CHAPTER 7

# ARBITRATION IN PROFESSIONAL SPORTS

## I. AN ARBITRATOR APPRAISES FOOTBALL ARBITRATION

BERT L. LUSKIN*

This afternoon's program, "Arbitration in Professional Sports," deals with a subject that has evoked a great deal of interest among the general public, the print and electronic media, and arbitrators. The arbitration process in professional sports has become a matter of national interest, as evidenced by the wide publicity that was generated when Tom Roberts issued a recent $1 million salary arbitration award to a professional baseball player. The impact of the Seitz award in the McNally-Messersmith case is still the subject of discussion. Similarly, the decision in the free agent Dutton case in professional football as well as the decision in the Riggins case seemed to create controversy and debate among professional football fans. I will limit my comments to the development of the arbitration process in professional football under the collective agreement between the National Football League and the National Football League Players Association.

It would take hours to develop fully the history and background relating to the formation of the National Football League, the merger with the American Football League, the certification of the National Football League Players Association as the collective bargaining representative of the National Football League players, and the events that led to the first collective bargaining agreement between the parties in 1971. That agreement provided for the arbitration of injury grievances arising out of claims by players whose services had been terminated under circumstances where the players contended that they were injured and unable to play professional

*Member, National Academy of Arbitrators, Chicago, Ill.

football at the time of their termination, release, and waiver.

Between 1971 and 1974, the only arbitration in professional football involved injury grievance claims. These cases were heard by a number of arbitrators jointly selected by the parties on an ad hoc arrangement. It is evident that the parties completely accepted the concept of arbitration for the resolution of those types of disputes.

After the 1971 contract expired in 1974, the parties were unable to negotiate a new collective bargaining agreement until early in 1977. In the period between 1974 and 1977, however, they continued to arbitrate injury grievances, even though no collective agreement was in force and effect during that period of time. The arbitrators were selected on an ad hoc basis and were governed by the procedures that had been developed in the period between 1971 and 1974.

When the parties negotiated the 1977 collective bargaining agreement, they included an arbitration clause which, in effect, continued the procedures that had been followed in the arbitration of injury grievances. There were some procedural changes concerning the administration of the arbitration process, but in general the fundamental procedures remained unchanged.

The parties agreed upon a list of arbitrators among whom the cases would be rotated, and they agreed upon the selection of Pat Fisher as the notice arbitrator to whom all injury grievances would be referred. The notice arbitrator would then assign the case to one of the arbitrators on the approved list, and a hearing would be scheduled.

A substantial number of problems were encountered in connection with the scheduling of hearings on injury grievances because of the logistics involved in attempting to bring together at one site everyone who either had an interest in the proceeding or whose presence was required for testimonial purposes. The team against whom an injury grievance was filed was required to arrange for the presence of the team doctor who had treated the player, the team trainer who had participated in the treatment of the player, as well as the production of all of the trainer's medical records and all of the pertinent medical records in the possession of the doctors who had treated the injured player. The team also had to arrange for the testimony of club officials concerning discussions that may have been held between the player and team officials, the presence of the neutral physician who had examined the complaining player in accordance

with the contractual provision that required the player making an injury grievance claim to submit to an examination by a neutral physician who had been selected and approved by the Players Association and the Management Council, and the presence of members of the coaching staff who may have been involved in the incident or incidents that gave rise to the player's complaint. The various teams had objected to the scheduling of cases during the football season because of the problems involved in assembling all of the persons whose presence would be required. Scheduling became a complicated and difficult process, but it was eventually accomplished and the procedure did work despite all of the problems associated with getting a case ready for an eventual arbitration hearing.

In the most recent collective bargaining agreement negotiated between the parties, they have attempted to eliminate some of those problems. They have also provided for a more expeditious method of handling injury grievance disputes. Arbitrators who have functioned as injury-grievance arbitrators have, within a relatively short period of time, built up a body of arbitral authority that permits the parties to reasonably anticipate the position that an experienced arbitrator would take with respect to certain types of claims advanced by grievants. This development of injury grievance arbitration over a period of a little more than 10 years is a remarkable tribute to those members of the Academy who have served as injury-grievance arbitrators. They have dealt with the most complex types of medical problems involving injuries to muscles, bones, ligaments, and cartilage. They have to be concerned with cranial and spinal injuries and to learn the medical terminology and rehabilitation procedures involved in recoveries from fractures, sprains, traumatic injuries, and surgical procedures. They have made a contribution to the arbitration process in injury grievance cases in professional football that compares favorably with the contributions made by permanent arbitrators who have served the parties in steel, auto, farm equipment, can, and so many other basic industries.

