

1993

## Union Views Concerning Agents: With Commentary on the Present Situation in Major League Baseball

Donald Fehr

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

---

### Repository Citation

Donald Fehr, *Union Views Concerning Agents: With Commentary on the Present Situation in Major League Baseball*, 4 Marq. Sports L. J. 71 (1993)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol4/iss1/6>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

# **UNION VIEWS CONCERNING AGENTS: WITH COMMENTARY ON THE PRESENT SITUATION IN MAJOR LEAGUE BASEBALL**

DONALD FEHR\*

## **I. INTRODUCTION**

Many general statements can be articulated concerning agents, their roles, and how they perform in their roles. I asked myself whether we need them, whether they are good people, whether they get paid too much, whether they know anything, and so on. This is one of those situations in which general comments are not worth very much.

This means that when someone expresses their views about an agent, you can not respond unless you explain where you are coming from, what your examination point is, what you think they should do or not do, if you have a particular beef or success story, etc. You also need to know which management representative you are talking to because he or she will have a differing perspective depending upon the sport, the particular team, the ownership, and his or her own experiences. You also have to know which union you are talking about because the same criteria will apply, although the views from time to time have been significantly different between the four major team sports. These criteria will similarly apply if you are talking about an individual representative of one of the unions, for example; Gene Upshaw, Gene Orza, Charlie Grantham or myself.

We are all colored by our own experiences, some of which are very positive, some of which are not. That means of course, that you have to know which agent it is you are talking about. Everyone will react to that particular individual or group, based upon their common knowledge first, and based upon what their own experiences have been second. To the extent that you are involved in discussing issues with clients, or potential clients, or in conducting your own businesses, for whatever it may be worth, it is the specific that matters. As all of you know, reputation spreads whether it is good or bad, right or wrong, or indifferent. The

---

\* Executive Director, Major League Baseball Players Association (MLBPA), New York, NY; B.A. 1970, Indiana University; J.D. with Distinction 1973, University of Missouri at Kansas City.

most common recommendations as to whom to hire or whom not to hire as an agent come from another player. Although sometimes those opinions are informed, very often they are not.

## II. AGENTS

### A. *Agent/Player Relationship*

In a general framework, this is not a traditional attorney/client relationship. This is not a traditional personal representative relationship in any way, shape, or form, even though many of the activities may be similar. The general rule on the club side is that the athlete has the right to have a lawyer come into negotiations to represent him. We all take that for granted. In baseball, we had to specifically bargain and include a provision in the collective bargaining agreement requiring a team to meet with the designated representative of a player on an individual basis. Had we not done so, had we been unsuccessful in doing so, or had Marvin Miller been unsuccessful in doing so back in the early 70s,<sup>1</sup> there would not be any agents.

The clubs' position at the time was very, very simple. In essence, clubs would tell players, "You are my potential employee, or you are my actual employee, and if you want to talk to me about a new contract or a raise, I will be glad to talk to you, by yourself, on my terms, for as long as I want to, and you cannot bring anyone with you." In those days, the circumstances were such that if you showed up with an agent, (if the meeting was not canceled immediately) the agent remained out in the hall. Every once in a while the player would be permitted, if his personality was strong enough, to walk out into the hall and talk to his agent. The player would try to recapitulate what had happened in the meeting so far, in an attempt to elicit advice from his agent to take back in and try to carry out individually. That is a very difficult thing to do. It reminded me of how attorneys are ordinarily treated as witnesses in grand jury proceedings. Essentially, attorneys are not wanted, but there are certain things that they cannot prohibit you from doing. Had there been no unions, and no group to say, "Here is a provision of an agreement which you are going to sign and which we can enforce," there would be no agents.

