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Arbitration of Grievance and Salary Disputes in Professional Baseball Evolution of a System of Private Law

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ARBITRATION OF GRIEVANCE AND SALARY DISPUTES IN PROFESSIONAL BASEBALL: EVOLUTION OF A SYSTEM OF PRIVATE LAW

Labor arbitration is a substitute for economic force.[1] The labor arbitrator is selected by the parties to a collective bargaining agreement to administer their private system of self-government,[2] and his decisions can vitalize the employment relationship. Too many unforeseeable problems exist in such a relationship to make the words of a contract the exclusive source of obligations.[3] As the Supreme Court has recognized,

> [a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.[4]

The provisions for labor arbitration which now exist in the Basic Agreement between the twelve teams composing the Na-

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[1] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960); Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. (n.s.) 13, 14 (1965).

[2] Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245 (1963); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955). In the words of Shulman:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.

Id. at 1016.

[3] Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959). Cox argues that a collective bargaining agreement cannot include all of the rules which may govern an employment relationship without becoming unwieldy. Therefore, he explains, a common law of the shop evolves in an industrial community, and this unwritten code of behavior must be considered in interpreting and applying the terms of a collective bargaining agreement.

[4] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). The decision rendered in *Warrior & Gulf* was one of three landmark decisions issued by the Supreme Court on June 20, 1960, on the matter of labor arbitration. The other cases composing the "Steelworkers Trilogy" were United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). With these three rulings, the Court elevated labor arbitration and the role of the arbitrator to an unprecedented status.

tional League of Professional Baseball Clubs, the twelve teams composing The American League of Professional Baseball Clubs, and the Major League Baseball Players Association,[5] demonstrate that the employment relationship between club owners and baseball players has matured. It has taken many years for unionism to develop firm roots in the field of professional sports, but the Major League Baseball Players Association, organized in 1954, has proven its effectiveness in meeting the needs of its members. Through collective bargaining, the players have realized economic benefits in the form of a pension plan, a minimum salary level, life and disability insurance, and increased expense allowances.[6] But perhaps the most significant modification in the employment relationship that has been a direct result of collective bargaining involves freedom, in addition to financial gains. Major league baseball players now have greater freedom from the unilateral imposition of discipline to the extent that arbitration has replaced the power of the baseball commissioner to resolve all grievance disputes. Moreover, major league baseball players are, for the first time, at liberty to submit their salary disputes to arbitration. Although baseball is exempt from the antitrust laws,[7] a measure of freedom has been introduced into the parties' system of self-government by the implementation of grievance and salary arbitration. This Note will trace the maturation of labor relations in professional baseball and will attempt to assess the protection which labor arbitration offers to the interests of the players, the club owners, and the fans of professional sports.

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[5] 1973-1975 Basic Agreement Between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association, art. V(D.), Salary Arbitration, and art. X, Grievances Procedure [hereinafter cited as Basic Agreement]. *See also* Memorandum Re Administration of Salary Arbitration Procedure, on file at the *Cornell Law Review.*

[6] Personal interview with John J. Gaherin, Player Relations Committee, Major Leagues of Professional Baseball Clubs, in New York City, Jan. 31, 1975 [hereinafter cited as Interview with J. Gaherin].

[7] In Flood v. Kuhn, 407 U.S. 258 (1972), the Supreme Court upheld the longstanding exemption of professional baseball from the antitrust laws. In reviewing Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), and Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), the Supreme Court stated that the exemption of professional baseball from the antitrust laws was an established aberration. It was an aberration because other professional sports had been held subject to the antitrust laws. However, the Court refused to subject professional baseball to antitrust regulation, reasoning that Congress had acquiesced in baseball's status (*see* note 21 *infra*) and that the exemption was entitled to the benefit of *stare decisis.* Thus, the Court upheld the constitutionality of baseball's reserve system, which indefinitely binds a player to the club that originally signs him until he retires or his contract is assigned. If a player's contract is assigned to another club, the assignee gains all the reservation rights.

I

SURVEY OF THE HISTORY OF COLLECTIVE BARGAINING IN PROFESSIONAL BASEBALL

Unionism and collective bargaining are not new to professional baseball. They have sprung up in the past as expressions of player dissatisfaction, but only to live for ephemeral periods. Baseball's first "union" was organized in 1885 by Billy Voltz, a sports editor and minor league manager.[8] Known as the National Brotherhood of Professional Baseball Players, it was originally a benevolent and protective association, consisting of approximately 200 players who paid monthly assessments of five dollars to aid sick and needy members and to provide for death benefits. During the first year of its existence the Brotherhood remained a secret organization, and did not attempt to engage in collective bargaining until 1886, when the National League adopted a rule setting $2,000 as a maximum salary, although under-the-table deals for additional money were frequently made.[9] In 1887, the Brotherhood recognized the reserve rule as part of the players' contracts,[10] but was unable to prevent owners from abusing the rule through blacklisting.[11] The following year, when salary grievances mounted, the players rejected calling a strike and instead attempted to form their own Players' League.[12] By 1890, the Brotherhood no longer existed.

[8] P. GREGORY, THE BASEBALL PLAYER 182 (1956). The leader of the "union" was John Montgomery Ward, who pitched for the Providence Grays in 1878, and paid his way through law school with his earnings from baseball.

[9] *Id.* at 182, 184.

[10] *Id.* at 183.

Early in the history of baseball, players were able to jump from one team to another at will. To limit player desertions, a group of National League officials held a secret meeting in Buffalo on September 30, 1879, to formulate and adopt the reserve rule. As adopted at that meeting, the reserve rule allowed each club to protect five players for the year 1880 from raiding by other teams. It was also hoped that the reserve rule would hold down salaries by preventing reserved players from accepting better offers. In 1883, the number of players reserved by each club was increased from five to eleven. In 1887, the number was increased to 14, and soon thereafter the reserve rule, as recognized by the Brotherhood, included all players under contract. *Id.* at 150-51. For further discussion of the reserve clause, see references cited in note 21 *infra*.

[11] Owners commonly suspended players with whom they had disputes. Drunkenness, absence, and insubordination were the reasons generally given, but frequently players were suspended for lesser offenses, sometimes for arguing over salary. Because the suspended man was reserved, he could not be bired by other clubs. *Id.* at 151.

[12] "This was an era in which the ideal of workers' cooperatives was popular; for example, during its first fifty years the New York Philharmonic Symphony Orchestra was a cooperative of the musicians who, like baseball players, were called the 'Philharmonics.'" *Id.* at 184.

