CHAPTER 6

ARBITRATION IN PROFESSIONAL ATHLETICS

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MR. RICHARD M. MOSS: Before turning to my subject, I feel compelled to say a word or two from the heart. I am deeply honored to be here this morning to participate in this historic session. Having done a cursory search of the proceedings of past Academy meetings, I believe this to be the first time an esteemed member of the Academy has appeared before you as a management representative—no ifs, ands, or buts. Moreover, in that capacity, Ted Kheel has been a staunch opponent of impartial arbitration, an interesting position not many of you would have the guts to take.

But while noting the historical significance of the occasion, I hope there will not be any misunderstanding about what I am saying. I have not come to Atlanta to criticize the Academy and its membership policies. Nor have I come to engage Ted in debate. That is a special and precious honor that rightfully belongs to my good friend Ed Garvey, and I would not want to deny him his pleasure. On the contrary, I congratulate the Academy on its refusal to get hung up on classical, and perhaps archaic, standards of propriety. And as for Ted, I here reaffirm my long-standing admiration of his versatility.

Impartial grievance arbitration in baseball is a relatively new phenomenon. In fact, even the concept of a grievance procedure dates back only to 1968. In our first basic agreement, which was

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negotiated in that year, we were successful in convincing the employers' representatives that an internal procedure for resolving disputes under the contract might somehow be useful to the parties, and could conceivably be more orderly and economical than a series of Section 301 actions.

In that same contract, we made a number of other innovative changes, such as establishing the principle that there must be just cause for discipline, a thought contrary to baseball's prior history and sacred tradition. But try as we did, we were not successful in gaining impartial arbitration as the final step in the grievance procedure. The club owners bitterly opposed our efforts toward that goal and, it seemed clear to me, viewed impartial arbitration as one of those subversive devices Marvin Miller was bringing over from the Steelworkers Union as part of his plan to ruin baseball.

In the 1968 settlement, the parties did agree on a grievance procedure and on arbitration as its culminating step, but we designated in the contract who the arbitrator would be for the two-year term of that agreement. We named the commissioner of baseball. Since I report that fact to you with obvious shame, I am sure you will permit me to take a moment to offer an explanation or two.

By way of background, there had not been a prior collective bargaining agreement covering anything other than pension and insurance matters. The players did have individual employment contracts, and in those contracts it was provided that if any dispute arose between a player and a club, the exclusive procedure for resolving it would be through appeal to the commissioner, whose decision would be final, binding, and unappealable.

In baseball, as in football, the commissioner is, of course, an employee of the club owners; he is hired by, paid by, and can, at will, be fired by the owners. He functions under very specific instructions prescribed by the owners in the documents they have agreed to among themselves relating to his office and duties. He is the chief executive officer of the industry association, and there's nothing wrong with that—it's a perfectly legitimate and respectable role. But to provide, as did the players' contracts prior to 1968, that he is also the exclusive judge of disputes arising between the employers and their employees is very much

the same as an apartment lease stating that any dispute between the landlord and the tenant will be resolved by the president of the landlord's industry association, and for that distinct privilege, the tenant will refrain from using any other avenue for redress.

That was the disputes procedure which had existed for more than 45 years. It is interesting to note that during that entire period there is no record or hint of even one player-club dispute being appealed by a player to the commissioner. Not only would it have been futile to do so, it would have ended whatever positive aspects did exist in a player's relationship with his club.

Faced with such a record of efficiency, it is no wonder the owners' representatives considered it so important to maintain as much as possible of that particular brand of due process. And we capitulated. As the cost of making that first basic agreement, which contained many valuable improvements from our standpoint, we agreed upon the commissioner as the grievance arbitrator for two years. We did so, quite frankly, because at that time and place, there were severe limits to our bargaining power. It had been only a year since the players had finally decided to reorganize their classic company union in an effort to make it into an effective bargaining agent, and the whole idea was still somewhat new. I don't know what, if any, issues would have been strike issues in 1968, but impartial arbitration clearly was not one of them. Other matters, as to which we did make significant progress in the negotiations, were considered much more important, for there was, even so recently, still a general lack of appreciation of how basic the issue was. We rationalized our defeat by deciding we would process grievances to arbitration, and we were confident that the record of that experience would conclusively demonstrate the importance of impartiality.

As events turned out, we had only one arbitration hearing before the commissioner, where I tried two cases. It's a unique experience to engage in what I call "partial" arbitration, as opposed to "impartial" arbitration. Ed Garvey will probably be able to give you details of his experience, so I'll just report on the flavor of what I was exposed to in my one hearing.

When I entered the hearing room, which was a conference room in the commissioner's office, I was confronted by a battery of

lawyers on the other side of the table. Now, as all of you who are advocates know, there is no more delightful situation in an arbitration hearing than to be massively outmanned by opposing counsel. You need not resort solely to your wits. You can rely on the sympathy of the arbitrator, and on the confusion of the presentation that is sure to come in rebuttal to yours. Moreover, you can attack the opposition individually, or collectively, or in small groups, as it may suit your purpose at any particular time, and you can usually encourage two or three of them to speak out simultaneously, to the utter disgust of the arbitrator. But on that day it occurred to me that the usual advantages may not be applicable when the arbitrator has the same employer as all those lawyers.

The other side of the table, however, was not of primary interest to me when I entered; the head of the table attracted even closer attention. Seated in the center was our arbitrator, the commissioner, who was then General William Eckert. On his right was the commissioner's counsel, the distinguished Paul Porter of Washington, and on his right was a younger partner of the firm of Arnold, Porter & Fortas. On the commissioner's left were several of his assistants, including the secretary-treasurer of baseball.

The hearing began when Mr. Porter handed the commissioner some notes on a yellow legal pad, and the arbitrator read a statement concerning the identity of the cases before him and the order in which he was prepared to consider them. At that point I interrupted to voice an objection. I noted, for the record, that the arbitrator appeared to be accompanied by a number of other gentlemen at the head table. I said that although I had the highest regard and professional respect for Paul Porter who, I added, I had always found to be a delightful human being, the fact remained that the parties did not select Mr. Porter or any of his associates or any of the commissioner's associates to act as arbitrator under the agreement. Using my most sincere tones, I said, "It is you, General Eckert, who the parties, after long and difficult negotiations, have selected to fill that role, and, therefore, I respectfully request that you ask all the others at the head table to excuse themselves."

