CHAPTER 2

DISTINGUISHED SPEAKER: ARBITRATION AND BASEBALL

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When I received a formal invitation to speak at this meeting from your president, he indicated that it was expected that my talk would somehow relate to labor arbitration; that, rather than focus on earlier experience in steel, it was suggested that arbitration in the baseball area would probably be of greater interest; and that about 20 minutes was the usual period allotted. I will try to follow the suggestions.

Howver, I would like to make a few more general comments initially. I read some of the Proceedings of your Annual Meeting last year and found particularly interesting Richard Mittenthal's paper titled "Whither Arbitration."[1]

You may recall that Mittenthal examined the evolution of labor-management arbitration in the past half century and, in so doing, highlighted two distinct concepts of arbitration in the 1940s: one of George W. Taylor, that arbitration was a substitute for a strike and, more important, an extension of the collective bargaining process. The other concept Mittenthal associated with J. Noble Braden—a view that labor arbitration was a substitute for litigation, a quasi-judicial process more closely resembling a court proceeding than an extension of the collective bargaining process. In illuminating fashion Mittenthal's paper proceeded to describe—accurately, I believe—the factors that have resulted in arbitrators' acceptance of the Braden model. He went so far as to say, ". . . the Taylor model has been rejected."

I was struck by the seemingly sweeping nature of that conclusion. Without actually saying so, the paper seems to foreclose or at least discourage the notion that under certain circumstances

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[1]Mittenthal, *Whither Arbitration*, in Arbitration 1991, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 35.

arbitrators could and, in fact, some do embrace both approaches. Why should not arbitrators strive to include in their repertoire (to borrow a phrase from tennis) an all-court game—an ability to rally from the baseline as well as to rush the net, an ability to adjust the game to the many different court surfaces and adjust the approach depending upon all the circumstances.

There can be no argument that the legalistic practices of arbitrators and the parties are the mode and that they seem to meet the desires of most parties. Nor would I deny that that is appropriate in the vast majority of grievances submitted to arbitration—for example, in routine cases where the outcome will not fundamentally alter the relations of the parties, and in virtually all ad hoc situations where the arbitrator has no special insight into the overall problems of the parties' collective bargaining relationship or of the plant or industry involved.

But in some special situations—perhaps where the grievance seems to have extraordinary significance, or where the arbitrator is a so-called "permanent" umpire with a sensitive feel for and understanding of that which does not appear in the words of the grievance submission or even in the presentations of the parties, or where the collective bargaining relationship is relatively new and in a developmental state, or where the grievance and its disposition may represent a turning point in the relationship, or where one or both parties seem not quite cognizant of the very real potential impact of the pending grievance or grievances, and possibly in other situations—treating a grievance routinely may miss the boat. In these instances I think that arbitrators have an opportunity—risky perhaps—to consider applying George Taylor's concept of the arbitral function, i.e., arbitration as an extension of collective bargaining.

Incidentally, in considering George Taylor's concept of the arbitral role, it is pertinent to note that his experience, beginning in the early 1930s before he was 30 years old, was as a permanent umpire rather than an ad hoc arbitrator. In 1931 he became the impartial chairman of the full fashioned hosiery industry, in 1935 the impartial arbitrator of the Philadelphia branch of the men's clothing industry, followed by similar roles in the hat and textile industries and as impartial umpire under the General Motors-UAW contract in 1941. In at least some of these situations the collective bargaining relationships were not very old and far from sophisticated. The Taylor talent for bringing conflicting parties together and helping them develop imaginative

solutions was honed in those situations. By the time he became vice-chairman of the National War Labor Board in 1942, he had made more than 1,200 awards, but had helped settle an even greater number of disputes without awards through methods he deemed to be extensions of the collective bargaining process.

I want to give an example—a grievance in Major League Baseball—which confronted an arbitrator with a situation which, to me, clearly called for far more than a routine, legalistic approach. (Parenthetically, as a union partisan in that case, it was in my interest and that of the union members for the arbitrator to adopt a strictly legalistic approach. The language of the contract was squarely in line with the union's position on the grievance.)

The arbitrator recognized early on the unusual nature of the matter before him, clearly saw that it was a turning point not only in the collective bargaining relationship but also might impact on the very way the industry had conducted its business for a century, and that the consequences for the employees—the Major League players—might be dramatic, indeed. With the limited means at his disposal, the arbitrator did everything but turn handsprings to get the parties to solve the problem through collective bargaining rather than arbitration. His effort failed but is still illustrative.

Major League Baseball, of course, is not one of your usual run-of-the-mill industries. It is a most peculiar industry, so peculiar that, if one of the participants in a game vigorously protests the impartial umpire's call, *he*—the player or manager or both—are thrown out of the game and the arbiter remains! (That's quite a perk which accompanies the job of baseball umpire.)

