

# Federal Labor Law Obstacles to Achieving a Completely Independent Drug Program in Major League Baseball

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**SYMPOSIUM:  
DOPING IN SPORTS: LEGAL AND ETHICAL ISSUES**

**FEDERAL LABOR LAW OBSTACLES TO  
ACHIEVING A COMPLETELY  
INDEPENDENT DRUG PROGRAM IN MAJOR  
LEAGUE BASEBALL**

ROBERT D. MANFRED, JR.\*

I. INTRODUCTION

The war against the illegal use of anabolic androgenic steroids and other performance enhancing substances in sports has piqued the interest of millions around the globe. Even the President of the United States called on the sports industry to “get rid of steroids” in his 2004 State of the Union Address.<sup>1</sup> Congress followed suit by introducing six bills, each proposing to establish minimum drug standards for professional sports leagues and mandatory random testing for their athletes.<sup>2</sup> However, congressional legislation has proven unnecessary as Major League Baseball (MLB) and the Major League Baseball Players Association (Players Association) (collectively, the “Parties”) have made tremendous progress in strengthening the sport’s Joint Drug Prevention and Treatment Program (Joint Drug Program). Indeed, MLB now

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1. See President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

2. See Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated By Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 653 n.13, 660-63 (2007) (summarizing the following bills: Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, H.R. 2565, 109th Cong. (superseded by H.R. 1862); Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong.; Clean Sports Act of 2005, S. 1114, 109th Cong. (companion bill to H.R. 2565); the Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); and the Professional Sports Responsibility and Accountability Act, S. 1334, 109th Cong. (2005)).

has the strongest drug program of any major professional sports league in the United States<sup>3</sup> and, perhaps more importantly, MLB has a drug program that will protect the integrity of the game.

On December 13, 2007, former Senator George J. Mitchell released his much anticipated *Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball* (Mitchell Report).<sup>4</sup> In Section XI of the Mitchell Report, the Senator set forth a series of recommendations for further improvement of the Joint Drug Program.<sup>5</sup> Many of Senator Mitchell's recommendations – e.g., forming a Department of Investigations, conducting random drug testing and background checks of clubhouse personnel, requiring club employees to disclose any knowledge of use, possession, or distribution of any Prohibited Substance, creating a hotline for reporting violations of the Joint Drug Program, and logging all incoming packages sent to clubhouses at Major League ballparks – lent themselves to unilateral implementation by the Commissioner and, in fact, were so implemented.<sup>6</sup> The remaining recommendations were subject to the collective bargaining process and required negotiation with the Players Association. One such recommendation was that the Joint Drug Program be “administered by a truly independent authority.”<sup>7</sup>

Despite occupying only three short paragraphs within the 409-page report, Senator Mitchell's recommendation that the Joint Drug Program be independent is a particularly significant one. Specifically, Senator Mitchell stated that “the independent program administrator should hold exclusive authority over all aspects of the *formulation* and *administration* of the program.”<sup>8</sup> In his statement before the House of Representatives Committee

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3. Commissioner Allen H. (Bud) Selig stated that “[b]aseball currently has the most aggressive drug program in professional sports, banning steroids, amphetamines, and human growth hormone, and imposing the stiffest penalties for use.” Press Release, Major League Baseball, Commissioner's Statement (Dec. 13, 2007), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20071213&content\\_id=2325226&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20071213&content_id=2325226&vkey=pr_mlb&fext=.jsp&c_id=mlb). The other sports leagues referred to are the National Football League, the National Basketball Association, and the National Hockey League.

4. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (Dec. 13, 2007) [hereinafter MITCHELL REPORT], available at <http://mlb.mlb.com/mlb/news/mitchell/index.jsp>.

5. See *Id.* at 285-309.

6. See Press Release, Major League Baseball, Major League Baseball Acts on Mitchell Recommendations (Jan. 7, 2008), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20080107&content\\_id=2341094&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080107&content_id=2341094&vkey=pr_mlb&fext=.jsp&c_id=mlb).

7. MITCHELL REPORT, *supra* note 4, at SR-24.

8. *Id.* at 303 (emphasis added).

on Oversight and Government Reform on January 15, 2008, Senator Mitchell reiterated that “[t]he program should be administered by a truly independent authority that holds exclusive authority over its structure and administration.”<sup>9</sup> Thus, Senator Mitchell’s definition of independence includes not only administering, but also establishing and modifying the terms of the Joint Drug Program.

