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SYMPOSIUM: ALTERNATIVE DISPUTE RESOLUTION IN SPORTS

KEEP YOUR EYE ON THE PELOTA: SPORTS ARBITRATION AT THE JAI-ALAI FRONTON

ROGER I. ABRAMS*

When you are appointed as a neutral to decide over one thousand labor arbitration cases over a three-decade career, you tend to forget the facts of the individual disputes. How many different employees have lost their jobs for a variety of imaginative misdeeds? What did management do wrong this time that justified finding a violation of its contract with the union? How many Holiday Inn conference rooms have provided the settings for these hearings? Arbitration is a simple system of alternative dispute resolution that works,¹ but it is too much to ask any neutral to recall too many of the details.

There are exceptions to this rule of transient memory. A few cases stand out: the employee who struck his supervisor with a machete,² the nurse who inadvertently allowed her patient (Mr. Grouch) to take the wrong medication,³ and the police officer in Miami who allegedly sold cocaine.⁴ More recently, there was a glorious case in another Florida city involving “sex, bagels, cream cheese, and an alleged racial slur.”⁵

There are no labor neutrals who are full-time sports arbitrators. However, some of us have been fortunate to have had the opportunity to hear disputes in the sports industry along the way. Each of the major team sports has a single

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1. The simplicity of the labor arbitration is belied, however, by the 1786 pages of the new edition of FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* (Alan Miles Ruben ed., 6th ed. 2003), edited masterfully by Professor Alan Miles Ruben.

2. *Gen. Elec. Co. v. Int'l Union of Elec., Radio and Mach. Workers, Local 707*, 71 Lab. Arb. Rep. (BNA) 884, 884 (1978) (Abrams, Arb.).

3. *Ohio Valley Hosp. Ass'n v. Ohio Nurses Ass'n*, 79 Lab. Arb. Rep. (BNA) 929, 930 (1982) (Abrams, Arb.).

4. See generally *City of Miami v. Fraternal Order of Police, Lodge 20*, 92 Lab. Arb. Rep. (BNA) 175 (1989) (Abrams, Arb.).

5. *City of Palm Beach Gardens v. Palm Beach County Police Benevolent Ass'n*, 117 Lab. Arb. Rep. (BNA) 929, 932 (2002) (Abrams, Arb.).

permanent arbitrator to hear grievance disputes.⁶ That person is not very “permanent;” his or her tenure ends when one party decides that it is time to find a new permanent arbitrator.⁷

As a baseball salary arbitrator on and off since 1986, I have seen how this innovative and unique dispute resolution technique has worked effectively to avoid player holdouts in the national game.⁸ My baseball salary arbitration cases are the only ones anyone ever asks me about, and in large measure, they are the only cases the media has cared about.⁹ After I decided, in 1986, that Ron Darling’s stellar performance in the prior season did not justify his demand to be paid like Fernando Valenzuela, as his agents had claimed, the *New York Post* expressed its amazement with glaring headlines on the back page; at least it did not include my photograph.

Among the exceptions to the rule that cases fade from memory was my opportunity to learn about and resolve a dispute involving the fascinating sport of jai-alai. The owners of the Miami fronton and the union, an affiliate of the United Auto Workers that represented the newly-organized jai-alai players, jointly appointed me to resolve a dispute involving the fronton’s failure to rehire three strikers.

The jai-alai case was fairly typical of sports grievance arbitration cases in many ways. The resolution of the dispute was based on the terms of the parties’ agreements and not on national law or any personal view as to what might be a good or just outcome. The parties presented testimony and documents at an informal hearing and filed briefs arguing their positions shortly after the close of the hearing. As the arbitrator, I resolved the dispute as quickly as I could, explaining in my written decision the reasons for my award. The opinion, which is attached below, was final and binding on the

6. See, e.g., NAT’L BASKETBALL PLAYERS ASS’N, NBPA COLLECTIVE BARGAINING AGREEMENT art. XXXI, § 6 (1999), available at <http://www.nbpa.com/downloads/CBA.pdf>.

7. ELKOURI, *supra* note 1, at 143. On November 22, 2005, the day after he decided the Terrell Owens grievance case, the National Football League Players’ Association fired the “permanent” umpire, Rich Bloch. Bloch, a long-time friend and colleague, may be the finest labor arbitrator in the country.

8. See generally ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* (2000) (discussing my experiences as a salary arbitrator and the workings of the final-offer arbitration process).

9. I did have one case in Palatka, Florida a number of years ago involving a local government scandal of some magnitude. It was covered by the *Palatka Daily News*. When the Tampa, Florida county bus agency fired all its drivers (apparently, they all took ill on the same day during stalled collective negotiations), we had to set up a press table for the *Tampa Tribune* and *St. Petersburg Times*. Local television stations did broadcasts for the five o’clock news from outside the hearing room. However, arbitrations are generally very private affairs.

parties.¹⁰

The jai-alai arbitration was remarkable in a number of ways. First, the participants spoke a collection of languages with various accents. The jai-alai players all hailed from the Basque country on the Spanish-French border.¹¹ Most spoke only their native language. The employer's manager of the players was from Cuba, and he spoke only Spanish. The owners of the fronton were from Boston, and they spoke with heavy Boston accents. I assured the parties that, based on my years of experience in law school, my experience as a clerk, and my practice in Boston, I could translate any sentences involving "pahked cahs" or the Red Sox. Understanding the testimony of the grievants and the company's main witness presented a greater challenge.

The company brought along a Spanish-English translator for its witness, the Cuban manager, but there was no one there to help me with the Basque witnesses, other than the jai-alai players. However, with surprisingly little difficulty, the few players who were comfortable with English stepped in to translate the Basque testimony while the other players listened closely. On occasion, there was controversy among the players as to what exactly a witness had said. The players would then huddle and advise me what the correct translation was. It was a one-of-a-kind hearing.

The arbitration was held in a small conference room at a law firm in Coral Gables, Florida, in the heat and humidity of the summer of 1991. Air conditioning in abundant quantities was an absolute necessity, and thankfully, it was amply provided. Each day for lunch I tried a different Cuban restaurant to sample the delights of the local cuisine. I remember the hearing as being courteous for the most part, even though the two parties had spent years feuding over the issue of union representation. Perhaps the presence of the arbitrator encouraged civility between the parties?

The opinion that follows provides the reader with some feeling for the sport of jai-alai. However, it pales when compared with my own educational experience. Both the employer and the union thought it was absolutely essential for me to attend an evening of play at the Miami fronton. They jointly entertained my wife and me for dinner and then brought us *inside* the jai-alai cage to see the game "up close and personal." Jai-alai is, as advertised,

10. The case did not involve anything associated with the stormy history of the World Jai-Alai ownership. In October 2003, Steve "The Rifleman" Flemmi, an associate of fugitive Whitey Bulger in Boston's Winter Hill Gang, pled guilty to helping set up the murder of Oklahoma businessman Roger Wheeler in 1981. Wheeler had been the owner of World Jai Alai. See Clarence Walker, *FBI Dark Secrets: Ex-FBI Agent Arrested in 1981 Mob-Hit Murder*, RICK PORRELLO'S AMERICANMAFIA.COM, Dec. 2003, http://www.americanmafia.com/Feature_Articles_257.html.

