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

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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.

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In a multiemployer bargaining structure, management's ability to achieve its expectations and maintain a unified front on any issue, including that of arbitration, is affected by many factors. Individual club strength, both financial and in terms of player talent, has an impact, as do overall market conditions. As Professors Berry and Gould state, the sports industry equation has additional variables:

> "(1) Sports combines are embryonic. These associations are overgrown small businesses, traditionally managed as such, now thrust into large industrial settings.
>
> "(2) People in the industry still are experimenting. The existing industry models are unclear, unappreciated or arguably inapplicable. Many people still refuse to accept the modern sports league model.
>
> "(3) There are relatively few participants in the professional sports business. This absence of participation may cause domination or disruption by small numbers of people. The human factor can tilt any equation; in the sport industry, this factor is magnified."[1]

The employee's expectations of the grievance process in professional football normally do not include it as a process for political exposure and manipulation. If he has a problem, he is looking for a process which is accessible, competent, fair, and understandable. I suggest to you that the last thing he wants is a process which uses what he feels is a legitimate gripe, complaint, or grievance as a vehicle for political exposure or for his leadership's self-aggrandisement.

The union part of the equation frequently has objectives that go beyond the leadership's professed concern for wages, hours, and working conditions. The leadership has political concerns which affect its appearance of unity and strength in dealing with management. They, understandably so, are concerned with issues of reelection or reappointment and the need to reinforce the perception of its members that they are getting their money's worth. Unfortunately, these political answers result in what Arthur Ross called "distressed grievance procedures." Ross feels, and I will try to support his assertion later, that the principal cause of overloaded procedures is the manipulation of the grievance machinery for ulterior purposes.[2]

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[1]Berry and Gould, *A Long Deep Dive to Collective Bargaining: Of Players, Owners, Brawls and Strikes,* 31 Case W. Res. L. Rev. 685, 688 (1981).

[2]Ross, *Distressed Grievance Procedures and Their Rehabilitation,* Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963), 104.

Since our system grew out of a litigious environment, it runs the risk, as arbitrator Joseph Raffaele wrote in a recent *Arbitration Journal* article, of being absorbed in the legal process of society. He stated further: "Because of its immersion in law, labor arbitration is losing its problem-solving efficacy and becoming a forum for the release of political pressures, a phase in the continuing adversarial relationship between labor and management, and an instrument for codifying employment terms into complex and rigid rules without reference to their effect on productivity."[3] Eva Robins, former president of this Academy, reflected this same concern about the increasing ratio of hard-fought legalistic arbitration presentations to problem-solving approaches.[4]

By any traditional measure, I think it is legitimate to characterize the grievance procedures, both injury and noninjury in the National Football League/Players Association contract, as being overburdened and certainly distressed. Grievances are requiring between two and three years from time of filing to the arbitrator's decision. Other industries require less than a year from filing to decision.

Nor do we fare well in another measure—cases arbitrated per 100 employees. In 1977, the first year in which we had both injury and noninjury grievance procedures, three grievances were arbitrated for each 100 players. By 1980, that had been reduced to one and one-half for each 100 players, a figure well above the 1.6 cases per year per *10,000* employees arbitrated under the General Motors/United Auto Workers agreement between 1950 and 1958. In the bituminous coal industry, which has a reputation for volatile labor-management relations and excessive arbitration, two cases per 100 miners were arbitrated each year between 1974 and 1977,[5] this, interestingly enough, under a grievance procedure negotiated by the current counsel to the National Football League Players Association.

The picture is more positive in terms of number of grievances filed between 1977 and 1982. After an initial burst of seven cases per 100 players in 1977, we have declined to a 1982 figure of three cases per 100.

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[3]Raffaele, *Lawyers in Labor Arbitration,* 37 Arb. J. 14, 16 (September 1982).

[4]Robins, *The Presidential Address: Threats to Arbitration,* Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 1.

[5]Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract,* 77 Nw. U. L. Rev. 270, 280 (1982).

This political abuse of the grievance procedure has its origin in the identity crisis experienced by the players in their early organizational efforts. In 1958, NFL Commissioner Bert Bell made the following statement to a House Subcommittee:

> "Accordingly, in keeping with my assurance that we would do whatever you gentlemen consider to be in the best interests of the public, on behalf of the National Football League, I hereby recognize the National Football League Players Association and I am prepared to negotiate immediately with the representatives of that Association concerning any differences between the players and the clubs that may exist. This will include the provisions of our bylaws and standard players contract which have been questioned by members of this Committee."[6]

Following that commitment, it took more than ten years before our first collective bargaining agreement was negotiated in the NFL. According to Berry and Gould, the delay was caused by players and lawyers who were afraid to declare that their organizations were unions. They state further that Creighton Miller, longtime counsel for the NFL Players Association, generally resisted labeling the NFLPA as a union.[7]

The players' identity crisis is not unlike that of the 747 airline pilot who makes $130,000 a year. When confronted with having to observe the picket line of a flight attendant making $20,000 a year, he had his wife write management saying, "Settle this strike soon or we'll have to sell one of our houses."

