BIG DEAL: HOW THE INFLUX OF CUBAN PLAYERS COULD AFFECT LABOR RELATIONS IN MAJOR LEAGUE BASEBALL

By Gregory D. Zeck

Introduction

In the spring of 2015, just down the road from the Stetson University College of Law, a multi-million dollar deal that would captivate the world of professional baseball was being negotiated and organized. Hotshot infielder prospect and Cuba native Yoan Moncada was on the brink of signing a contract to play ball with the big-market Boston Red Sox.[1] Eventually, through the work of Gulfport, Florida C.P.A. David Hastings, Moncada inked a contract with the club that included a $31.5 million signing bonus.[2] With the current structuring of the sport's Collective Bargaining Agreement (hereinafter referred to as the "Basic Agreement") between Major League Baseball ("MLB") and the Major League Baseball Players Association ("MLBPA"), the deal was taxed an extra $30 million.[3] This meant the true value of the deal the Red Sox's total investment in the deal came in at more than $60 million.

While the agreement caught the attention of the baseball world, including Cuba – just as deals from players like Yasiel Puig[4] and Yoenis Cespedes[5] did for Moncada – it was not universally loved by all players in the MLBPA. Tampa Bay Rays pitcher Drew Smiley tweeted his distaste for the deal by suggesting under the Basic Agreement that an international player, in theory, could receive as much

---

[1] Gordon Edes, *Plot thickens on Yoan Moncada*, ESPN (March 14, 2015), http://espn.go.com/boston/mlb/story/_/*Id*/12479603/mystery-suspense-surround-yoan-moncada-journey-boston-red-sox

[2] Jeff Passan, *Cuban super prospect Yoan Moncada agrees to sign with Red Sox*, YAHOO! (February 23, 2015), http://sports.yahoo.com/news/cuban-super-prospect-yoan-moncada-agrees-to-sign-with-red-sox-150807830.html

[3] *See*, *The Basic Agreement*, as bargained between Major League Baseball and the Major League Baseball Players Association, Attachment 46(II)(C)(2), *available at* http://mlbplayers.mlb.com/pa/info/cba.jsp. Because the signing of Moncada caused the Red Sox to exceed their bonus pool allotment by more than 15 percent, the signing effectively cost Boston twice its initial investment. To clarify, this tax is not one imposed by the government, but rather one governed by the Basic Agreement.

[4] The Dodgers signed Yasiel Puig to a seven-year deal worth $42 million. Ben Badler, *Dodgers Sign Yasiel Puig to Puzzling Deal*, BASEBALL AMERICA (June 28, 2012), http://www.baseballamerica.com/today/prospects/international-affairs/2012/2613621.html

[5] Oakland signed Yoenis Cespedes to a four-year $36 million contract. This deal was considered a surprise at the time because of the limited information scouts had on the outfielder. *A's to Sign Cuban OF Yoenis Cespedes, ESPN* (February 2, 2012). http://espn.go.com/mlb/story/_/*Id*/7570918/yoenis-cespedes-agrees-4-year-36-million-deal-oakland-athletics

money as the market would dictate.[6] However, all players residing in America, Puerto Rico and Canada are subjected to the Rule 4 Draft.[7] As a result, it is very unlikely for a player to receive a larger signing bonus than his "slot value,"[8] usually around $6 million.[9] Smiley, therefore, argued that there was no legitimate reason that a Cuban 18-year-old should be eligible to make more than five to six times as much as a comparable American. With the current Basic Agreement set to expire at the conclusion of the 2016 season, the gross disparity in the acquisition of young talent between domestic and international is sure to be a hot-stove issue.

Solutions have been floated around before, with the most common being to hold a draft specifically for international talent,[10] with the other being to subject all international players into the Rule 4 Draft as it is currently structured. Either of these proposals may have an uphill battle to climb as large-market teams could attempt to veto such a rule as those teams currently have larger assets to attract the most promising players. International free agents, including Cubans, Venezuelans and Dominicans, have already voiced their desire to prevent changing the current system.[11] Amending it would likely lead to smaller salaries,

---

[6] Smyly tweeted, "It's not right that a Cuban 19yr old gets paid 30m and the best 19yr old in the entire USA gets prob 1/6th" Drew Smyly, TWITTER (February 23, 2015), https://twitter.com/SmylyD/status/569936561418039296?ref_src=twsrc%5Etfw. *See* also Mark Topkin, *Rays' Drew Smyly clarifies tweet on Cuban free agent Yoan Moncada*, TAMPA BAY TIMES (February 24, 2015), http://www.tampabay.com/blogs/rays/rays-drew-smyly-clarifies-tweet-on-cuban-free-agent-yoan-moncada/2218870 (Smyly clarified his initial tweet, saying that he believed it unfair that American players do not have the ability to go on the free market. He also stated that he did not mean to criticize Moncada for the deal her received. Smyly explained further with a later tweet that he believed all players should be subject to the same process).

[7] *Basic Agreement*, *supra*, note 3 at Attachment 46 (II)(E)(1).

[8] Patrick O'Kennedy, *MLB's Draft slotting system: How it works*, SB NATION (June 26, 2013), http://www.blessyouboys.com/2013/6/26/4463258/MLB-draft-slotting-bonus-pools-penalties.

[9] The No. 1 overall pick in the 2015 Entry Draft, Dansby Swanson, received a $6.5 million signing bonus from the Diamondbacks. Adam Sparks, *Dansby Swanson humble despite $6.5 million Diamondbacks bonus*, THE TENNESSEAN (July 20, 2015), http://www.tennessean.com/story/sports/college/vanderbilt/2015/07/19/dansby-swanson-humble-despite-diamondbacks-bonus/30397857/. In 2013, top pick Mark Appel received $6.35 million. Brian McTaggart, *No. 1 Draft pick Appel signs with Astros*, MLB.COM (June 19, 2013) http://m.mlb.com/news/article/51028658/. In 2012, top pick Carlos Correa signed for a $4.8 million bonus. Brian McTaggart, *Astros officially sign No. 1 pick Correa*, MLB.COM, (June 6, 2012) http://m.mlb.com/news/article/32868692/.

[10] The Basic Agreement already has a provision in it that outlines requirements to implement an International Draft, had both MLB and the MLBPA agreed to opt into it. It required that the commissioner submit notice to the MLBPA that the league wished to institute a draft, but that the union would have two weeks to submit a written veto, if desired. *Basic Agreement*, *supra* n. 3, at Attachment 46(I)(F).

[11] Ben Badler, *Latin American Stars Sign Petition Opposing International Draft*, BASEBALL AMERICA (May 29, 2013), http://www.baseballamerica.com/international/latin-american-stars-sign-petition-opposing-international-draft/. Many of the game's most prominent players, including

akin to the "slot values" that are already included in the Rule 4 Draft. As relations with Cuba continue to improve and players continue to flock to the United States, implications may arise from these players' bargaining powers. Of the 853 players on Opening Day rosters in 2014, 224 (26.3 percent) were born outside of the United States.[12] Of these 224 players, just 21 were born in either Canada or Puerto Rico, meaning they were required to enter the Rule 4 Draft.[13] There were 19 Cubans on rosters in 2014, its highest mark to date, and fourth overall.[14]

Currently, the only MLBPA leadership representative that focuses exclusively on international players rights is Javier Vazquez, a Puerto Rican native who was taken in the fifth round of the 1994 Rule 4 Draft.[15] Vazquez, therefore, is a key component in negotiating and bargaining on behalf of a group of individuals that had a fundamentally different set of rights than what he had. This inequality could question the power of the MLBPA elite: a rift between whom it is supposed to serve and whom it is actually serving. As such, this may not conform to the ideals of the duty of fair representation that all unions are supposed to uphold.

