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Contraction in Major League Baseball: Do Owners Have a Duty To Bargain in Good Faith with the Union Before Shutting Down or Relocating a Team?

J. Benjamin Staherski*

I. Introduction

The future of the Minnesota Twins and the Montreal Expos was in question at the start of the 2002 Major League Baseball ("MLB") season. MLB owners considered shutting down the Montreal Expos and Minnesota Twins, a process called contraction, and possibly relocating the teams to another city.[1] The Expos and the Twins were the subject of contraction because they had trouble generating sufficient revenue.[2] The Montreal Expos suffered low attendance rates and generated little revenue from television and radio contracts.[3] Although they had sufficient attendance, the Minnesota Twins failed to generate government support for a much-needed new stadium.[4]

Both the Expos and the Twins, however, were benefiting from the

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2004; B.S., 2001, The Pennsylvania State University.

1. *Twins, Expos Say No in 28-2 Vote To Contract Two Teams,* ASSOCIATED PRESS, Nov. 6, 2001, *available at* http://cbs.sportsline.com/u/ce/multi/0,1329,448654252,00.html. The MLB owners voted to "contract" two teams from MLB, which would drop the total number of teams from thirty to twenty-eight. There were also talks of possibly relocating one of the teams to the Washington, D.C./Northern Virginia area).

2. *Id.* Major League Baseball Commissioner Bud Selig stated: "The teams to be contracted have a long record of failing to generate enough revenues to operate a viable major-league franchise." *Id.*

3. *Id.* "The Expos averaged just 7,648 fans per game at Olympic Stadium this year and have locally generated revenue of about $16 million—8 percent of the Yankees' total of nearly $200 million." *Id.*

4. *Id.* "Minnesota and Florida have failed to generate government support of new ballparks, and Twins owner Carl Pohlad has pushed Selig to eliminate his team in exchange for a large contraction payment, according to other owners, who spoke on condition they would not be identified." *Id.*

revenue sharing among the MLB teams. The high-revenue teams were frustrated with having to continue subsidizing the low-revenue teams.[5] To date, this attitude remains the same, particularly after the owner of the Minnesota Twins kept much of this revenue sharing money instead of reinvesting it for the betterment of the team.[6]

The decision to contract a team was not initiated by a few teams; rather, "[C]ontraction was an initiative of the 30 clubs and continues to be wholly supported by that group."[7] The decision to contract and/or relocate MLB teams was led by MLB Commissioner Bud Selig.[8] Selig vowed to press on, suggesting that the elimination of teams was necessary in order to stop industry losses, which he claims totaled hundreds of millions of dollars in 2002.[9]

This proposed contraction and/or relocation by the owners created conflict between the owners and the players' union, which is called the Major League Baseball Players Association ("MLBPA"). The owners felt that, like other organizations and businesses, they should be able to shut down an unprofitable plant, or in this case a team, without having to bargain with the union.[10]

The MLBPA felt, however, that if the owners were not only shutting down a team, but also relocating it, the owners should have to bargain with the MLBPA before doing so.[11] The MLBPA also argued that even if an owner is not required to bargain with the MLBPA under traditional rules of bargaining, there should be an exception due to the unique situation in MLB. Because MLB has historically been treated differently than other business entities due to MLB's antitrust exemption,

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5. *Id.* (stating that "the high-revenue teams don't want to give up any more money to revenue sharing.").

6. Doug Pappas, *The Numbers (Part Six): Profits and Revenue Sharing* (2002), *at* http://roadsidephotos.com/baseball/. "[I]n 2000 the Minnesota Twins received $21 million from the revenue-sharing pool, $5 million more than the salaries paid to their entire 25-man roster." *Id.* This was one of the reasons why the MLB owners were considering to contract the Minnesota Twins. *See id.*

7. *Selig Says Baseball Will Try Again in 2003*, ASSOCIATED PRESS, Feb. 13, 2002, *available at* http://espn.go.com/mlb/news/2002/0205/1323166.html (Bud Selig stated: "The clubs recognize that our current economic circumstance makes contraction absolutely inevitable, as certain franchises simply cannot compete and cannot generate enough revenues to survive. Quite a few of our clubs advocate contraction by as many as four clubs.")

8. *Id.*

9. *Id.*

10. *Id.* (Union Head Donald Fehr said: "We are pleased that the 2002 season will proceed with 30 teams .... However, it is regrettable that the clubs continue to assert that they can and will act unilaterally, rather than by negotiation and agreement.").

