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## SYMPOSIUM: JOHN ROCKER

# OFF HIS ROCKER: SPORTS DISCIPLINE AND LABOR ARBITRATION

ROGER I. ABRAMS\*

In his now famous December 27, 1999, *Sports Illustrated* story, reporter Jeff Pearlman revealed to the world the ugly side of Atlanta's hyperactive relief pitcher, John Rocker. Rocker trashed immigrants ("I'm not a very big fan of foreigners. You can walk an entire block in Times Square and not hear anybody speaking English. Asians and Koreans and Vietnamese and Indians and Russians and Spanish people and everything up there. How the hell did they get in this country?"), persons of color ("In passing, he calls an overweight black teammate 'a fat monkey'") and other people he found distasteful. ("Imagine having to take the [Number] 7 train to the ballpark, looking like you're [riding through] Beirut next to some kid with purple hair next to some queer with AIDS right next to some dude who just got out of jail for the fourth time right next to some 20-year-old mom with four kids.") It was an incendiary performance by someone who had been described as "a one-man psycho circus," and it brewed a national firestorm.

Major League Baseball Commissioner Bud Selig suspended the "Mouth of the South," saying that his insensitive and inappropriate remarks "offended practically every element of society."<sup>1</sup> Selig barred Rocker from spring training and playing the first month of the 2000 season and fined him \$20,000.00. The Commissioner explained:

The terrible example set by Mr. Rocker is not what our great game is about and, in fact, is a profound breach of the social compact we hold in such high regard. Major League Baseball takes seriously its role as an American institution and the important social responsibility that goes with it. We will not dodge our re-

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1. Ross Newman, *Now, Baseball Has Spoken; Commissioner Suspends Rocker Until May 1 and Fines Him \$20,000 for Racial and Ethnic Comments*, L.A. TIMES, Feb. 1, 2000, at D1.

sponsibility. Mr. Rocker should understand that his remarks . . . brought dishonor to himself, his team and baseball.<sup>2</sup>

Everyone seemed to have an opinion about Rocker's tirade. He did have his advocates. Undoubtedly, some agreed with Rocker's sentiments about multicultural America. Others thought Rocker had free speech rights under the First Amendment to the Constitution. (Of course, the Constitution constrains action of the government and, while baseball may be the national pastime, it is not an arm of the government). Braves owner Ted Turner excused his star closer: "He is just a kid. I think he was off his rocker when he said those things."<sup>3</sup> Most others simply found his words despicable.

The Major League Baseball Players Association vowed to contest the Commissioner's penalty, as was its right under the terms of the collective bargaining agreement between Major League Baseball and the Association.<sup>4</sup> Gene Orza, the Players Association's veteran Associate General Counsel, stated that even offensive speech did not justify the Commissioner's discipline: "That, coupled with the magnitude of the penalty . . . makes us optimistic about the outcome of the appeal."<sup>5</sup>

Orza had good reason to be optimistic. I was not surprised when baseball's new permanent arbitrator, Shaym Das, reduced Rocker's disciplinary penalty. Das, a highly respected neutral from Pittsburgh and a longtime member of the National Academy of Arbitrators, ruled that Rocker could join the Braves for spring training. He slashed Rocker's fine to \$500.00 and reduced his in-season suspension to two weeks.

Almost a year later, arbitrator Das has not issued a formal opinion to accompany his award, but we can surmise what happened at the hearing and the reasons for Das' decision. At the arbitration hearing, the Commissioner's Office bore the burden of proving "just cause" for its discipline.<sup>6</sup> Although Rocker's prominence in a major professional sport made his remarks and the resulting discipline national news, his case was not unlike hundreds of other discipline cases heard by labor arbitrators every year.

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2. *Id.*

3. Frank Hyland, *Turner Goes to Bat for Rocker His First Comments on the Controversy: 'Let's Give Him Another Chance,'* ATL. J. & CON., Jan. 20, 2000, at A1.

4. BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, art. XI (B), (E) (1997).

5. Carroll Rogers, *Rocker Vows to Fight Suspension,* ATL. J. & CON., Feb. 1, 2000, at A1.

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

John Rocker and his fellow Major League ballplayers are employees of their respective clubs. Although they are well paid at least at the contract minimum of \$200,000.00 a season and as much as \$25 million or more a season for a few prized superstars,<sup>7</sup> they are covered by the same protections, and subject to the same uncertainties, as factory workers. Like all employees, they have federally-protected rights to organize a union for purposes of collective bargaining.