---

1. Predecessor to Mr. Fehr at the MLBPA.

*B. Agents, Unions and Collective Bargaining*

The next point follows rather naturally. Agents, at least in baseball, are almost entirely creatures of the unions. We have bargaining provisions in baseball that cover what you do very precisely. For example, at the beginning of the collective bargaining agreement you have the recognition clause and a clause which permits individual contracts.<sup>2</sup> The way these clauses read is an accurate statement of what happens. The union is willing to cede its exclusive statutory right for limited purposes under the terms of the agreement. It is an exclusive, statutory right arising under the National Labor Relations Act.<sup>3</sup> The union's right to conduct all of these functions itself is unquestionable, if it chooses to do so. The union also cedes to the individual players the right to bargain for certain things. What it states is that the player has a right to have an agent represent him in connection with the things that the player is authorized to conduct on his own.

In other words, if any of the unions and the majority of the players would decide that it is no longer useful or helpful or in the best interest of the players to have agents at all, there would not be any. We would all disappear. In reality I see little or no prospect of that on the horizon for reasons to be discussed later. We did not get to the point of saying that having an agent is a good idea by accident. We got there because, as a general rule, we think that it is.

Consider for a moment how everything the union does, successfully or unsuccessfully, determines the scope of the activity you can engage in on behalf of your client or clients and whether you will be successful. For example, suppose that the owners in baseball were to prevail in collective bargaining on a position similar to their position in 1980. Simply stated, it was that based upon length of service all players would be paid within very narrow ranges. If you were a five year player the only discussion would be in determining if you were going to receive between \$110,000 to \$130,000. That would be it, there would be nothing further to negotiate. The owners' position was that you could not have any long term contracts, guarantees, or deferred money with interest anyway. There could not be any special covenants giving players the right to be a free agent, or to have a no-trade contract, or any one of the things that appear traditional in special covenants, such as bonuses or incentive clauses. If the owners were to prevail in their position, ask yourself,

---

2. MAJOR LEAGUE BASEBALL BASIC AGREEMENT, Article II & III (1990-93).

3. National Labor Relations Act (also known as the Wagner Act, 29 U.S.C.S. § 151, et. seq. (1935)).

what is there for an agent to do, and who is going to pay for it? Obviously there are other things that may be worth doing outside of the employment relationship, but the guts of the representation, the reason for being in it for the most part, is the employment relationship.

Consider the current baseball agreement. An agent tries to negotiate as many provisions in the agreement as possible that will enhance the player's basic ability, collectively and individually, to secure better terms and conditions of appointment. Players at certain points in their careers have the right to be a free agent. In non-collusion years that is ordinarily a pretty valuable thing if you have a good player as a client. But think about the free agency provisions in baseball which are very detailed.<sup>4</sup> A player can elect free agency only within a limited two week period at the end of the season. If he does this, he can not discuss financial terms with any club except his former club for a period of two weeks. After that, he can talk to any other club. It used to be the case that you could not talk to all clubs. There was a draft and you were limited with whom you could talk to. That has changed through bargaining. As time goes on, the former club has an obligation either to offer the player arbitration or not. If it does, the club will retain the right to negotiate with the player for a period of time. If it does not, that right will be cut off. You also have the compensation provisions where you have the right to negotiate special covenants. In baseball, you have the right to negotiate any special covenant the club will agree to that provides an actual or potential additional benefit to the player.

The framework within which you operate is determined by the collective bargaining agreement. Therefore, management can push you out of the way if they can negotiate players' rights out of the collective bargaining agreement. Essentially, what they are doing is pushing the players out of the way. But the agent is right there along with them. In this circumstance you, as agent, have a very valuable role to perform and you have natural allies in the union because the job that both have is to represent the players. However the perspectives are not the same.

There are always conditions under which the immediate short term objective of the player may be inconsistent with the long term objectives of the union, or players as a whole. For example, a player who wants to go to management and say, "Look, you say you have financial problems and the minimum salary is \$115,000 a year. Whatever it is, in order to get to the major leagues, I will play for \$20,000 and you do not have to cover me on medical benefits." It may well be in his best interest to take

---

4. MAJOR LEAGUE BASEBALL BASIC AGREEMENT, Article XX, Part B.

that shot if he does not think he is going to get another one. The question is whether the other players can permit him to do that. The answer is no.

