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ESSAY

SPORTS ARBITRATION AND ENFORCING PROMISES: BRIAN SHAW AND LABOR ARBITRATION

ROGER I. ABRAMS*

“I’m tired of hearing about money, money, money, money, money. I just want to play the game, drink Pepsi, and wear Reeboks.”- Shaquille O’Neal

Some sports commentators say that professional basketball players are the world’s finest athletes; only a few men make it to the pinnacle of the sport, the National Basketball Association (NBA). For them the game can be quite lucrative, even without adding in their endorsement income.

These tall, agile, and fleet-footed denizens of the court play a game of modest origins. Basketball was invented in the winter of 1891 at the Young Men’s Christian Association (YMCA) in Springfield, Massachusetts by a creative Canadian-born instructor, Dr. James Naismith. His charge was to develop an athletic “distraction” that would amuse his physical education students during the dreary months of a New England winter. From such humble beginnings, the game grew nationally and internationally. Basketball is now the world’s second most popular sport, after soccer, and is played in virtually every country in the world.

Basketball has become an inner-city playground pastime and a suburban gymnasium passion for millions of boys and girls. For a few entrepreneurs, basketball has also become a prosperous business. It is the favorite participation sport of many adult males, including President Barack Obama,

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who has planned a basketball court for the White House to replace President Nixon's bowling alley. As might be expected, the money generated by the business of basketball has often fostered disputes between players and clubs. Many of these disputes are resolved using the procedures of labor arbitration.

The professional game prospered when it produced player and club rivalries that captured the public's attention. In the 1960s, a face-off between two big men—Boston's Bill Russell and Philadelphia's Wilt Chamberlain—became an attraction within the overall play of the game. For a generation, the Boston Celtics and the Los Angeles Lakers battled for supremacy in the NBA. Michael Jordan's Chicago Bulls bested all-comers in the 1990s, and none could reach Jordan's level of excellence, not even Ervin "Magic" Johnson and Larry Bird. Some of the conflicts in basketball's boardrooms were equally contested, and examining one of these disputes will demonstrate how participants in the business of basketball turned to neutral outsiders to resolve their differences.

BRIAN SHAW: THE PROTAGONIST

Brian Shaw was one of the fortunate few athletes who were able to graduate from the schoolyard game to the highest professional ranks. He grew up in blue-collar Oakland, California, as the first of a series of all-star professional basketball players groomed on the east side of San Francisco Bay, which includes: Antonio Davis, Jason Kidd, and Gary Payton. From an early age, Shaw showed unique talent on the basketball court. As a student at Bishop O'Dowd High School in Oakland, Shaw excelled both on the court and in class. Not recruited by the Division I college basketball powerhouses, Shaw spent his freshman and sophomore years at St. Mary's College in Moraga, California, fifteen miles east of Oakland. He then transferred to the University of California at Santa Barbara (UCSB) for his junior and senior years. Playing for the UCSB Gauchos, Shaw received the press coverage that would bring him to the attention of professional scouts. He was named the 1988 Pacific Coast Athletic Association player of the year during his senior year. Shaw played fourteen seasons in the NBA, and after his playing days were over, he continued in the game as an assistant coach for the Los Angeles Lakers.

The Boston Celtics selected Brian Shaw in the first round of the 1988 NBA draft, with the twenty-fourth overall pick. The 6' 6" rookie guard played in all eighty-two games for the Celtics in the 1988-89 season, the only Celtic to play in every game. He earned a modest salary of \$75,000. The Celtics finished third in the division and were eliminated by the Detroit Pistons in the first round of the playoffs. Shaw's performance was recognized when he was named to the NBA's all-rookie second team.

The Celtics offered Shaw \$550,000 to play the 1989-90 NBA season in Boston. However, Shaw's Los Angeles-based agent, Leonard Armato, had other ideas. While Shaw was bound by the League's reserve system to play for the Celtics if he played in the NBA, Armato steered his client toward a more lucrative contract in the Italian Basketball League. The Celtics were not prepared to participate in an international bidding war for the young star. On August 10, 1989, Shaw signed a two-year contract with Rome's new *Il Messaggero* club for what was reported to be a million dollars per season. Celtics General Manager Jan Volk was quoted as saying, "[i]n Shaw's case, we have no regrets about the offer we made. If the numbers being reported are correct, we couldn't compete against them."

In 1989, the Rome club also signed Duke University's glamorous rookie Danny Ferry for two million dollars a season. It was the first time the Italian professional league had successfully raided talented young American players, although over-the-hill veterans like Bob McAdoo, Tom McMillan, Darryl Dawkins, and Micheal Ray Richardson had found new life on the Italian courts.