I. A BRIEF HISTORY OF CUBAN PLAYERS IN MAJOR LEAGUE BASEBALL

Former President John F. Kennedy made history and helped cement part of his personal legacy on February 3, 1962 when he elected to sign Proclamation 3447.[16] With an effective date of February 7, 1962, the order started "el bloqueo," as it would be come to known by the Cubans – "an embargo upon all trade between the United States and Cuba."[17] While the blockade effectively stopped all

---

Miguel Cabrera, Robinson Cano, Felix Hernandez, Elvis Andrus, Mariano Rivera, Carlos Gonzalez, Edwin Encarnacion, Pablo Sandoval, Carlos Santana and Hanley Ramirez signed the petition. Notable Cuban players like Yoenis Cespedes, Kendrys Morales and Leonys Martin also signed the petition. Even players who went through the Rule 4 Draft, such as Yadier Molina and Carlos Beltran were signatories. In all, more than 150 players endorsed it.

[12] *2014 Opening Day Rosters Feature 224 Players Born Outside the U.S.,* MLB.COM (April 1, 2014), http://m.mlb.com/news/article/70623418/2014-opening-day-rosters-feature-224-players-born-outside-the-us.

[13] *Id.*

[14] *Id*. Only the United States (629), Dominican Republic (83) and Venezuela (59) had more players on Opening Day Rosters than Cuba in 2014.

[15] *Javier Vazquez*, BASEBALL-REFERENCE (last visited October 26, 2015), http://www.baseball-reference.com/players/v/vazquja01.shtml.

[16] *Embargo on all trade with Cuba*, PROCLAMATION 3447, 22 U.S.C. 2369 (last amended 2009). *Available at* http://www.gpo.gov/fdsys/pkg/STATUTE-76/pdf/STATUTE-76-Pg1446.pdf.

[17] *Id.*

trade between the once-friendly nations, some items, like cigars,[18] became instantly valuable commodities. So did five-tool[19] ballplayers – better known as "peloteros."

Barbaro Garbey was the guinea pig in what would be an experiment for players to search for freedom and baseball. In 1980, he became the first player to defect from Cuba when he took a 12-hour trip on a fishing boat filled with 200 other people in the hopes of playing professionally in America.[20] The practice at that point was so new and dangerous that the next defector would be one of its most important. Rene Arocha took the risk in 1991, and signed with the Cardinals.[21] Two years later, making more than $100,000 at that time, Arocha was pitching in the big leagues.[22] This massive salary dwarfed what players were making back in Arocha's native land, as Cuba was in the middle of a massive economic crisis. Dubbed the "Special Period," Cuba was attempting to be sustainable economically as it had lost all aid from its biggest ally, the Soviet Union.[23] Estimates suggest that as much as 80 percent of Cuba's trading had instantly disappeared.[24]

With the view of greener pastures and fame just north of the isolated island, more players began to follow Arocha's lead, including Livan Hernandez. As documented in ESPN's 30 For 30 documentary, Brothers in Exile, Hernandez detailed his escape by leaving a team hotel while the Cuban national team was training in Mexico.[25] Joe Cubas, Hernandez's future agent, was able to orchestrate

---

[18] Lee Moran, *How Kennedy bought 1,200 hand rolled Cuban cigars just hours before he ordered blockade of communist state 50 years ago*, THE DAILY MAIL (February 8, 2012), http://www.dailymail.co.uk/news/article-2098064/John-F-Kennedy-bought-1-200-Cuban-cigars-hours-ordered-US-trade-embargo.html.

[19] It has been said that the five tools for a position player are the ability to hit for contact, hit for power, run fast, field the position and throwing prowess. Jeff Sullivan, *The Toolsiest Player of Them All*, FIVETHIRTYEIGHT (April 8, 2014), http://fivethirtyeight.com/features/the-toolsiest-player-of-them-all/.

[20] Brett LoGiurato, *Famous Cuban baseball defector says Obama action is 'amazing,' hopes to go back*, FUSION (December 19, 2014), http://fusion.net/story/35175/barbaro-garbey-interview-cuba-policy-shift-obama/.

[21] *SPORTS PEOPLE: BASEBALL; Cardinals Sign Arocha*, THE NEW YORK TIMES (November 22, 1991), http://www.nytimes.com/1991/11/22/sports/sports-people-baseball-cardinals-sign-arocha.html.

[22] *Rene Arocha*, BASEBALL REFERENCE (last visited October 28, 2015), http://www.baseball-reference.com/players/a/arochre01.shtml.

[23] Brendan C. Dolan, *Cubanomics: Mixed Economy in Cuba during the Special Period*, 1 EMORY ENDEAVORS IN WORLD HISTORY 1, 2 (2007), http://history.emory.edu/home/documents/endeavors/volume1/Brendans.pdf

[24] *Id*. at 3.

[25] BROTHERS IN EXILE (Dos Alas Films and MLB Productions 2014).

a successful escape and defection to Venezuela before coming to America as to conform to immigration procedures.[26] Already a highly-regarded pitching prospect, Hernandez had no shortage of parties interested in his services.[27] The right-hander settled on signing with the Florida Marlins in order to live in Miami, which held a large Cuban population.[28]

After signing a contract with a $4.5 million guaranteed bonus, Hernandez found himself with the Marlins Double-A affiliate to start the 1996 season.[29] He quickly moved up to Triple-A, where he also began his 1997 campaign.[30] By June 15, 1997, Hernandez had found himself in the big league rotation, where he dominated.[31] Though he finished as a runner-up in the Rookie of the Year voting, Hernandez was electric in the postseason, going 4-0 in five games and striking out 26 in 28 1/3 innings.[32] For his efforts, Hernandez instantly achieved fame by being named the World Series Most Valuable Player as the Marlins won their first title in franchise history.[33]

A little more than 10 years later, the Cuban influx became hotter than ever before when the big-money deals became routine. Perhaps none was more important than that of Yasiel Puig, the Dodgers outfielder who instantly became a fan-favorite and has since gone on to be the cover star of a video game.[34] Much of Puig's journey to the United States was relatively bizarre. Amid being smuggled by to Mexico via "launcheros" with ties to Mexican drug cartels, Puig was essentially held hostage while the smugglers attempted to sell him to agents for a

---

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Matt Monagan, *19 years ago, the Marlins signed Livan Hernandez*, MLB.COM (January 13, 2015), http://m.mlb.com/cutfour/2015/01/13/106297386/19-years-ago-the-marlins-signed-livan-hernandez. Murray Chass, *BASEBALL; Cuban Pitcher Is Offered A Record Signing Bonus*, THE NEW YORK TIMES (January 13, 2016), http://www.nytimes.com/1996/01/13/sports/baseball-cuban-pitcher-is-offered-a-record-signing-bonus.html.

[30] *Livan Hernandez*, BASEBALL REFERENCE (last visited October 28, 2015), http://www.baseball-reference.com/players/h/hernali01.shtml.

[31] For his 1997 campaign, Hernandez was able to amass a 9-3 record with a 3.18 Earned Runs Average in 96 1/3 innings of pitching. He also struck out 72 batters and walked just 38. *Id.*

[32] *Id.*

[33] *Id.*

[34] Dayn Perry, *Dodgers' Yasiel Puig on cover of MLB The Show 15*, CBS SPORTS (December 5, 2014), http://www.cbssports.com/mlb/eye-on-baseball/24869680/dodgers-yasiel-puig-on-cover-of-mlb-the-show-15

portion of Puig's future earnings.[35] After a rescue attempt that resulted in a murder of one of the smugglers, Puig was finally escorted to safe hands, as he would then prepare to train in order to be signed.[36] Even as scouts questioned Puig's potential after being away from the game for so long and reportedly being out of shape, the Dodgers saw enough in him to secure a deal for $42 million.[37]

Because of his stellar play on the field, as well as his extraordinary popularity off it, Puig has become the gold standard as to what teams hope to catch out of international – particularly Cuban – talent. Joining Puig in the ranks of high-paid superstars that have taken the league by storm include Cubs outfielder Jorge Soler and Reds reliever Aroldis Chapman, who each signed for more than $30 million.[38] White Sox first baseman Jose Abreu, meanwhile, garnered $68 million.[39] However, it is important to note that these deals – and the on-field production they brought – were only made possible by the current structuring of the Basic Agreement. Any change to this process could disrupt the positive publicity the league as a whole has received, especially in Latin markets.

