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**REVISITING THE SERVICE TIME QUANDARY: DOES SERVICE TIME
MANIPULATION OF MINOR LEAGUE BASEBALL PLAYERS VIOLATE MLB'S
COLLECTIVE BARGAINING AGREEMENT?**

*Ryan Probasco**

Abstract: Major League Baseball players qualify for free agency once they have accumulated six years of “service time,” a measure of days spent on the Major League Club, disciplinary suspension or the injured list. This rule has empowered teams to utilize a practice known as “service time manipulation,” in order to exert as much control over players’ rights as possible for the lowest total cost. With an intensifying strain between players, their collective bargaining representative and Clubs reaching the public eye in recent months, the economic landscape of America’s pastime has been under heavy scrutiny. Relatedly, it has been argued that a tenable argument exists for players who have had their service time manipulated to allege a violation of the sport’s collective bargaining agreement (“CBA”). This Note examines the potential for players to assert such a violation and other avenues for players to address the ground that has been surrendered from an economic standpoint.

I. INTRODUCTION

Labor disputes between professional sports team owners and athletes’ collective bargaining organizations are not unusual.¹ Within just the last decade, work stoppages have occurred in the National Football League (“NFL”), National Basketball Association (“NBA”), and the National Hockey League (“NHL”).² Since 2011, the NFL, NBA and NHL have combined for 416 “lockout”³ days, and have collectively had to cancel 750 regular season games as a result of the leagues’ respective labor disputes.⁴

Major League Baseball (“MLB”) is an outlier in this regard.⁵ On August 12, 1994, the Major League Baseball Players Association (“MLBPA”) initiated what would become the longest work stoppage in the history of American sports at the time by going on strike.⁶ Following the prolonged work stoppage centered around MLB owners’ attempt to unilaterally implement a salary cap for player salaries, the strike effectively ended on March 31, 1995, when then U.S. District Judge, and current Supreme Court Justice, Sonia Sotomayor, granted the National Labor Relations

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¹ CNN Library, *Pro Sports Lockouts and Strikes Fast Facts*, (June 2, 2018), <https://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html> (last visited Apr. 22, 2019).

² *Id.*

³ *Lockout*, The Law Dictionary, <https://thelawdictionary.org/lockout/> (last visited Apr. 22, 2019) (explaining that a “lockout” is defined as: “Employment action. An entity stops or withholds work. The work force is not allowed on entity property during this condition. It is a reverse strike by entity management, intended to compel an entity-favorable settlement to a labor dispute. When several employers in concert conduct a lock out action, it is known as a joint lockout. Also known as shut out.”).

⁴ *Supra* note 1.

⁵ Stephen Hawkins and Ronald Blum, *MLB players, owners come to terms on new CBA*, (Dec. 1, 2016), <https://www.baltimoresun.com/sports/mlb/bal-mlb-players-owners-have-verbal-labor-deal-20161130-story.html> (last visited Apr. 22, 2019) (noting “The peace in baseball is in contrast to the recent labor histories of other major sports.”)

⁶ Cliff Corcoran, *The Strike: Who was right, who was wrong and how it helped baseball*, (Aug. 12, 2014), <https://www.si.com/mlb/2014/08/12/1994-strike-bud-selig-orel-hershiser> (last visited Apr. 22, 2019).

Board's ("NLRB," or the "Board") request for injunctive relief, finding the Board had reasonable cause to believe the owners had committed an unfair labor practice.⁷ Players officially returned to work on April 2, 1995.⁸ The strike resulted in the cancellation of over 900 games, including the 1994 playoffs and World Series.⁹ A shortened 1995 season followed as well, with games not resuming until April 25, 1995.¹⁰

Some prominent players went as far to call the strike one of the most embarrassing moments in the game's history.¹¹ What has followed, however, is an increasingly rare and objectively impressive run of uninterrupted play since the 1994 strike.¹² To date, MLB remains the only "Big Four"¹³ North American sports league to have avoided a labor work stoppage during this millennium.¹⁴ Assuming there are no work stoppages before the end of the current CBA in 2021, MLB will have gone uninterrupted by a labor dispute for 26 consecutive seasons.¹⁵

Despite the unprecedented labor peace between owners and the players' collective bargaining agent, the MLBPA, tensions have skyrocketed in 2019, with Commissioner Rob Manfred and MLBPA executive director Tony Clark issuing public statements regarding current issues with free agency, pace of play, and a variety of other bedrock rules that could alter the fabric of the sport.¹⁶ Veteran starting pitcher Adam Wainwright was asked for comment in February of

⁷ *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y. 1995). While cross-charges for unfair labor practices were pending before the Board, MLB owners tried to change certain aspects of the sports' prior collective bargaining agreement, informing the players they would unilaterally eliminate salary arbitration for certain players, competitive bargaining for certain free agents, and the anti-collusion provision of the then-expired CBA. The Board then sought a preliminary injunction. U.S. District Judge Sonia Sotomayor wrote for the Court, finding there was reasonable cause for the NLRB. to believe that the owners had violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C.S. § 158(a)(1) and (5), because the provisions sought to be unilaterally changed were mandatory subjects of bargaining. This ruling effectively ended the 232-day strike, as it enjoined Major League Baseball to restore the terms and conditions of employment provided under the expired collective bargaining agreement. This decision was later upheld by the U.S. Court of Appeals for the Second Circuit. (see *Silverman v. Major League Baseball Player Relations Comm.*, 67 F.3d 1054 (2d Cir. 1995)).

⁸ History.com Editors, *Longest strike in Major League Baseball history ends*, (Aug. 21, 2018), <https://www.history.com/this-day-in-history/longest-strike-in-major-league-baseball-history-ends> (last visited Apr. 22, 2019).

