GLOBALIZATION IN COLLECTIVE BARGAINING, BASEBALL, AND MATSUZAKA: LABOR AND ANTITRUST LAW ON THE DIAMOND*

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I. INTRODUCTION

Aside from the enduring racial divide in the United States, the most critical domestic issue is that of the growing gap between the rich and poor in our country. The decline of the labor movement and collective bargaining is one of the factors intrinsically bound up with this phenomenon. The most vulnerable in our society—contingent workers[1] and undocumented workers (explicitly unprotected by virtue of a 2002 Supreme Court ruling[2])—are disproportionately lodged in

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1. The Board held that such employees can organize, even when confronted with more than one employer, without employer consent. In re M.B. Sturgis, Inc., 331 NLRB 1298 (2000); Tree of Life, Inc., 336 NLRB 872 (2001). Subsequently these decisions were reversed by the Bush II Board. H.S. Care L.L.C., 343 NLRB No. 76 (2004).

2. Hoffman Plastic Compounds Inc. v. NLRB, 535 U.S. 137 (2002). This decision, while adhering to the Court's holding in Sure Tran Inc. v. NLRB, 467 U.S. 883 (1984) that undocumented workers are employees within the meaning of the Act, denied enforcement of my Board's holding that they were also entitled to the relatively meaningful remedy of back pay A.P.R.A. Fuel Oil Buyers Group Inc., 320 NLRB 408 (1995), *enf'd* 134 F.3d 50 (2d Cir. 1997).

agriculture,[3] domestic service, and other jobs beyond the realm of collective bargaining. It is generally recognized that the existence of so many low wage, unskilled, frequently undocumented non-English-speaking workers in the service sectors such as the restaurants is generally responsible for the considerable resistance to attempts to make representation in unfair labor practice proceedings under the National Labor Relations Act more expeditious[4] through rule-making, for example, those proposed in the Clinton era as a substitute for more cumbersome adjudication.[5]

Collective bargaining developments as well as legal protection for performers in sports has been quite different. Generally speaking, the bargaining process has flourished, with unions actively representing employees in all of the major sports.[6] Strikes and lockouts have been frequent in all the sports—particularly in baseball, basketball, and hockey where, for the first time, an entire season was lost—in this case

3. *See* H. Levy, *The Agricultural Labor Relations Act of 1975*, 15 SANTA CLARA L. REV. 783 (1975). *Cf.* Babbit v. United Farm Workers Nat. Union, 442 U.S. 289 (1979).

4. *See generally* William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor Management Relations: The Role of the National Labor Relations Board*, 82 IND. L. J. 461 (2007).

5. In 1995 the Board issued a Notice of Proposed Rulemaking, 59 Fed. Reg. 50146 (Sept. 28, 1995). This neutral rule providing for a simple codification of some of the law of appropriate unit in existence since the 1960s encountered extraordinary opposition from the Republican Congresses. As a result, Congress attached a rider to appropriation bills for fiscal years 1996–1998 that prohibited the expenditure of funds "in any way" to promulgate a final rule. Subsequently, over my dissent the Board withdrew the proposed rule, 63 Fed. Reg. 8890 (Feb. 23, 1998).

6. In substantial part, this is due to the use of antitrust law as a vehicle to promote collective bargaining relationships because only through such mechanisms can employers avail themselves of the nonstatutory labor exemption and protect activity regulating the mobility of players in such sports that would otherwise be deemed to be anti competitive. *See* Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976) (holding that the "Rozelle Rule" was a mandatory subject of collective bargaining and was not the result of any bona fide arms-length bargaining between the affected parties, and therefore did not qualify for the nonstatutory labor exemption from antitrust laws); *see also* Robertson v. Nat'l Basketball Ass'n, 389 F.Supp. 867 (S.D.N.Y. 1975) (holding that the NBA could incur liability for antitrust violations arising from policies that were not mandatory subjects of bargaining). After collective bargaining commenced and endured, the issues became more complex. *See* McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (holding that the reserve system in hockey was a product of arms-length collective bargaining and it therefore qualified for the nonstatutory labor exemption); Reynolds v. Nat'l Football League, 584 F.2d 280, 289 (8th Cir. 1978) (noting, in dicta, that the nonstatutory labor exemption would prevent antitrust litigation over the right-of-first-refusal scheme because it was a product of the collective bargaining process); Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989); *see also* Powell v. Nat'l Football League, 690 F.Supp. 812 (D. Minn. 1988) (holding, inter alia, that the nonstatutory labor exemption survived the expiration of the collective bargaining agreement); White v. Nat'l Football League, 822 F.Supp. 1389 (D. Minn. 1993) (approving a stipulation and class settlement in antitrust litigation that significantly altered the NFL's free agency rules, while also providing money damages to certain named plaintiffs); Jackson v. Nat'l Football League, 802 F.Supp. 226 (D. Minn. 1992) (granting a temporary injunction prohibiting the NFL from enforcing Plan B rules, which had unlawfully restrained player mobility). I describe some of these developments in William B. Gould IV, *Players and Owners Mix it Up*, CAL. LAW., Aug. 1988, at 56.

due to the owner's lockout.[7] Thus problems have continued to abound.[8]

But baseball has gone down a different path. Unlike the other sports that were deemed to be businesses and thus subject to antitrust strictures[9] antitrust law was held to be not applicable to organized baseball in the landmark *Federal Baseball*[10] decision authored by Justice Oliver Wendell Holmes where the Court said:

> The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competition must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business . . . the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by defendant, personal effort, not related to production, is not a subject of commerce.[11]

Baseball therefore went down a path which contrasts with the other sports where antitrust law substantially augmented employee bargaining power and led to union negotiated collective bargaining agreements because of owner concern about antitrust liability.[12] Now, though the history of labor relations in baseball has been both extensive and fractious from the nineteenth century onward, the landmark dates for modern developments are 1946 and 1966. Nineteen-forty-six is important because it marks the return of the professional baseball players from World War II, the development of a new baseball league rival (the Mexican League) which attempted to

7. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) has been a seminal case not only in labor law generally but particularly in sports because it allows employers to use lockouts offensively as a kind of preemptive strike against an anticipated economic pressure from the union.

8. Professor Weiler has been a keen observer of these problems himself. PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS (2000).

9. Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (football); United States v. Int'l Boxing Club of N.Y., Inc., 348 U.S. 236 (1995) (boxing).

10. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

11. *Id.* at 208–09.

12. I have discussed this in more detail in William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61 (2004); William B. Gould IV, *Players and Owners Mix it Up*, CAL. LAW., Aug. 1988, at 56; Robert C. Berry & William B. Gould IV, *A Long Deep Drive to Collective Bargaining; Of Players, Owners, Brawls, and Strikes,* 31 CASE W. RES. L. REV. 685, (1981); ROBERT C. BERRY ET AL., LABOR RELATIONS IN PROFESSIONAL SPORTS (1986). *See generally* Jay H. Topkiss, *Monopoly in Professional Sports*, 58 YALE L.J. 691 (1949).

lure leading players "south of the border"[13] and thus both enhanced player leverage as well as promoted both expectations along with the attempted formation of a union by labor lawyer Robert Murphy. The union was unsuccessful and died aborning when the Pittsburgh Pirates voted not to strike. But one consequence of its resistance was the first players' pension fund. This was to provide a building block for the future and the basis for dispute in the first of the modern baseball strikes in 1972.

The Major League Baseball Players Association (MLBPA) was formed in 1954 in response to widespread player dissatisfaction with the operation of the pension fund and in 1966 the MLBPA hired Marvin Miller as its first Executive Director. At this point, comprehensive bargaining agreements were first negotiated between the players and the owners. Shortly thereafter the National Labor Relations Board (NLRB) asserted jurisdiction over baseball, notwithstanding the reasoning of the Supreme Court in *Federal Baseball* about the relationship between the sport and the commerce.[14] *Federal Baseball*, however, remained substantially intact.[15] Nonetheless, collective bargaining flourished, particularly when salary arbitration was negotiated in the 1973 agreement and once free agency was successfully challenged through the grievance-arbitration machinery under the collective bargaining agreement in 1975.[16] Strikes and lockouts ensued in what I regarded as a thirty years' war, with the most bitter of all the disputes taking place while I was Chairman of the NLRB. Unfair labor practice charges were filed. Meeting at my request, the Board, by 3–2 vote, authorized a request

13. G. RICHARD MCKELVEY, MEXICAN RAIDERS IN THE MAJOR LEAGUES (2006). This period produced litigation of the kind that has emerged in the past when rival leagues competed for player services with what has been traditionally called Organized Baseball. *See*, *e.g.*, American League Baseball Club of New York, Inc. v. Pasquel, 187 Misc. 230, 63 N.Y.S.2d 537 (May 20, 1946); American League Baseball Club of New York, Inc. v. Pasquel, 188 Misc. 102, 66 N.Y.S.2d 743 (Nov. 25, 1946); Brooklyn Nat'l League Baseball Club Inc. v. Pasquel, 66 F.Supp 117 (E.D. Missouri) (1946). The emergence of the American League at the turn of the previous century, Philadelphia v. Lajoie, 202 Pa. 210, 51 Atl. 973; the Federal League, American Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (July 21, 1914) and spawned earlier controversy. The Mexican League produced litigation by American players who were blacklisted in this country more directly implicating antitrust law. Gardella v. Chandler, 172 F.2d 402 (2nd Cir. 1949); Martin v. National League Baseball Club, 174 F.2d 917 (2nd Cir. 1949).

14. Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190 (1969).

15. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972); *cf.* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971) (arguing that reserve clause issues should be analyzed under labor law and not antitrust principles).

16. Prof'l Baseball Clubs, 66 Lab. Arb. 101 (1975) (Seitz, Arb.) *aff'd* Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976) (upholding the arbitrator's award); CHARLES P. KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960–81 (2002).

for an injunction from the United States District Court for the Southern District of New York.[17] On March 31, 1995, Judge Sonia Sotomayor issued a decree upholding our position, i.e., that there was reasonable cause to believe that the owners had not bargained in good faith and that the passage of time required by normal administrative and legal process made an effective remedy unlikely in the absence of an immediate injunction.[18] This brought the strike to a conclusion.[19] In the wake of the 1994–95 strike, and the consequent resumption of play on the field immediately after the injunction, the parties negotiated a collective bargaining agreement in 1996 in which both were obliged to support partial repeal of *Federal Baseball*-and this was subsequently accomplished through the Curt Flood Act of 1998. This proved to be the last strike or lockout to date, the parties peaceably resolving their differences through collective bargaining in both 2002[20] and 2006.[21]

Prior to the last two agreements the parties began to focus their attention on the globalization of baseball and the advent of foreign players to Major League Baseball, negotiating a study committee to examine the feasibility of an international draft. Major League Baseball (MLB) negotiated a series of special agreements with Japan and Korea. They provide the backdrop to the next stage in this story. The most recent chapter constitutes the boldest of all moves during the 2006–07 winter and one that raised a whole host of issues involving labor law, antitrust law, and contract.

17. WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS AND THE NLRB—A MEMOIR 114–116 (2000).

18. Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F.Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Circ. 1995).

19. *See* Murray Chass, *Backed by Court, Baseball Players Call Strike Over*, N.Y. TIMES, Apr. 1, 1995, at A1; Jack Curry, *Baseball Owners Quit Fight; Opening Day is Set for April 26,* N.Y. TIMES, Apr. 3, 1995, at A1.

20. I have discussed this in Gould, *supra* note 12.

21. In 2006 the 11th hour negotiating brinksmanship of 2002 and earlier years was avoided altogether. Murray Chass, *New Labor Contract Is Expected Soon*, N.Y. TIMES, Oct. 20, 2006, at C16, Murray Chass, *Players Union to Yankees: No New Taxes*, N.Y. TIMES, Oct. 25, 2006 at C15, Murray Chass, *Negotiators Have Worked Out 5-Year Labor Deal*, N.Y. TIMES, Oct. 23, 2006, at D7; John Shea, *Contract a Labor of Love and Big Money*, S.F. CHRONICLE, Oct. 25, 2006, at D1, 5; Dave Sheinin, *Big Deals Loom in Free Agency*, WASHINGTON POST, Nov. 1, 2006, at E1, 10; Alan Schwarz, *Negotiators Agree on Draft, Minors Tweaks,* BASEBALL AMERICA, Nov. 20–Dec. 3, 2006, at 6; Jim Callis, *Draft Changes Undercut Slotting,* BASEBALL AMERICA, Nov. 20–Dec. 3, 2006, at 8; Chris Kline, *Collective Bargaining Agreement Throws Potential Rule 5 Players a Curve in the AFL*, BASEBALL AMERICA, Nov. 20–Dec. 3, 2006, at 26. The prosperity enjoyed by baseball in this century soon fueled an escalation in the free agent bidding war. Tom Verducci, *Help Wanted (Name Your Price*), SPORTS ILLUSTRATED, Dec. 18, 2006, at 57.

II. GLOBALIZATION, DAISUKE MATSUZAKA AND THE BOSTON RED SOX

On December 14, 2006, with not a moment to spare, the Boston Red Sox entered into a six-year contract with Daisuke Matsuzaka, an outstanding twenty-six-year-old right-hander who had compiled an extremely successful record in eight years with the Seibu Lions of the Nippon Professional Baseball (NPB).[22] Under a specially devised procedure between NPB and the American MLB characterized as a "posting" process,[23] the Lions had granted permission for the Red Sox to negotiate with Matsuzaka after the Red Sox had offered a $51 million purchase price, payable if the negotiations were successful. The contract eventually negotiated with Matsuzaka provides for $52 million over the six years of the contract with $8 million in incentives.

The signing of Matsuzaka immediately gave the 2007 Boston Red Sox a chance to aspire to another World Championship and, more immediately, the opportunity to surpass the hated New York Yankees in the competition for the American League Eastern Division Championship.[24] The cost of the arrangement, particularly with reference to the amount of money that the Sox paid Seibu, which was almost four times the entire payroll of the Lions, sent MLB officials scurrying to conference rooms to consider whether this international agreement should be revised.[25]

22. Jack Curry, *Matsuzaka's First Pitch Is Welcome Relief for Red Sox*, N.Y. TIMES, Dec. 15, 2006, at C16–17.

23. This is discussed in William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thompson),* 8 IND. J. GLOBAL LEGAL STUD. 85 (2000); Elliott Z. Stein, *Coming to America: Protecting Japanese Baseball Players Who Want to Play in the Major Leagues,* 13 CARDOZO J. INT'L & COMP. L. 261 (2005).

24. The qualities of Matsuzaka-san have been examined and extolled at length. *See*, *e.g.*, Tom Verducci, *The Riddle: Splitter, Slider, Curve, Fastballs: Four-seam, Two-seam, cut Shuuto, Mad Changeup: Why Daisuke Matsuzaka is Worthy (and What America Will Learn From Him)*, SPORTS ILLUSTRATED, Mar. 26, 2007, at 58; *Monster Pitch*, THE SPORTING NEWS, Mar. 5, 2007, at 18.

25. Daisuke Matsuzaka and all Japan were astonished by the Boston Red Sox's record $51.1 million bid to negotiate for the ace's services, while Major League Baseball says its eye-popping size will cause a review of the process. "The reported magnitude of the amount paid for the right to negotiate with Matsuzaka will cause us at the end of this posting to review the system," MLB president Bob DuPuy said in an emailed response to Reuters question. Major League Baseball will "recommend any changes that are consistent with our strong working relationship with (Japanese professional baseball) and our desire to have competitive balance and economic stability in MLB." The bid to the Seibu Lions in a "posting" auction allowing players to leave Japan before becoming free agents far exceeded expectations and dwarfed the $13 million the Seattle Mariners paid for similar rights to Ichiro Suzuki. The amount is substantially larger than the 2006 payrolls of some smaller MLB franchises such as the Tampa Bay Devil Rays and the Florida Marlins and other American clubs, and is reportedly three times as large as Seibu's budget last year. THE EPOCH TIMES, Nov. 16, 2006.

The procedure that led to the agreement between the Red Sox and Matsuzaka is the result of both dissatisfaction of Japanese pitcher Hadeki Irabu and the working agreement between his Japanese team and the San Diego Padres that resulted in his assignment to the latter- as well as the willingness of pitcher Hideo Nomo to exploit a loophole in his Japanese contract and sign with the Los Angeles Dodgers. Irabu did not want to play for the Padres and openly expressed his desire to play for the New York Yankees. Antitrust litigation and grievances under the collective bargaining agreement between the Major League Players Association (MLBPA) and the MLB were threatened if he could not be signed to the club for which he wanted to play, that is, the Yankees. Before anything came of this, Irabu was traded by the Padres to the Yankees and the matter was resolved. In the earlier Nomo matter, he proceeded to sign with the Dodgers because he was not precluded by contract from so doing.