11. 29 U.S.C. § 158(d) (1994) (requiring an employer to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment" with the union).

and because of the profit and revenue sharing that occurs amongst the teams, the MLBPA argued that the owners should be required to bargain in good faith before contracting and/or relocating a team.[12]

The issue of whether or not a MLB owner has a duty to bargain with the MLBPA before contracting and/or relocating a team went before an arbitrator but was never resolved because the owners decided not to contract or relocate either team.[13] If this issue would arise again, would a MLB team owner be required to bargain with the union in good faith before deciding to contract or relocate their team?

This Comment addresses whether MLB owners have a duty to bargain in good faith before contracting and/or relocating a team. Part II of the Comment explains the current statutory law of bargaining.[14] Part III analyzes the Collective Bargaining Agreement in MLB. Part IV addresses whether closing and/or relocating a business is a mandatory subject of bargaining under 29 U.S.C. § 158(d). Part V discusses how the rules of bargaining should be applied to MLB in contracting or relocating teams. Part VI addresses the antitrust exemption in MLB and the other ways MLB is, or should be, treated uniquely. Part VII concludes that MLB owners do not have a duty to bargain in good faith before contracting or relocating a team.

II. Current Law of Bargaining

Title 29 U.S.C. § 158(d) governs an employer's duty to bargain in good faith with a union over mandatory subjects of bargaining.[15] An employer and the representative of the employees must "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[16] "[W]ages, hours and other terms and conditions of employment" are considered to be mandatory subjects of bargaining.[17] Any decision that is not considered a mandatory subject of bargaining can be unilaterally implemented by the employer.

When a mandatory subject of bargaining is contained in an employee's contract, it is treated differently than if it were left out of the contract. If a mandatory subject of bargaining is not contained in the

12. Flood v. Kuhn, 407 U.S. 258 (1972) (upholding, for the third time in fifty years, the antitrust exemption as it applies to MLB).

13. Telephone Interview with Doyle Pryor, Counsel for MLBPA (Sept. 19, 2002). The author is grateful to Doyle Pryor for suggesting this topic, which was a major issue of debate during arbitration that was never resolved.

14. *See* 29 U.S.C. § 158(d).

15. *Id.*

16. *Id.*

17. *Id.*

contract, an employer must bargain in good faith with the union representatives to impasse.[18] Once bargaining reaches impasse, then "[the] employer may unilaterally implement its bargaining proposal with respect to the matter not contained in the agreement."[19] "Where a mandatory subject is contained in the contract, however, [§ 158(d)] further limits an employer's actions."[20]

III. Collective Bargaining Agreement in MLB

On December 7, 1996, a Collective Bargaining Agreement was created between the Clubs comprising the National League of Professional Baseball Clubs and the Clubs compromising the American League of Professional Baseball Clubs ("Clubs") and the MLBPA.[21] The Collective Bargaining Agreement went into effect on January 1, 1997 and was to last through 2001.[22] The Collective Bargaining Agreement covered such employment issues as negotiation and approval of contracts, salaries, profit sharing, discipline, and arbitration, among others, but did not include the possibility of a contraction or relocation decision.[23] Because the issue of an owner's duty to bargain over the decision to contract or relocate a MLB team is not included in the Collective Bargaining Agreement, it must be determined if the decision is a mandatory subject of bargaining.

IV. Is the Decision To Close or Relocate a Business a Mandatory Subject of Bargaining?

A. Closures

Courts have held that a duty to bargain in good faith does not apply to owners who decide to close a business.[24] The Court in *Textile Workers Union of America v. Darlington Manufacturing Co.* held that an employer had the absolute right to terminate his entire business for any

18. Int'l Union v. NLRB, 765 F.2d 175 (D.C. Cir. 1985); *see* BLACK'S LAW DICTIONARY 755 (7th ed. 1999) (defining impasse as "a point in labor negotiations at which agreement cannot be reached").

19. *Int'l Union*, 765 F.2d at 179.

20. *Id.* (It is well understood that § 158(d) prohibits an employer from altering contractual terms concerning mandatory subjects of bargaining during the life of a collective bargaining agreement without the consent of the union).

21. AM. LEAGUE OF PROF'L BASEBALL CLUBS, NAT'L LEAGUE OF PROF'L BASEBALL CLUBS, & MAJOR LEAGUE BASEBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT (Jan. 1, 1997).

22. *Id.*

23. *Id.*

24. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).

reason he pleased.[25] Courts have also held that an employer does not have a duty to bargain in good faith over closings because decisions that change the direction of an enterprise,[26] or that involve major shifts in the capital investment or corporate strategy of a company,[27] do not fit under management decisions involving terms and conditions of employment.[28] The decision to close a business is not a mandatory subject of bargaining; an owner thus does not have a duty to bargain with a union before closing his business. The courts have looked at the decision to close and relocate a business in a different way from the decision just to close a business.

