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The Puck Stops Here: Analysis of Salary Arbitration in the National Hockey League

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May 7, 2011
Introduction

Clarke MacArthur had not been a bad player in the National Hockey League (hereinafter NHL) prior to the 2010-11 season. He had not been a good player either. Drafted by the Buffalo Sabres 74th overall in the 2003 NHL Entry Draft, he scored 79 points in 187 games spread over four seasons. The Sabres traded the 25 year old to the Atlanta Thrashers for two draft picks during the 2009-10 NHL season. MacArthur finished the 2009-10 NHL season with 35 points in 81 games. These numbers are consistent with a good third line player. Also consistent with a good third line player was MacArthur’s salary of $1,400,000 for the 2009-10 season.

Following the 2009-10 season, Clarke MacArthur became a restricted free agent (RFA) with arbitration eligibility. The Thrashers and MacArthur were unable to come to an agreement before MacArthur’s arbitration hearing date of July 21, 2010. The arbitrator awarded MacArthur $2,400,000 on a one-year contract. This news caused confusion across the hockey world, confusion that continued after the 2010-11 season began. Subsequently, the Thrashers exercised

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1 MacArthur had a breakout season in 2010-11, scoring 21 goals and 41 assists. This nearly doubled his career best season. While he may have played up to the contract he received in arbitration, there is no way this increase could have been predicted by an arbitrator.

2 [http://www.nhl.com/ice/player.htm?id=8470667](http://www.nhl.com/ice/player.htm?id=8470667) (last visited on 5/7/2011), All statistics courtesy of NHL.com

3 [http://www.tsn.ca/nhl/teams/players/bio/?id=3565](http://www.tsn.ca/nhl/teams/players/bio/?id=3565) (last visited on 5/7/2011)


6 [http://www.tsn.ca/nhl/teams/players/bio/?id=3565](http://www.tsn.ca/nhl/teams/players/bio/?id=3565) (last visited on 5/7/2011)


8 Id.

9 See for example:
their right to “walk away” from the arbitration award, rendering MacArthur an unrestricted free agent (UFA).\(^{10}\) The reaction to the MacArthur arbitration illuminated two important points. First, most of the hockey world lacks understanding of the NHL’s salary arbitration process. Second, the NHL’s salary arbitration process is not working.

What went mostly unsaid regarding the MacArthur arbitration was how MacArthur ended up with the $2,400,000 award. The arbitrator was uniformly blamed for making a poor decision.\(^{11}\) However, that was not the case. In fact, the Thrashers did not dispute the award sought by MacArthur.\(^{12}\) Only then did the arbitrator award MacArthur $2,400,000, which allowed the Thrashers to walk away.\(^{13}\) According to Reg Dunlop\(^ {14}\)

A team will accept a player’s offer in arbitration and walk away because they want to cut ties with the player. This is not uncommon. I do not know, and could only guess, why the Thrashers would want to walk away from MacArthur…. Perhaps the club has examined the comps [comparable players], has a good feeling for where the award would come in, and is unwilling to pay that player. In that case, they accept the player’s offer and walk away. You may ask, “well if they think the award is going to be too high, then why not just go to arbitration

\[^{10}\text{http://www.usatoday.com/sports/hockey/nhl/2010-07-21-macarthur-arbitration-walkaway_N.htm}\text{ (last visited on 5/7/2011)}\]
\[^{12}\text{http://www.usatoday.com/sports/hockey/nhl/2010-07-08-arbitration-scorecard_N.htm}\text{ (last visited on 5/7/2011)}\]
\[^{13}\text{http://www.usatoday.com/sports/hockey/nhl/2010-07-08-arbitration-scorecard_N.htm}\text{ (last visited on 5/7/2011)}\]
\[^{14}\text{“Reg Dunlop” is a current member of an NHL team’s front office, who has requested to remain anonymous. He has experience with arbitration cases representing both teams and players, possesses a Juris Doctorate and works on the arbitration cases for his present team. We exchanged numerous emails during the Fall of 2010, in which he expressed his opinion at great length regarding the arbitration process. These emails are on file with the author.}\]

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\[^{10}\text{http://www.edmontonjournal.com/sports/hockey/edmonton-oilers/Oilers+avoid+being+burned+Brule-arbitration/3329757/story.html}\text{ (last visited on 5/7/2011)}\]
\[^{11}\text{http://www.theglobeandmail.com/sports/hockey/a-new-twist-in-nhls-arbitration-plot/article1663772/}\text{ (last visited on 1/7/2011)}\] which quotes Atlanta General Manager Rick Dudley stating “We said, you know what, maybe it wouldn’t be a bad thing if he gets this silly award. We kind of encouraged it.”\]

\[^{12}\text{In most arbitration cases the team and the player submit a desired award, with the arbitrator’s decision falling somewhere in between. In this case, the Thrashers did not dispute the award sought by MacArthur. This ensured the award was high enough for the Thrashers to walk away from. (See http://www.theglobeandmail.com/sports/hockey/a-new-twist-in-nhls-arbitration-plot/article1663772/}\text{ (last visited on 1/7/2011)}\] which quotes Atlanta General Manager Rick Dudley stating “We said, you know what, maybe it wouldn’t be a bad thing if he gets this silly award. We kind of encouraged it.”\]
and see what it is, and if you don’t like it, then walk?” And you would be right in many cases. But the walk-away number was just over $1.6-million this year, meaning that the award has to come in above that number in order for you to walk away. So if you were only willing to spend $1-million, and thought the award was going to come in at $1.5-million, and the player was asking for $2-million, then you better just ask the arbitrator to enter an award of $2-million so you can walk, because if the award comes in at $1.5-million, you’re stuck with it.

... Another reason why the club may choose to accept an award, walk away and cut ties with the player is that in the period between the election of arbitration and the date of the hearing, the club has made other moves that leave no place for the player in arbitration. For example, let’s say a team’s starting goalie elects arbitration on July 5, and the hearing is set for July 25. The club, worried that the award will be too high, finds another starting goalie that they either like more than the old goalie, or who will play for less money. Having agreed to terms with that new goalie, they accept the player’s offer in arbitration and walk away, getting themselves out of any commitment to their old goaltender. A player must be smart. If he is not an irreplaceable player, he better not price himself out of a job by asking for too much, and if his price range is close to the walk-away number, better to ask for a salary just under the walk-away number to guarantee that you get a contract.

Arbitration is supposed to be a form of dispute resolution. In the process the NHL has adopted, arbitration has evolved into something else. Instead of being a process to bridge the gap between two sides, NHL arbitration has become a bargaining tool.

Concerns about the NHL’s arbitration process have been expressed in Nikolai Zherdev v. New York Rangers by arbitrator Elliott D. Shriftman regarding the process as outlined in the NHL’s Collective Bargaining Agreement (hereinafter CBA). Among the issues that Shriftman had with the process were the lack of evidentiary standards, the lack of requirements regarding the use or weight of the various factors to be considered, the use and weight of comparable players, and the consideration given to precedent. These concerns are valid and form the basis

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The Club also suggests that the goal of the Arbitrator must be to replicate, to the extent possible, the real bargaining process and place the player in the appropriate salary category, taking into account all relevant factors and arbitral standards and principles. One of these principles to be observed is the distinction between freely negotiated contracts and awarded salaries.

for how the NHL’s arbitration process has evolved into something beyond a dispute resolution system.17

What is more interesting about this case is the result. In awarding Nikolai Zherdev $3,900,000, Shriftman made the same mistakes he expressed concern about.18 The New York Rangers walked away from Zherdev’s award, rendering him an unrestricted free agent.19 Zherdev was unable to find a new contract in the NHL and signed with a Russian team for the 2009-10 season.20 Zherdev returned to the NHL over the 2010 NHL offseason, signing with the Philadelphia Flyers for $2,000,000 for one year.21

In similar fashion to Zherdev, Clarke MacArthur could only muster a one-year contract for $1,100,000 from the Toronto Maple Leafs following the Thrashers rendering him a free agent.22

**Overview of the Salary Arbitration Process**

Salary arbitration in the NHL is a collectively bargained dispute resolution process available to a limited number of players. To be eligible for salary arbitration, a player must have completed a minimum number of years in the NHL, determined by the age of the player when they signed their first standard player contract.23 Additionally, the player must be a restricted free

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17 *Id.*

18 According to Dunlop:

[I]n the 2009 Zherdev case, the Rangers had qualified Zherdev at 3.250, and therefore knew the award would come in above the walk-away number, so they could gamble a little bit. Their offer was above the walk-away number, but well below the player’s asking price. So they probably went into arbitration seeing how close the award would come to their end of that spectrum. Had it been very close to their number, the Rangers may have accepted the award and kept Zherdev. But obviously the award was outside their comfort zone, so they walked away.


20 *Id.*


agent as determined by the NHL’s CBA. These limitations set a small window of arbitration eligibility for some players between ages twenty-two and twenty-seven. When a player becomes a restricted free agent, either the player or the team can opt for a salary arbitration hearing to be scheduled. The team and players continue negotiating until the date of the hearing, meaning that many scheduled hearings end up being canceled because an agreement has been reached before the hearing.

Before the hearing, each party must submit a brief stating their case and their requested award to both the arbitrator and the opposing party. The team has the choice to select a one or two-year term for the arbitration award. This is significant, as a team cannot walk away from a two-year arbitration award.

The hearing consists of each party’s affirmative argument, followed by each party’s rebuttal and finally a surrebuttal. Article 12.9(g)(ii) sets forth the admissible evidence for the hearing:

(A) the overall performance, including official statistics prepared by the League (both offensive and defensive), of the Player in the previous season or seasons;
(B) the number of games played by the Player, his injuries or illnesses during the preceding seasons;
(C) the length of service of the Player in the League and/or with the Club;
(D) the overall contribution of the Player to the competitive success or failure of his Club in the preceding season;
(E) any special qualities of leadership or public appeal not inconsistent with the fulfillment of his responsibilities as a playing member of his team;

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24 See NHL CBA Article 10.2
25 See NHL CBA Article 12.1
26 See NHL CBA Articles 12.2 through 12.5
27 See NHL CBA Article 12.9
28 See NHL CBA Article 12.9(c)
29 See NHL CBA Article 12.10
30 See NHL CBA Article 12.9(k)
(F) the overall performance in the previous season or seasons of any Player(s) who is alleged to be comparable to the party Player whose salary is in dispute; and

(G) the compensation of any Player(s) who is alleged to be comparable to the party Player, provided, however, that in applying this or any of the above subparagraphs, the Salary Arbitrator shall not consider a Player(s) to be comparable to the party Player unless a party to the arbitration has contended that the Player(s) is comparable; nor shall the Salary Arbitrator consider the compensation or performance of a Player(s) unless a party to the arbitration has contended that the Player(s) is comparable.  

The arbitrator must announce the award within forty-eight hours of the hearing.  

If a one-year term was elected by the team, they then have forty-eight hours to walk away from the award. If a two-year term was elected by the team, they have forty-eight hours to decide if they want to honor the two-year award. If they choose not to honor the award, the player will then enter into a one-year contract with the team and be an unrestricted free agent at the expiration of the contract. However, if the club elected arbitration they cannot walk away from an award. A hearing may be reopened by the arbitrator or by either party if they can show good cause.

The arbitrators are selected from a pool of eight arbitrators determined by the NHL and the National Hockey League Players Association (hereinafter NHLPA). All arbitrators must be members of the National Academy of Arbitrators. Following that year’s arbitration hearings, either the NHL or the NHLPA may terminate an arbitrator. The party must submit a list of

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31 See NHL CBA Article 12.9(g)
32 See NHL CBA Article 12.9(n)(i)
33 See NHL CBA Article 12.10
34 See NHL CBA Article 12.10(b)
35 Id.
36 See NHL CBA Article 12.9(l)
37 “The League and the NHLPA shall jointly appoint eight (8) Salary Arbitrators who are members of the National Academy of Arbitrators.” NHL CBA Article 12.6.
38 Id.
39 See NHL CBA Article 12.8
three arbitrators for the other party to choose from to return to the set pool of eight arbitrators within ten days of the termination. The schedule of which arbitrator oversees what case is determined by the NHL and the NHLPA after all the eligible players have decided whether to file for arbitration. After a coin flip, the parties take turns selecting which arbitrator will oversee the arbitration cases that have been elected. Additionally, the parties split the costs of arbitration.

**Trends in NHL Arbitration Case Outcomes**

Over the last ten years, the players filing for arbitration and the outcomes of those arbitrations have changed dramatically.

### Arbitration Cases Heard by Position

<table>
<thead>
<tr>
<th>Year</th>
<th>Forwards</th>
<th>Defensemen</th>
<th>Goaltenders</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>11</td>
<td>5</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>2002</td>
<td>6</td>
<td>3</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>2003</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>2004</td>
<td>9</td>
<td>7</td>
<td>1</td>
<td>17</td>
</tr>
<tr>
<td>2005</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>2006</td>
<td>9</td>
<td>2</td>
<td>0</td>
<td>11</td>
</tr>
<tr>
<td>2007</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>2008</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>2009</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>2010</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>52</strong></td>
<td><strong>25</strong></td>
<td><strong>5</strong></td>
<td><strong>82</strong></td>
</tr>
</tbody>
</table>

In the five off-seasons from 2001 through 2005, 54 arbitration cases were heard. During that time, teams elected for two-year awards 20 times and one-year awards 34 times. In the five off-seasons from 2006 through 2010, only 28 arbitration cases were heard. During that time,

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40 *Id.*

41 See NHL CBA Article, 12.7

42 See NHL CBA Article 12.7(c)(i)

43 See NHL CBA Article 12.9(o)

44 All NHL Arbitration cases from 2001 through 2010 are on file with the author.
teams elected for two-year awards only three times and one-year awards 25 times. These time periods bracket a notable period in the NHL. The 2004-05 NHL season was canceled.\textsuperscript{45} The lockout resulted in a new CBA, enacted in 2005, which involved slight changes to the NHL arbitration process, a different structure for unrestricted free agency, and major changes to the economic environment with the institution of a salary cap.\textsuperscript{46} However, the CBA changes had little effect on the NHL arbitration outcomes.