Baseball in both America and Japan were sufficiently concerned with what had transpired in both the Nomo and Irabu matters to devise a new procedure for the transfer of players from Japan to the United States as well as Americans going to Japan. This procedure is the mirror image of a fundamental change in baseball and basketball and hockey as well, i.e., the globalization of the sport.[26]

The trigger for baseball's globalization has been a confluence of a number of factors—first, the perceived dearth of qualified players in North America and an attempt to diminish escalating draft and free agency salary expenses that have emerged in the wake of free agency. The need to find new revenues, through the licensing of a variety of products as well as the televising of American baseball in foreign countries, has accelerated the process. Latin American player recruitment has increased, particularly in the Dominican Republic and Venezuela. The demise of the Cold War has produced economic difficulties in Cuba and more defectors from that baseball-crazy country. The relaxation of conscription in Korea has brought that country into the mix as well. Negotiation of free agency provisions in the agreement between the Japanese baseball players union and NPB has been a factor as well, permitting Japanese players who wanted to transfer to the United States to do so after ten years when they

26. *See generally* ROBERT WHITING, THE MEANING OF ICHIRO (2004). The agreement negotiated is the United States-Japanese Player Contract Agreement July 10, 2000 (on file with author). *See also* United States-Korean Player Contract Agreement May 6, 2003 (on file with the author). On baseball globalization generally, see ALAN M. KLEIN, GROWING THE GAME: THE GLOBALIZATION OF MAJOR LEAGUE BASEBALL (2006); STEFAN SZYMANSKI & ANDREW ZIMBALIST, NATIONAL PASTTIME: HOW AMERICANS PLAY BASEBALL AND THE REST OF THE WORLD PLAYS SOCCER (2005).

become eligible for free agency. The prospect of no compensation for departing players is what has induced the Japanese to provide for posting at an earlier point when the club as well as the player will receive finances from the United States. Finally, the emergence of the World Baseball Classic in 2006 has shown the United States that baseball is played with great skill and reliance upon the fundamentals in countries such as Korea and Japan (the World Baseball Classic Champions and employer of Matsuzaka who was the Classic's MVP) as well as in Cuba, the runner ups.[27] Both China and Africa—South Africa participated in the 2006 World Baseball Classic—are now baseball's new frontiers.[28]

A protocol between the United States and Japan regulating the transfer of players between the two countries was negotiated in 1999 in the wake of both the Nomo and Irabu matters.[29] It was negotiated without apparent or visible union involvement from either country. The protocol applies to the recruitment of MLB and Japanese players by MLB and Japanese baseball, that is to say the transfer of players going to each country. The agreement states that if any Japanese baseball club wishes to contact and engage a baseball player "professional or amateur, who is playing or has played baseball in the United States or Canada and/or is under contract with a club that is a member of the National or American League," the Japanese team shall request the Japanese Commissioner of Baseball to determine the status and availability of the MLB player by communicating with the MLB Commissioner's Office.[30] If a MLB player is sought by a

27. The Classic was a great success, notwithstanding a number of glitches. *See* William B. Gould IV, *Baseball Classic Mirrors World Events*, S.J. MERCURY NEWS, Mar. 20, 2006, at 13A.

28. Murray Chass, *Yankees Are Hoping to Get a Good Jump in China*, N.Y. TIMES, Jan. 25, 2007, at C17; Tyler Kepner, *Baseball Before Business as Yankees Seek Edge in China*, N.Y. TIMES, Jan. 26, 2007, at C13; Ben Shpigel, *Minaya Goes Global Again, Leading Group to Ghana,* N.Y. TIMES, Jan. 27, 2007, at B14; Jake Hooker, *Joining China to Find a Yao Who Can Hit,* N.Y. TIMES, Jan. 31, 2007, at C17. Football as well as basketball have led the way. *See*, *e.g.*, *The Year of the Pigskin*, WALL STREET JOURNAL, Jan. 19, 2007, at W1.

29. There have been ten postings:

Daisuke Matsuzaka (BOS)
Akinor Iwamura (TB)
Kei Igawa (NYY)
Shinji Mori (TB)
Akinori Otsuka (TEX)
Ichiro Suzuki (SEA)
Ramon Ramirez (NYY)
Norihiro Nakamura (LA)
Alejandro Quezada (CIN)
Kazuhisa Ishii (LA)

E-mail from Lou Melendez to the author, January 30, 2007 (on file with author).

30. United States-Japanese Player Contract Agreement, Dec. 15, 2000, at 1, *available at* http://jpbpa.net/convention/2001_e.pdf.

Japanese club, they are not to contact or negotiate with the player unless approval is given through the MLB Commissioner. The Japanese club cannot contact the MLB player unless approval to do so is given by the MLB club through the MLB Commissioner. Approval is needed only when the MLB player is on the list of "Reserved, Military, Voluntarily Retired, Restricted, Disqualified, Suspended, or Ineligible." If approval is not needed, then the Japanese club may immediately contact and negotiate with the MLB player. If approval is required, the MLB Commissioner is to transmit to the Japanese Commissioner the approval or disapproval of the club.

If an MLB club wishes to engage a Japanese player who has "played baseball in Japan and/or is under contract with a Japanese club," the club must request that the MLB Commissioner determine the status and availability of the Japanese player in the same manner that the status and availability of the MLB player is determined.[31] If no approval is needed, the club may immediately contact the Japanese player. If approval is needed, that contact can only be initiated when the club has provided approval. Players for whom approval is not needed are those who have not played under contract for Japanese professional teams that are part of the NPB or those who have acquired free agent status at the end of ten years of play. With regard to those players for whom approval is required, the MLB Commissioner posts the Japanese player's availability by notifying "all U.S. Major League Clubs of the Japanese club to make the player available."[32] Requests for Japanese club postings are made from November 1 to March 1. Within four business days of the posting all interested MLB clubs are required to submit a bid to the MLB Commissioner "composed of monetary consideration only, to be paid to the Japanese Club as consideration for the Japanese Club relinquishing its rights to the player in the event that the U.S. Club reaches an agreement with the Japanese player." The MLB Commissioner determines the "highest bidder" and that determination is "conclusive and binding on all parties." The Japanese commissioner must then determine whether the bid is acceptable to the Japanese club. If it is not acceptable, then no contact may be had with the player until the next window period. If the highest bid is acceptable, the MLB Commissioner is to award the "sole, exclusive and non-assignable right to negotiate with and sign

31. *Id.* at 2.
32. *Id.* at 3.

the Japanese player."[33] If the MLB team cannot come to terms with the player within thirty days from the date that the MLB Commissioner indicates that the bid is acceptable to the Japanese club, the obligation to compensate lapses as do the negotiation rights of the club, and no contact may be had with the player until the following window period. Finally, while many American and Japanese clubs maintain so-called exclusive working agreements with one another, they are now prohibited insofar as they give the MLB club the "exclusive or preferential rights to contract with players."[34]

It is generally thought that had Matsuzaka not signed with the Red Sox in 2006, he would not have utilized the procedure during the following window period but would have rather waited for the 2009 season when he would have been a free agent under the Japanese rules. As the bidding price indicates, assuming his capabilities are roughly comparable at that point to what they are in 2007, he could have at least doubled the contract he received. Of course, for professional athletes, whose period of effective performance is an abbreviated one, there is a certain amount of risk taking in that process during the period between '07 and '09.

We have already seen the incentives for Japan to enter into this Protocol. They want compensation for their players who seek employment in the United States. (The only mystery is why Japan provided free agency, inasmuch as it was not ordered by an arbitrator or court or negotiated with the Japanese union[35]—it was encouraged by the Tokyo Giants who wanted to obtain better players from the other clubs.[36])

Why did Commissioner "Bud" Selig enter into this agreement for the Americans? In the first place, as more Japanese players are recruited, there will always be eighteen MLB clubs that are displeased by virtue of any exclusive or preferential working agreements. This is because there are thirty MLB teams, and only twelve Japanese teams. Thus, access for all MLB clubs to Japanese players became an important principle for a Commissioner desirous of pleasing more American clubs.

Second, the approval mechanisms were included so that Japanese sensibilities about MLB baseball imperialism would not be ignored. The Japanese do not want to see their own professional league

33. *Id.* at 5.
34. *Id.* at 6.
35. On the Japanese labor law scene *see generally* WILLIAM B. GOULD IV, JAPAN'S RESHAPING OF AMERICAN LABOR LAW (1984).
36. WHITING, *supra* note 26.

become a farm system for MLB and to see their best teams raided for top talent.[37] The same holds true for other nations that may fear talent depletion because of a MLB international draft. Nonetheless, the difficulty is that the Japanese leagues seem to be acquiring farm club status with MLB as more outstanding players like Matsuzaka go to America. But at this juncture there appears to be no other manner in which to proceed. The compensation provided to Seibu seems enormous compared to the amount received by the cellar dweller American teams—like the Washington Senators, St. Louis Browns, and Philadelphia Athletes—who dealt with both the Boston Red Sox and the New York Yankees in the pre-free agency, immediate post World War II era.