The development of arbitration of disputes over the interpretation and application of provisions of the collective bargaining agreement in professional football dates back only to 1977. As noted, the parties' first agreement, which provided for the arbitration of injury cases, expired in 1974. A player strike in July of that year lasted for approximately 55 days and ended before the start of the 1974 playing season, but it was not until 1977

that the parties were able to execute their next collective bargaining agreement. They deemed the inclusion of an arbitration provision in that contract to be of such import and significance that they reached a tentative agreement on its wording long before negotiations were completed and the new contract was executed.

In order to have a complete understanding of the events that led up to the 1977 agreement, it is necessary that we spend a few minutes talking about the history of the litigation that preceded that agreement as well as the influence of the U.S. District Court of Minnesota and of the Eighth Circuit Court of Appeals on the parties' future relationship.

For a period of some 30 years, the relationship between a football player and the team for whom he played was governed by a player contract and by the NFL constitution. Until the Rozelle Rule was adopted in 1963 and inserted in the NFL constitution, a player who had completed his contract and had played out any option that remained for his services became a free agent, meaning that he was free to sign a contract with a different team.

All of this changed with the adoption of the Rozelle Rule. Although any player whose contract had expired was free to sign a contract with a new club, that club was now required to compensate the old club for the loss of the player's services. Under the rule, the two clubs could reach an agreement concerning the form, degree, and extent of compensation to which the old club was entitled. Where they could not reach agreement, the amount of compensation would then be determined by the Commissioner of Football, who had the power to award compensation in the form of draft choices, money damages, or the transfer of the contract or contracts for the services of another player or players from the roster of the signing club.

The Rozelle Rule continued in effect until it was suspended by the NFL in 1976 following the decision of the U.S. District Court in the case of *Mackey* v. *National Football League.* During 1976 and 1977, all players whose contracts had expired or who were not under continuing option to their teams were, in effect, free agents and could offer their services to any football team in the NFL without compensation of any sort being paid to the team that had lost the services of that player.

When the parties were unable to reach agreement on the terms and provisions of a new collective bargaining agreement

following the expiration of the 1971 contract in 1974, the then president of the National Football League Players Association (Mackey) filed a suit in the U.S. District Court in Minnesota charging that the Rozelle Rule constituted a per se violation of the antitrust laws. That suit was still pending at the time of the 55-day player strike in July 1974. Prior to the strike, the Players Association had proposed the elimination of the Rozelle Rule. The Management Council informed the Players Association that it would never agree to the demand of an unqualified player freedom of movement, although it did at that time institute certain modifications in the Rozelle Rule.

Negotiations continued following the strike. However, the Players Association withdrew its demand for the elimination of the Rozelle Rule and informed the NFL negotiators that it would await the decision of the district court in the *Mackey* case. The parties did exchange proposals concerning a final-offer election whereby Commissioner Rozelle, in awarding compensation to a team that had lost a player, would be limited to choosing between the suggested forms of compensation submitted by each of the clubs concerned. The Players Association rejected that proposal, contending that it was an illegal subject of bargaining since it would (in its opinion) constitute a per se violation of antitrust laws.

Before the *Mackey* trial began, a U.S. District Court in San Francisco had ruled in a case filed by Joe Kapp, a star quarterback, who had charged that the Rozelle Rule was an unreasonable restraint of trade. That issue arose when the Commissioner of Football refused to accept a player contract signed by Kapp and the team for whom he played on the basis that it did not conform with the standard NFL player contract. Another player, Yazoo Smith, had also filed a suit charging that the annual college player draft was illegal; a U.S. district court subsequently ruled in Smith's favor.

No meaningful negotiations occurred during the trial of the *Mackey* case, which ran from February until July 1975. The NFL continued to maintain its position that compensation was a mandatory subject for bargaining.

The New England Patriots players struck for a few days in September 1975 and returned to practice after receiving assurance that the parties would engage in intensive negotiations in an effort to reach an agreement on the terms and conditions of a new collective bargaining agreement.

U.S. District Court Judge Larson issued his decision in *Mackey* v. *National Football League* in December 1975, finding that the Rozelle Rule was a per se violation of the antitrust laws. He ruled that the freedom available to a player whose option-year ended on May 1 "appeared to be illusory." After analyzing the effect of the Rozelle Rule on players whose contracts and options had terminated, he found that the compensation ordered by Commissioner Rozelle, in a series of cases where players had moved to another team, served to act "as an effective deterrent to clubs signing free agents without reaching a prior agreement on compensation with that player's former club." He further found that the effect of the Rozelle Rule was substantially identical to the lifetime reserve system in professional baseball.