The most concerning change in the latest arbitration results is the increase in teams walking away from arbitration awards. From 2001 through 2005, only three of the 54 players that reached arbitration did not begin play the following season\textsuperscript{47} with the team they went to arbitration with.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Players that Filed</th>
<th>Number of Cases Heard</th>
<th>Number of Cases Where the Player Did Not Return</th>
<th>Percent of Cases Heard out of Players Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>44</td>
<td>17</td>
<td>0</td>
<td>38.6%</td>
</tr>
<tr>
<td>2002</td>
<td>40</td>
<td>9</td>
<td>0</td>
<td>22.5%</td>
</tr>
<tr>
<td>2003</td>
<td>34</td>
<td>7</td>
<td>2</td>
<td>20.6%</td>
</tr>
<tr>
<td>2004</td>
<td>67</td>
<td>17</td>
<td>0</td>
<td>25.3%</td>
</tr>
<tr>
<td>2005</td>
<td>11</td>
<td>4</td>
<td>1</td>
<td>36.3%</td>
</tr>
<tr>
<td>2006</td>
<td>69</td>
<td>11</td>
<td>3</td>
<td>15.9%</td>
</tr>
<tr>
<td>2007</td>
<td>30</td>
<td>7</td>
<td>0</td>
<td>23.3%</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
<td>2</td>
<td>0</td>
<td>12.5%</td>
</tr>
<tr>
<td>2009</td>
<td>20</td>
<td>4</td>
<td>2</td>
<td>20.0%</td>
</tr>
<tr>
<td>2010</td>
<td>31</td>
<td>4</td>
<td>3</td>
<td>12.9%</td>
</tr>
<tr>
<td>Total</td>
<td>362</td>
<td>82</td>
<td>13</td>
<td>22.7%</td>
</tr>
</tbody>
</table>

Over the following five years, eight of the 28 players that reached arbitration were moved by their team following an arbitration award. According to Dunlop:

There could be a couple reasons [why teams are letting players go], but for me the best explanation is the salary cap. More specifically, the fact that the salary cap is

\textsuperscript{45} See http://www.usatoday.com/sports/hockey/nhl/2005-02-16-season-cancel_x.htm (last visited 5/7/2011)

\textsuperscript{46} http://www.nhl.com/ice/page.htm?id=26366 (last visited 5/7/2011)

\textsuperscript{47} This includes players who were traded or bought out in addition to those whose teams walked away from the award.
not increasing as much and more teams are being squeezed [sic]. It used to be that if you didn’t like the award, you would suck it up because you wanted to keep the player. These days, because it’s usually mid-level players going to arbitration, if the price is too high, teams have to think long and hard as to whether they can get similar production from a player carrying a lower cap hit, before they accept an unfavorable arbitration award.48

This change helps illustrate the problems with the awards being made in arbitration cases. Prior to the salary cap, teams’ willingness to accept a higher award than preferred masked the inefficiencies in the system. Now that teams have a hard ceiling on the amount of money they can spend, players given salaries in arbitration above their worth are being released.

This coincides with the other disturbing change in the arbitration results. The number of players filing for arbitration has declined, while the number of cases heard has declined at an even higher rate.49 The decline in the rate of arbitration cases being heard is influenced by a number of factors. The first factor is highlighted by Dunlop:

The number of arbitration cases has decreased since the lockout because there are fewer players eligible for arbitration. The UFA age is now 27, so in general, you’re only looking at players aged 22 to 26 as eligible players (and it’s rare for a 22 year old to be eligible).50 Within that small age bracket, you have only a few players that arb [arbitration] would help. The best young players all sign long term deals. The days of Luongos and Brieres going to arbitration are over.51

As the caliber of player reaching arbitration hearings decreases, the willingness of NHL teams to go to arbitration also decreases. Lower caliber players have a greater risk of coming in below the walk-away number, forcing a team to take on the salary, or to buy the player out. This has turned the arbitration hearing into a negotiating tool for the player’s agents. Since teams are

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48 Email on file with the author.

49 Pre-lockout, 27.6% of cases filed were settled by the arbitrator, while post-lockout only 16.9% were settled by the arbitrator.

50 Players who turn 27 after June 30th of a given year may also be arbitration eligible.

51 Email on file with the author.
more worried about an unacceptable award, players can hold out until immediately before the arbitration hearing before re-signing with the team.\textsuperscript{52}

\textbf{Literature Review}

There has been little written about salary arbitration in the NHL. The most extensive analysis given to the NHL’s arbitration process was by Stephen M. Yoost in \textit{The National Hockey League and Salary Arbitration: Time for a Line Change}.$^{53}$ This article focuses on the role that salary arbitration played in the financial decline of the NHL, and how it helped lead to the 2004-05 lockout. It includes an overview of the financial operations of the NHL and the NHLPA, the use of arbitration in professional sports, Major League Baseball’s (hereinafter the MLB) salary arbitration system and the mechanics of the NHL’s salary arbitration system.$^{54}$ Yoost analyzed how the arbitration process worked under the old CBA and how it changed with the new CBA introduced in 2005.$^{55}$

He then proposed four options the NHL should have considered during the lockout with regards to arbitration.$^{56}$ First, the NHL should have eliminated arbitration.$^{57}$ Most professional sports do not have salary arbitration and the existence of a free agent system renders salary arbitration dispensable.$^{58}$ Second, if they chose to keep arbitration, the NHL could have constricted the eligibility requirements.$^{59}$ This would make arbitration less frequent. Unaddressed by Yoost was the change in unrestricted free agent age, from 31 to 27. This change effectively

\begin{itemize}
\item \textsuperscript{52} In 2010, 6 players settled with their teams on their hearing day. See \url{http://nhlpa.com/News/Headlines/99C2F3E0-5742-4D70-90EE-A85058C32E7B/Salary-Arbitration-Dates} (last visited 5/7/2011)
\item \textsuperscript{54} Id. at 491.
\item \textsuperscript{55} Id. at 511.
\item \textsuperscript{56} Id. at 525.
\item \textsuperscript{57} Id. at 526.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id. at 528.
\end{itemize}
created the change that Yoost requested. Third, Yoost stated the NHL could have instituted final offer arbitration\textsuperscript{60} similar to that used in the MLB.\textsuperscript{61} Finally, Yoost suggested the NHL could have limited the value of arbitration awards by placing a cap on what salary the arbitrators could award.\textsuperscript{62} This suggestion has been rendered moot by the caliber of players that have reached arbitration since the lockout.

In \textit{Salary Arbitration in the National Hockey League: Taking the Next Step With Online Dispute Resolution} John B. Sprenzel focused on how online arbitration might work in the NHL.\textsuperscript{63} His proposed solution involves the team and players submitting a value for each of the six categories that an arbitrator is allowed to consider regarding a player’s worth.\textsuperscript{64} The player and his comparables would be ranked from 1-100 in each of these categories.\textsuperscript{65} This would allow for players to be ranked in order based on their composite score.\textsuperscript{66} The proper salary could then be awarded.

While the use of online arbitration is something that could work in the NHL, the proposed model has as more flaws than the current model. First, translating the currently considered factors into 100 point scores will prove more difficult than the current process. In Sprenzel’s model, each of the five categories used for rankings (statistics, injuries/illnesses, length of service, overall contribution and leadership/public appeal) are all rated equally. This method does nothing to solve the problems faced in current arbitration about valuing players.

\textsuperscript{60} Final offer arbitration is when both sides submit a salary request and the arbitrator chooses one submission or the other. Generally, this system results in more reasonable requests from both sides.

\textsuperscript{61} Id.

\textsuperscript{62} Id. at 529.

\textsuperscript{63} Id. at 68.

\textsuperscript{64} Id. at 69; The six categories used are statistics, injuries/illnesses, length of service, overall contribution, leadership/public appeal and compensation of comparable players. The sixth category is not used to rank the player being arbitrated, but to determine what salary should be given to the player.

\textsuperscript{66} Id.
Simply using “statistics” as a category with no breakdown of what statistics have a higher value for which players will further the current problems. Additionally, traditional arbitration cases have put far less emphasis on the four other categories, only using them to differentiate between players with similar statistics. To weigh length of service (the amount of time a player has spent with a team) the same as their on ice contributions is lunacy.

With no baseline, and all the factors essentially weighted equally, this will completely skew the results in favor of certain players. However, a modified formula could work using the proper considerations and using the proper players as comparables.

In *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems* Melanie Aubut details the history of salary arbitration in the NHL and MLB, the only North American professional sports leagues to utilize an arbitration system.\(^\text{67}\) After analyzing the arbitration systems of both leagues, she outlines the key differences between the NHL and MLB, identifying three major distinctions.\(^\text{68}\) First, MLB uses a final offer system, in which the arbitrator must choose the figure submitted by the player or the figure submitted by the team. Second, the players and teams in the MLB arbitration process do not exchange briefs until immediately preceding the hearing.\(^\text{69}\) This does not allow the parties’ time to prepare a rebuttal.\(^\text{70}\) Finally, MLB arbitrators do not have to justify their decision, while the NHL arbitrators pen extensive opinions regarding their decisions.\(^\text{71}\) This can be both positive and negative, as it does not allow prior cases to hold precedent but does not put as much weight on the arbitrator to make a proper decision.\(^\text{72}\) An evaluation of the NHL system is also included.\(^\text{73}\) However, it is an


\(^{68}\) *Id.* at 211.

\(^{69}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) *Id.*

\(^{72}\) *Id.*

\(^{73}\) *Id.* at 203.
outdated analysis, as the realities of the NHL arbitration system have changed with the current CBA.

Specific Problems of the NHL Arbitration Process

Weight of Considerations

The biggest issue faced when analyzing the arbitration process is the variance of the weight placed on different considerations. The CBA offers little guidance on what should be considered and what weight should be given to each element being considered. This concern was expressed by arbitrator Shriftman in Nikolai Zherdev, as he stated “nothing is mentioned about a requirement to use every one of these criteria in one’s case or about how much weight should be accorded to each.”

Taking into account that arbitrators are allowed to consider a wide range of statistics and comparable players, the lack of guidance leads to a high level of variance in what arbitrators consider and what the actual results are. This leads arbitrators to constantly rely on previous decisions when determining what statistics are useful, what players are good comparisons, and how much weight they should be given.

Relying on previous decisions is problematic. For example, following the lockout the NHL instituted a number of new rules meant to speed up the game. In the last five years scoring has increased and the emphasis for many teams has changed from compiling a team of big players to teams of fast players. Furthermore, the highest scoring player before the lockout (Martin St. Louis, with 94 points), would have finished 10th, 11th, 6th, 5th and 6th in the years since the lockout with the same point total (oddly enough Martin St. Louis finished 6th in scoring in 2009-10 with 94 points). The point leader in every year since the lockout: Joe Thornton (125

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74 See NHL CBA Article 12.9. Also see: Sergei Gonchar v. Boston Bruins (2004) (on file with the author): “I accept that defensive skills, physical attributes, and leadership qualities are elements to be valued along with the offensive element, I am not prepared to apply them as carrying the same weight as the latter.”

75 Nikolai Zherdev, p. 34, included in Appendix A

76 NHL CBA Article 12.9

77 Id.
points), Sidney Crosby (120 points), Alexander Ovechkin (112 points), Evgeni Malkin (113 points) and Henrik Sedin (112 points). This illuminates that a league leading season in 2003-04 would be merely a very good season in the years since. As the style of play in the NHL has evolved, new statistics have been introduced and the pool of useful comparable players shrinks, more inconsistency and problems are being created for arbitrators.

Use of Comparable Players

Another issue facing arbitrators is the use of comparable players in determining their award. The process has evolved into a slotting process. Basically, arbitrators determine the most relevant comparable players submitted by the team and the player, rank the player among those comparables, and then award the player a salary that falls between the closest two comparable players. Arbitrator Shriftman expressed concern over the use of comparables in Nikolai Zherdev, as he states:

Nothing in that article discusses the use of prior awards per se. In this case, both sides frequently cite and quote from salary awards of my colleagues. The Arbitrator questions just how useful they can be because inasmuch as each player is unique so it is that his salary arbitration is special to its facts. At most, the cited awards, frequently inconsistent in terms of how they utilize and weigh any given factor, deserve persuasive as opposed to precedential value. This should be construed not as a deprecation of the wisdom of those awards but, rather, and simply, a broad comment about their ultimate utility.

The use of comparable players has been a much discussed topic by arbitrators over the last ten years. The problem with using comparable players was succinctly stated by arbitrator Edwin H. Benn in Vitali Vishnevski v. Anaheim Ducks:

The notion of finding a true comparable — *i.e.*, an “identical twin” — tilts more towards hope than reality. As in any proceeding where comparables are used to set wages or economic benefits, there are just too many factors unique and different to these players that will always give the parties fertile ground for argument to support their respective positions. The most one can hope for when trying to determine sets of comparables is to get a reasonable picture of the marketplace by using similar players with similar abilities and production.

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78 See Appendix B for arbitrator opinions on the use of comparable players.

79 Nikolai Zherdev, p. 34
Hopefully that process yields an “apples to apples” comparison. Arbitrators use different methods for determining comparables. The key is to find a rational one based on the information and arguments supplied by the parties. The approach must be flexible and reflect what is presented by the parties.\textsuperscript{80}

However, the reliance on comparable players can create problems when a suitable set of comparable players cannot be found. This issue was faced in Dick Tarnstrom’s arbitration in 2005. Stated arbitrator Gill Vernon: “With so much diversity in the scarce comparable group, the lesson perhaps is that it is not inappropriate to compare these players as a \textit{whole} recognizing they are the sum of different and varied skills.”\textsuperscript{81}

The reliance on comparable players is further complicated by the CBA stipulation that only comparable players asserted by either the player or the team may be considered.\textsuperscript{82} Arbitrators are limited in what players they may consider, which may exclude better comparables. This was highlighted in \textit{Brendan Morrison v. Vancouver Canuck} by Arbitrator Vernon:

This isn't to say that there isn't any instructive value in the respective comparable groups or the respective comparable search criteria used by the parties. There are, however, aspects of each parties' search criteria that trouble the Arbitrator. Without the same luxuries enjoyed by the parties: manipulative computerized databases and gobs of time, the Arbitrator is handicapped in creating a preferred comparable group. Additionally, the Arbitrator is not privileged to create his own group of comparables that include players not on either party’s list. All these difficulties are compounded by the natural fact that no two players have exactly the same set of skills or have the same role on their particular team. When the Arbitrator says that he finds all the comparables useful to some degree and problematic to some degree, he does so without intent to create or undo any precedent as to how or how not to create a comparable group. It is to say this is more art than science and that in the end, at least in this case, the question isn't so much if a particular player from each group should or shouldn't be strictly considered comparable but rather the question is: "How instructive is the comparison?"\textsuperscript{83}


\textsuperscript{81} Dick Tarnstrom v. Pittsburgh Penguins, p. 1 (2005) (on file with the author)

\textsuperscript{82} See NHL CBA Article 12.9(g)(ii)(G)

\textsuperscript{83} Brendan Morrison v. Vancouver Canucks, p. 21 (2002) (on file with the author)
In Tarnstrom and Morrison, arbitrator Vernon did a good job of illustrating the issues of using comparable players. However, not all arbitrators take the faulty nature of comparable players into consideration when deciding on their awards. This is particularly egregious in *Nikolai Zherdev* and *Tim Kennedy v. Buffalo Sabres* (2010).