In response to Senator Mitchell’s recommendation, the Parties made major strides in the area of independence by delegating administrative authority to an Independent Program Administrator. However, Senator Mitchell’s goal of a completely independent drug program – in terms of *both* formulation and administration – is virtually impossible to achieve in the context of the federally governed labor-management relationship. Although the World Anti-Doping Agency<sup>10</sup> (WADA) on occasion has criticized the legitimacy of drug testing programs in North American professional sports,<sup>11</sup> the reality is that the permanent delegation of the authority to formulate a drug program to a person or persons independent of the bargaining parties is flatly inconsistent with the policy of free collective bargaining which is embedded in the federal labor laws and which has been the principle vehicle for promoting industrial stability in the United States since 1935.

As discussed in Part II of this article, unlike governing bodies for amateur sports (such as the International Olympic Committee), which have the ability to unilaterally establish and impose the terms of their drug testing programs, MLB (like the other major professional sports leagues in the United States) operates in a unionized environment subject to the strictures of the National Labor Relations Act (NLRA).<sup>12</sup> As will be discussed more fully below, there

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9. *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Gov’t Reform*, 110th Cong. 26 (2008) (statement of George J. Mitchell).

10. The World Anti-Doping Agency was established pursuant to the Lausanne Declaration on Doping in Sport on November 10, 1999 to promote and coordinate the global fight against doping in sports. In 2004, WADA created the World Anti-Doping Code, which contains a list of substances and methods prohibited in sports. See World Anti-Doping Agency, *WADA History*, WADA-AMA.ORG, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited Nov. 15, 2008).

11. See A.J. Perez, *Anti-Doping Leader Sure of Beijing Games’ Testing Program*, USA TODAY, July 31, 2008, available at [http://www.usatoday.com/sports/olympics/beijing/2008-07-31-wada-chief-testing-program\\_N.htm](http://www.usatoday.com/sports/olympics/beijing/2008-07-31-wada-chief-testing-program_N.htm).

12. In MLB, the Parties negotiated their first collective bargaining agreement in 1968, and, the following year, the National Labor Relations Board (NLRB) formally accepted jurisdiction over the sport. See American League of Professional Baseball Clubs & Association of National Baseball League Umpires, 180 N.L.R.B. 190 (1969). The NLRB declared that professional baseball is an industry “in or affecting commerce, and as such is subject to NLRB jurisdiction under the Act.” *Id.* at 192. Consequently, MLB is bound by the requirements of the NLRA with respect to its employment of Major League players.

is a stark difference between implementing a comprehensive drug program in a private unionized environment, as opposed to one that affects only non-unionized amateur athletes because important labor policies applicable to broad segments of the economy are implicated.<sup>13</sup>

## II. UNITED STATES LABOR LAW OBSTACLES TO ACHIEVING INDEPENDENCE WITH RESPECT TO THE JOINT DRUG PROGRAM

The National Labor Relations Act of 1935 (Wagner Act), amended in 1947 by the Taft-Hartley Act and in 1959 by the Landrum-Griffin Act, established the legal framework for private sector labor relations in the United States and created the National Labor Relations Board (NLRB), an independent federal agency, to administer the law.<sup>14</sup> Most notably, the Wagner Act grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.”<sup>15</sup> To safeguard these statutory rights, the NLRB is charged with ensuring employees’ free choice concerning union representation and preventing and remedying unfair labor practices.<sup>16</sup>

The policies underlying the NLRA have played an important role in the industrial and economic development of the United States. By creating a form of limited employee self-determination in the process of collective bargaining, the NLRA has served to limit costly industrial strife in the form of strikes and lockouts.<sup>17</sup> Moreover, the NLRA is premised on the notion that the bargaining parties, as opposed to an outside agency, are best situated to

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13. “In major professional sports leagues in the United States, athletes are represented in collective bargaining by players associations. Under federal law, drug testing is a subject of collective bargaining and, in this context, requires the agreement of the players associations. That is not the case with the Olympics or other traditionally amateur sports; there the governing bodies may unilaterally impose any program of their choice.” MITCHELL REPORT, *supra* note 4, at SR-13 n.8.

14. See 29 U.S.C. § 153 (2008).

15. *Id.* § 157. Collective bargaining is the process of negotiating a contract between an employer and a labor organization. The resulting agreement is known as a collective bargaining agreement and governs the employment relationship between the parties. The NLRA applies to nearly all private employers engaged in interstate commerce with the exception of the railroad and airline industries, which are governed by the Railway Labor Act, 45 U.S.C. §§ 151-64 (2008).

16. See National Labor Relations Board, *Fact Sheet*, NLRB.GOV, [http://www.nlr.gov/About\\_Us/Overview/fact\\_sheet.aspx](http://www.nlr.gov/About_Us/Overview/fact_sheet.aspx) (last visited Nov. 15, 2008); see also 29 U.S.C. §§ 159-61 (2008).

