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Few business enterprises receive the public attention accorded baseball. Newspapers large and small invariably report the details of every game or development in the sport. Radio and television bring the games to thousands of homes. Every player trade is given coast-to-coast coverage; the sore arm or lacerated finger of a star player becomes an object of national concern. These aspects of the game are matters of common knowledge.

In contrast to this is the general lack of familiarity with "baseball law," i.e., the self-imposed body of rules regulating baseball's activity. "Baseball law" is composed of (1) the Agreement of the National Association of Professional Baseball Leagues,[1] adopted in 1901 "to perpetuate baseball as the national game of America and to surround it with such safeguards as will warrant absolute public confidence in its integrity and methods," (2) the Major League Agreement,[2] (3) the Major-Minor League Agreement,[3] and (4) rules promulgated under these agreements.

Self discipline and strict adherence to its own rules have limited the vulnerability of organized baseball to the suits of disgruntled players or of outside forces. However, in the past five years this tranquillity has been severely challenged as illegal under the Sherman Antitrust Act[4] and the Clayton Act.[5]

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1 The Baseball Blue Book 701 (1948).

2 Id. at 501.

3 Id. at 601.

4 15 U.S.C. §§ 1-7 (1951). The pertinent sections provide:

"Section 1... Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . . ."

"Section 2... Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

"Section 3... Every contract, combination in form of trust or otherwise. or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

5 15 U.S.C. §§ 12-17 (1951). Section 15 provides:

I. THE STRUCTURE OF ORGANIZED BASEBALL

For over half a century organized baseball has ignored the mandate of the Sherman Act that competition, not combination, should be the law of trade. By agreeing not to compete for a player's services and by blacklisting players who turn to higher bidders, baseball has attained a buyer's monopoly over the market for skilled baseball talent. Through a system of agreements club owners have provided self-regulation of their business. The primary devices which have been employed by organized baseball to attain this self-regulation are uniform contracts, reserve lists, salary restrictions, and waiver and draft rules.

Uniform contracts. The rules promulgated by organized baseball provide that no club may hire a player unless he signs a uniform contract.[6] This contract contains a reserve or renewal clause which binds the player to the club with which he signs his original contract. Under the contract a player cannot play or negotiate with any other club until his contract has been assigned or he has been released. In contrast, the club may assign the player's contract to another club without consulting the player and the contract may be terminated at any time the club so wishes. The player agrees under the uniform contract to accept and abide by the rules of organized baseball, rules which, like the reserve clause, greatly restrict the player's freedom to choose his employer. Although these contract provisions are unquestionably unilateral in character, the fact that clubs will not negotiate with a player who violates them effectuates their purpose.

Player Lists. Supplementing the provisions of the uniform contract, the baseball rules require that annually each club file several player lists with the baseball commissioner. One list is the reserve list which contains the names of the players whom the club has under contract, and whom it wishes to have on its roster the following year.[7] Supplemental and explanatory lists

"... Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of the suit, including a reasonable attorney fee."

[6] Major League Rules 3(a), 3(d) (1951); Major-Minor League Rules 3(a), 3(d) (1951); National Association Agreement §§ 15.01, 15.04 (1951).

[7] Major League Rule 4(a) (1951); Major-Minor League Rule 4(a) (1951); National Association Agreement § 16.01 (1951).

indicate which players on the reserve list have retired, are ineligible, are in the armed forces, or are restricted because they have refused to come to terms with the club. These lists are circulated throughout organized baseball and under baseball rules, only the club submitting the players' names may deal with them. All other clubs are precluded from participating in any activities in which a player on an ineligible list is to participate, and no player is permitted to play with or against any team, including a team outside organized baseball, which has had any relations with an ineligible player. Thus, in effect, if a player wishes to play in organized baseball, he must play for the club that submits the list upon which his name appears.