II. AN EXAMINATION OF MAJOR LEAGUE BASEBALL'S COLLECTIVE BARGAINING AGREEMENT, AS IT PERTAINS TO THE ACQUISITION OF AMATEUR TALENT

Rule 3 of the Major League Rules outlines the eligibility of players to sign contracts, the terms of the contracts, and how they may be tendered. The rule states, "A player who has not previously contracted with a Major or Minor League Club, and who is a resident of the United States or Canada, may be signed to a contract only after having been eligible for selection in the First Year Player

[35] Scott Eden, *No One Walks Off The Island*, ESPN (April 17, 2014), http://espn.go.com/espn/feature/story/_/*Id*/10781144/no-one-walks-island-los-angeles-dodgers-yasiel-puig-journey-cuba.

[36] *Id*.

[37] *Id*.

[38] Doug Padilla, *Cubs, Soler reach deal*, ESPN (June 30, 2012), http://espn.go.com/mlb/story/_/*Id*/8116588/chicago-cubs-sign-cuban-outfielder-jorge-soler-nine-year-deal. *Chapman signs six-year contract*, ASSOCIATED PRESS (January 1, 2010), http://sports.espn.go.com/mlb/news/story?*Id*=4816007.

[39] Doug Padilla, *White Sox officially sign Jose Abreu*, ESPN (October 29, 2013), http://espn.go.com/mlb/story/_/*Id*/9899364/jose-abreu-deal-chicago-white-sox-was-calculated-risk-general-manager-rick-hahn-says. It is important to note that Abreu's contract was not subject to bonus pool restrictions. Abreu was 26 years old and had played more than five seasons in Cuba's professional league.

draft."[40] This is what is referred to as the "Rule 4" Draft. Players are eligible to be drafted once they have graduated high school.[41]

In the Rule 4 Draft, teams select eligible players based on a reverse-order of the previous year's standings.[42] Teams may receive "supplemental" selections if a draft pick from the previous year fails to sign. If a player leaves in free agency after receiving a qualifying offer from the team he played at least one full season with earlier, that team is eligible to receive a compensatory pick.[43] For the first 10 rounds of the draft, teams are allocated a "bonus pool," based on the selections each team has. Major League Baseball recommends how much each draft selection should be given in bonus money.[44] Teams can exceed or go below this value, so long as the aggregate value of the amount of money given for the first 10 rounds does not exceed the aggregate value that MLB recommends. Should a team exceed this amount, the pool overage amount it spent is taxed at least 75 percent by the league, and if the overage is excessive enough, the team could be penalized picks in the next draft.[45] This, in theory, deters large-market teams with huge budgets from over-spending on players whose price tag may be too high (i.e. they are more interested in going to college than turning professional unless the price is right) by costing the team even more money or the ability to draft players in the future. Each of these factors combined, while complicated, aims to bring competitive balance across the league.

Should a player who is drafted fail to sign, that player may return or enroll and compete collegiately, so long as they meet the eligibility requirements of the NCAA.[46] However, should a player elect to play collegiate baseball at a four-year university, they are not eligible to be drafted again until after their junior year.[47] The player is of course eligible for the draft after their senior year as well.[48] Still, these restrictions leave two whole years where a player is not eligible to sign with a professional baseball team. As an exception to this rule, if a player chooses to

---

[40] *Major League Rules*, Rule 3(a)(1)(A), March 2008. Available at http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/League%20rules,%20regulations/MajorLeagueRules-2008.pdf.

[41] *Id*.

[42] *Major League Rules*, *supra* n. 40 at Rule 4(c)(1).

[43] *Basic Agreement*, *supra* n. 3 at Article XX (B)(3).

[44] O'Kennedy, *supra* n. 8.

[45] *Id.*

[46] *Major League Rules*, *supra* n. 40 at Rule 4(h).

[47] *Id*. at Rule 3(a)(3)(E)(ii).

[48] *Id*.

go to a junior college (two-year school), that player is eligible to be drafted after either of his seasons.[49]

Acquiring international talent, however, is a completely different story. Up until and through the 2012 season, teams were allowed unlimited control in going after players born outside of the United States. This Wild-West attitude was dominated by the large-market teams like the Yankees, who signed pitcher Masahiro Tanaka for a $155 million investment.[50] The only restriction teams faced was how much the owner was willing to shell out. The excessive spending forced the smaller market teams to ban together and propose a bonus pool system that would conceivably limit spending for each team – in theory, benefiting everybody by reducing salaries and promoting competitive balance.

This change was applied for the 2013 season in the form of Attachment 46 to the Basic Agreement, which currently governs the process for signing international talent. The most important factor of this was the implementation of bonus pools. Each team is allocated a pool of money based on the previous year's standings, and it is adjusted year to year based on the industry growth rate.[51] To promote the ideal of competitive balance further, it was bargained that should a team exceed the bonus pool allotment, that the team would face penalties regarding international talent the next year. They are currently as follows:

a. 0-5% in excess of Pool – 100% tax on all of the Pool overage

b. 5-10% in excess of Pool – 100% tax on all of the Pool overage and loss of right to provide more than one player in the next succeeding signing period with a bonus in excess of $500,000

c. 10-15% in excess of Pool – 100% tax on all of the Pool overage and loss of right to provide any player in the next succeeding period with a bonus in excess of $300,000

d. 15% or greater in excess of Pool – 100% tax on all of the Pool overage and loss of right to provide any player in the next two succeeding seasons with a bonus in excess of $300,000.[52]

---

[49] *Id*.at Rule 3(a)(4).

[50] Bryan Hoch, *Tanaka signs $155 million contract with Yankees*, MLB.COM (January 23, 2014), http://m.mlb.com/news/article/66923096/masahiro-tanaka-signs-seven-year-155-million-contract-with-new-york-yankees.

[51] *Basic Agreement*, *supra* n. 3, at Attachment 46 (II)(A)(5).

[52] *Basic Agreement*, *supra* n. 3.

As an additional provision to the signing bonus pool, the league built into the agreement that teams can exchange their pool allotments via trade.[53] However, the one caveat is that a team may not exceed 150 percent of its original bonus pool.[54] Further, teams may not stockpile pool amounts from year to year or assign bonus values for a future year to the current one.[55] Teams are also now required to offer a Minor League Uniform Player Contract[56] only, which could affect player service time. The amount of service time that a player accrues has implications on when the player is eligible for a raise through free agency or arbitration. Players who have previously contracted with a Major or Minor League club, or players that are at least 23 years old that have played professional baseball in a league recognized by the commissioner for at least five seasons are not subject to International Bonus Pool payments. These players may contract for an unlimited amount of money or for an unlimited amount of time, should the team offer a Major League Uniform Player Contract.

This bonus pool structure would seem to ensure weaker teams – usually with a disadvantageous payroll – to be afforded the opportunity to compete. However, there was little doubt in Manfred's mind that the system is already outdated. The commissioner said:

> Frankly, we thought we made progress on the international side in terms of caps and penalties we put in place. Two years into the deal, we felt pretty good about where we were. What happened? With the relaxation that's taken place with respect of Cuban players it has put a stress test on that international system. Frankly, it's proved wanting.[57]

With all this in mind, it is important to know what players are eligible to be signed in the first place. Major League Rules Rule 3(a)(1)(B) outlines the eligibility requirements for a contract without being subjected to the Rule 4 Draft. In essence, it states that a player simply must be at least 17 years old, provided that:

> Proof of age in the form of a birth certificate or other appropriate documentation,[58] issued by an appropriate government agency, shall

[53] *Id*. at Attachment 46 (II)(D)(3).

[54] For example, if a team is initially given a signing pool allotment of $4 million, the most it could acquire is an additional $2 million, raising the capacity to $6 million. *Id*.

[55] *Id*. at Attachment 46 (II)(D)(6).

[56] *Id*. at Attachment 46 (II)(G)(1).

[57] Paul Hoynes, *Commissioner Rob Manfred wants international draft to help teams like Cleveland Indians*, THE CLEVELAND PLAIN DEALER (March 17, 2015), http://www.cleveland.com/tribe/index.ssf/2015/03/rob_manfred.html.

[58] There could be some very interesting issues concerning this, such as the authenticity of documents, which has led to harsh penalties in the past for players from Caribbean countries.