11. See generally ROBERT LAXALT, *THE LAND OF MY FATHERS: A SON'S RETURN TO THE BASQUE COUNTRY* (2000).

the “world’s fastest game.”¹² It is entertainment, like all sports, but it is designed particularly to serve as the basis for pari-mutuel wagering.¹³ It is one of the only sports in America where betting is allowed based solely on human performance.¹⁴

The sport of jai-alai is a refinement of simple handball that originated in ancient Egypt thousands of years ago.¹⁵ Most histories date its first American appearance to St. Louis in 1904 during the World’s Fair,¹⁶ but the *New York Times*, on January 10, 1902, reported that a group of Havana “sportsmen and capitalists” were planning to build a fronton to play the Spanish game of “pelota” “on Central Park West, between Sixty-second and Sixty-third Streets,” near today’s Columbus Circle: “It is said that the game is very exciting and that the matches played in Havana are the occasions of heavy betting.”¹⁷ The *Washington Post*, on December 28, 1902, lauded jai-alai as a sport that “American boys can play without much practice and without spending much money on equipment.”¹⁸

Modern jai-alai is played on a court with three walls and a wire mesh screen in lieu of the fourth wall.¹⁹ Opponents alternate catching the “pelota,” a hard rubber ball covered in goat skin, in a basket strapped to the player’s

12. Miami Jai-Alai Home Page, <http://www.fla-gaming.com/miami/> (last visited Nov. 30, 2005). “Imagine racketball on steroids, and you have an idea of what jai-alai is like.” Otis White, *Otis White’s Urban Notebook*, GOVERNING MAG., Mar. 2004, at 12.

13. Pari-mutuel betting means “betting among ourselves,” from the French “parier mutuel.” The system was devised in 1865 by Pierre Oller. ENCYCLOPEDIA BRITANNICA ONLINE, *Pari-Mutuel*, <http://www.britannica.com/eb/article-9058455> (last visited Nov. 30, 2005). After the fronton takes its cut, the house divides the pot among the betting winners. See generally Parrish Heppenstall, *Know Thy Enemy*, SUREBETSOFTWARE.COM, <http://www.surebetsoftware.com/articles/knowthy.htm> (last visited Nov. 30, 2005).

14. Of course, horse racing involves jockeys, but primarily the results depend upon the performance of finely bred horses. In Nevada, gambling is authorized on a variety of “solely human” activities, such as boxing. See generally ANDRES MARTINEZ, 24/7: LIVING IT UP AND DOUBLING DOWN IN THE NEW LAS VEGAS (1999).

15. Dania Jai-Alai, History/Lore: Jai-Alai: Where It Came from, <http://dania-jai-alai.com/history.htm> (last visited Nov. 30, 2005).

16. See generally JAI-ALAI HEAVEN, JAI-ALAI CHRONOLOGY: SIGNIFICANT EVENTS IN THE WORLD OF JAI-ALAI (2004), <http://rsbassociates.home.mindspring.com/chronology.htm>.

17. *Cubans to Introduce Pelota*, N.Y. TIMES, Jan. 10, 1902, at 14.

18. *Boys Games, Jai Alai*, WASH. POST, Dec. 28, 1902, at 36. American soldiers learned of the Spanish national game of jai-alai during the occupation of Cuba after the Spanish-American War. General Leonard Wood, the military governor of Cuba, granted approval for the construction of a fronton in Havana, allegedly in exchange for a “gift.” The resulting controversy caused much consternation in Washington during the confirmation of Wood’s promotion to the rank of major general. In fact, members of the Senate played the “mysterious game” of jai-alai on the Senate floor. *Senators Play Jai-Alai*, N.Y. TIMES, Mar. 18, 1904, at 1.

19. Dania Jai-Alai, Where Jai-Alai is Played, <http://www.dania-jai-alai.com/page7.htm> (last visited Nov. 30, 2005).

right arm, called a “cesta,” and slinging the ball back against the front wall without hesitation.²⁰ When the ball is not caught on the fly or on one bounce, a point is scored.²¹ Normally, seven points are required for a win.²²

Across the broad spectrum of professional team sports, management normally retains the exclusive right to determine whether a player has adequate skill and ability to play at a “major league” level.²³ The parties to the sport’s collective bargaining agreement set out this prerogative in the uniform player contract.²⁴ By comparison, almost all non-entertainment collective bargaining agreements limit management’s right to discharge an employee to circumstances where it can establish “just cause” before an arbitrator.²⁵ Thus, labor arbitrators used to applying the just cause standard must be careful not to transfer this well-developed concept to sports cases where they may not apply.²⁶

The *World Jai-Alai* opinion that follows addresses many of the issues common to sports grievance arbitration. No arbitrator is an expert in every industry in which he is asked to adjudicate, and few, if any, labor arbitrators have played jai-alai. It is fun to learn about an enterprise, especially when that business involves a ball moving at more than 150 miles per hour while the crowd cheers, betting slips in hand.

20. Dania Jai-Alai, Equipment, <http://www.dania-jai-alai.com/page6.htm> (last visited Nov. 30, 2005).

21. Dania Jai-Alai, Jai-Alai-The Game: Explanation of Jai-Alai, <http://www.dania-jai-alai.com/page3.htm> (last visited Nov. 30, 2005).

22. *Id.*

23. See, e.g., NAT’L BASKETBALL PLAYERS ASS’N, NBPA COLLECTIVE BARGAINING AGREEMENT art II, § 3(e)(i) (1999), available at <http://www.nbpa.com/downloads/CBA.pdf>; THE NFL MGMT. COUNCIL & THE NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT Appendix C, ¶ 8 (1998), available at <http://nflpa.org/Members/main.asp?subPage=CBA+Complete>.

24. See generally *id.*

25. Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594.

26. Arbitrator William G. Haemmel reached a different conclusion regarding some of the other terminated jai-alai strikers in *WJA Realty, Inc. v. Int’l Jai-Alai Player’s Ass’n*, 97 Lab. Arb. Rep. (BNA) 745, 749 (1991) (Haemmel, Arb.). Although his reasoning is difficult to follow, he appears to ignore management’s claim to have terminated certain players for their “fail[ure] to demonstrate the ability to play professional jai-alai at the level of professionalism, competence and competitiveness normally required.” *Id.* at 747.

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of an Arbitration

between

WORLD JAI-ALAI FMCS No.91-09455
Alberto, Zoqui and Juan
and

INTERNATIONAL JAI-ALAI
PLAYERS ASSOCIATION, UAW

ARBITRATOR'S OPINION AND AWARD

Jesse Hogg, Esq. - For the Company
Daniel Livingston, Esq. - For the Union
Roger I. Abrams - Arbitrator

September 3, 1991

On October 15, 1990, the International Jai-Alai Players Association filed a grievance on behalf of Alberto, Zoqui and Juan, claiming a violation of the Settlement Agreement with World Jai-Alai. The Company denied the grievance, and the Union has now brought the matter to arbitration.

A hearing was held in Coral Gables, Florida, on May 22, June 12, and July 10, 11, and 25, 1991. During the course of the hearing, both parties presented the Arbitrator with documentary proof and oral testimony. Both parties filed extensive post-hearing briefs with the Arbitrator postmarked August 15, 1991.

I. ISSUES

At the hearing, the parties stipulated to the following statement of the issues to be resolved:

Were the Grievants not offered player contracts because management determined in accordance with Section 6(d) of the Settlement Agreement that the Grievants were unable to play at the level required by Section 6(d)? If so, what shall the remedy be?

