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Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball

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NOTES

STEP UP TO THE BARGAINING TABLE:
A CALL FOR THE UNIONIZATION
OF MINOR LEAGUE BASEBALL

“They could make you stand on a street corner naked and sell lollipops if they wanted to.”

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1. Telephone Interview with Tim Roberts, former minor league hockey player and team union representative, Professional Hockey Players Association (Feb. 16, 1996) (commenting on the power of team owners over their players in the East Coast Hockey League ("ECHL")). The ECHL is a developmental hockey league containing some affiliations with the National Hockey League. See id.
I. INTRODUCTION

It has become a well known fact that one of the biggest businesses in America today is professional sports. Despite tremendous financial success, the reality of legal actions and labor struggles have too often resulted in player strikes, lockouts and the use of replacement players. Although these labor and legal difficulties have impacted the athletes in all four major United States sports leagues, minor league players in the National Hockey League ("NHL") and Major League Baseball ("MLB") systems have been unfairly and unjustifiably affected by the tenuous relationship that currently exists between professional athletes and their club owners. Minor league hockey and baseball players are not


4. See generally MILLER, supra note 3 (noting that the four major sports leagues in the United States are Major League Baseball, the National Hockey league, the National Basketball Association and the National Football League).

5. See Lee Lowenfish, Fielder's Nonchoice: Minor Leaguers Must Choose: Side With Owners Who Exploit Them? Or a Union That Snubs Them?, VILLAGE VOICE, Feb. 21, 1995, at 122. Minor league baseball players were asked by major league clubs during spring training of the 1995-1996 season to report to replacement player camps and if they refused, they would have had to train alongside the replacement players anyway. See id. The striking Major League Baseball Players Association asked the minor leaguers not to train alongside scabs. See id; see also If Players Strike, NHL May Use Replacements, BERGEN REC., Mar. 12, 1992, at E4 (stating that National Hockey League owners may look for replacement players in the event of a strike). Curt Leichner, General Counsel to the Professional Hockey Players Association, said at least two general managers had talked this option over with two minor-league teams and threatened to suspend any player who refused to be a replacement. See id; see also NHL Recruiting Minor-Leaguers, Player Rep Says, VANCOUVER SUN, Mar. 11, 1992, at D10 (discussing the fact that as contract talks between the
members of the NHL and MLB players unions, the National Hockey League Players Association ("NHLPA") and the Major League Baseball Players Association ("MLBPA"), respectively. However, the minor, alternative and developmental leagues of the National Hockey League have been unionized by the Professional Hockey Players Association ("PHPA"). The minor league players of MLB are not as fortunate as they have not been unionized by the MLBPA or any other union. As a result, the minor leagues of baseball and the leagues represented by the PHPA differ greatly in terms of wages, hours, working conditions and the amount of control retained by the players over their careers.

This Note will focus on the restrictive conditions imposed on the minor league baseball athlete. In order to thoroughly evaluate this issue, it is necessary to examine the antitrust exemption MLB presently enjoys. As a result, case law and commentaries will demonstrate that the entire business of baseball should be covered under the antitrust exemption. Although an argument can be made to restrict MLB's antitrust exemption to the reserve clause, this Note emphasizes the weakness of this view, which leads to the conclusion that the antitrust exemption will stand in its present form.

The antitrust exemption grants MLB preferential treatment that the other professional sports leagues in the United States do not receive.
In particular, the antitrust exemption affords MLB a tremendous advantage in structuring and managing minor league baseball. Specifically, notable attention will be given to the presence of the reserve system which still exists in minor league baseball, although no longer present in the major leagues. The reason for this inconsistency is that the reserve system was bargained out through the collective bargaining process by the MLBPA in 1976. Since minor league baseball players are not represented by the MLBPA, rules and conditions are unilaterally imposed by the owners of the minor league clubs and major league clubs, which are collectively referred to as the National Association of Professional Baseball Clubs ("National Association").


12. Previously, paragraph 10(a) in the Uniform Player's Contract of Major League Baseball stated that the owners had a right to renew an unsigned baseball player for one year. See MARVIN MILLER, A WHOLE DIFFERENT BALLGAME, THE SPORT AND BUSINESS OF BASEBALL 238 (1991). The owners contended that if a player and a team could not agree on salary or conditions of a contract, the team could automatically renew the player's last contract for one additional year. See id.

According to the owners the renewal of a prior contract would occur without the player's signature. See id. Thus, the right of renewal had no foreseeable limit. See id. This created the right for a team to renew a player's contract forever. See id. at 239. The only alternative a player had if he wished to challenge this was to quit playing baseball for a living. See id.

In addition, inactive players were still owned for life by the last club played for. See id.

In effect, this prevented those players that had retired, or those who wished to retire in order to circumvent the system, from coming back with another club. See id.

The Uniform Player's Contract was incorporated into the 1968 collective bargaining agreement. See id. at 94. Therefore, the form of the player's individual contract could no longer be changed unilaterally by the MLB owners. See id.

Changes made to a player's contract would now require agreement through collective bargaining. See id.

13. See ZIMBALIST, supra note 8, at 180-81. The reserve system in Major League Baseball had been in place in some form since 1879. See ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 4 (1992).

14. See ZIMBALIST, supra note 8, at 21. As a result of the collective bargaining process that occurred in 1976, free agency was granted to major league baseball players with six years of major league experience. See ZIMBALIST, supra note 8, at 21.

15. See ZIMBALIST, supra note 8.

16. See Deborah L. Spander, The Impact of Piazza on the Baseball Antitrust Exemption, 2 UCLA ENT. L. REV. 113, 156 n.7. The Professional Baseball Rules are the rules that govern the minor leagues. See id.

Unionization of Minor League Baseball

Therefore, the best option for minor league baseball players is to unionize. In order to illustrate this point, the Professional Hockey Players Association, which represents the players in the International Hockey League, the American Hockey League, and the East Coast Hockey League, will serve as the basis for much of the analysis and comparison to the feasibility of unionizing minor league baseball. The reasons for unionization of minor league hockey and the history of antitrust action in professional hockey will also be examined to draw an accurate parallel to major league baseball. This Note concludes by demonstrating that the success of the PHPA should be expanded and paralleled to minor league baseball.

II. THE ANTITRUST EXEMPTION IN MAJOR LEAGUE BASEBALL

A. The Supreme Court Decisions

The Supreme Court first had the occasion to examine the antitrust issue as it pertains to Major League Baseball in the landmark case of Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs. The Federal Baseball Club of Baltimore was a member of the Federal League of Baseball Players, essentially a condemnation of anticompetitive agreements restraining interstate commerce. See 15 U.S.C. §§ 1-2 (1990). Specifically, §1 states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." Id. §2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . " Id. In order to invoke the rules and provisions enumerated within the National Labor Relations Act, the employment in question must affect interstate commerce. See 29 U.S.C. §§ 151-152(7) (1994). The National Labor Relations Act expressly defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several states . . . ." Id. § 152(6). The Supreme Court has held that the National Labor Relations Act prohibits only "unreasonable restraints of trade." Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911). Certain practices are so unreasonable that they are illegal per se. See Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1956).


19. See ZIMBALIST, supra note 17.

rival league of MLB. The Baltimore baseball club was literally left without any competition, allegedly because MLB bought some of the clubs in the Federal League and induced the remaining teams to leave the league. Additionally, the Federal Baseball Club of Baltimore was unable to sign players to play on its team due to the reserve clauses contained within the contracts of MLB players. The plaintiff sued MLB for restraint of trade violations under the Sherman Act. The Supreme Court held that the business of baseball was not within the scope of the Sherman Act because "the business is giving exhibitions of baseball, which are purely state affairs," and therefore the conduct of MLB was not interference with commerce among the states.

Although the Federal League was defunct, a new threat began to challenge MLB following World War II. A new baseball league in Mexico began to bid for the services of MLB players. As a result of numerous players "defecting" to Mexico, MLB implemented a rule placing a five year playing ban on all United States players who jumped to the Mexican League.

MLB enforced this rule strictly to thwart its competition. For example, in Gardella v. Chandler, Danny Gardella was unsuccessful...
in his attempt to return to MLB from Mexico before the five year ban had elapsed. Gardella subsequently challenged the ruling by suing MLB, alleging MLB was engaged in interstate commerce because the owners contracted with television and radio broadcasting companies to broadcast their games across state lines thereby subjecting MLB to federal antitrust law. Although Gardella lost his first case, he appealed to the Second Circuit Court of Appeals, which found in his favor and remanded the case. Fearing the decision of the lower court, MLB Commissioner Happy Chandler reinstated Gardella, thereby averting a possible reversal of Federal Baseball based on the distinguished facts highlighted by the Second Circuit.

Subsequent to the issuance of the Gardella decision, the Supreme Court revisited the baseball antitrust exemption issue in Toolson v. New York Yankees. George Toolson brought this suit after refusing to play for a minor league team of the New York Yankees to which he had been reassigned. As a result, he was blacklisted shortly thereafter by all other professional baseball clubs. Toolson’s complaint alleged that the reserve clause constituted a federal antitrust violation. Relying on the fact that Congress had considered baseball’s exemption from the federal antitrust laws and had not acted on the issue, the Supreme Court held

32. See id. Gardella was a baseball player with a contract to play exclusively for the New York Giants. See id. He violated this contract by jumping to the Mexico League, in direct contradiction to the reserve clause found in the contract. See id. The reserve clause in these contracts required a player whose contract expired with a club to only play for that club. See id.

33. See id. at 406.

34. See id. at 406-15 (discussing the reserve clause found in Gardella’s contract, Circuit Judge Frank compared it to “involuntary servitude,” and stated that “no court should strive ingeniously to legalise a private (even if benevolent) dictatorship.” Additionally, Judge Frank distinguished the Federal Baseball decision by noting the differences in the interstate commerce examined in Gardella as opposed to Federal Baseball).


37. See id. at 93.

38. See id.

39. See id. Plaintiffs sued under the Sherman Antitrust Act sections 1-7. See id. Plaintiffs alleged that organized baseball, through its illegal monopoly and unreasonable restraints of trade, exploited the players who attracted the profits for the benefit of the club and leagues. See Toolson, 346 U.S. at 364. Among other allegations, the plaintiffs additionally alleged that the owners entered into a combination, conspiracy, and monopoly in an attempt to monopolize professional baseball in the United States. See id.
that *Federal Baseball* should be reaffirmed.\textsuperscript{40} In fact, the underlying issues of Toolson's case were not even re-examined by the Court.\textsuperscript{41} *Toolson* was founded entirely on the prior reasoning of *Federal Baseball* determining "that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."\textsuperscript{42} Lower courts subsequently applied the holding in *Toolson*,\textsuperscript{43} but did so with reservation.\textsuperscript{44}

Most recently, the fate of MLB's antitrust exemption was decided by the Supreme Court in *Flood v. Kuhn*.\textsuperscript{45} Curt Flood was a twelve year veteran of the major leagues and at the age of thirty-two was traded from the St. Louis Cardinals to the Philadelphia Phillies without his knowledge or consent.\textsuperscript{46} Flood subsequently petitioned MLB Commissioner Bowie Kuhn to void the trade and allow him to become a free agent.\textsuperscript{47} Not surprisingly, Flood's request was denied, and he then brought suit against MLB directly challenging professional baseball's reserve clause under the antitrust laws of the United States.\textsuperscript{48}

Justice Blackmun authored an opinion holding that *Federal Baseball* should be reaffirmed because of the doctrine of *stare decisis* and the

\textsuperscript{40} See *Toolson*, 346 U.S. at 357. The Court further stated that "we think that if there are evils in this field which now warrant application to it of the antitrust law it should be done by legislation." *Id.*

\textsuperscript{41} See *id.* at 357.

