

A REPORT

By: Samuel J. Reich, Esquire

STRUCTURING BASEBALL'S "FINAL OFFER"

ARBITRATION PROCESS

FOR USE IN PROCEEDINGS BEFORE THE CRTC

Broadcasting Notice of Consultation CRTC 2009-411-5

In paragraph 4 of Broadcasting Notice of Consultation CRTC 2009-411-3, the Commission modified paragraph 37 of Broadcasting Notice of Consultation CRTC 2009-411 to state that it considers that it is appropriate, in the context of the present proceeding, to consider whether or not a negotiated solution for the compensation for the fair value of local conventional television signals is also appropriate, and is seeking comment on this question.”

The Commission further modified paragraph 38 of Broadcasting Notice of Consultation CRTC 2009-411 to state that, should it decide that negotiations for local television signals is appropriate, where there is no negotiated agreement or agreements, it “is considering what strategies and procedures are most likely to contribute to and/or ensure a timely resolution of negotiations and is seeking comment on this issue as well.”

Finally, the Commission modified paragraph 39 of Broadcasting Notice of Consultation CRTC 2009-411 to indicate that it is “seeking comment on what mechanism should be used for establishing a negotiated fair value distant conventional signals, as well as local conventional signals, should the Commission find that the latter is appropriate.” The paragraph continues by setting out questions on which the Commission is seeking comment, including the following: “What is the appropriate method, if required, to achieve resolution through binding arbitration?” In this context, the Commission is making available the following report on the public record of this proceeding:

- Structuring Baseball’s “Final Offer” Arbitration process for use in proceedings before the CRTC (Samuel J. Reich, Esquire)

While the enclosed study was commissioned by the Commission, the observations and conclusions are those of the author alone. The Commission makes this study available in its usual spirit of transparency so that parties can comment on the study either in their submission before the Commission or in any final written submission after the hearing.

INTRODUCTION

This report describes the functioning of Baseball's Final Offer Arbitration (FOA) process to resolve salary disputes and discusses its possible utilization in proceedings before the CRTC (such as to resolve disputes involving compensation for access to local and distant television signals). Understandably, those involved in the communications industries probably have little professional interest in excessive discussion about Baseball's salary structure and the evolution of that structure. However, to adequately explain Baseball's FOA process, it is helpful, and perhaps necessary, to review some of that background. The same for those seeking to understand the process.

1.

The purpose of any mandated FOA process is to facilitate prompt settlements, not to have a lot of hearings. The main mechanism of FOA is its ultimate threat that if arbitration hearings become necessary, each party will win or lose everything in dispute. There will be no compromise between the proposals of the parties. Early hearing dates are established. The parties must move quickly to last stage settlement discussions or proceed to an arbitration hearing at which one party will gain a total win and the other will suffer a complete loss.

FOA "works" in Baseball, at least in terms of producing settlements. All salary disputes involving arbitration-eligible players are resolved within the period from early January (filing date) and late February (end of scheduled hearings). Particularly in recent years, more than 90% of filed arbitrations end with settlements.

However, before extolling the virtues of Baseball's process as a model for other industries, it also must be understood that the process has been distorted because of some of its procedural aspects, and, further does not operate even-handedly between players and teams. Gamesmanship is the rule, not the exception. Indeed, the fairness and effectiveness of any process requires examination when one side (management) literally hates the process and the other (labor) would fight almost to the death to keep it intact.

The good news is that Baseball's problems need not be the Commission's. For various reasons to be discussed, FOA can be effective in achieving the objectives of the Commission and without the deficiencies existing in Baseball's process.

2.

Baseball's FOA process is the most famous industrial utilization of FOA. Discussions of FOA often include "FOA" and "Baseball" in many of the same sentences. Many observers praise the beneficial effects of Baseball's FOA; others are highly critical. From my experiences, I conclude that most of the praise and some of the criticism is misplaced.

Salary Arbitration (SA) is an important part, but only a part of a total salary system established by the Baseball's Collective Bargaining Agreement (CBA). Most of the industrial effects – positive and negative – derive from the totality of provisions in the CBA. If you want to identify what has caused so much increase in player salaries over the years, start with Free Agency which involves negotiated agreements between willing parties. However, even though Salary Arbitration often is blamed excessively for many

of Baseball's problems, much of the criticism seems to be on point. One area of concern is the "final offer" feature.

There are numerous fundamental differences distinguishing Baseball from almost every other industry, particularly industries under the control of a commission. I mention two now for the purpose of quickly supporting my belief that FOA can operate beneficially for the CRTC.

First, the Commission serves as the all-powerful referee between disputants, and has the rule-making authority to amend or even abolish any process found to be deficient. In baseball, there is no rule-making referee and it is often difficult to produce constructive changes through collective bargaining.

Second, proceedings before the Commission proceed with considerations of the "public interest". "Public interest" as an element in decision-making serves as a meaningful protection against extreme and unduly harsh results. (I suggest other protections. See later discussion.) Of course, Baseball cases involve private disputes and "public interest" is not a factor.

3.

Most of my legal career has been spent as a litigator, frequently in federal and state criminal courts. I have participated in numerous disputes resolved through arbitration, and that includes my service as an arbitrator or as attorney for one of the parties.

My involvement in baseball matters occurred more by accident than by intention. My brother, Tom Reich, began to represent baseball players as an agent, and I handled arbitrations and grievances on behalf of his clients. For more than three decades, I have

had a good close-up view of the arbitration process, either as a participant or an observer. Most of my representation has been for players, but my most recent participations were for teams.

I approach my functions here as a student and analyst of the process, not as an advocate either for labor or management. In that spirit, I offer two initial observations. First, the Player's Union (the Major League Baseball Players Association – MLBPA), and the individual player representatives deserve the highest professional admiration for their successes in making the arbitration process so overwhelmingly advantageous for players. These advantages didn't emerge easily from the mere adoption of the process. The MLBPA and player representatives took a long view of how arbitration might evolve as an instrument to increase player salaries generally, and they persisted in achieving that objective. Second, as an extension of my first observation, I believe that team owners have good reason for being dissatisfied with how the process has developed and for feeling that the process operates unfairly to their disadvantage. See later discussion.

As I write, I know that I ought to feel somewhat conflicted in seeming to criticize a system which has been so beneficial to me, financially and professionally, regardless of which side I represented. I do not write here to change or affect Baseball; my purpose is to advise the Commission.

FOA COMPARED TO CONVENTIONAL ARBITRATION

FOA has many variations. In basic terms, both parties make simultaneous offers before knowing what the other proposes. Then, the decision-makers¹ select the offer determined to be more reasonable. The decision-makers can't compromise by reaching an in-between result.

