Arbitration of Professional Athletes' Contracts: An Effective System of Dispute Resolution in Professional Sports

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Arbitration of Professional Athletes' Contracts: An Effective System of Dispute Resolution In Professional Sports

In recent years, there has been a substantial increase in the number of legal disputes in the professional sports industry. For the first time, the fan is being exposed to a hidden side of American sports—the dealings between the professional athlete and his employer. There are several reasons for this phenomenon: the great amounts of money involved, the athlete's increased awareness of his legal rights, attempts by unions to organize players and then negotiate with owners, and the public exposure which the media has given this problem in recent years.

1. The touchstone of the problem revolves around the so-called freedom issues. These include the reserve system, termination provisions, option clauses and the draft system. Simply stated, they present the question: when should an athlete be free to sell his services to any team in a league which has been structured to limit that freedom?

While the reasons are many and complex, the result is not. The public impression of sports as the great American pastime, exemplar of fair play and builder of character, is being shaken. The athletes' performance is suffering, and owners are forced to make unpopular trades and dismissals. Indeed, the fundamental notion of sports as a game is eroding away. Realizing this problem, the sports industry has undertaken an extensive search for a system to resolve these disputes in an orderly and expeditious manner.

As of this date, the search for the "better" system is, in the opinion of the author, pointing toward grievance arbitration. This article focuses on this concept, the most recent to find its way into the professional sports industry. It will examine the most recent and far reaching decisions rendered pursuant to the new grievance arbitration mechanism to determine whether it is in fact a better system.

II. AN HISTORICAL OVERVIEW

A brief look at the history of professional sports reveals that this search has been an on-going one. Several concepts for an

4. Over 500 disputes were decided under the following system in the last three years. Many more were settled before a decision was rendered.

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<th>SPORT</th>
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<td>(4) Hockey a. National Hockey League</td>
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<td>b. World Hockey League</td>
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orderly method of resolving disputes between players and owners have been utilized with varying degrees of success. Among them are the judicial system, the representative system, unionization, legislation, and arbitration.

The judicial system, the most common method for resolving conflict, has proved too burdensome to use in the professional sports industry for reasons of time and money. Over the years there have been numerous examples of athletes forced to end promising careers to settle disputes with their respective clubs and leagues; however, an athlete should not be forced to end his career in order to challenge the validity of league rules or the interpretation of his contract. In support of this premise, many articles perceptively state that our courts have simply created a confusing situation in professional sports by rendering irreconcilable decisions. The judicial attitude in this area was summed up best by Justice Burger's concurring opinion in Flood v. Kuhn, wherein he said: "[our] courts are not the forum in which this tangled web ought to be unsnarled."

The second manner of dispute resolution, the representative system, can best be described by looking at baseball in the early 1940s. At that time, the American Baseball Guild attempted to unionize the Pittsburgh Pirates; the owners responded by adopting a representative system to thwart union activity. Under it, a player representative was elected from each team; he had no vote in the final outcome of any of his proposals and merely acted as a conduit to present the players' views to the owners. This system was more suited to handling general league policy rather than individual problems, and in the few instances where negotiations were successful, player representatives had to resort to threats of litigation or threats not to meet with owners.

5. Joe Kapp was a professional quarterback who enjoyed a very successful career. In 1969, he refused to sign the league's Standard Player Contract and as a result was dismissed by his club and barred by NFL Commissioner Rozelle from playing for any league club as long as he persisted in his refusal. Curt Flood, a highly successful baseball player, chose to challenge baseball's celebrated reserve system in the courts. The litigation took over three years and Flood was forced to sit out the most promising years of his career.


8. Id. at 286.

9. See Krasnow & Levy, supra note 3, at 750.


11. Hearings on Organized Baseball Before the Subcomm. on the Study
The unionized player associations, unlike the representative system, are theoretically more independent and tightly-knit organizations capable of affirmative action and economic tests of strength. In the last several years, they have made great progress in affecting league policy and negotiating terms and conditions of employment. However, even unionization does not completely solve the individual's problem since the union is mainly suited for gaining group benefits on a league-wide basis. More importantly, for a union to be effective at all it must be well organized, and all too often such is not the case. A prime example may be seen in professional football where the owners have simply refused even group demands, leaving the individual totally helpless.\textsuperscript{12}

While there is currently very little legislation directly dealing with professional sports, a plea has been made for congressional action designed to rectify the inequities of player bargaining.\textsuperscript{13} Such a system would apparently require an entire body of legislation regulating the area of professional sports, and would possibly need to be overseen by a separate federal regulatory agency. While this solution would have the advantage of establishing a uniform system of rules applying to all sports, it does, however, present several major problems. The most significant one would be passing this legislation at the federal level in the face of a strong lobby from both the players and owners each pushing to have their interests best protected. For example, since 1953 more than fifty bills have been introduced in Congress relating to professional sports but so far it has acted only on two: the sale of television rights and the NFL-AFL merger.\textsuperscript{14} Arguably, since both sides have generally structured documents and rules so that controversies could be resolved within the sports family, federal legislation would bring nothing but unwanted government influence and control.

