



Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players

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ABSTRACT

Collective bargaining has significantly altered the landscape of labor relations in organized baseball. While its impact on the life of the major league player has garnered much discussion, its impact on the majority of professional baseball players—those toiling in the minor leagues—has received scant attention. Yet an examination of every collective bargaining agreement between players and owners since the original 1968 Basic Agreement reveals that collective bargaining has greatly impacted minor league players, even though the Major League Baseball Players Association does not represent them. While a few of the effects of collective bargaining on the minor league player have been positive, the last two agreements have established a dangerous trend in which the Players Association consciously concedes an issue with negative implications for minor leaguers in order to receive something positive for major leaguers.

Armed with a court-awarded antitrust exemption solidified by legislation, Major League Baseball has continually and systematically exploited mi-

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nor leaguers. This has resulted in limited player mobility, limited bargaining power, and salaries placing many players below the federal individual poverty level. Unless minor leaguers gain true and real representation at the bargaining table, the exploitation will continue.

“Maybe I’m wrong for thinking this, but it makes me wonder why there is such a huge gap between the guys up here and the guys in the minors. I mean, if you just spread out the smallest portion of all this to the guys below it would make their lives so much easier, don’t you think?”

“That’s a terrible idea,” said Bentley.¹

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¹ DIRK HAYHURST, *OUT OF MY LEAGUE: A ROOKIE’S SURVIVAL IN THE BIGS* 302 (2012). As depicted in his book, during one of his first days in the major leagues Hayhurst decided to share his sympathy for minor leaguers with Bentley, one of his major league teammates. Like most major leaguers, Bentley did not share Hayhurst’s sympathy.

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I. INTRODUCTION

Throughout most of its history, organized baseball has operated as a classic cartel.² Since the birth of the National League of Professional Baseball Clubs in 1876, the major powers in organized baseball have ruthlessly quashed rival leagues and fiercely protected their most prized territories.³ In the process, they have also routinely exploited their chief commodity: baseball players.⁴ Armed with a court-awarded antitrust exemption in the early twentieth century,⁵ the National League and its sister circuit, the American League, have operated with little restraint on their powers.

The arrival of the Major League Baseball Players Association (MLBPA) as a legitimate union in 1966 finally provided a check on organized baseball's powers.⁶ Within a few decades, major league players would reap great benefits, as collective bargaining assured baseball's prosperity rained down upon the players.⁷ However, this prosperity did not extend to all professional baseball players. In fact, it extended to only a small minority.

The vast majority of professional players under contract with major league teams toil in the minor leagues,⁸ and they are not represented by the

² See JOHN D. KELLY, *THE AMERICAN GAME: CAPITALISM, DECOLONIZATION, WORLD DOMINATION, AND BASEBALL* 59 (2006) (stating that baseball is organized "into profit seeking corporations in a legally powerful cartel"); cf. ROBERT C. BERRY, WILLIAM B. GOULD & PAUL D. STAUDOHAR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 220 (1986) (stating that multiple sports operate as a cartel).

³ See NEIL J. SULLIVAN, *THE MINORS: THE STRUGGLES AND THE TRIUMPH OF BASEBALL'S POOR RELATION FROM 1876 TO THE PRESENT* 5–6 (1990).

⁴ See KELLY, *supra* note 2, at 91–92 (discussing baseball's choice to oppose free labor).

⁵ See *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922).

⁶ See, e.g., CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960–81* 36–53 (2002).

⁷ See discussion *infra* Part I.B.iii.

⁸ In fact, Major League Baseball (MLB) teams typically employ 150 or more minor league players. Conversely, MLB teams only employ around forty players on major league contracts.

MLBPA.⁹ Without representation at the bargaining table, minor leaguers have become baseball's untouchables. Their salaries have barely budged in the last forty years,¹⁰ and, with the exception of minor league stadiums, the travel and working conditions have changed little since Willie Mays and Mickey Mantle roamed the minors.¹¹ The bus remains the nearly exclusive mode of transportation, with players often passing entire nights in bus seats instead of beds.¹² When not sleeping on buses, players sleep in dismal road hotels, and are provided with mediocre food before games.¹³ Life during home games frequently proves no better, with teammates often electing either to cram six players into a dingy two-bedroom apartment or to live in the futon-clad basement of a host family.¹⁴

One would think that major league players would recognize the need to improve the conditions in the minor leagues since virtually all major leaguers played several seasons in the minors before arriving at the majors.¹⁵ However, as the opening quote from a pair of major leaguers demonstrates,

⁹ Lily Rothman, *Emancipation of the Minors*, SLATE, Apr. 3, 2012, http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_cash.html; see also discussion *infra* Part II.A.i.

¹⁰ See Table 1, *infra* Part II.B.

¹¹ Compare DIRK HAYHURST, *THE BULLPEN GOSPELS: MAJOR LEAGUE DREAMS OF A MINOR LEAGUE VETERAN* (2010) (describing one minor leaguer's recent, arduous journey in the minor leagues), and Garrett Broshuis, *Postcards from the Bushes*, THE SPORTING NEWS, July 21, 2006, at 68–69 (describing conditions in today's minor leagues), with PAT JORDAN, *A FALSE SPRING* (1973) (describing a minor leaguer's journey during the 1950s and 1960s).

¹² See Broshuis, *supra* note 11, at 69 (describing the feeling of sleeping on a bus like a contortionist).

¹³ For a description of the typical foods available to minor leaguers, see Garrett Broshuis, *Pizza and Fried Chicken: Minor League Staples*, LIFE IN THE MINORS (Nov. 17, 2009, 7:48 AM), <http://minorleaguelifelife.blogspot.com/2009/11/pizza-and-fried-chicken-minor-league.html>.

¹⁴ Garrett Broshuis, *Playing For Peanuts*, BASEBALL AMERICA, March 31, 2010, available at <http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html>. When electing to live in an apartment, the air mattress is usually the bed of choice due to its portability and low cost. See *id.*

¹⁵ Very few players go directly to the major leagues, especially today. In fact, of all players drafted since 1965, only twenty-one went directly to the major leagues. *Straight to the Major Leagues*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/feats/feats9.shtml> (last visited Nov. 8, 2012). Only one player, Mike Leake, has done so in the past twelve years. *Id.*

once a player reaches the major leagues, he generally forgets minor leaguers.¹⁶

Despite the apathy towards minor leaguers, baseball's collective bargaining process does affect them. Almost every collective bargaining agreement (CBA) signed between the MLBPA and MLB has affected minor leaguers in some way.¹⁷ While collective bargaining since the original 1968 Basic Agreement has yielded some positive benefits for minor leaguers, negative effects abound.¹⁸ In fact, the two most recent CBAs have established a disturbing trend in which the MLBPA concedes a bargaining chip with negative effects for minor leaguers in order to achieve something positive for major leaguers.¹⁹

The MLBPA and major leaguers are not entirely to blame for this troubling trend. After all, the MLBPA does not represent minor leaguers and owes no allegiance to them.²⁰ Moreover, without the MLBPA providing at least some check on the powers of organized baseball, MLB could unilaterally institute virtually any minor league policy without giving any thought to minor league players.²¹ Consequently, more must be done to ensure minor leaguers have a voice at the bargaining table. Otherwise, MLB

¹⁶ During my playing years, I heard many major leaguers make statements similar to the conversation found in Hayhurst's book. Further evidence of this attitude stems from the fact that there is a nonprofit organization set up to help minor leaguers with families, but it has struggled to gain funding and is currently dormant. See Garrett Broshuis, *Non-profit for Minor Leaguers*, LIFE IN THE MINORS (Apr. 30, 2010), <http://minorleaguelifelife.blogspot.com/2010/04/non-profit-for-minor-leaguers.html>. Some major leaguers think of the minors as a rite of passage; others simply seek to hoard all the game's prosperity at the highest level.

¹⁷ See discussion *infra* Parts II.A., II.B.

¹⁸ See *id.*

¹⁹ See, e.g., Rothman, *supra* note 9; discussion *infra* Parts II.A., II.B.

²⁰ See, e.g., DONALD H. WOLLETT, GETTING ON BASE: UNIONISM IN BASEBALL 96 (2008) ("The [bargaining] unit consists exclusively of major leaguers."); Rothman, *supra* note 9 (quoting the recently retired second-in-command at the MLBPA, Gene Orza, as saying "[w]e don't represent them . . . and have no obligation").

²¹ See Garrett Broshuis, *Deterring Opportunism Through Clawbacks: Lessons for Executive Compensation from Minor League Baseball*, 57 ST. LOUIS U. L.J. 185, 200–03 (describing the unilateral implementation of clawback provisions into minor league contracts); see also James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where is Home? Recently Drafted Minor League Baseball Players are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 575–76 (2011) (describing the unilateral implementation of workers' compensation clauses into minor league uniform player contracts (UPCs)).

will continue to exploit young men with dreams in a nearly unchecked fashion, as they have done throughout their history.²²

Part II of this Article briefly provides an overview of labor and baseball. It includes a discussion of both the development of the minor leagues and of the major league labor wars. Part III then examines the effect of each CBA and the collective bargaining process on minor leaguers, who are not beyond the reach of collective bargaining despite lacking representation. Lastly, Part IV demonstrates that, since the current pattern of bargaining is not an unfair labor practice and Congressional relief is both undesirable and unlikely, the unionization of minor leaguers is the sole fruitful—though improbable—solution. Consequently, needed change for minor leaguers remains unlikely.

II. A BRIEF HISTORY OF LABOR AND BASEBALL

America's national pastime juxtaposes athletic and mental challenges²³ against a backdrop that defies physics.²⁴ The simple graces and intricacies of the game have transfixed both artists²⁵ and mathematicians.²⁶ Yet organized baseball has carefully cultivated and magnified this simple beauty to achieve a sort of sanctity for the sport that attaches to the essence of being American.²⁷ As the national pastime, baseball has become not merely a game but

²² Cf. KELLY, *supra* note 2, at 92 (comparing organized baseball's Latin American baseball academies used to develop Latino minor leaguers to plantations); Rothman, *supra* note 9 (stating that minor leaguers are "subject to territorial monopolies, restrictions on labor movement, and caps on salaries that are illegal in other businesses").

²³ See generally MIKE STADLER, *THE PSYCHOLOGY OF BASEBALL* (2007).

²⁴ See generally ROBERT K. ADAIR, *THE PHYSICS OF BASEBALL* (3d ed. 2002).

²⁵ The National Baseball Hall of Fame and Museum devotes much space to art and baseball. Also, while certainly not alone in using baseball as his muse, Norman Rockwell is perhaps the most famous artist to capture baseball's scenes. See *Norman Rockwell Museum Digital Collections*, NORMAN ROCKWELL MUSEUM, <http://collections.nrm.org/search.do?highlight=4> (last visited Nov. 10, 2012).

²⁶ Baseball has inspired an entire language and field of statistics known as sabermetrics. For an overview of the various statistical terms, see *Glossary: Sabermetric*, BASEBALL PROSPECTUS, <http://www.baseballprospectus.com/glossary/index.php?context=2&category=true> (last visited Nov. 10, 2012). Of course, the use of statistics recently revolutionized the game. See, e.g., MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

²⁷ See KELLY, *supra* note 2, at 42–56.

an indelible fixture in Americana. Often, it has cleverly used this contrived sanctity not only to conceal but also to excuse labor abuses.²⁸

The labor abuses have extended to both minor league and major league baseball since the inception of the game. While an in-depth discussion of these labor abuses is beyond the scope of this Article, some exploration of labor relations in both the minor and major leagues is necessary to provide a backdrop for later discussion of collective bargaining in the sport. Each will be addressed below.

A. *Labor and the Minor Leagues*

i. The Development of the Minor Leagues

The early years of America's pastime might best be described as a chaotic big bang. Throughout the second half of the nineteenth century, the coming and going of new leagues seemed to abide by the tides, as teams and leagues arrived and dissolved abruptly, with new waves ever ready to replace those that failed before them.²⁹ It was during this chaotic era, however, that organized baseball—including the minor leagues—was born.

The minor leagues originated when the National League of Professional Baseball Clubs (National League) elevated itself to the lofty status of a "major" league after its 1876 inception.³⁰ Although some questioned whether the level of play was actually better than other leagues, the National League benefited from better organization than its rivals, and it instituted the monopolistic control over players and franchises that would become one of the

²⁸ Professor Neil J. Sullivan succinctly states the following:

By posing as a romantic diversion instead of a profitable business, organized baseball has been able to intimidate competing leagues and has denied players the freedom to choose their employers; the major leagues have raided the best players of minor league teams and compensated those clubs with a pittance. These abuses are permitted because baseball operates outside antitrust law; left to their own devices, the major league owners have historically followed a strategy of bullying weaker rivals without regard for the game's ultimate health.

SULLIVAN, *supra* note 3, at 5–6.

²⁹ See SULLIVAN, *supra* note 3, at 5. The first of two Northwestern Leagues was formed in 1879 and lasted all of two months. BOB HOIE, *The Minor Leagues, in TOTAL BASEBALL* 502, 502 (John Thorn & Pet Palmer eds., 3d. ed., 1993). In fact, an average of forty percent of leagues beginning a season during the 1890s failed to finish it. *Id.* With no league-appointed umpires, forfeits in the Northwestern League were also frequently attributed to "hometown" umpiring. *Id.*

³⁰ SULLIVAN, *supra* note 3, at 5–6.

signature aspects of the business.³¹ Thus, the National League owners “rejected a market of several competitive leagues in favor of a monopoly that stifled every other association of clubs.”³²

As the National League centralized power and raided rival minor leagues of their best players, it and two other leagues signed the first formal agreement recognizing the National League’s status as the sole major league on October 27, 1882.³³ The agreement “bound the clubs to honor the contracts on reserve lists, assured mutual recognition of expulsions and suspensions, established territorial rights,” and set higher minimum salaries in the major National League than the other two minor leagues.³⁴ Within two years, other leagues joined the arrangement, eventually forming the National Agreement.³⁵ In 1892, another National Agreement classified the minors into different levels for the first time and gave the National League the right to draft minor league players at fixed prices.³⁶

Dissatisfied with the National League’s arrogation of power, the still minor American League withdrew from the agreement in 1900. It decided not to allow its players to be drafted, nor did it respect the National League’s monopolistic territorial rights.³⁷ In reaction, seven minor leagues in 1901 formed the National Association of Professional Baseball Leagues (National Association) as its governing body, a body that continues to govern the minors today.³⁸

By 1902, fifteen leagues had joined the National Association.³⁹ Their new National Agreement established league classifications and a draft for the majors, and it respected the National League’s rights to players.⁴⁰ Soon thereafter, the National League and American League ended their standoff

³¹ *Id.* at 7.

³² *Id.* at 11.

³³ HOIE, *supra* note 29, at 502.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 503. The American League boldly expanded into eastern cities reserved for the National League. STAUDOHAR, *supra* note 2, at 50. The American League also pirated National League players, with seventy-four players joining the American League after abandoning the National League between 1901 and 1902. *Id.*

³⁸ HOIE, *supra* note 29, at 502. Although its name was changed to Minor League Baseball in 1999, it continues to operate most of the minor leagues today. *Minor League Baseball Timeline—1901-2002*, MiLB.COM, <http://www.milb.com/milb/history/timeline.jsp> (last visited Nov. 10, 2012).

³⁹ HOIE, *supra* note 29, at 503.