Shaw tried to make a graceful exit from Boston, "I feel that the Celtics organization is a great organization. I would like to remain in Boston. I love the fans, and I love all the people I met and have been associated with. There's no need for me to be embarrassed. I'm doing what I have to do." It was reported that the Celtics legendary president Red Auerbach was "steamed." He could not countenance anyone turning his back on him or the Celtics's green, even for almost double the salary.

RED AUERBACH: THE LEGEND

Arnold Jacob "Red" Auerbach was the NBA's greatest coach. When he joined the wretched Boston Celtics franchise in 1950, the club had never had a winning season. Red retired as Celtics coach in 1967. During Red's seventeen years at the helm, the Celtics never had a losing season.

Born in the Williamsburg section of Brooklyn to Jewish immigrant parents, Red was drawn to athletics although he lacked the playing skills of his charges in Boston; Bill Russell, Bob Cousy, John Havlicek, Tommy Heinsohn, Bill Sharman, Frank Ramsay, Sam Jones and K.C. Jones all became Hall of Fame players under Auerbach's tutelage. Auerbach had played some college basketball at George Washington University where he trained to become a teacher and a coach. He would use both of those skills to perfection on the parquet floor of the Boston Garden.

During World War II, Auerbach was assigned to handle all recreational activities at the Navy base in Norfolk, Virginia. It was there that he refined his

basketball coaching skills. He also helped Washington Redskins football players stay in shape during the off-season by playing basketball. Through his Washington connections, Auerbach befriended Mike Uline, one of the founders of the Basketball Association of America (the "Association"), later renamed the NBA. Uline hired Auerbach to assemble and coach the Washington Caps, one of the eight original clubs in the Association. After a detour coaching the Tri-Cities Blackhawks in western Illinois, Auerbach was hired by the owner of the Boston Celtics, Walter Brown, to turn around the Hub's dreadful basketball franchise.

During Red's tenure, the Celtics prospered on the scoreboard and in the standings, but the club was never rich. Lack of resources was always an issue. A child of the Great Depression, Auerbach would spend carefully and not waste the club's money. Boston's hockey team, the Bruins, owned the Boston Garden, and the Celtics was its tenant. The Celtics never shared in the income made from concessions and parking. Even in the glory years, Celtics basketball attendance was modest, at least until 1979, when Larry Bird became the mainstay of the club.

Auerbach's innovations, both on and off the court, changed the game. He created the famous "sixth man" strategy that would bring a fresh star player off the bench, like John Havlicek, Paul Silas or Kevin McHale, just when opponents were getting tired. He emphasized the psychological facets of the game. As his protégé Bill Russell said: "The idea is not to block every shot. The idea is to make your opponent believe that you might block every shot."

Auerbach's arrogance also was legendary. He would light up his trademark cigar at home games when the Celtics were safely ahead in the fourth quarter. His "victory cigar" was obnoxious to all but the Celtics faithful. The Celtics won eight straight NBA titles beginning in 1959. Exhausted by the pressures of the job, Auerbach finally gave up coaching before the 1966 season. He assumed the general manager's position and later served as Celtics President. Auerbach made Bill Russell the Celtics's player-coach, the first African-American to coach a team in a major American professional sport.

For Red Auerbach, being a Celtic was a matter of great pride and intense loyalty. He simply could not understand why Brian Shaw would voluntarily give up that opportunity after one year. This was not supposed to happen with a Celtic.

A PLANNED RETURN ABORTED

Brian Shaw arrived in Rome to great acclaim. He explained, "[b]eing here will make me more rounded as a person. I'll be more worldly as a whole. It's a different culture, and that's the biggest education you can get." Raul Gardini,

the money man behind the Ferruzzi Group, which owned both of Rome's leading newspapers and the professional basketball club, invited Shaw to his Venice palazzo overlooking the Grand Canal. Shaw was duly impressed. He used some of his earnings to buy a BMW and braved the Roman traffic, which he found even more chaotic than Boston's; "[a]ll the traffic signals are just suggestions," he told the *New York Times*.