The League Players' Protective Association was organized in 1900 and vanished by 1903. When the Protective Association came into existence there was only one authorized baseball league, the National League. A struggle was underway, however, as the outlaw American League sought recognition from the commissioner of baseball. The National League granted concessions to the Association in 1901 in exchange for a promise that its members would honor their contracts and not jump to the outlaw league; but the Association was unable to prevent its members from jumping to the higher-paying American League. Once the American League was officially recognized, the Protective Association was ignored by the players and disappeared soon thereafter.[13]

Ten years later, in 1912, the Baseball Players' Fraternity was organized.[14] As one writer has remarked:

> The owners at first paid little attention to the Fraternity, just as they had at first ignored the Brotherhood and the Protective Association, but, as in the two earlier cases, the existence of a new outlaw, the Federal League, forced them to reckon with the union in 1914. During the Federal League War the two major leagues recognized the Fraternity in the hope that this would make players respect the reserve clause in their contracts and ignore the high salaries supposedly offered by the outlaw. But this strategy proved as futile as it had in 1901 when the National League belatedly made concessions to the Protective Association in order to stave off the recruitment of the American League. Failing to prevent its members from violating the reserve clause, the Fraternity was forced to claim neutrality in the baseball war. However, it successfully agitated for certain reforms.[15]

When the Federal League died in 1915, the Fraternity began to lose its following among the players and its life was terminated in 1918 following an unsuccessful strike.[16]

Baseball's fourth union was born in 1946 when the American Baseball Guild was registered as an independent labor organization by Robert Murphy, a Boston lawyer.[17] The Guild was formed in response to five complaints: (*1*) that players were the property of the club that originally signed them under the reserve system; (*2*) that players never received any of their sales price when sold to another club; (*3*) that players were not compensated for the spring

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[13] *Id.* at 187-88.

[14] The Baseball Players' Fraternity was organized by David L. Fultz, a former baseball player and practicing attorney in New York. *Id.* at 188-89.

[15] *Id.* at 190.

[16] *Id.*

[17] *Id.* at 192.

training season; (4) that player contracts could be cancelled by the clubs on short notice but not by the players; and (5) that there was no minimum salary in professional baseball. The Guild was little more successful in realizing its goals than were its predecessors and lasted less than one year.[18]

Thus, only since 1954, with the formation of the Major League Baseball Players Association, has there been a union in professional baseball with the power to survive.[19] And it is only since 1966, with the election of Marvin Miller as director, that the Association has been effective in negotiations.[20] Since 1966, the battle cry of the Association has centered on the reserve system,[21] although concessions, so far, have come only on other major issues.

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[18] *Id.* at 192-94; Krasnow & Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749, 762-64 (1963).

[19] The growth of unionism and collective hargaining, which occurred in professional baseball in the 1960's, was experienced in the other major professional team sports of basketball, hockey, and football in varying degrees. The threat of a football players' strike in 1968 over pension fund provisions led club owners to contribute three million dollars to the player pension fund. The players' association in basketball, led by Oscar Robertson and attorney Lawrence Fleischer, hegan in the early 1960's by demanding that clubs increase their contributions to the pension fund and that certain contract provisions, including the option clause, which was similar to haseball's reserve system, be subject to bargaining. In hockey, the present players' association was formed in 1967, and has achieved progress in the areas of wages, pensions, and working conditions.

[20] Interview with J. Gaherin. Marvin Miller brought to the labor relations scene in professional baseball his years of experience with the Steelworkers Union.

[21] The basis for the exemption of basehall's reserve system from the antitrust laws has heen the subject of numerous congressional investigations. *See generally Hearings on S. 950 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on S. 2391 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 88th Cong., 2d Sess. (1964); *Hearings on S. 3483 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 86th Cong., 2d Sess. (1960); *Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 86th Cong., 1st Sess. (1959); *Hearings on H.R. 10378 and S. 4070 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 85th Cong., 2d Sess. (1958); *Hearings on H.R. 5307 et al. Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 85th Cong., 1st Sess. *(1957).*

For scholarly analysis of the antitrust ramifications of the reserve system in professional sports, see Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System,* 25 BAY. L. REV. 1 (1973); Foley, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?,* 22 CATH. U.L. REV. 403 (1973); Jacobs & Winter, *Antitrust Principles and Collective Professional Sports,* 58 YALE L.J. 691 (1949); Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis,* 12 B.C. IND. & COM. L. REV. 737 (1971); Note, *Baseball Players and the Antitrust Laws,* 53 COLUM. L. REV. 242 (1953); Note, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemption,* 7 IND. L. REV. 541 (1974); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism,* 12 WM. & MARY L. REV. 859 (1971); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws,* 62 YALE L.J. 576 (1953).

In view of the fact that congressional investigations and judicial decisions have failed to

II

RESOLUTION OF GRIEVANCE DISPUTES

A. *Establishing a Procedure for Grievance Arbitration*

The establishment of a negotiated grievance procedure in professional baseball only dates back to 1968.[22] Prior to that time, grievance disputes were "resolved" when the player paid his fine or sat out his period of suspension, in accordance with the dictates of the club or the commissioner of baseball. The player's alternative to discipline was to find a new way of earning a living.

Despite the Association's success in 1968 in negotiating a grievance procedure, it was unable to win impartial arbitration as the procedure's final step. Instead, the Association accepted the commissioner of baseball as the arbitrator of all grievance disputes.[23] It was clear, however, that the next round of negotiations would focus on replacing the commissioner with an arbitrator who would be more acceptable to the players. Richard M. Moss, counsel for the Association, explained the players' dissatisfaction with the commissioner as arbitrator in the following comment:

> In baseball, as in football, the commissioner is, of course, an employee of the club owners; he is hired by, paid by, and can, at will, be fired by the owners. He functions under very specific instructions prescribed by the owners in the documents they have agreed to among themselves relating to his office and duties. He is the chief executive officer of the industry associa-

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apply antitrust laws to professional baseball, and have failed to reduce the institutional restrictions on the mobility of athletes even where the antitrust laws have been applied, some observers have advocated increased governmental regulation of sports. In an address delivered at the University of Denver, May 31, 1974, the Honorable Arthur J. Goldberg proposed the establishment of a National Regulatory Commission of sports to cover both professional and amateur athletics.

[22] Dennis & Somers, *Arbitration of Interest Disputes,* in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING 108 (1973).

[23] *Id.* at 109. Richard Moss, counsel for the Players' Association, explains:

> As the cost of making that first basic agreement, which contained many valuable improvements from our standpoint, we agreed upon the commissioner as the grievance arbitrator for two years. We did so, quite frankly, because at that time and place, there were severe limits to our bargaining power. It had been only a year since the players had finally decided to reorganize their classic company union in an effort to make it into an effective bargaining agent, and the whole idea was still somewhat new. I don't know what, if any, issues would have been strike issues in 1968, but impartial arbitration clearly was not one of them. Other matters, as to which we did make significant progress in the negotiations, were considered much more important, for there was, even so recently, still a general lack of appreciation of how basic the issue was. We rationalized our defeat by deciding we would process grievances to arbitration, and we were confident that the record of that experience would conclusively demonstrate the importance of impartiality.

Id. at 110.

> tion, and there's nothing wrong with that—it's a perfectly legitimate and respectable role. But to provide, as did the players' contracts prior to 1968, that he is also the exclusive judge of disputes arising between the employers and their employees is very much the same as an apartment lease stating that any dispute between the landlord and the tenant will be resolved by the president of the landlord's industry association, and for that distinct privilege, the tenant will refrain from using any other avenue for redress.[24]

Ultimately, only two grievance disputes were heard by the "partial arbitrator," Commissioner Eckert, who decided one for the player and one for the owners.[25]

Before another round of negotiations had commenced, a new commissioner was hired by the owners to replace General Eckert. The new commissioner was Bowie Kuhn, a lawyer who had represented the National League in the 1968 negotiations.[26] Since there could be little doubt that the new commissioner would appear unduly biased toward the owners,[27] an impartial arbitrator was substituted for the remaining cases to be heard under the first Basic Agreement.[28]

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[24] *Id.* at 109-10.