II. RELEVANT PROVISIONS OF THE SETTLEMENT AGREEMENT

Section 6. Strikers to be offered playing contracts

All World players who went on strike against World in 1988 will be offered playing contracts, each at the fronton where he was last employed before the 1988 strike started, . . . in accordance with the further terms of this Agreement, with the following exceptions:

d. Any player who fails to demonstrate the ability to play professional Jai-Alai at the level of professionalism, competence and competitiveness normally required by World at the fronton where he would be employed, after being given a reasonable opportunity to practice and do so.

If World declines to offer any player a playing contract because of the provisions of . . . d. above, that player will be entitled to arbitration of his claim that this (these) was not (were not) the true reason(s) why he

was not offered a contract.

Section 9. Salaries

b. Salaries for Returned and Returning Strikers. With regard to strikers who have returned to work since the Union made an offer to return in their behalf in March, 1989, as well as strikers who will return to work as a result of this settlement, salaries will be set on the basis of individual player contract negotiations, subject to the above minimums and also to the following:

I. The striker will not in any case be offered a monthly salary which is less than 80% (Eighty Percent) of the monthly salary called for in his player contract in effect as of April 14, 1988, or in his next prior player contract if he was not under contract as of that date.

II. A reduction from pre—strike salary in an offer made pursuant to I. above, must be based on one or a combination of the following factors:

A. The player's current ability to play professional jai-alai at competitive levels, as demonstrated by the player as he practices in preparation for returning to professional play.

B. Other traditional player evaluation factors, such as performance, longevity, versatility, reliability, and salaries paid to other players of similar ability.

III. The Union shall be entitled to grieve and arbitrate a claim that such a reduction under I. and II. above is not truly based on II.A. and/or B. Whatever the contractual time limits for filing grievances may be, such a grievance may be filed at any time no later than six (6) months from and after the date when the player's first post-strike playing season begins at the fronton where employment is offered. This right to arbitrate regarding salary shall apply to the returning striker's first playing season after returning from strike only. There is to be no other agreement to engage in interest arbitration or salary arbitration, except upon claims that guarantees and minimums provided in the CBA are

violated.

c. All Salaries Can Be Re-Set.

It is understood that the language of a. and b. above is intended to allow World to re-set the salaries of all players, regardless of the fact that salaries have previously been set for non-strikers, striker replacements and strikers who returned to work before this settlement was arrived at. In other words, the only minimums that come into play are those referred to in a. and b., and current salaries do not constitute any kind of floor or minimum.

III. BACKGROUND FACTS

A. *Jai—Alai*

The sport of jai-alai is played either in singles or doubles on a court 170 feet long and 40 feet wide, bounded by a front, back and side wall and an overhead and side screen.²⁷ Spectators come to watch the exciting play and engage in pari-mutual wagering on the players. The object of the game is to serve the ball, the pelota,²⁸ and return it against the huge front wall. Each player wears a curved wicker basket, the cesta, strapped to his right arm. If the player misses the pelota, he loses the point. Within each game, the player with the most points is the "winner," second is "place" and third is "show." In a doubles match, the smaller, faster players play in the front court and the larger, stronger players play in the back court.

The Miami fronton has a roster of 42-50 players, the best of the 150 or so players at the Company's four frontons in Miami, Tampa, Fort Pierce and Ocala. There are some 500 jai-alai players in the United States and 70% of them come from the Basque country in Spain. Alberto, Zoqui and Juan, the Grievants here, had great careers as players at the Miami fronton over many

27. The nightly official program recalls the origins of the sport:

[I]t is believed that jai-alai began in the Basque region of Spain and France more than three centuries ago. The first permanent jai-alai fronton in the United States was built [in Miami] in 1926. Miami Jai-Alai has often been called the "Yankee Stadium" of jai-alai. Translated, jai-alai means "Merry Festival" in the Basque language.

28. The pelota, made of virgin de Para rubber, is hand-made and wound so tight that it is harder and livelier than a golf ball. The pelota is covered with two layers of goatskin and costs over \$100. Pelotas must be restitched after about 15 minutes of play.

years.

B. The Strike, the Settlement, and the Players' Return

In the spring of 1988, the International Jai-Alai Players Association sought recognition from World Jai-Alai and other fronton owners in the United States. It called a nationwide²⁹ strike on April 14, 1988. The strike lasted until September 23, 1990. The Company continued operations during the strike using non-striking players, replacements from other frontons, and new players who were of markedly lower caliber.³⁰ In March 1989, the Union made an offer that the players would return to play, but remain on strike. Many players came to the fronton in Miami to practice and the Company offered some of them contracts to play. Those who did return continued to picket outside the fronton when not actually playing inside the fronton, a most unusual situation.

Alfredo Garcia, the Company's Player Manager, testified that he observed the players practice. He watched the three Grievants, Alberto, Zoqui and Juan. It was his recommendation in 1989 to President Richard Donovan and Director of Player Personnel and Assistant Manager Frank Duffin that the three not be offered contracts. After the strike ended in 1990, the three Grievants again tried to qualify. Garcia again observed them. It was Garcia's conclusion that their ability had deteriorated even further. Alberto, Zoqui and Juan were 39, 38, and 41 years old respectively, quite old for professional athletes. As a result of the strike, they had been inactive for a year before the 1989 practice session and then another year-and-a-half before the October 1990 practice session.

The strike was settled in September 1990. Union attorney Dan Livingston explained that the Union's policy was that everyone would go back to work, that no striker would be replaced by a "scab." At the first negotiating session on September 12, Richard Donovan, the Company's President, handed out a sheet with the strikers' names in nine categories. Very few would be returned to work from that list. Jesse Hogg, the Company's attorney, told the Union that it could not expect the Company to put someone on the court with one leg. Riki Lasa, President of the Union, said that the Company could trust the Union. Donovan responded that some players obviously did not belong on the court. The Union agreed that the Company could disqualify players in that situation, subject to arbitration. The parties agreed that the players would have

29. Actually, the "nation" consists of Florida, Connecticut and Rhode Island, where the sport currently is played in this country. [The last fronton in Connecticut closed on December 12, 2001. The Newport Grand Jai-Alai remains in operation in Rhode Island.]

30. In his testimony, the Union's immigration attorney, Ira Kurzban, said the Company used "ball boys, forty-year old announcers and parking attendants" to fill the rosters.

reasonable practice time to get their game back. The parties also agreed that the Company could lower salaries of players up to 20%.

During negotiations, the Company wanted an exact number of strikers who would return so it could put together the roster. The Union refused, saying all capable strikers would come back. During the second day of negotiations on September 13, 1990, Donovan asked the Union for "one sacrificial lamb." The Union refused. Donovan agreed to work with the Union on the immigration problems. By 3:00 p.m. on the second day of negotiations, the parties had a deal and shook hands. On the way out of the meeting, Donovan said to Livingston: "I hope you are going to chisel me, because I know I'm going to chisel you."

Livingston sent Hogg a draft agreement, but Hogg returned a whole new draft. There were incorrect provisions in this draft that the parties changed. The Union ratified the agreement at a twelve-hour Sunday meeting on September 23rd. The next day Livingston and Lasa flew back to Hartford. Livingston testified that Hogg telephoned to say: "Donovan wants out of the deal. There are a whole bunch of players Donovan doesn't want to take back." Lasa and Livingston flew back to Miami on Tuesday and met with Donovan, Duffin and Hogg at the fronton. Donovan went over the list of players he wanted out. Lasa said that the Company could not replace the players with scabs, but he could get the people on the list to decide not to come back.