\textsuperscript{42} *Id.*

\textsuperscript{43} See, e.g., *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966) (holding that state antitrust laws were no longer applicable to baseball).

\textsuperscript{44} See *Salerno v. American League of Prof'l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970). Relying on *Federal Baseball*, *Toolson* and *Gardella*, Judge Friendly affirmed the holdings in these cases but noted that *Federal Baseball* was not one of Justice Holmes' "happiest days... the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.'" *Id.* at 1005. Although Friendly did adhere to these decisions, he also noted that his fellow judges "should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled . . . ." *Id.*

\textsuperscript{45} 407 U.S. 258 (1972).

\textsuperscript{46} See *id.* at 258; see also ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 18 (1992) (noting that Flood was a "slick fielding outfielder who batted over .300 six times in his major league career.").

\textsuperscript{47} See *Flood*, 407 U.S. at 265.

\textsuperscript{48} See *id.* at 264. *Flood* charged violations of the federal antitrust laws, civil rights statutes, violations of state statutes, the common law, the imposition of involuntary servitude to the Thirteenth Amendment and 42 U.S.C. § 1994, 18 U.S.C. § 1581, and 29 U.S.C. §§ 102-103. See *id.* at 265-66. Pursuant to the powers of the federal antitrust laws, Flood sought declaratory and injunctive relief combined with treble damages. See *id.*
inactivity of Congress in passing superseding legislation.\textsuperscript{49} However, the Court did find that “professional baseball is a business and it is engaged in interstate commerce.”\textsuperscript{50} Of note, this conclusion was not reached in either of the two previous Supreme Court decisions examining the antitrust exemption in MLB.\textsuperscript{51} Flood argued that other professional sports leagues did not enjoy the same exemption as MLB and as such, the fact that baseball’s reserve system did have the benefit of this exemption was “an anomaly” and “an aberration.”\textsuperscript{52} The Court agreed that this was an aberration, but a well established one, that had been reaffirmed through the doctrine of stare decisis; therefore, it would not be overruled by the judiciary branch of government.\textsuperscript{53} Seemingly, the antitrust exemption was firmly entrenched because of the Flood opinion. However, as of late, the exemption has been judicially tested resulting in varying interpretations of the Supreme Court’s reasoning.

\textbf{B. The Piazza Decision}

The plaintiffs in \textit{Piazza v. Major League Baseball}\textsuperscript{54} alleged that MLB unlawfully restricted their efforts to purchase and relocate the San Francisco Giants Baseball Club to Tampa Bay, Florida.\textsuperscript{55} Accordingly,

\textsuperscript{49} See id. at 285. The Court stated that “what the Court said in Federal Baseball in 1922 and what it said in \textit{Toolson} in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.” Id.

\textsuperscript{50} Id. at 282.


\textsuperscript{52} \textit{Flood}, 407 U.S. at 282. See, e.g., Haywood v. National Basketball Ass’n, 401 U.S. 1204 (1971) (stating that basketball does not enjoy the exemption from the federal antitrust laws); Radovich v. National Football League, 352 U.S. 445 (1957) (testing the application of the antitrust laws to professional football. The case was dismissed and the Court refused to extend the antitrust exemption of baseball to the sport of football holding that the exemption should be limited to baseball); International Boxing Club v. United States, 358 U.S. 242 (1955) (involving a civil antitrust action against defendants engaged in the business of promoting professional championship boxing matches. The Court refused to extend the exemption of baseball to boxing); Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (issuing a preliminary injunction against a further use of the reserve system in the National Football League).

\textsuperscript{53} See id.

\textsuperscript{54} 831 F. Supp. 420, 421 (E.D. Pa. 1993). The two investors that were plaintiffs in the case were Piazza and Tirendi. See id.

\textsuperscript{55} See \textit{Piazza}, 831 F. Supp. at 421. On August 6, 1992, the investors had secured a letter of intent from the owner of the San Francisco Giants, Bob Lurie, to purchase the Giants. See id. Pursuant to this agreement, Lurie was not supposed to negotiate with anyone else regarding the sale of the Giants. See id. MLB must approve the sale of a baseball club and as such, the investors submitted an application to MLB to purchase and relocate the franchise to Tampa Bay. See id. In a knowing violation of Lurie’s exclusive agreement with the investors, an official from MLB directed
MLB was sued, in pertinent part, for violating federal antitrust laws. Specifically, the plaintiffs alleged that MLB had monopolized the market for MLB teams and had placed restraints on the "purchase, sale, transfer, relocation of, and competition for such teams."

MLB moved to dismiss this case based on the contention that the Federal Baseball exemption applied broadly to the business of baseball, and as such, the present claims were inactionable. In a decision deviating from prior precedent, the Piazza court held that the antitrust exemption was only limited to the reserve clause. In reaching this decision, Judge Padova examined the three Supreme Court decisions known as the "Baseball Trilogy."

Analysis of these cases led the Piazza court to conclude that the facts of each of these three cases dealt specifically with the reserve system and reserve clause in MLB, and therefore, the holdings in these cases should be confined to the specific facts in those cases. Although the antitrust exemption may have applied to the business of baseball between 1922 and 1972, Judge Padova argued that with the writing of the opinion in Flood "any precedential value those cases [Federal Baseball and Toolson] may have had beyond the particular facts there involved, i.e., the reserve clause," was removed. According to Padova, the Flood Court rejected the reasoning in Federal Baseball by using Lurie to consider other offers. See id. Ultimately, with the aid of National League President Bill White, the Giants were sold to an investor who would keep the team in San Francisco. See id. Interestingly, the sale was made for a lower price than that offered by the investors. See id. at 422, 423.

56. See id. at 423. The applicable federal claim for this discussion filed by Piazza against MLB was an assertion of violations of sections 1 and 2 of the Sherman Antitrust Act. See 15 U.S.C. §§ 1-2 (West 1973 & Supp. 1993). In pertinent part, section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1994).

57. Piazza, 831 F. Supp. at 423. Therefore, plaintiffs alleged they were unlawfully restrained from engaging in the business of baseball. See id.

58. See id. at 421.

59. See id. at 438.

60. Id. at 420-35. The cases forming the "Baseball Trilogy" are Federal Baseball, Toolson and Flood. See id.

61. See id. at 435.

62. See id. at 435. Citing authority to the cases of Federal Baseball and Toolson as granting this wide exemption to the business of baseball as opposed to simply the reserve clause. See id.

63. Id.

64. See id. According to Padova, the holding in Federal Baseball was based upon the finding that the business of professional baseball, as opposed to the business of moving players, was not interstate commerce and therefore not subject to the federal antitrust laws. See Deborah L. Spander, The Impact of Piazza on the Baseball Antitrust Exemption, 2 UCLA ENT. L. REV. 113, 119 (1994).
the phrase "[p]rofessional baseball is a business ... engaged in interstate commerce."65

Citing this language as undercutting "the precedential value of the reasoning of Federal Baseball,"66 in Padova's opinion, the Flood Court sought to justify the precedential value of that result.67 To explain this, Padova cites four factors the Flood Court examined when looking at Toolson,68 and concludes that the Flood Court viewed the disposition in Federal Baseball and Toolson as being limited to the reserve system.69 However, in the actual opinion of Flood, after these four factors are noted, the Court states, unequivocally, that the determination in Toolson, as illustrated in Federal Baseball, was that "[c]ongress had no intention to include baseball within the reach of the federal antitrust laws."70

The Flood Court proceeded to examine subsequent Supreme Court decisions citing Toolson.71 In United States v. Shubert,72 Chief Justice Warren discussed the Toolson decision by stating that for over thirty years the decision of the Court "fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause'"73 allowed baseball to grow and develop.74 Justice Warren then concluded that the Toolson Court adhered to Federal Baseball in the sense that Congress had never intended to include "the business of baseball within the scope of the federal antitrust laws."75

Another argument contradicting Padova's position is set forth in Radovich v. National Football League.76 In that opinion, noting Federal

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65. Piazza, 831 F. Supp. at 420 (quoting Flood, 407 U.S. at 282). See generally Federal Baseball, 259 U.S. at 207 (finding that the business of baseball was not engaged in interstate commerce).
67. See id.
68. See id. These four factors are as follows: (a) Congress was aware of the decision in Federal Baseball and for three decades never acted to overrule it through legislation, (b) Baseball was left to develop during those three decades with the knowledge that the reserve system was not subject to federal antitrust laws, (c) The fact that the Court was reluctant to overrule Federal Baseball because of a fear of retroactive effects, (d) A remedy should be elicited through legislation rather than judicial decision. See id.
69. See id.
70. Flood, 407 U.S. at 274 (emphasis added).
71. See id.
74. See Flood, 407 U.S. at 275.
75. Shubert, 348 U.S. at 229-30.
76. 352 U.S. 445 (limiting the antitrust exemption to baseball while not extending it to football); see supra note 52 and accompanying text.

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Baseball and Toolson, the Court refused to extend the antitrust exemption to professional football stating the exemption would only stand for the facts of Federal Baseball and Toolson, which were "the business of organized professional baseball." The Flood Court repeated the holding of Toolson, reaffirming the judgment below on the authority of Federal Baseball stating that Congress did not intend to include the business of baseball within the scope of the federal antitrust laws. In fact, other courts have followed the logic of this argument to uphold the antitrust exemption for MLB.

Although these cases are in opposition to the reasoning utilized in Piazza, an argument can still be made that Judge Padova had solid legal ground to arrive at his conclusion. However, due to the recent developments in the world of sports concerning relocation of sport franchises, it is now extremely unlikely that Congress would act to...
strip baseball of its antitrust exemption.\footnote{See generally Stephen F. Ross, Monopoly Sports Leagues, 73 MINN. L. REV. 643 (1989).} Realizing that the Supreme Court defers to the legislative process as the mechanism of choice to override the antitrust exemption,\footnote{See Toolson, 346 U.S. at 357; Flood, 407 U.S. at 285.} it seems unlikely the Supreme Court would overrule seventy-four years of precedent based on a tenuous reading of \textit{Flood}. Therefore, this Note concludes that the antitrust exemption will continue to remain intact if either \textit{Piazza} or any other similar case is tested by the Court.

\section*{C. The Butterworth Decision}

In 1994, the Florida Supreme Court decided a second case arising out of the attempted relocation of the San Francisco Giants to Tampa Bay in \textit{Butterworth v. National League of Professional Baseball Clubs}.\footnote{Butterworth v. National League of Professional Baseball Clubs, 644 So.2d 1021 (Fla. 1994).} Florida Attorney General Butterworth brought this case acting upon an antitrust civil investigation demand ("CID").\footnote{See \textit{id.} at 1022. Section 542.28(1) of the Florida Statutes authorizes the attorney general to issue a civil investigative demand to any person that the attorney general has reason to believe may be in possession, custody or control of documentary material or information relevant to a civil antitrust investigation. See \textit{id. The specific focus of this civil investigation demand was combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants. See \textit{id.\footnote{See Butterworth, 644 So.2d at 1025.}}}

The Florida Supreme Court held that MLB's antitrust exemption extends only to the reserve system, and therefore the CID initiated by the Attorney General could proceed.\footnote{See \textit{id}. The specific focus of this civil investigation demand was combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants. See \textit{id.\footnote{See Butterworth, 644 So.2d at 1025.}}}

The rationale of the \textit{Piazza} decision was now adopted by a second court. This second opinion demonstrates that a potential trend is developing in the lower courts of our country. However, the present state of the law, as decreed by the Supreme Court, maintains a broad antitrust exemption applicable to the business of baseball.
III. APPLYING THE ANTITRUST EXEMPTION TO MINOR LEAGUE BASEBALL

A. The Draft and Major League Baseball Rules

The antitrust exemption is extremely crucial to the workings of minor league baseball. The exemption may not extend to the rules and operations of minor league baseball if the antitrust exemption is limited to the reserve clause of MLB, and specifically to the reservation and rules governing major league players. This would create a minor league baseball reserve system which would be considered a separate system apart from the major league system, thus excluding the minor leagues from the exemption. However, an argument can be made that the reserve system in MLB is an integrated whole, composed of both the major and minor leagues, meaning that the exemption should be applied equally to both sets of leagues. Players are constantly being called up from the minors and sent down to the minors during the course of a baseball season. These call-ups and assignments support a similar interpretation of what the Court originally intended when it first established the antitrust exemption for the reserve clause in MLB.