17. See 29 U.S.C. § 151. See also *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981). “A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.” *Id.*

develop practical solutions to workplace problems and disputes.<sup>18</sup>

As a policy matter, the NLRA encourages negotiation between employers and employee representatives, and accordingly, the statute imposes a reciprocal duty on employers and unions to bargain in good faith – that is, to negotiate with the intent of reaching an agreement.<sup>19</sup> Indeed, under Section 158(d), both sides are expressly required “to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement.”<sup>20</sup> Specifically, the good faith bargaining obligation extends to the so-called “mandatory subjects” concerning “rates of pay, wages, hours of employment, or other conditions of employment.”<sup>21</sup> Because it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” with respect to such mandatory subjects,<sup>22</sup> the determination of whether a subject should be classified as mandatory or non-mandatory (*i.e.*, permissive) – a role that has been assumed by the NLRB in the first instance – has significant consequences for the bargaining parties.

In the seminal case *NLRB v. Borg-Warner Corp., Wooster Division*, the Supreme Court reviewed Sections 158(a)(5) and 158(d) of the NLRA and created the distinction between mandatory and permissive bargaining subjects.<sup>23</sup> The Court held that the duty to bargain is limited to “wages, hours, and other terms and conditions of employment.”<sup>24</sup> “As to other matters (*i.e.*, permissive subjects of bargaining) . . . each party is free to bargain or not to bargain, and to agree or not to agree.”<sup>25</sup> That being said, while “decisions ‘primarily about the conditions of employment’” are mandatory subjects of bargaining, “entrepreneurial judgments ‘fundamental to the basic direction of a corporate enterprise’” are not within the scope of the bargaining obligation.<sup>26</sup>

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18. “Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

19. ABA SECTION OF LABOR AND EMPLOYMENT LAW, *THE DEVELOPING LABOR LAW* 826 (John E. Higgins, Jr. ed., BNA Books, 5th ed., vol. I, 2006).

20. 29 U.S.C. § 158(d) (2008).

21. *Id.* § 159(a).

22. *Id.* § 158(a)(5).

23. *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958).

24. *Id.* at 349.

25. *Id.*

26. *Local 777, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978) (quoting *United Auto Workers v. NLRB*, 470 U.S.422, 424 (D.C. Cir. 1972)). *See also* *Fibreboard*

In 1989, the NLRB held in *Johnson-Bateman Co.*<sup>27</sup> that the drug testing of current employees is a mandatory subject of bargaining because it substantially alters their terms and conditions of employment.<sup>28</sup> In reaching this conclusion, the NLRB applied the two-part test set forth by the Supreme Court in *Ford Motor Co. v. NLRB*<sup>29</sup> and reasoned that mandatory drug testing programs are compulsory subjects of bargaining because the implementation of such programs is (1) “germane to the working environment” and (2) “not among those ‘managerial decisions which lie at the core of entrepreneurial control.’”<sup>30</sup> Consequently, in the absence of a union waiver, a unionized employer in the private sector has a legal obligation to bargain with the union before drug testing bargaining-unit employees. MLB is not exempt from this legal requirement and therefore must bargain over the implementation and modification of a drug testing program for its Major League players.<sup>31</sup>

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Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that there was no duty “to bargain collectively regarding ... managerial decisions, which lie at the core of entrepreneurial control” and “management decisions which are fundamental to the basic direction of a corporate enterprise ... should be excluded from [the duty of collective bargaining]”).

27. *Johnson-Bateman Co.*, 295 N.L.R.B. 180 (1989) (involving an employer’s unilateral implementation of a drug testing requirement of all employees who suffer workplace injuries requiring medical treatment).

28. The NLRB explained that the drug testing of current employees “is a condition of employment because it has the potential to affect the continued employment of individuals who become subject to it.” *Id.* at 183. In contrast, the drug testing of job applicants is not a mandatory subject of bargaining. *See* *Star Tribune & Newspaper Guild of the Twin Cities, Local 2*, 295 N.L.R.B. 543 (1989) (an employer has no duty to bargain before testing job applicants because such duty extends only to terms and conditions of “employment” and job applicants are not considered “employees” under the NLRA).

29. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

30. *Johnson-Bateman Co.*, 295 N.L.R.B. at 182.