After a caucus, the Company officials refused Lasa's offer, saying they were not going to create a hiring hall where Lasa would act like "Hoffa." Livingston said that if these players were disqualified under the Settlement Agreement, that would be alright. Hogg said they could arbitrate it. Both parties agreed to live with the deal. The next day the parties signed a document with attachments called the Amendatory Memorandum.

Subsequently, additional disputes arose between the parties concerning visas for strikers who had returned to Spain and the Company's refusal to employ former strikers for a partial season. The Union filed "an infinite number of grievances," according to Livingston.

C. The Company's Disqualification of the Grievants

Player Manager Garcia testified the entire first day of the hearing about his evaluation of the players.³¹ Mr. Garcia has fifty years experience with jai-alai, starting at age seven running errands at the fronton in Havana, Cuba. He served as a ball boy, a ball maker, a cesta maker and repairer, and a masseuse

31. Questions to Mr. Garcia were stated in English, then translated into Spanish. His answers in Spanish were then translated back into English for the Arbitrator.

for the players. He began his career as a professional jai-alai player in Havana at age 14. In 1959, he came to the Daytona fronton and then to Miami. He finally retired as a player in 1968. In 1971, Garcia became Chief Judge at the Miami fronton and worked with the new players. In 1974, he became Player Manager in Fort Pierce and then in 1975 also became Player Manager in Miami.³² He testified in detail concerning his evaluation of the three Grievants.

President Richard Donovan testified the entire second day of the hearing. He has the ultimate responsibility for the roster and player salaries, working closely with Frank Duffin. He explained how the Company obtained its players from its school system in Guernica, Spain, and from France. Young players are hired at the Company's "minor" frontons in Fort Pierce and Ocala. If they develop their skills, they are then brought up to the "big leagues" in Miami and Tampa.

Donovan evaluates players from year to year to determine who will be released and who will be offered another annual contract. He testified that he examines physical ability, performance over a period of time, versatility, the discipline of the players, and the roster needs.³³ Donovan observed each of the three Grievants practice. He agreed with Garcia's evaluation of their skills and abilities.

Frank Duffin, who had been an FBI Special Agent for twenty-five years before coming to World Jai-Alai, testified that he also watched and evaluated the returning strikers. He relied especially on Garcia's opinions because of his long involvement with the sport. Garcia was, according to Duffin, "very knowledgeable." Duffin respected the three Grievants knowledge of the game, but not their current ability to play.

All the Grievants testified to the importance of experience in a jai-alai player. Alberto testified that it is crucial to know how to play, to play with your partner and to know your opponent's weak side. Juan said that success as a player means you must combine both your ability and your mind: "Be smart, play with your partner, and benefit from the errors of your opponent." Zoqui said that with a pelota moving 150 mph it is crucial to know where the ball will go and how each player will play. It is not enough to be in great shape.

Jorge Lasa, a fine Miami roster player who serves as Vice-President of the Union, confirmed their testimony. Lasa said that you have to watch your

32. It was Garcia's responsibility to put together the program, that is, listing of the players, the matches and when they would play. Since January 1991, this has been done by a computerized system.

33. Donovan explained that the Company cannot always keep the services of the players it wants. Other frontons, especially those in Connecticut, will outbid the Company for some players.

opponent and be there before the ball gets there. An older player cannot rely on power and speed, but rather must rely on experience. You must learn to cooperate with your partner: "Both of you have to be one."

All the Grievants and Jorge Lasa testified that in October 1990 they did not practice as hard as they would play in an actual game. They certainly did not want to get injured when they did not have contracts. The witnesses testified that during the 1990 practice sessions the Company did not make available a basket maker to repair the cestas. In the normal pre-season practices at the fronton and during the season, the basket maker plays a crucial role in repairing this expensive equipment on a daily basis. Also the Company did not have a trainer available during the practices. The returning strikers were allowed to use the sauna when they asked, but the Company did not make a trainer or the weight room available. In rebuttal, Richard Donovan said that no one asked him to open the exercise room or to use the equipment during the practice sessions.

(1) Alberto

Alberto testified that he has played jai-alai since he was eleven years old. He came to Miami in 1968. At the time of the strike, he was playing in the early and middle games. Since the strike, he has stayed in condition by walking, bike riding and playing soccer. During the four or five weeks of the 1989 practice session, Alberto said that no one from management observed him. He again attempted to return in October 1990 after the strike settlement. Garcia observed him once or twice during the first two weeks of practice. Then the players were told to go to the North Miami amateur fronton to practice because the Miami fronton was under repair. Alberto returned to Miami to practice for the final week of October. Garcia watched him regularly; Donovan and Duffin each watched him once. Later that week Duffin told him that the Company did not require his services.

Garcia testified that he has known Alberto for twenty years. Alberto was a backcourt player who came originally from the jai-alai school in Guernica, Spain, which was owned by World. Alberto went out on strike in April 1988. In March 1989 he joined those players who came back to the fronton to demonstrate their ability to play. He came to practice and Garcia observed him and the quality of his efforts on the court. Garcia emphasized that he watched the players from inside the court because it was much better to evaluate them that way. He observed Alberto over a ten to fourteen day period during which he practiced eight or nine times.

At the end of the practice period, Garcia spoke with Frank Duffin and gave his opinion with regard to Alberto "that he had lost his strength to throw

the ball." Garcia explained that a backcourt player needs great strength because he should be able to put the pelota "as far as possible." Alberto could only reach line eight or ten during the practice times when he should have been able to put the ball off the back wall so it would rebound.³⁴ He recommended to Duffin that Alberto not be offered a playing contract, that Alberto was "very weak" and could not play at the fronton in Miami. He did not tell Alberto about his evaluation or attempt to instruct Alberto how to improve his game.

Garcia said Alberto was known for keeping the ball against the side wall and had had the strongest "rebote" on the left side in the world, a very difficult shot. On cross-examination, Garcia was not ready to acknowledge that a backcourt player could get away without power. He would be "like a fish" just playing defensive to "throw it slow." Alberto had always been a defensive player doing damage with his rebote. He never relied on his power because his ability was in his rebote.

Garcia testified with regard to Alberto that nothing could have improved his play because "you can't give him power." His "fighting spirit" made him show his best. It is part of his pride. It would be an insult to tell him to throw harder, according to Garcia, because he is "a professional." Garcia said he had faith in his players and you could tell from the Alberto's expression that he was throwing as hard as he could. "To defend the money and the public," they always give their best. Garcia did acknowledge that some current players brought up during the strike, such as Vega, Gach, and Benjamin, have pretty bad right sides.

In 1989, it was Garcia's evaluation that Alberto was nearing the end of his career and he should not be required to "sweep the floors." "It is an insult to a player to finish his career being the worst in the early games." In 1990, Garcia watched Alberto practice eight times. Alberto was a very disciplined player and "was always there." Donovan testified that he concluded from his observations that Alberto "had no power, he was dead on the court." He had been losing his power before the strike, and Donovan thought then that he had been within a short time of the end of his career. Alberto would become tired as the long jai-alai season progressed.

Alberto testified that he was able to play, but he could have benefited from more practice.³⁵ He has not lost his power. He has the same power now as

34. The overhead screen above the court in the Miami fronton is the lowest in the world. If the ball touches the net on that screen, the player loses the point. A back court player without "power" would touch the upper net more and loses more points because he would throw it higher if he did not have "power."