Waiver restrictions. The waiver rule provides that a player may not be assigned to a club in a league of lower classification[8] without the other clubs in the assignor's league being given an opportunity to purchase the player's services.[9] This safeguard for the player would seem to mitigate some of the concessions he makes under the uniform contract and reserve system. However, its importance is reduced by the fact that players may be optionally assigned to a minor league club within three years after their entry into the major league without the necessity for waivers. After three years have elapsed, the players must be recalled to the major leagues. In addition, a request for waivers on a particular player may be twice withdrawn in any given year even though other clubs in the league have expressed an intent to purchase the player's contract.

Draft rule. Another apparent safeguard for the player exists in the draft rule which enables any higher classified club to compel lower classified clubs, regardless of contractual affiliation, to sell their players' contracts for a fixed price.[10] This safeguard is weakened, however, by the qualification that only one player per year may be drafted from a Class A or higher classification club. Thus, by shuffling draft-eligible players in its farm system to a Class A, AA or AAA club, a major league club can immunize all but one of these players from the draft.

[8] A complete directory of minor league clubs and executives is published annually in the Baseball Bluebook. In 1952 there were the following leagues: one league (Pacific Coast) in the "Open" classification at the top of the minor league hierarchy; two leagues (American Association and International) in "AAA"; two in "AA"; four in "A"; eight in "B"; eleven in "C"; and fifteen in "D".

[9] Major League Rule 10(b) (1951); National Association Agreement § 23.02(a).

[10] Major League Rule 5 (1951); Major-Minor League Rule 5 (1951); National Association Agreement § 27 (1951).

Salary restraints. In addition to suppressing competition for a player's services, the baseball rules have a pronounced effect on the player's earning power. The rules provide for a minimum salary for major league players[11] and place ceilings on the salaries of the players in the minor leagues.[12] They limit a player's participation in exhibition games. They also restrict the freedom of a clubowner in dealing with potential players; a player limit of twenty-five is established, and prohibitions against the signing of high school and American Legion Junior players are provided. The rules discourage the paying of large bonuses to prospective players by making the result of such practice an unattractive player investment. Any player receiving a bonus in excess of $6,000 must be carried on the major league roster of the paying club for at least two years. This prevents the bonus player from gaining valuable (and usually indispensable) minor league experience. In addition, it weakens the reserve strength of the club by compelling it to carry a "rookie" in place of a more experienced performer.

Thus, it is evident that once an organized baseball club secures the contract of a player, all competition for his services ceases, and he is powerless to determine for whom or where he will pursue his baseball career. Unless he is unconditionally released by his club or is declared a free agent by the baseball commissioner, i.e., able to negotiate with any club, his position is similar to that of a chattel. Faced with these exacting restraints upon his services, a player may strive to better his lot by challenging the whole structure of organized baseball in the courts, but such is a dubious undertaking.

II. JUDICIAL ATTACKS UPON ORGANIZED BASEBALL

Probably the greatest obstacle facing a player attacking organized baseball under the antitrust laws is the decision in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.*[13] There the plaintiff baseball club, which was a member of the Federal League, alleged that the National League bought up all of the Federal clubs and reduced that organization to a one-team league, that team being the plaintiff. The Baltimore club accordingly claimed that the Federal League became defunct because of the defendant's attempt to monopolize baseball. The plaintiff obtained a judgment of $80,000 in the District of

[11] Major League Rule 17(d) (1953) provides that a major league player shall be paid a minimum salary of $6,000 per year.

[12] National Association Agreement, art. 18 (1951).

[13] 259 U.S. 200 (1922), affirming, 269 Fed. 681 (D.C. Cir. 1920).

Columbia Supreme Court under the Sherman Act,[14] but the court of appeals reversed on the grounds that interstate commerce was not involved. The United States Supreme Court concurred.[15] Justice Holmes, writing for the Court, described baseball as a "purely state affair." Holmes considered the exhibition itself the substance of baseball and treated the transportation of players over state lines, along with all paraphernalia of the game, as a mere incident to the exhibition. In addition, he reasoned that the player's personal effort was not related to production of a commodity and therefore not a subject of commerce. The broad conclusion was that baseball was not interstate commerce.