Valuation of Comparable Contracts

Reliance on comparable players has created further issues in determining what players should be considered and what contract value should be used. The use of annual average value (hereinafter AAV) by arbitrators has been discussed previously, most notably in *Robert Lang v. Pittsburgh Penguins* (2001)\(^{84}\) and *Trent Hunter v. New York Islanders* (2007).\(^{85}\) Unfortunately, not all arbitrators use AAV as the contract value for that particular player. According to Dunlop:

> It should definitely be considered, maybe ahead of Annual Salary. So many teams care much more about AAV than Salary, as AAV is what counts against the cap. The truth is, most negotiations are centered around what the average salary is going to be, not what the player’s salary will be in one year vs. the next. It is true that in some negotiations, where it is mixed between arb [arbitration] years, non-arb [arbitration] years, and UFA years, that the parties might assign a price to the year based on corresponding status, but very rarely does a team say, “he has to earn X in 2010-11 and Y in 2011-12” if both are years of the same status.\(^{86}\)

This highlights the major problem with using AAV for extensive contracts. Any contract longer than one year has different value attached depending on the status of the player. By signing for longer than one year, a player may be giving up an off-season in which they would be eligible for arbitration or unrestricted free agency.\(^{87}\) This creates a problem in determining how to set the value for that player. According to Dunlop:

> Any deal over 3 years is too long to be relevant as an arbitration comparable. If you sign a player to a 4+ year deal, you usually do so because you think the player is going to be a very good player for you. If you believed in the player at arbitration as much, you would sign him long term too. You can’t give an arb

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\(^{84}\) See Appendix C

\(^{85}\) See Appendix C

\(^{86}\) Email on file with the author.

\(^{87}\) See Appendix D for arbitrator opinions on the contract length of comparable contracts.
[arbitration] player an AAV on a 2 year deal that matches the AAV of a comparable player on a 4 or 5 year deal, there are other factors at play.\textsuperscript{88}

These other factors often relate to the surrendering of free agent years. There has been no consensus among arbitrators on how to value the forfeiture of a year of unrestricted free agency. Arbitrator Terry A. Bethel expressed the prevailing opinion of the arbitrators in \textit{Jay Bouwmeester v. Florida Panthers} (2006):

\begin{quote}
I cannot know what motivated the comparable players in their negotiations, whether it was security or a payment for surrendering free agency. It also could be that the less restrictive rules and the increasing number of free agents will affect the choice between security and free agency, although it is too early to make that assessment. But absent evidence of injury or diminished ability, it is fair to assume that including a UFA year in a long-term contract results in at least some premium for the player. The players and the Players’ Association clearly value free agency as a benefit, so it is worth something when it is surrendered. Sometimes this increased value can be recognized by a significant increase in what would otherwise have been a UFA year. But in other cases, the benefit will be recognized by spreading it out over the term, as when a multi-year contract has the same salary in each year.\textsuperscript{89}

Traditionally, the logic expressed in Bouwmeester made sense. Players could not become unrestricted free agents until the age of 31, so forfeiting an unrestricted free agent year held a lot of value.\textsuperscript{90} However, in \textit{Jannik Hansen v. Vancouver Canucks} (2010) arbitrator Michel G. Picher demonstrates how the new CBA has affected the value of free agent years:

\begin{quote}
[The new CBA] allows for a greater access to unrestricted free agency for younger players than was the case under the previous Collective Bargaining Agreement, where the age of 31 was the general threshold for unrestricted free agency. In the result, as free agency becomes more commonly available at a younger age, the partial giving up of free agency in the signing of a multi-year contract may involve less of a sacrifice and, to that extent, should be understood to involve less of a premium within the multi-year contract. That does not change the reality that a multi-year contract, which obviously involves greater long-term security, must still be understood as involving some degree of premium. But to the extent that free agency is more accessible to more players at a younger age, it
\end{quote}

\textsuperscript{88} Email on file with the author.

\textsuperscript{89} \textit{Jay Bouwmeester v. Florida Panthers}, p. 3 (2006) (on file with the author)

\textsuperscript{90} \url{http://www.nhl.com/ice/page.htm?id=26366} (last visited 5/7/2011)
must be recognized that its intrinsic value in bargaining, and conversely its value as a premium in negotiated contracts, is now somewhat reduced.\textsuperscript{91}

What has gone largely unstated by arbitrators in their assessment of longer contracts is the thought process of the teams when signing players. Whether or not two players had comparable statistics is largely irrelevant when comparing a player in arbitration to a player under a long term contract. Players who have been signed to long term deals have the confidence of the team to continue their previous performance or to improve on that performance.

**Future Potential versus Past Performance**

The future potential of a player has gone largely unaddressed by NHL arbitrators. This makes sense, as arbitrators are ill equipped to assess the potential of a player. However, the future potential of a player is a major consideration when a player and a team negotiate a contract. In fact, in a rare occurrence of potential being discussed in an arbitration case, arbitrator Richard Bloch dismissed the argument, stating in *Daymond Langkow v. Phoenix Coyotes* (2001) that potential “is doubly speculative; the collective bargaining agreement directs the focus of these proceedings to demonstrable accomplishments.”\textsuperscript{92}

However, there are means by which arbitrators may consider potential, but it has rarely been used. According to Dunlop:

[Draft position] is of huge importance, especially for unproven players (less than 200 GP [games played]). Clubs are always willing to invest and give more time to their top picks, and pay those players more because they believe it will pay off once the player finally finds his game. Those players need to do less to prove the pick was a good one than a late pick (ie. A 21 year old 1\textsuperscript{st} round pick center scores 40 points in his first full year. His team will believe he’s on his way to stardom and will commit long term at higher dollars. If an undrafted player did it, the team might want to see him do it again to make sure it wasn’t a fluke).\textsuperscript{93}

While this is not a perfect measure of a player’s potential, it is one of the few ways in which an arbitrator untrained in hockey scouting can ascertain the value of a player in the future.

\textsuperscript{91} Jannik Hansen v. Vancouver Canucks, p. 19 (2010) (on file with the author)

\textsuperscript{92} Daymond Langkow v. Phoenix Coyotes, p. 5 (2001) (on file with the author)

\textsuperscript{93} Email on file with the author.
Nevertheless, a player’s draft position has rarely been mentioned. In *Brooks Laich*, Arbitrator Vernon stated:

Some of these players still enjoy the shine of being 1st round draft picks. While the buoyancy of this does not keep one afloat for long in the NHL, it is a factor in salary setting early in a career. Several of these players signed two-year contracts after their rookie year or first full season and their high draft status appears to have carried continuing weight.\(^{94}\)

However, arbitrator Vernon made little use of this statement, using it only to differentiate between two comparable players whose salaries were not in line with their statistics.\(^{95}\)

As arbitrators have not relied on potential for their awards, they have depended solely on prior statistics. Furthermore, this is another area in which the CBA does a poor job of instructing the arbitrators. The performance of a player and the comparables over the course of their career and the performance of the player over the platform (prior) season are both allowed to be considered.\(^{96}\) But no instruction is given to the arbitrators on whether platform or career performance takes precedence. According to Dunlop:

Platform Year performance is becoming more and more important as the group of players eligible for arbitration has become younger. When you’re looking at 23-25 year old players, especially those with only 1-3 years of NHL experience, generally platform year performance can rightfully be seen as a better indicator of future performance than career numbers.\(^{97}\)

This issue was more prevalent in older arbitration cases when more experienced players were involved in arbitration.\(^{98}\) Arbitrators were inconsistent with their application of career

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\(^{94}\) *Brooks Laich*, p. 19

\(^{95}\) Id.

\(^{96}\) See NHL CBA Article 12.9(g)(ii)(A)-(C),(F)

\(^{97}\) Email on file with the author.

\(^{98}\) The average age of arbitration players pre-lockout: 27.39, average age of arbitration players post-lockout: 25.87; furthermore, the age of arbitration eligible players has been lowered by the CBA due to the reduction in age for Unrestricted Free Agency as explained at [http://www.nhl.com/ice/page.htm?id=26366](http://www.nhl.com/ice/page.htm?id=26366) (last visited 5/7/2011)
versus platform performances. Some arbitrators gave more weight towards platform years, while others all but ignored the platform year performance.99

The Use of Older Contracts as Comparables

As the CBA has created a smaller group of players who are eligible for salary arbitration, it has also reduced the number of comparable players.100 In addition to the smaller time window for players eligible for arbitration, there is a problem with the preponderance of long term contracts signed by younger players.101 This creates a very small group of comparable players, which can create further erratic results in arbitration cases. One way to combat the diminutive pool of comparable players is to include players from previous years. Dunlop states that it “depends on the market. Sometimes they are helpful, sometimes not. Generally though, both sides have accepted that two-year old contracts or older are not helpful.”102 However, prior platform years can be used as comparables if the AAV of the contract is adjusted to the current economic climate, which would greatly increase the pool of comparable players. As the style of play in the NHL changed drastically beginning in the 2005-06 season, only platform years beginning then should be used. The amount of salary expenditures made by NHL teams every year is readily available and the number of players employed by the NHL has remained static. Therefore those numbers could be used to determine a fairly accurate AAV for comparison purposes.

Physicality

How to measure the contributions of players beyond the score-sheet is another common problem facing arbitrators. The standard way to measure aggressiveness and physicality is

99 See Appendix E for arbitrator opinions on using platform year versus using career performance.

100 See Appendix F for arbitrator opinions on the use of older contracts as comparables.

101 By signing young players long term, it essentially removes them as useful comparables in arbitration cases, as most arbitrators will not consider the contracts of players signed to long term deals. Signing players long term has become commonplace since the lockout, as a longer deal with a lower AAV is a method of lowering the amount that a player counts against the salary cap.

102 Email on file with the author.
through penalties in minutes (PIMs). This has expanded to include hits, as they became an officially recorded NHL statistic in 2005. According to Dunlop “These are fine measures, although hits can be a little unreliable. Over the course of a full season though, they’re usually fine, except for at Madison Square Garden, where everything in the RTSS [Real Time Scoring Statistics] is inflated due to the inconsistent way in which their scorers track things.”

The unreliability of hits per game has been discussed previously in Ladislav Nagy v. Phoenix Coyotes (2006) and Trent Hunter. In both cases, the arbitrator decided to give little credence to the statistic, stating that it is “a defensive statistic and not as relevant for an Offensive player like Nagy” and that it is a “subjective standard.”

PIMs have also been particularly troublesome. According to Dunlop:

They are not necessarily a good indicator of aggressiveness, although once you get to a certain number (approaching or passing 2.00 PIM/G), it’s hard to argue

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103 See Appendix G for opinions on the use of PIMs to measure aggressiveness.

104 Hits became an official NHL statistic following the 2004-05 NHL lockout, see NHL.com Statistic Database.

105 Madison Square Garden in New York is the home of the New York Rangers.

106 RTSS includes hits, blocked shots, missed shots, giveaways, takeaways and faceoff statistics.

107 Email on file with the author.


I have a problem with considering those statistics in this case. Hits per game is obviously a defensive statistic and not as relevant for an offensive player like Nagy. But hits are also subjective. In this case, I find the hits per game statistic is not really helpful in coming to reasonable conclusions concerning Nagy’s production…. I will therefore not consider the categories of hits per game and game winning goals.

109 Trent Hunter, p. 6:

There was much disagreement in the case about the value of hits and hits per game in establishing a physical presence. It is a subjective standard, as other arbitrators have noted. But that does not make it irrelevant, and that is especially true in this case where there is such a significant disparity between Hunter and other players. Although other factors also are indicative of aggressive play, Hunter’s hit statistics are influential in this case. Nor am I able to conclude that Hunter benefited disparately from home town statistics; all of the players, after all, played at home.

110 Ladislav Nagy, p. 5

111 Trent Hunter, p. 6
that the player isn’t an “aggressive” player. You’re not going to get 150+ PIMs without a bunch of them being for physical infractions.\textsuperscript{112}

However, using PIMs as a measure of aggressiveness ignores the detrimental effect that penalties have on a team, as well as the many penalties taken by a player that are not of an aggressive nature.\textsuperscript{113}


The Player argues that his high PIM total is a mere reflection of his aggressive, physical style, one that makes him a fan favorite and a player opponents hate to face. On the other hand, the Club makes the point that his excessive penalty minutes demonstrates his immaturity as a player, and the types of penalties he has taken, in the more recent past, have a negative, not a positive, impact to his team.

The arguments of both sides call for an intriguing analysis: should a player be financially penalized, or rewarded, for high penalty minutes? Certainly, players are compensated for bringing a “complete” game to the ice, one where offensive prowess is accompanied by an aggressive, defensive style. Avery brings a passion to the ice that has an impact. At the same time, there is a strong contention that certain penalties do not assist the team, and the man in the box obviously exposes his team to being scored against.

The Club asks this arbitrator to undertake an analysis of what is a “good” penalty versus a “bad” one. It is difficult to make that determination in the arbitral forum, as we are removed from the ice, and cannot evaluate the particular circumstances of an infraction. As the Player argues, the worth of a penalty to its team may be belied by the type of infraction, as what may be viewed as of little value on paper, may have fired up his team on game day.

What is of record evidence, however, is the performance of the Player for his Club, and the impact of that performance. It is best to start with the words of President and General Manager Sather at hearing. He testified that, while he was seeking maturity from the Player, he understood “what he was getting” when he traded for the Player, and he admired the energy and style of Avery’s play. There is no question that the Player assisted in the team’s push to the playoffs, and his value to his team is reflected by his significant ice time, especially in the playoffs. Moreover, it is an interesting fact that even though the Player enjoyed career

\textsuperscript{112} Email on file with the author.

\textsuperscript{113} See \textit{Sean Avery v. New York Rangers} (2007) (on file with the author)
highs in most categories in the Platform Year, his PIMs went down in that period, perhaps demonstrating that the Player is striving to achieve the maturity his Club seeks.  

Arbitrator Brogan expressed one of the largest oversights that have continually been made by other arbitrators. PIMs are wholly unreliable for the type of comparable analysis that most arbitrators utilize when determining the awards. As PIMs cannot be used as a definitive measure of aggressiveness without distinguishing the aggressive penalties from the non-aggressive penalties, it is only useful when used generally. However, this is mostly useless to arbitrators when slotting players as most team and player representatives use a PIM filter when creating their list of comparable players.

One other aspect of physicality that goes mostly unmentioned is the size of a player. From 2001 through 2010 only cursory mentions of size were made in the multitude of arbitrator opinions. According to Dunlop, size “is a factor, and should be considered, but not sure how much weight it should be given. And it should probably only weigh in as a factor for certain types of players.” Arbitrators have traditionally only used size when differentiating between comparable “enforcers,” when it is relevant in many other types of players. Size is also very important for “power” forwards and defenseman. These players spend a lot of their time in physical battles in the corners and in front of the net, and a player who is bigger and stronger than his peers has value that is not explicitly expressed in the standard NHL statistics.

### Games Played

Arbitrators face a multitude of additional problems. Among these is the number of games a player has played in his career versus his age. According to Dunlop “games played (GP) is generally accepted as the better indicator of experience than age. Players will be compared to

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114 *Id.* at 7.


116 Size as a measure was mentioned in *Cale Hulse v. Calgary Flames*, p. 12 (2001) (on file with the author) regarding Hal Gill, who at 6’7”, 250 pounds, is one of the largest players in NHL history.

