CHAPTER 11

BUNTS, DUNKS, PUNTS, AND STRIKES IN PROFESSIONAL SPORTS ARBITRATION

LAWRENCE T. HOLDEN, JR., MODERATOR*

I. INTRODUCTION

The professional sports panelists consist of representatives of both labor and management in the sports of professional baseball, basketball, and football. Each of the three sets of panelists discusses critical issues confronted by their respective sports. In baseball, the discussion centers around the issue of contraction (reduction in the number of teams). In basketball, the issues concern the problems associated with the management of salaries. The football panelists focus on the work stoppage issue and the operations of the arbitration panel.

II. BASEBALL: THE CONTRACTION ISSUE FROM THE MANAGEMENT PERSPECTIVE

FRANCIS X. COONELLY**

Michael Weiner and I decided to discuss the contraction agreement that was litigated last year. Both the litigants and the arbitrator enjoyed working on the issue because, after arbitrating the matter for days, we concluded a new collective bargaining agreement that specifically addressed the issue and we asked the arbitrator (Shyam Das) not to issue his decision. Michael and I sit here

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today supremely confident that each of our views prevailed in that case and Mr. Das sits here not willing to tell either one of us who is right. As a result, we all go home happy.

I will describe the background of the case and the position taken by the clubs and then address what the contraction case meant to the collective bargaining process. Briefly, the contraction case was one where the owners decided that there were clubs within the industry that were failing, that were simply not producing enough revenue to justify their survival, and the owners voted to begin the negotiation over buying back the membership rights of two of those clubs (the Minnesota Twins and the Montreal Expos). The owners' right to take this action is spelled out in the constitution of the league. There are similar provisions in the constitutions of other leagues, usually found in provisions that deal with expanding the league and with dissolving or contracting out unsuccessful franchises.

We believed then and believe now that the decision to buy back the franchise rights of members of the league is a core management decision. We recognize that such a decision has an impact on labor and will require bargaining over the effects of the decision. But the decision itself was not one that had to be negotiated with the Players Association. We knew that there would be massive effects on the members of the bargaining unit, including the loss of 80 jobs. So we provided the Association with notice of the decision and told them that we were willing to engage in and wanted to begin bargaining over the effects of the contemplated change. The union had a different view and filed a grievance to challenge our decision to begin the negotiation process with the affected clubs to buy back their franchise rights.

There are two ways of looking at our decision. First, you could consider that the two clubs were independently owned and operated and they were going out of business entirely. Therefore, this was not a mandatory topic of bargaining under the Supreme Court's decision in *Darlington*.[1] The decision also could be viewed as being made by the leagues as a whole, rather than as being made by the two clubs. From this perspective, this decision represented, at the very least, a partial closure of the business and therefore should be analyzed under the Supreme Court's decision in *First*

[1] *Textile Workers v. Darlington*, 380 U.S. 263, 58 LRRM 2657 (1965).

National Maintenance.[2] In *First National*, the Supreme Court decided that a partial closing is also not a mandatory topic of bargaining. And, philosophically, you could conclude that it is not a mandatory topic of bargaining because it is a decision that goes to the heart, the scope, and the direction of the organization. Our position was that our decision to remove ourselves from two of the 28 markets of major league baseball was a change in the scope and the operation of this industry that could not require bargaining under the labor laws or under our contract.

Although the union's grievance alleged several contract violations, we believed that there was no contract violation because the planned contraction was not a mandatory topic of bargaining. Under the law, employers and unions can agree in a collective bargaining agreement (CBA) to restrict management's rights on a nonmandatory topic of bargaining. However, that restriction must be explicit in the agreement. In our view there was no explicit limitation on the right of management to contract two teams. Indeed, the contract contains a broad management rights clause that says that unless the issue is specifically addressed in this agreement, management retains the right to direct the operation of the entity. Furthermore, we had a provision in the CBA at that time that laid out the procedures under which we would expand. But there was no similar provision on contraction. As I mentioned at the outset of the remarks, today we have a provision that does deal expressly with contraction. The clubs agreed that they would not contract during the term of this new basic agreement and the union agreed that the clubs would have the right to contract preceding the 2007 season, assuming that certain steps were taken under the CBA.