Why is it then that most of us who have been around for a long time believe that the individual negotiating process, conducted as effectively as it can be by individuals operating within the best collectively bargained framework we can give them, is going to be much better for players than the results that might otherwise be obtained through traditional collective bargaining?

There are a lot of dynamics at work. There is the desire of individual players, through their agents, to beat the other players' contracts because there is a lot of status associated with having the better contract. After a while, the absolute dollars may not mean as much as they used to. What is important is the relative dollars to somebody else.

Consider for a moment something that may not have crossed your mind before: unions will proceed as a vehicle through which collective bargaining for employees will take place. That is to say, you would bargain on behalf of the employees as a group, and implicit within this judgment is the understanding that there are common jobs about which you can negotiate. You can figure out how much the person doing job X, who has been around for so long, ought to get paid. In doing so employees will move into job slots. You do not negotiate with the employee, rather you negotiate the salary, or the hourly rate, or the benefits, or whatever they are, for the job slot. You negotiate terms and conditions and promotion as well.

Think about any baseball player. For example, think about any shortstop. And now begin to differentiate, if you can, between that individual and all the other shortstops. Forget the other positions, just all the other shortstops in the major leagues. How common are they? Are there any two of them for which you can say that they are so identical they ought to get paid exactly the same salary? You could differentiate by style of hitting. Some of them can hit, some can not. Some of them hit for power while some of them hit for average. Some of them are runners, some jump. Some are old, some are young. Some are injury prone, others are not. Some have natural athletic ability, others do not. Some have celebrity status, others do not, etc. When you think about it, you could never reach the point of exhaustion with differences between the players. If we were to honestly bargain collectively on behalf of all players, not simply saying that we will arbitrarily define a four year shortstop as worth X dollars, you probably would have to collectively bargain each salary, player, by player, by player. The best guess is that

you probably would not do the job as well as the individuals representing those players. That is why it is important to have agents around.

There are other reasons that agents are necessary. We would have to have staffs essentially as large as the agent group in order to know the individuals well enough, to know what they want in order to be able to bargain effectively for them. If you are bargaining for a player, you are bargaining the length of the contract, where he wants to live, and what his financial situation is, among a host of other things. In addition to these factors, you have another problem that you do not have in most places. The concept of seniority as a device by which jobs are protected is sort of extinct. If you get the player \$320,000 and the player gets someone else who can get him \$325,000, you may lose your job. It does not matter how good of an attorney you are. There is an artificial limitation on the number of jobs. That is the way the work force works. What is necessary is for people to know the individual players very well, know the industry very well, and be able to function knowing that the individual players will be competing with one another for a limited number of jobs. That is a function that is not easy for a union to accommodate. However, it can be done. We do assist in proceedings because there are a lot of things that we can do. Even so, we all have our own views as to the relative ability or likelihood of agent X to get an appropriate contract for player Y.

The next important question is, who ought to be an agent? Furthermore, who should the union or players permit to be an agent? Three of the unions now have regulatory schemes which differ to some degree, while I believe football is putting one together again. There are some fundamental questions that arise. For example, is it enough for player A to say, I want Don Fehr to represent me? Should that be the only criteria? Well, a case can be made that it should. Everybody is free to choose whomever they want whether he or she is good, bad, or indifferent. But what if a player chooses a bad agent? Before answering this, ask yourself whether a player could ever make such a judgment on an informed basis, and whether or not you could increase the likelihood of better judgments being made, and so on.

Then you are faced with the next problem. People who have done work in baseball know that you sit around every February waiting for the next salary arbitration settlement or award to come out because every single award effects every contract that follows it. The trends in contracts are important. As a result, a particularly poor representation of player X which ends in a bad contract can adversely affect all the other players because that is one of the comparison points. Conversely, if

there is a good contract, it helps them. In other words, all players have a distinct and definite interest in the contracts other players sign.