35. There is no evidence in the record that at any time the Grievants requested additional time to

when he was seventeen. Alberto explained that he did not rely on his power, but rather his style was to catch the pelota, put his opponent off guard and get advantage off a rebote by putting the ball to the left wall. He denied that he could not throw the pelota past the "9" line.

(2) Zoqui

Zoqui testified that he started playing in Miami in 1974 and was playing in the featured late games before the strike. He had just received a new two-year contract with a \$200/month increase. Zoqui had won the doubles championship at the fronton the prior season. He kept in shape during the strike by walking. When he attempted to return in March 1989, he practiced for a few weeks without anyone observing him. Duffin told him: "All your power is there, but you have slowed down a bit." He was not offered a contract. In 1990, he was again not offered a contract. No one observed him the first two weeks in Miami or the next two weeks at the amateur fronton in North Miami. Garcia watched him everyday the final week of October, and he only saw Donovan once in the player's cage.

Garcia testified that he has known Zoqui since December 1974. During his best years, Zoqui was a very strong player, especially on the backhand. His right hand was slow, however. Garcia explained that the foot movement of a backcourt player must be very mobile. The more moves he has, the better his chances are to win the point. He observed Zoqui on the court in practice in 1989 and thought that his mobility was lost to the right hand side of the court. He said he would only play "facing the court" and couldn't "play down." He would only cover the backhand side, and he had lost all his speed on his legs. With regard to the "rebote"—the rebound off the back wall—Garcia said that Zoqui just covered his area and the rest was left empty. Zoqui was making no effort to move side-to-side. "He just couldn't get there."

Donovan testified that Zoqui was not in tip-top physical condition. Although he showed power, he could not demonstrate mobility on the court. A backcourter has much territory to cover, and Zoqui could not do it. He never had great speed, and when he practiced he was not moving to the ball very well. Donovan first thought that Zoqui could get into shape with more practice. After additional practice, however, Zoqui did not improve.

Garcia said that he did not think it would be good for Zoqui to play in the first five early games for his own health and for the public. He said: "It would be an insult for him to play in those games and lose against those younger players. He would have lost more than he would have won because he had no

movement." Garcia emphasized that he had "respect for the players" and would not do that to them.³⁶ By 1990, it was Garcia's evaluation that it would have been even more difficult for Zoqui to play and win because the boys who had played in the early games in 1989 had improved after one year of play.

Garcia did acknowledge that there are some highly regarded backcourtiers without a right side. Chimela didn't have a right hand, but Garcia said he had the greatest cannonball backhand ever. (Chimela is over fifty years old and is still playing in Hartford.)

Zoqui said that he can move and has not lost his legs. Since a backcourter must throw the ball to the left wall and only one out of thirty balls are on the right side, the Company's criticism was meaningless." Zoqui said he never scratched: "I go to the left, the right, the front and the back." He concluded: "I was perfect." He was shocked and very disappointed when he did not receive a contract: "I know it is a joke that I can't play against the scabs."

(3) Juan II

Juan testified that he first starting playing jai-alai when he was eight and professionally when he was fifteen. He came to Miami in 1969. He was upset that Garcia had moved him to the early games in 1987 after being a feature game player for many years. He stayed in shape during the strike playing soccer, squash and the Basque equivalent of racquetball. In 1989, when he tried to return, Duffin said the Company would not offer him a contract. Garcia had watched him two or three times in 1989 "with his big old cigar sitting in the middle of the court." In 1990, Juan said that Garcia did not watch him until the final week of practice. The players were given one bag of balls. When they broke, practice was over. Donovan and Duffin watched him one time for a few minutes during the last week of October 1990.

Garcia said he has known Juan for twenty years. Juan was a frontcourt player who must be more mobile because he plays laterally and must be able to go to the backcourt at times. Power is essential because the harder he throws the pelota, the farther it goes and the more "damage" he can do. Garcia testified that the Company reduced Juan's salary before the strike in 1987-88

36. Upon questioning by the Arbitrator, Garcia distinguished this case from the treatment given to a great superstar of jai-alai, known as Asis, who was one of the most famous singles players in the last twenty years. When he got older and less healthy, Garcia talked with him and moved him back to the backcourt in doubles and into the middle games. The middle games were not an insult, Garcia explained, because middle game and premier game players often intermix. It is the early games that would be the insult.

On rebuttal, the Company presented a videotape from the prior Saturday's matinee that showed that about one-third of a backcourter's shots are from the right side.

on Garcia's recommendation because "Juan was losing his game."

Garcia concluded that Juan was starting to lose his physical conditioning, misplayed more balls and did not catch them. Juan's problem in 1987-88 was that he was missing a lot of easy balls by catching them in the wrong place in the cesta.³⁷ Juan went on strike in April 1988 and came in to practice in March 1989. He practiced seven times before Garcia made his recommendation about his playing. (Garcia did note that Juan missed practices one or two days, although the fronton had been available to him.) He observed that Juan had lost more of his physical condition, that he had "lost sight of the ball" and "the ball would dominate, conquer and overcome him."³⁸ Juan had begun using contact lenses to try to improve his game in 1987, but by 1989 even this didn't help any longer. Garcia testified that the first sign of deterioration shows up in a player's placement and his positioning on how he catches the ball. Juan had "lost enormously in his physical conditioning." Juan just couldn't move to the ball. "He tried, but he did not reach the ball."

Donovan thought that Juan looked disoriented on the court. He was not catching well and was missing shots. He seemed to be running all over the court and was not in control of the point. Juan "could play, but at what quality?" Garcia added: "What type of respect would he have after a career of twenty years." His "human valor" and "self worth" on the court would be undermined, according to Garcia.

Juan said that he continued to be able to catch the ball well. He could stop and control the ball as he had throughout his career. He found it "curious" that anyone would think that he was out of condition with all the sports he plays. Only a trainer could determine whether he was out of condition, and there was no trainer available in 1990. He denied that he was disoriented on the court and couldn't find the ball. Juan concluded that if he could have practiced two or three weeks more, he would have been "at my level." He said that he will "let God judge Garcia for what he has done."

D. The Company's Action

Based on Garcia's evaluations of all the players and the corroborative evaluations of Donovan and Duffin, on April 19, 1989, the Company offered contracts to three of the twelve striking players who practiced, but not to the Grievants. On April 25, 1989, following Donovan's instructions, Duffin

37. The player should catch the pelota from the middle of the cesta forward, except for the two-wall shot. If you catch the ball wrong, the ball will fall out of the basket.

38. Garcia said that when he saw Juan practice, he was concerned for his safety because he was an aggressive player. Without his strength, Juan would be in trouble. The pelota moves at 150 miles per hour. Juan had been hit by the ball many years ago and had been hurt.

offered Alberto a contract to be Chief Judge at the Company's Ocala fronton. Donovan testified he "had a fondness" for Alberto. Alberto later rejected the offer.

When the players came back to practice in October 1990, it was Garcia's conclusion that the three Grievants had further deteriorated in their ability to play: "I would say worse." Alberto showed that he lost his strength and "the power when he threw the ball." Juan's showed his "physical conditioning was very bad" and so he "could not play the game." Zoqui showed that he "lost more of his movement."

Garcia again recommended that the three not be given contracts. Garcia emphasized that his opinion about the three Grievants was based solely on their playing abilities and conditioning. He said that he never had any problems with the players, and he would have nothing to gain by having those problems: "I only try to present the best play in the game. I try to give the best show."