⁹ *Supra* note 6.

¹⁰ *Id.*

¹¹ Bob Nightengale, *1994 strike most embarrassing moment in MLB history*, (Aug. 11, 2014), <https://www.usatoday.com/story/sports/mlb/2014/08/11/1994-mlb-strike/13912279/> (last visited Apr. 22, 2019).

¹² *Supra* note 1.

¹³ Sports Media Watch, *Major Pro Sports Teams By TV Market Size*, <https://www.sportsmediawatch.com/nba-market-size-nfl-mlb-nhl-nielsen-ratings/> (last visited Apr. 22, 2019) (ranking the U.S. based franchises in the "Big Four" sports leagues by Nielsen market size).

¹⁴ *Supra* note 6.

¹⁵ 2017-2021 Collective Bargaining Agreement (Dec. 1, 2016), http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211078089 (last visited May 10, 2019) (hereinafter *2017-2021 Basic Agreement*) (noting "[t]his agreement shall terminate on December 1, 2021 at 11:59 P.M. Eastern time.").

¹⁶ R.J. Anderson, *MLBPA's Tony Clark calls Rob Manfred's comments on payroll 'unconstructive and misleading at best'*, (Feb. 18, 2019), <https://www.cbssports.com/mlb/news/mlbpas-tony-clark-calls-rob-manfreds-comments-on-payroll-unconstructive-and-misleading-at-best/> (last visited Apr. 22, 2019) (in which Tony Clark calls Rob Manfred's comments on payroll "unconstructive and misleading at best."); see also Matt Martell, *Rob Manfred Denies Tanking, Says 'Every Single Team Wants to Win'*, (Feb. 17, 2019), <https://www.si.com/MLB-commissioner-Rob-Manfred-calls-out-union-chief-Tony-Clark-Scott-Boras-denies-tanking> (last visited Apr. 22, 2019) (in which Rob Manfred characterizes Tony Clark's criticism of teams roster strategy and tanking, stating, "The assertion that teams aren't trying started last spring training with [MLB Players Association chief] Tony Clark singling out four

2019 and stated, “Unless something changes, there’s going to be a strike, 100 percent. I’m just worried people are going to walk out mid-season.”¹⁷

The driving force of the intensifying strain between baseball players and Club owners is rooted in the economic landscape of the league.¹⁸ The immediate and most obvious concern amongst players is the decline in spending by teams.¹⁹ According to recent reports, 54.8% of league revenues were allocated to payments of salaries for major league, minor league, and amateur players in 2018, which would be the lowest percentage since 2012.²⁰ This is especially striking to the players, as industry revenues have increased significantly in that timeframe, from approximately \$7 billion to \$9 billion.²¹ What this means is that industry revenue is growing at a faster rate than payments back to players.²²

What’s driven the decrease in player compensation, according to Commissioner Manfred, is that teams are analyzing players differently and more effectively than they have in the past.²³ Teams are more cognizant than ever of how age can affect player performance.²⁴ In turn, teams are increasingly prioritizing the acquisition of young and “controllable” talent, above aging and potentially-established veterans.²⁵ Teams’ front offices are more inclined to aim their resources and time at acquiring younger players, who are more likely to improve in performance and simultaneously cost the team less for payroll purposes during the course of their contract.²⁶

Indeed, once teams have young, promising players in their organization, the goal switches from acquisition to retention.²⁷ As part of an overall aim to be as cost effective as possible, teams

teams. He did very poorly with those four teams. This narrative that our teams are not trying is just not supported by the facts. Every single team wants to win.”)

¹⁷ Scott Boeck, *Cardinals’ Adam Wainwright: MLB players will strike barring change*, (Feb. 16, 2019), <https://www.usatoday.com/story/sports/mlb/2019/02/16/adam-wainwright-mlb-players-will-strike-barring-change/2890706002/> (last visited Apr. 22, 2019).

¹⁸ Maury Brown, *Inside The Numbers: The Player Salary Battle Lines Between MLB And The MLBPA*, (Feb. 11, 2019), <https://www.forbes.com/sites/maurybrown/2019/02/11/inside-the-numbers-the-player-salary-battle-lines-between-mlb-and-the-mlbpa/#612a9805c148> (last visited Apr. 22, 2019).

¹⁹ *Id.* (showing “last offseason and this [offseason], there has been a decline in spending.”).

²⁰ *Id.* (noting that this figure includes minor league and amateur player payments, while other calculations may not).

²¹ *Id.*; see also Maury Brown, *MLB Sees Record Revenues Of \$10.3 Billion For 2018*, (Jan. 7, 2019), <https://www.forbes.com/sites/maurybrown/2019/01/07/mlb-sees-record-revenues-of-10-3-billion-for-2018/#637907525bea> (last visited Apr. 22, 2019) (some methodologies actually report MLB revenues above \$10 billion for 2018. Per Forbes, for 2018, MLB’s baseball-related revenues were \$10.3 billion. Those revenues do not include the \$2.58 billion sale of BAMTech to Disney that is reported as capital. BAMTech is the digital media company spun off from MLB Advanced Media.).

²² *Supra* note 18.

²³ *Id.*

²⁴ *Id.*; see also Sam Miller, *Young players have officially taken over Major League Baseball*, (Dec. 4, 2018), http://www.espn.com/mlb/story/_/id/25417893/young-players-officially-taken-major-league-baseball (last visited Apr. 22, 2019) (explaining that “In 2018, batters 25 and under accounted for about 51,000 plate appearances, or 27.6 percent of all the plate appearances taken across the majors ... At the start of this decade, that share was less than 21 percent. To find a season when young players took a higher share of playing time, you have to go back 40 years to 1978.” In addition, it notes that baseball executives are now incentivized to allot playing time to younger players to capture their peak seasons, while they exist.).