Questions may then arise relating to what the interaction should be between players and agents in the collective bargaining process and in negotiating with the union. Historically, agents have had the least contentious relationship in that regard. Agents are not permitted to attend negotiating meetings. They never have been, and I see no reasonable prospect that they ever will be so permitted. As a practical matter, how could we select one agent or the other? The union still does affirmatively solicit the views of agents, and, on a subjective basis we tend to take the views of certain people with more experience a little more to heart than the views of less experienced agents. The questions we ask are the obvious ones: Do you represent players? Is the system working well enough for you? If there are particular problems, what are they and how do you suggest we fix them? If there are things we can do to be helpful, what are they? And by the way, we need your help to bring the message to players about how important this collective bargaining relationship is.

This can create potential conflict of interest for agents. Suppose the following hypothetical takes place. The owners come in with a salary cap proposal which the players accurately believe pay them more than the free market would pay them in the aggregate. But it had some conditions on it, some fairly tight salary caps and limitations on what players could negotiate. We might ask if you would support that if you thought it was better for the players. In doing so we would be asking you to support a resolution that might well cut substantially into the way you, as an agent, now make your living. It is a difficult, involved, and on-going process. I doubt that the rules will ever be sorted out to everyone's satisfaction.

There is another goal that agents have which, in baseball at least, we look to anticipate, expect, and insist upon, yet, as a practical matter, under the current system, we could not do. Simply put, players have problems individually with either agreements, salary arbitrations, potential trades, etc. Problems could collectively be something as massive as collusion of free agents or attempts to change some of the rules on major league or minor league moving. Or individually as small as a problem due to a disciplinary case involving a player.

The easiest way to describe the phenomena I want to discuss is through the example of the collusion cases. How do we prove that the owners are collectively acting to restrain trade in a player market, or to boycott, or to fix prices depending on the case? Where does the evi-



dence come from? Those of you who are lawyers of course will know it and those of you who have tried anti-trust and other types of restraint cases will know from experience. There will be some economic expert evidence you can put into evidence which says, in a free market, the salaries would be X and they were Y and the difference is damages and that is also proven in collusion where you did not have the free market. If you could do that, it would be helpful, and sometimes it could win a case for you. What we had to have, even in collusion cases, was the testimony from numerous players. They were testifying to the day-by-day facts of what happened in the negotiating process. We would then add all of this testimony together and ask the arbitrator for an appropriate remedy.

Our role is extremely important. Our ability to represent players effectively in the agreement arbitration process depends entirely on the kind of cooperation and the job the person representing him has done, including; the notes he has kept, the kind of recall he or she has, and all of those other circumstances. Without assistance, we, as the players' union, could not possibly keep tabs on 600 individual negotiations with our small staff.

### *C. Agent and Union Roles*

The third area of discussion is markedly different from the employment relationship. All of you know, depending on a client, what your own expertise is, and how you want to conduct your businesses, that there are a host of things that an agent might believe that his client should allow him to do, or might want him to do. A few of these would include; financial planning, including tax and estate planning; the whole question of endorsements; the whole question of appearances; outside legal problems that do not have anything to do with the employment relationship; marital problems; drug problems; and, bankruptcy problems. Unless the players' agent has contributed to the problem, players will tend to either ask the agent they have worked with for a long time to get them out of this particular situation, or they will take their agent's advice as to whom they should retain to work them through a situation. There can be lots of problems in this regard. Agents have been criticized for saying that the union has to regulate this stuff, to clean it up, to throw out the bums, to make sure this does not happen, etc.

The question becomes: What business is it of the union how much taxes you pay? What risks you take? Whether you are getting along with your wife? Whether or not you ought to sell a piece of property of

get involved in a company? I do not mean that there is not an appropriate role for the union to play if a player wants the union's help, or if the union has some particular knowledge. In this situation the union, through a representative, should say, "Look, pay attention, this is really important." But what should we be able to do, if anything, to propel a player along in that regard. This role is essential and can have a tremendous effect on an employment relationship. Players that have made poor investments, or have been ill served, often negotiate grossly substandard contracts with small signing bonuses a year or two early because they need the money. Under the circumstances this is understandable, absolutely understandable. Such a contract is then held up in the face of all the other players as an example of a free market contract for the appropriate value that other similar players should then be paid.

