Immediate Release
January 19, 2011

LABOR ISSUES IN PROFESSIONAL SPORTS: THE UPCOMING NEGOTIATIONS IN THE NFL, NBA, AND MLB

ORANGE COUNTY
LABOR & EMPLOYMENT RELATIONS ASSOCIATION

Delivered by:

William B. Gould IV
Charles A. Beardsley Professor of Law, Emeritus
Chairman of the National Labor Relations Board (1994-1998)
Author of Baseball in the Age of Prosperous Turmoil: Of Strikes, Brawls and Drugs (McFarland, 2011) and with Robert Berry, Labor Relations in Professional Sports (Auburn 1986).

8:00 pm, January 19, 2011
Sheraton Park Hotel, (Tiffany Terrace)
1885 South Harbor Boulevard
Anaheim, CA 92802

Thank you Bonnie Castrey. It is a pleasure to return here to southern California and to see old friends from the NLRB and others in labor law, arbitration and mediation. Bonnie knew that by I would readily accept an invitation to come down here, given the fact that I have many pals here – and that new generations of Goulds, the most recent of which span the ages of 4 months to nearly 11 years are in the area. It is a pleasure to be with you again. This is an unprecedented year for the world of collective bargaining in professional sports. For in 2011 all of the collective bargaining agreements in the three major sports – baseball, football and basketball expire during the year. Football comes first, in less than two months time from now; basketball will come to a crunch when the agreement expires on June 30; and baseball, where pitchers and catchers will report in just a couple of weeks, will be the last of the three at the end of the year after the 2011 season is completed – though it is possible that differences between the parties in that sport can be resolved substantially in advance of the expiration date of the agreement.

As the United States is still mired in the midst of our Great Recession here, these industries are flourishing considerably by all standards. Football leads the pack with annual revenues of $9 billion, baseball comes soon behind with $7 billion and the National Basketball

Association and the National Hockey League (whose contract expires in 2012) with 4 and 3 respectively. In an era of relatively undiminished and precipitous union decline, all of the sports deal with unions that have some measure of muscle with unions negotiating relatively strong and comprehensive collective bargaining agreements. These contracts contain lengths of nearly 300 in football, more than 350 in basketball (including exhibits) and 430 in baseball. In the degree of detail and sophistication, they resemble in some respects the voluminous agreements negotiated by the great industrial unions which first walked onto the scene of history in the Great Depression of the 1930s. Though, at the beginning, the sports unions emerged along side of the social and economic upheavals of 60's and 70's to protect the "have nots", today we see sports labor controversies as a fight between the millionaires, albeit with very brief access to vast sums, and the billionaires!

Not only is it unprecedented for all of these agreements to be negotiated with near simultaneity, but also this round of bargaining is different from the past in another respect as well – i.e., a kind of role reversal. For it is baseball, which was filled with strife and discord in what I have characterized as a 30 year war before it enjoyed unprecedented peace and prosperity ever since my National Labor Relations Board intervened in the "mother all strikes" and

obtained an injunction in 1995 from now Justice Sonia Sotomayor.[1] Now, having concluded two agreements without resort to strike or lockout in 2002 and '06 the parties have put behind them uninterrupted warfare and a losing streak of legal mistakes by the owners. The prospects appear to be good that we will continue to enjoy uninterrupted peace beyond the 17 years that the parties will have lived together successfully at the end of this year.

True, there are issues and problems which will arise at the baseball collective bargaining table in this year. Though the steroid scandal of the '90s and the early part of this century appears to have diminished and the litigation involving BALCO has ended,[2] the problem of HGH for which baseball has not yet devised a test remains out there. But, as the late George Steinbrenner's admonition to Jason Giambi to "shut up" rather than talk to Senator Mitchell during his drug investigation of a few years back illustrates, there has long been a unity of interest between the owners and players in down peddling the focus on this matter.

One would expect therefore that this issue will receive little attention in 2011. Yet, as the Barry Bonds and Roger Clemens perjury trials along with revelations about such matters as

[1] 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 Cir. 1995). The strike is chronicled in William B. Gould IV, Labored Relations: Law, Politics and the NLRB (2000).

[2] U.S. v. Comprehensive Drug Testing, Inc. 621 F.3d 1162 (9th Cir. 2010) (*en banc*).