But there are problems with the Japanese agreement. The nonassignability of the rights obtained by the highest bidder is presumably designed to avoid another Irabu situation where the Yankees were waiting in the wings to receive Irabu's assigned negotiating rights. But teams like the Yankees—and now one must say, the Red Sox as well, given the Matsuzaka signing—will still benefit from the new mechanism because they are most likely to be the highest bidder. This is particularly true given the fact that only monetary compensation may be provided. (It is unclear why a trade between the two countries cannot be arranged unless the Commissioners thought that an agreement could not be negotiated with the players unions.) And while the rich teams are constrained in seeking free agents in the United States through a collectively-negotiated luxury tax which imposes financial penalties upon big spending clubs, the luxury tax does not apply to the Japanese team's compensation. This means that the Red Sox or Yankees might have been compelled to make more difficult financial decisions if the compensation, which goes to the club, is paid to the player instead. Thus, the protocol is particularly good for the high spending, big market teams that want to sign the elite Japanese players.

Though insider preferences are discouraged or prohibited by virtue of the new limitations upon team-to-team working agreements, the fact of the matter is the clubs are more likely to get their players through Japanese teams with whom they have working agreements. The acquisition of 2000 Rookie of the Year relief pitcher Kazuhiro Sazaki by the Seattle Mariners (owned by the Japanese chairman of

37. Calvin Sims, *Japanese Leagues Fret About Being Overwhelmed*, N.Y. TIMES, Mar. 30, 2000, at D3.

Nintendo), which has a working arrangement with the Orix Blue Wave of Kobe, is a good illustration.

Finally, after the highest bidder wins, the negotiating rights lapse if no agreement is reached with the player within thirty days. Some teams may want to keep the player off the market and to provide the highest bid, knowing that their bargaining stance makes a contract with the player impossible since no dispute resolution mechanism such as arbitration is contained in the agreement. It is unclear how this and other potential abuses by teams can be adjudicated, though Commissioner Selig indicated that he would intervene in the Matsuzaka negotiations if he did not believe that they were taking place in good faith.[38]

III. THE LEGAL AVENUES THAT MATSUZAKA MIGHT HAVE PURSUED IN THE ABSENCE OF CONTRACT

If Matsuzaka had found the Red Sox offer unacceptable, what were the legal avenues that he could pursue? Irabu certainly threatened such action if he was not dealt to the Yankees. What if Matsuzaka preferred to deal with the Yankees or insisted on a bidding war between the Red Sox, Yankees, and Mets? What if Matsuzaka had not been able to bargain with any team at all if Seibu had viewed his compensation offered by the American club to be insufficient?

Matsuzaka might have sued in federal district court for injunctive relief and/or treble damages under the Sherman Antitrust Act of 1890 on the theory that he was restrained from pursuing his calling and that the process negotiated restrained him and others in Japan from so doing. Though, as noted above, the United States Supreme Court held that baseball was immune from antitrust law in 1922 in the *Federal Baseball* decision, that holding was modified by the Curt Flood Act of 1998, which applied antitrust's strictures to matters "directly relating to major league players." The statute purported to

38. Presumably, Commissioner Selig had this authority under paragraph 13 of the U.S.-Japan Agreement:

> The U.S. Commissioner shall have the authority to oversee the bidding procedures set forth in paragraphs (8) through (12) above to ensure that they not been undermined in any manner. Among other actions that he may deem appropriate and in the best interests of baseball, the U.S. Commissioner shall have the authority to revoke a U.S. Major League Club's exclusive negotiation rights with respect to a Japanese Player (and, subject to the Japanese Club's approval pursuant to paragraph (11) above, to award such rights to the next highest bidder, if any) and to declare null and void any contract between a Japanese Player and a U.S. Major League Club that the U.S. Commissioner deems was the result of conduct that was inconsistent with this Agreement or otherwise not in the best interests of professional baseball.

put major baseball players on the same footing as players in all of the other professional sports to which antitrust law has traditionally applied.[39]

A whole host of questions present themselves here. The first is whether antitrust law can apply extraterritorially since some of the conduct complained of has been engaged in in Japan, i.e., the conspiracy and restraint of trade between the U.S. and Japanese baseball organizations. At least from the time of Judge Learned Hand's opinion in the *Alcoa Aluminum*[40] case, the Sherman Antitrust Act has been applied extraterritorially. Indeed, antitrust law has been deemed to apply to foreign jurisdictions from the beginning of the previous century when, for instance, half of a monopolized route that violated the statute was in Canada.[41] The Court of Appeals for the Ninth Circuit said in a leading case that the "question of extraterritorial jurisdiction in the absence of an explicit instruction in the statute in question was whether there was 'some effect—actual or intended—on American foreign commerce . . . [and] an effect [which] is sufficiently large to present a cognizable injury' to those within the United States and an effect which possessed a 'magnitude' which was 'sufficiently strong' to 'justify an assertion of extraterritorial authority.'"[42]

In the 1990s the Supreme Court moved toward the promotion of extraterritoriality in a series of decisions. For instance, in *Hartford Fire Ins. Co. v. California*[43] the Court held that antitrust liability existed where a group of foreign and domestic defendants in a conspiracy caused a violation in the United States. The Court stated that "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[44] In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*[45] the Court held that the key for determining whether foreign conduct violated American law was its domestic as opposed to foreign effects. Said Justice Breyer writing for

39. The intent of Congress was to incorporate for baseball the standards of the Supreme Court's ruling in Brown v. Pro Football, 518 U.S. 231 (1996), which established the preeminence of labor law over antitrust law a half a year before the parties agreed in their 1996 collective bargaining agreement to push Congress to partially reverse *Federal Baseball*.

40. United States v. Aluminum Oil of America (ALCOA), 148 F.2d 416 (2nd Cir. 1945).

41. United States of America v. Pacific and Arctic Railway and Navigation Company, Pacific Coast Steamship Company, Alaska Steamship Company, Canadian Pacific Railway Company 228 U.S. 87, 105–06 (1913).

42. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

43. 509 U.S. 764, 794–799 (1993).

44. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

45. 124 S. Ct. 2359 (2004).

a unanimous Court in addressing anti competitive price fixing activity that was in "significant part foreign, [causing] . . . some domestic antitrust injury . . ."[46]:

> The price fixing conduct [here] significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign affect is independent of any adverse domestic affect.[47]

Accordingly, in these mixed territory cases, the Court, citing Judge Hand's *Aluminum Co.* case decision, allowed application of "our antitrust laws to foreign anti competitive conduct [where] . . . they reflect a legislative effort to redress *domestic* antitrust industry that foreign anti competitive conduct has caused. The case for American interference is 'insubstantial' where 'independent foreign harm . . . alone gives rise to the plaintiff's claim . . .'"[48]

But the assertion of jurisdiction is not the end of inquiry relating to antitrust liability for NPB and MLB through the control of players. The first hurdle is whether the relevant labor market for Japanese players is America. There may be some Japanese players who will accept less than the salary that they have in Japan to play in America. Can they be said to be restrained under antitrust law? Yet, as the Court of Appeals for the District of Columbia has held, dimunition of a player-bargaining power is a pre-requisite to a showing of restraint under antitrust law.[49] While it would seem that bargaining power can be equated with the search for market relevancy and thus create antitrust liability for those who restrain access by the Japanese players to the American market, judicial precedent on the relevant market issue is not entirely clear.[50]

The next hurdle is the *Federal Baseball* exemption that has been modified only in part. Still, the question is whether the Curt Flood Act, applicable as it is to matters relating directly to major league players, and its partial repeal of *Federal Baseball*, applies to Japanese applicants. Again, since the assumption of the statute is that the same rules apply for all major sports,[51] the cases in which applicants or rookie basketball players as well as college freshmen have sued under

46. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004).

47. *Id.* at 164. *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 443–44 (C.A.2 1945) (L. Hand, J.).

48. *Id.* at 165

49. Smith v. Professional Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

50. Fraser v. Major League Soccer, 284 F.3d 47 (1st Cir. 2002); Nat'l. Hockey League Players' Ass'n. v. Plymouth Whalers Hockey Club, 325 F.3d 712 (6th Cir. 2003); Edward Matias, *Big League Perestroika, The Implications of* Fraser v. Major League Soccer, 148 U. PA. L. REV. 203 (1999).

51. Brown v. Pro Football, 518 U.S. 231 (1996).

the Sherman Antitrust Act, albeit unsuccessfully because of the non-statutory labor exemption to the Act, are applicable.[52]

The gravamen of the antitrust complaint filed by Matsuzaka, had he not successfully concluded his negotiations with the Red Sox, would have been that (1) the confluence of the fees paid to the club and the fact that the American club that obtains negotiating rights has exclusive rights possesses them on an exclusive basis, diminishes considerably salary prospects for the Japanese player, and the consequent attractiveness of transfer rights; (2) again, the player can be shut out of the American market altogether if the Japanese team views the compensation offered as insufficient; (3) the player can be shut out of the American market if the bidding team has as its primary or partial objective excluding access for a rival. In this case the Red Sox, even though they sought Matsuzaka's services in good faith, certainly wanted to make sure that the Yankees would not be able to contract with him. Again, against the latter prospect it may be said that the Commissioner has jurisdiction—as he has articulated it—to monitor the potential for "bad faith" negotiations.[53] In any event, it does not appear that any problem like this has arisen. Nonetheless, the fact that the American team does not have to pay the posting fee unless it concludes its negotiations successfully, creates the potential for this kind of behavior.

