AN EXAMINATION OF DRUG-TESTING AS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING IN MAJOR LEAGUE BASEBALL

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I. INTRODUCTION

American society has been facing an onslaught of sorts from the rise in the use of illegal drugs and the improper use of performance-enhancing drugs such as steroids. It is a violation of federal law to engage in the use of either any illegal drugs or steroids without a prescription. Cocaine and amphetamines, the most commonly used drugs, can involve a high degree of psychological dependence. Other effects include excitation, accelerated pulse rate, aggressiveness, and the potential for death from cardiac or respiratory arrest.1 Anabolic steroids, which differ from recreational illegal drug use in that athletes predominantly use them, stimulate muscle growth and hasten recovery time. However, they also are linked with the adverse effects of heart disease, stroke, and liver disease.2

As illegal drug use has been ubiquitous in almost every industry and trade, so is the case in the field of professional athletics—baseball is such an example. With the large amount of professional baseball players that have, in recent years, posted a high number of home runs and extra-base hits, suspicion has grown over the catalyst for this offensive firepower. In fact, Major League Baseball (hereinafter “MLB” or “League”) officials, coaches, and even some players have generated a public and persistent sentiment that steroid abuse and other illegal drug use has become a “widespread” problem in the sport.3

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3. Id. (stating that a general manager of one MLB team admitted his belief that one-
Many private employers have implemented drug-testing programs to detect employee drug use, and both professional sports leagues and particular team owners have attempted to impose such a policy. MLB does not randomly test players for illegal drugs or drugs that may enhance performance.\textsuperscript{4} In fact, testing is not allowed under the current collective bargaining agreement.\textsuperscript{5} The League is pressing the Major League Baseball Players’ Association (hereinafter “MLBPA”) to accept a testing program in the next round of collective bargaining.\textsuperscript{6} Union leaders, prior to making any concession, request a scientific study to determine if so-called “performance-enhancing drugs” actually improve performance.\textsuperscript{7}

The issue of testing again presented a conflict with the expiration of the most recent collective bargaining agreement on October 31, 2001.\textsuperscript{8} Random testing for illegal drugs and performance-enhancing substances has the potential to bring detrimental effects to professional athletes in the League, both by removing the legitimacy of the players’ statistics and by casting a cloud over MLB. With that, the question of whether drug-testing is a mandatory issue of collective bargaining, and thus whether the owners could unilaterally implement a drug-testing program, is closely associated with the future of MLB. This comment examines: (1) the history of the issue of drug-testing and collective bargaining in the League; (2) other professional sports leagues’ treatment of the matter of drug-testing; (3) National Labor Relations Board (hereinafter “NLRB” or “Board”) decisions, arbitration decisions, and case law precedents supporting the notion that drug-testing is a mandatory subject of collective bargaining; and (4) prevailing reasons for allowing the unilateral implementation of a drug-testing program by the League. Upon inspection, this issue is one that does indeed require treatment in good faith collective bargaining by the employees’ union representatives and League management.

II. Survey of Previous Collective Bargaining Over Drug-Testing in Major League Baseball

A. Evolution of the Major League Baseball Players’ Association

The MLBPA was formed in 1954 to give the players a vehicle to

\begin{itemize}
\item third of the League’s players are active users of steroids and one All-Star player believed that two-thirds of the top players in the National League are using some sort of steroid).
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{itemize}
communicate their complaints and suggestions regarding the operation of the League. It was neither a union nor a collective bargaining agent as recognized under the National Labor Relations Act (hereinafter “NLRA”). Eventually, the MLBPA evolved to become an actual labor organization, marked by the early stages of collective union activity. The League’s first collective bargaining agreement was drafted in 1968. One year later, the NLRB indicated that it would accept jurisdiction over the realm of professional sports, including MLB. In American League of Professional Baseball Clubs & Ass’n of National Baseball League Umpires, the Board held that professional baseball was an industry in or “affecting interstate commerce,” thus subjecting the industry to the provisions of the NLRA (including the duty of both sides to collectively bargain over mandatory subjects).

The NLRA encourages “the practice and procedure of collective bargaining,” in addition to the right of management to create multi-employer bargaining units, such as a professional sports league.

B. Previous Collective Bargaining Agreements and Negotiations

In traditional industrial settings, as with professional sports leagues like MLB, the collective bargaining agreement contains the general provisions of employment governing the relationship, and thus any collective agreements, between management (here, the League and team owners) and employees (the players). This relationship in MLB would be shaped by various events within the League transpiring over the span of several years. In the early 1980’s, a series of drug-related incidents plagued the League, requiring MLB Commissioner Bowie Kuhn to suspend several players for illegal drug use and possession. An arbitration panel upheld the Commissioner’s actions stating, “there can be no question that drug involvement by a Major League Ballplayer is not only contrary to established rules and provisions of the Uniform Players Contract, but also constitutes a serious and immediate threat to the business that is promoted

10. Id.
11. Id. at 246.
14. C. Peter Goplerud III, Collective Bargaining in the National Football League: A Historical and Comparative Analysis, 4 VILL. SPORTS & ENT. L.J. 13, 14 n.8 (1997). Professional sports leagues that are unionized qualify as multi-employer bargaining units because each team in the league has a player representative to the union. Id. at 15.
15. Wong & Ensor, supra note 12, at 783-85.
as our National Pastime.\textsuperscript{16}