> accompany the filing of such player's first Major or Minor League contract. . . . any Minor League Uniform Player Contract made in violation of this Rule 3(a)(1)(B) may be declared null and void only in the discretion of the Commissioner or the Commissioner's designee . . .[59]

To satisfy the documentation needed for "signability," Major League Baseball, prior to the 2015 season, had required Cuban players to obtain a license from the Office of Foreign Assets Control. This mandated that those born in the communist country had to reside in another country for at least one year.[60] Major League Baseball still requires that these players have taken residency in another country for at least one year, but no longer requires the license.[61] Instead, the players must make an oath:

> I have taken up permanent residence outside of Cuba. In addition, I hereby state that I do not intend to, nor would I be welcome to, return to Cuba. Further, I hereby state that I am not a prohibited official of the Government of Cuba … and am not a prohibited member of the Cuban Communist Party.[62]

Attachment 46 Section I(D)(12) of the Basic Agreement even explicitly states that the International Talent Committee shall decide, "How Cuban players should be treated under an amateur talent system in light of the legal and political factors that affect their signability."[63] While this in premise means that the talent committee will decide how to classify Cuban players, these players' rights will ultimately be bargained for with the next Basic Agreement.

Changing international signings will probably be a hotly contested issue after the 2016 season. One of the most likely scenarios is to either create an International Draft or incorporate international players into the current Rule 4 format; the former of these two options would seem to be more feasible. Also in favor of the International Draft is that Attachment 46 already leaves the two sides open to the possibility of the draft and even goes as far to outline what eligibility requirements would come with it.[64] In fact, under the current Basic Agreement,

---

[59] *Major League Rules*, *supra* n. 40 at Rule 3(a)(1)(B).

[60] *Id*. at Rule 3(a)(1)(A).

[61] *MLB eliminates requirement Cuban players must obtain US license*, ASSOCIATED PRESS (February 3, 2015), http://sports.yahoo.com/news/mlb-eliminates-requirement-cuban-players-obtain-us-license-225109303--mlb.html.

[62] *MLB nixes Cuban requirement*, ESPN (February 4, 2015) http://espn.go.com/mlb/story/_/*Id*/12277232/mlb-eliminates-requirement-cuban-players-obtain-us-license-yoan-moncada-cleared-sign.

[63] *Basic Agreement*, *supra* n. 3 at Attachment 46 (I)(D)(12).

[64] *Id.* at Attachment 46(I)(E)-(G).

the Commissioner had the right to give notice that the league wished to conduct an International Draft.[65] The last possible chance Major League Baseball had to implement this proposal elapsed on June 1, 2013 (when Commissioner Manfred still thought the current system was working).[66] However, the Major League Baseball Players Association would have also had the right to veto the commencement of a draft by providing written notice by June 15, 2013.[67]

Whether a change actually happens is up for debate, as small-market teams may feel it is the only way to distribute talent equally, whereas larger-market teams have already made concessions to even adopt the bonus pool structure.

III. THE DUTY OF FAIR REPRESENTATION

In 1944, the Supreme Court decided a necessary case for the implementation for the duty of fair representation in *J.I. Case v. National Labor Relations Board*.[68] In it, the concept of an exclusive bargaining representative was adopted. This meant the union – or whoever was appointed by the employees – would be in charge of negotiating work conditions, wages and hours with the employer.[69] In itself, this provision would not seem problematic; however, when combined with another established principle by the court, known as majority rule, issues quickly arose. As basic as it sounds, majority rule carried the theory that what was best for the majority was best for everybody.[70] This left minority groups – such as those separated by race or ethnic background – unable to bargain on their own behalf or to have safeguards put in place to protect their interests. Later in the same year, the Supreme Court took this prerequisite and refined it further.

The judicially made law creating the Duty of Fair Representation was established in *Steele v. Louisville & Nashville R.R. Co*.[71] In it, an all-white union of locomotive firemen excluded their black counterparts, with the all-white union holding the power of being the exclusive bargaining representative for both groups. In 1940, the union negotiated agreements with multiple railroads, with the intention of barring black firemen from these jobs after not even giving notice of these agreements.[72] After a black fireman sued the union on behalf of his

[65] *Id*. at Attachment 46 (I)(G).

[66] *Id*.

[67] *Id*.

[68] *J.I. Case v. National Labor Relations Board*, 321 U.S. 332 (1944).

[69] *Id*. at 334.

[70] *Id*. at 339.

[71] *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

[72] *Id*. at 195.

colleagues, the Alabama Supreme Court found that discrimination or unfair treatment for the black workers was permitted because there was no duty imposed on the union as it was deemed.[73] That court reasoned that the union was the exclusive bargaining representative, as deemed by the Railway Labor Act, and could therefore follow the majority rule, which was controlled by the white workers.[74] The United States Supreme Court rejected this reasoning, instead saying that Congress intended that power rested in an exclusive bargaining representative through the Railway Labor Act. The Act, the Court said, presumably imposed "a duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[75] As a result, the court determined that an appropriate breach of this newly created Duty of Fair Representation were normal monetary or injunction remedies.[76] However, the Court still did not extend this newly formed Duty of Fair Representation to unions under the National Labor Relations Act (NLRA), as it only applied the framework under the Railway Labor Act. In fact, the NLRA, as it was enacted, did not protect workers' rights pertaining to bargaining. Essentially, at this time, workers in a union under the NLRA were not owed the same duty, leaving the door open to discriminatory bargaining.

This newly formed Duty of Fair Representation applies to both the making and bargaining of a bargaining agreement, as well as to the administration and grievance processing that follows in actually enforcing that contract.[77] Because of this, different case law has developed out of both as the union tries to balance competing demands from its constituents. As it pertains to the actual negotiation and bargaining of contracts, *Ford v. Huffman*[78] provided the first rubric of how to deal with these competing interests. The case dealt with a decision by the United Auto Workers, which bargained with Ford to give new employees with military service a seniority credit if they were able to complete a six-month probationary period.[79] This was an inherent advantage to have in terms of job retention, but did not affect wages or working conditions.[80] The Court sided with the union because of the fact that wages or working conditions were not at issue, and that the government had widely endorsed companies extending seniority credit to those

[73] *Id*. at 230.

[74] *Id*.

[75] *Id*. at 202.

[76] *Id*. at 207.

[77] *See generally* Clyde. W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977).

[78] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)

[79] *Id*. at 333.

[80] *Id*. at 338-339.

who served the country in an emergency situation.[81] It rationalized that unions should have a wide range of reasonableness in serving this group.[82] This standard of reasonableness, the court added, should only be limited by good faith and legitimate purpose; rewarding public service was a legitimate exercise of union discretion.[83]

Citing the *Steele* opinion, the *Huffman* court found that exclusive bargaining representatives – including unions not subject to the Railway Labor Act – were required to make an "honest effort to serve the interests of all members, without any hostility to any."[84] Perhaps just as importantly as establishing the standard of which to review the actions of an exclusive bargaining representative, this determined the scope of the Duty of Fair Representation, and whether it extends to unions covered under the NLRA. By considering that the United Auto Workers, which followed NLRA guidelines at that time, was a union, a duty of fair representation was owed to its members. The duty was therefore implied to extend to all unions covered under the NLRA.

A. The Duty of Fair Representation as it pertains to the National Labor Relations Act

With *Huffman* now providing safeguards to union members subjected to the NLRA through the obligation to represent all members of a bargaining unit with good faith and honesty, it is important to define the parties covered by the NLRA. Employees are considered essentially anybody that works for an employer or who is involved in a labor dispute with an employer.[85] However, workers under the Railway Labor Act, as well as supervisors, independent contractors, those employed by a parent or spouse, those who work at home and agricultural laborers do not qualify as employees.[86] Those protected were afforded the opportunity to organize and decide upon the exclusive bargaining representative for the interests of the party as it relates to wages, hours of employment and work conditions.[87]

The scope of the Duty of Fair Representation was elaborated further in *Vaca v. Sipes*, which said a union violates the duty when its actions are "arbitrary,

---

[81] *Id*. at 338.

[82] *Id*.

[83] *Id*.

[84] *Id*. at 337.

[85] 29 U.S.C. § 152(3).

[86] *Id*.

