

SETTING THE RECORD STRAIGHT: WHY THE NBA NEEDS TO OFFICIALLY ADOPT ABA STATISTICS

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Julius Erving of the New York Nets elevates over Fly Williams of the Spirits of St. Louis as Al Skinner (#30), Freddie Lewis (#1), Brian Taylor (#14), and Billy Paultz (#5) look on; St. Louis Arena, November 6, 1974. (Getty Images, Bettmann Archive)

[T]he wrong of not keeping a record of our players [is] such an injustice. It denies the athlete of his most valuable possession.¹

[While] a writer, a painter . . . live on through their work . . . [an athlete] leaves only statistics and memories.²

What is a record in our modern sense? It is the marvelous abstraction that permits competition not only among those gathered together on the field of sport but also among them and others distant in time and space.³

If they absorb the league and take its players, they ought to count their stats⁴

It is MLB's view that the . . . omission of the Negro Leagues from consideration [as a major league] was clearly an error that demands today's designation.⁵

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1. Dave Wyatt, *Base Ball!*, THE FREEMAN, Jan. 27, 1917 (lamenting the paucity of Negro League statistics at the time); see also Robert C. Cottrell, *Rube Foster*, in THE NEGRO LEAGUES WERE MAJOR LEAGUES 156, 164 (Todd Peterson ed., 2020) [hereinafter NEGRO LEAGUES].

2. ALAN ROSS, CAPE SUMMER AND THE AUSTRALIANS IN ENGLAND 4 (1957).

3. ALLEN GUTTMAN, FROM RITUAL TO RECORD 51-52 (1978) (2004 ed.).

4. *Should NBA Count ABA Stats?*, NEWSDAY, Feb. 14, 1982, at Sports/9 [hereinafter *Should NBA Count*] (quoting Stan Albeck).

5. *MLB officially designates the Negro Leagues as 'Major League'*, MLB (Dec. 16, 2020) [hereinafter MLB Release], [<https://perma.cc/SU8L-HM3F>].

I. INTRODUCTION

Julius Erving is generally thought to be one of the greatest players in the annals of basketball.⁶ During his professional career, which spanned from 1971 to 1987, he won three titles and four Most Valuable Player (“MVP”) awards . . . *or did he?*⁷ While most basketball authorities acknowledge these accomplishments, the National Basketball Association (“NBA”) does not. How could such seemingly objective data about a player of Dr. J’s stature and fame be in dispute?

The answer lies in the fact that Erving played five seasons in the now defunct American Basketball Association (“ABA”), a professional league that challenged the NBA’s primacy from 1967 to 1976.⁸ More broadly, the answer reflects the power politics involved with sports mergers and acquisitions and the illogical results, the unjust legacies, and the seemingly intractable problems that they often leave behind. In the case of the legal settlement between the NBA and ABA, one of those legacies is that the NBA chooses not to officially recognize the ABA’s statistics.⁹

6. See *NBA at 50: Top 50 Players*, NBA, [https://perma.cc/23SR-8VND] (last visited Nov. 12, 2023); see also The Athletic NBA Staff, *NBA 75: Top 75 NBA players of all time, from MJ and LeBron to Lenny Wilkens*, THE ATHLETIC (Feb. 23, 2022), [https://perma.cc/FB5X-YV4A].

7. See *Julius Erving*, BASKETBALL REFERENCE, [https://perma.cc/DQR2-YUJK] (last visited Nov. 12, 2023).

8. See, e.g., TERRY PLUTO, *LOOSE BALLS* 18-19 (1990).

9. The NBA website currently notes: “Are there statistics from the ABA on the site? For now, we do not include ABA stats. The NBA Stats team is currently exploring options regarding displaying these. While unavailable at this time, please check back often to see if they have been added.” *NBA.com/Stats Frequently Asked Questions*, NBA, [https://perma.cc/9WA3-JTNE] (last visited Nov. 12, 2023) (emphasis added). This reference to ABA statistics has been up on the NBA website for some time. Moreover, the language the NBA employs (i.e., “if,” “exploring options,” and potentially “displaying” ABA data) is ambiguous and does not necessarily imply eventual recognition of ABA records and their full integration into those of the NBA. See *id.*; see also Tony Favia, *Ex-ABA Players Want Their Stats Counted*, UPI (Feb. 13, 1982), [https://perma.cc/4YBV-YU9P] (quoting an NBA spokesman regarding its failure to adopt ABA statistics).

The NBA’s reply to the author’s query was equally evasive:

The ABA is a storied professional basketball league whose history remains engrained in the NBA through the Brooklyn Nets, Denver Nuggets, Indiana Pacers and San Antonio Spurs. As you mention, we do not include ABA stats at this time. The NBA Stats team continues to explore options regarding displaying these.

Email from Bill, NBA Coordinator, to Roy Brownell (Apr. 18, 2022, 3:55 PM) [hereinafter NBA Email to Author] (on file with author).

This outcome was not preordained. Statistical records can and have been addressed as part of interleague settlements in the past. It was agreed as part of the merger process between the National Football League (“NFL”) and the American Football League (“AFL”)¹⁰ that the records of the two leagues would be combined.¹¹ In baseball, when the American League (“AL”) and National League (“NL”) buried the hatchet in 1903, acknowledgement of the others’ statistics followed suit.¹²

The issue of why ABA records remain unacknowledged transcends “just” sports numbers. It implicates significant issues of morality, history, and logic. These factors play a significant role in how professional basketball—an international cultural powerhouse and multibillion dollar industry—and its legacy are portrayed and perceived, which has its own second-order societal effects.¹³ All three considerations strongly support the NBA formally acknowledging ABA records and fully integrating them into the NBA statistical canon.¹⁴

10. For purposes of this Article, “AFL” refers to the fourth professional football league by that name, which existed from 1960-69. See JAMES QUIRK & RODNEY D. FORT, *PAY DIRT* 295 (1992). AFL statistics were officially incorporated into the NFL record book in 1970, the first year the two leagues were fully integrated.

11. See Jerry Nason, *Equality for AFL in Record Book*, BOSTON EVENING GLOBE, July 21, 1970, at 25 (“Mr. Bill Sullivan [owner] of the local [Boston] Patriots said that all of this [unification of NFL and AFL statistical records] was agreed upon a couple of years ago when pro football made its final decision to become ‘one world.’”); Murray Olderman, *Blanda Takes Over NFL Record Book*, CORPUS CHRISTI TIMES, Apr. 21, 1970, at 4-B (“One of the final by-products of the merger of the National and American Football Leagues, now fully consummated, was the incorporation of all the AFL records.”); Forrest R. Kyle, *Blanda Profits Most by Combining NFL, AFL Records*, DECATUR DAILY REV., Apr. 23, 1970, at 14 (“One of the least publicized by-products of the merger of the National and American football leagues was the merger of all the records established by the two leagues.”); Alex Sachare, *NBA Shuns Boone’s Iron-Man Feat*, DETROIT FREE PRESS, Nov. 23, 1978, at 9D (“[W]hen the leagues merged the NFL agreed to accept into its record book ‘all applicable records from the AFL.’”); see also Mike Rathet, *League Grid Merger Causes Reshuffling of NFL Records*, PADUCAH SUN-DEMOCRAT, Jul. 21, 1970, at 13.

12. See, e.g., SPALDING’S OFFICIAL BASE BALL GUIDE 1901, 103-05 (Henry Chadwick ed., 1901) (categorizing the American League as a minor league); SPALDING’S OFFICIAL BASE BALL GUIDE 1902, 8-98, 99-110 (Henry Chadwick ed., 1902) (treating the American League as an elevated minor league and, unlike the National League, providing only team statistics for the former); SPALDING’S OFFICIAL BASE BALL GUIDE 1903, 71-136 (Henry Chadwick ed., 1903) (treating the American League in similar fashion to the National League).

13. See, e.g., Glyn Hughes, *Managing Black Guys: Representation, Corporate Culture, and the NBA*, 21 SOCIO. OF SPORT J. 163, 163-64, 170 (2004).

14. Over the years, former ABA players have advocated for the league’s statistics to be officially acknowledged. See Favia, *supra* note 9; ARMEN KETEVIAN, HARVEY ARATON & MARTIN F. DARDIS, *MONEY PLAYERS* 340-341 (1997). In the early 1980s, Dan Issel spearheaded the effort. See Favia, *supra* note 9. The NBA ultimately only took the half measure of adding a separate section to the *NBA Guide* which included a smattering of ABA

2024 *SETTING THE RECORD STRAIGHT* 631

The main moral consideration in this context centers around matters of racial equality. Simply put, by recognizing ABA statistics the NBA would acknowledge the remarkable legacy left by a league that was greatly influenced by Black players and that has left an important imprint on Black culture and the nation as a whole.¹⁵ In many respects, the NBA's continued omission of ABA statistics smacks of erasure.¹⁶

records. See *infra* notes 222-233 and accompanying text. In 1987, it was reported that, at the request of Julius Erving, Commissioner David Stern promised to look into whether to officially acknowledge ABA statistics. See Mike Bruton, *A Favor the NBA Can Do for Erving*, PHILA. INQUIRER, Apr. 5, 1987, at 3-D; Jan Hubbard, *NBA Should Add the ABA Statistics into NBA Books*, BILLINGS GAZETTE, Mar. 1, 1987, at 5-B. If the report is accurate, it is unclear if this study was ever undertaken. If it was, it does not seem to have been made public and it did not result in official NBA recognition and integration of ABA records, though the NBA included additional ABA records in its subsequent annual *Guides*. See *infra* notes 222-233 and accompanying text.

15. The ABA's impact on popular culture is reflected in many settings. For example, the movie *Semi-Pro* was a 2008 comedy about the league starring Will Ferrell and Woody Harrelson. In 2002, Nike ran a series of commercials with NBA players Vince Carter, Jerry Stackhouse, Jermaine O'Neal, Tim Duncan, Paul Pierce, Steve Nash, Dirk Nowitzki, and Baron Davis playing for an imaginary ABA team named the Roswell Rayguns. See Ioweizard, *Nike Roswell Rayguns*, YOUTUBE (Mar. 14, 2006), [https://perma.cc/9LJB-DWVC]; *Keep the Funk Alive: The Roswell Rayguns Story*, BOUNCEWEAR, [https://perma.cc/TV6A-29Z4] (last visited Nov. 12, 2023); see also BETHLEHEM SHOALS, FREEDARKO PRESENTS: THE UNDISPUTED GUIDE TO PRO BASKETBALL HISTORY 90 (2010). In 2000, Converse used ABA footage in its own marketing campaign. See Chad Marcoux, *Dr. J Converse 2000 Commercial*, YOUTUBE (Nov. 4, 2020), [https://perma.cc/ZE5V-HCBJ]. For the ABA's influence on American cities, see BOB NETOLICKY ET AL, WE CHANGED THE GAME 136-141, 173-174 (2018); BOBBY "SLICK" LEONARD & LEW FREEDMAN, BOOM, BABY! 208 (2013); Tom Orsborn, *Spurs' original investors to take a bow*, EXPRESS-NEWS, found at [https://perma.cc/B3VK-AR75] (last visited Jan. 5, 2024).

16. See, e.g., Parul Sehgal, *Fighting 'Erasure'*, N.Y. TIMES MAG. (Feb. 2, 2016), [perma.cc/J8DR-95SB] (emphases added) ("'Erasure' refers to the practice of collective indifference that renders certain people and groups invisible. The word . . . is increasingly used to describe how inconvenient people are dismissed, *their history*, pain and *achievements blotted out*." (emphasis added); Daryl Bell, *Time for the NBA to Recognize the ABA*, PHILA. TRIB. (Mar. 3, 2015), [https://perma.cc/W5LE-RAX8] ("[T]he NBA wanted to erase professional basketball history by saying the ABA never existed."); Favia, *supra* note 9 (quoting Larry Kenon) (stating, in the context of ABA statistics, "You can't erase part of a person's past"); Woodrow Paige Jr., *Hey, the Old ABA Wasn't So Bad After All*, BASKETBALL DIG., Jan. 1978 at 48, 53 ("[T]he NBA . . . hop[ed] people would believe the ABA never existed."); GEORGE GERVIN WITH SCOOP JACKSON, ICE 100 (2023) ("It would be nice to recognize that the ABA was a big part of what the NBA has grown to become . . . but is that going to happen? Naw. It makes you wonder why. Who's holding that narrative?"); see also David Friedman, *ABA Numbers Paint a Very Different Picture*, BASKETBALL DIG., May 2001, at 22-24; cf. Curtis M. Harris, *Happy Birthday, NBA!*, PROHOOPSHISTORY (Aug. 3, 2020), [https://perma.cc/7S5X-7UFX] (noting "the NBA's subsequent . . . whitewashing [of] the NBL's existence"). Julius Erving notes that ABA players, coaches, and teams "deserve to have a place in basketball history other than [with] an asterisk." Author Interview with Julius Erving, ABA and NBA player, at 1 (Sept. 16, 2021) [hereinafter Erving Interview] (transcript on file with author).

Adopting ABA records would complement the 2022 decision by the NBA and National Basketball Players Association (“NBPA”) to essentially grant enhanced pension benefits to former ABA players.¹⁷ An additional moral consideration is that the NBA has seen fit to make money off of the ABA’s legacy and yet the surviving league refuses to formally and fully acknowledge the former league’s history and records.¹⁸

Second, recognizing ABA records would also be very much in keeping with the history of the other major American and Canadian professional team sports, especially baseball and football.¹⁹ Their experience reveals several factors that can help inform whether a former sporting association can be truly considered a “major league” and therefore whether its statistics deserve official recognition.²⁰

The third and final factor is one of logic. There are jarring inconsistencies in how the NBA has come to treat the defunct

17. The NBA and NBPA termed the financial commitments “recognition payments.” See *NBA and NBPA Announce Recognition Payments For Former ABA Players*, NBPA (July 12, 2002) [hereinafter *NBA/NBPA Announcement*], [<https://perma.cc/DTW7-BPTY>].

18. See *NBA Store*, [<https://perma.cc/N3UU-C7TL>] (last visited Nov. 12, 2023); see also *Bell*, *supra* note 16; *infra* notes 198-218.

19. Applying considerations of racial equality and weighing historical practice from other major professional sports leagues simply holds the NBA to its own professed standards. First, the NBA asserts that it is among the most progressive American sports leagues, yet it denies full recognition to the ABA, which is widely regarded as a “Black” league—a league to which the NBA owes much. See *infra* Parts III.A and III.B. Second, the NBA in the past has defended its opposition to recognizing ABA statistics by mis-citing historical precedent from other major professional sports leagues as well as mis-citing its very own history. These factors actually strongly support officially recognizing ABA numbers. See *Favia*, *supra* note 9; see *infra* Parts IV and VI.B.

20. See, e.g., *Decisions of the Special Baseball Records Committee*, in *THE BASEBALL ENCYC. 2327-30* (1969) [hereinafter *Decisions*]; see also *Rrhersh*, *Comments to Was the NA (1871-75) a “Major” League?*, *BASEBALL FEVER* (Mar. 22, 2009, Mar. 29, 2009, May 18, 2009, June 3, 2009), [<https://perma.cc/CHE7-RTRP>] [hereinafter *Rrhersh*].

The term “major league” has different meanings in different contexts. First, the term can be used in relation to other contemporary sports. That is to say, is a professional league in one sport on par with major leagues of other sports at the time? For instance, the question arose as to whether the NBA was a major league from the late 1940s to the early 1960s compared to MLB and the NFL. Second, the term can mean major league in that the organization represents the top league sitting at the pinnacle of the sport, with minor leagues below it. See *BILL JAMES, THE NEW BILL JAMES HISTORICAL BASEBALL ABSTRACT 22* (2001); *Richard Hershberger, The First Baseball War: The American Association and the National League*, *BASEBALL RSCH. J.*, Fall 2020, [<https://perma.cc/8URY-WSJF>]; *Rrhersh*, *supra* note 20. Third, it can mean major league across time in the sense that the performance, contemporary reputation, ties to big cities, popularity, and structure of the league were sufficiently advanced to make it the equal of contemporary big leagues of the same sport (allowing for inevitable advances in training, nutrition, analytics, and technology). See *infra* Part IV. The ABA and Negro Leagues would fall into this latter category and this is the definition that will be generally used for this Article.

2024 *SETTING THE RECORD STRAIGHT* 633

league's history and legacy which render the former's policy untenable, especially considering the NBA's recent decision to essentially provide pension benefits for former ABA players.²¹

While a handful of short-form articles have discussed reasons why the NBA should officially recognize and incorporate ABA statistics into its canon, there has never been an extended treatment of the subject.²² Similarly, no article has previously discussed the treatment of ABA statistics within the wider context of racial equality. Nor has the issue been examined with respect to the history and practice of mergers and expansions of the other three major professional sports leagues: Major League Baseball ("MLB"),²³ the NFL, and the National Hockey League ("NHL"). Indeed, no article of any appreciable length has discussed in comparative fashion how to determine major-league status across professional leagues.

By arguing in favor of the NBA officially adopting ABA statistics, this Article addresses a question that lies at the intersection of law, race, sports, history, and corporate policy. Part II discusses the 1976 legal settlement between the two leagues.²⁴ Part III, in turn, analyzes concerns over morality and why they weigh heavily in support of the NBA acknowledging ABA records.²⁵ Part IV offers an evaluation of historical factors influencing whether a former professional sports enterprise should be considered a "major league" as a matter of policy and

21. See Dana Hunsinger Benbow, *A Lawyer, an Eye Doctor and a Filmmaker Got Together, Fought NBA for ABA Pensions –and Won*, INDYSTAR (Jul. 15, 2022), [<https://perma.cc/DT9P-X6DF>].

22. See Bell, *supra* note 16; Mark Whicker, *NBA Heads for 50th, but Something's Missing*, GLENS FALL POST-STAR, June 10, 1996, at C6; Bruton, *supra* note 14; Hubbard, *supra* note 14; Friedman, *supra* note 16; David Friedman, *The NBA and Its Media Partners Continue to Ignore the ABA's History and Statistics*, 20 SECOND TIMEOUT (May 28, 2022), [<https://perma.cc/E7EV-3GGS>]; cf. Sachare, *supra* note 11; *Why Doesn't the ABA History Officially Count?*, OVER AND BACK CLASSIC NBA PODCAST (Nov. 13, 2019), [<https://perma.cc/WF4W-3AU4>] [hereinafter *Why Doesn't ABA History*]; Jonny Arnett, *If ABA Achievements Counted. . .*, YOUTUBE (Feb. 27, 2021), [<https://perma.cc/D4BK-8ZMC>]; Curtis Matthew Harris, *Hardwood Revolution: The NBA's Growth and Player Revolt, 1950-1976*, at 205 n. 228 (July 28, 2021) (PhD dissertation, American University); Phil Jasner, *Dr. J Points 76ers to Victory*, PHILA. DAILY NEWS, Feb. 21, 1983, at 86.

23. Technically speaking, the term "MLB" only formally came into being during the 1999-2000 period. See Bill Nowlin, *Did MLB Exist Before the Year 2000?*, BASEBALL RESEARCH J., Fall 2019, [<https://perma.cc/H8S3-6RU5>]. But, for the sake of simplicity, the term will be used in this Article to refer to the NL from 1876 to the present and the AL and NL together from 1901 to the present.

24. See *infra* Part II.

25. See *infra* Part III.

therefore whether it deserves to have its records recognized.²⁶ Part V reveals the illogic of the NBA's posture regarding the ABA statistical question.²⁷ Finally, Part VI weighs potential counterarguments that the NBA has put forward or that may quietly animate its posture.²⁸ Ultimately, those views prove unpersuasive and indeed strongly reinforce the case for full NBA recognition of ABA statistics.

II. THE NBA-ABA SETTLEMENT

In the Bicentennial Year, the NBA addressed two significant and long-simmering business issues. The first was settling the *Robertson v. National Basketball Association* lawsuit, an antitrust action brought against the league by NBA players to block a potential merger with the ABA, which the union believed would have depressed wages and reduced player freedom.²⁹

With the *Robertson* suit resolved, the NBA was at last positioned to address its second major challenge: settling its differences with the ABA. Although popularly called a “merger,”³⁰ in reality the NBA agreed to absorb four of the six existing ABA franchises as expansion teams and let the other two dissolve. The resulting NBA-ABA settlement consisted of a host of legal documents, generally divided into two categories.³¹ The first set, sometimes referred to as the “NBA Agreement,” entailed the NBA entering into separate but very similar contracts—formally termed “Expansion Agreements”—with each of the four ABA franchises it was willing to admit. These were with the San Antonio Spurs, the Indiana Pacers, the New York (now Brooklyn)

26. See *infra* Part IV.

27. See *infra* Part V.

28. See *infra* Part VI.

29. See 389 F. Supp. 867 (S.D.N.Y. 1975).

30. See, e.g., *Pro Basketball: The Merger Season*, SPORTS ILLUSTRATED, Oct. 25, 1976, at cover. Former NBA attorney Russ Granik recalled “We never called it a merger, by the way. It was an expansion by four new teams, which is what David [Stern] always insisted on calling it, as an antitrust lawyer. Everyone else in the world, but he and I, called it a merger.” MICHAEL MACCAMBRIDGE, *THE BIG TIME* 266-67 (2023).

31. See *Spirits of St. Louis Basketball Club, L.P. v. Denver Nuggets, Inc.*, 922 N.Y.S.2d 349, 351 (N.Y. Sup. Ct. 2011). The NBA is not a public company. Nor was the ABA. Therefore, the two leagues did not have to make public the details of their agreements. The materials herein have been gathered from exhibits filed in various lawsuits. For related questions as to what legal corporate entity the NBA constitutes, see generally Nadelle Grossman, *What is the NBA?*, 25 MARQ. SPORTS L. REV. 101 (2014).

2024 *SETTING THE RECORD STRAIGHT* 635

Nets, and the Denver Nuggets.³² An additional document in this vein was a contract called the “Knickerbocker Agreement” between the New York Knicks and the Nets in which the latter indemnified the former for infringing on its turf.³³

The second set of settlement documents, sometimes referred to as the “ABA Agreement,” also involved several components.³⁴ They included materials related to the four former ABA teams reaching separate agreements to buy out the owners of the two franchises that were not accepted into the NBA: the Kentucky Colonels and Spirits of St. Louis.³⁵ In addition, the ABA Agreement involved provisions regarding the status of current and former ABA players,³⁶ modest pension benefits for some active and recently retired athletes, and salaries for players not picked up by NBA teams.³⁷ Finally, the four ABA expansion

32. See Expansion Agreement Between the National Basketball Association and the Denver Nuggets, Inc., July 26, 1976 [hereinafter NBA/Nuggets Agreement] (on file with author); Expansion Agreement Between the National Basketball Association and Long Island Sports, July 26, 1976 [hereinafter NBA/Nets Agreement] (on file with author); Expansion Agreement Between the National Basketball Association and Arena Sports, Inc., July 26, 1976 (on file with author); Expansion Agreement Between the National Basketball Association and San Antonio Basketball Ltd., July 26, 1976 (on file with author); see also *Spirits of St. Louis*, 922 N.Y.S.2d at 351; PLUTO, *supra* note 8, at 432-33.

33. See Indemnification Agreement dated July 29, 1976 between New York Knickerbockers Basketball Club and Long Island Sports [hereinafter Knickerbocker Agreement] (on file with author); see also NBA/Nets Agreement, *supra* note 32, at 2, 4.

34. See *Spirits of St. Louis*, 922 N.Y.S.2d at 351; Letter Agreement from the San Antonio Spurs Professional Basketball Club, Ltd., Denver Nuggets, Inc. & Long Island Sports to Commissioner Lawrence F. O’Brien (May 25, 1977) Lawrence O’Brien Papers, Springfield College [hereinafter LOBP/SC], Box 17 (regarding “Payments Related to the Dispersal Draft to Kentucky Colonels, Ltd.”).

35. See Agreement between the Expansion Teams, the American Basketball Association (ABA) & Spirits of St. Louis Club (July 26, 1976) [hereinafter Spirits Agreement No. 1] (on file with author); Agreement between Defendants and Plaintiff (July 26, 1976) [hereinafter Spirits Agreement No. 2] (on file with author); see also *Spirits of St. Louis*, 922 N.Y.S.2d at 351; PLUTO, *supra* note 8, at 429, 432-33. A seventh team, the Virginia Squires, completed the final ABA season but folded prior to settlement with the NBA. See *Am. Basketball Ass’n v. Nat’l Basketball Ass’n*, 72 F.R.D. 594, 598 (S.D.N.Y. 1976). The reason only four of the six surviving ABA teams were brought into the NBA was because the latter objected to all six coming into the league. It was not a question of the talent level of the Kentucky Colonels or the Spirits of St. Louis. See, e.g., MACCAMBRIDGE, *supra* note 30, at 266; JIM O’BRIEN, *LOOKING UP ONCE AGAIN* 99, 419 (2020) [hereinafter *LOOKING UP ONCE AGAIN*]; PLUTO, *supra* note 8, at 429, 431-32; THOMAS AIELLO, *HOOPS* 153 (2022); RAY SCOTT WITH CHARLEY ROSEN, *THE NBA IN BLACK AND WHITE* 148 (2022); Curry Kirkpatrick, *They Came To Play*, *SPORTS ILLUSTRATED*, Nov. 15, 1976, at 19; Rick Hummel, *ABA Stars Doing OK in the NBA*, *BASKETBALL DIG.*, May 1977, at 42, 44.

36. See *Am. Basketball Ass’n*, 72 F.R.D. at 596-97; see also Author Interview with Scott Tarter, ABA historian and attorney, at 11-13, 16-18 (Feb. 18, 2022) (transcript on file with author) [hereinafter Tarter interview]; Harris, *supra* note 22, at 235-42.

37. See PLUTO, *supra* note 8, at 432-33. The matter of insufficient ABA pensions was the gravest moral shortcoming stemming from the NBA-ABA settlement, one that went

teams also agreed to assume the soon-to-be-disbanded league's ongoing litigation and administrative expenses.³⁸

Only four ABA teams were admitted to the NBA because, in its negotiations with the established league, the younger enterprise had little leverage given its perilous financial standing.³⁹ At the same time, after years of incurring financial losses in its clash with the ABA, NBA owners held a grudge.⁴⁰ As a result, the overall NBA-ABA settlement was one-sided.⁴¹ To enter the established league, the four former ABA franchises had to fork over \$3.2 million apiece and, as part of the Knickerbocker Agreement, the Nets were forced to shell out an additional indemnification fee of \$4.8 million to the Knicks.⁴² None of the quartet could participate in the college draft of 1976 and until 1979 no funds were forthcoming from the NBA's television deal with CBS.⁴³ Even after this period, the former ABA franchises received a reduced share of television revenue for decades thereafter because of their settlement with one of the dissolved ABA teams.⁴⁴

Lost in the midst of this complex, dog-eat-dog financial and legal wrangling among the owners and front offices of both leagues and the ABA Players Association ("ABAPA") was the question of the statistical records of the former league's players, coaches, and teams. The issue was nowhere expressly mentioned in the NBA Agreement and apparently was not part of the

unaddressed by the NBA for decades, and that had a negative, concrete impact on the lives of former players many of whom died before they could receive assistance from the surviving league. See, e.g., Dana Hunsinger Benbow, *Former ABA Players Struggling and Running out of Time: 'The NBA's Waiting for Us to Die Off'*, USA TODAY (Feb. 9, 2021), [<https://perma.cc/Y4GG-5GJJ>].

38. See Confidential Memorandum from Michael A. Cardozo to Commissioner O'Brien 2-4 (Mar. 28, 1977) LOBP/SC, Box 1 [hereinafter Cardozo Memo].

39. See *Am. Basketball Ass'n*, 72 F.R.D. at 598; see also PETE CROATTO, FROM HANG TIME TO PRIME TIME 21-22 (2020).

40. See *Why Doesn't ABA History*, *supra* note 22.

41. See, e.g., LEONARD & FREEDMAN, *supra* note 15, at 213-14, 217.

42. See Knickerbocker Agreement, *supra* note 33, at 2-3; see also PLUTO, *supra* note 8, at 432. There were a host of other expenses incurred by the ABA expansion teams as part of the ABA Agreement. See Cardozo Memo, *supra* note 38.

43. See, e.g., LEONARD & FREEDMAN, *supra* note 15, at 214; PLUTO, *supra* note 8, at 432.

44. See, e.g., Spirits Agreement No. 1, *supra* note 35; Spirits Agreement No. 2, *supra* note 35; PLUTO, *supra* note 8, at 432; LEONARD & FREEDMAN, *supra* note 15, at 213-14, 217; *infra* notes 554-555 and accompanying text; Monte Burke, *The NBA Finally Puts an End To The Greatest Sports Deal Of All Time*, FORBES (Jan. 7, 2014, 10:59 AM), [<https://perma.cc/E5WC-5J8K>].

2024 *SETTING THE RECORD STRAIGHT* 637

discussions leading up to the interleague settlement.⁴⁵ The result of the settlement was that afterward the NBA treated the ABA as if it had never been a major league and its records were jettisoned accordingly.⁴⁶

In his classic book, *The Breaks of the Game*, David Halberstam captured the sentiment of NBA management towards the rival league and its records following the settlement. The distinguished author observed, “There was a built-in prejudice against almost any ABA player, a belief that the other league was filled with gunners and hot dogs and that its statistics meant nothing.”⁴⁷

45. Preceding the execution of the NBA Agreement, there were a flurry of memoranda exchanged between the two leagues in their negotiations. There is no mention of ABA statistics by either league office in these documents. See Letter from ABA Commissioner Dave DeBusschere to NBA Commissioner Lawrence O’Brien (Apr. 16, 1976), LOBP/SC, Box 16 (regarding potential settlement and including a written proposal); Undated Handwritten Notes by Lawrence O’Brien regarding ABA Proposals, LOBP/SC, Box 16; Letter from ABA Commissioner David A. DeBusschere to NBA Commissioner Lawrence F. O’Brien (Apr. 26, 1976), LOBP/SC, Box 17 (with attachments); Memorandum from William H. Alverson to Commissioner Lawrence F. O’Brien, Members of the Advisory Committee (May 10, 1976), LOBP/SC, Box 16 (regarding ABA Settlement Proposals); Relevant 1975 Expansion Chronology, LOBP/SC, Box 17; Proposal from the American Basketball Association to the National Basketball Association (May 28, 1976), LOBP/SC, Box 16; see also Proposal for Settlement Between ABA and NBA (1974), LOBP/SC Box 16; Letter from David Stern and Michael Cardozo to Commissioner O’Brien and Deputy Commissioner Gourdine (June 28, 1976), LOBP/SC Box 17 (regarding the 1976 expansion). In the lead up to the settlement, the ABAPA does not seem to have made statistics a priority either, if in fact the organization raised the issue at all. See Jane Gross, *Are NBA, ABA Getting Closer?*, NEWSDAY, June 17, 1976, at 180; Jane Gross, *NBA absorbs four ABA teams for \$3.2 million each*, NEWSDAY, June 18, 1976, at 120. Erving, who was a leader in the ABAPA at the time, has no recollection of the issue having been broached. See Erving Interview, *supra* note 16, at 3.

