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IN THE MATTER OF ARBITRATION BETWEEN THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION AND THE COMMISSIONER OF MAJOR LEAGUE BASEBALL (JOHN ROCKER), DECISION OF ARBITRATION PANEL

THE MAJOR LEAGUE BASEBALL ARBITRATION PANEL

In the Matter of Arbitration Between	)	Panel Decision No. 104
THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION	)	Grievance No. 2000-3 (John Rocker)
and	)	
THE COMMISSIONER OF MAJOR LEAGUE BASEBALL	)	

Arbitration Panel

Robert D. Manfred, Jr., Office of the Commissioner's Member
Donald M. Fehr, Association's Member
Shyam Das, Chairman

Appearances

For the Players Association:

Eugene D. Orza, Esq.
Steven A. Fehr, Esq.

For the Commissioner:

Proskauer Rose LLP
By: Howard L. Ganz, Esq.
Neil H. Abramson, Esq.
Daniel R. Halem, Esq.

INTRODUCTION

On January 31, 2000, Allan H. "Bud" Selig, the Commissioner of Baseball, imposed discipline on John Rocker, a pitcher for the Atlanta Braves, for having engaged in conduct not in the best interests of baseball. Selig specifically referred to "certain profoundly insensitive and arguably racist statements" made by Rocker that were reported in the December 27, 1999 issue of *Sports Illustrated*. Selig charged that: "Your comments in Sports Illustrated have harmed your reputation, have damaged the image and goodwill of Major League Baseball and the Atlanta Braves and have caused various other harms to the Club and the game."

The Association immediately filed a Notice of Grievance protesting that the discipline was without just cause within the meaning of Article XII(A) of the Basic Agreement. The case was heard in arbitration by the Panel on February 9 and 10, 2000. Thereafter, the parties filed post-hearing briefs and the record was closed on February 22.

On March 1, 2000, the Chairman of the Panel issued the following Award:

AWARD

1. The decision of Commissioner Allan H. Selig to suspend John Rocker from Major and Minor League Spring Training in 2000, to suspend him, with pay, from Major League Baseball from opening day until May 1, 2000, to require that he make a $20,000.00 contribution to the NAACP or a similar organization dedicated to the goals of diversity, and to participate in a program of diversity training prior to his return as an active player, was without just cause.

2. Said suspension from Spring Training shall be rescinded. A suspension, with pay, from Major League Baseball from opening day until April 17 is sustained. A requirement of a $500.00 charitable contribution is sustained, as is a requirement that Rocker participate in an in-season program of diversity training, as established by Major League Baseball's Employee Assistance Program.

3. The Panel will retain jurisdiction in the event there is disagreement between the Parties as to the diversity training, or disputes as to the implementation or interpretation thereof.

4. A formal opinion will follow.

This Opinion sets forth the reasoning in support of the Award.

BACKGROUND

John Rocker, who now is 25 years old, began his minor league career in the Braves' organization in 1994. During the 1998 season he was called up to the Braves' Major League team as a relief pitcher. In 1999 he became the Braves' closer. His pitching performance during the 1999 regular season and the post-season was outstanding.

During the 1999 season, a mutual and growing antagonism developed between Rocker and the fans at Shea Stadium, the home of the New York Mets, Atlanta's principal rival in the National League East. Mets' fans used abusive and profane language and gestures to taunt Rocker, and he responded in kind. Some, according to Rocker, also threw various objects at him. The ongoing feud received widespread coverage in the media. The situation was exacerbated by critical comments in the press about Rocker and comments he made to the press attacking Mets' fans.

The relationship between Rocker and the Mets' fans intensified after the Braves swept the Mets in a late September

series at Shea. The two teams met again in the National League Championship Series. In the third game -- the first in that series to be played at Shea -- the Braves won 1-0, and Rocker saved the game. Following the game, when Rocker approached the Braves' dugout after doing some interviews, a large group of hostile Mets' fans threatened to surge down onto the field from behind the Braves' dugout. The fans verbally attacked Rocker and he responded in kind. MLB Director of Security Kevin Hallinan was present, and at the hearing he described the situation as being as bad as any he had seen in his fourteen years in baseball. In his view, only quick and effective action by the New York Police Department prevented the fans from physically assaulting Rocker.