Nonetheless, there is another problem with the antitrust theory, i.e., the ability of Japanese clubs to enforce their personal services contract with the player. After all, the posting procedure arises in connection with players who are under contract to another team.[54] American courts have held that contracts with the foreign teams are enforceable here[55] and in a series of decisions over more than 100 years American courts have seemed to provide negative injunctions or damages to clubs whose players jump from them so as to move to a rival league—a critical consideration being whether the services provided are "unique."[56]

52. Wood v. National Basketball Association, 809 F.2d 954 (2nd Cir. 1987); Clarett v. National Football League, 369 F.3d 124 (2nd Cir. 2004). *Cert. denied* 544 U.S. 961 (2004).

53. *See supra* note 33.

54. MLB International Representative Lou Melendez assures me that all Japanese players involved in this procedure have been in fact under contract to their teams. E-mail from Lou Melendez to the author, Dec. 14, 2006 (on file with author).

55. Jugo Plastika Basketball Club v. Boston Celtics Ltd. Partnership (D. Mass., Nov. 21, 1989, Civil Action No. 89-1889-Wd). Sometimes these disputes are handled through the labor arbitration process. Shaw v Boston Celtics, 908 F.2d 1041 (1st Cir. 1990).

56. *See supra* note 13. Since baseball has not had a rival league situation since the Mexican League, the disputes over player services and the question of whether they are unique have arisen in other sports like football and basketball. Winnipeg Rugby Football Club v. Freeman

Nonetheless some courts have also looked to the question of whether mutuality is present in the contract[57] and Japanese clubs might have some difficulties explaining the extended period before which a player can exercise free agency eligibility as well as the inability to demand or veto trades in the interim as is the case in the United States. For instance Alfredo Soriano was allowed to leave his contract in Japan and sign with the New York Yankees in the United States because it was thought that American courts would not enforce the contract with Soriano since he was a minor at the time that it was entered into. Moreover, the Supreme Court has suggested in dicta that in the patent context in appropriate circumstances public policies like those contained in antitrust law can be asserted as a defense in a breach of contract case.[58]

As noted above, in the most recent round of rival leagues (this one involving a foreign league as well) American players jumped to the Mexican League in 1946. And when the Yankees and Dodgers sued for tortious interference with contract, the principal defense asserted was that of antitrust law,[59] i.e., that the contract was part of the monopoly power that baseball possessed. Perhaps *Federal Baseball* would have made this argument a more difficult one had these cases been resolved on their merits. In any event, the courts did not resolve this issue. They were also unsympathetic to the view

and Cleveland Browns. 140 F. Supp. 365 (N.D. Ohio, E. D. 1955); Central New York Basketball, Inc. v. Barnett, 181 N.E. 2d 506 (1961); but see World Football League v. Dallas Cowboys Football Club, 513 S.W. 2d 102 (Court of Civil Appeals of Texas, Dallas 1974); Cincinnati Bengals v. Bergey, 453 F. Supp. 129 (S.D. Ohio 1974) for players under contract who have been allowed to contract for the future with teams in rival leagues.

57. *See*, *e.g.*, American Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (July 21, 1914).

> But why should a player enter into a contract when his liberty of conduct and of contract is thus curtailed? The answer is that he has no recourse. He must either take the contract under the provisions of the National Agreement, whose organization controls practically all of the good ball players of the country, or resort to some other occupation.

The court also said:

> There is no difference in principle between the system of servitude built up by the Operation of this National Agreement, which as has been shown, provides for the purchase, sale, barter, and exchange of the services of baseball players-skilled laborers-without their consent, and the system of peonage brought into the United States from Mexico and thereafter existing for a time within the territory of New Mexico. The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of the Constitution of the United States.

Id. at 11.

58. Henry v. A. B. Dick, 224 U.S. 28 (1912). *See generally* Robin C. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 HASTINGS L.J. 399 (2003).

59. The cases are cited in *supra* note 14.

expressed at the time of the Federal Baseball league cases that the relationship was inherently unequal and unfair.[60]

Now the argument would be that a restraint in trade conspired to by American and Japanese clubs, perhaps coupled with oppressiveness of the Japanese contract, affected the contract negotiated in Japan. Success on this issue would be the most difficult hurdle for Matsuzaka to surmount. An additional argument that would be raised by both NPB and MLB would be that no opportunity would have existed for a transfer in the absence of the posting procedure and that the Japanese contract system antedated the U.S.-Japan protocol.

Of course, the ultimate question here is whether the restraint upon the market is a reasonable one under the rule of reason principle that applies in professional sports player mobility antitrust cases.[61] MLB would argue that this is no different than a player who wants to play for the Red Sox, for instance, when he is under contract to the Detroit Tigers.

Generally speaking, the leagues have not been successful in restraining player mobility unless the nonstatutory labor exemption has been asserted subsequent to negotiation with a union through which restraints upon player transfer and mobility would be more easily immunized.[62] In the Red Sox-Tiger hypothetical, the exemption is available without a full-fledged examination of the restraint's unreasonableness.[63]

But is the non-statutory labor exemption applicable? Arguing for the presence of the exemption is a fact that the union, here the MLBPA, was deeply involved in the Irabu matter that, in part, led directly to the posting protocol between the United States and Japan. Moreover, union representatives for MLBPA have said that they were assured that Japanese free-agency rules (more restrictive than those in America) would be frozen to their current status. This would argue for the presence of the non-statutory labor exemption, given apparent union involvement in aspects of the protocol.

But it was more than Irabu that led to the Protocol, i.e., the signing of Hideo Nomo by the Dodgers. Moreover, whatever the content of the discussions about freezing Japanese free agency

60. *E.g.*, American Baseball Club of Chicago, 86 Misc. 441, 149 N.Y.S. 6 (July 21, 1914).
61. *See*, *e.g.*, Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir. 1978)
62. See cases cited in *supra* note 5.
63 Because of the non-statutory exemption.

standards, the union was not in fact involved in the negotiation and thus was not a party to the agreement.

Though it seems that the 2006 Agreement does not address the issue[64] an appendix in the 2002 Collective Bargaining Agreement might have some relevance. The World-Wide Draft Subcommittee, designed to address the possibility of an international draft and other "issues relating to the acquisition of players" refers to "player protocols."[65] If the Court of Appeals for the Second Circuit is correct in its view of the nonstatutory labor exemption, i.e., the mere reference to major league rules in the collective bargaining agreement without any showing of any negotiations on any basis can suffice in establishing nonstatutory exemption might be available.[66] However, Major League Baseball states that this contractual provision has nothing whatsoever to do with the U.S.-Japan protocol or that of any other agreement of this kind.[67]

Accordingly, it would seem that the exemption is not available. Beyond the approach of the Court of Appeals of the Second Circuit lies the question of whether the *Brown* decision means that all antitrust litigation is shut down whenever a union is not decertified. Unilateral actions between the U.S. and Japanese owners was not part of the bargained agreement. But then, neither was the taxi squad payment dispute in *Brown*. What makes this difficult to resolve under existing precedent is the fact that the Court did not allude to the factual dispute in *Brown* and prior to that its relationship was not to the collective bargaining agreement was not addressed. Such an expansive reading of *Brown* would take us beyond the approach of the Court of Appeals for the Second Circuit and would mean that labor law would trump antitrust law on matters unrelated to the collective bargaining agreement in all circumstances. My view is that that bridge, which the Court may cross in the years to come, at present is a bridge too far.

64. Basic Agreement Summary, Jan. 22, 2007 (on file with author).

65. Basic Agreement, at 203–204 (2002) (on file with author).

66. *See* Clarett v. National Football League, 369 F.3d 124 (2nd Cir. 2004). *See generally* Lee Goldman, *The Labor Exemption to the Antitrust Laws as Applied to Employers' Labor Market Restraints in Sports and Non-Sports Market*, 1989 UTAH L. REV. 617; BERRY ET AL., *supra* note 12. My view is that, while the Court of Appeals is correct that in concluding that the Court of Appeals for the Eighth Circuit has misapplied national labor law, by requiring "arms length" negotiations and a *quid pro quo* for the player restraint, something more than a mere reference to the rules of the league is a prerequisite to the assertion of the exemption. I also think that the Second Circuit has provided an excessively expansive interpretation of Brown v. Pro Football, 518 U.S. 231 (1996), a case that only focuses upon the question of *when* the labor exemption becomes available. *See contra*, Note, 118 HARV. L. REV. 1379 (2005).