No mention about NBA or ABA statistics can be found in either the NBA Constitution or its By Laws. See generally *National Basketball Association Constitution and By-Laws*, (Sept. 2019) [<https://perma.cc/QK8J-VMA3>]. The NBA Constitution would seem to implicitly grant authority to the Commissioner to decide the ABA statistical question. See *id.* at 37-40.

46. See, e.g., Bell, *supra* note 16; LEONARD & FREEDMAN, *supra* note 15, at 213-14. For his part, Erving is uncertain “whether [the NBA’s posture] . . . was an oversight or whether it was a snub or whether it was just something out of attitude towards the ABA.” Erving Interview, *supra* note 16, at 1.

47. DAVID HALBERSTAM, *THE BREAKS OF THE GAME* 221 (2015 ed.); see also GERVIN WITH JACKSON, *supra* note 16, at 117 (“The ABA was almost considered, especially to the Red Auerbachs and most of the general managers and people around the NBA, a league of a bunch of guys who couldn’t play, who couldn’t make it in the NBA. To them, we were like a farm team.”); JERRY WEST AND JONATHAN COLEMAN, *WEST BY WEST* 215 (2011 large print ed.) (“As far as he [Laker owner Jack Kent Cooke] was concerned, anyone who played in the ABA had to be inferior.”).

III. MORALITY

There are two moral reasons why the NBA should at long last officially acknowledge ABA statistics. They are concerns involving racial equality and the NBA profiting from the ABA's legacy.

A. Concerns of Racial Equality: Recognizing the Major African-American Legacy of the ABA

The National Museum of African American History and Culture (“NMAAHC”) displays artifacts that tell the story of the Black experience in the United States.⁴⁸ As such, each item placed in the museum bears an important link to African-American history. Tellingly, one such object is a red, white, and blue basketball from the ABA.⁴⁹ The placement of this piece of memorabilia in the NMAAHC is no accident; it represents in tangible form that the ABA was in many ways a “Black” league.⁵⁰

The ball on display also manifests the most compelling reason for the NBA to recognize ABA statistics—that doing so would formally recognize the significant historical contributions made by an important cross section of Black men to professional basketball and American culture more broadly.⁵¹ In past decades, there have been great strides made in identifying and acknowledging the profound historical contributions of African Americans in all walks of life. The world of sports has been no different, as evidenced by MLB's recent action to officially acknowledge the records of seven Negro Leagues and to integrate them into the MLB statistical canon.⁵²

48. See *About the Museum*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, [https://perma.cc/TSK6-MTJB] (last visited Nov. 12, 2023).

49. See *Basketball Used in American Basketball Association Games*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, [https://perma.cc/T3A7-287J] (last visited Nov. 12, 2023); see also, Franz Lidz, *The ABA Was Short-Lived, but Its Impact on Basketball Is Eternal*, SMITHSONIAN MAG. (Oct. 2017), [https://perma.cc/QC8R-B2VS].

50. The impact of Black players on the ABA became more pronounced in the 1970s. See THERESA RUNSTEDTLER, *BLACK BALL* 86-87 (2023).

51. Cf. Ted Knorr, *The Top Ten Reasons Why the Negro Leagues Should Be Declared a Major League*, in *NEGRO LEAGUES*, *supra* note 1, at 99.

52. See, e.g., Anthony Castrovince, *MLB adds Negro Leagues to official records*, MLB (Dec. 16, 2020), [https://perma.cc/74JB-U5NC]; Dave Sheinin, *The Negro Leagues Are Now 'Major League' in Eyes of MLB*, WASH. POST (Dec. 16, 2020, 9:37 PM), [https://perma.cc/DM8Y-Z6RL]. The ABA and the Negro Leagues were different in several important respects. Among the distinctions is that the two entities existed in different historical eras, the former during the period immediately following major strides toward

2024 *SETTING THE RECORD STRAIGHT* 639

For its part, the NFL has acknowledged the records of the AFL, which in many ways was a “Black” football league.⁵³ The AFL provided opportunities for Black players that the more staid older league did not. Furthermore, the AFL was more culturally influenced by African-American athletes than was its older rival.⁵⁴

As was the case to a great extent with the AFL, the ABA has been widely regarded as culturally a “Black” league.⁵⁵ Professor Adam Criblez, one of the leading authorities on the history of the professional game, observes that “The American Basketball Association . . . became known as a ‘Black’ league.”⁵⁶

racial integration following the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and the latter during the period of widespread *de jure* segregation. As such, the obstacles faced by Black athletes in the two sports were different. The ABA was racially integrated though fewer Black players gained positions in the league than should have. *See infra* note 122. On the other hand, Black baseball players from the late nineteenth century until Jackie Robinson’s entrance into MLB in 1947 faced an outright ban on their participation in the AL and NL. As a result, the Negro Leagues were made up almost exclusively of Black players. Moreover, Negro League owners were mostly Black. By contrast, no ABA owners were. Finally, whereas the ABA has a statistical record that has long been fairly easy to access, the Negro League data has had to be painstakingly reconstructed. *See* Email from Scott Simkus (Aug. 6, 2022) (on file with author); *see also* *Negro Leagues Database*, SEAMHEADS, [https://perma.cc/Y2S4-VEHD] (last visited Nov. 12, 2023). Nonetheless, important parallels between the ABA and the Negro Leagues exist. Both leagues provided all-too-rare opportunities for Black citizens to excel in their chosen profession. Both leagues also allowed Black athletes the freedom to experiment and express themselves on the field and on the court, changing the culture of each sport. Thus, parallels between the leagues have been drawn in the past. *See, e.g.*, John Greathouse, *Startup Underdogs: The ABA and Negro Leagues*, FORBES (Jan. 19, 2015, 11:44 PM), [https://perma.cc/934N-TG7L]. Julius Erving noted the comparison in the context of the need to acknowledge ABA statistics. *See* Erving Interview, *supra* note 16, at 1.

53. *See* Joel Dinerstein, *Backfield in Motion*, in *IN THE GAME* 181 (Amy Bass ed., 2005); *see also* MACCAMBRIDGE, *supra* note 30, at 36.

54. *See* Dinerstein, *supra* note 53, at 181; KEN RAPPOPORT, *THE LITTLE LEAGUE THAT COULD* xiii, 49, 119-28 (2010).

55. *See* Adam J. Criblez, *White Men Playing a Black Man’s Game*, 42 *J. SPORT HIST.* 371, 374 (2015) [hereinafter *White Men Playing a Black Man’s Game*]; RUNSTEDTLER, *supra* note 50, at 144-45, 205; SAM SMITH, *HARD LABOR* 11 (2017); Dinerstein, *supra* note 53, at 181; *cf.* Tarter Interview, *supra* note 36, at 21-22, 29-30; *see also* Matthew Schneider-Mayerson, “Too Black”: Race in the “Dark Ages” of the National Basketball Association, 1 *INT’L J. OF SPORT SOC’Y*, 223, 229 (2010). During its existence, the perception of the ABA as a “Black” league was not seen in all circles as a positive thing. *See* PLUTO, *supra* note 8, at 241. Considering the ABA a “Black” league is not to say that *only* African-American players were influential regarding the ABA or the culture at large. There were many outstanding white players such as Rick Barry, Billy Cunningham, and Dan Issel who were important to the league both on the court and off. This Article simply maintains that, by and large, African-American athletes played the predominant role in the ABA’s impact on the game and popular culture.

56. *White Men Playing a Black Man’s Game*, *supra* note 55, at 374.

By contrast, “The NBA was . . . perceived as a ‘white’ league.”⁵⁷ Criblez’s characterization can be broken down into four categories: (1) the way the ABA game was played; (2) the way the league was marketed; (3) the off-court style of its players; and (4) the opportunities the ABA opened up for African-American athletes.

1. How the Game was Played

While the NBA game in the 1960s and 1970s was generally more tightly structured and traditional, the ABA provided players with greater freedom to experiment.⁵⁸ This freedom benefitted great numbers of Black players, many of whom preferred to compete in a manner less inhibited by basketball mores at the time.⁵⁹ This “Black” style of play was looked down upon as “playground” hoops in many circles, but it would revolutionize the game.⁶⁰

In this respect, historian Waldo Martin reflects, “The short-lived American Basketball Association . . . functioned as an[] important showcase for paradigmatic black basketball talent such as the legendary Julius ‘Dr. J’ Erving. Not only did the ABA’s history parallel that of the Black Power Movement, but in crucial ways the ABA represented Black Power basketball.”⁶¹ Martin explains that “the league featured the black basketball aesthetic to a greater degree than the NBA. The more flamboyant ABA showcased a more black-inflected style of play: a more individualistic, fast-paced, high-leaping, fancy-dribbling, outrageous-dunking, playground-inspired style of play.”⁶²

In a similar vein, Professors Todd Boyd and Kenneth Shropshire note that “the upstart American Basketball Association . . . featured a large percentage of African American players and a style of play that closely resembled playground basketball, which is very much in line with the impulses of the

57. *Id.*; see also Tonya Simpson, *The Push to Secure Pensions for American Basketball Association Pioneers the NBA Left Behind*, ESPN (Sept. 14, 2021), [https://perma.cc/ZH2M-XU86] (quoting former ABA player Maurice McHartley) (“The NBA at that particular time was more of a white league”); cf. RUNSTEDTLER, *supra* note 50, at 144-45.

58. See PLUTO, *supra* note 8, at 30, 34, 131; Bob Ryan, *ABA Players vs. NBA Players*, BASKETBALL DIG., Feb. 1976, at 54; YAGO COLÁS, *BALL DON’T LIE* 82-86 (2016).

59. See RUNSTEDTLER, *supra* note 50, at 62.

60. *See id.*

61. WALDO E. MARTIN, JR., *NO COWARD SOLDIERS* 83 (2005).

62. *Id.* at 84; see also RUNSTEDTLER, *supra* note 50, at 210.

black aesthetic. The ABA led in moving the game away from stiff two-handed set shots and bounce passes to behind-the-back alley-oop passes and 360-degree slam dunks.”⁶³

Concurring is Professor Theresa Runstedtler. “[T]he ABA,” she wrote, “flouted the traditions of pro basketball both on and off the court, paving the way for the racial transformation of the game. . . . It would soon become an incubator for a new style of pro ball—Black ball.”⁶⁴

Cultural critic Nelson George is of the same view. “[T]he ABA . . . [was] a league dominated by the Black athletic aesthetic.”⁶⁵ Citing the likes of Erving, Connie Hawkins, and David Thompson, “it was,” in George’s words, “airborne brothers who defined ABA ball.”⁶⁶

In sum, it is generally understood that the ABA played a major role in importing Black basketball style into the game.⁶⁷ This approach, which stressed individuality and showmanship, helped to greatly popularize basketball, leading the younger enterprise to be widely seen as a “Black” league.⁶⁸

2. *How the Game was Marketed*

The ABA was also seen as a “Black” league because of the way it was marketed to the public, particularly in the 1970s.⁶⁹ Erving recalled that the league “really knew how to promote its teams and its stars. What the NBA [later did] with Michael Jordan, Larry Bird and Magic Johnson, the ABA was doing with players such as George McGinnis, George Gervin and myself.”⁷⁰

63. Todd Boyd & Kenneth L. Shropshire, *Introduction*, in *BASKETBALL JONES* 6-7 (Todd Boyd & Kenneth L. Shropshire eds., 2000); *see also* TODD BOYD, *YOUNG, BLACK, RICH, AND FAMOUS* 32 (2003).

64. RUNSTEDTLER, *supra* note 50, at 28, 30.

65. NELSON GEORGE, *ELEVATING THE GAME* 181 (1992); *see also* Tom Dyja, *History of the NBA*, in *PROFESSIONAL SPORTS TEAM HISTORIES: BASKETBALL* 16 (Michael L. LaBlanc ed., 1994).

66. GEORGE, *supra* note 65, at 181-85; *see also* Dinerstein, *supra* note 53, at 181; Dyja, *supra* note 65, at 16.

67. *See, e.g.*, COLÁS, *supra* note 58, at 84-85; RUNSTEDTLER, *supra* note 50, at 210, 246.

68. *See* RUNSTEDTLER, *supra* note 50, at 246.

69. *See* Charles P. Pierce, *Basketball in Black and White*, *BOSTON GLOBE*, May 24, 1992, at 67 (“Significantly, it was the outlaw ABA that first realized that the African-American aesthetic could sell to a general audience.”); *see also* *White Men Playing a Black Man’s Game*, *supra* note 55, at 374; *cf.* RUNSTEDTLER, *supra* note 50, at 34; PLUTO, *supra* note 8, at 31; AIELLO, *supra* note 35, at 146-47, 260.

70. PLUTO, *supra* note 8, at 31.

Historian Thomas Aiello agrees. The younger “league . . . promoted its Black players in a way that the NBA had been reluctant to do.”⁷¹ He concluded that “the [new] league . . . wanted a more flamboyant, less fundamental style that officials believed Black athletes could bring.”⁷² To another authority, the fact that the ABA originated “in the immediate wake of the most active and successful period of America’s civil rights struggle encouraged further efforts [by the ABA] to bring black players into the limelight.”⁷³

A classic example of this marketing effort took place at one of the league’s highest-profile events, the 1976 All-Star Game. Denver Nugget general manager Carl Scheer recalled,

We had to come up with a concept that would get everyone’s attention [W]e had to make a big impression. We felt the All-Star game was our big showcase—our swan song, so to speak. We needed to have something dramatic to show the world, and the NBA, that our product was worthwhile for their league. We had to show that we had great players, great ideas, and great contests.⁷⁴

Indeed, the notion of holding a dunk contest came indirectly from Erving.⁷⁵ The competition, which is one of the best remembered basketball moments of the 1970s, involved exclusively Black players.⁷⁶

The ABA effort to market African-American stars was also reflected in other ways. Some were of the garden variety, such as prominently displaying Black players on the cover of numerous game programs, yearbooks, and official guides.⁷⁷ Some were outlandish such as the Utah Stars hyping one of the ABA’s great brawlers by holding a “John Brisker Intimidation

71. AIELLO, *supra* note 35, at 260.

72. *Id.* at 146-47.

73. JAMES WHITESIDE, COLORADO: A SPORTS HISTORY 317 (1999).

74. Michael Murphy, *The ABA Way*, REMEMBER THE ABA [<https://perma.cc/J2VW-UWAV>] (last visited Nov. 12, 2023).

75. *See id.*

76. *See* PLUTO, *supra* note 8, at 25; DENNIS MURPHY, MURPH 29 (2013); BILL SIMMONS, THE BOOK OF BASKETBALL 123-24 (2009).

77. *See, e.g.*, Erving v. Va. Squires Basketball Club, 468 F.2d 1064, 1066 (2d Cir. 1972) (quoting ABA advertising material about the “fabulous” Julius Erving); 1973 ABA PLAYOFFS: VIRGINIA SQUIRES (on file with author) (Julius Erving); 1975-76 INDIANA PACERS VS. VIRGINIA SQUIRES PROGRAM (on file with author) (Len Elmore); U.S. ARMY POSTER (1975-76) (on file with author) (in conjunction with the Spirits of St. Louis) (Marvin Barnes); 1971-72 PITTSBURGH CONDORS SEASON TICKET PLAN (on file with author) (John Brisker); NEW YORK NETS OFFICIAL 1971/72 PROGRAM (on file with author) (Ollie Taylor).

Night.”⁷⁸ While the NBA was often standoffish toward the press, the ABA recognized it needed all the publicity it could get. The result was the ABA encouraged its players—the most prominent of whom by the early 1970s were generally Black—to actively work with the media to promote the league.⁷⁹

Thus, not only was the ABA’s style of play seen to be “Black” the league also actively marketed its Black stars.

3. *Off-Court Style*

Off the court, the ABA was culturally a Black league. Recalled ABA alumnus Steve “Snapper” Jones, “There was still a revolution from the ‘60s going on in sports . . . and black players [in the ABA] were deadly serious about letting people know that they were equal to the white players and they weren’t taking any guff.”⁸⁰ He recollected further that “the bigger the Afro and actually the more militant you could look the better it was. . . . It kind of accentuated nastiness.”⁸¹ As one former ABA executive noted, “[t]he league was very African American in those days. The Afro was a big statement of the ABA. There was a certain swagger. This wasn’t *Hoosiers*, if you follow what I mean.”⁸² As former ABA star Spencer Haywood recalled, in the younger league, “[w]e had the loud clothes and the wild colors and the big old Afros.”⁸³ Fellow ABA standout Charlie Scott agreed. “In the ABA, there was no protocol. We all did what we wanted to do. And, everybody had beards and moustaches, and bellbottom pants, and the loud-colored shirts, and the big Afros, and they were able to have their own identity.”⁸⁴ In the ABA, reflected Professor Martin, “Large Afro hairdos, high-five hand claps,

78. JIM O’BRIEN, ABA ALL-STARS 20 (1972) [hereinafter ABA ALL-STARS].

79. See LOOKING UP ONCE AGAIN, *supra* note 35, at 302, 407-08, 410-11.

80. TREY WILLIAMS, SKEETER 174 (2011).

81. TheTrueSportsJunkie, *Longshots—The Life and Times of the American Basketball Association*, YOUTUBE (Jan. 5, 2014) [hereinafter *Longshots*], [https://perma.cc/8QLR-G8YC] (quoting Steve Jones, Darnell Hillman, and Julius Erving); see also David L. Andrews, *The Fact(s) of Michael Jordan’s Blackness: Excavating a Floating Racial Signifier*, in MICHAEL JORDAN, INC. 123 (ed. David L. Andrews, 2001).

82. JACKIE MACMULLAN, ET AL, BASKETBALL: A LOVE STORY 140 (2018) (quoting Michael Goldberg, former ABA general counsel); see also PLUTO, *supra* note 8, at 30; SHOALS, *supra* note 15, at 96-98.

83. MACMULLAN, ET AL, *supra* note 82, at 140; see also GEORGE, *supra* note 65, at 185; RALPH LAWLER & CHRIS EPTING, BINGO! 60 (2022).

84. *Longshots*, *supra* note 81.

slamming soul music, and growing numbers of black fans proliferated.”⁸⁵

ABA players such as Erving, Darnell Hillman, Artis Gilmore, Michael Jackson, Mike Gale, Larry Kenon, Rich Jones, James Silas, and Mel Bennett were well known for their coiffure.⁸⁶ Indeed, in 1975, *The Sporting News* published a feature presenting an “All-Hair Team” for the ABA.⁸⁷ In the same vein, the website Remembertheaba.com devotes an entire section to the league’s hairstyles.⁸⁸

Thus, African-American popular culture permeated the ABA and further contributed to the notion that it was a “Black” league.

4. Opportunities Created

Adding to its reputation as a “Black” league was that it provided many Black players a shot at top-flight professional basketball they might not otherwise have gotten.⁸⁹ The most prominent players in this regard were two all-time greats: Connie Hawkins and Roger Brown.⁹⁰ Both were unfairly excluded from the NBA due to unproven allegations about the nature of their association with sports gamblers.⁹¹ Both recognized the lifeline that the ABA had thrown them.⁹² Upon his entry into the ABA, Hawkins commented “I feel as though I’ve gotten a new life.”⁹³ Reflected Brown, “I’m glad somebody thought of this league. . . . The guys who never got a chance in the NBA now have someplace to play.”⁹⁴ Before the ABA gave him his shot, Brown

85. MARTIN, *supra* note 61, at 84; *see also* Richard O’Brien, *ABA Alumni Gathered to Celebrate the Renegade League 30 Years After Its Birth*, SPORTS ILLUSTRATED, Sept. 1, 1997, at 26 (quoting Bob Costas) [hereinafter *ABA Alumni*].

86. *See When Big Hair Ruled the ABA*, REMEBERTHEABA.COM [hereinafter *Big Hair*], [https://perma.cc/98CJ-89XT] (last visited Nov. 12, 2023).

87. *See* JIM O’BRIEN, LOOKING UP 83 (2017) (reprinting the *Sporting News* segment) [hereinafter LOOKING UP].

88. *See Big Hair*, *supra* note 86.

89. *See, e.g.*, SCOTT WITH ROSEN, *supra* note 35, at 98-99; RUNSTEDTLER, *supra* note 50, at 26-28; *see also* BILL LIBBY & SPENCER HAYWOOD, STAND UP FOR SOMETHING 200 (1972); *cf.* *ABA Alumni*, *supra* note 85.

90. *See, e.g.*, GARY DAVIDSON WITH BILL LIBBY, BREAKING THE GAME WIDE OPEN 53-54 (1974).

91. *See generally* DAVID WOLF, FOUL! 230-58, 270-76 (1972); MARK MONTIETH, REBORN 66-69, 340 (2017).

92. *See* ABA ALL-STARS, *supra* note 78, at 61; MONTIETH, *supra* note 91, at 340.

93. RUNSTEDTLER, *supra* note 50, at 36.

94. NETOLICKY ET AL., *supra* note 15, at 60.

2024 *SETTING THE RECORD STRAIGHT* 645

stated bluntly “I was dead.”⁹⁵ The gifted star, who prior to the new league had worked in a factory to make ends meet, concluded that “the ABA has returned my life.”⁹⁶

Opportunities to play in the ABA were also afforded to Tony Jackson and Charlie Williams, two other African-American players unfairly banned from the older league due to their own alleged ties to gamblers.⁹⁷ The new league accepted all four players as well as Doug Moe, a white player, who had been denied entry into the NBA for the same reason.⁹⁸

Outside of the four Black players unjustly banned from the NBA, the ABA provided a chance for scores of additional African-American players to ply their trade.⁹⁹ As Nelson George has written, “for African-American athletes the ABA was an incredible success. First and foremost it meant jobs.”¹⁰⁰ During its first season the league established eleven new franchises, offering more than 120 ABA roster opportunities for players.¹⁰¹ And, as George notes, a large number “of these [ABA] roster spots went to Black men.”¹⁰² Haywood concurred. The ABA provided “a lot of black men a lot of playing jobs.”¹⁰³ Moreover, the ABA’s creation prompted the NBA to add new franchises which opened up still further opportunities for African-American players.¹⁰⁴

Athletes afforded this opportunity included many who had played important roles in opening up the game for other Black athletes.¹⁰⁵ They included the likes of Jerry Harkness and Les Hunter both of whom had played on the historic 1962-63 Loyola-Chicago team, which won the “Game of Change” against all-white Mississippi State University¹⁰⁶ and became the first squad

95. LEONARD & FREEDMAN, *supra* note 15, at 154.

96. MONTIETH, *supra* note 91, at 67-68, 340.

97. See WOLF, *supra* note 91, at 71, 160, 163; MURRY R. NELSON, ABE SAPERSTEIN AND THE AMERICAN BASKETBALL LEAGUE 1960-1963, 55-56 (2013); LOOKING UP ONCE AGAIN, *supra* note 35, at 446-48.

98. See WOLF, *supra* note 91, at 71.

99. See, e.g., LOOKING UP ONCE AGAIN, *supra* note 35, at 107, 125-26, 297.

100. GEORGE, *supra* note 65, at 180; see also Dyja, *supra* note 65, at 16; COLÁS, *supra* note 58, at 84; Tarter Interview, *supra* note 36, at 21.

101. See GEORGE, *supra* note 65, at 180.

102. See *id.*; see also ARTHUR R. ASHE, JR., A HARD ROAD TO GLORY 64 (1993 ed.).

103. DAVIDSON WITH LIBBY, *supra* note 90, at 96.

104. See *id.* at 31-32; see also *infra* note 348 and accompanying text.

105. See KEITH B. WOOD, MEMPHIS HOOPS 61 (2021).

106. See Victor Mather, *When Loyola-Chicago Broke a Racial Barrier 55 Years Ago*, N.Y. TIMES (Mar. 29, 2018), [<https://perma.cc/8YGP-W9TN>]; WOOD, *supra* note 105, at 61; MONTIETH, *supra* note 91, at 137.

with four African-American starters to win the NCAA championship.¹⁰⁷ Nonetheless, getting a real opportunity in the older league proved well-nigh impossible for several Loyola stars. Recalled Harkness, “[I] never got a chance in the NBA.”¹⁰⁸ Hunter, who saw action in a mere twenty-four games in the established league, felt much the same way. “The NBA didn’t wait back then for a player to develop. . . . [I]f you weren’t ready to play in the NBA when you got there, they didn’t wait for your development. The ABA was a blessing.”¹⁰⁹

The same was true of Willie Worsley and David Lattin, who were starters on the 1965-66 Texas Western squad, the first team with five African-American starters to win the Division I crown.¹¹⁰ The ABA provided both men with enhanced opportunities to play professionally at the major-league level.¹¹¹ Similarly, Charlie Scott, the first Black varsity basketball player at the University of North Carolina, got his professional start in the ABA.¹¹² Will Allen, at the University of Miami, and Collis Temple Jr., at Louisiana State University, were each the first Black students to represent their respective schools on the court.¹¹³ The first person of color to suit up at a largely white university in the Tar Heel state was Henry Logan when he played for Western Carolina.¹¹⁴ Each of these trailblazers seized the chance to play professionally in the ABA.¹¹⁵ In similar fashion, Walt Simon took the opportunity to play major-league basketball in the younger league. He later helped break the glass ceiling in

107. See MONTIETH, *supra* note 91, at 89, 137-39; see also Tarter Interview, *supra* note 36, at 29.

108. PLUTO, *supra* note 8, at 62.

109. GARY P. WEST WITH LLOYD “PINK” GARDNER, KENTUCKY COLONELS 147 (2011).

110. See WOOD, *supra* note 105, at 61.

111. See *id.*; Tarter Interview, *supra* note 36, at 29. Lattin played two years in the NBA before he was waived. After a year abroad he played three seasons in the ABA. Worsley never played in the NBA.

112. See ART CHANSKY, GAME CHANGERS 86-166 (2016).

113. BARRY JACOBS, ACROSS THE LINE 333 (2008); *Will Allen*, UNIV. OF MIAMI SPORTS HALL OF FAME & MUSEUM, [https://perma.cc/B2SX-VVLZ] (last visited Nov. 13, 2023); *Collis B. Temple, Jr.*, LSU, [https://perma.cc/AE53-VGWM] (last visited Nov. 13, 2023); see also *Stewart Johnson*, MURRAY STATE RACERS, [https://perma.cc/9539-P24U] (last visited Nov. 13, 2023).

114. *1965-68 Henry Logan attends WCC*, *Our History*, W.C. UNIV., [https://perma.cc/Q4RV-Z8TU] (last visited Nov. 13, 2023).

115. See CHANSKY, *supra* note 112, at 38; JACOBS, *supra* note 113, at 333; see also *Will Allen*, *supra* note 113; *1965-68 Henry Logan attends WCC*, *supra* note 114.

2024 *SETTING THE RECORD STRAIGHT* 647

the business world as the first African-American vice president of a major American corporation.¹¹⁶

The ABA also enabled many young players to come into their own, which in turn later permitted them to make it in the NBA. George Gervin remarked “[i]t was to my advantage to play in the ABA That was the only way I could get into the [older] league.”¹¹⁷ Others in the same boat included the likes of Steve Jones, Donnie Freeman, and Larry Jones.¹¹⁸

The younger circuit was able to provide such opportunities for Black players because of three factors. First, prior to the ABA, the NBA had been a monopoly composed of ten teams offering approximately 110 permanent major-league jobs.¹¹⁹ Second, the established league operated on an informal quota system, whereby franchises limited the number of African-American players on their rosters.¹²⁰ Management’s primary concern was that “too many” Black players might deter white fans from coming to games. Finally, the rise of no-cut contracts in the NBA meant that talented incoming players could not make rosters because so many existing players were locked in with their current team.¹²¹ As a result, many Black players who had been excluded because of these three factors were given their shot at the pros in the ABA.¹²² The result was, as one historian notes, “[t]he ABA helped to shift the balance of power in professional basketball to African-Americans by basing its existence on them and not pretending otherwise.”¹²³

116. See WEST WITH GARDNER, *supra* note 109, at 150; LOOKING UP ONCE AGAIN, *supra* note 35, at 286.

117. *Should NBA Count*, *supra* note 4.

118. See ABA ALL-STARS, *supra* note 78, at 55, 85, 90, 94.

119. See *Roster Size*, APBR, [https://perma.cc/3LFC-LUDM] (last visited Nov. 13, 2023); see also PLUTO, *supra* note 8, at 64.

120. See *e.g.*, Jane Gross, *Pro Basketball Still Suffers Racial Anxieties*, HARTFORD COURANT, Jan. 13, 1979, at 29; BILL RUSSELL WITH BILL MCSWEENEY, GO UP FOR GLORY 64-65 (2000 ed.); ARNOLD RED AUERBACH & PAUL SANN, WINNING THE HARD WAY 132-34 (1966); John Devaney, *Pro Basketball's Hidden Fear*, SPORT, Feb. 1966, at 33, 90.

121. See LOOKING UP, *supra* note 87, at 91.

122. Some southern and western-based ABA franchises may have implemented their own informal quota systems. See MONTIETH, *supra* note 91, at 114, 297; PLUTO, *supra* note 8, at 289; WEST WITH GARDNER, *supra* note 109, at 305; RUNSTEDTLER, *supra* note 50, at 73; ASHE, *supra* note 102, at 63-64; Gross, *supra* note 120, at 33 (quoting Carl Scheer); LIBBY & HAYWOOD, *supra* note 89, at 136, 204; Eric Hawkins, *Knubia Locker Room: Justice Delayed*, THEHUB.NEWS (Aug. 25, 2022), [https://perma.cc/PVE8-A4Y8]. Despite this apparent posture by some ABA teams, by its very existence the new league provided more opportunities for Black players than would have been available otherwise had there been just one league with ten teams.