This interpretation is important because if the courts limit the antitrust exemption to the reserve clause in MLB, the minor leagues would then be excluded from the exemption, and would therefore remain under the jurisdiction of the federal antitrust laws. As a result, the

89. See id.
90. See id.
91. See id.
92. See id. at 156. The reserve clause refers to those major league rules that govern player contracts and player movement. See id. Major League Rules 3, 9 and 12 state as follows: (1) require uniformity of player contracts, (2) confine players to the club that has him under contract, (3) prevent tampering, (4) allow a major league team which drafts or otherwise acquires a player to renew his contract for up to five years, and (5) allow a team to assign a player to one of its minor league affiliates or another club and bind that player to that assignment, among other things. See id. at 156 n.2.
93. See generally Federal Baseball, 259 U.S. at 200; Flood, 407 U.S. at 258; Toolson, 346 U.S. at 356.
amateur draft and minor league restraints could be declared illegal restraints of trade.\textsuperscript{95} However, since it appears unlikely that this exemption will be lifted, thereby causing the draft and restraints to remain as the status-quo, the minor league athlete will have to look elsewhere for relief.\textsuperscript{96}

**B. Restraints in the Minor League Baseball System**

The National Association of Professional Baseball Leagues covers nineteen professional baseball leagues\textsuperscript{97} and over 158 teams which are more commonly known as the minor leagues.\textsuperscript{98} This league is governed by two sets of bylaws—the Professional Baseball Agreement ("PBA"),

\textsuperscript{95} See id. Spander argues that the draft and minor league restraints can violate section 1 of the Sherman Antitrust Act as illegal restraints of trade in the "market" for player services under the rule of reason analysis. See id. at 134. In all antitrust cases, a plaintiff has to first allege the market in which trade is being limited. See id. For sports cases, the applicable market is professional athletes' services in the appropriate sport. See id. at 156 n.104. Additionally, the rule of reasoned analysis is applied if there is not a per se violation of section 1 of the Sherman Act, meaning the restraint is not a "blatant refusal to deal." Id. at 156 n.105. The test is whether the restraint is justified by a legitimate business purpose, and is no more restrictive than necessary. See id. (citing Board of Trade of Chicago v. United States, 246 U.S. 231 (1918)); see also Jeffrey A. Rosenthal, \textit{The Amateur Sports Draft: The Best Means to the End?}, 6 MARQ. SPORTS L.J. 1 (1995).

\textsuperscript{96} At this point, it is extremely important to note the assumption operated under is that the judicially created antitrust exemption unique to major league baseball will not be overturned as previously analyzed. Therefore, an analysis of baseball without the exemption is unnecessary. However, should the antitrust exemption be repealed by the Supreme Court or by Congress, making the baseball draft and minor league restraints susceptible to federal antitrust law, MLB owners could argue they are entitled to the nonstatutory labor exemption in professional sports. For a full discussion of this nonstatutory labor exemption in professional sports see Kieran M. Corcoran, \textit{When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports}, 94 COLUM. L. REV. 1045 (1994). For a discussion of the nonstatutory labor exemption if applied to major league baseball see Deborah L. Spander, \textit{The Impact Piazza on the Baseball Antitrust Exemption}, 2 UCLA ENT. L. REV. 113, 124-34.

\textsuperscript{97} See ARTHUR T. JOHNSON, MINOR LEAGUE BASEBALL AND ECONOMIC DEVELOPMENT 10 (1993). These leagues cover teams in Canada, the United States, Mexico and other summer leagues, See id.

an agreement created by MLB and the National Association, and the Professional Baseball Rules.

MLB operates an amateur draft where college and high school players are assigned to one professional baseball team. This draft, which is composed of sixty rounds, was unilaterally imposed by MLB in 1965. All United States players who are in their final year of high school, third or fourth year of college, second year of junior college or have been out of college for at least 120 days are eligible for the entry draft. Additionally, players in Canada and Mexico can be drafted as long as those draftees have completed a minimum of eleven years of school.

Once a team drafts a player, that team has the exclusive right to negotiate and sign that player. If the drafted player refuses to sign with the team, the only available option for that player to join MLB as a player is to sit out an entire year and reenter the draft the following season. However, the team that drafts this player the next year also will maintain his exclusive rights for a year, and tampering by other teams with a player during the negotiation process is expressly prohibited.

It is extremely important to note that almost every Major League Baseball player gets sent to the minor leagues to prove whether he will able to perform at the major league level. This often entails going through each and every level of the minor league system, which means

99. A new seven year agreement was negotiated by both parties in 1990. See ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 113 (1992). However, it can be reopened by either side after three years and terminated after four years. See id. Neither of these have occurred. See id. This agreement was negotiated following the owners defeat in three collusion cases brought by the MLBPA and therefore, MLB knew it was time to negotiate a new deal with lower subsidies. See id. Analysts suggest that because of their bitter defeat in the collusion cases, MLB was determined to “beat up on the minor leagues.” Id.

100. See Spander, supra note 98, at 115.
101. See Major League Baseball Rule 4 (reprinted in THE BASEBALL BLUEBOOK 529-35 (1988)).
102. See Spander, supra note 98, at 115.
103. See Spander, supra note 98, at 115.
104. See Major League Baseball Rule 3 (reprinted in THE BASEBALL BLUEBOOK 528 (1988)).
105. See id.
106. See id.
108. See Major League Baseball Rule 3(j) (reprinted in THE BASEBALL BLUEBOOK 528-34 (1988)).
entering rookie ball, then proceeding to Single-A ("A"), Double-A ("AA"), and finally reaching Triple-A ("AAA").\textsuperscript{110} Triple-A is the closest level to the major leagues, with rookie ball being the furthest.\textsuperscript{111} Most players do not even make it to the majors, either becoming career minor leaguers or simply ending their playing days.\textsuperscript{112} In fact, only one minor leaguer in ten ever plays in the majors and only one in fifty stays in the majors for more than six years.\textsuperscript{113}

The next significant hurdle for a minor league player to overcome is the presentation and negotiation of his contract. The contract is called the Minor League Uniform Player Contract ("MLUPC"), and it contains four parts.\textsuperscript{114} Section two consists of twenty-seven paragraphs that cover a variety of important subject matters.\textsuperscript{115} The National Association strictly prohibits any player from amending, altering or negotiating any part of this section, and as of 1995, no player had been successful in his attempt to do so.\textsuperscript{116} The next section of the MLUPC is labeled "Addendum B" which lists the terms of the contract that are subject to negotiation, for example, signing bonuses, scholarship plans,\textsuperscript{117} automatic call-up provisions,\textsuperscript{118} or any other covenant a player can secure from a scout acting as a representative for the drafting team.\textsuperscript{119} However-

\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{113} See id.; see also infra notes 148-50 and accompanying text.
\textsuperscript{114} See Derek C. Crownover, Minor League Rights of Publicity are Major League, 2 SPORTS L.J. 227, 228 (1995).
\textsuperscript{115} See id. at 228. The subjects covered in the second paragraph consist of parties to the contracts, payments schedules, loyalty clauses, dispute resolution, termination, applicable state laws and licensing waivers. See id. This is all in eight point fine print divided into twenty-seven separate paragraphs. See id.
\textsuperscript{116} See id. at 229. But see id. at 242 (arguing that this is an adhesion contract). If a player does not accept this contract he cannot play baseball and therefore must agree to the terms of the contract without the opportunity to freely negotiate at arm's length for the provisions. See id. at 242.
\textsuperscript{117} See id. at 229. Scholarship plans are freely negotiable although once secured, specific guidelines are attached. See id. The scholarship money can only be used while either playing professional baseball or within two years of retiring or being released; and can only be used for tuition, room and board. See id. at 243 n.4
\textsuperscript{118} See id. Major League rosters expand from twenty-five to forty players every season on September 1st. See id. Some players are able to secure an "automatic call-up" provision requiring the club to put the player on that expanded forty man roster. See id. at 243 n.3.
\textsuperscript{119} See id. Such provisions include performance and promotion bonuses; donations made to charities made by the club on behalf of the player; plane fare for parents to visit during spring training or for games during the season. See id. It is important to note that the highest percentage of players are not able to secure these benefits, with mostly the high picks securing these clauses. See id. at 243 n.5.
er, during the initial contract negotiation, a player is forbidden from negotiating any part of his contract except for the signing bonus and an education stipend during his first seven seasons. Additionally, no individual or team performance bonus clauses are allowed.

“Addendum C” to the contract contains the salary amounts per year for the length of the player’s contract. Most minor league contracts are for one year in duration. Once the initial contract is signed, a drafted player is forced to grant his drafting team six successive and annual renewal options. In actuality, notwithstanding a few minor exceptions, the team retains the exclusive rights to the drafted player for the first seven seasons of his minor league career. Moreover, the pay scale, which is established by the National Association and followed by all minor league clubs, is fixed at the signing of the initial contract for the duration of the contract including the option years. After the initial MLUPC is signed, negotiation becomes moot because the player’s salary is based upon “Addendum C” which contains the pay scale according to the level of assignment.

120. See Deborah L. Spander, The Impact of Piazza on Baseball’s Antitrust Exemption, 2 UCLA Ent. L. Rev. 113, 116. But see supra notes 116-19 and accompanying text.
121. See id.
122. See id.
123. See id.
124. See id.
125. See id.; see also infra notes 137-47 and accompanying text.
127. See id.
129. See id. The average monthly salary of the minor league players as of 1990 were as follows: Rookie, $868; A, $850-950; AA, $1,000-1200; AAA, $1250-1500. See Deborah L. Spander, The Impact of Piazza on Baseball’s Antitrust Exemption, 2 UCLA Ent. L. Rev. 113, 116 (1994); see also ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 116 (1992) (stating that as of 1990, the following pay scale existed: Rookie, $868; A-$1074, AA- $1763; AAA, $5,424. The averages at the Triple-A level are distorted higher because of the high salaries of a few dozen top draft picks and former major leaguers. The median salary in Triple-A in 1990 was likely below $2,000/month). Additionally, the low level A ball salary is lower than the $1074, approximately the same as Rookie ball. See Derek C. Crownover, Minor League Rights of Publicity are Major League, 2 SPORTS L.J. 227, 229 (1995). Minor league players receive salaries for 4.5 months, except players in the rookie league who play for 2.5 months. See ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 115, 116 (1992).
Upon signing the MLUPC, a player also relinquishes most, if not all of his privacy and marketing rights.\textsuperscript{130} Unfortunately, many minor league players sign their contracts without full knowledge of the ramifications of the agreement, doing so without the aid or advice of counsel or an agent.\textsuperscript{131} In effect, the contract requires a player to relinquish all rights to make money from trading cards, photographs, movies, radio, television, commercials and sponsorships without the express written consent of the player’s club.\textsuperscript{132}

In addition to all of these restrictions, the minor leagues also impose binding arbitration on all salary disputes.\textsuperscript{133} In and of itself, arbitration is a viable form of alternative dispute settlement, however, the arbitration proceedings for minor league players can only be heard by the President of the National Association, the Executive Committee of the National Association and the Commissioner of Baseball.\textsuperscript{134} An outside, impartial arbitrator is not allowed,\textsuperscript{135} and thus, the good faith intention of arbitration as a way to resolve disputes by avoiding costs and time of litigation is lost.\textsuperscript{136}

There are only two mechanisms that provide the minor league player with any kind of autonomy. First, Rule 10-e restricts the ability of MLB clubs to freely call-up players from the minor leagues.\textsuperscript{137} During his first three seasons, a minor league player can be called up without having to clear waivers.\textsuperscript{138} However, after three seasons of freely optioning the player back and forth from the minors to the majors, a team must expose the player to the waiver wire where another team has the ability to claim that player’s rights before the player is sent down to the minor leagues.\textsuperscript{139} Also, a player cannot be optioned without his permission following his fifth season.\textsuperscript{140}

\textsuperscript{130} See id. at 238. This is based on the language of Paragraph XXIV entitled “Pictures of Player” as contained in the MLUPC. See id.