²⁵ *Supra* note 18.

²⁶ *Supra* note 24; see also Jeff Zimmerman, *Are Aging Curves Changing?*, (Dec. 13, 2013), <https://blogs.fangraphs.com/hitters-no-longer-peak-only-decline/> (last visited Apr. 22, 2019).

²⁷ Rob Mains, *Roster Construction, Service Time, and the Next CBA: The Fifty Percent Solution*, (Apr. 2, 2019), <https://www.baseballprospectus.com/news/article/48162/roster-construction-service-time-and-the-next-cba-the-fifty-percent-solution/> (last visited Apr. 22, 2019) (explaining “Shrinking MLB service time has resulted in fewer players reaching the threshold of six years’ experience which entitles them to free agency. Under free agency, players can

attempt to leverage as much production for the least amount of return in salary paid to the player.²⁸ This affords front offices the leeway to potentially acquire more highly-priced veterans to patch holes or weaknesses of rosters, as more cash is available in the owner-allocated budget, assuming the team was successful in drafting or acquiring young and productive players.²⁹ Alternatively, franchises may choose to not allocate savings back into player payroll at all.³⁰

Going further, teams have become notorious for stretching what rules are in place in order to retain younger players for as long as possible.³¹ Under the current CBA, teams are allotted six years of “control” of a player before he can enjoy the right of free agency.³² In order to circumvent this from occurring strictly after a player’s sixth season in the major leagues, teams will often delay calling players up from the minor leagues until the rules afford them the ability to keep the player for nearly a full seventh season.³³ This practice results in the team exerting the maximum amount of “control” over a player in years that may end up being his most productive.³⁴ As such, what has become known industry-wide as “service time manipulation” is a popularly-utilized practice, which delays players’ right of testing the open market in free agency and creates additional cost certainty for Clubs.³⁵ The practice is beneficial to teams both from a talent retention and payroll planning standpoint.³⁶

This quandary presents players who have had their service time manipulated the opportunity to assert a violation of the CBA under the covenant of good faith and fair dealing,

conduct an auction for their services, which is effectively the way almost every employed person reading this gets paid. Prior to that, after three years’ service time, players can file for arbitration, which, in theory at least, helps ensure that they are paid commensurate to their peers.”).

²⁸ Travis Sawchik, *Nobody Wants Baseball’s 30-Something Free Agents Anymore*, (Nov. 8, 2018), <https://fivethirtyeight.com/features/nobody-wants-baseballs-30-something-free-agents-anymore-%F0%9F%98%9E/> (last visited Apr. 22, 2019) (noting that “older players are aging out of the game and teams are avoiding risky, big-ticket contracts”).

²⁹ *2017-2021 Basic Agreement*, at 18-19. (Players with less than three years of service are subject to team-set salaries, which often are near the league’s minimum.)

³⁰ Jeff Passan, *It’s not just the worst teams not spending money in baseball free agency – it’s the richest, too*, (Nov. 9, 2018), <https://sports.yahoo.com/not-just-worst-teams-not-spending-money-baseball-free-agency-richest-165757468.html> (last visited Apr. 22, 2019)

³¹ Patrick Kessock, *Out of Service: Does Service Time Manipulation Violate Major League Baseball’s Collective Bargaining Agreement?*, 57 B.C.L. Rev. 1367, 1385 (2016); see also Mains, *supra* note 27 (noting that salary negotiating leverage amongst the players is receding).

³² *2017-2021 Basic Agreement*, at 92 (“Following the completion of the term of his Uniform Player’s Contract, any Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall become a free agent.”).

³³ Kessock, *supra* note 31, at 1385. (noting “the easiest way to prevent a player from reaching the free agent eligibility threshold is by keeping him in the minor leagues for as long as possible. Once a player has become too skilled to hold back any longer, teams typically engage in service time manipulation by waiting until there are less than 172 remaining service days to promote the player for the first time to the major league roster. If the player spends the remainder of his rookie season, as well as the entirety of the next five seasons on the major league roster, he will have five years and 171 days of service time at the end of his sixth season, falling just one day short of free agent eligibility. Practically, the player is prevented from becoming a free agent until he has accumulated six years and 171 days of service time.”).

³⁴ *Id.*; see also Zimmerman, *supra* note 26 (analyzing players’ aging curves).

³⁵ *Id.*

³⁶ Michael Baumann, *MLB’s Service-Time Manipulation Farce Has Reached Unprecedented Proportions*, (Mar. 7, 2019), <https://www.theringer.com/mlb/2019/3/7/18254501/service-time-manipulation-vladimir-guerrero-jr-fernando-tatis-jr-peter-alonso> (last visited Apr. 22, 2019) (noting the practice saves teams money).

which is present in every contract dealing.³⁷ Because the current CBA provides that individuals do not become part of the players' union until they are called up to the Major Leagues, the issue is somewhat compounded because minor league baseball players are not expressly afforded the protection of the CBA.³⁸ However, because the CBA recognizes the MLBPA as the sole and exclusive bargaining agent for "individuals who may become Major League Players during the term of this Agreement," players could assert that they justifiably expected MLB teams to not thwart their entry into the union for pecuniary gain, relying on the covenant of good faith and fair dealing.³⁹ Below is an examination of the history of MLB free agency, the covenant of good faith and fair dealing, and the viability of a claim that service time manipulation is a violation of the CBA.