A study of collective bargaining agreements and standard player contracts reveals that as of July, 1975, all of the four major profes-

\textsuperscript{12} The National Football League Players Association was recognized as the sole bargaining agent for the players by the NLRB pursuant to a consent election agreement on July 10, 1970. The National Labor Relations Act, 29 U.S.C. § 158(d) (1970), forces an employer to bargain in good faith. It does not require him to make any concessions. In July, 1974, the National Football League Players Association used the strike as a lever to gain concessions for its members. However, the owners refused to give in to the players' demands, contracting with other players instead. Thus the union's most effective weapon to gain individual benefits was rendered useless.

\textsuperscript{13} 407 U.S. 258 (1972).

\textsuperscript{14} Id. at 281.
sional leagues and most other leagues, have joined the rest of the labor industry and opted for some type of grievance arbitration system. It appears that this method of dispute resolution reaches the optimum balance in terms of time, expense, powers of parties, and outside intervention. The collective bargaining agreement effective in 1973-1975, between the National Baseball League and the Major League Baseball Players Association, is an example of this system. It stipulated that all disputes over the interpretation of, or compliance with, the collective bargaining agreement or any agreement between a player and a club should be referred to a three step grievance process. If the dispute were not resolved to the satisfaction of either party, the player or the owner could appeal to an arbitration panel consisting of three arbitrators, one selected by the player, one by management, and the impartial chairman selected by agreement of the parties. Any dispute falling within the definition of a grievance as defined by the contract was within the jurisdiction of the panel as the exclusive remedy of the parties.

The enactment of this type of mechanism for the resolution of athletic disputes has aroused much speculation over its future application and workability. The grievance provisions of all the professional sports leagues, while providing a skeletal framework for what should happen when a dispute arises, need much fleshing out before their impact can be fully understood. Thus, the question remains as to whether a system of industrial self-government, such as the grievance machinery, is a viable means of settling disputes in this unique area of labor law. In December, 1974, and a year later in 1975, the decisions reached in American & National Leagues of Professional Baseball Clubs (Oakland Athletics, Division of Charles O. Finley & Co.) v. Major League Baseball Players Association (James "Catfish" Hunter) and the American & National League of Professional Baseball Clubs (Los Angeles Club & Montreal Club) v. Major League Baseball Players Association (John

15. See note 4 supra.
17. Id. at Article X A.1. (c) (10) and B.
18. Id. at Article X.
Messersmith & Dave McNally, rendered pursuant to baseball's grievance procedure, dropped a "bombshell" on labor relations in professional sports and may have set back the owners' willingness to arbitrate a hundred years, and has spurred the development of the athletes' freedom by forcing owners to negotiate on certain issues. As a result of the first decision, "Catfish" Hunter found himself in one of the fiercest bidding wars in professional sports history. To the owners' dismay, this ended with him signing a reported $3,000,000 contract with the New York Yankees. Although conceptually neither of the opinions is a binding precedent, other professional leagues are keeping a close eye on the possible ramifications of this line of cases as if they were United States Supreme Court decisions.

III. THE HUNTER DECISION

A. The Factual Setting

While the factual setting in Hunter is complex, a simplified version will facilitate discussion of the legal issues in the case. In January, 1974, "Catfish" reached agreement with Charles O. Finley, General Manager of the Oakland Athletics, that he would receive $100,000 as compensation for each of the years 1974 and 1975. The contract contained the following special covenant:

\[
\text{It is agreed that as part of the consideration of this Uniform Player's Contract between Oakland Athletics, . . . and James A. Hunter, . . . that said Club will pay to any person, firm or corporation designated by said Player the sum of Fifty Thousand ($50,000.00) Dollars per year, for the duration of this contract to be deferred compensation, same to be paid during the season as earned.}
\]

22. Club owners through the years have been able to deal with players in a dictatorial fashion. They were very skeptical that the grievance system would shake their throne, but when these players were declared free agents, owners became fearful of the system. All indications are that club owners will take a very hard-line approach to the grievance system in future negotiations.
24. Each arbitration case is conceptually decided on its own merits, thus permitting the arbitrator maximum adaptability within specified contractual limitations. It is important to note that the arbitrator's role is judicial in nature, but his authority and jurisdiction are created only by the collective bargaining agreement.
25. Decision No. 23 at 3.
The exact terms of the deferral arrangement were contained in a separate deferred compensation agreement drafted pursuant to Rev. Rul. 72-25, 1972-4 CUM. BULL. 8. Hunter played the entire 1974 season. On August 1, he requested that the club pay the deferred amount to Jefferson Standard Life Insurance Company as the special covenant required. Upon Mr. Finley's refusal, Hunter elected to terminate his contract under the termination provisions of the contract. The dispute reached the arbitration

26. Relevant portions of the Investment Agreement are as follows:

1. Out of Mr. Hunter's yearly compensation the sum of $50,000.00 shall be credited to a Deferred Compensation Investment Account (DCIA) to be established by the Employer as a separate accounting record. The amount of deferred compensation to be credited to the account may be changed "in the sole discretion of the Employer" with certain prescribed limitations. The DCIA shall be "a convenient accounting method for measuring the Employer's obligations" to Mr. Hunter.