There followed a short period of silence. Mr. Porter jotted down something on his yellow pad and passed it to General

Eckert, who read, "I have considered your argument and have decided that it is without merit—your motion is denied."

I then proceeded to reargue my position, this time ending with a statement that if I understood correctly the arbitrator's ruling, I had no interest in proceeding further with the hearing, and I would be forced instead to seek enforcement of our arbitration provisions in another forum. Mr. Porter passed another note, and General Eckert announced a short recess.

When the commissioner and his entourage returned and were seated, the General picked up the now-familiar legal pad and proceeded to announce: "During the recess, I have studied the provisions of the Basic Agreement, and I have noted that under the Rules of Procedure relating to Grievance Arbitration Hearings each of the parties may be represented by counsel and others who may participate in the hearing and represent such party. Surely if that is so, the arbitrator also may be represented by counsel or others, and they may participate in the hearing and represent the arbitrator."

I found that statement so enchanting that I merely protested and indicated I would continue only on the basis it would be without prejudice to remedies we might seek elsewhere. I then proceeded to try the two cases.

Incidentally, I won one of those cases. Admittedly it did not involve a very important issue, nor did it impose a serious liability on the clubs concerned. The other case, which theoretically involved a matter of great importance, was not decided our way. Trying to view the two cases as objectively as possible, it seemed clear to me that the one I lost was a far sounder case than the one in which I was successful. Far from being outraged, however, we were delighted with this early support for our position that the standards of judgment for partial arbitration have little to do with normal standards.

Now you might think there would be a tendency in a situation such as this for the commissioner to lean over backwards, but if you think that, it shows only your lack of understanding of baseball. While the game itself has many subtle elements, the management people consistently display utter contempt of that quality.

Unfortunately, before we could appeal more cases to General

Eckert, he was fired by the club owners. The reasons, I believe, did not have anything to do with his performance as the arbitrator. In any event, we are not, nor would we want to be, privy to the reasons the owners fire their commissioners.

The new commissioner hired by the owners was Bowie Kuhn, who had been one of the attorneys for the National League and who, in that capacity, had participated in the 1968 negotiations. The addition of that fact on top of all the other ludicrous aspects of the situation was apparently too much for even the owners' representatives. For the remainder of the arbitration cases heard under the first basic agreement, the parties agreed to use a substitute arbitrator, and we turned to Dave Cole as our first impartial arbitrator. As you would suspect, Dave heard and decided his cases precisely, judiciously, and correctly.

We entered the negotiations leading to the 1970 basic agreement fully confident that the issue of impartial arbitration was now behind us. But we were somewhat premature in our judgment, and it was only after several months of tedious bargaining on the subject and management arguments so distasteful that I have completely blocked them from my memory that the owners' representatives finally agreed to the concept of impartiality.

We established a tripartite arbitration panel, with two party arbitrators and a permanent impartial chairman. Since 1970 John Gaherin has functioned as the management arbitrator and Marvin Miller as the union arbitrator. Our first permanent chairman was Lew Gill, who served the parties well—usually deciding in favor of the one who had the more meritorious case—for two years until his resignation in early 1972. Since then our chairman has been Gabe Alexander, as to whom it is still premature to render judgment. However, the parties are in agreement that on the basis of his first few cases, Gabe has displayed some early promise, but not entirely without qualifications which I'll not bore you with at the moment.

In the past few years I have often been asked whether baseball arbitration is just a pleasant joke or is, in reality, big league arbitration. I have always answered that it is the latter. Without engaging in false modesty, I feel qualified to testify on that matter. I have tried, on behalf of the players, every grievance-arbitration case there has been in baseball, and the total now

exceeds 20. And I argued, of course, many more arbitration cases than that during the six and a half years I was with the Steelworkers Union.

My arbitration experience with the Steelworkers was uncommonly varied and rewarding. Very few of the cases I became involved in concerned minor issues. There was usually some special reason for me to handle a matter out of the headquarters office, although I must admit I solicited an occasional case in San Francisco or New Orleans.

I argued before the acknowledged great men of the profession—men like Ralph Seward, Syl Garrett, and Harry Platt. I appeared before many of those first-class arbitrators who are no longer with us, such as Scotty Crawford, Joe Stashower, Dave Wolff, Saul Wallen, and a man for whom I had a very special admiration and respect, Milton Schmidt. And I helped break in some of those bright young men who are still flourishing, even though they're not all that young anymore—arbitrators like Rolf Valtin, Dick Mittenthal, and Mickey McDermott. I argued steel industry incentive cases, can industry psychological testing cases, and discipline cases that would arise only in the peculiar context of the aluminum industry. I tried the first SUB short-workweek cases, various pension and SUB financing cases, and a variety of contracting-out and automation matters.

While I recognize the risk of being accused of dropping names and issues, I do feel obliged to state my credentials. I have known what most of you acknowledge to be big league arbitration and have functioned on that scene. And with that background, I can tell you that three of the five most interesting, complicated, and intellectually challenging arbitration cases I have prepared and argued were in baseball.

Almost all of our cases are matters of first instance. Many involve a special complexity in that not only the provisions of the basic agreement must be interpreted, but also the provisions of the Major League rules, which are incorporated by reference into the agreement insofar as they are not inconsistent with it. The Major League rules are a hodgepodge of semiliterate statements on a variety of subjects, most of which have only the most illusionary relevance to anything of consequence. They have been developed by the owners' lawyers over a period of 40 to 50 years.

For each rule which says something, there can usually be found one which states quite the opposite, and it becomes a test of the imagination of the advocates and the arbitrator to bring order out of chaos. Of course, our arbitrators, all of whom have been good lawyers, are constantly reminded of the basic tenet that such conflicts must be resolved against the party that unilaterally drafted the provisions. Incidentally, some of these complexities remind me of Syl Garrett's early incentive decisions in U.S. Steel, and I do not use that comparison lightly. I am convinced that there is only one man in America who fully understood those cases and decisions, and it wasn't Garrett—it was Ben Fischer.

But perhaps the most important and intriguing aspect of our cases is that they are all very much involved with a new and developing relationship. We have brought cases to each of our three arbitrators which have involved basic issues concerning the duties and obligations of the parties to each other, and their decisions, I am convinced, have helped the parties to establish a more mature and mutually respectful relationship.