Montreal doctors reveal, there is still no certainty about the ability of the parties to put the drug matter behind them. And as the movie Sugar demonstrated, this is frequently bound up with the recruitment of new talent from Latin America often desperate to use any means to capture the riches of the North. The Commissioner's office has apparently expressed displeasure about the Players Association exoneration of Scott Boras' financial dealings with players in the Dominican Republic through its authority over agents – though under labor law baseball management would seem to be unable to insist upon addressing what has been an internal union matter through the collective bargaining process.[3]

The abuses of Latin American recruitment in baseball academies which Professor David Fidler of Indiana Law School has spotlighted for all of us[4] will invite in all probability the revisiting of another issue discussed by the parties and others for the past decade, i.e., the international draft. Thus far baseball has opted for the academies as a recruitment mechanism. Though a draft will drive up the size of bonuses to be paid to individual players (particularly as a

[3] NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

[4] Arturo J. Marcano and David P. Fidler, "Stealing Lives: The Globalization of Baseball and the Tragic Story of Alexis Quiroz," (2002), Arturo J. Marcano and David P. Fidler, The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent, 6 Ind. J. Global Legal Stud. 511 (1999) and Arturo J. Marcano and David P. Fidler, "Global Baseball: Latin America," in The Cambridge Companion to Baseball (2011).

new talented pool emerges from Cuba in a post-Castro era), it may be that reputation and other cost will impel a reconsideration. On this matter, baseball needs the union to agree so as to avoid antitrust law strictures (more about them later).

Arguably connected to these issues will be the draft as presently constituted domestically. Even prior to its origin in 1965, and the subsequent Peter Seitz 1975 award creating fee agency, the expense of domestic players drove the owners to Latin America – and more recently the Far East, Australia and other countries as well. The owners will propose a slotting mechanism in the collective bargaining agreement requiring particular payments to draftees depending upon the round in which they are picked – the surrogate for a rookie cap which will be at issue in football and basketball. They will want to make sure that Steven Strausberg – type payouts are a remnant of the past.

Sports unions are not primarily concerned with rookie salaries inasmuch as most of their members are veterans and the draftees are invited applicants, at best, when the collective bargaining decisions are made. I am confident that the NFL Players Association will accept a restrictive salary cap for the rookies, lockout or not. There will be no more guarantees of $31 million to the likes of JaMarcus Russell -- just as the NBA Players Association is likely to give

ground on their new eligibility demands for players aged 19, one year removed from high school. One can anticipate that the major league baseball players will not enter into anything like slotting (the Commissioner's office attempts rather unsuccessfully to do the slotting itself as of the present time) unless the owners give considerable ground on economic issues elsewhere.

The decline of football revenue sharing between clubs – a principal obstacle to the resolution of 2011 collective bargaining lies in the sharp economic distance between clubs like Jacksonville, Carolina, San Francisco, and Oakland as opposed to their well resourced brethren in Washington and Dallas – has muddied this year's waters. Still, baseball's commitment to revenue sharing between teams stands somewhere in between a more socialistic football on the one hand and a more laissez-faire approach of basketball on the other – and it could be on the bargaining table again in light of last summer's revelation that some recipient clubs were not making good use of what they received – a previously unkept dirty little secret. The Players Association which has thus far resisted a minimum payroll for clubs (as opposed to a minimum salary for individual players) pressured the Florida Marlins in concert with the Commissioner to get that club to spend more. Though the Commissioner has the authority to take action against clubs that are not spending the payments for baseball purposes, except for the Marlins case last

year, he has never taken action against anyone. The luxury tax, predominantly applicable to the New York Yankees who drive the market in baseball – in football the union wants a parity of spending between the clubs – will get the union's attention because of its concern that this mechanism not become a de facto salary cap against which the union has long fought. Nonetheless, particularly given the fact that the parties have come so close together on a wide variety of issues these past 16 years – the World Baseball Classics of 2006 and 2009 providing a prominent illustration – the chances of a peaceable resolution are good, particularly in comparison with the other sports.

Football is the more forbidding, though I expect that there will be a good deal of serious bargaining during these next weeks as the Ides of March and the contract expiration date come close. Here the owners have put together a $900 million dollar fund to support a lockout for the '11 fall season subsequent to an Andrew Luckless draft in April. Again, this is a role reversal at least in terms of the past two decades subsequent to the union's defeated strike effort when replacements crossed its picket lines in 1987 – a retreat reversed only through antitrust litigation which culminated in the McNeil decision of 1992 which settled outstanding antitrust liability

claims to player and union satisfaction, and in the process, restored union recognition.[5]

Subsequently, both sides prospered through a revenue sharing (between players and owners) – salary cap framework first promoted in basketball. Now, at least some of the the owners are dissatisfied with the economics of the old Gene Upshaw – Roger Tagliabue days of collaboration, and the most recent 2006 agreement, contending that the 60% share accorded to players impairs product investment and have proposed that the players' share of revenue be diminished. (The parties are fighting over their respective calculations about the precise amount of concessions demanded).