Bad press relating to these incidents created the need for a uniform written policy, which would give notice that misconduct related to illegal drugs would result in rapid and proportionate action. Some owners pushed for mandatory random drug-testing, while others desired a more flexible program with intermediate steps of both detection and treatment.\textsuperscript{17} In the June 1984 Collective Bargaining Agreement, MLB and the MLBPA jointly agreed upon a drug abuse program aimed at illegal drugs, particularly cocaine (the program excluded marijuana, amphetamines, and even alcohol).\textsuperscript{18} Under this program, a player voluntarily seeking help would receive treatment as well as immunity from disciplinary action.\textsuperscript{19} Players would be treated and then placed on probation, during which time they would be tested for illegal substances and could be required to receive further therapy.\textsuperscript{20} Additionally, a club having "reasonable cause" to suspect a player of drug use could ask that player to undergo an examination. If the player refused, he would be subject to disciplinary action by the League Commissioner.\textsuperscript{21} A year later, new Commissioner Peter Ueberroth deemed this agreement insufficient and the owners conceded that the program was altogether ineffective.\textsuperscript{22} Ueberroth then desired to adopt a comprehensive and League-wide drug-testing program.\textsuperscript{23} However, the players rejected such a plan despite evidence that drug use was affecting player performance.\textsuperscript{24} No such agreement was subsequently adopted.\textsuperscript{25}

Ueberroth used the 1985 "Pittsburgh Drug Trials" (a federal drug probe of professional baseball players) as a catalyst to introduce a random drug-testing program.\textsuperscript{26} The program covered League management, League umpires, and all minor league players, for the controlled substances of cocaine, heroin, amphetamines, morphine, and marijuana.\textsuperscript{27} Positive test results would yield the evaluation and treatment of the individual, since the stated primary purpose of the program was to deter drug use and not to punish.\textsuperscript{28} The Commissioner made a point to emphasize that MLB players would not be covered under this program.\textsuperscript{29}

\begin{footnotes}
\item[16.] Id. at 788.
\item[17.] Id. at 791.
\item[18.] Id. at 792.
\item[19.] Id.
\item[20.] Id.
\item[21.] Id.
\item[22.] Freudenberg, supra note 1, at 2 n.4.
\item[23.] Id.
\item[24.] Id.
\item[25.] Id.
\item[26.] Wong & Ensor, supra note 12, at 795.
\item[27.] Id. at 796.
\item[28.] Id. at 797.
\item[29.] Id.
\end{footnotes}
After the Pittsburgh Drug Trials concluded, Ueberroth made a push for voluntary drug-testing of all MLB players. The MLBPA rejected the plan in 1985, objecting to it because they believed drug-testing intrinsically presumed guilt on the part of the players. It maintained that this program could not be implemented unilaterally and was indeed a matter suited for collective bargaining. In 1986, the Commissioner again tried to institute a drug-testing program for MLB players. Clauses requiring mandatory random drug-testing were inserted into a segment of individual players’ contracts, which the MLBPA again rejected. The players’ grievance was addressed in the decision of In the Matter of the Arbitration Between MLB Player Relations Committee and MLBPA, which sided with the MLBPA’s claim. A 1986 revised “Drug Policy & Prevention Program” placed substance testing under the control of the Office of the Commissioner, and has been subsequently revised on occasion by succeeding commissioners. The Program in its revised form: (1) forbids any random and unannounced drug-testing and (2) allows for mandatory testing only for players who have either admitted to drug use or are detected of using illegal drugs. There was a similar stalemate regarding random drug-testing in the most recent set of collective bargaining negotiations. After the 1990 Collective Bargaining Agreement expired in December 1993, an agreement was finally drafted and finalized, after much hostility and litigation, in the 1996 season. This agreement would run through October 2001. 

After experiments with such initiatives as sanctioning for drug use, a joint management-players’ association drug program, and unilateral League management proposals, currently no systematic testing program or disciplinary regime in baseball has been agreed upon through the vehicle of collective bargaining. Throughout this process, player objections to mandatory drug-testing have included the notion that testing is an invasion of privacy, an insult to player integrity, and an ineffective deterrent of drug use (especially considering there was no scientific data demonstrating widespread drug use among the League’s players).

30. Id. at 802.
31. Id. at 798-802.
32. Wong & Ensor, supra note 12, at 804.
33. Id. The details of the arbitration are discussed later in this comment. See supra IV.
35. Abrams, supra note 8, at 197.
C. Other Professional Sports Leagues’ Treatment of Drug-Testing

1. The National Football League

The National Football League (hereinafter “NFL”) management and the National Football League Players’ Association (hereinafter “NFLPA”) inserted language in the 1982 Collective Bargaining Agreement regarding drug abuse. The agreement states that, “[t]he parties agree that it is the responsibility of everyone in the industry to treat, care for and eliminate chemical dependency problems of players.” A provision states that a drug rehabilitation center would be responsible for conducting player education and providing clubs with vehicles for detection and treatment. A team’s physician could, upon “reasonable cause,” direct a player to undergo chemical abuse testing. Detected dependency by a player is not sufficient for disciplinary action; only upon a player failing to adhere to required treatment will he be disciplined. The agreement specifically provides that there will be no “spot checking” for chemical abuse or dependency by an NFL franchise. It provides only for the testing of “street drugs” and steroids (as of 1987) on two occasions: upon “reasonable cause” and during pre-season physicals.