B. Relocation

If an owner of a MLB team were to contract their team, the owner should not have to bargain with the MLBPA before doing so. However, would an owner who was planning on contracting the team and relocating it to a new city have a duty to bargain with the MLBPA? The owners of the Montreal Expos and the Minnesota Twins contemplated this exact situation. It was rumored that the owners of these teams were considering moving their teams to the Washington, D.C./Northern Virginia region.[29]

Two leading Supreme Court cases analyzed the question of mandatory bargaining in an owner's decision to subcontract work[30] and an owner's decision to partially close his business.[31]

In *Fibreboard Paper Products Corp. v. NLRB*, an employer subcontracted work to cut labor costs in his business.[32] The *Fibreboard*

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25. *Id.* (holding that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice).

26. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-10 (1964) ("Management decisions that fundamentally alter the direction of an enterprise, or involve significant reallocation of capital generally are not considered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining.").

27. Local 777, Democratic Union Org. Comm. v. NLRB, 603 F.2d 862, 884 (U.S. App. 1978) ("Major shifts in the capital investment or corporate strategy of a company are not mandatory bargaining subjects, even though they may have a profound effect on the conditions of employment.").

28. 29 U.S.C. § 158(d) (1994) (Courts attempt to define the ambiguous wording "terms and conditions of employment" in the statute).

29. *Twins, Expos Say No in 28-2 Vote To Contract Two Teams,* ASSOCIATED PRESS, Nov. 6, 2001, *available at* http://cbs.sportsline.com/u/ce/multi/0,1329,4486542_52,00.html ("Washington-Northern Virginia has been the most aggressive area in pursuing a team.")

30. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964).

31. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

32. *Fibreboard*, 379 U.S. at 206.

Court held that the decision by the employer to subcontract work was a violation of § 8(d).[33] The Court said that the relocation decision was a violation of § 8(d) because the decision turned on the issue of labor costs, an issue that is typically a mandatory subject of bargaining.[34] The Court held that the decision to subcontract work violated § 8(d) because it did not change the company's basic operation and was merely done to replace existing employees.[35]

More recently, the Supreme Court looked at the issue of an employer's duty to bargain over a partial closing of a business.[36] In *First National Maintenance Corp. v. NLRB*, the Court held that an employer did not have a duty to bargain with the union before shutting down a part of the business.[37] The Supreme Court's holding in *First National* was limited to allow employers to make unilateral decisions so long as the burden placed on the conduct of the business outweighs the benefit for labor-management relations and the collective-bargaining process.[38] The Court also allowed an employer to make decisions without bargaining with the union in instances where the union has no control or authority to change the employer's decision, even if bargaining were to take place.[39]

The NLRB used the Supreme Court's analysis in *Fibreboard* and *First National* to determine that an owner did not need to bargain with the union over a relocation decision.[40] In *Otis Elevator Co.*, the NLRB looked at the decision to relocate's impact on the employees.[41] The NLRB asked whether the owner's decision to relocate turned on the issue

33. 29 U.S.C. § 158(d) was previously § 8(d).

34. *Fibreboard*, 379 U.S. at 213.

35. *Id.* (The decision to subcontract work "did not alter the Company's basic operation. The maintenance work still had to be performed at the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment").

36. *See First Nat'l*, 452 U.S. at 666 (The issue of a duty to bargain over a partial closing is evaluated in the same fashion as a duty to bargain over a relocation).

37. *Id.* at 686 (Employer of a housekeeping service, for commercial customers, stopped providing services to a nursing home due to a loss of money on the contract).

38. *Id.* ("The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss.").

39. *Id.* (The employer had no duty to bargain because the union had no control or authority over the fee that the employer was willing to pay to continue housekeeping services at the nursing home).

40. *Otis Elevator Co.*, 1984 NLRB LEXIS 866, at *1 (1984) (owner was not required to bargain with union over discontinuing research and development at Parsippany and Mahwah facilities and consolidating them at their East Hartford, Connecticut facility).