⁴⁰ *Id.*

by agreeing to play the first World Series in 1903, and the precursor to Major League Baseball was born.⁴¹

Following this arrangement, the majors continued to exploit minor league teams and players through the draft, options, and reserve lists.⁴² Once young players performed at high levels in the minors, the majors drafted these players at fixed rates.⁴³ If a player failed to perform at a high level in the majors, he could be optioned down to a minor league team for more seasoning while the major league team still retained the property rights to the player.⁴⁴

Eventually, top minor leagues, such as the International League, Pacific Coast League, and American Association, resisted the arrangement.⁴⁵ They succeeded in temporarily exempting themselves from the draft, causing prices paid by the majors to the minors for players to skyrocket in the 1920s.⁴⁶ Perhaps due to the sudden increase in the price of top players, Branch Rickey, the General Manager of the budget-strained St. Louis Cardinals, sought a new method of acquiring cheap labor. In the early 1920s, Rickey began acquiring minor league teams at different classifications.⁴⁷ This enabled Rickey, who has been called the “Pharaoh who developed the bonds that held the minor leagues in their subordinate state,”⁴⁸ to sign amateur players at a cheap rate and continuously maintain their property rights as they developed at different levels of the minor leagues.⁴⁹ Talented players advanced up the system’s developmental ladder, and

⁴¹ BERRY, GOULD & STAUDOHAR, *supra* note 2, at 50. The American League and National League would continue as separate legal entities until a formal merger in 2000, though the usage of Major League Baseball began long before this date. *Year in Review: 2000*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr2000n.shtml> (last visited Nov. 10, 2012).

⁴² See discussion *infra* Part I.B.i (discussing the development of the reserve clause in baseball).

⁴³ See, e.g., HOIE, *supra* note 29, at 503–04.

⁴⁴ See *id.*

⁴⁵ See *id.* at 504.

⁴⁶ *Id.* Although the 1921 National Agreement stated that a maximum of \$5000 could be spent on a player drafted from the minors, the majors often were forced to spend more than \$75,000 on top players from the minor leagues who declared themselves exempt from the draft. *Id.*

⁴⁷ *Id.* at 511.

⁴⁸ SULLIVAN, *supra* note 3, at 94.

⁴⁹ See HOIE, *supra* note 29, at 511.

ultimately the Cardinals either promoted the best players to their own major league team or sold them to another club for a profit.⁵⁰

The Cardinals had never finished higher than third in their league prior to Rickey's vision, but won the World Series in 1926 thanks to top talent produced from their "farm system."⁵¹ Buoyed by success,⁵² Rickey began collecting teams at an alarming rate. By 1940, the Cardinals owned *thirty-two minor league teams* and over *600 players*.⁵³ In fact, Rickey controlled entire minor *leagues*.⁵⁴ At first, other major league clubs operated as they had by buying players from other minor league teams, and teams with significant resources, such as the New York Yankees, continued to have success.⁵⁵ However, others began to recognize the value of the farm system model and began purchasing minor league teams.⁵⁶ Soon, even the mighty Yankees developed a farm system.⁵⁷

As the farm system proliferated, baseball's commissioner, Kennesaw Landis, resisted the movement as bad for baseball. In 1931, he ordered Phil Ball, the owner of the St. Louis Browns, either to promote minor leaguer Herschel Bennett or to release him.⁵⁸ Ball refused and filed suit in federal court.⁵⁹ In *Milwaukee American Ass'n v. Landis*, Judge Walter Lindley sided with Landis, stating that "St. Louis was at work to keep Bennett out of the Major Leagues in the Minors; to keep control of Bennett's services; and to prevent any Major club from securing his services. If the plaintiffs' position were to prevail, this situation might continue indefinitely."⁶⁰ Moreover, "such conduct is detrimental to the national game of baseball."⁶¹ Yet, de-

⁵⁰ SULLIVAN, *supra* note 3, at 99.

⁵¹ HOIE, *supra* note 29, at 511.

⁵² The Cardinals won pennants in 1928 and 1930 and the World Series in 1926, 1931, and 1934. *Cardinals Timeline*, CARDINALS.COM, <http://stlouis.cardinals.mlb.com/stl/history/timeline3.jsp> (last visited Oct. 15, 2012).

⁵³ SULLIVAN, *supra* note 3, at 99–100.

⁵⁴ *Id.* at 111. For instance, the Class D Nebraska State League consisted entirely of teams owned by the Cardinals. *Id.*

⁵⁵ HOIE, *supra* note 29, at 511.

⁵⁶ *Id.* at 512.

⁵⁷ *Id.*

⁵⁸ SULLIVAN, *supra* note 3, at 111.

⁵⁹ *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

⁶⁰ *Id.* at 302.

⁶¹ *Id.*

spite Landis' victory, the decision represented a mere speed bump to farm system development.⁶²

During the 1950s, major league teams began culling their farm systems of perceived excesses.⁶³ During a congressional inquiry into the state of the minor leagues, Commissioner Ford Frick recognized that "the majors cannot exist without the minor leagues."⁶⁴ Consequently, the majors established a temporary stabilization fund to aid the lower minor leagues.⁶⁵ In 1962, the majors and minors agreed to a Player Development Plan requiring each major league team to operate at least five farm teams.⁶⁶ It also mandated that major league clubs would be responsible for salaries and spring training costs of minor league players, coaches, and managers, even if the major league club did not own the minor league team.⁶⁷ This embedded a vertically integrated system that remains largely unchanged today.

ii. The Minor Leagues Today

Every major league team today retains an expansive farm system with at least one team at every classification of the minor leagues—Triple-A, Double-A, A Advanced, A, Short-Season A, and Rookie.⁶⁸ Major league teams all go beyond minimum requirements and currently maintain player

⁶² In 1948, six major league teams possessed farm systems of twenty or more minor league teams. HOIE, *supra* note 29, at 513.

⁶³ See *id.* In the post-World War II era, attendance at minor league games had plummeted, resulting in large operating losses for major league teams owning numerous minor league teams. SULLIVAN, *supra* note 3, at 235. Forty-two million people attended minor league games in 1949 compared to only 12 million in 1959, *id.*, as the advent of television and major league franchise relocation affected the popularity of the minors. *Id.* at 237–51. Consequently, minor leagues rapidly folded. See HOIE, *supra* note 29, at 513.

⁶⁴ SULLIVAN, *supra* note 3, at 239.

⁶⁵ HOIE, *supra* note 29, at 513.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ For a list of classifications and affiliates, see *MiLB Clubs by MLB Affiliation*, MiLB.COM, <http://www.milb.com/milb/info/affiliations.jsp> (last visited Oct. 15, 2012). The current rules require major league teams to have player development contracts with one team at each of the first four levels, but this is not required at the Short-Season A and Rookie levels. See *Here Are 10 Ways to Improve Minor League Baseball*, BASEBALL AMERICA, Mar. 28, 2012, available at <http://www.baseballamerica.com/today/minors/season-preview/2012/2613181.html>.

development contracts with either seven or eight minor league clubs.⁶⁹ Teams typically have over 200 players under contract.⁷⁰

Most minor league clubs today are independently owned.⁷¹ While some costs have been shifted to minor league teams since the 1962 Player Development Plan,⁷² the majors continue to pay the salaries and meal money of players, coaches, and managers.⁷³ The minor league owner typically assembles “a front office and staff to manage all business aspects,” such as the ticket sales for the minor league team, while the major league team “makes all decisions related to player development,” including assignments, promotions, and releases.⁷⁴ With this arrangement, the business of minor league baseball has thrived, with franchise values appreciating at high rates even during recessions.⁷⁵

With major league owners paying salaries of players not immediately contributing to their chief product, there is an incentive to keep wages at a minimum while still maximizing the number of prospects under contract in their organizations. Consequently, salaries remain strikingly low and off-

⁶⁹ See *MiLB Clubs by MLB Affiliation*, *supra* note 68.

⁷⁰ Major League Rule 2(b)(1) permits a club to reserve forty players on a major league roster, thirty-eight on a Triple-A roster, thirty-seven on a Double-A roster, and thirty-five on each class A and rookie roster.

⁷¹ Major league teams own less than one-fifth of their minor league affiliates. See Josh Leventhal, *2010 Player Development Contract Chart*, BASEBALL AMERICA (Oct. 6, 2010), available at <http://www.baseballamerica.com/today/minors/business-beat/2010/2610422.html>.

⁷² Broshuis, *supra* note 14 (“Tremendous amounts of cost have already been shifted to the minor league system in the past 10 to 15 years . . .”).

⁷³ HOIE, *supra* note 29, at 513.

⁷⁴ *MiLB.com Frequently Asked Questions*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business#3> (last visited Oct. 15, 2012). In addition to these affiliated minor league teams, there has been an expansion of independent minor league teams over the last twenty years. These teams have no relationship to a major league team, and the players sign contracts directly with the minor league team. Independent teams, however, operate in flux, with many teams and leagues folding from year to year. For a current list of independent leagues, see *Independent League (IND)*, BASEBALL AMERICA, available at http://www.baseballamerica.com/statistics/classifications/?cl_id=20&y=2006 (last visited Nov. 8, 2012).

⁷⁵ Broshuis, *supra* note 14; Michael K. Ozanian, *Minor Leagues, Major Profits*, FORBES.COM (Aug. 6, 2008), http://www.forbes.com/2008/08/06/baseball-minors-sacramento-biz-sports-cz_mo_0806minors.html. As Professor Sullivan states, “Freed from significant expenses, the new owners can concentrate on having fun for a few years before realizing a handsome profit. Whether the team makes money each year or not, the owner can be confident that the value of the franchise is appreciating.” Sullivan, *supra* note 3, at 255.

the-field working conditions poor.⁷⁶ Entry-level wages consist of \$1100 per month, and they are only paid over the course of the five-month season.⁷⁷ Most players therefore earn less than \$10,000 per year,⁷⁸ placing them below federal poverty guidelines.⁷⁹ Yet players consistently work more than fifty hours per week, as teams typically require players to spend eight hours per day at their workplace for six or seven days per week, and additional “optional” work is encouraged.⁸⁰ The job also entails long hours of travel,⁸¹ and deplorable living conditions contribute to minor leaguers’ difficult situations.⁸²

MLB’s Rule 4 draft provides the chief avenue for entry into the minor leagues for the majority of players.⁸³ Held annually in June, teams select players from the United States, Canada, and Puerto Rico in up to fifty rounds.⁸⁴ The most talented players often receive large signing bonuses to incentivize them to forgo college and sign with MLB teams.⁸⁵ However, players drafted beyond the tenth round usually only obtain a signing bonus

⁷⁶ See Broshuis, *supra* note 14; Rothman, *supra* note 9.

⁷⁷ Rothman, *supra* note 9.

⁷⁸ *Id.*

⁷⁹ Masteralexis, *supra* note 21, at 594. The poverty threshold for an individual not living with their family in 2010 was \$11,137. *Table 1. Weighted Average Poverty Thresholds for Families of Specified Sizes, Historical Poverty Tables-People*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/historical/people.html> (last visited Nov 10, 2012).

⁸⁰ Players only enjoy a day off every couple of weeks. In what is a typical schedule, the aptly named Arkansas Travelers, the Double-A affiliate of the Los Angeles Angels of Anaheim, played 154 games in 165 days in 2012. *Schedule*, TRAVS.COM, <http://www.milb.com/schedule/index.jsp?sid=t574&m=08&y=2012> (last visited Nov. 8, 2012). They had two days off the entire month of April, three days off in May and June, just one day off in July, and two days off in August. *Id.* Additionally, many of these days will not be true off days, as no doubt some of these off days will be spent traveling with the team from one destination to another.

⁸¹ The Northwest League has a moderate travel schedule, yet most trips between cities are still between 250 and 400 miles. *Distance between NWL cities*, NWL.COM, http://www.milb.com/league3/page.jsp?ymd=20061214&content_id=148667&vkey=league3_1126&fext=.jsp&sid=1126 (last visited Nov. 8, 2012). One trip, from Boise to Vancouver, is 605 miles. *Id.* Except in Triple-A, almost every trip is done by bus, often overnight after games conclude. See Broshuis, *Postcards from the Bushes*, *supra* note 11.

⁸² Broshuis, *supra* note 14.

⁸³ See Major League Rule 4.

⁸⁴ *Id.*

⁸⁵ *Baseball Signing Bonus*, BASEBALL ALMANAC, http://www.baseball-almanac.com/players/baseball_signing_bonus.shtml (last visited Nov. 8, 2012).

of \$1000 to \$2500.⁸⁶ The draft therefore creates a minor league system consisting of a few rich, young “bonus babies,” as they are called in the industry, enmeshed amongst a plethora of penniless players.⁸⁷

Major League Rules require all players drafted to sign initial contracts spanning seven years.⁸⁸ Over the course of the seven-year period, a club may trade, promote, or demote a player at will.⁸⁹ Organizations can also fire a player any time for any reason without severance pay.⁹⁰ A player may retire at any time, but, upon retiring, he cannot sign with another team—even internationally—for the duration of the contract.⁹¹ Thus, “the players are free to go, just not free to play elsewhere in Organized Baseball.”⁹²

In sum, baseball is awash with “many thousands of minor leaguers most of whom have no freedom of contract, are stuck where they are, did not receive large signing bonuses, [and] work for modest seasonal salaries.”⁹³ Indeed, the words of Judge Lindley in *Landis* have proved prescient, as the situation *has* continued indefinitely, often to the detriment of players.

⁸⁶ See *id.*; see also Broshuis, *supra* note 14 (describing a player who received only a \$2,500 signing bonus and, after deducting taxes and mandatory clubhouse dues, received a check for only \$308 every two weeks).

⁸⁷ Since identifying future major leaguers at a young age remains difficult, however, the young bonus babies often fail to develop into productive major league players. See Marty Dobrow, *MLB Draft Can Be Risky Business*, ESPNBOSTON.COM (June 6, 2012), <http://sports.espn.go.com/boston/columns/story?id=6628930> (finding that of the 917 first-round draft picks from the twenty-five year period between 1981 and 2005, 32.7 percent never played in the major leagues).

⁸⁸ Major League Rule 3(b)(2).

⁸⁹ See Minor League Uniform Player Contract, Major League Rules Attachment 3, Art. XVIII; see also Garrett Broshuis, *Suitcase Chronicles: Keep Your Bags Packed*, BASEBALL AMERICA (July 14, 2009), available at <http://www.baseballamerica.com/today/prospects/prospect-diary/2009/268555.html> (describing the feeling of playing for three different minor league teams in one week).

⁹⁰ Minor League Uniform Player Contract, Major League Rules Attachment 3, Art. XIX.

⁹¹ See Major League Rule 14(b) (“If a voluntarily retired player, during the player’s retirement, shall desire to play baseball for hire, otherwise than for the Major or Minor League Club entitled to the player’s services, the player shall first obtain written consent of the player’s Club” and must also file an application with the Commissioner’s Office).

⁹² KELLY, *supra* note 2, at 92.

⁹³ WOLLETT, *supra* note 20, at xv-xvi.

B. Labor and Major League Baseball

i. The Early Years: The Reserve Clause Forms

In the earliest years of professional baseball, contract “jumping” was a frequent occurrence among players.⁹⁴ Moving from team-to-team increased competition for services, which raised salaries.⁹⁵ The competition, however, led to the collapse of several teams, and owners searched for ways to halt the practice.⁹⁶ The situation reached a boiling point in 1879 when Hall of Famer James “Orator” O’Rourke, incensed by an owner’s refusal to pay for his uniform, left the Boston Red Caps for the Providence Grays.⁹⁷ His addition helped Providence recapture the National League championship.⁹⁸

Boston’s owner, Arthur Soden, responded by calling a meeting of owners.⁹⁹ He convinced each team to secretly remove five of its players from the open market.¹⁰⁰ Teams recognized the utility of the arrangement, and the number of removed players grew to fourteen per team by 1887.¹⁰¹ The same year, the owners decided to make the arrangement contractual, and the reserve clause was born.¹⁰²

At first, players did not resist the restraint on mobility; instead, they welcomed the job security.¹⁰³ Within a few years, however, the reserve clause was written into every player’s contract.¹⁰⁴ Unless a team decided to

⁹⁴ Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 55–56 (1997).