As most parties have, I have played the game of demeaning arbitrators: They are overpaid for performing an essentially simple task; they are creatures of the parties who must constantly be reminded of their place. But I don't really believe that. I believe arbitrators serve an extremely important role concerning the parties' relationship with each other, and that is especially true where there is, as we have, a relationship not yet entirely mature. I believe an arbitrator not only has an obligation to decide cases without doing harm to the agreement and the relationship, but also has the positive obligation, if he possesses the subtle, artistic, and admittedly rare talent for doing so, of promoting that relationship. We have been fortunate in that regard.

In summary, I am convinced that of all of the progress we have made as an organization through negotiations in the past six years, one of the most significant victories we have won has been agreement on impartial grievance arbitration. I mean that not only from the standpoint of effectively representing our membership, but also from the standpoint of healthy and stable relations between the parties. I am confident that some day soon football, too, will be able to reap the benefits of fair play, and I am anxiously awaiting, with you, to hear from Ted Kheel and learn whether today is the day he will admit to the errors of his past.

Orginally I had planned to talk in some detail about the new salary administration procedure agreed upon in the negotiations we have just completed. However, if I did so, I'm afraid I would preempt the time of all the other speakers. On reflection, that might be a good thing, but, on the other hand, having had the experience of receiving the wrath of our chairman on the subject of filibustering, I refuse to risk that humiliation in front of you. Hopefully, we will have some time for discussion at the end of this program, and if you are interested, we can spend a few minutes on salary arbitration which is of extreme importance in the context of professional sports.

MR. JOHN J. GAHERIN: I'm somewhat at a loss to follow Dick. Having enjoyed his moment of comedy, which I think every program should have, and certainly joining most wholeheartedly in his unbounded admiration of himself and his accomplishments, I would agree that he is a good lawyer and that we have had very interesting and intriguing problems which we have handled in our arbitration proceedings. However, I'd like to skip yesterday. Dwelling on the past, be it accomplishments or defeats or even a little foolishness, is counterproductive. It's more important to consider where we are today and what is on the horizon for tomorrow.

I needn't tell you gentlemen, who have spent your lives and your careers in the process, that collective bargaining is the product of two parties. Like the old expression, it takes two to tango; it takes two to make an agreement. Sometimes you start with wide differences of opinion as to what represents a proper settlement. However, pressures come to bear on the parties which stimulate their desire to come to agreements. Those pressures come in many forms. I think one of the forms is that sooner or later you look in the mirror and say to yourself that yesterday did end with a sunset and that you're looking at the dawn of a new day, and what do you do about it.

In the area of professional sports, which differs from the classic collective bargaining relationship, we bargain across the table with the employees' representatives, or whatever term you care to use, with respect to the basic rules which govern our relationship, the various allowances paid for specific things, and the form of the uniform player's contract. But we do not bargain for the player's individual salary, except to the extent of establishing the

minimum salary and the amount by which salaries can be reduced from year to year.

All of you have heard, from time to time, about the reserve clause and slavery at $100,000 a year—all of those bad things. I think the parties, and there have to be two, have introduced into our relationship, and probably into the area of arbitration, a totally new concept—individual salary arbitration. I'd like to take just a few minutes to outline—at least from my point of view, and I would be amazed if it represents the joint point of view even now—what we have done and what we hope to do.

From the point of view of the baseball clubs and, if I may be a little bit personal, from my own point of view, we've introduced something into this relationship which should correct any imbalance in bargaining ability between the individual player and his employing club, if indeed there ever was any imbalance.

We have constructed a procedure which should require both players and clubs to enter into their salary negotiations on a rational, realistic basis. They will know full well, and they know now, that if they fail in their effort to reach an agreement, someone independent of both, using criteria that we have jointly established, will judge whether the player's salary demand or the club's salary offer is the proper compensation.

In other words, we have reached agreement on a procedure that many of you have heard discussed, particularly in national emergency disputes in the transportation area, as one weapon in the arsenal of weapons that the President would have available. We have created a procedure under which we'll submit to some of you in this room, probably next season, the problem of deciding whether the amount of money that Club X has offered the player is proper, based on all the criteria, or whether the amount that has been submitted by the player is proper.

The agreed-upon criteria will be the quality of the player's contribution to his club during the past season, including, but not limited to, his overall performance; special qualities of leadership and public appeal; the length and consistency of his career contribution; the record of the player's past compensation and comparative baseball salaries (and I'll say something more about that when I finish) ; the existence of any physical or mental defects on the part of the player; and the recent performance record of the

club, including, but not limited to, its league standing and attendance as an indication of public acceptance. Any evidence may be submitted which is relevant to the above criteria, and the arbitrator shall assign such weight to the evidence as shall to him appear appropriate under the circumstances.

The following items, however, shall be excluded: the financial position of the player and the club; press comments, testimonials, or similar material bearing on the performance of either the player or the club, except that recognized annual player awards for playing excellence shall not be excluded; offers made by either party prior to the arbitration; the cost to the parties of their representatives, attorneys, etc.; and salaries in other sports or occupations.

Now, going back to the matter of comparison of salaries, the agreement provides this: For his own confidential use as background information, the arbitrator will be given a tabulation showing the minimum salary in the major leagues and the salaries for the preceding season of all players on major league rosters as of August 31, broken down by years of major league service. The names of the players and the clubs concerned will appear in the tabulation. Those are the criteria that the arbitrator will have to work with in his deliberation.

We've constructed this procedure to meet the particular needs of baseball, and I think it does meet our needs. I won't make any assumptions with respect to its adaptability to anybody else's situation. It's ours, and I believe that with the good will of both parties it will work.

The procedure was designed to obtain expeditious handling of disputes. If the parties, or either of the parties (since either party can go to arbitration), move the dispute into the area of arbitration, they will do so between February 1 and 10. Normally (and there are some exceptions provided for), the matter must be heard by the arbitrator between the date of submission and February 20, and it must be decided within 72 hours following the hearing. The hearing will be confidential and informal: it will not have the formality of a record or transcript. The arbitrator simply will decide which number is appropriate, the player's or the club's, and he will insert that number into the otherwise completed contract between the parties. The parties are then

bound by that decision. That's a very broad and cursory outline of the procedure.

Speaking only for baseball, since it's all I'm qualified to speak for and there might even be doubt in some quarters about that, I think our relationship since 1967 (when we came into a more or less formalized relationship with the reorganized Players Association and when Marvin and I became the respective representatives of the parties) has been a tough road. I don't think that either of us would minimize the problems we have had. I think we have had, I think we do have, and I think we will continue to have serious differences of opinion. But I think that we have established a relationship that is realistic and mature, and we are equipped to handle sensibly and reasonably the differences which are going to occur.