In the arbitration, the union charged us with several violations of the collective agreement and argued that all of the related provisions were implied restrictions on management's right to contract either under federal labor law or under arbitration precedent. We countered with the concept that, in the face of the broad management rights clause, those other items in the agreement could not imply restrictions on the right to contract. We argued further that the union's arguments essentially dealt with the *effects* of contraction. And we agreed that contraction did affect some mandatorily bargainable terms and conditions of employ-

[2]*First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

ment, but we argued that under Supreme Court and National Labor Relations Board (NLRB) precedents, that fact alone did not make the issue of contraction mandatorily bargainable. Rather, it obligated us to bargain over the impact of contraction on the terms and conditions of employment that would be affected by the fundamental change in the management of the business.

The case raised a number of interesting side issues. One of the principal leaders in the effort to assess and determine which clubs should be contracted and how the contraction should be implemented was Bob DeFey. Bob was then the chief legal officer of Major League Baseball and is now the President of Major League Baseball. He also held an executive "business" position within baseball. When he was leading the efforts at contraction, he acted sometimes as a business person and sometimes as the chief legal officer. We believed that the union's request for documents asked for many documents that were covered by either the attorney-client privilege or the work product doctrine. We interposed objections to producing some of these documents and we got into some very difficult issues as to when a lawyer acting as a business person in some context and as a lawyer in other contexts should have the benefit of the attorney-client privilege. In some of the meetings that were covered by these document requests, Bob was working as the chief legal officer for baseball, as when he was rendering advice over threats to sue major league baseball, and in other meetings, he was working as baseball executive. We had many interesting legal arguments on those issues. Shyam Das issued several awards, some of which favored us and some of which favored the union.

The other point I'd like to mention illustrates how the arbitration process is an extension of the collective bargaining process. The clubs had decided to contract prior to the 2002 season. The collective bargaining agreement was expiring roughly a month and a half after the decision to start the negotiations over contraction was made. As it turned out, the parties weren't ready to reach an agreement in the off season after the 2001 season. They simply weren't ready to make the tough compromises that were required to reach an agreement in this matter. In the negotiations, we spent our time fighting with one another over contraction, and, in the arbitration, we also spent days and days before Shyam Das also fighting about contraction. Then we would take a break and we would go back to the negotiating table and negotiate for a week. Then we'd go back to the arbitration. The two processes were really

one, and we had several instances in which we resolved parts of the contraction issue outside the bargaining process. The contraction issue, however, was both painful and expensive for all the people involved in it, and the arbitration had the effect of being in some respects a placeholder until we were ready to get serious about the bargaining process. As a strike date approached in August 2002, the parties did get serious and made the tough compromises needed to reach a collective bargaining agreement. For the first time in many years we were able to reach a collective bargaining agreement successfully without a strike or lockout. We did address the contraction issue in a negotiated settlement and now have a decision on that topic, and Michael and I both remain supremely confident that we each prevailed in the case.

III. BASEBALL: THE CONTRACTION ISSUE FROM THE UNION PERSPECTIVE

MICHAEL WEINER*

To paraphrase a giant of Puerto Rican baseball, Chico Escuela, arbitration and arbitrators have been very good to baseball. I refer to the institution of baseball and not just to the union side. Some of the most important contributions—some of the most important legal decisions rendered in baseball—have been rendered by the chairs of our arbitration panel—Peter Seitz in the Messersmith/McNally case [1] that created free agency; several decisions by outgoing National Academy of Arbitrators President, Rich Bloch; and the decisions of Tom Roberts and George Nicolau in connection with the collusion grievances of the 1980s. And Frank Coonelly was absolutely right in praising the assistance we received from Chairman Das in the contraction case. In collective bargaining in the field of team sports, it's about creating a system, a set of rules under which individual contracts are negotiated. In baseball, since 1974, arbitration and arbitrators have played a crucial role.