The *Federal Baseball* decision gave organized baseball an exemption so broad that it was not challenged until 1947 when Daniel Gardella filed suit against Chandler, Commissioner of Baseball, and others. In this case, *Gardella v. Chandler*,[16] the plaintiff, while under contract with the New York Giants, violated the reserve clause of his contract by playing professional baseball in Mexico. He was immediately placed on the ineligible list and barred from participation in organized baseball for a period of five years. Gardella did not deny that in "jumping" to Mexico he broke his contract for which the stated penalty was suspension from organized baseball. Rather he premised his action upon the allegation that the contract was illegal because it served to effect an illegal restraint of trade or commerce and to promote an illegal monopoly over trade or commerce in contravention of sections one, two and three of the Sherman Act and section four of the Clayton Act. The trial court, reasoning that the *Federal Baseball* case was still the law and that the federal antitrust laws were not applicable to organized baseball, granted the defendant's motion to dismiss on the ground that plaintiff had failed to state a cause of action. On appeal, the court of appeals, in a two to one decision, reversed and remanded.[17] Referring to baseball players as "quasi-peons," Judge Frank flatly stated that baseball was in interstate commerce. Judge Frank felt that the game of baseball had changed since the *Federal Baseball* case and that because of the frequent broadcasts of baseball games by radio and television, baseball games were being played "interstate as well as intrastate."[18] Judge Hand concluded that the court of appeals should

[14] The court awarded the plaintiff $240,000 treble damages under Section 7 of the Sherman Act.

[15] See note 13 supra.

[16] 79 F. Supp. 260 (S.D.N.Y. 1948).

[17] Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

[18] Id. at 411.

not dispose of the question as to the reserve clause of the contract, but should remand the case to the district court. Although he found that the radio and television aspects of baseball make it interstate commerce to that extent, he was of the opinion that the plaintiff should be required to prove that organized baseball as a whole was colored by the interstate features of the business.

On the other hand, Judge Chase, dissenting, reasoned that the *Federal Baseball* case was controlling on either one of two grounds. First, that there was no substantial difference between the practice of broadcasting or televising a game and the practice of telegraphing a game; thus, since the latter was a factor considered in the *Federal Baseball* case, the prior case was controlling. Second, that even if organized baseball was interstate commerce, the Sherman and Clayton Acts did not apply to the wrong alleged since (1) the player's opportunity to play baseball is not the subject of trade or commerce within the antitrust acts[19] and (2) controls over the player did not affect the price of goods in interstate commerce to the detriment of the consumer.

In June of 1949 the court of appeals rendered a decision in an action which it denominated a "sequel" to the *Gardella* case. In that proceeding, *Martin v. National League Baseball Club*,[20] two other players, Fred Martin and Max Lanier, who like Gardella were suspended after jumping to the Mexican League, brought an action for damages under the antitrusts acts. The plaintiffs moved for an injunction pendente lite to compel the defendants to remove the plaintiffs' suspensions and to reinstate them on the eligible list. On appeal from an order denying the injunction, the court of appeals affirmed on the ground that the plaintiffs' rights depended on disputed questions of fact and law. While briefly analyzing the court's opinion in the *Gardella* case, Judge Hand amplified his own position and, on the intrastate vs. interstate issue, said: "It seemed to me that it was [in the *Federal* case] a question of the proportion of the interstate activities to the whole business and that the new activities of radio broadcasting and television should be added to the earlier interstate activities, and the sum should be compared with the business as a whole."[21] The court had before it the controversial "reserve clause" and in reference to it said: "Apart from the question of jurisdiction, we are not prepared to say that, on the record now

[19] Id. at 406.
[20] 174 F.2d 917 (2d Cir. 1949).
[21] Id. at 918.