Before the start of the fourth game of the NLCS, Hallinan arranged a meeting with Rocker, Braves' Manager Bobby Cox and Braves' General Manager John Schuerholz in which Hallinan expressed his security concerns and asked Rocker to show restraint. Rocker expressed his willingness to do so, and he testified that he did "tone it down" after that meeting. Nonetheless, when Rocker went out onto the field, Hallinan subsequently reported:

> His appearance on the field triggered an immediate reaction by the Mets fans who loudly booed, and greeted him with obscenities and verbal abuse. Rocker responded by sticking out his tongue and yelling obscenities at the fans. He departed for the bullpen where he continued to engage in a verbal exchange of hostilities with New York Mets fans.

There were no further meetings or discussions with Rocker regarding his interaction with New York fans, either during the remainder of the NLCS with the Mets or during the World Series, which the Braves lost to the Yankees in four straight games. Rocker testified that he was hit with a battery at Yankee Stadium during the third game of the World Series, but there were no other major incidents with New York fans.

On December 12, 1999, Rocker was interviewed by a reporter for *Sports Illustrated*. Rocker had agreed to the interview ahead of time, to obtain publicity, and it was conducted in Atlanta where he resides. The reporter spent the better part of the day driving around with Rocker in his vehicle, as he went about his business. He recorded Rocker's comments. Rocker testified that he asked the reporter to keep

certain remarks off the record and, with one exception, the reporter complied with his requests.

On December 22, 1999, the *Sports Illustrated* article first appeared on the magazine's website, and it later appeared in print. It landed like a bombshell, creating a huge nation-wide furor, which had not abated by the time of the arbitration hearing in early February 2000. The statements which triggered the Commissioner's decision to discipline Rocker are contained in the following excerpts from the article, and Rocker does not dispute they accurately reflect what he said:

> ... "So many dumb asses don't know how to drive in this town," he says.... "They turn from the wrong lane. They go 20 miles per hour. It makes me want -- Look! Look at this idiot! I guarantee you she's a Japanese woman." A Beige Toyota is jerking from lane to lane. The woman at the wheel is white. "How bad are Asian women at driving?"
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> JOHN ROCKER has opinions, and there's no way to sugarcoat them. They are politically incorrect, to say the least, and he likes to express them.
>
> * On ever playing for a New York team: "I would retire first. It's the most hectic, nerve-racking city. 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's depressing."
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> * On New York City itself: "The biggest thing I don't like about New York are the foreigners. 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?"
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> * * *
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> ... In passing, he calls an overweight black teammate "a fat monkey." Asked if he feels any bond with New York Knicks guard Latrell Sprewell, notorious for choking coach P.J. Carlesimo two years ago, Rocker lets out a snarl of disgust. "That guy should've been arrested, and instead he's playing basketball," he says. "Why do you think that is? Do you think if he was Keith Van Horn -- if he was white -- they'd let him back? No way." Rocker is rarely tongue-tied when it comes to bashing those of a race or sexual orientation different from his. "I'm not a racist or prejudiced person," he says with apparent conviction. "But certain people bother me."

Immediately after publication of the article, the Braves issued a statement disassociating the Club from the

viewpoints attributed to Rocker. In consultation with his agents, Rocker issued a public apology, in which he stated:

> While I have evidenced strong competitive feelings about New York fans in the past, and take responsibility for things I have said publicly, including the Sports Illustrated article, I recognize that I have gone way too far in my competitive zeal. I want everybody to understand that my emotions fuel my competitive desire. They are a source of energy for me, however I have let my emotions get the best of my judgment and have said things which, when read with cold, hard logic, are unacceptable to me and to my country. Even though it might appear otherwise from what I've said, I am not a racist. I should not have said what I did because it is not what I believe in my heart.
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> I was angry and basically firing back at the people of New York. It is time to stop this process.
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> I fully intend to learn from this experience. Everyone makes mistakes and I hope everyone can put this aside and begin with a fresh start in the 2000 season.
>
> I am contrite.

Commissioner Selig testified that when he read the article he was "stunned" and "shocked". After deliberating with other MLB officials and conferring with the Braves' management,

he made the decision to impose the discipline challenged in this grievance. He testified that he based his decision on several factors, including his belief that "all of us in Major League Baseball have a social responsibility". As he stated in his news release announcing the discipline:

> Major League Baseball takes seriously its role as an American institution and the important social responsibility that goes with it, said Selig. We will not dodge our responsibility. Mr. Rocker should understand that his remarks offended practically every element of society and brought dishonor to himself, the Atlanta Braves and Major League Baseball.
>
> 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.