We really have three arbitration proceedings available within the baseball picture. We have the procedure I have described. We have a proceeding available to settle disputes concerning the benefit plan. We have, as Dick has touched upon, a very sophisticated grievance procedure with its several steps not unlike those you deal with every day, with appeal going up to and including final and binding arbitration by a tripartite panel. The latter has served its purpose. We have not, with but rare exceptions, burdened the procedure with frivolous disputes from either side. There have been difficult disputes, involving very intricate questions of contract interpretation, the construction and application of rules that have been in existence for a long time and are subject to interpretation, and practices certain of which have not been codified.

I think the application of both sides to the problems has been good. I think we're doing well. I wish I had a little bit more of the humor they say the Irish have; however, I wouldn't match mine with Dick's, nor would I try.

I thank you for having invited me to come here to talk with you about baseball, the national pastime, the first of the major sports. We look forward to your continued attendance and patronage, and if you have any other problems—like getting tickets or something—don't call me. Go to the ticket office.

MR. EDWARD R. GARVEY: First of all, I am honored to be here. I made a cursory check of your rolls and found that Commission-

er Rozelle was not a member of your Academy, but I would hope that by the time I'm finished someone will at least nominate him for membership. And I must apologize to Professor Feinsinger for having to use him as the only thing in my background that qualifies me to be here. As it turns out, the sole reason Chairman Alexander called a breakfast meeting of the panel members this morning was to see if there was something he could say about me by way of introduction. Finally we came up with the idea that I was once a student of Professor Feinsinger's, where I think I did learn something about arbitration.

I would like to begin by giving you some of the background of the National Football League because I think that you cannot really understand arbitration as we know it in the league unless you're fairly familiar with "Alice in Wonderland" or unless you understand the position of the player when he gets into the game and before he goes before the arbitrator.

First of all, the National Football League is a monopoly, and I think that this is an important fact. It's an unregulated monopoly, and I think that's an important fact. It has exclusive control of the product of professional football, and it has exclusive control of the labor market. If a talented player decides that he is going to play football for pay in this country, he must do so under rules established by the owners and by their commissioner.

In order to make the grade in pro football, he must be among the most talented players in this country. The player was a high school sensation and a college standout. He prepared for his profession for at least eight years, and those years are not easy. He looks forward to the day when he will play professional football, and when he graduates from college he finds that he has been drafted by one of the 26 NFL teams. He suddenly finds that he has no say in where he is going to work or where he is going to live. He cannot go elsewhere.

He is told that the common draft is designed to bring about competitive balance in the National Football League. He is not told that the primary purpose of the draft is to hold players' salaries down. He is not told that competitive balance has nothing to do with the common draft—that it is there so that the club can get him at a reduced price. Nor does anyone explain to him why only gifted athletes in our society are denied their freedom of choice in selecting their employer.

He then learns that if he wants to play professional football, he has to sign something called the NFL standard player contract. If he has a lawyer, his lawyer will tell him that it's the most ridiculously one-sided agreement he has ever seen. He informs the player that of course he will try to change it in negotiation, but the lawyer will find out that he will fail in that effort. Then he, tells the player that incorporated into that standard player contract is an 83-page document called the NFL Constitution and Bylaws, that he will be bound by all future amendments to that document, and that that document is under the exclusive control of the 26 owners and their commissioner. He will tell the player that he will gain few, if any, rights under the standard player contract and that the club will have total control over him once he signs it. But the player will sign it because he wants to play professional football.

Soon thereafter he is told that if he has a dispute with his club, or with the league, that the commissioner of the National Football League will decide that dispute. He reads that once the commissioner decides that dispute, his decision is final, conclusive, binding, and unappealable. There is one exception: If the player is injured and the club refuses to pay him, the dispute will be settled not by the commissioner, but by an impartial arbitrator, under the collective bargaining agreement. Several Academy members are now serving in that capacity, and I can say that at least this aspect of the relationship is going quite well.

When the player reports to camp, he soon learns from his fellow players that there is really no difference between the baseball reserve clause and the football option clause. He finds that the team that drafted him will control him for his professional career unless the club decides to release him, trade him, or sell him. He has no choice in the matter, and so he finds himself, at age 21 or 22 and after eight years of preparation, in a system where he is playing for a team that happened to select him whether he liked it or not, under rules and regulations developed by the employer and incorporated into his contract, and with an employee of the club owners designated to settle all disputes between himself and his employer.

He wonders what the union is doing. The union happens to be the National Football League Players Association. It is a certified union—I think the only one of professional athletes. We're cer-

tified because in 1970, after the merger of the two leagues became official, the two players' associations came together, and the owners decided that they would not sign a voluntary recognition agreement with us unless we decided to waive in perpetuity our right to negotiate preseason pay. I searched back into my labor law notes to find where unions got the right to waive anything in perpetuity, and we suggested to Mr. Kheel and others that maybe we should waive the right to strike in perpetuity, which would certainly help to settle disputes more easily.

But we are a young organization. Like Dick, I have to apologize when I say that yes, indeed, we did agree in collective bargaining that the commissioner would be the arbitrator; we did not agree that he would be the *impartial* arbitrator.

We negotiated a four-year contract in 1970 (our contract expires next year), and we tried during those negotiations to replace the commissioner with a neutral arbitrator. But we were successful only in removing him as the arbitrator of injury grievances; he remains as the final arbitrator of retirement board disputes and of noninjury grievance cases. While we reduced his role somewhat by limiting the definition of a grievance, in practically every instance where a player is mistreated by a club or by the league, we are forced to appeal the matter to the commissioner for decision.

Some of you may be wondering how the commissioner is selected. After all, the lofty title of "commissioner" does, to me at least, imply some governmental sanction. But that power, I'm sorry to tell you, was not bestowed on him by Congress when it exempted the NFL-AFL merger from federal antitrust laws, nor is he a Presidential appointee.

The owners of the 26 teams gave him the title and the power more than 50 years ago. The constitution and bylaws of the league say that the league shall select and employ a person of unquestioned integrity as commissioner of the league, and shall determine the period and fix the compensation of his employment. That document goes on to say that the commissioner may suspend a player, fine a player in the amount of $5,000, cancel any contract that the player has with the league or the club, award the player to another club, bar a player from the league for life, and impose such other and additional punishment or discipline as he may decide. That's not bad for openers.