117 Email on file with the author.

118 “Enforcers” are players whose main role on the team is to fight or intimidate the other team.
others with similar GP, rather than similar age.”\textsuperscript{119} However, judging a player by games played alone instead of in conjunction with age can create poor results when considering a player with his comparables. The number of games played over a player’s career and in his platform year can be influenced by his age, durability and the number of healthy scratches he has compiled in his career.\textsuperscript{120}

In \textit{Pavol Demitra v. St. Louis Blues} (2001), arbitrator Claude H. Foisy stated

Arbitrators have generally given credit to players who play a large percentage of games season after season. Given the nature of the game, the players are exposed to injuries over their career. Some may be more accident prone than others. Some players may suffer from chronic disability. Others will miss games as a result of injuries that are not career-threatening and from which they will fully recover. The durability of a player must be considered not in relation of a single season but over a larger time span. A player may have be injured in his platform year but have stayed healthy in the two or three previous years [sic].\textsuperscript{121}

This is a sound analysis of durability but it has become dated with the restrictions imposed by the recent CBA. Formerly, many players seeking arbitration had a larger history from which to draw conclusions regarding a player’s durability. Given that most arbitration eligible players have only a few seasons in the NHL, arbitrators do not have the proper sample size to determine whether a player is durable or not.

Similarly, healthy scratches also present issues when deciding the value of a player. In \textit{Jannik Hansen}, Arbitrator Picher regarded the number of healthy scratches of Hansen thusly:

I do accept that in the evaluation of younger journeymen players, the relative strength of a club and its talent depth chart are legitimate factors to be weighed in understanding both the relative ice time accorded to a younger player and the

\textsuperscript{119} Email on file with the author. See also Appendix H.

\textsuperscript{120} Age, draft position, injuries, the caliber of the player and the caliber of the team can dramatically alter how many games a player has played in their career. A young, highly drafted player on a poor team will have a chance to play more NHL games at a younger age than a similar player on a good team, or a late drafted player, as expectations for such player are not as high. A healthy scratch is when an uninjured player does not play in a game.

likelihood of occasional healthy scratches. Being scratched or assigned to the minors is not unusual in the early development of a young player.\textsuperscript{122}

While this analysis is not untrue, it is inconsistent with prior analyses of healthy scratches in \textit{Daniel Winnik v. Phoenix Coyotes} (2009)\textsuperscript{123} and \textit{Sean O’Donnell v. Los Angeles Kings} (1997).\textsuperscript{124} In those cases the arbitrators determined that being a healthy scratch limited the award for the player as they had not established themselves fully as an NHL player.\textsuperscript{125} This is particularly relevant given that most players seeking arbitration in recent years are younger players of lower caliber. Many players are seeking arbitration as a means to receive a one-way contract in lieu of a two-way contract.\textsuperscript{126} According to Dunlop, “the only players going these days are mid-level players who think they are being undervalued and borderline NHLers trying to get one-way deals.”\textsuperscript{127}

Healthy scratches should be used as an indicator in determining if a player is justified in receiving a one-way or two-way contract. Devaluing the healthy scratch as something that is usual in the early stages of a career is both untrue and poor precedent.

\textbf{Players with a Single Productive Season}

As the number of players eligible for arbitration has decreased, the sample size of statistics for those players eligible has similarly decreased. This has put added weight on players

\begin{itemize}
  \item \textsuperscript{122} \textit{Jannik Hansen}, p. 19.
  \item \textsuperscript{124} \textit{Sean O’Donnell v. Los Angeles Kings}, p. 7 (1997) (on file with the author). See Appendix I.
  \item \textsuperscript{125} \textit{Daniel Winnik}, p. 5; \textit{Sean O’Donnell}, p. 7.
  \item \textsuperscript{126} A two-way contract is one that provides a salary for the player in the NHL and in the minor leagues. A player on a one-way contract receives his NHL salary regardless of where he is playing. This is important to players and teams as the average salary in the NHL for the 2010-11 season was $2.4 million, while the average salary in the AHL (the top minor professional hockey league) is around $90,000. For example, Daniel Winnik received a two-way contract which paid $600,000 at the NHL level and $75,000 at the minor league level. See \url{http://www.forbes.com/2010/11/30/ovechkin-lecavalier-crosby-business-sports-hockey-valuations-10-highest-paid-players.html} (last visited 5/7/2011) and \url{http://www.capgeek.com/leaders.php?type=AHL_SALARY} (last visited 5/7/2011).
  \item \textsuperscript{127} Email on file with the author.
\end{itemize}
with only one productive season in the NHL. However, arbitrators have historically put a low amount of weight in only one year of good production.\textsuperscript{128} Unfortunately, this model is outdated as almost all players eligible for arbitration and the relevant comparables will have a small sample size of statistics. This creates further problems for the arbitrators, as the standard statistical approach is near futile. A prime example of an arbitrator struggling to make a proper decision due to sample size is \textit{Tim Kennedy}.\textsuperscript{129} The smaller sample size only furthers the need for potential to be considered in arbitration awards.

\textbf{Plus-Minus}\textsuperscript{130}

Plus-minus is the most problematic statistic that can be considered by an arbitrator.\textsuperscript{131} Arbitrators have consistently dismissed its use and attempted to rely on other measures to determine the value of a player defensively. However, the other measures are either problematic or greatly influenced by the quality of a player’s team.\textsuperscript{132} Plus-minus is also greatly influenced by a player’s team, but it can be useful if considered properly. Dunlop states that plus-minus “should be considered, but is most valuable when looking to see where a player ranked on his team (saying a player had the worst plus minus on his team is much more meaningful than saying he was -7).”\textsuperscript{133}

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\\textsuperscript{128} See Appendix J for arbitrator opinions on players with only one year of production.

\textsuperscript{129} See page 32 on Tim Kennedy for more detail.

\textsuperscript{130} Plus-minus measures the goal differential for a player while he is on the ice, excluding powerplay (PP) goals. If a player is on the ice and his team scores, he gets a plus. If a player is on the ice and the other team scores, he gets a minus.

\textsuperscript{131} See Appendix K for examples of problems with plus-minus.

\textsuperscript{132} Dunlop on defensive statistics used:

Defensive play has never been easy to quantify. I think the stats they use (SH TOI, plus-minus, blocks) are as good as it gets. Any other statistical analysis would be too unreliable. If you take a close look at how takeaways and giveaways are tracked, and how hits are tracked, and how shot location is tracked, you will notice that it varies tremendously from one building to the next. The tracking of these stats is too subjective, so it would be tough to place a lot of weight on these statistics, as the totals are often unreliable. (Email on file with the author).

\textsuperscript{133} Email on file with the author.
However, this view also presents problems. It is entirely possible for an excellent defensive player to have a poor plus-minus rating on a very good team if they are consistently on the ice against the top players on the opposing teams. As most excellent defensive players are typically assigned this role, the quality of the team and the player’s time on ice (TOI) should be considered in relation to the plus-minus statistic. A player on a good team, with little short-handed ice time and a poor plus-minus should be considered a poor defensive player. Similarly, a player on a poor team, with ample short-handed ice time and a relatively high plus-minus rating should be considered an excellent defensive player. Nevertheless, this kind of analysis is problematic when trying to slot a player with their comparables.

The Quality of a Player’s Team

The quality of a player’s team has rarely been given much weight in arbitrator’s decisions, even though Dunlop stated that “team quality has a huge effect, especially on ice time.” A better team presumably has better players. However, the top players on a poor team will play approximately equal minutes to the top players on an excellent team. This is very problematic given the weight placed by arbitrators on time on ice statistics. Dunlop warns of this, stating:

Time on ice is of huge importance, especially for defensemen. But it really must be tempered based on the quality of team. Posting big TOI numbers on a bad team should be taken with a grain of salt, and it’s not the same thing as posting high TOI totals on a contending team.

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134 For example, in 2009-10 former Norris Trophy winner for best defenseman Scott Niedermayer finished with a -9 rating for the Anaheim Ducks.

135 For example, in 2009-10 Erik Karlsson of the playoff-bound Ottawa Senators finished -5 on the season (tied for worst amongst Ottawa defensemen who played more than 18 games) while averaging 0:05 minutes per game in shorthanded (SH) ice time.

136 For example, in 2009-10 Tim Gleason of the 24th place Carolina Hurricanes finished with a plus-minus of 0 on the season with 3:10 in shorthanded ice time per game (24th in the NHL among defenseman).

137 Email on file with the author.

138 Email on file with the author.
Nonetheless, this type of analysis was rarely found throughout the previous ten years of arbitration cases.\textsuperscript{139} 

In spite of the weight attached to time on ice by most arbitrators, it was ignored by others. In \textit{Pavol Demitra} (2001), little weight was given to the fact that Demitra played almost no time on the penalty kill. Arbitrator Foisy stated that “Demitra could be a superlative defensive player but if his team only allows him to play on even strength or on power plays, there is nothing he can do about it.”\textsuperscript{140} This kind of analysis completely undermines the use of time on ice as a valid statistic. Obviously, a player can only play the minutes that are assigned to that player by the team. However, the goal of every NHL team is to win as many games as possible. Players are generally given the time on ice they deserve based on their skill. To presume otherwise is the kind of judgment that should not be present in an arbitrator’s decision.

The quality of a player’s teammates can also have a substantial effect on other statistics. The effect seen by a player from playing with excellent players has been examined substantially in \textit{Robert Lang}\textsuperscript{141}, \textit{Brendan Morrison}\textsuperscript{142} and \textit{Ruslan Fedotenko v. Tampa Bay Lightning} (2004).\textsuperscript{143} The consensus is that the player in question was as important to the success of the other players as they were to his success. In \textit{Robert Lang}, arbitrator Rolf Valtin warned against

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\textsuperscript{139} Quality of team has rarely been considered. One of the few times it was mentioned was in \textit{Jannik Hansen}, p. 24: “I consider Colin Fraser to be a significant comparable, in part because he played his platform season with the Chicago Blackhawks, a club which is obviously comparable to the Vancouver Canucks, having won the Stanley Cup for the 2009-10 season.”

\textsuperscript{140} \textit{Pavol Demita}, p. 7 (2001). Arbitrator Foisy continued:

It is true that arbitrators have looked at TOISH as an important factor in determining the defensive value of a player. Was also considered +/- and Selke Trophy votes[sic]. In the case of St. Louis, the Club has used a team of specialists in the last two years to kill penalties. Before that system was utilized, Demitra played in short-handed situations. In that context, the lack of TOISH minutes cannot be invoked by the Club to characterize Demitra as a player who does not have defensive capabilities. It may be that offensive players who also play regularly in short-handed situations have an added value to their team but that is another question.

\textsuperscript{141} \textit{Robert Lang}, p. 11; see Appendix L for opinions on quality of linemates.

\textsuperscript{142} \textit{Brendan Morrison}, p. 32; see Appendix L.

\textsuperscript{143} \textit{Ruslan Fedotenko v. Tampa Bay Lightning}, p. 14 (2004) (on file with the author); see Appendix L.
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allowing the offensive statistics for Robert Lang to be adjusted in light of his superb line-mates, as doing so would “open the flood gates for endless debates” regarding whether or not statistics should be modified.144 This argument belies an important point. Whereas modified figures in one case could create a seemingly endless string of statistical modifications, the impact of playing extensive minutes with top players should be something that factors into how an arbitrator considers the statistics presented. While it is impossible for an arbitrator to determine if a player or his teammates are responsible for his outstanding statistics, it is poor logic to disregard the quality of those teammates completely.

Goaltender-Specific Considerations

Bearing in mind that approximately 60 goaltenders are employed by NHL teams, as opposed to approximately 360 forwards and 180 defensemen, it is surprising that arbitration awards for goaltenders have been consistently adequate.145 Part of this is due to the small number of goaltender arbitration hearings that have occurred.146 According to Dunlop:

The goaltender arbitrations are predictable. Niemi was the first one since 2005, and I think the criteria used were in line with what would have been expected. Goaltender arbitrations have traditionally been a three-pronged analysis, as they are compared based on statistics, playoff success, and awards/accolades.147

The statistics considered by arbitrators are games played (platform and career), winning percentage (wins divided by games played), save percentage (saves divided by shots on goal), goals against average (goals allowed divided by games played), shots faced, and team offense (a goalie on high scoring team can pick up more wins than the equivalent goalie on a lower scoring team). Additional considerations are whether the player is a starting or backup goalie, and votes

144 Robert Lang, p. 11

145 Every NHL team usually dresses twelve forwards, six defensemen and two goaltenders. Multiplying this number by thirty teams equals three-hundred sixty forwards, one-hundred eighty defensemen and sixty goaltenders. Simply based off of numbers there are less arbitration cases involving goaltenders. Additionally, teams typically carry a spare forward and/or defenseman.


147 Email on file with the author.
received for the Georges Vezina Trophy (award for the top goaltender), Hart Memorial Trophy (most valuable player award) and the NHL All Star game.\textsuperscript{148}

**Forward-Specific Considerations**

A thorough examination of the arbitration cases from 2001 through 2010 created an extensive list of statistics and other elements considered by arbitrators when determining where to slot a forward in relationship to his comparables.\textsuperscript{149}

While extensive, this list by no means is able to encompass every aspect of a forward.\textsuperscript{150} One notable exception is the lack of distinction between centers and wingers. Dunlop stated that “there’s no real distinction in arbitration. There probably is a distinction in the market, but it’s so hard to spot.”\textsuperscript{151} There is a difference in the skill set and responsibilities required for a player to play winger versus center. Comparing the two with little to no mention of the distinction can cause further discrepancies among awards.\textsuperscript{152}

\textsuperscript{148} For examples of arbitrator comments on goaltenders see Appendix M.

\textsuperscript{149} Considered by arbitrators for forwards: Age, career games played, points per game, goals per game, assists per game, penalty minutes per game, hits per game, time on ice (the time a player spends on the ice divided by games played), powerplay time on ice (the time a player spends on the ice while the other team has a penalty divided by games played), shorthanded time on ice (the time a player spends on the ice while his team has a penalty divided by games played), blocked shots per game, plus-minus, takeaway-giveaway ratio (the number of times a player takes the puck away from an opponent divided by the number of times an opponent takes the puck away from the player), game winning goals, playoff games played, All Star votes, Frank J. Selke votes (award for best defensive forward) and other award wins.

\textsuperscript{150} Also constantly underrated among forwards is defensive play. For example:

This must be given weight because the case is not one in which a Forward with marginal scoring statistics is seeking to prevail on the basis of the strength of his defensive play, the context in which I referred to the need to maintain the primacy of scoring statistics for Forwards. It is a case, rather, in which the comparables are themselves top-notch scorers and are either intrinsically strong defensive players or, at the least, outdo the Player defensively. This is not to pull back from my statement regarding the primacy of the scoring statistics for Forwards. It is to recognize that there is important value in strong defensive attributes on the part of a high-scoring Forward. Demitra leads in scoring, but he is a pure scorer. \textit{Pavol Demitra v. St. Louis Blues}, p. 9 (2003) (on file with the author)

\textsuperscript{151} Email on file with the author.