It must be recognized that these areas are outside the traditional role and authority of what unions are set up to do. What we can do with the players agreement is one thing. What we can compel them or should properly compel them to do, is something else. As a practical matter, the line which has been drawn so far is that if you want to represent players in a role which is a traditional one for the union, (i.e., you want to negotiate their contracts and operate within the existing employment relationship) as the price for being permitted to do this, there are a number of other things the union can require you to do, some of which you may already be required to do. Still, maybe you do not want to go through this, all you want to do is to hang your shingle and do tax work, estate planning, and negotiate endorsements.

This raises the fundamental philosophical question as to what legal authority we have to allow you to do anything you want. Many people think that this is a philosophical problem one ought to be able to get past. It is, however, one of those problems which is troublesome for the union, because what we are about is defining roles. You have to remember what a union is. I do not mean the statutory definition (i.e., an organization of employees to both negotiate collective bargaining agreements for them and to put together a group of a lot of these employees). What I am referring to is in practical day-to-day terms. A union is a political organization; first, last and most of the time in the middle. A union can do what it believes is necessary, if it can persuade the majority of players that it ought to be done.

In the end, the players have to approve any measures the union undertakes. If the union were to undertake such measures on its own without player approval, the players could fire the union as they should. It is their organization. It is not the staff's organization. That means that

players have to be prepared to take that step. It cannot be done by proxy. It can not be done by sending out a notice that you, as agent, signed your name to. The players have to do it. It was not long ago (although it is changed now) when players took the view, not only literally but emphatically (and I used to hear a number of people tell Marvin Miller this) that "The union's job is to get us all the money you can and what we do with it is none of your business. We can throw it down a rat hole, we can give it to our girlfriends, or invest it in the best kind of investments we can find. It is not your concern so do not ask us about it. We are not going to tell you."

If the players as a group are predominantly of that mindset, there is nothing that the union can do, nor is there anything that the union should do about it. The most that can be said is that people in staff positions or players who believe otherwise ought to attempt to educate the other side to change this mindset. That is the prevailing view among players today in baseball. It was their view up until the mid 1980s. I can encapsulate it as follows: there are certain things that the players chose not to have the union do. There are things that are delegated to the individual players, and appropriate bargaining agreements can be negotiated to provide means for them to exercise those individual rights. One of those things is to employ people, an agent, as a negotiator on their behalf.

All of the certification and regulation provisions in all of the unions essentially stem from the union's authority under the Wagner Act in the secession of authority.<sup>5</sup> Those provisions are what they are because that is what the players were prepared to accept at that time. In baseball, for example, the players were not prepared to accept any sort of regulation until the late 1980's. I think they were wrong about that. I repeatedly told them so and they told me that my opinion was very nice but all the same they were not prepared to do it which of course is what they are there for. Those regulation and certification provisions will no doubt change.

#### *D. Fees*

One last idea concerns fees. Fees are limited in basketball at least as far as the regulation scheme. The players do that because they thought that was the most appropriate thing to do. We have not done this in baseball. One reason is that it is hard to see how anything meaningful

---

5. 29 U.S.C.S. § 151, et. seq.

could be written which defines what an appropriate fee is. One could say, "The appropriate fee is going to be 3% of the value of the contract up to X amount of money and 2% above that and 1% above that." If all agents did was to negotiate contracts, you might actually be able to make some sense out of that. However, that is unusual. More often the agent will perform a variety of services for which there are a series of fees. Now if he or she actually believes that he has to have 4% and the player is willing to accept this, then what may happen is that someone will come down the middle and say that the baseball contract negotiations fee is this particular percent. Upon closer examination, you will realize that the fees for money management and tax planning have gone up to compensate for this occurrence. So it is difficult to determine correctly what they are.

A judgment was made. The judgment was that if fees become known the players will look at the information that comes in under the regulations and sooner or later they will become educated consumers, to use a bad phrase, and they will shop. They will say it is enough, it is too much, or I want you to do it this way. Eventually, there ought to be a market price and some reasonable measure of what the appropriate fees should be. Unfortunately, we were completely wrong in assuming that players would react in this manner. There has been almost no such movement in that regard.