before us, the 'reserve clause' violates the Anti-Trust acts. Such a determination may involve consideration, among other things, of the needs and conduct of the business as a whole."[22]

The *Gardella* and *Martin* rulings severely jolted the secure position that organized baseball had held since the *Federal Baseball* decision. The treble damage actions by the three blacklisted players threatened to undermine the *Federal* case; organized baseball had at stake its entire structure. However, out-of-court settlements with all three players temporarily averted the showdown. The amount of the settlements was not made public, but it is known that the legal and litigation expenses of the Commissioner, and the American and National Leagues, amounted to $55,550 in 1948, $337,600 in 1949, and $93,400 in 1950, indicating that the financial burden of these cases on organized baseball was substantial.[23]

Soon after these settlements, baseball was again plagued with antitrust suits by dissident players and clubowners. In *Toolson v. New York Yankees*[24] a pitcher who had been blacklisted for refusing to accept an assignment of his services from Newark to Binghamton alleged that the defendants had combined to monopolize professional baseball and, by blacklisting him, had deprived him of his means of livelihood, thus injuring him to the extent of $375,000. In *Corbett and El Paso Baseball Club v. Chandler*,[25] one Corbett, former owner of the El Paso baseball club, contracted for the 1949 services of four players despite the fact that each of the players was already bound by a reciprocal agreement to play in the Mexican League. President Trautman of the National Association refused to recognize Corbett's claim for the services of the four players and awarded them to the Mexican League. Claiming $300,000 damages, Corbett alleged that organized baseball was a monopoly. He based his allegation on the reserve rule which had deprived the El Paso club of the four players' services and the opportunity to sell their contracts. In

[22] Ibid.

[23] Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., ser. 1, pt. 6, at 332, 335, 1336, 1338, 1339, 1427 (1951). A. B. Chandler, former Commissioner of Baseball, testified "I do not think the lawyers thought we could win the Gardella case." Hearings, supra at 290.

[24] 101 F. Supp. 93 (S.D. Cal. 1951), aff'd per curiam, 200 F.2d 198 (9th Cir. 1952).

[25] No. 2589, S.D. Ohio, Jan. 25, 1952, aff'd per curiam, 200 F.2d 428 (6th Cir. 1953).

Kowalski v. Chandler,[26] Kowalski, a minor league player since 1946, alleged that defendants used the draft restrictions and the uniform contract, which contained the reserve clause, to deprive him of the reasonable value of his services and his opportunities for promotion. Damages were estimated to be $150,000. All three suits were dismissed by the lower courts on the basis of the *Federal Baseball* decision and in each suit a petition was filed with the Supreme Court for a writ of certiorari.

III. CONGRESSIONAL INVESTIGATIONS AND RECOMMENDATIONS

This renewed litigation and the possibility of a Supreme Court decision prompted the House Antitrust Subcommittee to investigate organized baseball, hoping to find means of softening the clash between the Sherman Act and baseball's long-established trade practices.[27] Spokesmen for organized baseball urged complete exemption equivalent to that established by the *Federal Baseball* case. Senator Edwin Johnson (Colo.), president of the Western League, sounded the call to arms, stating that:

> Player contracts, including the much-misunderstood reserve clause, can be and must be legalized. . . . It is getting so that every little pipsqueak troublemaker and every disgruntled ballplayer nowadays attacks the reserve clause to lend support to his pet peeve. These annoyers are quick to indulge in legal blackmail to extract cash and other valuable consideration from the game which do not rightfully belong to them.[28]

In 1951 four identical bills were introduced in Congress—three in the House and one in the Senate—forbidding the application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises."[29] But Congress, not satisfied that organized baseball merited the broad immunity it desired, passed back to the courts the burden of resolving the conflict between the national policy of economic competition and the intricate pattern of restrictive practices which constitute the economic basis of professional baseball. At the

[26] No. 2646, S.D. Ohio, Jan. 25, 1952, aff'd. per curiam, 202 F.2d 413 (6th Cir. 1953).