\textsuperscript{152} Centers have the responsibility of taking face-offs, as well as different roles and responsibilities. In the defensive end, the wingers generally cover the defensemen and stay up high, while a center typically plays low and aids the defensemen.
Furthermore, the lack of separation between centers and wingers disregards faceoff win percentage, an important statistic that is measurable and reliable.\footnote{The face-off is won by the team that maintains possession after a face-off. This is not arbitrary and therefore is more reliable than many other statistics. Possession of the puck is an important part of the game and the ability to consistently win face-offs provides a player with an important advantage over his competitors. Face-off ability was mentioned numerous times in *Brooks Laich and Niklas Sundstrom v. San Jose Sharks* (2002) (on file with the author). For example: “Both have had their share of Selke votes over the years, although Mr. Marchant's votes have been somewhat stronger in recent years. The Club also stresses that as a centre, Marchant's positive statistics in face off winning percentages bring added value.” *Niklas Sundstrom*, p. 9.} However, this statistic has yet to develop much value in the free agent market or arbitration.\footnote{Dunlop on face-offs:
I’ve always said that the market, and arbitration by extension, places no real value on faceoffs. A good faceoff man is like a house with a pool in the backyard. The pool will not necessarily add any value to the home when you try to sell it, but it will probably make it easier to sell. A high faceoff % is the same thing. Nobody is going to pay any more for a player because he has a higher faceoff %, but if they’re willing to spend $2-million on a center and are trying to decide between two comparable players, they may go with the better faceoff man at the same price. (Email on file with the author).} 

**Defenseman Specific Considerations**

Similar to that of forwards, examination of the arbitration cases from 2001 through 2010 created an extensive list of statistics and other elements considered by arbitrators when determining where to slot a defenseman in relationship to his comparables.\footnote{Considered by arbitrators for defensemen: Age, career games played, points per game, penalty minutes per game, hits per game, time on ice, powerplay time on ice, shorthanded time on ice, blocked shots per game, plus-minus, takeaway-giveaway ratio, playoff games played, All Star votes, Norris Trophy votes (award for best defenseman) and leadership qualities.} This list is very similar to the one compiled for forwards. Nevertheless, there are serious issues in determining the value of defensemen in arbitration.

The chief concern in addressing defenseman arbitration cases is how to value players whose importance does not generally appear on a score sheet. The importance of defensive
Derek Marr

defensemen\(^{156}\) shows that different statistics must be weighted differently for players of different positions.\(^{157}\) According to Dunlop:

> Defensive play has never been easy to quantify. I think the stats they use (SH TOI, plus-minus, blocks) are as good as it gets. Any other statistical analysis would be too unreliable. If you take a close look at how takeaways and giveaways are tracked, and how hits are tracked, and how shot location is tracked, you will notice that it varies tremendously from one building to the next. The tracking of these stats is too subjective, so it would be tough to place a lot of weight on these statistics, as the totals are often unreliable.\(^{158}\)

This illustrates the difficulty arbitrator’s face in determining an award for a defensive defenseman. The problems with time on ice and plus-minus have been discussed, but blocks have also been similarly dismissed by previous arbitrators. In Vitali Vishnevski, Arbitrator Benn states that “blocked shots are somewhat subjective.”\(^{159}\) Nevertheless, other arbitrators have utilized block shots without regards to its subjective nature.\(^{160}\) There is a major problem with using the limited number of defensive statistics as the sole measures of defensive competency. So much of defensive play is related to a players positioning, something that is not reflected in statistics.

Given the issues faced by arbitrators in measuring the defensive contributions it is surprising that few cases of teams walking away from players have involved defensive defenseman.\(^{161}\) This fact highlights the problem of arbitrators relying too heavily on statistics and comparable players in the case of offensive players. In the case of defensive players arbitrators tend to determine a general outlook on a player’s ability and compare their value on the whole to

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\(^{156}\) Defensive defensemen are players whose primary role is to stop the opposing team from scoring. They will play most of their time in their own end, often play shorthanded minutes and rarely have good offensive statistics. Offensive defensemen are players whose role extends to the offensive end and the powerplay.

\(^{157}\) For arbitrator opinions on defensive defensemen see Appendix N.

\(^{158}\) Email on file with the author.

\(^{159}\) Vitali Vishnevski, p. 5

\(^{160}\) Block shots are used in most other arbitration cases involving defensemen.

\(^{161}\) Since 2001, *David Tanabe v. Boston Bruins* (2006) (on file with the author) is the only case in which a team walked away from the award for a defensive defenseman.
the comparables. This is in opposition to the points per game slotting with comparables used in most forwards cases.

The Tim Kennedy Arbitration Case

The issues faced by the NHL’s arbitrators were shown clearly in the arbitration of Tim Kennedy during the summer of 2010. Kennedy was drafted by the Washington Capitals in the sixth round, 181st overall in the 2005 NHL Entry Draft. He was then traded to his hometown Buffalo Sabres the same day he was drafted. After three years with the Michigan State Spartans and one year with the Sabres’ minor league affiliate, Kennedy finally became a full time NHL player in 2009-10. Over the course of the season, the 24 year old played in 78 games, scoring 10 goals and 16 assists. Following the season, he became a restricted free agent with arbitration eligibility.

Likely looking for a one-way contract and a small raise on his $635,000 contract, Kennedy took the Sabres to arbitration. However the arbitrator in the case erred greatly and it cost the Sabres and Kennedy. Kennedy had played a total of 79 NHL games and scored only 10

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162 David Tanabe and Bryan Berard v. Boston Bruins (2003) (on file with the author) are the only defenseman since 2001 whose team walked away from the arbitration award. This compares to one goaltender and eight forwards who left their team following arbitration.

163 In the case of most forwards, the arbitrator will generally slot them by points per game, with some leeway given to the other factors that are considered.

164 http://www.nhl.com/ice/player.htm?id=8471842 (last visited 5/7/2011)

165 http://www.tsn.ca/nhl/teams/players/bio/?id=5248 (last visited 5/7/2011)

166 Id.

167 Id.


goals. Yet he was awarded a one-year, $1,000,000 contract by the arbitrator. As explained by Dunlop:

The player’s ask [ing price] and the club offer were both below the walk-away number. So in order to cut ties, the club couldn’t walk away. They had to go through arbitration, get as low a number as possible, and then buy out that contract.171

In this case, it is unlikely the Sabres wanted to cut ties with Kennedy. The salary he was awarded was above almost all of the comparable players submitted by both the team and the player.172

The reason for the result was simple. The arbitrator failed to utilize points per game (Pts/G) and instead viewed the gross result of Kennedy’s season.171 This was erroneous, as Kennedy had played more games than all of his comparables in their platform years.172 Subsequently, the arbitrator compared Kennedy to every comparable individually and while the arbitrator should have placed Kennedy lower than some of them, Kennedy ended up higher by the measures used by the arbitrator.173

Considering the process set in the CBA, players and teams set extreme asking prices in the briefs they submit. As there is no punishment for asking for a large award, Kennedy had asked for a higher number than he merited, and likely higher than he expected to receive. This was exacerbated by the arbitrator’s failure to utilize the standard statistic when discussing a forward in an arbitration case. As stated in Pavol Demitra (2003) by Arbitrator Valtin, “the category of Pts/G is presumably the most important one in gauging the quality of play on the part of Forwards.”173

170 http://www.nhl.com/ice/player.htm?id=8471842 (last visited 5/7/2011)

171 Email on file with the author.

172 The comparables used were Tom Wandell ($700,000), Darroll Powe ($725,000), Teddy Purcell ($750,000), Blake Comeau ($800,000), Jannik Hansen ($825,000), Tyler Kennedy ($850,000), David Jones ($850,000), Scott Parse ($900,000) and Ryan Jones ($975,000). Tim Kennedy. p. 17.

The result was an award higher than the Sabres could justify, which led to the unprecedented occurrence of Kennedy’s contract being bought out by the Sabres. The Buffalo Sabres were out a depth forward, and the amount of the buyout. Kennedy was out of a job with his hometown team. He subsequently signed a one-year, two-way deal with the New York Rangers for $550,000. Kennedy was cut by the Rangers during training camp and opened the 2010-11 season with the Hartford Wolfpack, the Rangers minor league team. Kennedy played 53 games with the Wolfpack before New York traded his rights to the Florida Panthers. Following the trade, Kennedy played 6 games for Florida and 14 games for the Rochester Americans, Florida’s minor league affiliate. Kennedy finished the 2010-11 season with six NHL games played and only one point. With the exception of one injured player, the comparable players all played at least 75 NHL games and averaged 0.42 points per game and combined to play zero minor league games.

**Fixing the NHL Arbitration Process**

The NHL and the NHLPA have four options to consider in their upcoming CBA negotiation regarding the arbitration process. They could eliminate salary arbitration, modify

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175 *Id.*


178 Kennedy cleared waivers three times during the NHL season, once with New York and twice with Florida. This means that any team had the option to acquire Kennedy for nothing and declined.

179 [http://www.tsn.ca/nhl/teams/players/bio/?id=5248](http://www.tsn.ca/nhl/teams/players/bio/?id=5248) (last visited 5/7/2011)

180 *Id.*

181 Scott Parse missed all but five games of the 2010-11 NHL season due to hip surgery.

182 The comparable players during the 2010-11 season: Ted Purcell (51 points in 81 games), Blake Comeau (46 points in 77 games), David Jones (45 points in 77 games), Tyler Kennedy (45 points in 80 games), Jannik Hansen (29 points in 82 games), Ryan Jones (25 points in 81 games), Darroll Powe (17 points in 81 games), Tom Wandell (9 points in 75 games) and Scott Parse (4 points in 5 games).

the current process, find an alternative to arbitration or keep the status quo. In discussing arbitration, Dunlop stated

It’s a flawed system, an inflationary system, and one that the clubs would like to see gone, or at least reduced in use. But that’s never going to happen, it’s too important to the players. The best we can hope for is to tweak it, and that’s something I hope to see happen under the next CBA. The best idea I have is to eliminate mixed RFA-UFA deals as comps, and to eliminate deals longer than 3 years as comps [comparables], as these mixed RFA-UFA deals and long term deals are apples-to-oranges comparisons to arb [arbitration] awards that come in at 1 or 2 years and can only include RFA years.184

The NHL would not be able to eliminate salary arbitration without a concession on their part. Considering that is unlikely given the smaller number of players affected by arbitration, a modified process is the best scenario.

Modify the current process

Making four changes to the current salary arbitration process would increase the consistency of the outcomes and improve the process for both the NHL and the NHLPA. First, the considerations should be specified. Currently the admissible considerations are official league statistics, number of games played, length of career, contribution to the success of the team, leadership/public appeal, performance in previous season for comparable players and the compensation of comparable players. The section on official league statistics should be expanded. Instead of combining all statistics into one category, they should each be listed individually and the weight given to each statistic should be stated in the CBA. This would allow for points per game to be mandated in the CBA as the most important statistic for forwards. Similarly, defensive statistics could also be analyzed in the CBA. As hits and blocks are somewhat arbitrary, the CBA can mandate that they are considered but should be applied generally and not used to definitively rank players. Plus-minus could be used only regarding the players ranking on his team. Finally, time on ice statistics could be stipulated to only be used if the quality of the player’s team is included.

184 Email on file with the author.
The second change would be to limit the players that are considered as comparables. Including only players on one-year contracts in one-year awards and two-year contracts in two-year awards would eliminate the need to adjust those figures to account for the premium paid to secure free agent years. As this would limit the pool of potential comparables, players from the past three platform years could all be used with their salary numbers adjusted for league inflation.\footnote{The expenditures by every NHL team each season are readily available. By looking at the total amount spent in past years and inflating the salaries of the players to create the same amount of expenditures, a player’s salary can be changed to reflect the current economic climate, while still maintaining the same portion of the market. However, this should be limited to recent history to reflect the current market for the various skills and positions.}

The third change would see the use of prior cases as precedent eliminated from the arbitration process. By implementing the first two changes, the need for precedent would be nearly eliminated. However, eliminating the use all together in conjunction with extensive explanations of the consideration would keep the arbitration process collectively bargained. As it currently stands, some arbitrators rely heavily on precedent while others do not. This makes for wholly inconsistent results. Additionally, the emphasis placed by some arbitrators on precedent means that arbitrators are essentially legislating what statistics should be used in arbitration. For example, almost all prior cases dismiss the use of plus-minus, even though plus-minus is a league collected statistic that is admissible according to the CBA.

The fourth possible change would be the adoption of a final offer system similar to that used in Major League Baseball. By mandating that the arbitrator choose one submission or the other, the CBA would push both the player and the team to submit more reasonable offers. This would eliminate cases like Tim Kennedy. Using final offer arbitration would also help to minimize the effect that comparable players have on the outcome. Instead of slotting the player with the comparables, the arbitrator could view the grouping of the comparables at the compensation level of the player and team offers. Then the arbitrator could determine in which grouping the player deserved to be placed.
Automated Arbitration Process

In Nikolai Zherdev, arbitrator Shriftman stated that based on the historical evidence of player contracts, a mechanical formula could be created that would determine what raise a player would receive. While this type of formula is beyond the scope of arbitration, creating a form of automated arbitration process is a possibility. By taking the prior arbitration awards with the comparables used, and then adjusting those awards for league inflation, it is possible to see what statistics correlate with a higher salary. By including all possible statistics, limiting the players considered to those on one or two-year contracts, and adjusting their salaries to the current economic climate, it is possible to develop a formula to predict the outcome of arbitration. The formula could be combined with the online process suggested by Sprenzel in Arbitration in the National Hockey League: Taking the Next Step With Online Dispute Resolution. Implementing this type of system would save the players and teams on arbitration costs, could be adjusted yearly and would be impartial.

Nevertheless, a number of issues exist in such a formula. Dunlop offered an extensive analysis of this proposal:

The players would certainly love this idea, I don’t know that I would like it as a club representative….A standardized system would run into a couple problems, in my opinion. First, it would skew player values because statistics can be misleading, and especially with defensemen, they rarely tell the whole story (it’s a little better with forwards, as market prices are generally attached to offensive output - there is a price for a 30 goal scorer, or a 50 point man, or a 10 goal guy playing 3rd line minutes). But the bigger problem with a standardized system is that I don’t think you could get the league and the PA [NHLPA] to agree to the standards, which is why we have arbitration. Let the arbitrators decide a player’s value on a case by case basis, taking all factors into account.

These are valid concerns and highlight why an automated process is not likely to ever be a part of the NHL CBA. What statistics should be used, developing a formula based from them, and how to incorporate non-statistical considerations would be major problems that would need to be collectively bargained by the NHL and the NHLPA. With the low number of players that

186 Nikolai Zherdev, p. 34. See Appendix A.

187 Email on file with the author.
are arbitration eligible, it is unlikely the two parties spend the time necessary to come to an agreement on how an automated process would function.