123. Dyja, *supra* note 65, at 17; see also AIELLO, *supra* note 35, at 147.

In addition, the ABA provided younger athletes—including younger Black players—with earlier and potentially lengthier access to professional basketball and its wages than the NBA permitted.¹²⁴ At the time of the ABA's founding, NBA policy prohibited players from entering the league until the year their college graduating class had completed its eligibility.¹²⁵ This “four-year rule” prevented individuals from joining the NBA until they were in their early twenties. The new league had the same policy until 1969 when the Denver Rockets signed college underclassman Spencer Haywood, under what the ABA termed the “hardship” exception.¹²⁶ Reflected Haywood, in this way, the ABA “gave me my chance.”¹²⁷ Ralph Simpson, Erving, and McGinnis soon followed suit.¹²⁸

Five years later, the ABA's Utah Stars took the next step by signing Moses Malone straight out of high school.¹²⁹ The ABA's efforts would carry forward and have a major beneficial impact on basketball players—especially Black players—for generations to come. Soon, the NBA would follow the ABA's lead and draft underclassmen and high school players.¹³⁰ The Haywood and Malone signings had the long-term effect of permitting individuals—many of whom were African-American and from modest socio-economic backgrounds (such as Haywood and Malone)—to earn a living earlier and for longer than they otherwise would have under the NBA's policy at the time. Magic Johnson, Michael Jordan, Kobe Bryant, and LeBron James were but a few of the marquee players able to begin their professional careers sooner because of the ABA's actions.¹³¹

124. See DAVIDSON WITH LIBBY, *supra* note 90, at 57; Dyja, *supra* note 65, at 17.

125. See Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1204 (1971); PLUTO, *supra* note 8, at 184.

126. See, e.g., DAVIDSON WITH LIBBY, *supra* note 90, at 57.

127. *Id.* at 57, 96.

128. See Vincent Ellis, *Ex-Spartan, Piston Ralph Simpson fond of his ABA, Pershing days*, USA TODAY HIGH SCH. SPORTS (Aug. 16, 2012, 5:00 PM), [<https://perma.cc/65Y2-4HQA>]; Sam Gardner, *40 Years Later, Julius Erving Says 'The ABA Still Lives Within the NBA'*, FOX SPORTS (May 13, 2016, 7:00 AM), [<https://perma.cc/7YHE-5ZKQ>]; Clifton Brown, *Legendary Indianapolis Basketball player George McGinnis was LeBron before LeBron*, INDYSTAR (Sept. 3, 2017, 8:24 AM), [<https://perma.cc/9PPQ-BE29>].

129. See Frank Deford, *Bounding into Prominence*, SPORTS ILLUSTRATED, Feb. 19, 1979, at 62.

130. See David Friedman, *The NBA in the 1970s*, 20 SECOND TIMEOUT (Sept. 3, 2015), [<https://perma.cc/N38Z-DWYX>].

131. See *Magic Johnson*, ENCYC. BRITANNICA (Nov. 5, 2023), [<https://perma.cc/GKD2-22JG>]; Tom Huddleston Jr., *How Michael Jordan Became Great: 'Nobody Will Ever Work as Hard as I Work'*, CNBC (Apr. 21, 2020, 1:39 PM),

Finally, the existence of the ABA provided opportunities for driving up salaries for professional basketball players. As a monopoly, the NBA not only had limited roster slots, but also kept player pay low.¹³² With the arrival of free-market competition in the form of the ABA, pay for professional major-league players skyrocketed.¹³³ When the two leagues tried to merge in 1970, Oscar Robertson and a number of his NBA colleagues sued claiming that the proposed merger would violate the Sherman Antitrust Act by removing this new-found competition for wages.¹³⁴ In the long run, the *Robertson* litigation helped pave the way for NBA players to become the best compensated athletes in the United States.¹³⁵ African-American players were major beneficiaries of these developments, which provided not only lucrative salaries for the athletes themselves, but also the means of establishing intergenerational wealth for scores of Black families.¹³⁶

Players were not the only Black professionals who benefitted from the expanded opportunities in the ABA. There were other major African-American figures associated with the game who were given a chance in the younger league. One was coach John McLendon.¹³⁷ A protégé of the game's founder, Dr. James Naismith, McLendon had established himself as one of the

[<https://perma.cc/K6L6-WT75>]; Logic Johnson, *LeBron James and the 10 Greatest Players Drafted out of High School*, BLEACHER REP. (Apr. 10, 2012), [<https://perma.cc/Q2FA-D4TJ>]. Of course, many players who entered the professional ranks right out of high school or left college early flamed out at the professional level. See Alan Nahigian, *15 Basketball High School Phenoms Who Failed In the NBA: Where Are They Now?*, THE SPORTSTER (Jan. 8, 2018), [<https://perma.cc/G8TJ-RMVN>]. The point is not that entering the professional ranks early is always a prudent decision for all players (African American or otherwise). The point is that, because of the ABA and trailblazers such as Haywood and Malone, players now have much greater freedom to make this major career decision for themselves and not have it imposed on them by the NBA.

132. See, e.g., *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867, 875, 890-96 (S.D.N.Y. 1975).

133. See, e.g., Paul L. Montgomery, *Top N.B.A. Stars Were Subsidized*, N.Y. TIMES, March 21, 1976, at 153; DAN SHAUGHNESSY, *SEEING RED 200* (1994); LEIGH MONTVILLE, *TALL MEN, SHORT SHORTS 157* (2021).

134. See *Robertson*, 389 F. Supp. at 890-96; 15 U.S.C. § 1 (2004).

135. See, e.g., Barbara Bean-Mellinger, *What Sport Has the Highest Average Salary*, S.F. CHRON. (Sept. 22, 2020), [<https://perma.cc/T8KA-BW5W>].

136. See GEORGE, *supra* note 65, at 180-81; Evan Barnes, *Why Jaren Jackson, Jr. Deal is a Win for Him, Grizzlies*, MEMPHIS COM. APPEAL (Oct. 18, 2021, 6:30 PM), [<https://perma.cc/JP9K-FDLY>]; Tim Reynolds, *LeBron Buys Piece of BoSox, Adds to Business Empire*, BISMARCK TRIB., May 17, 2021, at 89; Mike Vorkunov, *A Future NBA Billionaire was Just Drafted*, THE ATHLETIC (July 19, 2022), [<https://perma.cc/4P37-4KM7>].

137. See Tarter Interview, *supra* note 36, at 30.

great college coaches at a number of historically black colleges and universities.¹³⁸ Despite a remarkable track record, the NBA had never given him a chance to lead a professional team.¹³⁹

In the early 1960s, the American Basketball League (“ABL”) had provided McLendon with the opportunity to coach in the professional ranks,¹⁴⁰ but the ABL was not seen as a true rival to the established league and the enterprise quickly folded.¹⁴¹ In 1966, the Boston Celtics elevated Bill Russell to serve as player-coach, making him the first Black coach in NBA history.¹⁴² A handful of NBA franchises followed suit, elevating Black players to become player-coaches, including Lenny Wilkens and Al Attles.¹⁴³ Yet, no African-American coach, who was not also a current player, had ever been hired.¹⁴⁴

In 1969, the ABA’s Denver Rockets crossed that barrier and signed McLendon to be their head coach.¹⁴⁵ Though he was treated shabbily by the Rockets¹⁴⁶ and his tenure proved short lived—only twenty-nine games—McLendon still broke important new ground.¹⁴⁷ Reflected the coach “I feel I have been fortunate as a black coach to get an opportunity to coach in major

138. See MILTON S. KATZ, *BREAKING THROUGH 169-70, 174, 179, 182* (2007).

139. See *id.* at 174, 182.

140. See *John McLendon*, NAISMITH MEMORIAL BASKETBALL HALL OF FAME, [<https://perma.cc/CG8G-FYE6>].

141. See QUIRK & FORT, *supra* note 10, at 323; LEONARD KOPPETT, *24 SECONDS TO SHOOT* 148, 178 (1999 ed.). Cf. NELSON, *supra* note 97, at 2. In this context, the “ABL” refers to the professional league in existence from 1961 to 1963, not the ABL that was in existence from 1925 to 1931 and 1933 to 1955. See ROBERT W. PETERSON, *CAGES TO JUMP SHOTS 196-99* (1990); AIELLO, *supra* note 35, at 98-101.

142. For the 1948-49 campaign, William “Pop” Gates—an African American—played for and coached the Dayton Rens in the National Basketball League (NBL). See DAVID GEORGE SURDAM, *THE RISE OF THE NATIONAL BASKETBALL ASSOCIATION* 162 (2012). However, the NBL is not officially and fully considered part of the NBA’s history. See *infra* Part VI.A.

143. See Joe Vardon, *NBA 75: At No. 75, Lenny Wilkins Was the Embodiment of the Player as Coach on the Floor*, THE ATHLETIC (Nov. 1, 2021), [<https://perma.cc/AZF6-PWDG>]; Jeff Zillgitt, *Al Attles Headed to Basketball Hall of Fame after Six Decades with Warriors*, USA TODAY (Sept. 6, 2019, 6:55 AM), [<https://perma.cc/SHJ7-AAS9>].

144. See LIBBY & HAYWOOD, *supra* note 89, at 187.

145. See MARC J. SPEARS & GARY WASHBURN, *THE SPENCER HAYWOOD RULE* 87 (2020); LIBBY & HAYWOOD, *supra* note 89, at 187; WHITESIDE, *supra* note 73, at 317-18.

146. See SPEARS & WASHBURN, *supra* note 145, at 90-91; KATZ, *supra* note 138, at 174-79; DAVIDSON WITH LIBBY, *supra* note 90, at 50; LIBBY & HAYWOOD, *supra* note 89, at 70, 134-35, 203-05.

147. See KATZ, *supra* note 138, at 169-79. Cf. WHITESIDE, *supra* note 73, at 317-18.

2024 *SETTING THE RECORD STRAIGHT* 651

league [sic] professional basketball. I wish it could have gone further, of course.”¹⁴⁸

Despite the tremendous opportunities afforded Black professionals by the ABA, it is important to note that the ABA took none of these steps for benevolent reasons.¹⁴⁹ The league’s teams signed Hawkins, Brown, Jackson, and Williams; inked contracts with Black players who could not find roster spots in the NBA; drafted African-American underclassmen and a high schooler; promoted Black players; shelled out big salaries; and hired the first Black bench coach not because its aim was to help African Americans, but because it was competing with the NBA for talent and public attention.¹⁵⁰ Indeed, the ABA’s merger efforts with the NBA starting in the early 1970s were an attempt to “put the genie back in the bottle” regarding escalating player salaries.¹⁵¹

But, regardless of the *intent* of ABA owners and management, the *effect* of their efforts on the game is difficult to overstate.¹⁵² The ABA created more of a free market system for major league professional basketball. As a consequence, there was much greater compensation for players, who as the 1970s progressed, were increasingly African-American.¹⁵³ Because of this injection of free-market forces, salaries increased accordingly.¹⁵⁴

The NBA is quick to tout its record as a progressive league, especially on matters of race.¹⁵⁵ And, indeed, it has moved more rapidly (or less slowly) to employ African

148. LIBBY & HAYWOOD, *supra* note 89, at 203. After McLendon, ABA teams hired several other Black coaches: Wilt Chamberlain, K.C. Jones, Mack Calvin, and Zelmo Beaty. All but Calvin were bench coaches.

149. See WOLF, *supra* note 91, at 270, 272; DAVIDSON WITH LIBBY, *supra* note 90, at 6-7, 87-88; ASHE, *supra* note 102, at 63-64; Alan Goldsher, *Bringing the Funk: How the ABA Changed the NBA Forever*, AOL (July 14, 2016, 10:39 PM), [<https://perma.cc/6NWD-3BRH>]; RUNSTEDTLER, *supra* note 50, at 56, 61, 63.

150. See *supra* Part III.A.4.

151. See, e.g., David A. DeBusschere, *An Organized Approach to Placing Professional Basketball on a Sound Businesslike Basis* (Apr. 15, 1976) [hereinafter DeBusschere Memo] (discussion draft) LOBP/SC, Box 16.

152. See SCOTT WITH ROSEN, *supra* note 35, at 120.

153. See ASHE, *supra* note 102, at 64.

154. See, e.g., DAVIDSON WITH LIBBY, *supra* note 90, at 6-7, 53.

155. See, e.g., Bomani Jones, *Adam Silver Goes Deep on the Wildest Year in NBA History*, GQ (Nov. 30, 2020), [<https://perma.cc/HD9A-XA6T>]. The league’s commitment to such principles has not been in evidence regarding support for democracy and human rights in Hong Kong. See, e.g., Daniel Victor, *Hong Kong Protests Put N.B.A. on Edge in China*, N.Y. TIMES (Oct. 7, 2021), [<https://perma.cc/7GDS-5NV4>].

Americans as head coaches and executives than have the other three major American sports.¹⁵⁶ The same is true of its hiring of female coaches and officials.¹⁵⁷ Consistent with its historical legacy, the NBA should take the necessary steps to formally acknowledge statistics in the ABA, widely recognized as a “Black” league. Continuing to do otherwise greatly obscures and undervalues the historic contributions of African Americans to the development of professional basketball and diminishes the NBA’s record on racial equality.

B. The NBA Benefits from the ABA’s Legacy but Refuses to Officially Recognize the Former League’s History

Another important moral reason why the NBA should recognize the statistics from the defunct league is that the NBA has had no qualms with utilizing ABA history for its own benefit. By officially acknowledging the dissolved league’s statistics, the NBA would formally recognize that the ABA left a major impact on the surviving league in numerous interrelated ways:¹⁵⁸ (1) contributing to a spike in interest in the NBA; (2) driving widespread acceptance of dunking and individual play; (3) pushing the NBA to adopt the three-point line; (4) moving the emphasis of the game from the post to the wing; (5) influencing the location of NBA franchises; and (6) providing new financial and marketing opportunities for the NBA. Reflected former NBA great Walt Frazier, in today’s game, “The whole NBA is the ABA. . . . [A]ll we got to do is color the ball red, white and blue.”¹⁵⁹ George Karl, longtime NBA coach and veteran of both leagues, expressed similar sentiments. “[T]he way the game is played today is very ABA-ish.”¹⁶⁰

First, the ABA helped to build greater fan interest in the NBA. Average NBA attendance jumped to a record level in 1976-77, the year after the interleague settlement. This high attendance level would remain roughly in place for several seasons

156. See SURDAM, *supra* note 142, at 168; SCOTT WITH ROSEN, *supra* note 35, at 97.

157. See AIELLO, *supra* note 35, at 233-34.

158. See SCOTT WITH ROSEN, *supra* note 35, at 120, 214-15; SHOALS, *supra* note 15, at 113; Goldsher, *supra* note 149.

159. NETOLICKY ET AL., *supra* note 15, at 169; *see also* Bell, *supra* note 16; Author Interview with Pat Williams, former NBA General Manager, at 1 (Mar. 19, 2020) (transcript on file with author).

160. Author Interview with George Karl, former ABA and NBA Player and former NBA Coach, at 1 (Dec. 13, 2021) [hereinafter Karl Interview] (transcript on file with author).

2024 *SETTING THE RECORD STRAIGHT* 653

thereafter.¹⁶¹ Recalled Frazier, “I think the changes started more or less around the time when the ABA . . . merged into the NBA. . . . [T]he ABA came in, and the transition to a speed, showtime-type of game really took off.”¹⁶² He noted that, “Dr. J and players like George Gervin and George McGinniss [sic] who were stars in the ABA . . . changed the style of play in the [NBA]. Coaches who had been in the ABA were now the NBA coaches, and they brought with them their concepts of speed and flair.”¹⁶³ ABA style focused greater public attention on the NBA. Following the interleague settlement, NBA general manager Jerry Colangelo conceded that, “The ABA helped raise the interest level in pro basketball tremendously and got the sport more media coverage.”¹⁶⁴ Even NBA traditionalist and former Knick coach Red Holzman had to admit that “taking in those ABA teams gave the NBA a shot in the arm.”¹⁶⁵ Explained NBA star Doug Collins, “when you got the merger, you could just start feeling the momentum for the NBA and then came Magic and then came Bird.”¹⁶⁶

A second related point is that the ABA bequeathed a new ethos about dunking and individual play.¹⁶⁷ Prior to the 1976 interleague settlement, dunking was generally seen in the NBA as disrespectful and largely the province of centers and power forwards while the slams that did occur were typically fairly pedestrian by today’s standards.¹⁶⁸ By contrast, the ABA

161. See *NBA/ABA Home Attendance Totals*, APBR, [<https://perma.cc/EP7P-LT28>] (last visited Nov. 30, 2023).

162. WALT FRAZIER WITH NEIL OFFEN, *ONE MAGIC SEASON AND A BASKETBALL LIFE* 94-95 (1988); see also GERVIN WITH JACKSON, *supra* note 16, at 102; PLUTO, *supra* note 8, at 30.

163. FRAZIER WITH OFFEN, *supra* note 162, at 94-95; see also Karl Interview, *supra* note 160, at 1-2.

164. Joe Gilmartin, *Where Does the NBA Go From Here?*, STREET AND SMITH’S OFFICIAL COLLEGE, PRO, AND PREP YEARBOOK, 1977-78, at 168; see also WALTER LAFEVER, MICHAEL JORDAN AND THE NEW GLOBAL CAPITALISM 41 (1999).

165. RED HOLZMAN, *RED ON RED* 156 (1987); see also TOMMY HEINSOHN & JOE FITZGERALD, *GIVE ‘EM THE HOOK* 196 (1988); Dick Mackey, *How the Merger Improved the NBA*, BASKETBALL DIGEST, May 1977, at 38.

166. Author Interview with Doug Collins, former NBA Player and former NBA Coach, at 15 (Jan. 11, 2022) (transcript on file with author).

167. See e.g., SMITH, *supra* note 55, at 151.

168. See Wilt Chamberlain Archive, *The ‘Short Guys’ That Dared to Dunk in the Wilt Chamberlain Era (late 1950s, 1960s, early 1970s)*, YOUTUBE (Jan. 7, 2019), [<https://perma.cc/LY82-3Q4D>]; see generally Wilt Chamberlain Archive, *NBA All-Star Game Dunks of the 1960’s*, YOUTUBE (AUG. 13, 2017), [<https://perma.cc/V4PQ-B2F2>]; TERRY PLUTO, *TALL TALES* 377 (1992); Tony Kornheiser, *NBA Slam Dunk: Your World and Welcome to It, Kid*, WASH. POST, Feb. 10, 1985, at C7.

encouraged dunking and, with its legion of talented forwards and fewer shot-blocking centers, slams were frequent and highly prized in the younger league.¹⁶⁹ Recollected Dan Issel, who starred in both leagues, “The dunk was a bigger play in the ABA . . . it was a statement of your manhood and your talent.”¹⁷⁰ Looking back, ABA executive Jim Bukata had a similar take.¹⁷¹ When ABA players came to the NBA, they brought with them the ethos of the younger league, leading the NBA to openly embrace dunking.¹⁷²

While it is too much to say that the ABA introduced showmanship into basketball’s major leagues—NBA stars Bob Cousy, Elgin Baylor, Earl Monroe, Gus Johnson, and Pete Maravich each made important contributions in this regard—the younger league encouraged such an approach more than the established league.¹⁷³ This greater emphasis on individual brilliance—inspired in large part by the ABA—had a significant impact on the fortunes of the NBA as fans embraced this style of play. As Colangelo noted, “spectacular plays . . . built this league.”¹⁷⁴

Third, while there are few developments that can rival the dunk for influencing how the modern NBA game is played and how it is marketed, one of them is the three-point shot.¹⁷⁵ The ABA played a major role in the older league ultimately adopting the rule.¹⁷⁶

The ABL, which existed from 1961 to 1963, introduced the three-point shot to professional basketball.¹⁷⁷ However, that outfit did not mount a serious challenge to the NBA and was not in existence long enough to make an impression on the preexisting league.¹⁷⁸ Soon thereafter the most prominent minor league at the time—the Eastern League—implemented the three-point rule.¹⁷⁹

169. See SMITH, *supra* note 55, at 151.

170. PLUTO, *supra* note 8, at 26.

171. See *id.* (quoting Bukata, “the ABA was known for—its athletes and its dunking”).

172. See, e.g., Kornheiser, *supra* note 168.

173. See Ryan, *supra* note 58; see also TERRY PLUTO, FALLING FROM GRACE 86-87 (1995); PLUTO, *supra* note 8, at 30, 34; SHOALS, *supra* note 15, at 88.

174. PLUTO, *supra* note 168, at 171; see also *Why Doesn't ABA History*, *supra* note 22.

175. See, e.g., SMITH, *supra* note 55, at 151.

176. See, e.g., LUKASZ MUNIOWSKI, THREE-POINTER! 22-26 (2020); SMITH, *supra* note 55, at 151; MIKE PRADA, SPACED OUT 4-11 (2022).

177. See PRADA, *supra* note 176, at 9-10.

178. See KOPPETT, *supra* note 141, at 148-49, 178.

179. See SYL SOBEL & JAY ROSENSTEIN, BOXED OUT OF THE NBA 47 (2021); @prohoophistory, TWITTER (June 4, 2021, 1:57 PM) (on file with author).

2024 *SETTING THE RECORD STRAIGHT* 655

But it was not until the ABA adopted the shot that it became truly part of the professional basketball landscape. After the settlement, the NBA was hesitant to add the three-pointer, in large part because of its resentment toward the ABA.¹⁸⁰ But soon the NBA began to rethink its stance.¹⁸¹ Efforts by a number of former ABA alumni and NBA lifers Gene Shue and Pat Williams ultimately carried the day. The former ABA figures included Philadelphia coach Billy Cunningham (former ABA player); Spurs owner Angelo Drossos (former ABA owner); and NBA coaches Kevin Loughery, Tom Nissalke, Doug Moe, Hubie Brown, Donnie Walsh, and Slick Leonard (all former ABA headmen).¹⁸² The NBA adopted the rule provisionally for the 1979-80 season and it has remained on the books ever since.¹⁸³

The three-point shot did not immediately transform the league. As author Shawn Fury has noted, “[a]t first, the NBA didn’t want people thinking the league borrowed anything from the ABA, its old rival, one reason the three-pointer struggled to gain acceptance.”¹⁸⁴ In the second decade of the twenty-first century, however, the shot began to dramatically alter the game with the increased use of advanced metrics. Player skillsets, shot selection, and spacing would never be the same.¹⁸⁵

Through a combination of dunking and three-point shooting, the ABA left its mark on the NBA. Willie Wise, who played in both leagues, remarked in 2017, “I look at Golden State now and I thought to myself that’s just an ABA team running and gunning and shooting up 3-pointers, spreading the floor, driving to the hoop and doing dunk shots.”¹⁸⁶ He concluded, “The NBA is nothing but the ABA revisited.”¹⁸⁷

180. See, e.g., PRADA, *supra* note 176, at 6-8.

181. *Id.*

182. See Bill Livingston, *Coaches Support NBA 3-Pointers*, PHILA. INQUIRER, June 13, 1979, at 61; Jack Wilkinson, *Long Shot Shifts Odds on Court*, N.Y. DAILY NEWS, June 22, 1979, at 50; Sam Goldaper, *N.B.A. Leaning to 3-Point Goal*, N.Y. TIMES, June 13, 1979, at D22; LEONARD & FREEDMAN, *supra* note 15, at 228.

183. See Leigh Montville, *NBA Adopts 3-Point Goal . . . Now All This Circus Needs is a Ringmaster*, BOS. GLOBE, June 22, 1979, at 49.

184. SHAWN FURY, *RISE AND FIRE* 268 (2016); see also Livingston, *supra* note 182.

185. See KIRK GOLDSBERRY, *SPRAWLBALL* 11-12 (2019).

186. Dwain Price, *NBA Takes on a Red, White and Blue Hue*, FORT WORTH STAR-TELEGRAM, Mar. 1, 2017, at B1, B10.

187. *Id.*; see also GERVIN WITH JACKSON, *supra* note 16, at 100 (“We all know right now the NBA is the ABA. . . . [T]he game is being played now the same way it was when we were playing with that red, white, and blue ball.”).

Fourth, the ABA changed the game by placing a greater premium on athletic wings rather than low-post players. In the league's existence, only three times was the MVP trophy awarded to a center; on seven occasions forwards claimed the honor.¹⁸⁸ During this same period, every NBA MVP was a center.¹⁸⁹ George McGinnis reflected that “[t]he A.B.A. [wa]s a forwards league. Rick Barry, Billy Cunningham, Julius [Erving], and myself . . . it just seemed like things were tailored for us.”¹⁹⁰

At the same time, several ABA championship teams lacked a star center: the 1967-68 Pittsburgh Pipers, the 1968-69 Oakland Oaks, the 1973-74 New York Nets, and the 1975-76 Nets.¹⁹¹ By contrast, just one NBA team during the ABA's lifetime—and indeed just a single team from the mid-1950s to late 1980s—won a title without a top-flight center: the 1974-75 Golden State Warriors.¹⁹²

Moreover, the ABA's emphasis on wing players dovetailed nicely with the league's fast-paced, more improvisational approach to the game.¹⁹³ After the interleague settlement took place, these gifted wing players began slowly to move the action in the NBA from the pivot to the perimeter. Jim Chones, another veteran of both leagues, commented, “The game that the NBA is trying to play now, that's the game we played in the ABA Shooting early in the clock, a lot of transition stuff, and no real physical centers.”¹⁹⁴

Fifth, the ABA influenced the location of a number of NBA franchises. Obviously, San Antonio, Indiana, Denver, and

188. In 1974-75, Julius Erving and George McGinnis were co-MVPs. *See NBA MVP & ABA Most Valuable Player Award Winners*, BASKETBALL REFERENCE, [https://perma.cc/W3X4-2KDE] (last visited Jan. 5, 2024).

189. *See id.*

190. Bill Livingston, *McGinnis' Rundown on His Old A.B.A. Colleagues*, PRO BASKETBALL EXTRA, 1976-77, at 10.

191. *See 1967-68 Pittsburgh Pipers Roster and Stats*, BASKETBALL REFERENCE, [https://perma.cc/R3RX-JX8F] (last visited Nov. 13, 2023); *1968-69 Oakland Oaks Roster and Stats*, BASKETBALL REFERENCE, [https://perma.cc/4F76-UFNF] (last visited Nov. 13, 2023); *1973-74 New York Nets Roster and Stats*, BASKETBALL REFERENCE, [https://perma.cc/SM8B-3ZMA] (last visited Nov. 13, 2023); *1975-76 New York Nets Roster and Stats*, BASKETBALL REFERENCE, [https://perma.cc/U9HB-UEDY] (last visited Jan. 5, 2024).

192. *See 1974-75 Golden State Warriors Roster and Stats*, BASKETBALL REFERENCE, [https://perma.cc/S9GK-45GM] (last visited Jan. 5, 2024); ADAM J. CRIBLEZ, TALL TALES AND SHORT SHORTS 130-31 (2017) [hereinafter TALL TALES AND SHORT SHORTS]; JOHNNY KERR & TERRY PLUTO, BULL SESSION 104-06 (1989).

193. *See* MACMULLAN ET AL., *supra* note 82, at 146, 149-150, 184.

194. Price, *supra* note 186.

2024 *SETTING THE RECORD STRAIGHT* 657

Brooklyn have NBA teams because each team had been an ABA club.¹⁹⁵ But the impact of the defunct league runs much deeper, having launched big-league basketball in seven cities that now host NBA franchises: Salt Lake City, Miami, Charlotte, Houston, Memphis, New Orleans, and Dallas.¹⁹⁶ In addition, the ABA replanted seeds for NBA franchises in Washington and Minneapolis.¹⁹⁷

Finally, the ABA opened up financial and marketing opportunities that the NBA has seized. Any question about whether ABA teams were the forebearers of numerous NBA franchises can be answered by the NBA's sponsorship of throwback jerseys in 2012. That year, the NBA had its franchises in New Jersey (earlier New York and later Brooklyn), Miami, Denver, Minnesota, Indiana, Charlotte, Memphis, San Antonio, and Los Angeles (the Clippers) each wear and sell ABA replica uniforms.¹⁹⁸ One NBA vice president noted that, "with it being the 45th anniversary of the ABA, we felt it was a good way to celebrate that league's entire story."¹⁹⁹ A decade later, in 2022, the Nets dusted off their old ABA jerseys once again.²⁰⁰ In this respect, the NBA has displayed a cynical posture by continuing to reject ABA statistics but jumping at the chance to "celebrate" the defunct league's anniversary by making money off of it through the sale of replica jerseys.²⁰¹

The NBA's attempts to reap financial and marketing benefits from the ABA's historical legacy transcend throw-back uniforms. The surviving league has pursued and secured trademarks for numerous ABA logos, including those of the disbanded league itself,²⁰² as well as several of its teams, such as

195. See Burke, *supra* note 44.

196. Cf. SCOTT WITH ROSEN, *supra* note 35, at 120-21; NETOLICKY ET AL., *supra* note 15, at 172; LEONARD & FREEDMAN, *supra* note 15, at 212, 219.

197. See LEONARD & FREEDMAN, *supra* note 15, at 219.

198. See Art Garcia, *ABA's Legacy Lives in NBA*, FORT WORTH STAR-TELEGRAM, Feb. 5, 2012, at Z6; Don Muret, *Cougar Town: Bobcats to Honor ABA Team During Five Home Games This Season*, SPORTS BUS. J. (Jan. 6, 2012), [<https://perma.cc/2NK3-PGGM>]; *NBA Teams Celebrate 45th Anniversary of ABA's Founding with NBA Hardwood Classics Month*, NBA COMM'NS (Jan. 26, 2012), [<https://perma.cc/D56F-CF5A>]; cf. Todd Peterson, *The Case for the Negro Leagues*, in *NEGRO LEAGUES*, *supra* note 1, at 35-38.

199. Garcia, *supra* note 198.

200. See *Brooklyn Nets Revive Fan Favorite Stars and Stripes Uniform from ABA Era*, NBA (Aug. 25, 2022, 11:15 AM), [<https://perma.cc/6TY7-FR8S>]; see also *NBA Store*, *supra* note 18.