Donovan had also viewed the Grievants' practice sessions. He concluded that the three players were incapable of playing professional jai-alai at the Miami fronton. They had not improved over their 1989 performance. In fact, even before the strike the three players had a lower than average winning percentage. Donovan concluded that the three Grievants could not perform adequately.

Donovan testified that the Grievants might have had a few years left in their careers had they not been interrupted by the strike. In general, older players took longer to get into form and some could not do it at all. He acknowledged that if older players had the right kind of style and technique, using finesse and timing to catch the ball cleanly and not tax their bodies, they could play.³⁹ He flatly denied any "malice aforethought" in not offering a contract to the three grievants. Donovan described them as "gentlemen" and "good family men." On cross-examination, Donovan stated that he never refused to reinstate a striker to save a place for a replacement player. Although the Company's legal position during the strike was that the replacements were permanent, he said he always thought that the strikers would eventually return to the roster.

The Union listed the players who went on strike who are currently not playing in Miami. In response, the Company listed the striking players who

39. Donovan noted that the Company had offered contracts to older players, including Soroa, who was in good condition at age 39, and Oregui, a smart player, who was 38 at the time. Donovan explained that he has involuntarily released players in the past because they were physically incapable of performing and their game deteriorated. Sometimes players would still be able to play, but they could not meet the high standards of the Miami fronton. They might be allowed to move to another less demanding roster in Ocala and Fort Pierce.

are playing in the Miami fronton today. Garcia thought that if a player was in good condition he could go out on the court and play with a week to ten days of practice. This was suitable practice time. When Miami played a nine-month schedule, the players would report ten days to two weeks before the beginning of the season to get into condition.

Garcia explained that he always made his recommendations about contract renewals based on the following factors: (1) the quality of the player; (2) the discipline of the player; (3) and the player's desire to compete and perform. These were grounds upon which he made recommendations about annual contract renewals after watching the players for the full year. These were the grounds he used in recommending that no contracts be given to the Grievants.⁴⁰

Zoqui testified that before the strike Garcia spoke with him about the Union, asking what was going on. According to Zoqui, Garcia said: "If I were you, I would think twice. Whoever is joining the Union will not be coming back to the Miami fronton." Later, Garcia repeated this to all the players. Garcia flatly denied that he ever told Zoqui that he wouldn't have a player contract if he joined the Union.

Garcia said he tried to take the best players for the 1990-91 season. Some of the replacement players had not progressed far enough along. That is why they were let go. It is not unusual for the Company to let older players go. Some would leave Miami and go to Fort Pierce or Ocala. Garcia says that no one seems to accept the reality of retirement.

Garcia testified that he paid no attention to whether the players were members of the Union or not: "For me they are all players." He didn't know about the Union: "Only talk to me about jai-alai. That's my stuff."

E. Immigration Matters

The Union presented testimony from its immigration counsel, noted South Florida attorney Ira Kurzban, concerning his frustrating attempts to get the Company to file visa applications and extensions for the players who were foreign nationals. He tried unsuccessfully to get documents and information on the status of the players. Duffin told him the Company was not obligated to provide this information to the Union. It only supplied the applications the Company filed with the Immigration and Naturalization Service. The first visa applications were not filed until January 1991. Kurzban had been trying to get the Company to do this since October 12, 1990.

40. Garcia says he does appreciate a player who rarely scratches, and it is better not to scratch. Zoqui rarely scratched, but Juan scratched more since he was more aggressive.

With regard to some players, the Company filed so late and so close to the projected playing time to make it most unlikely that the petitions would be granted. This was not prudent or intelligent, according to Kurzban. He believed the Company was not acting in good faith. It should have argued that the five-year rule exceptions for seasonal players applied and sued the I.N.S. if it had not agreed. The Company responded that it did not want to file futile petitions.

Donovan acknowledged on cross-examination that there were some problems getting visas for some of the strikers after the end of the strike. The Company took the position after the strike with regard to players with "five-year rule problems" who would have to sit out for a year, that the Company would apply for their visas after it applied for extensions for players without this encumbrance.

In rebuttal, Donovan reviewed the letters Mr. Kurzban sent to the Company. They contained numerous factual errors. The Company finally determined it could not rely on this information. Frank Duffin, who had processed immigration matters for the Company for fifteen years, decided to do what he had always done. The Company and its attorney had been informed that the I.N.S. was sitting on petitions and extension requests for jai-alai players until it received its new Operating Instructions. It would not have expedited matters for the Company to file these documents until after the first of the year. Duffin did so and received rapid action from the I.N.S. by February 1991.

Of the total of the sixty-five players who were eligible for player contracts, the Company offered fifty-seven of them contracts. Eight were disqualified, including the three grievants here. The Union has filed grievances with regard to all eight.

The Union offered in evidence records showing the salaries of players on the Miami roster. As a result of a general downturn in jai-alai profits caused by the strike and the competition from the new Florida Lottery, player salaries were lower after the strike than before.

IV. CONTENTIONS OF THE PARTIES

A. The Company's Arguments

The Union bears the burden of persuasion in this matter. This is not a discharge case, but rather a claim by the Union that the Company violated the Agreement when it disqualified three players who voluntarily placed themselves in inactive status for a period of 2 1/2 years. In order to alter the

status quo, the strikers were required to demonstrate their ability to play at the Miami fronton level.

The Union witnesses testified that the Company was obligated to take back every striker and that their diminished ability to play could only result in a salary reduction. That is not what the Settlement Agreement says. The Company was to give the strikers a tryout to demonstrate this ability, and it did so.

There can be no question that management has the right to exercise discretion to determine whether the strikers qualified. That is a basic principle in sports labor relations, and it is embodied in the Collective Bargaining Agreement. The Company was required only to give a reasonable opportunity to practice. This means "such an opportunity as is necessary for the management to arrive at a firm opinion or evaluation as to the player's ability." (Company Brief, p. 25). The Company's long-standing practice was to bring players in ten days to two weeks before the start of the season to practice. Here the Grievants had twice that long to practice.

The Settlement Agreement provides for limited review of management's decision. The only question is one of the Company's truthfulness or good faith. The clause is very clear and concise. Many facts showed the Company's good faith, including its willingness to take chances on players. The Company willingly released replacements. The Company even offered Alberto employment as a judge in Ocala after deciding he no longer had the ability to play at Miami. The Union claim of Company bad faith "more readily suggests a highly paranoid attitude on their part." (Company Brief, p. 39).

The Union's attempt to prove through its immigration attorney that the Company failed to meet its obligations can only be described as "an unfortunate effort." (Company Brief, p. 43). The Company never agreed "to engage in heroic effort to get as many strikers as possible on the roster as quickly as possible." (Company Brief, p. 45). The Settlement Agreement does not say that. It only requires cooperative efforts, which the Company made here.

The Company has done everything it agreed to and acted in complete good faith. The Union, in turn, has grieved every single instance of disqualification. Apparently, "the Union has taken a blood oath to the strikers that it will take up the cudgels for any strikers who wants to come back and is denied." (Company Brief, p. 52). The Company has given its true reasons for declining to offer the three Grievants playing contracts, and the Arbitrator should deny the grievance.