**Is it working now?**

The final option for the NHL and NHLPA regarding salary arbitration is to leave the process alone. As it currently stands, fewer players are reaching arbitration recently than under the previous CBA. This is partly due to the smaller number of arbitration eligible players. Yet, that is not the entire reason. A higher percentage of players that file for arbitration are settling with their team prior to the arbitration hearing in recent years than under the prior CBA. While this may be due to the inconsistency of the arbitration awards, the settlements are still being made. The goal of dispute resolution is to promote settlement between the parties, whether through the process itself or prior to it. Players and teams are reaching settlements at a higher rate than ever. In that respect, the process is working.

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188 Percentage of players settling before arbitration, Rate of arbitration results, Pre-lockout: 27.6% of cases filed were settled by the arbitrator, post-lockout: 16.9% were settled by the arbitrator.
Appendix A


An arbitrator's most elemental mandate is to apply the terms of a collective bargaining agreement as written; no modifications are allowed. Notably, Article 12 (Salary Arbitration) of the CBA does not discuss standards of proof, such as a preponderance of the credible evidence, among several possible others. It specifically provides that "the arbitrator shall not be bound by any formal legal rules of evidence." While not using the term, criteria, it is clear that Article 12.9 (g)(ii) intends just that by the statement, "The parties may offer evidence of the following:" This is followed by a denomination of seven (7) different categories. Cast as precatory, it is not surprising that nothing is mentioned about a requirement to use every one of these criteria in one's case or about how much weight should be accorded to each. Similarly, nothing in that article discusses the use of prior awards per se. In this case, both sides frequently cite and quote from salary awards of my colleagues. The Arbitrator questions just how useful they can be because inasmuch as each player is unique so it is that his salary arbitration is special to its facts. At most, the cited awards, frequently inconsistent in terms of how they utilize and weigh any given factor, deserve persuasive as opposed to precedential value. This should be construed not as a depreciation of the wisdom of those awards but, rather, and simply, a broad comment about their ultimate utility.

In my opinion, arbitrators should not be legislating for the parties nor be accused of ipse dixit [an unproven statement claimed to be authoritative because it was said]. Undoubtedly, when the parties established salary arbitration as a surrogate for bargaining, they did not approach the process like babes in the woods. Thousands of contracts had already been negotiated and their pricing was a function of those performance criteria, qualitative and quantitative, which could be used for upward or downward adjustments. The parties could have established a compensation system which applied mechanically. Thus, for example, a player who performed at basically the same level in his platform year as he did in the prior year might be awarded a 5% increase simply on the basis that everyone in his service class is entitled to a raise by dint of the additional year's experience and the concomitant level of exposure to the fans who have come to know his style of play and level of performance. An additional 10% raise could be given when the player improved, to the same extent, in either goals or assists, in the case of forwards. A 10% to 20% increase above the prior year's compensation could also be awarded to a player who truly excelled in one or more important areas of play. The parties could likewise have factored in market trends the way some industries do with cost of living adjustments or other economic barometers. They did not follow this approach and the Arbitrator is by no means suggesting that it would have been better than the one they chose. The point to be made is that a subjectively and abstractly driven standard, to be distinguished from the essentially objective, widely reported factual statistics shoring it up, is inherently more difficult to apply than one, to continue the metaphor, which comes with bold median and shoulder lines.
Appendix B

Arbitrator Opinions on the Use of Comparable Players


In rendering a decision last year in the salary arbitration case involving Brian Rolston and the Boston Bruins, this Arbitrator noted that he was aware of different approaches to the Issue as to what year of a "comparable" player's compensation should be focused upon as an appropriate salary benchmark. The salient point made there is that the contractual formula governing the evaluation of evidence legitimately placed on record in these cases does not require myopic focus on a particular formula to the exclusion of another, and different views may be taken. Arbitrators are granted discretion to weigh the evidence under the opposite portion of the Parties' Collective Bargaining Agreement. Much as myriad factors play into the bargaining process, individual arbitrators are called upon to attempt to conduct a circumspect review of the information given to them so as to ultimately reasonably balance it.


The notion of finding a true comparable — *i.e.*, an “identical twin” — tilts more towards hope than reality. As in any proceeding where comparables are used to set wages or economic benefits, there are just too many factors unique and different to these players that will always give the parties fertile ground for argument to support their respective positions. The most one can hope for when trying to determine sets of comparables is to get a reasonable picture of the marketplace by using similar players with similar abilities and production. Hopefully that process yields an “apples to apples” comparison. Arbitrators use different methods for determining comparables. The key is to find a rational one based on the information and arguments supplied by the parties. The approach must be flexible and reflect what is presented by the parties.


As stated by Arbitrator Bloch at page 3 in *Weight v. The Edmonton Oilers* (1995): Multyear contracts, signing bonuses, midterm renegotiations and many other elements may be factors in an ultimate wage package. That is why players with facially similar statistics may have markedly different contracts. For this reason, one ought to be wary of unnecessarily narrowing the field of comparisons, such as identifying a single player as a benchmark. Instead, to the extent one may approach fairness, it will be achieved, if at all, by maintaining a broad view of as many relevant and comparable factors as possible.


It cites page 7 of *Lang v. Pittsburgh Penguins* (Valtin, 2001) for the proposition that one should look at the salary of the “comparable” in the same calendar year (meaning 2003-04 for the purposes of this case). It also noted that in *Morrison v. Vancouver Canucks* (Vernon, 2002) the Arbitrator found that the first year salary following the player’s platform year was the appropriate benchmark to review. The undersigned does not believe that either formula must be adopted exclusively.
The method I use for selecting comparables provides an element of predictability to the parties where the bargaining process has not yielded agreement and a third party neutral arbitrator, as here, must set the economic terms. It is particularly useful in this type of relationship where the arbitrator is not constrained by the parties’ final offers (as in baseball or other final offer interest arbitrations established by statutes), but has the authority to choose a salary different from the ones proposed by the parties. Salary arbitration — as in all interest arbitrations — is the last resort. Having a third party determine the parties’ fates is always the last thing the parties desire. However, if the bargaining process breaks down and the decision ultimately must be made by an arbitrator, knowing how that arbitrator selects comparables and determines salaries is the best inducement to the parties to finally come to terms before someone like me has to do that for them. The first look in this analysis shall be at the statistics of the proposed comparables for the clearly quantifiable — and in my view the most important — factors for an offensive forward which were cited by the parties in their briefs: games played, goals, goals per game, assists, points, points per game, time-on-ice, and time-on-ice power play per game.
Appendix C

The Valuation of Comparable Contracts:


I continue to believe that AAV can be a relevant statistic, although as I have said before, it has to be considered on the basis of individual factors. It would be difficult, if even possible, to know exactly what influenced other players to sign multiple year contracts. But arbitrators sometimes can make reasonable inferences from the facts, as where a player coming off an injury-plagued year might opt for the security of a long term deal, or where a back-loaded contract might reflect relinquishing a year of UFA. However, I also understand the Player’s argument that UFA may be more problematic or risky for some players.

Robert Lang v. Pittsburgh Penguins, p. 6 (2001):

One concerns the use of AAV rather than the use of the 01/02 salary figure specified in a multi-year contract. As everyone understands, there are circumstances in which nothing but the use of AAV makes sense. An example is a 3-year contract calling for $1 million in each of the three seasons and a signing bonus of $3 million to be paid at the outset of the first season. It makes no sense to view this contract as calling for $4,000,000 for the first season and $1,000,000 for each of the succeeding two seasons. Sensibly applied, it is a contract calling for $2 million per each of the three seasons. But no such circumstance is here presented. In each instance of the multi-year contracts here involved, there is nothing unfair or unreasonable in applying the figure allotted for the 01/02 season. Two examples make the point. The contract for Mariusz Czeraawski calls for $2,400,000 in the 01.02 season, $2,600,000 in the 02.03 season, and $2,850,000 in the 03/04 season. The Player’s side urges the application of the AAV (which is $2,617,000), but I see nothing wrong with adherence to the $2,400,000 specified for the 01.02 season – and indeed, considering the year-by-year incremental nature of the contract, the salary specified for the 01/02 season is the appropriate one to apply in a case which requires a look at the likely 01.02 market values of comparable players. Similarly, the contract for Eric Daze respectively calls for $2,800,000, $3,000,000 and $3,200,000 in the three upcoming seasons. I see no cause for the application of the AAV ($3,000,000) for the 01/02 season.
Appendix D

Opinions on Foregoing Arbitration Eligibility:


Both of these Arguments are sensible and, as the Player argues, I cannot know what motivated the comparable players in their negotiations, whether it was security or a payment for surrendering free agency. It also could be that the less restrictive rules and the increasing number of free agents will affect the choice between security and free agency, although it is too early to make that assessment. But absent evidence of injury or diminished ability, it is fair to assume that including a UFA year in a long-term contract results in at least some premium for the player. The players and the Players’ Association clearly value free agency as a benefit, so it is worth something when it is surrendered. Sometimes this increased value can be recognized by a significant increase in what would otherwise have been a UFA year. But in other cases, the benefit will be recognized by spreading it out over the term, as when a multi-year contract has the same salary in each year.

Brendan Morrison v. Vancouver Canucks, p. 28 (2002):

The Arbitrator's sense of it now and in this case -- and it cannot be stressed enough that the individual facts and circumstances in this or any case heavily weigh in shaping thoughts on such general matters -- is that when a multiple-year contract spans one or two years into a three- or four-year multi-year contract at substantial amounts of money, subject to significant contract revisions, it can't be said such comparisons are useless or significantly impaired. There seems to be no compelling reason why these particular multi-year contracts should not be part of the mix. Players and clubs sign contracts at all sorts of times for all sorts of reasons. The marketplace isn't monolithic and a multi-year contract that gives away some measure of arbitration rights is just another part of the varied salary determination landscape.


The Club argues that Stevenson's salary should be discounted because the selling of a year's unrestricted Group III Free Agency operated as an upward push in the negotiation of his 3-year contract. The Player's side, on the other hand, argues that Jokinen's salary should be appreciated as unduly low because it came into being at a time when Jokinen was without arbitration rights. Arbitrators have recognized the merits of both arguments. In the scheme of things in the present case, they can be disposed of as carrying offsetting weight.”


Firstly, this arbitration arises under the parties’ “new” Collective Bargaining Agreement. That Agreement allows for a greater access to unrestricted free agency for younger players than was the case under the previous Collective Bargaining Agreement, where the age of 31 was the general threshold for unrestricted free agency. In the result, as free agency becomes more commonly available at a younger age, the partial giving up of free
agency in the signing of a multi-year contract may involve less of a sacrifice and, to that extent, should be understood to involve less of a premium within the multi-year contract. That does not change the reality that a multi-year contract, which obviously involves greater long-term security, must still be understood as involving some degree of premium. But to the extent that free agency is more accessible to more players at a younger age, it must be recognized that its intrinsic value in bargaining, and conversely its value as a premium in negotiated contracts, is now somewhat reduced.

Dunlop on the length of contracts for comparables:

I might make an argument that any deal over 3 years is too long to be relevant as an arbitration comparable. If you sign a player to a 4+ year deal, you usually do so because you think the player is going to be a very good player for you. If you believed in the player at arbitration as much, you would sign him long term too. You can’t give an arb[arbitration] player an AAV on a 2 year deal that matches the AAV of a comparable player on a 4 or 5 year deal, there are other factors at play. (Email on file with author).

Opinions on the Length of Contracts for Comparable Players:


One of the arguments made with respect to Gill, and other comparable players, by the Club is that Gill has secured a two-year contract, a factor which it argues denotes a higher degree of confidence in that player. I find that argument less than persuasive, and to some degree self-serving as it is obviously this Club's choice as to whether to offer Hulse a two year deal. Moreover, the Player is now coming off a two year contract which the Calgary Club was obviously willing to negotiate with him after the 1998-99 season, half of which the Predators were willing to assume, notwithstanding that Mr. Hulse came to them injured.


Every multi-year contract or arbitration award reflects to some degree the fact that the player will have more experience in the following seasons. It implies that the player will continue to produce at the same level of performance or better. There is always a risk factored in that the player may be injured or that his performance may decline. It may also increase and the Club would have more value for the dollar paid. The dollar value of a player is established in relation to comparables. In determining remuneration, arbitrators have refused to consider only the most recently signed awards. To agree with the Club’s position, I would have to disregard the value for the coming year of contracts signed before the summer of 2001. That has not been the jurisprudence to date.

Robert Lang, p. 8:

The other issue also arises in connection with multi-year contracts. The Club contends that it is the salary specified for the season immediately following the platform year, not the salary specified for the 01/02 season, which ought to be used in the determination of the Player’s salary for the 01/02 season. One example suffices to show what the Club is saying. The specified 00/01, 01/02 and the 02/03 salaries in Jozef Stumpel’s contract are
$2,200,000, $2,650,000 and $2,850,000. The argument is that, just as the salary here to be determined is for the season which immediately follows the Player’s platform year, so should the salary here to be used in the exercise involving the comparables be the salary for the season which came on the immediate heels of the comparable’s platform year. It is a novel argument in my experience, and, though I understand its theoretical basis, I think it has to be rejected as not helpful in measuring the likely market values in the 01/02 season. The proper input for that purpose is the 01/02 salary specified in Stumpel’s contract. The 00/01 salary was the salary which immediately followed the platform year but it was part of the bundle of salaries which influenced the market determination for that season – so as to be obsolete for the purpose of what is here to be determined.

**Ruslan Fedotenko v. Tampa Bay Lightning**, p. 6 (2004):

In my respectful view the better approach is generally to view the second year of an earlier two-year contract as properly reflecting the parties’ assessment of the market value of the player in that season based on his platform year performance of two seasons earlier, while always bearing in mind that the second year figure would, in all probability, reflect some element of upward push for the value of a longer contract. The premium implicit in a longer contract may also be in recognition of the surrender of other rights, such as access to arbitration or unrestricted free agency. As a corollary, it might be added the longer the multi-year contract the more difficult it becomes to make reliable comparisons.”


At the outset, however, one notes that most of the proposed comparable players have signed multi-year contracts. Such agreements often, but not always, represent a premium situation, the Club paying more for longer term personnel stability. A team wishing to ensure continued availability of a young rising star, for example, may well pay more, particularly if the player forfeits free agency rights in the process. But it is also true that a player may, for a variety of reasons, conclude that long-term security, even at a reduced annual salary, is prudent on his part. As one of the seasoned advocates has noted, “The only thing one can know is that one cannot know”. And that, in the final analysis, is the point. Whether one infers a premium paid by the Club or, contrarily, an “under-market” concession by the Player, the multi-year agreement is problematical for comparison purposes. The task is made no easier when one attempts to parce[sic] the meanings of “level” agreements (repeated iterations of a single salary) as contrasted with those that are “stepped.” There are simply too many dynamics, financial, psychological, tactical and otherwise, that enter the bargaining process to reduce this aspect of comparative analysis to anything approaching science. This does not require rejection of all such agreements as per se inapplicable. They may, in a given case, serve to inform. It means that one must exercise extreme caution before relying on them to draw per pat conclusions on comparability.