The Commissioner also took into account security concerns and reports from the Atlanta Club that the controversy spawned by Rocker's remarks was affecting its business and the community. On January 5, 2000 the Atlanta City Council unanimously adopted a resolution condemning Rocker's remarks. A coalition of community organizations, many representing groups

that were maligned by Rocker's remarks, as well as other individuals (including Jesse Jackson) and groups, demanded swift and decisive action by the Braves and the Commissioner. The Commissioner received literally thousands of communications condemning and, in some instances, defending Rocker's remarks. Many of these communications, while disapproving of Rocker's words, opposed disciplining him on free speech grounds. The Commissioner stressed that the controversy engendered by Rocker's remarks was all that "people want to talk about" with him, and was detracting from his efforts to "move baseball forward".

COMMISSIONER'S POSITION

The Commissioner contends that his decision to discipline Rocker for his hate speech is entitled to great deference, citing *Nixon*, No. 84 (Nicolau) and *Howe*, No. 95 (Nicolau). The Commissioner's decision in this case was a fair and reasonable decision by the individual charged with protecting the best interests of baseball and the safety and security of its fans and players. Even if reviewed *de novo*, the

Commissioner's decision should be upheld because Rocker's conduct: (1) violated his obligations under Paragraph 3(a) of the Uniform Player's Contract (UPC); (2) was contrary to the best interests of baseball and, thus, in violation of Major League Rule (MLR) 21(f); and, independently of those two provisions, (3) constituted "just cause" under traditional principles of arbitral jurisprudence.

The Commissioner based his decision to discipline Rocker, in part, on his failure to conform to the "high standards of personal conduct, fair play and good sportsmanship" that he agreed to adhere to in Paragraph 3(a) of his UPC. The Commissioner rejects the Association's contention that "conduct" excludes "speech", and asserts that courts and arbitrators routinely have held that offensive speech constitutes "conduct" within the meaning of provisions similar to that of Paragraph 3(a). The Commissioner insists that Rocker's offensive, racist and bigoted comments clearly violated the "high standards" of conduct all Players have agreed to follow, as Rocker himself essentially acknowledged in his December 22, 1999 press release after the interview was published.

The Commissioner maintains that terms of the UPC provide that Rocker remained under contract to the Braves for the entire calendar year of 1999. While the playing obligations of the Player during that period normally end upon conclusion of the World Series, the UPC imposes numerous nonplaying obligations on the Player that continue in the off-season, including those in Paragraphs 3(c) (Pictures and Public Appearances), 5(b) (Other Sports) and 10(a) (Renewal). Players in Rocker's circumstance -- with less than three years of service -- consistently have acted as though under contract to the Club for which they were last employed during the short hiatus period between the end of the playing season and the execution of a UPC for the year covering the next playing season. Moreover, Rocker considered himself to be a Player on the Braves' Club after the end of the playing season.

The Commissioner also asserts that he acted under his authority to protect the "best interests of baseball, as he is charged to do in Article 1, Section 2 of the Major League Agreement (MLA). MLR 21(f), which was binding on Rocker by virtue of his UPC, states:

> OTHER MISCONDUCT. Nothing herein contained shall be construed as exclusively defining or otherwise limiting acts, transactions, practices or conduct not to be in the best interests of Baseball; and any and all other acts, transactions, practices or conduct not to be in the best interests of Baseball are prohibited and shall be subject to such penalties, including permanent ineligibility, as the facts in the particular case may warrant.

Even if Rocker was not subject to the terms of the UPC, he was still subject to the Commissioner's best interests powers. Rule 21(f), like other Major League Rules and rules and regulations of the National and American Leagues, applies to Rocker by virtue of the Basic Agreement (Article XVIII). Moreover, the Association filed this grievance pursuant to the dispute resolution procedure in the Basic Agreement alleging a violation of the just cause provisions, thereby essentially conceding that the Basic Agreement continues to apply to Rocker.

The Commissioner insists there is no question that the profoundly insensitive and racist statements made by Rocker constituted conduct that is not in the best interests of baseball. In particular, the Commissioner asserts that:

(i) Rocker's irresponsible hate speech denigrated and insulted a broad swath of ethnic and minority groups that comprise a large percentage of baseball players and its fan base and outraged thousands (if not tens of thousands) of citizens, and community and civic leaders;

(ii) As evidenced by the thousands of letters and e-mails received by the Braves and officials of Major League Baseball, because Rocker is employed as a professional baseball player, his comments in a national sports magazine featuring a picture of him in uniform reasonably were associated with those organizations and the institution of baseball, and thereby destroyed many years' worth of goodwill and positive community relations of the Club and MLB;

(iii) Rocker's comments undermine the important institutional efforts of MLB and the Braves to increase the hiring of minorities and to nurture or promote minority business enterprises as a vehicle for achieving a diverse fan base;