2. The Employer has the discretion "to segregate or not segregate and invest or not invest," all or any portion of the amount credited to the DCIA and "nothing contained in this agreement shall be construed as requiring such investment." If the Employer invests, it may do so in a broad variety of ways including "insurance policies, annuities (fixed or variable)." If the funds are invested, all interest and dividends shall be an asset of the Employer and the Employee shall have no legal or beneficial interest therein.

3. The value of the DCIA "shall at all times be deemed equal to the amount which would have been in the DCIA had the money credit to the DCIA been invested in the manner set forth in Schedule A. The Employer, however, shall not be obligated to invest the amount credited to the DCIA in such manner, but shall be free to invest or not to invest the amount in any manner in which it sees fit."

Schedule A provides that "the value of the DCIA shall be equal to the amounts which would have existed had the agreed upon amount of Deferred Compensation been invested as follows:

"50% invested in a fixed annuity contract issued by Jefferson Standard Life Insurance Company.

"50% invested in a variable annuity contract issued by Jefferson Standard Life Insurance Company."

Decision No. 23 at 8.

27. The insurance annuity policy which Mr. Finley was asked to sign referred to an annuity on the life of James A. Hunter. The beneficiary for death benefits was to be "Oakland Athletics, Division of Charles O. Finley & Company, Inc." The application indicated that the policy was for "Annual Premium Elective at Interest" and called for the signatures of the "Annuitant," Mr. Hunter, and of "Purchaser if other than Annuitant." There was typed above the last mentioned description, "Oakland Athletics, Division of Charles O. Finley & Company, Inc."

28. NBL UNIFORM PLAYERS' CONTRACT § 7(a) (1973-75) provides:

The player may terminate this contract upon written notice to the Club, if the Club shall default in the payments to the
panel upon the filing of two grievances. One complained that the twenty-four clubs acting through their agents and representatives had conspired to refuse to honor the contract termination notices. The other asserted that the Player's Contract had been duly terminated and asked for payment and damages.29

B. The Issues Involved

The principal issues facing the arbitration panel were whether it had jurisdiction to make a final disposition of the dispute, and if so, whether the merits of the case called for termination. The impartial Chairman Peter Seitz answered the first issue in the affirmative:

When the dispute arose, in August, Mr. Hunter had an election of remedies. He could have filed a grievance alleging a dispute between him and the Club as to the interpretation and application of the Special Covenant: In so doing, he would be standing on the Player's Contract, so to speak, and resorting to the grievance provision to enforce that Player's Contract. If his grievance went to arbitration and he prevailed, the relief provided in the Award would have been to require Mr. Finley to pay over the money to the insurance company designated by Mr. Hunter.... In this way Mr. Hunter would get specific performance of the special covenant. Mr. Hunter, however, chose not to follow this course. He did not seek to enforce or seek compliance by Mr. Finley with the provisions of the Special Covenant in the Player's Contract. Instead, he elected to invoke the rights granted in the Termination provisions of his Player's Contract. In contrast to enforcing that contract he asserted that the Club's actions resulted in there being no contract at all.

Mr. Hunter resorted to a provision in the Player's Contract which supplements but is not necessarily in conflict with the grievance procedure in the Basic Agreement.30

While expressing his doubts about the wisdom of the termination provisions, Mr. Seitz held that the grievance procedure was available for the resolution of a dispute as to the consequences of a default which a player had elected to declare under Section 7(a).31

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29. Decision No. 23 at 20.
30. Id. at 20-21.
31. The 1973-1975 Basic Agreement sets forth a Grievance Procedure in Article X for the handling of grievances and complaints which "shall apply as the exclusive remedy of the parties." Article X A.1. (a) describes "Grievance" very broadly as meaning "a complaint which involves the interpretation of, or compliance with, the provisions of any agreement be-
As to the second issue, the panel concluded that for the following reasons, it was clear from the contract that in each of the two years, as compensation was earned, the club was under a duty to pay it to Mr. Hunter's designee as deferred compensation. First, even if the Special Covenant and the Investment Agreement were internally inconsistent and might not have qualified as deferred compensation, this would only affect Mr. Hunter's success in not being taxed on current income, but was of no concern to Mr. Finley. Secondly, the fact that Mr. Finley could not take a business deduction was a risk he agreed to assume by deferring the compensation at the outset. Finally, the free and unrestricted use of the funds by the club was not made an express condition to the signing of the Player's Contract or the Special Covenant with Mr. Hunter.