[87] 29 U.S.C. § 159(a).

discriminatory or in bad faith."[88] The court failed to elaborate much further on how the language should be interpreted, but this premise was reinforced further in *Air Line Pilots Association, Int'l v. O'Neill*,[89] which said agreements should be reviewed for rationality. The *O'Neill* court also noted that a union's actions must be outside the "wide range of reasonableness" as defined in *Huffman*, in order for the duty to be breached, making it a rather high standard to reach.

So what exactly constitutes a breach of the duty? As previously stated, an exclusive bargaining representative must not act in arbitrary, discriminatory or bad faith means. However, as provided by *Huffman*, some forms of discriminatory action are permitted (such as giving those who served in the U.S. Military seniority status). In order to show that an act is discriminatory, the plaintiff must show "substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives."[90] The *O'Neill* Court further stated that discernment between striking and working pilots did not constitute discrimination required to breach the duty.[91]

Further, in order for actions to be grounded on arbitrary or bad faith conduct, the employee must prove "substantial evidence of fraud, deceitful action or dishonest conduct."[92] When again examining whether favoring senior employees was based on bad faith, the Second Circuit for the United States Court of Appeals found three relevant factors to determine when there is not breach of the Duty of Fair Representation. The union must open about its bargaining wants without objection, must try to secure the future and must not display animosity towards a minority group.[93] While the language continues to be largely ambiguous, the Seventh Circuit also attempted to provide some context for the issue by saying that arbitrary or bad faith behavior is that which shows "deliberate disregard or misconduct."[94] Once again, without the conduct being blatantly unfounded, it appears that the courts have given the unions a wide range of reasonableness in which to act.

Each of these standards would appear to have a high bar to top. Through case law, unions hold a wide range of latitude in which to operate, so long as they can reason their actions adequately. Moreover, extra protection is given when

---

[88] *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

[89] *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991).

[90] *Amalgamated Ass'n of Street, Electric Railway, & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 301 (1974) (citing Vaca v. Sipes, 386 U.S. 171, 179 (1967)).

[91] *O'Neill*, *supra* n. 89 at 81.

[92] *Lockridge*, *supra* n. 90 at 299. (citing *Humphrey v. Moore*, 375 U.S. 335, 348 (1964)).

[93] *Ryan v. New York Newspaper Printing Pressmen's Union*, 590 F.2d 451, 456 (2nd. Cir. 1979).

[94] *Superczynski v. P.T.O. Services, Inc*., 706 F.2d 200, 203 (7th Cir. 1983).

they operate openly with their members. While this may favor unions greatly, they still need to operate with the minority groups' interests in mind as this deference is far from an absolute right. Not doing so can lead to needless litigation, spending valuable time and resources, which should instead be used to affect positive change for the group as a whole. How this applies to the business of baseball will be examined in further detail, as a minority group has already come out in support of not changing the current international talent provision in the Collective Bargaining Agreement.

B. The Duty of Fair Representation in the Sports Industry

The sports industry has always held a distinctive position compared to industry as a whole, as the product that it is selling is the competition between local athletes, not a traditional good or service. Because of this, the United States Supreme Court has even recognized that sports hold a unique status when it comes to business issues.[95] As such, it could be expected that the conflicts arising out of labor disputes are also inherently unique. While the content surrounding the circumstances may be particular, the ultimate subject matter – wages, hours and working conditions – remains the same. As such, these agreements "result from the same federally mandated process as do collective bargaining agreements in the more familiar industry context,"[96] according to the Second Circuit.

The logical outgrowth of this is that the Major League Baseball Players Association is subject to the NLRA. Employees in this instance are the players, as they do work for a particular employer – whichever team they compete for. Accordingly, they are not exempt from this category, as their work does not fall under an exception, such as being an agricultural laborer.[97] Finally, the players are able to organize and decide who will bargain on their behalf. The players of each team elect player representatives, whose primary duty is to administer and enforce the contract for each individual team. However, those team representatives also have the power to affect change above them, making recommendations to the MLBPA board and its head: former player and current Executive Director Tony Clark. Also of importance, both current and future members of a professional sports league are to be bound to the terms of the current collective bargaining agreement; new players cannot challenge this.[98] It may be argued that no duty is owed. This is untrue for multiple reasons. For one, international players will join the MLBPA upon being placed on the team's 40-man roster. Secondly, some of the game's top international players already part of the union, have voiced their desire to preserve the current rights of that international prospects currently have. Third, should a Collective Bargaining Agreement not be reached, players have the

[95] *NCAA v. Bd. Of Regents*, 468 U.S. 85, 101-102 (1984).

[96] *Wood v. NBA*, 809 369 F.2d 954, 959 (2nd Cir. 1987).

[97] *Infra* n. 85.

[98] *Zimmerman v. NFL*, 632 F. Supp. 398, 405 (D.D.C. 1986).

option to vote regarding whether or not to strike, as permitted by the NLRA. Finally, all of the relevant actions and negotiations are happening within the United States – the Basic Agreement was bargained there, the players perform all relevant work there, the players reside there during the season, and the wages are paid according to federal and state tax requirements. It is definitive that the Major League Baseball Players Association is subject to the NLRA.

While it is rather clear that the duty extends to player grievances[99] and contract disputes,[100] what remains unclear is just how much it extends or fails to extend to future professional athletes.[101] However, with the acknowledgement that a portion of current players does not wish the current system of international talent acquisition in baseball, it should be presumed that the duty exists. While discriminating against future players based on ethnic origin may not be the same as age discrimination, it is the most analogous comparison to make. It will be discussed in further detail below. However, it should be noted that the courts, as previously discussed, have already been more willing to discriminate based on age[102] than on ethnic origin, where the case law just simply has not developed.

C. Antitrust Issues are Unlikely to Develop

This analysis contained in this article largely overlooks any potential antitrust claims, as they are unlikely to succeed. However, they are worth mentioning. No cases involving age restrictions in the NBA or NFL have dealt directly with the Duty of Fair Representation, but rather, all challenges have relied on anti-trust exemptions. Because Major League Baseball – and all aspects related to the "business of baseball"[103] are exempt from antitrust laws – an antitrust challenge would seem to be assured to fail. This wide-ranging net was trimmed in 1998 when Congress passed the Curt Flood Act.[104] This legislation guaranteed only that *current* baseball players have the same rights under antitrust laws that

---

[99] *See Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). When an individual violates a rule in the collective bargaining agreement or that a rule is burdensome, such as not submitting to drug testing, the individual can file a grievance.

[100] *Sharpe v. NFLPA*, 941 F. Supp. 8 (D.D.C. 1996). When a player has a dispute about their own individual contract with a team and needs the language of the collective bargaining agreement to interpret how the contract should be enforced, this would be a contract dispute. For example, if a team tries to withhold a bonus that the player believes it is due, the player files a contract dispute.

[101] For an examination of whether prospective draftees are owed the duty of fair representation, see Kevin W. Brooks, *"Physically Ready to Compete": Can Players' Unions Bar Potential Draftees Based on Their Age?*, 21 SPORTS LAW J. 89, 2014.

[102] *See generally*, *Wood v. NBA*, 809 369 F.2d 954; Clarett v. NFL, 369 F.3d 124 (2nd Cir. 2004).

[103] *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) established that baseball was exempt from antitrust regulations. This was reaffirmed, in large part, in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

[104] 15 U.S.C. § 26b (2012).

professional athletes of other sports do. However, this does not change the context of any other application of antitrust laws in relation to baseball. In fact, the Curt Flood Act explicitly states that it does not relate to "employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft."[105] Because international players fall under the amateur status,[106] this effectively negates any opportunity for them to challenge employment in professional baseball using antitrust laws. The only plaintiff group that has standing to file a lawsuit is current major league players, but even they would be unable to make an antitrust challenge in this situation as they would be challenging employment related to amateurs, which is specifically barred from the statute.[107] It is possible that a future plaintiff will make a challenge, much like Flood v. Kuhn,[108] that could change that landscape of antitrust laws in baseball, but absent an imminent action, the mere possibility does not warrant future discussion.