Of course, that is not the only thing that makes baseball different. In 1970 after a century of existence, impartial arbitration of grievances finally arrived in baseball. The "self-governing" system that the industry had touted was an obvious sham. Before 1970 the final arbiter of grievances, whether they involved alleged violations of the voluminous major league rules or of the players' contracts, or management decisions ending a player's career, was the Commissioner of baseball, hired by, paid solely by, and subject to being terminated by the owners of the ball clubs against whom grievances theoretically could be filed. Eminently fair! Throughout the years before the union, the players may have been powerless, but they weren't stupid.

In the first collective bargaining negotiations involving a grievance procedure, I asked for a record of the types of grievances filed in the past and their disposition by the Commissioner. I was told there weren't any records! For all anyone knew, no player had ever filed a grievance with the Commissioner's office. This was not surprising, really, given the stacked deck with which the players had to contend.

In the first five years after impartial arbitration of grievances was established through collective bargaining, many of the grievances were not routine. The owners and officials of the ball clubs and the leagues were totally unschooled in how to live with a union and the need to comply with a collectively bargained contract. In some ways this was to be expected given their prior 100-year history of operating as a totally unregulated monopoly.

In those early years of impartial arbitration in baseball, the set-up included a permanent chairman of a tripartite panel. The chairmen in that period all were distinguished arbitrators with long experience and great competence. They operated by the book, pretty much as Richard Mittenthal described the J. Noble Braden tradition.

I thought then, and I still do, that an opportunity was missed. This is not to fault the arbitrators involved. After all, it was not in their job description to imaginatively find ways and means to educate, to bring up to snuff, an industry new to unionism and collective bargaining, new to the inhibitions imposed by contract compliance, new to grievance processing, and new to impartial arbitration—a difficult state of affairs considering that we were not in the early 1900s but rather in the 1970s.

In 1975 after five years of impartial arbitration, a grievance was filed which, depending upon how it was resolved, as I indicated earlier, had the potential to change in the most fundamental manner the very way the industry had operated since its inception, the way it related to the players (who were virtually the owners' only assets), and much, much more. The case arose from the claims of two players—Andy Messersmith, an outstanding pitcher of the Los Angeles Dodgers, and Dave McNally, who had been a standout pitcher most recently for the Montreal Expos.

Messersmith's grievance was the primary one. He had not signed a contract for the 1975 season because he was displeased with the terms offered. He played for his club, nevertheless, in 1975 at the club's terms by virtue of the club's exercising its

contractual right to renew his 1974 contract (without the player's signature) "for one additional year." Under those circumstances, when the 1975 season was over, Messersmith requested the arbitrator to recognize his free agent status since his contractual commitment to the Los Angeles club had ended under the provisions of that contract.

Since the 1870s Major League Baseball had operated on the premise that a player was simply property, owned by and bound to his club for his entire career (and beyond) unless and until the club sold him—for cash—or traded him for other players, or, if he was deemed lacking in ability, released him. (Discharged is the usual term in other industries, but released did seem a more appropriate word to describe the action of setting a player free.) This assumption of lifetime ownership and control of a player had withstood numerous antitrust challenges in the courts (most recently in the Curt Flood case in 1972), but the reality was that the owners' assumptions rested on a very thin reed, their attorneys' unilateral interpretation of the renewal clause in the players' standard contract.

I am oversimplifying somewhat, but the question was: Did a club's right to renew a player's contract against his will—"for one additional year"—permit the club to exercise that right year after year in perpetuity, or did the contractual connection between the player and club expire after a one-year renewal? I have not done enough research to say that that grievance had greater import, greater potential for changing and reforming an industry, than any other grievance decided in a labor-management setting, but it probably ranks pretty high in relative importance.

The permanent arbitrator in baseball at that time, of course, was the late Peter Seitz—bright, witty, literate, mature—with extensive arbitral experience in a variety of industries. There is no doubt that he considered his role squarely in the J. Noble Braden tradition as previously described. He stated on more than one occasion that his concept of the arbitral role was that it is quasi-judicial, that the arbitrator's function is very limited, with power not to seek solutions to collective bargaining problems but merely to interpret the contract and apply its provisions.

In the Messersmith opinion Seitz wrote: "To go beyond this [interpreting and applying contract provisions] would be an act of quasi-judicial arrogance." And yet, given the importance of

the matter at hand, when the grievance was before him he found it impossible to view it in a vacuum. Instead, he had to view it as part of the collective bargaining process. In spite of himself, he had to try to mediate, to take extraordinary measures to try to persuade the parties to remove the issue from the arbitrator's purview and resolve it by negotiation.