Major League baseball players are a talented and fortunate group, having beaten the 14:1 odds that face every minor leaguer against making it to "The Show." They can be "released"-what rank-and-file workers would call a discharge - at management's discretion when they can no longer play expert baseball, subject only to pay guarantees included in their individual player contracts or in the protective terms of the collective bargaining agreement.

Baseball management and the Players Association select a permanent arbitrator to adjudicate disputes that arise during the term of the agreement.<sup>8</sup> He serves at the pleasure of the parties and can be fired by either side. Eventually every arbitrator is replaced, making "permanent" only a state of mind rather than an accurate description of his status. During his service, the permanent arbitrator is expected to apply the generally understood principles of the common law of the collective bargaining agreement much as any appointed labor neutral.<sup>9</sup>

Had John Rocker disparaged or verbally abused his manager or coaches in the clubhouse, a fairly easy case could be made that his aspersions would tend to undermine the authority of his supervisors.<sup>10</sup> In fact, his intemperate language might even have been considered "fighting words" worthy of serious discipline.<sup>11</sup> Baseball players must conduct

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7. ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* (2000); Thomas Hill, *A-Rod Tosses In A-Wrench: Texas Deal for \$252M Sends Shock to System*, N.Y. DAILY NEWS, Dec. 12, 2000, at 84.

8. *See generally*, ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 119-123 (1998).

9. Carlton J. Snow, *Contract Interpretation*, in *THE COMMON LAW OF THE WORKPLACE*, § 2.1 (Theodore J. St. Antoine ed., 1998).

10. *Compare* Coca-Cola Bottling Co. v. Soft Drink Mineral Water Workers Local 303, 79 Lab. Arb. Rep. (BNA) 1122, 1127-29 (1982) (Garnholz, Arb.) (Discipline upheld), *with* Douglas & Lomason Co. v. Aluminum Brick & Glass Workers Internat'l Union, Local 212, 90 Lab. Arb. Rep. (BNA) 1302, 1304-05 (1988) (Odom, Jr., Arb.) (Discipline set aside), *and* Warren Assemblies, Inc. v. UAW Local 155, 92 Lab. Arb. Rep. (BNA) 521, 524-25 (1989) (Roumell, Jr., Arb.) (Discipline set aside).

11. *Compare* IRS v. Nat'l Treas. Employees Union, 113 Lab. Arb. Rep. (BNA) 523, 526 (1999) (Abrams, Arb.) (Discipline upheld) *with* Florida State Univ. v. AFSCME Council 79, 114 Lab. Arb. Rep. (BNA) 129, 131-32 (2000) (Abrams, Arb.) (Discipline set aside).

themselves in an appropriate manner toward their employer's representatives.

Rocker's ill-considered words were said away from the workplace, although one of his racist remarks concerned a teammate. In general, events away from the workplace are none of an employer's business, unless the employer can prove convincingly how the conduct would affect the employer's enterprise.<sup>12</sup> The Union undoubtedly argued at the arbitration hearing that what this player said on his own time, away from the workplace, simply did not satisfy this high standard of proof.

In some instances, however, employee off-premises activities will lead to sustainable discipline. For example, an employee convicted of a notorious crime may bring harm to an employer's public image and thus affect a business' good will with actual and potential customers.<sup>13</sup> An employee's legal, but disreputable, off-duty activities, for example, serving as the local commandant of a racist organization, may make it difficult for fellow employees to work with him productively or may result in a loss of business.<sup>14</sup> Arbitrators have ruled that misbehavior away from work can implicate a legitimate employer interest justifying discipline or even discharge.

In this instance, it was not Rocker's employer that disciplined him. Rather, it was the Commissioner of Baseball, acting on behalf of the two leagues of clubs, who exercised his disciplinary power. The Braves could have, but did not, choose to suspend their star reliever.<sup>15</sup>

At the Rocker hearing, the Commissioner's Office had to prove how the business of baseball was affected by Rocker's incendiary remarks. Here is how that could have been shown: 1) Baseball is a commercial amusement dependent on patrons who have choices in spending their entertainment dollars; 2) Scandals are bad for the baseball business un-

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12. Compare *Proctor & Gamble Co. v. Pace Local 47*, 114 Lab. Arb. Rep. (BNA) 1185, 1187-89 (2000) (Allen, Jr., Arb.) (Nexus established and discipline upheld) with *Hill Air Force Base v. American Fed'n of Gov't Employees, Local 1592*, 114 Lab. Arb. Rep. (BNA) 1670, 1673-74 (2000) (Staudohar, Arb.) (Discipline set aside).