2. The National Basketball Association

In the National Basketball Association (hereinafter “NBA”), league management and the National Basketball Players’ Association (hereinafter “NBPA”) agreed upon a drug-testing program, incorporated in Article XXXIII of the 1984 Collective Bargaining Agreement. This contract establishes a “reasonable cause” procedure. When the NBA or NBPA has reasonable cause to believe a player “may have been engaged in the use, possession, or distribution of a prohibited substance,” an appointed expert—accountable to neither the league nor the players association—

36. Freudenberger, supra note 1, at 2 n.4.
37. Id.
38. Id.
39. Id.
40. Id.
oversees the drug program and discerns if such reasonable cause does in fact exist.\textsuperscript{43} If the expert determines that reasonable cause is present, the player is required to submit to testing.\textsuperscript{44} Also under this program, players who voluntarily seek treatment for either dependency or addiction to heroine or cocaine will receive it with no attached discipline.\textsuperscript{45} Any player that is either convicted of violating a crime or pleads guilty to a crime involving the use, possession, or distribution of a prohibited substance is permanently disqualified from the league.\textsuperscript{46}

III. STATUTES AND CASE LAW ON SUBJECTS OF BARGAINING

A. \textit{Relevant Provisions of the NLRA}

The NLRA supports the use of collective bargaining between union representatives of the employees and management. The NLRA asserts the policy:

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 to eliminate the causes of certain substantial obstructions to the free flow of commerce... by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.\textsuperscript{47}
\end{quote}

Section 7 provides all employees with the right to self-organize, unionize, and collectively bargain about conditions of employment through union representatives of their own choosing.\textsuperscript{48} Further, Section 8(d) makes the employer's duty to bargain with the union mandatory in some cases, as it states that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."\textsuperscript{49} Additionally, Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to collectively bargain with the representatives of his employees.\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} National Labor Relations Act, § 1, 29 U.S.C. § 151 (2001).
  \item \textsuperscript{49} National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (2001) (emphasis added).
\end{itemize}
B. Overview of Mandatory and Permissive Subjects of Bargaining

League management’s right to unilaterally implement a drug-testing regime depends on the characterization of the matter as either a mandatory or a permissive subject of collective bargaining. The Supreme Court in *NLRB v. Katz* declared that it is an unfair labor practice, in violation of Section 8(a)(5), for an employer to unilaterally change a mandatory subject of an agreement, as collective bargaining over the matter is required. After all, the NLRA requires both management and the union to negotiate over “wages, hours, and other terms and conditions of employment.” The Supreme Court construed the phrase “terms and conditions” broadly, such that it is interpreted in light of specific industrial practices.

Management must bargain over mandatory subjects and may bargain over permissive subjects. Classification as a mandatory subject means, for the purposes of collective bargaining, that it is an unfair labor practice for either the employer or a union to refuse to good faith bargain about such a matter at the request of the other party. Either party is entitled by statute to the right of insisting, to the point of impasse, on the implementation of its own position regarding a mandatory subject. If good faith bargaining and discussion by both sides leads to an impasse, management may implement its proposal without the agreement of the union and still comply with the duty to bargain. The employer need not alter or concede its position despite classification of a matter as “mandatory,” since Section 8(d) states that, “such obligation [to collectively bargain] does not compel either party to agree to a proposal or require the making of a concession.”

Non-mandatory or permissive subjects may be proposed, but neither party can insist on its position to the point of impasse because these subjects fall outside the phrase “terms and conditions” and thus are not statutory. Essentially, management may implement a program incorporating permissive subjects of bargaining without the concern of requiring the response of employee representatives or violating the NLRA, as the employer’s refusal to bargain is privileged. If a term is non-

51. 369 U.S. 736, 743 (1962) (holding that an employer cannot announce unilateral changes, such as granting merit increases and reducing sick leave, without good faith collective bargaining over the matters).
55. “Impasse” can be defined as the point where good faith negotiations have terminated and neither side is willing to change its respective position in order to reach a joint agreement. *Id.* at 374.
56. *Id* at 410.
57. *Id.* at 412.
59. Cox, supra note 54, at 410.
mandatory, an employer can impose it upon employees regardless of whether it was addressed in the collective bargaining agreement.\textsuperscript{60}

Employers also have the ability to exercise managerial prerogative, thus requiring no collective bargaining, with matters "fundamental to the basic direction of a corporate enterprise or . . . [that] impinge only indirectly upon employment security."\textsuperscript{61} Decisions involving product design, financing, and sales have only a speculative effect on employment, and thus are permissive subjects. In his concurrence in \textit{Fibreboard Paper Products Corp. v. NLRB}, Justice Stewart stated,

\begin{quote}
[\textit{n}othing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.\textsuperscript{62}
\end{quote}

C. \textit{Case Law}

The Supreme Court, in \textit{NLRB v. Wooster Division of Borg-Warner Corp.}, ruled that a "mandatory subject" qualifies as an issue that vitally affects employees and about which both the adversaries must bargain in good faith.\textsuperscript{63} Further, a party is not obligated to bargain over a non-mandatory subject.\textsuperscript{64}

Nonetheless, in \textit{NLRB v. American National Insurance Co.}, the Court previously held that it is lawful for an employer to collectively bargain for a management rights clause in an employment agreement.\textsuperscript{65} The NLRB may not forbid an employer from insisting upon a mandatory subject of bargaining, because it cannot compel concessions by either party.\textsuperscript{66} According to the Court, to say that the employer has to share the determination of employment conditions with the union during the life of the collective bargaining agreement would interfere too much with the

\begin{itemize}
\item 60. \textit{Id.}
\item 62. \textit{Id.}
\item 63. 356 U.S. 342, 349 (1958) (holding that an employer's insistence on permissive subjects such as having a ballots clause or a recognition clause in the collective bargaining agreement is a \textit{per se} unlawful refusal to bargain).
\item 64. \textit{Id.}
\item 65. 343 U.S. 395, 409 (1952).
\item 66. \textit{Id.} at 404.
\end{itemize}
substantive terms of the agreement.\textsuperscript{67} The NLRA only requires that the parties bargain in good faith, and it is not improper for an employer to insist on having some flexible control over conditions of employment.\textsuperscript{68}