41. *Id.* at *8.

of labor costs.[42] If a decision to relocate turned on the issue of labor costs, then the decision would be a mandatory subject of bargaining.[43] The NLRB decided that the relocation decision did not turn on the issue of labor costs, but rather the decision was made due to the outdated technology at the research and development facility.[44] Because the decision did not turn on the issue of labor costs, the employer had no duty to bargain with the union before relocating.[45]

The Fourth Circuit Court of Appeals evaluated the decision to relocate in a similar fashion.[46] In *Dorsey Trailers v. NLRB*, the company and the owners could not successfully negotiate the terms of a new collective bargaining agreement.[47] Due to the increase in demand for new trailers and the union's decision to go on strike, the company relocated its business from Northumberland, Pennsylvania to Cartersville, Georgia.[48] The court held that the company did not have a duty to bargain with the union over its relocation decision even though it influenced the "tenure" of employment.[49] The court called this decision "fundamental to the basic direction of a corporate enterprise"[50] and "not a term or condition of employment;" therefore, there was no obligation for the company to bargain with the union until impasse.[51]

In all of the cases dealing with relocation decisions, the court's duty was to determine if the employers failed to bargain with the unions over "terms and conditions of employment."[52] The courts used the reasoning

42. *Id.* (The NLRB realized that labor costs "may have been one of the factors which stimulated the evaluation process which generated the decision").

43. *See Fibreboard*, 379 U.S. at 203.

44. *Otis Elevator Co.*, 1984 NLRB LEXIS, at *1.

45. *Id.* at *2.

46. Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831 (4th Cir. 2000) (Here, the court also looked at *Fibreboard* and *First National* in evaluating whether the owner's decision to relocate was a mandatory subject of bargaining).

47. *Id.* at 836 ("The company wanted the ability to subcontract work and to mandate overtime" in order "to meet the increasing demand for its trailers." The union, however, "asked for wage increases while opposing the subcontracting and mandatory overtime provisions").

48. *Id.* at 836-37 ("On June 26, 1995, the strike began. In response, the company began to look at other options to fill the work orders that were backlogged due to the strike. On September 25, the company investigated purchasing a new facility in Cartersville, Georgia." The company relocated the business due to the more effective assembly line structure and due to the geographical location, which would "substantially reduce shipping and freight costs").

49. *Id.* at 842 (stating that plant relocation that results in termination may affect the "tenure" of employment, but tenure is not the same thing as a "term or condition of employment").

50. Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

51. *Dorsey Trailers, Inc.*, 233 F.3d at 842.

52. 29 U.S.C. § 158(d) (1994).

in either *Fibreboard* and/or *First National* to determine if the decision to relocate was a term and condition of employment. A more comprehensive look into the decision to relocate came in *United Food & Commercial Workers Int'l Union v. Dubuque Packing Co.*[53]

The D.C. Circuit in *Dubuque Packing* upheld the NLRB's new standard of evaluating possible violations of § 158(d) as they pertain to relocation decisions.[54] The new standard created by the NLRB involved a three-part test, which was engineered using the various elements looked at by the courts in the previous cases.[55]

The first part of the test is based upon Justice Stewart's concurring opinion in *Fibreboard*.[56] The Board's test exempts from the duty to bargain relocation decisions that involve:

> (1) a basic change in the nature of the employer's operation, (2) a change in the scope and direction of the enterprise, (3) situations in which the work performed at the new location varies significantly from the work performed at the former plant, or (4) situations in which the work performed at the former plant is to be discontinued entirely and not moved to the new location.[57]

This part of the test stresses the need to have a different type of business being conducted at the new plant location than what had previously been performed at the old plant.

The second part of the NLRB's test looks at the "motivation for the relocation decision."[58] The Board is particularly interested in whether or not the employer's decision to relocate was based on labor costs (direct and/or indirect).[59] If the decision to relocate is motivated by labor costs, then the employer has a duty to bargain in good faith prior to relocating. This part of the test is very similar to the analysis that was done by the

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53. United Food & Commercial Workers Int'l Union v. Dubuque Packing Co., 1 F.3d 24 (D.C. Cir. 1993). The NLRB incorporated the logic used in *Fibreboard*, *First National*, and *Otis Elevator Co.* in creating a new standard to evaluate if a term and condition of employment has been violated by an employer who failed to bargain over a relocation decision. *See id.*

54. *Id.* at 25 ("We hold that the new standard adopted by the Board for evaluating such claims is an acceptable reading of the National Labor Relations Act and Supreme Court precedents.").

55. *Id.* at 30 (The three-part test was used by the NLRB to determine if Dubuque Packing Company committed unfair labor practices by failing to bargain with the union over the relocation of its "hog kill and cut" operations).

56. *Id.* ("First, the test recognizes a category of decisions lying 'at the core of entrepreneurial control,' in which employers may unilaterally take action.") (citing *Fibreboard Paper Products Corp.*, 379 U.S. at 223).

57. *Id.*

58. *Id.* (This part of the "Board's analysis is a subjective one").

59. *Id.* (This part of the Board's analysis "will distinguish relocations motivated by labor costs from those motivated by other perceived advantages of the new location").