[27] Originally known as the Subcommittee on the Study of Monopoly Power, the subcommittee was renamed the Antitrust Subcommittee during the reorganization of the House Judiciary Committee in 1952.

[28] N.Y. Times, April 22, 1951, § 5, p. 5, col. 6.

[29] H.R. 4229, 4230, and 4231; and S. 1526, 82d Cong., 1st Sess. (1951). These bills were introduced "by friends of baseball because they feared that the continued existence of organized baseball as America's national pastime was in substantial danger by threat of impending litigation." H.R. Rep. No. 2002, 82d Cong., 2d Sess. 1 (1952).

conclusion of its hearings, the House subcommittee unanimously declared its opposition to the four bills. Its report stated:

> The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus the sale of radio and television rights, the management of stadia, the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on the playing field, would be immune and untouchable. Such a broad exemption could not be granted without substantially repealing the antitrust laws.[30]

With specific reference to baseball, the subcommittee recommended postponement of any legislation until the status of the *Federal Baseball* decision was clarified in the courts.[31] No further action was taken on any of the bills; Congress thus left intact the existing coverage of the antitrust laws.[32]

IV. DETERMINATION BY THE SUPREME COURT OF BASEBALL'S STATUS UNDER THE ANTITRUST LAWS

The long-awaited showdown between organized baseball and the antitrust laws resulted when the Supreme Court granted certiorari in the *Toolson, Kowalski,* and *Corbett* cases. It seemed probable that the *Federal Baseball* case would be overruled or distinguished. For more than fifteen years the theory of the *Federal* case had been obsolete. Since 1937 the Supreme Court, reaffirming the broad doctrine of *Gibbons v. Ogden,*[33] repeatedly asserted that any activity which crossed state borders or used the channels of interstate commerce, or any local activity which even remotely affected other states or interstate commerce, came within the purview of the commerce power.[34]

Furthermore, application of present-day tests to the facts revealed by the congressional investigation indicated that baseball was an interstate activity. The business combination encom-

[30] H.R. Rep. No. 2002, 82d Cong., 2d Sess. 230 (1952).

[31] Id. at 134, 231.

[32] Sports columnist Red Smith said: "After ten long arduous months, the status has tottered triumphantly back to quo." N.Y. Herald Tribune, May 23, 1952, p. 20, col. 5.

[33] 9 Wheat. 1 (U.S. 1824).

[34] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); North American Co. v. SEC, 327 U.S. 686 (1946); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); United States v. Darby, 312 U.S. 100 (1941); Associated Press v. NLRB, 301 U.S. 103 (1937).

passed practically every state and many foreign countries as well. While the final exhibition which the consumer bought was a local affair, as in other spectator amusements, interstate commerce was a necessary component of presenting such exhibitions. Every spring professional baseball clubs trained in the south and presented "barnstorming" exhibitions at whistle-stops along the way from their training camps to their home cities. The championship season itself required clubs to abide by a fixed schedule, necessitating interstate transportation of both players and equipment. Players signed annual contracts which bound them to appear in every state where the club had scheduled games. Negotiations for these contracts were often made across state lines, and the contracts themselves, being both assignable and renewable under baseball law, were articles of commerce which were bought, sold, and bartered in interstate transactions.

On the other hand, there was the possibility that the Supreme Court might reaffirm the *Federal Baseball* decision on other policy considerations. Senator George W. Pepper (Fla.), who represented organized baseball in its fight for antitrust immunity in the *Federal* case, had used essentially a policy approach. The defenders of baseball followed the same line of argument in their efforts to obtain continued antitrust immunity. They contended that baseball, like other team sports, faced problems unique in the realm of business; that the sport demanded restraints on economic competition if it was to survive as an amusement industry; and implicitly that the industry merited special consideration under the antitrust laws.[35]