[25] Richard Moss has related his unusual, and somewhat amusing, experience with what he describes as "partial" arbitration:

> When I entered the hearing room, which was a conference room in the commissioner's office, I was confronted by a battery of lawyers ou the other side of the table. Now, as all of you who are advocates know, there is no more delightful situation in an arbitration hearing than to be massively outmanned by opposing counsel. You need not resort solely to your wits. You can rely on the sympathy of the arbitrator, and on the confusion of the presentation that is sure to come in rebuttal to yours. Moreover, you can attack the opposition individually, or collectively, or in small groups, as it may suit your purpose at any particular time, and you can usually encourage two or three of them to speak out simultaneously, to the utter disgust of the arbitrator. But on that day it occurred to me that the usual advantages may not be applicable when the arbitrator has the same employer as all those lawyers.
>
> . . . Seated in the center was our arbitrator, the commissioner, who was then General William Eckert. On his right was the commissioner's counsel, the distinguished Paul Porter of Washington . . . .
>
> The hearing began when Mr. Porter handed the commissioner some notes on a yellow legal pad, and the arbitrator read a statement concerning the identity of the cases before him . . . . At that point I interrupted to voice an objection. . . . Using my most sincere tones, I said, "It is you, General Eckert, who the parties, after long and difficult negotiations, have selected to fill that role, and, therefore, I respectfully request that you ask all the others at the head table to excuse themselves."
>
> There followed a short period of silence. Mr. Porter jotted down something on his yellow pad and passed it to General Eckert, who read, "I have considered your argument and have decided that it is without merit—your motion is denied."

Id. at 110-12.

[26] *Id.* at 112-13.

[27] *See* note 84 and accompanying text *infra.*

[28] Both sides now agree that David Cole served admirably as baseball's first impartial arbitrator. Dennis & Somers, *supra* note 22, at 113. Interview with J. Gaherin.

In 1969, baseball's system of self-government was subjected to the scrutiny, and castigating comments, of the National Labor Relations Board.[29] Upon a petition filed under section 9(c) of the National Labor Relations Act[30] by an association of National League umpires, the Board decided to assert jurisdiction over professional baseball as an industry in or affecting commerce.[31] Management had argued that the Board, as a matter of policy, should refuse to assert jurisdiction pursuant to section 14(c) of the Act.[32] It was management's contention that because of baseball's system of self-regulation, a labor dispute would be unlikely to have a substantial effect on interstate commerce. It was also contended that application of the National Labor Relations Act to professional baseball would be contrary to national labor policy,

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[29] American League of Professional Baseball Clubs and Association of National Baseball League Umpires, 180 N.L.R.B. 190 (1969).

[30] Section 9(c)(1) provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
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> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
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> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1970).

[31] The Board's jurisdiction under the National Labor Relations Act is based upon the commerce clause of the Constitution, and is coextensive with the reach of that clause. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

In 1946, the American Baseball Guild petitioned the NLRB for an election, and was refused on the ground that baseball was not "commerce." N.Y. Times, Aug. 8, 1946, at 25, col. 3.

[32] Section 14(c)(1) provides:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

29 U.S.C. § 164(c)(1) (1970) (emphasis in original).

since Congress had already sanctioned baseball's system of self-government.[33]

In rejecting management's contentions, the Board supplied the Association with additional ammunition for the upcoming 1970 negotiations. Finding that assertion of jurisdiction over professional baseball would best serve national labor policy, the Board reasoned:

> Baseball's system for internal self-regulation of disputes involving umpires is made up of the Uniform Umpires Contract, the Major League Agreement, and the Major League Rules, which provide, among other things, for final resolution of disputes through arbitration by the Commissioner. The system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves. We do not believe that such a system is likely either to prevent labor disputes from arising in the future, or, having once arisen, to resolve them in a manner susceptible or conductive to voluntary compliance by all parties involved. Moreover, it is patently contrary to the letter and spirit of the Act for the Board to defer its undoubted jurisdiction to decide unfair labor practices to a disputes settlement system established unilaterally by an employer or group of employers.[34]

There could be no clearer message as to what should be discussed in future negotiations, and after three months of bargaining, culminating in the 1970 Basic Agreement, the owners' representatives finally agreed to establish a tripartite arbitration panel, consisting of two partisan arbitrators and a permanent impartial chairman.[35]

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[33] 180 N.L.R.B. at 191.

[34] *Id.* (footnotes omitted).

[35] Since 1970 John Gaherin has served as the management arbitrator and Marvin Miller as the union arbitrator. The first permanent chairman was Lew Gill, who resigned in 1972. The present impartial chairman is Peter Seitz. Interview with J. Gaherin.

Article X(A)(10) of the 1973 Basic Agreement provides in full:

> "Arbitration Panel" shall mean the tripartite panel of arbitrators empowered to decide Grievances appealed to arbitration. One arbitrator shall be appointed by the Association, one arbitrator shall be appointed by the Clubs and the impartial arbitrator, who shall serve as the Chairman of the Panel, shall be appointed by agreement of the two Party arbitrators. In the event the Party arbitrators are unable to agree upon the appointment of the impartial arbitrator, they jointly shall request that the American Arbitration Association furnish them a list of prominent, professional arbitrators. Upon receipt of said list, the Party arbitrators shall alternate in striking names from the list until only one remains. The arbitrator whose name remains shall be deemed appointed as the impartial arbitrator.

B. *Professional Baseball's Experience with Impartial Grievance Arbitration*

The significance of the establishment of the tripartite arbitration panel should not be minimized. It involved an historic loosening of management's control over the lives of players—control which had been inherent in the commissioner system. Although the concept of a tripartite arbitration panel is not unique to baseball, it is particularly well-suited to the labor relations demands of the sport. Although an impartial arbitrator might not be sufficiently sensitive to some of the more subtle problems which could arise, he could benefit from the partisan arguments framed by fellow panel members who may be closer to the sport.[36] Decisions of the arbitration panel are made by majority vote or, with the agreement of the partisan arbitrators, by the impartial arbitrator alone.[37]

It would, of course, be unproductive for the partisan arbitrators merely to reargue for their respective sides. But a degree of continuity may be fostered by the partisan arbitrators, at least until an impartial chairman learns "the rules of the shop."[38] Theoretically, a long-tenured impartial arbitrator might function well without such partisan advice. By having partisan arbitrators on the panel, however, both parties to the agreement can feel free to dismiss an unsatisfactory impartial chairman without destroying the accumulated experience gained from prior cases.[39] The presence of partisan arbitrators can also provide the impartial chairman with an opportunity to test his ideas before he must render a final decision. "As a practical matter," observes one author, "the presence of partisan members on an arbitration tribunal achieves much the same end as the equity practice of submitting a master in chancery's report to the parties before it is returned to the court. In both cases there is a desire to give the parties a chance to react before a final decision is made."[40]

All disputes between a player and his employer are resolved in accordance with the grievance procedure set forth in the Basic Agreement between the Major League Clubs and the Major League

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[36] Interview with J. Gaherin.

[37] Basic Agreement, art. X(A).

[38] *See* note 3 and accompanying text *supra*.

[39] Article X(A) of the Basic Agreement provides, in part:

> At any time during the term of this Agreement either of the Party arbitrators may terminate the appointment of the impartial arbitrator by serving written notice upon him and the other Party arbitrator. Within 30 days thereafter, the Party arbitrators shall either agree upon a successor impartial arbitrator or select a successor from an American Arbitration Association list, as set forth above.