(iv) Rocker's comments have resulted in damage to the economic business of the Braves and, very likely, Major League Baseball;

(v) Rocker's comments have raised serious security considerations and have jeopardized the ability of the Braves and Major League Baseball to ensure the security of the fans, players and, of

course, Rocker himself. At a minimum, Rocker's comments will require a significant expenditure of Club and MLB resources to ensure the safety of those on the field and in the stands at every Major League ballpark during the season;

(vi) Rocker's comments damaged relations between him and his teammates, and the Braves' coaching staff. To make matters even worse, this hostility within the Club was in full public view;

(vii) Rocker's comments engendered needless controversy at a time when the baseball-watching public could have been and should be focused on the positive contributions the Braves and all other Major League Clubs have made and are making in the communities they serve.

The Commissioner maintains that his best interests powers are exceedingly broad, as recognized in *Wilson/Martin*, No. 54 (Bloch), and that there is nothing in MLB's governing documents, including Article 1, Section 2 of the MLA and MLR 21(f), which states or implies that speech is not subject to discipline. The Association's references to provisions contained in collective bargaining agreements or governing documents of other sports have no probative value in determining

the Commissioner's authority to discipline players pursuant to his best interests powers. Moreover, close analysis of the documents from other sports demonstrates that speech generally is considered a form of "conduct" and that when the parties intended to limit the penalty that may be imposed for speech-related conduct they did so expressly. MLB's governing documents impose no such limitation and do not differentiate between speech-related conduct and other types of conduct.

The Commissioner contends that, even in the absence of a violation of Paragraph 3(a) of the UPC or the best interests provisions, there was just cause for the discipline imposed. It is firmly established that an employer properly may discipline an employee for inappropriate speech and, in particular, for speech that evidences bias, bigotry or insidious stereotyping. Moreover, Rocker's misconduct was aggravated by the fact that he made his offensive comments in an interview with a reporter from the premier national sports magazine, knowing that the resulting story would be read by millions of sports fans, as well as by his teammates and management of the Braves and MLB.

The Commissioner also argues that Rocker's comments are not properly considered "off-duty" conduct, because they clearly were work-related and were intended to increase his publicity as a ballplayer. But even if they are considered entirely "off-duty", an employer has the right to properly discipline an employee for off-duty misconduct that has a sufficient nexus with the workplace. In this case, such nexus clearly is established. Rocker's comments: (1) harmed the Braves' and MLB's reputation and the product of professional baseball; (2) interfered with the operations of the Braves and MLB by creating serious security and safety risks to Rocker, other Players and fans who attend Braves games at home and on the road; (3) undermined both the Braves' and MLB's minority and community outreach initiatives designed to increase fan diversity; and (4) interfered with Rocker's relationships with other Players on the Braves and the Club's coaching staff.

The Commissioner asserts that the penalty imposed on Rocker was well within his discretion in protecting the interests of baseball. Rocker's conduct truly is unprecedented in the history of sports in terms of its vileness and the public condemnation that it precipitated. In essence, Rocker's

suspension constitutes a 24-game suspension, without loss of pay or service credit, since he will be able to participate in the equivalent of spring training during the period from April 3 to 30. In other industries, arbitrators have upheld significantly more severe discipline, including discharge, for speech-related conduct that had a less widespread ana detrimental impact on the employer's business and reputation. Within baseball, Marge Schott, the former owner of the Cincinnati Reds, was suspended from baseball for one year for making racist and anti-Semitic remarks. Moreover, this penalty is lenient compared to the discipline imposed by the Commissioner for drug-related misconduct which, while it tarnishes the game of baseball, is pure off-duty conduct that does not directly denigrate and offend large segments of the population, create security issues or cause economic injury equal to that caused by Rocker's hate speech. Suspensions of up to 119 days with loss of pay have been upheld by arbitrators in such cases as *Howe*, No. 95 (Nicolau), *Wilson/Martin*, No. 54 (Bloch), *Nixon*, No. 84 (Nicolau) and *Hoyt*, No. 74 (Nicolau).

The Commissioner also insists that he had a rational basis to bar Rocker from regular spring training. This provided

a "cooling off" period deemed advisable by MLB's security chief and avoided the heightened security risks posed by Rocker's presence at spring training facilities, which are smaller and provide less extensive security than is available in Major League stadiums. Furthermore, Rocker will be provided adequate opportunity to participate in extended spring training during April.