201. Garcia, *supra* note 198.

202. See "ABA American Basketball Association," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/3WGQ-YAJF>] (last

the Virginia Squires,²⁰³ the Pittsburgh Condors,²⁰⁴ the Oakland Oaks,²⁰⁵ the Miami Floridians,²⁰⁶ the Memphis Pros,²⁰⁷ and the Spirits of St. Louis.²⁰⁸ None of these teams ever became part of the NBA; indeed, the NBA made a point of preventing the Spirits from entering the league in the 1976 settlement.²⁰⁹

The NBA's efforts to benefit financially from the ABA legacy began almost immediately after the interleague settlement. In early 1980, when Denver's Dan Issel was approaching the 20,000 career-point-mark, the team ran a promotion in his honor.²¹⁰ The spectator who was judged to have brought the most creative Issel sign to the game was promised 20,000 pennies.²¹¹ The "problem" was that more than half of Issel's points had been scored in the defunct league.²¹²

Later that year, Philadelphia 76er star Julius Erving was approaching the very same milestone: 20,000 career points.²¹³ As with Issel, a sizeable chunk of his scoring had taken place in the

visited Jan. 4, 2024) (currently pending application by the NBA); "ABA," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/V3KT-XAJB>] (last visited Jan. 4, 2024) (registration obtained by the NBA though now expired); *see also* "ABA," Trademark Status & Document Retrieval, U.S. Patent and Trademark Office, [<https://perma.cc/E3CZ-AMGT>] (last visited Jan. 4, 2024).

203. *See* "Virginia Squires," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/LM2E-J2RA>] (last visited Jan. 5, 2024) (live registration owned by NBA).

204. *See* "Condors," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/2HBR-PQTB>] (last visited Jan. 5, 2024) (live registration owned by NBA).

205. *See* "Oakland Oaks," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/2X3K-AH99>] (last visited Jan. 5, 2024) (live registration owned by NBA).

206. *See* "Floridians," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/CK5S-SUFD>] (last visited Jan. 5, 2024) (live registration owned by NBA).

207. *See* "ABA Memphis Pros," Trademark Status & Document Retrieval, U.S. Patent and Trademark Office, [<https://perma.cc/9XXU-XW9F>] (last visited Jan. 5, 2024) (live registration owned by the NBA).

208. *See* "Spirits of St. Louis," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/KE75-TMPW>] (last visited Jan. 5, 2024); "Spirits of St. Louis," Trademark Status & Document Retrieval, U.S. PATENT AND TRADEMARK OFFICE, [<https://perma.cc/7C3K-AXG4>] (last visited Jan. 5, 2024) (live registration owned by the NBA).

209. *See supra* note 35.

210. *See Nuggets to Cite Dan at Saturday's Game*, DENVER POST, Nov. 13, 1980, at 79 [hereinafter *Nuggets*].

211. *See id.*

212. *See id.*

213. *See* Bill Livingston, *Truck Robinson Says Tilting at Pinball is Helping His Game*, PHILA. INQUIRER, Dec. 14, 1980, at 2F.

2024 *SETTING THE RECORD STRAIGHT* 659

ABA.²¹⁴ Nonetheless, the 76ers—not even a former ABA franchise—decided they would undertake a vigorous promotional campaign to cash in on this achievement.²¹⁵ One local reporter captured the absurdity of Philadelphia’s posture:

My, how sagging attendance can change management’s viewpoint. In the past, the 76ers, with all the haughty disdain of an old-line NBA team, treated records set in the old American Basketball Association as something darn near fraudulent. But the Sixers, trying to hype their gate by any means possible, have started trumpeting a 20,000-point night for Julius Erving. . . . Only catch is, 11,662 of Dr. J’s points came in the ABA. The old-line clubs won’t recognize [ABA records] . . . but, when a few bucks can be made, it is apparently a different story.²¹⁶

Not only has the NBA’s bottom line benefited directly from the ABA through the sale of replica jerseys and commemoration of career milestones, the NBA has benefited indirectly as well. As will be discussed below,²¹⁷ ABA footage and lore are part of the overall NBA marketing effort which is manifested on league websites and in its arenas. History is an important marketing tool for sports organizations in general and the NBA actively harnesses the ABA’s past to suit its own needs.²¹⁸

In 1976, Denver, New York, San Antonio, and Indiana were brought into the NBA. But culturally, to a great extent the reverse has taken place, the older league might as well have been absorbed into the younger.²¹⁹ In a very real sense, the modern NBA game is, in many respects, a reformulation of the way the ABA played.²²⁰ Given its significant and multi-faceted

214. *See id.*

215. *See id.*

216. *Id.*

217. *See infra* Part V.

218. *See e.g.*, Daniel A. Rascher, *Franchise Relocations, Expansions, and Mergers in Professional Sports Leagues*, (Oct. 13, 2007) (unpublished manuscript) [<https://perma.cc/R4B8-FWRG>] (“[H]istory, tradition, and statistics are critical elements of the product that sports leagues sell.”).

219. *See* MACMULLAN, *supra* note 82, at 184; COLÁS, *supra* note 58, at 85.

220. *See, e.g.*, STEPHEN DEMOREST & LARRY MILLER, *LARRY MILLER TIME* 234 (2020) (quoting George Lehmann who played in both leagues: “the ABA was all about running and shooting the three—we basically gave birth to the basketball that’s being played today—although the guys today took it to a whole different level.”); *see also* GERVIN WITH JACKSON, *supra* note 16, at 100, 158; Price, *supra* note 186 (quoting Willie Wise); Karl Interview, *supra* note 160, at 1-2; *see also supra* notes 159-172 and 186-187 accompanying text.

contributions to the success of the modern pro game, it is only proper for the NBA to fully acknowledge the ABA by officially recognizing its statistics.

IV. HISTORY

A. The ABA was a “Major League”

In addition to moral considerations, there are numerous historical factors indicating that the ABA was a “major league” and that the NBA should formally acknowledge ABA statistics. At the outset it is important to note that *the NBA itself* has repeatedly categorized the ABA as a “major league.”

The NBA’s Official Encyclopedia of Pro Basketball, which was published to commemorate the thirty-fifth anniversary of the league, provided a history of both the NBA and ABA under the heading “The Major Leagues.”²²¹ Beginning in its *Official NBA Guide* for the 1981-82 season, the surviving league included a brief segment in its publication entitled “Major-League All-Time” statistical leaders which added parenthetically “ABA included.”²²² For the categories of career scoring average, career scoring totals, career field goals attempted, career field goals made, career field goal percentage, free throws made in a career, free throw percentage in a career, and career minutes, players had their ABA statistics factored into the equation in this section of the publication.²²³ This designation of the ABA as “Major-League” was included in *Official NBA Guides* for five subsequent years.²²⁴

221. THE NBA’S OFFICIAL ENCYCLOPEDIA OF PRO BASKETBALL 41-338 (Zander Hollander ed., 1981).

222. THE SPORTING NEWS, OFFICIAL NBA GUIDE 1981-82, at 142-43 (1981); *see also* Jasner, *supra* note 22. *The NBA Official Guide* for 1976-77, the first such publication after the interleague settlement, included a separate segment on ABA statistics for players coming directly from the ABA, but for players already playing in the NBA at the time who had played previously in the ABA, no reference was made to their ABA numbers. *See* THE SPORTING NEWS, THE NATIONAL BASKETBALL ASSOCIATION OFFICIAL GUIDE FOR 1976-77, at 222-40 (1976); *see also* NBA Email to Author, *supra* note 9 (stating incorrectly that “the Official NBA Guide . . . recognizes the stats for ABA players who joined the NBA in 1976.”). For the next few years, the *NBA Guide* listed ABA statistics for individual players but pointedly did not combine the ABA totals with NBA numbers. *See, e.g.*, THE SPORTING NEWS, NATIONAL BASKETBALL ASSOCIATION OFFICIAL GUIDE FOR 1977-78 (1977).

223. *See* NBA GUIDE, 1981-82, *supra* note 222, at 142-43.

224. *See, e.g.*, THE SPORTING NEWS, OFFICIAL NBA GUIDE 1982-83, at 154-55 (1982); THE SPORTING NEWS, OFFICIAL NBA GUIDE 1983-84, at 154-55 (1983); THE SPORTING NEWS, OFFICIAL NBA GUIDE 1984-85, at 119 (1984); THE SPORTING NEWS,

2024 *SETTING THE RECORD STRAIGHT* 661

The *1983-84 Guide* added mention of ABA All-League and All-Rookie squads; MVPs, Rookies of the Year, and Coaches of the Year; players who earned All-ABA honors; ABA All Star Game results; and cumulative team records of ABA franchises.²²⁵ These references were also included in subsequent editions.²²⁶ “ABA Yearly Statistical Leaders” and “ABA Championship Series Results” categories were included for five editions in a row.²²⁷

The *1987-88 Guide* changed the “Major League” designation to “Combined NBA/ABA All-Time Leaders.”²²⁸ That year’s edition also took things a step further by including, for the first time, the full complement of career regular-season statistical categories. In this separate section, rebounds, assists, steals, blocked shots, attempted three-point shots, made three-point shots, three-point percentage, disqualifications, and personal fouls were all listed for NBA and ABA career leaders.²²⁹ These same ABA records were included in subsequent years including the most recent *2019-20 NBA Guide*.²³⁰ Thus, to a significant extent, through its annual *Guides* the NBA has tacitly recognized the legitimacy of ABA statistics. However, ABA achievements in individual games from the regular season and the playoffs have been consistently omitted, as have career ABA playoff numbers; moreover, with regard to individual career statistics and achievements, the NBA very clearly sets ABA totals apart in its publications.²³¹

OFFICIAL NBA GUIDE 1985-86, at 119 (1985); THE SPORTING NEWS, OFFICIAL NBA GUIDE 1986-87, at 121 (1986).

225. See NBA GUIDE 1983-84, *supra* note 224, at 138-40. For those it deems “All-Time Great Players,” the *NBA Register* includes separate categories for NBA numbers, ABA data, and combined totals. See THE SPORTING NEWS, OFFICIAL NBA REGISTER 2006-07, at 341-42 (2006) [hereinafter 2006-07 REGISTER] (Julius Erving’s entry). But ABA statistics have never been comprehensively integrated into the NBA statistical canon.

226. See NBA GUIDE 1984-85, *supra* note 224, at 106-08, 119; NBA GUIDE 1985-86, *supra* note 224, at 107-08, 119; NBA GUIDE 1986-87, *supra* note 224, at 108-10, 121; THE SPORTING NEWS, OFFICIAL NBA GUIDE 1987-88, at 126-27 (1987).

227. NBA GUIDE 1986-87, *supra* note 224, at 108-10, 121; see also NBA GUIDE 1987-88, *supra* note 226, at 112-14, 126-27.

228. NBA GUIDE 1987-88, *supra* note 226, at 126-27; see also Friedman, *supra* note 16.

229. See NBA GUIDE 1987-88, *supra* note 226, at 112-13, 126-27.

230. See THE SPORTING NEWS, OFFICIAL NBA GUIDE 1988-89, at 115-16, 128-29 (1988); THE SPORTING NEWS, OFFICIAL NBA GUIDE 1989-90, at 134-35 (1989); 2019-20 OFFICIAL NBA GUIDE 184-85, at 192, 221-23 (2019).

231. See 2019-20 NBA GUIDE, *supra* note 230, at 184-85, 192, 221-23; 2006-07 REGISTER, *supra* note 225, at 341; Friedman, *supra* note 16.

Separation of ABA statistics from “true” NBA records in this manner reflects that the NBA still does not formally recognize ABA numbers and has not integrated them into its statistical canon. For example, when the NBA displays its all-time leaderboards, as it did often during LeBron James’s recent pursuit of the career scoring record, the names of Erving and Gervin are nowhere to be found since ABA numbers are not formally recognized.²³²

While the NBA’s very own *Official Guide* is compelling evidence that the ABA was in fact a major league and its statistics legitimate, a deeper analysis is warranted. While there is no agreed-upon test for what constitutes a major league, the U.S. and Canadian experience and public discourse involving the four largest professional sports leagues provide helpful criteria.²³³

The first and clearly primary consideration is the talent level of players, coaches, and teams in the professional association.²³⁴ Other secondary factors include: the views of contemporary authorities as to the league’s standing; the duration of the league’s existence; the league’s association with large cities; the question of competitive balance within the sports enterprise; the means by which the league attracted players; the league’s scheduling practices and procedures; and the attendance and stability of franchises within the league.²³⁵ Taken all in all, these criteria strongly make the case for the NBA officially adopting ABA statistics.²³⁶

1. The Pivotal Question: Talent Level

By and large, baseball writers and analysts have been the pioneers in American sports historiography and statistical analysis. This same principle holds true with respect to discussing the question of what constitutes a major league.²³⁷ If a

232. See *Players: All Time Leaders*, NBA, [https://perma.cc/39V7-C6ZL] (last visited Nov. 13, 2023).

233. See, e.g., JAMES, *supra* note 20, at 22-34.

234. See *id.*

235. See *id.*

236. In the 1970s, two authorities suggested that a national television contract was part of what makes an association a major league. See Leonard Koppett, *A.B.A. Flunks Its Demography Test*, N.Y. TIMES, May 26, 1974, at 1; JOE FITZGERALD, *THAT CHAMPIONSHIP FEELING* 43 (1975). This criterion, however, excludes the entire pretelevision era and is therefore of limited applicability.

237. Drawing on the experience of major leagues in other sports makes sense as both they and the NBA have long been engaged in the same professional enterprise. See

2024 *SETTING THE RECORD STRAIGHT* 663

professional sporting enterprise was a major league, it therefore follows that the league's statistics should be officially recognized.²³⁸ In this regard, baseball historian Bill James offered a host of factors which should be weighed when considering whether a baseball enterprise is truly major league. He concluded that "The key question, of course, is whether or not [a league] had major league talent."²³⁹ Several other prominent baseball authorities who have discussed the question of major-league status, such as John Thorn, Rob Neyer, Emil Rothe, David Neft, William Ryczek, and Eric Leifer, agree with James on the importance of this criterion as does basketball historian Robert Peterson and hockey authority J. Andrew Ross.²⁴⁰

Vis-à-vis the ABA, the NBA always asserted it was the better basketball league talent-wise.²⁴¹ And, at the outset of the former, that was almost certainly the case.²⁴² But, within a few years, the talent gap narrowed significantly.²⁴³ By the time of the interleague settlement, the two enterprises were roughly on par

Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 881 (S.D.N.Y. 1975) (stating, in the context of merger litigation, "Baseball and basketball are in the same business, which is the staging of sports contests for public view").

238. See Rrhersh, *supra* note 20; Nason, *supra* note 11.

239. JAMES, *supra* note 20, at 23, 31; *see also* Introduction, in NEGRO LEAGUES, *supra* note 1, at 1-3; Knorr, *supra* note 51, at 101-02; *cf.* NEIL J. SULLIVAN, THE MINORS 15 (1990).

240. See Rob Neyer, *Was the Federal League Really a Major League?*, NAT'L PASTIME MUSEUM (Oct. 27, 2023), [https://perma.cc/W443-9PFB]; Emil H. Rothe, *Was the Federal League a Major League?*, SOC'Y FOR AM. BASEBALL RSCH., [https://perma.cc/8UTH-4MB8] (last visited Nov. 13, 2023); William J. Ryczek, *Why the National Association was a Major League*, NAT'L PASTIME MUSEUM (Oct. 27, 2023), [https://perma.cc/56QK-Z7TS]; Interview with David Neft and John Thorn on Baseball Records [hereinafter Neft] (transcript on file with the author) (quoting David Neft); Interview with David Neft and John Thorn on Baseball Records [hereinafter Thorn] (transcript on file with the author) (quoting John Thorn); PETERSON, *supra* note 141, at viii; ERIC M. LEIFER, MAKING THE MAJORS 342 n.2 (1995); Roger G. Noll, *Professional Basketball, in THE BUSINESS OF PROFESSIONAL SPORTS* 30 (Paul D. Staudohar & James A. Mangan eds., 1991); J. ANDREW ROSS, JOINING THE CLUBS 144 (2015); Knorr, *supra* note 51, at 101-02; *see generally* *Was the NA (1871-75) a "Major" League?*, BASEBALL FEVER, [https://perma.cc/K8YM-JT4C] (last visited Nov. 13, 2023).

241. See, e.g., WAYNE EMBRY WITH MARY SCHMITT BOYER, THE INSIDE GAME 211-14 (2004) (quoting the perspective of an NBA GM: "The NBA wanted to prove that the ABA was an inferior league and needed gimmicks to attract fans. . . . I thought there was no way they could beat us."); Hawkins, *supra* note 122 (quoting NBA GM Red Auerbach about the ABA's Julius Erving: "Julius Erving is a nice kid but *not* a great player.").

242. See, e.g., Dave Quinn, *How Good was the ABA—A Statistical Analysis*, CAGE CHRONICLES, Winter 2000, [https://perma.cc/CP2B-D7M8]; Penbeast, *Converting ABA Numbers to NBA*, APBR (July 4, 2008, 5:12 PM), [https://perma.cc/5LLG-92Y5] [hereinafter Penbeast].

243. See Quinn, *supra* note 242; Penbeast, *supra* note 242.

with one another.²⁴⁴ This view is supported by a number of considerations.

a. Exhibition Games

From 1971 until 1975, teams from the two leagues played 155 exhibition games against one another.²⁴⁵ That is a fairly significant sample size, amounting to almost two complete professional seasons. It also covers the last five years of the leagues' coexistence. In these clashes, ABA teams prevailed head-to-head 79-76 with their victories becoming much more frequent as the 1970s progressed.²⁴⁶ Demonstrating the narrowing of the gap between the two leagues, the ABA was victorious in fourteen of the twenty-five exhibitions in 1973 (56%), sixteen of twenty-three in 1974 (70%), and thirty of forty-eight (64%) in the final year 1975.²⁴⁷

These contests were dismissed as “mere exhibitions” by some in the NBA and their partisans,²⁴⁸ but its players and coaches were routinely assessed technical fouls.²⁴⁹ If the games meant nothing, one suspects NBA coaches and players would have been less likely to have incurred technicals. Moreover, NBA

244. See, e.g., Quinn, *supra* note 242; Penbeast, *supra* note 242; Curry Kirkpatrick, *Now the Incredible Shrinking ABA*, SPORTS ILLUSTRATED, Dec. 15, 1975, at 29; Paige, *supra* note 16.

245. See TODD SPEHR, INTERLEAGUE 1 (2019); cf. Knorr, *supra* note 51, at 106-07; *Appendices I & II*, in NEGRO LEAGUES, *supra* note 1, at 209-26.

246. See SPEHR, *supra* note 245, at 1. There were also two, unofficial NBA-ABA All Star games (1971 and 1972). Both games were very tight and were won by the NBA. These two contests, which took place before the ABA had begun winning a majority of the “official” exhibitions, are not included in the traditional NBA-ABA exhibition tabulations, though the ABA would hold a 79-78 advantage even if they were. See *id.* at 9; ABA ALL-STARS, *supra* note 78, at 5.

247. See SPEHR, *supra* note 245, at 5-9.

248. See Kirkpatrick, *supra* note 244; PLUTO, *supra* note 8, at 287. One ABA skeptic has argued that most of these contests took place in ABA venues with officials from the younger league. But, of course, if the ABA had truly been a minor league, none of this should have mattered as NBA teams should have still throttled the ABA clubs. NBA teams did not. The same critic notes that the Los Angeles Lakers—a top-flight NBA team at the time—did not participate in any exhibitions. See Tywill33, Comments to *Correcting the ABA-NBA “Equality” Myth*, COURTSIDE ANALYST (Jan. 9, 2010, 10:51 PM), [<https://perma.cc/BV7R-3VEU>]. But, of course, the Knicks, Celtics, Bucks, Bullets, Bulls, and Warriors—the other six marquee NBA teams of the first half of the 1970s—played in 70 exhibitions, nearly half the games. See SPEHR, *supra* note 245, at 5-9. At the same time, the high-flying Lakers were not the only NBA franchise to avoid ABA contests. In the 1971-72 preseason, an executive with the Cincinnati Royals, an NBA doormat, conceded that his team purposely avoided playing ABA exhibition games for fear of losing. See ABA ALL-STARS, *supra* note 78, at 49.

249. See Karl Interview, *supra* note 160, at 3; PLUTO, *supra* note 8, at 287.

2024 *SETTING THE RECORD STRAIGHT* 665

stalwarts (e.g., Walt Frazier and Elvin Hayes) frequently logged significant minutes in these clashes.²⁵⁰ Presumably NBA teams would not have played stars big minutes if the exhibitions had been truly meaningless. Players also engaged in brawls, another sign that these matchups were marked by a fair amount of intensity.²⁵¹

Looking back, the Milwaukee Bucks' Bobby Dandridge indicated that NBA players did indeed take the games seriously. "[W]e were playing to let [the ABA] know we were the NBA. That we were the top dog. That we were the best. It was pride."²⁵² NBA general manager Pete Newell refused to make excuses when teams from the established league lost to ABA clubs. "We [in the NBA] can't cop a plea. If we play the ABA, we give up the psychological edge, and we have to get ourselves up [for the game] or get beat."²⁵³ These considerations, as well as anecdotes and assessments from the time,²⁵⁴ indicate that the NBA took these exhibitions much more seriously than it had sometimes let on.²⁵⁵

When two of the top teams in each league—the NBA's Knicks and the ABA's Pacers—faced off against one another in a 1971 exhibition, the result was a narrow two-point win for the NBA squad.²⁵⁶ New York players freely conceded how good Indiana was. Frazier remarked, "I don't see any reason why the Pacers couldn't be a great NBA club."²⁵⁷ Registering his agreement was teammate Willis Reed. "Indiana would be more than competitive in the NBA." The Knick center concluded, "I think they can play with anybody."²⁵⁸ Fellow Knick Dave DeBusschere was of the same opinion.²⁵⁹

250. See SPEHR, *supra* note 245, at 2, 19.

251. See Karl Interview, *supra* note 160, at 3.

252. CROATTO, *supra* note 39, at 19; see also EMBRY WITH BOYER, *supra* note 241, at 211-14.

253. Kirkpatrick, *supra* note 244.

254. See *id.*

255. ABA coach Bob "Slick" Leonard was clear in his view. "They wanted to beat us just as much as we wanted to beat them." NETOLICKY ET AL., *supra* note 15, at 124; see also Karl Interview, *supra* note 160, at 3.

256. See SPEHR, *supra* note 245, at 19.

257. NETOLICKY ET AL., *supra* note 15, at 124.

258. *Id.* at 125.

259. SPEHR, *supra* note 245, at 19, 144; *Knicks Triumph Over Stars*, 96-89, N.Y. TIMES, Sept. 29, 1971.

Dandridge was a standout forward for the 1970-71 Bucks, the team that claimed that season's NBA title.²⁶⁰ Prior to the season, Milwaukee participated in four exhibitions versus ABA clubs.²⁶¹ Dandridge believed these contests were more challenging than any the Bucks played the entire year.²⁶² Rick Barry, who played in both leagues, speculated that the 1971-72 Kentucky Colonels, a team that did not even make the ABA finals, could have defeated the NBA runner-up Knicks.²⁶³

Bob Ryan, *Boston Globe* sportswriter and columnist, had long been an ABA skeptic.²⁶⁴ Then he attended an NBA-ABA exhibition. "Those NBA-ABA games were intense," he recalled.²⁶⁵ After watching the Nets' Billy Paultz have his way with Celtic great Dave Cowens, Ryan became a believer in the ABA.²⁶⁶ Basketball historian Todd Spehr, who has written a book on the subject of the interleague matchups, concluded that "the games were hard-fought."²⁶⁷

The ABA's success in its exhibitions with the NBA is, of course, highly significant in its own right.²⁶⁸ But it stands out all the more when compared with the performance of the AFL in its exhibitions against the more established NFL. The AFL successfully challenged the NFL's pro-football monopoly in the 1960s, and in 1966, the two leagues agreed to merge.²⁶⁹ Nonetheless, veteran sportswriter Leonard Koppett wrote that during the 1960s the "competitive prestige" of the AFL had been "lower, in comparison to the [NFL] than [was] the ABA's" of the mid-1970s compared to the NBA.²⁷⁰ Koppett's observation was

260. Matthew Dugandzic, *The Story of Milwaukee Bucks Legend Bob Dandridge*, SPORTS ILLUSTRATED (Jan. 15, 2023, 4:26 AM), [<https://perma.cc/PZ7N-JCWW>].

261. See CROATTO, *supra* note 39, at 19.

262. See *id.* at 19.

263. See Bill Libby, *Rick Barry Discusses: Is the ABA as Good as the NBA?*, PRO BASKETBALL SPORTS STARS OF 1973, 1973, at 33; see also Bob Kuska, *Rick Barry Discusses: Is the ABA As Good as the NBA? 1973*, FROM WAY DOWNTOWN (June 2, 2022), [<https://perma.cc/66P9-WUYK>].

264. See Ryan, *supra* note 58, at 54.

265. PLUTO, *supra* note 8, at 287.

266. See *id.* at 287-88.

267. SPEHR, *supra* note 245, at 1; see also EMBRY WITH BOYER, *supra* note 241, at 211-14; Al Trautwig, *The Doctor of Dunk*, in ROLLING STONE: THE SEVENTIES 115 (eds. Ashley Kahn et al., 1998) (recalling that the exhibitions were "bitter encounters"); cf. ABA ALL-STARS, *supra* note 78, at 49.

268. See AIELLO, *supra* note 35, at 153.

269. See *AFL-NFL Exhibition Games 1967—1968—1969*, REMEMBER THE AFL.COM, [<https://perma.cc/SJS5-D657>] (last visited Nov. 13, 2023) [hereinafter *AFL-NFL Exhibitions*].

270. Koppett, *supra* note 236.

2024 *SETTING THE RECORD STRAIGHT* 667

born out in the late 1960s when the two football leagues played seventy-two exhibitions, equivalent to approximately five seasons worth of games.²⁷¹ The AFL's record against the NFL was 29-42-1, a .408 winning percentage.²⁷² Thus, the younger football enterprise—whose records are acknowledged today by the NFL—had a worse record in exhibitions against its more established rival than did the ABA against the NBA, the ABA having posted a .510 mark.²⁷³

As noted, MLB recently recognized statistics from seven Negro Leagues.²⁷⁴ From 1900 until 1948, Negro League teams played hundreds of games versus white major-league competition, which consisted of actual MLB clubs and MLB all-star squads.²⁷⁵ Taken collectively, Negro League clubs compiled a 315-282-20 mark against white major-league competition, a .527 mark.²⁷⁶ Having also won more than half its games against an established rival league, the ABA's record against the NBA is roughly on par with that of the Negro Leagues in its exhibition games.²⁷⁷

When stacked up against other leagues whose statistics have been recognized by more established outfits, the ABA's exhibition performance holds up well. The record of the defunct league makes clear that its statistics should be formally acknowledged as are those of the AFL and the seven Negro Leagues.

b. ABA Talent Later Proved Itself in the NBA

In evaluating whether a professional sports association displayed major-league talent, James, Thorn, Rothe, Neyer, and

271. See *AFL-NFL Exhibitions*, *supra* note 269.

272. See *id.*

273. See *All-Time ABA vs. NBA Exhibition Game Results*, REMEMBER THE ABA, [https://perma.cc/6LTH-GEMB] (last visited Nov. 13, 2023).

274. See Sheinin, *supra* note 52.

275. See Peterson, *supra* note 198, at 10; *Appendices I & II*, in *NEGRO LEAGUES*, *supra* note 1, at 209-26.

276. See Peterson, *supra* note 198, at 10; *Appendices I & II*, in *NEGRO LEAGUES*, *supra* note 1, at 209-26.

277. In a much smaller sample size, the World Hockey Association, which existed from 1972 to 1979 and does not have its records acknowledged by the NHL, posted a 34-22-7 mark (a .601 winning percentage) against the older league. See *WHA vs NHL*, *WHA HOCKEY*, [https://perma.cc/S9YZ-WNDD]; see also *infra* text accompanying note 351. This is a rare instance where the WHA outperformed the ABA. As Michael MacCambridge has written, the “ABA was *by far* the most sophisticated and legitimate upstart league of the decade [the 1970s].” See *MACCAMBRIDGE*, *supra* note 30, at 186; see also *infra* note 351.

other baseball authorities such as Todd Peterson as well as pro-football author Gary Webster have each placed a premium on how players from the newer sports enterprise performed once they moved over to the more established league.²⁷⁸

Specifically, James examined the experience of baseball's Union Association ("UA"), which existed in 1884.²⁷⁹ Analyzing the former UA players' performance in the more established NL, he concluded that NL journeymen became UA stars and UA stars became NL journeymen, supporting his view that the UA should not be considered a major league and that its statistics should be downgraded accordingly.²⁸⁰

Neyer makes the same point regarding "stars" of baseball's Federal League ("FL"), which existed from 1914 to 1915.²⁸¹ After their tenure in the new league, FL standouts underperformed in the AL and NL.²⁸² In contrast to the performance of UA and FL players after they moved to the two established major leagues, ABA alumni generally performed at a comparable level once they arrived in the NBA.

The performance of ABA players is unsurprising since one of the major reasons for the interleague agreement was that the NBA and its television partner, CBS, wanted top-flight ABA talent in the more established league.²⁸³ Prior to the settlement, one senior network executive scoffed at the older league's pretensions of superiority, "the superstars weren't super enough and the super teams didn't play up to expectation."²⁸⁴ Indeed, basketball authority Bill Simmons concluded that the NBA's 1975-76 season constituted "the league's weakest season for talent since the [early 1950s] Mikan era."²⁸⁵

Among the ABA players the older league most coveted were Erving, Thompson, Gervin, and Gilmore. Each of these ABA stars later performed exceedingly well in the NBA. Erving won the NBA MVP award in 1980-81, was runner-up the season

278. See JAMES, *supra* note 20, at 23-31; Thorn, *supra* note 240; Rothe, *supra* note 240; Peterson, *supra* note 198, at 27-32; GARY WEBSTER, THE LEAGUE THAT DIDN'T EXIST 8-9, 214-15 (2018).