31. “[D]rug testing is a mandatory subject of collective bargaining with the MLBPA . . . . [T]he system of collective bargaining created by the National Labor Relations Act is, by design, an incremental process. The law creates a framework for mandatory negotiation, but no outside party or governmental agency has the authority to dictate a substantive result. Because the process is essentially consensual, the agreements that emerge necessarily reflect a balancing of different interests and are often not as forceful as those that can be produced by a different process or in a different legal framework.” *Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. On Gov’t Reform*, 109th Cong. (2005) (statement of Robert D. Manfred, Jr., Executive Vice President, Major League Baseball), available at [http://oversight.house.gov/features/steroids/march\\_17\\_hearing\\_testimony.htm](http://oversight.house.gov/features/steroids/march_17_hearing_testimony.htm). *See also* Glenn M. Wong & Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779, 805-09 (1987) (citing *In the Matter of the Arbitration Between Major League Baseball Player Relations Committee and Major League Baseball Players Association*, Decision No. 69, Gr. Mo. 86-1, July 30, 1986, which held that drug testing provisions in player contracts must be bargained with the Players Association). However, with respect to the minor league players, who are not represented by a union, the Office of the Commissioner was able to unilaterally implement a drug treatment and prevention program that covered performance enhancing substances and promptly did so in 2001. *See* MITCHELL REPORT, *supra* note 4, at SR-12, 44-46.

Just as a refusal to bargain in good faith over a mandatory subject of bargaining is a violation of the NLRA, an employer commits an unfair labor practice by unilaterally changing the terms of an already-existing agreement concerning a mandatory subject.<sup>32</sup> Therefore, MLB cannot take unilateral action with respect to modifying the terms of the Joint Drug Program – the participation and consent of the Players Association is required. Only after the expiration of the collective bargaining agreement, if good faith bargaining were to result in an impasse,<sup>33</sup> could MLB then unilaterally modify the terms of the Joint Drug Program to mirror its last offer proposal.<sup>34</sup>

In the NLRA context, Senator Mitchell's model of complete third party independence in formulating and modifying the terms of the Joint Drug Program cannot be achieved. First, as a practical matter, any agreement to have a third party independently set the terms of the Joint Drug Program would have to include a "clear and unmistakable" waiver by the Players Association and the Clubs of their right to bargain over changes to such mandatory terms.<sup>35</sup> Moreover, even in the unlikely event that such a waiver could be obtained, an agreement to have such complete third party independence would be illusory because that very agreement itself would be subject to renegotiation each time the term of the Joint Drug Program expires. Indeed, like interest arbitration clauses, which also provide for the delegation

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32. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

33. The Supreme Court has defined impasse as "a temporary deadlock or hiatus in negotiations." *Charles D. Bonnano Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Similarly, the NLRB has defined impasse as "the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile . . . . 'Both parties must believe that they are at the end of their rope.'" *A.M.F. Bowling Co.*, 314 N.L.R.B. 969, 978 (1994), *enforcement denied*, 63 F.3d 1293 (4th Cir. 1995) (quoting *PRC Recording Co.*, 280 N.L.R.B. 615, 635 (1986), *enforcing* 836 F.2d 289 (7th Cir. 1987)). The question of impasse is a factual one concerning the totality of the circumstances, and the NLRB has established five factors, none of which are dispositive, to analyze whether parties have reached an impasse. The NLRB may consider "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues [over] which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967). Accordingly, there is "no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations." *Id.* at 482.

34. Unilateral changes implemented after impasse must "not [be] substantially different or greater than any [offers] which the employer has proposed during its negotiations." *Loral Defense Sys.-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999), *enforcing* 320 N.L.R.B. 755 (1996).

35. *Johnson-Bateman Co.*, 295 N.L.R.B. at 184. In order for a union to waive its statutory right to bargain over a mandatory subject, it must receive timely notice of an employer's intention to change a term or condition of employment and fail to promptly request bargaining. Additionally, a union may expressly waive this statutory right by agreeing to a contractual provision or practice that grants the employer the authority to take unilateral action with regard to said mandatory subject. Dennis J. Morikawa et al., *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L. REV. 653, 660-61 (1987).



of decision-making authority to a third party for the determination of specific collective bargaining issues,<sup>36</sup> an independent third party administrator could never assume absolute or exclusive authority over the Joint Drug Program because “interest arbitration clauses are not enforceable to ‘perpetuate the inclusion of the [interest arbitration] clause in successive bargaining agreements.’”<sup>37</sup> Accordingly, the Joint Drug Program can never be “truly independent” in the sense of formulating and modifying its terms because federal labor law will always demand that the Parties return to the bargaining table.<sup>38</sup>

There should be no dispute that the elimination of the use of performance enhancing substances in sports is an important goal. But, the NLRA requires that employers and unions bargain over mandatory subjects of bargaining, irrespective of how important the subject may be for the employer, its employees, or third-parties. By way of example, the NLRB rejected the claim of an employer that it was not required to bargain over a change in procedures that it claimed were necessary to reduce the threat of a nuclear accident, and rejected the claim of another employer that it was permitted to act unilaterally to respond to a safety issue presented by security guards carrying guns at work.<sup>39</sup> The policy judgment reflected in the NLRA is that, over time, the collective bargaining process will produce the best solutions, even on

36. See THE DEVELOPING LABOR LAW, *supra* note 19, at 1378 (explaining that the purpose of interest arbitration clauses is to resolve deadlocked bargaining issues through arbitration).