The theory is that FOA: 1.) provides powerful incentives for both parties to reach settlements because litigants normally won't want to run the risk of total loss; 2.) likewise, it encourages parties to make reasonable offers at or near their bottom lines, because unreasonable offers jeopardize their chances to prevail if a hearing is required. As will be seen, these theoretical factors operate inconsistently in Baseball's process.

In forms of conventional arbitration requiring parties to submit offers, decision-makers may make any award at or between the submissions by the parties. The final decisions are likely to reflect judicious analysis seeking exactitude. Conventional arbitration doesn't provide exceptional compulsion to settle and/or to make reasonable offers, but any final award is likely to be much more precise according to the merits of the dispute than in FOA.

It should also be noted that this discussion involves mandated FOA. FOA can be a harsh process and parties should not be forced into it unless there are sufficient protections to assure fairness and to limit excessive consequences. Precision in result is sacrificed in FOA to encourage prompt settlements. In moderation, that might be a fair trade-off, but only with caution.

¹ I use the plural throughout because I favor three arbitrators in important cases. Many arbitrations involve only one decision-maker.

Baseball is the only sport utilizing mandated FOA. Hockey employs a more conventional arbitration system.

A BRIEF HISTORY

Before 1976, baseball players were bound by what is usually referred to as a “reserve clause”. By one device or another, players were “owned” perpetually, unless they were released by their teams. Thus, a player could only play for the team holding his contract (or another team to which he might be traded) for whatever the team was willing to pay. Or he could decline to play for his team, meaning he could not play for anyone, anywhere, ever.

However, in 1976, the players gained a stunning victory in a grievance proceeding. Suddenly, every major league player was a potential free agent. It didn’t seem to serve anyone’s interests for everyone to be free. Teams didn’t want to lose their players. Among other things, the MLBPA believed that free agency rights would be more valuable if there was an element of scarcity in the availability of quality players.

Thus, with some later modifications, the present system was negotiated. Free agency rights were established for players having at least six years of major league service. Instead of free agency, players with at least two and less than six years of service received expanded arbitration privileges. Younger players were excluded from arbitration.

Salary Arbitration had been instituted in 1974, but generally was utilized to resolve relatively minor disputes. One important new arbitration provision was that players with at least five years of service could be compared to free agents.² The minimum service requirement for arbitration has been changed twice: once, raised to a

² This was a compromise provision to resolve the issue about whether free agency should begin after five or six years.

minimum of three years; then, after a work stoppage, reduced to include the top 17% in service among those with more than two and less than three years of service.³

For several years, arbitration operated fairly quietly. The relatively few filings and hearings usually involved small sums. (There were exceptions.) Some teams used in-house personnel to conduct the proceedings. Preparation in some cases could be completed in a few days, sometimes a few hours.

One of the enormous benefits for players concerned some owners who took extremely hard lines on salary matters, and also were outspoken about their attitudes. No longer were arbitration-eligible players required to accept dictation. Win or lose, their disputes could be resolved by impartial arbitrators or settled because of the incentives inherent in FOA. The availability of the process was very positive for the psyches of players and altered the dynamics of owner-player relations.

As part of the history, I also must note the highly contentious relationships between management and labor. “Hostility” and “distrust” are two appropriate words to characterize that relationship, particularly from the time the MLBPA became a formidable opponent for the once all-powerful owners. The history includes difficult negotiations and threats of work stoppages with the threats frequently becoming fact.

In my opinion, arbitration has been one of the continuing battlefields in the warfare. That mentality, in part, contributes to what I regard as the inability of the process to meet its full potential as a constructive mechanism in the industry.

³ A few players in the 17% may not qualify because of earning insufficient service time in the previous season.

A DESCRIPTION OF BASEBALL'S SALARY SYSTEM

Service Time

Baseball salaries are substantially affected by major league service time. During their first three seasons, most players have little bargaining leverage. Their bargaining rights are somewhat similar to conditions existing under the reserve clause. Unless they decide to “hold out” and not play, they must play for whatever amount at or above the established minimum salary their teams are willing to pay. Because the Collective Bargaining Agreement (CBA) provides massive financial incentives for players to accumulate service time, “hold outs” rarely, if ever, occur. No one really wants to “stop their clock” for gaining free agency. The harshness resulting from the lack of negotiating power for these players is softened in some circumstances, because teams may not want to risk incurring extreme ill will with important players and their agents in anticipation of the time when the players acquire more power and, in fact, can go elsewhere.

Players become eligible for salary arbitration after their three years of service (or, for some, almost three). After six years, unsigned players may elect to become “free agents”. They may negotiate and sign with any team including their original teams and even teams outside of the major leagues, such as in Japan or Mexico.

Almost all salary arbitration cases involve eligible players with three (or almost three), but less than six years of service. Occasionally, some players with more service may arbitrate, but that is by mutual agreement.

To be eligible for salary arbitrations or free agency, players must not have existing contracts for the current season. It is common for players and teams to negotiate multi-year contracts in which the teams “buy out” arbitration and/or free agency years.

Administration/Selection of Arbitrators

Salary Arbitration is administered jointly by the two organizations representing all the teams in Major League Baseball and all the players: the Labor Relations Department (LRD - for the teams) and the Major League Baseball Players Association (MLBPA - for the players). The particular teams and players involved in the disputes are mainly involved in negotiations and presentations at the hearing, but not administrative matters.

1.

To retain exclusive control over an arbitration-eligible player, a team must tender a contract offer by a specified date in December. If the team does not tender, the player can become a free agent. The tender must meet specified minimum requirements. The main effect of a valid tender is to maintain the team's continuing control of the player. The precise terms seldom have much significance in any negotiations.

Either the team or an eligible player may initiate the demand for salary arbitration. One party may invoke the procedures without the consent of the other, but some players have a limited right to withdraw in some of the few incidents when the team is the initiator.

2.

Notices of the intent to arbitrate are circulated among the respective organizations and parties. Shortly after, proposed salary figures are exchanged simultaneously between the organizations, which receive such figures from their parties.

The exchange process occurs between January 5 and 15; hearings are held from February 1 through February 20. Once submitted, neither party may change its proposal.

(Later, I discuss the implications of being locked into figures formulated in January and having hearings in February.)

3.

The LRD and MLBPA select arbitrators each year. Either organization may decline to approve a proposed arbitrator, and either may strike an arbitrator from the previous year. Although there are alternative provisions if the organizations can't or won't agree, selection of arbitrators doesn't appear to have been problematic. Both organizations have exercised their prerogatives to reject past arbitrators for service in following years. I estimate that most of the arbitrators have extensive backgrounds in labor arbitration; others include attorneys, college professors, etc. These are "outside" arbitrators; none are affiliated with teams or players.