67. E-mail from Louis Melendez to author, Jan. 23, 2007 (on file with author).

Therefore, given the extraterritoriality of antitrust law, the key question would focus upon contract. If the contract barrier cannot be traversed, for Matsuzaka, the definition to be given to the unfair labor practice prohibitions contained in the National Labor Relations Act before the Board and in arbitration is all the more important.

IV. THE LABOR LAW ISSUE

If antitrust claims are not deemed meritorious or if the procedures are cumbersome and lengthy in the absence of injunctive relief, it is possible that these disputes could arise and be resolved in the labor law forum. Labor law relating to extraterritoriality—again, recall that conduct of the Japanese in Japan would be involved—seems to swim in waters more unchartered than those of antitrust law. A leading decision involving Title VII of the Civil Rights Act of 1964, *EEOC v. Aramco*,[68] held the anti discrimination provisions to be inapplicable to an American who complained of religious discrimination while he was permanently working for an American corporation in Saudi Arabia. This opinion, subsequently reversed by Congress in the Civil Rights Act of 1991,[69] placed some reliance upon the Supreme Court's *McCulloch* decision where the Court refused to allow the NLRB to assert jurisdiction over foreign crewmen on a foreign flag vessel operating within United States territory.[70] However, the Court held that the statute applies extraterritorially to foreign flagships where American workers were involved[71]—they were not involved in *McCulloch*. In 2005 the Supreme Court held that the Americans With Disabilities Act of 1990 also applies to foreign flagships.[72]

While the Board has not viewed the statute as applicable to American residents permanently working abroad,[73] it has asserted jurisdiction where only half of the work involved was performed in the United States.[74] More recently the Board has held that the statute

68. EEOC v Arabian American Oil Co., 499 U.S. 244 (1991) (*Aramco*).

69. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1077 (codified in scattered sanctions of 42 U.S.C.).

70. McCulloch v Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

71. Int'l Longshoremen's Local 1416 v Ariadne Shipping Co., 397 U.S. 195 (1970).

72. Spector v Norwegian Cruise Line Ltd., 125 S. Ct. 2169 (June 6, 2005).

73. Range Systems Engineering Support, 326 NLRB 1047, 1048 (1998); Computer Sciences Raytheon, 318 NLRB 966, 970–971 (1995); GTE Automatic Electric Inc., 226 NLRB 1222, 1223 (1976); RCA OMS, Inc., 202 NLRB 228, 228 (1973).

74. Detroit & Can. Tunnel Corp., 83 NLRB 727 (1949).

applies to employees working temporarily in both Canada[75] and Mexico.[76] However, in the Canadian case, the Court of Appeals for the Third Circuit reversed, relying upon both *Aramco* and *McCulloch* as precedents against extraterritoriality.[77] Of course, the Board, because of its more than six-decade-old policy of "non-acquiescence" in contrary judicial rulings, continues to adhere to its own interpretation of the Act—a policy pursued even if all the circuit courts of appeals are against it unless and until the Supreme Court reverses.[78] Indeed, the Board, subsequent to *Asplundh* in a case involving unfair labor practices committed in Mexico, stated that it "can and should assert jurisdiction."[79] The Board explicitly relied upon the Supreme Court's *Hoffman-LaRoche* antitrust decision. The Board stated that "the test was whether the violations caused unlawful effects in the United States."[80] Accordingly, the Board, reaching a decision contrary to that of the Court of Appeals for the Third Circuit in *Asplundh*[81], approved an administrative law judge's decision in which reliance was placed on a number of cases involving disputes on the docks.

The first of these opinions, *Coastal Stevedoring*,[82] saw the Board assert jurisdiction over secondary boycott activity engaged in by Japanese unions in Japan acting in concert with their American counterparts, because the intention and the effect was to create an unlawful secondary boycott in the United States. The Board's decision in *Coastal Stevedoring* was appealed to the Court of Appeals for the District of Columbia,[83] which remanded the matter to the Board after resolving some of the issues of secondary boycott law and

75. Asplundh Tree Expert Co., 336 NLRB 1106 (2001), *enforcement denied*; Asplundh Tree Expert Co. v NLRB, 365 F.3d 168 (3rd Cir. 2004).

76. California Gas Transport Inc., 347 NLRB No. 118 (Aug. 31, 2006).

77. Asplundh Tree Expert Co. v NLRB, 365 F.3d 168 (3rd Cir. 2004).

78. Theodore R. Schmidt, 58 NLRB 1342 (1944). This policy continues until the present day. *See*, *e.g.*, Sandusky Mall Co., 329 NLRB 618 (1999). This policy of non-acquiescence to interpretations of the Act by the circuit courts of appeals is rooted in the fact that the National Labor Relations Board, and not courts of general jurisdiction, is the expert agency to resolve labor-management conflict under the National Labor Relations Act, and as Justice Felix Frankfurter aptly stated, is "equipped with its specialized knowledge and cumulative experience," and thus possesses both expertise and interest in maintaining uniformity in the fashioning of federal labor law. San Diego Bldg. Trades v Garmon, 359 U.S. 236, 242 (1959). Accord e.g., NLRB v Erie Resistor, 373 U.S. 221, 236 (1963); Fall River Dyeing Corp. v NLRB, 482 U.S. 27, 42 (1987); NLRB v Town & Country Electric, 516 U.S. 85 (1985); Auciello Ironworks v NLRB, 517 U.S. 781 (1996); Holly Farms Corp. v NLRB, 517 U.S. 392 (1996).

79. California Gas Transport Inc., 347 NLRB No. 118 (Aug. 31, 2006).

80. *Id*. at 3.

81. Asplundh Tree Expert Co. v NLRB, 365 F.3d 168 (3rd Cir. 2004).

82. Longshoreman ILA Coastal Stevedoring Co., 313 NLRB 412 (1993) ("Coastal Stevedoring").

83. Int'l. Longshoremen's Ass'n, AFL-CIO v. NLRB, 56 F.3d 205 (D.C. Cir. 1995).

agency, did not address the issue of extraterritoriality. Upon remand, a 2-1 majority of the NLRB panel concluded that the court's remand *precluded* any resolution of the secondary boycott or agency issues relating to extraterritoriality by the Board, and thus the panel did not deal with the issue of extraterritoriality. In my capacity as Chairman of the NLRB, I dissented from the majority on the question of whether the remand precluded NLRB re-examination of either the secondary boycott issues that implicated the law of agency or extraterritoriality. I found that the requisite findings of agency were present. I also dealt with the issue of extraterritoriality, and concluded that the NLRA did apply to the actions of the Japanese unions.[84]

Asplundh also relied upon a decision of the Court of Appeals for the Eleventh Circuit[85] where that court also concluded that the conduct of the Japanese unions was unlawful. In *Dowd*, the court determined that several factors supported the assertion of jurisdiction over extraterritorial conduct. The court, in language also quoted by the Board with approval in *Asplundh*, stated:

> (1) The NLRA is here applied, as Congress intended, to protect persons and commerce from the secondary boycott, (2) *The conduct was intended and had the effect of creating an unlawful secondary boycott in the United States,* (3) certain significant conduct in furtherance of the secondary boycott occurred within the geographic territory of the United States and (4) the fact that the Board is acting against a domestic labor organization subject to regulation under the NLRA. . . .[86]

The court in *Dowd* went on to find that the threats made by the Japanese unions, notwithstanding the fact that they were made extraterritorially, were within the scope of the Act:

> Although the Supreme Court has limited the scope of the NLRA to avoid interference with internal affairs of other nations, the Act is properly applied to the conduct of a domestic labor union which solicits a foreign union to apply pressure overseas with the intent and result of creating a secondary boycott in the United States.[87]

This approach seems to be also in accord with the Supreme Court's decision in *International Longshoremen's Ass'n v. Allied Int'l,*

84. Coastal Stevedoring Co., 323 NLRB 1029, 1031 (Chairman Gould dissenting) (1997). Again, the majority did not address either or any issue, since they viewed the court's remand as precluding them from so doing. Thus, although my Coastal Stevedoring opinion is properly categorized as a dissenting opinion, it is only a dissent from the majority's decision that the Board was precluded from considering the above referenced issues by virtue of the remand.

85. Dowd v Longshoreman ILA, 975 F.2d 779 (11th Cir. 1992).

86. *Id.* at 14 (emphasis added).

87. *Id.* at 16.

Inc.[88] where the Court held that a union's refusal to unload cargo shipped from the Soviet Union in protest against that country's invasion of Afghanistan constituted a secondary boycott violation of the Act, notwithstanding the Board's absence of jurisdiction over either country. This was because the effect of the union's conduct was in the United States, even though the object of the protest was abroad. The Eleventh Circuit relied upon that decision in its reasoning.