The commissioner is paid exclusively by the owners, and he is paid almost as much as the President of the United States, which should help you understand why he was able to respond negatively when the President asked that the blackouts be lifted.

He is the chief executive officer of the league. He chairs most of the owners' meetings, consults with the owners daily, relies on their counsel, offers rule changes for their consideration, actively participates in the drafting of league rules and regulations, and when he's all finished, he finds that he is the final arbitrator over the rules and regulations which he has proposed, drafted, or approved.

Now a cynic might conclude, based on these facts, that the commissioner is not a classic study of impartiality. He is an employee of the league, plain and simple, and he must answer to the club owners' desires or find himself unemployed.

"Not so," say the owners. "He is not our employee. He is the commissioner, and we have the commissioner form of government"—the implication being that by somehow granting him the title, the facts seem to change by some magic.

"Not so," says the commissioner. "I speak for the owners, players, and fans. I am in the middle."

"Not so," says the executive director of the Management Council, who was recently quoted in the *Los Angeles Times* as saying, "We *pay* him to be impartial." He could not understand why the union was upset.

I'm sure we'll have the pleasure of hearing from Mr. Kheel who has before today skirted the issue of impartiality and simply argued that football is such a unique industry that no arbitrator other than the commissioner could possibly understand its complexities and subtleties. Besides, "there was a baseball scandal 54 years ago, and we need a commissioner with these powers to make sure there's not a football scandal." (I hope that we can also hear today of a system that he might have developed to avoid future Watergate incidents.)

Never mind, says Mr. Kheel, that the commissioner is hired by the owners; never mind that he is interpreting his own rules; never mind that he attends owners' meetings and their caucuses. Remember the baseball scandal—54 years ago.

I want to return just for a moment to the question of the power of the commissioner over the individual player. Remember that he's tied to his club for life, and he's tied by those rules, so the commissioner can, therefore, not only regulate the conduct of the player during the regular season, but can oversee his off-field activities as well as his business ventures. If he does not like what the player is doing, he simply orders him to stop. The player has no choice but to obey the directives of the commissioner because of the latter's power to expel him from the industry through disapproval of his contract. That is power. He can force, and he has forced, players to sell their interests in business ventures. He can fine, and he has fined, players without notice or hearing. He can force, and he has forced, players to go to other teams. He can suspend, and he has suspended, players from the league. He can and has convinced many writers and most fans that all of this power is needed to protect the sport. We dissent.

Now that you understand the system, let me give you a few examples of how the system operates and why we consider arbitration in the National Football League to be an outrage. Let us begin briefly with Joe Kapp.

Joe Kapp was a quarterback for the Minnesota Vikings who played out the club's option and was later signed by the New England Patriots in 1970. At that time the Patriots signed a contract with Joe for three years—a guaranteed contract. The Patriots say that it was not a contract, but that it was a memorandum of agreement. Whatever it was, he played under that agreement—that contract—in 1970. But before the 1971 training period began, and after the New England Patriots had sold their season tickets to their new stadium, the commissioner decided that Joe must sign the standard player contract or he could no longer perform under his 1970 agreement.

Joe refused to sign the standard contract, and the commissioner ordered the Patriots to stop paying him and to expel him from the training camp. He then publicly justified his position by saying that all other players had to sign it; why not Joe? He finally convinced the writers that he was right and Joe Kapp was wrong.

The preseason moved along quickly and Joe continued his refusal, much to the dismay of the commissioner and the owners who wondered why a man would risk $400,000 over a principle.

But then counsel for the owners had a thought: Let's file a grievance against Joe Kapp and the NFL Players Association over Joe's refusal to sign the standard player contract.

Now if you will, just for a moment, put yourself in Joe Kapp's position, and in mine. We were asked to go before "Arbitrator" Rozelle, the employee of the Patriots and the other clubs, to argue that "Commissioner" Rozelle was wrong in ordering Joe out of the Patriots' camp and ordering the Patriots to stop paying him. We refused to participate, but we did receive the transcript of the hearing which went on despite our refusal to be present.

After considering the matter, very carefully I am sure, "Arbitrator" Rozelle, acting with, as Mark Twain described it, "the calm confidence of a Christian holding four aces," surprisingly found that "Commissioner" Rozelle had been absolutely correct in ordering Joe Kapp to leave professional football.

It is comic, but the problem is that Joe Kapp is out of football today, and probably for life, because the commissioner decided to protect the system developed and devised by the owners, to take from the player practically all rights, and to grant to the league and the club unbridled power to fine, suspend, fire, trade, cut, or sell a player without notice, consultation, or a fair hearing. That is what the standard player contract allows, and that is what Mr. Rozelle as commissioner and as arbitrator was protecting in the Kapp case.

A second matter we recently took up involved a rather minor matter of $13 per diem in expense payment to hospitalized players—players who were injured playing professional football. The owners believe that a player in the hospital has no expenses and, therefore, is not deserving of the $13.

In the course of presenting our case before "Arbitrator" Rozelle, it became necessary for us to call him as a witness, as he was intimately involved in the collective bargaining process. When we called him, he stood up, was sworn in, and took the witness chair. His counsel, who was there but who had been silenced by earlier protestations on our part, sat by wondering how he could manage to pass the notes to the witness chair.

The scene became comical when counsel for the owners objected to one of the questions I put to the commissioner, but of

course, since there was no one there to rule on the objection as the arbitrator was now the witness, nothing could be done. Finally the witness decided, after much shouting, that he would go ahead and answer the question. On the next objection, when we again suggested that no one was there to rule on our objection, he asked if he could answer the question sitting in the other chair, and I allowed as how we would be happy to let him move back to the other chair to answer the question.

Now you see how comical it is, but it's almost imperative to call him as a witness every time we have a grievance, first, because he was so involved in collective bargaining throughout the 1970 negotiations, and second, because he has interpreted these rules, or drafted them, or suggested changes in them. He is interpreting his own work, and we'd like to know the thought processes that went into those rules.

I think that those of you who have operated as arbitrators can imagine the absurdity of the commissioner sitting as our arbitrator and having the union call him as a witness to find out the extent of his involvement in collective bargaining on behalf of management. It's offensive, but that's the situation we find ourselves in—having the most highly paid employee of the National Football League as our arbitrator.