Also in baseball's favor was the fact that if the Supreme Court reversed the dismissal orders in the *Toolson, Corbett* and *Kowalski* cases, baseball would be forced to return to free competition. Clubs or players injured by organized baseball's restrictive agreements would be entitled to obtain treble damages and injunctive relief. Agreements dividing player and consumer markets would become void and legally unenforceable. To escape recurring suits, baseball would have to disorganize. Thus, the entire system of competitive restraints binding together the various leagues would disappear—the reserve rule, blacklisting, boycotts, and territorial rights. Only internal league agreements, involving such matters as scheduling games and dividing revenue, would be safe from antitrust attack, so long as they would not unreasonably restrain competition. Such forced return to free

[35] Brief for Appellees, p. 5, Toolson v. New York Yankees, Inc., 200 F.2d 198 (9th Cir. 1952); see note 36 infra.

competition was the panacea recommended by many of the game's critics. Of the alternatives, it seemed the least feasible, for it was a cure that might well kill the patient.

On November 9, 1953, the Supreme Court disposed of the *Toolson, Corbett,* and *Kowalski* cases in a per curiam opinion.[36] By a seven to two decision, the Court affirmed the *Federal Baseball* ruling that baseball is not covered by the federal antitrust laws because it is not in interstate commerce. Recalling the *Federal Baseball* decision, the Court noted that congressional committees had the 1922 decision under consideration for some time but had not seen fit to act. The Court took the position that if there were evils in the baseball industry which warranted application of the antitrust laws, the elimination of these ills should be effectuated by Congress. The members of the majority emphasized that they were not re-examining the underlying issues but affirming the 1922 decision so far as it determined that Congress had no intention of including baseball within the antitrust laws.

In a vigorous dissent Justice Burton, with Justice Reed concurring, concluded that baseball was engaged in interstate commerce because of (1) interstate travel by the teams, (2) transmission of receipts between states, (3) radio and television expansion of baseball audiences beyond state lines, (4) interstate advertising sponsored by baseball, and (5) development of highly organized "farm systems" composed of minor league clubs, coupled with restrictive contracts and understandings between individuals and among clubs.

V. THE EFFECT OF THE TOOLSON DECISION ON OTHER SPORTS

At the time the *Toolson* case was before the Supreme Court, a civil antitrust action against the International Boxing Club of New York was pending in the United States District Court for the Southern District of New York. The defendants were engaged in the business of promoting professional championship boxing contests. The government charged that defendants, in the course of this business, had violated sections one and two of the Sherman Act. Subsequent to the *Toolson* decision, the district court granted defendant motion to dismiss, in reliance upon *Federal Baseball* and *Toolson,*[37] on direct appeal to the Supreme Court.[38] The judgment

[36] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

[37] The district court's opinion was oral and not transcribed. All the parties agreed, however, that the dismissal was based on *Federal Baseball* and *Toolson.*

[38] Under the Expediting Act, 15 U.S.C. § 29 (1951).

was reversed, thus opening the way for antitrust suits against boxing interests.[39]

Chief Justice Warren, writing for the Court, said that the previous rulings that organized baseball was outside the provisions of the antitrust statutes did not immunize boxing from these laws. This was the first time, the Chief Justice noted, that the Court had considered the antitrust status of the boxing business. He conceded that a boxing match, like the showing of a motion picture, was a "local affair." "But that fact alone," he added, "does not bar application of the Sherman Act to a business based on the promotion of such matches if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce."[40]

Since the baseball decisions did not hold that all professional sports were outside the scope of the antitrust laws, Warren continued, the issue was not whether an exception previously granted should continue, "but whether an exception should be granted in the first instance." That issue "is for Congress to resolve, not this court,"[41] he concluded. In passing, the Chief Justice noted that in 1951 four bills forbidding the application of the antitrust laws to organized baseball had not been passed by Congress. He agreed with the report of the House subcommittee that "such a broad exemption could not be granted without substantially repealing the antitrust laws."[42]