The record, as a whole, compels the conclusion that Mr. Finley, some time after August 1, decided that the undertaking set forth in the Special Covenant, as executed by the papers presented to him, was an improvident one, principally because it denied him the use of the deferred compensation during the period of deferral. It is not known when he reached that conclusion; but he did not state his refusal to sign definitively until a month and a half after the papers were given to him for signature. In the meantime he had the use of Mr. Hunter's services which was the consideration for the salary and deferred compensation the Club was under a duty to pay. This was a material breach of Mr. Hunter's Player's Contract.

Mr. Finley's refusal to accept the insurance company as the "person, firm or corporation designated by Mr. Hunter to which compensation should be paid, as deferred compensation," constituted a viola-

tween a Player and a Club. . . ." Article X A.10. provides that the Arbitration Panel is empowered to decide "Grievances" appealed to arbitration.

Id. at 19.

32. In the case described in Rev. Rul. 72-25, 1972-4 Cum. Bull. 8, the deferred compensation account of the employer could be increased or decreased from the employer's investments, "at its option." Since Hunter could require his employer to invest the money he would probably have sufficient control over the income to require inclusion in his current gross income.

33. Mr. Finley had no duty to make certain that Mr. Hunter avoided being taxed on the money as current income. "Since in any deferral arrangement the Club would not pay the money to the Player as earned it is presumed the Club could not claim the compensation as a business expense." See Decision No. 23 at 35.

34. Mr. Finley's refusal to sign the deferral agreement was his downfall. If he had signed, he could have argued that as part of the consideration for deferring the money he was to be allowed to use the funds as the deferral agreement required. At least, he would have had a much stronger case.

35. See Decision No. 23 at 36.
tion of the Special Covenant and justified its termination by Mr. Hunter.

Mr. Hunter's Contract for services to be performed during the 1975 season no longer binds him and he is a free agent. The Club shall compensate Mr. Hunter in the amount deducted from his salary during the 1974 season, as deferred compensation, with interest.36

This decision was appealed to Alameda County Superior Court in California on the theory that the panel did not have jurisdiction to rule on the subject of baseball's reserve system, and by so doing the decision was arbitrary and capricious. Superior Court Judge Phillips, however, refused to reverse the decision, and held that the award of the arbitration panel was confirmed in all respects,37 thereby reflecting the judicial holding of the United States Supreme Court in the famous Steelworkers Trilogy.38

IV. THE MESSERSMITH AND McNALLY DECISIONS

A. The Factual Setting

Unlike Hunter, the factual settings in Messersmith and McNally are relatively simple, and the issues are largely matters of contract interpretation. Messersmith, a veteran pitcher, signed a one year contract with the Los Angeles Dodgers in 1974. He did not sign a new contract for the year 1975. Nevertheless, his contract was duly renewed by his club for what is commonly called the "renewal or option" year39 under the provisions of Section 10(a) of the Uniform Players' Contract.40

36. Id. at 39-40.
38. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). These cases have become known as the Steelworkers Trilogy. They articulate the legal principles applicable to the arbitration of labor disputes, and reflect the current judicial attitude toward review of an arbitrator's decision which is that it will not be reversed unless it is clearly wrong or unless the arbitrator had no authority to render the decision. See note 66 infra.
39. See Decision No. 29 at 32.
40. NBL Uniform Players' Contract § 10(a) (1973-75). On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms
The Players Association claimed that Messersmith having served out and completed his renewal year was no longer under contract, and accordingly, was a free agent to negotiate with any of the other clubs in the league. It must be noted that the opinion refers mainly to Messersmith because, with minor exceptions, the facts of the McNally grievance are identical.

B. The Issues Involved

The principal issues in Messersmith were very similar to those in Hunter and involved whether the arbitration panel had jurisdiction over the subject matter in dispute, and if so, whether on the merits the players had been reserved in such a manner as to inhibit other clubs from dealing with them. The jurisdictional question so easily resolved in Hunter was a focal point of concern in this opinion. While in Hunter the panel took a liberal reading of what issues would be subject to the grievance mechanism, this case presented a special twist. It was the league's position that Article XV had effectively removed jurisdiction from the panel to arbitrate these grievances because they asked for relief contrary to Major League Rules which it characterized as the

of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the next preceding year and at a rate not less than 70% of the rate stipulated for the year immediately prior to the next preceding year.

41. See Decision No. 29 at 33.
42. Id. at 30. McNally, unlike Messersmith, did not play out the entire "renewal" year. He quit in mid-season, claiming that he was through with baseball. Thus Messersmith was placed on the reserve list of the Los Angeles Club, but McNally was placed on the disqualified list of the Montreal Club.
43. See Decision No. 29 at 7.
44. Id. at 7-8.
45. Article XV of the (1973-75) BASEBALL AGREEMENT states:

Except as adjusted or modified hereby, this Agreement does not deal with the reserve system. The Parties have differing views as to the legality and as to the merits of such system as presently constituted. This Agreement shall in no way prejudice the position or legal rights of the Parties or of any Player regarding the reserve system. During the term of this Agreement neither of the Parties will resort to any form of concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system.