Initially, one arbitrator decided each case. Presently, cases are heard by three-member panels. The immediate parties have no input in selecting their panels or individual members; this is handled by the organizations. Panel assignments apparently are made according to some random system, subject to the dates of availability for individual arbitrators. The parties can make requests regarding scheduling dates, but the organizations have the final word.

The arbitrators have been of high quality. (I say that whether my side prevailed or not.) However, the procedures create a concern. Here is a short description. Since either the LAD or the MLBPA can cause an arbitrator to lose his/her position the following year, some believe that arbitrators may feel pressured to make their decisions "even" or "nearly even". Some participants become concerned if, for example, they are on the side of a team, and a particular panel or arbitrator has recently ruled in favor of a team. To

use a basketball analogy, they wonder whether the “possession arrow” now is tilted against them.

Let’s just say I am skeptical about the skepticism. The arbitrators usually perform well. Regardless, this issue need not ever arise in the CRTC process.

Hearings

All hearings each year are conducted at one mutually selected central location. The arbitration panel must choose one side’s submission or the other. Decisions are rendered within 24 hours. There are no written opinions or oral explanations. There are no appeals.

The only issue concerns the single salary figure for the coming season – nothing else. The panel receives an executed Uniform Players Contract executed in duplicate, with the salary figure left blank. Upon reaching decision, the prevailing figure is inserted.

The organizations may participate actively. In fact, such participation has become so extensive that it sometimes becomes easy to forget who the real parties are.

Neither party has a burden of proof. Trial briefs are submitted to the arbitrators and exchanged among the parties before the start of presentations. Although the rules are silent, the player begins the presentations. By rule, each side receives at least one hour to present a case-in-chief and one-half hour for rebuttal and summation. In practice, most arbitrators permit additional arguments. New points may be raised in the last presentation. Most arbitrators permit a round-robin of short rebuttals and sur-rebuttals limited solely to “new” responses to the most recent comments of an opposing party.

The procedures permit full and fair presentations of the issues. The level of professionalism usually is high by all involved. I have heard some horror stories about allegedly bizarre behavior and/or distorted presentations by some participants, but that has not been my experience. Also, there may be some discomfort because some contentions by the team may be regarded as personal attacks against the player. I have heard some horror stories about that too, but my personal experiences have been mild in that regard.

Criteria/Evidence

Both sides seek to identify relevant players, past or present, receiving salaries supporting their submissions and who are or were similar to the arbitrating player in service time and performance. Such players are described as “comparables”. A great deal of ingenuity is displayed in identifying and discussing comparables. Players with “special accomplishments” (not further defined) may compare themselves with any other player, regardless of service time. To a great extent, many of the limitations based on service time have been reduced, thereby providing players with more opportunities to argue comparisons to players in higher service groups. Very often, the arbitration decision may depend on whether the panel gives more or less weight to a player’s cumulative career performances or to his most recent season or seasons.

1.

The written criteria are broad enough to include almost everything reasonably relevant to determining a player’s value. The main criteria features includes: the quality of the player’s contribution to the team during the past season (including overall performance), special qualities of leadership and public appeal, length and consistency of

his career contribution, his past compensation, comparative baseball salaries, the existence of any physical or mental defects on the part of the player, the team's recent performance record including league standing and attendance (as an indication of public acceptance).

Certain specific types of evidence are inadmissible: 1.) financial position of the player and/or the team;⁴ 2.) press comments or testimonials, except that awards for playing excellence are admissible; 3.) prior offers or demands during the negotiations; 4.) cost of the proceedings; 5.) salaries in other sports.

2.

Much important evidence comes from stipulated exhibits prepared jointly by the LRD and the MLBPA. Every salary for every player in every service group is contained in a main salary exhibit and supplemented to include later signings and arbitration results. Numerous other uncontested exhibits provide information such as average salaries according to positions and service groups.

Also, salary and performance information for almost every player in every fairly recent year are available to the respective parties in computer programs developed by the organizations. (I believe each side's program is checked by the other for accuracy.) Abundant performance statistics are available from numerous outside services. However, it is often difficult to track the accuracy of the almost infinite combinations of statistics utilized by the parties.

⁴ The reasons for excluding the team's financial condition involve considerations which would not be applicable in CRTC proceedings.

To some extent, the parties depend on the integrity of all participants in submitting evidence. I haven't seen significant problems. The hearings are recorded and the briefs of the parties are retained. A distorting party would run great risk of discovery.

3.

Even in the earliest days of this process, parties had access to substantial precedent which would aid them in determining what salaries were appropriate for particular players and in formulating their submissions for arbitrations. The minimum salary established by the Collective Bargaining Agreement (CBA) is a theoretical starting point, but really not a factor for arbitration-eligible players. The parties know the salary history of each player. The CBA establishes the maximums by which previous salaries can be reduced. The salary exhibits disclose "average" salaries according to positions and service group. They also disclose previous salaries for individual players and groups of players who are arguably comparable. Each salary season adds numerous relevant precedents.

Thus, in many disputes, it should be fairly simple to identify a range of appropriate compensation according to past practices. However, Baseball's salary structure even on an annual basis can be quite volatile. The parties know where the salary market has been; they can't be quite sure where it is going. To a great extent, players have succeeded in having each arbitration season treated as a "new season", thereby minimizing the effects of older precedents and emphasizing the impact of a few (sometimes very few) more recent salary developments. In January, when submissions are made, there is significant room for upward movement by the end of February when

the arbitration season concludes. Few players or agents want to be left behind if such movement occurs.

4.

Most eligible players file for arbitration (approximately 110). Exceptions may include some who are concerned about being non-tendered if they don't sign early, and they aren't sure they will do well as free agents. About half of filing players exchange numbers with their teams. Numerous settlements occur between the filing and exchange dates. Most remaining cases settle before hearing, sometimes on the scheduled day of hearing. Approximately 5 – 10 hearings occur each arbitration season.

5.

The only issue resolved in baseball salary arbitrations is the player's one-year non-guaranteed salary. It still remains for him to display enough skill in training camp to "make" the team and avoid being released. (If released, he earns only a small percentage of his salary.) However, very few players are released by teams after arbitration. Such action can leave the team vulnerable to claims of "retaliation" and subject to paying all of most of the entire salary of a released player.

Even in a fairly simple dispute, both sides may have interests beyond salary amount, which issues will still remain after the arbitration. The player really may want a multi-year fully guaranteed contract or at least a guarantee for the current season. Other desired features may include: performance bonuses, deferred compensation, no trade provisions, etc. He also may be interested in "perks" such as single rooms on road trips or free access to the team's luxury suite. The team also may want to negotiate a multi-year contract buying out arbitration years and some free agency years. The team may

negotiate for option years, giving it the choice to extend or terminate the player's services after the guaranteed years have expired.