In \textit{Fibreboard Paper Products Corp. v. NLRB}, the employer at issue unilaterally acted in subcontracting work that was currently performed by maintenance workers in the bargaining unit. The employees within that unit were subsequently terminated.\textsuperscript{69} The NLRB held that the employer's decision dealt with the mandatory subject of subcontracting work, over which it was required to bargain.\textsuperscript{70} Established industrial practice demonstrated that subcontracting work was indeed a term addressed in previous collective bargaining agreements.\textsuperscript{71} The issue of subcontracting did not affect the "entrepreneurial control" of the employer to manage its business freely, as the Court determined that this decision did not affect the company's basic operation or concern its capital structure.\textsuperscript{72} Neither the basic scope of the enterprise nor the commitments in investment capital were implicated by subcontracting decisions such as the one at issue.\textsuperscript{73} Further, rules that regulate how employees perform their job were considered terms and conditions of employment, including health and safety protections at the workplace. Justice Stewart's concurrence stated that, "[w]hat one's hours are to be, what amount of work is expected... [and] what safety practices are observed, would all seem conditions of one's employment."\textsuperscript{74}

In the seminal case \textit{First National Maintenance Corp. v. NLRB}, the Court addressed an employer who operated a cleaning service for commercial customers.\textsuperscript{75} He terminated a bargaining unit of employees because it affirmatively voted to be represented by a union.\textsuperscript{76} The Court held that an employer's decision to terminate a portion of its business for purely economic motives was not a mandatory subject of bargaining.\textsuperscript{77} In its opinion, the Court offered the existence of three types of management decisions. Mandatory subjects are those that have a direct impact on the

\begin{itemize}
  \item \textsuperscript{67} \textit{Id.} at 409.
  \item \textsuperscript{68} \textit{Id.} at 408.
  \item \textsuperscript{69} 379 U.S. 203 (1964).
  \item \textsuperscript{70} \textit{Id.} at 209.
  \item \textsuperscript{71} \textit{Id.} at 211-12.
  \item \textsuperscript{72} \textit{Id.} at 213.
  \item \textsuperscript{73} Ethan Lock, \textit{The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs}, 39 U. FLA. L. REV. 1, 22 (1987).
  \item \textsuperscript{74} \textit{Fibreboard Paper Prods. Corp.}, 379 U.S. at 222 (Stewart, J., concurring) (emphasis added).
  \item \textsuperscript{75} 452 U.S. 666, 668 (1981).
  \item \textsuperscript{76} \textit{Id.} at 669.
  \item \textsuperscript{77} \textit{Id.} at 686.
\end{itemize}
employer-employee relationship (i.e., layoffs). 

Permissive subjects are those that "have only an indirect and attenuated impact on the employment relationship." The third category falls in between these two ends, with decisions that not only have a direct impact on the employment relationship, but also involve an economic decision that would change the scope and direction of the enterprise (this is the category in which the Court placed the matter in *First National*). 

For this last category, the Court mandated the application of a balancing test, where an employer is required to bargain over such decisions only if the benefits to both labor relations and the collective bargaining process within the enterprise outweigh the burdens placed on the employer's ability to operate his business profitably. The Court balanced the employer's need for "unencumbered decision-making" and the benefit to employee-employer relations. *First National* held that the employer's need to operate his business profitably was weightier than the benefits that would come with collective bargaining over this particular matter. Thus, primarily economic decisions involving a change in the scope and the direction of the enterprise are reserved for management. The NLRB interpreted this issue in *Otis Elevator*, where the Board upheld an employer's unilateral action. It held that all management decisions affecting the "scope and direction of an enterprise" are permissive subjects.

IV. ARGUMENTS SURROUNDING THE ISSUE OF DRUG-TESTING IN BASEBALL

A. Drug-Testing Must be a Mandatory Subject of Collective Bargaining

1. MLB Arbitration

In a grievance filed by the MLBPA in 1986, the Players' Association claimed that drug-testing clauses in players' individually negotiated contracts (agreed to by several hundred players) were contrary to Article II

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78. *Id.* at 677.
79. *Id.* at 676-77.
80. *Id.* at 677.
81. *Id.* at 679.
82. *Id.*
83. *Id.* at 686.
85. *Id.*
of the basic collective bargaining agreement. Article II states that the MLBPA is the "sole and exclusive collective bargaining agent for all Major League Players... with regard to all terms and conditions of employment." A limited exception to this provision exists when there is a special covenant between the player and his club, providing benefits beyond those found in the Uniform Player’s Contract. The owners claimed that because the collective bargaining agreement did not mention the issue of random drug-testing (more specifically that there was no explicit prohibition of the issue), they should be allowed to use the contractual powers afforded to them to place individual drug-testing clauses in players’ contracts.