Finally, the Commissioner argues that there is no merit to the Association's contention that Rocker was not on notice that his comments could result in discipline. His UPC required that he maintain "high standards of personal conduct". MLR 21(f) gives the Commissioner authority to discipline Players who engage in conduct that is not in the best interests of baseball. Moreover, Rocker himself acknowledged that his remarks were "unacceptable to the country" and sought to convince the public, his teammates and the Commissioner that he is not a racist or bigot. In any case, under general arbitral principles, specific notice is not required in cases involving conduct that is "clearly wrong", such as that involved in this case.

ASSOCIATION POSITION

Initially, the Association contends that the Commissioner was not empowered to impose discipline in this case under MLR 21(f) because Rocker was not under contract to the Braves either at the time of his interview or its publication. By its terms, the UPC runs from the opening of spring training until the close of the World Series. Only in those limited instances where the UPC specifically expands the period of the contract, or the player otherwise has agreed to such an expansion, is the player obliged to fulfill its mandates outside that specified period of employment.

Even assuming *arguendo* that Rocker's status made him susceptible to discipline by the Commissioner, the Association insists, he could not be disciplined for speech. Neither Paragraph 3(a) of the UPC nor MLR 21(f), the two provisions upon which the Commissioner testified he relied, justifies a penalty for a magazine interview. Paragraph 3(a) refers only to the period when the Player is playing for the Club, and it makes no reference of any kind of speech. MLR 21(f) is the bedrock anti-gambling provision. It does not mention speech and it never has

been relied on to interdict speech. The Association argues that pure speech is different from "conduct" subject to discipline under this provision. It points out that, in contrast to MLR 21 which is simply entitled "Misconduct", MLR 13(a) is entitled "Misconduct or Insubordination". MLR 13(a) obviously contemplates the possibility that a player may be insubordinate in a situation that could not be characterized as conduct, whereas MLR 21 is confined to conduct.

The Association stresses that the relevant language of the UPC and associated agreements stands in stark contrast to that found in other major sports, all of which have provisions that specifically mention "words" or "language" or "speech". Similarly, the Braves' own rules applicable to Players say nothing about speech, while their rules for other categories of employees specifically address interviews with the media.

The First Amendment may not be applicable to private employment disputes, the Association asserts, but that does not detract from the generally recognized distinction between speech and conduct. The existing rules extend only to conduct. If the

Clubs wish to impose restrictions on speech, they must bargain for that.

The Association further contends that, as a matter of just cause, Rocker did not have appropriate notice that he could be punished for remarks. The culture of the sport, in which Players are strongly encouraged to cooperate with the media, and the history of MLB's response to controversial speech, provide no basis on which Rocker should have concluded that nonbaseball remarks offending various population groups subjected him to any discipline, let alone to the second longest suspension in the history of the collective bargaining relationsnip.

The Association cites the treatment of the controversial remarks made by Bob Knepper in 1988 regarding the proper role of women, in the context of possible employment of a female umpire, as well as his comments denigrating the National Organization of Women, after it charged him with workplace discrimination. The Association stresses that not only was no discipline imposed by the Club or the Commissioner's Office, but each publicly stated that, while it totally disagreed with his remarks, Knepper was entitled to his personal opinions.

The Association also points to various controversial remarks made by the Braves' owner, Ted Turner, without any disciplinary consequences. The Association asserts that the treatment of Knepper and Turner reasonably should be seen as informing the degree to which, if any, Rocker should have known about the rule or policy he is alleged to have violated. Minimally, both demonstrate that the rule or policy, even if it can be said to exist, lacks any semblance of the clarity necessary to sustain the resulting penalty.

The Association stresses that Rocker's interview was conducted off-duty and out-of-uniform, and his remarks were not addressed to his employer or fellow employees. In these circumstances, just cause principles generally require a showing of impact on the employer's business to justify discipline. Moreover, precedent in this industry, *Jenkins*, No. 41 (Goetz), establishes that the mere surmise that business will be affected is not enough. The Association does not deny the extent of controversy caused by Rocker's comments, but controversy is not necessarily bad for business and there has been no showing of any demonstrable economic harm to the Braves or Major League

Baseball. Nor is there legitimate reason to conclude that his remarks will have any negative effect on his professional relationship with his teammates.

The Association also faults the Braves and the Commissioner for their inaction in response to Rocker's growing feud with New York fans in the months before the *Sports Illustrated* interview. If not by July, then certainly by September, the Braves knew that Rocker and New York simply did not mix, but the Club never ordered him to refrain from responding to the fans. Nor after the season ended did the Club take any action to discourage Rocker from sounding off about New York fans, who were the real target of his remarks in the *Sports Illustrated* article. Even after receiving a complaint from a fan about Rocker's "giving the finger" to fans at Shea Stadium, neither the Commissioner nor the Braves did anything. At the very least, this inaction suggests that a more progressive discipline should have been applied in this instance.