TV has been a gold mine for football, permitting the public to see the 3 or 4 games going on inside one, providing the NFL with about $4 billion a year with this year's Super Bowl costing advertisers $3 million for 30 seconds. The TV monies for this fall which are due even if the season is modified or cancelled is a form of partial lockout insurance for the teams. Though it must be ultimately be repaid in the event that games are not played, repayment may well be in kind i.e. additional games or TV advertisements allowed subsequent to the lockout. The players maintain that this arrangement has artificially diminished revenues in violation of the contractual

[5] McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992).

obligation to maximize them during the term of the agreement and thus deprived players of income that would otherwise be due to them.

Meanwhile, the owners have also proposed that the season be extended to 18 games (over the present 16 game schedule) with a diminished pre-season schedule and presumably an expanded roster – a matter which has caused players concern given the current focus upon safety, concussions and other injuries in the abbreviated football player career. (Baseball may also extend its season with more wild cards, an owner idea not thus far rejected by the union.)

While the baseball union has muscled its way into sports prominence through labor law and labor arbitration, football, basketball as well as hockey and other sports have seen their unions rely upon antitrust law since the late '60s and early '70s. (Antitrust law is not generally applicable to baseball because of the 1922 Federal Baseball ruling.[6]) As the result of the 1956 Radovich case[7] antitrust law has been deemed applicable to football, liability predicated upon collusion between the owners on conditions of employment and wages in restraint of trade. This, in turn, incentivizes the clubs to deal with the union so as to avail themselves of the non-statutory

[6] Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).
[7] Radovich v. the National Football League 352 U.S. 445 (1956).

labor exemption to antitrust law [8] -- though just within the past 2 years the football owners once again tried mightily and unsuccessfully to rid themselves yet again of antitrust law and liability.[9]

The NFL Players Association, having successfully bargained revenue sharing subsequent to decertifying itself as collective bargaining representative two decades ago, may try the same tactic again this year. Since the last decertification experience in the late 80s and early 90s proved that this weapon could induce management to modify previously held positions, the Supreme Court, in Brown v. Pro Football[10], has confirmed the renunciation of the union by the players as exclusive bargaining agent, i.e., decertification, as the only way that the union can abandon labor law and use antitrust law. The practical problem is that union members will be deprived of insurance benefits and the check-off of union dues. This avenue will not be taken lightly and is not an absolute slam dunk for success.

But if it is taken, Article LVII of the agreement, Mutual Reservation of Rights Labor Exemption. contains a number of seemingly contrary contract provisions on this issue. On the one hand, Section 3(b) states that after the expiration of the agreement in March or "..any time

[8] Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976). See also, Robertson v. National' Basketball Association, 389 F Supp. 867 (D.D.N.Y 1975), Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 518 (E.D.Pa.1972) and Boston Professional Hockey Ass'n, Inc. v. Cheevers, 348 F.Supp. 261, 267 (D.Mass.).

[9] Reggie White v. National Football League, 585 F.3d 1129 (8th Cir. 2009);. American Needle, Inc. v. National Football League, 130 S. Ct. 2201 (2010).

[10] Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

thereafter a majority of players indicate that they wish to end the collective bargaining status of the NFLPA", if the union is in existence certain procedures must be followed.[11] The NFL waives the right to assert the labor exemption on the ground that the union's termination of its collective bargaining status is a "sham, pretext, ineffective, requires additional steps, or has not in fact occurred." On the other hand, Section 1 states that upon the expiration of the agreement, "no party… shall be deemed to have waived….their respective rights under law with respect to the issues of whether any provision or practice authorized by this agreement is or is not then a violation of the antitrust laws." Section 1 further provides that "Subject to the provisions of this Article, upon the expiration or termination of this Agreement or the Settlement Agreement, the Parties shall be free to make any available argument that any provision or practice authorized by this Agreement or the Settlement Agreement is or is not then a violation of the antitrust laws, or is or is not then entitled to any labor exemption.

[11] Article LVII of the agreement, Mutual Reservation of Rights Labor Exemption Section 3. CBA Expiration:
(a) Following the expiration of the express term of this Agreement, then, if the NFLPA is in existence as a union, the Parties agree that none of the Class Members (as defined in the Settlement Agreement) nor any player represented by the NFLPA shall be able to commence an action, or assert a claim, under the antitrust laws for conduct occurring, until either: (i) the Management Council and NFLPA have bargained to impasse; or (ii) six (6) months after such expiration, whichever is later; at that time, the Parties reserve any arguments they may make regarding the application of the labor exemption.

