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COURT OF APPEALS  
STATE OF NEW YORK

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TCR SPORTS BROADCASTING,  
Appellant,

-against-

WN PARTNER,

Respondent.

NO. 13

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20 Eagle Street  
Albany, New York  
March 14, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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Official Court Transcriber



1           ACTING CHIEF JUDGE CANNATARO: So to begin number  
2           13, TCR Sports Broadcasting v. WN Partner.

3           MR. PHILLIPS: Good afternoon, Your Honors.  
4           Carter Phillips representing the Baltimore Orioles and  
5           MASN. Your Honor, may I reserve three minutes for  
6           rebuttal, please?

7           ACTING CHIEF JUDGE CANNATARO: You have three  
8           minutes.

9           MR. PHILLIPS: Thank you, Your Honor.

10          This case comes to the Court in a particularly  
11          unusual posture. There has been a formal and final  
12          determination that the first arbitration in this case had  
13          to be vacated because of evident partiality demonstrated by  
14          the RSDC, by Major League Baseball, and by the commissioner  
15          of Major League Baseball.

16          Under those circumstances, the question then  
17          becomes what's the appropriate remedy. Does the court have  
18          authority to do something, or is it compelled to send the  
19          case back to a forum that's already been determined to be  
20          partially evident.

21          JUDGE SINGAS: Aren't you extending the evident  
22          partiality too far? Didn't it all only go to the Proskauer  
23          representation?

24          MR. PHILLIPS: No. They actually - - - the  
25          quotation from Justice Andrias' opinion is arising out of



1 the failure of MLB and the RSDC to correct the evident  
2 partiality that was embedded in it. So it's not just the  
3 problem of the conflicts of Proskauer. It is the refusal  
4 to do anything about it that reflects, for lack of concern  
5 for fundamental fairness, which as the U.S. Supreme Court  
6 said in Com - - - in Commonwealth Coatings that's the  
7 fundamental requirement of the Federal Arbitration Act.  
8 And so then the question is if you have a fundamental  
9 breach of the FAA, what do you do about it?

10 Well, Section 10 gives you authority - - - the  
11 discretion, to send it somewhere, and most courts candidly,  
12 do not - - -you know, no other court that I know of has  
13 ever sent a proceeding back to the same forum that's  
14 already been declared to be evidently partial.

15 JUDGE SINGAS: So where would authority come  
16 from? FAA 2, 10, or inherent powers? What?

17 MR. PHILLIPS: All three of those. I think  
18 actually Section 5 might even be available. But I mean,  
19 Section 2 clearly gives you discretion to send it to the  
20 arbitrators. We know that authority says the arbitrators  
21 doesn't mean you send it back to the same body. No court  
22 has ever done that.

23 Section 2, obviously, allows you, if the purpose  
24 of the contract has been utterly frustrated, which again  
25 the notion of fundamental fairness was the essence of this



1 agreement, and it has been for - - -

2 JUDGE SINGAS: So are you claiming there's  
3 evident partiality even after the change of the attorney?

4 MR. PHILLIPS: Absolutely. At some point, the  
5 commissioner of Major League Baseball - - - Major League  
6 Baseball reached the conclusion that the Orioles should  
7 lose this case. And in the litigation, before - - - in the  
8 lower courts, the commissioner of Major League Baseball  
9 went on record explicitly rejecting all of the arguments  
10 that the Orioles made about how this arbitration agreement  
11 should be interpreted. He's made those statements in  
12 public, and he's taken that position.

13 ACTING CHIEF JUDGE CANNATARO: Was that a  
14 position adopted by either of the courts below? It seems  
15 as if Judge Marks' decision was cabined very tightly to the  
16 representation issue, and I thought that carried through at  
17 the Appellate Division as well.

18 MR. PHILLIPS: No, all of those goods. Justice  
19 Marks says that it was the - - - it was the refusal to  
20 provide for any form of fairness, and that was a refusal by  
21 MLB and the commissioner, and the RSDC to engage in any  
22 effort - - -

23 ACTING CHIEF JUDGE CANNATARO: In your view,  
24 that's not limited just to the refusal to engage say, in  
25 discovery with respect to Proskauer's representation? It



1 goes beyond that?

2 MR. PHILLIPS: Right. It goes to the whole idea  
3 of allowing that proceeding to be conducted in a context  
4 where it is decidedly partial. And under those  
5 circumstances, you know, we don't know when the  
6 commissioner reached the conclusion he reached. But we  
7 know that by the end of the proceeding - - - the first  
8 proceeding, which was an evidently partial proceeding, his  
9 view was the Orioles should lose, and he has said that over  
10 and over and over again. So that partiality continues on  
11 to this day, and this Court should not blink at it. It  
12 should say look, partiality is.