Id. at 7 (emphasis supplied).
“core” of the Reserve System; that Rule 4-A (Reserve Lists),\footnote{MAJOR LEAGUE RULE 4-A(a) (1975) provides:} and Rule 3-G (Tampering),\footnote{MAJOR LEAGUE RULE 3(g) (1975) provides:} as part of the “core” of that system,\footnote{The League did not contend that peripheral matters involving the reserve system were removed from the grievance provisions. However, it did claim that core matters were beyond the authority of the arbitration panel. This argument bore little weight in the final holding.} prohibit negotiations between a player on a club’s reserve list and any other club in the league; that the arbitration panel derives its authority only from Article X of the Basic Agreement which involves “the interpretation of, or compliance with, the provisions of any agreement between the Association and the Clubs;” that Article XV expressly provides that “this Agreement does not deal with the reserve system;” and, accordingly, that the grievances did not address themselves to disputes within the ambit of the Basic Agreement so that the arbitration panel could exercise its authority.\footnote{Decision No. 29 at 9.}

After an extensive discussion of the history of how and why the reserve system developed, the arbitrator reached the real question he faced, \textit{i.e.}, what does it mean when the basic agreement professes not to “deal with the reserve system” but the player’s contract, incorporated into and made a part of that Basic Agreement, actually contains provisions which are components of that system?\footnote{Decision No. 29 at 9.} In holding that the grievance provisions were not affected or limited by the language of Article XV as to the issue in dispute,\footnote{Id. at 19.} several reasons were advanced. First, Article XV

\footnote{Decision No. 29 at 33–34 (emphasis added).}
itself provides, "Except as adjusted or modified herein, this Agreement does not deal with the Reserve System." This evidences an intent that the "does not deal with" language should not be read literally.52 Second, the broad provisions of Article X defining grievances and setting forth grievance and arbitration procedures exclude certain kinds of disputes from its scope, but say nothing of grievances about a violation of the reserve system.53 Thirdly, no jurisdictional objection was voiced before the arbitration panel in the Hunter case.54 Finally, by an agreement of understanding dated January 1, 1973, the parties had expressly concurred that the Basic Agreement did affect the reserve system.55 As to the merits of the case, the arbitrator also sustained the players' position.56

The league had based its argument on language in Section 10(a) which states that a club "may renew this contract for the period of one year on the same terms" and that among those "same terms" is the right to further renewal, thus, providing in effect for perpetual renewal.57 By drawing an analogy to cases dealing with the renewal of real estate leases58 and various basketball cases,59 Mr. Seitz answered this allegation by stating:

dispute as to the interpretation or application of Section 10(a) of the Uniform Players Contract or the Major League Rules dealing with the Reserve System from the reach of the broad grievance and arbitration provisions in Article X.

Id. at 31.
52. Id. at 29.
53. Id. at 27-28.
54. Id. at 27 n.1.
55. Id. at 29-30.
56. Id. at 35-36.
57. Id. at 41 (emphasis added).
58. Brown, Weelock, Harris, Vought & Co., Inc. v. One Park Ave. Corp., 134 Misc. 313, 35 N.Y. Supp. 297 (1929), was an action by a real estate broker to recover commissions which were to be paid partially at the time of the execution of the lease and the balance when and if the options in the lease were exercised. The court denied the plaintiff additional commissions, and held that a renewal in a lease gives the right of only one renewal, unless otherwise expressed. In Albany Sav. Bank v. R.E. Gigliotti Motor Sales, 162 Misc. 468, 295 N.Y. Supp. 779 (1937), an action for possession was sustained. The court held that the tenant had the right to renew his lease for a period of one year under the renewal clause, in the absence of specific language to the contrary.

59. In Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 181 N.E.2d 506 (1961), and Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969), the Ohio and California courts interpreted provisions very similar to Section 10(a) of the baseball players' contract. In Barnett, the court was faced with an action by the New York basketball club to enjoin Richard Barnett from playing with the Cleveland club, a member of the American Basketball League. In granting the injunction, the court held that the New York club could
In the law of contract construction, as I know it, there is nothing to prevent parties from agreeing to successive renewals of the terms of their bargain (even to what has been described as "perpetuity"), provided the contract expresses that intention with explicit clarity and the right of subsequent renewals does not have to be implied.60

[That] the Uniform Players Contract in Section 10(a), provides that it may be renewed 'for the period of one year'; and I have stated that the manner in which the renewal clause has been written does not warrant interpreting the section as providing for contract renewal beyond the contract year.61

The league had also argued that regardless of the continued existence of any contractual relationship a club under Major League Rule 4-A(a) had the exclusive right to reserve a player's services,62 enabling it to continue a career-long control over a player regardless of the renewal clause (Section 10(a)). Thus, by placing a player on its reserve list a club could prevent any other club from negotiating with that player.