Within a few months of his arrival in Europe, Shaw had second thoughts about his move. Although his level of play on the basketball court did not suffer, Shaw was homesick. The Celtics retained the exclusive NBA rights to contract with Shaw under the provisions of the collective bargaining agreement (CBA) between the NBA and the National Basketball Players Association (NBPA). In November 1989, Shaw asked Leonard Armato to contact the Celtics about a return to the NBA for the following season. Shaw then took over his own negotiating, speaking by telephone with Alan Cohen, a Celtics co-owner and Vice Chairman and Treasurer of the club, about what it would take to have him return. Cohen agreed to Shaw's demands for salary and a signing bonus. Celtics General Manager Jan Volk then called Shaw in Rome, Italy, to confirm the terms. The Celtics would pay Shaw a \$400,000 signing bonus and a salary of \$1.1 million for the 1990-91 basketball season, \$1.2 million for the 1991-92 basketball season, \$1.3 million for the 1992-93 basketball season, and \$1.4 million for the 1993-94 basketball season. Volk also suggested to Shaw that although the Celtics had loaned Shaw \$50,000 during his rookie season, that note should be treated as paid in full and, at the same time, his signing bonus should be increased to \$450,000. Volk flew to Rome to have Shaw sign the contract, and Shaw met him at the airport.

On January 26, 1990, Brian Shaw signed a four-year deal with the Celtics and would commence playing the coming season. He executed the agreement in the presence of the United States Counsel in Rome and before a notary public. Shaw received his signing bonus of \$450,000 on February 16, 1990. As part of the arrangement, Shaw promised to cancel the second year of his contract with *Il Messaggero*, something he was allowed to do under the Rome contract if he was going to return to the NBA. Finally, in a provision that would turn out to have critical importance, Shaw agreed that the Celtics could seek to enforce its contract rights by arbitration. NBA Commissioner David Stern approved the Celtics's contract with Shaw. Shaw, it seemed, would once again don the fabled green uniform of the Hub's basketball franchise.

Shaw played out the 1989-90 season with *Il Messaggero*. He led the team in scoring, rebounding and assists. He was named to play in the 1989 Italian All-Star Game. In his final game for Rome, Shaw scored forty-six points as the club lost in the playoff quarterfinals. Meanwhile, the Celtics were once again eliminated in the first round of the 1990 NBA playoffs.

Sometime after Shaw had signed the agreement to return to the NBA, someone advised him that if he waited an additional season the Celtics would no longer hold the exclusive NBA option to sign him. As a seasoned free agent—albeit, with Italian seasonings—Shaw would then have the opportunity to multiply his salary substantially by seeking competing offers for his services from other NBA clubs. He would be a free agent. On June 6, 1990, Shaw's counsel informed the Celtics that Shaw would not cancel the second year of his Italian contract and would not be returning to play for the Celtics.

ARBITRAL JUSTICE

Red Auerbach and the Celtics knew that Shaw had agreed in a written contract to return to the Celtics. Shaw, after all, had accepted the signing bonus shortly after he executed the agreement. Now as the 1990-91 season approached, he had reneged on his promise. The Celtics wanted their point guard, but litigating the issue in court would take too much time. Much like the passing between offensive players on a fast break, speed was of the essence. The Celtics wanted Shaw on the court, not in a court.

The CBA between the NBA and the NBPA set forth the terms and conditions under which NBA players were to perform their employment. It incorporated the Uniform Player Contract that all players signed and established an expedited arbitration procedure to resolve conflicts between clubs and players. The Celtics immediately filed a grievance. The matter was quickly set for hearing before Professor Daniel G. Collins, the impartial arbitrator who had been jointly appointed by basketball management and the union to hear these types of matters.

Dan Collins was a highly regarded labor neutral. Born in Brooklyn in 1930 and raised in Queens, Collins received his bachelor's degree from Hofstra University in English literature, which might explain why his arbitration opinions were always so well written. He studied law at New York University Law School, where he served as an editor of the Law Review. Collins practiced law with the New York blue-ribbon firm of Cravath Swaine & Moore before returning to New York University in 1961 as a faculty member. He also began to hear cases as a neutral labor arbitrator and was well respected by both management and labor for his knowledge and fairness.

Collins' arbitration experience was not limited to the business of sports. For years, he had resolved grievance disputes in the aerospace and auto industries, municipal transit and the postal service. Collins also handled high visibility disputes involving the Broadway theaters and Actors Equity, which represented actors, dancers, and singers. Ultimately, the NBA and its NBPA named Collins their permanent arbitrator for all grievance disputes.

Collins conducted the arbitration hearing in Brian Shaw's case at the NBA's offices in New York City on June 13 and 14, 1990, within days after the Celtics filed its grievance. Shaw did not attend the hearing—he was home in California—but he was informed of his opportunity to appear. His interests were represented by his counsel, W. Jerome Stanley, but he presented no evidence to rebut the Celtics's case. Attorney John J. McGovern was allowed to attend the hearing to represent the interests of *Il Messaggero*, Shaw's erstwhile and perhaps, future employer.