Impartial arbitrator Thomas Roberts with In the Matter of the Arbitration between MLB Player Relations Committee and MLBPA heard the issue. He held that, in order for a drug-testing clause to be enforceable, representatives of both the players and ownership must collectively bargain if the clause does not provide actual or potential additional benefits to the player. Roberts concurred with the MLBPA’s claim that these individual covenants were efforts by the owners to ensure a League-wide drug-testing program through bypassing the bargaining constraints of Article II. Roberts stated, “[a]ny such clauses must be negotiated with the Players Association,” and thus it is a violation to bypass the MLBPA as the players’ exclusive bargaining agent.

2. NFL Arbitrations and Cases

Two 1986 arbitrations both suggested that drug-testing is a mandatory subject of collective bargaining. In In the Matter of Arbitration among the National Football League Players Ass’n & the National Football League Management Council & the National Football League, Arbitrator Kasher ruled that NFL Commissioner Pete Rozelle could not unilaterally impose a

86. Wong & Ensor, supra note 12, at 805 n.132. The clauses stated,

[p]layer agrees to submit to any test or examination for drug use when requested by the Club and the failure to do so shall make the guarantee set forth in (the balance of the guarantee provision) null and void. Player is of the opinion that it is vitally important to him and his professional career that his image not be tarnished by the specter of drugs. Therefore, player voluntarily agrees to submit to any test or examination for drug use when requested by the Club.

Id.

87. Id. at 806.
88. Id. at 807.
89. Id.
90. Freudenberger, supra note 1, at 26 n.7.
91. Wong & Ensor, supra note 12, at 806.
92. Id.
new league-wide drug program that included random drug-testing. The arbitrator determined that this program would constitute an illegal departure from the collective bargaining agreement because it was unilaterally implemented without any bargaining or negotiation over the matter—the agreement’s Article XXXI precluded all random drug-testing. Rozelle asserted that the drug-testing program was an exercise of his disciplinary authority preserved within the position of Commissioner in the 1982 Collective Bargaining Agreement, and that this “residual disciplinary authority” overcame any collective bargaining agreement provisions to the contrary. The arbitrator disagreed, stating:

[C]ertain . . . subject areas, such as drug-testing and the evaluation of chemical dependency treatment facilities were addressed by the collective bargaining agreement and represented limitations on club and/or the Commissioner’s right to change those agreements . . . [T]he Commissioner’s rule-making authority was supplanted, in certain respects, by specific agreement language . . . which established clear procedures concerning . . . testing . . . [The Players’ Association has] consistently resisted suggestions from the Commissioner . . . which would have enlarged the scope of testing for chemical dependency by including “unscheduled” analyses.

The arbitrator also rejected the argument of the National Football League Management Council (“NFLMC”) that Rozelle’s program would not violate the prohibition on “spot-check” drug-testing because the program would test all players randomly, as opposed to randomly selected players. The 1982 Agreement clearly addressed this type of testing as contrary to the Commissioner’s intent.

The arbitrator ruled that the Commissioner did retain “integrity of the game” authority under Article VIII. The Commissioner could exercise some control by augmenting pre-existing drug-testing provisions related to pre-season and “reasonable cause” testing, provided they did not violate the terms of the 1982 Agreement. Because some terms of the drug program were not specifically addressed in the agreement, the arbitrator allowed the Commissioner to supplement these terms. For example, the 1982 Agreement did not give a precise definition of “prohibited substances” or

93. Thurston, supra note 41, at 122.
94. Id.
95. Id.
96. Id.
97. Lock, supra note 73, at 15.
address the status of players hospitalized for drug treatment (for purposes of pay and classification); thus, the Commissioner was allowed to address these matters by imposing an "augmented" program.99

In another matter, Arbitrator Kagel, in Opinion & Decision In re Arbitration between National Football League Management Council & National Football League Players Ass'n Re: Post-Season Physical Examinations, ruled that NFL management could not unilaterally implement post-season drug-testing.100 He stated that, because the NFL and the Players’ Association only bargained over: (1) pre-season and (2) "reasonable cause" testing, any post-season testing violated the 1982 Collective Bargaining Agreement of the NFL.101 Because the NFLMC did not seek the capacity to implement post-season drug-testing during the course of collective bargaining, the arbitrator ruled that the League could not implement it after-the-fact.102 The League used the "management rights" clause to support its claim; the clause gave management the ability to have unilateral control in areas not specifically limited in the agreement. The NFL claimed that the NFLMC reserved the capacity to impose such a program.103 The arbitrator did not accept the NFLMC’s claim. The agreement specifically limited the league’s ability to test, thus the Commissioner retained no residual rights with respect to other forms of drug-testing. The "management rights" clause only applied to issues not addressed in the 1982 agreement.104 Neither arbitrator, however, definitively decided whether drug-testing was a mandatory subject of collective bargaining, limiting their decisions to whether the provisions at issue violated the respective NFL Agreement.105

3. NLRB Decisions

The issue that the two 1986 arbitrations did not definitively decide upon—the status of drug-testing as a subject of collective bargaining—would be addressed and subsequently decided three years later by the NLRB. Two decisions in 1989 by the NLRB held that drug-testing is a mandatory subject of collective bargaining over which employers are required to fully bargain—the employer must seemingly bargain to impasse. The NLRB in Johnson-Bateman Co.106 and Minneapolis Star

99. Id.
100. Id. at 8.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 21.
Tribune\textsuperscript{107} ruled that a drug-testing program is a "condition of employment," and thus a mandatory subject of bargaining.