This argument basically goes to the issue of "free agent" status. Without this status, even though the player is not under contract with his former club, no other club, under the league rule, could negotiate with him. This would in effect accomplish almost the same result as perpetual renewal under Section 10(a). The arbitrator focused on the language of various league rules and observed that most of them used the term "contract," thus contemplates a nexus between a player and a club before they took effect.63 Mr. Seitz then stated:

that absent a contractual connection between Messersmith and the Los Angeles Club after September 28, 1975, the Club's action in reserving his services for the ensuing year by placing him on its reserve list (Major League Rule 4-A(a) ) was unavailing and ineffectual in prohibiting him from dealing with other clubs in the league and to prohibit such clubs from dealing with him.64

Like Hunter this decision was also appealed. First, the United States District Court for the Western District of Missouri, Judge

60. See Decision No. 29 at 41-42.
61. Id. at 54.
62. Id. at 47-48.
63. Id. at 48-50.
64. Id. at 56.
Oliver presiding, refused to reverse, and on appeal, the United States Court of Appeals for the Eighth Circuit also refused to reverse.

66. Kansas City Royals v. Major League Baseball Players Association, — F.2d (8th Cir. 1976). The court reiterated the judicial attitude on reviewing an arbitrator's award:

The Supreme Court articulated the legal principles applicable to the arbitration of labor disputes in the Steelworkers trilogy, and recently reaffirmed them in Gateway Coal Co. v. United Mine Workers of America. A Party may be compelled to arbitrate a grievance only if it has agreed to do so. The question of arbitrability is thus one of contract construction and is for the courts to decide. In resolving questions of arbitrability, the courts are guided by Congress's declaration of policy that arbitration is the desirable method for settling labor disputes. Accordingly, a grievance arising under a collective bargaining agreement providing for arbitration must be deemed arbitrable "Unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Consistent with these principles, a broad arbitration provision may be deemed to exclude a particular grievance in only two instances: (1) where the collective bargaining agreement contains an express provision clearly excluding the grievance involved from arbitration; or (2) where the agreement contains an ambiguous exclusionary provision and the record evinces the most forceful evidence of a purpose to exclude the grievance from arbitration.

If it is determined that the arbitrator had jurisdiction, judicial review of his award is limited to the question of whether it "draws its essence from the collective bargaining agreement." We do not sit as an appellate tribunal to review the merits of the arbitrator's decision.

The court went on to state:

We hold that the arbitration panel had jurisdiction to hear and decide the Messersmith-McNally grievances, that the Panel's award drew its essence from the collective bargaining agreement, and that the relief fashioned by the District Court was appropriate. Accordingly, the award of the arbitration panel must be sustained, and the District Court's judgment affirmed. In so holding we intimate no views on the merits of the reserve system. We note, however, the Club Owners and the players Association's agree that some form of a reserve system is needed if the integrity of the game is to be preserved and if public confidence in baseball is to be maintained. The disagreement lies over the degree of control necessary if these goals are to be achieved. Certainly, the parties are in a better position to negotiate their differences than to have them decided in a series of arbitrations and court decisions. We commend them to that process and suggest that the time for obfuscation has passed and that the time for plain talk and clear language has arrived. Baseball fans everywhere expect nothing less.
V. ROLE AND EXTENT OF ARBITRATION

Up to this point, grievance arbitration appears to have caused more problems than it solved, and with the broad definitions that the leagues have used on what issues are grievable, perhaps the owners' fears are justified. If nothing else, Hunter, Messersmith and McNally teach players and attorneys to stay away from the judicial system, read the contract and go to the arbitrator because in many cases, the same result may be obtained in a more informal, less time-consuming and expensive manner. However, before criticizing the system because of these cases, it must be noted that there have also been situations where impartial arbitration can have additional advantages over resort to the judiciary. The problems involving Curt Flood and Joe Kapp are illustrative. Arbitration was not available to them and these two athletes were forced into early retirement in order to challenge league rules in the courts.

The Flood case involved the last test of the validity of baseball's "reserve system." After going all the way to the Supreme Court Flood found out that once a ball club owns you, it owns you for life.67 Assume arguendo, that baseball's current arbitration system was in effect at the time the Flood controversy arose. After seeing the power Section 7(a) had in Hunter Flood might have used that clause to his benefit. The clause raises many points for speculation. In addition to the salary default language which the panel considered in Hunter, Section 7(a) also provides that a player may terminate his contract if the club "... shall fail to perform any other obligation agreed to be performed ..."68 Players basing their arguments on this second phrase of Section 7(a) might also be declared free agents. The failure to iron the player's uniform might result in termination unless the failure had to result in a material breach. Flood, arguing from the "catch all" phrase of Section 7(a), might have benefited by arbitration.