13 Ken Feinberg said this is evident partiality,  
14 Justice Acosta is a hundred percent right that this is  
15 evident partiality. And there is a remedy available, which  
16 is under the - - - which is the AAA under Section A - - -

17 JUDGE WILSON: So I'm puzzled - - - I'm puzzled  
18 by something; it may be tangential. But when I read the  
19 agreement, it looks really more like an agreement - - - an  
20 appraisal agreement rather than an arbitration agreement.  
21 That is, if the parties go through med - - - no, they can't  
22 resolve it, they go through mediation if they want to or  
23 not, and at the end of the day, it then gets referred to  
24 by - - - this isn't an arbitral body; it's a value  
25 determining body. It really looks like - - - more like an



1 appraisal agreement than an arbitration agreement.

2 I know you've litigated it as an arbitration.  
3 You maybe stuck with that, but it doesn't really read that  
4 way. And when I look at Maryland law, which is what the  
5 contract chooses, Maryland law seems to suggest this is an  
6 appraisal proceed - - - contract rather than an arbitration  
7 contract.

8 MR. PHILLIPS: Well, the parties have treated it  
9 all along - - -

10 JUDGE WILSON: I get that.

11 MR. PHILLIPS: - - - as an arbitration  
12 proceeding.

13 JUDGE WILSON: I'm wondering why.

14 MR. PHILLIPS: I suppose in part because no one  
15 knows exactly what the - - what the nature of or source of  
16 judicial review is of an appraisal agreement. The Federal  
17 Arbitration Act, obviously ensures that there is judicial  
18 review of arbitral awards.

19 And at the end of the day, this - - - I mean, as  
20 written - - - I could imagine why you would - - - you might  
21 lead - - - run to the conclusion that it's really just a  
22 valuation, an auditing kind of thing. But in context of  
23 how it got analyzed by the RSDC both the first time and the  
24 second time, it feels candidly much more like the second  
25 one. Much more like a true arbitral proceeding.



1           Unfortunately, it's one that's the product of evident  
2           partiality in the Federal Arbitration Act. That tells you  
3           exactly what they're doing.

4                   JUDGE RIVERA: I suppose it's because of the - -  
5           - I'm sorry.

6                   MR. PHILLIPS: That's all right.

7                   JUDGE RIVERA: Is that because of the choice of  
8           the methodology, the dispute over the choice of  
9           methodology? Is that what you mean?

10                   MR. PHILLIPS: No, I mean, obviously I'm  
11           disappointed by the choice of methodology.

12                   JUDGE RIVERA: Yeah.

13                   MR. PHILLIPS: But the fundamental problem that  
14           courts should be worried about - - -

15                   JUDGE RIVERA: Um-hum.

16                   MR. PHILLIPS: - - - is the fundamental fairness  
17           of the process. And if the party in control of - - -

18                   JUDGE RIVERA: I'm sorry. I mean, with respect  
19           to why it's more like an arbitration?

20                   MR. PHILLIPS: Oh, yes. I mean - - -

21                   JUDGE RIVERA: So - - -

22                   MR. PHILLIPS: - - - both what is the  
23           methodology, and then how should the methodology be applied  
24           under the - - - I apologize. I misunderstood your  
25           question. Thank you, Your Honor.



1 JUDGE RIVERA: That's okay.

2 JUDGE GARCIA: Counsel, go back to your original  
3 statement that this is an unusual posture for this case.  
4 It comes up to us in sort of a strange way.

5 Let's say we were to agree that the Court would  
6 have discretion to send it to a different panel, what are  
7 we reviewing? I mean, there's really no decision below on  
8 that issue, right. There's a plurality, and then there's a  
9 concurring opinion that says something different.

10 MR. PHILLIPS: Well, you have Justice Marks'  
11 decision at the outset of this that said he didn't believe  
12 he had authority to do anything other than send it back to  
13 the RSDC.

14 JUDGE GARCIA: Right.

15 MR. PHILLIPS: So at a minimum, you could say  
16 that's wrong.

17 JUDGE GARCIA: Then what do we do with the case?

18 MR. PHILLIPS: Well, I think the right answer is  
19 the court should simply say what the Federal Arbitration  
20 Act requires, which is that this be submitted as Justice  
21 Acosta said to the - - - via Section 8 under the agreement  
22 to a third party.

23 JUDGE GARCIA: But who would be - - - it would  
24 be the Supreme Court, in the initial instance here, that  
25 would be exercising discretion as to whether to send it to





1 a different body, right?