[40] Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245, 1268 (1963) (footnote omitted).

Baseball Players Association,[41] effective January 1, 1973.[42] Under the terms of the grievance procedure, however, not every dispute will ultimately come before the tripartite panel. A complaint to the commissioner, which concerns action taken with respect to a player or players "involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball" will be heard by the commissioner, and his decision will be final and binding.[43] In addition, complaints involving a fine or suspension imposed upon a player by a league or by the commissioner "for conduct on the playing field or in the ball park" are heard and decided by the league president or the commissioner, and no further appeal is available.[44]

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[41] In professional baseball, all players must sign the Uniform Player's Contract, which sets forth the terms of the employment relationship entered into by the individual players when hired hy the club. Rule 9(a) of the Uniform Player's Contract provides:

> The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, in effect on the date of this Uniform Player's Contract, which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the Major League Baseball Players Association, provided that the Club, together with the other Clubs of the American and National Leagues and the National Association, reserves the right to modify, supplement or repeal any provision of said Agreement, Rules and/or Regulations in a manner not inconsistent with this contract or the provisions of any then existing agreement between the Major League Clubs and the Major League Baseball Players Association.

[42] However, disputes relating to the following agreements between the Players Association and the clubs are specifically excepted from the grievance procedure:

> (1) The Major League Baseball Players Benefit Plan.
> (2) The Agreement Re Major League Baseball Players Benefit Plan.
> (3) The Agreement regarding dues check-off.

Basic Agreement, art. X(A)(1)(a).

[43] *Id.* art. X(A)(1)(b). This provision provides, in part:

> Notwithstanding the definition of "Grievance" set forth in subparagraph (a) above, "Grievance" shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball. Within 30 days of the date of the action taken, such complaint shall be presented to the Commissioner who promptly shall conduct a hearing in accordance with the Rules of Procedure attached hereto as Appendix A. The Commissioner shall render a written decision as soon as practicable following the conclusion of such hearing. The Commissioner's decision shall constitute full, final and complete disposition of such complaint, and shall have the same effect as a Grievance decision of the Arbitration Panel.

[44] *Id.* art. X(C). This clause provides, in part:

> Complaints involving a fine or suspension imposed upon a Player by a League or by the Commissioner for conduct on the playing field or in the ball park shall be subject exclusively to this Section C, as follows:
>
> I. Any Player who believes that he has a justifiable complaint regarding such discipline may, within 30 days of his receipt of written notification of the discipline, appeal in writing to the League President if the discipline was imposed by him, or to the Commissioner, if the discipline was imposed by him, for a hearing. Upon the receipt of the notice of appeal, the League President or Commissioner, as the case

These limitations upon the jurisdiction of the tripartite arbitration panel are arguably not within the spirit of the National Labor Relations Act, as they deprive employees of an impartial forum for the resolution of work-related grievance disputes.[45] It can be expected that upcoming negotiations will focus upon whether to remove these limitations on the jurisdiction of the arbitration panel.[46]

With respect to those complaints which involve the integrity of, or the maintenance of public confidence in, the game of baseball, the owners may have good reason for believing that the type of forum for the resolution of such complaints could determine the very survival of the sport as it is known today. In short, club owners fear that an outside arbitrator might not deal with allegations of illegal gambling in a manner consistent with the best interests of the survival of the sport, and that another "Black Sox Scandal" could destroy the public's confidence in professional baseball.[47] A commissioner of baseball, in whose dedication to preserve the integrity of the game the public can place its confidence, is thought by the owners to be preferable to the arbitration panel as the final arbiter on such complaints.[48] But there is

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may be, shall designate a time and place for hearing the appeal, which hearing shall be commenced within 10 days from the date of receipt of the appeal. Such hearing shall be conducted in accordance with the Rules of Procedure attached hereto as Appendix A. The League President or Commissioner, as the case may be, shall render a written decision as soon as practicable following the conclusion of such hearing, and may affirm, modify, or revoke the disciplinary action originally imposed. The decision of the League President or Commissioner, as the case may be, shall constitute full, final and complete disposition of the complaint and shall have the same effect as a Grievance decision of the Arbitration Panel.

[45] *See* notes 33-34 and accompanying text *supra*.

[46] Interview with J. Gaherin.

Professional baseball is not the only major sport confronted with the problem of expanding the jurisdiction of impartial grievance arbitration. In professional football a major controversy between the players and the clubs has concerned the extent to which issues, which both sides accept as arbitrable, should be put to the commissioner, rather than to an arbitrator. Football has agreed to the arbitration of injury grievances by an outside arbitrator, but all other grievances are ultimately settled by the commissioner. In the last negotiations, the Football Players Association sought to enlarge the scope of outside arbitration. The clubs made some proposals of modification but no agreement was reached. Letter from Theodore W. Kheel, Labor Counsel to the Management Council of the National Football League, New York, New York, to the *Cornell Law Review*, January 29, 1975. *See also* Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 LAW & CONTEMP. PROB. 3, 18 (1973).

[47] Interview with J. Gaherin.

When Judge Kenesaw Mountain Landis became baseball's first commissioner, one of his initial acts was to blacklist permanently eight players of the Chicago White Sox who were allegedly involved in the "Black Sox scandal"—the "throwing" of the 1919 World Series to Cincinnati. N.Y. Times, March 13, 1921, at 16, col. 1. One of his last acts as commissioner was to remove a major league club owner for gambling on his club's games. N.Y. Times, Nov. 24, 1943, at 24, col. 1.

[48] Interview with J. Gaherin.

little reason to believe that the general public would be reluctant to place its confidence in the impartial chairman of the arbitration panel. There is, however, one problem that would have to be resolved before extending the panel's jurisdiction to such cases: would the commissioner of baseball have the power and authority to restrict the members of the arbitration panel from releasing to the media information concerning allegations of illegal gambling? Rather than enter this uncertain territory, with its constitutional implications for freedom of speech and freedom of the press, management is likely to continue the struggle to preserve this domain for the commissioner.[49]

With respect to complaints involving a fine or suspension imposed upon a player by a league or by the commissioner for conduct on the playing field or in the ball park, the club owners' arguments for retaining these complaints for final determination by the league president or the commissioner are unpersuasive. From the players' point of view, it is a futile exercise to appeal the imposition of a penalty to the very person who imposed that penalty in the first place. It is politically impossible for a union to settle for the judge's judging himself.[50] Management's counter-arguments, framed in terms of the need for discipline and efficiency, fail to take account of the player dissatisfaction that forms the nucleus of strong support for the union.

Consider this example suggested by management's representative.[51] A player becomes involved in an altercation with an umpire and is ejected from the game. Umpires work for the league and, in effect, represent the presence of the league president on the field. Although the league president should be objective, he is likely to fine or suspend the player in order to show support for the umpire's right to exert his authority. To then have the penalty removed to the jurisdiction of the arbitration panel, management maintains,[52] would weaken the player's respect for the umpire and cause the umpire to lose effective control of the game.

In an industrial setting, the foreman or supervisor must play the role of "umpire" and attempt to resolve disputes prior to arbitration. But that does not mean that superiors in the managerial hierarchy are to have the sole authority to resolve the disputes. The rationale underlying arbitration rejects this philosophy. Of course, no one pays to watch factories in operation, and baseball

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

could be distinguished on the ground that it is the fans' confidence in the authority of the umpires which must be preserved. Nevertheless, it would be a sad commentary on the business of professional sports to sacrifice a player's interest in due process to the myth that the umpire is always right.