"Ah," says Mr. Kheel, though, "before 1970, and before the Players Association became a union, and before Mr. Garvey became associated with the players, there were no problems. In fact, the commissioner ruled for the players eight times and never for the owners. Doesn't that prove neutrality?" Presumably, since we no longer fare so well before Mr. Rozelle, it also proves that we made a mistake by becoming a certified union or by my becoming involved.

Interestingly enough, I've asked for copies of those eight decisions, only to find that none of them was reduced to writing. Our current arbitrator has been the commissioner for 13 years, and yet only one decision prior to 1970 was ever put into writing. That puts us at a little disadvantage in gauging the results of arbitration since, as you will recall, football is so complex and so subtle that no one other than the commissioner could understand it.

But eight grievances in 11 years—think about that. Since the

commissioner has been replaced by an impartial arbitrator in injury grievances, 65 or 70 grievances have been filed in less than three years.

Grievances arise out of an interpretation of the NFL constitution and bylaws and the standard player contract. The commissioner interprets these documents; he and his staff draft the amendments of those documents; he is paid to enforce those provisions. Therefore, we find ourselves arguing before the draftsman that his amendment and his interpretation is not only wrong, but has worked a hardship upon on individual player.

If he upholds the player, he is admitting to his employers that he made a mistake by initially suggesting the rule. If the dispute affecting a player arises under the collective bargaining agreement, then we are arguing before the man who participated in collective bargaining and who is paid to uphold management prerogatives.

What could be more absurd? Yet, if we turn to the NLRB, we are told by the owners that *Collyer* should apply—that the arbitrator should settle our contractual disputes. That's why I refer back to "Alice in Wonderland" so that you can have a better understanding of the league. The frustration we feel is total. As you can see by the friendship that exists between John Gaherin and Dick Moss, they have settled their disputes and they now have a love affair, whereas we're just warming up.

Ninety-four percent of our players want the commissioner replaced with an impartial arbitrator. I have finally reconciled myself to the fact that the commissioner is the arbitrator, but I cannot honestly tell the player that he should go ahead and file a grievance because we know it's going to end up before the commissioner, and we know what the results will be. When I tell the player that the commissioner will decide it, he says, "Forget it. Why waste the money?"

I need not lecture this distinguished group on the value of impartial arbitration. The NFL system stands as a mockery of your diligent work in seeking honest answers to complex industrial disputes. The NFL system stands for the proposition that impartiality is unnecessary and irrelevant so long as one side has the power to impose its will on the other. It would be funny if the system did not end careers, deny players the help they need, and destroy confidence in arbitration as we know it.

Normally, we look to arbitration as a method for resolving disputes. In the NFL, arbitration is the source of the dispute between labor and management. Obviously it must be changed, and I hope that a year from now we can come back and report to you that yes, indeed, a member of the Academy is the impartial arbitrator, or that there is a member in this audience who will stand and say that he will become the arbitrator, so that we can end the kind of nonsense that now goes on in the league.

If I sound overly serious, I don't mean to be. But the system is an outrage and one that we feel should be changed. I know that Mr. Kheel is perfectly capable of responding and will—and I look forward to it.

MR. THEODORE W. KHEEL: First, let me say I am not available to be the impartial arbitrator for professional football, but I am prepared to acknowledge the errors of my past. However, since the list is much longer than the cases that Dick Moss has handled in steel and baseball, I will not undertake to recount them.

I will acknowledge, however, that whereas formerly, when I went to bed early as I did last night, I might have purchased a copy of *Playboy* magazine, last night I bought a copy of the magazine called *Money,* and by coincidence, it turned out to be about bargaining in professional football.

John Gaherin mentioned that salaries are not an item of collective bargaining in professional sports; that is correct. Salaries are not an item of bargaining, at the request of the union, both in baseball and in football, as well as in hockey and basketball, because it is the wish of the players that they retain the right to bargain individually on their salaries.

And in this magazine called *Money* that I read for a while last evening, it is reported that four years ago Carl Eller of the Minnesota Vikings was up to his helmet in debt on $30,000 a year. Now, thanks to a scrappy money manager—not the union—he has hopes of retiring as a millionaire. His money manager, whose picture is in the magazine, doesn't look at all like Ed Garvey. He's not nearly as good looking, and he was not the beneficiary of a course in labor law with Professor Feinsinger. But Mr. Ross, this scrappy money manager, is quoted as saying that he told General Manager Jim Finks—in July 1970 while we were engaged in collective bargaining on the subjects within the

ambit of the union's authority, namely, wages, hours, and working conditions—that Eller wanted a three-year $250,000 contract, including a base salary of $50,000, a $30,000 loan from the club, and a $20,000 bonus for signing.

"We needed the cash to pay off Carl's creditors and to set up a tax shelter to begin protecting his money," said Ross, and he also included a demand that the Vikings retire a $10,000 loan that Eller owed the owners.

"The rationale for a long-term contract," Ross explained, "is that it gives the player protection and security and, for someone like Eller, the cash up front to enable him to plan his future and get out of the rut he was in. Finks, as expected, balked at the terms, so Eller decided to hold out and strike, refusing to play until his contract was signed."

Ross and Finks, not Garvey and Thompson, negotiated back and forth, and after two weeks, the Vikings agreed to almost all of Ross' terms, according to *Money*. This major negotiation on salary in no way involved the union.

I acknowledge many errors, but I do protest when anyone suggests that I am not fully committed to the use of impartial arbitration in the resolution of grievances. Nor do I believe I have to take second place in my admiration for the collective bargaining system. Collective bargaining has come to professional football, and there is no doubt that it is going to stay. And I have no doubt that it will make a great contribution to the improvement of the game and to the improvement of the condition of the players as well as the owners. But the impartial arbitration of grievances in football as in any industry is an outgrowth of the bargaining process, and its terms and dimensions are set through bargaining in the particular industry.

In professional sports, salaries are not, at the union's request, part of the bargaining, and therefore all grievances that might grow out of salaries are exempt from grievance arbitration. That is one major difference in football. There are others as I will show.