In another case[89] the court held that the relocation of facilities to Tijuana, Mexico, for unlawful anti-union reasons was unlawful even though the relocation to a foreign country was not covered by the Act. Significantly, Judge Carlos Moreno (now Justice Moreno of the California Supreme Court) ordered that the employer restore to its California facility any bargaining unit work that had been subcontracted or relocated to Mexico and that all outstanding agreements to subcontract work to Mexico be rescinded. Once again, in this case the statute was applied extraterritorially because of the substantial effect in the United States.

Thus in labor law cases involving extraterritoriality the weight of authority appears to be that the key is analogous to the antitrust cases, i.e., whether there is a substantial effect in the United States. In the leading commentary on these cases these holdings have been characterized thusly:

> *Aramco* treated *McCulloch* as precedent for the presumption against extraterritoriality, when in fact *McCulloch* did not deal with extraterritoriality at all. *McCulloch* dealt with foreigners who were in the United States, 'not temporarily in the United States waters but operating in a regular course of trade between foreign ports and those of the United States.' Therefore, the decision in *McCulloch* had nothing to do with extraterritoriality and neither *Aramco* nor *Asplundh* should have cited *McCulloch* as support for a strictly territorial application of the NLRA.[90]

Thus it would seem that the NLRB could assert jurisdiction over unfair labor practices involving the U.S.-Japan Protocol, though the matter is complicated somewhat by an embryonic NLRB decision in which the Board refused to assert jurisdiction over Canadian teams in the 1970s.[91] In that case a divided Board, former Chairman Murphy dissenting on the extraterritorial issue, held that the League was a

88. 456 U.S. 212 (1982).
89. Aguayao v Quadrtech Corp., 129 F. Supp. 2d 1273 (C.D. Cal. 2000).
90. Note, 105 COLUM. L. REV. 2135, 2148 (2005).
91. North American Soccer League, 236 NLRB 1317 enforced 613 F.2d 1379 (5th Cir. 1980).

joint employer within the meaning of the NLRA and that the statute does not apply to Canadian clubs. First, not only was the Board divided—a 2-1 majority providing a quick and cursory examination of the jurisdiction issue—but the Court of Appeals for the Second Circuit did not even refer to the issue of extraterritorial jurisdiction in its decision. Second, the decision took place at a time when the idea of sports leagues in collective bargaining was an embryonic one and it has not been followed since.

Though the Ontario Labor Relations Board has asserted jurisdiction over disputes arising in leagues that are based in the United States involving both umpires in baseball[92] and referees in basketball,[93] those decisions would seem to balkanize well established bargaining units and erode national labor policy promoting uniformity and certainty. The Board in the United States has continuously asserted jurisdiction over baseball and basketball itself, notwithstanding the decisions of the Ontario Board.[94] Indeed in basketball a case that was not appealed to the full NLRB the regional director said:

> I find [the soccer case] . . . is not controlling and that it will best effectuate the purposes and policies of the Act to assert jurisdiction over the two Canadian teams. Preliminarily, I note that whereas the *Soccer League* case involved an initial organizational effort, in which bargaining practices and procedures had not yet been established by the parties, the Employer and the Union herein have a substantial bargaining history in the multi-employer unit, to which the new franchises have been charted.[95]

92. The American League and the National League of Professional Baseball Clubs and the Toronto Blue Jays Baseball Club, [1995] OLRB Rep. April 540 (Apr. 28, 1995).

93. National Basketball Association, [1995] OLRB Rep. November 1389 (Nov. 10, 1995).

94. Silverman v Major League Baseball Player Relations Committee, Inc., et al., 880 F. Supp. 246 (S.D.N.Y.), *aff'd*. 67 F.3d 1054 (2d Cir. 1995). When I was Chairman of the NLRB during the second *Silverman* case, there was no challenge to the Board's assertion of jurisdiction over Canadian clubs-and so far as appears from any papers that I have seen, there was no challenge to the legitimacy and viability of the 1981 process either.

95. The opinion also states:

> Further to the extent that the Board has discretion in the area, this history of league-wide negotiations is one of the considerations militating in favor of asserting of jurisdiction over the Canadian teams. Additionally, I recognize that should the Board decline jurisdiction over the Raptors and the Grizzlies, the inherent possibilities for a splintering of results and representation between the American and Canadian teams would not tend to promote stability in industrial relations, clearly a significant consideration. I further note that the parties have all taken the position that they wish any players deemed eligible to vote to have the opportunity to do so, notwithstanding their affiliation with Canadian or American teams at the time of the election. Moreover, the close affiliation of the Canadian teams with Canadian interests relied upon to decline jurisdiction in *Soccer League* is not present in the instant case. For example, in *Soccer League* the Canadian teams were affiliated with an exclusively Canadian federation. Here the Canadian teams are fully integrated in the existing unit. Further, as described below, the record

Under the NLRA the Matsuzaka dispute could have emerged through the union's filing of a refusal to bargain unfair labor practice charge[96] in which it would be contended that Major League Baseball had unilaterally and thus unlawfully unilaterally altered mandatory subject of bargaining involving conditions of employment.[97] Since the Protocol was negotiated without the union's formal involvement and since it involves transfers and working conditions, the contention would be that an unfair labor practice in the form of a refusal to bargain had been committed.

However, because NLRB procedures are both cumbersome and slow moving and are becoming ever more so[98] the union might file a grievance on behalf of Matsuzaka because the subject matter constitutes a mandatory subject of bargaining that is prohibited where unilateral changes are prohibited under the collective bargaining agreement. The theory under the agreement would be at least partially akin to that which would be pursued before the Board, i.e., that unilateral imposition of a rule imposed upon a player from Japan would affect free agency rights because both the signings of such players could conceivably diminish what was available for free agent players and others already in the bargaining unit and, in any event, these signings could be used as both evidence in salary arbitrations as well as free agency negotiations involving incumbent players. Baseball seems to have assumed that the principles of the National Labor Relations Act apply to some of the unilateral change issues arising under its collective bargaining agreement.[99]

> establishes that there is a functional integration within the NLB, among its teams, in matters such as employee relations and league rules and regulations, which directly impacts on terms and conditions of employment for players in all teams within the League. These factors clearly warrant the assertion of jurisdiction over the entire employing entity. Thus, based upon the stipulations of the parties, the record as a whole and the considerations set forth above, I conclude it will effectuate the purposes and policies of the Act to assert jurisdiction over the NBA and all its constituent member teams herein.

National Basketball Association, et. al., Case No. 2-RD-1354 (July 26, 1996).

96. As noted, the Board has long asserted jurisdiction over baseball. American League of Professional Baseball Clubs, 180 NLRB 190 (1969).

97. NLRB v Borg-Warner Corp., 356 U.S. 342 (1958); Fibreboard Products Inc. v NLRB, 379 U.S. 203 (1964); First National Maintenance Corp. v NLRB, 452 U.S. 666 (1981).

98. Gould, *supra* note 4; William B. Gould IV, *The NLRB at Age 70: Some Reflections on the Clinton Board and the Bush II Aftermath,* 26 BERKELEY J. EMP. & LAB. L. 309 (2005). Although the problem has grown considerably worse during the past five years, it existed in the 1990s as well. William B. Gould IV, *The Labor Board's Ever Deepening Somnolence: Some Reflections of a Former Chairman,* 32 CREIGHTON L. REV. 1505 (1998–1999).

99. Major League Baseball Player Relations Committee, Inc and Major League Baseball Players Association (dispute over rule providing for a 60/40 ratio of assets to liabilities) (Jan. 10, 1985). On the relationship between arbitration and public law. *See generally* William B. Gould IV, *Kissing Cousins? Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609

In a series of decisions[100] involving changes in rules relating to amateurs outside the bargaining unit, arbitrators have held that changes could not be made because of the relationship between amateur draft choices that are compensation for free agency and free agency itself. Said the arbitrator in one of these cases:

> [T]his is not a case that only affects non-employees not yet in the bargaining unit. It also affects bargaining unit employees because free agency and draft choices are, as of now, inseparable . . .[T]he connection is obvious; draft choices and free agency co-exist in the same contractual provision.[101]

In one of these cases involving J.D. Drew, the outstanding and newly acquired Red Sox right fielder, the arbitrator considered the draft rules as they related to players who signed with new independent leagues unaffiliated with MLB.[102] The question was whether such a player under contract to one of the new unaffiliated leagues, such as the Northern League and the Western League that emerged in the 1990s would be subject to a new draft or could be a free agent. Again, the unilateral change in the rules to bring unaffiliated clubs within the requirement that an unsigned player be in a succeeding draft was condemned as inconsistent with the agreement:

> In the fierce competition which typifies high-stakes negotiations surrounding premium players, whether in the draft or in free agency, unilateral elimination of even a perceived bargaining edge in the Rules for a drafted player would devalue related free agency, a disruption of the [contractual] linkage of draft and free agency which the parties last reconfirmed in their Basic Agreement effective January 1, 1997 . . .[103]

Thus, all of the arbitral decisions provided protections against unilateral changes in the collective bargaining agreement for applicants who were potential MLB employees, but who were outside the MLBPA bargaining unit. However, there is a difference between the amateur draft cases and those involving the U.S.-Japan Protocol. In the case of draft choices, they are direct compensation in some circumstances for free agents, notwithstanding the diminished role of

(2006); William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discriminations* 118 U. OF PA. L. REV. 40 (1969).