The availability of arbitration and the occasional occurrence of hearings often provide vehicles for more complete resolutions of issues. This can be regarded as a benefit of the process. Negotiations for multi-year contracts often continue after the hearings, and some replace the recently issued one-year arbitration awards may be replaced.

6.

Many, if not most, one-year settlements are at or very near mid-point. In recent years, the number of hearings has been reducing. (Ten may be a high number.) Advocates of FOA often cite the settlements as a triumph for Baseball and for FOA. Maybe.

However, even the settlements do not necessarily reflect the actual values of the players or the perceptions of the parties regarding the values. The mid-points often result from excessively high or low submissions by one or both parties. (See later discussion regarding mid-points.) Parties settle, often unfavorably, because they don't want to lose the entire amount in dispute. Yes, this "threat" of losing is the basic component of FOA. But there can be a high industrial cost in establishing salary levels based on factors other than merit. Parties "win" because they have been more skilled or fortunate in establishing effective mid-points and have created a credible threat of total victory. The merits of the player become far secondary.

The Salary Arbitration process (including settlements induced by the prospects of arbitration) is the major instrument for determining salaries for almost all players not yet eligible for free agency.

MISCELLANEOUS POINTS ABOUT BASEBALL'S SALARY SYSTEM

To further aid in understanding Baseball's salary system, I briefly mention some basic points without extended discussion.

1.

Baseball differs from virtually every industry imaginable, including other sports leagues, in the ways salary determinations are made.

- I don't know of any industry in which so many salaries are established or influenced by an arbitration process.
- Baseball's salary structure can be unusually volatile on a year-to-year basis. A few more recent salaries (sometimes one) arguably supersede large portions of the previous structure for players fairly similar in service time and performance. Thus, every salary result can substantially affect many teams and players.
- Every player negotiates and signs on an individual basis. However, there is a great deal of permitted group coordination and control. Many decisions are influenced significantly by what is believed to benefit the group.
- The original criteria served the initial purposes of the process. But as the process developed, numerous interpretive issues arose which never have been resolved or clarified authoritatively. They remain for arbitrators to determine case by case.⁵ This leads to inconsistency and uncertainty. Collective bargaining serves many beneficial purposes, but not in terms of supervising the operations of a process and providing prompt corrective action.

⁵ A narrow but important example concerns the issue of what constitutes "special accomplishments" permitting a player to compare his entitlement to any other player regardless of service. There are numerous other significant issues.

2.

Baseball salaries largely relate to the amounts of generated revenue. As teams acquire more money, they become more inclined to spend more to obtain or keep players who can help them compete. Revenue growth soon results in salary growth.

However, that proposition doesn't operate evenly throughout the industry. Once wealthier teams spend more money on particular players, all teams can be affected regardless of their revenue flows.

3.

The salary market for arbitration-eligible players is fueled by free agency contracts. That includes contracts for players presently eligible for free agency and for younger players signing multi-year contracts which apply to one or more future free agency years. Either immediately or in the near future, such contracts have a "trickle down" effect throughout the structure. (Some might suggest that "geyser-like" is more accurate than "trickle down".)

4.

Most players in the pre-arbitration years, particularly stars or near-stars, are severely underpaid in the pre-arbitration years. Most are paid close to the negotiated league minimum salary and even those paid more generously don't receive anything close to what stars with more service time are paid. (Some younger players escape this situation to some extent by negotiating multi-year contracts wherein they sell their arbitration eligibility and/or postpone their rights to become free agents.) See also Points 5 and 6.

5.

Naturally, players generally secure huge raises in their first year of arbitration eligibility and this fact is often misused by some (usually in the media) to ridicule salary arbitration. “Everyone gets a big raise and no one gets a cut”. As to the first year eligibles, they have been paid so close to the minimum, there would be little room to reduce their salaries. With the availability of arbitration, for the first time, these players have recourse to an impartial and independent process, and thus, they have more equal negotiating leverage. Particularly for those who are arbitration-eligible for the first time, there is a “bursting out” effect because they are being paid now for earlier achievements for which they were not compensated in full. Large raises for this service group should be quite understandable.

Likewise, as players accumulate more service, they increase in salary comparability to higher paid players, including free agents. That too is understandable. (The appropriate extent of such comparability may be disputable.)

6.

The players surrendered several years of free agency, in substantial part, because of the availability of expanded arbitration criteria. In other words, for many players, FOA was a substitute for free agency. In fact, free agency was surrendered for service groups not receiving arbitration rights. Players “paid” to keep and expand arbitration.

Players accumulating substantial service time certainly find the “cost” worthwhile because of what they earn through free agency and salary arbitration. However, some never recoup what they lost during their early years without bargaining leverage; they

don't last long beyond those early years or the early uncompensated years may be their most productive years.

7.

Teams are paying, in part, for past performances by tendered players and for the right to retain their services. The retention value often is not understood or discussed.

MID-POINT ANALYSIS

On its face, the concept of mid-point analysis (M-PA) seems logical enough as one tool for evaluating cases. In practice, M-PA has proven to be over emphasized in the process and undermining to the purposes of FOA. It is also seriously threatening to parties, mainly teams, when proposals are extremely high and/or low.

Fact-finders using M-PA calculate the mid-point of two submissions and then determine what they regard as the appropriate salary for each particular player. If that figure is above mid-point, player wins; if below, team wins. Which figure is closer to the player's actual salary entitlement?⁶

Fairly early in the history of the process, some arbitrators indicated that they were utilizing M-PA in arriving at decisions. Both sides began to focus more and more on mid-points.

The method can be explained logically. The illogical part arises from the distortions to the process resulting from the inventions of brilliant and adaptive minds – on both sides.

In a typical hearing, neither side now has much need to justify its submission. The actual submissions may be mentioned once in a while, but all emphasis is on the mid-points. Mid-points tend to obscure the weaknesses of the actual submissions. Because arguments focus on the middle rather than on the extremes, cases seem closer than they should be. The risk of error is increased because both sides have an easier time in finding comparables to support “close to middle” positions than the extremes.

⁶ For example, if player demands \$3.0 million and team offers \$1.0 million, both teams will be arguing about whether player is worth more or less than \$2.0 million. Both sides may be better able to find precedents near the mid-point than they can for their actual submissions. But the real dispute should be whether \$3.0 million is more reasonable compensation than \$1.0 million, or the reverse.

The distortion begins with the effects of M-PA or the submission figures. Attention is paid to how much advantage either side can gain by creating a favorable mid-point. Little consideration is given to what the player arguably should receive. Each party begins by estimating what figure the other side is likely to submit and then calculates a figure providing a potentially favorable mid-point.