However, the analysis provided throughout the case law surrounding the topic in the NBA and NFL opened up the doors to potential challenges through the Duty of Fair Representation.[109] The most recent and relevant case to the challenge of age restrictions in the draft came in 2004 when Ohio State running back attempted to join the NFL after the 2002 season.[110] Judge Sotomayor's opinion stated that unions had a right to favor players in order to "create and restrict the rights of those whom it represents."[111] Judge Sotomayor added that the union might attempt to secure employment for veterans – players the union *currently* represented – and may disregard those who were yet to join.[112] She also reaffirmed the notion that the duty of fair representation may be an effective

---

[105] 15 U.S.C. § 26b(b)(1) (2012).

[106] All international amateurs are also required to sign a Minor League Uniform Player Contract, *infra* Section II, another class that is specifically excluded from suing under antitrust laws.

[107] For a comprehensive and current examination of baseball's antitrust exemption, *see* Nathaniel Grow, *Defining the Business of "Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557 (2010).

[108] *Flood v. Kuhn*, 407 U.S. 258 (1972). Up through the 1960s, a team that agreed to a contract with a player essentially held the rights to that player for the rest of their careers, unless the team decided to trade or "post" the player. In 1970, Curt Flood decided to challenge this process. When Flood prevailed in the 1972 decision, it essentially created the concept of free agency, whereas a player was free to choose which team he wanted to contract with on the free market.

[109] *Wood v. NBA*, 809 F.2d 954, 956-957 (2nd Cir. 1987) (stating that discrimination against new players under Collective Bargaining Agreements may not be able to withstand a Duty of Fair Representation challenge. It reasoned that the discrimination against future players may not be an absolute right).

[110] *Clarett v. NFL*, 369 F.3d 124 (2nd Cir. 2004).

[111] *Id*. at 139.

[112] *Id*.

avenue for future players securing rights.[113] In light of the forgoing, this may be the only way in which prospective players, and even its current ones, may challenge the union majority should it wish to bargain away the rights of its international prospects.

III. APPLYING THE DUTY OF FAIR REPRESENTATION TO THE UPCOMING BASIC AGREEMENT NEGOTIATIONS

Determining whether the Major League Baseball Players Association would violate the Duty of Fair Representation is a tall task. For one, the union has not made any formal agreement with the league past 2016 and has therefore not *currently* violated any duty to international prospects. Additionally, much of the analysis includes prognostication of what could, and perhaps what is likely to happen, but that does not mean what it actually will happen. What is simply clear is that the Duty of Fair Representation is the best vehicle in which to challenge union behavior in that normal antitrust litigation is likely to fail based on the case law that has developed from other sports leagues.

As such, any of the three elements that lead itself open to a breach of the Duty of Fair Representation would be the best possible avenue for a challenge. These elements are that the negotiation tactics of the union were in (1) bad faith, (2) arbitrary or (3) discriminatory.[114] Based on the forgoing, it is plausible that should international amateurs challenge the union if it bargains away the current system, the minority group would prevail. This is in large part because a significant, yet powerful, minority of current Major League Baseball players has spoken out about preventing free-market bonus pool rights from being bargained away.[115] However, this is an uphill battle as the courts have already allowed unions to bargain with some discriminatory effects,[116] setting the standard to breach the duty very high.

A. The Major League Baseball Players Association Would Likely Avoid a Bad Faith Challenge

A showing that the MLBPA operates in bad faith would be requiring the plaintiff to prove that the negotiations were done with "substantial evidence of fraud, deceitful action or dishonest conduct."[117] Additionally, bad faith actions are "when [the union] acts with an improper intent purpose or motive."[118] The players

---

[113] *Id*.

[114] *Vaca*, *supra* n. 88 at 190.

[115] Badler, *supra* n. 11.

[116] *Steele*, *supra* n. 71 (stating it is not a violation to discriminate based on seniority).

[117] *Lockridge*, *supra* n. 90 at 299.

[118] *Spellacy v. Airline Piots Ass'n Int'l*, 156 F.3d 120, 126 (2d Cir. 1998).

would essentially have to show that the union was *intentionally* trying to deceive its future members through a representation it made. While a situation could be imagined in which the union tried to misdirect international prospects, this is far from what would actually happen in reality. For one, it could conceivably show there was some sort of secret deal, perhaps. The discovery process would greatly determine the merits of a potential action. However, in the current situation, this is unfounded and merely speculative – hard evidence of deceit or fraud would be difficult to come by. Secondly, there is nothing to suggest that the MLBPA has been anything but open when it has come to contract negotiations. For example, in the last Basic Agreement, there were provisions of how a draft may be adopted and rules of regarding its implication that were explicit even for the general population to view. Players know about the possibility of an International Draft and that the current labor agreement is set to expire. In light of these circumstances, it would seem incredibly unlikely that a challenge that the union operates in bad faith would be successful.

B. Could the Major League Baseball Players Association be Acting Arbitrarily?

There is more than a mere possibility that international players could show that the MLBPA acted arbitrarily. Still, these players would probably fail to prove the union acted arbitrarily as the MLBPA could also conceivably demonstrate that the deal was in the best interest of its members as a whole. In order for the international amateurs to show arbitrariness, it must prove that the union acted "so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'"[119] The plaintiff may also show that the behavior is "without a rational basis or explanation."[120] Additionally, this standard "gives the union room to make discretionary decisions and choices, even if those choices are ultimately wrong."[121] The Ninth Circuit went as far as to say, in 2007, that it had not yet found a case in its district where an arbitrary breach of the Duty of Fair Representation was through the exercise of a judgment.[122] Instead, all arbitrary breaches were the result of a failure to perform a procedural or ministerial act.[123] For example, a union's failure to file a timely grievance,[124] or its failure to disclose to a member that a grievance would not be submitted to arbitration proceedings was also arbitrary.[125] As pertaining to the actual negotiating a

[119] *O'Neill*, *supra* n. 89 at 67.

[120] *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46 (1998).

[121] *Id*.

[122] *Beck v. United Food and Commercial Workers Union, Local 99*, 506 F.3d 874, 879 (9th Cir. 2007).

[123] *Id*.

[124] *Durtrisac v. Caterpillar Tractor Co*., 749 F.2d 1270, 1274 (9th Cir. 1983).

[125] *Robesky v. Qantas Empire Airways Ltd*., 573 F.2d 1082, 1091 (9th Cir. 1978).

collective bargaining agreement, a failure to research aspects of the agreement may constitute an arbitrary breach, but not the actual judgment involved.[126] Given the unlikelihood that the judgment of a union has a wide range of latitude, international players would have a distinct disadvantage of proving the MLBPA acted arbitrarily through a judgment. Instead, the far more promising route in regards to an arbitrary breach would be for the international amateurs to prove they were owed and never received performance of a procedural or ministerial act.

Without knowing the full extent of the new language that would come with a new Basic Agreement to challenge the union's judgments, the players would likely argue that holding an amateur draft is actually against the union's best interest. This is because a new international draft would likely include draft pool bonuses, akin to the Rule 4 Draft, which severely limits a player's income capacity. As previously mentioned, the first overall pick in the Rule 4 Draft typically is slotted to make around $6 million, while a top-rated international player could easily make upwards of $30 million.[127] Why the union would want to concede this money would appear to go against why the union exists in the first place. Incorporating players into the Rule 4 Draft would have the same effect. Players would be subjected to draft pool bonuses – it is unclear how valuable they would be if international bonus pools are abolished – but there are still limits as to how much an individual could seemingly make. Again, this would seem to go against the inherent goals of the union.

However, the MLBPA could respond to both of these claims by looking at the larger picture. For instance, it could assert that including amateurs into a draft would serve the purpose of creating more parity in the game – that bad teams can become good teams quicker. Because teams with smaller payrolls tend to come for smaller markets, and there is a direct correlation between payroll and estimated wins,[128] smaller market teams would benefit further. With the value of local television broadcast rights deals exploding in value,[129] teams that even

---

[126] *Peters v. Burlington Northern R. Co*., 931 F.2d 534, 541 (9th Cir. 1990).

[127] Smiley, *infra* n. 6.