37. *Electrical Workers (IBEW) Local 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1089 n.3, *reh'g denied en banc* (8th Cir. 2004).

38. Indeed, under the NLRA, the Parties could not agree to indefinitely delegate responsibility for modifying the Joint Drug Program to a third-party. The NLRB has long held that a contract term of indefinite duration “will be interpreted as intending performance for a reasonable time.” *Boeing Airplane Co.*, 80 N.L.R.B. 447 (1948), *enforcement denied on other grounds*, 174 F.2d 988 (D.C. Cir. 1949). Even if the Parties did purport to agree to delegate responsibility for the Program to a third-party, either Party would have the right under federal labor law to request bargaining on the subject after a reasonable period of time. See *McArdle Desco Corp.*, 4-CA-20660, 1992 WL 414992, at \*4 (N.L.R.B.G.C. Aug. 28, 1992) (“the principle established in *Boeing*—that clauses calling for perpetual adherence to a contract’s terms become contracts of indefinite duration which are terminable by either party after a reasonable period—continues to be valid”); *Air Systems Engineering, Inc.*, 19-CA-16790, 1984 WL 47364, at \*2 (N.L.R.B.G.C. Sept. 28, 1984).

39. See *E.G. & G. Rocky Flats, Inc.*, 314 N.L.R.B. 489, 492-93 (1994) (where employer discontinued contractually-prescribed training procedures in order to reduce the threat of a nuclear accident by alleviating the shortage of qualified and experienced employees, noting that the “operation of a nuclear weapons facility presents unique safety concerns which must be carefully considered,” but nonetheless concluding that the employer “failed to establish that any particularized exigent threat to safety existed at [its] facility which would have justified the [employer’s] unilateral action”); *Northside Center for Child Development, Inc.*, 310 N.L.R.B. 105, 105 (1993) (acknowledging the “emergency circumstances” presented by the employer’s legitimate safety concern over security guards’ on-site possession of guns, but concluding that those concerns did not excuse the employer from bargaining).

important issues, and will minimize the overarching problem of industrial strife.

Unlike achieving complete independence in formulating and modifying the terms of the Joint Drug Program, however, achieving administrative independence – that is, for example, in scheduling tests and reporting results, monitoring collection procedures, and determining eligibility for therapeutic use exemptions – is a practical and attainable goal through collective bargaining. Indeed, in the latest round of negotiations, both Parties recognized the need to achieve administrative independence of the Joint Drug Program to the greatest extent possible and, as is explained in Part III, were able to do so.

### III. THE 2008 MODIFICATIONS TO THE JOINT DRUG PROGRAM AND THE ACHIEVEMENT OF ADMINISTRATIVE INDEPENDENCE

Senator Mitchell rightly reported that it was a “critical necessity” for “everyone in baseball to work together to devise and implement the strongest possible strategy to combat the illegal use of performance enhancing substances, including the recommendations set forth in [his] report.”<sup>40</sup> To this end, although MLB and the Players Association were under no legal obligation to modify the Joint Drug Program during its term, and despite the obstacles posed by federal labor law, the Parties reopened and formally amended the Joint Drug Program for the third time in as many years.<sup>41</sup> In fact, MLB unilaterally made improvements outside the Joint Drug Program

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40. MITCHELL REPORT, *supra* note 4, at 307.

41. January 2005 was the first occasion in which the Parties amended the Joint Drug Program mid-term. The Parties agreed to greater frequency of testing for performance enhancing substances and more stringent penalties for positive test results. Under the January 2005 agreement, a player’s first positive test would merit a ten-day suspension without pay, while second, third, and fourth positive tests would result in thirty-day, sixty-day, and one year suspensions without pay, respectively. In addition, human growth hormone and seventeen other compounds were added to the list of performance enhancing substances. Press Release, Major League Baseball, MLB and Players Association Reach Tentative Agreement on New Steroids Policy (Jan. 13, 2005), [http://mlbplayers.mlb.com/pa/news/article.jsp?ymd=20050311&content\\_id=964769&vkey=mlbpa\\_news&fext=.jsp](http://mlbplayers.mlb.com/pa/news/article.jsp?ymd=20050311&content_id=964769&vkey=mlbpa_news&fext=.jsp). November 2005 marked the second occasion in which the Parties amended the Joint Drug Program. The Parties agreed to further increase the frequency of testing and instituted significantly increased penalties for positive test results for performance enhancing substances. Under this new agreement, players testing positive for steroids and similar substances became subject to a fifty-game suspension for a first positive test, a hundred-game suspension for a second positive test, and a lifetime ban for a third positive test. In addition, amphetamines were re-categorized as performance enhancing substances. The first time a player tested positive for an amphetamine, he would be subject to mandatory follow-up testing. Players who tested positive for amphetamines a second and third time became subject to twenty-five-game and eighty-game suspensions, respectively. A fourth positive test for amphetamines would result in a lifetime ban. Press Release, Major League Baseball, MLB, MLBPA Announce New Drug Agreement (Nov. 15, 2005), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20051115&content\\_id=1268552&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20051115&content_id=1268552&vkey=pr_mlb&fext=.jsp&c_id=mlb).