2 MR. PHILLIPS: Right.

3 JUDGE GARCIA: And we would normally - - - that  
4 was as the Appellate Division we would review that for an  
5 abuse of discretion. So you would be asking us to make  
6 that determination?

7 MR. PHILLIPS: Well, it's not the end of the  
8 world if the Court wanted to remand it to Justice Marks to  
9 exercise his discretion. Candidly, I think he was pretty  
10 put out by the process by which the initial ruling came  
11 out, and he said as much. He just said I don't have any  
12 authority to do anything about this.

13 I do think, as a matter of law now, that the  
14 answer is clear, no other - - - no other court faced with  
15 any situation like this has done anything other than send  
16 the matter to a neutral and impartial arbitration panel.

17 And the Fourth Circuit in Hooters could not be  
18 clearer. They did it even before the arbitration. So for  
19 this Court to go on a different direction seems to me would  
20 undeniably create a split - - -

21 JUDGE RIVERA: But isn't it - - -

22 MR. PHILLIPS: - - - between the Fourth Circuit  
23 and this Court.

24 JUDGE RIVERA: But isn't the Court usually to  
25 send it to a different arbitrator, not a completely



1 different forum. It strikes me that that's what you're  
2 asking for something that would be unusual under the  
3 circumstances.

4 MR. PHILLIPS: Only when the - - -

5 JUDGE RIVERA: Especially when the parties  
6 understood when they entered this agreement, the way the  
7 MLB works and what they were specifically asking this  
8 entity to do, which it had never done before.

9 MR. PHILLIPS: That's not significantly different  
10 than something that happens pretty regularly where a  
11 specific arbitrator is identified in the contract, and it  
12 turns out that person is not available before it goes to  
13 another arbitrator, goes to a completely different process.  
14 That happens all the time.

15 JUDGE RIVERA: Um-hum.

16 MR. PHILLIPS: What makes it unusual, obviously,  
17 is that this is a forum that has become corrupted to the  
18 evident partiality process that entered into it. And the  
19 question is - - -

20 JUDGE RIVERA: But is it corrupted because  
21 there's no longer a commissioner that's as favorable to  
22 your - - -

23 MR. PHILLIPS: Well, there's a commissioner who  
24 is evidentially partial against my client's position.

25 JUDGE RIVERA: Yes, but it seems that the prior



1 commissioner was quite favorable to your side.

2 MR. PHILLIPS: Candidly, I'm not sure.

3 JUDGE RIVERA: No one complained about partiality  
4 there, right?

5 MR. PHILLIPS: I'm not sure whether he was  
6 partial or not, and - - -

7 JUDGE RIVERA: Well, --

8 MR. PHILLIPS: - - - you know, if we were - - -

9 JUDGE RIVERA: I read your briefs to say it  
10 includes statements to the effect that my concern is what  
11 happens with the Orioles?

12 MR. PHILLIPS: That was in 2005.

13 JUDGE RIVERA: But nevertheless, right?

14 MR. PHILLIPS: Right.

15 JUDGE RIVERA: Nevertheless.

16 MR. PHILLIPS: Again - - - I mean, I don't think  
17 that - - - I mean, our perspective on this was we were  
18 perfectly comfortable the first - - - when we went to  
19 arbitration in the first instance. It is only after we  
20 were treated as badly in the first arbitration, and it  
21 seems to me at that point we now have evident partiality.  
22 It's a final determination. The question is, is there a  
23 relief to be had there.

24 The Federal Arbitration Act says absolutely there  
25 is. I think you should rule as a matter of law that this



1 case has to go to a neutral decisionmaker at this point, if  
2 you felt compelled to send it back - - -

3 JUDGE RIVERA: And then how does - - - how does  
4 the Court decide what body that would be?

5 MR. PHILLIPS: Justice Acosta explained that in  
6 his dissent. The catchall provision for all disputes  
7 resolution in the contract is Section 8. So if you sever  
8 out the 2.J provision, the rest is a nonseverability clause  
9 in the contract. So the rest of the contract stays in  
10 place.

11 JUDGE RIVERA: That would be the default.

12 MR. PHILLIPS: So the default is sent through  
13 Section 8, so the American Arbitration Association - - - we  
14 would get an expert entity, because that's what the - - -  
15 that's what the arbitration calls for, for all of - - -

16 JUDGE WILSON: If we did - - - going back a  
17 little bit to something like Judge Garcia's question - - -  
18 if we did what you're asking for - - - the first part of  
19 what you're asking for, to say they had the power to send  
20 this to a different tribunal, are there - - - is it truly  
21 then a question of law that we must do that, or are there  
22 facts that they require - - - Judge Marks is retired - - -  
23 but send it back somewhere to somebody that has fact  
24 determining power?