Justice Frankfurter, in a vigorous dissent, asserted that it would "baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to 'trade or commerce'."[43]

Justice Minton, also dissenting, stated that: "When boxers travel from state to state, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate, it is now held by this court that the boxing bout becomes interstate commerce. What this court held in the Federal Baseball case to be incidents to the exhibition now

[39] United States v. International Boxing Club of New York, 75 Sup. Ct. 259 (1954).
[40] Id. at 261.
[41] Id. at 263.
[42] Id. at 263.
[43] Id. at 265.

become more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up."[44]

While the holding in the boxing case may be a popular one,[45] the slender thread distinguishing boxing is, at best, tenuous. Although the Court rather airily determined that the status of boxing was not controlled by the *Federal Baseball* and *Toolson* cases, it could be said that the end justified the devious means. It would seem that the boxing decision is basically one of "policy"—a term of convenience devised to conceal and mystify a deviation from a straight line. It appears the Court felt baseball was a clean and honest sport, capable of carrying on unhampered; whereas boxing, scandal-ridden and degenerate, needed to be subject to close scrutiny.

VI. POLICY CONSIDERATION: PECULIARITIES OF BASEBALL PRECLUDE EASY SOLUTION

The proposed House and Senate bills of 1951 would have exempted all aspects of organized professional sports enterprises from the antitrust laws. In addition to exempting individual sports, such as boxing, they would have given blanket approval to practices in baseball which do not merit special protection. For example, they would have sanctioned the division of consumer markets, restrictive broadcasting agreements, the blacklisting of players who refused to comply with the clubs' own agreements, and any future restraints of trade which might be devised by the baseball industry. Although there is need for legislation granting some type of protection from the antitrust laws, the legislation ought not be in the form of a blanket exemption. In regard to internal government, the past history of baseball clearly indicates that the self-interested club owners are incapable of providing restraints on their own behavior. Industrial tyranny, however benevolent, neither recommends itself to American traditions nor promises to act indefinitely as a faithful public servant. If professional team sports are natural monopolies, the burden rests upon Congress to create a public check to replace checks normally found in a free market.

The only practices in baseball which merit legislative immunity from the antitrust laws are those restraints which foster equal playing competition among league rivals and thus permit base-

[44] Id. at 267.

[45] There has been much criticism of the present status of boxing, especially in regard to the presence of many known criminals. See Sports Illustrated, Jan. 17, 1955, p. 11; Sports Illustrated, Jan. 24, 1955, p. 24; Sports Illustrated, Jan. 31, 1955, p. 18.

ball to operate as a business. A team in organized baseball faces problems unique in the baseball world, unique because professional baseball must cooperate with chosen competitors in order to create a marketable product. Because the attractiveness of each product or exhibition depends on its uncertainty and dramatic value, this cooperation must extend beyond the mere performance of the exhibition to the creation of common trade practices which promote equality of playing skill among opposing clubs. Baseball's product is *competition,* and without competition on the playing field, the public has demonstrated a marked reluctance to purchase the product.

The only major restraint presently used by organized baseball which fosters equal competition is the reserve rule. There is little doubt that without the reserve rule, baseball as we know it could not survive. But it merits legislative exemption only if adequate safeguards are provided which would prevent abuse by clubowners of their monopoly power.

For the individual club, profits and intangible rewards are directly related to the playing success of the team. A club which wins two-thirds of its games tends to draw two or three times as many fans as a team winning only one-fourth of its games. Each club, therefore, is desirous of employing the best players it can find. If given free rein, however, the individual club's pursuit of the best player talent will tend to destroy first the club's competition and ultimately the club itself. Only one club in a league can win the pennant, and unless the losers also prosper, the victor of one year may lose money the next through lack of competition. Collective financial success for a league requires continued equality of competition on the playing field. Collective profits of competing clubs within the same league are directly related to the closeness of the pennant race.