where it was legally able to do so,<sup>42</sup> and the Parties worked together to respond to the remainder of Senator Mitchell's recommendations to strengthen the Joint Drug Program.<sup>43</sup> The current version of the Joint Drug Program reflects significant strides in the area of administrative independence and now more closely resembles Senator Mitchell's vision than ever before.

In the latest modifications to the Joint Drug Program, the Parties disbanded the Health Policy Advisory Committee, which was comprised of management and union officials, and delegated its previous responsibilities for the administration of the Joint Drug Program to an independent third party having "no affiliation with the Commissioner's Office, any Major League Club or the [Players] Association."<sup>44</sup> Specifically, the Parties appointed Dr. Bryan Smith<sup>45</sup> to serve as the Independent Program Administrator (IPA) for an initial term of three years.<sup>46</sup> Dr. Smith's appointment is renewable for successive four-year terms unless "[e]ither Party may remove the Independent Program Administrator by serving written notice on [him]."<sup>47</sup> Interestingly, in an effort to make the administrative delegation as "permanent" as possible, the bargaining parties avoided making the term of the IPA coterminous with the Basic Agreement, thus allowing the Joint Drug Program to continue to operate independently during the renegotiation of the Parties' economic agreement.<sup>48</sup>

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42. See Major League Baseball Acts on Mitchell Recommendations, *supra* note 6.

43. Barry M. Bloom, *MLB, Union Formalize New Drug Policy*, MLB.COM, Apr. 11, 2008, [http://mlb.mlb.com/news/article.jsp?ymd=20080411&content\\_id=2515782&vkey=news\\_mlb&fext=jsp&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20080411&content_id=2515782&vkey=news_mlb&fext=jsp&c_id=mlb); See also *Recommendations from the Mitchell Commission Report*, ESPN.COM, Dec. 13, 2007, <http://sports.espn.go.com/mlb/news/story?id=3153754> (summarizing all of Senator Mitchell's recommendations).

44. Major League Baseball, Joint Drug Prevention and Treatment Program, § 1(A)(1)(a) (2008); Press Release, Major League Baseball, Major League Baseball and Players Association Modify Joint Drug Agreement (Apr. 11, 2008), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20080411&content\\_id=2515749&vkey=pr\\_mlb&fext=jsp](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080411&content_id=2515749&vkey=pr_mlb&fext=jsp). See *id.* (summarizing the major changes to the Joint Drug Program).

45. Dr. Smith is the former head team physician at the University of North Carolina (UNC), where he also served as director of UNC's drug testing program. Accordingly, Dr. Smith has experience both working with athletes and administering a drug testing program. Dr. Smith earned his medical degree from Duke University and holds a doctorate in exercise physiology from Michigan State University. Dr. Smith did his residency in pediatrics at UNC and then completed a sports medicine fellowship program at the University of California at Los Angeles. A.J. Perez, *MLB Drug-Tester Drawing Increased Scrutiny*, USA TODAY, Feb. 12, 2008, available at [http://www.usatoday.com/sports/baseball/2008-02-12-drug-tester\\_N.htm](http://www.usatoday.com/sports/baseball/2008-02-12-drug-tester_N.htm).

46. Major League Baseball and Players Association Modify Joint Drug Agreement, *supra* note 44.

47. Major League Baseball, Joint Drug Prevention and Treatment Program, § 1(B)(1) (2006).

48. Compare Basic Agreement Between The 30 Major League Clubs And Major League Baseball Players Association, Article XXVI (effective Dec. 20, 2006) with Major League Baseball, Joint Drug Prevention and Treatment Program, § 1(A)(1)(b) (2008).