25 MR. PHILLIPS: Well, I'm not sure - - - I think



1 the only question would be is there - - - is there a a  
2 mechanism under the settlement agreement for where this  
3 should go under the circumstances, and I don't think  
4 there's any - - - I don't think there's a dispute between  
5 the parties on that. Section 8 is the default provision.

6 JUDGE WILSON: No, I was asking something  
7 different. I was asking - - - or trying to ask something  
8 different. Assuming that that's right, that it's got to go  
9 somewhere else if there's sufficient predicate, presumably,  
10 that predicate involves some facts at some point. Have  
11 those facts all been determined - - -

12 MR. PHILLIPS: Yes.

13 JUDGE WILSON: - - - or do we need to send it  
14 back somewhere for further factual findings?

15 MR. PHILLIPS: No, the critical fact in this case  
16 has been finally decided is that MLB, the commissioner, and  
17 the RSDC, which is just an arm of the MLB, have been found  
18 to be evidently partial, and there's no way to unring that  
19 bell.

20 So you have an en - - - an evidently partial  
21 entity. And so then the question - - - so they're not  
22 available. So then the question is where do you send it,  
23 and Section 8 tells you where you send it. It should go to  
24 the AAA. And obviously, if you send it to the AAA,  
25 candidly, this dispute will be over a lot sooner than if



1           you don't send it to AAA and we will continue to go through  
2           this process, seemingly in perpetuity.

3                     ACTING CHIEF JUDGE CANNATARO: Thank you,  
4           counsel.

5                     MR. PHILLIPS: Thank you, Your Honor.

6                     MR. SHAFFER: Thank you, Mr. Chief Judge, and may  
7           it please the Court, Derek Shaffer here on behalf of the  
8           Nationals.

9                     Your Honors, first time around, Justice Marks  
10          found evident partiality in one discrete respect. You can  
11          find it in the record at 3839 rejected all other arguments  
12          by my friends to the other side as to why there was evident  
13          partiality or any other basis for vacature indicated just  
14          how easily, how readily that evident partiality could be  
15          cured. So let's look at what's happening the six years  
16          since.

17                    You had a newly constituted RSDC, the same one  
18          that decides all such disputes about fair market value and  
19          about television rights across Major League Baseball,  
20          decided this dispute. You had a change of counsel, not  
21          only by the Nationals, but by the RSDC. That happened  
22          twice, because the Orioles didn't like the first chosen  
23          counsel, so they went to a second counsel at that point.

24                    Seven expert reports were submitted. A two-day  
25          hearing was held before the RSDC. And then the RSDC's



1 forty-seven-page decision issued that Justice Cohen aptly  
2 characterized as extraordinarily detailed and thorough.

3 JUDGE TROUTMAN: So in this instance, they  
4 originally contracted for a place for disputes to take  
5 place, correct?

6 MR. SHAFFER: Correct.

7 JUDGE TROUTMAN: So your argument, one person  
8 being disqualified could not, in fact, or ever or could  
9 make it such that we should disregard an agreement that the  
10 parties reached in the original settlement?

11 MR. SHAFFER: That's exactly right. And to put a  
12 sharp point on that, they reached that agreement in Section  
13 2.J.3 of their agreement. It was core to the agreement.  
14 It was right up-front. This is the only way that all  
15 important disputes over rights fees could be decided was by  
16 the RSDC. And that was exactly what the RSDC did in this  
17 agreement. You can find that in 203 of the record. So  
18 that forum was uniquely competent to decide, as is often  
19 true for in - - - for industry insider arbitration to  
20 decide - - -

21 JUDGE WILSON: So what - - -

22 MR. SHAFFER: - - - what is established  
23 methodology.

24 JUDGE WILSON: What about the - - - what about  
25 the repeated statements by the commissioner in between the



1 first and second arbitration that suggests this is a  
2 foregone conclusion? It's going to come out exactly the  
3 same way, and so on. I mean, you wouldn't be too happy if  
4 Chief Judge Cannataro would have been saying how this case  
5 was going to come out unfavorably to you for the last month  
6 or two, I assume.

7 MR. SHAFFER: That's true, but I think what the  
8 commissioner was saying there was that the integrity of the  
9 process would need to be respected, that the RSDC's  
10 decision would be final as the parties had agreed - - - had  
11 agreed they would be. Not that there was a specified  
12 outcome, and here's what the numbers should be. Just that  
13 the outcome would be entitled to judicial enforcement.