\textsuperscript{131} See id.

\textsuperscript{132} See id. This conclusion was based on a case study from law in New York. See id.


\textsuperscript{134} See id.

\textsuperscript{135} See id.

\textsuperscript{136} See id.

\textsuperscript{137} See Major League Baseball Rule 10 (reprinted in THE BASEBALL BLUEBOOK 529-35 (1988)).

\textsuperscript{138} See id.

\textsuperscript{139} See id.

\textsuperscript{140} See id.
Another rule that grants a player limited freedom is Rule 5.141 This Rule pertains to the winter draft which allows players who have been in the minors for four or more seasons to be drafted by another team if that player is not placed on his major league team’s forty-man roster.142 The actual major league roster consists of twenty-five players, but each team is allowed to additionally protect a maximum of fifteen players to arrive at a forty man roster.143 Essentially, there is an active major league roster of twenty-five players plus fifteen optioned players.144 Although this appears to give a player some freedom, in reality it does not because the new drafting team can force the player to fulfill the remaining option years from the original MLUPC.145 As a result, a Rule 5 player is simply uprooted from his original team during the life of his seven year deal. To retain a Rule 5 player, the new team must keep him on the active twenty-five man roster for the entire subsequent season.146 If the player is not on this twenty-five man roster, he must be offered back to his original team at half the Rule 5 drafting price.147

This process only scratches the surface of the arduous journey through the minor league system. Often a player may remain in the minors for years simply waiting for his position to open up at the major league level.148 In reality, only one minor leaguer out of ten ever makes it to the “big leagues” and out of that number, only one in fifty lasts for more than six years.149 Once in the major leagues, a player then has to wait an additional six years before becoming a free agent.150

Minor league players can be released unconditionally and without any additional salary rights or severance pay.151 These players receive

141. See Major League Baseball Rule 5 (reprinted in THE BASEBALL BLUEBOOK 536 (1988)).
142. See id.; see also supra note 112 and accompanying text.
144. See id.
146. See ZIMBALIST, supra note 143, at 106.
147. See ZIMBALIST, supra note 143, at 106.
148. See ZIMBALIST, supra note 143, at 106. Essentially, this means if a minor league player only plays second base, and the major league club has a young all-star second baseman, the minor league prospect will have to wait his turn in the minors. See ZIMBALIST, supra 143, at 106.
149. See ZIMBALIST, supra note 143, at 106; see also J. MARKMAN & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY 22-23 (1981).
150. See ZIMBALIST, supra note 143, at 106.
no benefits except a “modest health insurance program.” Based on the salary structure and lack of incentives and benefits, players must scrape to survive. Perhaps Whitey Herzog described the minor leagues the best when he said

[h]e’ll [the minor league baseball player] get a crappy little apartment with a couple of other guys, eat nothing but greasy hamburgers and fries, and try to have a good time. A lot of them will drink too much, and I have to believe that’s where a lot of drug problems get started.

It is clear that the true compensation while playing in the minors is the future possibility of becoming a major leaguer, although, relative to the circumstance, conditions do improve as you move up the “baseball ladder.”

Minor league baseball clubs are a tremendous asset to their major league partners. The minor leagues serve as a place for player development; a forum where a genuine interest can develop between a fan and a prospect, a franchise, and baseball in general; a medium to geographically diversify baseball’s fan base; a pool to fill inevitable holes that develop on the major league roster during the course of a season due to injury or slumping players; a rehabilitation ground for major league

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(Stating that the relationship between a club and a player created by contract may be terminated by the club before the expiration of the specified term by notice of writing of unconditional release tendered the player by the club. Liability for such salary to such player shall not extend beyond the date on which such notice is given).


153. New York agent and lawyer Jay Goldberg was quoted as saying during the 1995-1996 season strike where owners were asking minor league players to report early, “[B]ut it’s an economic hardship for most of my guys [clients who were minor league baseball players] to give up three weeks of paying work. One of my players is working as a substitute teacher by day and a pizza deliverer by night just to make ends meet.” Lee Lowenfish, Fielder’s Nonchoice: Minor Leaguers Must Choose: Side With Owners Who Exploit Them? Or a Union That Snubs Them?, Village Voice, Feb. 21, 1995, at 122. Another example is shortstop Tim Naehering. He earned $1,400 a month and was forced to share a two bedroom apartment with four other teammates. See Andrew Zimbalist, Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime 107 (1992). One of the five actually slept on the couch. See id. During the off-seasons, Naehering would return to his parents’ home and deliver pizza in the winter and work in a sporting goods store. See id.

154. Former player, manager and executive in major league baseball. See Gerry Fraley, All-Star State; Rejuvenated AL shows it has best swat team, Austin Am.-Statesman, July 11, 1995, at C1.


baseball players recovering from injury; and lastly, the minor leagues effectively corner the market on all baseball playing talent so as to make it a near impossibility for rival leagues to form.\(^157\)

During negotiations for the 1990 Professional Baseball Agreement, MLB argued that the minor leagues were an extremely expensive investment.\(^158\) Using its player development budget as its arsenal, MLB claimed that it spent $169,679,000 in 1990 and $187,231,000 in 1991 on the minor leagues alone.\(^159\) It is crucial to realize that this figure included the scouting, signing and administrative expenses, which totaled over $11.23 million.\(^160\) Therefore, the actual expenditures on a Triple-A team was $810,000, on a Double-A team $367,923 and on a Single-A team $229,549.\(^161\) In spite of the "relatively low cost" of maintaining these minor league teams and an increase in attendance,\(^162\) MLB walked away from the 1990 negotiating session with the National Association gaining concessions, money,\(^163\) and increased power over the minor leagues.\(^164\)

\(^{157}\) See Zimbalist, supra note 152, at 105-21; see also Gary Roberts, On the Scope and Effect of Baseball's Antitrust Exclusion, 4 Seton Hall J. Sport L. 321, 326 n.9 (1994).

\(^{158}\) See Zimbalist, supra note 152, at 105-121.

\(^{159}\) See Andrew Zimbalist, Baseball Economics and Antitrust Immunity, 4 Seton Hall J. Sport L. 287, 304 (1994).

\(^{160}\) See id.

\(^{161}\) See id.; see also Major League Baseball, Report of Independent Members of the Economic Study Committee on Baseball, App. B, at 3-9 (Dec. 3, 1992). These numbers are not gross and therefore do not contain revenue sharing payments made from the minor league clubs to their major league affiliates. See Zimbalist, supra note 159, at 304.


\(^{163}\) See Andrew Zimbalist, Baseball Economics and Antitrust Immunity, 4 Seton Hall J. Sport L. 287, 304 (1994). The key elements of the 1990 agreement were as follows: (1) For the years 1991-1994, the National Association will pay respectively, $750,000, $1.5 million, $1.75 million and $2 million. See id.; (2) A joint licensing agreement was created between the two parties whereby the National Association would receive at least $2.8 million per year for the royalties of minor league trading cards. See id.; (3) Minor league baseball clubs would assume a greater percentage of the costs of travel expenses. See id.; (4) Major league clubs will pay all salaries and meal money for players and umpires, and buy all equipment. See id.; (5) The previous $35.00 transaction fee paid to the minors was eliminated. See id.; (6) The minor leagues would no longer receive any of the television fees which for AAA, AA and A, respectively per team used to be $25,000, $16,000, $11,000. See id. For 1992, according to the then President of the National Association, minor league teams spent $13.5 million on team expenses and sent $1.9 million from ticket sales. See id. at 304-05 n.85. Additionally, the licensing agreement produced between $250,000 and $500,000 for 1992. See id. at 304-05 n.85.

\(^{164}\) See Arthur T. Johnson, Minor League Baseball and Economic Development 30 (1993) (stating the increased powers of the Commissioner of MLB over the minor leagues). They include the authority to: intervene in the business of the National Association if in the "best interests of baseball"; void or approve all sales or transfers of minor league franchises; request audited financial statements; require eighteen months notice from a minor league if that league intends to
These statistics indicate that MLB is getting a good deal on their clubs. Waste and inefficiency can be attributed to scouting and administration, but not to the teams themselves.\textsuperscript{165} In actuality, the value of the minor league franchises range from hundreds of thousands of dollars for A-level teams to several million dollars for AA and AAA-level teams.\textsuperscript{166} Additionally, expansion franchise fees allocated in the 1990 deal for AAA, AA and A, cost; $5 million, $3 million and 1.3 million respectively.\textsuperscript{167} It is also apparent that the minor league clubs themselves are able to turn a profit.\textsuperscript{168} In spite of this, the minor league player, while contributing to the profits, is not being rewarded proportionally, or even modestly, for his efforts.

C. The Antitrust Exemption and the Reserve Clause in Major League Baseball

Acting under the present state of the law, baseball rules restricting the player market are protected under the antitrust exemption.\textsuperscript{169} However, the collective bargaining efforts of the MLBPA have virtually made these rules and reserve clauses non-existent.\textsuperscript{170} Minor league
players are not as fortunate as their major league counterparts because they do not have a union which attempts to secure the rights and freedoms of its players.\textsuperscript{71}

To their credit, many lower courts have narrowed the scope of the antitrust exclusion by holding that contracts between entities of baseball\textsuperscript{72} and third parties will not be protected under section 1 of the Sherman Act.\textsuperscript{173} However, this exception does not include those situations where the third party is a minor league baseball entity.\textsuperscript{74}

Protected rules and clauses allow MLB to structure the minor leagues as it wishes, without a fear of antitrust litigation.\textsuperscript{175} This exclusion grants MLB the right to control players, and as a result, MLB keeps a tight reign on minor league baseball.\textsuperscript{176} This is why the exclusion makes its largest impact in minor league baseball.\textsuperscript{177} When a player signs his initial MLUPC, that contract, and subsequently that player, is owned and controlled by the major league franchise.\textsuperscript{178} The contracts have expired and performed six years of major league service are eligible to become free agents. See id. Players who have not completed the six years of major league service can only negotiate with their original clubs. See id. at 608-09. If the two sides cannot agree on a salary, the matter is submitted to an impartial arbitrator where the result is binding. See id. Additionally, some players who have signed free agent contracts cannot become free agents again until another five years of major league service have passed. See id. This is all in addition to the time spent in the minor leagues. See id. at 609 n.100.


172. See Gary Roberts, On the Scope and Effect of Baseball's Antitrust Exemption, 4 SETON HALL J. SPORT L. 321, 325 (1994). Baseball entities, according to Roberts, include, but are not limited to: teams, leagues and players associations. See id.