The Association contends that the penalty imposed in this case -- a 73-day suspension -- lacks any semblance of fairness, consistency or proportionality. Citing custom and

practice, the Association rejects any notion that the spring training period covered by the suspension should not count in assessing the size of the penalty. *Jenkins*, No. 41 (Goetz), establishes that a suspension with pay, as in this case, is to be treated the same as one without pay in assessing whether the penalty meets the requirements of just cause.

The Association emphasizes that the present suspension is more than twice as long as any nondrug-related suspension in the history of the just cause provision and longer than any challenged drug decision with the exception of the signing ban imposed on the Clubs regarding Vida Blue. Blue's cocaine involvement is not remotely comparable to the speech in this case. The penalty in this case is a month longer than the penalties authorized by the Panel for the three other players with whom Blue was convicted of attempted cocaine possession. Other drug offenders have received much less severe discipline than Rocker, except for repeat offenders. This includes the players involved in The Pittsburgh Drug Trials, which generated far more adverse publicity than Rocker's remarks.

In assessing the propriety of the penalty imposed on Rocker, the Association also draws attention to what it asserts is a unique feature. This is the first case in which the Commissioner has supported his exercise of disciplinary authority by reference to the UPC, rather than citing a violation of some other written policy or playing rule. Likewise, it is the first time the Commissioner has purported to exercise "best interests" power without reference to such a written policy or playing rule.

The testimony of Ambassador Young suggests that, even from a public relations point of view, the Commissioner's action in this case may have been ill-considered. In any event, the Association insists, action taken to further even the most legitimate of interests must be consistent with contractual obligations, as Chairman Nicolau declared in *Hoyt*, No. 74. There is no question that the penalty imposed on Rocker, which will place him at an unfair competitive disadvantage, is excessive in the extreme, even assuming there was a legitimate basis for some discipline.

FINDINGS

The parties' dispute as to whether Rocker was or was not under contract to the Braves at the time of the *Sports Illustrated* interview or its publication need not be resolved in this case. The Association's action in filing this grievance on Rocker's behalf on January 31, 2000, under the grievance and arbitration procedure contained in the Basic Agreement, implicitly acknowledges that he is subject to disciplinary action for just cause by the Commissioner. Indeed, the stated basis for this grievance is that the Commissioner disciplined Rocker without just cause within the meaning of Article XII(A) of the Basic Agreement.

The parties' recognition in Article XII(A) that "a Player may be subjected to disciplinary action for just cause by ... the Commissioner" is sufficient, even without reliance on the UPC, to encompass action taken by the Commissioner under the best interests provision in MLR 21(f), provided it satisfies the just cause standard in the Basic Agreement.

The treatment of speech as a disciplinable offense in other sports is not particularly relevant in light of Baseball's unique history and set of agreements. Moreover, while speech may require special consideration when cited as misconduct, in light of customary norms of free expression that exist even outside the context of state action, offensive speech has been treated by courts and arbitrators as conduct in the application of provisions establishing standards of conduct in other employment contexts, as is reflected in the decisions cited in the Commissioner's brief. An individual's First Amendment right to speak his or her mind regardless of the offensive or hateful nature of the speech does not, under a just cause standard, necessarily preclude an employer from taking appropriate disciplinary action where such speech, even if off-duty, has a negative impact on the employer's business.

The comments made by Rocker that appeared in the *Sports Illustrated* article were, as the Commissioner contends, sexist, racist, homophobic and xenophobic. They seriously offended the many groups of people he targeted in his remarks, and undoubtedly they were considered offensive by most Americans. Rocker's rough treatment by New York Met fans during

the baseball season, which he encouraged by his own conduct, in no way excuses these offensive remarks.