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[1] *Professional Baseball Clubs*, 66 LA 101 (Seitz 1975), *motion to vacate denied sub nom.*, *Kansas City Royals Baseball Corp. v. Major League Baseball Players' Ass'n*, 409 F. Supp. 233 (W.D. Mo. 1975), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

A substantial portion of our bargaining unit is eligible for salary arbitration. This is not the place to discuss how exactly that plays out. I attended a session yesterday involving the airline industry where the term "baseball arbitration" was thrown around quite a bit, and I'm fully prepared to defend the use of arbitration. In our system it has worked exceedingly well to prevent disputes. And in the last 15 years or so we also have used arbitration to resolve some thorny disputes involving players and agents and even among agent groups. Ted St. Antoine has been our arbitrator for those purposes.

Turning to the contraction case, from the union's perspective, there were several theories. Some of them were quite narrow and arose when the case was filed. Some of them concerned the timing issue. It was far too late in November of 2001 to make an announcement that you were going to change the number of teams that were going to play when spring training opened 3 months later. We believed that if the clubs violated specific contractual provisions related, for example, to the scheduling of games or the operation of the free agent market, they had to negotiate over the underlying issue, contraction, regardless of whether contraction was a mandatory subject of bargaining.

However, when a state court in Minnesota later issued an injunction that precluded contraction of the Minnesota Twins, the clubs abandoned the idea of contraction for the 2002 season. At that point, the grievance was narrowed to only the broadest of the issues: that is, whether the clubs could unilaterally reduce the number of teams under our contract without bargaining with us. To me the most thought-provoking issue that arose during the arbitration—and there wasn't a lot of time to provoke thought while we were in the middle of bargaining—was whether we were asking the arbitrator to interpret our collective bargaining agreement or to interpret the National Labor Relations Act (NLRA).[2] That question arose when we briefed the case and offered closing oral arguments. We never really answered that question but I have some thoughts to throw out.

The clubs pointed out that much of the precedent relied upon by both sides involved interpretation of the NLRA. Both sides referred to a line from a Rich Bloch decision in the mid-1980s

[2]Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §151 et seq.).

stating that the contractual provision at issue in that case was our contractual equivalent of the statutory provisions that govern the duty to bargain. The union still maintained in the contraction case that, while the outside precedent was relevant in interpreting the contract, the arbitrator was hired to interpret the contract. That is a different endeavor from interpreting the statute. It's a different endeavor substantively from the perspective offered by the clubs: that is, if this arbitration panel failed to rule their way, the panel would then be flying in the face of decades of NLRA precedent that had ruled that partial closings, relocations, or shutdowns were not mandatory subjects of bargaining. Our position was that this case was a matter of first impression. The clubs had never before tried to reduce the number of teams under our basic agreement. No arbitrator had ever been presented with that question, and, as in any other case, the arbitrator can look to whatever precedent the parties give, but in the end his job was to interpret our contract. Both sides focused on the NLRA precedent that Frank alluded to, in particular *First National Maintenance*[3] and the *Fibreboard*[4] case that preceded it. Our view was simply this: considering the broad principles that those cases enunciated in the light of the facts of our case, the issue of contraction was something that had to be bargained under our contract.