In his opinion resolving the dispute, Arbitrator Collins had to determine whether Shaw was in breach of the contract he had signed the prior January with the Celtics. Based on the evidence presented at the hearing, Collins explained how the contract was formed and detailed the mutual promises it contained, including the clause which stated that Shaw had the right to rescind his *Il Messaggero* contract and “agrees to exercise such right of rescission in the manner and at the time called for by the *Il Messaggero* Contract.” The *Il Messaggero* contract allowed him to void his commitment to play a second year in Rome “if the player returns to the United States to play with the NBA.”

In his opinion, Arbitrator Collins quoted at length from a June 6, 1990 letter that W. Jerome Stanley, Shaw's counsel, wrote to Alan N. Cohen, Celtics vice chairman, treasurer, and co-owner. Stanley stated his client was going to remain in Rome “notwithstanding any putative agreement between [Shaw] and the Celtics to the contrary.” Stanley attacked the fairness of the process used in reaching that agreement with the ballplayer. Shaw's attorney, Stanley, said Shaw's decision to return to the Celtics:

was made in an atmosphere clearly ill-suited for thoughtful decision making on his part. He was at the time only 23 years old, impressionable, legally unsophisticated, living in a foreign country, and isolated from his family and friends. He was frustrated and overly sensitive to the adverse, misplaced and undeserved Italian press he was receiving Most importantly, his decision was made without the benefit of counsel or other representatives.

Stanley argued that the Celtics were at fault in not requiring that Shaw have counsel present when the contract was signed. Ultimately, Stanley wrote, Shaw decided to stay in Italy “as an indication of the gratitude he feels for the affection, generosity, confidence and trust displayed towards him by [*Il Messaggero*] over this past season.”

Contrary to Stanley's assertions, the Celtics's witnesses testified that Shaw had access to the services of an agent and a legal advisor in Italy and the

contract was signed before the United States Counsel in Rome, who specifically asked Shaw whether he understood the terms of the contract and was freely executing it. Shaw indicated that he did understand those terms, and he was freely executing the contract.

Following his analysis of the facts, Arbitrator Collins ruled that the Celtics-Shaw agreement was enforceable. Shaw had promised to play exclusively for the Celtics. By way of remedy, arbitrator Collins ordered Shaw to comply with his contractual promise. He was ordered not to play for any club other than the Celtics during the term of his contract. The arbitrator ordered Shaw to exercise his right to cancel the second year of the Rome contract.

Shaw's counsel informed the Celtics that his client would not voluntarily comply with the arbitrator's decision. The next day the Celtics filed suit in Federal District Court in Boston seeking expedited judicial enforcement of the Collins award. Shaw's attorney moved to dismiss the action. Shaw's union, the NBPA, no longer supported the player's position, and it did not formally participate in the court litigation. In fact, the NBPA advised Shaw to comply with the arbitrator's award.

At a federal court hearing on June 26, 1990, District Court Judge A. David Mazzone ruled from the bench that Arbitrator Collins had the power to decide the Shaw dispute under the terms of the collective bargaining agreement, that the arbitrator's interpretation of Shaw's contract with the Celtics was a plausible, reasonable reading of the contract, and therefore, his ultimate award was "valid, enforceable and binding" on Shaw. Judge Mazzone issued an injunction ordering Shaw to terminate his contract with Il Messaggero. Otherwise, the Boston club would be "irreparably harmed." The next day, Shaw's counsel appealed.

The United States Court of Appeals for the First Circuit in Boston affirmed the District Court's judgment and enforced the arbitrator's award. As Judge and later Supreme Court Justice Stephen Breyer wrote for the First Circuit, "federal labor law gives arbitrators, not judges, the power to interpret such contracts." Citing from the controlling Supreme Court doctrine, Breyer emphasized the very limited role courts play in reviewing arbitration awards. He explained, arbitration is an autonomous system established by parties to a collective bargaining agreement, and the courts should not interfere with the results of that system except in very limited situations.