279. See JAMES, *supra* note 20, at 24.

280. See *id.* at 23-34.

281. See Neyer, *supra* note 240.

282. See *id.*

283. See CROATTO, *supra* note 39, at 20-21; TALL TALES AND SHORT SHORTS, *supra* note 192, at 173-74.

284. TALL TALES AND SHORT SHORTS, *supra* note 192, at 174.

285. SIMMONS, *supra* note 76, at 9; see also Gilmartin, *supra* note 164, at 165.

2024 *SETTING THE RECORD STRAIGHT* 669

before that, and was seven times All-NBA first or second team.²⁸⁶ He also led four squads to the NBA championship series, winning the title in 1983.²⁸⁷ Twice selected All-NBA in his own right, Thompson was only just edged out for the 1977-78 scoring title by Gervin.²⁸⁸ Gilmore was a six-time NBA All Star who led the league in field goal percentage four straight years.²⁸⁹ For his part, Gervin finished second in the MVP balloting in 1977-78 and 1978-79 and was third in 1979-80.²⁹⁰ On seven occasions, Gervin was named first or second team All-NBA.²⁹¹

Other ABA alumni also excelled. Moses Malone won three NBA MVP awards (1978-79, 1981-82, 1982-83), was MVP of the 1983 championship series, and was named first or second team All-NBA eight times.²⁹² Though he joined the NBA at the age of twenty-seven, Connie Hawkins proved himself an NBA standout by becoming first team All-NBA during his initial season and a four-time All Star over the course of his career.²⁹³ McGinnis was also first team All-NBA upon his arrival in the older circuit and was named All-NBA second team the following year.²⁹⁴ Issel was an All Star and perennial twenty-point scorer in the NBA.²⁹⁵ Each of these ABA alumni is enshrined in the Naismith Memorial Basketball Hall of Fame (“NMBBHOF”).

In addition to these eight stalwarts, there are scores of other Hall of Famers with ABA pedigree including Roger Brown, Cliff Hagan, Billy Cunningham, Rick Barry, Gus Johnson, Mel Daniels, Louie Dampier, Spencer Haywood, Zelmo Beaty, Charlie Scott, and Bobby Jones. For their part, Brown, Daniels, and Dampier played all or most of their careers in the new

286. See *Julius Erving*, BASKETBALL REFERENCE, [https://perma.cc/ZHT5-UF4T] (last visited Jan. 6, 2024).

287. See *id.*

288. See *David Thompson*, BASKETBALL REFERENCE, [https://perma.cc/XPJ5-4D2] (last visited Jan. 5, 2024).

289. See *Artis Gilmore*, BASKETBALL REFERENCE, [https://perma.cc/5JCV-HW5S] (last visited Jan. 5, 2024).

290. See *George Gervin*, BASKETBALL REFERENCE, [https://perma.cc/A6T8-QD8Y] (last visited Jan. 5, 2024) [hereinafter *Gervin*].

291. See *id.*

292. See *Moses Malone*, BASKETBALL REFERENCE, [https://perma.cc/5WR4-5TNA] (last visited Jan. 5, 2024) [hereinafter *Malone*].

293. See *Connie Hawkins*, BASKETBALL REFERENCE, [https://perma.cc/H4GS-7CXE] (last visited Jan. 5, 2024).

294. See *George McGinnis*, BASKETBALL REFERENCE, [https://perma.cc/YLD6-DCRF] (last visited Jan. 5, 2024).

295. See *Dan Issel*, BASKETBALL REFERENCE, [https://perma.cc/S2SX-GSSH] (last visited Jan. 5, 2024).

league.²⁹⁶ In the case of Barry, Cunningham, and Beaty, each left the NBA in their primes for sojourns in the newly established league.²⁹⁷ Each played at a high level in the ABA, but none utterly dominated the competition as might have been expected if they had played in truly a “minor” league.²⁹⁸ Recalled Cunningham, “It wasn’t automatic that, because you went from the NBA to the ABA, your totals went up.”²⁹⁹ Barry noted that “[p]layers like Beaty and [Joe] Caldwell, who were great, but not dominant in the NBA, went into the ABA and weren’t dominant there, either. My statistics are about the same in the ABA as they were or would be in the NBA.”³⁰⁰

Many ABA alumni actually played *better* upon arrival in the NBA. Gervin never won a scoring crown in his five years in the ABA but won four in the more established circuit.³⁰¹ Malone never led the ABA in rebounding in his two years in the younger league, but he led the NBA in the category on half a dozen occasions.³⁰²

The talent comparison between the two leagues demonstrates that, by and large, the NBA may have had better centers (Gilmore and Malone notwithstanding), but the ABA had superior forwards.³⁰³ Indeed, the ABA’s influence on the game is manifested by the reality that, following the 1976 settlement,

296. See Roger Brown, BASKETBALL REFERENCE, [https://perma.cc/LZT8-VFXK] (last visited Jan. 5, 2024); Mel Daniels, BASKETBALL REFERENCE, [https://perma.cc/JF33-C54] (last visited Jan. 5, 2024); Louie Dampier, BASKETBALL REFERENCE, [https://perma.cc/YH2C-2794] (last visited Jan. 5, 2024).

297. See Rick Barry, BASKETBALL REFERENCE, [https://perma.cc/L7XA-D3X7] (last visited Jan. 5, 2024) [hereinafter *Barry*]; Billy Cunningham, BASKETBALL REFERENCE, [https://perma.cc/PP6U-5LK] (last visited Jan. 6, 2024) [hereinafter *Cunningham*]; Zelmo Beaty, BASKETBALL REFERENCE, [https://perma.cc/2U5A-KYE3] (last visited Jan. 6, 2024).

298. See Keith Ellis, *Converting ABA Numbers to NBA*, APBR (July 7, 2008, 2:43 PM), [https://perma.cc/A52C-NX5D]; cf. JAMES, *supra* note 20, at 29-30.

299. Jasner, *supra* note 22. For example, Barry’s single-season career highs in scoring, rebounding, and assists all took place in the NBA, not the ABA. See *Barry*, *supra* note 297. Similarly, Cunningham’s peak scoring and rebounding seasons occurred in the established league. See *Cunningham*, *supra* note 297.

300. Libby, *supra* note 263.

301. See *Gervin*, *supra* note 290; see also Ellis, *supra* note 298.

302. See *Malone*, *supra* note 292; see also Ellis, *supra* note 298.

303. See GEORGE, *supra* note 65, at 181-83; COLÁS, *supra* note 58, at 83; see also Author Interview with Rod Thorn, former NBA Player, NBA and ABA Coach, and NBA General Manager, at 1 (Mar. 26, 2021) (transcript on file with author) [hereinafter *Thorn Interview*]. Standout ABA forwards included Erving, McGinnis, Issel, Cunningham, Barry, Hayward, Hawkins, Marvin Barnes, Billy Knight, Bobby Jones, Larry Kenon, Joe Caldwell, Dan Roundfield, Willie Wise, Maurice Lucas, and Roger Brown.

2024 *SETTING THE RECORD STRAIGHT* 671

the NBA over the next few decades became increasingly dominated by wing players and less by pivotmen.³⁰⁴

The high skill level of ABA players is also reflected by their performance during the 1976-77 season—the year immediately after the two leagues came together.³⁰⁵ Many ABA alumni excelled even though they had to adjust to different rules (e.g., no three-point line, players fouling out of games, two officials instead of three); at least eighteen new venues for road games (as opposed to only four for NBA players to get used to); and a different ball.³⁰⁶ Of the ten individuals selected as first-team or second-team All-NBA, four slots were filled by ex-ABA players, the same number as received first or second-team All-NBA Defensive honors.³⁰⁷ Half of the NBA's leading twenty scorers and five of the NBA's ten top rebounders were ABA alumni.³⁰⁸ Ten of the twenty NBA leaders in blocks hailed from the ABA.³⁰⁹ The league leader in steals and assists was from the disbanded league.³¹⁰ Two dozen players were named to the 1977 All-Star Game, of whom no fewer than ten had an ABA pedigree³¹¹ and a former ABA player was named the contest's MVP.³¹² The expired league boasted half of the regular-season starters for the clubs that reached the 1977 NBA championship series and one of the finalists—the Philadelphia 76ers—was widely seen as a de facto ABA club.³¹³ Former ABA headman Tom Nissalke took home the Coach-of-the-Year trophy.³¹⁴ And,

304. See TALL TALES AND SHORT SHORTS, *supra* note 192, at 175; Clifford Smith, *The 70s*, BASKETBALL WEEKLY, Nov. 28, 1979; SIMMONS, *supra* note 76, at 517-521; MACCAMBRIDGE, *supra* note 30, at 304.

305. See, e.g., Rick Hummel, *ABA Stars Doing OK in the NBA*, BASKETBALL DIGEST, May 1977, at 42, 42, 44-45.

306. See, e.g., GEORGE SULLIVAN, THIS IS PRO BASKETBALL 21-32 (1977).

307. See Paige, *supra* note 16; *1977 NBA All-Star Game*, BASKETBALL REFERENCE, [https://perma.cc/4BAK-CHD7] (last visited Nov. 14, 2023) [hereinafter *All-Star Game*].

308. See *1976-77 NBA Season Summary*, BASKETBALL REFERENCE, [https://perma.cc/85X2-HPP2] (last visited Jan. 6, 2024) [hereinafter *Season Summary*]; Paige, *supra* note 16; PLUTO, *supra* note 8, at 435.

309. See *Season Summary*, *supra* note 308; Paige, *supra* note 16; PLUTO, *supra* note 8, at 435.

310. See *Season Summary*, *supra* note 308; Paige, *supra* note 16; PLUTO, *supra* note 8, at 435.

311. See *All-Star Game*, *supra* note 307; SMITH, *supra* note 55, at 150-51; Paige, *supra* note 16; PLUTO, *supra* note 8, at 436.

312. See *All-Star Game*, *supra* note 307; Paige, *supra* note 16; *NBA History—1977 Awards*, ESPN, [https://perma.cc/23ZE-2DEF] (last visited Nov. 14, 2023).

313. See PLUTO, *supra* note 8, at 435-36; Paige, *supra* note 16; SIMMONS, *supra* note 76, at 126-29; SMITH, *supra* note 55, at 150-51; cf. Kirkpatrick, *supra* note 35.

314. See PLUTO, *supra* note 8, at 435-36; Paige, *supra* note 16.

fittingly, the victor in the 1976-77 NBA dunk contest, Darnell Hillman, was an ABA alumnus.³¹⁵

Seventy-seven of the 295 NBA players during the 1976-77 season had logged time at one point or another in the younger league,³¹⁶ including sixty-three who went directly to the NBA after the settlement.³¹⁷ Those figures reflect comparable talent levels between the two leagues.

All things considered, the four ABA franchises that came into the older league also performed ably in their inaugural NBA season.³¹⁸ M.L. Carr, who played in both leagues, observed, “[t]he teams that were brought in [to the NBA] were competitive. They proved that.”³¹⁹ Together, the four former ABA franchises achieved a .463 winning percentage during the 1976-77 campaign.³²⁰ That year, Denver won its division and tied for the second-best record in the league.³²¹ Despite a costly injury to star guard James Silas, San Antonio made the playoffs.³²² Meanwhile, Indiana finished out of the playoffs at 36-46, only three games worse than their performance the previous year in the ABA.³²³ Going into the season, the New York Nets were widely thought to be playoff contenders until the team sold the rights to reigning ABA MVP Julius Erving to help cover the costs of settlement with the NBA.³²⁴ Following the sale of Dr. J’s rights and a season-ending injury to another key contributor, New York finished with the league’s worst record at 22-60.³²⁵

Again, regarding performance in a more established league, the example of MLB is instructive. The UA, which was

315. See Paige, *supra* note 16. The NBA dunk contest that year was an event that was spread out over the entire season and was not linked to halftime of the All-Star Game as would be the case beginning in 1984.

316. See Woody Paige, *No Red Faces for Red, White and Blues*, BASKETBALL WEEKLY, Mar. 17, 1977, at 15.

317. See Joe Moore & Tim Bontemps, *The ABA is Long Gone, but it Remains the Soul of the NBA*, WASH. POST (May 31, 2017), [<https://perma.cc/7XMU-ERTW>]. The sixty-three players represented three quarters of the active ABA players at the time of the interleague settlement. See *id.*

318. Cf. *supra* note 276 and accompanying text.

319. *Should NBA Count*, *supra* note 4; see also Kirkpatrick, *supra* note 35.

320. See *Season Summary*, *supra* note 308.

321. See *id.*

322. See *id.*

323. See *id.* The Pacers finished 39-45 in the last year of the ABA. See *1975-76 Indiana Pacers Roster and Stats*, BASKETBALL REFERENCE, [<https://perma.cc/B7T9-JULB>] (last visited Jan. 6, 2024). The ABA played an eighty-four-game season that year and the NBA eighty-two.

324. See *supra* notes 33, 42-43 and accompanying text.

325. See *Season Summary*, *supra* note 308.

2024 *SETTING THE RECORD STRAIGHT* 673

in existence for the 1884 season, is considered a major league by MLB and its statistics are recognized.³²⁶ The UA's St. Louis club posted a 94-19 record in 1884, running away with the league title.³²⁷ But the next year, after it entered the established NL, the team went 36-72 and ended up in last place, helping demonstrate the inferior nature of UA competition.³²⁸ The Nuggets—ABA runners up the year before—saw no such decline in their fortunes and the ABA champion Nets underperformed because, as noted, they lost Erving to the 76ers and a second star player to injury. ABA franchises continued to fare well on the court in the years that followed. During their second season in the NBA, the Nuggets repeated as division champions.³²⁹ That same year, the Spurs won their division and battled the eventual league champion Washington Bullets in a hard-fought six-game playoff series.³³⁰ The Spurs repeated as division winners in 1978-79.³³¹

In sum, ABA players, teams, and coaches generally more than held their own during their first NBA season and immediately thereafter, reflecting the rough parity between the two leagues at the time of settlement.

c. Various Analyses Demonstrate That the ABA Was
Comparable Talent-wise with the NBA for Most of its Existence

No rival sports enterprise has ever sprung to life and immediately been on-par with one of the four existing major leagues. That was true even of baseball's AL, dubbed "the most successful rival league in the history of team sports in the United States."³³² Indeed, at the time of its origin, the Basketball Association of America ("BAA") (1946-49)—claimed (inaccurately) by the NBA to be the very same league by another name—was not the equal of the preexisting National Basketball

326. See *Decisions*, *supra* note 20, at 2327.

327. See JAMES, *supra* note 20, at 31.

328. See *id.*

329. See 1977-78 NBA Standings, BASKETBALL REFERENCE, [https://perma.cc/QKW8-Z4BL] (last visited Nov. 14, 2023).

330. See *id.*; 1978 NBA Eastern Conference Semifinals Bullets vs. Spurs, BASKETBALL REFERENCE, [https://perma.cc/5YJR-KHFN] (last visited Nov. 14, 2023); Karl Interview, *supra* note 160, at 3-4.

331. See 1978-79 NBA Standings, BASKETBALL REFERENCE, [https://perma.cc/BUN3-ACFF] (last visited Nov. 14, 2023).

332. QUIRK & FORT, *supra* note 10, at 312; see also LEIFER, *supra* note 240, at 78.

League (“NBL”) (1937-49).³³³ And, the same was true of the ABA during its first few seasons vis-à-vis the NBA.³³⁴

Nonetheless, statistical analyses reflect that the difference in talent between the NBA and ABA closed dramatically in the early 1970s.³³⁵ Dave Quinn compared the two leagues by statistically evaluating the points, rebounds, and assists per minute of players who logged a minimum of 200 minutes in both the NBA and ABA. He determined that, while the ABA competed at 88.4% of the NBA’s level for its first four seasons, the younger league improved to 94.7% during its final five campaigns.³³⁶ Concludes Quinn, the ABA “achieved near parity with the NBA by 1973.”³³⁷

Another authority also compared the per-minute points, rebounds, and assists of players who performed in both leagues and reached largely the same conclusion. In the ABA’s last five seasons, the league’s alumni on average played at almost the same level in the NBA as they had in the ABA.³³⁸ Their points, rebounds, and assists per minute in the NBA were ninety percent or above what they had been in the ABA.³³⁹

The statistical comparison is bolstered by anecdotal accounts of those who played in both leagues. Indeed, many who had experience first in the NBA and later in the ABA attested to the latter’s generally equal standing with the more established enterprise.³⁴⁰ Erving, who played in both leagues, reflected that “depth-wise an ABA team could go six deep, and an NBA team could go eight deep. . . . So, maybe depth of talent, I would give that to the NBA. But when it comes to starting fives or top three

333. See, e.g., MURRY R. NELSON, *THE NATIONAL BASKETBALL LEAGUE 1* (2009).

334. See, e.g., RICK BARRY & BILL LIBBY, *CONFESSIONS OF A BASKETBALL GYPSY* 131-32, 159-61, 203 (1972).

335. See Quinn, *supra* note 242; Penbeast, *supra* note 242; see also LEONARD & FREEDMAN, *supra* note 15, at 196-98.

336. See Quinn, *supra* note 242.

337. *Id.* Quinn notes that baseball statisticians believe that minor-league, AAA baseball players perform at about 85% of the MLB level. For its first four seasons the ABA was a bit above that threshold and as such Quinn doubts during this period that the ABA was truly a major league. At the same time, he asserts that ninety percent marks the major-league threshold for pro basketball which the ABA hit during seven of its nine seasons, including its final five. See *id.*

338. See Penbeast, *supra* note 242.

339. See *id.*

340. See *LOOKING UP ONCE AGAIN*, *supra* note 35, at 306 (quoting Bill Sharman); *Should NBA Count*, *supra* note 4 (quoting Issel); *id.* (quoting Jan van Breda Kolff); see also *supra* text accompanying notes 299-300.

2024 *SETTING THE RECORD STRAIGHT* 675

players” the two were on par.³⁴¹ Recalls ABA standout Bob Netolicky, “The disparity between the leagues was blown way out of proportion. There wasn’t that much. After the third year it was pretty close.”³⁴² In 1973, Rick Barry analyzed the two leagues. He reflected that the ABA got

better . . . very fast. . . . The ABA . . . this past season [1971-72] . . . at times . . . had teams which might have competed with the better teams in the NBA. . . . There just simply isn’t that much difference between the two leagues any more. . . . Franchises like [the ABA] has in New York, Kentucky, Indiana and Utah are outstanding.³⁴³

The same season, Cunningham offered a similar assessment. He believed that “six [of the ten] teams in the ABA . . . can compete favorably in the NBA.”³⁴⁴ Continued the former NBA stalwart, “When I was in the NBA, I felt that the ABA was inferior. My opinion has changed. Time will even things up. In two or three years the best NBA players won’t be playing. . . . The ABA’s top players are younger. They just need experience.”³⁴⁵

One prominent NBA journalist at the time noted that, during negotiations with the NBA over the settlement, initially the four surviving ABA squads sought a “right of first refusal” for players from the defunct Kentucky and St. Louis franchises.³⁴⁶ It was reported that NBA teams opposed this effort out of “fear that the [four former] ABA teams would dominate in the new league.”³⁴⁷ Needless to say, if true, the NBA’s alleged motivation for opposing the right of first refusal was not the move of a league that was confident in its own superiority.

341. Erving Interview, *supra* note 16, at 4; *see also* Gardner, *supra* note 128 (quoting Erving); *A.B.A. All-Stars Rated Equal to N.B.A. 's*, N.Y. TIMES, Jan. 30, 1972, at S5 (quoting Joe Mullaney); *supra* notes 298-300 and accompanying text.

342. MURPHY, *supra* note 76.

343. Libby, *supra* note 263, at 32-33. This article reflected an update on Barry’s views of the ABA’s strides in comparison to the NBA. His earlier, more skeptical views of the ABA had been expressed in his autobiography. *See* BARRY & LIBBY, *supra* note 334, at 131-32, 159-61, 203.

344. Lenox Rawlings, *The Tale of Two Leagues*, POPULAR SPORTS 1974 ALL-PRO BASKETBALL, 1973, at 30.

345. *Id.* at 108.

346. *See* Bill Livingston, *Sixers on Verge of Signing Jones*, PHILA. INQUIRER, June 19, 1976, at 21, 23.

347. *Id.*

d. The ABA Compares Favorably with Respect to Bona Fide
NBA Expansion Teams

Finally, the performance of ABA teams stacks up well against bona fide NBA expansion teams of the same era. During the ABA's existence, the NBA added eight new franchises. They included the San Diego Rockets and Seattle SuperSonics (1967-68); the Milwaukee Bucks and Phoenix Suns (1968-69); the Buffalo Braves, Cleveland Cavaliers, and Portland Trailblazers (1969-70); and the New Orleans Jazz (1974-75).³⁴⁸ These teams were made up of the lowliest players on existing NBA squads and new college draft picks. Assembly of these new NBA rosters in many ways resembled construction of early ABA teams.

In light of this burst of expansion, the idea that the level of competition within the NBA from 1967 to 1976 was uniformly and significantly higher than the ABA appears to be dubious as most of these NBA expansion squads were at best on par with those of the younger league or even below.³⁴⁹ As noted, altogether the four ABA teams compiled a .463 winning percentage in their inaugural NBA season, even with the inherent disadvantages they all shared³⁵⁰ and the Nets' own unique misfortunes.³⁵¹ If the ABA was as inferior as purported by the NBA, the four ABA teams by all rights should have been NBA doormats like typical expansion teams.³⁵²

Peter Carry, a writer for *Sports Illustrated*, closely observed both the NBA and ABA throughout the 1970-71 season. He listed all seventeen NBA and eleven ABA teams in order of quality. ABA teams were not ranked in the lowest eleven spots (eighteen through twenty-eight) as might have been expected of a "minor" league. Of the twenty-eight total professional teams, the

348. See *supra* note 104 and accompanying text.

349. See Peter Carry, *Meanwhile, Back at the Merge*, SPORTS ILLUSTRATED, May 24, 1971, at 73.

350. See *supra* notes 33, 43, and 44 and accompanying text.

351. By comparison, AFL teams, with the benefit of college draft picks and television money, performed at only a .423 clip in their first year after the merger with the NFL. The four WHA teams joining the NHL in 1979-80 also faced significant disadvantages upon entry into the older league and posted an average winning percentage of .397. The AAFC teams, which had access to the college draft, posted a .389 winning percentage during their first year in the NFL, though AAFC-alumnus Cleveland won the title.

352. Bona fide expansion teams entering the NBA during the ABA's tenure posted winning percentages in their first seasons of .280 (Seattle); .183 (San Diego); .329 (Milwaukee); .195 (Phoenix); .183 (Cleveland); .354 (Portland); .268 (Buffalo); and .280 (New Orleans). See QUIRK AND FORT, *supra* note 10, at 251.

younger league had squads that ranked ninth, tenth, thirteenth, seventeenth, eighteenth, nineteenth, twenty-second, twenty-third, twenty-fifth, twenty-sixth, and twenty-seventh in Carry's listing.³⁵³ Notably, this ranking of the two leagues took place before Erving, Thompson, Gilmore, Malone, McGinnis, Gervin, and Cunningham had entered the league and before the ABA began to regularly defeat NBA teams in exhibitions.

In the fall of 1973, it was *Basketball News's* turn to rank the seventeen NBA and now ten ABA teams in a manner similar to Carry's undertaking three years prior.³⁵⁴ Demonstrating the ABA's quick comparative rise, six of its clubs were among the top fifteen pro teams. ABA teams were ranked as follows: fourth, fifth, sixth, tenth, fourteenth, fifteenth, twenty-third, twenty-fourth, twenty-fifth, and twenty-seventh.³⁵⁵

Given all of these data points—exhibition results; the subsequent performance of ABA players, coaches, and teams in the NBA; statistical analyses; views of players from the period; and the ABA's performance relative to true NBA expansion teams—it is hard to argue that the ABA was not roughly on par talent-wise with the NBA at the time of the interleague settlement.³⁵⁶ Indeed, the ABA seemed to be almost assuredly stronger in 1976 in relation to the NBA than the AFL was with respect to the NFL when the two football leagues effectuated their merger. In light of the high priority authorities place on talent in deciding whether an enterprise was a “major league,” the argument in favor of the NBA officially adopting ABA statistics rests on a rock-solid foundation. As discussed below, taken together, the various second-tier determinants lend additional support for recognition of ABA records.

2. *The Views of Contemporary Authorities*

How a league was viewed by contemporary or near contemporary authorities is another criterion James, Neft, and other historians of the National Pastime have weighed when

353. See Carry, *supra* note 349, at 73; see also PLUTO, *supra* note 8, at 202.

354. See *Exclusive Basketball News Combined ABA-NBA Ratings*, BASKETBALL NEWS, Nov. 12, 1973, at 20.

355. See *id.*

356. See Tywill33, *supra* note 248; Kirkpatrick, *supra* note 35.

gauging whether a baseball enterprise was truly major-league.³⁵⁷ That is to say, did prominent observers at the time treat the entity in question as a major-league operation? Though not accepted as uniformly or thought as vital as the issue of league talent, the views of contemporaries remain an important consideration regarding the question of ABA statistics.

During the younger league's lifetime, publications routinely included the ABA alongside the NBA in their pro basketball reviews and analyses, particularly during its final years. This trend became more pronounced as it became increasingly clear that the ABA's talent level began to closely rival the NBA's.

From the league's inception in 1967, *Sports Illustrated* decided that the ABA merited a preseason preview segment right alongside that of the NBA.³⁵⁸ This continued throughout the ABA's existence.³⁵⁹ In a similar vein, beginning in the 1968-69 season—the ABA's second year—*The Sporting News* began publishing the official *American Basketball Association Guide*.³⁶⁰ This volume, which gave *The Sporting News's* imprimatur to ABA statistics, was published annually for the rest of the league's existence.³⁶¹

Basketball Digest began publishing in 1973.³⁶² Its very first volume announced previews of the upcoming season for both the NBA and the ABA, and it continued to cover the latter for the remainder of the life of the league.³⁶³

357. See JAMES, *supra* note 20, at 31; Neft, *supra* note 240; TonyK, Comments to *Was the NA (1871-75) a "Major" League?*, BASEBALL FEVER (Mar. 22, 2009), [<https://perma.cc/BM33-VJPX>].

358. See *Pro Basketball Preview*, SPORTS ILLUSTRATED, Oct. 23, 1967, at 37.

359. See *id.* 46-47; *The ABA is Catching Up*, SPORTS ILLUSTRATED, Oct. 21, 1968, at 36; *ABA Competition Will be Stimulating but the Quality is Second Best*, SPORTS ILLUSTRATED Oct. 27, 1969, at 35; Peter Carry, *Celebration in the Seventies*, SPORTS ILLUSTRATED, Oct. 26, 1970, at 37; Peter Carry, *A War is Over, and the Shooting Starts*, SPORTS ILLUSTRATED, Oct. 25, 1971, at 37.

360. See THE SPORTING NEWS, OFFICIAL 1968-69 AMERICAN BASKETBALL ASSOCIATION GUIDE (1968).

361. Prior to the NBA's absorption of the four ABA teams, *NBA Guides* omitted ABA statistics altogether. See THE SPORTING NEWS, NBA OFFICIAL GUIDE FOR 1975-76 (1975); THE SPORTING NEWS, NBA OFFICIAL GUIDE FOR 1974-75 (1974); see also *Keeping Score*, MICHAEL HAMEL, [<https://perma.cc/R575-HADF>] (last visited Nov. 14, 2023). *ABA Guides*, on the other hand, listed NBA statistics and tabulated career player records for each league as well as for the two in tandem. See, e.g., THE SPORTING NEWS, OFFICIAL 1971-72 AMERICAN BASKETBALL ASSOCIATION GUIDE 127-128 (1971).

362. See BASKETBALL DIGEST, Nov. 1973.

363. See *id.*

2024 *SETTING THE RECORD STRAIGHT* 679

The first book-length version of the *Complete Handbook of Pro Basketball*³⁶⁴ was published for the 1971-72 season. In this edition, ABA squads were profiled just like NBA teams.³⁶⁵ The same was true of subsequent editions right up to the 1976 settlement.³⁶⁶ Afterwards, *The Complete Handbook* combined NBA and ABA statistics together for individual players.³⁶⁷ Other annual books about the professional game in the 1970s included ABA discussions and profiles right alongside those of the NBA.³⁶⁸

After a hiatus of several years, *Street and Smith* began publishing again its annual *College & Pro Basketball Yearbook* for the 1970-71 season.³⁶⁹ That edition included a preview of both the NBA and ABA. Subsequent editions did as well.³⁷⁰

Finally, countless contemporary basketball books recognized ABA statistics. The very first professional basketball encyclopedia was co-edited by David Neft and was published in 1975.³⁷¹ This volume, titled *The Sports Encyclopedia: Pro Basketball*, treated ABA numbers in the same fashion as NBA data.³⁷² Zander Hollander's *Pro Basketball Encyclopedia* was

364. See *Keeping Score*, *supra* note 361, at 4 n.11.

365. See JIM O'BRIEN, THE COMPLETE HANDBOOK OF PRO BASKETBALL 1971-72 (1971); JIM O'BRIEN, THE COMPLETE HANDBOOK OF PRO BASKETBALL 1972-73 (1972) [hereinafter O'BRIEN, 1972-73]; see also *Keeping Score*, *supra* note 361. NBA GM Jerry Colangelo called the *Handbook* "the finest book of its kind." See O'BRIEN, 1972-73, *supra* note 365, at cover.

366. See THE COMPLETE HANDBOOK OF PRO BASKETBALL 1975 EDITION (Zander Hollander ed., 1974); THE COMPLETE HANDBOOK OF PRO BASKETBALL 1976 EDITION (Zander Hollander ed., 1975).

367. See THE COMPLETE HANDBOOK OF PRO BASKETBALL 1978 EDITION (Zander Hollander ed., 1977); THE COMPLETE HANDBOOK OF PRO BASKETBALL 1979 EDITION (Zander Hollander ed., 1978); THE COMPLETE HANDBOOK OF PRO BASKETBALL 1980 EDITION (Zander Hollander ed., 1979).

368. See, e.g., SPORTS GUIDE SERIES: 1971-72 PRO BASKETBALL GUIDE (1971); BERT ROSENTHAL & BRUCE LOWITT, PRO BASKETBALL SUPERSTARS (1974); PRO BASKETBALL FACTBOOK 1971-72 (Jack Orr ed., 1971); HAL BOCK & BEN OLAN, BASKETBALL STARS OF 1974 (1973).