Although the *Sports Illustrated* interview took place during the off-season and out-of-uniform, Rocker was interviewed, and knew he was being interviewed, as a Player of some renown, both because of his stellar pitching as a closer for the Braves and his well-publicized running feud with New York Mets fans. He knew that whatever was published in *Sports Illustrated* would be widely read throughout the country -- indeed, he was eager for the publicity the article would bring -- and he also knew, or should have known, that any offensive or controversial remarks of his that were published inevitably would be associated with and bring a measure of disrepute upon the Braves and Baseball as an institution. He had a public forum in which to express himself only because of his status as a Player, and he chose to use it. Rocker testified that he expected the article to be a positive piece that would not focus on his run-ins with New York fans, and he stressed that the remarks for which he was disciplined were only a miniscule part of the interview. But, it is evident from his testimony that,

with a single exception, he fully expected and intended that some or all of his offensive remarks would be published.[1]

The Association stresses that Players are strongly encouraged to talk to the media, and that the Braves did not offer Rocker any guidance or warning to be careful of what he said prior to his *Sports Illustrated* interview, even though they were well aware of his ongoing feud with New York fans. There is nothing in the record, however, that suggests that the Club should have anticipated that Rocker would make the sort of offensive comments he did. Rocker's action once his words hit the street (or, more accurately, cyberspace) shows he understood the gravity of his misconduct. He immediately issued a statement through his agent in which he stated:

> I have let my emotions get the best of my judgment and have said things which, when read with cold, hard logic are unacceptable to me and my country. Even though it might appear otherwise from what I've said, I am not a racist. I should not have said what I did because it is not what I believe in my heart.

[1] Rocker testified that he asked the reporter to keep his remarks about the Latrell Sprewell case off the record, and that the reporter said he would.

This was no borderline case.

The Association has pointed out that both Astros' Pitcher Bob Knepper, in 1988, and Braves' owner Ted Turner, in more recent years, have made comments that offended particular groups of people without being disciplined. There is no question that Commissioner Selig's response to Rocker's comments was quite different from the response of Baseball officials to Knepper's remarks. Knepper's sexist comments about the role he believed God ordained for women, and his characterization of NOW, after it criticized him, as a "blowhard organization" whose members were a "bunch of lesbians" were treated by his Club and National League President Giamatti as a permissible expression of his personal opinions. Some of Ted Turner's offensive comments, including likening broadcasting rival Rupert Murdoch to Hitler and making an ethnic slur against Poles which was demeaning to the Pope, have been made on Commissioner Selig's watch. Although he disapproved, he took no action, he said, largely because he considered those comments to be inconsistent with Turner's philanthropic activities and the manner in which Turner and his various organizations have promoted diversity.

Knepper's remarks were made more than ten years ago. In the interim, Baseball has greatly expanded its efforts to promote diversity both in its management and business operations and in its fan base. While the handling of the Knepper incident should be taken into account as part of the relevant history in assessing just cause, particularly with respect to the severity of the penalty imposed on Rocker, it does not establish a practice condoning any type of speech by a Player.[2] Moreover, there is no evidence that Rocker was aware of the Knepper incident prior to his interview with *Sports Illustrated*.

The Commissioner took no action in response to Turner's offensive comments. This must be balanced, however, by the well publicized action taken in 1993 against Marge Schott, the former owner of the Cincinnati Reds, who was suspended from

[2] The only other off-field speech incident involving a Player referred to by either party involved the ten-day suspension issued to Jake Powell in 1938 by Baseball's first Commissioner, Judge Kenesaw Mountain Landis, for racist comments Powell made on a radio dugout show. That, of course, predated collective bargaining and the just cause provision. As Selig also noted, it predated the Civil Rights Movement and the integration of Major League Baseball. The Commissioner did not claim that the unearthing of the Jack Powell incident, which occurred in connection with the present case, played any particular part in his decision to discipline Rocker.

Baseball for one year for making a series of racist and anti-Semitic remarks. Schott's suspension was not subject to review under the just cause provision, and the Panel does not suggest that Rocker's offense was equal to Schott's. But he had no good reason to believe that his comments would be deemed tolerable or that he was taking no risk by making those sorts of statements in an interview with a major national sports magazine.

Evaluation of Rocker's conduct also must include consideration of the impact of his remarks. There seems little doubt that because of the breadth of his verbal offensive and the harshness of its tone, his remarks caused a strong reaction, as has been reflected in media coverage. The evidence, however, does not fully support the Commissioner's claims as to the resulting harm. Although there clearly will be some increased security costs, at least temporarily, there is no hard evidence to establish that either the Braves or Baseball, generally, actually has suffered or likely will suffer from reduced attendance or other loss of income because of Rocker's comments. Based on the record, the panel also is not prepared to hold that there was an irreparable breach between Rocker and his teammates and other Braves personnel or that the team's performance will

be hurt. It also seems true, as the Association points out, that at least a substantial portion of the public does not favor Rocker being penalized for his remarks, even if they consider those remarks to be highly objectionable. That does not detract, however, from the negative publicity caused by his remarks and the resulting controversy. This has diverted considerable attention away from the game, not only to Rocker's comments, but to the reaction to those comments and to the anticipated reaction to Rocker's upcoming appearances in ballparks across the country. The evidence is persuasive that all of this has been detrimental to some significant degree to the reputation of the Braves and of Baseball.