174. See Roberts, supra note 172. See, e.g., Portland Baseball Club v. Kuhn, 491 F.2d 1101 (9th Cir. 1974).

175. See Roberts, supra note 172.

176. See Roberts, supra note 172 at 326 n.9.


178. See id. at 743.
existence of the reserve clause in these contracts allows control over the player for six years. 179

Unlike most people who work, a minor league athlete is prevented from marketing his skills after signing this contract. 180 He is at the mercy of the major league franchise. If his position is filled at the major league level, he must wait patiently for a roster spot to open or hope to be traded to another organization. 181 There is no leverage or bargaining power that the minor league athlete can draw upon. He may enter the minors after graduating high school at the age of eighteen or after graduating college at the age of twenty-two. 182 With the restraints placed upon him, he may be anywhere from twenty-four to twenty-eight years old by the time he has the opportunity to freely market his skills. 183 Beginning a major league career at the age of twenty-eight is not ideal, that is, if he makes it at all. During his quest, he must endure the long bus rides throughout minor league baseball towns, continually dine at inexpensive restaurants and live in less than accommodating conditions. 184 This is the life of the minor league player while the major league franchises continue to make money hand over fist 185 in spite of their claims that they are losing money on the minor league systems. 186 The only clear remedy to provide equity to the minor

179. See id. at 746.
182. See id.
183. See id.
185. An additional aspect to major league ownership is that when a franchise is purchased, whether expansion or sale, owners may take depreciation deductions on their taxes for their acquired player contracts, typically over a period of five years. See Stephen A. Zorn, "Couldn't Done It Without the Players:" Depreciation of Professional Sports Player Contracts Under the Internal Revenue Code, 4 SETON HALL J. SPORT L. 337 (1994). Simultaneously, owners may also deduct the cost of maintaining a scouting system and paying minor league players and coaches, all under I.R.C. § 162. See id. Evidence shows that the cost to develop a player through a farm system was approximately $350,000, or $8.7 million for the twenty-five player major league roster. See id. All of that cost is currently deductible allowing for a double deduction in terms of depreciation. See id.
186. See ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 178-80; see also ARTHUR T. JOHNSON, MINOR LEAGUE BASEBALL AND ECONOMIC DEVELOPMENT 10 (1993).
league players under the present legal status of major league baseball is to unionize.

IV. UNIONIZING MINOR LEAGUE BASEBALL

A. Benefits of the Collective Bargaining Process

It is evident that life in the minor leagues leaves much to be desired. Although the benefits of union representation are numerous, the question remains if selecting an exclusive bargaining representative is viable, and if it is, will it change the present system. The following section details the general concepts and requirements for negotiating a collective bargaining agreement.

To begin a collective bargaining relationship, an employer must first recognize the union, or other selected representative, as the exclusive bargaining representative of the employees. This can occur in one of two ways. Once a union conveys to an employer that a majority of the employees support it as the exclusive bargaining representative, the employer can in turn "voluntarily" recognize the union. "Majority status" may be established by obtaining signed authorization cards from the employees within the unit. If the employer chooses not to voluntarily recognize the union, the union can opt to petition the National Labor Relations Board ("NLRB") for


188. See id. at 156.

189. See id. at 159-60.


191. If an employer recognizes a union based on the majority of authorization cards, and the union turns out to not have a majority, the employer and the union have just committed an unfair labor practice under section 8(a)(2) of the National Labor Relations Act. See, e.g., ILGWU v. NLRB (Bernhard-Altmann Texan Corp.), 366 U.S. 731 (1961). The burden is on the employer to verify the union's majority status, therefore it is understandable for the employer to seek a definite answer through an NLRB election. See id. at 739.

192. See Ukeiley, supra note 190, at 193. The National Labor Relations Board is the body that implements the National Labor Relations Act. See Ukeiley, supra note 190, at 193. The NLRB "is empowered to prevent any person from engaging in any unfair labor practice." Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 252 (S.D.N.Y. 1995) (quoting 29 U.S.C. § 160(a)). The NLRB investigates charges of unfair labor practices with the assistance of Regional Offices, and if a charge is found to be meritorious, a complaint can be issued. See Silverman, 880 F. Supp. at 253. An Administrative Law Judge hears the complaint and the NLRB is allowed to review the disposition and hold its own hearings if it wishes. See id.
a certification election guaranteed under the National Labor Relations Act ("NLRA").\textsuperscript{193}

After winning the election by receiving a majority of the votes of the employees within the bargaining unit, a union may be certified by the NLRB. Both the employer and the union are obligated to begin good-faith negotiating in the hopes of arriving at a collective bargaining agreement.\textsuperscript{194} A union should attempt to accomplish three objectives during this process: (1) secure and improve the employee's standard of living; (2) guarantee individual security against fluctuating markets; and (3) ensure employee participation in work and union activities.\textsuperscript{195} The ultimate goal is to increase employee participation in establishing work-related conditions.\textsuperscript{196}

A common misconception is that the parties have to bargain over every issue raised.\textsuperscript{197} According to section 8(a)(5) of the NLRA, the only legal duty is for parties to bargain in good faith over mandatory subjects.\textsuperscript{198} These issues include, but are not limited to wages, hours and working conditions.\textsuperscript{199} The distinction between mandatory and

\textsuperscript{193} See 29 U.S.C. §§ 151-169 (1994). The National Labor Relations Act was enacted by Congress in order to protect employees from employer attempts to disrupt union organization and the collective bargaining process. See id. § 151. The law was passed to eliminate obstructions to the free flow of commerce when it has occurred by encouraging the practice and procedure of collective bargaining through protection of "workers freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." See id. § 151.


\textsuperscript{195} See Ukeiley, supra note 190, at 194.

\textsuperscript{196} See Ukeiley, supra note 190, at 194. The MLBPA’s primary thrust in 1966 was the goal of improved job-related rights for its members. See WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 438 (1990).


\textsuperscript{198} See JAMES P. BEGIN & EDWIN F. BEAL, THE PRACTICE OF COLLECTIVE BARGAINING 203 (7th ed. 1985). If a topic is considered permissive, then an employer can unilaterally implement this subject without negotiating. See U.S.C. § 158(a)(5) (1994); see also WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 440 (1990). In professional sports, the subject matter of collective bargaining extends to all topics that relate to the terms and conditions of employment of ballplayers. See id. During the MLBPA negotiations with MLB, the reserve clause was considered to be a mandatory subject of collective bargaining. See id. Although the collective bargaining agreement itself did not solve the reserve clause problem, the arbitration system, allowing for an impartial arbitrator, created a forum where the reserve clause was dismantled. See id.

\textsuperscript{199} See 29 U.S.C. § 159(a) (1994); see also Stephen L. Ukeiley, No Salary, No Union, No Collective Bargaining: Scholarship Athlete's Are an Employer's Dream Come True, 6 SETON HALL J. SPORT L. 188, 194 (1996) (noting that section 9(a) of the NLRA requires the employee's representatives to collectively bargain over wages, hours and working conditions for all of the employees within the unit). Mandatory subjects of collective bargaining are covered under section
permissive subjects of bargaining is crucial in labor disputes, because it determines to what extent one party may compel the other to bargain over a given proposal. Mandatory subjects require the parties to bargain in good faith, while permissive subjects do not require the same burden.

Free agency and the reserve system have been determined to be mandatory subjects of collective bargaining in major league baseball. This is so because the more restrictive the reserve system, the greater the revenue share to the club, while the greater the role for free agency, the greater the player's share. The reserve system gives a particular club the right to the player's services and allows the player limited freedom to seek employment with another club. In enforcing a complete reserve system, MLB "was exercising monopoly power—a buyer's monopoly." Therefore, MLB would be forced to bargain in good faith over free agency and the reserve system in minor league baseball. This fact does not exist in minor league baseball today, nor will it unless a union organizes the minor league baseball players and utilizes the power of the NLRA to effectuate employee rights.

Moreover, salary arbitration in MLB that was detailed in the 1990 collective bargaining agreement ("Basic Agreement") has been determined to be a mandatory subject of collective bargaining. Salary arbitration under the Basic Agreement is a method by which players who are not eligible for free agency but have between three and six years of

8(d) of the NLRA stating "wages, hours, and other terms and conditions of employment." NLRB v. Wooster Div. of Borg Warner Corp., 356 U.S. 342, 349 (1958). Permissive subjects are all other matters. See id.

200. See Silverman, 880 F. Supp. at 253. The court noted the fact that potential subjects of bargaining are divided into two areas—permissive and mandatory. See id.; see also Wooster, 356 U.S. at 349.


202. See id.

203. See Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1059 (2d Cir. 1995) (holding that unfair labor practices committed by the owners against the players by unilaterally eliminating subjects were mandatory).

204. See id. at 1061.

205. See id.

206. Id. The Second Circuit in Silverman noted that this monopoly power was reduced by the 1976 elimination of free agency through the arbitration decision Messersmith. See id.; see also National & Am. League Prof'l Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. Rep. (BNA) 101 (1976). Consequently, the MLBPA used this decision to bargain free agency into a new collective bargaining agreement. See id.

207. See Silverman, 67 F.3d at 1062.
major league service, can set salaries. Both owners and players submit salary figures to an agreed upon arbitrator, who is then bound to pick one of these salaries at the conclusion of the arbitration proceeding. Interest arbitration, defined as "a method by which an employer and union reach new agreements by sending disputed issues to an arbitrator rather than settling them through the collective bargaining process and economic force," is a permissive subject of collective bargaining. The Second Circuit held that salary arbitration under the Basic Agreement is not interest arbitration and therefore is a mandatory subject of collective bargaining. As a result of this determination, minor league baseball players would also have the opportunity to bargain over a new arbitration procedure with the employers. The result of this bargaining process would most certainly create a more equitable arbitration system than the one that presently exists.

The current status of minor league baseball players can be characterized as a group of workers with no voice. A union, through the collective bargaining process, can give them the voice they need to "level the playing field." Wages could increase, job security could improve and pension, health and insurance benefits could become a reality. It is obvious the minor league players cannot accomplish these goals on their own—the collective bargaining process is designed to facilitate this process.

B. The Legality of Unionizing Minor League Baseball

In order for minor league athletes to designate a collective bargaining representative, it must be shown that there is an employment relationship between Major League Baseball and its minor league athletes. Additionally, the minor league athlete must fit within the

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208. See id. Criteria in determining the salary include player’s performance from the preceding year, physical or mental defects, salaries of comparable players, career contribution, and the performance of the team on the field and amount of fan attendance. See id.

209. See id.; see also Major League Baseball Basic Agreement, art. VI(F) (1990).

210. Silverman, 67 F.3d at 1061; see also New York Typographical Union No. 6 v. Printers League, 919 F.2d 3, n.2 (2d Cir. 1990).

211. See Silverman, 67 F.3d at 1061.

212. See id.

213. See supra notes 133-36 and accompanying text.

214. 29 U.S.C. § 152(2) (1994) provides:

The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof,
The statutory definition of "employee" as defined by section 2(3) of the National Labor Relations Act. The NLRA covers only "private" employees and employers, which includes MLB and minor league clubs. The goal of the NLRA is to improve labor relations by granting specific sets of rights to employers and employees. Most importantly, the NLRA grants employees the right to self organization, to form, join or assist labor organizations, to bargain collectively and to engage in concerted activity. As a result, minor league baseball players will be allowed to select an exclusive bargaining representative, if they so choose do so, that will negotiate the terms and working conditions of employment as well as look for opportunities to increase health and welfare benefits.