Management's efficiency argument relates to the practicalities of having such complaints submitted to arbitration. It is claimed that monumental difficulties would arise in scheduling hearings at locations and times convenient to both players and arbitrators.[53] The arbitrator's capacity to understand, on the basis of a dry record, the emotion that led to the altercation has also been questioned.[54] While one might speculate that an arbitrator, when confronted with an identical record, would respond with no less understanding than the commissioner, there is nevertheless room for substantial improvement in this area. For example, video tapes of games could be introduced into evidence. And to alleviate the problem of scheduling, regional arbitrators could be used, as an alternative to the tripartite panel, to assure that disputes are heard at times and locations convenient to the parties. There is little logical justification for retaining this domain for the two league presidents or for the commissioner. But whether change will come through negotiation, and the extent of the change, depends upon the strength of the Association's commitment to this issue.

The cases which have been argued before the tripartite panel have often been matters of first instance, involving basic issues concerning the duties and obligations of the parties to each other. Many of the cases are complex because not only the Basic Agreement, but also the provisions of the Major League Rules and the Uniform Player's Contract must be interpreted. In the words of the counsel for the Association:

> The Major League rules are a hodgepodge of semiliterate statements on a variety of subjects, most of which have only the most illusionary relevance to anything of consequence. They have been developed by the owners' lawyers over a period of 40 to 50 years. For each rule which says something, there can usually be found one which states quite the opposite, and it becomes a test of the imagination of the advocates and the arbitrator to bring order out of chaos.[55]

One highly publicized grievance arbitration case, involving Charles

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[53] *Id.*

[54] *Id.*

[55] Dennis & Somers, *supra* note 22, at 114-15.

O. Finley and James A. ("Catfish") Hunter, tested the imagination of all concerned.[56]

Charles O. Finley is general manager and part owner of the Oakland Athletics. In January 1974, discussions began with his star pitcher James ("Catfish") Hunter as to the terms of Hunter's contract for the upcoming year. Finley agreed to pay Hunter $100,000 per year, for 1974 and 1975, with $50,000 of it deferred so that Hunter would not have to pay the taxes on it until later years, when his tax obligations presumably would be reduced.[57] Months later, Finley refused to pay the deferred $50,000 for an insurance annuity, as Hunter had directed. Finley realized that the club, being the owner of the policy, would have to pay the taxes on the annuity and would be denied the use of the deferred compensation during the period of deferral.[58]

On October 4, 1974, Richard M. Moss, counsel to the Association, wired Finley as follows:

> "This wire being sent on behalf of James A. Hunter. Pursuant to Paragraph 7(A) of contract between Hunter and the Oakland Club, please be advised that contract is terminated due to default in making payments in accordance with said contract and its [sic] failure to remedy said default within 10 days after receiving written notice thereof. Because of the impending playoffs and World Series the effective date of termination shall be the day following the last game played by the Oakland Athletics in 1974."[59]

On October 17, the Association filed Grievance No. 74-18 with the Player Relations Committee, requesting that the 24 major league clubs be ordered to treat Hunter as a free agent, exempt from the restrictions of the reserve system.[60] On October 18, the Association

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[56] American and National Leagues of Professional Baseball Clubs (Oakland Athletics, Division of Charles O. Finley & Co.) v. Major League Baseball Players Association (James A. ("Catfish") Hunter), Decision No. 23 (1974) (Seitz, Impartial Chairman) (unpublished).

[57] *Id.* at 1-2.

[58] *Id.* at 11, 39.

[59] *Id.* at 14.

Section 7(a) of the Uniform Player's Contract provides:

> The Player may terminate this contract, upon written notice to the Club, if the Club shall default in the payments to the Player provided for in paragraph 2 hereof or shall fail to perform any other obligation agreed to be performed by the Club hereunder and if the Club shall fail to remedy such default within ten (10) days after the receipt by the Club of written notice of such default. The Player may also terminate this contract as provided in subparagrapb (g)(4) of this paragraph 7.

[60] American and National Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n, Decision No. 23, at 16 (1974) (Seitz, Impartial Chairman) (unpublished).

filed Grievance No. 74-20 with Finley, requesting that the club pay Hunter the deferred $50,000 plus damages.[61]

When the dispute arose, Hunter had an election of remedies. He could have filed a grievance alleging a dispute regarding the interpretation and application of the special covenant provision relating to deferred compensation. In so doing, Hunter would have framed his grievance as a resort to arbitration for the specific enforcement of his contract, requesting that the arbitrator order Finley to pay the $50,000 to the insurance company for the annuity.[62] Hunter elected, however, to invoke the rights granted in the termination provisions of his Player's Contract,[63] asserting that Finley's actions nullified the contract.[64] The character of Hunter's complaint and the remedy he was seeking propelled the confrontation beyond normal grievance disputes. Considering the record as a whole, the impartial chairman sustained Hunter's grievance. Hunter was declared a free agent and was awarded the deferred amount for 1974 plus interest.[65]

The immediate result of Hunter's case was a spectacular bidding war;[66] however, its long-term effect may be of greater importance. As long as baseball retains its exemption from the antitrust laws, players will look to the Hunter case for whatever guidance it may offer in escaping the reserve system through a contractual loophole. The financial magnitude of Hunter's agreement with the Yankees will also be remembered by players in future negotiations.[67] There is little doubt that players will benefit

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[61] *Id.*

[62] *Id.* at 20.

[63] *See* note 59 *supra*.

[64] American and National Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n, Decision No. 23, at 21 (1974) (Seitz, Impartial Chairman) (unpublished).

[65] *Id.* at 40.

[66] The Sporting News, Jan. 18, 1975, at 45, col. 1. The opening paragraph of the story begins as follows:

> The biggest auction in baseball history came to an end in a bizarre, unprecedented and hastily called press conference on a snowy New Year's Eve when the Yankees announced . . . that they had won the bidding war over 22 other teams (only San Francisco did not bid) to gain the services of the former Oakland pitching star, Jim (Catfish) Hunter.

The New York Yankees agreed to pay Hunter an estimated $2.85 million, including salary—$150,000 per year for five years, attorneys' fees, insurance policies for Hunter and his two children, and deferred bonus payments. *Id.*

[67] An editorial in The Sporting News described the effect of the Hunter case on the salary structure of baseball as follows:

> Other star players must be looking at Hunter's pact with envy and with determination to achieve the same kind of financial security. Their demands for salaries and fringe benefits are certain to skyrocket. Every club in baseball will be

from impartial grievance arbitration as long as baseball's establishment and its fans are not enraged by the results. For better or for worse, the potential impact of the Hunter proceeding will depend upon the skills of the impartial chairman and his partisan advisors.