Under all the circumstances, the Panel is convinced that the Commissioner had a legitimate basis on which to conclude that Rocker's conduct provided just cause for discipline, and that Rocker, with a modicum of thought, would have realized that was the case when he was making his remarks, as suggested by his almost immediate apology. The Panel is not persuaded on the present facts that disciplining Rocker violates traditional just cause standards due to lack of notice or that a

written policy defining impermissible speech was necessary to enable the Commissioner to discipline Rocker.

The Panel is mindful, however, that any attempt to draw a precise line beyond which off-field speech may justify discipline poses real difficulties. Clearly, the mark must be set high both with respect to the offensive content of the speech and the harm caused by the speech. Moreover, due weight must be given to the context in which the speech is made -- here in a publicity-seeking interview with a national sports magazine that Rocker had reason to believe, and expected, would result in the publication and wide dissemination of his offensive and hurtful remarks. Inevitably, these kinds of issues must be decided on a case-by-case basis. In this case, the Panel finds that the mark definitely was passed.

Just cause encompasses not only the question of whether discipline properly can be imposed for a particular offense, but also whether the nature and extent of the penalty are warranted. Chairman Nicolau set forth the standard of review in *Howe*, No. 95, at p.15:

> As in any disciplinary matter, the burden of establishing just cause is on those imposing discipline. While the Commissioner has a "reasonable range of discretion" in such matters, the penalty he imposes in a particular case must be "reasonably commensurate with the offense" and "appropriate, given all the circumstances" Nixon (Panel Decision 84, Nicolau, 1992). Moreover, "offenders must be viewed with a careful eye to the specific nature of the offense, and penalties must be carefully fashioned with an eye toward responsive, consistent and fair discipline" Wilson/Martin (Panel Decision 54, Bloch 1964). There must, in other words, be "careful scrutiny of the individual circumstances and the particular facts relevant to each case." Id at p.9.

In assessing the appropriateness of the penalty imposed in this case, consideration must be given to the absence of a specific rule or policy addressing speech and to the fact that no other Player previously has been disciplined for speech since the advent of the just cause standard in Baseball. The penalty also must be reviewed with an eye to its proportionality, relative to penalties imposed in other cases.

The Commissioner's suspension of Rocker covers the entire 45-day spring training period and the first 28 days

(April 3 through April 30) of the 2000 regular season, albeit without loss of pay or service credit. In terms of the impact on a Player, a suspension of this length and the inability to participate in regular spring training with his team and other Major League Players is a very severe penalty. As the Association has pointed out, suspensions for 73 days, in Baseball, are unheard of outside a handful of cases dealing with drug usage, mostly involving repeat offenders. And this suspension is more than twice as long as any previous nondrug-related suspension. The Commissioner simply has not proffered a justifiable basis for this disparity. The evidence does not support the conclusion that the harm and controversy caused by Rocker's remarks exceed that resulting from the conduct of Players involved in the Pittsburgh Drug Trials, for example, which resulted in much less severe discipline. Taking these and other relevant factors into account, the length of the suspension imposed on Rocker clearly was unduly harsh and lacks just cause.

The reasons cited by the Commissioner for suspending Rocker for all of spring training are not compelling, particularly when balanced against the evidence that missing

Major League spring training not only may pose some risk of injury to Rocker, but will disadvantage him competitively above and beyond the effect of a suspension during the regular season.

Under all the circumstances, including the fact that Rocker already has missed almost the first two weeks of spring training, Rocker's suspension is reduced to a 14-day suspension, from opening day until April 17. The monetary penalty -- in the form of a charitable contribution -- also is reduced from $20,000 to $500, in light of the limit specified in Article 1, Section 3(a) of the MLA for fines imposed by the Commissioner on a Player for conduct deemed not in the best interests of baseball.[3] The requirement that Rocker participate in an in-season program of diversity training, as established by Major League Baseball's Employee Assistance Program is sustained.

[3] The issue of whether the Commissioner had some other basis for imposing a larger monetary penalty was not developed or joined in this case, which was heard on an expedited basis.

Shyam Das
Chairman

Donald W. Fehr
Players Association
Panel Member

Robert D. Manfred, Jr.
Office of the Commissioner
Panel Member

November 30, 2000