[128] *See* Noah Davis and Michel Lopez, *Don't Be Fooled By Baseball's Small-Budget Success Stories*, FIVETHIRTYEIGHT (July 8, 2015), http://fivethirtyeight.com/features/dont-be-fooled-by-baseballs-small-budget-success-stories/. FiveThirtyEight broke down the previous 20 years of data, determining that the more a team spends on its payroll, the greater the likelihood of success. FiveThirtyEight routinely turns out data-driven analysis on all topics from sports to pop culture to politics. The website's founder, Nate Silver, has had numerous contributions to the baseball world as his PECOTA player projection system is among the most accurate player forecasting models in use today.

[129] *See* Maury Brown, *MLB's Billion Dollar TV Deals, Free Agency, And Why Robinson Cano's Deal With The Mariners Isn't Crazy*, FORBES (January 7, 2014), http://www.forbes.com/sites/maurybrown/2014/01/07/mlbs-billion-dollar-tv-deals-free-agency-and-why-robinson-canos-deal-with-the-mariners-isnt-crazy/. For example, the Los Angeles Angels of Anaheim's television deal is set to pay the club more than $3 billion over the next 20 years. The

experience moderate success could have more money to spend. Finally, if these teams have more money to spend, especially because of sustained success, they would in theory have more money to retain players that have blossomed into stars, or they could acquire new talent. The international players could contest this, citing that small to mid-market teams have had success signing international players in the past under the current system,[130] which promotes a free market.

Secondly, by capping the amount international players can make by implementing a draft, the union may also argue that the earnings capabilities of its veteran players are more secured. As the courts have previously demonstrated, Duty of Fair Representation challenges are more likely to be upheld if they concern an issue of seniority. Veteran players would seemingly benefit, the MLBPA would argue, because if the amateurs have a capped amount, teams have more money to spend on retaining their own players and signing free agents. Managing money was the basis for instituting draft pools in the Rule 4 Draft originally.[131]

Finally, the Union would be wise to bring up what would happen if no agreement that pleases everybody can be reached: a work stoppage. If a deal ultimately holds the best interests in mind for its players can be struck, players continue to be able to pay the game and earn millions in contracts and endorsements. If a work stoppage occurs, players' income is essentially cut. Further, work stoppages also tend to hurt players in the long run in that salaries are usually negatively affected in future contracts. This means that on top of not playing for an indeterminate amount of time, players may be making even less as a result of a work stoppage than they had been before.[132] Finally, the popularity of

---

mid-market Cleveland Indians are in the middle of a $400 million deal that extends over 10 years. The Indians showed a greater willingness to spend this new income on free agency deals, including $113 million of guaranteed money during the 2013 off-season. *See* Stephen Uhlmann, *Major League teams taking advantage of new TV contracts*, SOCIETY FOR AMERICAN BASEBALL RESEARCH (last visited November 1, 2015), http://sabr.org/herb-moss-business-baseball-scholarship-stephen-uhlmann.

[130] The mid-market Diamondbacks were able to sign star Cuban Yasmany Tomas during the 2014-15 offseason for $68.5 million. Craig Calcaterra, *Yasmany Tomas signs a six-year, $68.5 million deal with the Diamondbacks*, NBC SPORTS (November 26, 2014), http://mlb.nbcsports.com/2014/11/26/yasmany-tomas-signs-a-six-year-deal-with-the-diamondbacks/. Even the notoriously frugal Rays have been able to entice top-tier international free agents to sign as Dominican shortstop Adrian Rondon, ranked the number one prospect for the 2014 class, to a deal worth nearly $3 million. Ben Badler, *Rays Sign No. 1 International Prospect Adrian Rondon*, BASEBALL AMERICA (July 7, 2014), http://www.baseballamerica.com/international/rays-sign-1-international-prospect-adrian-rondon/.

[131] Jonathan Mayo, *Signing-bonus constraints to impact Draft*, MLB.COM (December 1, 2011), http://m.mlb.com/news/article/26066708/.

[132] Daniel Gregory Horowitz, *The Effect of Strikes and Lockouts on the Strength of Professional Sports Leagues*, 2011, *available at*, https://kb.osu.edu/dspace/bitstream/handle/1811/48847/The_Effect_of_Strikes_and_Lockouts_on_the_Strength_of_Professional_Sports_Leagues.pdf?sequence=1

a sport suffers when games are not being played, leading to a decline in jersey sales and endorsements that professional athletes receive compensation for.[133]

The international players could attempt to refute the first two points by simply stating that there is no proof that teams would be willing to spend the extra money that was saved by acquiring cheap talent. For instance, the Miami Marlins in 2013 had a comically low $42 million payroll.[134] In fact, despite two World Series championships in its 20-year existence, the Marlins have not had a payroll that was in the top half of baseball (data available since 2000).[135] Disputing the claim about work stoppages would appear to be more difficult. The players would likely have to argue that the specific concession of international players' rights was immaterial to the contract as a whole. That is, that these rights were not a major point of contention throughout the negotiation process. Given that there are millions of dollars involved, this seems like an unfounded argument.

Regarding a procedural or ministerial act claim for breaching the Duty of Fair Representation, it is difficult to prognosticate what may be sufficient. The players must prove that they were owed the duty of performance and that they did not receive it. This provision is typically used during the grievance process, not the agreement negotiations. However, the players could assert, if the circumstances were such, that the union failed to do adequate research on bargaining agreement provisions, which in turn affected negotiations, like in *Peters*.[136] However, there is no indication as of the current period to indicate that any duty could be breached. The current Basic Agreement makes it well known that international amateurs may well be subject to a draft in the future.[137] The largest duty the union owes to the international prospects is to weigh their own desires against the landscape of professional baseball as a whole, so it would seem that an arbitrary breach would be that of completely ignoring these players. However, the MLBPA also has a special advisor as to the handling of international players,[138] so it would appear on its face that an omission to do a procedural or ministerial act claim would be unsuccessful.

---

[133] *Id*. at 14.

[134] *Cot's Baseball Contracts – Miami Marlins*, BASEBALL PROSPECTUS (last visited November 1, 2015), https://www.baseballprospectus.com/compensation/cots/national-league/miami-marlins/. By comparison, Yankees slugger Alex Rodriguez made just $13 million less during that season. *Alex Rodriguez*, BASEBALL-REFERENCE (last visited November 1, 2015), http://www.baseball-reference.com/players/r/rodrial01.shtml.

[135] *Id.*

[136] *Peters*, *infra* n. 126.

[137] *Basic Agreement*, *infra* n. 3.

[138] *Infra Introduction*. The current MLBPA international representative is Javier Vazquez, a Puerto Rican native who was taken in the fifth round of the 1994 Rule 4 Draft. Vazquez, therefore, was

Still, the players would probably not prevail on any claim. The television contract revenue and seniority justifications that the MLBPA could declare would likely not convince the court that they are "without a rational basis." Further, there is great rational basis in coming to a deal that will prevent harm to the game and prevent a work stoppage. Given this wide range of deference to negotiate an agreement on their behalf, the court would likely find that arbitrary standard was not breached in regards to the Duty of Fair Representation.

C. A Discriminatory Challenge to the Union's Actions is Plausible if Certain Factors are Met

The argument with the most prospects for the international amateurs is that it can claim that the MLBPA was acting in a discriminatory manner. This standard requires that the plaintiff discriminated on the basis of "irrelevant and invidious"[139] conditions. Whether a bargaining representative acts fairly, impartially, or without discrimination depends on the facts of each case.[140] This means that issues of law are not the driving force in these actions, but rather issues of fact. While age is not necessarily a discriminatory factor,[141] aspects such as race, gender, sexual orientation or disability could be more likely to lend itself to being in violation. In this situation, players that were born outside of the United States, Canada or Puerto Rico could lose their current rights. How the argument is framed by both sides would ultimately decide who would likely prevail on the discrimination challenge.

What sort of evidence the international amateurs end up putting forward will be determinative to how successful a discriminatory challenge may be. In *Williams v. Molpus,*[142] the plaintiff put forth evidence to create a dispute of material fact in a case involving how transferring employees should be treated in regards to seniority status. In it, the plaintiff presented evidence showing (1) how the union offered contradicting reasons to support the legitimacy of a practice of entailing; (2) that the provision was proposed by the union itself, not a demand made by the company; (3) the agreement may have been ratified based on a misrepresentation of the union; (4) the agreement benefited only few employees and was detrimental to a larger group; and (5) of the few employees that benefited from the agreement, one of the employees was the union representative's son.[143]

---

not subject to the free-market bonus pool system currently employed for international amateurs born outside of the United States, Canada and Puerto Rico.

