

# Here We Go Again

By Reg P. Wydeven  
January 30, 2010

In the early 1990s, a man earned one of the most coveted jobs in the world. He enjoyed tremendous success in this position, but retired after 17 years. The job was given to a young man who had waited on the sidelines for years, waiting to get his chance.

Then things got complicated. The recent retiree went out on the top of his game, and quickly realized he wanted his old job back. The young man didn't want to give up his new position, so the veteran took a new job. The nation soon grew divided as it chose sides between beloved legend and rising star.

While this sounds like the Green Bay Packers drama that played out between Brett Favre and Aaron Rodgers, I'm actually describing NBC's late night spectacle between Jay Leno and Conan O'Brien.

In 2004, NBC was concerned that Conan O'Brien would leave the network when his contract expired in 2009. Accordingly, NBC arranged that last year, Jay Leno would retire as host of 'The Tonight Show' and the reins would be handed over to O'Brien.

Of course, when 2009 came, Leno was on top of the ratings and didn't want to retire. So NBC gave Leno an hour-long prime time show at 10:00. The experiment failed, as ratings for Leno's show tanked and local NBC affiliates lost 25% of their viewership leading into their late local news. NBC attempted to fix the problem by bumping 'The Tonight Show' back to 12:05 a.m. and giving Leno a half-hour show at 11:35.

O'Brien balked at the idea, stating the move would "seriously damage what I consider to be the greatest franchise in the history of broadcasting." Both sides agreed to part ways and reached a settlement before O'Brien hosted his last 'Tonight Show' on January 22. Leno will resume his old job on March 1, after the Winter Olympics. While NBC unfortunately can't win an Emmy for the riveting off-air drama, for a lawyer, the intriguing part of this story starts with the settlement agreement.

In the contract, NBC agreed to pay O'Brien \$33 million, while his 200-member staff will receive \$12 million in severance pay. O'Brien also has a non-compete clause, meaning he cannot appear on another network for seven months, the length of his tenure as host of 'The Tonight Show.' Both sides agreed to a "non-disparage" clause so they cannot speak poorly of one another.

If O'Brien hosts a new show in September, there is a set-off clause in the contract as well. Whatever his new gig pays him during the next 2½ years (the amount remaining on O'Brien's contract as 'Tonight' host) will be reduced from what NBC owes him.

The most interesting legal issue involves the intellectual property rights to the comedy bits O'Brien used on 'Tonight', such as Triumph the Insult Comic Dog, the Masturbating Bear and Vomiting Kermit the Frog. NBC owns the rights to the bits, many of which were carried over from O'Brien's days as host of 'Late Night.' However, even O'Brien concedes: "Isn't it great to live in a country where a cigar-smoking dog puppet and a bear that masturbates are considered intellectual property?"

Many speculate that if O'Brien does host a new show, he will change the bits just enough to not violate the agreement, such as introducing "The Bear That Pleasures Himself" and "The Dog Puppet That Makes Fun of People." David Letterman did the same thing when he left NBC for CBS after losing 'The Tonight Show' to Leno.

I may just start going to bed earlier.