A NOTABLE NBA CAREER

Brian Shaw played for the Celtics for the 1990-91 season, his best in the NBA. He led the club in assists and averaged almost 14 points per game. The

Celtics—led by Larry Bird, Kevin McHale and Robert Parrish—made it to the second round of the playoffs before bowing out to the Pistons in six games. The Boston faithful never let Shaw forget that they considered him a “traitor,” and despite his stellar performance, boos rained down from the Garden’s upper deck whenever he touched the ball. Midway through the following season, after playing only seventeen games because of an injured right hamstring muscle, the Celtics traded Shaw to the Miami Heat in exchange for the Heat’s disgruntled guard Sherman Douglas. Celtics Vice President Dave Gavitt commented to the press, “[b]oth clubs feel that a change of scenery is needed for both players, and I think you’ll see major contributions from both Brian and Sherman with their new teams. They are quality players and two quality individuals.”

Shaw’s NBA career continued first with the Heat, and then the Orlando Magic, the Golden State Warriors, the Philadelphia 76ers, the Portland Trail Blazers, and finally the Los Angeles Lakers. He won three championship rings with the Lakers in 2000, 2001 and 2002. Shaw retired as an active player following the 2002-03 season and was appointed an assistant coach with the Lakers in 2004. His career earnings as a player in the NBA totaled over \$28 million. Shaw did not suffer much from being required to fulfill the contractual promises he had made.

ARBITRATION AND SPORTS JUSTICE

As Brian Shaw’s case demonstrates, labor arbitration plays a vital role in the private arena of sports justice. Neutral and experienced adjudicators, like arbitrator Daniel Collins, who died of cancer in 2002 at age seventy-one, enforce promises reached by management and labor. The cases they resolve often make headlines because of the fame or notoriety of the disputants. Much like some less visible cases throughout the unionized entertainment industry, all sports disputes involve differences about the application and interpretation of the terms of collective bargaining agreements and individual employment contracts negotiated pursuant to those terms. As we have seen with Brian Shaw’s case, under prevailing federal labor law, the authoritative decisions of these arbitrators are not subject to review on the merits in court, except in rare circumstances.

Justice for the Celtics resulted from expedited labor arbitration and quick judicial enforcement of an arbitrator’s award. The process reaffirmed the value of promise keeping. All commerce depends upon the sanctity of promises. Contracting parties may not enjoy equal bargaining power; Shaw’s rookie contract for \$75,000 was the product of the NBA’s monopsony, where a single club—in this case the Celtics—had exclusive rights to negotiate with a player

it selected in the draft. Nonetheless, that buyers' cartel is the product of collective bargaining and is thus exempt from the antitrust laws. Players who prove themselves in the game, however, do well financially under the established system of salary determination and free agency.

The business of sports is a collection of contracts and of promises made by parties who seek to benefit from the enterprise. We value those promises, without which business activity would grind to a halt, by offering our society's court system as an available mechanism for enforcing agreements. In many instances, however, the judicial system would not move quickly enough to meet the needs of the parties. In other cases, the unique knowledge set of private neutrals may facilitate the resolution of a particular dispute consistent with the expectations of the parties. It is here where arbitration has proven so valuable in the business of sports.

There is the ever-present risk in the sports business that agents, owners, or clubs will take advantage of players whose athletic skills often far outweigh their business acumen. In *Shaw*, however, experienced attorneys were matched on both sides of the table. Shaw sought to avoid his promise to the Celtics because it likely cost him money in the short run. There was no evidence the Celtics took advantage of him, however. If anything, the Boston club had been burned the prior season because it failed to correctly gauge the effect of the new world-wide market for basketball talent and low-balled its offer to Shaw. The great Red Auerbach had misplayed the Celtics's hand.

When his agent exercised Shaw's opportunity to play in Europe, he skillfully outmaneuvered Auerbach, who only held Shaw's exclusive rights within the NBA. It was rare that anyone beat out Red Auerbach. Shaw cashed in and, in the process, retained the option to negate a second year's employment with Rome if it served his purposes. He did everything right until, a few months into his European adventure, he signed an agreement to return to the Celtics. Only later was he advised that he had made a bad deal. Had he waited another year, he would have been a free agent and could have negotiated with many NBA teams.

It is not surprising that Brian Shaw only played one more full season with the Celtics. While Red Auerbach valued quality ballplayers, and Brian Shaw certainly fit in that category, it would be typical of Red to trade someone who had failed to demonstrate loyalty to the Celtics. Red had a long memory.

Sports justice does not always bring riches to players or to club owners. It establishes a system of rights and responsibilities that are defined and ascertainable. *Shaw* is a useful example because it demonstrates the role played by the parties' own private arbitration mechanism under their CBA. While only courts can ultimately determine and apply constitutional principles and statutory proscriptions, labor arbitrators are better able to read, interpret

and apply the terms of private CBAs.