369. See *Men's College Basketball Magazine Annuals*, UNIV. OF NOTRE DAME, [<https://perma.cc/J5UQ-FS75>] (last visited Nov. 14, 2023).

370. See STREET AND SMITH'S COLLEGE & PRO OFFICIAL YEARBOOK BASKETBALL, 1970-71, at 109-16; STREET AND SMITH'S COLLEGE & PRO OFFICIAL YEARBOOK BASKETBALL, 1971-72, at 111-22; STREET AND SMITH'S: BASKETBALL, 1972-73, at 111-18; STREET AND SMITH'S BASKETBALL, 1973-74, at 134-43; STREET AND SMITH'S BASKETBALL, 1974-75, at 136-46; STREET AND SMITH'S BASKETBALL, 1975-76, at 141-50.

371. See *Keeping Score*, *supra* note 361.

372. See THE SPORTS ENCYCLOPEDIA: PRO BASKETBALL (David S. Neft, et. al eds., 1975); see also *Keeping Score*, *supra* note 361. The volume also included NBL statistics but omitted the ABL.

completed two years later and treated ABA data as it did the NBA's.³⁷³

Earlier, Hollander had published several editions of a broader effort, encompassing both pro and amateur hoops: the *Modern Encyclopedia of Basketball*. His first *Modern Encyclopedia* was published in 1969 and included statistical data through the 1967-68 season, the ABA's first year.³⁷⁴ The volume categorized the ABA along with the ABL and the Eastern League as "The Other Pros," clearly a minor-league designation.³⁷⁵ The second edition, however, came out in 1973 and combined NBA and ABA statistics for players and teams.³⁷⁶ His 1979 edition of the *Modern Encyclopedia*, published three years after the settlement, again treated the ABA as it did the NBA.³⁷⁷ "The Other Pros" section in both the 1973 and 1979 editions once again included the ABL and the Eastern League but no longer the ABA.³⁷⁸

In 1981, Hollander edited *The NBA's Official Encyclopedia of Pro Basketball*, which even included a foreword by the league commissioner.³⁷⁹ Its history of the ABA mirrored its treatment of the NBA's background and merged the career statistics of players from the two leagues.³⁸⁰

In a similar fashion to basketball encyclopedias, it did not take long for Topps pro basketball cards to treat the ABA as it did the NBA. The company began producing NBA trading cards for the 1969-70 season. Within two years, Topps started selling pro basketball cards which included ABA players alongside those from the NBA and did so until the former league disbanded. In doing so, Topps merged the career statistics of players who had played in both leagues.

Thus, contemporary authorities routinely treated the ABA in a fashion similar to the NBA. This reality is a clear recognition that the ABA was seen as a major league for most of its existence

373. See THE PRO BASKETBALL ENCYCLOPEDIA (Zander Hollander ed., 1977).

374. See THE MODERN ENCYCLOPEDIA OF BASKETBALL (Zander Hollander ed., 1969).

375. *Id.* at 376-79.

376. See THE MODERN ENCYCLOPEDIA OF BASKETBALL 361-447 (Zander Hollander ed., 1973) [hereinafter 1973 ENCYCLOPEDIA]; cf. PRO BASKETBALL: ITS SUPERSTARS AND HISTORY 21, 41, 195-222 (Zander Hollander ed., 1974).

377. See THE MODERN ENCYCLOPEDIA OF BASKETBALL 371-422 (Zander Hollander ed., 1979).

378. See *id.* at 426-27; 1973 ENCYCLOPEDIA, *supra* note 376, at 448-49.

379. See NBA'S OFFICIAL ENCYCLOPEDIA, *supra* note 221, at vii.

380. See *id.* at 41-338.

and strongly supports the view that statistics from the disbanded league merit official NBA acknowledgement.

3. Duration of the League

A third factor considered by some baseball authorities when determining whether an entity was truly a major league is the duration of the association.³⁸¹ A “major league” would seem implicitly to mean that the enterprise was not a fly-by-night operation. Among the four primary American and Canadian team sports, there have been only six professional associations that challenged preexisting, modern major leagues that lasted longer than the ABA.³⁸² In baseball, the AL took on the NL in 1901, is still in existence today, and the NL recognizes its records. The first Negro National League lasted twelve seasons (1920-31) and the Negro American League was in operation for at least a decade.³⁸³ The second Negro National League was in business for sixteen years (1933-48).³⁸⁴ The records of these three Negro Leagues were acknowledged by MLB in 2020.³⁸⁵ The American Association (“AA”) was a baseball league in existence for ten seasons (1882-91).³⁸⁶ Its records were recognized by MLB in 1968.³⁸⁷ Pro football’s AFL existed for ten seasons (1960-69). Its records have been officially recognized by the NFL since

381. See JAMES, *supra* note 20, at 22; Thorn, *supra* note 240; Knorr, *supra* note 51, at 100-01; WolfSpear, *Was the NA (1871-75) a “Major” League?*, (Nov. 22, 2009, 11:43 PM), [<https://perma.cc/P2UV-39MN>]; but see Buzzaldrin, *Comments to Was the NA (1871-75) a “Major” League?*, BASEBALL FEVER (Nov. 23, 2009, 7:33 PM), [<https://perma.cc/CEN8-ZC9B>].

382. In this context, the NBL—which lasted twelve seasons and whose statistics are also largely unrecognized—does not compare with the ABA since the NBL *preceded* creation of the rival league—the BAA—with which it ultimately merged to form the NBA. See *infra* Part VI.A. In professional hockey, the Pacific Coast Hockey Association (“PCHA”) lasted for thirteen seasons beginning in 1911 and its statistics are also unrecognized, but it does not compare to the ABA either. This is because the PCHA was established *before* the surviving major league—the NHL—which was founded in 1917. The NHL’s predecessor entity—the National Hockey Association (NHA)—preceded the PCHA by a year but the NHL does not recognize the NHA’s records either. See *About the NHL, NHL*, [<https://perma.cc/TS2P-54AL>]; ARTHUR PINCUS ET AL, *THE OFFICIAL ILLUSTRATED NHL HISTORY* 14-20, 28-31 (2010 ed.); STAN FISCHLER & SHIRLEY WALTON FISCHLER, *THE HOCKEY ENCYCLOPEDIA* 4-5 (1983); see also ROSS, *supra* note 240, at 35-88, 133-50. The author would like to thank Adam Wodon for sharing his expertise in this area.

383. See Castrovince, *supra* note 52.

384. See *id.*

385. See *id.*

386. See *Decisions*, *supra* note 20, at 2327.

387. See *id.*

1970.³⁸⁸ Standing alone among these similarly situated pro leagues is the ABA which lasted for nine full seasons, yet its statistics remain officially unacknowledged.³⁸⁹

Indeed, statistics from several professional sports leagues are recognized even though they were around for a much shorter time than the ABA. MLB acknowledges the Eastern Colored League which lasted for six seasons (1923-28).³⁹⁰ In addition, MLB recognizes the statistics of several leagues that were in existence for just a year including the UA (1884), the Player's League ("PL") (1890), the American Negro League (1929), the Negro Southern League (1932), and the East-West League (1932).³⁹¹

Thus, the duration of the ABA is yet another factor strongly in its favor as it stands alone as the only association that challenged an established professional league for as long as it did and still has not had its statistics formally acknowledged.

4. *Big Cities and Venues*

A fourth factor that James, Neft, Ryczek, Leifer, basketball authorities Koppett and George Surdam, hockey scholar Ross,³⁹² and AFL pioneer Lamar Hunt considered was whether the league's teams were affiliated with cities that were sufficiently large.³⁹³ The somewhat intuitive rationale is that major leagues will be associated with major cities. The ABA generally satisfies this criterion as well. For the last eight years of its existence the new basketball league had a franchise representing New York (albeit on Long Island). The ABA also briefly had a franchise in Los Angeles. Though it never fielded teams in Chicago, Philadelphia, Detroit, or Boston, by and large

388. See OFFICIAL NATIONAL FOOTBALL LEAGUE RECORD MANUAL 1970, at 197 (1970); *Pro Grid Records Merged*, FORT WORTH STAR-TELEGRAM, July 19, 1970, at 3-B; Nason, *supra* note 11.

389. See, e.g., Bell, *supra* note 16.

390. See *MLB Release*, *supra* note 5.

391. See *id.*; *Decisions*, *supra* note 20, at 2327. The WHA's statistics remain unrecognized by the NHL but that league lasted two years less than the ABA.

392. See ROSS, *supra* note 240, at 144.

393. See JAMES, *supra* note 20, at 23, 31; Neft, *supra* note 240; Ryczek, *supra* note 240; LEIFER, *supra* note 240, at 14, 53, 56, 99, 135, 156, 314; KOPPETT, *supra* note 141, at 14, 37, 64, 87, 114, 117; SURDAM, *supra* note 142, at 21, 132, 152, 167, 172; JEFF MILLER, GOING LONG 5 (2004) (quoting Lamar Hunt); MONTIETH, *supra* note 91, at 187 n.2; cf. PETERSON, *supra* note 141, at 152; COLÁS, *supra* note 58, at 41; SULLIVAN, *supra* note 239, at viii, 7; Hershberger, *supra* note 20.

2024 *SETTING THE RECORD STRAIGHT* 683

the ABA posted franchises in metropolitan areas that ranked highly at the time. They included New York (the largest city), Los Angeles (second), Oakland/San Francisco (sixth), Washington, D.C. (seventh), Pittsburgh (ninth), St. Louis (tenth), Baltimore (eleventh), Houston (thirteenth), Minneapolis-St. Paul (fourteenth), Dallas (fifteenth), San Diego (twentieth), Miami (twenty-second), Denver (twenty-fourth), Indianapolis (twenty-fifth), New Orleans (twenty-sixth), San Antonio (thirty-third), Louisville (thirty-fourth), Memphis (thirty-seventh), Norfolk (forty-second), Salt Lake City (fifty-third), and Charlotte (seventieth).³⁹⁴ While the ABA's cities tended to be smaller than the NBA's, the same was also true of the AFL in comparison with the NFL.³⁹⁵

Admittedly, the ABA fielded at least two regionally-based franchises—Virginia (centered in Norfolk) and Carolina (centered in Charlotte)—which represented multiple smaller markets.³⁹⁶ But, that is not different from the early NBA which had a franchise called “Tri-Cities,” which represented Rock Island, Illinois; Moline, Illinois; and Davenport, Iowa.³⁹⁷

Indeed, the ABA would appear to outperform the early NBA with respect to the “big-city” test.³⁹⁸ In addition to Tri-Cities, the NBA's first seasons included franchises in Fort Wayne, Indiana; Syracuse, New York; Rochester, New York; Anderson, Indiana; Sheboygan, Wisconsin; and Waterloo, Iowa.³⁹⁹

394. See QUIRK AND FORT, *supra* note 10, at 325 (using 1970 census figures). At the end of the 1976 season, when cities supporting the eighteen NBA and six ABA teams were ranked by population, ABA franchises were not the lowest six (nos. nineteen through twenty-four) as might be supposed. When listed in order, ABA cities were tied for first (New York), tenth (St. Louis), fourteenth (Indianapolis), sixteenth (Denver), twenty-second (San Antonio), twenty-third (Louisville), and twenty-fourth (Norfolk). See DeBusschere Memo, *supra* note 151.

395. See LEIFER, *supra* note 240, at 138. At one point, Leifer argues that the ABA had “nearly minor league demographics.” *Id.* at 173. Elsewhere, however, he unequivocally concludes that the ABA was a “Major League.” See *id.* at 313.

396. See *The New Virginia Squires*, REMEMBER THE ABA, [https://perma.cc/YD5C-T9Y3] (last visited Nov. 14, 2023); *The Carolina Cougars*, REMEMBER THE ABA, [https://perma.cc/Y24A-XAY4] (last visited Nov. 14, 2023). The Floridians began in Miami and later adopted a regionally-based model akin to those in Virginia and Carolina so the number could be increased to three. See *Miami Floridians/The Floridians*, REMEMBER THE ABA, [https://perma.cc/E5AR-A9KZ] (last visited Jan. 6, 2024).

397. See Frank Fleming, *Tri-cities Blackhawks*, SPORTING POST (Oct. 31, 2023), [https://perma.cc/3Z5X-U748].

398. See Ed Linn, *Is the N.B.A. Big League?*, SPORT, Jan. 1957, at 85 (“the NBA can not be called big-league until the biggest cities in the country are represented.”).

399. See *1949-50 NBA Season Summary*, BASKETBALL REFERENCE, [https://perma.cc/7TVS-CJ5Z] (last visited Jan. 6, 2024).

Related to the view that a big league plays in big-league cities is whether the entity's teams played in big-league venues.⁴⁰⁰ As far as places to play go, a good number of ABA teams played in clearly inferior sites while others performed in larger, more modern arenas.⁴⁰¹ Once again, however, this is a test that the NBA itself could not have passed during its formative years.⁴⁰² Koppett—the first person to author a full-length history of the NBA—repeatedly notes the poor quality of the older league's early venues.⁴⁰³ He observed that the league's first Baltimore franchise played in a 4,000-seat complex.⁴⁰⁴ Fort Wayne's home-court was a high-school gymnasium with even less capacity.⁴⁰⁵ Rochester's venue seated a mere 5,000.⁴⁰⁶ Even the NBA's New York franchise, which boasted Madison Square Garden as its home arena, actually hosted a large number of its contests at the far more modest 69th Regiment Armory.⁴⁰⁷ The NBA's first dynasty—the Minneapolis Lakers—held home games not only in the City of Lakes but also in Minot, South Dakota; LaCrosse, Wisconsin; and Hibbing, Minnesota.⁴⁰⁸

In part for this reason, the early NBA fought for years against the notion that it was a small-time operation.⁴⁰⁹ Koppett—an NBA partisan to be sure⁴¹⁰—observed that, even though in its early years the ABA “could not compare to the NBA in basic playing talent,” the new league still “upheld major-league standards of operation.”⁴¹¹ He continued, “The arenas, travel conditions, pay scales, and other details, modeled on NBA

400. See JAMES, *supra* note 20, at 31; cf. MONTIETH, *supra* note 91, at 187 n.2.

401. See, e.g., PLUTO, *supra* note 8, at 89, 119; BARRY & LIBBY, *supra* note 334, at 156; DEMOREST & MILLER, *supra* note 220, at 246. ABA facilities also generally improved over time. See Libby, *supra* note 263 (quoting Rick Barry in 1973).

402. See KOPPETT, *supra* note 141, at 49-50, 129, 202, 206.

403. See *id.* at 20, 36, 49; see also NEIL D. ISAACS, VINTAGE NBA 134, 217 (1996).

404. See KOPPETT, *supra* note 141, at 49.

405. See *id.*

406. See *id.* at 49-50; see also SURDAM, *supra* note 142, at 30-31.

407. See KOPPETT, *supra* note 141, at 20, 57; see also SURDAM, *supra* note 142, at 22-23, 30.

408. See KOPPETT, *supra* note 141, at 129.

409. See Linn, *supra* note 398, at 82-85; RUSSELL WITH MCSWEENEY, *supra* note 120, at 55, 117, 153; Leonard Koppett, *Does Pro Basketball Have a Future?*, SATURDAY EVENING POST, Dec. 6, 1958, at 36; see also SURDAM, *supra* note 142, at 1-3, 30-31, 36; PETERSON, *supra* note 141, at 178-81.

410. See Jared S., Comments to *The BAA-NBL Merger and the Question of the NBA's Birthday*, APBR (Dec. 18, 24, 2008, Jan. 27, Feb. 15, Feb. 17, 2009), [<https://perma.cc/CGE2-UVLJ>] (quoting Murry Nelson).

411. KOPPETT, *supra* note 141, at 206.

practices, were certainly ‘big league’—more so than they had been in the NBA years after it began.”⁴¹²

Taken all in all, when determining major-league status and applying the large-city and large-venue criteria, the ABA holds up well enough, and certainly better than the NBA during its first several seasons.

5. *Competitive Balance*

Another criterion James and others have suggested in helping determine major-league status is competitive balance.⁴¹³ A league that is utterly dominated by one team tends to look rinky-dink.⁴¹⁴ One of the reasons for the failure of the All-America Football Conference (“AAFC”) (1946-49) and its subsequent absorption by the NFL—without recognition of its statistics—was competitive imbalance.⁴¹⁵ The Cleveland Browns ran roughshod over the AAFC for the entirety of its lifetime. In the eyes of many, the fact that Cleveland took home the title in each of the league’s four seasons—including an undefeated campaign—delegitimized the rest of the enterprise.⁴¹⁶

By contrast, the ABA never experienced such competitive imbalance. Six different franchises won titles during the ABA’s nine years.⁴¹⁷ Ironically, competitive balance was not the case

412. *Id.* at 202; *see also* Bob Ryan, *ABA: Alive, Respectable, Fun*, BOSTON EVENING GLOBE, Mar. 14, 1975, at 45 (quoting former NBA official Carl Scheer about the ABA’s Indiana, New York, San Antonio, Kentucky, and Denver franchises: “Those teams . . . are first class operations, both on and off the court. I’m talking about players, coaches, executives, everything.”).

413. *See* JAMES, *supra* note 20, at 22, 31; SURDAM, *supra* note 142, at 6, 10-13, 21; DAVIDSON WITH LIBBY, *supra* note 90, at 58; SABR Matt, Comments to *Was the NA (1871-75) a “Major” League?*, BASEBALL FEVER, [<https://perma.cc/B9PX-X52G>] (last visited Nov. 14, 2023); LEIFER, *supra* note 240, at 18; *cf.* WILLIAM J. RYCZEK, BLACKGUARDS AND RED STOCKINGS 227, 233-35 (2016).

414. This consideration is not uniformly accepted. Koppett argued that the Celtic dynasty of the late 1950s and 1960s—reflecting competitive imbalance as its most manifest—helped the NBA become a “major-league” operation. *See* KOPPETT, *supra* note 141, at 125, 156, 218. By contrast, Thomas Aiello argues that the Minneapolis Laker dynasty to some degree had the opposite effect on the early NBA. *See* AIELLO, *supra* note 35, at 106.

415. *See* MICHAEL MACCAMBRIDGE, AMERICA’S GAME 51 (2005).

416. *See id.*; *see also* QUIRK AND FORT, *supra* note 10, at 240, 305; WEBSTER, *supra* note 278, at 24-25, 66, 215-16; MILLER, *supra* note 393, at 66; *cf.* Kenneth R. Crippen, *A Brief History of the AAFC*, in THE ALL-AMERICA FOOTBALL CONFERENCE 9 (Kenneth R. Crippen and Matt Reaser eds., 2018). The status of the UA has been similarly called into question due to the dominance of the St. Louis franchise. *See* JAMES, *supra* note 20, at 22, 31; QUIRK AND FORT, *supra* note 10, at 305.

417. *See* NBA & ABA *Champions*, BASKETBALL REFERENCE, [<https://perma.cc/MTY8-V8ZW>] (last visited Jan. 6, 2024).

with the older league. In the NBA's infancy, the Minneapolis Lakers won four titles in five years.⁴¹⁸ From 1956-57 to 1968-69, the Bill Russell-era Boston Celtics won eleven championships in thirteen seasons.⁴¹⁹ Indeed, Boston's success constitutes the most dominant run by one professional franchise in American and Canadian major-sports history. Thus, with respect to competitive balance, the ABA outperformed the NBA, constituting yet another factor in its favor regarding acknowledgement of its records.

6. *Stable Schedule and Operating Procedures*

Baseball authorities have also assigned weight to the importance of stable scheduling in determining whether an enterprise was "major league."⁴²⁰ In 1968, MLB's Special Baseball Records Committee decided that the precursor to the NL, the National Association ("NA") (1871-75), would "not be considered as a 'major league' due to its erratic schedule and procedures."⁴²¹

With the exception of the ABA's last season, which saw three franchises fold and end up unable to fulfill their schedule, teams stuck to the regular seventy-eight-game slate for the first two years of the league and the regular eighty-four-game schedule thereafter.⁴²² By contrast, in three of the first four years of the NBA, numerous teams finished the same season having played a different number of games.⁴²³ Even in recent years, the NBA has

418. *See id.*

419. *See id.*

420. *See* Neyer, *supra* note 240; SURDAM, *supra* note 142, at 21; *see also* Beady, Comments to *Was the NA (1871-75) a "Major" League?*, BASEBALL FEVER (Mar. 22, 2009, 2:19 PM), [<https://perma.cc/PC8J-KF5K>]; Brian McKenna, Comments to *Was the NA (1871-75) a "Major" League?*, BASEBALL FEVER (Mar. 23, 2009, 5:45 AM), [<https://perma.cc/PC8J-KF5K>].

421. *Decisions*, *supra* note 20, at 2327; *see also* John Thorn, *Why Is the National Association Not a Major League . . . and Other Records Issues*, OUR GAME (May 4, 2015), [<https://perma.cc/939U-6BQA>]; Knorr, *supra* note 51, at 98; SURDAM, *supra* note 142, at 21; *cf.* LEIFER, *supra* note 240, at 18.

422. *See, e.g.*, WEST WITH GARDNER, *supra* note 109, at 302; *see also* WOLF, *supra* note 91, at 158; RUNSTEDTLER, *supra* note 50, at 37.

423. *See 1949-50 NBA Standings*, BASKETBALL REFERENCE, [<https://perma.cc/NR4E-YA54>] (last visited Jan. 6, 2024); *1950-51 NBA Standings*, BASKETBALL REFERENCE, [<https://perma.cc/YKC6-P3R2>] (last visited Jan. 6, 2024); *1952-53 NBA Standings*, BASKETBALL REFERENCE, [<https://perma.cc/H5AV-CCKA>] (last visited Jan. 6, 2024); NATIONAL BASKETBALL ASSOCIATION 1949-50 RECORD BOOK 92-96 (1949); NATIONAL BASKETBALL ASSOCIATION 1950-51 RECORD BOOK 62-64 (1950); NATIONAL BASKETBALL ASSOCIATION 1952-53 RECORD BOOK 62-64 (1952); *see also* FITZGERALD, *supra* note 236,

2024 *SETTING THE RECORD STRAIGHT* 687

not always carried out a full 82-game schedule. During both the 1998-99 and 2011-12 seasons, NBA lockouts resulted in a drastic compression of the regular season.⁴²⁴ By contrast, for all the scheduling problems the ABA experienced with three teams folding during the 1975-76 season, the younger league did not suffer the wholesale and multi-year scheduling problems that the NBA did during its early years or arguably even during its two strike-shortened seasons.

Once again, on the question of stable scheduling and procedures, the NBA resides in a glass house.

7. A Draft

James alone also placed some emphasis on whether a rival league had “[a] structure to attract talent.”⁴²⁵ In the context of baseball, he was inquiring whether there was a minor-league feeder system. For pro basketball, the question would be recast into whether there was a player draft as opposed to just the helter-skelter signing of players. That is to say, was the league sufficiently organized to have unsigned players assigned to teams in an orderly and rational manner?

The ABA had a player draft from the very beginning of its existence in 1967.⁴²⁶ Admittedly, the league’s draft procedures were often bizarre and ad hoc. They frequently took place more than once a year and in secret and sometimes focused on the selection of underclassmen and existing NBA players.⁴²⁷

However, in its history, the NBA instituted irregular draft procedures of its own.⁴²⁸ For instance, in 1955, the league

at 13; Linn, *supra* note 398, at 84; BOB COUSY AND AL HIRSHBERG, *BASKETBALL IS MY LIFE* 111-12 (1958); PETERSON, *supra* note 141, at 167.

424. See 1998-99 *NBA Season Summary*, BASKETBALL REFERENCE, [https://perma.cc/UK5E-KM3S] (last visited Jan. 6, 2024); 2011-12 *NBA Season Summary*, BASKETBALL REFERENCE, [https://perma.cc/VJR9-YRTP] (last visited Dec. 6, 2024); cf. Marc Onigman, *The National Association Should be in the Major Leagues*, SPORTS ILLUSTRATED, May 24, 1982; Ryczek, *supra* note 240. The COVID pandemic dramatically changed the 2019-20 NBA season but that had nothing to do with the league’s competence.

425. JAMES, *supra* note 20, at 31.

426. See ROBERT D. BRADLEY, *THE BASKETBALL DRAFT FACT BOOK* 106-12 (2013).

427. See *id.*, at 118-19, 134, 148, 164, 182-83, 198, 212, 215, 219; PLUTO, *supra* note 8, at 33, 163-64; ABA ALL-STARS, *supra* note 78, at 153; *Early Draft Assures ABA of Top Stars*, SPOKANE SPOKESMAN-REV., Apr. 14, 1974, at 38; *Nets Take Alcindor In Secret ABA Draft*, MIAMI NEWS, Feb. 18, 1969, at 25; see also Robert Bradley & John Grasso, *ABA Player Drafts*, APBR, [https://perma.cc/YN23-DKUH] (last visited Nov. 30, 2023).

428. See Bert Rosenthal, *ABA, NBA Set To Draft Cage Stars This Week*, DANVILLE REG., Apr. 15, 1973, at 6-D; BRADLEY, *supra* note 426, at 126, 140, 181, 215, 237.

essentially authorized the Philadelphia Warriors to choose Wilt Chamberlain four years ahead of time.⁴²⁹ The NBA's rivalry with the ABA also led the older league to take additional irregular steps such as moving around its draft date at the last minute.⁴³⁰ At the end of 1975, the NBA held what it called a supplementary draft in which the league selected a number of ABA players even through the ABA was still a going concern at the time.⁴³¹ In apparent contravention of its own policy, on occasion, NBA clubs seem to have signed athletes while they were still playing as collegians and before the league had even drafted them.⁴³² For example, there were allegations that NBA teams signed Wes Unseld and Elvin Hayes in 1968 while both were still playing in college and prior to the NBA draft.⁴³³

Once again, over the course of its history, the NBA's "structure to attract talent" at times appeared nearly as makeshift as the ABA's.

8. Good Attendance, Popularity, and Stable Franchises

There is one final factor that James and Leifer have suggested. It is whether a league demonstrated good attendance, a significant level of popularity, and stable franchises.⁴³⁴ Admittedly, the ABA faces real challenges satisfying these criteria, especially early on.⁴³⁵ That said, ABA numbers at the gate showed marked improvement over time.⁴³⁶ Average ABA turnout rose from 2,804 per game in 1967-68 to 7,264 for 1975-76.⁴³⁷ Moreover, when comparing the ABA's average season-by-season attendance figures with those of the NBA for its first seven

429. See Owen Crumb, *Warriors Granted Draft Rights on Cager 4 Years in Advance*, OWENSBORO MESSENGER-INQUIRER, Nov. 29, 1955, at 10.

430. See *NBA's 'Early' Draft Triggers League War*, CINCINNATI ENQUIRER, Apr. 4, 1968, at 53.

431. See Bill Livingston, *4 ABA Clubs Added to NBA in Merger*, PHILA. INQUIRER., June 18, 1976, at 1-C.

432. See LIBBY & HAYWOOD, *supra* note 89, at 163, 193.

433. See *id.*

434. See JAMES, *supra* note 20, at 31; LEIFER, *supra* note 240, at 39; see also MONTIETH, *supra* note 91, at 187 n.2.

435. See PLUTO, *supra* note 8, at 18-21, 63-65, 90, 109, 127, 201-02, 273, 416. The cover image of this Article demonstrates the ABA's attendance problems.

436. See *NBA/ABA Home Attendance*, *supra* note 161.

437. See *id.* Attendance numbers during the league's inaugural season are generally thought to have been inflated. See, e.g., Goldsher, *supra* note 149.

2024 *SETTING THE RECORD STRAIGHT* 689

years with recorded data, the ABA outperformed the NBA in all but one campaign.⁴³⁸

Despite its steadily improving number of patrons, the ABA needed significantly more fans through the turnstiles to ensure that its revenue kept up with its expenditures. Attendance was at a premium since the league was unable to secure a significant national television contract and was in the midst of a bidding war for players with the NBA.⁴³⁹ As a result, the ABA saw six of its franchises go under: Pittsburgh, Florida, Baltimore, Utah, San Diego, and Virginia.⁴⁴⁰ That reflects a lot of unstable franchises, but it still compares favorably to the early NBA.

In the first nine years of its existence—the lifespan as the ABA—the NBA saw *nine* franchises fold: the Indianapolis Olympians, the original Baltimore Bullets, the Washington Capitals, the Anderson Packers, the Chicago Stags, the original Denver Nuggets, the Sheboygan Red Skins, the St. Louis Bombers, and the Waterloo Hawks.⁴⁴¹ Once again, if the good-attendance, popularity, and stable franchise criterion was dispositive of the question of major-league status and hence the validity of a sports enterprise's statistics, it would prevent the NBA from recognizing records from its own early years.

When considering the most important criterion for determining major-league status—talent—the ABA's case for having its statistics officially adopted is strong. For the secondary considerations, the ABA again generally performs quite well and no worse than the NBA in its early years.⁴⁴² These secondary factors further underscore that the ABA was indeed a major league and that its records deserve formal NBA recognition.

438. See *NBA/ABA Home Attendance*, *supra* note 161. There are apparently no NBA attendance totals for the 1949-50 and 1951-52 seasons, therefore, the comparisons are between the second, fourth, fifth, sixth, seventh, eighth, and ninth seasons of the two leagues. See *id.*

439. Indeed, the gap in stability between the NBA and ABA—to a great extent—came down to the fact that the NBA had a national television contract and the ABA did not. See Alan Goldstein, *Stronger League Seeks TV Pact to Get Cash, Merger to Cut Costs*, *BALT. SUN*, Oct. 20, 1975, at C9; Kirkpatrick, *supra* note 244.

440. See *PLUTO*, *supra* note 8, at 19. The Kentucky and St. Louis franchises survived until the end of the ABA but were dissolved as part of the NBA/ABA settlement. The ABA's Pittsburgh, Florida, and Baltimore franchises each folded but not during the regular season.

441. See *List of all the NBA & ABA Teams*, *BASKETBALL REFERENCE*, [<https://perma.cc/L2J7-GDB8>] (last visited Nov. 30, 2023).

442. See, e.g., Koppett, *supra* note 236 (“[T]he A.B.A. . . . has . . . close competition, public acceptance, professional respect and generally satisfactory buildings.”).