Board in *Otis Elevator Co.*[60]

The third part of the test includes a futility provision.[61] In this part of the test, "the Board permits an employer to relocate without negotiating where its union either would not or could not offer sufficient concessions to change its decision."[62] The Board used an illustration to show a situation in which negotiations with the union would not have changed the relocation decision by the employer: a case in which "[an employer] would not remain at the present plant because . . . the costs for modernization of equipment or environmental controls were greater than [the value of] any labor cost concessions the union could offer."[63] This part of the test uses logic similar to that of the Supreme Court in *First National.*[64] In *First National*, the Court held that an employer did not have a duty to bargain with the union before shutting down a part of the business because the union had no control or authority over the fee that the employer was willing to pay to continue running that portion of the business.[65]

The Supreme Court, circuit courts, and the NLRB use various ways to look at the issue of an employer's duty to bargain with the union under 29 U.S.C § 158(d). We will now look at how these decisions apply to a MLB owner's decision to close and/or relocate a MLB team.

V. Laws of Bargaining as They Apply to Contracting and/or Relocating MLB Teams

A. Contraction

When applying the precedent caselaw to the possibility of contraction in MLB, it appears that an owner would be able to contract a team at will. By shutting down a baseball team, an owner would be closing down the entire business.[66] The owner would also be making a

60. *See Otis Elevator Co.*, 1984 NLRB LEXIS 866, at *1 (1984). In both cases the NLRB looked at whether the employer's decision to relocate was based upon the direct and/or indirect costs of labor. *See id.*

61. *Dubuque Packing Co.*, 1 F.3d at 24.

62. *Id.* ("Also, the Board has pledged to consider circumstances such as the need to implement a relocation 'expeditiously' in determining whether bargaining over a relocation has reached 'a bona fide impasse,' that is, the point at which a party may act unilaterally.").

63. *Id.* at 31.

64. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

65. *Id.* (The employer had no duty to bargain because the union had no control or authority over the fee that the employer was willing to pay to continue housekeeping services at the nursing home).

66. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965) (Under the holding in *Darlington*, a MLB team owner should be able to contract a team

decision that "fundamentally alter[s] the direction of an enterprise," involving "major shifts in the capital investment or corporate strategy of a company."[67] Therefore, if a MLB team owner is merely contracting a team, he should not have a duty to bargain with the MLBPA.

B. Relocation

The issue of relocation is not as clear-cut as the issue of contraction. All precedent concerning the shutting down of a business, or contraction, establishes that employers are under no duty to bargain with a union prior to closing their entire business.[68] The caselaw on the issue of relocation is not nearly as clear. As discussed earlier, courts have looked at the duty of an employer to bargain with the union prior to relocating a business in several different ways.[69] How do these different holdings apply to the decision of a MLB owner who wishes to relocate a baseball team?

When evaluating the issue of whether a MLB owner has a duty to bargain with the MLBPA before relocating a team, one must first look to the Supreme Court precedents on the matter.[70] When applying *Fibreboard* to the decision a MLB owner would face, one question is whether the decision to relocate turns on the issue of labor costs.[71] If a MLB owner is considering a move, the decision to relocate inevitably will turn on the issue of labor costs. MLB owners will decide to relocate if their costs compared to their revenues are causing the business to be unprofitable. Because the cost of MLB player's salaries (labor costs) are the major expense of the team, the decisions would be influenced by this factor.

The other issue raised in *Fibreboard* was the question whether or not the decision to subcontract work would "alter the Company's basic operation."[72] Similar to *Fibreboard*, if a MLB owner decided to relocate

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without having to bargain with the MLBPA because he would be closing an "entire business").

67. *See Fibreboard Paper Prod. Corp.*, 379 U.S. at 209-10.

68. *See Darlington Mfg. Co.*, 380 U.S. at 263; *Fibreboard Paper Prod. Corp.*, 379 U.S. at 203.

69. *See First Nat'l*, 452 U.S. at 666; *Fibreboard*, 379 U.S. at 203; *Dubuque Packing Co.*, 1 F.3d at 24; Otis Elevator Co., 1984 NLRB LEXIS 866, at *1 (1984).

70. *See First Nat'l*, 452 U.S. at 666; *Fibreboard*, 379 U.S. at 203. These two Supreme Court cases, though not dealing with a relocation decision, are looked at as precedent in evaluating an employer's decision to relocate a business.

71. *Fibreboard*, 379 U.S. at 213.