II. MLB FREE AGENCY: A BRIEF HISTORY

Baseball Clubs' ability to retain players throughout their presumed prime seasons is restricted by players' collectively-bargained free agency rights.⁴⁰ MLB free agency, as it's known today, largely derives from the landmark *Flood v. Kuhn* case, in which the Supreme Court eroded the grounds on which baseball's infamous antitrust exemption existed.⁴¹ Though the decision actually upheld the antitrust exemption, its holding encouraged a later arbitration ruling, which destroyed baseball's reserve clause.⁴² While Curt Flood, plaintiff in the aforementioned landmark case, is arguably the most pivotal figure in the labor history of American professional sports, understanding MLB's modern free agency requires a comprehensive look into the period preceding Flood's career.

The National League of Professional Baseball Clubs' reserve system was implemented by 1893, which provided that players were bound to teams for the entirety of their careers.⁴³ The system also provided Clubs the certainty that no other Club could negotiate with its players for their services.⁴⁴ Ten years later, the National League formed the foundation of today's MLB by merging with its main competitor, the American League.⁴⁵ In merging, the two leagues agreed to honor each other's reserve systems.⁴⁶

³⁷ Sheryl Ring, *A Possible Legal Argument Against Service-Time Manipulation*, (Mar. 2, 2018), <https://blogs.fangraphs.com/a-possible-legal-argument-against-service-time-manipulation/> (last visited Apr. 22, 2019).

³⁸ *2017-2021 Basic Agreement*, at 1.; see also *MLBPA's Frequently Asked Questions*, http://www.mlbplayers.com/ViewArticle.dbml?&DB_OEM_ID=34000&ATCLID=211785603#d (last visited Apr. 22, 2019) (those eligible for membership in the MLBPA are "all players, managers, coaches and trainers who hold a signed contract with a Major League Club ... In collective bargaining, the Association represents around 1,200 players, or the number of players on each Club's 40-man roster, in addition to any players on the disabled list.").

³⁹ *Id.*; see also Ring, *supra* note 37.

⁴⁰ Mains, *supra* note 27 (noting free agency allows players to auction their services); see also Alex Speier, *What is a baseball player's prime age?*, (Jan. 2, 2015), <https://www.bostonglobe.com/sports/2015/01/02/what-baseball-player-prime-age/mS39neFWm4hrVukT6lSYuK/story.html> (last visited Apr. 22, 2019) (analyzing players' prime ages).

⁴¹ *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁴² Kessock, *supra* note 31, at 1376.

⁴³ *Id.* at 1373.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1373-74.

⁴⁶ *Id.*

In 1914, the “outlaw” Federal League debuted, with its founders convinced that the popularity of the sport amongst the public could drive interest in a third major league.⁴⁷ Eight teams made up the Federal League in its inaugural season, and each one of them built new ballparks.⁴⁸ To successfully compete with the other two major leagues, the Federal League did not follow the reserve system and attracted 81 former major leaguers into the Federal League Baseball Company, Inc.⁴⁹ As a way to stymie the Federal League’s pilfering of its players, the National and American Leagues agreed to compensate the Federal League in exchange for its agreement to disband.⁵⁰ As part of the Federal League’s disbandment, only some team owners were compensated as part of the settlement, which inevitably was met with ire from those who were not accounted for in the settlement.⁵¹ In response, the owners of the Baltimore Terrapins brought an antitrust suit against organized baseball, alleging it had conspired to monopolize the business of the sport by inducing Federal League teams to disband.⁵² Writing for the U.S. Supreme Court, Justice Oliver Wendell Holmes affirmed the decision of the Court of Appeals, holding that Clubs in the National and American Leagues were not engaging in interstate trade or commerce as defined by the Sherman Act, as baseball games were not “trade” or “commerce” as the terms were understood at the time.⁵³

The Baltimore Terrapins’ unsuccessful bid to thwart baseball’s antitrust exemption was not the last, however.⁵⁴ George Toolson, a pitcher in the New York Yankees’ minor league system during the 1940s, believed he was good enough to receive a call-up to a major league roster.⁵⁵ With MLB’s reserve system still in place several decades after the *Federal Baseball Club of Baltimore* ruling, however, the Yankees were under no obligation to trade Toolson to another team to afford him that opportunity.⁵⁶ Accordingly, Toolson brought a Sherman Act claim after the Yankees assigned him to another minor league affiliate in their system and his refusal to report to the new Club.⁵⁷ The U.S. Supreme Court held firm on precedent from the *Federal Baseball Club of Baltimore* ruling, adding that if the current system created injustice, it was Congress’ responsibility to amend antitrust legislation.⁵⁸

⁴⁷ Baseball Almanac, *Year In Review : 1914 Federal League*, <http://www.baseball-almanac.com/yearly/yr1914f.shtml> (last visited Apr. 22, 2019).

⁴⁸ *Id.*

⁴⁹ *Id.*; see also Kessock, *supra* note 31, at 1374.

⁵⁰ *Id.*

⁵¹ Historic Baseball, *Federal League*, <http://www.historicbaseball.com/federalleague.html> (last visited Apr. 22, 2019).

⁵² *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, (1922)

⁵³ *Id.* at 208-09 (holding baseball’s “business” was giving exhibitions of baseball games. While true that this required organization between Clubs from different states, per the Court, that fact alone didn’t change the character of the business of baseball); see also Kessock, *supra* note 31, at 1374.

⁵⁴ *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (holding “[t]he present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”).