Under the new agreement, the IPA can only be removed during his term “for acting in a manner inconsistent with the Program or for misconduct that affects his ability to perform as IPA.”<sup>49</sup> If the Parties serve the IPA with written notice of their intention to remove him, an arbitration hearing will “determine whether grounds exist for [his removal].”<sup>50</sup> Should the Arbitration Panel decide to remove the IPA and the Parties are unable to select a successor within thirty days, the Panel Chair is authorized to appoint a new IPA after consulting with the Parties.<sup>51</sup>

The IPA’s duties and responsibilities under the Joint Drug Program are broad and comprehensive as they include:

- (1) administering testing requirements, from the scheduling of the collection of specimens to the reporting of test results to the Parties;
- (2) monitoring, maintaining and supervising the collection procedures, laboratory analysis and testing protocols;
- (3) auditing results of the Joint Drug Program and reviewing all aspects of its operation, including the performance of the specimen collectors and the testing laboratory;
- (4) communicating with the collectors and laboratory regarding the collection, transmission and analysis of urine samples;
- (5) administering the “Therapeutic Use Exemption” process by which it is determined whether a player has a valid, medically appropriate prescription to use an otherwise prohibited substance;
- (6) developing, in consultation with the Parties, education programs supporting the objectives of the Joint Drug Program;
- (7) preparing and publicly releasing an annual report that sets forth the number of tests conducted, the number of adverse analytical findings reported by the laboratory that resulted in discipline, the substances involved in the adverse analytical findings that resulted in discipline, the number of non-analytical positives that resulted in discipline, and the number of Therapeutic Use Exemptions broken down by category of medication (ADD/ADHD, hypertension, etc.);
- (8) preparing and publicly releasing a report at the conclusion of each term that sets forth the total number of in-season tests and off-season tests conducted during that term; and
- (9) taking any and all other reasonable actions necessary to ensure the proper administration of the Joint Drug Program and confidentiality of

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49. Major League Baseball, Joint Drug Prevention and Treatment Program, § 1(A)(1)(c) (2008).

50. *Id.* § 1(A)(1)(d).

51. *See id.* § 1(A)(1)(e).

its records.<sup>52</sup>

As evidenced by these recent changes, the Joint Drug Program is now independently administered. However, due to the constraints of the NLRA, the formulation and modification of the Joint Drug Program remains a mandatory subject of bargaining, and the Clubs and Players Association are required by federal law to collectively bargain its terms, such as the list of prohibited substances and the penalties imposed on players. That being said, the improved Joint Drug Program does provide for an annual review process whereby “the Parties will meet with the IPA, the Medical Testing Officer, and a representative from [the Joint Drug Program’s specimen collection company]<sup>53</sup> regarding potential changes to the Program based on developments during the most recent year.”<sup>54</sup> The Parties are required to meet and confer on any recommendations or suggestions offered with the purpose of trying to reach an agreement on their implementation.<sup>55</sup> The procedures assure serious, annual independent input on the structure of the Joint Drug Program. In addition, any controlled substances added by the federal government to its list of controlled substances in Schedules I, II, or III<sup>56</sup> are *automatically* added to the list of Prohibited Substances.<sup>57</sup> At any time during the term of the Joint Drug Program, the Parties may agree to add additional substances to the list of Prohibited Substances.<sup>58</sup>

#### IV. CONCLUSION

By improving the Joint Drug Program in the variety of ways discussed above, MLB and the Players Association have made every effort to fulfill Senator Mitchell’s recommendation of a completely independent drug testing program consistent with the important policies underlying the NLRA. Although, as a practical matter, there must be shared authority with the Players Association over the formulation and modification of the Joint Drug Program’s terms, baseball is the only major professional sport in the United

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52. *Id.* §§ 1(A)(2), 3(G).

53. “The Director of the Montreal Lab shall be the Medical Testing Officer and shall conduct all of the testing of Player samples collected.” *Id.* § 1(E). The “Montreal Lab” is the WADA-certified laboratory known as the Laboratoire de Controle du Dopage (IRNS – Institut Armand-Frappier) in Montreal, Quebec, Canada. *Id.* § 1(D). Comprehensive Drug Testing, Inc. collects urine samples and is “responsible for the transport of such specimens” under the Joint Drug Program. *Id.* § 1(C).

54. *Id.* § 1(F).

55. *Id.*

56. *See* Schedules of Controlled Substances, 21 C.F.R. §§ 1308.11-1308.13 (2008).

57. Major League Baseball, Joint Drug Prevention and Treatment Program, § 2(D) (2008)(emphasis added).

58. *Id.*; *see generally* § 2 (showing the full list of “Prohibited Substances”).