Other factors contribute to the union leadership's political abuse of our grievance system:

1. The relatively short career contributes to frequent turnover in union membership. In addition, there is some movement of players from one club to another.
2. Limited contact with the union, because of structural and geographic dispersion, encourages union leadership activity that gets maximum exposure.
3. A well-recognized salary diversity separates the rookie, who earns $40,000 a year, from the superstar, who earns several hundred thousand dollars a year.
4. The presence of agents and attorneys, who do essentially the same job as the union's, compounds the union's political problems.

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[6]Berry and Gould, *supra* note 1, at 687.
[7]*Ibid.*

5. The union's leadership has made the mistake of trying to superimpose an industrial collective bargaining system on the sports industry. Since few models upon which to base the system exist, such an effort is understandable. However, this leadership, with no actual experience in collective bargaining in any sector, has attempted to apply an academic and essentially uninformed perception of what collective bargaining is to the real world.

I have discussed earlier how the above factors have resulted in abuses of the system in terms of number of cases filed and number arbitrated. I think the outcome of these cases is even more revealing concerning the use of—or, more appropriately, the abuse of—our system. Of the 51 injury grievance decisions issued between 1977 and 1982, 35 of the awards were for 25 percent or less of the potential contract exposure and 21 of the decisions were for no recovery.[8]

Lest there be any misunderstanding, I am not one of those who views a win-loss record as a measure of an effective or successful grievance procedure. When I see a high caseload, I see inordinate delay between filing and decision, and when I see only 11 full awards out of 51 grievances filed, I am troubled. I am worried, as Arthur Ross says, about curbstone lawyers being involved in the grievance procedure: ". . . where the comma and semicolon become more important to them than the problem which gave rise to the complaint. Winning grievances and counting the cost of wins and losses become a sort of shibboleth and technical perfection tends to replace sound and reasonable judgment."[9]

We are not pleased with this system, and we plan to do what we can to correct it. Instead of transposing existing labor relations models, we want to develop a system that meets the needs of professional football. In addition to being unclear and inapplicable, existing collective bargaining systems in steel, coal, and auto can hardly be pointed to as examples of effectiveness, competitiveness, or vehicles to job security. They can, however, teach us not to make the same mistakes of overreliance on process and litigation, creativity only when in distress, and overdependence on third-party resolution of disputes.

During the last negotiations, we did agree to the addition of

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[8]NFL Management Council.
[9]Ross, *supra* note 2.

a fact-finding step and tightened time limits. Procedural modifications alone will not relieve a distressed grievance and arbitration system. If anything, a more efficient system will frequently stimulate further controversy and expanded political abuse. More sophisticated procedures often play right into the hands of the "curbstone" lawyer who can more effectively demonstrate his legal and procedural prowess, on his way to expanded visibility.

In contrast to other industries in this country, collective bargaining in football did not grow out of a militant confrontation between labor and management. Instead it developed from employee associations which at first rejected traditional trade union approaches. The recent militance grew not from confrontation, but from litigation and legislation which overnight thrust the union leadership into an unfamiliar role. With no tradition of its own, it had to rely on models ill-suited to the unique characteristics of professional sports. Without this militant history and without the traditions and experience associated with an evolutionary development, our grievance procedure has assumed an unfair burden.

Our grievance procedure need not be the economic and political focal point of our collective bargaining relationship. It can, as George W. Taylor believed, involve agreement-making as well as agreement-administration.[10] We in the Management Council would like to think we can head in this direction.

In a mature and successful collective bargaining relationship, the parties have come to recognize that there exist both an area of mutual interest and an area of conflict. They have come to recognize that bargaining and administration of their agreement are not a process of gamesmanship or "I gotcha." And most importantly, where there is disagreement, they recognize that there is a rational and legitimate basis for that disagreement. Sadly, those elements are not present in our relationship with NFLPA leadership. We will continue our efforts to shape a relationship that will make the grievance and arbitration system an effective means of resolving issues, not a vehicle for institutional and political justification.

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[10]Shils, Gershenfeld, Ingsten, Weinberg, Industrial Peacemaker (Philadelphia: University of Pennsylvania Press, 1979), 38.