67. A true reserve clause binds the player to a club until he either retires or is traded by that club. This is accomplished by allowing the club to renew the player's contract automatically through the reserve clause. Such a perpetual service contract restricts the player's ability to sell his services on the market and thus violates the Sherman Act. Because baseball is the only sport enjoying immunity from the antitrust laws, it is the only sport in which the true reserve clause is found. Flood v. Kuhn, 407 U.S. 258 (1972). All other professional sports are limited to the use of an option clause allowing renewal for only one year. The Flood decision was reached purely on antitrust principles, and the lifetime ownership rule is limited to that decision's basis.
68. See NBL Uniform Players' Contract supra note 28.
Flood began his baseball career in 1956 with the Cincinnati Reds. He was then traded to the St. Louis Cardinals before the 1958 season and rose to fame as a star center fielder with the Cardinals during the years of 1958-1969, consistently achieving a good batting and outstanding fielding record. In October, 1969, he was traded to the Philadelphia Phillies in a multi-player transaction. Flood was not consulted about the trade, but was merely informed by telephone, receiving formal notice only after the deal had been consummated. In December of that year he complained to the Commissioner of Baseball, Bowie Kuhn, and asked that he be made a free agent. His request was denied. Instead of bringing the antitrust action he did, Flood might have relied on Article XIV (a) (1) of the 1973-1975 Basic Agreement which deals with consent to trade: "The contract of a Player with ten or more years of major league service, the last five of which have been with one Club, shall not be assignable to any other major league Club without the player's written consent." Although Flood met these requirements, he was nevertheless traded without his consent. This may be failure by the club to perform any other obligation agreed to be performed. Under the arbitration system Flood may have been declared a free agent as Hunter was. Regardless of this argument, Flood may have been able to play out his option year and then sought to be declared a free agent as Messersmith and McNally were.

The second case that might have had a different outcome under arbitration involved Joe Kapp. He was an All-American for the University of California, later a professional quarterback of considerable renown first with the Minnesota Vikings and finally with the New England Patriots. In July, 1971, he was told by NFL Commissioner, Pete Rozelle, to leave training camp unless he signed a Standard Player Contract. The problem arose because this standard form contained provisions in addition to those contained in his October 6, 1970 contract with the New England team. Because Kapp did not agree with those additional terms, he left camp, foresook his career, and launched a full fledged attack on the entire league regulatory system. After the case had taken three and a half years in the judicial system, the court, as one of its holdings, stated that Kapp was not bound to sign a Standard Player Contract. Judge Sweigert, in this part of his decision, reasoned that the June 17, 1971 Collective Bargaining Agreement between the players and owners, made retroactive to February 1, 1970 (the expiration of the prior collective agreement), did not bind Kapp because his dis-

69. See Allison supra note 6.
70. See BASEBALL AGREEMENT supra note 16, at Article XIV A.(1).
charge was procured on July 15, 1971, and on that date there was no requirement that a player sign a Standard Player Contract.\footnote{71} The Collective Bargaining Agreement on June 17 for the first time contained the Standard Contract Rule under which Kapp was discharged from employment, and thus had not been contractually accepted by him or the Players Association as a result of collective bargaining.\footnote{72}

The important fact here is that in July, 1971 the club instituted a grievance proceeding pursuant to the NFL Constitution and By-Laws (Article VIII §§ 8.3, 8.5, and 8.13(A) (f), and Article X of the February 1, 1970 Collective Agreement),\footnote{73} which allowed the commissioner to make final disposition of disputes between players and member clubs.\footnote{74} The commissioner ordered Kapp to sign a Standard Player Contract. Judge Sweigert, in his opinion, called this procedure a mere "formality."\footnote{75} What if the NFL had in effect an impartial grievance procedure? An arbitrator on this issue might have reached the same result as Judge Sweigert did in a much shorter time. Joe Kapp could still be playing football and this all out attack on the system might have been prevented by arbitration.

These hypotheticals serve to illustrate situations in which a more desirable result could have been reached through impartial arbitration.

VI. SUGGESTED SOLUTIONS

The solution to the problems caused by today's disputes between players and owners in professional sports boils down to an application of the fundamental concept of "fairness." The athlete has a commodity to sell in a limited market, and the owners, by controlling how the market is run, have great power over him. A parity between the two factions must be reached. Grievance arbitration can provide that parity and, thus, promote the requisite essential fairness. It allows for a meaningful way to resolve everyday disputes and serves as a safety valve to let off steam and prevent the drastic consequences that result when these everyday disputes

\footnote{71}{Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974).} \footnote{72}{Id. at 77. Judge Sweigert also held that various antitrust violations had occurred. See 55 Neb. L. Rev. 335 (1976).} \footnote{73}{390 F. Supp. at 77-78.} \footnote{74}{Collective Bargaining Agreement Between the National Football League Players Association, the National Football League Player Relations Association and the Member Clubs of the National Football League, Article X Feb. 1, 1970.} \footnote{75}{390 F. Supp. at 78.}
snowball. In the few years since its inclusion in professional athletes' contracts and collective bargaining agreements, arbitration has resolved a great number of cases in a quick and inexpensive manner.