⁹⁵ *Id.* at 56.

⁹⁶ *Id.*

⁹⁷ Ed Edmonds, *At the Brink of Free Agency: Creating the Foundation for the Messersmith-McNally Decision—1968-1975*, 34 S. ILL. U. L.J. 565, 568 (2010). “Orator” O’Rourke later earned his name by giving an impassioned speech pleading for players to play in an alternative league, saying, “Our ascension from thralldom is positive, uncoupled from all doubts, notwithstanding the warning of the master magnates and the snapping of their ship, which has no more terror for the players as they stand today shorn of all physical strength to use them.” LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL’S LABOR WARS* 41 (1980).

⁹⁸ Edmonds, *supra* note 97, at 568.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 569.

¹⁰² *Id.* A reserved player could not sign with another team but could instead only re-sign with his prior team. *Id.*

¹⁰³ *Id.*

¹⁰⁴ Moorad, *supra* note 94, at 56.

trade or cut a player, all players were perpetually bound to their original teams.¹⁰⁵ As one commentator has remarked, the arrangement resulted “in a contractual hall of mirrors, with endlessly repeating obligations and no reasonable way out.”¹⁰⁶ Players soon resisted the restraints, but the owners successfully withstood all challenges, including the formation of alternate leagues.¹⁰⁷ The reserve clause was firmly in place, and it restrained mobility for the next seventy-five years.¹⁰⁸

ii. Antitrust Challenges Lead to an Antitrust Exemption

Power grabs by the major leagues led to many court challenges in the early twentieth century. The first challenge resulted from the quashing of the Federal League.¹⁰⁹ The National League had absorbed some of the Federal League’s teams and bought others,¹¹⁰ but the Baltimore Terrapins resisted and brought an antitrust suit.¹¹¹ In 1922, *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs* reached the United States Supreme Court.¹¹²

The suit alleged a conspiracy among the leagues to destroy the Federal League.¹¹³ It described the elaborate business of professional baseball and the incessant interstate travel required.¹¹⁴ Despite this, Justice Oliver Wendell Holmes famously wrote that “[t]he business is giving exhibitions of base ball, which are purely state affairs.”¹¹⁵ Moreover, the transportation of play-

¹⁰⁵ *Id.* at 56–57.

¹⁰⁶ *Id.* at 56.

¹⁰⁷ Edmonds, *supra* note 97, at 569–71. The alternative leagues, which included the American Association, the Union Association, and the Players League, abolished the reserve clause in an attempt to attract players. Moorad, *supra* note 94, at 58. However, they were short-lived, as the National League partially absorbed all three leagues upon their failures. *Id.* One league that did gain traction, the American League, soon emerged as an equal to the National League in attendance, but in 1903 the two leagues quickly formed an agreement to merge the two leagues into a single bicameral system of Major League Baseball. *Id.*

¹⁰⁸ *Id.* at 571.

¹⁰⁹ Moorad, *supra* note 94, at 58. The Federal League represented the last alternative league to be formed in the pre-World War II era. *Id.*

¹¹⁰ *Id.* at 59.

¹¹¹ *Id.*

¹¹² 259 U.S. 200 (1922).

¹¹³ *Id.* at 207.

¹¹⁴ *Id.* at 208.

¹¹⁵ *Id.*

ers was “mere incident,” and, although the exhibitions were “made for money,” they “would not be called trade of commerce in the commonly accepted use of those words.”¹¹⁶ Baseball was “not related to production,” but instead depended on “personal effort.”¹¹⁷ Consequently, the business of baseball was outside the reach of the antitrust laws.¹¹⁸

The antitrust exemption established by *Federal Baseball* legitimized and facilitated the majors’ control and constraint on the business of baseball. Recognizing this, the owners carefully guarded the exemption. In 1946, Danny Gardella brought suit after being “blacklisted” from baseball for playing in the Mexican League for a season.¹¹⁹ Following *Federal Baseball*, the district court dismissed the suit.¹²⁰ On appeal, Judge Learned Hand reversed, finding that the advent of radio and television broadcasts of baseball games since *Federal Baseball* placed baseball within the confines of interstate commerce.¹²¹ With the antitrust exemption—and the coveted reserve clause—under assault, the owners settled Gardella’s case for \$60,000 to avoid a final judicial resolution.¹²²

Perhaps seeing an opportunity after *Gardella*, another player, George Toolson,¹²³ challenged the exemption two years later. As in the *Gardella*

¹¹⁶ *Id.* at 209.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Gardella v. Chandler*, 79 F. Supp. 260, 261–62 (S.D.N.Y. 1948). Gardella had played for the New York Giants in 1944 and 1945, but, sensing that he would not make the team in 1946 with players returning from World War II, he signed a contract to play for professional team in Mexico. John T. Wolohan, *The Curt Flood Act of 1998 and Major League Baseball’s Antitrust Exemption*, 9 MARQ. SPORTS L.J. 347, 354 (1998-1999).

¹²⁰ *Gardella*, 79 F. Supp. at 263.

¹²¹ *Gardella v. Chandler*, 172 F.2d 402, 407–08 (2d. Cir. 1949). Writing separately, Judge Frank found the relationship amongst teams to be a monopoly, and the effect on players “possesses characteristics shockingly repugnant to moral principles. . .condemning ‘involuntary servitude.’” *Id.* at 409. Moreover, their relative high pay did not excuse the behavior, as “only the totalitarian-minded will believe high pay excuses virtual slavery.” *Id.* To say the least, Judge Frank believed the reserve clause should be struck down, as “no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.” *Id.* at 415.

¹²² Moorad, *supra* note 94, at 60. According to one historian, Gardella wished to keep fighting the reserve clause, but “economic necessity won out over an ideal of justice.” LOWENFISH, *supra* note 97, at 166.

¹²³ Interestingly, Toolson was not a major league player but was a minor league player who refused to report from one minor league assignment to another after receiving a demotion. Wolohan, *supra* note 119, at 356.

case, the district court dismissed the suit.¹²⁴ Unlike *Gardella*, the appellate court affirmed.¹²⁵ With other players also challenging the *Federal Baseball* exemption,¹²⁶ the Supreme Court reviewed the case, writing in a single paragraph that “if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.”¹²⁷ Twenty years would pass before the Court would again consider baseball’s antitrust exemption, where it would be re-affirmed in *Flood v. Kuhn*.¹²⁸ The antitrust exemption

¹²⁴ *Toolson v. N.Y. Yankees*, 101 F. Supp. 93, 95 (S.D. Cal. 1951). In taking a critical view of Judge Frank’s position in *Gardella*, the court stated that they were “bound by the decision of the Supreme Court” and that “[s]tability in law requires respect for the decision of controlling courts . . .” *Id.* at 94–95. The court further stated that if *Federal Baseball* “is, as Judge Frank intimates an ‘impotent zombi’, I feel it is not my duty to so find but that the Supreme Court should so declare.” *Id.* at 95.

¹²⁵ *Toolson v. N.Y. Yankees*, 200 F.2d 198, 198 (9th Cir. 1952). The court said simply that, “for the reasons stated in” the district court’s opinion, “the order of the District Court is affirmed.” *Id.*

¹²⁶ See *Kowalski v. Chandler*, 202 F.2d 413, 413 (6th Cir. 1953). Like in *Toolson*, the district court dismissed the action and the Sixth Circuit affirmed due to the precedent established in *Federal Baseball*. *Id.*

¹²⁷ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953). In fact, Congress had considered acting in 1952 but took no action. *Organized Baseball: Report of the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, H.R. No. 2002, 82d Cong. 2d Sess. 229 (1952). Yet, part of the reason Congress took no action was because they found it unnecessary “until the reasonableness of the reserve rule has been tested by the courts.” *Id.* Consequently, the Court found Congressional inaction to be evidence of intent, yet the Congressional inaction resulted from a desire to allow the Court time for further review. See *id.*; see also Moorad, *supra* note 95, at n. 51. Though the Court affirmed by a 9-2 decision, Justice Burton filed a strong dissent, saying that given the economics of baseball and the international aspect of the game, “it is a contradiction in terms to say that the defendants . . . are not engaged in interstate trade or commerce . . .” *Toolson*, 346 U.S. at 358.

¹²⁸ 407 U.S. 258 (1972). Curt Flood was a three-time All-Star and seven-time Gold Glove Award winner with the St. Louis Cardinals. *Id.* at 264. When the Cardinals traded Flood to the Philadelphia Phillies, he asked to instead be made a free agent. *Id.* at 265. His request was denied, so he filed suit to challenge the reserve clause. *Id.* The Court in 1972 attempted to clarify the status of baseball’s antitrust exemption, saying that “[p]rofessional baseball is a business and it is engaged in interstate commerce” yet “its reserve system” and “exemption from the federal antitrust laws” makes baseball “an exception and an anomaly.” *Id.* at 282. Due to the numerous decisions citing approvingly of *Toolson* and *Federal Baseball*, and due to congressional inaction, the Court found that the exemption should be upheld unless “remedied by the Congress.” *Id.* at 283-284. The exemption remained firmly in place, though it did not end the challenges. See, e.g., *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978); *Prof'l Baseball Sch. & Clubs*,

had been firmly established, as courts would not overturn decades of precedent.

iii. The Formation of the Players' Union

While antitrust challenges and alternative leagues failed, players began looking to unionization as a solution. As early as 1885, John Montgomery Ward, a shortstop for the New York Giants, formed the Brotherhood of Professional Baseball Players.¹²⁹ Like the alternative leagues, however, the Brotherhood was short-lived and ceased in 1891.¹³⁰ Players next attempted to organize in 1914.¹³¹ Like the Brotherhood, the Players Fraternity relied on an alternative league—this time the Federal League—for its leverage.¹³² The effort ceased alongside the dissolution of the Federal League in 1915.¹³³ The next attempt came in 1946, when a Boston attorney formed the American Baseball Guild.¹³⁴ Like its predecessors, it too quickly failed.¹³⁵

The MLBPA finally emerged in 1954.¹³⁶ Ironically, the Association did not initially aspire to union status.¹³⁷ Perhaps more ironically, the first president, Judge Robert Cannon, was a non-player who held deep pro-owner sympathies.¹³⁸ This and other management difficulties hindered the MLBPA's success for over a decade.¹³⁹

Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (1993). Eventually, Congress did take action in passing the Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824, which amended the Clayton Act. As will be discussed below, the Act only applied to major league players. *See infra* Part III.B.

¹²⁹ Moorad, *supra* note 94, at 62. The goal of the Brotherhood “was to fight the reserve clause and the salary cap imposed by owners.” *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ BERRY, GOULD & STAUDOHAR, *supra* note 2, at 52. Bob Friend, the second player-president of the MLBPA stated at the time, “I firmly believe a union . . . simply would not fit the situation in baseball.” *Id.*

¹³⁸ Moorad, *supra* note 94, at 63.

¹³⁹ *Id.*

Eventually, the MLBPA became more organized. In 1960, players formed a central office for the organization.¹⁴⁰ Yet with Judge Cannon at the helm, progress arrived slowly.¹⁴¹ The Association began searching for a full-time executive director in 1965.¹⁴² On July 1, 1966, Marvin Miller became head of the MLBPA,¹⁴³ a move that transformed the association into a union that would soon dramatically tilt the balance of power.

Within a year, Miller secured a pension plan and “virtually doubled players’ benefits.”¹⁴⁴ More incredibly, in 1968—just two years after Miller’s hiring—the suddenly energized MLBPA negotiated the first collective bargaining agreement in the history of professional sports.¹⁴⁵ This 1968 CBA included a grievance process, minimum salaries, and pension payments.¹⁴⁶

In 1972, the MLBPA took another significant step in the history of baseball labor relations: it called a strike during spring training that delayed the start of the regular season.¹⁴⁷ It was baseball’s first league-wide work stoppage, and it led to the 1972 CBA, which further refined the arbitration process for grievances.¹⁴⁸

Included in the grievance process was the addition of a neutral arbitrator to settle disputes in a binding manner, which later proved to be one of

¹⁴⁰ KORR, *supra* note 6, at 21–22.

¹⁴¹ *See id.* at 23–24. Cannon apparently repeatedly reminded players they were lucky “to have a job ‘that 10,000 men making a lot more money would give anything to do.’” *Id.* at 27.

¹⁴² *Id.* at 28.

¹⁴³ Edmonds, *supra* note 97, at 572. Judge Cannon and others warned players about selecting Miller, who was known as a staunch union man. LOWENFISH, *supra* note 97, at 197. However, Miller toured spring training complexes and won the resounding support of players by a 489-136 vote. *Id.* at 199. The players would not be disappointed, as few figures in baseball have had a greater impact on the game than Miller. His many accomplishments as head of the union have led many to call for his entry into the Hall of Fame, yet, thus far, he has not been admitted. He recently passed away at the age of ninety-five. *See* Richard Goldstein, *The Bargainer Who Remade the Old Ball Game*, N.Y. TIMES, Nov. 28, 2012, at A1.

¹⁴⁴ Moorad, *supra* note 94, at 63.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* According to Professor Moorad, the “grievance process gave the players the ability to enforce the rights for which they had fought at the bargaining table.” *Id.* Also, the grievance procedure provided that an arbitrator would settle disputes, which would lay the groundwork for subsequent challenges to the reserve clause. Edmonds, *supra* note 97, at 573. Two years later, the parties agreed to another CBA that raised salaries and refined the grievance process. Moorad, *supra* note 94, at 64.

¹⁴⁷ *See* Moorad, *supra* note 94, at 64.

¹⁴⁸ *Id.*

the most significant mechanisms ever secured by the MLBPA. With the Supreme Court upholding the reserve clause in *Flood*,¹⁴⁹ Miller and the players viewed the grievance process as an alternative mode of challenging the reserve clause.¹⁵⁰ In 1975, two players, Andy Messersmith and Dave McNally,¹⁵¹ challenged the perpetuity of contractual rights, arguing that the contractual plain language allowed for the reserve clause to expire after a single renewal.¹⁵² Peter Seitz, the tie-breaking, neutral arbitrator on baseball's three-person Arbitration Panel, agreed.¹⁵³ Seitz released his decision on December 23, 1975, finding that the reserve clause allowed a team to unilaterally renew a contract for only a single season—not for perpetual, unilateral renewal as believed by owners and as practiced by owners up to that point.¹⁵⁴ McNally and Messersmith were thus declared free agents.¹⁵⁵

In response to the decision, the owners not only fired Seitz¹⁵⁶ but also appealed the decision in federal court.¹⁵⁷ Yet when the Eighth Circuit upheld the Seitz decision,¹⁵⁸ the owners were forced to address the reserve system through collective bargaining.¹⁵⁹ On July 11, 1976, they reached a

¹⁴⁹ 407 U.S. 258 (1972).

¹⁵⁰ See Moorad, *supra* note 92, at 64.

¹⁵¹ Messersmith was a star pitcher who had been traded the prior year against his wishes. KORR, *supra* note 6, at 148. McNally, on the other hand, was a great player but not a star. *Id.* at 149. In fact, being a part of the case “cost him a great deal of money.” *Id.* McNally became involved out of principle, “to help break a system that he thought was wrong.” *Id.*

¹⁵² See Moorad, *supra* note 94, at 64.

¹⁵³ KORR, *supra* note 6, at 157. Seitz had been appointed in 1974 to be the permanent chairman of baseball's Arbitration Panel. *Id.* at 141–42.

¹⁵⁴ *Id.* at 157. Seitz found that the reserve clause, found in clause 10(a) of the uniform player's contracts, allowed clubs to renew a contract for one year. *Id.* This power to renew a contract, however, did not also include a renewal on the right to renew. *Id.*

¹⁵⁵ *Id.* at 158.