What tends to happen is what always happens. The player, if he is satisfied with his agent, if he trusts him or believes that he is doing the right thing and is putting his heart and soul on the line for the player, and if the fees are not ridiculous, this is where he wants to be. The relationship is much more complicated than paying a fee to a real estate agent to help you buy a house. It is a much closer and much more encompassing relationship.

However, we are beginning to get fairly significant pressure from players to consider modifying this relationship. There has to be another way to do this because the fees are getting out of hand. As an athlete begins to earn 3 or 4 or 5 million dollars a year, is the work involved that much more lengthy than it was before? As a matter of fact, the agent's skills may improve and his or her bargaining power may be greater which could mean the process entails less work. Do percentages make any sense? Well, maybe not. What then should the agent do? Tell him you want to do the deal differently. Sometimes that works, sometimes it does not. Whether that will push us into the direction of reexamining this over the next year or so, I do not really know. That remains to be

seen but it is closer than it has been. We will have to look at it again sooner or later.

### III. COMMENTS ON THE CURRENT SITUATION IN BASEBALL<sup>6</sup>

#### *A. Overview of the Industry*

Let me take the opportunity to give you a little sense of how we see what's going on in baseball. I think it is fair to say that we have an industry that is going through fairly significant changes. It is not at all clear what is going to emerge, nor is it clear when anything definite will emerge. Consider industry X making the proverbial widgets. This particular company making widgets had an income of \$180 million in 1976. And in 1993 it had an income approaching two (2) billion dollars. It has developed no new products, it does not have any more employees except the extension county expansion teams, and the order and magnitude of the numbers would not be much different now than they were then. It provides no new services to people. It has just had income growth similarly to the price of oil going up, yet you still have the same cost to pump it out of the ground. Then this particular management said, "Things are terrible." They do not know if they can make it. "Internally, the money is not distributed right. We need to have major concessions from our employees. We do not know what we are going to do."

Most people will say one of three things looking at those facts. Either, the whole story has not come out, or if this is really true we have what can only be described as a massive management failure, or the relative people involved who run this cartel do not really care about the other cartel members. They are only willing to help drive down employee salaries because that helps them even if they are well-off. That is what we believe that you have in baseball today.

#### *B. Revenue Sharing*

Revenue sharing is an interesting concept. Acting under such a system would entail taking all of the people in a given industry and moving the money around until everybody is happy. In reality, when it reaches that point, none of us will be alive. Still the owners have agreed on some form of revenue sharing. Even so they have begun to bargain with one another about redoing the revenue sharing.

There are essentially two sides to the revenue sharing dispute and there are compelling cases that can be made for both. The smaller mar-

---

6. Comments as of Fall 1993.

ket clubs (or the smaller asset clubs, or the smaller income clubs, depending on which group you are looking at) sit back and say,

Wait a minute, we have all these revenue sharing agreements that were written 35 to 40 years ago at a time when local T.V. and cable did not matter. All these things are different now. There were no large local media over the air contracts in big cities. Therefore, the smaller market clubs are disadvantaged and seek to rewrite these agreements in a manner that would have been written 25 years ago if we could have predicted what today's world would have looked like now. The agreements are antiquated and designed for a different world. They would have been written the proper way at the time if anybody had known what was coming. But no one knew what was coming.

The large market clubs say something at least as compelling. They say,

Wait a minute, with all deference to my friend Bud (Selig), you (Selig) spent more money on the Milwaukee Brewers in 1969 than I did on the Yankees in 1973. You knew you were buying the Milwaukee market. I knew I was buying the New York market. All things being equal, since we all knew what the revenue sharing agreements were, which is likely to be the better deal over time? Therefore, since my judgment proves to be much better than yours, your position is that I should rewrite the revenue sharing rules? Which means that I will give you money every year, forever.