[139] *Steele, supra* n. 71 at 203.

[140] *Balowski v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am.,* 372 F.2d 829, 834 (6th Cir. 1967).

[141] *Steele, supra* n. 71 at 202.

[142] *Williams v. Molpus*, 171 F.3d 360 (6th Cir. 1999).

[143] *Id*. at 367.

Conditions similar to these should be able to help provide framework of arguments to determine what may be a discriminatory violation of the Duty of Fair Representation as it relates to baseball.

First, the international players would attempt to show that their rights would be robbed if they could no longer openly negotiate with the team of their choosing. Never before had international players been subject to an international draft. Secondly, it would cite that some of the games top superstars – some of who were even required to enter the Rule 4 Draft – are in favor of keeping the current system of signing bonus pools.[144] Third, it could assert that if American or Canadian players wished to play in a different league, such as in Japan or Korea, that they are not subjected to a draft. The international players could also show that the union is discriminating by inciting the Lockridge factors:[145] that discrimination is intentional, severe and unrelated to union objectives. This is a potentially strong argument because the union is intentionally attempting to restrict salaries of players just because they were born outside of the United States. The tactic is severe because it is costing players millions of dollars and taking away their freedom to sign with the team of their choosing. Finally, it is unrelated to union objectives because the purpose of a union is to ensure better wages and working conditions; by capping a player's salary, this is inherently against what a union is meant to do. Arguing that any changes are purely motivated on country of origin, the players would effectively switched the onus towards the union to show how that bargaining away these rights would not be discriminatory.

With the pressure on the MLBPA to counter these assertions, there is some reason to believe that they may be able to. Most significantly, the union would argue, is that the current system is unfair to players domestically. There is no reason, it would say, that the top American should make one-fifth that his Cuban or Dominican counterpart may. By knocking down international players' salaries through subjecting them to a draft, the playing field is effectively equalized. The MLBPA could also state that players are not bound to come to America. With popular leagues in Cuba, Korea and Japan, for instance, the MLBPA could effectively state that a player may take his talents to one of those leagues. Third, it could point to the fact that while there has been a Rule 4 Draft since 1965,[146] these international amateurs did not face salary restrictions until 2012.[147] As previously discussed, the union would argue, this just makes all

[144] Badler, *supra* n. 11.

[145] *Lockridge*, *supra* n. 90 at 301.

[146] *First-Year Player Draft History*, MLB.COM (last visited November 1, 2015), http://mlb.mlb.com/mlb/history/draft/index.jsp?feature=decade1960s.

[147] In 2012, the MLBPA and MLB bargained for the implementation of bonus pools. This was bargained for in the Basic Agreement. *See* O'Kennedy, *supra* n. 8. It should be noted that

amateurs equal. Finally, the MLBPA can point to what its counterparts have bargained for. Both the National Basketball Association and National Hockey League make international players subject to their respective drafts.

Using the framework and factors similar to the *Molpus*[148] case may also be beneficial for the international amateurs. In *Molpus*, the plaintiffs were able to use the fact that the union suggested a provision – instead of it being a demand by the company – to their advantage. Likewise, if the international amateurs could prove that the MLBPA wanted to subject the amateurs to the draft and that this was not something MLB necessarily wanted, the international players would have a better argument. However, this is an unlikely possibility as Commissioner Manfred has publicly stated that a draft involving international prospects is preferential to the league. Acknowledging again that many of the provisions are merely speculative at this point, the international players may also attempt to show that the union made a misrepresentation. Finally, the international amateurs can argue that it is discriminatory that they are underrepresented in the union leadership itself, and that the union's main goal was to benefit only American, Canadian and Puerto Rican born players, like in *Molpus* when a representative's son was to unfairly benefit from a bargaining agreement. The MLBPA can counter this argument by again stating that there is a special advisor related to affairs of international players. Moreover, the union could also demonstrate that a large group – a vast majority – of individuals would be benefitting if international players went through a draft instead of on the free market, unlike *Molpus* where only an elite minority were to benefit from a bargaining agreement. Both sides seem to have unique arguments with certain strengths and weaknesses, but given that the onus is on the plaintiffs to prove discrimination, the MLBPA would seem to have the upper hand.

Ultimately, it would seem like the union would be favored on a Duty of Fair Representation challenge. Given the wide range of deference offered generally in the Duty of Fair Representation, a court would seem to favor the MLBPA, but only if it could show that the motivation for bargaining these rights is for the greater good of the game and players as a whole. With the arguments that potential union action is arbitrary or in bad faith likely to be unfounded, the discriminatory peg is the best chance for players to ensure that they are being fairly represented by their union to ensure their rights.

V. A "BASIC" SOLUTION THAT BENEFITS EVERYONE

Coming up with a solution to ensure that all players are treated equally, while each team has a greater opportunity to become better is a guessing game.

---

individual players today do not face salary restrictions. In theory, a player may sign for whatever they bargain for. However, MLB recommends how much each of the team's draft picks in the first 10 rounds should be valued at. If a team surpasses this aggregate amount, they will be penalized.

[148] Molpus, *Infra* n. 143.

That is essentially what the MLBPA and MLB did when they agreed to institute bonus pools for international amateur players. However, it is clear to Commissioner Manfred that the current system does not work, and changes must be made. So how does it become fixed?

As Commissioner Manfred also noted, the international bonus pools appeared to be working well until the most recent influx of Cubans to the game. Perhaps instead of scrapping the idea as a whole, it should be refined. Harsher penalties for teams that exceed their allotment would appear to be the most logical place to start. Instead of taxing a team 100 percent if it purposely blows past its allotment, a 300 percent tax with the extra proceeds going towards a trust that would be used for revenue sharing purposes could be a start. This would punish teams monetarily if it intentionally attempts to circumvent the system while giving teams that obey some additional revenue that could perhaps be used in signing other free agents or retaining their current players. Further restricting a team's ability to sign a player in future years would seem to ensure pro-competitive benefits also. Players, meanwhile, are still not subject to a cap, and if good enough, could still sign for tens of millions of dollars.

Compelling players to enter a draft – whether holding a separate one for international players or by making them enter the Rule 4 Draft – could still be a solution, albeit a less plausible one. This effectively caps how much an international player could sign for while also restricting which team to sign with. Further, a player who is unable to reach an agreement may not have any additional options but to play another year in their native league and attempt to re-enter the draft, where they may very well be unable to secure a contract again. Additionally, in this situation a team may low-ball a player with an offer that is still exponentially higher than what they would have made in their native country, but is still a fraction of their true market value if the team were to have exclusive negotiating rights. As teams have already learned to exploit the current bonus pool system, it could very well be a matter of time before the draft is exploited, too. What is undeniable, is that if both amateurs abroad and domestically must go through a draft, the draft bonus pools should be raised in order to reflect the amount teams would be saving in abolishing the international bonus pool arrangement. But with a draft being inherently flawed for international players, it is difficult to see how such a situation would be implemented properly.

Conclusion

Whatever short-term solution the MLBPA and MLB is able to bargain for will likely have significant long-term effects. That makes the Basic Agreement negotiations that begin at the conclusion of the 2016 season some of the most important in the game's history. While the union has a "wide range of reasonableness,"[149] it must be careful not to alienate any of its minority groups or

[149] *Huffman*, *supra* n. 78.

else it may face a Duty of Fair Representation challenge. While some discrimination is allowed, such a challenge could also potentially win. For now, it seems like it would only be in the MLBPA's best interest to sit back and see how the game – and world – develops in the upcoming year. After all, one could observe a lot, just by watching.[150]

[150] This is one of the many comical quotes attributed to Yankees legend Yogi Berra, but it also demonstrates how rushing to quick generalizations and making rapid decisions may not be as advisable as taking a more relaxed approach. Jeff Passan, *Yogi Berra: A celebration of baseball, life and a man's legacy of words*, YAHOO! (September 23, 2015), http://sports.yahoo.com/news/yogi-berra--a-celebration-of-baseball--life-and-a-man-s-legacy-of-words-150929520.html.