14 JUDGE WILSON: Well, would you - - - suppose he'd  
15 said the latter that you say he didn't say that. It's the  
16 outcome that's going to be exactly the same. Would you  
17 then say we should send it to a different forum?

18 MR. SHAFFER: I think you can look to what the  
19 RSDC itself said in explaining why it was not recusal - - -  
20 recusing it. You can find it at 4450-51 of the appendix  
21 that they have just as much integrity, just as much  
22 reliability as a judge who looks at these questions, says  
23 you do not have - - - there's not basis for recusal. And  
24 in fact, they are independent. They are their own body  
25 that decides disputes across Major League Baseball.





1                   In most of the RSDC's cases, they're deciding  
2                   have individual clubs essentially shortchanged Major League  
3                   Baseball by not having fair market value transactions, so  
4                   it looks like they have less money than they actually have  
5                   to contribute to Major League Baseball.

6                   JUDGE WILSON: That sounds like an appraisal  
7                   proceeding to me.

8                   MR. SHAFFER: Perhaps, Your Honor, and I credit  
9                   Your Honor's point. I do think that this is an arbitration  
10                  agreement under the FAA. I think the parties have agreed  
11                  to that. But the point is the appraisal is - - - as  
12                  between individual clubs and Major League Baseball.

13                 So you always have, when the RSDC is deciding  
14                 these disputes, you have the interest of Major League  
15                 Baseball against the individual clubs, yet you have owners  
16                 who are part of this whole framework. Their clubs will be  
17                 subjected to the same established methodology, the same  
18                 sort of determinations. That's exactly what Baltimore  
19                 signed up for when they did this agreement, extremely  
20                 sophisticated parties, very familiar with this league.  
21                 Their owner, sitting on the executive committee of Major  
22                 League Baseball, goes to Congress, praises the RSDC for the  
23                 work it does in these cases and all across Major League  
24                 Baseball. And if you subscribe to what my friends from the  
25                 other side are arguing, you would basically be invalidating



1 everything that the RSDC does, because they always have the  
2 commissioner in baseball and Major League Baseball who can  
3 be somewhere in the ether of their cases. Yet, these are  
4 arbitrators who do their jobs reliably, with integrity, no  
5 less than other arbitrators, and Justice Marks found all  
6 that.

7 He rejected every argument that was made for why  
8 the RSDC's output was supposedly invalid, and he found one  
9 discrete basis for evident partiality that was completely  
10 and undisputably fixed. Again, not just by the same RSDC  
11 upon return, but a newly constituted RSDC.

12 ACTING CHIEF JUDGE CANNATARO: Do you agree with  
13 that holding that the first proceeding was infected by some  
14 structural inequity?

15 MR. SHAFFER: To be honest, Your Honor, we  
16 thought - - - we disagreed with it, but we took our lumps  
17 and we wanted to get this matter resolved. And although my  
18 friend says that it was destined that Baltimore was going  
19 to lose, in fact, they mostly won.

20 The second time around, they did even better in  
21 terms of the ultimate valuation. We are not huge fans of  
22 that, except we need to have a binding reliable resolution  
23 by the RSDC, which also is going to decide these issues for  
24 other points in time. I mean, we - - -

25 ACTING CHIEF JUDGE CANNATARO: But only because



1 Justice Acosta predicted that the outcome at the second  
2 proceeding had to be nearly the same as the one in the  
3 first. And - - - and his prediction became true, and it  
4 sort of suggests to me that maybe the unfairness goes  
5 beyond just the one that was identified by Justice Marks.

6 MR. SHAFFER: Well, Mr. Chief Judge, I think that  
7 that's an unfair critique by my friends to the other side,  
8 because of course if it had been a much worse outcome for  
9 Baltimore, I don't think they would have been holding that  
10 up as a virtue of the second arbitration. It's the - - -  
11 it's the same established methodology that's being applied.  
12 The same basic inputs of what are comparable teams making  
13 off of their television rights. And you have basically the  
14 same numbers. The difference is you had projected numbers  
15 for the first arbitration; the second RSDC was looking at  
16 the actuals. But look at their work.

17 I would encourage Your Honors to read, as Justice  
18 Cohen did, the fifty-page decision by them, 5662-5711.  
19 They go through every argument made by Baltimore, credit  
20 most of them, do their own independent work, and it's not a  
21 surprise that the basic number is somewhere in the same  
22 ballpark as the first, because again, it's the same  
23 established methodology. You're looking at the same market  
24 comps. And you're basically working through the parties'  
25 competing positions which have - - - which have not



1 changed.