V. THE NBA'S INCONSISTENT POSTURE TOWARD THE ABA

The NBA has long tried to have it both ways with respect to ABA history. While officially rejecting the statistical heritage of the defunct league, the NBA unofficially acknowledges the ABA's numbers when it suits its financial interests and rarely hesitates to wrap itself fully in the lore and mystique of the ABA. This reflects the third factor strongly favoring official acknowledgement of ABA statistics: the NBA's illogical position.

There are numerous inconsistencies with the NBA's policy on ABA records. During the league's seventy-fifth anniversary celebration, the NBA unveiled its seventy-five greatest players.⁴⁴³ On the NBA website, the league included brief synopses of the selected players' careers. For Erving, it included a reference to his ranking "No. 8 [in] Career Points in [the] NBA & ABA."⁴⁴⁴ For Gervin, it stated he placed "No. 17 [in] combined points in [the] NBA & ABA."⁴⁴⁵ Malone's career précis made mention of his "21 professional seasons in [the] NBA & ABA" and a "No. 3 Career" ranking in "combined rebounds in [the] NBA & ABA."⁴⁴⁶ For Rick Barry, his ABA career was noted on four occasions.⁴⁴⁷ The question is, why include ABA statistics in these NBA materials, but not officially recognize these very same numbers? After all, these materials were meant to commemorate *the historical legacy of the NBA*, not pro basketball more broadly. Yet, the league's posture regarding the seventy-fifth anniversary materials should not be surprising. The NBA's website is awash in ABA highlights and statistical references.⁴⁴⁸

443. See *NBA 75th Anniversary Team Announced*, NBA (Oct. 21, 2021, 6:26 PM), [<https://perma.cc/2J6J-G9PV>].

444. *Id.*

445. *Id.*

446. *Id.*

447. *See id.*

448. See e.g., *Billy Cunningham ABA Highlights*, NBA, [<https://perma.cc/R8U7-DEBS>] (last visited Nov. 30, 2023); *Legends Profile: Billy Cunningham*, NBA (Sept. 13, 2021, 11:59 AM), *Daniels' Impact On The ABA*, NBA, [<https://perma.cc/B2DX-A5ZJ>] (last visited Nov. 30, 2023); *Former NBA Player, Broadcaster Steve "Snapper" Jones Dead at 75*, NBA (Nov. 25, 2017, 9:22 PM), [<https://perma.cc/77ZC-5PMR>]; *Area 21: Haywood in ABA*, NBA, [<https://perma.cc/9JFF-LD8N>] (last visited Nov. 30, 2023); *Gervin and the Spurs Style in the ABA*, NBA, [<https://perma.cc/G8AL-T4H2>] (last visited Nov. 30, 2023); *Dr. J's Jersey Retirement at LI Nets Season Opener*, NBA, [hereinafter *Dr. J's Jersey Retirement*] [<https://perma.cc/8ZAY-RCQF>] (last visited Nov. 30, 2023).

2024 *SETTING THE RECORD STRAIGHT* 691

The NBA has also borrowed heavily from the ABA's history and traditions. For instance, two of the central elements of the NBA's annual All-Star weekend are the slam dunk competition and the three-point contest. They reflect two fundamental aspects of the modern professional game, how it is played and sold to the public.⁴⁴⁹ The NBA slam dunk competition derived from the 1976 ABA All-Star Game in Denver which featured the first professional dunk contest.⁴⁵⁰ Revived by the NBA in 1984 as an All-Star Game event, the contest is now a fixture at the league's mid-season extravaganza.⁴⁵¹

With respect to the All-Star weekend's three-point contest, the final shot for each contestant is worth an extra point.⁴⁵² In the first two decades of the competition, this "money ball" typically was red, white, and blue—the same color pattern used for the ABA ball; it was of course also the ABA that popularized the three-point rule in the first place.⁴⁵³ While the NBA has gone out of its way to embrace influences from the ABA, it paradoxically still refuses to recognize statistics from the very same league.

The NBA's inconsistent posture toward ABA history is manifested in still other ways. A fan attending NBA games in Brooklyn, Indiana, San Antonio or Denver will notice multiple retired ABA jerseys on display at those arenas.⁴⁵⁴ Of the six Nets' retired numbers, three have an ABA pedigree.⁴⁵⁵ For the Nuggets, three of the jerseys represent stars who played in the ABA.⁴⁵⁶ All

449. See WEST WITH GARDNER, *supra* note 109, at 121; Bryan Altman, *Ranking the Top Five Events During the NBA All-Star Weekend*, CBS NEWS (Feb. 7, 2015, 7:01 AM), [<https://perma.cc/ST9C-N7W5>].

450. See e.g., Charles Curtis, *30 Years Later: An Oral History of the NBA's First Slam Dunk Contest*, BLEACHER REP. (Feb. 13, 2014), [<https://perma.cc/ZN9Q-F7BX>].

451. See *id.*

452. See WEST WITH GARDNER, *supra* note 109, at 121.

453. See *id.*; see also Price, *supra* note 186; PLUTO, *supra* note 8, at 30.

454. See Karl Interview, *supra* note 160, at 1; cf. Peterson, *supra* note 198, at 35-38.

455. See Ashish Mathur, *Nets: Every Retired Jersey Number Retired in Franchise History*, CLUTCHPOINTS (May 31, 2020); *Dr. J's Jersey Retirement*, *supra* note 448. Erving's Nets jersey retirement ceremony is in fact on the NBA's website. See *id.*

456. See Ashish Mathur, *Nuggets: Every Retired Jersey Number in Franchise History*, CLUTCHPOINTS (May 30, 2020, 4:47 PM), [<https://perma.cc/XUH6-95XY>]. A fourth retired jersey represents Doug Moe, a former Nugget assistant coach from the ABA days and later an NBA head coach of the team.

but one of the Pacers' retired jerseys are ABA-affiliated.⁴⁵⁷ Two of the Spurs' retired numbers are linked to the defunct league.⁴⁵⁸

By the same token, ABA championship banners adorn the Brooklyn and Indiana arenas.⁴⁵⁹ Furthermore, the websites and publications of the four franchises include ABA references and features.⁴⁶⁰ It makes little sense for the long-established league to honor the performances of ABA greats by retiring their jerseys in NBA arenas, hanging ABA title banners from the rafters, and packing their websites with ABA material, but at the same time, not officially recognizing their statistics which record those very same on-court achievements.

The NBA has similarly honored ABA alumni for reaching certain statistical milestones, which included numbers from the latter league. When Issel registered his 20,000th point in 1980, NBA officials stopped the game to recognize his accomplishment.⁴⁶¹ NBA Commissioner Lawrence O'Brien sent Issel a telegram commending him on his achievement as he did when the star passed the 25,000-point mark almost three years later.⁴⁶² Why would the NBA interrupt play during one of its games and have the Commissioner acknowledge a milestone which included 12,823 ABA points but not include those very same points in its record book?

A very similar occurrence took place in January 1981 when Erving passed the 20,000-point mark in Milwaukee.⁴⁶³ As

457. See Ashish Mathur, *Pacers: Every Jersey Number Retired in Franchise History*, CLUTCHPOINTS (May 30, 2020, 6:31 PM), [https://perma.cc/YNU7-FS2M].

458. See Ashish Mathur, *Spurs: Every Jersey Number Retired in San Antonio Franchise History*, CLUTCHPOINTS (May 30, 2020, 3:51 PM), [https://perma.cc/GL4H-AQEC].

459. See e.g., @ABAThrowbacks, TWITTER (March 12, 2022, 7:55 PM), [https://perma.cc/EET6-HECQ]; see also @HiAdamReed, TWITTER (May 7, 2020, 8:51 PM), [https://perma.cc/4GKV-JQDK].

460. See *2022-23 Uniform Collection, Classic Edition*, NBA, [https://perma.cc/L3J7-BEGM] (last visited Nov. 20, 2023) (referencing the origins of the Nets' franchise which dates back to the ABA); Ben Hunt, *A Look Back: Celebration of George Gervin*, NBA SPURS (Nov. 9, 2011, 2:06 PM), [https://perma.cc/UY4C-VE3W]; INDIANA PACERS 2022-23 SEASON MEDIA GUIDE 175-76 (2023), [https://perma.cc/CRD6-KB5H] (last visited Jan. 6, 2024) (listing retired ABA jerseys and former ABA players); 2021-22 DENVER NUGGETS MEDIA GUIDE 317-19 (2021), [https://perma.cc/YW7D-F3UA], (providing ABA star Byron Beck's lifetime statistics).

461. See *Nuggets*, *supra* note 210.

462. See *id.*; Telex from Larry O'Brien to Dan Issel (Nov. 14, 1980) LOBP/SC, Box 55; Telex from Larry O'Brien to Dan Issel (Oct. 28, 1983) LOBP/SC, Box 55.

463. See Livingston, *supra* note 213. The BAA, which the NBA views inaccurately to be one and the same with itself, stopped play during a game in its inaugural 1946-47 season to acknowledge Joe Fulks setting a new professional scoring mark for a season, surpassing a

2024 *SETTING THE RECORD STRAIGHT* 693

was the case with Issel's achievement, the Bucks stopped the action to commemorate the milestone.⁴⁶⁴ Again, O'Brien sent a telegram.⁴⁶⁵ Two years later, the Doctor scored his 25,000th combined point in Seattle.⁴⁶⁶ Once again, officials stopped the game in order for the 76ers standout to receive the game ball and an ovation from the fans.⁴⁶⁷ The Seattle arena also placed a message on its jumbotron honoring Erving's achievement.⁴⁶⁸ When he scored his 30,000th point in Philadelphia in 1987, once again the contest was halted to honor the achievement. Once again, the Doctor was given the game ball.⁴⁶⁹ Once again, the NBA marketed the event to the hilt. A reporter noted the absurdity of the league's position, "The NBA is promoting Julius Erving's quest for 30,000 points while not acknowledging his ABA points in their record books."⁴⁷⁰

In 1983, it was Artis Gilmore who scored his 20,000th career point, a total which included his scoring totals from the ABA. To commemorate the achievement, action was halted and he received the game ball.⁴⁷¹

Two years later, George Gervin scored his 25,000th career point in Phoenix. As with Issel's, Erving's, and Gilmore's totals, this sum included a significant number of ABA points. Nonetheless, the Suns halted the proceedings and handed the San Antonio star the game ball.⁴⁷²

Twelve years later, the surviving league celebrated the three-decade anniversary of the establishment of the ABA. It did

record established by Willie Kummer of the long-defunct Central League three and a half decades before. See CHARLEY ROSEN, *THE FIRST TIP-OFF* 216 (2009)

464. See Bill Livingston, *Sixers Defeated by Bucks*, PHILA. INQUIRER, Jan. 16, 1981, at C01.

465. See Letter from Lawrence F. O'Brien, NBA Commissioner, to Julius Erving, Jan. 19, 1981, LOBP/SC, Box 6.

466. See George Shirk, *76ers Go Overtime in Seattle*, PHILA. INQUIRER, Dec. 31, 1983, at C01.

467. See *id.*

468. See *id.*

469. See Jere Longman, *A One-of-a-Kind Night for the NBA*, PHILA. INQUIRER, Apr. 18, 1987, at C04.

470. See Jeff Denberg, *Lakers' Riley is Upset over Coaching Honors*, ATLANTA J.-CONST., Apr. 19, 1987, at D25.

471. See Mike Bruton, *Spurs Overcome Jazz with Bench Strength*, SAN ANTONIO EXPRESS, Apr. 16, 1983; Stan Albeck, *Longtime NBA Coach, Dies at 89*, N.Y. POST (Mar. 25, 2021, 10:38 PM), [<https://perma.cc/6VQU-JYYL>].

472. See Norm Frauenheim, *Adjustment Problems Plague Suns in Loss to Roughhouse Spurs*, ARIZ. REPUBLIC, Feb. 23, 1985, at 25.

so by authorizing the former ABA franchises to play pre-season contests using a red, white, and blue basketball.⁴⁷³

In 2001, the 76ers commemorated coach Larry Brown notching his 1,000th professional coaching win, 229 of which came in the ABA.⁴⁷⁴ There was a post-game event with players and fans during which the Philadelphia owner presented Brown with the game ball.⁴⁷⁵

Six years afterwards, on the fortieth anniversary of its ABA founding, Indiana released its all-time team, which included players from the disbanded league.⁴⁷⁶ A decade later, the NBA commemorated the fiftieth anniversary of the founding of the Pacers and Nugget franchises, a tabulation which necessarily included their ABA seasons.⁴⁷⁷ Indiana included a fiftieth anniversary patch on its jerseys.⁴⁷⁸ The Nuggets created a special logo for the occasion.⁴⁷⁹ During a Denver event observing the team having reached the same half-century mark, the club's master of ceremonies recognized Spencer Haywood as a past MVP winner for the Nuggets.⁴⁸⁰ The star forward won the award in the ABA for his performance during the 1969-70 season.⁴⁸¹ In 2022, the Spurs rolled out a special logo to commemorate their own fiftieth anniversary, a milestone that also included its ABA years.⁴⁸² Why would the NBA permit these franchises to count ABA seasons when they tabulated the years since their founding?

473. See Tommy Cummings, *Sports on the Net*, FORT WORTH STAR-TELEGRAM, Oct. 20, 1997, at C7.

474. See Friedman, *supra* note 16.

475. See *id.*; see also Ashley McGeachy, *Brown Finishes Mountain Climb*, PHILA. INQUIRER, Feb 17, 2001, at C01.

476. See *Pacers Announce 40th Anniversary Team*, NBA (Apr. 13, 2007, 4:47 PM), [<https://perma.cc/2VHP-WLU4>].

477. See *Pacers Celebrate 50th Anniversary*, NBA (June 16, 2017, 10:14 AM), [<https://perma.cc/W9Q2-XZSW>]; *Nuggets Unveil 50th Anniversary Logo in Celebration of Franchise's 50th Year*, NBA (June 14, 2017, 6:16 PM), [hereinafter *Nuggets Unveil*] [<https://perma.cc/4L8K-E9K2>].

478. See @Pacers, TWITTER (Sept. 24, 2016, 12:26 PM), [<https://perma.cc/R33D-FZML>].

479. See *Nuggets Unveil*, *supra* note 477.

480. See SPEARS & WASHBURN, *supra* note 145, at 201; @Nuggets, TWITTER (Nov. 21, 2017, 10:57 PM), [<https://perma.cc/SGJ5-LAPC>]; see also *Nuggets Announce Legends Celebration on Opening Night as Part of 50th Anniversary*, NBA (Oct. 3, 2017, 10:21 AM), [<https://perma.cc/T8RQ-DZF4>].

481. See *Legends Profile: Spencer Haywood*, NBA (Sept. 13, 2021, 1:14 PM), [<https://perma.cc/Q432-ZU7R>].

482. See Madalyn Mendoza, *Spurs Reveal Logo Celebrating 50 Years of San Antonio Basketball*, *Culture*, MY SAN ANTONIO (May 14, 2022, 7:15 AM), [<https://perma.cc/89R4-UMD3>].

2024 *SETTING THE RECORD STRAIGHT* 695

In July 2022, the NBA and the NBPA finally took steps to help former ABA players with their insufficient pensions.⁴⁸³ Through this long overdue decision, which was prompted in large part by the work of attorney Scott Tarter and the Dropping Dimes Foundation, the NBA agreed to provide \$25 million toward ex-ABA player pensions.⁴⁸⁴ Unlike assuming responsibility for ABA pensions, acknowledging the defunct league's statistics would appear to be cost-free or virtually cost-free for the NBA. Why not close the book once and for all on outstanding ABA issues?

A final inconsistency with the NBA's recordkeeping position involves its annual Rookie of the Year award. If the ABA was not a major league, why were no ABA players who entered the NBA in 1976-77 considered for Rookie of the Year or the All-Rookie team?⁴⁸⁵ Similarly, why was George McGinnis not considered for the honor during his first NBA season in 1975-76 or Connie Hawkins in 1969-70?⁴⁸⁶ This is all the more mystifying considering that players who played in the minor-league CBA before their NBA tenure *have* been considered rookies. Richard Dumas, Matt Maloney, and Chucky Atkins were each named to the NBA All-Rookie first or second-team after having played in the CBA.⁴⁸⁷ The same holds true for European League players. The 2002, 2019, and 2021 NBA Rookies of the Year were Pau Gasol, Luka Doncic, and LaMelo Ball, respectively, each a veteran of the professional European leagues.⁴⁸⁸ Scores of other European league players (e.g., Arvydas Sabonis, Tony Parker, Yao Ming, and Nikola Jokic) made first-team All-Rookie after having played professionally

483. See NBA/NBPA Announcement, *supra* note 17.

484. See, e.g., Benbow, *supra* note 21.

485. See Letter from Steve O'Neil, *Basketball Rookies*, SPORTS ILLUSTRATED, Apr. 11, 1977, at 108; Bob Ellis, *Now That's a Challenge*, WELLSVILLE DAILY REP., Apr. 14, 1977, at 10; cf. ED WILLES, *THE REBEL LEAGUE* 219 (2005).

486. See Ellis, *supra* note 298. Both men would have been clearly deserving of All-Rookie honors, if eligible. McGinnis made First Team All-NBA in 1975-76 as did Hawkins in 1969-70.

487. See Mike Baldwin, *Cavs Get Tough, Win Game 3*, THE OKLAHOMAN, Mar. 26, 1992, at 23; Steve Tappa, *Thunder Home Run Done in Festival of 3s*, MOLINE DISPATCH, Dec. 30, 1995; Jeff Brown, *Atkins, Bobcats Storm Past Thunder*, LA CROSSE TRIBUNE, Dec. 23, 1996; see also *Year-By-Year NBA All Rookie Teams*, NBA (Sept. 13, 2021, 10:35 AM), [<https://perma.cc/62N7-XBQ9>].

488. See *NBA & ABA Rookie of the Year*, BASKETBALL REFERENCE, [<https://perma.cc/8KFM-ZYQ9>] (last visited Jan. 6, 2024).

overseas.⁴⁸⁹ In 2015, Jordan Clarkson made All-Rookie after time in the D/G League, the NBA's farm league.⁴⁹⁰ If the ABA had truly been a minor league, its players should have been eligible for the NBA Rookie of the Year Award and for All-Rookie honors as were professionals from the CBA, the European Leagues, and the D/G League.

The reason former ABA players were not considered for Rookie of the Year in 1976-77 was because the NBA did not view them as rookies. At the same time, the NBA claimed that the ABA was an inferior league.⁴⁹¹ Again, NBA policy was and remains at war with itself. The league's internally contradictory position greatly undermines its opposition to acknowledging ABA statistics.

VI. POTENTIAL NBA JUSTIFICATIONS FOR NOT RECOGNIZING ABA STATISTICS ARE UNPERSUASIVE

The NBA has only briefly articulated its reasons for denying recognition to ABA statistics, sometimes utilizing different rationales. But the arguments the league has used for external consumption—or that might be used internally to prevent or delay the league from taking this step—are unpersuasive. There would seem to be six possible reasons: (1) the NBA record book is for NBA games and the ABA was never a part of the older league; (2) parallels to other major leagues support the NBA's position; (3) ABA statistics were kept in a slipshod fashion; (4) inclusion of ABA records would distort the NBA record book; (5) adding ABA numbers might re-open the 1976 settlement; and (6) recognizing ABA statistics might draw the ire of NBA legends.⁴⁹²

A. The NBA Record Book is for NBA Games Only

In 1978, the NBA put forward the position that its statistical information would only document the exploits of players, coaches, and teams from within the NBA itself and that

489. See *NBA & ABA All-Rookie Teams*, BASKETBALL REFERENCE, [https://perma.cc/TJW3-72WV] (last visited Jan. 6, 2024).

490. See *id.*; *Jordan Clarkson Named to NBA All-Rookie First Team*, NBA (May 18, 2015, 11:15 AM), [https://perma.cc/GC76-BLXZ]; *Jordan Clarkson*, NBA G LEAGUE, [https://perma.cc/ZQ4J-XWNNH] (last visited Nov. 20, 2023).

491. See *e.g.*, *supra* note 241.

492. Inertia and bureaucratic resistance to outside pressure could be factors in the NBA's stance as well.

2024 *SETTING THE RECORD STRAIGHT* 697

the ABA and its numbers would be excluded. That year, a league spokesperson explained that “An NBA record can only be set in the NBA. We never combine the two leagues’ records.”⁴⁹³ To this way of thinking, NBA statistics are just that, *NBA* statistics. By this same logic, the ABA has its own record book and that is what people should consult for information about its players, coaches, and teams.

In a sense, this contention reflects that there are two conceptual approaches to viewing the record book of a major professional sports league. The first is through the somewhat intuitive, if narrow and simplistic outlook the NBA ostensibly embraced; what might be considered the “membership” perspective. Only if a player, coach or team was an actual member of the league will the league compile and recognize their statistics.⁴⁹⁴ But, of course, this approach has not been embraced by MLB—the league (and the fan base) most conscious of its statistical history and heritage.⁴⁹⁵ MLB recognizes statistics from seven Negro Leagues, the UA, the AA, the PL, and the FL.⁴⁹⁶ Nor has the membership approach been fully embraced by the NFL which acknowledges AFL statistics, though it does not accept AAFC numbers. And, as will be seen, *the NBA has not fully followed this approach itself*, as it recognizes the records from a separate league—the BAA—and partially those of another—the NBL.⁴⁹⁷

The second conceptual way to look at a major league’s record book involves doing so more broadly and with a greater sense of subtlety and historical context. Seen this way, an existing major league’s official numbers represent a statistical canon that records the exploits of those performing in professional leagues at the highest level during the lifespan of the surviving association, including those of rival major leagues that failed in

493. Sachare, *supra* note 11, at 36; cf. Ed Pavlick, *Opinion: Pro Football Records Should Include The AAFC*, THE COFFIN CORNER, 1980, at 2; PAUL ZIMMERMAN, THE NEW THINKING MAN’S GUIDE TO PRO FOOTBALL 382 (2017).

494. Cf. Rrhersh, *supra* note 20.

495. See MACCAMBRIDGE, *supra* note 30, at 354; Ben Lindbergh, *MLB is Finally Recognizing the Negro Leagues as the Major Leagues They Always Were*, THE RINGER (Dec. 16, 2020, 10:45 AM), [<https://perma.cc/C3AQ-KWCV>]; Matt Schudel, *Seymour Siwoff, Who Knew the Score for Baseball and Other Sports, Dies at 99*, WASH. POST (Nov. 30, 2019, 8:17 PM), [<https://perma.cc/U2QC-Z7HU>].

496. See Castrovince, *supra* note 52; *Decisions*, *supra* note 20, at 2327.

497. See Hubbard, *supra* note 14, at 5-8. Only the NHL has wholly assumed the narrow membership posture. See *Why Doesn’t the WHA Count?*, REDDIT (2020), [<https://perma.cc/NW2C-C9MH>] (last visited Jan. 6, 2024).

the end. This is what might be termed a “performance-based” approach to statistical recognition. Those professionals playing or coaching in a major league should have their statistics recorded regardless of whether the league had the good fortune to survive economically.

In this respect, a surviving major league owes an obligation to help preserve and promote the professional game’s heritage, especially when it involves the achievements of racial minorities and when the surviving league drapes itself in that history and profits from it as does the NBA. In this context, an existing major league’s statistics serve a vital *curatorial purpose* to the public as well as an important legitimizing function to professional players, coaches, and teams that did not or could not—for whatever reason—enter the surviving major league.⁴⁹⁸

One way existing major leagues can bear this curatorial responsibility is through recognition of the statistics of rival major leagues. To do otherwise could mean that an important part of the rich heritage of the game is lost or, at the very least, diminished. In an age when materials are increasingly archived on websites and the like, it would seem that pro sports leagues have even greater capacity to undertake this responsibility than they did prior to the internet. And, indeed, the NBA has already implicitly recognized this curatorial responsibility on numerous occasions (e.g., including ABA numbers unofficially in segments of *NBA Guides*, providing ABA footage and references on NBA websites, incorporating ABA materials into NBA commemorations, selling ABA replica jerseys, pursuing and securing trademarks of ABA logos, and hanging of ABA jerseys and banners in NBA arenas).⁴⁹⁹

This curatorial function is especially important when—as was the case with the ABA—the influence of African-American players was so significant. To do otherwise carries overtones of erasure and leaves behind a highly distorted rendering of pro

498. There is, of course, the NMBBHOF, but its mission is the collection of material related to *all* basketball history, not simply the history of the professional men’s game. See e.g., *About the Naismith Memorial Basketball Hall of Fame*, BASKETBALL HALL OF FAME, [https://perma.cc/3XRT-PRN6] (last visited Nov. 20, 2023). The NBA, on the other hand, is exclusively devoted to pro basketball. The league is also much more accessible to the public—through television, social media, the press, and its arenas—than is the Hall of Fame. Moreover, the ABA’s achievements should be *universally* accorded respect and recognition; such acknowledgement should not be limited to the NMBBHOF.

499. See *supra* Part V; see also THE OFFICIAL NBA ENCYC. (3d. ed. 2000) (unpaginated color photo inserts).

2024 *SETTING THE RECORD STRAIGHT* 699

basketball history.⁵⁰⁰ This is especially true when the defunct league has had a major impact on how the NBA game is played and marketed as has the ABA.

This performance-based outlook recognizes the reality that just because a sports league is no longer in existence does not mean it never was of major-league caliber in its performance and long-term influence. In the early years of American and Canadian professional sports leagues, determining which entity was a major league was often somewhat arbitrary and may ultimately have been determined by factors aside from the abilities of its players, teams, and coaches.⁵⁰¹ With respect to the ABA, the upstart league clearly satisfies the most important criteria—talent. The defunct league also generally fulfilled the secondary considerations. Even for those categories that proved more challenging for the ABA (e.g., maintaining stable schedules, holding a regularized draft, and enjoying good attendance), it still outperformed the early NBA.

And, of course, the membership policy put forward by the NBA might be taken more seriously *if in fact the NBA had actually followed it*. It has not. In reality, the position articulated by the NBA in 1978 is wildly inconsistent with the league's longstanding and enthusiastic embrace of numerous aspects of the ABA's historical legacy. ABA title banners and retired jerseys hang in NBA arenas.⁵⁰² The NBA has used red, white, and blue balls in preseason games and three-point competitions and had teams wear ABA replica jerseys.⁵⁰³ The league has pursued and secured trademarks for ABA logos.⁵⁰⁴ In no way can the NBA claim straight-faced that it adheres to the "membership" approach to ABA history; and, to a significant degree, it would even be hard pressed to do so with respect to ABA statistics. As noted earlier, the NBA cites ABA numbers whenever it wishes. The annual *Official NBA Guide* has for years included a separate segment totaling many combined NBA and ABA statistical categories which implicitly seems to recognize their validity.⁵⁰⁵ Indeed, as the years have passed, more and more ABA data have been

500. See Sehgal, *supra* note 16.

501. See, e.g., HAROLD SEYMOUR & DOROTHY SEYMOUR MILLS, *BASEBALL* 94-103 (1989 ed.); Hershberger, *supra* note 20.

502. See *supra* notes 454-460 and accompanying text.

503. See *supra* notes 198, 200, 452-453, and 473 and accompanying text.

504. See *supra* notes 202-209 and accompanying text.

505. See e.g., *supra* notes 221-231 and accompanying text.

displayed. The NBA has made presentations that acknowledge statistical milestones that rely on data from the disbanded league.⁵⁰⁶ The NBA itself and its teams show ABA footage and statistics on their websites.⁵⁰⁷

Moreover, the NBA has not embraced the membership theory regarding the statistics of other leagues. Records from the BAA, a distinct league which existed from 1946-47 to 1948-49, are accorded full NBA status even though the NBA did not come into being until the 1949-50 season following the BAA's merger with its rival, the NBL. This reality, however, collides squarely with two fundamental aspects of the NBA's origin myth: (1) that the BAA and NBL did not merge; the former absorbed the latter; and (2) that the BAA and NBA are just different names for the same historical entity.⁵⁰⁸

In fact, contemporary sources make clear that the BAA and NBL merged and formed a brand new entity.⁵⁰⁹ Immediately after the deal between the two leagues had been struck, current BAA President and soon-to-be NBA President Maurice Podoloff announced to the public that the NBA would be a "new league."⁵¹⁰

506. See *supra* notes 443-447 and accompanying text.

507. See *supra* note 448 and accompanying text.

508. See, e.g., *Season Review: 1946-47*, NBA (Sept. 13, 2021, 8:40 AM), [<https://perma.cc/G73A-CJEX>] (1946-47 was "the first season of the BAA, the precursor to the modern-day NBA."); *Season Review: 1949-50*, NBA (Sept. 13, 2021, 8:40 AM), [<https://perma.cc/RG8B-WC8F>] ("The summer of 1949 solidified the professional basketball picture, with the six surviving NBL teams being absorbed into the BAA and the league being renamed the National Basketball Association."); *The NBA at 50 and Counting*, in THE SPORTING NEWS, OFFICIAL NBA GUIDE 1996-97, 11 (1997) (noting the 1946 "launch[]" [of] what was then called the Basketball Association of America."); see also Harris, *supra* note 22, at 48. As one scholar notes, "[t]he BAA is a precursor of the NBA not *the* precursor." Harris, *supra* note 16 (first emphasis added). For the link between the BAA/NBL and NBA/ABA interleague settlements, see *Why Doesn't ABA History*, *supra* note 22 (stating that how one "view[s] . . . the origin of the NBA . . . obviously informs the way that you think of how the ABA and the NBA came together") (quoting Jason Mann); see also *id.* (quoting Adam Criblez).

509. The minutes from BAA league meetings in 1949 reveal the nature of the interleague agreement. On July 1, 1949, NBL representatives told BAA owners that the "NBL was interested only in a merger, not any other type of agreement." *Basketball Association of America League Minutes 1946-1949*, ABPR, [<https://perma.cc/UF2G-9A77>] (last visited Nov. 20, 2023) (emphasis added). Several weeks later, after the merger had been executed, a Special Meeting of the BAA owners took place wherein it was recorded that "The agreement for merger with NBL was read." *Id.* (emphasis added). Many scholars have recognized this reality. See PETERSON, *supra* note 141, at 166-67; NELSON, *supra* note 333, at 1; Harris, *supra* note 22, at 48; COLÁS, *supra* note 58, at 38-46; RUNSTEDTLER, *supra* note 50, at 4.