As a prerequisite to conducting a representation election, the NLRB must determine which group of jobs and workers shall serve as the election constituency. This group of jobs becomes known as the

or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Id.

215. Id. § 152(3). An employee is defined as: [A]ny employee, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by an employer subject to the Railway Labor Act, as amended form time to time, or by any person who is not an employer as herein defined.

Id.

216. See supra note 214.


220. Section 9(a) of the National Labor Relations Act requires the employees' representatives to collectively bargain over wages, hours and other working conditions for all of the employees within the bargaining unit. In pertinent part, this section of the NLRA reads: Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .


appropriate bargaining unit and the workers so employed in those jobs can vote whether to elect the union.\textsuperscript{222} The NLRB bases its determinations upon what is known as the \textit{community of interest} standard.\textsuperscript{223} Based on this criteria, it is possible for several units to join as one unit and be deemed the appropriate bargaining unit.\textsuperscript{224} However, smaller units are easier to organize and tend to give the individual employee greater attention.\textsuperscript{225} Larger units encompass a more diverse group of employees, often differing in skill, attitude and interest.\textsuperscript{226} Additionally, larger units tend to wield greater power because of the threat of a massive work-stoppage in the event of a bargaining dispute.\textsuperscript{227} The minor leagues are a vast and geographically diverse system, and as such determining an appropriate bargaining unit may prove to be difficult. The choices would be team, league or sport.\textsuperscript{228} In MLB, the entire sport is the bargaining unit.\textsuperscript{229} The NLRB agreed that the larger unit was more suited to allow the players the greatest benefits of the NLRA.\textsuperscript{230} There is no reason why this same logic should not transfer to the minor leagues. In fact, this would allow the minor league players to garner power for what would loom to be a difficult negotiation and therefore truly take advantage of the power of the NLRA. However, the selection of an appropriate bargaining unit does not have to be made until after the minor leaguers are recognized as employees, therefore, the matter will be left for future analysis.\textsuperscript{231}

\textsuperscript{222} See id.
\textsuperscript{223} See id. at 283. In determining if employees have a "community of interest," the NLRB looks at the following factors: (1) similarity in the scale and method of determining salaries; (2) similarity in hours of work, benefits, and other terms and conditions of employment; (3) similarity in the type of work performed; (4) similarity in the skills, training and qualifications of employees; (5) frequency of contact between employees; (6) geographic proximity; (7) continuity of production processes; (8) common supervision and determination of labor-relations policy; (9) history of collective bargaining; (10) desires of affected employees; (11) extent of union organization. See id. See generally NLRB v. Purnell's Pride, Inc., 609 F.2d 1153 (5th Cir. 1980).
\textsuperscript{224} See ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 279 (11th ed. 1991).
\textsuperscript{225} See id. at 281.
\textsuperscript{226} See id.
\textsuperscript{227} See id.
\textsuperscript{228} WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 439 (1990).
\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} See Stephen L. Uksiley, \textit{No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True}, \textit{6 SETON HALL J. SPORT L.} 167, 177 (1996). There are two different types of bargaining units; single plant and multiemployer units. See id. Multiemployer bargaining units occur where employers within a single industry organize and act as one entity representing all companies. See id. Perfect examples of these multiemployer units are professional sports leagues. See id. A presumption is that there is a single unit unless it is shown
The term "employee" is broadly construed and can be understood to include virtually any person within the meaning of that term as it is commonly used. Minor league baseball players are not specifically excluded under section 2(3) of the NLRA as are other groups who are traditionally thought of as fitting the layman's definition of an employee. The groups of workers excluded under this section are agricultural workers, domestics, independent contractors, supervisors, and employees covered by the Railway Labor Act.

Courts have also had occasion to apply and interpret the definition of "employee" to persons and employment situations not explicitly included by the NLRA. It is evident that minor league baseball players are not on the exclusionary list, and no court has excluded them from the definition of "employee." Moreover, there was no challenge as to the jurisdiction of the NLRA.

employees agree to the multiemployer unit. See id. at 15 n.50. Therefore, minor league athletes could form together as one bargaining unit of each level (AAA, AA, etc.) or the entire minor leagues could form one unit. See id.

232. See NLRB v. Town & Country Elec., Inc., 116 S. Ct. 450, 453 (1995). The Court noted the ordinary dictionary definition of "employee" is consistent with the phrasing of the NLRA. See id. at 453. This definition includes "any person who works for another in return for financial or other compensation." Id. (quoting AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992)). The court also adopted the following definition "an employee is a 'person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power of right to control and direct the employee in the material details of how the work is to be performed.'" Town & Country, 116 S. Ct. at 453-54 (quoting BLACK'S LAW DICTIONARY 525 (6th ed. 1990)).


The term employee shall include any employee, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined. 29 U.S.C. § 152(3) (1994).

234. See id.


236. See supra notes 232-35 and accompanying text.
Unionization of Minor League Baseball

over minor league hockey players. Due to the similarities in the employment circumstances of minor league hockey and baseball players, the minor league baseball player is an employee under the NLRA. Furthermore, due to the fact that professional baseball, hockey, and football players are all unionized, there are clear precedents to cite so that the status of a minor league athlete should not be questioned.

The fact that MLB itself is unionized is extremely important. Section 1 of the NLRA applies to all employers that affect commerce, although the NLRB can decline to assert jurisdiction over a labor dispute if its effect on commerce is minimal. Due to the holding in Federal Baseball, the NLRB had difficulties bringing the concepts of professional sports and athletes under the purview of the NLRA. However, in a response to a 1969 petition filed by the association of National League Umpires, the NLRB decided to assert jurisdiction over baseball as an industry that affects commerce. The NLRB noted that the NLRA was created to foster collective bargaining relationships which are not likely to occur in an employer dominated system such as MLB. The NLRB also noted that there are many different types of employees in professional baseball besides umpires and players. These include everyone from the stadium janitors to the team ticket sellers. The NLRB ruled that employers should not be able to maintain such complete control over their employees.

It can be concluded from this language that the NLRB found MLB players as well as a whole host of other workers associated with a MLB club to be employees under the NLRA. The minor leaguer is no different from any of these employees and therefore should be considered an employee under the NLRA. Although the antitrust exemption continued in MLB, the Flood opinion, which declared baseball’s involvement in

237. See Telephone Interview with Richard Evans, Director of Legal & Business Affairs, Professional Hockey Players Association (Feb. 16, 1996).
238. See id.
242. See id.
243. See id.
244. See id. The actual list included; “players, clubhouse attendants, bat boys, watchmen, scouts, ticket sellers, ushers, gatemen, trainers, office clericals, batting practice pitchers, stilemen, publicity, and advertising men, groundskeepers and maintenance men.” Id.; see WALTER T. JOHNSON, FUNDAMENTALS OF SPORTS LAW 435-36 (1990).
interstate commerce, concurred with the Board’s earlier determination and thus subjected MLB to NLRA coverage.246

C. The Employer of the Minor League Player

Major League Baseball might argue that the individual minor league franchise owners are the employers of each minor league player. However, this is an invalid assertion. As is the case with any employment analysis, it is critical to examine who has the authority and control over these players. As previously stated, according to the National Association Agreement, the major league baseball club that signs the draftee to a minor league contract pays that player.247 The minor league team the player actually plays on does not pay any portion of his salary.248 These minor league baseball players work for money—this is not simply a game played for fun anymore. The goal is to reach the major leagues and to receive a tremendous salary increase. Certainly, the pursuit and love of the game is part of it, but it is a business and one that players play to make money.

In addition, the MLB club retains almost exclusive right of control over players in terms of player movement within the franchise as well as outside the franchise.249 Terminating a players contract also rests in the hands of the major league franchise.250 Additionally, minor league clubs have no input as to who their own managers will be as the major league affiliate wants to be certain that it controls which instructors are given the responsibility of teaching its minor league players.251 Furthermore, the National Association must acquiesce to the demands and authority of the Commissioner of MLB.252 Section 2(2) of the NLRA states that all “persons” who act as employers or, directly or indirectly, as agents of employers are covered as employers under the NLRA.253 The entities excluded from NLRA coverage are: federal and state offices;

246. See id.
247. See supra note 151 and accompanying text.
248. See supra note 151 and accompanying text.
Federal Reserve Banks; those subject to the Railway Labor Act; and labor unions, when not acting as employers.\textsuperscript{254} Parochial schools, as employers, are also not covered.\textsuperscript{255} MLB owners do not fall under any of these categories, and therefore are not excluded as employers under the NLRA. Additionally, Major League Baseball owners have already been determined to be employers based on the formation of the MLBPA as binding precedent.\textsuperscript{256} Also, it has been shown that the major leagues retain almost exclusive control over the minor league players and therefore, these players are the employees of MLB. Therefore, unionization of minor league baseball is legally possible, and the model to follow is clear.

V. THE MODEL TO FOLLOW—HOCKEY

A. Federal Antitrust Law and the National Hockey League

In order to properly analogize Major League Baseball to the National Hockey League, a brief understanding of the current posture of the reserve clause and antitrust law must be introduced. The National Hockey League had a perpetual reserve system which operated similarly to baseball’s until 1972\textsuperscript{257} when the World Hockey Association (“WHA”)\textsuperscript{258} attempted to enjoin its operation. The WHA claimed that the inclusion of a clause within all players’ contracts giving the NHL
clubs a permanent renewable option when the player's contract ended created a monopoly for the NHL.\footnote{See Michael H. Juarez, Baseball's Antitrust Exemption, 17 Hastings Comm. & Ent. L.J. 737, 747 (1995).} This clause essentially allowed a NHL hockey club to retain a player until that club unilaterally decided the player was no longer needed within the organization.\footnote{See id.} Therefore, the WHA could not effectively compete with the NHL because it could not sign any of the more established players without the consent of the league itself.\footnote{See id.}

In \textit{Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.},\footnote{See Philadelphia World Hockey Club, 351 F. Supp. at 462.} the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction against further use of the reserve system in the NHL.\footnote{See id.} Although the court issued the injunction against the NHL, it noted that some restraints on federal law were necessary for the NHL to operate efficiently.\footnote{See id.}

In \textit{McCourt v. California Sports, Inc.},\footnote{See McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978).} the NHL's reserve clause came under fire once again.\footnote{See id. at 486, 504.} Dale McCourt was a star hockey player for the Detroit Red Wings, and in 1978 his contract was assigned to the Los Angeles Kings.\footnote{600 F.2d 1193 (6th Cir. 1979).} Under the NHL's free agency system at the time, when a team signed a free agent, the signing team was required to compensate the team that lost the free agent by assignment of player contracts, draft choices or by payment of cash.\footnote{See id. at 1195-96.} McCourt was the compensation player sent to the Los Angeles Kings after the Red Wings has signed a Kings' free agent.\footnote{See id. at 1195-96.} McCourt refused to report to the Kings and instead filed an antitrust suit alleging that the system under which his contract could be awarded to any team without his or his team's consent violated section 1 of the Sherman Act.\footnote{See id. at 1195-96.}

The reserve clause is clearly a per se violation of the Sherman Act because it places limitations on trade.\footnote{See id.} However, due to the fact that the two parties had negotiated over the reserve clause during their first
collective bargaining meetings, the NHL argued the labor exemption established in Mackey v. National Football League applied to this case. The ultimate issue then became whether or not the reserve clause had been legitimately negotiated between the respective parties to the collective bargaining agreement. The court found that the reserve clause was negotiated seriously as a significant issue, and therefore concluded that the reserve clause was exempt from antitrust law.