Following the *Toolson* decision in 1953, MLB's reserve system remained in place and went unchallenged for an additional fifteen years.⁵⁹ In 1966, Marvin Miller was hired by the MLBPA as a result of increasing agitation with the reserve system.⁶⁰ When Miller was hired, the MLBPA was not yet a union, but was known as a fraternal organization.⁶¹ Approximately two years after his hire, the MLBPA successfully negotiated the first collective bargaining agreement in professional sports.⁶²

Soon after, Curt Flood would refuse to report to the Philadelphia Phillies after being traded from the St. Louis Cardinals, chastising the reserve system as a price-fixing and collusive mechanism in violation of the Sherman Act.⁶³ In 1970, before the U.S. Supreme Court decided the *Flood* case, Marvin Miller and the MLBPA negotiated for arbitration for dispute resolution under the CBA.⁶⁴ Eventually in 1972, the Supreme Court held that baseball did engage in interstate commerce in the *Flood* suit.⁶⁵ However, it also held that precedent created an anomalistic exemption that must be upheld.⁶⁶ Though Flood's attempt to dismantle the reserve system ultimately failed, it did lay the groundwork for the system's eventual demise.⁶⁷ The MLBPA used the *Flood* decision to negotiate in subsequent collective bargaining sessions.⁶⁸ In 1975, utilizing the arbitration system put in place in 1970, pitchers Dave McNally and Andy Messersmith challenged the reserve system after their contracts were renewed after they had ended.⁶⁹ The arbiter found that only if the reserve system was explicitly agreed upon in players' contracts was it valid.⁷⁰ And since player contracts did not explicitly bind players to the reserve system, MLB's leverage and the reserve system was eliminated in 1976.⁷¹

That year, MLB and the MLBPA negotiated its new CBA, which created modern free agency, providing that players with six years of service were eligible to enjoy the right to free agency after his contract concluded.⁷²

III. SERVICE TIME, MANIPULATION AND ITS ADVERSE IMPACT

Under the current CBA, players who have accumulated six years of "service time" qualify for free agency, assuming they have not agreed to a contract extension which covers subsequent seasons.⁷³ Service time is a measure of days a player spends on a Major League

⁵⁹ Kessock, *supra* note 31, at 1374-75.

⁶⁰ *Id.* at 1375.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Supra* note 41.

⁶⁴ Kessock, *supra* note 31, at 1376.

⁶⁵ *Supra* note 41.

⁶⁶ Kessock, *supra* note 31, at 1376 (citing *Flood*).

⁶⁷ *Supra* note 41; *see also* Ring, *supra* note 37.

⁶⁸ Kessock, *supra* note 31, at 1376.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1376-77.

⁷³ *2017-2021 Basic Agreement*, *supra* note 15 (providing "[f]ollowing the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall become a free agent ...").

active roster, on disciplinary suspension, or on the injured list.⁷⁴ Beginning in 2018, Major League seasons consist of 187 “days.”⁷⁵ A player is said to have reached “one year” of service if 172 days are accrued in a given season.⁷⁶

Significantly, free agency is not the only contractual feature dictated by service time.⁷⁷ In players’ first three years of service, teams are given the autonomy to set salaries, so long as it meets the agreed-to league minimum.⁷⁸ Players do not have the ability to contest these team-determined salaries, and are subject to the team’s discretion in setting their pay.⁷⁹

Once three years are accrued or a player is designated as a “super two,” having accrued service time in the top 22% of players between two and three years of service time, players gain the right to file for salary arbitration.⁸⁰ If a player and team cannot mutually agree to a salary figure for the players’ “arb” seasons, both the team and player submit preferred figures for the upcoming season and then are assigned a date for argument in front of an independent arbitrator.⁸¹

Due to the fact that free agency is dictated by service time accrued, teams have been extremely mindful of when players’ service time clocks actually begin.⁸² Teams have become notorious for not placing certain players on the active Major League roster for the beginning of seasons.⁸³ Instead, players, often ones of a certain caliber, are not called up until a few weeks or months into the season. Recent examples of this practice include Kris Bryant of the Chicago Cubs, Ronald Acuña of the Atlanta Braves, and Vladimir Guerrero Jr. of the Toronto Blue Jays.⁸⁴ Teams often justify the practice by offering boilerplate, “[player] needs more seasoning,” “[player] isn’t ready,” or, “[player] needs to work on his defense” falsehoods.⁸⁵

The latter of which was seen most recently in the case of Guerrero Jr. Blue Jays general manager Ross Atkins was asked about the possibility of Guerrero Jr., who terrorized the highest levels of Toronto’s minor league system in 2018⁸⁶, beginning the 2019 season on the big-league roster. Atkins responded, stating, “Our vision, it really comes down to development. I just don’t

⁷⁴ *Id.* (“(2) For purposes of calculating credited service, a Player will be considered to be on a Club’s Active List if: (a) placed on a disciplinary suspension by a Club, the Chief Baseball Officer or the Commissioner, or on the Disabled List; or (b) called to active military duty for up to two years or if called to emergency duty by the National Guard for a period of up to thirty days.”).

⁷⁵ *Service Time*, MLB.com Glossary, <http://m.mlb.com/glossary/transactions/service-time> (last visited Apr. 22, 2019).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Mains, *supra* note 27.

⁷⁹ *Id.*

⁸⁰ *Supra* note 75.

⁸¹ *Salary Arbitration*, MLB.com Glossary, <http://m.mlb.com/glossary/transactions/salary-arbitration> (last visited Apr. 22, 2019).

⁸² Mains, *supra* note 27.

⁸³ Russell A. Carleton, *Baseball Therapy: Fixing the Service Time Manipulation Problem*, (Sept. 19, 2018), <https://www.baseballprospectus.com/news/article/42717/baseball-therapy-fixing-the-service-time-manipulation-problem/> (last visited Apr. 22, 2019).