The ideal grievance arbitration system through which this parity would be achieved does not as yet exist. However, several observations about future schemes may be offered. The first is that the system must make its field of applicability as broad as possible, while clearly delineating what does and does not fall within its realm. The problems in baseball, which also may be found in basketball and hockey because of similar provisions in their player contracts,\(^7\) basically involve whether or not the so-called "freedom issues" are or should be subject to a grievance system. When one defines a grievance as broadly as these leagues have done, the only conclusion is that they are, and arbitrators and the courts have so interpreted them. Despite this, several questions are left open by the Messersmith and McNally decisions; i.e., what other "freedom issues" are subject to the grievance system; are the draft system and tampering rules arbitrable issues? To avoid these problem areas, the parties must clearly indicate which issues they intend to be subject to the grievance machinery. This is largely a drafting problem and should present no great difficulty.

The second observation to be made requires that all issues subject to the grievance provisions must be finally resolved by an impartial third party, regardless of whether the dispute involves fines, suspensions, or the integrity of the game.\(^7\) The commissioner is not such an individual. Rather, he is an employee of the club owners, hired, paid, and subject to firing at their will. His office and duties are unilaterally prescribed by the owners in rules agreed to among themselves.\(^7\) Confidence in the system can only be gained when a player has the right to appeal to an impartial party; the simple fact is that the commissioner cannot be impartial.

The third requirement for an improved league arbitration system would require a termination provision exactly like Section 7(a), which is used in baseball.\(^7\) As a general rule, the owners may terminate a player's contract at any time.\(^8\) In order to allow mutuality with regard to employment relations, a player must have

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76. See note 4 supra.
78. Id. at 109-10.
80. Most standard player contracts contain very broad provisions allowing the owners to place players on waiver lists.
the same right. Indeed, it would be easier from the player's view to live with many of the "freedom issues" if he knew that when he was dealt with unfairly, as determined by an impartial third party, he would be free to take his services elsewhere. This would also solve the problem of which "freedom issues" are arbitrable, thus not upsetting the basic structure of the game.81

VII. CONCLUSION

The arbitration panels' decisions in Hunter, Messersmith, and McNally will have a significant impact on the issue of the overall desirability of arbitration as a grievance-settling mechanism in professional sports. Those skeptics who criticize arbitration because of the results in these cases should take a second look at what has been agreed to in player contracts.82 The problem is not created by the grievance machinery, but by the broad definitions of what issues should be arbitrable in collective bargaining agreements. Mr. Seitz took great care in limiting his role as arbitrator to an interpretation and application of the agreement and only operated within the bounds of discretion given him. Furthermore, he clearly attempted to limit even that discretion.

It deserves emphasis that this decision strikes no blow emancipating players from claimed serfdom or involuntary servitude such as was alleged in the Flood Case. It does not condemn the Reserve System presently in force on constitutional or moral grounds. It does not counsel or require that the System be changed to suit the predilections or preferences of an arbitrator acting as a Philosopher-King intent upon imposing his own personal brand of industrial justice on the parties. It does no more that seek to interpret and apply provisions that are in the agreements of the parties. To go beyond this would be an act of quasi-judicial arrogance!83

... the scope and effect of a reserve system is for the parties to determine, not the panel. As stated, the Panel's role is restricted to an interpretation and application of the agreement of the parties.84

Impartial arbitration could have solved the problems in Flood and Kapp, thereby preventing attacks on the entire system. It is as-

81. A Section 7(a) provision would not open the flood gates on freedom issue questions, and would allow free agent status only when a club failed to perform an obligation agreed to be performed.

82. These decisions will effect not only baseball, but most other professional leagues which have termination provisions similar to baseball's Section 7(a). See ABA Uniform Players' Contract § 11 (1974); NBA Uniform Players' Contract § 20 (1974); NHL Uniform Players' Contract § 12 (1974). The ABA, NBA and NHL all have defined a "grievance" as broadly as in the baseball contracts.

83. See Decision No. 29 at 37.

84. Id. at 40.
sumed that the results of Hunter, Messersmith, and McNally could eventually have been reached in the courts on the basis of labor contract interpretation; therefore, the worth of the system should not be judged by poor drafting and little reflection on what the parties actually agreed to.

The grievance machinery that exists in professional sports is at the very heart of a system of industrial self-government. It represents a substitute for industrial strife, a means of solving the unforeseeable by molding a system of private law to cover all the problems which arise, and a method for resolution of problems in a way which will generally accord with the variant needs and desires of the parties. The owners should not shy away from grievance arbitration as a workable process for settling disputes in the professional sports industry, as it merits greatly outweigh its disadvantages.

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