¹⁵⁶ Moorad, *supra* note 94, at 65.

¹⁵⁷ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233 (W.D. Mo. 1976). Officials reportedly chose Kansas City as the venue for challenging the Seitz decision in the hopes that a Midwest judge would be more conservative. KORR, *supra* note 6, at 159.

¹⁵⁸ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 632 (8th Cir. 1976). The court stated that “[t]he 1968 agreement clearly permitted grievances relating to the reserve system.” *Id.* at 629. The court also suggested that “the time for obfuscation has passed and that the time for plain talk and clear language has arrived.” *Id.* at 632.

¹⁵⁹ KORR, *supra* note 6, at 176.

tentative agreement that overhauled the reserve system and awarded free agency to a player after six years of service time.¹⁶⁰ In only eight years of collective bargaining, the players shattered a system that had withstood over a half century of court challenges.

III. MINOR LEAGUERS AND COLLECTIVE BARGAINING

The Seitz decision of 1975 resulted in perhaps the greatest shift in relative bargaining power in the history of baseball. With one precipitous decision from an arbitrator, one of the great pillars of baseball's cartel came crashing down.¹⁶¹ In the coming decades, concessions from owners would continue. Minimum salaries for major league players skyrocketed, from \$7000 under the 1968 Agreement¹⁶² to \$480,000 in 2012,¹⁶³ and contributions to pension plans also increased exponentially.¹⁶⁴

A. *The Effect of Collective Bargaining on Minor Leaguers*

The great impact of collective bargaining on major leaguers is well-established. The effect of collective bargaining on minor league players, by stark contrast, has garnered scant attention. As will become apparent, many of baseball's CBAs have impacted minor leaguers, sometimes with detrimental results.

¹⁶⁰ See 1976 Basic Agreement, art. XVII § (B). Miller recognized that granting free agency to all players would flood the market with talent and reduce competition for labor. See KORR, *supra* note 6, at 182–85. Consequently, he fought to find the appropriate balance that would grant players the mobility they desired while simultaneously preserving the necessary competition for services that would increase wages. *Id.*

¹⁶¹ See KORR, *supra* note 6, at 184 (saying “[f]or decades, the owners had enjoyed the advantages of being part of a cartel.”)

¹⁶² 1968 Basic Agreement, Schedule A.

¹⁶³ *Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement*, MLB.COM, http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf (last visited Nov. 5, 2012).

¹⁶⁴ Owners in 2012 were required to make a \$184.5 million annual contribution. *Summary of Major League Baseball Players Association—Major League Labor Agreement*, *supra* note 163.

i. The Early Agreements

For minor leaguers, the 1968 Agreement contained arguably the most important clause of all the subsequent agreements. In the introductory section, the Agreement stipulated the following:

In making this Agreement the Association represents that it contracts for and on behalf of the *major league baseball players* and individuals who may become major league baseball players during the term of this Agreement and the Clubs represent that they contract for and on behalf of themselves, any additional Clubs which may become members of the Major Leagues and the successors thereof.¹⁶⁵

While the phrase “individuals who may become major league baseball players” might be broadly interpreted to include minor league players, the phrase has been interpreted narrowly both within the industry and by courts.¹⁶⁶ Indeed, the 1968 Agreement further stated that “[t]he intent and purpose of the parties in entering into this Agreement is to set forth . . . certain terms and conditions of employment of all *major league baseball players*”¹⁶⁷ The Agreement’s plain language therefore stated that its stipulated grievance procedure, minimum salaries, and pension contributions, as well as its parking space and uniform provisions, did not apply to minor leaguers.

Subsequent agreements contained the same language, and the 1970 Agreement provided further clarification. First, it stated for the first time that “[t]he Clubs recognize the Association as the sole and exclusive collective bargaining agent for all Major League Players, and individuals who may become Major League Players”¹⁶⁸ Second, under a section of definitions

¹⁶⁵ 1968 Basic Agreement (emphasis added).

¹⁶⁶ See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D. N.Y. 1995) (saying that the MLBPA “is the collective bargaining unit for the forty-person rosters of each of the Major League Clubs”). According to Professor Donald Wollett, “[t]here’s never been an election among major league baseball players” and “[t]he unit has been fixed by agreement which is based on the consent of the governed, that is, the members of the bargaining unit and the employer.” WOLLETT, *supra* note 20, at 102. One might question whether this bargaining unit is proper since it excluded minor leaguers. However, section 9(a) of the N.L.R.A. merely requires “a unit appropriate” for collective bargaining, which does not require *the* most appropriate unit. See, e.g., *Cmty. Hosp. of Cent. Cal. v. N.L.R.B.*, 335 F.3d 1079, 1084–85 (D.C. Cir. 2003). Moreover, “a group of employees with a significant history of representation by a particular union presumptively constitute an appropriate bargaining unit.” *Id.* at 1085.

¹⁶⁷ 1968 Basic Agreement, art. I (emphasis added).

¹⁶⁸ 1970 Basic Agreement, art. II.

for the revised grievance procedures, it stated that a “‘Player’ or ‘Players’ shall mean a Player or Players on the active roster of a Major League Club or on a disabled, restricted, disqualified, ineligible, suspended or military list of a Major League Club.”¹⁶⁹

This firmly established that the MLBPA did not bargain on behalf of minor league players. Consequently, the MLBPA—the association that finally provided a check on the owners’ monopolistic power—is not required to provide a check on owners’ powers over minor leaguers.

ii. The 1976 Basic Agreement

Signed in the wake of the Seitz decision, the 1976 Basic Agreement altered the landscape of MLB labor relations. While most of the Agreement pertains to major leaguers—such as the requirement for first-class travel and first-class meals—some of the provisions did have an effect on minor league players. For instance, the College Scholarship Plan was altered.¹⁷⁰ Also, the 1976 Basic Agreement contained the details of free agency for the first time.¹⁷¹

¹⁶⁹ 1970 Basic Agreement, art. X, § (A)(4).

¹⁷⁰ 1976 Basic Agreement, art. XIII, § (D). Originating in the early 1960s, the College Scholarship Plan (CSP) allows teams to offer a college scholarship to amateur players as an incentive for foregoing college. *College Scholarship Program: A Guide for Players*, MLB.COM, http://mlb.mlb.com/mlb/official_info/scholarship.jsp?content=guide (last visited Nov. 7, 2012).

While still amateurs, players negotiated for the inclusion of the CSP into their initial minor league UPCs, yet the 1976 Basic Agreement changed the terms of the CSP by stating the following:

A Major League Player for whom there is in effect. . . a valid and unexpired scholarship under the College Scholarship Plan may commence or resume his studies under the Plan at any time within two years after his last day of Major League service. If his college studies have not commenced under the Plan by that date, his scholarship shall terminate.

1976 Basic Agreement, art. XIII, § (4).

During this time period, MLB had unilaterally implemented many programs and policies designed to curtail signing bonuses while still incentivizing professional baseball. See Allan Simpson, *Bonus Concerns Created Draft; Yet Still Exist*, BASEBALL AMERICA, June 4, 2005, available at <http://www.baseballamerica.com/today/2005draft/050604bonus.html>. Early attempts included a 1946 bonus rule that required teams to place players signed to high bonuses on the major league roster and a 1959 first-year draft rule that required teams to place their top prospects on the equivalent of an expanded major league roster. *Id.* The effort capitulated with the unilateral institution of the amateur draft, which is still in place today. *Id.*

¹⁷¹ See 1976 Basic Agreement, art. XVII, § (B).

While nearly all provisions related only to major leaguers, one provision indirectly impacted minor leaguers. Section (C)(2)(e) of the free agency portion of the Agreement stipulated that compensation would be awarded to a free agent's former team if the free agent signed with a new team.¹⁷² The new team would be required to "compensate the Player's former Club by assigning to it a draft choice in the Regular Phase of the next Major League Rule 4 Amateur Player Draft."¹⁷³

The effect of these provisions when analyzed in isolation seems marginal. Yet these modifications established a precedent, as, for the first time, the MLBPA and the owners negotiated over terms that modified the draft and affected amateur players. This seemingly innocuous step of bargaining over terms relating to amateur players would later become commonplace. Moreover, since nearly all amateur players become minor leaguers prior to ever playing in the major leagues, and since the vast majority of players drafted never reach the major leagues, the impact—though indirect—would come to affect minor league players greatly. Only a small stone had been cast into the water, yet minor leaguers would feel the unforeseen effects of that stone's ripples generations later.

iv. Agreements in the 1980s

Agreements in the 1980s largely tracked the 1976 Basic Agreement. Labor relations were often contentious, with a mid-season strike occurring in 1981,¹⁷⁴ and owners actively colluded to suppress the free agent market dur-

¹⁷² 1976 Basic Agreement, art. XVII, § (C)(2)(e).

¹⁷³ *Id.* Depending on the circumstances, the signing team would be forced to assign either their first or second choice in the draft for the top free agent that they signed. *Id.* The Agreement set forth a system that allowed teams finishing at the bottom of the previous year's baseball standings to have priority negotiation rights with free agents. *Id.* Also, the compensation clause required teams in the first half of selecting clubs—those with priority negotiation rights—to forfeit their second choice in the draft whereas those teams in the bottom half of selecting clubs—those teams who finished higher in the standings the previous year—were required to forfeit their first pick in the draft. *Id.*

¹⁷⁴ See KORR, *supra* note 6, at 210–30. The players nearly went on strike in 1980, as, on May 22, players refused to go to airports to travel to their next games. . *Id.* at 201–02. A strike was averted through an all-night bargaining session that resulted in a Joint Study Committee to look at possible changes in the free agency system. *Id.* at 201–02. Since the 1976 Basic Agreement, baseball had prospered, with salaries and attendance increasing. *Id.* at 207. Yet owners claimed they were operating at a loss due to free agency, so they sought changes to the system. *Id.* at 208. Owners pushed for direct monetary compensation for teams losing players to free

ing several off-seasons.¹⁷⁵ These combative events shaped negotiations, but the agreements were of little significance to minor league players.

The 1981 Basic Agreement, which altered the compensation structure for teams losing top players through free agency, affected minor leaguers the most.¹⁷⁶ The Agreement set forth a classification system for free agents, and teams were compensated with draft picks when they lost higher-level free agents.¹⁷⁷ A similar system still exists today.

v. The 1990 Basic Agreement

Baseball was prospering as the sides entered negotiations for the 1990 Basic Agreement. Annual revenue had surpassed \$1,000,000,000, and huge new television broadcasting contracts promised further monetary infusions.¹⁷⁸ However, the labor setting remained tense, and the parties reached an agreement only after a thirty-two day lockout during spring training.¹⁷⁹

In addition to including terms for minimum salaries for major leaguers, the 1990 Agreement also delineated salaries for players with major league service time depending on whether they played the subsequent season in the major or minor leagues. The Agreement required minimum salaries for major league service to be “at a rate not less than the Major League minimum salary” of \$100,000,¹⁸⁰ and for minor leaguers with previous major league service time the Agreement required salaries of at least \$26,500

agency, and the players fervently opposed the proposal. *Id.* at 212. The strike began in June. *Id.* at 214. As the strike neared two months, a settlement was finally reached. *Id.* at 221.

¹⁷⁵ See Moorad, *supra* note 94, at 68–70. In 1985, even the reigning American League Most Valuable Player, Kirk Gibson, received no offers in the free agent market. *Id.* at 69. Despite successfully depressing the free agent market, the tactics ultimately backfired. Grievances were filed in several years, and the arbitrator sided with players in all instances, awarding a total of \$280,000,000 to the players. *Id.* at 70.

¹⁷⁶ See 1981 Memorandum of Agreement (on file with the author).

¹⁷⁷ 1981 Memorandum of Agreement, art. 1. Depending on a player’s level of performance, Type A free agents consisted of players in the top twenty percent at their position and Type B free agents consisted of players ranked between twenty and thirty percent. *Id.*

¹⁷⁸ Moorad, *supra* note 94, at 70–71.

¹⁷⁹ *Id.* at 71. The major obstacle was salary arbitration, as players desired a return to allowing arbitration eligibility after two years instead of three while owners wanted to completely eliminate arbitration. *Id.*

¹⁸⁰ 1991 Basic Agreement, art. VI, § (B)(1).

per season.¹⁸¹ Thus, a player with only a single day of major league service found his subsequent minor league salary regulated and increased by the Agreement.¹⁸²

Since the parties planned to expand the National League at the time of the Agreement, they also set forth procedures for selecting players in an expansion draft.¹⁸³ The provision, found in Attachment 10 to the Agreement, required every club to provide a list of all major league and minor league players under their control. Each team could then submit a list of fifteen “withdrawn players”—major or minor leaguers to be protected from an expansion draft.¹⁸⁴ Additionally, “National Association player contracts not subject to selection at the next Rule 5” draft were not eligible for the expansion draft.¹⁸⁵

¹⁸¹ 1991 Basic Agreement, art. VI, § (B)(2)(i). The Agreement referred to the minor leagues as the “National Association.” *Id.* § (B)(3). The National Association of Professional Baseball Leagues has served as the governing entity for minor league baseball teams since its inception in 1901. *The History & Function of Minor League Baseball*, MiLB.COM, http://www.milb.com/milb/history/general_history.jsp (last visited Nov. 5, 2012). The body was commonly referred to as the National Association until being renamed Minor League Baseball in 1999. *Minor League Baseball Timeline—1901-2001*, MiLB.COM, <http://www.milb.com/milb/history/timeline.jsp> (last visited Nov. 5, 2012).

¹⁸² The 1990 Basic Agreement also contained a provision requiring reimbursement of reasonable moving expenses not only if a player was assigned from one major league club to another but also if a player was assigned from a major league club to a minor league club. 1991 Basic Agreement, art. VIII. Additionally, severance pay was delineated for players signing “split contracts,” requiring severance pay even if these players were playing in the minor leagues. *Id.* at art. IX. The Agreement stipulated that a player on a split contract would receive severance pay calculated at the major league rate if the player was in the major leagues at the time of termination but would receive severance pay at the minor league rate if in the minor leagues at the time of termination. *Id.*

¹⁸³ 1991 Basic Agreement, Attachment 10.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* The Rule 5 draft is held annually at baseball’s Winter Meetings pursuant to Rule 5 of the Major League Rules. It allows for the selection of minor leaguers by other teams if the player is placed on a Minor League Reserve List. Major League Rule 5. In essence, for a minor leaguer to be eligible for the Rule 5 draft, the player must have played several seasons in the minor leagues and must not be on a major league roster. *See id.*; Kary Booher, *Explaining the Rule 5 Draft*, BASEBALL AMERICA, Nov. 20, 2008, available at <http://www.baseballamerica.com/today/majors/news/2008/267230.html>; *infra* Part II.A.viii. Consequently, only a portion of minor leaguers were eligible for the expansion draft, as only those players who had played in the minors for several years and were subject to the Rule 5 draft were also subject to the expansion draft.