2 JUDGE SINGAS: Can we talk about that judgment  
3 for a minute? Do you think it accounts for all setoffs and  
4 profit sharing, like - - -

5 MR. SHAFFER: It accounts for the number that  
6 shall be paid in the language at Section 2.G of the  
7 agreement. That's all the RSDC decides, and it gave the  
8 courts everything needed to decide what is the amount that  
9 shall be paid off the television rights. It says what were  
10 the - - - what the numbers should have been versus what the  
11 numbers were. It says three times what its deciding as to  
12 the numbers.

13 And so - - -

14 JUDGE SINGAS: So what are you asking us to do  
15 regarding a judgment?

16 MR. SHAFFER: Simply affirm. I think this Court  
17 should affirm. And I'd note that all justices - - -

18 JUDGE TROUTMAN: So the RSDC had the right to  
19 enter judgment?

20 MR. SHAFFER: It did. I think this was  
21 everything that the RSDC could have done.

22 JUDGE TROUTMAN: So it's not just valuation?

23 MR. SHAFFER: It's not just valuation as to these  
24 rights. It's the - - - it's the amounts that shall be paid  
25 versus what actually was paid, and it is complete unto



1           itself. All justices who've reviewed the second  
2           arbitration award have unanimously agreed on this. Justice  
3           Cohen so found, and he was unanimously affirmed.

4                       And so we would submit to Your Honors - - -

5                       JUDGE RIVERA: But what about the offsets?

6                       MR. SHAFFER: The offsets could be left to a  
7           separate proceeding. I'm sure my adversaries are going to  
8           argue everything that they can - - -

9                       JUDGE WILSON: Why should - - -

10                      ACTING CHIEF JUDGE CANNATARO: Why shouldn't  
11           there be? Yeah.

12                      JUDGE WILSON: Why - - -

13                      ACTING CHIEF JUDGE CANNATARO: Why should there  
14           be a money judgment now if we still have to do the offsets?  
15           I'm sorry, Judge.

16                      MR. SHAFFER: Because I think that the RSDC did  
17           its work, and that it is complete work as to the value of  
18           the television rights and what those contracts should have  
19           been, and you can simply do subtraction to get to the  
20           correct number.

21                      JUDGE TROUTMAN: But in its decision it says the  
22           authority runs no further than determining the fair market  
23           value of the rights at issue. Does not speak to  
24           adjustment.

25                      MR. SHAFFER: Well, but my respectful submission



1 to the Court is that it is deciding what is the amount that  
2 should be paid pursuant to those rights, and you can, as  
3 you often have in a separate litigation between parties.

4 JUDGE TROUTMAN: But is also an argument that  
5 they understood their limitation.

6 MR. SHAFFER: Well, I think that they said three  
7 times in their opinion: at the beginning, at the end of  
8 their analysis, and then in the conclusion what exactly the  
9 amounts were that, again, under the operative provision  
10 shall be paid. I think they were indicating that they  
11 thought their work was done, and I think that translates to  
12 a money judgment.

13 If you were to disagree with that, Your Honor,  
14 all you would do is simply - - - you would affirm in all  
15 other respects, and indicate that it is not yet a judgment  
16 that could be monetized and collected on.

17 But if I may be just a couple quick points under  
18 the federal - - -

19 ACTING CHIEF JUDGE CANNATARO: Before you do, my  
20 last question on that is, doesn't the agreement provide a  
21 separate procedure for disputes over payments of the -- you  
22 know, the correct number of payments for the rights?

23 MR. SHAFFER: Mr. Chief Judge, in all other  
24 respects, Section 8 provides for arbitration of all the  
25 other disputes separate from Section 2, but that is my



1 point, that the RSDC under Section 2 did everything the  
2 RSDC could do to say an amount certain what was the value  
3 of the television rights that should have been paid, that  
4 shall be paid to the Nationals versus what was paid, and I  
5 think that they're entitled to have their judgment enforced  
6 no different than in other arbitrations.

7 ACTING CHIEF JUDGE CANNATARO: But to the extent  
8 that it's declaring the value of the rights, but it didn't  
9 do the math with respect to what had been paid and what the  
10 offsets are, and there was that - - - that loan that was  
11 made that - - -

12 MR. SHAFFER: That's been repaid. That - - -  
13 that loan has been repaid. Justice Cohen so found and  
14 explained that. So that - - -

15 ACTING CHIEF JUDGE CANNATARO: But I'm not saying  
16 it factors in, but it might. I'm just saying there are a  
17 lot of other things that go into deciding what the final  
18 money judgment should be in this case besides what's the  
19 value of the rights, which is, Judge Troutman said, that  
20 was their charge for this arbitration. Just determine the  
21 value of the rights.