72. *Id.* The decision to subcontract work "did not alter the Company's basic operation. The maintenance work still had to be performed at the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment." *Id.* In the case of a MLB owner relocating a team, he too would continue

a team there would not be a change in "the Company's basic operation."[73] The difference, however, lies in the fact that in *Fibreboard* the employees lost their jobs, while the MLB owners would keep the same players when they relocated. Even though the decision to relocate has much to do with labor costs, and relocating would not "alter the Company's basic operation," the decision would not cause any player to lose his job.[74] For this reason, the MLB owners should not feel compelled to bargain with the MLBPA over a relocation decision for fear of violating the rule set forth in *Fibreboard*.[75]

When looking at the same situation applied to the *First National* decision, the same result occurs, but through different logic and application.[76] The Court in *First National* allowed for unilateral decisions by employers in instances where the burden placed on the business outweighs the benefit for labor-management relations and the collective bargaining process.[77] In the situation of a MLB owner, the burden placed on the owner is low revenues. These low revenues are caused by low ticket sales and inadequate television contracts, in conjunction with increased salaries and other expenses. If this loss in revenues is great enough, it might outweigh the benefit for labor-management relations and the collective bargaining process.[78] This, however, would have to be decided on a case-by-case basis.

The Court in *First National* also stated that an employer can unilaterally implement decisions in instances where the union has no control or authority to change the employer's decision even if bargaining were to take place.[79] When looking at this rule in terms of a MLB owner relocating a team, one must see whether or not the MLBPA has the authority to, or can, control some aspect of the employer's decision.[80] As previously stated, a MLB owner's decision to relocate will hinge on whether the team is taking in enough revenue compared to the amount of its expenses. The MLBPA has no control or authority over the amount of ticket sales and other revenue coming in to the business. The MLBPA does, however, have control over negotiating the salaries of the players (labor costs) with the owners. Because the MLBPA has control over a

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"the same work under similar conditions of employment" because the baseball team would continue to operate, just in a different city. *See id.*

73. *See id.*

74. *See id.*

75. *Id.*

76. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

77. *Id.* at 686.

78. *See id.* (the decision by the housekeeping service to stop providing services to a nursing home was due to a loss of money on the contract).

79. *Id.*

80. *See id.*

part of the owner's decision to relocate, it looks like the owner would have to bargain with the MLBPA before doing so.[81]

This is not necessarily true. A MLB owner's decision to relocate will not be made because of the salaries of the players. The MLB owners will not ask players to take pay cuts due to low revenues, nor will the MLBPA agree to lower players' salaries. The owner's decision to relocate will be based solely on the reason that the team is suffering from low revenues: the team's location in an unprofitable area. The owner's desire to move stems from the belief that another city will be more profitable for the organization, and the MLBPA has no control or authority over this aspect of the decision. Therefore, under *First National* a MLB owner should not have a duty to bargain with the MLBPA before relocating a team.

The next step is to look at the decision to relocate a baseball team in regard to cases that dealt specifically with relocations. The NLRB in *Otis Elevator Co.*, and the Fourth Circuit Court of Appeals in *Dorsey Trailers*, looked at the decision to relocate in terms of how the decision impacted the employees.[82] The NLRB in *Otis Elevator Co.* asked whether or not the decision to relocate turned on the issue of labor costs.[83] The Fourth Circuit held that a decision to relocate can influence the "tenure" of employment, but that does not necessarily mean the same thing as affecting a "term or condition of employment."[84]

After applying the holdings in *Otis Elevator Co.* and *Dorsey Trailers* to a MLB owner who wants to relocate a team, the MLB owner should not feel obligated to bargain with the MLBPA before making the decision to relocate. Similar to *Otis Elevator Co.*, the decision of a MLB owner to relocate a team would not "turn" on the issue of labor costs.[85] The decision to relocate in *Otis Elevator Co.* was made due to the outdated technology at the research and development facility, while the

81. *See id.* (the union had no control or authority to negotiate the fee that the employer was willing to receive for continuing service at the nursing home). In the decision to relocate a MLB team, it seems like the authority of the MLBPA to negotiate salaries should be enough to require the owners to bargain with them before relocating.

82. Otis Elevator Co., 1984 NLRB LEXIS 866, at *1 (1984); *see* Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831 (4th Cir. 2000).

83. *Otis Elevator Co.*, 1984 NLRB LEXIS, at *8 (NLRB held that the labor costs "may have been one of the factors which stimulated the evaluation process which generated the decision," but the decision "turned" on the fact that the research and development facility had outdated technology).

84. *Dorsey Trailers*, 233 F.3d at 842 (The decision to relocate was due to the more effective assembly line structure and the geographical location of the new facility. The court held that the decision to relocate was "fundamental to the basic direction of a corporate enterprise" and that even though jobs were terminated at the facility this only influenced the "tenure of employment").