⁸⁴ *Id.*

⁸⁵ Tim Stebbins, *Kris Bryant: MLB’s service time manipulation is ‘awful’*, (Feb. 25, 2019), <https://www.nbcsports.com/chicago/cubs/kris-bryant-mlbs-service-time-manipulation-awful> (last visited Apr. 22, 2019) (Bryant was told to work on his defense when he was optioned to the minor leagues prior to this Major League debut.).

⁸⁶ Baseball Reference, Vladimir Guerrero Jr., <https://www.baseball-reference.com/register/player.fcgi?id=guerre002vla> (last visited Apr. 22, 2019).

see him as a major league player. Just pencil him in and it's done. He's 19. He has accomplished everything he can accomplish as an offensive player. There're so many opportunities for him defensively and what he can do to really maximize the power and the size and the strength that he has. Everyone then points to defense, but it's really not just about defense, it's about him having a 15, 20-year career, starting with an incredible foundation. That's everything that encompasses 'teammate' — the physical aspect, the baserunning, the defense. That physical aspect really plays into what type of offensive player he's going to be. He has the ability to be so versatile and dynamic and we want to make sure we tap into all that potential."⁸⁷ The defense rationale is often employed, largely because defensive proficiency is not as quantifiable and recognizable as offensive statistics.⁸⁸ Thus, teams rely on defensive concerns as they are more justifiable to the public and teams' fans.⁸⁹ It's less believable for a team to assert that a player like Guerrero Jr. needs to continue to work on his hitting and offensive proficiency, as his minor league statistics do not support that claim.⁹⁰

The adverse impact this imposes on players is layered.⁹¹ First and foremost, service time manipulation has the potential to decrease a player's immediate salaries significantly, as tinkering with service time can effectively convert a free agency year into a year in which the team can unilaterally set a player's salary at or near the league's minimum, assuming that player is not designated as a "super two," thus creating a fourth arbitration season.⁹² For instance, players who are called up to the active roster after the 172-day deadline are subject to pre-arbitration salaries for three years, plus the remaining games for which they are called up after the 172-day deadline.⁹³ Without this type of manipulation, the "fourth" season in which a player is mandated to accept a salary at the team's discretion would convert into an arbitration season, and thus their last year of arbitration would convert into a free agency year.⁹⁴

Manipulation of service time also potentially harms players' later career earnings, as delaying free agency rights consequently increases the age at which a player reaches free agency, which decreases their value on the open market.⁹⁵ Teams are increasingly cognizant of age

⁸⁷ Bill Baer, *Ross Atkins: 'I just don't see [Vladimir Guerrero, Jr.] as a major league player*, (Feb. 27, 2019), <https://sports.yahoo.com/ross-atkins-just-don-t-033022357.html> (last visited Apr. 22, 2019).

⁸⁸ Sahadev Sharma, *'It's awful': Kris Bryant on how baseball's service-time rule needs to change*, (Feb. 25, 2019), <https://theathletic.com/837222/2019/02/25/its-awful-kris-bryant-on-how-baseballs-service-time-rule-needs-to-change/> (last visited Apr. 22, 2019) (Noting Bryant hit .425/.477/.1.175 in 14 spring training games prior to the 2015 season. Nevertheless he was optioned to the minor leagues to begin the season and was told to work on his defense.).

⁸⁹ *Id.*

⁹⁰ *Supra* note 86. Across four different levels of the Blue Jays' minor league system in 2018, Guerrero Jr. hit .381/.437/.636 with 20 home runs in 95 games. Of note as well, Guerrero Jr. was 5.3 and 7.5 years younger than the weighted average of all players in the Eastern (Double-A) and International (Triple-A) leagues, respectively.

⁹¹ Mains, *supra* note 27..

⁹² *2017-2021 Basic Agreement*, at 18-19; *see also* Baumann, *supra* note 36 (noting that service time manipulation is saving teams money); *see also* Mains, *supra* note 27 (showing that "becoming eligible for free agency has a large impact on compensation, raising hitter salaries by about \$2 million and pitcher salaries by \$1 million," and "arbitration eligibility has a larger dollar impact for pitchers, about the same dollar impact for hitters, a far greater percentage change for each, and affects many more players. Earlier free agency eligibility would be a boon to player compensation. Earlier arbitration eligibility would be a greater boon.").

⁹³ *2017-2021 Basic Agreement*, at 18-19.

⁹⁴ *Id.*

⁹⁵ Rob Mains, *Roster Construction, Service Time, and the Next CBA: Laying the Groundwork*, (Mar. 19, 2019), <https://www.baseballprospectus.com/news/article/47882/roster-construction-service-time-and-the-next-cba-laying-the-groundwork/> (last visited Apr. 22, 2019) (noting the "representation of players eligible for free agency has been

curves and expected performance throughout a player's career and strongly weigh those factors in determining who to target in free agency and how much to offer free agents in total dollars and years.⁹⁶ It is widely recognized that teams and their front offices dedicate more time and resources to player evaluation than they ever have.⁹⁷ What this means is that teams are strongly invested in ensuring they do not spend dollars dedicated to player payroll on those who they do not believe will provide an adequate return on investment.⁹⁸ As players age, performance trends downward.⁹⁹ Thus, the age of a player when he hits free agency is critical in terms of his market value and this manifests in the eventual contract offers he receives from Clubs.¹⁰⁰ By manipulating the service time of young players, teams increase the volume of older players available via free agency, which decreases demand in their services.