The club's argument, on the other hand, was consistent with the way the courts and the Board had dealt with this issue. They created categories: Is it a partial closing? Is it a relocation? Does it fall within *Darlington*?[5] They were trying to place this case within one of those categories that allowed them to argue that this planned contraction was not a mandatory subject of bargaining. Our position was that Arbitrator Das did not have to place the case into one of those categories. This was the first time in our relationship in which this issue and this fact pattern were being interpreted. It would have been fascinating to all of us to see what Shyam's decision would have been on such questions as: Is there a difference between an arbitrator's interpretation of a contract and a statute? Does the context matter when you are determining whether someone complied with external rules created outside the relationship or whether you are determining whether someone broke a promise within the

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[3]*First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).
[4]*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 57 LRRM 2609 (1964).
[5]*Textile Workers v. Darlington*, 380 U.S. 263, 58 LRRM 2657 (1965).

relationship? We felt very strongly that what happened in this case was that the clubs had broken a promise to us. One of the reasons why we had 21 days of, at times, painful hearings was that we felt that the context in which those promises were made and in which we believe those promises were broken was essential in understanding the claims we were making in this case. This was not the National Labor Relations Board or a federal court determining whether there had been compliance with the Act.

The beauty of this process is that we'll never know the answers to these questions. Frank and I are not entitled to know the answers because we were able to work the matter out. And, to echo Frank, having this matter in arbitration as opposed to some other forum was vital. Our system is one of tripartite arbitration with each party represented on the panel. This structure provided Arbitrator Das and the parties with flexibility as to when a ruling would issue and, in the end, flexibility to help us resolve our problems. Contraction, which in the winter of 2001 was a substantial impediment to our bargaining effort, became an area where we reached agreement, and it supplied a substantial push toward the overall bargain that we made.

IV. PROFESSIONAL BASKETBALL: UNION PERSPECTIVE

DAVID FEHER*

I think that all sports—and basketball and football in particular—have been blessed by the arbitrators who have served us. Arbitration has made a difference. As in a marriage, from time to time we cannot work things out and we need a third party to help decide the outcome.

One interesting thing in both basketball and football is that it's a continuing process. We will have an arbitration over an issue that seems like life or death at that moment, even though it may be a dispute over a few words in a collective bargaining agreement (CBA) that people paid little attention to when they negotiated the agreement. And those words remained almost forgotten until—

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1 year, 2 years, or 10 years later—an event happens that brings it to the top of the sports pages.

That happened a few years ago in the Sprewell grievance in the National Basketball Association (NBA).[1] That arbitration involved an event that no one could have anticipated, and the outcome of the arbitration hinged upon a few words in the CBA.

In a more recent arbitration, we argued long and hard about the meaning of the words "sole discretion." The concern was whether these words meant simply what the dictionary said or whether they meant something more.

To be more specific, in the NBA we do not have a "hard" salary cap. But in the last round of CBA negotiations, the owners made demands for an absolute hard salary cap, a cap that would not permit a club's total salary bill to exceed a specified amount. The players fought this demand and, in the end, we agreed upon an escrow system where the players would place up to 10 percent of their salary into a pool that the NBA owners could distribute among themselves under certain circumstances. The question came up in arbitration about what the owners could and could not do with this money.

The CBA clause said that management could distribute that money in its "sole discretion." When it came time to distribute the money, there were disputes. Some of the questions raised were whether the money should go to this owner who was promoting his team well, or that owner who was not, and whether the low-revenue teams should or should not get any of this money. However, the distribution of the fund that the NBA ultimately adopted also would have had a negative impact on other provisions of the CBA that the parties specifically negotiated, particularly the provision that called for a dollar-for-dollar salary cap tax. So we had an arbitration over whether the term "sole discretion" meant that the distribution of the money could be done as the NBA proposed, which the players believed would undermine other provisions of the CBA.

In basketball as well as football, once we get into arbitration, we do not have testimony as to what was said or not said in the CBA negotiations. We want the decision, whatever it will be, to be based

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[1] *In re National Basketball Players Ass'n on Behalf of Player Latrell Sprewell* (Opinion and Award), 548 PLI/P at 429 (Mar. 4, 1998) (Sprewell had an altercation with his coach; he first received a long suspension, but that was shortened in arbitration).

on the language of the CBA and relevant legal authorities. So in the arbitration neither side testified as to what was said when the term "sole discretion" over the distribution of this money was negotiated.