Following the NHL strike in 1992, a new compensation system emerged where the players were divided into three distinct groups. Group I players are those twenty-four years of age or younger. Players in this group may choose whether their former team is entitled to draft compensation or allow an arbitrator to select one of the club’s compensation offers if the player leaves via free agency. Group II players, ages twenty-five through twenty-nine, have the same options as Group I players, except compensation is determined by the player’s new salary. Group III players, age thirty and over, are unrestricted free agents and no type of compensation to the former team is required. As a result of this agreement, there is no true free agency in the NHL until a player reaches the age of thirty.

272. 543 F.2d 606 (8th Cir. 1976). The Mackey test set three principles a reserve system must meet in order to become exempt from the antitrust laws. They are as follows: (1) Where the restraint on trade primarily affects only the parties to the collective bargaining relationship, the national labor policy favoring collective bargaining may be given preeminence over the antitrust law; (2) the subject of that collective bargaining must be a mandatory subject of collective bargaining; (3) the agreement sought to be exempted must be the product of a bona fide arm’s length agreement. See id. at 614.

273. See McCourt, 600 F.2d at 1198.

274. See id.

275. See id. at 1193.


277. See id.

278. See id.

279. See id. No matter what choice a Group II player makes, the former team gets right of first refusal. See id. Additionally, the higher the new salary is, the greater the compensation is for the old team, in the form of draft picks. See id.

280. See id.

281. See id.; see also Ian Craig Pulver, A Face Off Between the National Hockey League and the National Hockey League Players Association: The Goal A More Competitively Balanced League, 2 MARQ. SPORTS L.J. 39, 49 n.56 (1992). The St. Louis Blues gave up five first round draft picks as compensation for signing Scott Stevens from the Washington Capitals in 1990. See id. The next year the Blues had to relinquish Stevens to the New Jersey Devils in compensation for signing Brendon Shanahan. See id. at 50. The Blues then re-signed Stevens from the Devils. See id. The ultimate result was an arbitration award of five first round draft picks. See id. at 49-52.
Following the 103 day lockout during the 1994-95 NHL season, once again new rules regarding free agency were instituted. An $850,000 rookie salary cap for draftees was created, and the Group I salary arbitration and free agency were eliminated. Group III free agency became more restricted as the age requirement was increased in order to become an unrestricted free agent. Although the salary cap was eliminated, except for the rookie cap, the players lost on the free agency and salary arbitration issues.

The reserve clause also allows NHL clubs to retain drafted players for two years following the draft. For the two years, the player is under the complete authority of the drafting NHL club. A player can be cut at any time and depending on the contract he has signed and the collective bargaining agreement, he may or may not be eligible to receive severance pay and benefits. After two years, the team can then offer the player a contract or in the alternative, put the player back into the draft for that year.

After being drafted, most players are designated to junior hockey leagues which are very similar in function to rookie ball and the Single-A minor league baseball system. Successful players are then sent to either the East Coast Hockey League (“ECHL”), International Hockey League (“IHL”), or American Hockey League (“AHL”). During their entire stay in any of these leagues, players are subject to the authority of the affiliated NHL club regarding player movement. There are no rules or restraints concerning the shuffling of players back

283. See id.
284. See id.
286. See Telephone Interview with John Gentile, Business Administrator, New York Rangers (Feb. 16, 1996). The draft was recently reduced from eleven rounds to nine rounds as a result of the new collective bargaining agreement in the NHL. See id.
287. See id.
288. See id.
289. See id.
290. See id.
291. See id. These junior leagues are: the Western Hockey League; the Ontario Hockey League; and the Quebec Hockey League. See id. Each team at this level can only have two twenty year olds in an attempt to keep the level of play and ability equal. See id.
292. See id. Essentially, it is similar to being promoted from Single A to either Double A or Triple A baseball. See id.
293. See id.
and forth from league to league. However, once the contract period expires, a player is free to offer his services to any team. The parallels between MLB and the NHL are strikingly similar. Presently, MLB has a six year free agency guideline while the NHL has over a thirty year age limit. Since most MLB players do not enter the big leagues before their twenty-second birthday, free agency in both leagues is quite similar. Additionally, both leagues have a legal reserve clause, with the NHL's upheld pursuant to the nonstatutory labor exemption. Therefore, both minor league systems are forced to deal with a legal reserve clause. Also, the minor league systems themselves are strikingly similar in terms of their functions and number of levels. However, one significant difference does exist, one system is unionized while the other is not.

B. The Professional Hockey Players' Association

The Professional Hockey Players' Association ("PHPA") represents professional hockey players in the IHL, AHL and ECHL. The PHPA organized the AHL in 1968-69, the IHL in 1985-86, and the ECHL in 1995. The total number of members within the union exceed 1200, spread out over fifty-eight teams throughout North America. The PHPA is recognized by the NLRB as the bargaining unit for all hockey players.

294. See id.
295. See id. Generally these contract periods are for three years. See id.
296. See Telephone Interview with Richard Evans, Director of Legal & Business Affairs, Professional Hockey Players Association (Feb. 16, 1996).
297. See supra note 170.
300. See McCourt, 460 F. Supp. at 904.
301. See supra notes 7-8 and accompanying text.
303. See Telephone Interview with Richard Evans, Director of Legal and Business Affairs, Professional Hockey Players Association (Feb. 16, 1996).
304. See id.
The main function of the PHPA is to negotiate for wages, hours and working conditions, as well as other benefits, through the collective bargaining process. The PHPA also represents players individually and collectively in grievances and arbitration, ranging from antitrust violations to fines. The three leagues comprising the PHPA differ in their purposes and functions. The AHL is essentially the farm system of the NHL, existing as minor league baseball’s equivalent of the AAA-level. The goal of each team in the AHL is to have a NHL affiliate. Therefore, most players in the AHL are on two way contracts, however some can be on one way contracts or even three way contracts.

Wages and working conditions in the AHL are decent. The average salary in the AHL was $37,000 in 1994 but entry fees for teams in the AHL as of 1994 were $1 million. A new collective bargaining agreement was recently negotiated, however details of that agreement were not disclosed at the time this note was written. This includes all players enrolled throughout the three developmental leagues. See id. The AHL Has Become Hockey’s Farm System, Syracuse Fans Will Soon See Plenty of Players Destined For NHL Rinks, POST STANDARD, Apr. 26, 1994, at D1. Noting that seventy percent, over 400, of the NHL’s players are AHL alumni. See id. Seventeen members of the 1993 Stanley Cup champions were AHL alumni as were sixteen players on the 1994 NHL All-Star team. See id. The average age of a player in the AHL is between twenty-two and twenty-four years old. See id. Affiliation agreements are where an NHL club is able to send a certain number of players to a minor league club and retain all rights over the players. See id. The affiliation agreements themselves specify who pays the salary and benefits of the players. See id. These agreements are not available to the public or to the PHPA. See id.

An example of a two way contract would be if the Boston Bruins sign “X” to a two way contract and then decide they don’t need him on the Bruins, they can send him to their AHL affiliate, Providence, who would pick up a portion of the contract. See id. There are also one way contracts where the NHL club pays the entire salary and even three way contracts where costs could be split between three leagues. See Telephone Interview with Tim Roberts, Former ECHL and AHL Player and Former Union Representative, Professional Hockey Players Association (Feb. 16, 1996) (describing the different types of contracts).

This data is conclusive according to a survey done by the PHPA. See Kramer, supra note 309. See Kramer, supra note 309. See Kramer, supra note 309.
new agreement, however, may have a significant effect on the previous benefits including health and welfare, dental insurance, life insurance, disability insurance, transportation, relocation expenses, play-off pools, training camp allowances as well as daily per diem.\textsuperscript{317}

Compared to the low salaries of AHL players, the Triple-A baseball players are grossly underpaid, as a player who has never made it to the major leagues generally earns between $10,000 and $15,000 per season.\textsuperscript{318} The Class A player makes as little as $650.00 per month, and management shuttles players from league to league so they do not have to pay any of the bonuses that a player may have negotiated.\textsuperscript{319}

The comparisons became more extreme when the IHL is considered. The IHL salaries, per diem allowance and franchise entry fees are all examples of the successes a union can engineer when dealing with a minor league system.\textsuperscript{320} A joint IHL/PHPA Marketing/Licensing Committee\textsuperscript{321} exists to enhance the overall marketability of the league and its players.\textsuperscript{322} Television money and national sponsorship money is also divided amongst the teams and the PHPA.\textsuperscript{323} In addition, an advanced player compensation system has been enacted whereby money is paid to the league and to the PHPA if a team is above the league

\begin{enumerate}
  \item See id.
  \item See id.
  \item See Doug Mitchell, IHL Reaches Collective Bargaining Deal, HOUSTON POST, Nov. 18, 1994, at B8 (stating the average salary is $62,000 per season). According to the IHL/PHPA Collective Bargaining Agreement, the minimum salary is $25,000, or $500.00 for players signed to a twenty-five game try-out agreement. Entry fees into the IHL are $6 million. See Lindsay Kramer, AHL Has Become Hockey's Farm System, Syracuse Fans Will Soon See Plenty of Players Destined for NHL Rinks, POST STANDARD, Apr. 26, 1994, at D1. Per diem allowance for the 1995-96 season is $40.00/day. See IHL/PHPA Collective Bargaining Agreement 10 (signed Oct. 2, 1995). Additionally, The IHL team pays for travel expenses to training camp and home following the season for players and their families and the same should a player be traded. See id.
  \item See IHL/PHPA Collective Bargaining Agreement 13 (signed Oct. 2, 1995). Each club must contact the IHL and PHPA if intending to use Player Likenesses for Club promotions or retail sales. See id. Both groups must agree on issues for promotion or the issue goes to binding arbitration. See id.
  \item See id. at 10-11. This includes, helmet and jersey sponsorship, trading card promotions and licenses and other sponsorships. See id. at 13-14. According to section 9(a) of the collective bargaining agreement, the IHL pays the PHPA a guaranteed minimum payment under the royalty, revenue-sharing plan of $50,000 in 1994-1995, $60,000 in 1995-1996 and $70,000 in 1996-1997. See id.
  \item See id. at 22. Proceeds received by the PHPA for these purposes are use toward players pensions and health benefits. See id. The IHL guarantees a minimum payment for television of $50,000, $60,000 and $70,000 for the 1994-1995, 1995-1996 and 1996-1997 seasons, respectively. See id.
\end{enumerate}
average. Additional guidelines are set if a team has a NHL Partial Affiliation Agreement.

The reserve system negotiated allows a team the right to match another team's offer for one season after the player's last contract season which expires after that year. In addition, if a team has an option contract on a player, that player must be notified if the option will be picked up by July 1st and in the event notification is not given, the player becomes an unrestricted free agent.

Moreover, health and welfare benefits were secured under the IHL Collective Bargaining Agreement whereby money is paid by each team to the PHPA Trust Fund. All players signed by a team are eligible for team payment of their insurance premium. Finally, arbitration procedures are outlined as are plans for a 401(K) pension plan, rights to a second medical opinion and surgeon of the player's choice, all paid for by the club.

This agreement has allowed the IHL to become an alternative, professional hockey league. When players cannot make it to the

324. See id. at 18-19.

Divided in to A, B and C they are as follows: (A) If a team spends on player compensation in excess of the league average, plus 15% of the league average, for a season, that team shall pay an amount to the league office equal to 50% of the compensation the team spent in excess of the league average. (B) If a team spends on player compensation in excess of the league average, plus 25% of the league average, for a season, that team shall pay an amount to the league office equal to 100% of the compensation the team spent in excess of the league average. (C) If a team spends on player compensation in excess of the league average plus 50% of the league average, for a season, that team shall pay an amount to the league office equal to 200% if the compensation the team spent in excess of the league average.