100. Major League Baseball Players Association and the twenty-eight major league clubs (Amateur draft) (Aug. 19, 1992); Major League Baseball Players Association and the twenty-eight major league clubs (Amateur draft) (June 10, 1993); Major League Baseball Players Association and the thirty major league clubs (May 18, 1998).

101. Major League Baseball Players Association and the twenty-eight major league clubs (Amateur draft) (Aug. 19, 1992) at 15–16.

102. Major League Baseball Players Association and the thirty major league clubs (May 18, 1998).

103. *Id.* at 27.

draft choices in free agency under the 2006 collective bargaining agreement Even in 2007, in many circumstances the value of free agency is in part determined by the cost of compensation in the form of draft choices. The same dynamics do not exist with regard to the U.S.-Japan Protocol. That is to say, there is no relationship under the collective bargaining agreement in the United States between the exercise of free agency and the signing of Japanese players.

Thus it is not clear whether there are benefits or burdens to the free agents in the sense that this was involved in the *J.D. Drew* case by virtue of the advent of the Japanese player contracts with MLB teams under such circumstances. All of the draft cases left unresolved the question of whether an obligation to bargain over applicants' terms and conditions of employment is viable. Again, it would seem that the case has to be made on the grounds that free agency and salary arbitration would inevitably be affected by the advent of new player salaries that, in turn, would be affected by the compensation provided to the Japanese team as well as the number of American teams with which the Japanese player can bargain.

The cases relating to applicants under the National Labor Relations Act have been sometimes puzzling.[104] In 1969 the Board, in a case involving union protest over allegedly racially discriminatory working conditions said: "an employer's hiring policies and practices are of vital concern to employees inasmuch as such policies and practices inherently affect terms and conditions of employment."[105] Subsequently the Supreme Court held that bargaining about retiree benefits was not a mandatory subject of bargaining within the meaning of the Act because the individuals are not employees and the subject matter does not directly affect the working conditions of those who are employees within the bargaining unit.[106] Nonetheless, the Board and the circuit courts held in a series of decisions that bargaining about applicants regarding at least discriminatory conditions itself was mandatory, obliging both sides to bargain to the point impasse.[107] Subsequently, however, the Board seemed to

104. It all begins with the Supreme Court's holding in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845 (1941) to the effect applicants are protected by the unfair labor practice prohibitions of the Act, notwithstanding the statute's failure to mention them.

105. Tanner Motor Livery, 148 NLRB 1402, 1404 (1964); remanded 349 F2d 1 (9th Cir. 1965). In part, this decision inspired William B. Gould IV, *Black Power in the Unions: The Impact Upon the Collective Bargaining Relationships*, 79 YALE L.J. 1 (1969).

106. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

107. The East Dayton Tool and Die Co., 239 NLRB 141 (1978); International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 650 F.2d 334 (D.C. Cir. 1980); International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 648 F.2d 18 (D.C. Cir. 1980).

retreat, relying upon the Court's retiree benefit decision and distinguished cases involving hiring halls where both the Board and the courts have concluded that job priority standards do constitute a mandatory subject of bargaining from bargaining about hiring applicants generally.[108] Said the Board in distinguishing those cases:

> [they relied upon] . . . the intermittent, temporary, transitory nature of the employment of current employees in that case and noted that the essence of employee security therein rested on the establishment of seniority rights through a common source of job priority and priority standards. . . . By contrast, the subject case does not involve an intermittent employment situation nor does the drug and alcohol testing of applicants have a direct effect on current employees by setting job priority standards with respect to their future employment.[109]

In fact, as the Court of Appeals for the Second Circuit has noted in the antitrust cases,[110] the system of recruitment through both drafting and free agency is akin to the hiring hall. Subsequent Board decisions—particularly that of my Board in the *Hertz Corporation*[111]—has held that an employer is obliged to provide the union with information about applicants so that it may discharge its duty as collective bargaining representatives. Said the Board:

> concerns by a union about possible discrimination in the workplace, including in the hiring process, are relevant to the union's representative function. In fact, as evidenced by the parties' inclusion of a nondiscrimination clause in the collective bargaining agreement, the parties considered possible discriminatory hiring practices as an appropriate subject for bargaining.[112]

Accordingly, the issue unanswered in the amateur draft cases would seem to be resolved favorably for Matsuzaka or those who follow in his wake. As noted above, there is a direct relationship between the applicants from NPB and those who are already within the bargaining unit. Notwithstanding the fact that they have no relationship to compensation for free agents, there is a nexus between the working conditions of each given the effect that Matsuzaka's contract will have upon others who have free agent status and those whose demands will be adjudicated in the salary arbitration process. The MLB Players

108. The leading hiring hall case is Houston Chapter, Associated General Contractors (Houston AGC), 143 NLRB 409 (1963), *enf'd* 349 F.2d 449 (5th Cir. 1965).

109. Star Tribune, 295 NLRB 543, 545 (1989).

110. *See* Wood v. National Basketball Association, 809 F.2d 954 (2nd Cir. 1987); Clarett v. National Football League, 369 F.3d 124 (2nd Cir. 2004).

111. 319 NLRB 597 (1995) *enforcement denied* 105 F.3d 868 (3d Cir. 1997); *cf.* NLRB v. US Postal Service, 18 F.3d 1089 (3rd Cir. 1994).

112. *Id.* at 599.

Association was among the chorus bewailing the large amount paid to Seibu by the Red Sox for Matsuzaka. This payment or team compensation depresses a salary that the union could use in salary arbitrations and free agent negotiations.

V. CONCLUSION

Both labor law and antitrust law would appear to be applicable to disputes arising under the U.S.-Japan Protocol and any disputes that Matsuzaka had or that others will have in the future. Notwithstanding the complexities of the extraterritorial issues, my view is that the Board, the circuit courts of appeals, and the Supreme Court will assert jurisdiction. Under the law that has developed pursuant to *Brown v. Pro Football*[113]—law that Congress deemed to be applicable to baseball when enacting the Curt Flood Act of 1998—applicants can challenge restraints on the labor market under the Sherman Antitrust Act. It is more than arguable that there is no labor exemption given the lack of involvement on the part of the union. The restraint seems to be an unreasonable one, though the personal services contract executed between the Japanese players and Japanese teams is an obstacle, albeit one that could properly be surmounted given the supremacy of antitrust law to contracts that are in restraint of trade.[114]

Under labor law the Board will also assert jurisdiction, particularly given its recent reliance upon the law of antitrust relating to extraterritoriality. A refusal to bargain charge is arguably meritorious, although the time lag in implementing such rights, given the NLRB's record of inactivity would be considerable. The more expeditious grievance-arbitration machinery holds some promise though admittedly the rationale of the amateur draft cases is not fully applicable.

It is difficult to know which way America and Japan will move. In 2007 the NPB seems to be satisfied with compensation for its best players—just as has been the case with Central and Eastern Europe in hockey. Surely Japan will be confronted with considerable dissatisfaction by much of its population which does not want to always travel to the United States or to rise very early in the morning to view American baseball on television.

113. Brown v. Pro Football, 518 U.S. 231 (1996).

114. See the discussion of the contract issue in Casey Duncan, *Stealing Signs: Is Professional Baseball's United States-Japanese Player Contract Agreement Enough to Avoid Another "Baseball War"?*, 13 MINN. J. GLOBAL TRADE 87, 103–15 (2004).

What is the alternative to the existing system? It may be that revision of the Protocol allowing for compensation in the form of American players will help Japan—but, it seems to me that this will hardly affect the general trend. Thus far the American players going to Japan have been those whose career is in a decline or who for some reason cannot obtain an adequate contract in the United States. Surely there will be pressure in the United States to reduce the monetary compensation provided by the Red Sox, though American baseball's prosperity and the share that all teams have in globalization may assuage the concerns of the small market clubs.

It may be that national pride will be best realized through the World Baseball Classic when, notwithstanding the fact that the best players play professionally in the United States, they will be able to represent their nation in the one true World Series. After all, in that one Matsuzaka will play for Japan and not the Red Sox! That is more than a fair tradeoff for a 2007 Red Sox World Championship!