85. *See Otis Elevator Co.*, 1984 NLRB LEXIS, at *8.

decision to relocate a MLB team would be made due to the stale market in the current city.[86]

The Fourth Circuit would likely view the decision to relocate a baseball team in a similar way as it did in *Dorsey Trailers*. As in *Dorsey Trailers*, the decision of an owner to relocate a MLB team would influence the "tenure" of employment but "not a term or condition of employment."[87] The decision to relocate a MLB team would influence the "tenure" of employment because the decision to relocate would cause the players, coaches, and team to move to another city.[88] Once more, however, the decision to relocate a MLB team would be based on the low revenues in the current city and "not a term or condition of employment." Thus, a MLB owner should not be required to bargain with the MLBPA before deciding to relocate.[89]

The last case that can be applied to a MLB owner's decision to relocate is *Dubuque Packing*.[90] Because *Dubuque Packing* uses the logic found in the cases already discussed, there is no need to reapply the *Dubuque Packing* test.[91] When applying a MLB owner's decision to relocate a team to any of the cases on the topic, the outcome has consistently been that the MLB owner should not be required to bargain with the MLBPA before deciding to relocate a team.

VI. Should There Be an Exception for MLB?

Precedent dictates that owners are not required to bargain in good faith with the union before contracting[92] or relocating a team.[93] The MLBPA feels that an exception to this rule should exist for MLB due to the unique character of the organization.[94] This would not be the first time MLB would be given an exception to a law governing labor and employment. In 1922, the Supreme Court granted MLB an exemption to the antitrust laws, which still exists today.[95] In addition to this exemption, MLB is unique due to the profit and revenue sharing amongst

86. *Id.*
87. *Dorsey Trailers*, 233 F.3d at 842.
88. *Id.*
89. *Id.*
90. United Food & Commercial Workers Int'l Union v. Dubuque Packing Co., 1 F.3d 24 (D.C. Cir. 1993).
91. *Id.* (The NLRB incorporated the logic used in *Fibreboard*, *First National*, and *Otis* in creating a new standard to evaluate if a term and condition of employment has been violated by an employer who failed to bargain over a relocation decision).
92. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).
93. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); *Dubuque Packing Co.*, 1 F.3d at 24; Otis Elevator Co., 1984 NLRB LEXIS 866, at *1 (1984).
94. Telephone Interview with Doyle Pryor, *supra* note 13.
95. Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

the teams.[96] Because of these unique circumstances, MLBPA argues that the owners should be required to bargain in good faith prior to contracting or relocating a team.[97]

A. MLB's Antitrust Exemption

In 1922, the United States Supreme Court, in *Federal Baseball Club v. National League*, was presented with the issue of whether federal antitrust laws apply to MLB.[98] In a unanimous decision, the Supreme Court determined that the federal antitrust laws do not apply to MLB.[99] The Court held that the business of baseball was not interstate commerce because the movement of teams across state lines was merely "incidental" to the business.[100] This distinction enabled baseball to be left alone, allowing its reserve system to avoid antitrust laws during crucial times of development.[101] In 1953, the Supreme Court used a narrow application of stare decisis to determine that the federal antitrust laws still do not pertain to MLB.[102]

For the third time in fifty years, the Supreme Court reviewed federal antitrust laws as they relate to MLB in *Flood v. Kuhn*.[103] Again the Supreme Court ruled that the federal antitrust laws do not apply to MLB.[104] In *Flood,* the Court held that MLB is a business engaged in interstate commerce, but that baseball is an "exception and an anomaly" to the federal antitrust laws.[105]

This exemption is not evident in any other sport; it is something that is unique to the sport of baseball. This distinction between baseball and other professional sports has been described as being "unrealistic," "inconsistent," and "illogical,"[106] yet the exemption is still prevalent.

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96. Pappas, *supra* note 6.

97. Telephone Interview with Doyle Pryor, *supra* note 13.

98. *See Fed. Baseball Club,* 259 U.S. at 200.

99. *Id.* at 208-09.

100. *Id.* This decision was, and is, highly criticized because there should be no question that MLB is interstate commerce. MLB has teams traveling from state to state to play games. The proceeds of the ticket sales of the games go toward paying the salaries of the players, coaches, and owners. There are also vendors at the games who sell commodities that have ties to interstate commerce. This is not "incidental to the business." The Court should not have decided that MLB is not interstate commerce in order to support its decision to grant MLB an exemption to the federal antitrust laws.

101. Flood v. Kuhn, 407 U.S. 258, 274 (1972). If it were not for the antitrust exemption for MLB, there would have been a strong likelihood that MLB would have failed. This is the main reason why critics believe that there is an antitrust exemption unique to baseball. *See id.*

102. *See id.*

103. *Id.* at 258.

104. *Id.*

105. *Id.* at 282.