States that has an independently administered drug testing program. Indeed, the Joint Drug Program is more closely aligned with Senator Mitchell's recommendation than any of the drug testing programs utilized by the other three major professional sports leagues. At the present time, no other major professional sports league has achieved administrative independence and each of their drug testing programs continues to be "jointly controlled by the leagues and their respective players associations."<sup>59</sup>

Baseball has moved past the so-called "steroids era"<sup>60</sup> and the sport has never been more popular: attendance records continue to be set on an annual basis and revenues are at an all-time high.<sup>61</sup> The Mitchell Report was "a call to action,"<sup>62</sup> which played an important role in helping the sport move forward, and provided substantial guidance to the Parties in restructuring the Joint Drug Program. Still, the Joint Drug Program is a fluid document and continuing challenges, such as overcoming the inability to test for human growth hormone, remain.<sup>63</sup> Certainly, as explained by Senator Mitchell, MLB will need to face and overcome new and unforeseen issues that will inevitably arise.<sup>64</sup>

The battle to eradicate performance enhancing substances in sports is an ongoing effort, and federal labor law makes the effort more complicated for

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59. MITCHELL REPORT, *supra* note 4, at 263. See National Football League Policy on Anabolic Steroids and Related Substances (2007); Collective Bargaining Agreement Between National Hockey League and National Hockey League Players Association, Art. 47 (2005); National Basketball Players Association Collective Bargaining Agreement, Art. 33 (1999).

60. Senator Mitchell found that baseball's testing program has been "effective in that detectable steroid use appears to have declined." MITCHELL REPORT, *supra* note 4, at 310. Commissioner Selig has said that he is "happy in a great sense that we've cleaned the sport up and we don't have to continue talking about things. The reason we're having an extraordinary year is that we're not talking about steroids anymore. When you think of everything that's been done, we're down to two or three positive tests for steroids and we've banned amphetamines." Rick Hummel, *Bud Selig – MLB Commissioner – That Was Then*, ST. LOUIS POST-DISPATCH, Sept. 7, 2008, at D9.

61. Forbes reported that in 2007 Major League Baseball set an attendance record for the fourth consecutive season, as 79.5 million fans "hit the turnstiles." In addition, the sport's annual revenue increased to \$5.5 billion, a 7.7% gain from the previous season. Michael K. Ozanian & Kurt Badenhausen, *Special Report: The Business of Baseball*, FORBES, Apr. 16, 2008, available at [http://www.forbes.com/2008/04/16/baseball-team-values-biz-sports-baseball08-cx\\_mo\\_kb\\_0416\\_baseballintro.html](http://www.forbes.com/2008/04/16/baseball-team-values-biz-sports-baseball08-cx_mo_kb_0416_baseballintro.html). Commissioner Selig confirmed such findings, as he stated that he is "proud to say Baseball has never been more popular. Our attendance continues to break records, year after year, and our fans continue to love the game." Commissioner's Statement, *supra* note 3.

62. Commissioner's Statement, *supra* note 3.

63. Human growth hormone is undetectable in a urine test. Major League Baseball, along with the National Football League, is funding Dr. Don Catlin in his efforts to find a valid urine test for Human Growth Hormone (HGH). *Id.* For an interesting discussion about the challenges posed by efforts to test for HGH and doubts concerning the reliability of blood testing for the substance, see Richard H. McLaren, *WADA Drug Testing Standards*, 18 MARQ. SPORTS L. REV. 1, 18-19 (2007).

64. MITCHELL REPORT, *supra* note 4, at 258.

unionized professional sports leagues, which are required to collectively bargain over improvements to their drug testing programs. Today, MLB's Joint Drug Program is more comprehensive and independent than ever before.<sup>65</sup> Indeed, it is "the most aggressive drug program in professional sports,"<sup>66</sup> and its penalties for failed drug tests are "the strongest of any major professional sports league in the United States."<sup>67</sup> These facts suggest that the system of free collective bargaining has proven capable of addressing this difficult problem. That being said, Major League Baseball will continue to be diligent, support research, education and, to the extent not restricted by federal labor law, do whatever may be necessary to strengthen the Joint Drug Program and protect the integrity of the game.<sup>68</sup>

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65. Commissioner Selig has explained that "[b]aseball already has the toughest penalties in professional sports and our testing program will now be more rigorous and independent than ever." Press Release, Major League Baseball, Joint Drug Agreement Addresses Mitchell Recommendations (Apr. 11, 2008), [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20080411&content\\_id=2515767&vkey=pr\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080411&content_id=2515767&vkey=pr_mlb&fext=.jsp&c_id=mlb).

66. Commissioner's Statement, *supra* note 3.

67. MITCHELL REPORT, *supra* note 4, at 304; *see also id.* at 276-77.

68. Commissioner Selig stated, "[a]s we implement the Senator's recommendations, we will do even more. We will not rest. Major League Baseball remains committed to this cause and to the effort to eliminate the use of performance-enhancing substances from the game." Commissioner's Statement, *supra* note 3. Selig further stated, "I will continue to take every step necessary to protect the integrity of this game." Joint Drug Agreement Addresses Mitchell Recommendations, *supra* note 65.