13. Compare *The Kroger Co. v. General Drivers, Warehousemen, and Helpers, Local 89*, 108 Lab. Arb. Rep. (BNA) 229, 231-35 (1997) (Froct, Arb.) (Discharge sustained), with *DOT v. Nat'l Air Traffic Controllers Assoc.*, 108 Lab. Arb. Rep. (BNA) 857, 862-65 (1997) (Sergent, Arb.) (Suspension set aside).

14. *Baltimore Transit Co. v. Amalgamated Transit Union, Div. 1300*, 47 Lab. Arb. Rep. (BNA) 62, 64-67 (1966) (Duff, Arb.) (Discharge upheld of bus driver who was Grand Dragon of the Klu Klux Klan).

15. One would hope that the club's failure to act was not another example of its insensitivity towards minorities. The obnoxious "tomahawk chop" and the chanting of the Atlanta crowd must be enervating to historically abused members of the First Nation.

less they involve lovable rogues like Babe Ruth; 3) John Rocker does not yet fit into that Ruthian category.

Major League Baseball says it is trying hard to diversify management. The game is played by persons of color from many countries, but managed on the field, in large measure, by white former ballplayers. By comparison, professional basketball has discovered a wealth of coaching talent in the pool of retired players of color. Condoning racist remarks reported in a major sports journal would prove that baseball's effort is a sham. The Commissioner could ill-afford inaction.

At the arbitration hearing, the Players Association undoubtedly pressed its claim that the Commissioner's penalty was unprecedented and draconian. Although the Commissioner had imposed stiffer suspensions on miscreant owners, such as Cincinnati's Marge Schott, for their ill-chosen words, Rocker's was the harshest *player* discipline for off-work behavior unconnected to misconduct such as substance abuse and gambling.

An unprecedented suspension is troubling, however, only if the discipline is unwarranted.<sup>16</sup> Rocker's verbal performance was exceptional. Of course, Ty Cobb was a notorious racist during a time when the country accepted such sentiments as natural and appropriate. Little more than a half-century ago, blacks were still banned from the Major Leagues. No one wants to return to that disgraceful era of our National Game. Bud Selig knew that the future economics of the enterprise depended on enhancing its attractiveness to the fastest growing sector in the population - the minority fans Rocker abused.

There was at least one obvious error in the Commissioner's sanctions, however. Under the then existing powers of the Commissioner, a player could only be fined \$500.00.<sup>17</sup> Under a proposed revision of the Major League Agreement then under consideration (and now adopted), a much larger fine is permissible, but at the time in question, the cap limited the Commissioner's Office's power to fine. There was no way the arbitrator could uphold a fine beyond the Commissioner's power.

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16. *Noranda Aluminum, Inc. v. United Steelworkers of America, Local 7686*, 94 Lab. Arb. Rep. (BNA) 690, 694 (1990) (Pratte, Arb.) (“[A]lthough the Arbitrator does not want to appear flippant, there is a first time for everything. If the situation merits discharge, the absence of prior discharge will not save the Grievant.”)

17. Major League Agreement, art. I, § 3, provides: “In the case of conduct by . . . players which is deemed by the Commissioner not to be in the best interests of Baseball, punitive action by the Commissioner for each offense may include one or more of the following: . . . (e) a fine . . . not to exceed Five Hundred Dollars (\$500) in the case of a player.”

One possible argument the Union might have made in arbitration was that Rocker was obliged to make himself available to the press. It was something baseball management wanted him to do. He had to talk with the *Sports Illustrated* reporter. (Incidentally, both reporter Pearlman and pitcher Rocker have the same employers. Time Warner owns both the Atlanta Braves and *Sports Illustrated*). How could the Commissioner discipline him for performing what was, in essence, a contract obligation? Of course, Rocker's contract did not require him to malign every minority group in the process of talking with a reporter. The contents of his egregious *Sports Illustrated* interview seemed to warrant some discipline.

Parties to a collective bargaining agreement normally intend that management will follow progressive discipline in response to employee misconduct, imposing increasing penalties for repeated offenses in an effort to rehabilitate an employee and deter future misconduct.<sup>18</sup> Under the contractual "just cause" standard, employers must use discipline to guide an employee toward improved performance. An employer has no legitimate *parens patriae* interest in punishing a misbehaving worker.