Given the language, at first glance one would think that no good arguments could be made. But a decision by Judge Scalia, before he went to the Supreme Court, held that "sole discretion" still meant that you could not undermine the essential benefits of the contract that had been specifically negotiated. [2] Nonetheless, after a vigorous fight, the NBA's interpretation prevailed. The arbitration, however, was also a fight that may have a significant impact on how the parties negotiate the CBA in the next round.

Last night I was discussing with our moderator how arbitration works in the NBA and the National Football League. I said that it really is analogous to how Congress works with the judiciary in the case of statutory enactments. Every now and then judges will render a decision that Congress does not like, and, if both sides of the aisle agree that the decision should be changed, they change it.

That happens in our negotiations. After the Sprewell case, we revisited the words that led to that decision and made some changes. Now we have another negotiation with the NBA concerning the next CBA and the escrow system, including the issue of precisely how any money in such a system is to be distributed. These matters were not issues before, but they are issues now.

So, in some ways arbitration decisions just set the stage for the next round of negotiations. We are in a marriage. Arbitrators render decisions, but we also have to move on to the next negotiation. In that regard it's a continuing process.

V. PROFESSIONAL BASKETBALL: MANAGEMENT PERSPECTIVE

HOWARD GANZ*

Certainly the arbitration process has been an important one in professional sports generally, and in the National Basketball Asso-

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[2] *See Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1153, 1 IER Cases 613 (D.C. Cir. 1984).

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ciation (NBA) in particular. I do think there are some elements in professional sports that make arbitration matters different, if not unique, and there are certain aspects to the NBA arbitration system that are unique. From my perspective, there are four different, if not unique, factors that have considerable impact on the resolution of disputes in professional sports, including, but not limited to, those disputes that are submitted for decision by arbitrators.

First, there is an absolutely intense interest on the part of the public and the media in what goes on in the world of sports in America. That means that there is an inordinate focus on disputes in professional sports. David Feher mentioned the Latrell Sprewell case. That case was front page news in *The New York Times* for weeks; indeed it was replaced on the front page only by the grace of Monica Lewinsky.

More recently (as Shyam Das well knows—because he was the chair of the arbitration panel that decided the matter), the point about the fascination of the media and the public in matters related to professional sports was made, perhaps even more graphically, by the case involving John Rocker, formerly a pitcher for the Atlanta Braves.

As some of you may recall, Mr. Rocker had become well known as much for his antics on the field as for his prowess as a pitcher. (Those antics, by the way, included derisive comments and gestures aimed at the fans, especially in Shea Stadium, the home of the New York Mets.) In any event, Rocker agreed to spend the better part of a day being interviewed by a writer for *Sports Illustrated*, and he was subsequently quoted in that magazine (and there was little, if any, dispute as to the accuracy of the quotes) as having made a number of racially-tinged remarks (about African Americans, Asian women, and the types of people who, at least in his opinion, customarily rode the subways in New York City). Rocker's statements evoked a maelstrom of controversy; he was disciplined by the Commissioner of Baseball for those statements, and the Major League Baseball Players Association filed a grievance on his behalf.

Not only was there intense media scrutiny of the Rocker case, but on the street outside the Park Avenue office building in which the hearings were conducted, there were demonstrations that included a giant 20- or 30-foot rat that the unions in New York City trot out only for the most significant of labor controversies. On one corner there were 150 people with microphones and TV cameras, on the next corner there were 300 union adherents and this large

plastic rat, and somewhere in the middle were police and other law enforcement officials. Mr. Rocker actually had to be sneaked into and out of the building because the media and public frenzy was so great.