510. Glen Gaff, *Cage Peace: Form 18-Team League*, MINNEAPOLIS STAR TRIB., Aug. 4, 1949, at 20.

2024 *SETTING THE RECORD STRAIGHT* 701

Similarly, the official *NBA Record Book* for the inaugural 1949-50 season stated that:

The basketball season of 1949-50 finds a new name flashing across the national court scene—the National Basketball Association. It is an *off-spring* of a mid-summer *merger* between the 12 year old National Basketball League and the four-year old Basketball Association of America. . . . The merger brought 10 of the *old* B.A.A. teams *into* the N.B.A., with seven of the *former* National League teams. . . . Ike W. Duffey, former head of the National League, was elected chairman of the board of governors of *the new loop*.⁵¹¹

In the same vein, the *1950-51 NBA Record Book* stated that “The National Basketball Association enters *its second season* of play in 1950-51.”⁵¹² The very next year, the *NBA Record Book* noted that the league was about to “enter *its third season* of play.”⁵¹³ In 1951, basketball great George Mikan looked back on his career up to that point. During the 1948-49 season he had played in the BAA but the next year he and his team became part of the NBA.⁵¹⁴ Regarding the latter campaign, he recalled that “the start of that season was notable for a couple of . . . things. First of all, I was in *another* league. This was *the brand new* National Basketball Association—the fifth different league in five years.”⁵¹⁵

511. NBA 1949-50 RECORD BOOK, *supra* note 423, at 4 (emphases added); *see also* Harris, *supra* note 22, at 48; Jared S., *supra* note 410; rlee, Comments to *The BAA-NBL merger and the Question of the NBA’s Birthday*, APBR (Mar. 13, 2010; 9:12 PM), [<https://perma.cc/S99A-7E78>].

512. NBA 1950-51 RECORD BOOK, *supra* note 423, at 4 (emphasis added); *see also id.* (“In 1946, when the Basketball Association of America was being organized . . . [Maurice Podoloff] . . . was named president of *that new* league. His success with the B.A.A. and his efforts in bringing about a *merger* with the old National Basketball League resulted in his being elected president of the N.B.A. in 1949, when the two organizations *merged, a post he has held since.*”) (emphases added); Jared S., *supra* note 410; rlee, *supra* note 511.

513. NATIONAL BASKETBALL ASSOCIATION 1951-52 RECORD BOOK 4 (1951) (emphasis added). The *1952-53 NBA Record Book* noted that the BAA and NBL had “merged.” *See* 1952-53 NBA RECORD BOOK, *supra* note 423, at 4.

514. *See, e.g., George Mikan*, BASKETBALL REFERENCE, [<https://perma.cc/HF6Z-S5UC>] (last visited Jan. 6, 2024).

515. GEORGE MIKAN, MR. BASKETBALL 58 (1951) (emphases added); *see also* GEORGE L. MIKAN & JOSEPH OBERLE, UNSTOPPABLE 113-14 (1997) (emphases added) (“in the fall of 1949, we [on the BAA’s Minneapolis Laker team] were *heading to the newly formed* National Basketball Association, the NBA, *created by a merger* of the NBL and BAA. . . . [T]he NBA. . . . had been *created* by the *merger* of two existing leagues. . . . The NBA was based on the promise of joining the best of those two leagues together”). The other four leagues Mikan alluded to were the BAA, NBL, ABL (different from the league of the same name from the early 1960s), and the short-lived Professional Basketball League of America. For other accounts by contemporaries, *see* RICHARD F. TRIPTOW, THE DYNASTY

The media at the time also saw the NBA for what it was: a new enterprise, not a continuation of the BAA. In January, 1950, *Sport* magazine ran a piece discussing the merger. It observed that “the two warring groups became one.”⁵¹⁶ The NBA was, in the magazine’s estimation a “new league.”⁵¹⁷

As the 1950s progressed, however, the NBA began to reinvent its origin story. The reasons for this development are not altogether clear and are beyond the scope of this Article.⁵¹⁸ But, from a statistical standpoint, this meant that the league recognized all BAA records and, somewhat bizarrely, NBL numbers only for players who had also performed in either the BAA or the NBA.⁵¹⁹ Despite its historical mythmaking, the reality is that the NBA acknowledges the statistics of the BAA, which was a separate league, and some numbers for the NBL, which was also a distinct entity. But, by and large, the NBL remains outside of official NBA history to this day.

The NBA’s argument that its statistics reflect *only* NBA games—the membership approach—is therefore highly dubious

THAT NEVER WAS 243 (1996) (emphasis added) (noting that the two leagues “merged to form the 18 club organization to be known as the National Basketball Association.”).

516. Jim Dailey, *The Great Basketball Experiment*, SPORT, Jan. 1950, at 60, 86; see also *2 Pro Basketball Teams Agree on Merger*, CHI. TRIB., Aug. 12, 1949 (“The nation’s 18 top pro teams . . . are members of the new league . . .”); *2 Pro Basketball Leagues To Merge Officially Today*, CHI. TRIB., Aug. 11, 1949, at 52 (emphasis added) (“Two pro basketball leagues . . . will wind up old business today at a meeting . . . and officially will merge into the new National Basketball association [sic].”); *Call New Loop National Basketball Association: Podoloff New Prexy Of 18-Team League*, MOLINE DISPATCH, Aug. 4, 1949, at 17; *Blackhawks, Nuggets Set to Inaugurate New League*, ROCK ISLAND ARGUS, Oct. 29, 1949, at 15; Linn, *supra* note 398, at 85 (emphasis added) (“In 1949 . . . the BAA had merged with the old National Basketball League”); see also Harris, *supra* note 22, at 48. If the BAA had actually absorbed the NBL in 1949, as the NBA later absorbed part of the ABA, why did the BAA not keep its original name as the NBA did in 1976? Cf. Harris, *supra* note 16. The very title of the NBA obviously reflects a combination of the names of the two merging entities. See *id.*

517. Dailey, *supra* note 516, at 86; see also Gaff, *supra* note 510, at 20 (referring to “the new league”); Frank Elkins, *Rival Basketball Circuits Merge into One Loop of Eighteen Clubs*, N.Y. TIMES, Aug. 4, 1949 (noting the “merger” marked “the inception of the National Basketball Association” and calling it “the new league.”). Several modern authorities agree that the rival entities created a new league. See MICHAEL SCHUMACHER, MR. BASKETBALL 142 (2007); STEW THORNLEY, BASKETBALL’S ORIGINAL DYNASTY 25 (1989); Harris, *supra* note 22, at 48; COLÁS, *supra* note 58, at 38-46; RICH WESTCOTT, THE MOGUL 160 (2008).

518. See NELSON, *supra* note 333, at 1; see also ISAACS, *supra* note 403, at 232; Jared S., *supra* note 410; Chuck Durante, Comments to *The BAA-NBL Merger and the Question of the NBA’s Birthday*, APBR (June 9, 2010, 12:52 AM), [https://perma.cc/334H-GTZQ].

519. See Hubbard, *supra* note 14, at 5-8; *Keeping Score*, *supra* note 361, at 2; rlee, *supra* note 511; OFFICIAL NATIONAL BASKETBALL ASSOCIATION GUIDE 1958-59, at 145 (1958) (including NBL statistics for players who later played in the NBA); 2006-07 REGISTER, *supra* note 225, at 397. The author would like to acknowledge Mike Lynch for pointing out this NBL anomaly.

for two reasons. First, the membership approach is conceptually flawed as it overlooks the curatorial function of a modern major league. Second, the NBA has not even followed this outlook regarding the ABA itself given its widespread informal embrace of much of the ABA's history and its tacit acknowledgement of the disbanded league's statistics. And, furthermore, the NBA has ignored this methodology altogether regarding statistics from the BAA, a separate historical entity whose numbers it fully recognizes. The NBA has also turned a blind eye to the membership approach to a significant degree regarding the NBL—another separate league—whose statistics the NBA partly acknowledges.

B. Historical Parallels to Other Major Sports Leagues

Four years after the NBA articulated the membership policy, it put forward a different rationale for excluding ABA numbers. When queried in 1982 about recognizing the statistics from the defunct league, an NBA spokesman indicated that ABA records should not be accepted because:

In past instances where part of a league was absorbed into an existing league, such as the All-America [Football] Conference into the NFL, the same procedure was followed. The only situation in which this was different was the American Football League, where the entire league came in as a unit. This was not the case with the ABA, where only four teams came into the NBA.⁵²⁰

The NBA's 1982 statement is highly misleading for two reasons. First, it is inconsistent with the league's own history. Essentially, the point the NBA was trying to make was that a true merger will result in a merger of the statistics of both leagues and anything short of a merger will not. However, as discussed earlier, in 1949, the BAA and the NBL consummated a merger and became a new league: the NBA.⁵²¹ Despite the fact that NBL teams came into

520. Favia, *supra* note 9 (emphasis added).

521. See Harris, *supra* note 22, at 48; Dailey, *supra* note 516, at 86; Jared S., *supra* note 410; *supra* notes 508-519 and accompanying text. One could quibble and argue that only six of the nine existing NBL teams came directly into the newly formed NBA in 1949; meaning the older league did not merge "as a unit" as the NBA spokesman propounded. That would reflect that three NBL teams—Hammond, Detroit/Dayton and Oshkosh—did not enter the NBA because they were on the brink of financial collapse after the 1948-49 season. See *Merger Dims Buc Salvage*, HAMMOND TIMES, Aug. 4, 1949, at 1; John Whitaker, *Loren Ellis Resigns as Club Pilot*, HAMMOND TIMES, Aug. 2, 1949, at 11; *All-Star '5' Out of National Cage Loop Play for 1 Year*, APPLETON POST-CRESCENT, Sept. 10, 1949, at 13; *Ex-*

the NBA through a merger just as the BAA clubs did, the NBA has never fully recognized NBL statistics while it acknowledges all BAA records. Thus, the NBA's basic assertion that a merger results in the new entity fully acknowledging the records of both merging leagues is contradicted by its own past with regard to the NBL.

Second, the notion expressed by the NBA that there is some hard-and-fast rule that one major professional league accepts another's statistics *only* when accompanied by a merger is sheer nonsense. In 1876, the NL was the sole major league in baseball until challenged in 1882 by the AA.⁵²² For ten years—a comparable duration to that of the ABA—the AA competed with the NL until four AA teams were then absorbed into the senior circuit.⁵²³ However, unlike the NBA vis-à-vis the ABA, MLB today recognizes AA statistics.

In the decades following the founding of the AA, the NL faced a number of challenges from other new leagues including the UA in 1884 and the PL in 1890, two enterprises that existed for one season only.⁵²⁴ Nevertheless, statistics from the UA and PL are recognized by MLB even though the two leagues produced a combined total of one team for the NL.⁵²⁵ MLB also recognizes the FL's official records even though no FL teams were ever absorbed into either the AL or NL.⁵²⁶

And none of the seven Negro League teams, whose numbers MLB acknowledges, were ever absorbed into MLB. The NBA's citation to sports history is not only incorrect it actually works actively against its own case as the NBA completely

Cats, Scribe Get Franchise At Indianapolis, LEXINGTON HAROLD-LEADER, May 5, 1949, at 12. Nonetheless, the very same thing occurred regarding the BAA at the time of merger. The BAA's Providence Steamrollers and Indianapolis Jets also failed to make it into the NBA. See SCHUMACHER, *supra* note 517, at 142. As a result, the BAA did not come into the new league "as a unit" either. Thus, according to a strict reading of the NBA's 1982 statement, neither the NBL nor the BAA should have their statistics recognized because *both* leagues failed to enter the new league "as a unit." Therefore, under either a strict or a broad reading of the NBA's statement, the NBA has not followed its own professed policy because it fully recognizes the statistics of the BAA but only partially accepts numbers from the NBL.

522. The NL did not see the contemporary International Association as a true rival. See SEYMOUR & MILLS, *supra* note 501, at 99.

523. See DAVID NEMEC, *THE BEER AND WHISKY LEAGUE* 233-35 (1994); QUIRK & FORT, *supra* note 10, at 309.

524. See Harold Dellinger, *Rival Leagues*, in *TOTAL BASEBALL* 568, 568-73 (John Thorn, Pete Palmer & David Reuther eds., 1989).

525. See JAMES, *supra* note 20, at 31; see e.g., *1884 St. Louis Maroons Statistics*, BASEBALL REFERENCE, [https://perma.cc/MP7H-97VF] (last visited Nov. 20, 2023).

526. See *Decisions*, *supra* note 20, at 2327.

overlooks the experience of the oldest U.S. major pro sports league, MLB.

C. The ABA's Statistics were Kept in a Slipshod Fashion

Concern over how rigorously ABA statistics were maintained is a point that the NBA could raise, and it certainly has some merit, especially for the first season of the ABA.⁵²⁷ Lee Meade, who was in charge of ABA statistics at the time, conceded that the league's numbers were dubious during its inaugural campaign.

That first year, the stats were a problem. Some teams didn't complete all the categories on the scorecard. Occasionally, a team wouldn't send in any box scores. I kept the stats by projections. I took the games and stats I did have and projected them out over the course of the season. So I wouldn't put much faith in those early ABA stats.⁵²⁸

However, the problem of faulty first-year ABA statistics has been largely resolved. ABA statistics have been, for the most part, reconstructed through the diligent efforts of researchers such as Michael Hamel, who painstakingly consulted newspaper box scores during the period.⁵²⁹ Because of such efforts, *basketball-reference.com* offers game logs from the inaugural ABA season which provide a number of statistical categories.⁵³⁰

Even if some categories of statistics from the ABA's first season cannot be reconstructed fully, ignoring all the records for the entire life of the league makes little sense. The NBA itself did not begin compiling rebounding numbers until the 1950-51 season and did not tabulate blocked shots and steals until 1973-74. Does that mean that *all* the NBA records before 1950-51 or even before 1973-74 should also be disregarded?

527. See Author Interview with Matt Winick, Former Senior Advisor to the NBA President of Operations, at 3 (Jan. 6, 2020) (transcript on file with author); Hubbard, *supra* note 14; cf. HALBERSTAM, *supra* note 47, at 221. Of course, even MLB has experienced its share of statistical problems. See Larry Lester, *Baseball Is the Music of Mathematics*, in NEGRO LEAGUES, *supra* note 1, at 6-8; Neft, *supra* note 240; Thorn, *supra* note 240; THE 2006 ESPN BASEBALL ENCYCLOPEDIA xi-xiv (Gary Gillette & Pete Palmer eds., 2006) [hereinafter ESPN BASEBALL].

528. PLUTO, *supra* note 8, at 66; cf. MONTIETH, *supra* note 91, at 156 n.4; NETOLICKY ET AL., *supra* note 15, at 51-56.

529. See *ABA Box Scores 1967-1976*, MICHAEL HAMEL, [<https://perma.cc/N7MK-XMTK>] (last visited Nov. 30, 2023); see also Tarter interview, *supra* note 36, at 27.

530. See, e.g., *Pittsburgh Pipers at New Jersey Americans Box Score, October 23, 1967*, BASKETBALL REFERENCE, [<https://perma.cc/NDB3-S9H3>] (last visited Nov. 20, 2023).

Even when the NBA did start to keep rebounding statistics, its tabulations in this and other categories were erratic.⁵³¹ Johnny Macknowsky, who played in the first two seasons of the NBA, recalled, “Defensive records, rebounds and assists were not accurately, systematically or scientifically maintained in those days.”⁵³²

The NBA continued to have a poor reputation for official scoring during the 1950s, 1960s, and 1970s.⁵³³ As a result, a number of the *NBA Guides* during this period were riddled with errors, which the league was at pains later to try to correct.⁵³⁴ The actions of some NBA scorekeepers consequently call into question the legitimacy of many of the league’s older numbers. In the 1960s, the Boston official scorer was notorious for padding Bill Russell’s rebounding statistics at home games.⁵³⁵ By the same token, on the road, Wilt Chamberlain was often credited with fewer rebounds and assists than were warranted.⁵³⁶

In the mid-1970s, the Buffalo Braves’ official scorer was exceedingly generous in tallying assists for the team’s star Ernie DiGregorio.⁵³⁷ Similarly, the Washington Bullets’ official scorer was seen as inflating the rebounding numbers for hometown hero Wes Unseld.⁵³⁸ Celtics GM Red Auerbach was outraged, “It’s ridiculous. Every time a guy touches the ball they give him a rebound.”⁵³⁹ Similar concerns surrounded the assist totals of the

531. The NBA officially acknowledges BAA records even though BAA’s official scoring was often dreadful. See ROSEN, *supra* note 463, at 73, 90, 93, 144.

532. ISAACS, *supra* note 403, at 130.

533. See, e.g., Linn, *supra* note 398, at 84; Koppett, *supra* note 409; LEONARD KOPPETT, *THE ESSENCE OF THE GAME IS DECEPTION* 221 (1973); Email from Michael Hamel, Aug. 20, 2022. For example, during this period, newspaper box score data and official numbers from the NBA are sometimes different. See Hamel email, *supra* note 533; Michael Hamel, Comment to *ABA Box Scores*, APBR (Jan. 21, 2015, 4:06 PM), [<https://perma.cc/4YHM-FVDF>]. In the 1950s, some NBA home teams had their own employees keep score. Others paid journalists to perform the task. The unsurprising result was inconsistency. See Linn, *supra* note 398, at 84.

534. See Author Interview with Nick Curran, former NBA public relations executive, at 4 (Nov. 29, 2021) (transcript on file with author).

535. See BILL LIBBY, *GOLIATH* 74 (1977); see also PAT WILLIAMS AND GORDON JONES, *TALES FROM THE PHILADELPHIA 76ERS* 74 (2007).

536. See LIBBY, *supra* note 535, at 74; see also Jack Kiser, *In Chicago, Wilt Just Doesn’t Get Enough Credit*, PHILA. DAILY NEWS, Dec. 16, 1961, at 32.

537. See CHARLES ROSEN, *GOD, MAN AND BASKETBALL* JONES 19 (1979).

538. See *id.*; SULLIVAN, *supra* note 306, at 36.

539. SULLIVAN, *supra* note 306, at 36; see also ARNOLD “RED” AUERBACH AND JOE FITZGERALD, *RED AUERBACH*, 164 (1977).

2024 *SETTING THE RECORD STRAIGHT* 707

Bullets’ Kevin Porter.⁵⁴⁰ Groused Auerbach, “Assists? They don’t mean the same thing in any two cities in the league.”⁵⁴¹

And, of course, a final question remains. If ABA statistics were kept in such a slipshod manner, why would the older league have even informally recognized them in their annual *NBA Guides*?

Thus, while the ABA had systematic problems with its recordkeeping during its first season, those matters have been largely resolved by researchers. Moreover, the NBA itself long suffered from its own share of scorekeeping problems including during the same era as the ABA.

D. Incorporating ABA Numbers Would Distort NBA Statistics

A fourth potential counterargument could be that recognizing the ABA’s records might create inconsistencies within the NBA statistical canon. For instance, the ABA’s use of a three-point line prior to the NBA implementing the rule in 1979 could be seen as distorting scoring numbers; in effect, statistically mixing apples and oranges.⁵⁴²

This potential counterargument sounds more compelling than it really is. After all, the NBA has apparently not had a problem reconciling its *own* statistics before and after it adopted the three-point rule. Furthermore, the NBA modified the shot’s distance in 1994, the league moving the line in by twenty-one inches for three seasons.⁵⁴³ Thus, the NBA record book is already inconsistent with respect to three-point shooting, having played several decades with it and several decades without it as well as having three seasons with a different distance.

In addition, the NBA has made numerous rule modifications over the years that have had a profound influence on its statistics. The NBA adopted the twenty-four-second shot

540. See SULLIVAN, *supra* note 306, at 36; see also ROSEN, *supra* note 537, at 19.

541. KOPPETT, *supra* note 533, at 221; see also CHARLEY ROSEN, PERFECTLY AWFUL 146 (2014).

542. See Jasner, *supra* note 22; Thorn Interview, *supra* note 303, at 22; @Watchagame, TWITTER (Dec. 12, 2022) (on file with author) (replying to @abathrowbacks); @RebBrownell, TWITTER (Dec. 26, 2022) (on file with author) (replying to @watchagame and @abathrowbacks).

543. See Zachmo Marsupalami, *Why Michael Jordan Was a Better 3-Point Shooter than Kobe Bryant*, BLEACHER REPORT (Sept. 13, 2011), [<https://perma.cc/3HJG-FF6M>].

clock in 1954 which dramatically increased scoring.⁵⁴⁴ It increased the width of the lane in 1951 and 1964 to make it more challenging for big men to rack up points.⁵⁴⁵ These rule changes, to name but a few, modified how the game was played and, consequently, had a major impact on the NBA record book.⁵⁴⁶

Concern could also be raised that the ABA tabulated offensive rebounds, blocks, and steals before the NBA did and that this would further throw off the total combined numbers. Again, this is a bridge the NBA has already crossed. It will be recalled that rebounds were not calculated at the beginning of the NBA but that has not kept the league from presenting various rebounding records even without the 1949-50 and 1950-51 campaigns.⁵⁴⁷ The same is true of blocks and steals before 1973-74, the league simply noting that it did not keep such records before this time.⁵⁴⁸

Notably, other major professional sports have accepted and integrated statistics from rival leagues even though they had different rules that affected recordkeeping. For example, since 1973, the AL has had a rule permitting pitchers to be replaced at the plate by designated hitters. From 1973 until 2022 (with some exceptions) the NL did have not such a rule.⁵⁴⁹ As a result of this difference, individual and team statistics (e.g., earned run average, runs batted in, and runs scored) are not wholly comparable between leagues for a nearly fifty-year period. Nonetheless, the two leagues recognize the statistics of the other.⁵⁵⁰

In the nineteenth century, the NL had a number of rules that were different from its rivals that had an impact on statistics (e.g., the permissibility of overhand pitching, the distance

544. See PETERSON, *supra* note 141, at 181-82.

545. See *id.* at 180; Mike Sorensen, *NBA Rules Have Adapted over the Years to Make the Game More Fun for Players, Fans*, DESERET NEWS (Feb. 21, 2019, 3:57 PM), [<https://perma.cc/5T9Y-AKFY>].

546. See PETERSON, *supra* note 141, at 181.

547. See, e.g., *Players: Official Leaders, Rebounding*, NBA, [<https://perma.cc/CEJ5-WMPD>] (last visited Nov. 30, 2023).

548. It has been asserted that, since ABA intra-game play-by-play stat sheets cannot be found, certain records (e.g., most field goals made in a row during a single contest) could not be tabulated for the defunct league. See Hubbard, *supra* note 14. Assuming that all NBA sheets are available, that would be unfortunate. But it would be no different from the NBA's inability to track blocked shots, steals, and offensive rebounds prior to 1973-74, data which the ABA recorded.

549. See *Designated Hitter Rule*, MLB, [<https://perma.cc/4MV4-E4YK>] (last visited Nov. 30, 2023).

550. See *Stats*, MLB, [<https://perma.cc/7SGC-QPGQ>] (last visited Nov. 30, 2023).

between the pitcher and home plate, and the outcome when a batter was hit by pitch).⁵⁵¹ Despite these varying rules, MLB accepts statistics from the AA, UA, and PL. Similarly, the NFL acknowledges AFL statistics even though the latter permitted two-point conversions and the former did not during their ten-year interleague rivalry.⁵⁵²

And, of course, the same nagging question remains for opponents of ABA statistics. If adding ABA statistics would be so distorting to the NBA canon, why did the NBA include a section in past *NBA Guides* with combined NBA-ABA statistics?

For these reasons, the NBA recognizing ABA numbers would not distort the surviving league's statistics any more than steps the NBA has already taken on its own. Furthermore, adopting ABA statistics despite differing rules would once again be consistent with the experience of other major sports leagues.

E. Recognizing ABA Statistics Could Re-open the NBA-ABA Settlement

It could be contended that formally recognizing ABA statistics might involve modifying the 1976 NBA/ABA settlement. This is also unpersuasive. First, the interleague settlement documents were silent on ABA statistics, so it is difficult to see how the NBA acknowledging ABA numbers would necessarily re-open the settlement. Second, the NBA recently agreed essentially to pay for the pensions of a number of former ABA players even though the settlement ensured the league did not have to do so.⁵⁵³ Third, as part of the settlement, the four surviving ABA teams agreed forever to grant the owners of the defunct ABA Spirits—the Silna brothers—one seventh of the television revenue from the Nets, Spurs, Pacers, and Nuggets.⁵⁵⁴ In 2014, the league basically negotiated a modification to the settlement in order to buy out the former

551. See John Thorn, *The Origins of the Designated Hitter*, OUR GAME (Mar. 7, 2016), [<https://perma.cc/K2QA-AUSZ>]; John Thorn, *A Brief History of the Pitching Distance*, OUR GAME (Feb. 27, 2015), [<https://perma.cc/86SW-RA6Q>]; John Thorn, *Pitching: Evolution and Revolution*, OUR GAME (Aug. 6, 2014), [<https://perma.cc/DK3X-N6QM>]; *American Association (19th Century)*, BASEBALL REFERENCE, [<https://perma.cc/E7WJ-3AP5>] (last visited Nov. 15, 2023).

552. The NFL subsequently adopted two-point conversions in 1994.

553. See Burke, *supra* note 44.

554. See *id.*

owners.⁵⁵⁵ The idea that the interleague settlement is somehow inviolate cannot withstand scrutiny and is not a serious obstacle to the NBA recognizing ABA statistics.

F. Recognizing ABA Statistics Could Draw the Ire of NBA Legends

A final potential reason for the NBA not wishing to acknowledge ABA statistics could be that it might draw the ire of former NBA stars or even current players. Adding ABA numbers to the statistical rolls would involve modification of a number of career and regular-season leaderboards.⁵⁵⁶

For example, with ABA statistics acknowledged, Erving would move up to eighth on the career scoring list and Malone to ninth.⁵⁵⁷ Their rise means others must fall. The Doctor's and Malone's elevation would mean that Shaquille O'Neal drops two slots to number ten. Elvin Hayes, Hakeem Olajuwon, and Oscar Robertson would each drop two slots to numbers fourteen, fifteen, and sixteen respectively.⁵⁵⁸ These stars might not appreciate their "drop" in status and the NBA could receive blowback from some of its all-time greats.

However, it is far from certain that NBA legends would in fact protest this decision.⁵⁵⁹ While Erving and Issel have publicly advocated for ABA statistics to be recognized,⁵⁶⁰ no former or current NBA player has stepped forward as the public face of opposition to the NBA taking this step. And none seems to have protested the league's tacit acceptance of combined NBA-ABA numbers in past *NBA Guides*. In the case of MLB adopting Negro

555. *See id.*

556. *See* Tarter Interview, *supra* note 36, at 25; *see generally* Arnett, *supra* note 22. Modification of career recordholders in this respect is hardly novel. MLB did so in 1968 and is doing so again with the adoption of Negro League statistics. The NFL experienced this same transition in 1970. *See* Rathet, *supra* note 11. Sports statistics are constantly modified by leagues as new data become available. *See, e.g.,* Gary Gillette, *Introduction*, ESPN BASEBALL, *supra* note 527, at xi-xvi.

557. *See* Arnett, *supra* note 22.

558. *See id.*; *NBA & ABA Career Leaders and Records for Points*, BASKETBALL REFERENCE, [https://perma.cc/2UP6-GGMJ] (last visited Jan. 6, 2024). *Stats*, NBA, [https://perma.cc/V35P-425G] (last visited Nov. 15, 2023).

559. Including ABA statistics in some cases would actually help players who only played in the NBA. For example, Gilmore ranks fifth all time in career NBA field goal percentage. When NBA and ABA statistics are merged, he drops to twelfth place. *See NBA & ABA Career Leaders and Records for Field Goal Pct*, BASKETBALL REFERENCE, [https://perma.cc/K7W7-9RK7] (last visited Nov. 15, 2023).

560. *See supra* note 14.

League statistics, no former or current baseball player seems to have publicly condemned this analogous decision even though integrating Negro League statistics would appear to have a much larger impact on MLB all-time records than would the NBA integrating ABA numbers.⁵⁶¹ Indeed, the response from current and former baseball players seems to have been positive.⁵⁶² Thus, this potential concern is speculative at best and would appear unlikely.

VII. CONCLUSION

Does Dr. J have four MVPs under his belt or one? Does he have one championship ring or three? These are statistical questions, but they also involve matters of morality, history, and logic. In effect, this trinity bumps up against the raw practicalities of sports mergers and acquisitions and to this day manifests a defect in NBA operating procedures—what amounts to an erasure of a major part of the ABA’s historical legacy. The result is that, while MLB is busy integrating Negro League statistics into its official canon, the NBA stubbornly refuses to fully acknowledge the historical legacy of a rival league with an important African-American cultural legacy all its own. Just as Negro League players distinguished themselves on the field, so too did ABA players on the court. Yet, the NBA continues to maintain this posture even though it cannot withstand serious scrutiny.

As such, it is long past time for the NBA to officially acknowledge the statistics of the ABA; this “Black” league which changed the landscape of professional basketball forever, bequeathed four franchises and helped pave the way for nine others, and left an important mark on contemporary culture. In this regard, the lens needs to be pulled back on the issue of ABA statistics, viewing it less as a matter of sports commentary and more as a question of American social history. Last year, the NBA finally took action to help secure proper pensions for former ABA players. By officially recognizing ABA statistics, the NBA

⁵⁶¹ Cf. Sheinin, *supra* note 52; Mike Petriello, *How Negro Leaguers May Alter Leaderboards*, MLB (Dec. 17, 2020), [<https://perma.cc/PS66-XXV>]

⁵⁶² See *Former Orioles Star Adam Jones Assists with Expanded Coverage of the Negro Leagues*, BALT. SUN (June 15, 2021, 9:33 AM), [<https://perma.cc/8R7F-FHSC>]; Donald Hunt, *Baseball Reference to Include Negro Leagues Stats with American and National*, PHILA. TRIBUNE (June 15, 2021), [<https://perma.cc/62BH-452F>].

712

ARKANSAS LAW REVIEW

Vol. 76:4

can help secure another matter of great importance to the former players of the disbanded league: their historical legacy.