Id.

325. See id. at 19-20. The funds for this are divided among the PHPA and the IHL where moneys collected by the PHPA are once again used for pension/retirement accounts for the players. See id. at 18-19.

326. See id. at 30.

327. See id. at 31.

328. See id. at 32. Under Article XII, Health and Welfare, each team is required to pay $2,523.00 to the PHPA Trust Fund with an initial one time team payment of $2,500.00. See id.

329. See id.

330. See id. at 36. Consultation by the player with the club physician is required. See id.

331. See Telephone Interview with Richard Evans, Director of Legal & Business Affairs, Professional Hockey Players Association (Feb. 16, 1996).
NHL, many now jump from the AHL to the IHL. Many IHL teams also have limited NHL affiliates, but the age in the IHL is now rising, so the NHL teams want their young athletic players playing against players with similar youth, and therefore, most players are sent to the AHL or the ECHL.

Until recently, the players with the least amount of rights were clearly those in the ECHL. Players in this league did not have any protection of license and marketing rights or even modest food per diems because they were not represented by the PHPA. Additionally, travel conditions were terrible while owners fill arenas.

The biggest concern was the fact that players in the ECHL were not under contract. There was a perpetual try-out agreement which means a club could release a player within 24 hours of providing notice. The released player was not entitled to severance pay or health benefits as they were simply terminated on the spot. While

332. See id. For example, Todd Simon of the Buffalo Sabres had been up and down from the AHL affiliate in Rochester, New York to Buffalo. See id. He is twenty-four years old and had played a half a dozen games in the NHL. See id. He realized he was not going to stick in the NHL, so he jumped to the Los Angeles Thunder of the IHL. See id. His salary increased from $35,000 to $110,000 with the move. See id. Additionally, the Thunder have inserted an out clause allowing him to go to an NHL team if offered. See id.

333. See id.

334. See id. Food per diem for away games is approximately $18.00 which for a hockey player is completely outrageous because of the great shape these players need to maintain. See id. License and marketing rights rest in the complete control of the ECHL with all revenue for player likenesses going to the ECHL owners. See id.

335. See Telephone Interview with Tim Roberts, former minor league hockey player and team union representative, Professional Hockey Players Association (Feb. 16, 1996). Travel occurs by bus, with home and home series occurring on the weekends. See id. Therefore, after a Friday night home game, a team has to board a bus and travel to its opponent’s home arena to play on a Saturday night. See id. Also, when Roberts played in the AHL, he once played a span of sixteen to eighteen games in the month of February. See id.

336. See id. Tickets sell for $6.00-$8.00 a seat with attendance ranging from 4,000 to 10,000 for an eighty game season. See id.

337. See id.

338. See id.

339. See id.
attempting to maintain a youthful league makes older players end their hockey careers early.

The players in the ECHL voted to select the PHPA as its exclusive bargaining representative in 1995, and an agreement has recently been reached. An increase in the salary cap, better health and insurance benefits, a share in the post season revenue, a partnership concerning player likeness fees and a higher per diem allowance highlight the labor deal. These accomplishments mark the positive effects a union can attain on the wages, working conditions, and benefits of the minor league athlete without dismantling the league itself. Had the PHPA not unionized the players in the ECHL, these changes would not have occurred.

According to Richard Evans, the Director of Legal & Business Affairs for the PHPA, there are no serious problems with having such a large and diverse membership. In negotiating each collective bargaining agreement, the PHPA realizes there are different economic realities at each level and addresses its strategy and goals accordingly. The only drawback is that because of player movement throughout the system, player representatives are difficult to maintain, and therefore, a lack of stability may develop. However, because the same union is

340. See id. The average age of the ECHL player is between twenty-one and twenty-two years old, many of which are recent college graduates or former junior hockey players. See id.
341. See id. This is where a player is considered a veteran after three seasons. Only three of these players are allowed on a roster. See id.
342. See id. Tim Roberts likens this to “age discrimination.” See id. It should be noted that Roberts played in the ECHL for four and a half years while making brief stays in the AHL. See id. He is also a graduate of Rensselaer Polytechnical Institute (RPI) in Rensselaer, New York and is currently a stockbroker. Id.
343. See Telephone Interview with Richard Evans, Director of Legal and Business Affairs for the Professional Hockey Players Association (Feb. 16, 1996).
344. See John Packett, ECHL Notes, RICHMOND TIMES-DISPATCH, July 3, 1996, at E3.
345. See id. Salary cap (per team per week) will go up from $7,500 last season to $7,750 next season, $8,000 in 1997-1998, and $8,250 in 1998-1999. See id.
346. See id. Players will receive severance and career-ending disability payments for the first time. See id. Players also will be eligible for off-ice health insurance for the first time. See id.
347. See id. The playoff pool, which ranged from $180 for first-round losers to $2,400 for the league champions of the 1995 season, will increase slightly each year through the 1998-1999 season. See id.
348. See id. The meal money allowance for each player, which was $20 last season, will be $24 next season, $25 in 1997-1998, and $26 in 1998-1999. See id.
already established in the AHL and the IHL, the players remain confident in the union and its abilities.\textsuperscript{353}

VI. Effects of Unionization on Major League Baseball

A. The Owners

It is extremely difficult to predict the effects a union would bring to the minor league baseball system. Much of this analysis will depend on many intangibles—subjects and issues that can only be speculated upon with no guarantees. However, some assumptions can be drawn. It is highly plausible that the minor league union would not, nor could not, want to come in and expect to make sweeping, drastic changes immediately. Change must be made over time\textsuperscript{354} and, therefore, making modest improvements would be the ideal path to pursue. I would suggest the minor league baseball union start with goals similar to that of the PHPA in negotiating the ECHL collective bargaining agreement. Increase of wages, benefits, pensions, job security and health care would be foremost on the list. It is reasonable to conclude that the union would recognize the economic realities of the system and the owners ability to contribute. Nothing radical such as testing the labor exemption on the amateur draft would be tried.

With reasonable goals like these in mind, what would be the results? Surely, the MLB owners would continue to argue that the minor league systems are no longer affordable or practical under these demands. If major league teams, under greater economic pressure and higher minor league salaries, decide to economize on their player development budgets and reduce the number of farm teams per major league team, then they will have more money available to support each team and its ballpark.\textsuperscript{355} If a major league team does decide to reduce its number of affiliated minor league teams, it has to do so at the Single-A or Rookie League level.\textsuperscript{356} Only one team is allowed at the Triple-A and Double-A level, but many major league teams maintain two or three Single-A and rookie level teams.\textsuperscript{357} For each club that is eliminated at this level,

\begin{itemize}
  \item \textsuperscript{353} See id.
  \item \textsuperscript{354} See id.
  \item \textsuperscript{355} See \textsc{Andrew Zimbalist}, \textit{Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime} 106 (1992).
  \item \textsuperscript{356} See id. at 105.
  \item \textsuperscript{357} See id.
\end{itemize}
the parent club can save over $200,000 which is approximately one-fifth the amount it pays the average major league ballplayer.358

It is possible if the major league teams choose to downsize, rival leagues would begin to form at the lower levels.359 A rival minor league would serve to pressure MLB to deal with its "notoriously inefficient and wasteful management practices."360 These management wastes are usually paid for by the fan, the umpire, other employees and the players, instead, the owners would be forced to run their businesses more efficiently.361 Minor league baseball does not exist to make a profit, but exists for the sole purpose to aid their major league parents.362 However, there is no reason why the focus of minor league baseball cannot be on both of these purposes—money and aid. The attendance figures for minor league baseball are increasing, and serious marketing possibilities could be opened, if properly explored. All players would be asking for are reasonable requests which could be granted.

B. Not Another Strike

What about the threat of strikes in the minor league system? As Mickey Brantley, a former Seattle Mariner outfielder who played in over 1,100 minor league games, said "[w]e know we’re targeting the wrong group . . . we couldn’t walk out; we don’t make what the big leaguers do."363 However, players are entitled to strike.364 According to section 7 of the NLRA, employees can engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection” which most certainly includes striking.365 In fact, the power to strike is protected because it is illustrative of the impetus to bargain collectively.366 Collective bargaining works because it is less expensive to sit down and work through issues than it is to suffer through a lockout or

358. See id. at 105.
359. See id. at 108.
360. See id. at 110.
361. See id.
363. Spitting Mad Over Tobacco Ban, Team to Keep a Tight Lip With Press Spitting Mad, Firebirds Keep a Tight Lip, SALT LAKE TRIB., June 18, 1993, at Fl. Brantley was referring to a ban of tobacco products in minor league baseball while allowing it in major league baseball. See id.
365. Id.
366. See WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 438 (1990) (noting that strikes and other concerted activities are a major part of American labor).
a strike. In baseball a strike can be even more devastating because the season is relatively short, and time that is lost cannot be made up. Furthermore, if a developing player does not work on his skills, there is a strong possibility of deterioration. There are no other alternatives for professional athletes because there are no alternative leagues to turn towards.

When employees decide to strike they should determine if the strike is lawful and if the potential benefits outweigh the risks. Determining the lawfulness of economic and unfair labor practice strikes is the decision of the NLRB. These cases are decided on a fact specific basis by the NLRB.

Additionally, if players decide to strike, the owners could decide to replace them. The effectiveness of the method can be questioned and therefore, players must consider the potential damage that can occur. Additionally, employees do not get paid while out on strike which creates the hesitancy to strike. Due to the drive and determination a minor league baseball player has to reach the “SHOW,” and the small amount of money a player makes while journeying, the likelihood of a work stoppage is minimal. However, the mere presence of the union

367. See id.
368. See id.
369. See id.
370. See id.
372. An unfair labor practice strike is a potential employee response to an alleged 8(a) violation by an employer. See 29 U.S.C. § 158(a) (1994). See ARCHIBALD COX ET AL., LABOR LAW CASES AND MATERIALS 487 (11th ed. 1991) (stating an employer must reinstate the employee after an unfair labor practice has been committed). An economic strike occurs if a strike is not an unfair labor practice strike. See id. If an economic strike occurs, an employer is only obligated to place the employee on a “preferential hiring list.” Essentially, when a position becomes available, the employer must go to the former employees first. See Charles W. Nugent, A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA’s Side Accords and Prospects For Reform, 7 TRANSNAT’L LAW, 197, 200-01 (1994).
374. See id.
376. See Ukeiley, supra note 371, at 220.
377. See Ukeiley, supra note 371, at 221.
378. The “Show” is a slang nickname for major league baseball. See Craig Yuhas, Dynamite Set to Start Inaugural Season, DETROIT NEWS, May 17, 1996, at F7.
and the tools it brings gives the minor league athlete weapons he never dreamed of possessing.

VII. CONCLUSION

The abilities of the PHPA and the power of a union in general, have allowed the players of the IHL and AHL to lead respectable lives in terms of health care, retirement funds and salary. This is the primary reason why the players in the ECHL have followed the lead of their fellow hockey players—the hope of an improved employment. These players can spend years in the minor leagues doing a job they love, but it is a job and it is their primary source of income. The PHPA realized this, and capitalized on the represented players exhibiting tremendous potential.

Players in the minor leagues of baseball have that same potential. The reserve clause will not be revoked and the hierarchy of MLB will not suddenly raise the level of wages, benefits and working conditions that exist today in minor league baseball. The quickest and most efficient way to guarantee improvement in wages, working conditions and benefits can be seen through the PHPA model. Minor league baseball players must have the courage to break the status quo, one that has existed for years in our National Pastime. Their brethren in minor league hockey have surpassed them, and it is time for them to follow a successful example. The unionization of minor league baseball can benefit all the parties involved morally and financially.

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