When expansion actually occurred,¹⁸⁶ this provision greatly affected minor league players, as it placed severe limitations on player mobility for minor league players hoping to be chosen in the expansion draft. It clearly allowed for highly talented minor league players to be protected from the expansion draft by allowing teams to place minor leaguers on their list of fifteen protected players. It also placed a severe limitation on eligibility for the draft by only allowing those players eligible for the Rule 5 draft to be eligible for the expansion draft. Therefore, the pool of eligible minor leaguers was confined without any input from minor leaguers during negotiations. Since a player chosen in the draft would be required to be placed on the expansion club's major league roster,¹⁸⁷ this represented a significant limitation on player mobility and cost minor leaguers potential opportunities and potential monetary gains.

vi. The 1994–1995 Strike

While the 1981 season had been salvaged despite a mid-season strike, 1994 would prove different. The 1990 Basic Agreement expired in 1993, and, after negotiations failed, the parties entered the 1994 season operating under the key terms of the old agreement, as required by law.¹⁸⁸ Neither side made concessions, and the players set a strike deadline for August 12, 1994.¹⁸⁹ On August 1, the owners responded by failing to make a \$7.8

¹⁸⁶ MLB added two teams, the Florida Marlins and Colorado Rockies in 1993, and an expansion draft was held on November 17, 1992. Murray Chass, *Baseball; Rockies and Marlins Dive Into a 26-Team Pool*, N.Y. TIMES, Nov. 17, 1992, at B17. MLB next added the Arizona Diamondbacks and Tampa Bay Devil Rays in 1998, with the expansion draft held November 18, 1997. Murray Chass, *Baseball Sets Expansion Draft*, N.Y. TIMES, Aug. 16, 1997, at 31.

¹⁸⁷ 1991 Basic Agreement, Attachment 10. Specifically, if a minor leaguer were selected, the Attachment required the assignor club to assign the minor league contract "to the Major League Club, which shall then assign the contract to the Expansion Club." *Id.* To add insult to the injury, the Attachment required "[t]he names of all players on the withdrawn lists are to be considered privileged material, and shall not be divulged. . . at any time before or after the meeting." *Id.* Not only was player mobility severely limited for minor leaguers, but the constraint on a player's mobility was to remain a secret. A talented minor leaguer might be at home, waiting to learn that he had been selected by an expansion club, yet, unbeknownst to him, they were not even eligible for the expansion draft since his name had been placed on a secret list of withdrawn players.

¹⁸⁸ Moorad, *supra* note 94, at 76.

¹⁸⁹ *Id.* at 77. Like previous years, owners claimed they were losing money, and they called for a salary cap and an end to arbitration to remedy the situation. *Id.* at

million deposit into the players' pension and benefit fund as required under the previous Basic Agreement.¹⁹⁰ With both sides incensed, a strike ensued.¹⁹¹ For the first time since 1904, there would be no World Series.¹⁹²

The prolonged strike directly affected minor league players, as owners made plans to enter the 1995 season with replacement players.¹⁹³ As spring approached, all players on MLB rosters refused to report to spring camps.¹⁹⁴ When the union also asked agents to advise minor leaguers to not report,¹⁹⁵ Gene Orza, MLBPA's associate general counsel, made a remarkable claim about the best player in baseball: "Dave Winfield isn't doing this for himself. He has nothing to gain from it. He's doing it for the players who are in the minor leagues now."¹⁹⁶ Yet the owners' plan for replacement players offered a salary of \$115,000 for most players.¹⁹⁷ For many minor leaguers, this incentive—and the chance to fulfill a lifelong dream even in a tarnished fashion—proved too tempting.¹⁹⁸ Many signed up to play.¹⁹⁹

76–77. The players rejected these plans and instead desired more favorable arbitration and free agency terms. *Id.* at 77.

¹⁹⁰ *Id.* at 77.

¹⁹¹ *Id.*

¹⁹² Jack Curry, *Lost Games, Lost Dreams*, N.Y. TIMES, Aug. 26, 2002, at D1.

¹⁹³ Murray Chass, *Teams and Players Escalate Labor War*, N.Y. TIMES, Jan. 14, 1995, at 31.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* Three players would be permitted salaries of \$275,000. *Id.*

¹⁹⁸ See generally Murray Chass, *Who's on First? In '95, It Could Be Anybody*, N.Y. TIMES, Jan. 22, 1995, at 1 (describing teams' search for replacement players and players agreeing to be replacement players).

¹⁹⁹ For a full list of replacement players reaching the major leagues and the names used as replacement players, see *Replacement Players*, BASEBALL ALMANAC, http://www.baseball-almanac.com/legendary/replacement_players.shtml (last visited Nov. 5, 2012). In addition to the monetary incentive, some teams threatened to fire minor leaguers if they refused to be replacement players. Rick Reed, who pitched for the Reds' Triple-A affiliate in 1994, was told by the Reds to cross the line or he'd be fired and blackballed. Tim Kurkjian, *The Replacements*, ESPN THE MAGAZINE, Aug. 29, 2002, available at http://espn.go.com/magazine/kurkjian_20020829.html. In need of money to pay for a sick mother's medical bills, he agreed. *Id.* A lower level player, Shane Spencer, just wanted to secure a job in the minor leagues, but he was told that if he did not play in a replacement game he would be released. *Id.*

As spring training began with replacement players, the MLBPA filed a complaint with the National Labor Relations Board (NLRB).²⁰⁰ Earlier in the winter, the owners had declared an impasse and unilaterally implemented their last good faith offer in negotiations.²⁰¹ These provisions included salary cap provisions and the elimination of salary arbitration and anti-collusion provisions.²⁰² The union, however, contended that an impasse had not been reached and sought an injunction to enjoin the owners' unilateral actions.²⁰³

The NLRB agreed that there was reason to believe owners had violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by unilaterally implementing terms before an impasse had been reached,²⁰⁴ and the owners went to federal court.²⁰⁵ In a March 31, 1995 decision, then-Judge Sotomayor found the NLRB had reasonable cause for believing the owners had not negotiated in good faith in violation of the NLRA, and she issued the injunction.²⁰⁶ The owners appealed, but the Second Circuit upheld the findings.²⁰⁷ With the injunction in hand, the players called an end to the longest work stoppage in professional sports history.²⁰⁸

When the strike ended, the replacement minor leaguers were no longer needed.²⁰⁹ For those players who acquiesced to the pressure to play during spring training, however, the strike would have longstanding effects, as

²⁰⁰ Moorad, *supra* note 92, at 80.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 80–81.

²⁰⁴ See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 250 (S.D. N.Y. 1995). The MLBPA claimed the unilateral implementation resulted in a failure to bargain in good faith. *Id.* at 253.

²⁰⁵ *Id.* An injunction may be issued under section 10(j) of the NLRA. Judge Sotomayor stated that, due to the public attention the strike had garnered, the “strike has placed the entire concept of collective bargaining on trial.” *Id.* at 259.

²⁰⁶ *Id.* at 261.

²⁰⁷ *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995).

²⁰⁸ Murray Chass, *Backed By Court, Baseball Players Call Strike Over*, N.Y. TIMES, April 1, 1995, at 1.

²⁰⁹ Most were given severance pay in the order of \$2000 to \$5000 per player, though the St. Louis Cardinals gave each replacement player \$25,000. *Replacement Players*, BASEBALL ALMANAC, *supra* note 199. The Montreal Expos, on the other hand, only gave each player a signed jersey. *Id.* Not to be outdone, the Philadelphia Phillies gave not only a jersey but also a baseball—signed by the team of replacements. *Id.*

many would be branded by teammates for their entire careers.²¹⁰ The MLBPA also punished the replacement players. It became the policy of the MLBPA that once a former replacement player later earned a spot on a 40-man roster, he would not be part of the union.²¹¹ The list of players included prominent players such as Cory Lidle, Benny Agbayani, and Kevin Millar.²¹² No matter their performance and no matter the length of their career, they would not be allowed to vote on union matters and would not receive licensing money from the union.²¹³

Many of these minor leaguers had been pressured with the threat of being released from the pursuit of their dream job.²¹⁴ Others had responded to the incentive of money.²¹⁵ Some merely wanted to grasp perhaps their only chance to play in the major leagues. Their decisions would haunt them for the rest of their careers.²¹⁶

vii. The 1997 Basic Agreement

Both the 1995 and 1996 seasons passed before the MLBPA and the owners forged a new agreement.²¹⁷ Finally, on December 7, 1996, the par-

²¹⁰ Kurkjian, *supra* note 199. Reed, the Triple-A player who pitched in only a few spring training games as a replacement, would be recalled by the Reds late in the 1995 season. *Id.* When one soon-to-be teammate heard the news, the player stood up in the clubhouse and screamed “he would never be a teammate with a ‘scab.’” *Id.* Similarly, Spencer, the Class A player, received just two spring training at-bats as a replacement player, yet this too was enough to brand him as a scab. *Id.*

²¹¹ *Id.* However, former replacement players would be represented by the union on arbitration matters and grievances and would receive pension benefits. *Id.*

²¹² *Id.* As of 2002, the full list of replacement players on 40-man rosters included Benny Agbayani, Brian Daubach, Brendan Donnelly, Angel Echeverria, Charles Gipson, Matt Herges, Cory Lidle, Kerry Ligtenberg, Ron Mahay, Tom Martin, Walt McKeel, Frank Menechino, Lou Merloni, Kevin Millar, Damian Miller, Eddie Oropeso, Keith Osik, Rick Reed, Chuck Smith, Shane Spencer, Pedro Swann, Jeff Tam, Brian Tollberg, Chris Truby, and Jamie Walker. *Id.* For a more thorough list of all replacement players reaching the major leagues, see *Replacement Players*, *BASEBALL ALMANAC*, *supra* note 199.

²¹³ Kurkjian, *supra* note 199.

²¹⁴ See generally Chass, *supra* note 198.

²¹⁵ *Id.*

²¹⁶ Will Leitch, *The Great Near Fakeout of 1995*, *THE SPORTING NEWS*, Feb. 15, 2010. Millar’s teammate Johnny Damon lobbied for his inclusion in the union after they won the World Series together, but the request was denied. *Id.*

²¹⁷ See Moorad, *supra* note 94, at 83.

ties agreed to the 1997 Basic Agreement.²¹⁸ The Agreement largely resembled previous agreements in terms of scheduling,²¹⁹ grievances, and salaries, although it did increase the major league minimum salary to \$200,000 by the 1999 season.²²⁰ Pertaining to minor leaguers, the Agreement retained the protections put in place in 1990 for split contracts and included a minimum salary for minor league service under split contracts of \$37,000.²²¹ It also retained severance pay requirements for minor leaguers playing under split contracts.²²²

Article XXVIII of the Agreement perhaps had the largest effect on minor leaguers. This clause stated that “[t]he Clubs and the Association will jointly request and cooperate in lobbying Congress to pass a law that will clarify that *Major League Baseball Players* are covered under the antitrust laws”²²³ In fact, Congress passed a bill that would only apply the antitrust laws to major league players.²²⁴

viii. The 2003 Basic Agreement

Following the 2001 season, Commissioner Bud Selig announced that baseball would be contracting two teams.²²⁵ This would have eliminated many major league jobs, and the union resisted the move.²²⁶ Of course, any contraction of major league teams would have a great impact on minor league jobs as well, as the closing of two major league teams would mean

²¹⁸ 1997 Basic Agreement.

²¹⁹ One major change in scheduling instituted interleague play. *Id.* at Attachment 2.

²²⁰ *Id.* at art. VI, § (B)(1). In addition to the change in minimum salaries, the biggest change came in the form of revenue sharing between teams and a competitive balance tax levied against the five richest teams. *Id.* at art. XXIII, § (B)(3)(4).

²²¹ *Id.* at art. VI, § (B)(2)(ii)-(iii). Split contracts are defined in the Agreement as a contract “which sets out separate rates of pay for service with a minor league club and service with a Major League Club.” *Id.* at art. XXIII, § (A)(3).

²²² *Id.* at art. IX, § (D).

²²³ *Id.* at art. XXVIII (emphasis added).

²²⁴ See discussion *infra* Part III.B.

²²⁵ Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball's Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L.J. 49, 49 (2003).

²²⁶ Michael O’Keeffe, *Lawyer: MLB Woes Union’s Fault*, NY DAILY NEWS, Feb. 14, 2002, available at http://articles.nydailynews.com/2002-02-14/sports/18192295_1_union-chief-donald-fehr-major-league-baseball-labor-contract.

the closing of twelve to fourteen minor league teams.²²⁷ While fifty major league jobs were at stake, hundreds of minor league jobs were at stake. Selig eventually tabled his plan, and the two sides resumed their bargaining towards a new agreement.²²⁸

On September 30, 2002, the parties agreed to the 2003 Basic Agreement.²²⁹ The Agreement put aside contraction for the length of the Agreement, but allowed MLB to unilaterally contract two teams in 2007 so long as they gave notice by July 1, 2006.²³⁰ The decision likely saved hundreds of minor league jobs.

Other provisions also affected minor leaguers.²³¹ For example, the parties contemplated a worldwide draft.²³² Although it never materialized, a worldwide draft would have greatly affected amateur Latin American players, as the bargaining limitations imposed by a draft would have artificially constrained signing bonuses.²³³ Since amateur Latinos immediately become minor leaguers, any effort to suppress signing bonuses of Latinos would

²²⁷ See, e.g., Brand & Giorgione, *supra* note 225, at 63–64 (discussing how the contraction of the Montreal Expos would lead to the end of the Harrisburg Senators, the Expos' Double-A affiliate).

²²⁸ See O'Keeffe, *supra* note 226.

²²⁹ 2003 Basic Agreement.

²³⁰ *Id.* at art. XV, § (H)(1)(a).

²³¹ The previous provisions relating to split contracts were left intact. *Id.* at art. IX, § (D). The parties also agreed for the first time to institute steroid testing. *Id.* at Attachment 18. The policy called for random steroid testing of all players on 40-man rosters in 2003, though players would not be penalized for testing positive. *Id.* If more than 5% of players tested positive for performance enhancers, a testing system with penalties would be implemented in 2004. *Id.* Unlike the minor league testing, players would be tested for drugs of abuse only if there was "reasonable cause" to suspect abuse. *Id.* MLB had already unilaterally instituted a drug testing program in the minor leagues in 2001. *Drug Policy in Baseball: Event Timeline*, MLB.COM, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Nov. 8, 2012).

²³² 2003 Basic Agreement, Attachment 24. Attachment 24 stated the parties "agreed that the First-Year Player Draft should be expanded to cover all players who are first entering Major League or Minor League baseball, regardless of a player's residence." *Id.* However, the matter was tabled due to insufficient time for deliberation and negotiation. *Id.* The parties agreed to form a committee to address the issue. *Id.*

²³³ As of 2012, a worldwide draft had not been instituted, though Commissioner Selig maintained in early 2012 that it was "inevitable." Josh Leventhal, *Selig Calls International Draft 'Inevitable'*, BASEBALL AMERICA, Feb. 23, 2012, available at <http://www.baseballamerica.com/today/majors/news/2012/2613020.html>. The current rules permit the signing of Latinos at the age of 16, without being subjected to the

limit the amount of money on which minor leaguers have to live. In bargaining over matters related to the draft, the parties continued a tradition beginning with the 1976 Basic Agreement. This tradition would set the stage for the negative implications for minor leaguers that would result from the next two CBAs.

ix. The 2007 Basic Agreement

Negotiations for the 2007 Basic Agreement made extensive changes to both the Rule 4 amateur draft and the Rule 5 draft. Interestingly, most of these changes are not found within the four corners of the Agreement, though the parties bargained over the changes.²³⁴

The Rule 4 modifications lessened amateur draftees' leverage in negotiating initial contract terms. First, a signing period deadline for draftees was set at August 15.²³⁵ This shortened the signing period and eliminated "draft-and-follow" draftees.²³⁶ Second, the parties agreed that if a team failed to sign a first-round pick, it would be compensated with a virtually identical pick in the following year's draft.²³⁷ As one club official stated, the goal was to get teams "as much leverage that they can have."²³⁸ Of course, the increased leverage for clubs signified a relative decrease in leverage for players, which, for players, would have a deleterious effect on signing bonuses. Even MLBPA executive director Donald Fehr conceded that "[i]t will clearly have an effect," but "[y]ou have to find compromises."²³⁹

draft. *Id.* The free market competition for players has resulted in an escalation of signing bonuses. *See Id.*

²³⁴ *See* Alan Schwarz, *New Agreement Includes Draft, Rule 5 Changes*, *BASEBALL AMERICA*, Oct. 25, 2006, available at <http://www.baseballamerica.com/today/draft/news/2007/262720.html>.