The reason that you hear threats of lawsuits is that most people on the clubs' side believe that internal litigation will support the large market position. It does not make sense. Everybody bought in at the same time. But how did the players get into it and how do they fit in the equation? Well, Mr. Ravitch has been running around the country for the last 18 months refusing to negotiate with us, instead negotiating only with the owners.

One of the great dangers is that the owners will negotiate all the issues among themselves and give us (players) an ultimatum. The owners claim that players' salaries are inextricably intertwined with revenue sharing. How? Why? What does the way you pay your employees have to do with the way you allocate industry income, which at least in large portion is jointly produced? Why is it that one has anything to do with the other one? I can not find anyone who can give me a logical explanation.

The bargaining dynamics are these; the only way that the large market owners will agree with the small market owners, is if the small mar-

ket owners get X dollars, from which X plus Y is the total, but at least X will be secured for the players at bargaining and paid back to the large market owners. In other words, large market owners are repaid the money that they gave the small market owners in the form of lower player salaries. That is the link. That is why players do not like it and that is why people who represent players in your capacity and mine do not like it either. And that is why this extra round of bargaining has a tremendously divisive component to it.

Management mistakes have been made. We say fix it. The owners do not want to do that. They would much rather say that, "It is now clear that the San Diego (Padres) team was bought by a bunch of people who did not really have any idea what they were getting into. They have a decision making structure which does not lend itself to making decisions and thus they are losing a bunch of money. We will not help them." You will notice that no major league club, or the acting commissioner or anybody else for that matter, attempted to do so much as float the Padres a loan before the team was destroyed. Why? Perhaps they are the stalking horse, the example that is going to be used in bargaining as to why players have to give concessions. But players will be asked to pay for that problem. They paid too much and they do not know how to run it so we will get the money back through the players.

That is the essence of what is going on now in baseball. It may not work out that way. Maybe common sense will prevail. Maybe we will finally have a real negotiation that amounts to something. However, there is precious little evidence of that thus far and that is what is troublesome. Anytime you have a problem that can not be resolved without hitting somebody on the head, it will be difficult to move forward.

The agent's job in an individual context is to find a way around the problem so that everybody is happy. But there are very difficult prospects to consider. One must weigh how to get money paid back to the players. You have to impose a salary cap. That is to say, an absolute limit on the aggregate amount of player salaries, which is sufficiently below the expectations of total market value that will be paid back to large market clubs. It always will be substantially below the players' market value. Think about it, why would the owners be interested in a salary cap below the players market value? Why would they be interested in shutting the industry down if it was the same as the players' market value? It only works if they assume they want underpaid players relative to what they believe the free market would produce in the aggregate. That is the only way it makes any sense. That is the kind of situation that

we are facing. Other problems that you hear about in baseball, with one exception, I do not take all that seriously.

### *C. The Commissioner*

When are they ever going to pick a commissioner? I have no idea. I think the greatest likelihood is that Bud (Selig) will continue in this role for an indefinite period of time. I will also suggest potentially as a matter of some heresy that the commissioner position does not really matter very much, except in one small regard.

The notion that the baseball commissioner is independent is pure myth. It never existed and it is not going to exist. The owners do not want a commissioner because they do not want anyone telling them what to do. They do not want somebody else around. A commissioner, even with no legal authority, can always rally public opinion. The mistake that was made was the manner by which Fay Vincent was fired and the ugliness surrounding it. It appeared as a sort of very nasty corporate board fight on television, which ended up with the owners destroying the myth of the commissioner's office as the representative of the fans. That myth served baseball very well for a very long time, and we can hardly get it back.

Secondly, they keep doing studies trying to come up with a new organization because the difference between baseball, and basketball or football, is that football is marketed nationally at almost 100%, and basketball is marketed nationally and internationally, while baseball is rarely marketed nationally. There is nobody in New York with whom one can make a deal for national sponsorship. There is nobody there who has the authority to do so. Traditionally the owners have wanted it that way.

My own personal belief is that a large part of the difficulty that baseball is perceived to be in stems precisely from that fact. I do not want them to hire a commissioner, I want them to hire a boss. I want them to hire somebody whose job it is going to be to run the business, and who will either have enough ability or enough authority in some fashion to actually get things done. If that does not happen, if you have to have endless committee meetings on an ongoing basis, then nothing much is going to change.