III

RESOLUTION OF SALARY DISPUTES

A. *Establishing a Procedure for Salary Arbitration*

Determination of player salaries has long been a thorny issue in professional baseball.[68] In 1952, congressional hearings prompted testimony from Baseball Commissioner A. B. Chandler that he believed that players should have the right to secure arbitration of salary disputes.[69] Many of the players who testified agreed with Chandler, and the view was expressed that "a standardized method of salary arbitration was desirable because of the inferior bargaining position of the player who may negotiate with only one employer."[70] But most club owners rejected the idea, preferring to let a player stage a "hold-out" if he did not want to sign the contract that was offered.[71] Since a player was not free, under the reserve system,[72] to negotiate with the team of his choice,[73] the

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affected as their players measure their value against Hunter. If Hunter as a pitcher can command a king's ransom, what princely sums should go to other pitchers of prominence? And how about the outstanding regular players who are in the lineup every day? We look for sharp disagreements in contract negotiations this year and a swarm of salary arbitration cases that could throw payrolls completely out of kilter.

The Sporting News, Jan. 18, 1975, at 14, col. 1.

[68] In 1869, the Cincinnati Red Stockings became baseball's first salaried team. The highest salary that year was less than $1,500. In 1871 "Cap" Anson was paid $66.66 a month by the Rockford club in the National Association, and his contract stipulated that he would "conduct himself as a gentleman and abstain from profane language, scuffling and light conduct." During the 1880's major league salaries ranged from $1,000 to $5,000 for a seven month season. Although salaries gradually improved in the early 1900's, Christy Mathewson never received more than $10,000 a season from the New York Giants. As late as 1922, the entire payroll of the Boston Braves was only $80,000. P. GREGORY, *supra* note 8, at 93-94.

[69] *Hearings on Organized Baseball Before the Subcomm. on the Study of Monopoly Power of the House Comm. on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 6, at 298-99 (1951).

[70] H.R. REP. No. 2002, 82d Cong., 2d Sess. 162 (1952).

[71] 1951 *Hearings, supra* note 69, at 730-32. Branch Rickey, former general manager of the Pittsburgh Pirates and the Brooklyn Dodgers, believed that arbitration of salaries would be a complex task and predicted "that the ultimate end of such a system would be a department which signed all professional baseball players." *Id.*

[72] Rule 3(a) of the Major League Rules and Professional Baseball Rules, agreed to by all professional baseball clubs, requires that each club contract with its players pursuant to the Uniform Player's Contract prescribed by the Major League Executive Council, and specifies that "[n]o club shall make a contract . . . containing a non-reserve clause." In addition, "[t]he making of any agreement between a club and a player not embodied in the contract shall

player's only alternative to accepting his club's final salary offer was retirement from baseball.

On October 18, 1969, Curtis C. Flood, then a major league outfielder for the St. Louis Cardinals, was traded to the Philadelphia Phillies, as part of a multiplayer transaction. At the time of the trade, Flood was a twelve-year veteran with the Cardinals and "acknowledged to be a player of exceptional and proven baseball ability."[74] Flood was unwilling to play for Philadelphia, but could not negotiate with any other team due to the restrictions of the reserve system. He therefore brought an action against the twenty-four major league clubs, their league presidents, and the baseball commissioner, seeking to have baseball's reserve system declared unlawful.[75] Flood was unsuccessful before both the lower federal courts and the Supreme Court.[76] But the case was instrumental in paving the way toward a negotiated modification of the reserve system by the introduction of salary arbitration.[77] Witnesses had testified as to the advantages and disadvantages of salary arbitration as a modification of the existing reserve system.[78]

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subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced." Paragraph 10(a) of the Uniform Player's Contract provides that if in the year of expiration of the contract a player and club do not reach agreement by a certain date

> the Club shall have the right by written notice to the Player at [his] address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice . . . at a rate not less than 80% of the rate stipulated for the next preceding year and at a rate not less than 70% of the rate stipulated for the year immediately prior to the next preceding year.

[73] Rule 3(g) of the Major League and Professional Baseball Rules provides:

> (g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, . . . unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

[74] Flood v. Kuhn, 316 F. Supp. 271, 272 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[75] *Id.* at 272.

[76] *See* note 7 *supra*.

[77] The following modifications of and alternatives to the existing reserve system were suggested by witnesses on behalf of Flood:

> (*a*) independent competitive leagues; (*b*) limitation of club control over a player to a fixed term of years; (*c*) permitting a player to become a free agent after an option period; (*d*) trade veto for veteran players; (*e*) minimum salary progression; (*f*) reduction in the number of reserved players; (*g*) salary arbitration.

Flood v. Kuhn, 316 F. Supp. 271, 275 n.12 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[78] When asked on direct examination for his view of the feasibility of salary arbitration, Charles S. Feeney, President of the National League, responded as follows:

In the end, the judicial forum left it to the parties to determine whether the reserve system would be changed.[79]

On February 8, 1973, baseball club owners, for the first time, proposed that individual salary disputes with players be submitted to arbitration. The owners proposed the granting of salary arbitration in exchange for relinquishment by the players of their demand for a complete revision of the reserve system.[80] The owners' proposal contained a number of restrictions. Only a player with three or more years of Major League service would be permitted to submit his salary dispute to arbitration, and no player would be eligible for salary arbitration in two consecutive years.[81] The criteria to be considered by an arbitrator would be the quality of the player's contribution to his club during the past season, the length and consistency of his career contribution, the record of the player's past compensation, the existence of any physical or mental defects on the part of the player, and the recent performance record of the club including its league standing and attendance.[82]

> This is a very difficult situation for any arbitrator because you can't judge a player strictly by his batting average or his home run total. There are lots of things players do to help win games that are not reflected in averages, and to see and know what he does you must be there and observe it. I think the players and the people that are negotiating with them at the present time are in a much better position to negotiate and know exactly what they are negotiating about than an arbitrator. Also I think you would end up having an arm's length situation between the players and management with arbitration. I think that you would probably find yourself in a situation where the player rated his services very much higher than he really thought he was going to get and maybe management rated the services lower than really felt because they knew arbitration was going to get into the picture.
>
> I don't think it would be a good thing as far as relations between clubs and players are concerned at all.

Appendix to Petitioner's Brief for Certiorari, at 286-87, Flood v. Kuhn, 407 U.S. 258 (1972).

On the other side, one club owner, Bill Veeck, responded to the question as to whether he thought salary arbitration would hurt or help baseball as follows:

> I think that would be a splendid idea. . . . I think . . . it would help. I think that it would create a little better relationship. Just the right to have an arbitration, the right not to be feeling that you are singly, as an athlete, negotiating against the wealth of a ball club, I think it would improve relationships. I think on many occasions that the club itself might profit a little bit, that on occasion ballplayers have been somewhat unrealistic in their various demands. So I think it would be beneficial from both ways.

Id. at 396-97.

[79] "From the trial record and the sense of fair play demonstrated in the main by the witnesses on both sides, we are convinced that the reserve clause can be fashioned so as to find acceptance by player and club." Flood v. Kuhn, 316 F. Supp. 271, 284 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[80] N.Y. Times, Feb. 9, 1973, at 17, col. 8. John Gaherin, who represented the club owners in the negotiations, commented: "We sincerely hope this offer proves to be the instrument that brings us to agreement. This is the first proposal in the history of baseball in which salary arbitration has been put on the table." *Id.* at 20, col. 6.

[81] N.Y. Times, Feb. 14, 1973, at 33, col. 2.

[82] *Id.* at col. 4.