²³⁵ *Id.*

²³⁶ *Id.* With a "draft-and-follow" player, a club selected a player in the draft, failed to sign the player during the summer of the same draft, and then followed the player as he played for either a community college or independent team. The club retained the rights to the player and then determined whether the player's performance during the "follow" period merited the desired signing bonus. If the player and club failed to reach an agreement prior to the following draft, the player re-entered the draft process. *See* Jonathan Mayo, *Draft-and-Follow Era Comes to an End*, *MLB.COM* (May 31, 2007), http://mlb.mlb.com/news/article.jsp?ymd=20070531&content_id=1997066&vkey=draft2007&fext=.jsp. Since the new CBA set a deadline for signing picks, it ended the draft and follow era. *Id.*

²³⁷ *See* Schwarz, *supra* note 234.

²³⁸ *Id.*

²³⁹ *Id.*

If these changes had an indirect negative effect on minor leaguers by suppressing signing bonuses, the changes to the Rule 5 draft had a direct negative effect on minor leaguers. Shockingly, the parties agreed to push back the eligibility requirements for the Rule 5 draft by an entire year.²⁴⁰ Previously, players signed after the age of nineteen were eligible for the Rule 5 draft after three years of minor league service, and players signed before the age of nineteen were eligible after four years.²⁴¹ Once eligible, teams were forced either to protect the players on the major league 40-man roster or to risk losing the players to the Rule 5 draft. After the changes, however, players were not eligible until after either four or five years of minor league service (depending on their age at signing).²⁴² Perhaps most surprising, the change took effect immediately.²⁴³

The Rule 5 draft represents one of the only avenues for player mobility in minor league baseball. To illustrate the significance of the change, it might be best to use an example. Mark Alexander, one of my best friends in baseball, was drafted by the Los Angeles Dodgers in the twentieth round of the 2004 draft.²⁴⁴ Drafted in the middle rounds as a college senior, he received a miniscule signing bonus. Despite his draft position, Alexander enjoyed much success during his early minor league career.²⁴⁵ He posted an incredible 0.96 ERA in forty-seven innings in 2006, spending most of the season at the Dodgers' Double-A affiliate in Jacksonville, Florida.²⁴⁶ Serving as the closer, he also saved twenty-six games and struck out seventy-two

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Alexander Joins List of Tiger Draftees*, MUTIGERS.COM (June 8, 2004), <http://www.mutigers.com/sports/m-basebl/spec-rel/060804aad.html> (last visited Nov. 8, 2012).

²⁴⁵ See Mark Alexander, THE BASEBALL CUBE, <http://www.thebaseballcube.com/players/profile.asp?P=Mark-Alexander> (last visited Nov. 9, 2012). In his first two seasons, the reliever had win-loss records of 4-1 and 5-4 respectively and posted ERAs of 2.65 and 3.03 respectively. *Id.* Additionally, he saved twenty-three games while pitching at the advanced Class-A level in 2005, and he struck out ninety-one batters in only sixty-five innings of work. *Id.*

²⁴⁶ *Id.* He did not allow a single run between May 21 and September 1. Houston Mitchell, *Dodgers' Players of the Year*, L.A. TIMES, Oct. 1, 2006.

batters.²⁴⁷ The effort led to a well-deserved promotion, and Alexander spent the last month in Triple-A Las Vegas.²⁴⁸

The awards rolled in for Alexander, as he was named the Los Angeles Dodgers' Branch Rickey Minor League Pitcher of the Year.²⁴⁹ Since 2006 had been Alexander's third season in the minors, he was eligible for the Rule 5 draft. The Dodgers would most likely have protected him on their 40-man roster. If not protected, he hoped to be acquired in the Rule 5 draft by another team, which would ensure placement on their active 25-man major league roster.²⁵⁰ In either case, the future looked bright for Alexander.

At the end of October, a little over a month before the Rule 5 draft, Alexander learned of the changes to the Rule 5 draft. These changes meant that he would not be eligible for the Rule 5 draft for another year. The Dodgers would not be forced to make a decision on Alexander. He would remain an ordinary minor leaguer, and he would never reach the major leagues.²⁵¹

Though it is difficult to ascertain the full effect, the change in the Rule 5 draft at the least cost Alexander monetarily, as his salary would have been several times higher on a major league roster.²⁵² Also, a new team or the confidence of being placed on a major league roster might have enabled him to continue his success. While Alexander represents a more extreme example, the rule no doubt affected many other minor leaguers as well.²⁵³ Additionally, since the rule is still in place, the change continues to affect the mobility of minor leaguers for the foreseeable future.

²⁴⁷ Mark Alexander, *supra* note 245.

²⁴⁸ *Id.* In the hitter friendly park, his numbers dipped slightly, but he still posted a respectable 3.14 ERA. *See id.*

²⁴⁹ Mitchell, *supra* note 246; Crystal Fukumoto, *James Loney & Mark Alexander Selected As Dodgers' 2006 Branch Rickey Minor Leaguers of Year*, MILB.COM (Sep. 25, 2006), http://www.milb.com/gen/articles/printer_friendly/clubs/t400/press/y2006/m09/d25/c134681.jsp (last visited Nov. 9, 2012).

²⁵⁰ For an explanation of the Rule 5 draft, *see* Booher, *supra* note 185. If the team took him off the active 25-man roster, it would be forced to offer him back to the Dodgers. *Id.*

²⁵¹ *See* Mark Alexander, *supra* note 245. For whatever reason, Alexander never again found the magic that he displayed in 2006. He would never reach the major leagues or even be placed on the 40-man roster.

²⁵² Moreover, placement on the 40-man roster would have garnered him union protection and he would have enjoyed all the union benefits such as health care and pension benefits.

²⁵³ After all, there is not only a major league phase to the Rule 5 draft but also a minor league phase. *See* Booher, *supra* note 185.

In return for the change in the Rule 5 draft rules, the union secured higher salaries for players on major league 40-man rosters.²⁵⁴ One player representative, Craig Counsell of the Arizona Diamondbacks, acknowledged that “[s]ome players, especially immediately, are going to be hurt by that—this year. But in the end, you have to give up something to get something.”²⁵⁵ Indeed, the union had merely given up a bargaining chip primarily affecting minor leaguers, and, in return, they had secured something directly benefiting their unit.

x. The 2012 Basic Agreement

The recently finalized 2012 Basic Agreement will once again have a significant effect on minor leaguers due to significant changes in the Rule 4 draft and changes to contract rules. In the years leading up to negotiations, MLB pushed for greater regulations on amateur signing bonuses.²⁵⁶ The union provided some resistance to MLB—preventing them from making all the changes they desired—but considerable changes still occurred.

For minor leaguers, aggregate signing bonus pools represent the most offensive aspect of the new draft regulations. As the Summary of the 2011 Labor Agreement states,

Each Club will be assigned an aggregate Signing Bonus Pool prior to each draft. For the purpose of calculating the Signing Bonus Pools, each pick in the first 10 rounds of the draft has been assigned a value A Club’s Signing Bonus Pool equals the sum of the values of that Club’s selection in the first 10 rounds of the draft. Players selected after the 10th round do not count against a Club’s Signing Bonus Pool if they receive bonuses up to \$100,000. Any amounts paid in excess of \$100,000 will count against the Pool.²⁵⁷

²⁵⁴ Schwarz, *supra* note 234.

²⁵⁵ *Id.*

²⁵⁶ For a discussion on amateur signing bonuses and MLB’s desire to regulate them, see Jim Callis, *MLB’s Amateur Attitude is Baffling*, BASEBALL AMERICA, July 13, 2011, available at <http://www.baseballamerica.com/online/prospects/column/2011/2612097.html>.

²⁵⁷ *Summary of the 2011 Labor Agreement*, *supra* note 163. Curiously, the finalized version of the 2012-2016 Basic Agreement does not actually incorporate this language within the four corners of the document, although the negotiated system clearly remains in place for the Rule 4 draft. See generally 2011 Basic Agreement. In fact, the 2012 Rule 4 draft operated under the system agreed upon during the negotiations for the 2012 Agreement. See Ronald Blum, *Spending Drops 11 Pct in MLB Draft*, SAN FRANCISCO CHRON., July 18, 2012; Bill Brink, *MLB Draft: Record Signing Bonuses a Thing of the Past*, PITTSBURGH POST-GAZETTE, June 3, 2012.

The Agreement also institutes sharp penalties for exceeding bonus pools. For instance, if a team merely exceeds its bonus pool by five to ten percent, it will be taxed at a seventy-five percent rate on the overage *and lose a first round pick* in the following draft.²⁵⁸ Indeed, the new policy had an immediate effect, as spending on signing bonuses in the 2012 Rule 4 draft decreased by eleven percent compared to the 2011 Rule 4 draft.²⁵⁹ Super agent Scott Boras claimed that the new system prevented teams from spending “what was needed to sign the best player.”²⁶⁰ Instead, teams “had to make alternate choices.”²⁶¹

Restrictions were also placed on international amateur negotiations. International amateurs have formerly enjoyed the benefit of bargaining freely since they are not subject to the Rule 4 draft.²⁶² Beginning in 2012, however, “each Club will be allocated an equal Signing Bonus Pool” for international draftees.²⁶³ The penalties instituted for exceeding the international pools will be similar to the penalties discussed above.²⁶⁴

Both of these changes significantly affect minor leaguers. Players will still be able to negotiate individual signing bonuses under the new rules, but they will do so within the confines of a box with few holes. Although a full discussion is beyond the scope of this article, the bargaining power of many amateurs is already significantly limited since the Rule 4 draft limits a player’s negotiations to a single team instead of the open market, and since NCAA rules prohibit the open use of agents to assist in negotiations.²⁶⁵

²⁵⁸ *Id.*

²⁵⁹ Blum, *supra* note 257.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Summary of the 2011 Labor Agreement*, *supra* note 163; 2012-2016 Basic Agreement, Attachment 46.

²⁶³ *Summary of the 2011 Labor Agreement*, *supra* note 163. Each signing period following 2012 will allocate a pool “based on reverse order of winning percentage the prior championship season.” *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Masteralexis, *supra* note 21, at 588–89; Jeff Reese, *MLB Draft and International Free Agency Reformation*, MLB BONUS BABY (Nov. 22, 2011, 4:03 pm), <http://www.mlbbonusbaby.com/2011/11/22/2580154/mlb-draft-reformation> (“The entire concept of a draft . . . is . . . a cartel by the owners of 30 organizations to restrict the income of the incoming players”). While the highest drafted players still retain some leverage within the draft system due to their immense talent and threat to either go or return to college, most players possess far less leverage. See, e.g., Masteralexis, *supra* note 21, at 588–89. Even for the most highly talented players though, the draft still artificially reduces signing bonus levels since the players do not bargain within a free market system but can instead only bargain with a single team.

Moreover, due to the length of minor league contracts and the lack of player mobility, the ability to negotiate the first contract for many players represents the only opportunity to ever bargain over an entire career.²⁶⁶ After all, most minor leaguers never reach major league free agency or even minor league free agency.²⁶⁷ Diluting amateur bargaining power strips future minor leaguers of one of the only checks on the nearly limitless power of the MLB cartel.²⁶⁸

The bargaining process also resulted in changes to contract rules for amateurs. Buried in the Summary is a single sentence stating “[d]rafted players may only sign Minor League contracts.”²⁶⁹ While a rare occurrence, highly talented amateurs in the past have been able to negotiate a major league contract instead of a minor league contract upon being drafted.²⁷⁰ The new Agreement now prohibits this type of contracting.

Like in 2007, the union traded these bargaining chips in order to secure benefits for the players they represent. Specifically, the Agreement increases minimum major league salaries to \$500,000 by 2014.²⁷¹ Moreover,

See Broshuis, *supra* note 20 (describing MLB’s efforts to suppress signing bonuses and the occurrence in 1996 of four minor leaguers using a loophole in the draft process to bypass the draft, resulting in significantly higher signing bonuses through free agency).

²⁶⁶ *See* Garrett Broshuis, *Voiceless: The CBA’s negative impact on minor leaguers*, LIFE IN THE MINORS (Dec. 3, 2011), <http://minorleaguelife.blogspot.com/2011/12/voiceless-cbas-negative-impact-on-minor.html>; *see also* WOLLETT, *supra* note 20, at 105–06 (stating that the length of minor leaguer contracts cause them to give up their freedom of contract since most minor leaguers never reach the major leagues, and even those who reach the majors often fail to reach salary arbitration).

²⁶⁷ *Cf.* Marty Dobrow, *MLB Draft Can Be Risky Business*, ESPNBOSTON.COM (June 6, 2011), <http://sports.espn.go.com/boston/columns/story?id=6628930> (discussing the difficulties of even making the major leagues—much less reaching free agency—for draft picks).

²⁶⁸ *See* Reese, *supra* note 265.

²⁶⁹ *Summary of 2011 Labor Agreement*, *supra* note 163, at 4.

²⁷⁰ *See* Reese, *supra* note 265; *see also* Nats, *Strasburg Beat Deadline*, ESPN.COM (Aug. 18, 2009), <http://sports.espn.go.com/mlb/news/story?id=4403920> (discussing the record major league contract signed by Stephen Strasburg and other major league contracts signed by talented draftees). These players enter the minor leagues like all other amateur signees, but they enjoy the benefits of being in the union and on the 40-man roster: a significantly higher salary than their colleagues, astonishingly better benefits, and access to a grievance process. Also, being on the 40-man roster at this stage of their career places them on a more aggressive development path. *See* Reese, *supra* note 265.

²⁷¹ *See Summary of 2011 Labor Agreement*, *supra* note 163, at 4. The head of the union, Michael Weiner denied the tradeoff, saying, “The way we view the econom-

the tax derived from teams exceeding bonus pools will be distributed amongst teams not exceeding their bonus pools.²⁷² This money will not be allotted for spending on amateurs or minor leaguers, but will be spent on major league salaries. After all, any effort to suppress signing bonuses will result in a greater operating budget for clubs, and the most pressing and competitive expense for clubs comes in the form of major league salaries.²⁷³

B. Minor Leaguers Are Left Behind: A Summary and a Comparison

As demonstrated, collective bargaining in baseball has affected minor leaguers in numerous ways. The process began with the original 1968 Basic Agreement, which established the duty of the MLBPA to represent only major league players—not minor league players. Some subsequent negotiations did have positive effects on minor leaguers. The Agreements increased salaries for minor leaguers signing split contracts and for minor leaguers on the 40-man roster. Also, the prevention of the contraction of MLB teams following the 2001 season most likely saved hundreds of minor league jobs.

Despite these positive benefits, collective bargaining in baseball has resulted in substantially more negatives for minor leaguers, especially in recent years. The 1990 Basic Agreement restricted player mobility by severely limiting the number of minor leaguers eligible for the expansion draft. The strike of 1994 forced minor leaguers to choose between conflicting loyalties: support the union or follow their dreams and obey their employers' wishes by becoming replacements. Those who chose to follow their dreams and obey their employers would wear a scarlet letter for the rest of their career and would never be part of the union. The 2007 Basic Agreement brought forth perhaps the most egregious and immediate blow to minor leaguers, as it pushed back minor leaguers' eligibility for the Rule 5 draft. Not to be outdone, the 2012 Basic Agreement proves almost as offensive, strictly regulating amateur signing bonuses and eliminating amateurs'

ics is that what you're going to pay for a draft choice is independent of what you're going to pay for a major league player. So they never tried to justify this by saying, 'The major league guys will get more money.'" Jayson Stark, *Michael Weiner Details MLB's New CBA*, ESPN.COM (Nov. 29, 2011), http://espn.go.com/mlb/story/_/id/7293543/qa-michael-weiner (last visited Oct. 19 2012).

