CHAPTER 16
LABOR-MANAGEMENT RELATIONS AND SPORTS:
ARBITRATION

I. Introduction

The introductory material provides a roadmap of the chapter and expands on the arbitration overview contained in Chapter 14. It should familiarize students with the basic rudiments of voluntary dispute adjustment mechanisms in labor relations and the extent to which courts and administrative agencies are deferential to such processes. At this point, students should consider the value of arbitration as an alternative to formal litigation and also should assess the substantial homage that reviewing forums pay to arbitration and arbitrator's decisions. Students should also be apprised of recent scholarly commentary that questions the substantial sacrifice of individual rights that is endemic to any collective bargaining regimen. In particular, considerable criticism has focused on decisions that find state or federal judicial consideration of controversies to be preempted by grievance/arbitration procedures of union contracts. A recent symposium conducted by the University of Denver Law Review examines in detail the interplay between individual employer rights and the deference to a mechanism agreed upon by a collective group and its bargaining representative. See Symposium, The New Private Law, 73 DENV. U. L. REV. 1 (1996).

II. Grievance Arbitration

(A) Free at Last -- Almost

Case: Kansas City Royals Baseball Corp. v. MLB Players Ass'n

Primary reason for inclusion: To illustrate the degree to which reviewing courts will defer to an arbitrator's decision and to expose students to a case that may be the most significant arbitration in the history of Major League Baseball.

Points to emphasize:

1) Two fundamental questions were presented in this case: the arbitrator's jurisdiction to resolve the "perpetual reserve" question; and the substantive determination of whether the reserve clause could be interpreted to bind a player to one club in perpetuity. As the Notes and Questions illustrate, the arbitrability question was by no means simple. The league advanced a colorable argument that the reserve clause was beyond the arbitrator's jurisdiction. The union offered an effective rejoinder that there was no clear evidence of an intent to exclude the grievance over the reserve system from the arbitrator's jurisdiction. Two points are worthy of emphasis here: the owners' counsel admitted that language centered on free agency and the reserve system was intentionally ambiguous; and the evolving importance of arbitration as a dispute resolution mechanism portended the arbitrator's assertion of jurisdiction absent the most indisputable and unmistakable evidence of an intent to exclude reserve system controversies from the grievance machinery.

2) Several attempts had been made to resolve the reserve system debate through challenges under the antitrust laws. Each time, the players' effort failed due to Major League Baseball's exemption from the antitrust laws. As a preface to Notes 1 and 2,
students should be reminded of this history as a possible additional factor that may have prompted Arbitrator Seitz to err on the side of finally reaching the merits of this controversy.

3) In evaluating the substantive issue of contract interpretation, Seitz was left with a relatively simple array of alternatives. To construe the system as one of perpetual reserve, especially with no clear agreement on such an interpretation, would be tantamount to enforcing contracts of vague or interminable duration. It would also be at war with recent precedent in other contexts that essentially rejected that option out of hand. Thus, Seitz was left the choice of finding all player contracts void for indefiniteness (or enforceable as a perpetually renewing option) or purposefully interpreting the contract as having a one-year option on player services and rendering the players free to negotiate elsewhere as the anniversary date of their contract's expiration. He chose the latter. This should trigger some discussion as to whether Seitz was within his rights as a matter of substantive arbitrability (i.e., did this decision exceed his power only to interpret the terms of the collective bargaining agreement?)

Notes and Questions:

Notes 1 through 5 reprise the importance of arbitration as a means of resolving disputes and the lengths to which decisionmakers will go to make the process effective. It is conceivable that Seitz gave an expansive view of the reserve system's arbitrability, and found ambiguity where none existed. It is more likely that the parties' contractual ambivalence in terms of their hedging of bets on the free agency issue created enough true ambiguity to open the door for Seitz to assume jurisdiction.

Note 6 is included for a few reasons. First, it illustrates that arbitration decisions do not have precedential value or stare decisis effect -- especially when different collective bargaining agreements are implicated. Second, it shows that arbitration was an unavailing vehicle to rid professional football players of the NFL's reserve system. Thus, the strike and/or antitrust route emerged as the only viable options to effect a change -- especially after the NFLPA made free agent concessions following victories in the Mackey and Smith cases. (See, e.g., Chapter 10 at page 430.) Arbitrator Luskin's decision foretold more litigation and labor strife and helped to set the stage for the infamous work stoppages in 1982 and 1987, the McNeil lawsuit, and the controversial settlement that is now embraced in the 1993-2000 collective bargaining agreement. Students should be asked whether Luskin's decision is plausible contract analysis. They should focus upon whether there are factors present in this case that were not present in McNally-Messersmith. They should also ponder whether either decision could have been influenced by the arbitrator's perceptions of their roles and their status in the entire litigation scheme. That is, because of the baseball exemption, it is unlikely that the issue would ever see the light of day in an adjudicatory or quasi-adjudicatory forum. In the football case, it is possible that Luskin interpreted the clauses in question literally and narrowly, recognizing both that the players had already won the battle once, only to surrender it at the table, and that the players could always relitigate the matter in the antitrust forum (assuming that they would not be barred by the labor exemption).