22 MR. SHAFFER: I think those other disputes - - -  
23 potential disputes that Your Honor is alluding to are ones  
24 that will be litigated, as this case has been litigated  
25 until kingdom come by my friends at the other side. So I



1 think that is a recipe for just having this litigation  
2 continue and continue in never-ending fashion as opposed to  
3 having one chapter of this at long last more than a decade  
4 later conclude, and then if there are going to be separate  
5 litigations about other aspects of the dealings between  
6 these teams, other points in time, that can be litigated as  
7 cases are often litigated in parallel. That's my  
8 respectful submission.

9 But as to the Federal Arbitration Act, which this  
10 case is being decided under, Section 2 provides only for  
11 reformation of a contract, a rescission of a contract on  
12 such grounds as exist in law or equity, no one in this  
13 case - - - no one in this has offered a coherent clear  
14 analysis of what the basis is for reforming or rescinding  
15 the contract as - - - as negotiated between sophisticated  
16 parties who understood what the RSDC was and how it  
17 operated within Major League Baseball, and did that with -  
18 - - with precision and with clarity.

19 So I don't think that there is a basis under  
20 Section 2, and I don't think anyone has - - - has credibly  
21 suggested otherwise.

22 Under Section 10, you have after-the-fact  
23 vacature. That's what happened the first time around  
24 including to Justice Marks, and could readily be fixed.

25 There's no basis to send it to a different





1           arbitral tribunal under that. And Section 5, not only is  
2           inoperative, because you don't have a mechanical lapse, you  
3           have an RSDC that does exist. It is performing its  
4           responsibilities. It's there to arbitrate this case, and  
5           it was reconstituted in time to do that, just as it's  
6           decided all disputes throughout Major League Baseball.

7                        Last, the Second Circuit has specifically held in  
8           the Solomon case, which we cite in response to the amicus  
9           briefs that if you have a designation of an arbitral forum  
10          that is central to the parties' agreement as it so clearly  
11          was here and set forth in Section 2J, you cannot - - - you  
12          cannot then have a remand to a different arbitral forum.  
13          And I think that that rule makes sense. It tracks what the  
14          Supreme Court has held about the enforcement of private  
15          arbitration agreements, and no court, with all due respect  
16          to Mr. Phillips, no court has held otherwise under the  
17          Federal Arbitration Act.

18                       JUDGE RIVERA: But doesn't that make sense so  
19          long as the parties identify the arbitral forum as not  
20          corrupted? I mean, that's their point. It's just - - -  
21          it's corrupted, and that's not what they bargained for.  
22          They didn't bargain for a corrupt arbitral forum.

23                       MR. SHAFFER: I think that that is a grotesque  
24          caricature of what this tribunal was and what it did, and  
25          you have that from Justice Marks, you have that from a



1 majority of the Appellate Division, you have that from  
 2 Justice Cohen. The reality of the fact that you had an  
 3 RSDC that did its work just as a fair arbitral tribunal  
 4 would. You have the unanimous affirmance of that. You  
 5 could leave for another case what do we do if there's a  
 6 fundamental act of fairness. My respectful submission in  
 7 terms of the set of law on this, and the clear text in the  
 8 Federal Arbitration Act, is you would vacate the award of  
 9 such a tribunal and say that that's going to be the law of  
 10 the case, and there's no prospect of valid judgment  
 11 ultimately issuing.

12 And then if that keeps happening and keeps  
 13 happening, perhaps extraordinary relief in that case might  
 14 be warranted. This case is not even close to that in terms  
 15 of where it falls on the spectrum.

16 So I think this is an easy case for Your Honors  
 17 to affirm consistent with the set of laws of the Federal  
 18 Arbitration Act. And otherwise - - - otherwise, New York  
 19 would be holding in special disfavor industry insider  
 20 arbitrations, which are commonplace. They're commonplace  
 21 within sports leagues as we have here. They're commonplace  
 22 within industries. They are very valuable for the Second  
 23 Circuit as specifically acknowledged in the Lucent case  
 24 that there's value in having industry expertise.