In the first impression case of Johnson-Bateman, the issue concerned a concrete pipe manufacturer and his unionized production employees. The Management's Rights clause of the contract stated,

[t]he management of the plant, direction of the working forces, and work affairs of the Company, including but not limited to the right . . . to discipline or discharge for just cause . . . to issue, enforce and change Company rules [is reserved to the Company] . . . Thus, the Company reserves and retains, solely and exclusively, all of the rights, privileges, and prerogatives which it would have in the absence of this Agreement . . . .\textsuperscript{108}

Prior to the conduct at issue, provisions in the contract gave the employer the right to discipline an employee for just cause, including for consuming, possessing, or being under the influence of alcohol or drugs.\textsuperscript{109} Further, all employees had to undergo drug and alcohol testing at the time of their hiring.\textsuperscript{110} The employer then unilaterally imposed a program whereby all workplace injuries requiring medical treatment would be accompanied by drug and alcohol testing.\textsuperscript{111} The employer's motivation was the growing number of workplace accidents (perhaps due to the use of drugs and alcohol), resulting in increased insurance rates.\textsuperscript{112} The Board determined that this issue did not fall under the understanding of a "Company rule" within the scope of the Management's Rights clause, and thus was a mandatory subject of bargaining.\textsuperscript{113}

The Board applied the two-part test of Ford Motor Co. v. NLRB,\textsuperscript{114} where the Supreme Court held that a mandatory subject is "plainly germane to the working environment" and "not among those 'managerial decisions which lie at the core of entrepreneurial control.'"\textsuperscript{115} The drug-testing requirement was "germane to the working environment" because a violation of the policies could result in the discharge or other discipline of the injured employee.\textsuperscript{116} This factor "is a condition of employment because it has the potential to affect the continued employment of individuals who become subject to it."\textsuperscript{117}

\begin{itemize}
  \item 107. 295 N.L.R.B. 543 (1989).
  \item 108. Johnson-Bateman, 295 N.L.R.B. at 180.
  \item 109. Id. at 181.
  \item 110. Id.
  \item 111. Id.
  \item 112. Id. at 183.
  \item 113. Id. at 182.
  \item 114. 441 U.S. 488 (1979).
  \item 115. Johnson-Bateman, 295 N.L.R.B. at 182.
  \item 116. Id. at 183.
  \item 117. Id.
\end{itemize}
Also, the issue of drug-testing was not considered to be among those managerial decisions that fall under the realm of "entrepreneurial control." The Board relied on Justice Stewart's concurrence in *Fibreboard Paper Products Corp.* in making this determination. It asserted that the imposition of a drug-testing policy is not entrepreneurial in character; rather, it is a change in a vital part of the employees' regular workday and "a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary 'core of entrepreneurial control.'" It does not involve the investment capital or affect the fundamental scope and direction of the enterprise, but "is rather a more limited decision directed toward reducing workplace accidents and attendant insurance rates." Thus, it is treated as a mandatory subject of collective bargaining.

In *Minneapolis Star Tribune*, the employer unilaterally implemented a drug and alcohol policy consisting of three parts: a pre-employment medical examination, drug and alcohol screening for current employees, and a disciplinary schedule for offenses. The Board affirmed the decision in *Johnson-Bateman* that the unilateral implementation of a drug program for current employees violates Section 8(a)(5) of the NLRA. However, a drug and alcohol-testing program for prospective employees was not considered an unfair labor practice.

These decisions stand today and coincide with other Board decisions holding that the implementation of testing programs for current employees is considered a changed condition of employment, and thus is a mandatory subject of collective bargaining. For example, in *Medicenter, Mid-South Hospital*, a private employer's newly-implemented lie detector test for current employees was held to be a mandatory subject of collective bargaining.

4. NLRB, arbitration, and case precedents provide support for the designation of drug-testing as a mandatory subject

The NLRB decisions of *Johnson-Bateman* and *Minneapolis Star Tribune* (which are still as yet unchallenged) and the arbitration precedents in both MLB and the NFL all consistently hold that drug-testing programs cannot be unilaterally implemented and must involve collective bargaining.

118. *Id.*
119. *Id.*
120. *Id.* at 184.
121. *Id.*
123. *Id.*
124. *Id.*
125. 221 N.L.R.B. 670 (1975).
Since a drug-testing program will affect the athlete’s “terms and conditions of employment”—as defined by Section 8(d) of the NLRA—it should be considered a mandatory subject. As such, the implementation of a drug-testing program by the League may not be effectuated unilaterally without prior bargaining with the MLBPA. There is no legal basis on which to randomly test for drugs in the League.

The precedents reveal that “terms and conditions” has been interpreted to mean most any matter that affects the employer-employee relationship, especially issues that influence how employees perform their responsibilities. Thus, an issue like mandatory random drug-testing, which implicates the mandatory subjects of (1) safety, (2) testing, and (3) disciplinary matters, is also considered a mandatory subject of bargaining.

Further, an attempt to eliminate drug use in the League does not constitute a decision tantamount to a change in the scope or direction of the “business,” as would an issue like the termination of a bargaining unit for economic reasons (as in First National). The imposition of such a drug-testing program would not alter the basic operation of professional baseball or require a change in the capital structure of the League. The only difference would be that random drug tests may detect illegal drug use by individual players—the game would continue under its current form for all intents and purposes. There is no evidence that professional athletes’ drug use would have that great of an economic or structural effect on the League. As the Board suggested in Johnston-Bateman, Fibreboard required that, to be a permissive subject of bargaining, the issue must reach the core of the employer’s “entrepreneurial control”; drug-testing does not reach that level in this employment context either. Also, as in Johnson-Bateman, the issue of drug-testing in professional baseball is “plainly germane to the working environment,” in that a violation of any drug-testing policy has the potential to drastically affect the ability of the athletes to continue participation in the League (at least temporarily).