It is true that changes codified in the new CBA, including earlier player access to unrestricted free agency (hereinafter UFA), may well have sparked a greater desire for
multi-year contracts for younger players. Nevertheless, the various incentives are unchanged: It remains the case that longer contracts, particularly those involving sale of free agency rights, may well cost more than shorter contracts. Even recognizing the existence of some agreements where the opportunity to flex one’s economic muscles is overshadowed by the enticement of a long term relationship, the continuing wisdom of exercising considerable caution in comparing to such agreements is apparent.
Appendix E

Arbitrator Opinions on Using Platform Year versus Using Career Performance

Denis Gauthier v. Calgary Flames, p. 16 (2002):

As arbitrators have noted previously, it is not unreasonable to expect more than one season of high level performance before attaining the compensation earned by players of the same category who have performed at that level over a number of seasons. There can be no doubt but that Mr. Gauthier has the full potential to reach that level of achievement. It is also clear that his delay in doing so has been chiefly the result of problems of durability related to injuries, a factor which both parties have always recognized as an element of importance in the remuneration of a player.


It is well established that the platform year is the critical benchmark year for establishing the worth of the player in the market. It is therefore important to appreciate certain aspects of the Player's platform year, particularly as relates to his injury. As an offensive defenseman, Mr. Poti falls is to be evaluated to a considerable degree on the basis of his points per game, although both his offensive and defensive value is also reflected in the time which he spends on the ice on a per game basis.

Tom Poti, p. 7: “Post contract performance can have no relation to the market value of a player's remuneration. That figure can only be based on his platform year and career to platform performance.”

Brendan Morrison, p. 24: “The arbitrator does not like the Club's approach in selecting career comparables because it includes post-platform performance and therefore, post contract performance.”


It is not to be denied that, though there is occasional downplaying of the importance of the PFY, it is generally the case that the PFY is given great weight in arbitrating the appropriate figure for the succeeding salary. It is true of the parties as well as of the arbitrators. But, where the PFY is the last year in a multi-year contract and where the statistics in that year are plain aberrant relative to the contract's earlier years, one cannot properly proceed on the basis of an isolated look at the PFY. It is especially true where it is argued that "he owes us we didn't get what we paid for” The proper approach, rather, is to permit a look at the performance over the contract as a whole – at the performance in the PFY mixed in with the performance in the earlier years. There would still be the question of the importance of the PFY relative to the earlier years. But, contrary to what the Club is in effect urging, the earlier years are not to be shut out.

Pavel Kubina v. Tampa Bay Lightning, p. 7 (2004):

There is the Club's reliance on Kubina's performance under the just expired 2-year contract as compared to his performance under the prior 2-year contract. Kubina's
performance in the 02-03 season may be said to have been disappointing, but the same cannot be said of his performance in the 03-04 season.


But there are also problems with the Club's methodology. The Club essentially lops off the first four years of Witt's career - half of his games - by arguing that Arbitrator Foisy has already evaluated them. It says that award was the benchmark and that future evaluations should start there and not look back. The Club's justification is that Witt is one of only a few players to submit to a second arbitration, and that in such cases the first arbitration established the value of those years and compensated the player accordingly. This argument will not hold water. It is the Club, after all, that argues the arbitration process should replicate negotiations. Presumably, it can do so only by considering the same factors that influence negotiators. There is no reason to suspect those negotiators do not consider length of service and performance over the course of a career. The Club did not suggest that successful negotiations establish a benchmark that erases the past, even though every player who negotiates a contract has been evaluated and has been compensated for his contribution. In fact, it appears that all of the clubs have recognized the importance of prior performance to the arbitration process and, by extension, to negotiations.

By using less experienced players - sometimes considerably less - the Club essentially argues that the market value for a player takes into account only what someone would pay for like services at a particular time, without consideration of what the player might have done earlier. This may be the classic definition of market value, but this is not a classic market. The players do not come to the table to have their value determined solely by their skill and by their ability to sell it on an open market. Some players are free agents and some are not; some have restricted rights, which affects how much they can command on the market because of the penalty assessed by the CBA; some elect arbitration; and others have neither free agency nor arbitration. Moreover, there is not merely one market in play; players and clubs can opt for one-year contracts or negotiate longer terms. I agree with the arbitrators who have said these long term contracts usually command a premium -- which is another way of saying they form a different market -- but that does not mean there are irrelevant to this process. All of these matters have to be factored into an assessment of what the Club should pay a particular player for the coming year, but some are of more value than others.

As arbitrators in this bargaining relationship have applied the criteria, most of the Club's comparables have too little experience to provide a fair comparison. They play the same position and they have had good years, rivaling (but not really exceeding) Witt in overall performance categories. But it does not follow that Witt is only worth what they make because in a perfect market the Club could buy them or someone like them. As already noted, that is not the market in which these parties participate. Moreover, it would be unfair to Witt to apply such a standard to him. In 2000, the Club convinced an arbitrator that Witt's first year as a top four defenseman should not cause irrational exuberance. Instead, Arbitrator Foisy stressed the importance of consistent performance over time. The standard should not change just because it is four years later, especially since Witt now seems to have achieved what Foisy said he needed.
Derek Marr

*Steve Montador v. Florida Panthers*, p. 17 (2007): “And there is no hard and fast rule of whether career or platform year performance should be weighted more or less. Both are meaningful and per game statistics are helpful in getting apples compared to apples.”


As I noted last year in the Trent Hunter case, compensation differences between players cannot always be explained by statistics. The disparities suggest that there are marketplace factors that may depend on subjective impressions or considerations that are not readily captured by numbers. Arbitrators, however, must make decisions based on the statistical patterns shown by comparable players in the same market.
Appendix F

Arbitrator Opinions on the Use of Older Contracts as Comparables

Dave Scatchard, p. 9:

The Player's side excluded Laperriere from its list of comparables on the grounds that recent signings are the more reliable indicator of market value. Arbitrators have sided with this notion, but they have not done so to the point of authorizing the exclusion of "old" contracts. I am in accord with Arbitrator Picher's treatment of the matter in his 1993 Reichel and Calgary Flames decision (including his by now famous "swath of reality" reference), and I think the Player's side errs in seeking to exclude Laperriere as a comparable.

Mark Smith v. San Jose Sharks, p. 9 (2006):

The $646,000 Begin will be paid in 2006-07 has its origin in the contract he signed on July 1, 2004. It can, therefore, be viewed as having some “age” in the same manner as that of Jeff Cowan’s contract. The Club was willing to recognize the age of the Cowan contract to the tune of $58,000. Applying that figure to the Begin contract would bring his 2006-07 compensation to $704,000. Considering all of the above Mark Smith’s 206-07 compensation will be set at $700,000. While that figure is only marginally below Begin’s “adjusted-for-contract-age” compensation, it is significantly below the AAV value of Begin’s three-year contract. Further, that figure places Smith more reasonably in relation to Mayer and Cowan than would a strict application of the first year of the Begin contract.

Adam Mair v. Buffalo Sabres, p. 6 (2006):

Rather, the Player urges rejection of Nash as a valid comparable based on the age of the contract. See Poti and New York Rangers (Picher, 2002) at p. 10; Hrdina and Pittsburgh Penguins (Bloch, 2001) at p. 3. While the Club correctly observes there are circumstances in which older contracts should be considered, there is no reason to do so here. Nash not only outperforms Mair, he outperforms other comparable players who have negotiated or been awarded 2006-07 salaries this year well in excess of the $608,000 negotiated by Nash in 2004. This evidence supports the argument that Nash's flat three year contract does not inform of the Player's value in the current NHL marketplace. Because there are sufficient comparables with recent contracts to establish the market, Nash will not be relied upon as a comparable in this case.


It is not believed, however, that the coupling of these salaries with a year of non-arbitration eligibility seriously limits the utility of their comparability. The undeniable fact is the players who signed two year contracts involving one year of arbitration eligibility did have leverage in the second year and the option not to sign for that year if he believed the second year of the contract or the contract as a whole didn’t fairly reflect his value. At best, in the absence of better evidence, these mixed status signings can be
said to ‘nudge’ the value in the downward direction. The fact these players signed a year ago, in such circumstances, is not a determinate.
Appendix G

Opinions on Using PIMs to Measure Aggressiveness

Dunlop on PIMs as a measure of aggressiveness:

I’d agree that they are not necessarily a good indicator of aggressiveness, although once you get to a certain number (approaching or passing 2.00 PIM/G), it’s hard to argue that the player isn’t an “aggressive” player. You’re not going to get 150+ PIMs without a bunch of them being for physical infractions. (Email on file with author).


The Player argues that his high PIM total is a mere reflection of his aggressive, physical style, one that makes him a fan favorite and a player opponents hate to face. On the other hand, the Club makes the point that his excessive penalty minutes demonstrates his immaturity as a player, and the types of penalties he has taken, in the more recent past, have a negative, not a positive, impact to his team.

The arguments of both sides call for an intriguing analysis: should a player be financially penalized, or rewarded, for high penalty minutes? Certainly, players are compensated for bringing a “complete” game to the ice, one where offensive prowess is accompanied by an aggressive, defensive style. Avery brings a passion to the ice that has an impact. At the same time, there is a strong contention that certain penalties do not assist the team, and the man in the box obviously exposes his team to being scored against.

The Club asks this arbitrator to undertake an analysis of what is a “good” penalty versus a “bad” one. It is difficult to make that determination in the arbitral forum, as we are removed from the ice, and cannot evaluate the particular circumstances of an infraction. As the Player argues, the worth of a penalty to its team may be belied by the type of infraction, as what may be viewed as of little value on paper, may have fired up his team on game day.

What is of record evidence, however, is the performance of the Player for his Club, and the impact of that performance. It is best to start with the words of President and General Manager Sather at hearing. He testified that, while he was seeking maturity from the Player, he understood “what he was getting” when he traded for the Player, and he admired the energy and style of Avery’s play. There is no question that the Player assisted in the team’s push to the playoffs, and his value to his team is reflected by his significant ice time, especially in the playoffs. Moreover, it is an interesting fact that even though the Player enjoyed career highs in most categories in the Platform Year, his PIMs went down in that period, perhaps demonstrating that the Player is striving to achieve the maturity his Club seeks.

The bottom line, then, is that the Player has been of value to his team, and has brought a high level of offensive production and aggressive play to the ice, albeit taking many penalties -- facts that should be stirred into the mix in determining his appropriate salary. Given his uniqueness, however, finding appropriate comparables is not an easy task. The Club used an interesting three-pronged search, in an attempt to basically “throw open the
doors” to find comparability. The Player utilized a more traditional method, but as the Club points out, failed to use a PIM filter for its Career to Platform Year snapshot. In the end, the parties came up with only a few comparables they ask to be considered, which include some common ones which are always of value.

*Brendan Witt*, p. 16:

The Club asserts that when trying to measure aggressiveness, the standard practice is to look for players who are equal to or greater than 1.0 PIMs/G. The Players’ Association did not comment on this claim at the hearing. However, the Players’ Association identified players who were +/- 1 of Witt’s total of 1.57 PIMs. This could have selected players whose PIMs/G were as low as .57. As noted above, the Club says this allowed Witt to compare himself to 3 highly paid players who would not have surfaced under the traditional criteria. There is some merit to this allegation, and it will affect the weight given to those players, although it does not necessarily make the comparisons irrelevant.
Appendix H

Arbitrator Opinions on Age versus Games Played

*Nils Ekman v. San Jose Sharks*, p. 8 (2004):

In prior cited cases players and clubs have sought to use age as a factor, and arbitrators rejected that approach largely on the basis of relevance. A look at total games played coupled with the player's consistency will factor into the mix the career path element emphasized by the club here, to the extent it is relevant, and reveal the differences between a player whose NHL success rapidly followed his draft and one who took years to become a full-time player.

*Jay Bouwmeester*, p. 3:

It is true that most people develop more maturity and better judgment as they age (not including arbitrators), and it is easy to surmise that an athlete becomes more valuable with experience. But age alone is not a measure of experience. The relevant factor is games played. Bouwmeester has been durable, playing in all but 21 games in his three-year career, and, in his platform year, playing more than anyone else on his team and more than most of the defensemen in the league. The number of games compares favorably with many of the comparable players, who have been in the league longer and are older. Some of the players played professionally elsewhere, but Bouwmeester played for two years in the Western Hockey League, beginning at age 16. This suggests that he was somewhat ahead of the curve for players in his age group. I have not given weight to Bouwmeester's age in this case. Similarly, I am not willing to exclude players from comparison because they have been in the league for 6 years or more, as the Club did in selecting comparable players. In some cases, the difference is less significant than the number of years might suggest, because players missed considerable time with injuries. The comparison should be to games played, not years under contract in the league.
Appendix I

Opinion in Daniel Winnik which includes an extended quotation of Sean O’Donnell:

Most importantly, the Club emphasized that Winnik was a “healthy scratch from the Phoenix line-up 22 times in 2008-09. This indicated, it was argued, that Winnik was a player the coaching staff did not feel it could rely upon. And, as noted in the Club’s brief, arbitrators have placed emphasis on healthy scratches in assessing a player’s value to his club. A particularly relevant comment is that of Arbitrator Bloch in O’Donnell v. Los Angeles, Bloch, 1997, at p. 7:

Most notable, in terms of O’Donnell’s comparison deficiencies, is his relative lack of experience, including having played in only 55 games during his platform year [Winnik played in only 49 games]. Some of this, it is true, was due to injury or suspension. It is also true, however, that he was, for a variety of reasons, the subject of some 15 “healthy scratches”. He cannot, therefore, claim this to have been the type of fully productive season that would somehow justify more than doubling his recent salary.
Appendix J

Players with Only One Year of Production


Both parties have a point. On the one hand, one season does not make a career. At that same time, exceptional contributions may hardly be ignored for a lack of their having been sufficiently repeated. This arbitration will set the salary rate for one season, after which both parties are free to return to the bargaining table…. There is, to be sure, a premium paid for consistency. The Club is clearly correct in observing that it is too early to tell, in this case.

*Denis Gauthier*, p. 16:

However, the fact that he has played only two seasons at a level in excess of 60 games played, and has just completed his first season as a fourth defenseman, does not of itself place him in the salary range of those more established players, even though his defensive statistics on a games played basis may be better than theirs. As arbitrators have noted previously, it is not unreasonable to expect more than one season of high level performance before attaining the compensation earned by players of the same category who have performed at that level over a number of seasons. There can be no doubt but that Mr. Gauthier has the full potential to reach that level of achievement. It is also clear that his delay in doing so has been chiefly the result of problems of durability related to injuries, a factor which both parties have always recognized as an element of importance in the remuneration of a player.