B. The Union's Arguments

Management's action violated the Settlement Agreement. "The evidence is overwhelming that the evaluation process in 1990 was a sham, that the Company had decided in advance to disqualify the players it had disqualified in 1989, and that the claims to have reevaluated the players in 1990 were mere pretense." (Union Brief, p. 45). Garcia testified that the players were disqualified so they wouldn't be insulted, not because they could not play at the required level. No reasonable observer could believe that three top players could fail to compete with farm club players and amateurs. The Company also utterly failed to keep its promise to provide reasonable practice time.

Under the Settlement Agreement, returning players enjoyed a presumption of reinstatement. Management relies instead on subjective conclusory evaluations that are "to put it bluntly — a lie." (Union Brief p. 48). By comparison, Jorge Lasa's evaluations of the Grievants' abilities is persuasive. The Grievants were disqualified in 1990 because they had been disqualified in 1989. The testimony of Richard Donovan is particularly suspect. "Richard Donovan demonstrated. . .that he will say whatever he thinks will help his case, regardless of whether he has any memory of the issue at all." (Union Brief, p. 13).

The Company's disqualification of the Grievants was part of a pattern of bad faith obstruction. Donovan promised he was going to "chisel" the Union, and chisel he did. In particular, the Company's course of conduct concerning immigration matters is instructive. It did not apply for visas for months. It used every tactic to interfere with player rights. This was the very antithesis of good faith.

It is impossible to believe the Grievants were unable to compete at the required level. That level in Miami had dropped substantially since the strike, and this evidence is un rebutted. All management asserts is its unilateral and conclusory claims of good faith. It is not sufficient for management simply to say that it had good reasons. It was unable to prove them.

Based on all these reasons, the Arbitrator should grant the grievance. By way of remedy, the Arbitrator should direct the Company to offer each of the Grievants a full year contract at Miami at the players' former rate of pay and make them whole for lost wages and all their benefits.

V. DISCUSSION AND OPINION

This arbitration case is about a remarkable sport. Anyone who has experienced jai-alai will never forget "the spectacle," the intensity of the

players, and the speed of the pelota.⁴¹ The game had its origin in the Basque country of Spain. Most of the players come from Spain where it is the Basque region's "national" sport.

Some might say the "national sport" of labor relations is arbitration. It was played here by both parties with great intensity for five long days of hearing. The parties played every shot, rebounding off the "back wall" with finesse and power.

The parties have had a rocky start to their collective relationship. After a 2 1/2 year strike—undoubtedly one of the longest strikes in this country in the 1980s—and litigation before the National Labor Relations Board, the parties reached a Settlement Agreement and a Collective Bargaining Agreement. The Settlement Agreement provided that a striker would be offered a playing contract unless the player failed to "demonstrate the ability to play professional jai-alai at the level of professionalism, competence and competitiveness normally required by [the Company] at the fronton where he would be employed, after being given a reasonable opportunity to practice and do so." Section 6(d). The Company decided that Alberto, Zoqui and Juan failed to meet the Section 6(d) standard. The Union protests that decision in this grievance.

This was not a typical arbitration case in many ways. A normal collective bargaining agreement is a peace treaty of sorts that ends the threat of use (or the actual use) of economic power by labor and management. The parties' Settlement Agreement appears to be more like a cease-fire. The parties have not yet developed a collective "relationship." This case took five days to try because there was baggage left over from the long work stoppage.⁴² This case addressed the jobs of three fine men, but the hearing also showed a great deal about the parties themselves.

A. The Standard

In the first instance, the Arbitrator must decide what the parties intended in Section 6 of the Settlement Agreement. What standard should be used to evaluate management's disqualification of the three Grievants?

41. In a most unusual "plant visit," the Arbitrator and his spouse were asked by the parties to spend an evening at the jai alai fronton accompanied by management and union representatives.

42. Both counsel felt it necessary to testify. Lay witnesses, experienced by now in the ways of adversarial hearings, were cagey. They carefully selected their words, afraid to be tripped up by opposing counsel. Regrettably, animosity left over from the strike seemed to infuse the briefs. Adjectives flew with abandon. Whenever a hostile witness said something that favored the other side, he was reported by the other side as "candid" and "truthful"; otherwise, he was simply "lying." Ambiguities -- and there are many in a long hearing such as this one -- were all interpreted with a distinctly adversarial gloss.

It is common in organized professional sports for management to have broad discretion to make decisions about the professional competence and abilities of the players. J. Weistart and C. Lowell, *THE LAW OF SPORTS* 230-233 (1979); see also, Abrams, "Sports Labor Relations: The Arbitrator's Turn at Bat," 5 *ENTERTAINMENT & SPORTS LAW JOURNAL* 1 (1988). The parties' Collective Bargaining Agreement includes a typical clause reserving to management this broad prerogative. The Union argues that the same discretion should not apply to management's decision to disqualify returning strikers. In fact, it argues, a presumption should apply that all the players will return.⁴³ Management must prove the exception.

Management argues to the direct contrary, as might be expected. It agreed to present its evidence first at the hearing at the Arbitrator's request, but specifically reserved its argument that the Union bore the burden of persuasion. The Company reminds the Arbitrator that the Grievants were not discharged. They had been voluntarily inactive for a period of 2½ years. Since the Union wants to alter this status quo, it must bear the burden of convincing the Arbitrator.

In over fifteen years of arbitrating, the Arbitrator has not found burdens of proof and persuasion to be very helpful in resolving most disputes. Arbitrators sometimes justify their decisions based on a technical allocation of burdens, but this could be simply a post-hoc rationale. It is far more useful to talk in terms of the evidence in the record matched against the standard derived from the parties' contract. Here, for example, if the evidence shows noncompliance with Section 6, the grievance must be granted. If the evidence shows compliance, the grievance must be dismissed.

The Union argued at the hearing that it was the Arbitrator's responsibility to decide whether the Grievants demonstrated "the ability to play professional jai-alai at the level of professionalism, competence and competitiveness normally required by the" Miami fronton. Although it is flattering to think that the Arbitrator could actually do that, the parties did not select the Arbitrator because of his great knowledge of jai-alai.⁴⁴ More importantly, Section 6 read as a whole does not suggest such an expansive role for the parties' neutral.

The Union said it did not agree to any form of a "try-out" for the players, but the parties in Section 6(d) did use the word "demonstrate." A player "who fails to demonstrate the ability to play professional jai-alai at the level of

43. Some Union witnesses even suggested in their testimony that this presumption was irrebuttable.

44. By comparison, some collective bargaining agreements require that the arbitrator have particular skill in non-arbitration fields, for example, in engineering. The Agreement here is silent on the arbitrator's jai-alai skill.

professionalism, competence and competitiveness normally required by World at the fronton where he would be employed” need not be offered a contract. The player must show his ability. Who would then determine whether he “fails?”

It is apparent the parties contemplated that management would do the evaluation. The standard the Company was to apply was “fronton-specific.” This recognized that the level of play in Miami was substantially higher than in Fort Pierce or Ocala. The Union argues that the quality of play suffered greatly during the strike, but the clause refers to “the level of professionalism, competence and competitiveness normally required.” The strike was not normal times.

What then is the Arbitrator’s role in all of this? The parties stated expressly: “If World declines to offer any player a playing contract because of the provisions of . . . d. above, that player will be entitled to arbitration of his claim that this (these) was not (were not) the true reason(s) why he was not offered a contract.” The Arbitrator is to apply this rather curious “true reasons” formulation.

The Union says this language does not mean that the Arbitrator only examines management’s good faith. Something more is required by way of review. The Company argues that the Arbitrator is to determine whether the Company lied or told the truth when it concluded that the Grievants did not meet the Section 6(d) standard.