The arbitrator would not, however, be able to consider the following: (*1*) the financial position of the player and the club; (*2*) press reports, testimonials, or similar material bearing on the performance of the player or the club; (*3*) offers made by either player or club prior to arbitration; (*4*) the cost to the parties of their representatives or attorneys; (*5*) specific comparisons with other players' salaries; or (*6*) salaries in other sports or occupations.[83]

The restrictive conditions became the immediate subject for further negotiations. Both sides agreed on the concept of salary arbitration, but negotiations dragged on as to the actual details of implementation. Through the course of negotiations, the weaknesses of the commissioner system became apparent. In the *N.Y. Times*, sports columnist Red Smith lamented:

> Whatever gains are achieved, or damage done, in the current contract dispute between the baseball players and the men who own them, there has already been at least one result. Any misconceptions about the role of the commissioner that may have lingered in the minds of fans have been eliminated. On two or three occasions since the haggling began, Bowie Kuhn has abandoned the pretense of neutrality and has issued press releases presenting the owners' side to the public. No longer can there be any illusion that the commissioner's office is a court of last appeal or its occupant an impartial magistrate or a house dick riding herd on the bosses to protect the players from exploitation. From here out everyone must accept Kuhn for what he has been ever since he was hired—his employers' mouthpiece, a front man, a figurehead.
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> . . . .
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> . . . In 1968, when the owners replaced William D. Eckert with their own lawyer, not one living soul confused the new commissioner with the first commissioner, Kenesaw Mountain Landis. From that day forward, everybody realized, the game would be played the company way. That is why the players fought for and won impartial arbitration of grievances, bypassing the commissioner.[84]

The players supported the Association,[85] and despite the intervention of the commissioner on behalf of the owners,[86] the final agreement of February 25, 1973,[87] was somewhat more favorable to the players than was the owners' initial proposal. Under the

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[83] *Id.*

[84] N.Y. Times, Feb. 23, 1973, at 27, col. 2.

[85] N.Y. Times, Feb. 26, 1973, at 39, col. 2.

[86] N.Y. Times, Feb. 14, 1973, at 31, col. 1.

[87] N.Y. Times, Feb. 26, 1973, at 39, col. 2.

terms of the agreement, "[a]ny Club, or any Player with both a total of two years of Major League service and Major League service in at least three different championship seasons, may submit the issue of the Player's salary to final and binding arbitration."[88] The prohibition against submitting salary disputes to arbitration in consecutive years was eliminated.[89]

The technique agreed to by the parties for salary arbitration is both innovative and alluring, and has been described as "either/or" or "high-low" arbitration.[90] The player and the club each submit to the arbitrator, and exchange with each other prior to the hearing, single salary figures for the coming season (which need not be figures offered during the prior negotiations).[91] The arbitrator is "limited to awarding only one or the other of the two figures submitted."[92] The concept was discussed in the late 1940's and 1950's as an alternative to the national emergency dispute procedures in the Taft-Hartley Act, but was not adopted.[93] It was raised again by President Nixon in a proposal for dealing with national emergency disputes in the transportation area, as one weapon in the arsenal of weapons that the President would have available to forestall a strike. But the proposal was not accepted by Congress.[94] The technique, nevertheless, does seem well-suited for professional sports when the sole issue to be resolved is an individual's salary, and a failure to agree on terms expeditiously can have a deleterious effect on the entire team.[95] Since the award is issued without a written opinion,[96] cases are decided quickly.[97]

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[88] Basic Agreement, art. V(D)(1).

[89] Interview with J. Gaherin.

[90] Seitz, *Footnotes to Baseball Salary Arbitration,* 29 ARB. J. (n.s.) 98, 99 (1974); Letter from C. C. Johnson Spink, President of *The Sporting News* to the *Cornell Law Review,* Feb. 11, 1975.

[91] Basic Agreement, art. V(D)(3).

[92] *Id.* art. V(D)(4).

[93] Seitz, *supra* note 90, at 99.

[94] Dennis & Somers, *supra* note 22, at 117. Arbitrator Arnold M. Zack has suggested that a similar technique, but encompassing all issues in dispute, could meet the pressing need in the public sector "for a procedure which will embody a viable substitute for the threat of the strike, rather than a substitute for the strike itself." He calls this technique "final offer selection." Zack, *Final Offer Selection—Panacea or Pandora's Box?,* 19 N.Y.L.F. 567, 572 (1974).

[95] In professional hockey, an agreement has established the arbitration of salary differences between NHL clubs and players for the seasons 1972-73, 1973-74, and 1974-75. Under the terms of the agreement a permanent arbitrator has been selected to conduct hearings and issue awards. The arbitrator's award is not limited to a selection between the requests of owner or player. In arriving at his decision, the arbitrator must take into account the following factors and assign to each of them the appropriate weight:

(a) the over-all performance of the player in the previous season or seasons;

(b) the number of games played by the player, his injuries or illnesses during the previous season;

B. *Professional Baseball's Experience with Salary Arbitration*

In order to agree upon the criteria to be used by an arbitrator in resolving salary disputes, the parties had to overcome the difficulty of measuring objectively a player's financial value to a particular club. As one observer has remarked:

> If baseball were simply a game, the value of a player would be based entirely on his performance . . .; but baseball is also a business, depending largely on gate receipts for revenue. Hence those players are worth most who can attract the largest number of customers to the ball park. A colorful personality, or even a clown, can attract customers for a time, without high quality performance, but in the long run the best performers are usually also the best drawing cards.[98]

The parties agreed upon the criteria set forth in the owners' proposal,[99] excluding from the arbitrator's consideration the club's ability to pay. Whether an arbitrator should be permitted to consider the financial position of the club and the players is now of academic interest at best, but one may venture to guess that at least one arbitrator involved with salary disputes is relieved that financial analysis is not part of his responsibility. Speaking of the torrent of statistical data presented by both parties at the hearings where he has presided, arbitrator Seitz has noted: "I had a feeling that I had more figures before me than exist in the files of the Census Bureau and the Bureau of Labor Statistics."[100]

The premise underlying the adoption of the "either/or" tech-

(c) the player's length of service in the league and/or with the club;
(d) the over-all contribution of the player to the competitive success or failure of the club in the previous season;
(e) special qualities of leadership or public appeal;
(f) the financial position of the club shall *not* be taken into account in determining the player's compensation.

Owner-player Council, Minutes and Agreements, Section IV, Schedule A, revised to Jan. 1, 1973.

[96] Basic Agreement, art. V(D)(4).

[97] Article V(D)(4) of the Basic Agreement provides in part:

(4) *Timetable and decision.* Submission may be made at any time between February 1 and February 10. In the event the offer of the Club is reduced on or subsequent to February 10, the Player's right to submit to arbitration shall be reinstated for a period of 7 days. Arbitration hearings shall be held as soon as possible after submission, but, in any event, shall be scheduled to be held before February 20. The decision shall be rendered by the arbitrator within 72 hours after the hearing.

[98] P. GREGORY, *supra* note 8, at 1. Gregory relates that when pitcher Rube Waddell was in his prime, the gate-conscious owner of his club recorded each pitcher's performance and also the size of the crowd that watched him. The owner, Connie Mack, noticed that "on days Waddell pitched, attendance always ran a little higher." *Id.*

[99] *See* notes 82-83 and accompanying text *supra*.