As part of the calculations, the parties also will attempt to predict the extent of “movement” in the current salary structure, if any. Some upward movement almost always occurs in the arbitration-eligible service groups and can be easily factored. But frequently there is more than usual movement which can change the viability of pending cases. Such movement results from the variety of salary resolutions during the current arbitration season: free agency signings, multi-year and one year contracts, settlements in pending cases; arbitration decisions. Relatively few recent events may create the perception of movement and affect the outcomes of pending cases. Most cases I participated in were decisively affected by my side’s success (or lack) in accurately predicting market movement.

Add to all this the fact that teams and players receive substantial guidance from their organizations: the LRD for teams and the MLBPA for players. The amount of supervision and coordination by the organizations has become more and more extensive. And, all eyes are on the mid-points.

Another dynamic unique to Baseball affects the mid-point analysis and resulting hearings or settlements: the competition among player agents. This is another fierce battlefield in the industry. Many agents feel they must file aggressive arbitration numbers and must avoid the appearance of “weak” settlements.

For both sides, it almost becomes a point of honor to seek settlements above mid-point, but certainly not below. What is mid-point? It is a number usually resulting in part because one party's offer is unreasonably high or low. Yet, if a party (usually the team) agrees to a mid-point settlement to avoid the risk of total loss, that settlement becomes part of the market with all the appearances of an agreement between "willing" parties.

Tactical Offers

Tactical offers are a by-product of mid-point analysis. Their purpose is to create favorable mid-points. Both sides may make tactical offers, although players usually have much more room to maneuver. From the player's perspective, a tactical offer serves to link him in salary entitlement to highly paid players while avoiding negative impact because he really doesn't compare favorably in performance to those same players. Following is a fairly typical example.

Player A seeks a salary similar to what is paid to B, C, and D. Player B is one of the best players in the league. Any attempt to compare A to B could damage the credibility of A's case.

Players C and D also may be regarded as superior to A in criteria factors, but the merits are fairly close. For cosmetic reasons, A's demand probably would be close to B's salary, but below. His demand probably would be above the salaries earned by C and D, but A hopes and expects that his team's offer will create a lower mid-point. Thus, A will have little need to demonstrate that he is more worthy than B, C or D; his mid-point will be less than what they receive.

If A wins at hearing, he will earn more than C and D and close to what B earns. Even if A settles at or near mid-point, that mid-point is influenced in part by his artificially high demand.

If A had filed slightly below C and D, his mid-point would be lower and his settlement potential would be reduced. Also, A's high demand actually may benefit C and D.

A's team may engage in similar thought processes to gain a favorable mid-point above what C and D receive. However, in doing so, the higher mid-point may help A to achieve a more favorable settlement.

When C and D negotiate, they will be able to use A as a favorable comparable. Their entitlements really are superior to A's. His high demand actually may benefit C and D.

Thus, A's new salary and the later salaries of C and D illustrate some aspects of the constant salary escalation. Notice that there is no element of consideration for what A really deserves. His salary results from mid-point maneuvering.

EXAMPLES OF ISSUES IN DETERMINING BASEBALL SALARIES

Each player negotiates individually. For arbitration-eligible players, previous salary levels become easily obsolete. Salary issues become even more complicated in the transition from negotiation to arbitration. Arbitration does not operate as a supplement to negotiation. It has become almost a separate salary system with much different principles for decision.

Baseball salaries, whether determined by negotiation or arbitration, are largely influenced by comparisons of players seeking compensation to other allegedly similarly performing players under contracts established recently or in the past. In other words, the search for comparability involves a matching of players with similar features under the salary criteria.

There is a difference between “arguable” similarities and “real” similarities. It is fairly easy to find some areas of similarity or even superiority involving players seeking to compare themselves to other highly paid players. The potential salary ranges can be quite extensive – hundreds of thousands, sometimes millions of dollars. That is partly because particular levels of compensation can be logically justified by a variety of factors made relevant by the criteria. The scope of the criteria raises logical questions as to whether players really are comparable for salary purpose, or comparable enough for an accurate judgment. Part of the problem is that more questions than answers are raised regarding the priorities of criteria factors. To illustrate the point, I offer two examples.

1.

Most players tend to be paid mainly because of their achievements in important statistical categories. However, as stated in the criteria, many players earn high pay in

substantial part because of special contributions to their teams. Their teams may be champions on the field and leaders in game attendance. Perhaps, some also receive premiums because of leadership qualities or public appeal. A second group of players may be statistically superior to the former in batting achievements or in some important skill area. To what extent are the salaries for players in the first group relevant to salaries for players in the second group?

The real point is not whether players in the first group deserve more or less than the second group. All of the reasons supporting the salaries of the first group are specifically relevant under the criteria. Just because a team agrees to pay premiums to players contributing to its exceptional success would not seem to have a lot of bearing on the precise entitlements of players whose team successes were not as great, regardless of the players' statistical achievements. Probably players in the second group deserve high compensation as well, but not because of what first group players receive for different reasons or combinations of reasons. Most players are different enough from others to require different salary analysis.

2.

Another facet of comparability, perhaps more significant in salary arbitrations, concerns the "real" salary comparability of players seeking one-year contracts to players previously signing multi-year contracts. A player signing a one-year contract generally is being compensated for his performance in the past season or a combination of past season and career. Much different considerations apply to multi-year contracts which mainly tend to look to the future.

Teams sign free agents because of their needs and because of how they perceive the potential of the player to meet those needs in the future. Past performances may be highly indicative of future value, but they do not guarantee high contracts. For example, many players producing brilliant careers in the past may have difficulty getting high paying free agent contracts because the teams either don't feel they need the players or because the teams doubt that the players will continue to perform at high levels. Some lower performing free agents may sign more lucrative contracts than some performing better in the recent past, because a particular team concludes that a particular player is more needed or has more potential. Finances may be a factor in such decisions. Some teams may have much more money to spend.

Similar considerations apply to arbitration-eligible players signing multi-year contracts. There are some differences. The real considerations extend beyond past performance and include perceptions of future potential and the desire to attain cost certainties by "buying out" some of the player's arbitration and/or free agency years. By "buying out" future years, the team may be seeking to avoid some of the huge salary increases if and when the player performs at the level anticipated by the team. These are not factors in one-year contracts.

In multi-year contracts, both sides make concessions. The team may commit to large guaranteed payments. The player gives up the right to earn more as the market moves or his contributions increase. In arbitrations, too much attention can be paid to what a player received in a particular year and not enough to what he might have earned if he were free to negotiate in later years.

As with performance comparisons, using multi-year contracts to establish one-year entitlements usually is misleading.