It would not be sufficient under this arbitration clause for management simply to state: “We decided not to offer a contract after evaluating the Grievants.” Something more is required. On the other hand, as noted above, the parties could not have contemplated that the Arbitrator would make an independent determination of skill and ability. Nor did they provide, as they could have, that management would have to establish “cause” or “just cause” for its action. Focusing particularly on the words the parties used in Section 6 of their Settlement Agreement as the best evidence of their intent, the appropriate standard can be stated as follows: The Arbitrator must decide

- (1) whether management articulated the reasons for its actions,
- (2) whether those reasons made sense, consistent with the sport’s context, and
- (3) whether they were applied by the Company in a rational manner to disqualify the Grievants.

B. Applying the Standard

Although both Richard Donovan and Frank Duffin observed and evaluated

the Grievants, the decision not to offer contracts to Alberto, Zoqui and Juan was based primarily upon the judgment of Alfredo Garcia. The Arbitrator was impressed with Mr. Garcia's sincerity and his understanding of the game drawn from a lifetime of jai-alai experience. It is possible, of course, that he was motivated by extraneous reasons, such as anti-unionism or a Company predetermination to disqualify certain players. That appears unlikely.⁴⁵ It is also possible that some Company officials might have been pleased not to offer contracts to the three Grievants. The fact remains that Garcia made a merit-based evaluation.⁴⁶

The Union says that the Company's 1990 disqualification of the Grievants was predetermined by its 1989 action. The players were entitled to a "fresh look." Garcia knew these players and how they were capable of performing on the court when the bright lights came on. In 1990, he could compare their ability and fitness with this baseline. At the core, however, the Company had to evaluate whether in October 1990 these men were capable of playing at the requisite level. The evidence shows it did just that.

Garcia explained in detail the Grievants' deficiencies in the professional skill and ability. He explained how these affected their ability to play at the professional level at the best fronton in the world, the Miami fronton. Alberto, a premier back court player, had lost his strength to throw the ball. Zoqui had lost his mobility, especially to the right side of the court. Juan had lost his physical conditioning, and the ball would control him.

It is true that the Grievants and Jorge Lasa disagreed with Garcia's evaluation, as you expect they would. The three Grievants thought they could play. If they did not think so, they would not have gone through this long and arduous arbitration process. The question, however, is not whether the parties disagreed about the Grievants' skill and ability. The question is whether management articulated the reasons for its actions, whether those reasons made sense consistent with the sport's context, and whether they were applied in a rational manner in disqualifying the Grievants. Considering the record as a whole, the Arbitrator concludes that management did explain its reasons, those reasons made sense in the jai-alai context, and they were applied in a rational manner to the Grievants.

While these three Grievants were not offered contracts, other strikers

45. There was evidence of some anti-union remarks by Garcia, which he flatly denied. The Union did not focus on this factor in its brief.

46. The record does not suggest any alternative reason why the Company would single out these three players for disqualification. Many striking players who practiced were offered contracts. Why would the Company not offer contracts to Alberto, Juan, and Zoqui if it was not because of their playing ability? They were not strike leaders or particularly difficult employees. They were senior professional jai-alai players, but the Company offered contracts to players who were just as old.

were. Garcia performed the same evaluation on them as he did on the Grievants. He seemed to care sincerely about his players. He also cared about the “spectacle” that he was putting on for the public. He wanted to protect the public’s money.

Threading through Garcia’s testimony was his concern about matters of pride. He could not recommend that these players—men of great personal stature and reputation—be required to play the early games where they could not keep up and would lose frequently to younger players. This might appear somewhat “corny” or outdated to some, but Garcia was sincere about his concern for the feelings of the players and how a blow to their pride would affect their level of play. The Union certainly disagrees with this conclusion and so do the Grievants, but it was a conclusion based on relevant factors in the jai-alai context.

The Union says that since Garcia considered matters of pride, then necessarily the decision was not based on “the ability to play professional jai-alai at the level of professionalism, competence and competitiveness normally required” at the Miami fronton. This clever argument ignores the context and the full import of Garcia’s testimony. Garcia was pained by the prospect of disqualifying formerly great players. He also knew how the players would take a “demotion” and he knew how it would affect their level of play. He knew what had already happened to their ability to play jai-alai. It was Garcia’s skill-and-ability determination that informed his final recommendation about whether the Company should offer the Grievants contracts. Considering the total profile of the three Grievants, he concluded that they could no longer play in Miami.

We must remember that Section 6(d) is not a mechanical standard. It allows for the exercise of judgment. Garcia exercised that judgment and, based upon it, gave his recommendations: The players failed to demonstrate the requisite ability under Section 6(d) of the Settlement Agreement.⁴⁷

The Union says that the strikers were not given a reasonable opportunity to practice. The evidence shows that the players were given more than four weeks to practice in October 1990, although some of that time was at the smaller amateur fronton in North Miami. Nothing in the Settlement Agreement required any specific amount of time, or indicated that older players would or should have more time. It is reasonable to assume that within that period of time the players could have demonstrated improvement in their level of play.

The evidence was in conflict about the frequency of management’s

47. Even using the Union’s approach of a presumption of reinstatement under Section 6, the record evidence rebuts the presumption. Management determined in fact (in “truth”) that the Grievants could not play at the required level.

observation of the players. At least during the last week in October when a decision had to be made before the beginning of the season, Garcia watched the players every day sitting right on the court (as Juan testified) "with his big fat cigar." The evidence does not establish that the opportunity to practice and demonstrate ability did not meet the contract standard.

The Union argues that the Company's Section 6 right to disqualify is limited by Section 9, which allows management to reduce a player's salary based on diminished ability. First of all, the Company points out that Section 9 allows a salary reduction based on a variety of factors including a comparison with the "salaries paid to other players of similar ability." It says the provision allowed a general readjustment of salaries to reflect decreased revenues. More importantly, it does not negate management's right to disqualify a player under Section 6.

Let's assume that a star feature game player's ability had diminished to a point where he could successfully play early and middle games. Management could offer him a contract and reduce his salary under Section 9. If the player could no longer successfully play up to the Miami fronton standard, management could disqualify him under Section 6. That is what this case is all about. The Union argues that the Company should have reduced the Grievants' salary. Instead, the Company disqualified them. It had the right to do so under Section 6.

The Union presents an alternative argument. Although it was sure the Arbitrator would determine that the Grievants met the Section 6(d) standard, it also says that the Company's general course of conduct in derogation of its promises in the Settlement Agreement indicates that its decision with regard to the Grievants was suspect. It relies on the testimony of attorney Ira Kurzban about Company foot-dragging on visas and other immigration matters.

Even assuming the Company failed to fulfill its obligations with regard to I.N.S. matters (an issue the Arbitrator need not, and does not, decide), that would not taint the disqualification of the Grievants. The Company convinced the Arbitrator that it made a separate and distinct merit determination of that matter.

Considering the entire, lengthy record in this case as a whole, the Arbitrator concludes that the Company declined to offer the playing contracts to Alberto, Zoqui and Juan based on its determination that they failed to demonstrate the ability to play professional jai-alai at the level of professionalism, competence and competitiveness normally required at the Miami fronton.

V. AWARD

Accordingly, the grievance is denied.

Roger I. Abrams

Arbitrator

Fort Lauderdale, Florida

September 3, 1991