The players, almost to a man, are not only represented by the union which, under the certification of the National Labor Relations Board, is the bargaining agent on wages, hours, and working conditions, but the union was freely accepted by the owners, first

pursuant to a card check in 1968, conducted by Arbitrator David L. Cole, and then as a result of the Board's certification. In addition to the union, however, the players have agents, or, as this magazine says, money managers; they also have tax consultants, and they have other advisers. Not only do these advisers act for them in regard to money matters, they act in other respects as well. I'm glad Ed Garvey mentioned the Joe Kapp case because in the Kapp case Mr. Kapp was represented by an attorney named John Elliot Cook of San Francisco. In point of fact, in connection with his grievance, which was clearly within the terms of the collective bargaining agreement as I'll explain in a moment, Ed Garvey undertook to be a mediator—commendably so—in trying to work out the problem.

Let me give you a few of the facts that Ed didn't mention. The standard player contract, which was devised long before there was a union in football, was incorporated, not by reference but specifically, in the collective bargaining agreements that were negotiated in 1968 with the NFL as it then existed, and the AFL, which had a separate contract at the time. It was incorporated again in 1970, when the combined NFL and AFL contract was negotiated, and that contract says, "... every player shall sign the Standard Player Contract."

Maybe it isn't a good contract. Maybe there are lots of things wrong with it, but it was the product of negotiation and incorporation in the collective bargaining agreement in 1970 by agreement of both sides, and no one said that there were any limitations on the powers of the Players Association and its members to bargain collectively or to strike.

There was a settlement, and the settlement provided that every player would sign the standard player contract. And every player did, except one, Mr. Kapp, on advice of his counsel, not on advice of the union. Frankly, I was surprised that the union did not take issue with Joe Kapp because the union has as much interest in the maintenance of the collective bargaining agreement, whether they like it or not once it is executed, as the employers do.

Mr. Kapp refused to sign the standard player contract. Here was a clear, unequivocal violation of the collective bargaining agreement. There were no ifs, ands, or buts about it. We filed a grievance with the commissioner, calling on him to direct compliance after a hearing at which Mr. Kapp would be given the

opportunity to present his case, to examine Mr. Sullivan of the Boston Patriots, and to be represented by his own attorney if he chose, or by the union if that was his preference.

Mr. Kapp did not appear at the hearing, and Mr. Garvey chose not to appear to defend the collective bargaining agreement. Instead he appeared on the Today Show before Arbitrator Hugh Downs—Joe Garagiola, excuse me. He was acting as arbitrator that day. Fortunately, I caught the presentation and was able to hear the arguments. There was no transcript available, however, and so when the hearing we requested took place before Commissioner Rozelle two days later, and we submitted evidence that answered the arguments Mr. Garvey presented on the Today Show, we did have a copy of the record of the hearing sent to Mr. Garvey, and he has used it since in arguing in connection with this matter.

There are one or two more significant facts in the Kapp case in addition to the fact that he had not signed the standard player contract at the time he began to play for the New England Patriots. Mr. Kapp and Mr. Sullivan negotiated a contract—and it was not for $400,000; it was for $600,000—and the Patriots were very anxious to get him into the game. He's a great player and a great leader of men.

The Patriots and Mr. Kapp—both of them—communicated with the commissioner and said, "Mr. Kapp is consulting his tax adviser, Price Waterhouse, on how best to structure the payment that he is to receive, and would the commissioner please excuse Mr. Kapp and the club from executing the standard player contract until he got advice from Price Waterhouse." The commissioner acquiesced.

Subsequently Mr. Kapp got advice from Price Waterhouse as to how best to structure these payments so as to minimize his tax liability, and the commissioner called upon him to sign the standard player contract. For reasons that are totally inexplicable to me, both with regard to Mr. Kapp and with regard to the union's defense of his violation of the contract observed by every other player, he refused to sign the contract. To this day, I do not know why he would not sign the standard player contract.

I do know that he has commenced a lawsuit (he has not filed a grievance) under the antitrust laws, in which he is represented

by Mr. Cook, charging that there was a violation of the antitrust laws in connection with the league's insistence that he comply with the collective bargaining agreement, and that case is pending in the courts. And, unfortunately, Mr. Kapp is not playing professional football.

Now there's another aspect of arbitration in professional sports that I might bring to your attention. In addition to the fact that no matters pertaining to salaries except the minimum can be grievances or arbitrated, there is no provision in the contract that says that an employee cannot be discharged except for just cause. This, as you know, is the predicate for practically 50 percent of all of the grievance arbitrations that we have in the steel industry and in the various other industries with which this Academy is associated.

The reason is quite obvious. Despite the fact that a player may have served long and well, despite the fact that he might have the greatest seniority on the club, with no prior infractions entered on his record of discipline, there comes a time, unfortunately, in the life of arbitrators as well of professional sports participants when they get a little old and they go over the hill. I recall with great sentimentality the benching and subsequent dismissal—if I may use that word—of Johnny Unitas, perhaps the greatest quarterback in football history.

Dick Moss, when he was representing the Steelworkers, could have come in charging and said, "Johnny Unitas has got the most seniority of anybody on the team. His record of performance over the years has been impeccable. The discharge obviously is not for cause; it must be because of his union activity," or something like that, and the case would have been presented to an arbitrator and a decision made. That type of arbitration does not take place in football or baseball, for very obvious reasons.

In professional football, the type of dispute which has given rise to the most grievances—unfortunately, but it is a fact of professional football—is injury disputes where the claim is that a player's injury was football-related. Those disputes are now arbitrated by members of this Academy, as Ed Garvey explained, and there have been some 70 or 72 submitted in the past two years. The union wanted this type of arbitration of injury grievances even though the union or the players had won every injury grievance, with or without a written decision, previously decided

by the commissioner when he was the arbitrator, and we agreed to the current procedure. The union's record is not nearly as good under the present system of decisions by members of this Academy. But the fact is that this type of grievance, which is far and away the major type of grievance in football, is being handled by an impartial arbitrator pursuant to arrangements worked out in collective bargaining and agreed to by the union as well as the clubs in 1968 and 1970.

There are some other grievances that will arise; I think there have been about seven that have been presented recently by the union. Ed mentioned one—whether a man should be paid per diem when he is in the hospital. That's an important grievance, but put it in perspective with the fact that when you are considering the applicability of impartial arbitration, as it has developed so superbly in American industry, to professional sports, there can be no arbitration at the request of the union on matters pertaining to salaries. Also, there can be no arbitration, in the vast majority of instances, on the dismissal of players because of the conclusion, on the part of coaches or others, that at that juncture certain players don't fit into the scheme of things for the particular club. It may not even be because of any lack of competence on the player's part, but because the club has two quarterbacks and it trades one for another player.