3.

In many negotiations and arbitrations, particularly in arbitrations, players can support their positions only by relying on multi-year contracts signed by players arguably comparable in performance. Hopefully, the above discussion points out why these contentions – involving both performance and salary comparisons – may be regarded as dubious. Such issues rise to the level of policy and are permitted by the criteria without guidance as to resolution.

4.

Comparing the relative merits of baseball players is neither science nor art. One can see decisive evidence of this in the countless discussions and disputes among acknowledged baseball experts concerning: the best players of all time; players most deserving Hall of Fame induction; awardees, All Star selections, etc. When money is involved, determined advocacy can become even more imaginative and inventive.

Perhaps such disputes arise because of the inherent nature of baseball. One can almost always find one or more criteria areas in which a player seems superior or at least similar to other relevant players. For example, one may have superiority as a batter; another may be ahead as a defensive player, in career length, or in his contributions to the success of the team, etc. Depending on how much one is willing to run the risk of appearing foolish, it is quite easy to identify favorable points of comparison between ordinary players and the greatest stars in the game.

REASONS WHY TEAMS ARE DISSATISFIED WITH BASEBALL'S FOA

For many reasons, teams are dissatisfied with the Salary Arbitration process. Much of that dissatisfaction relates to the “final offer” feature. Any dissatisfaction with how Baseball’s Salary Arbitration system operates does *not* necessarily require an accompanying conclusion that baseball players make too much money. Baseball generates a lot of revenue and teams spend much of that revenue on players, particularly “star” players. Even if labor and management adopted another reasonably even-handed system for Baseball while retaining free agency, the over-all salary results might not change significantly. Too much focus on the amounts of money being distributed can cause loss of focus on the particulars of the system.

1.

First, unless they are willing to incur severe economic consequences, the teams have been locked into a system adopted more than 30 years ago and which has developed much differently than what was expected or intended. Rightly or wrongly, they literally hate a system which they have little practical ability to improve to any meaningful degree.

Players have gained so much from salary arbitration that any attempt to change it significantly would provoke a bitter strike. Considering public disaffection resulting from the work stoppage in 1994 into early 1995, another strike could be destructive. Some changes in arbitration have been adopted over the years, and most of them only further added to the extreme disadvantages of the teams. From the owners’ point of view, the system should be abolished or substantially revised.

2.

Teams also become committed to arbitration for individual players before really knowing the potential costs. Arbitration-eligible players obtain filing rights immediately after they are tendered contracts by their teams. Teams can't decline to participate in arbitration once they have tendered a contract. A player can file for any amount of money, limited only by the scope of his imagination and by the reality that an unreasonable submission might jeopardize his chances in the hearing. But, demanding more in FOA often results in receiving more in settlement!

Teams have lost cases they expected to win. (So did some of my players, I add ruefully.) Also, when submissions are made, no one knows exactly what will follow in terms of later signings by other players or arbitration results. Settlements usually result, but often on terms considered unreasonable by the teams. Even when a team seems in a strong position based on the submissions, it may be a prudent business decision to avoid any viable risk of a larger loss by agreeing to settle.

3.

The only way a team can be sure of avoiding arbitration is to decline to tender a contract or find another team willing to trade for the player. Non-tender means the team probably loses the player without receiving any compensation. Also that decision must be made before anyone knows the extent of movement in the relevant salary structure.

The "being stuck" feelings persist even after the terms of the one-year non-guaranteed contract are established. No matter how poorly a player performs or how much he is outplayed by competitors in Spring Training, teams are at risk if they release the player before the season. The CBA prohibits retaliation (quite reasonably) and

arguably also prohibits releasing a player for financial reasons. Regardless of the true reasons for a release, adverse inferences may be argued and grievances follow.

4.

How can any business function efficiently or establish a meaningful budget when so many salaries are determined just before training camp starts? How can teams enjoy cost certainty?

5.

The “final offer” feature contributes heavily to the dissatisfaction. As the salary system has evolved, player salaries, particularly larger contracts, can affect broad segments of the salary structure, either sooner or later. When a player prevails at a high salary in an arbitration, he does not receive that salary because the arbitrators think he is worth that much. In almost every case won by a player, arbitrators probably concluded that he should receive less, but his submission was above the “mid-point”. See discussion regarding mid-point analysis. But what the player actually will receive and the figure which affects the salary structure is the full value of his submission. This applies even more strongly to settlements at the mid-point induced by the fear of losing everything.

It is one thing to have individual disputes resolved by a process which awards artificially high or low salaries to the parties. The settlement inducing effect possibly can be seen as outweighing the disadvantages in one or a few cases. The equation seems much different when inexact and artificial results have such broad industrial impact.

6.

Teams have won most of the cases proceeding to final disposition (some say approximately 60%). That does little to ease their pain.

A team victory merely means that the present structure is maintained at or near present levels and not that teams have gained any roll-back in salaries. Many team victories are attributable to over-reaching by particular players and/or the lack of sufficient market movement to support aggressive submissions.

Because players are generally aggressive in seeking to receive salaries at the upper end of any feasible salary range and to advance the structure above previous years, player victories often affect segments of the salary structure in important ways. Thus, although teams may win most of the cases, team wins generally create no important new precedents. Arbitration wins – even a few – by players usually have more significant market impact.

Also, the hearings are only a small part of the process. Teams have more at risk; settlements to avoid the risk of more substantial expenditures also move the structure. Such settlements occur much more frequently than hearings.

Why do teams have more to lose? The submissions usually assure that, win or lose, the player will be reasonably well paid according to the past salary structure. It remains for him to decide whether he can obtain even more or whether he can help “move” the structure to new levels. Teams usually have more at risk if they lose at hearing, because players often submit demands well above previous salary levels for similarly achieving players.

Teams are fairly limited in making low offers to players with significant service and still maintain credibility. Most players can make fairly plausible sounding arguments

comparing themselves to higher paid players. Combine that with the mid-point emphasis. Even when the player clearly over reaches, a viable threat often remains. The player almost always has the ability to create a viable threat; teams seldom do.

Higher offers actually may diminish the incentive to settle reasonably. The lure of potential wind-falls may be too great to resist. Also, high offers in one year generate higher demands in the next. The escalation goes on, not on merit, but significantly because of tactical mid-points.

Teams are in a continuous state of losing important cases, barely dodging bullets, feeling compelled to make poor settlements. That isn't satisfactory to them and wouldn't be to anyone else.

7.