Finally, and perhaps most importantly for a potential MLBPA grievance against the practice, service time manipulation thwarts a player's entry into the union, and thus robs the player of the protections and benefits gained via union membership, in exchange for the team's pecuniary gain.¹⁰¹ Entry into the union affords players the full protection of the CBA, most notably a minimum salary and essential benefits.¹⁰² Without the protection of the MLBPA, players are not eligible for those minimum salaries and benefits.¹⁰³

IV. THE NLRA AND COLLECTIVE BARGAINING

In 1935, the National Labor Relations Act ("NLRA" or the "Act") was signed into law in order to protect the rights of employees and employers, to encourage collective bargaining, and to impose restrictions on certain labor and management practices, which were deemed to have been harmful to the general welfare of workers, businesses and the country's economy.¹⁰⁴

in decline recently.); *see also* Zimmerman, *supra* note 26 (discussing how "hitters no longer improve once they arrive in the majors. Instead, their performance is constant until they begin to decline, which, on average, is at 26 years old." This information, which is readily available to MLB franchises, will only serve to discourage the investment in older, aging veteran players who reach free agency.).

⁹⁶ Michael Santoli, *Machado and Harper haven't signed because baseball teams are now run like Wall Street 'quant funds*, (Feb. 13, 2019), <https://www.cnn.com/2019/02/13/santoli-blame-quant-funds-for-baseballs-soft-free-agent-market.html> (last visited Apr. 22, 2019) (likening baseball's "analytic revolution" to that of a quant investing strategy that is used on Wall Street. "Quant investors seek to create a portfolio using models blending several factors (value, momentum, quality, analyst estimate revisions) that leaves them agnostic on the stocks themselves and typically has them underweighting the largest index components and hottest glamour stocks — which might be great companies but whose valuation already builds in years of great future fundamental performance. The new breed of baseball general managers and their extensive analytics departments do the same.").

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Zimmerman, *supra* note 26.

¹⁰⁰ *Id.*

¹⁰¹ Ring, *supra* note 37.

¹⁰² *MLBPA's Frequently Asked Questions*, *supra* note 38 (the MLBPA "is the collective bargaining representative for all current Major League Baseball players. The Association also assists players with grievances and salary arbitration. The Association works closely with MLB in ensuring that the playing conditions for all games involving Major League players, whether the games are played in MLB stadiums or elsewhere, including internationally, meet proper safety guidelines. The Association also serves as the group licensing agent on behalf of the players.").

¹⁰³ *Id.* (explaining what the MLBPA offers to those in the collective bargaining unit).

¹⁰⁴ National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (2019).; *see also* National Labor Relations Board Act, <https://www.nlr.gov/how-we-work/national-labor-relations-act> (last visited Apr. 22, 2019) (the National Labor Relations Board states "Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights

Collective bargaining is deemed to be an obligation of bargaining representatives and employers, whereas the parties are required to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”¹⁰⁵ The Act stipulated that, while collective bargaining is an obligation and a refusal to do so is an unfair labor practice, this obligation does not require a party to agree to any proposal, nor does it require a party to agree to any concession in negotiations.¹⁰⁶

In the aftermath of a wave of strikes, the Labor Management Relations Act (“Taft-Hartley Act”) was passed into law in 1947, which codified that the preferred method to resolve labor disputes is a grievance-arbitration procedure agreed upon by the parties to a collective bargaining agreement.¹⁰⁷ Later, the U.S. Supreme Court noted that arbitration procedures are part of the ongoing process of collective bargaining, and thus parties are free to set the procedural rules for arbitrators to follow.¹⁰⁸ The Taft-Hartley Act also provided that suits for labor contract violations are within the jurisdiction of federal courts.¹⁰⁹ However, the U.S. Supreme Court has held that any arbitration or grievance procedure must be exhausted before parties to a collective bargaining agreement may seek judicial review.¹¹⁰ Added, even in the event a court is asked to review a grievance or arbitration award, the court is not permitted to conduct *de novo* review of case-specific facts or the findings of the arbitrator.¹¹¹ Even in the circumstance where the court is convinced the arbitrator committed serious error, that alone does not suffice to overturn the arbitrator’s decision.¹¹² The court should affirm an arbitration award unless it reflects bias, the arbitrator’s procedure amounts to affirmative misconduct, or the award is so against public policy that it creates explicit conflict with legal precedent and other law.¹¹³

V. MLB’s GRIEVANCE PROCEDURE

The process MLB utilizes to resolve grievances and complaints is described within Article XI of the CBA.¹¹⁴ Defined, a “grievance” is a complaint involving the “existence or interpretation of, or compliance with, any agreement, or any provision of any agreement,

of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”)

¹⁰⁵ See 29 U.S.C. § 158(d).

¹⁰⁶ *Id.*

¹⁰⁷ Kessock, *supra* note 31, at 1372 (citing 29 U.S.C. §§ 171(c), 173(d); 48 AM. JUR. 2D *Labor and Labor Relations* § 353 (1979) (noting that Congress was encouraging arbitration in labor disputes with Taft-Hartley Act).

¹⁰⁸ *United Paperworks Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

¹⁰⁹ 29 U.S.C. § 185 (codifying that venue is proper in U.S. District Courts for suits involving labor contract violations where jurisdiction is also deemed to be proper over the parties involved).

¹¹⁰ Kessock, *supra* note 31, at 1372-73 (citing *United Paperworks*, 484 U.S. at 37 (holding that a court with jurisdiction to review collective bargaining agreements must order parties to exhaust all grievance and arbitration procedures in a contract before the court can decide a case on the merits).

¹¹¹ Kessock, *supra* note 31, at 1372-73 (citing *United Paperworks*, 484 U.S. 37-38 (discussing the limited standard of review in the judicial review of arbitration awards).