Note 7 introduces the collusion case which is useful not so much for any profound arbitral analysis as for a manifestation of the league's imprudent negotiation strategy and its unbridled arrogance in believing that it could engage in a virtually unmasked conspiracy in direct violation of the union contract without fear of reprisal.
Case: In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the Twenty-Six Major League Baseball Clubs

Primary reason for inclusion: To explain why and how baseball swallowed a $280,000,000 settlement for conspiring to suppress free agency in the face of an antitrust exemption that would appear to insulate such activity from sanction.

Points to emphasize:

1) The language in Article XVIII(H) should be read carefully. Its direct message is difficult to ignore especially given that it was included at the behest of the league.

2) In light of the clear instruction of Article XVIII(H), this case turns heavily on the facts and whether the almost non-existent movement of players from club to club was coincidental or was the product of the owners' orchestrations. In addressing these questions, attention should be drawn to the arbitrator's assessment of the evidence, both in terms of the direct evidence of the commissioner's clarion call for restraint in spending as well as the inferences drawn from the comparisons to other years in which free agent, even marginal players, were wooed by numerous teams.

3) The final three paragraphs of Arbitrator Nicolau's award synopsizes the folly of the league's arguments. Baseball's leadership sent a message to the owners to tighten the purse strings; the owners complied. In Nicolau's eyes their compliance, the blatant disinterest in any available player, was too transparent to be ignored.

4) Subsequent arbitration, before another arbitrator, yielded similar results. The owners were found guilty of collusion for three separate seasons.

Notes and Questions:

Note 1 reports on a monetary settlement that was years in the making. The MLBPA was custodian of the funds and assumed responsibility for distribution to the affected players. Several players became free agents and were freed from existing contractual relationships. Given the results of the collusion decision(s), students should be asked how they would handle the "problem" of spiraling salaries. What would owners say if they were told simply to make assessments of what they can afford (on an individual basis) and tailor their operating budgets accordingly. It is precisely what every other business does as a routine matter. If past is prologue, students should engage in a robust debate that brings into play earlier classes dealing with the nature of a league as a cooperative venture, an individual owner's rights versus his or her duty to the collective, the various antitrust exemptions, salary caps or revenue sharing as solutions, the emerging strength of players' unions, the parties' ability to absorb the effects of a lengthy strike, and numerous other issues.

As the text indicates, the next few cases are designed to show that arbitration is serious business, whose procedures must be faithfully followed and whose ultimate dispositions will be scrupulously enforced by courts and pertinent administrative agencies. At the same time, arbitrators are not immune from reversal simply because they have been selected by the litigants themselves. Much like the deference that the judiciary shows league commissioners, a court's propensity to enforce an arbitrator's award is not unlimited.
(B) Judicial Response to the Arbitration Process: Respect for the Process but Not Blind Deference

Case: NFL Players Ass'n v. Pro-Football, Inc.

Primary reason for inclusion: To provide an example of the relatively rare instance in which a court will vacate an arbitration award and, substantively, to illustrate the tension that can develop between state labor laws that have not been preempted by federal law. This case is also noteworthy because it exposes some of the chinks in the NFLPA's solidarity armor created by the settlement culminating in the current collective bargaining agreement.

Points to emphasize:

1) Virginia and the District of Columbia have adopted dramatically different positions regarding the union shop. Students should be referred to Chapter 14 to review the union security/right to work dichotomy and the fact that the National Labor Relations Act has given individual states license to prohibit union shop clauses. It does not often cause conflicts between states but professional sports presents a fertile ground for such a dispute.

2) The background of this controversy is relevant because, if players had not been disenchanted with the perceived antics of their collective bargaining representatives and refused to pay dues, the Redskins would never have been asked to take action against the alleged recalcitrants. As evident throughout various parts of this text, the current collective bargaining agreement was not warmly embraced by all NFL players, and this refusal to pay dues was but a small manifestation. At another time, the problem may not have surfaced because, even in a non-union shop context where periodic dues may not be required as a condition of employment, players would likely voluntarily tender the monthly dues to show solidarity or to avoid the castigation of fellow dues-paying players. Likewise, the union, if the refusal to pay were isolated and not a show of dissidence by more than a few players, may have pursued the issue with less vigor.