Judge Larson concluded that the Rozelle Rule was unreasonable since it was unlimited in duration and constituted a perpetual restriction on a player that followed said player throughout his entire professional football career. In his opinion, the Rozelle Rule was unreasonable when viewed in conjunction with other anticompetitive practices of the NFL such as the player draft, the use of a standard player contract, the use of an option provision, and the implementation of the tampering rule. He further found that since the Rozelle Rule was a per se violation of the antitrust laws, player transfer restrictions were improper subjects of bargaining and the collective bargaining contract could not provide a labor exemption to the antitrust laws.

The decision in *Mackey* provided no solution to the continuing problems that arose during the parties' negotiations, since the Players Association interpreted it as completely supporting its contention that restrictions on a player's movements were not negotiable. The NFL, on the other hand, continued to insist that it could not continue to function without some "system" for the long-term continuation of professional football. The Rozelle Rule, however, was now suspended and eligible players were free to negotiate their contracts without restrictions on their compensation or on their movements from one team to another.

In March 1976, Kermit Alexander, then president of the NFLPA, filed a class action suit on behalf of current and former NFL players against all NFL teams seeking damages for losses allegedly suffered as a result of the application of the Rozelle Rule.

As a result of an election of officers in March 1976, the compo-

sition of the Players Association executive committee changed substantially. Efforts were made to reopen negotiations, and NFLPA representatives were informed that, in the opinion of their executive committee, an agreement might be reached for the establishment of a system that would provide some measure of compensation to a team that lost a player. At the same time it was suggested that the Players Association might be willing to accept a system which would include the college draft.

The NFL responded by indicating a willingness to accept a system which would limit the compensation to a team losing a player to a predetermined draft choice or choices. The composition of both negotiating teams then changed, and at about the same time Commissioner Rozelle, responding to the district court decision in *Mackey,* suspended enforcement of the Rozelle Rule.

Proposals and counterproposals were then exchanged. One proposal established a formula that spelled out the exact compensation in terms of draft choices that would be received by a club that lost a player. The parties also discussed the management concept—its right of first refusal. Those proposals, as later modified, became the basis for the language appearing in Article XV of the collective bargaining agreement establishing the newly negotiated compensation procedures for a team that lost a player as well as the development of the concept of the right of first refusal.

In July 1976, the Players Association submitted a proposal that made specific reference to the finding of the district court in the *Mackey* case. The proposal was to exclude from collective bargaining any application or aspect of the reserve system. The parties then prepared a memorandum of understanding, known as the Anderson-Rooney agreement, which, when it was submitted to the Players Association executive committee in August, was rejected with a recommendation that the parties return to the bargaining table.

The Eighth Circuit Court of Appeals issued its decision in *Mackey* v. *National Football League* in October 1976. That decision was especially significant in that it rejected the district court's finding that the Rozelle Rule was a per se violation of antitrust laws. It found instead that the Rozelle Rule was a violation of the antitrust laws under the "rule of reason test." The decision reversed the lower court's holding that the reserve system was an impermissible subject of bargaining and found that, as a mat-

ter of fact, the reserve system was a mandatory subject for negotiations. It held that it was a labor exemption to the antitrust laws for agreements reached as a result of bona fide bargaining.

The Eighth Circuit's decision assumed major significance when the court concluded with the statement that the Rozelle Rule as implemented concerned a mandatory subject of collective bargaining and any agreement as to inter-team compensation for free agents moving from one team to another that was reached as a result of good-faith collective bargaining "might and will be immune from anti-trust liability under the non-statutory labor exemption."

At the same time the court found that some reasonable restrictions relating to player transfers are necessary for the successful operation of the National Football League and that the protection of the mutual interests of both the players and the clubs may indeed require such restrictions. It concluded with the following statement: "We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the Courts."

Shortly after the circuit court decision in *Mackey,* the parties exchanged correspondence. When the Players Association indicated it would be willing to accept a compensation plan that would be limited to superstars and that it would be willing to listen to proposals that would not unreasonably restrict player movement, the main barrier to an agreement came down. The parties thereafter engaged in intensive bargaining on the terms and provisions of an agreement that became effective March 1, 1977.