The second factor that affects the resolution of disputes in professional sports is the enormous amount of money that is ordinarily at stake. Almost every dispute over a sports matter involves large amounts of money, even when the case involves only an individual grievant challenging the imposition of discipline. When Latrell Sprewell's suspension was reduced from 1 year to "only" one season, that "reduced" discipline still cost Mr. Sprewell $6 million in lost salary. That is a lot of money. On a level that is even more grandiose, David Feher and I were on opposite sides of the arbitration table when the NBA locked out its players in the fall of 1998. The Players Association brought a proceeding alleging that, notwithstanding the lockout, the teams were obliged to pay players who had "guaranteed contracts"—that is, contracts that guarantee the payment of a player's salary whether or not he ever plays (and in some cases, even whether he remains alive). One of the cute things that happened in that case was that whenever NBA counsel communicated with the arbitrator, John Feerick, our caption was "Lockout Pay Case," which we thought was a contradiction in terms. Not to be outdone, the caption used by Mr. Feher's firm representing the players' union was "Guaranteed Contract Case." And, just to punctuate the point that there are ordinarily enormous sums of money involved in sports industry disputes, the potential liability of the NBA teams in this case, whatever its caption, was about $800 million.

Similarly, the controversy that David Feher mentioned—over the operation of the escrow/tax procedure that is part of the NBA Salary Cap system—was a dispute over how some $300 to $400 million was to be distributed. Needless to say, the enormous amount of money that is involved serves to heighten the interest of the public on sports issues and the attention paid by the media to such disputes.

The third factor that makes disputes in professional sports at least somewhat unique results from the dual system of employment contracts. In the professional sports leagues, there are, typically, both collective bargaining agreements and individual contracts.

The early NBA collective bargaining agreements in the 1960s covered pretty standard stuff: pensions, hours of work (meaning, in the basketball context, the number of games played, when

players were required to report for training camp, etc.), and matters like those. In fact, the first collective bargaining agreement that I worked on ended up being a three-page agreement to which a standard form player contract was appended. The most recent NBA agreement contains 279 pages of text, plus 80 pages of exhibits, plus another 30 pages of side letters. I am not sure this signifies progress, but at least we have managed to denude several forests over the course of the decades. I am fond of describing the NBA collective bargaining agreement as biblical in its proportions and talmudic in its complexity.

Over the years, the scope of individual bargaining in the NBA—that is, the bargaining that takes place between the player and his team—has been narrowed by the collective bargaining agreement. I think that there has been a role reversal, at management's urging, to put more and more into the collective agreement and to narrow the scope of bargaining between the individual team and player/player agent. That is certainly true in a system where there is a salary cap that limits the total amount a team can pay to all of its players, where there is a maximum individual salary, and where there are precise, down-to-the-dollar salaries that can be paid to rookies. Thus, for example, if a player is drafted number one in the first round of the draft, there is no individual bargaining between player and team over salary. Rather, the collective bargaining agreement specifies the number of dollars the player will be paid in salary during the first 3 or 4 years of employment.

The final element that makes collective bargaining and arbitration in professional sports different is the large amount of "lawyering" that is invested in the formation of the collective bargaining agreements themselves. An agreement that runs for some 300 pages is an agreement that only a lawyer could love. In many respects, the contract language produced by this "lawyering" looks more like a set of papers documenting a major corporate transaction than a standard labor agreement. Defining "just cause" may be difficult, but at least it is a term with which you are all familiar. However, if anyone sitting here can even guess at what the NBA collective bargaining agreement means when it refers to "Projected Aggregate Compensation Adjustment Account," please go ahead and take a crack. And that, I assure you, is only one term I decided to select from dozens of other similarly abstruse formulations that I could have picked from the NBA agreement.

So if any of you are interested in cases in which your decisions will be dissected by the media and the public, in which the winner-take-

all money at stake may be in the hundreds of millions of dollars, and in which you will be confronted with a dual (and sometimes conflicting) system of employment contracts that use language you have never heard of, welcome to the world of arbitration in professional sports.