3) The arbitrator placed considerable emphasis on the locale of RFK Stadium, the site of the Redskins home games. The court did not question the arbitrator's authority nor did it find his decision to be implausible. Further, the court acknowledged that arbitrators' decisions are entitled to considerable deference. It also pointed out considerable flaws in the defendant's case. Yet, because it found that affirmance would result in a violation of Virginia law, and would be manifestly at war with the Supreme Court's decision in Mobil Oil, the court declined to enforce the award.

Notes and Questions:

N&Qs 1 through 3 require the students to assess whether the arbitrator's decision was a reasonable reading of Mobil Oil. Clearly, if the Supreme Court has spoken on a given issue, a contradictory arbitral decision will not be enforced. Further, while many arbitration clauses limit the arbitrator's authority to the interpretation of the agreement, that does not foreclose arbitrators from considering analogous judicial or administrative authority as part of its decision making. The degree to which arbitrators look beyond the contract will vary from arbitrator to arbitrator and issue to issue. Courts will allow some latitude in this regard -- but, this court believed that the language of the Mobil Oil opinion was explicit enough not to indulge much arbitral discretion. Students should examine whether Judge Hogan merely paid lip service to the notion of deference or whether deference in this case would plainly have amounted to an abdication of judicial
responsibility and condonation of a violation of Virginia law. They should, as part of this analysis, discuss the extent to which arbitrators should call upon analogous precedent for guidance.

**Case:** *Sharpe v. NFL Players Ass'n*

**Primary reason for inclusion:** To illustrate the importance of following arbitration procedures and exhausting contractual remedies.

**Points to emphasize:**

1) Plaintiff instigated the arbitration process and then sought to have the matter resolved in a judicial forum. The collective bargaining agreement allows for the initiation of grievances by the player or the NFLPA. As will be discussed below, it seems that, even when the player files a grievance on his own behalf, the union is never totally divorced from the process (directly or indirectly).

2) Because the arbitration claim against the Packers was pending at the time of the lawsuit, the court refused to consider the plaintiff's claim against the team and the union -- both of which are inextricably entwined. Students should here consider what purpose is to be served by staying any judicial action pending arbitration. Issues such as possible futility, judicial economy, and pre-eminence of arbitration as a dispute-resolution mechanism should be explored as part of this discussion. Also, students should be asked to consider what hat the union wears at the arbitration stage of the proceeding -- even though an individual player has activated the machinery.

**Notes and Questions:**

While the distinctions are often elusive, students here should be given a brief reprise on the concepts of ripeness, primary jurisdiction, and exhaustion of remedies. The differentiation may help to explain judicial hair-splitting in assessing whether to assert jurisdiction in a particular case. For a useful summary of such issues see William F. Fox, Jr., *Understanding Administrative Law* 271-285 (1992).

N&Q 2 somewhat loosely suggests that in the pending arbitration the union may be serving as the plaintiff/grievant's representative. This point reiterates the statement made above regarding the "iffy" status of the union in this context. A perusal of the collective bargaining agreement shows that the players association is arguably still a part of the process. A question of the union's allegiance thus arises in cases where the issues raised may be relevant to the union's future representation of grievants with related claims even though the union sees little merit in the instant grievance and is, at some level, at war with the grievant.

The remainder of the *Notes and Questions* speak for themselves in terms of the need to be attentive to procedural prerequisites and the unique aspects of injury grievances. The question posed at the end of N&Q 5 is largely one of opinion, but the response most likely would be that even the elaborate injury grievance language leaves room for interpretation. For example, whether an injury is football-related or whether it was a new (as opposed to an aggravated) condition still may present difficult questions for examining physicians and/or arbitrators.

**(C) Salary Recompense During a Strike**
The introduction to Section C provides an overview of an employee's right to compensation during a work stoppage. This introduction, together with the appropriate section of Chapter 14, should provide the students with an adequate, albeit sketchy, synopsis of the relevant law in this area. The players' agents have attempted to protect their clients from the vagaries of injuries, work stoppages, and other occurrences that interfere with performance by negotiating salary guarantees. As we saw in Chapter 6, the effectiveness of these guarantees will turn on the language of the contract and other ancillary circumstances that manifest the parties' intent. The following case, which was one of a series of cases involving the applicability of a salary guarantee provision in the face of a strike, illustrates that a player's eligibility for continued salary during a strike will often depend upon subtle factors and slight variations in contract language.

**Case:** *Tommy John Arbitration, Case No. 50(D)*

**Primary reason for inclusion:** To provide a brief overview of broad salary guarantee clauses and their applicability to strikes or related work stoppages.