25 Who better than the RSDC to say what is its

1 established methodology for valuing television rights among  
2 Major League Baseball clubs, and what are - - - what's fair  
3 value to arms-length transactions? They know that better  
4 than anyone. But when you have industry insiders, you will  
5 also have ties that throw across an industry. It is  
6 likelier that they're going to have dealings with one party  
7 or another, as is true certainly with the Orioles here.  
8 And to say that you can then indict the tribunal that's  
9 been chosen based on evident partiality not only to get one  
10 vacature, but then to disqualify the entire arbitral  
11 tribunal would make New York inhospitable to venerable well  
12 accepting arbitration agreements and arbitration mechanisms  
13 like we have here. That's going to be the rule of law  
14 here.

15 ACTING CHIEF JUDGE CANNATARO: Thank you.

16 MR. SHAFFER: Thank you, Your Honors.

17 MR. PHILLIPS: Thank you, Your Honor.

18 My friend starts with Justice Marks' findings.  
19 His - - - his statement was, "This complete inaction by MLB  
20 and the commissioner objectively demonstrates an utter lack  
21 of concern for fairness of the proceeding, and is so  
22 inconsistent with basic principles of justice that the  
23 award must be vacated". This is not a problem of a single  
24 arbitrator. This is a problem of MLB and of the entire  
25 institution, first.



1           Second of all, there was no question what the  
2           second arbitration award was going to look like. It's  
3           within .02 percent of the first award. You can reverse  
4           engineer from a number - - -

5           JUDGE GARCIA: Counsel - - -

6           MR. SHAFFER: - - - and go back to where we are

7           JUDGE GARCIA: - - - that's really assuming that  
8           the conflict originally had effect on the award. It's kind  
9           of setup in a way, right. So if the award is indifferent  
10          the second time, then you're kind of reaffirming, well, the  
11          conflict must have affected the dollar figure the first  
12          time. But they were only - - - what they were only saying  
13          there was the appearance of - - - and I understand that's  
14          what they say in the decision - - - but it was the  
15          appearance of Proskauer representing these different  
16          entities that created the problem that eventually  
17          overturned that first arbitration award.

18          So to say, well, you didn't get a different  
19          number the second time, I don't see the connection there,  
20          because they weren't saying in that decision that that  
21          conflict affected the number the tribunal gave you. They  
22          were just saying it couldn't stand because of that - - -  
23          what happened there.

24          MR. PHILLIPS: But what it - - - what it did say  
25          was the product of that process was poisoned.



1 JUDGE GARCIA: Right. And that's - - -

2 MR. PHILLIPS: That poison - - -

3 JUDGE GARCIA: It's not saying the number is - -

4 -

5 MR. PHILLIPS: No. Fair enough.

6 JUDGE GARCIA: - - - to use your phrase, poison.  
7 So to say oh, because the numbers stayed the same it proves  
8 my point, I can't follow that.

9 MR. PHILLIPS: Fair enough, but I don't need  
10 that, because what I'm - - - the problem of the poison is  
11 the commissioner and MLB, and they are the ones who made a  
12 final determination that the Orioles should lose at all  
13 costs, and that's exactly what happened. But the focus  
14 shouldn't be on the second arbitration. The question is  
15 Justice Marks looked at the first arbitration, said it had  
16 to be set back, and then concluded he had no authority to  
17 do anything in that situation. But we know that  
18 frustration of purpose, my friend says what's the legal  
19 basis? Frustration of purpose.

20 Justice Acosta said it. The court in Erving and  
21 Aviall have both recognized that that's an appropriate  
22 basis for sending a case to another tribunal. Even the  
23 Solomon case he cites himself, the court decided the  
24 question. It didn't send it back to the same forum in  
25 which that case had arisen.



1           I don't want to spend a lot of time on the - - -  
2           on the final money judgment, because I don't think you  
3           should ever get to it, but clearly if you did, that is so  
4           far beyond what the Federal Arbitration Act provides.  
5           That's not what the parties agreed to, to allow somebody to  
6           just enter a judgment under these circumstances. And his  
7           concern about it is, is this litigation going to go on  
8           forever? Well, it's not going to end with - - - even if  
9           this Court does affirm, we got a whole new proceeding that  
10          has to go on regardless of that.

11           And as I said at the outset - - - at the end of  
12          my last remarks, the only way to get this to full closure,  
13          send it to a neutral forum, let that forum decide it, and  
14          then regardless of what gets decided, it will no longer be  
15          a basis for challenging anything in court, because that  
16          will be a fair and impartial ruling in the case. That's  
17          what we bargained for. Fair and impartial. Once it became  
18          impartial, that's frustration of purpose. I ask the Court  
19          to reverse. Thank you.

20                    ACTING CHIEF JUDGE CANNATARO: Thank you.

21                           (Court is adjourned)

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of TCR Sports Broadcasting v. WN Partner Group, No. APL-2020-175 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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