Since the *Alexander* case was still pending, the parties' agreement had to be submitted to the U.S. District Court for its approval in connection with the antitrust features thereof. The court also had to approve any settlement reached between the parties disposing of the class action claim for damages. The parties reached an agreement that resulted in the payment of $16 million to be distributed to members of the class. The National Football League also had agreed to contribute retroactive amounts to the pension plan. The total cost to the NFL was estimated to be in excess of $100 million.

Those who objected to the proposed settlement filed an ac-

tion, contending that the parties had agreed upon procedures that would result in an unreasonable limitation and restriction upon movements of players. U.S. District Judge Larson overruled the objections and approved the contract in its entirety. The decision was then appealed to the Eighth Circuit which ultimately affirmed Judge Larson's decision.

The Players Association had conceded before the court that its original objective of total unrestrained freedom of movement had not been realized. However, the Eighth Circuit, in affirming Judge Larson's approval of the settlement in *Alexander,* concluded that such unrestrained freedom of movement was "not in the best interest of professional football, the owners, the players, or the public that supported professional football." The court found that it was a "near certainty that the collective bargaining agreement was a result of bona fide arm's length negotiations."

The decision of the Eighth Circuit Court seemed to resolve all of the pending litigation, and the parties moved on to implement the terms and provisions of their collective bargaining agreement. They adopted procedures for the continued arbitration of injury grievances, and the arbitrators specially selected to hear noninjury grievances began to schedule those types of cases.

In May 1978, an issue arose between the parties concerning their respective positions involving a player whose contract had expired and who had played out the option year of his contract. The Management Council took the position that options were automatically renewable on an annual basis under the provisions of Article XV of the collective bargaining agreement. The Players Association took issue, contending that it had never agreed to any such interpretation. The matter was then called to the attention of the Eighth Circuit Court of Appeals since it had not yet issued its decision arising out of the settlement of the *Alexander* class action suit.

The Players Association raised questions regarding good faith bargaining on the part of its opponents, and there were charges of fraud and conspiracy. After each party filed affidavits in support of its position, the Eighth Circuit Court heard oral arguments concerning the alleged improper interpretation of Article XV, Section 17, as well as the charges of bargaining in bad faith. The court found that the contentions raised were without merit. Its decision is most interesting and revealing:

> "The only new evidence or change in circumstances is that the National Football League and its member clubs have interpreted the collective bargaining agreement in a manner different from that of the Players Association. This is precisely the kind of dispute to be resolved by arbitration and the normal channels of labor dispute resolution. Without deciding whether the plaintiff class followed the correct procedures in raising the issue, we hold that the District Court correctly refused to exercise supervisory jurisdiction over the collective bargaining agreement in this class action. The motion to remand or stay the appeal is denied."

Further attempts were made to reopen the matter before the district court, but those motions also were denied and the court refused to modify its original findings approving the *Alexander* settlement as well as the applicable provisions of the collective bargaining agreement. Both the district court judge and the circuit court of appeals had denied the suggestion advanced by the Players Association that the district court should exercise jurisdiction over the collective bargaining agreement.

The issues of bad faith, fraud, conspiracy, and failure to achieve a meeting of the minds were later reargued before me in the proceedings involving the Dutton case. Representatives of the parties filed extensive preliminary statements of position. At the conclusion of 11 days of hearings, the respective parties filed posthearing briefs, and later they filed reply briefs. In the award, I found that the contractual language was not ambiguous and was susceptible of interpretation. I denied the grievance, finding that the article in issue relating to the continuing option renewal feature of the contract had been litigated and had been found by the courts to have been the product of good faith collective bargaining.

There was a unique twist to this case when, on the day before the hearing was scheduled to begin, the Dutton grievance was removed from arbitration as a result of its being settled. The settlement was achieved when Dutton agreed to execute new player contracts with his team, the Baltimore Colts, upon terms and conditions acceptable to him. Those contracts were then immediately assigned to the Dallas Cowboys who, in return, compensated the Colts for the loss of Dutton's services by transferring a number of draft choices to the Baltimore team. Although the Management Council sought to dismiss the proceedings on the grounds of a disposition of the Dutton grievance, the hearing proceeded on the basis that the issue raised by the

Players Association in the original grievance was identical to the one raised in the Dutton grievance.

The parties had continued to arbitrate injury grievances before arbitrators who had been appointed to hear cases of that type. All other grievances involving contract interpretation issues were heard by two arbitrators jointly selected by the parties. The noninjury grievances included matters involving contract interpretation and the reimbursement for transportation expenses for players selected to participate in the Pro Bowl as well as issues concerning preseason physical examinations that would have an impact upon a player's right to claim injury protection compensation benefits, the legality of contracts, and the application of provisions of the NFL constitution to provisions under the NFL standard player contract.