VI. PROFESSIONAL FOOTBALL: UNION PERSPECTIVE

GENE UPSHAW*

It has been a privilege for me to be here because I've learned a lot from what is going on in the other sports. In football, we start with our basic collective bargaining agreement. From that agreement, we try to develop a vision about where we want the industry to go, and then we try to move it in that direction. We do not always look at all of the issues that might be faced and that's why we need arbitrators to help put us in a position to be creative and to do the things that we didn't take time to do when we reached agreement on a contract.

Over the years, we have done all of the things that have been discussed here, even ceasing to be a union. We did that because that is exactly what the court said we had to do in order to obtain some of the freedoms we couldn't get at the bargaining table. We learned early that in the National Football League, it wasn't a matter of how well you could argue or how great your points might be. Collective bargaining ended up being collective begging and we decided to get out of that business. As Harold Henderson has pointed out, we went to the federal court in Minnesota and won. When we walked out of the courtroom after that decision, Harold told me that we didn't win very much money after all that fighting and I remember what I said to him: "But you have to pay it!"

I said earlier that we had to have a vision. We have tried to work together from that point on to continue the relationship that we thought we needed in the game of football. We saw it very clearly then and we still see it very clearly. We have extended the agreement we negotiated in 1992 three or four times. In April 2004, we have an obligation to look for still another "extension"—we don't

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like the word extension, we like to say that we are renegotiating. The experiences of the other sports have been useful and helpful to us. We were watching very closely baseball's situation with contraction, even though we were expanding. In the past few years, we entered two new markets—Cleveland and Houston. We'll probably do something in Los Angeles but we know that when we do, Al Davis is probably going to sue somebody else.

We all have used a number of the people whose names you've heard here. We've all used the same people for some reason and when we win too many cases, Harold fires them. We never fire any arbitrators. As a matter of fact, we have a very good relationship over the selection of arbitrators and I've been very pleased with the outcome. We don't always win and they don't always win. At the end of the day, we try to find ways to gain from what the arbitrator brings to us and I think this is a very important process. It's a lot cheaper than antitrust attorneys and at the end of the day, in many cases it gives us the chance to decide what's best.

VII. PROFESSIONAL FOOTBALL: MANAGEMENT PERSPECTIVE

HAROLD HENDERSON*

I think Gene Upshaw has pretty much summarized our history and brought us to where we are in our collective bargaining relationship. I would like to talk specifically about our arbitrations and our arbitration procedures. Football is different from baseball and basketball because the role of arbitrators is much more limited. We have seen fit to try to limit the impact that anyone outside our business would have on the business itself, particularly on the competitive issues. We don't want an outsider deciding who's going to play on Sunday or on what team a player or coach might be. We want to reserve to ourselves the right to make those kinds of decisions.

Under our collective bargaining agreement (CBA) we have two arbitration panels. One is a noninjury panel to handle the typical grievances you see under any CBA, including discipline imposed by the clubs. The other is an injury panel. Football is, unfortu-

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nately, a sport in which players sometimes suffer injuries. Under our contract they are entitled to full compensation for the time that they are injured as a result of working. There on occasion is a question as to when the player is healthy. The player is entitled to his full salary for the season until he is healthy, but some people think that a club might let a player go before he's fully recovered. Such an action leads to money questions.

There are five arbitrators on one panel and four on the other, but we have no more than three dozen filings a year, and fully half of those are settled before a decision is rendered. We also have an impartial arbitrator whose job is to handle questions about offer sheets, player movements, and restricted free agents. In the last 10 years we've had three of those cases. We have a special master who has broader responsibility for system issues such as free agency and the salary cap. We've had about 30 or so cases filed with the special master. At least half of those have been settled. As you can see, we don't get a lot of decisions that really guide the nature of the business.

There are other arbitrations that affect the integrity of the game, which we submit to the Commissioner rather than an outside arbitrator. These cases cover matters that are pursuant to the constitution and bylaws, including drug, alcohol, and steroid violations. Steroids in particular is deemed to be a competitive issue. The Commissioner also acts as an arbitrator in disputes between the clubs over territorial and other club rights under the constitution and by-laws. Disputes between the club and such club employees as the executives or the coaches about interpretation of their contracts also are resolved by the Commissioner, acting as an arbitrator.