If the NFLPA can use antitrust law, the lockout weapon itself would be illegal, notwithstanding the fact that the Supreme Court has said in 1965 that the labor law provides that the right to lockout is "correlative" with the right to strike.[12] The public and labor – management practitioners generally have held the view that the dictates of labor and antitrust law have unduly affected the rights and liabilities of parties in sports and disrupted the collective bargaining process in the past, -- "but they ain't seen nothing yet."

Meanwhile, there is basketball, in which matters will come down to the final hours at least three months after crunch time in football – that is, at the time contract expiration on June 30. Here, it is generally thought that the union is very much on the defensive and that a lockout is more likely than in football. (it was used through lockouts in 1998-99 and 2005, consisting of 7 months and 1 month respectively) In both instances, the National Basketball Players Association apparently thought that the benefits to be obtained through the football decertification tactic were outweighed by the burdens – though the basketball trade unionists had threatened decertification earlier. This time around, Stern has started down the lockout trail once again, initially out of concern with oversized salaries given to young high school graduates like superstar Kevin

[12] American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).

Garnett (when he came out to join the Timberwolves). The owners are now proposing a 38% reduction in player salaries (estimated as between a $750 to $800 million rollback), a diminution of existing salaries, a hard salary cap, shorter individual contracts for players, elimination of all exceptions to the salary cap and prohibition of the guaranteed contract itself. This seems like the beginning of war, putting aside all the huffing and puffing that normally goes into collective bargaining proposals and demands.

Some on the management side believe that the owners will lose $350 million this season and the union, for its part, states that they are ahead of the game to a tune of $100 million. The one area of potential compromise seems to be the union's concession that revenue sharing with the players should be reduced. This contrasts vividly with football where the owners do not seem to be declaring that they are losing money – as the basketball owners are – but rather that they do not have enough monies under the existing revenue sharing framework to invest sufficiently in infrastructure and the like.[13] Thus, in basketball both sides are putting aside war chests, the union

[13] But even in the case of the NFL, concession demands would appear to oblige the owners to back up their claims with data. Caldwell Manufacturing Company 346 NLRB 1159 (2006); Cf. Con-Agra-Inc. 321 NLRB 944 (1996). In the case of the NBA, there appears to be an obligation to open the books to union access – and it appears that this obligation is being met. NLRB v. Truitt Manufacturing MFG Co..351 U.S. 149 (1956).

about $175 million. The consensus seems to be that the game is an economically perilous situation.

Though the initiative seems to be coming from the owners' side, nonetheless the players are like a ship passing them in the night in making their own proposals. The union wants to cut down on the number of days that the club has (currently seven) to match another teams offer sheet for restricted free agents, believing that player mobility is diminished by this. It also is proposing increased revenue sharing (remember that the NBA has the weakest revenue sharing of all the three majors) between the clubs so that the weak sisters can be helped by Boston, New York and Los Angeles. The carrot in the union's proposals is deduction of stadium or arena costs from the revenues to be shared between players and owners. But one can expect the NBA to resist negotiation of the deduction issues on the ground that they constitute management prerogatives within the meaning of Supreme Court precedent interpreting the duty to bargain obligation.[14]

And like their football brethren who seek to move away from unilateral Commissioner authority to penalize players for violent helmet to helmet contact, the basketball players are

---

[14] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

attempting to place suspensions in the forum of arbitration rather than that of the Commissioner – at present unless the suspension is for more than 12 games or more, the Commissioner decides, without arbitral interference.

Out of all this come two abiding certainties. The first is that, as I said when NLRB Chairman at the time of the Brown decision in 1996, that reconciliation between antitrust and labor law in that case invites obfuscation and game playing. Law reform proposals which would put all of these matters in the labor law arena and exclude antitrust are wrong-headed in that labor law is weak and antitrust is strong i.e., treble damages in the case of the latter and ineffective remedies as well as emasculation of the strike weapon in the former. But labor law reform is just as distant, if not more so today[15] than when I wrote a book about it nearly 20 years ago. [16]

Thus, those who bemoan the presence of labor issues and labor law in professional sports will continue to gnash their teeth in 2011. Even baseball which looks ironically pacific, will be

[15] In the case of the NBA, there appears to be an obligation to open the books to union access – and it appears that this obligation is being met. NLRB v. Truitt Manufacturing MFG Co..351 U.S. 149 (1956).

[16] W. B. Gould IV, Agenda for Reform (1993); New Labor Law Reform Variations on an Old Theme; is the Employee Free Choice Act the Answer? 70 La Rev.1 (2009); The Future of Employment Relationships and the Law (1993).

filled with complex issues. Football and basketball negotiations will get the headlines and perhaps the lockouts as well. Neither the law nor lawyers can be kept out of the bargaining.