Also, the courts’ and the Board’s practice to look at industrial practice, when determining whether something is a mandatory subject, also harms the League’s prospects of implementing this program unilaterally. The Court in Fibreboard, for instance, supported its decision to require collective bargaining by looking at industry practice. For the court,
employer decisions to subcontract work outside the bargaining unit were viewed as matters amenable to collective bargaining.\textsuperscript{132} Current practice in the field of professional sports demonstrates that drug-testing is indeed an issue that collective bargaining can adequately address; the threshold issue is \textit{addressing}, not resolving, of which the former is accurately performed. The joint agreements that have been created through collective bargaining in the MLB, NFL, and NBA, regardless of whether \textit{current} drug-testing proposals are in effect, suggest that the issue of drug-testing is amenable to treatment in collective bargaining by both parties in some fashion.

5. Limitations on Commissioner powers

The parameters of federal labor policy limit the League Commissioner's authority to unilaterally implement a program such as drug-testing. Labor law makes the collective bargaining agreement the primary authority governing the terms and conditions of the employment relationship. This fact precludes an employer or management from changing particular terms without engaging in the process of collective bargaining with union representation, acting to limit a commissioner's role.\textsuperscript{133} Even though the Commissioner is granted binding authority for actions that affect the "preservation of the integrity of, or the maintenance of public confidence in, the game of baseball," this provision has been construed narrowly.\textsuperscript{134} The intent was for this clause to apply to misconduct such as gambling within the sport, and not for use or possession of illegal drugs. Within the League, Commissioner-initiated discipline for drug misconduct can be reviewed and even altered by a neutral arbitrator.\textsuperscript{135} Further, Article XI of the League's collective bargaining agreement reserves for the players the right to reopen collective bargaining on an issue where they deemed that the Commissioner exercised authority in such a manner that contravened their own interpretation of the agreement.\textsuperscript{136}

A case involving NFL management also supports this line of reasoning. Commissioner Rozelle adopted a rule whereby any player leaving the bench while a brawl was taking place on the field would be fined.\textsuperscript{137} Rozelle was precluded from promulgating this rule, which the owners wanted implemented.\textsuperscript{138} The Union argued that he could not

\begin{itemize}
  \item \textsuperscript{132} Fibreboard, 379 U.S. at 210-15.
  \item \textsuperscript{134} \textit{Id.} at 180.
  \item \textsuperscript{135} \textit{Id.} at 181.
  \item \textsuperscript{136} \textit{Id.} at 181 n.66.
  \item \textsuperscript{137} Nat'l Football League Players Ass'n v. NLRB, 503 F.2d 12, 13 (8th Cir. 1974).
  \item \textsuperscript{138} \textit{Id.}
impose "bench fines" for this misconduct because the action was a unilateral change of the terms and conditions of employment, and in contravention of the collective bargaining agreement. The judge held that the owners' unilateral implementation regarding this matter of mandatory bargaining violated Section 8(a)(5) of the NLRA. The "bench fines" could be deemed a reduction in salary, directly affecting the terms and conditions of employment. Similarly, any discipline imposed due to failing a random drug-testing would result in a reduction (or even a forfeiture) of salary, similarly implicating the employment relationship in such a manner that requires mandatory bargaining. The management of the League is not granted any opportunity under the collective bargaining agreement to act unilaterally on matters of such gravity as a drug-testing program.

B. Arguments Proposed in Favor of Drug-Testing as a Permissive Subject

1. The application of precedents should be cast in the light of changed circumstances

Due to the changing world of professional athletics and the need for MLB to exercise managerial control over the business, the authority of the NLRB's decisions in 1989 should be reconsidered. Drug-testing should be treated as a permissive subject of collective bargaining, allowing for unilateral implementation of a drug-testing program. Despite the NLRB's decisions in 1989, and Fibreboard prior to that, the changing times and heightened issues of players' health and the sport's integrity lead to the need for characterizing the issue as only a permissive subject. These economic concerns have grown in importance in the last decade and thus the NLRB's decisions regarding managerial prerogative should be considered in this changing environment. In Justice Stewart's concurrence in Fibreboard, he stated that rules regulating how employees perform their job are considered terms and conditions of employment, including health and safety protections at the workplace. The concurrence further stated that, "[w]hat one's hours are to be, what amount of work is expected . . . and what safety practices are observed, would all seem conditions of one's employment." Fibreboard could be refuted here because the drug

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139. Id.
140. Id. at 17.
141. Id. at 16 n.3, 17.
143. Id.
use that would be targeted would be conduct occurring off the field and away from the job, and thus it does not implicate workplace concerns. The Court specifically asserted that only rules regulating how employees perform at the workplace are mandatory subjects.

In the Roberts arbitration, the arbitrator said that according to Article II, any contractual clauses must be negotiated, except for special covenants that provide benefits beyond those found in the Uniform Player's Contract. 144 Thus, the drug-testing clauses could potentially be valid, even when unilaterally implemented, if they provide athletes with additional actual or potential benefits. Ancillary benefits to these players include the maintenance in public trust of the game and the protection of player health and welfare. 145 Further, the Kasher arbitration reserved to the Commissioner an "integrity of the game" authority to augment MLB's existing drug policy, which suggests that the drug concerns of the League are indeed valuable. 146

Under the First National balancing test, the Court held that chiefly economic decisions involving a change in the scope and the direction of the enterprise are reserved for management. 147 Decisions "essential for the running of a profitable business" are not amenable to collective bargaining. 148 Within the League, the management-employer has a legitimate interest in controlling drug use to protect its investment and the job performance of its employees. Because the profitability of MLB is tied to the success of players and fan support, the preservation of League integrity through drug-testing is an issue that should thus be reserved for managerial prerogative.