That will not destroy baseball, far from it. Everybody talks about the national T.V. revenue, and what happens if national television revenue collapses. The best estimates are far from that even under the worst scenarios. But if it collapsed to nothing, the total income of baseball would be something more than 1.5 billion dollars a year, probably ap-



proaching 1.6 billion, and that is more than baseball took in in any year in its history prior to 1992. What has happened is that the viewers on national T. V., and the revenue, have shifted away from the networks to the local cable and superstations, just like they have everywhere else in the economy. What bothers me about this is that the opportunities are out there to expand the game, to move it internationally and to re-emerge as predominant. They are so obvious and so close to grab. The fact that we cannot implement them is bothersome.

Consider for a moment, the fact that in a dying sport 70 million plus people came to the ballparks last year. The baseball stadiums in Toronto, Baltimore, and Atlanta, were sold out in the beginning quarter if you count from the beginning of the year to the end of the year. If you had said even three years ago we will sell-out every seat in the stadium for every game, people would have sent you off to see a shrink. Yet it happens now. Why does it happen now? Predominantly because the local ownership figures out how to do it. Traditionally that is where the good work is done in baseball. It is done on a local level. The problem is that you have just as many franchises, if not more, that have not performed well on a local level.

#### *D. The Salary Cap*

Finally, I am often asked, "Are there any circumstances under which you think the players will accept a salary cap." The first answer, and the flip one is, of course, that it depends on how close it is to 100% revenue. But in most circumstances it is very difficult to see getting from here to there. The practical problems are great and dividing the revenue among the players makes it insurmountable from where we sit.

There is one thing which flows naturally and inescapably from a salary cap system which defines the percentage of revenue. The owners would have to give up their unilateral right to manage the industry and determine how revenue is derived. This is a very extreme notion, but it can be understood with a very extreme example. Most of you will remember that there was a time, up until the mid 1980's, in Minneapolis, and up until the early 1980s in New York with the Mets, when the teams were disastrous. You could not get people to attend baseball in Minneapolis even after they built the new stadium. Now they draw over 3 million people—great local management and tremendous community involvement.<sup>7</sup> What happens if Carl Pohlad wants to sell the team and

---

7. See for example, Baseball attendance tops 70 million, SPORTS INDUSTRY NEWS, October 8, 1993, at 398.

the offer is \$ 5 million more from Calvin Griffiths than it is from anybody else and we have salary cap based on a percentage of revenue? The salary cap will drive any other buyers out all by itself. Can that be allowed to happen? That is an extreme example, but it suggests at least what the implications are for the long range of a percentage of revenue type arrangement.

The hardest single question in any salary cap negotiation, once you get past the philosophical objections, is trying to figure out what money goes into the cap. How much of the \$173 million that the Orioles sold for is considered income for baseball as available for player salaries? The answer under the traditional approach (and in basketball) is nothing. Except we all know that owners may well choose, and have chosen, to take their profits out through the form of franchise depreciation rather than by year end profits. So what do you do? I do not have the answer. That is as far as it goes. The answer to the question is that if you ever got that far, then you would have to negotiate that set of problems. It is very, very difficult to see your way through.

#### *E. The Union*

We, as the union, are here to serve the players as best we can and if you, as an agent, are the chosen vehicle of communication (which is usually the case in sophisticated player problems) then make sure that any problem is being considered in a timely fashion. The union is there to try to be of assistance, to tell you what your players' rights are, to tell you what we think we can do with your grievance, and so on.

Why is it that we charge no fees? In the other sports there is at least some sort of payment that the agents make as part of the privilege of being certified as a player agent. That is done in the other sports for reasons that I am sure they believe are good and sufficient for themselves. Our own view is twofold: (a) we do not need the money; and, (b) I make the assumption that all charges agents have as part of the business, sooner or later end up getting paid by the player. It is usually in one pocket and out the other.