[100] Seitz, *supra* note 90, at 100.

nique for salary arbitration was that it would deter the parties from bringing every salary dispute to an arbitrator for resolution, and would consequently induce the parties to work out their differences through compromise.[101] Although it is too early to determine whether experience will prove the premise to have been correct or mistaken, the technique does seem to motivate both the players and the clubs to narrow their bargaining differences. Although a number of salary cases have been withdrawn from arbitration and settled by the parties without a hearing,[102] the majority, within the past two years, have gone to arbitration.[103] It may be that the risk of having an arbitrator deliver an adverse award is not so great as to discourage dependence upon the procedure. When the "either/or" technique was raised in discussion with respect to national emergency disputes, and as the technique has been applied more recently in the public sector, the entire package of demands and offers was to be submitted to the arbitrator on an "either/or" basis.[104] Naturally, each side's list of demands, or offers, could contain items of great, as well as limited importance. But neither side could be certain how the arbitrator would decide, since he could not trade items, but rather, had to adopt one package or the other. In baseball, however, where the only issue in dispute is salary, each party may reasonably believe that it has relatively little to fear, provided that its figure submitted to arbitration is not completely unrealistic.

In addition to the statistics which are presented at the hearings, each arbitrator is given, in advance of the hearings, the following joint exhibits:

(a) A copy of the Basic Agreement and the Memorandum Re Administration of Salary Arbitration Procedure;

(b) A tabulation showing salaries for all players on Major League rosters for the three previous seasons;

(c) The Baseball Register;

(d) A copy of the Official American League Averages for the season preceding the arbitration; and

(e) A copy of the Official National League Averages for that same season.

Memorandum Re Administration of Salary Arbitration Procedure, *supra* note 5.

[101] Letter from C. C. Johnson Spink, President of *The Sporting News*, to the *Cornell Law Review*, Feb. 11, 1975.

[102] *Id.* In 1974, "25 players originally submitted their salary disputes to arbitration, only to settle . . . before the hearings were held." N.Y. Times, March 3, 1974, § 5, at 2, col. 2.

[103] In 1974, the first year that salary arbitration was available, 29 players went to arbitration. Thirteen players won their hearings; 16 lost. The Oakland Athletics, World Series champions in 1972, 1973, and 1974, had nine players—more tban any other club—submit their salary disputes to arbitration in 1974. Of the nine Athletics who filed for arbitration in 1974, five won their cases. N.Y. Tinies, Feb. 9, 1975, § 5, at 5, col. 2. In 1975, approximately 27 players requested arbitration, including 11 members of the Oakland Athletics. N.Y. Times, Feb. 11, 1975, at 53, col. 1.

[104] *See* Zack, *Final Offer Selection—Panacea or Pandora's Box?*, 19 N.Y.L.F. 567 (1974).

If the "either/or" technique does not deter dependence on arbitration, the parties must face another question: is this good or bad? The procedure could continue to work satisfactorily as a staff of arbitrators who are knowledgeable about baseball develops. But there may be a danger lurking behind the alluring mask of arbitration if the players and management lose respect for each other. Good labor relations demand that arbitration not become a replacement for direct settlement. The proper role for arbitration is one of last resort.[105]

When used selectively to reach a resolution of salary disputes where direct settlement has already failed, there is no cause for alarm that arbitration will destroy the salary structure of baseball or lead to a significant increase in the cost of tickets to the fans. Sports salaries have soared in recent years, and the trend may continue, but salary arbitration should not receive disproportionate blame or credit for the general upward movement.[106] Salaries in professional baseball, basketball, football, and hockey are not determined in a competitive market because of the institutional restrictions imposed by the leagues which prevent players from negotiating with the teams of their choice. For every salary increase that a baseball player receives as a result of salary arbitration, one must consider how much more that player might have received if he were free to negotiate with teams other than the one which reserved him from the competitive forces of the marketplace.[107]

In fact, sports salaries in basketball and hockey have outpaced gains in baseball in recent years because of the rival leagues which have entered bidding wars for the services of professional basketball and hockey players.[108] In contrast to the lucrative, multiyear

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[105] Speaking of arbitration in the industrial context, Shulman has remarked:

> The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government.

Shulman, *supra* note 2, at 1024.

[106] N.Y. Times, March 11, 1973, § 5, at 4, col. 4.

[107] The case of hockey player John McKenzie serves to illustrate the point that salary arbitration does not produce competitive results. McKenzie's salary was arbitrated during the 1971-72 season. The arbitrator settled on the $48,000 salary which McKenzie had received the previous season. Yet McKenzie had been offered more than twice that salary by teams which were excluded from negotiating for his services by the "reserve system." GOVERNMENT AND THE SPORTS BUSINESS 207 (R. Noll ed. 1974).

[108] A study of athlete salaries by the staff of the Pay Board provides the following data:

> Football: Salary range from $12,000 to $200,000 with an average of $28,000; profits per team (average pre-tax estimate) of $900,000; average team payroll is 37% of the operating costs; less than 25% of players with multi-year contracts.

contracts which have been signed by basketball and hockey players who have chosen to jump leagues, the gains realized through salary arbitration are relatively modest. Moreover, "since the price-setting process [for tickets] in [professional] sports is not closely related to player salaries," depending more on considerations such as radio and television broadcast contracts, it is unlikely that increased salaries realized by those players who win their arbitration cases will have a significant adverse effect on the cost of tickets.[109] Rather, salary arbitration, just one step toward freedom from the reserve system, protects the right of the sports fan to a stable professional sports system—one that he can rely upon and enjoy.

CONCLUSION

Collective bargaining has brought benefits to professional baseball players that they were unable to secure through legislation or litigation. The establishment of a procedure for the resolution of grievance disputes, which culminates in impartial arbitration, has given baseball players much the same freedom from the unilateral imposition of discipline that employees in other occupations have enjoyed for many years. Nevertheless, not all complaints in professional baseball are within the jurisdiction of impartial arbitration, as a result of continuing tension between the commissioner system and the impartial arbitration system. Those complaints that involve the preservation of the integrity of the game are different from the routine grievances of an industrial employment relationship, and it is understandable that the commissioner of baseball believes that he must have final and binding authority to resolve such complaints. But complaints involving the penalization of a player for conduct on the playing field or in the ball park are

Basketball: Salary range of $16,500 to $250,000 with the average salary $50,000; average increase over last three years of 28%; average profits per team unknown; team payroll is 35% of operating costs; incidence of multi-year contracts unknown.

Baseball: Salary range of $13,500 to $160,000 with average player salary of $28,500; average increase of 9.5% over past five years; profits per team (average pre-tax estimate) of $2.5 million for "most successful teams" and $400,000 for "least successful teams;" average team payroll is 30% of operating costs; incidence of multi-year contracts is unknown. (The questionnaire was completed prior to Henry Aaron's signing for $200,000.)

Hockey: Salary range of $12,000 to $120,000 with average of $32,000; average increase over past three years of 15%; profits per team of $2.1 million; average team payroll is 30-40% of operating costs; multi-year contracts held by 20-25% of players.

Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 84 (1972).

[109] GOVERNMENT AND THE SPORTS BUSINESS 422 (R. Noll ed. 1974).

not sufficiently distinguisbable from routine industrial grievances to warrant their present exclusion from the jurisdiction of impartial arbitration.

With the establishment of a procedure for impartial salary arbitration, professional baseball has taken an innovative approach to labor relations, which deserves the consideration of employers and unions within the world of professional sports and in the general employment community. Professional baseball illustrates the flexibility of the labor arbitration process and demonstrates that a system of private law can be designed to protect the interests of those concerned with the improvement of the employment relationship.

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