Gene didn't mention it, but on his side I know that disputes or appeals over the certification or decertification of the agents that represent the players ultimately go to an arbitrator. I believe he has a similar procedure for certified financial advisors.

We have about a dozen arbitrators doing different things, but they do not handle many cases, and very few cases that really affect our business. I think in part this situation stems from Gene Upshaw's not being a lawyer, and from my trying not to be one for the last 12 years. We both have legal staffs and outside counsels that handle these cases in the early stages. But at the top, we are not inclined to fight over these matters. We are much more inclined to resolve our differences ourselves, and we've been fairly successful at it.

VIII. QUESTIONS

From the Floor: I agree with Howard Ganz that America is sports crazy. But I want to go beyond the direct presentation and address an issue that wasn't covered by any of you. I think that most of the fans are uncomfortable with the length of the season. I think it was absurd that basketball and hockey were still working out their seasons in June. We recognize the underlying economic pressure, but I hear almost everywhere that fans would love to see those seasons shortened somewhat—with the possible exception of football.

Howard Ganz: Why should football be played in September when baseball is still being played? I think the economics dictates the length of the seasons pretty much. I agree with you that the seasons are too long, but I don't foresee a change in the near future.

From the Floor: There are two empty seats at the table and nobody from hockey. I was wondering if any of the panelists would be willing to talk about what is going to happen in the upcoming nuclear war between the league and the players association.

Response from Audience: I can talk on that. The reason we're not up here is we couldn't coordinate someone from the league coming down. Only time will tell. Everybody would like to get a deal but there are different philosophies on either side. The league would like to have cost certainty, and the players association and the players stand for a market like everybody else. Those are differing philosophies and hopefully we'll be able to find a way to make them work, but that's where the future will unfold. It could take a long time to get something. The agreement expires in September 2004.

Lawrence Holden: That's Ian Pulver speaking from the National Hockey League (NHL) Players Association. I just might say that I did try to get the NHL and the players association here, but the best I could do was to get them to agree to come on different dates.

David Feher: I would like to say one more thing. The fears you have about hockey are in part a function of the laws that apply and are tied into what Howard and Gene were talking about. In sports, players like competition and management doesn't. These markets are different from those of an auto worker. If you ask auto workers if they want more freedom to compete for jobs in the market, the answer is usually no because there are more people with skills who can take their jobs. With Alex Rodriguez and the superstars, and

even with the people who are just good enough to be major leaguers, there aren't ready replacements. Replacement player games don't work.

And so because the players enjoy the benefits of competition, it's a different situation than most other industries and the antitrust laws are more important. The Supreme Court, even with the *Brown*[1] case, has made it clear that there is a choice between the labor laws and the antitrust laws. It is a difficult decision for the employees to make when an agreement is about to expire. If you go under the labor laws, whether you like it or not, it's generally a question of strikes or lockouts. That choice affects the fans and the fans don't like it. If you go the antitrust route, you can fight the owners in the courts while your constituents are still playing the games. I think that helped the sport of football because we settled our dispute without hurting the fans. But the fans didn't say thank you. They didn't seem to know that there was a fight between the owners and the players. I think not disrupting the fans was one of the best things we did there.

From the Floor: When is major league baseball coming back to D.C.?

Francis Coonelly: D.C. is one of the areas that is being considered for the purchase of the Expos franchise. That process is an ongoing one and it's too early to tell whether or not D.C. will get it because other markets are in the running for the club.

Gene Upshaw: D.C. is not doing itself any favors by trying to pass legislation that would tax the baseball players and other athletes coming into the district. If you are trying to get a team, that is the last thing you want to do.

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[1] *Brown v. Pro Football, Inc.*, 518 U.S. 231, 152 LRRM 2513 (1996).