Let's look at the functions that are performed by the commissioner, picked and paid for by the owners, that are not performed by the traditional arbitrator in industry. These functions were structured 54 years ago when there was a scandal in baseball. The fact that Ed Garvey said it first does not diminish the importance in professional sports and other sports of preserving the integrity of the game. Football is a form of entertainment. People buy tickets to see the games, as they might go to the theater. They don't buy tickets to go into a steel mill to see how the various machines are working. They buy tickets to see a game; and where the players are paid, it is of the utmost importance—the most fundamental importance—that the spectator be satisfied that the game is a bona fide contest and not just an exhibition. Those are the words that are used to distinguish what takes place in professional wrestling and what takes place on that football field, where the participants are joined together, yes, as a monopoly in a tiny little industry, but also in competition with each other. And the clubs are as much in competition with each other as are the

players. That's what makes this game so great. That's what makes it possible, year after year, for more people to want to watch it on television, and for more people to want to come to see the game as it is played in the various stadiums throughout the country.

There is the commissioner system—and it still exists in baseball and it can't be otherwise—under which the commissioner has the power to impose discipline, to discharge, to suspend a player, a coach, an owner, or anybody because of an involvement in gambling or some related activity affecting the welfare of the game.

Some three years ago Commissioner Rozelle directed Joe Namath to dispose of his equity in a night club called Bachelors Three on Lexington Avenue in the Sixties, and Ed complains about that. At that time Ed was not involved in professional football, and the union made no effort to come to the defense of Joe Namath by saying, "He has a grievance that should be taken up through the grievance procedure; that he has been directed to sell his interest without a hearing, without due process of law." The union didn't make that argument, and of course it would not.

The union is just as interested in the integrity of the game as the owners are. Neither has a monopoly on virtue in that respect because it's a matter of self-interest. The moment anybody thinks that the game is fixed, that's the end of the sport.

In the kinds of cases which are arbitrated by members of this Academy, the arbitrator has no power to come in on his own initiative and impose discipline. He sits there and waits until the case is brought to him. The commissioner can move on his own intiative, and he has to do so because that is the function that was given to him in order to make certain that the people who see the game believe in its integrity.

You can say, "Why doesn't the management perform that function? This should be a management right. If an employee is caught stealing, he can be discharged, and the case can be taken to arbitration." It was structured the way it was so that there would be a person, separate and apart from the management, who would perform this function, whose integrity was respected by the fans, and who could proceed against management as well as the player. And it has worked. The moment a commissioner, whether he is paid by the owners or paid by the U.S. Govern-

ment, is not respected by the fans, that is the day that the system which maintains the integrity of the game that is played for money is ended. The test is not who picks the commissioner or who pays him. The test is whether he has integrity and is respected.

Just recently we argued before the National Labor Relations Board on a few matters that were brought there by the union, and we did get into the *Collyer* case. There was the question of whether the Board should defer to the arbitration machinery which the parties themselves had constructed in connection with certain "grievances" the union raised. The parties themselves have constructed the machinery as it now exists. A year from now, when the contract expires, it can be changed. It can be changed through whatever way the parties in collective bargaining decide.

At the moment, the machinery that exists in professional football was agreed to in collective bargaining, and I think it's unfortunate, and not conducive to the furtherance of collective bargaining, for anyone to repudiate the products of it. There are parts of the agreement which the clubs obviously don't like, and we'll talk about these when the bargaining agreement expires. But the agreement is currently in existence.

Now what happened on the grievances the union took to the NLRB is instructive. One involved a rule, introduced a couple of years ago, that any player who left the bench during a game when there was a fight on the field was automatically fined $200. It appeared to the union that that rule was not introduced by the commissioner but by the clubs.

The union filed a charge with the NLRB claiming that since the fine involved dollars and dollars were part of salaries, it was therefore a mandatory subject of bargaining, and that by unilaterally introducing this fine, the owners had violated Section 8 (a) 5. We have been reduced, on this playing rule, to the argument that it was within the scope of the management-rights clause and, indeed, that there is a zipper clause, although they say the zipper is down and we say the zipper is up.

For a year and a half we have been debating before the NLRB the question—the primary question—whether this rule was introduced by the commissioner or the clubs. If introduced by the

commissioner, it was acknowledged that under the standard player contract, which, by agreement of the parties, is a part of the collective bargaining agreement, the commissioner had that power. If the rule was introduced by the owners, was it an improper unilateral change in working conditions? That is the question before the NLRB.

Under the *Collyer* rule, which would allow the commissioner to decide, we would ask, "Mr. Commissioner, did you introduce that rule?" But the union wants the Board to decide. So for one year and a half we have been arguing the question, should we ask the commissioner? Should we ask him, "Did you introduce this rule?"

The administrative law judge (and I have great difficulty remembering to call him that and not the trial examiner) said that in his opinion the owners introduced the rule, not the commissioner. We have appealed.

Incidentally, the rule has worked perfectly. Since it was used in three games in 1971, there has never been another violation. So this horrendous decision of the employers unilaterally to impose a fine to protect the players from beating each other up, which has worked to prevent this from occurring (although some people say that that will take away from the attractiveness of the game—let them beat each other up because it makes a more interesting spectacle), is and has been before the NLRB and not the commissioner.

In any event, when the administrative law judge came down with his decision, saying it was an unfair labor practice for the owners to impose the rule unilaterally and that in his opinion the owners did it and not the commissioner, although it was so clearly within the commissioner's powers to do it that it would be frivolous to argue otherwise, we were faced with a situation that the rule might no longer be in force if the administrative law judge's decision was affirmed.

So the commissioner promulgated the rule clearly and unequivocally as his rule, and the union charges that this is an example of his prejudice. He has the power. He exercised the power when there was a question as to whether or not it was his rule. The rule has worked well. And now it is charged that by doing that—protecting the players from beating each other up—he's acting in

a prejudiced way. (The NLRB has since ruled that it *was* the commissioner's rule originally and has dismissed all of the charges against the clubs.)

Collective bargaining is a great process. It's done a lot for professional sports, and it's going to do more. It has incorporated the commissioner system into the bargaining relationship. It should be respected and honored, both in the making of agreements and in their observance, and I hope to be able to participate in furtherance of collective bargaining in professional football in the future.