2. Commissioner powers

MLB's Major League Agreement, Article I, section iii, lays out the functions of the Commissioner. They shall be to "investigate . . . any act, transaction . . . alleged or suspected to be not in the best interests of the national game of baseball" and "to formulate . . . the rules of procedure to be observed by the Commissioner and all other parties in connection with the discharge of his duties." 149 The agreement gives the Commissioner the power to reprimand, fine, suspend, or even expel a player who engages in conduct that he deems as "not to be in the best interests of [b]aseball." 150

144. Wong & Ensor, supra note 12, at 805 n.132.
146. Id. at 10-12.
148. Id. at 679.
149. Rippey, supra note 34, at 147.
150. Id. at 170.
Also, Rule 21 of the Major League Rules provides League management with the ability to impose discipline for a variety of misconducts, including betting on baseball games, attacking a player or an umpire during the game, and giving gifts to umpires. These parts of the basic League agreement lend support for managerial prerogative based on the League's justified desire to maintain the integrity of the game and the health of the players, through being able to create a drug-testing program for the player-employees.

3. Health and welfare concerns

The paramount reason advanced by management for imposing a drug-testing program is to reduce the use of drugs by athletes, thereby protecting the players' health. Another consideration is the health and well being of the other athletes. By creating what is essentially a "drug-free workplace" through mandatory testing, the risk of accidents to other players is reduced. This argument is particularly compelling in a trade such as professional athletics, considering the inherently physical nature of professional sports and the vulnerability to injury that exists even under the most optimal conditions. Harm could come to either the drug user or one in contact with him if the individual is not capable of performing a high-risk set of tasks at the standard of care required of himself and expected by others.

4. Economic and contractual concerns

Similar to many other business institutions, the legal relationship in professional sports is governed by contractual principles. In a contract for providing a service, the employees' continuing physical ability to perform is considered to be a prerequisite condition for payment. In signing the basic player contract, a professional athlete represents himself as being in good physical health and free of any condition that could hamper his performance. This contract translates to a guarantee that the player is in a state of physical well-being, such that he can endure the daily rigors imposed on a professional athlete. Considering this employment context, it is reasonable for the League to ensure through testing that the player maintains an overall healthy state, which he represents himself to be in

151. Id. at 171.
152. Id. at 170.
153. Sisson & Trexell, supra note 98, at 10.
154. Id.
156. Id.
upon entering his contract with the club.

Typically, in most employment contexts, an employer's implementation of objective drug-testing is justified on economic grounds. Management has a legitimate right to maximize the productivity of employees and prevent any compromise of their ability to perform. Drug-dependent employees tend to be less productive due to absenteeism and more likely to endanger public safety. In professional sports, in particular, drug use is likely to result in: (1) athletes' irregular attendance at practices and games; (2) sub-par performance due to their impaired state; and (3) additional team costs incurred for the rehabilitation of players.

5. Maintaining the integrity of the sport

Because the viability of professional baseball is so connected with fan support, there is a need by the League to maintain the integrity of the sport through vehicles such as random drug-testing. Both the owners and the League alike have the concern that increased drug use by MLB players affects public confidence and trust in the sport. The essence of the MLB Collective Bargaining Agreement Uniform Players' Contract also supports managerial prerogative. It gives the Commissioner binding authority with respect to action taken which involves the "preservation of the integrity of, or the maintenance of public confidence in, the game of baseball." The League, after all, has a right to protect its investment.

The product market theory provides support for management to unilaterally impose a drug program, with respect to its need to maintain the integrity of the game. The theory excludes from mandatory bargaining all management decisions that determine the nature, quantity, and marketing of products. It proposes to exclude employees from bargaining over any matters dealing with direct control over the product market. Because players' drug use can affect the image and quality of the "product" offered on the market, the issue of drug-testing is at the core of entrepreneurial control under the theory.

This theory essentially excludes safety issues as mandatory subjects in situations where the employees themselves have created the risk that harms the product. This theory is in direct opposition to the prevailing interpretations of the NLRA where matters involving employee safety and

158. Id. at 95.
159. Stiglitz, supra note 132, at 180.
160. Lock, supra note 73, at 36-39.
161. Id. at 36.
discipline are considered mandatory subjects. With MLB, owners have a legitimate interest in determining both the nature of the product of baseball offered to the consumer/fan and the image of the sport. This is especially the case with drug-testing, where the athletes' voluntary drug use is directly creating the safety concerns with which the League is concerned.

V. CONCLUSION

The precedents established by the 1989 NLRB rulings and a host of sports arbitration decisions demonstrate that drug-testing must be a mandatory subject of collective bargaining, despite the changing treatment and nature of professional sports in the last decade. As such, the decision of whether and in what fashion to implement a drug-testing regime in the League must be a mandatory subject of bargaining. While courts have accepted a drug-testing program as binding when the employees implicitly agree to the testing, the objections brought by the MLBPA suggest that no voluntary agreement to a random drug-testing program will be imminent. It is not so much that the MLBPA is opposed to detecting drug use, but that it has a great respect for the collective bargaining process. Thus it would not support any unilateral implementation of a program that would bypass its statutory right to bargain over such mandatory subjects of collective bargaining.

162. Id. at 37.