A substantial number of issues concerning the player's right to receive injury protection benefits remained unresolved. Prior to 1977, a player who suffered a career-ending injury could be compensated only for the year in which the injury occurred. Although players sign multiyear contracts, a separate contract is prepared and signed each year. The provisions of the injury protection article, which the parties negotiated in 1977, permits the payment of compensation to an injured player who is under contract to the team for the following year, under certain conditions and circumstances. The maximum payment was 50 percent of his contract salary for the season following the season of injury, up to a maximum of $37,500 unless the player had individually negotiated a more favorable form of injury protection benefits into his contract.

Under the parties 1982 agreement, recently negotiated, the maximum payment has been increased to $65,000. A number of cases of this type were heard in 1981 and 1982, each of which raised different issues concerning preseason medical examinations by team doctors, the contractual relationship that may or may not have existed, and allegations concerning bad-faith application of the provisions of the eligibility requirements of that article in the contract.

In the five-year period following the execution of the 1977 agreement, the parties arbitrated a substantial number of issues, with the parties being represented in each case by competent and able attorneys. A hearing involving a grievance of John Riggins of the Washington Redskins received a great deal of media attention. I had insisted from the very beginning of our relation-

ship that the arbitration process could not function if it were to be conducted under circumstances where information would be communicated on a daily basis to the press and to radio and television sports reporters.

In the Dutton case, I had informed the parties prior to the proceedings that I could not serve as arbitrator if the parties held daily press conferences. They agreed to refrain from discussing the matter until such time as the award was issued and distributed to the parties. They kept their word, and we were able to proceed through some 11 days of hearings during which the parties and their advocates got to know each other and conducted themselves with extreme courtesy and fairness toward each other.

The same no-publicity conditions were laid down at the start of the Riggins case. We were initially besieged by members of the press. Both parties refused to grant interviews, and I refused to discuss the proceedings and issues. I informed the press that there would be no statements until such time as the award was issued to the parties. It is my opinion that publicity during the course of a hearing is harmful to the effective operation of the arbitration process.

Since beginning their new relationship in 1977, the parties have come a long way in only five short years. Their agreement provided for the resolution of disputes by arbitration, and they have been highly successful in implementing the process, reaping the benefits that flowed from the relationships that developed over the years.

The fact that the parties were unable to reach agreement on the terms of a new collective bargaining agreement until after a long strike does not mean that the arbitration process had failed. On the contrary, when the parties resolved the terms and conditions of their new agreement, they went to great lengths to adopt changes in their procedure which were the result of lessons they had jointly learned during the earlier years when they were arbitrating injury grievances. They found ways to reduce delays, to expedite the resolution of disputes, and to provide a better vehicle which could only serve to improve the administration of their arbitration process.

I am confident that the parties to the collective agreement between the National Football League Management Council and the National Football League Players Association would agree that the performance of their arbitration process in all phases,

including the arbitration of both injury and noninjury grievances, has lived up to the promise.

Based on my personal experience, I believe that as the parties get to know each other better, and as the relationship matures, they can look to a period of stability under an effective vehicle for the prompt resolution of grievances.

That is precisely what the Eighth Circuit Court of Appeals anticipated when it urged and then directed the parties to utilize the arbitration process as a means for resolving issues arising out of disputes concerning the implementation and application of provisions of the collective bargaining agreement. The decisions of the Eighth Circuit in the *Mackey* and *Alexander* cases did for professional football what the decisions of the Supreme Court in the *Trilogy* did for the parties involved in the arbitration of industrial disputes and disputes arising out of the public sector.

## II. A MANAGEMENT VIEW OF FOOTBALL ARBITRATION

JOHN M. DONLAN*

Leave it to the National Academy of Arbitrators to come up with an Academy meeting theme which has sexual overtones. But then again, when you consider the reaction of some parties to arbitration decisions, the overtones may be entirely appropriate.

The relative newness of the collective bargaining relationship in professional football and the arbitration of issue disputes, which was agreed to in 1973, provide an opportunity to review in a compressed time frame the expectations of the parties concerning arbitration and how the performance of the various elements compares with those expectations. Not unexpectedly, those expectations can differ broadly among management, the union leadership, and the employees.

Management, in any collective bargaining relationship, seeks to maintain as much flexibility and discretion in the administration of the agreement as it possibly can. Through bargaining, through definition, through draftsmanship, and through restrictions on the arbitrator's authority, it seeks to do just that.

---

*Executive Director, NFL Management Council, New York, N.Y.