Admittedly, this was an unusual case, but I think that from time to time individual situations arise when a more flexible approach to grievance resolution by arbitrators—consistent with the concept of a George Taylor, consistent with the practices of a Dave Cole or a Peter Seitz—on a careful, selective basis might provide a valuable service to the parties and to the overall process of collective bargaining.

In the time remaining, I want to include some comments about several other aspects of baseball arbitration. Salary arbitration in baseball could be discussed at some length, but a few brief comments will have to suffice. Salaries in Major League Baseball, as many of you know, are established in a variety of ways: The minimum salary is determined by collective bargaining; the salaries of players who have relatively short major league service are set by individual "negotiation." But "negotiation" has to be in quotes. In reality, the clubs decide those unilaterally. At the other end of the service scale, those players with six or more years of major league service whose contracts have expired may elect to become free agents and negotiate with any club in either league—relatively free market in noncollusion years. In between but with some overlap are the players whose length of service entitles them to submit salary disputes to impartial arbitration. The arbitrator in each individual case, on the basis of specified criteria negotiated by the Union and the League, determines the salary to be paid for the forthcoming year by selecting either the player's or the club's last offer, with no compromise permitted.

Salary arbitration was negotiated in 1973 and became effective for the 1974 baseball season. There were many concerns, management was wary, and individual players unfamiliar with the arbitration process were unsure of what to expect. I had some concerns. But in those days a change in the way of doing things in baseball almost certainly had to be a change for the better. In the case of salary arbitration that point is made when you consider what it replaced. It replaced salary setting by total management fiat. Before salary arbitration players' salaries were

determined solely by the owners of each individual baseball club. Those determinations were so final and binding that they were enforced by the credible threat of banishing from the game all players who for any reason found the salary determinations unacceptable. And it did not matter whether the player was relatively unknown—a marginal performer—or whether he was Joe DiMaggio, Sandy Koufax, or Reggie Jackson.

This almost incredible state of affairs in the pre-union days resulted from the reserve system under which players were property, an agreement among all the owners (a written agreement, incidentally) not to tamper with each other's property, and the establishment of a blacklist of any and all players who rejected their owners' terms. Such players were barred from playing baseball professionally in the major leagues or minor leagues in the United States, Canada, Mexico, Puerto Rico, Venezuela, and the Dominican Republic, or in Japan by written agreement of the Japanese and United States Commissioners of baseball.

If full-time professional arbitrators were confronted by a combine (outside the purview of antitrust laws), a combine of all those who utilized the services of arbitrators, and the combine determined who could be arbitrators and what fees they would be paid (enforced by banishment from the profession), that would approximately parallel the pre-union situation of professional baseball players. As you can see, it was not difficult to improve on that.

One of the concerns I had in the beginning was that we might need a sizable number of arbitrators willing to serve, and I did not know how many might be sports fans. Indeed, some were not. In that connection, I want to pay belated tribute to those arbitrators who in 1974 were not sports fans, some who did not know then that RBI stood for runs batted in or that ERA referred to a pitcher's earned run average and not to the proposed Equal Rights Amendment, but who, since then, have valiantly learned the significance of the many statistical measurements of a major league baseball player's performance on the field in order to decide salary disputes with reason.

It is evident that arbitration in one form or another has played a significant role in the evolution of labor-management relations in baseball, and one of the results is that everyone has prospered. Management understandably stresses the growth in players' salaries since the union was formed. This emphasis is then

picked up by numerous sports columnists. But almost never is the other side of the coin discussed. Major League Baseball is one of the very few growth industries left in this country. When the Union started in 1966, gross revenue of all the major league clubs combined was less than $50 million a year. Last year it was $1.5 billion. When two expansion franchises are added to the National League next year—Denver and Miami—Major League Baseball will have expanded by 40 percent since the Union began—40 percent more franchises, 40 percent more players, 40 percent more jobs of every kind. The value of the franchises continues to skyrocket. The expansion franchises—Denver and Miami—cost $95 million each. Thirty years ago the expansion franchise known as the New York Mets cost $2.6 million. Its worth today is estimated conservatively as between $150 million and $200 million. The Seattle franchise 15 years ago cost $7 million. Today $100 million is on the table as the current offer for the franchise. Tidy little capital gains!

It is really amusing how much publicity is given to the alleged economic plight of baseball, at a time when it may be one of the most profitable industries around. I never thought I would see a year like last year, when Major League Baseball as a whole was well in the black and turned away countless $95 million bidders for the two expansion franchises—in the same year when such former industrial stalwarts as General Motors, Ford, Chrysler, IBM, the former United States Steel Corporation, and Alcoa all were in the red in billions of dollars. If, as claimed by baseball owners, it is salary arbitration which has brought the game to its present economic condition, we can all take a bow.

I feel honored by your invitation to speak, and I have enjoyed being here and having the opportunity to see again so many of the people with whom I have worked professionally through the years.