**Points to emphasize:**

1) The Special Covenants provision of Tommy John's contract guaranteed his salary unless the player "arbitrarily" declined to "render his professional services." As the arbitrator indicated, the language was unremarkable, and the ultimate resolution of this case turned on the negotiating history and other pertinent background.

2) Despite specifically asking that the salary guarantee be qualified in several ways, the club neglected to ask that the broad guarantee exclude situations in which John did not play because of a players' strike. After the contract's Special Covenants had been signed by the club, owner George Steinbrenner raised this issue and, as a result, the contract was modified to exclude recompense during a strike if the club would guarantee payment during the lockout and would up the ante on an insurance policy. After the league president allegedly refused to approve the lockout addendum, and the parties engaged in more sabre rattling, the club told the players that it would agree to the Special Covenants as originally agreed upon, with no qualifying language regarding either a strike or a lockout. Thus, this "arbitrarily refuse to work" verbiage in the Special Covenants was really presented to the arbitrator as a naked abstraction.

3) There is no dispute about John's entitlement to recompense while he was disabled. The controversy centered on the grievant's eligibility subsequent to his recovery but prior to the termination of the strike. The arbitrator rejected the clubs arguments that the contract was intended to address injuries not work stoppages and that John was ineligible for benefits.

**Notes and Questions:**

N&Q 1 is answered by references to the negotiating history surrounding John's standard player contract. The arbitrator concluded that the owner's remonstrations and subsequent recanting established his acquiescence in John's interpretation of the questionable language. John adduced evidence of correspondence between the parties establishing that the salary guarantee clause would apply in a strike context. Absent this additional information, it is likely that the arbitrator would have denied John's grievance. *See Arbitration Between Major League Baseball Player..."*
N&Qs 2 and 3 emphasize the importance of protecting one's client at the transaction stage. Again, the key to success will rest upon the parties' bargaining strength. As discussed in Chapter 5, the ability to insist on precise language and the strategic prudence of such persistence will depend upon the economic power of the adversaries. Many arbitrators, consistent with one of the traditional contract interpretation saws, will construe an ambiguous contract against the drafter. Of course, given the perceptions of today's wealthy and well-represented athletes, together with the relative openness and bi-lateral input (as opposed to the boilerplate language of the remainder of the standard player contracts) characterizing special covenants language, this interpretation stand-by may be ignored with increased frequency.

N&Q 4 requires students to revisit the John opinion at pages 797-798. Conceivably, a declaration that a player would have not worked even if physically able, would require a reassessment of the "arbitrarily refuse" language and a resolution of that ambiguous phraseology in the context of a strike. Yet, the arbitrator suggests that, even if the player were to proclaim support for the strike, his disability deprived him of any choice in the matter. Therefore, it would be difficult to argue persuasively that he willfully withheld his services. Of course, if there were no salary guarantee, the player would probably be ineligible for compensation during a strike even if he were truly disabled. The expressed rationale has been that, whether he was on strike or disabled, absent a guarantee provision, he or she would not receive any recompense during the period in which he or she was ineligible to perform. See Arbitration Between Major League Players Ass'n and Major League Baseball Players Relations Comm., Inc., Panel Decision No. 49. Regarding alternative service, the club's ability to insist that a player perform functions other than traditional play would turn on the language of the guarantee read together with other pertinent provisions of the standard player contract, the collective bargaining agreement, and, of course, any pertinent negotiating history.

III. Salary Arbitration

The excerpt from Frederick Donegan's article will provide students with a useful overview of salary arbitration in major league baseball. Students should be encouraged to focus on the arbitration format, particularly the "last best offer" procedure. Also, students should be asked to assess the impact of salary arbitration upon spiraling salaries in the era of qualified free agency. The Notes and Questions following the Donegan excerpt seize on these points. In responding to the questions, students should be made aware that the "last best offer" procedure eliminates outlandish demands on both sides because it prohibits the arbitrator from issuing a compromise award. It has always been hoped that this approach will streamline the negotiating process and, in many respects, provide an impetus for realistic proposals that will oftentimes obviate the need for arbitration.

In some respects salary arbitration is viewed by owners as more of an anathema than free agency itself. Once an arbitrator has slotted a player at a particular level, that designation becomes a new floor above which all similarly-situated players will insist upon becoming eligible for free agency. It has been a source of considerable consternation since its inception and, as the second Silverman case in Chapter 15 illustrated, was a major bone of contention in the 1994-95 negotiations and strike.

Finally, students should be asked to revisit Silverman and, armed with a more detailed explanation of salary arbitration, discuss whether this form of grievance adjustment should be deemed a mandatory subject of bargaining.