²⁷² *Summary of 2011 Labor Agreement*, *supra* note 163.

²⁷³ See Joe Posnanski, *When It Comes to Revenue, the Yanks Are in a League of their Own*, SPORTS ILLUSTRATED, Apr. 20, 2010, available at http://sportsillustrated.cnn.com/2010/writers/joe_posnanski/04/19/baseball.revenue/index.html. According to Posnanski, the percentage of the baseball operation's budget spent on payroll "tends to be just a touch more than half" with the Cubs spending 62.1% of their budget on payroll. *Id.*

ability to negotiate major league contracts prior to entering the minor leagues.

As discussed in the Introduction, even though the MLBPA has, at times, used issues affecting minor leaguers as bargaining chips, the MLBPA is not entirely to blame for the negative impact on minor leaguers. After all, the baseball cartel could unilaterally institute even more egregious policies if the MLBPA did not provide a check on their powers. Armed with an anti-trust exemption, the power of the owners over minor leaguers is almost limitless.²⁷⁴ Yet this behavior is not entirely excusable, as it represents a choice on the part of the major league players and the MLBPA. As Professor J. Gordon Hylton recently remarked, there is a “growing awareness on the part of established baseball players that we don’t want to make the entry-level arrangement too good, because that’s money that might be going to mid-level or low-level [major-league] players.”²⁷⁵ The choice resulting from this growing awareness is not encouraging for minor leaguers.

Collective bargaining has clearly resulted in more negatives for minor leaguers than positives, and these negatives become more apparent when minor league working conditions and wages are compared to those in the major leagues. Beginning in 1976, first-class travel and first-class meals were required for major leaguers.²⁷⁶ Recent agreements have required a single person per hotel room for major leaguers.²⁷⁷ Per diem rates for road meals are included in each Agreement, with the 2007 Basic Agreement mandating \$85.00 per day plus a cost of living adjustment.²⁷⁸ Restrictions are placed on doubleheaders and day games following night games when travel is involved.²⁷⁹

Minor leaguers, meanwhile, have made very little progress in working conditions over this time period. Instead of first-class air travel, the typical minor league trip involves a six- to eight-hour bus ride. Per diem has scarcely increased and currently stands at \$25.00 per day—much lower even

²⁷⁴ For instance, the league unilaterally imposes drug testing, HGH testing, clawbacks in contracts, worker’s compensation clauses in contracts, and changes to pension plans. *See, e.g.*, Masteralexis, *supra* note 21, at 575–76; Broshuis, *Detering Opportunism Through Clawbacks*, *supra* note 21, at 200–03.

²⁷⁵ Rothman, *supra* note 9.

²⁷⁶ 1976 Basic Agreement, art. VI § (A)(1).

²⁷⁷ *See, e.g.*, 2003 Basic Agreement, art. VII § (D); 2007 Basic Agreement, art. VII § (D).

²⁷⁸ 2007 Basic Agreement, art. VII § (B)(3).

²⁷⁹ *See, e.g.*, 2003 Basic Agreement, art. V § (C); 2007 Basic Agreement, art. V § (C).

than what amateur athletes receive on college road trips.²⁸⁰ Few restrictions exist on scheduling, and games are often played following nights spent entirely on a bus.

Minor leaguers also do not enjoy the benefit of a bargained-for grievance procedure. The recent drug testing controversy involving Ryan Braun, the 2011 National League MVP, illustrates the importance of this benefit. After Braun tested positive for a performance-enhancing drug, he appealed the result.²⁸¹ The formal procedure allowed him to argue in front of a three-person panel of arbitrators.²⁸² By a two-to-one vote, the panel decided that proper procedures had not been followed during the testing process.²⁸³ Consequently, Braun won the appeal and avoided a fifty-game suspension.²⁸⁴ On the contrary, minor leaguers do not enjoy the benefit of such a grievance procedure. If they test positive for a performance-enhancing drug, the only thing they can do is ask for the second half of the already tested sample to be tested again. There is no process in place to appeal whether or not the procedure for testing was adequately followed, and no grievance process in place to settle any disputes with their employer other than appealing to the Commissioner.²⁸⁵

A comparison of wage growth is even more alarming. As seen in Table 1, major league minimum salaries have increased exponentially since the monumental 1976 Basic Agreement. By 2010, the major league minimum had increased 2400% since 1976.²⁸⁶ Minor league salaries failed to even keep up with inflation, with the minimum—averaged across each level of the minors—scarcely budging 74% from 1976 to 2010.²⁸⁷

²⁸⁰ David Biderman, *A Minor-League Boost in Players' Meal Money*, WALL ST. J., Jan. 20, 2010; Garrett Broshuis, *Minor Leaguers Per Diem Gets A Bump*, BASEBALL AMERICA, Jan. 26, 2010, available at <http://www.baseballamerica.com/today/minors/business-beat/2010/269438.html>.

²⁸¹ Ken Belson & Michael S. Schmidt, *Star Player First To Win Appeal On a Drug Test*, N.Y. TIMES, Feb. 24, 2012, at A1.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Art. XX.B, Minor League Uniform Player Contract, Major League Rules Attachment 3 (“the sole exclusive forum available to Player and Club to resolve such dispute shall be arbitration by the Commissioner”).

²⁸⁶ The minimum salary in the 1976 Basic Agreement was \$19,000 per season. 1976 Basic Agreement, art. V § (A). The minimum salary in 2010 was \$400,000 per season. 2007 Basic Agreement, art. VI § (B)(1).

²⁸⁷ See Garrett Broshuis, *More on “Playing for Peanuts,”* LIFE IN THE MINORS (Mar. 31, 2010), <http://minorleaguelifelife.blogspot.com/2010/03/more-on-playing->

TABLE 1: MINOR LEAGUE AND MAJOR LEAGUE MINIMUM SALARIES SINCE 1976

	Major League Minimum ²⁸⁸	Minor League Average Minimum ²⁸⁹	National Median Household Income ²⁹⁰	Poverty Level for an Individual ²⁹¹
1976	\$ 16,000	\$4,375	\$11,360	\$ 2,884
2010	\$400,000	\$7,375	\$49,445	\$11,139
Percent Increase	2400%	69%	335%	286%

Nearly all stakeholders in baseball have prospered as the overall game has flourished. Major league owners and minor league owners have seen profits increase and franchise values skyrocket. Major league players have reaped many riches. Yet with lingering issues such as wages, working conditions, pension plans, and severance pay, among others, minor leaguers have not shared in this prosperity. They have been forgotten and they have been left behind.

for-pennies.html; *see also* Broshuis, *supra* note 14. Past minor league salaries are very difficult to obtain. The Hall of Fame does not have old minor league contracts in their records, and both the Office of the Commissioner of Baseball and Minor League Baseball state that they have no such records either. Numbers for 1976 were obtained by talking to ex-minor leaguers who played during this time period. The numbers they gave for this period were confirmed by multiple players, increasing their reliability.

²⁸⁸ 1976 Basic Agreement, art. V § (A); 2007 Basic Agreement, art. VI § (B)(1).

²⁸⁹ Minor league average minimums were calculated by adding the minimum salaries per month for each level, dividing them by the number of levels, and multiplying by a five-month season. This method differed slightly from the method that resulted in a 74% increase. *See* Broshuis, *supra* note 287. However, since significantly more minor leaguers play at the lower levels than the upper levels of the minors, this admittedly results in an upwardly skewed number. Also, it should again be noted that exact salaries for minor leaguers playing in past decades are difficult to obtain. *Id.*

²⁹⁰ *See Income*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/income/data/historical/household/> (follow "All Races" hyperlink under "Table H-6. Regions-by Median and Mean Income" heading) (last visited Nov. 7, 2012) (with charts detailing median household incomes from 1975 to 2011).

²⁹¹ *Table 1. Weighted Average Poverty Thresholds for Families of Specified Sizes, Historical Poverty Tables-People*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/historical/people.html> (last visited Nov. 7, 2012).

IV. POSSIBLE SOLUTIONS

Previous sections of this Article described organized baseball's continuous exploitation of minor league players. Such exploitation should no longer be permitted. Whether by appealing to the NLRB, lobbying Congress, or unionizing the workforce, a solution must be sought. However, a solution will not be easy, as numerous obstacles will be encountered.

A. *Alleging an Unfair Labor Practice*

While minor leaguers might attempt to allege an unfair labor practice, such an effort will likely not offer a viable solution since neither MLB nor the MLBPA have committed unfair labor practices in violation of the NLRA. First, it might be argued that by bargaining over matters relating to minor leaguers, MLB is recognizing a union that does not represent minor leaguers. Section 9(a) of the NLRA guarantees employees freedom of choice in selecting a bargaining representative.²⁹² However, this section applies to "representatives designated or selected" for a bargaining unit, which typically involves recognition of a union.²⁹³ Here, MLB has not recognized the MLBPA as the bargaining representative of minor leaguers, as every Basic Agreement since 1970 states that the union is "the sole and exclusive collective bargaining agent for all Major League Players"²⁹⁴—not minor league players. With no recognition occurring, MLB has not "designated or selected" the MLBPA as the bargaining agent for minor leaguers, so no violation has occurred.

Section 8(a)(2) of the NLRA also makes it an unfair labor practice to dominate or interfere with the formation of a labor organization.²⁹⁵ It might be argued that MLB, by bargaining with the MLBPA over matters affecting minor leaguers, makes it less likely that minor leaguers will unionize since they are already represented on some matters. However, cases implicating 8(a)(2) typically involve a company independently initiating or organizing a representative for its employees.²⁹⁶ Here, no such initiation has occurred, as MLB is not encouraging the MLBPA to represent minor leaguers.

²⁹² National Labor Relations Act, 29 U.S.C. § 159; *Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 737 (1961) (*Bernhard-Altman*).

²⁹³ See *Bernhard-Altman*, 366 U.S. at 737.

²⁹⁴ E.g., 1970 Basic Agreement, art. II; 2007 Basic Agreement, art. II.

²⁹⁵ 29 U.S.C. § 158 (2012).

²⁹⁶ See, e.g., *NLRB v. Post Pub. Co.*, 311 F.2d 565 (7th Cir. 1962); *NLRB v. Pepsi Cola Bottling Co.*, 454 F.2d 5 (6th Cir. 1972).

Ultimately, it is probable that neither party has violated any section of the NLRA. After all, nearly all the aspects of bargaining that have affected minor leaguers also affect major leaguers in some way. For instance, the changes to the Rule 5 draft instituted in the winter of 2006 impacted minor leaguers, but players selected in the Rule 5 draft are immediately placed on 40-man major league rosters. Consequently, this rule change had a tangential affect on major leaguers. Similarly, the Rule 4 draft, although further removed from major leaguers than the Rule 5 draft, also affects major leaguers. The early agreements established a precedent of bargaining over the draft because draft selections are awarded as compensation to teams losing high-level major league free agents. Consequently, changes in the draft also affect changes to major league free agency.

In the end, these aspects of bargaining would be deemed permissive subjects of bargaining. Section 8(d) of the NLRA requires subjects relating to “wages, hours, and other conditions of employment” to be mandatory bargaining subjects, but subjects outside of 8(d) are permissive.²⁹⁷ As the District of Columbia Circuit has stated, “[p]ermissive subjects fall outside the scope of Section 8(d), but may nevertheless touch and concern the relationship of the employer to the union or to the employees the union represents.”²⁹⁸ Importantly, permissive subjects of bargaining cannot be insisted upon until impasse, as only mandatory subjects of bargaining can be insisted upon until impasse.²⁹⁹ For baseball, courts have found mandatory subjects to include free agency, the reserve system, and salary arbitration.³⁰⁰ The bargaining done relating to minor leaguers would not be considered mandatory, but it permissively “touch[es] and concern[s] the relationship of” MLB to the players. Consequently, this permissive bargaining does not constitute an unfair labor practice, especially in light of the fact that collective bargaining often has spillover effects on non-unionized workers.³⁰¹

²⁹⁷ 29 U.S.C. § 158 (2012).

²⁹⁸ *The Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988).

²⁹⁹ *Id.*

³⁰⁰ *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1061–62 (2d Cir. 1995).

³⁰¹ *Cf. ANTONI ZABALZA ET AL., THE ECONOMICS OF TEACHER SUPPLY* 216 (1979) (describing spillover effects of collective bargaining on non-unionized teachers).

B. Ask for Help from Congress

Since no unfair labor practice has taken place, minor leaguers might appeal to Congress for relief from the antitrust exemption. However, this is neither likely to occur nor is it optimal.

The Supreme Court has repeatedly recognized that Congress has the power to eliminate baseball's antitrust exemption.³⁰² If the exemption were overturned, both the Rule 4 draft and the minor league reserve clause could be challenged under Section 1 of the Sherman Act as illegal restraints of trade.³⁰³ Section 1 prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce."³⁰⁴ The Supreme Court narrowed this broad language, which seemingly encompasses every commercial endeavor, in *Standard Oil Co. of New Jersey v. United States*.³⁰⁵ But even under this more narrow analysis, the draft and certainly the reserve clause could be struck down.³⁰⁶

The effect would immediately increase competition for minor league players' services. Instead of forcing players to bargain with only a single team after being drafted, players would freely bargain with all teams on the open market.³⁰⁷ In the absence of a reserve clause and uniform minor league player contracts, player mobility would accelerate, as the length of contracts would decrease.

³⁰² See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); *United States v. Shubert*, 348 U.S. 222, 229 (1955).

³⁰³ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (finding the NFL draft to be an illegal restraint on trade); see also *Brand & Giorgione*, *supra* note 225, at 51–52 (discussing how the draft and reserve clause would be challenged if the antitrust exemption were lifted).

³⁰⁴ Sherman Act, 15 U.S.C. § 1 (2012).

³⁰⁵ 221 U.S. 1 (1911). The narrower "rule of reason" analysis allows courts to engage in a balancing test. If the analysis demonstrates the restraint has a legitimate business purpose that serves to promote competition, "the 'anticompetitive evils. . . must be carefully balanced against its 'procompetitive virtues'" to see if the restraint impedes competition. *Smith*, 593 F.2d at 1183.

³⁰⁶ See *id.* at 1183–84; see also Michael Jay Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489, 515 (1974) ("The so-called 'reserve clause' . . . has been held to perpetually operate to remove from a player his free choice of teams, thereby having a restraining effect . . . [w]hether the player was initially cultivated through the 'farm system' of league-affiliated minor teams, or 'drafted' . . ."). Importantly, the nonstatutory labor exemption that serves to promote collective bargaining would also not apply since minor leaguers would not have a union. *Brand & Giorgione*, *supra* note 225, at 53.

³⁰⁷ Reese, *supra* note 265.

However, Congress has already passed a bill relating to baseball's anti-trust exemption in the form of the Curt Flood Act of 1998,³⁰⁸ and, due to lobbying by the minor league industry, it does not apply to minor leaguers.³⁰⁹ The Act states that the antitrust laws are to apply to matters "directly relating to or affecting employment of major league baseball players."³¹⁰ Subsection (b) of the Act expressly states the Act does not apply to "any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of . . . baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players."³¹¹

Prior to the passage of the Curt Flood Act, former minor leaguer Dan Peltier testified that he had "no idea how some of [his] friends who were married and had kids were able to make ends meet," and that owners should not be given a "legal blank check."³¹² Despite Peltier's poignant testimony, the minor leagues remained exempt from antitrust laws.

³⁰⁸ 15 U.S.C. § 26b (2012).