For a relatively minor employee offense - poor work performance or tardiness, for example - an employer must first warn an employee of future disciplinary consequences if a misstep is repeated. Then, if necessary, the employer may impose more serious discipline - perhaps a suspension - in an effort to rehabilitate the worker. In the absence of proof of a cardinal sin - striking a supervisor, for example - an employer must try to teach a worker to do better and not repeat his misconduct. Especially in a tight labor market, it is to management's advantage to try to salvage a trained and experienced worker. In the process, an employer can seek to deter other employees from following the example of the disciplined employee. Ultimately, despite progressive discipline, if an employee proves incorrigible, dismissal would be warranted.<sup>19</sup>

The Commissioner disciplined John Rocker to teach him the limits of his "lip." Other ballplayers certainly took notice of the suspension. They would naturally seek to avoid becoming the next grievant. The question for the arbitrator was whether the penalty was more severe

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18. O'Brien Mem'l Hosp. v. American Fed'n of State, County and Mun. Employees, Local 1252, 114 Lab. Arb. Rep. (BNA) 1601, 1603-08 (2000) (Fullmer, Arb.); Southwestern Bell Tel. Co. v. Communications Workers of America, 114 Lab. Arb. Rep. (BNA) 1131, 1134-35 (2000) (Fowler, Arb.).

19. See generally, Stratosphere Tower & Casino v. Culinary Workers Union, Local 226, 114 Lab. Arb. Rep. (BNA) 188 (1999) (Bickner, Arb.).

than necessary to accomplish these legitimate purposes of rehabilitation<sup>20</sup> and deterrence.<sup>21</sup>

A disciplinary suspension in a typical industrial plant keeps an employee from earning his regular pay. Rocker's suspension, however, potentially had a more serious impact on his ability to earn his "regular pay" in the future. Missing spring training can affect a pitcher's performance for an entire season and beyond. While Rocker was allowed to get in shape while serving his in-season suspension, he would be pitching against minor league competition, likely inadequate to sharpen his pitching repertoire. In addition, one bad season for a Major League player could end his career.

Arbitrator Das determined that the extent of discipline imposed by the Commissioner did not comport with the basic fairness due all employees. It was unduly harsh. In this instance, the Atlanta closer was "saved" by baseball's ultimate umpire, the independent arbitrator.

On the other hand, Das upheld the Commissioner's basic right, in appropriate circumstances, to discipline players for "pure speech" off the field that affects the business of baseball. Commissioner Selig, of course, wanted more. He commented that the ruling "completely ignores the sensibilities of those groups [of people] maligned by Mr. Rocker and disregards his position as a role model [for children]."<sup>22</sup> The Union was also disappointed that Das did not "accept all of our arguments."<sup>23</sup>

It is not the job of a labor arbitrator to make both sides happy. Based on the evidence presented at the two-day arbitration hearing, the arbitrator did his job by interpreting the parties' agreement and reviewing the discipline imposed by the Commissioner. His conclusion - that the power to suspend and fine should be upheld, but the extent of discipline reduced - is well within the range of awards normally issued by labor arbitrators.

Rocker had been taught a lesson, and he has made some half-hearted apologies, but it is uncertain whether he will be able to avoid future missteps. He still had to face a jury of his peers, his fellow ballplayers on the Atlanta club and on other clubs. His 2000 campaign had its ups and

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20. *Montague Mach. Co. v. Int'l Assoc. of Machinists and Aerospace Workers*, Lodge 1803, 78 Lab. Arb. Rep. (BNA) 172, 174-76 (1982) (Bornstein, Arb.).

21. *Soc. Sec. Admin. v. American Fed'n of Gov't Employees*, 79 Lab. Arb. Rep. (BNA) 449, 454-59 (1982) (Mittleman, Arb.).

22. Ross Newhan, *Rocker's Penalty Trimmed Severely; Baseball Pitcher Can Report to Braves' Camp Today and Will Have to Sit Out 14 Days of Regular Season*, L.A. TIMES, Mar. 2, 2000, at D1.

23. *Id.*

downs. He balked when the Braves sent him down to their AAA Richmond club in June for a few days, but he returned to the majors in mid-season form. He appeared in 59 games for the Braves, amassing 24 saves and a 2.89 earned run average, an excellent performance. He has not lived down his reputation, however. At the end of the season, website CNN.com named him its premier "Turkey of the Year."

The ultimate judges in Rocker's case, of course, will be the fans. The Atlanta faithful welcomed him back to the mound with unqualified cheering, perhaps a sad reaffirmation of our national acceptance of racism and our American commitment to winning at all costs. Rocker seems to have persevered, but has he changed? Only time will tell.