Baseball arbitrations are not "cheap". Salary arbitration has become an industry within an industry. Personnel on both sides may spend almost a full year in preparing for the next arbitration season. Most cases are presented by attorneys or other professionals. Exhibit "books" closely resemble Supreme Court documents. Each arbitration "team" usually includes several assistants or other staff members. Most teams have access to computers to aid in rapid analysis of the opposing positions. (I am hard-pressed to complain, because I have been a frequent beneficiary of the high costs of the process.)

Quickness? So many file for arbitration. Because there are so few early settlements, salary issues are being resolved even after some players have started to report to their training camps. This is because most players want to see what is going to happen. Thus, in many cases, the process delays settlements.

Just results? Submissions are calculated to obtain strategic advantages regarding mid-points rather than reflecting anything near what the parties actually believe the player should be paid.

8.

There is the ongoing threat that situations can worsen for teams. At least one veteran player earns or will earn at least \$30 million in certain years of a multi-year contract. He may be joined soon by at least one other. \$20 million per year soon will be a fairly common salary level for elite players. One player received \$18 million from arbitration. The record award for players with less than six years of service was \$10 million. (Two actually lost their hearings.)

Players in the five-year service group can compare themselves to free agents. So can younger players with “special accomplishments”.

There is no limit on salary demands in arbitration. It should be expected soon that some team soon will be confronted with an arbitration demand in excess of \$20 million with at least \$10 million in dispute. With mid-point analysis, the threat of loss could be very real. What if such demands are made systematically by several young stars?

With much justification, the teams have reason to be concerned about the potentially devastating effects from future developments in salary arbitration. As much as they resent the past, the future could be worse.

The level of hostility among teams to the system is so great that one eventual result seems highly probable. If Baseball suffers another lengthy work-stoppage, salary arbitration will be one of the core disputes.⁷

⁷ Teams attempted to abolish free agency and salary arbitration during the strike in 1994-95. That action failed because of an adverse court ruling. Eventually, the parties negotiated an end to the strike, with the result that free agency and salary arbitration remained.

SUMMARIZING THE CHARACTERISTICS OF BASEBALL SALARY ARBITRATION PROCESS

Obviously, I am concerned about the way Baseball salary arbitration process functions and how it may function in the future. My observations about the characteristics of Baseball salary arbitration process may be summarized as follows. More than the existence of one or several characteristics, it is the combination which undermines the process.

- The process is dominated by a culture of gamesmanship.
- The process is difficult to improve or correct.
- Rather than serving as an adjunct for voluntary negotiations, salary arbitration has emerged as an instrument which forces the direction of negotiations, rather than following direction.
- The process is open ended; players may seek any amount without limit.
- The criteria factors fail to resolve important issues and contribute to the open endedness of the process.
- The emphasis on mid-point analysis contributes to the artificiality of salary results.
- The process is heavily influenced by group interests rather than the interests of the immediate parties.
- The process poses severe future threats to all teams.
- The excesses contribute to labor-management discord with potentially disruptive consequences.

INDUSTRIAL ADVANTAGES FROM BASEBALL'S FOA SYSTEM

Regardless of any earlier discussion, I should not conclude without mentioning that FOA has had several positive effects for the industry. The brevity of this discussion should not be taken as indicating any perception on my part that these aspects are insubstantial for Baseball.

1.

The availability of salary arbitration and other provisions of the Collective Bargaining Agreement generally assure that players will sign contracts without "holding out". Thus, baseball teams rarely, if every, incur the same disruptions as teams in other sports when key players withhold services.

2.

Arbitration is a process operating under the auspices of impartial adjudicators and beyond the ultimate control of either side. For example, when owners engaged in collusion to restrict salaries for free agents during the 1980's, the availability of arbitration served to protect much (not all) of the bargaining leverage for younger players.

3.

Certainly, most disputes do settle. Considering the history of labor-management relations, that fact should not be minimized.

SUGGESTIONS FOR STRUCTURING AN FOA PROCESS

As much as Baseball's FOA process unquestionably serves the beneficial purpose of producing settlements, also unquestionably, it has contributed to inevitable increases in the salary structure regardless of merit. However, I believe that mandatory FOA can be implemented by the CRTC without undue risks.

It is beneficial to industries and the public to have processes in place which encourage prompt and fair settlements. The benefits of such a process may outweigh the occasional wind-falls bestowed on a "winner" and the penalties imposed on a "loser", even when the actual merits of the dispute would dictate a resolution more toward the middle. However, the artificiality of FOA awards demands that the process include safeguards: for both parties – the loser as well the winner; for the arbitrators; and for the public.

Necessary Safeguards

I suggest certain main principles which provide the basis for formulating specific safeguards. All of these principles are intended to promote the effectiveness of the process by reducing the risks of undue hardship and avoiding many of the deficiencies which I find in Baseball's process. More importantly; they should eliminate or reduce the cumulative effects of negative factors.

1.

The process should be reviewed periodically by the Commission and amended or abolished if it is found to be defective. The industries should not be locked into a system which is difficult to improve. That includes providing ongoing guidance to arbitrators and the parties regarding how certain issues should be handled. As the system matures,

events and issues will require institutional resolution. For example, any such resolutions in Baseball would require amendments to the CBA, a difficult and lengthy process.

2.

FOA awards should be limited in time – approximately one year. (This is part of the Baseball process.)

3.

Parties should have at least one opportunity to change their offers. Any change must reduce the amount in dispute. The purpose is to protect both parties from being locked into early offers in the event of changed circumstances after submission. It is usually beneficial when the parties narrow their disputes. The Commission should create a mechanism which encourages parties to submit their best offers first, but, even without such mechanism, there would be a procedural penalty in giving a responder to a changed submission the opportunity to make the last offer.

4.

Mid-point analysis should be prohibited or limited as a basis for argument and decision. Parties should be required to support the reasonableness of their specific submissions and to challenge the reasonableness of the other side's position.

5.

As part of their rulings, arbitrators should be permitted to identify offers which are considered “clearly unreasonable” or “contrary to public interest”, even if they are found to be “better” (or less defective) than the opposing offer. Each case should be decided so that there will be no need for a new hearing if the Commission finds the prevailing offer to be unobjectionable.

6.

Consistent with the previous discussion, I endorse the idea that the Commission retains the right to reject offers because they are “clearly unreasonable” or “contrary to public interest”.

Other Aspects of A Model FOA Process

1.

Mandated, FOA is best suited for disputes involving amounts of money or the appropriate method for calculating money. The more issues there are, the more complex the case becomes, and complexity increases both the risk of error and the potential for undue harshness in a ruling against the losing party. In our immediate context, an ideal type of case would involve the determination of access fees for one year or for some other limited period determined in advance to be “commercially reasonable”. Limiting the issues in this manner also tends to assure that comparable offers will be submitted.