106. *See* Salerno v. Am. League, 429 F.2d 1003, 1005 (2d Cir. 1970).

The Court in *Flood* recognized the fact that the courts have been reluctant to overrule *Federal Baseball*, and Congress has done nothing to change legislation to eliminate the antitrust exemption.[107] For these reasons, the Supreme Court in *Flood* concluded that any change to MLB's antitrust exemption must come by way of the legislature and not by the courts.

B. Profit and Revenue Sharing in MLB

The revenue-sharing formula implemented for the 2001 MLB season required each club to pay "20% of its local receipts, net of stadium expenses, into a common pool."[108] Three-quarters of this money was divided equally among all thirty MLB teams and the remaining 25% was shared by the clubs with the below-average local revenue, with the lowest revenue teams receiving the most.[109] Revenue and profit sharing is intended to help give small-market teams a chance to compete with the big-markets clubs.[110]

The flaw with revenue and profit sharing is that the owners of teams are not required to use this money to help bolster their teams.[111] Instead, some small market owners pocket this money in order to turn a profit.[112] This is one of the reasons why the Minnesota Twins were the subject of contraction.[113] "[I]n 2000, the Minnesota Twins received $21 million from the revenue-sharing pool, $5 million more than the salaries paid to their entire 25-man roster."[114] That year, the Twins managed to turn a profit, causing other MLB owners to realize that it would be cheaper to contract the Twins than "to continue subsidizing their parasitic billionaire owner."[115]

B. No Bargaining Exception for MLB

Under 29 U.S.C. § 158(d) and the authoritative caselaw, an owner should not have a duty to bargain with the MLBPA before contracting or relocating a team. The reason why the Montreal Expos and the Minnesota Twins were almost contracted was that the two teams failed to bring in enough revenue to cover their expenses. The Expos and Twins were being kept afloat by the profit and revenue shares provided by the

107. *Flood*, 407 U.S. at 272.
108. Pappas, *supra* note 6.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *See id.*
114. *Id.*
115. *Id.*

other MLB teams. In the case of the Twins, this subsidy that should have been used to strengthen the team instead went toward making the owners profitable.[116]

If the owners decide to contract and/or relocate a team, like the MLB owner's contemplated with the Expos and Twins, they should be able to do so without having to bargain with the MLBPA. The fact that MLB happens to be exempt from antitrust law and is treated differently from other businesses is not an excuse to change the rules of bargaining.[117] The antitrust exemption was granted to keep the "National Pastime" alive during times of financial difficulty. There is no reason now for the courts, or an arbitrator, to change the rules of bargaining for MLB.

MLBPA's other argument that owners should bargain in good faith before contraction due to the profit and revenue sharing implications is also weak. True, all thirty teams contribute to the "pool" of money that is divided among the baseball clubs, but if a team is in financial disarray then those teams will receive the majority of the money from the remaining 25% of the proceeds.[118] By contracting struggling teams, the pool of revenue can be concentrated on teams that need a little extra help instead of keeping the least profitable teams afloat.[119] The profit and revenue sharing amongst the MLB teams is not a valid reason for changing the traditional rules of bargaining.

VII. Conclusion

In the future, if an arbitrator is faced with the issue of whether or not a MLB owner has a duty to bargain with the MLBPA before contracting and/or relocating a team, the arbitrator should conclude that the MLB owner has no such duty.

If MLB owners decide to contract a team, it should be the right of the owner to shut down operations without having to bargain with the MLBPA before doing so.[120] If the owners decide to relocate a MLB team, they should not have to bargain with the MLBPA because the decision to relocate would not turn on the issue of labor costs.[121] The decision of an owner to relocate a MLB team would stem from the

116. *See id.*
117. 29 U.S.C. § 158(d) (1994).
118. Pappas, *supra* note 6.
119. *See id.*
120. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263 (1965).
121. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1964); United Food & Commercial Workers Int'l Union v. Dubuque Packing Co., 1 F.3d 24 (D.C. Cir. 1993); Otis Elevator Co., 1984 NLRB LEXIS 866, at *1 (1984); *see also* Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831 (4th Cir. 2000).

inadequate revenue being produced in the current city. If a MLB team is located in an unprofitable area, the decision to relocate the team will not change, no matter how much the owners and the MLBPA bargain and negotiate.[122]

The fact that MLB is unique when compared to other business entities is not a reason to make an exception to the rules of bargaining for MLB. It should not matter that the courts have given an antitrust exemption to MLB, nor should it matter that there is revenue sharing amongst the clubs. These distinct characteristics in MLB should not change the well-established rules of bargaining and their application to MLB owners and the MLBPA.

122. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981); *Dubuque Packing Co.*, 1 F.3d at 24.

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