*Steve Montador*, p. 17:

Nonetheless it is true many of the comparable players have fewer games and seasons. However, the selection criteria in this regard is reasonable in this case. Moreover, while many comparables have fewer games these players have been more consistent or perhaps put more precisely took a shorter time to be consistent to the point they inspired the confidence of their coach to play a large number of games and minutes in a season. Many were consistent enough early enough to inspire multi year contracts. It took Montador longer to gel and play at a similar level of games in a single season. Thus, the Arbitrator does not see Montador sharply distinguished in career experience. All these players have taken root lately. Montador appears to have ‘itched his scratch’ problem. While he had 10 last season they were early and he had none late in the season. While his earlier seasons had significant scratches they shouldn’t brand or define the whole scope of his career. In this regard, the platform year look might be somewhat more reasonable than the career stats in these circumstances. The platform year look at other players might be a somewhat better indicator in this case because most of them also put their first solid seasons together recently. I look at them as all relatively young defensemen who have for different reasons just in the recent past taken foothold in the NHL.

I understand the Club’s position that Koistinen’s limited experience in the NHL makes it difficult to identify a group of comparable players. The Club argues that if it is acceptable for the Union to identify players who have more than twice as many games as Koistinen, then it is equally acceptable to use players who have substantially less experience. I agree that Koistinen’s short time in the league makes comparison difficult and challenges the traditional format the parties use. And that may mean that it is appropriate to consider other factors in a determination of market value. Obviously, some considerations other than statistics affected decisions to offer multiyear, multimillion-dollar contracts to players like O’Byrne and Colaiacovo, whose stats do not explain their salaries, when compared to other players in the group who are paid less.


In sum, the Player is talented offensively and a power play specialist. Each of the four comparable players cited above (Dackell, Grosek, Shantz and Warriner), however, is much more of a two-way player and has contributed both offensively and defensively to their respective teams. Furthermore, the Arbitrator must acknowledge the fact that the Player was traded for low round draft picks and was repeatedly released, waived, and exposed in Expansion/Waiver Drafts. Clearly, he has been less protected and sought after than any of the comparables cited. This is not to say, however, that the Player's worth has “barely changed” since his last contract signing, as is argued by the Club. Prior to being injured in the 2000-2001 season, the Player scored an impressive 26 goals during his fully healthy 1999-2000 season. During his platform year the Player served as more of a playmaker than a scorer, with a career high of 26 assists, to average .45 PPG. He also was one Edmonton's most effective face-off men, winning 60.55 percent of his draws.

Brendan Morrison, p. 30: Career consistency (ie. Morrison had one good, “break-out” year) used to distinguish him from Chris Drury and Milan Hejduk.

Dave Scatchard, p. 8:

The Club points to the height of Scatchard's success in the 00-01 season as an anomaly resulting from the fact that the Club was in a rebuilding process at the time, providing Scatchard with a unique opportunity created by a dearth of top-notch forwards on his team. The argument is the reverse of the argument (with which I was confronted in another case of recent times) that the particular player was the co-player with two first-rate forwards and therefore could not help but produce his high scoring numbers. One can do no more than take judicial notice of arguments of these sorts if one is to be faithful to the assignment of applying the statistics as they exist for the purpose of determining market value.

Nils Ekman, p. 8: Only having one good year was used in the selection of comparables and used to distinguish him from those comparables.


One of the other differences between the parties, besides the big one ($700,000 per year), is their analytical approach. The Player focuses on the platform year. In essence he argues
platform year scoring can explain everything the Arbitrator needs to know. The Club looks to Kvasha's whole career including his platform year minus one and platform year minus two years to show a lack of consistency. Although it is noted that the Player provides statistics and analysis for his career-to-platform year and three years to platform. Nonetheless, he cites many cases touting the importance of platform year performance. The Club acknowledges that Kvasha had a respectable platform year but harkens the Arbitrator to temper the platform year's 51 points (15 + 36) with the fact Kvasha had only 26 points the year before the platform year. This was a year he was not getting as much ice time as he did in his platform year. In his platform year he got more ice time, particularly shorthanded minutes, due to Yashin's and Parrish's injuries.

\textit{Oleg Kvasha, p. 19:}

This is a good point to address another broad stroke wielded by the Club. They acknowledge a decent platform year but diminish it by saying it was a "season of circumstance" because of injuries to Yashin and Parrish. Much of his platform year can be attributed to these circumstances say the Club. There is some truth to what the Club says. However, it is not unusual in sports that someone's misfortune is someone else's opportunity. Kvasha didn't have to step up and change positions but he did. He didn't have to put up 51 points but he did. And why shouldn't he get credit? It says something about his value in the marketplace.

Consistency should draw some particular attention if Kvasha is discernibly different in this regard. On its own, a career high 51 points after the 26-point season warrants a closer look.

The Arbitrator thinks it can be safely said as a general matter that Kvasha has been more inconsistent than other comparable players in that, generally, his fluctuations are wider, there is a less discernable pattern (if any at all) in his performance and he hasn't put two big years in a row together.

For example, looking at Stefan and Halpern, their production has been on an upward trend the last three seasons (23-34-40 points for Stefan and 1934-46 points for Halpern). Sturm has consistently been over 40 points the last two seasons (41-48-51). Axelsson, with one spike, consistently has been in the "twenties." In his last five seasons he has produced 26-23-24-36-20 points. Blake, in his last two years, was consistently high with 55 and 47 points. Only Schaefer and Bulis lack a pattern or upward trend and even though they are at the end of the salary spectrum for this comparable group, they are paid more than the Club offers Kvasha.

None of this discussion on career consistency is to cast aside platform year comparisons. They are very important. However, in this case, the Club is right when it says Kvasha has not been consistent to a degree that distinguishes him from most of the comparables and it is a fact that must be in the mix and given some weight in arriving at a balanced assessment of Kvasha's salary for 2004-05. He is different enough that his inconsistency cannot simply be accounted for by looking at career averages. Kvasha's career is distinguished from the bulk of the comparables as a roller-coaster ride rather than an upward trend or settled in a particular predictable pattern.
This is a negative factor in the marketplace and in player valuation. It seems obvious less predictability means more risk and making the market less willing to gamble. Mr. Kvasha simply needs to be more consistent and at least put together two big years in a row. Platform year statistics in his case don't tell the whole story.

*Mark Smith*, p. 8:

Mayers’ performance did decline somewhat in his platform season. That Mark Smith’s improved is not sufficient, however, to persuade this Arbitrator that Smith should be compensated more than Mayers. The weight of Mayers’ career performance leads to the conclusion that he should be more highly compensated than Smith.

*Trent Hunter*, p. 12:

There is obviously some merit to the Club’s contention that Hunter did not improve significantly over last year and is still behind his rookie year. This justifies its position that he should not get a raise, the Club argues. Obviously, performance from year to year is a significant factor in the bargaining process, which arbitration seeks to replicate. But the question isn’t only what Hunter’s performance was in 2005-06 and 2006-07. Rather, the issue is what that kind of performance is worth in the 2007-08 market, and the only way to determine that in this process is by comparing contracts of comparable players.
Appendix K

Problems with Plus-Minus

Cale Hulse, p. 9: “It is also significant to have some regard to a player's +/- statistics and the related question of the overall defensive strength or weakness of the Club's performance, particularly in the platform year.”

Vitali Vishnevski v. Anaheim Ducks, p. 5 (2006): “”+/-“ is a team-oriented number and not necessarily reflective of a player’s individual production. But all of these can be considered in varying weights.”

Vitali Vishnevski, p. 6: “Sixth, Vishnevski’s +/- is up substantially in his platform year from the prior year (8 from 0). But again, that factor is not definitive in making an assessment of this player. Those are team oriented numbers and not necessarily reflective of an individual player’s performance. Nevertheless, they are considered.”

Ruslan Salei v. Anaheim Mighty Ducks, p. 2 (2004): “Moreover, the Club placed much emphasis on the +/- category. This Arbitrator concludes, like Arbitrator Valtin repeatedly has, that this statistic is "tricky. It is simply a statistic undermined by the influence of too many unknown variables.”

Brendan Witt, p. 5: “However, both parties agreed this statistic is of limited value because, as Arbitrator Rolf Valtin and others have said, it is "tricky," especially when compared between clubs.”
Appendix L

Quality of Linemates

Robert Lang, p. 11:

Last, I do not believe that the Club can properly be upheld on the argument that Lang’s remarkable success in either or both of the last two seasons should be downgraded in the light of the fact that the players who were his fellow players on the line are among the best of the NHL Forwards. Lang’s fellow players on his line – Alexei Kovalev and Martin Straka – are of that status. And I think it is true – in hockey as in other team sports – that the higher the quality of one’s teammates the more one’s own game is likely to go up. But it remains a fact that Lang was one of the members of the line which had the NHL’s greatest scoring success in the 00/01 season and that he scored the goals and assists which brought him to a .98 PPG in that season. Kovalev and Straka were each in excess of a full-point PPG, and, whereas Lang ranked 20th in League scoring, they respectively ended up in 5th and 6th place. But it seems to me as valid to assume that Lang was good enough to contribute to their success as it is to assume that Lang’s high number was substantially the product of their superior play. Somewhat lower production is not the same thing as dependency. And, in any event, one should proceed with the great caution in contemplating a modifying application of PPG numbers to proceed otherwise is to open the flood gates for endless debates as to whether one or another PPG figure should be given a modifying application, up or down, in the light of the sort of factor here introduced by the club.

Brendan Morrison, p. 32:

The Arbitrator suggests a third alternative explanation. The underlying coaching decision, as well as other motivational factors, may have produced the desired effect: that the combination of these three valuable players just "clicked," that the "gears meshed" really well, and/or that it is just one of those "magical" things in sports where the "whole is greater than the sum of the parts." In a word, another cliche for sure, "teamwork." Isn't that one of the great things about the great game of hockey? It is a great team game and without teamwork and great line combinations, success is unlikely. The Arbitrator believes everyone on the whole line deserves credit, but no one more than another. Players who create their own shooting opportunities are rare. Scorers usually need a play maker and a play maker without scorers is equally akin to a three-legged mule in the Kentucky Derby. The individual credit for the line's accomplishments goes into the individual stats and ultimately statistics are valued for what they are. The marketplace already differentially values goals and assists, so there is no reason to make Mr. Morrison's performance something more or less than it is.

Ruslan Fedotenko, p. 14:

The Arbitrator is inclined to believe that Mr. Fedotenko did not merely ride the coat-tails of his line-mates St. Louis and Lecavalier, but rather came into their company as a goal scorer truly worthy of their play-making skills. However, before that belief can be translated into significantly increased compensation levels, it must be realized on a sustained basis
Appendix M

Comments on Goaltenders

Martin Biron v. Buffalo Sabres, p. 8 (2004): “I am also aware that comparing goalies is a "difficult and sometimes elusive" process, as the universe is so small" 

Martin Biron, p. 12: “As stand-out of a season that Aebischer had, his compensation reflects a wait and see approach as to whether his rookie numbers will be repeated. It shows that experience tending net, and remaining in the starting job, is rewarded.”

Martin Biron, p. 11: “Given the demonstrated variability in this group from game to game, it shows that the better statistic in gauging a goalie's performance for salary purposes is the yearly Save Percentage.”

Manny Fernandez, p. 5: “In John Vanbiesbrouck vs. Florida Panthers (McLaren, June 16, 1995) and Tommy Salo vs. Edmonton Oilers (Picher, August 9, 1999), starting goaltenders have been defined as those who have played at least 41 games in a NHL season.”
Appendix N

Arbitrator Opinions on Defensive Defensemen

_Cale Hulse_, p. 9, quoted in _Denis Gauthier_, p. 7:

In assessing the comparable Players I am inclined to agree with the Player's counsel who stresses that minor fluctuations in offensive statistics are of little significance in evaluating a defensive defenseman whose role on a Club is not focused on point scoring. While it is mathematically true to say that a defenseman who has four goals and four assists over a season has 100% more offensive production than a defenseman who has two goals and two assists, that difference should have very little bearing on a meaningful analysis of the relative value of the two Players, an analysis which must focus on their defensive contribution. The relative performance of such Players is better understood by examining closely the statistics relating to their time on ice, both in even strength and shorthanded situations, their hits and hits per game, their penalty minutes and penalty minutes per game, with some regard to the type of penalties involved. It is also significant to have some regard to a Player's +/- statistics and the related question of the overall defensive strength or weakness of the Club's performance, particularly in the platform year.

_Anders Eriksson v. Chicago Blackhawks_ (2000), quoted in _Denis Gauthier_, 8:

It is generally accepted that defensemen can be characterized as "top four" defensemen on a given Club, or be viewed as a fifth, sixth, or seventh defenseman who can expect to see less playing time. Among top four rankings, first and second defensemen are sometimes distinguished from third and fourth defensemen, also by ice time. Obviously the quality of a Club can have a substantial impact on the significance of top four status. It may be easier for a Player to achieve top four standing on a Club that is weaker defensively than a Club which is rich in veteran talent. It is therefore important for an Arbitrator to be cautious in assessing the meaning of top four status in any given case, having careful regard to the defensive strength and record of the Club or Clubs in question.

_Vitali Vishnevski_, p. 4:

However, given the type of player involved in a salary arbitration case, some statistics are more informative than others. Vishnevski is a “defensive” defenseman — his job is to keep the puck away from his team’s net. Therefore, statistics concerning goals scored, assists, points, points per game and time on-ice during power plays are not as helpful in examining a defensive defenseman as would be statistics concerning games played and time-on-ice (total, equal strength and short handed). PIM could be relevant to show how aggressive a defenseman is, but were the penalties “good” ones or were they for nonaggressive conduct? Hits, take away-give aways and blocked shots are somewhat subjective. “+/-” is a team-oriented number and not necessarily reflective of a player's individual production. But all of these can be considered in varying weights. Further, relevant production during the playoffs should be considered.
To the foregoing I would simply add that regard may also be had to statistics relating to blocked shots as well as to the takeaway/giveaway ratio, which can speak meaningfully to a player's puck-handling reliability, particularly in his own zone. Additionally, with a defenseman who brings offensive attributes to the table, points, points per game and power play minutes per game are obviously relevant.” After quoting Hulse (2001) “In assessing the comparable players I am inclined to agree with the Player's counsel who stresses that minor fluctuations in offensive statistics are of little significance in evaluating a defensive defenceman whose role on a Club is not focused on point scoring. While it is mathematically true to say that a defenceman who has four goals and four assists over a season has 100% more offensive production than a defenceman who has two goals and two assists, that difference should have very little bearing on a meaningful analysis of the relative value of the two players, an analysis which must focus on their defensive contribution. The relative performance of such players is better understood by examining closely the statistics relating to their time on ice, both in even strength and shorthanded minutes per game, their hits and hits per game, their penalty minutes and penalty minutes per game, with some regard to the type of penalties involved. It is also significant to have some regard to a player's +/- statistics and the related question of the overall defensive strength or weakness of the Club's performance, particularly in the platform year.