In the free market existing prior to the adoption of the reserve rule, the best player talent gravitated to the major league clubs whose larger consumer markets enabled them to offer higher salaries. Because a club's success depended upon its players' abilities, the bidding for talent was intense. Transferring from club to club for a higher salary became a common practice; competition on the ball field became a farce. For example, Boston won the professional championship in 1875 with seventy-one wins and only eight losses. Last-place Brooklyn won only two games and lost fifty-four.[46] Of twenty-five clubs which competed in the

[46] H.R. Rep. No. 2002, 82d Cong., 2d Sess. 17 (1952).

first professional league, 1871-1875, sixteen were financial failures.

Restoration of a free player market would return the baseball industry to the chaos which ruled its early years, when clubs had an average life expectancy of two or three years. Early baseball pioneers tried every available alternative in an attempt to keep the player market open, but nothing short of direct restraints proved capable of putting the business on a self-paying basis. The annual scramble for players burdened clubs with expenses that only a pennant-winner could hope to meet. To reduce the payroll meant a loss of the club's best players, a poor playing record, declining attendance, and certain financial loss. To join in the reckless bidding only reduced these losses. In fact, the number of interested investors and the number of active professional teams dwindled during the 1870's to the point where a quick collapse of the industry seemed probable.[47]

For the most part, player criticisms have been directed against the abuses which the reserve rule makes possible—assignment without consent, arbitrary salary terms, blacklisting for joining independent clubs, and retarding of their advancement to the major leagues.[48] The fact remains however, that the players generally agree that restraints on their freedom of contract are necessary if baseball is to be a successful business which offers them secure employment.[49] The elimination of the reserve rule would remove the foregoing abuses, but the history of the game indicates that the end result would be detrimental to the players. Unless the clubs could eliminate competition in the player market, most investors would soon tire of seeing their capital disappear in the pursuit of player talent and would withdraw from the industry, leaving the players without employment.

Since neither a blanket-immunity from the antitrust laws nor a complete subjection thereto are answers to organized baseball's ills, Congress, the courts, or some other regulatory body must effectuate a policy which retains the benefits of the reserve rule but which eliminates the disadvantages arising under it.

VII. POSSIBLE SOLUTIONS

Congress conceivably could draft a comprehensive code specifically defining the permissive limits of antitrust exemption. Such legislation, however, may be impracticable since the task of fore-

[47] Id. at 16.
[48] Id. at 139.
[49] Id. at 208.

seeing all possible contingencies would be tremendous and constant revision would probably be required.

A more feasible solution perhaps would be the legislative drafting of a limited exemption for the reserve rule. This would leave to the judiciary the problem of determining what safeguards are reasonable for the protection of clubs' and players' interests. Such legislation would require application of the test of reasonableness to the concerted activity. Under such a test, baseball, while protected from irreparable damage, could still be required to adopt new, less restrictive means of achieving its admittedly desirable goals: continuity of personnel, equality of club playing ability, and public confidence in the loyalty of players to their clubs. The disadvantage of this approach is that the inevitable disagreement among courts as to what safeguards are reasonable might produce an extended period of uncertainty and confusion.

As an alternative, Congress could establish a Baseball Commission and assign to such administrative body the responsibility for prescribing reasonable restraints on baseball's competitive practices. An expert federal administrative agency would provide more efficient administration and more disinterested rule-making than would be obtained from judicial review of the reasonableness of baseball's regulatory agreements. It would also be better equipped than Congress to draft and revise necessary safeguards to protect the antitrust exemption from abuse.

Whether a federal agency, the courts, or Congress itself should prescribe the necessary safeguards presents a difficult legislative choice. Both Congress and the Supreme Court have been reluctant to take the initiative. The *Toolson* case, while protecting baseball for the present, nevertheless leaves baseball's exemption from the antitrust statutes upon the tenuous ground that Congress has shown no contrary intention. The uncertainty of the exemption's basis may subject the sport to future suits presenting other factual situations. Time will tell.