Three other observations relate to this point. Recall that FOA usually encourages settlements and frequently these settlements resolve issues in addition to those subject to determination by FOA. Also, this discussion involves matters mandated for resolution by FOA. The parties may agree to submit additional issues for resolution. (Generally, I favor almost anything acceptable to both parties.) Finally, if other issues remain after the money issues are decided, the Commission can mandate another form of dispute resolution.

2.

The Commission should adopt a combination oral/written process for presentations, with emphasis on the oral. I believe an oral process has served Baseball

well and contributes not only to the fairness of the process, but, just as importantly, the appearance of fairness of the process, but, just as importantly, to the appearance of fairness. Regardless of outcome, disputants have a lot more comfort if they know they had the opportunity to present their positions directly and personally to the adjudicators, to question their opponents about points of dispute, and answer questions or clear up misunderstandings the adjudicators might have about their positions.

Baseball's procedures don't include pre-hearing briefs or statements. Such written presentations probably would aid preparation by the arbitrators and the parties. When I was involved in Hockey arbitrations, the pre-hearing presentations seemed useful to all concerned.

3.

The rules should establish suggested time limits for the presentations, but, as in Baseball, the arbitrators should be flexible in permitting parties to respond to "new" points.

However, the issues involved in cases before the Commission, particularly issues such as the fair price for certain services frequently will require someone to hear and evaluate some oral testimony from experts and others. The time limits applicable to Baseball Salary Arbitrations will be insufficient for matters requiring trial-type hearings and expanded time limits must be provided, if needed.

4.

I see no basic unfairness in subjecting licensees to mandatory FOA, and imposing agreements on one or both of the parties. The public is entitled to good programming. The parties to these price disputes are obliged to see that the public interests are served.

However, if the process as described herein did not contain sufficient protections to prevent or reduce the potential for prolonged detriment to one side or the other, my views regarding fairness, would be different.

5.

Once a party initiates FOA, the process can be completed fairly quickly. The following deadlines must be established: simultaneous submission of offers (through the Commission); appointment of arbitrators, particularly a chairperson, by the Commission; conducting of a pre-hearing telephone conference to resolve procedural matters (by the chairperson); simultaneous exchange of written pre-hearing statements; conducting the hearing; filing the record and final report for necessary action and enforcement by the Commission. The Commission seems to have established time limits in similar proceedings which could apply to these proceedings with minor modifications.

It is necessary to decide whether the Arbitrators should file written opinions. In Baseball, there are no opinions, no explanations, and no appeals. There may be a greater need for opinions and appeals in Commission matters. Opinions probably would have positive effects in creating and evaluating precedents. However, permitting or requiring opinions slows the process and encourages efforts to impeach the results. I raise this issue for appropriate consideration.

6.

Of course, specific evaluation criteria should be established and made known to the arbitrators and the parties. The criteria should be broad enough to permit consideration of anything commercially reasonable that would be considered by willing buyers and sellers on equal bargaining footing: e.g., cost of developing the broadcast

system and providing the required service; appropriate profit; customary past charges between the same or other parties for similar access to television signals; accepted industrial methods for calculating price, etc. Certainly, public interest should be referenced.

My understanding is that existing language, with some modifications, adequately serves the purpose. I suggest two specific inclusions: first, that mid-point analysis is not to be considered and that parties are required to establish the merits of their own submissions and the deficiencies in the submissions of the opposing parties; second, that rulings in FOA cases are to be considered with caution.

As the process ages, I believe the criteria should be amended to deal with specific issues which may arise. The criteria should be reviewed frequently to deal with such matters.

7.

Formal rules of evidence are usually much relaxed in arbitration hearings. That is appropriate and no special comment seems necessary here. Because of what may be at stake in these cases, it seems appropriate to stress that misconduct regarding false or misleading evidence is subject to sanctions.

8.

I favor arbitration panels, particularly for important cases. However, single arbitrators may be sufficient.

9.

Arbitrators should not participate in attempting to settle cases. Their jobs are to hear cases and decide disputes. Encouraging settlements certainly is a proper function for

other staff members, but not the fact-finders. When fact-finders attempt to engage in the settlement aspects, there is a risk that cases won't proceed expeditiously. Leave settlements to others.

Final Thoughts

1.

One of the main objectives of the Commission should be to control the culture of the process. The Commission's process should encourage constructive approaches by the parties and discourage gamesmanship. I believe my suggestions work in that direction. The Commission should make it abundantly clear that negotiations are the preferred method for resolving disputes and that arbitrations are intended to serve as an adjunct, not a dominating force.

2.

FOA works best to resolve money disputes between individual parties. Baseball's system is undermined because each dispute tends to be handled as part of ongoing labor-management conflict and may have implications affecting broader interests. The interests of the immediate parties often are treated as far secondary to group interests. This affects the submissions, decisions to settle, conduct of the hearings.

I don't know the extent to which disputes before the Commission might have significant industry-wide effects. Similar to Baseball, if the interests of the immediate parties become secondary to group interests and subject to group control or coordination, FOA might not work as well as it should.

3.

Some may argue that my safeguards neuter the essence of FOA by weakening the "whip". FOA can be scary because it uses the whip to produce artificial results instead of seeking precise justice. Safeguards are necessary; whips can kill, and no one should want that.

Even with the safeguards, the parties still have similar incentives to settle and/or to take reasonable positions in submitting offers. No one can be certain that any particular opposing offer will be rejected as "clearly unreasonable" or "contrary to public interest". Hopefully few offers will be found to meet those negative standards.

How are the incentives unduly changed if the parties are told that objectionable offers jeopardize their positions with the arbitrators and the Commission?

Except as to the initial offers, how are the incentives unduly changed by giving parties the opportunity to reduce the amount in controversy by changing their offers? (A mechanism can be established to encourage parties to submit their best offers first, but there should be an opportunity to revise.)

How are the incentives unduly changed if parties are required to support the reasonableness of their offers instead of emphasizing the fiction of mid-point analysis?

I believe parties would still have substantial incentives to settle and probably would settle almost as frequently, even if those safeguards are adopted.

Biography

Samuel J. Reich authored this report. He began his involvement in baseball salary arbitrations more than 30 years ago, and has represented players and teams over the years.

Mr. Reich received a B.A. in Political Science from the University of Pittsburgh and his law degree from the University of Pennsylvania. He practices law in Pittsburgh, Pennsylvania. During his law career, in addition to his sports law involvement, he has been: a federal prosecutor, a trial attorney with emphasis on criminal law, an Adjunct Professor of Law at Duquesne University Law School and a Bar Association President. He is presently senior partner in the Pittsburgh law firm of Reich, Alexander and Demas.

He also has written a book about Baseball's Hall of Fame and hosts a radio show about old-time baseball.