³⁰⁹ Wolohan, *supra* note 119, at 368; Edmund P. Edmonds, *The Curt Flood Act of 1998: A Congressional Response to Baseball's Antitrust Exemption*, in *BASEBALL AND ANTITRUST: THE LEGISLATIVE HISTORY OF THE CURT FLOOD ACT OF 1998* PUBLIC LAW NO. 105-297, 112 STAT. 2824 1, 5 (Edmund P. Edmonds & William H. Manz eds. 2001).

³¹⁰ Wolohan, *supra* note 119, at 368.

³¹¹ 15 U.S.C. § 26b (2012).

³¹² *Testimony of Dan Peltier, Former Baseball Player, Before the S. Comm. on the Judiciary*, 105th Congress (June 17, 1997). He also stated the following about the minor league existence:

[It is] very much like the indentured servitude of the 1700's. When you first sign, you are owned by that team for basically 7 seasons. A team can buy you, sell you, send you to another country, or fire you whenever they want. They can cut you if you get hurt. A player, on the other hand, cannot try to play for someone else. He can't try out for his home team. You have to play for the team that drafted you even if they are loaded at your position. . . .

Given these facts, I think you can understand my surprise that some want to stack the deck even further and create a new Federal law exempting the owners' actions in the minors from the antitrust laws. Quite frankly, what else do the owners need than what they have already? What are the laws they must be able to break in order to run minor league teams? How much more power do they need when bargaining with an 18-year-old kid whom they own for 7 years, and what minor league player is going to jeopardize his career by challenging the system? If you believe a player would do that, then you really don't understand the mindset of a minor league player. . . .

Of course, just because Congress has passed one bill does not preclude it from passing another that would apply the antitrust laws to the minor leagues. In fact, a subsequent bill introduced in 2001 by Senator Paul Wellstone of Minnesota would have amended the Curt Flood Act.³¹³ Although the antitrust exemption relating to the minor leagues would have remained largely intact, those within baseball still worried that some changes in language would apply the antitrust laws to the minor leagues, as Commissioner Selig's testimony demonstrates:

In 1998, we worked closely with the union and with Congress to craft a carefully worded change to our exemption in the area of labor relations. All parties at the time believed that the change created the right balance for the exemption. The wording of this bill could be read to shed doubt on the exemption's applicability to such areas as Minor League players, the amateur draft, expansion and others.³¹⁴

Ultimately Senator Wellstone's bill failed, and the Curt Flood Act remains unchanged. As Peltier feared, Congress has given the owners a blank check. Owners have continued to exploit minor leaguers chasing their boyhood dreams, and a subsequent act in Congress to correct its mistake remains unlikely. The minor leaguers simply have too little power to lobby Congress and effect real and meaningful change.

C. Unionize the Minor Leagues

Even if minor leaguers could somehow appeal to Congress, this would not be the optimal solution. Suddenly lifting the antitrust exemption would cause much chaos and uncertainty in the minor leagues.³¹⁵ MLB's vertical integration of the minor leagues might quickly collapse, and minor leaguers would find themselves in a great unknown.

Unionization offers a much better solution, as it would force the owners to engage in collective bargaining over "wages, hours, and other terms

[T]his obsession with making the majors should not be a justification for the current treatment of minor league players, and I certainly hope it would not be used as an excuse to give major league and minor league owners a legal blank check.

Id.

³¹³ Fairness in Antitrust in National Sports (FANS) Act, S. 1704, 107th Cong. (2001).

³¹⁴ *Testimony of Allan H. (Bud) Selig, Commissioner of Baseball, Before the H. Comm. on the Judiciary*, 107th Congress (Dec. 6, 2001).

³¹⁵ Brand & Giorgione, *supra* note 225, at 55.

and conditions of employment.”³¹⁶ Unionization would also allow for incremental change. Following the Seitz decision’s introduction of free agency into baseball, Marvin Miller worried about the implications of effecting too sudden and too great a change.³¹⁷ He worried that granting all players free agency would flood the market with an overabundant supply of talent and suppress wages.³¹⁸ He instead negotiated a tiered system that awarded free agency in a controlled manner once players played for a club for several years.³¹⁹ The genius of this agreement was that it not only increased player mobility and salaries, but it also afforded teams needed protections on their talent.³²⁰

The situation is similar for minor leaguers. Minor leaguers deserve higher wages, better working conditions, and greater mobility. But destroying the entire system and allowing all players to flood the market might not only *further* depress already artificially depressed wages, but it also might result in an even worse system.³²¹ It might mark a return to the minor leagues of the turn of the twentieth century; a system infested with back-door gentlemen’s agreements, awful playing conditions, and leagues folding without even finishing seasons.³²² Instead, an agreement could be reached through collective bargaining that allows a MLB team to continue to develop talent in the minor leagues while affording minor leaguers higher wages. For instance, MLB owners and a minor league union could reach an agreement requiring contracts for players signed out of colleges to be four years instead of seven years, and the restrictions on the Rule 5 draft could be eased. Also, the parties might negotiate a modest increase in wages of thirty percent over a five-year period,³²³ and revenue from minor league baseball’s

³¹⁶ Section 8(d), NLRA, 29 U.S.C. § 158. Being mandatory subjects of bargaining, minor league players could even demand better pay and working conditions to the point of an impasse. *Id.*

³¹⁷ See generally KORR, *supra* note 6, at 183–85.

³¹⁸ *Id.* This position was advocated by one of the owners, Charlie Finley, who “understood the dynamics of free-market capitalism.” *Id.* at 183.

³¹⁹ *Id.* at 184–85.

³²⁰ As Korrr stated, “The negotiations . . . showed that the classic attributes of free bargaining, compromise, concessions, self-interest, and a recognition that the other side had interests could work even in baseball.” *Id.* at 184.

³²¹ See Brand & Giorgione, *supra* note 225, at 55 (discussing the debilitating effects that application of antitrust laws would have on minor league teams).

³²² See discussion *supra* Part I.A.

³²³ Based on a quick calculation, such an increase, for roughly 150 minor leaguers, would cost less than the major league minimum for a single major league player.

\$45 million in annual merchandise sales could be shared.³²⁴ The parties might also include requirements for such things as subsidized apartments for players during the season and better food before and after games.

Of course, steep impediments exist on the road to minor league unionization. First, the transience of players creates a problem, as each year more than a thousand minor leaguers are drafted into the system and a thousand more released.³²⁵ Second, the geographic dispersion of minor leaguers is a problem since minor leaguers play in small units of thirty or fewer players spread throughout the country in different leagues.³²⁶ Third, the low salaries also present a problem, as there is little monetary incentive for an existing union to provide seed money to assist in unionization with little prospect of a return on the investment.³²⁷ Moreover, outside of baseball, general union membership and power has weakened substantially over recent decades,³²⁸ lessening the likelihood of assistance despite the low salaries.

Perhaps the greatest impediment to unionization comes from the minor league players themselves. As Peltier stated before Congress, “[W]hat minor league player is going to jeopardize his career by challenging the system?”³²⁹ The minor league player is chasing a dream. Given a short window of opportunity and facing long odds, he is hesitant to do anything that will upset the status quo.³³⁰ The NLRA, of course, would prevent minor leaguers from being fired or discriminated against for any concerted actions,³³¹ yet even when told of such protections, the minor league player would likely remain hesitant to act.

³²⁴ See *General History*, MiLB.COM, http://www.milb.com/milb/history/general_history.jsp (last visited Nov. 8, 2012) (stating that “merchandise sales have averaged about \$45-million since 2000”).

³²⁵ See generally *Testimony of Dan Peltier*, *supra* note 312; *Masteralexis*, *supra* note 21, at 591 (discussing potential obstacles to minor league unionization).

³²⁶ See *Masteralexis*, *supra* note 21, at 591.

³²⁷ See *Rothman*, *supra* note 9.

³²⁸ In 2011, the Bureau of Labor reported a union membership rate of 11.8 percent, as opposed to a membership rate of 20.1 percent in 1983. Economic News Release, BUREAU OF LABOR STATISTICS, *Union Members Summary* (Jan. 27, 2012), <http://www.bls.gov/news.release/union2.nr0.htm>.

³²⁹ *Testimony of Dan Peltier*, *supra* note 312.

³³⁰ Gene Orza, former number two at the MLBPA, expressed this thought recently, saying that minor leaguers “don’t want to tick off [the club] by being the person who forms the union.” *Rothman*, *supra* note 9.

³³¹ See Section 8(a)(1), NLRA, 29 U.S.C. § 158 (making it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title”).

Major league players no doubt faced similar challenges prior to their unionization, and yet they were able to overcome this paralysis of the status quo. As former player and current broadcaster Tim McCarver later stated, “We were naïve. We had no idea about unions More than that, we had no idea of how powerful we were.”³³² Yet with the proper leadership, the players found their collective power and changed the system.

Other sports groups have also overcome this fear-filled paralysis. Minor league hockey players, for instance, have a union.³³³ Despite the fact that the National Hockey League (NHL) gains far lower revenue than MLB,³³⁴ minor league hockey players earn much higher salaries than minor league baseball players. The latest CBA for the American Hockey League (AHL)—a top hockey minor league—requires a minimum salary of \$40,500 for the 2012-2013 season and per diem of \$67.³³⁵ By contrast, minimum Triple-A baseball requires salaries of \$2150 per month for the five-month season (\$10,750 per season)³³⁶ and only a \$25 per diem.³³⁷

Minor league baseball umpires also have a union, and they too make far more money than minor league baseball players. While the minimum salary of a minor league player in Double-A is \$1500 per month, the minor league umpire at the same level receives a minimum of \$2300 per month.³³⁸ Addi-

³³² KORR, *supra* note 6, at 38.

³³³ The Professional Hockey Players Association represents players in the AHL, ECHL, and CHL, the top developmental leagues of the NHL. *About the PHPA*, PHPA.COM, <http://www.phpa.com/en/content/home/about/index/> (last visited Nov. 7, 2012).

³³⁴ *Compare Best-Ever Business Year Highlighted by Record Revenue*, NHL.COM (Apr. 13, 2011, 6:54 PM), <http://www.nhl.com/ice/news.htm?id=559630> (stating that the 2010-2011 season yielded \$2.9 billion for the NHL), *with* Barry M. Bloom, *MLB Revenue Expected to Approach \$7 billion for First Time*, MLB.COM (Oct. 4, 2010, 5:00 PM), http://mlb.mlb.com/news/article.jsp?ymd=20101004&content_id=15410876&vkey=news_mlb&c_id=mlb (stating that 2010 revenue for MLB was expected to reach \$7 billion).

³³⁵ *AHL-PHPA Collective Bargaining Agreement*, PHPA.COM, <http://www.phpa.com/en/content/home/about/ahl-collective-bargaining-agreement/> (last visited Nov. 8, 2012).

³³⁶ *See Pay Structure of Minor League Baseball Players*, NATIONAL SPORTS AND ENTERTAINMENT LAW SOCIETY (Mar. 17, 2010), <http://nationalsportsandentertainment.wordpress.com/2010/03/17/pay-structure-of-minor-league-baseball-players/>.

³³⁷ David Biderman, *A Minor-League Boost in Players' Meal Money*, WALL ST. J., Jan. 20, 2010, at B18.

³³⁸ *Umpire Salaries*, MiLB.COM, http://www.milb.com/milb/info/umpires.jsp?mc=_ump_salaries (last visited Nov. 21, 2012).

tionally, minor league umpires do not have to pay for housing over the course of the season,³³⁹ unlike minor league baseball players.

The minor league hockey union, founded in 1967, emerged during a different era more favorable to unionization.³⁴⁰ However, the minor league umpires managed to unionize in 1999³⁴¹ in an environment more akin to today. While some differences exist between the groups, the similarities are extensive.³⁴² Their similarities evince that the steep obstacles facing minor league unionization can be overcome. As Professor Wollett recently pointed out in his call for minor league unionization, the bargaining unit might be limited initially to certain teams, levels, or leagues,³⁴³ as a smaller group and smaller geographic area might facilitate organizing. The newly formed union could then seek to represent other clubs and leagues, and players

³³⁹ *Umpire History*, MILB.COM, http://www.milb.com/milb/info/umpires.jsp?mc=_ump_history (last visited Nov. 21, 2012) (“Hotel lodging is provided free through the league offices for each umpire while on assignment within the league.”).

³⁴⁰ *About the PHPA*, PHPA.COM, <http://www.phpa.com/en/content/home/about/index/> (last visited Nov. 8, 2012).

³⁴¹ *About AMLU*, AMLU.COM, http://www.amlu.org/about_amlu.php (last visited Apr. 18, 2012).

³⁴² Minor league umpires, like minor league baseball players, start at the bottom rungs of the minor leagues in the hopes of eventually advancing to the major leagues. See *Umpires*, MILB.COM, <http://www.milb.com/milb/info/umpires.jsp> (last visited Nov. 21, 2012). Other similarities include the low pay, the high turnover rate, and the geographic dispersion. Tom Fitzgerald, *Feeling Blue: Striking Minor-League Umps Want More Money, Appreciation*, SAN FRANCISCO CHRON., May 25, 2006.

³⁴³ WOLLETT, *supra* note 20, at 107–11. Establishing the appropriate bargaining unit is always difficult in the sports industry. STAUDOHR, *supra* note 2, at 233–34. The decision to group players according to club or league repeatedly presents problems. *Id.* at 234. Of course, the NLRB is granted much discretion in determining the appropriate bargaining unit. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491–92 (1947). The test for appropriateness “is whether the employees comprising the unit share a ‘community of interest.’” *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575 (1st Cir. 1983). Initially seeking recognition of a single team as a bargaining unit would most likely be appropriate, as it could be analogized to the Board’s presumption that a single store within a multi-store operation is appropriate. See *id.* at 576. Moreover, it would be in line with the “policy of assuring employees the fullest freedom in exercising their right to bargain collectively.” *Id.* at 575. Of course, this same policy and the discretion that the Act gives would also allow for a broader unit consisting of an entire league or all of minor league baseball to be appropriate as well. See David M. Szuchman, *Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball*, 14 HOFSTRA LAB. & EMP. L.J. 265, 295 (1996–1997).

would no doubt view a union more favorably if other players had already joined it.

The MLBPA can also teach a lesson. As discussed above, the Association began as just that: an association of ballplayers.³⁴⁴ It formed on more informal terms, which lessened the players' weariness towards it. The Association gradually developed over its first decade, and suddenly, with a new office and new leadership under Marvin Miller, morphed into a powerful union that changed the landscape of the entire sports industry. One can only hope that a similar transformation might eventually take place in minor league baseball.

CONCLUSION

The great union leader Marvin Miller recently stated that he considered bringing minor leaguers into the union during its inception in the 1960s.³⁴⁵ However, "[t]he appeal of unionizing every pro baseball player . . . was always outweighed by a lack of resources, the geographic decentralization of the minors, and the dreamy idealism of the players."³⁴⁶ In the end, minor leaguers were left behind.

Despite their exclusion from the union, almost every CBA since the original 1968 Basic Agreement has touched minor leaguers in some way. Often, and especially during recent agreements, the effects have been negative. The lives of major leaguers have improved exponentially as the entire game has prospered. Yet the minor league baseball player today makes little more money than the minor league baseball player of forty years ago, and the working conditions remain nearly as deplorable. In fact, most minor leaguers earn annual salaries placing them below the individual poverty threshold.

More than eighty years have passed since Judge Lindley issued his opinion in *Landis*. Unfortunately, Judge Lindley's prescient fears of owners endlessly exerting nearly omnipotent control over minor leaguers have come true. The exploitation of minor leaguers has continued indefinitely, and the current system of collective bargaining has offered no relief for baseball's untouchables.

³⁴⁴ See discussion *supra* Part I.B.iii.

³⁴⁵ Rothman, *supra* note 9.

³⁴⁶ *Id.*