¹¹² *United Paperworks*, 484 U.S. at 38 (noting “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”).

¹¹³ Kessock, *supra* note 31, at 1373 (citing *United Paperworks*, 484 U.S. at 36, 40 n. 10, 43).

¹¹⁴ *2017-2021 Basic Agreement*, at 41.

between the Association and the Clubs or any of them, or between a Player and a Club.”¹¹⁵ Per the outlined procedure, if a player believes he has a justifiable grievance, he first must discuss the matter with a Club representative.¹¹⁶ If the matter is not settled as a result of those discussions with the Club representative, a written notice of the grievance must be submitted to the Club’s designated representative.¹¹⁷

Following submission of written notice of the grievance, the Club’s representative is required to advise the player and the MLBPA of the Club’s decision, within ten days after the receipt of the player’s written notice.¹¹⁸ The grievance is considered settled if the Club’s decision is not appealed further within 15 days of its receipt.¹¹⁹ If the player decides to timely appeal, the grievance is submitted to MLB’s Labor Relations Department (“LRD”), who is required to discuss the grievance between the player and Club’s representatives in an attempt to settle within thirty-five days.¹²⁰ Within 10 days following the “Step 2 meeting,” a designated representative of the LRD advises the grievant of his decision in writing.¹²¹ If the LRD decision is not appealed within 15 days of its receipt, the grievance is considered settled and is not eligible for any further appeal.¹²² If the LRD decision is timely appealed, the arbitration process begins.¹²³

To initiate the arbitration procedure, the grievance must be submitted to the Panel Chair, an impartial arbitrator.¹²⁴ The Panel Chair is then responsible for scheduling of the appeal hearing and is required to attempt to open the hearing within one-year from the filing of the grievance.¹²⁵ After the conclusion of the hearing, the arbitration panel renders a written decision as soon as possible and is permitted to affirm, modify or reverse the decision from which the appeal is taken.¹²⁶ Following issuance of the decision, the respective parties may seek appeal or confirmation in federal court.¹²⁷

¹¹⁵ *2017-2021 Basic Agreement*, at 41. (Disputes relating to the Major League Baseball Players Benefit Plan, the Agreement re Major League Baseball Players Benefit Plan and the Agreement regarding dues check-off are not subject to the grievance procedure.).

¹¹⁶ *2017-2021 Basic Agreement*, at 45. (Notably, this procedure differs from discipline-related grievances.); *see also 2017-2021 Basic Agreement*, at 47-49.

¹¹⁷ *Id.* (For a grievance to be eligible for consideration at this stage, it must be presented to the Club representative within “45 days from the date of the occurrence upon which the grievance is based, or 45 days from the date on which the facts of the matter became known or reasonably should have been known to the Player, whichever is later.”).

¹¹⁸ *2017-2021 Basic Agreement*, at 45.

¹¹⁹ *Id.* (The decision shall not be eligible for further appeal if it is not appealed within this timeframe.).

¹²⁰ *Id.* at 45-46.

¹²¹ *Id.* at 46. (A copy of the decision is also furnished to the MLBPA.).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; *see also Kessock, supra* note 31, at 1381. (The Panel Chair is an impartial arbitrator agreed upon by both the MLBPA and the LRD.).

¹²⁵ *2017-2021 Basic Agreement*, at 46.

¹²⁶ *Id.*

¹²⁷ *Kessock, supra* note 31, at 1381.

VI. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Originally applied to Nineteenth Century common law contract cases, the implied covenant of good faith and fair dealing has gained wide acceptance in contemporary practice.¹²⁸ In its early uses, the covenant of good faith and fair dealing was applied to various scenarios in which the express contract language appeared to grant unbridled discretion to a certain party who could alter or completely suppress the opposing party's benefits from a contract.¹²⁹ Later in the Twentieth Century, courts held that there is an implied covenant that neither party to a contract can do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.¹³⁰

Defined, the implied covenant of good faith and fair dealing "is a general assumption of the law of contracts, that people will act in good faith and deal fairly without breaking their word, using shifty means to avoid obligations or denying what the other party obviously understood."¹³¹ A lawsuit (or one of the causes of action in a lawsuit) based on the breach of this covenant is often brought when the other party has been claiming technical excuses for breaching the contract or using the specific words of the contract to refuse to perform when surrounding circumstances or apparent understanding of the parties were to the contrary."¹³²

The U.S. Supreme Court has held that collective bargaining agreements are actually considered more than merely a contract.¹³³ Added, the Tenth Circuit has held that "the covenant of good faith and fair dealings which must inhere in every collective bargaining contract if it is to serve its institutional purposes."¹³⁴ In sum, the covenant of good faith and fair dealing applies to collective bargaining agreements in the same manner it does to contracts.¹³⁵ Having established that the covenant of good faith and fair dealing applies, we next turn to the covenant's meaning and application. Section 205 of the Restatement (Second) of Contracts provides that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."¹³⁶ A comment to Section 205 goes further and states that "good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the *justified expectations* of the other party."¹³⁷ (emphasis added).

¹²⁸ Dubroff, Harold (2006) "The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic," *St. John's Law Review*: Vol. 80 : No. 2, Article 3.

¹²⁹ *Id.*

¹³⁰ *Kirke La Shelle Co v. Paul Armstrong Co.*, 263 N.Y. 79, 87 (N.Y. 1933) (holding "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing").

¹³¹ *Implied Covenant of Good Faith and Fair Dealing*, Cornell Law School, https://www.law.cornell.edu/wex/IMPLIED_COVENANT_OF_GOOD_FAITH_AND_FAIR_DEALING (last visited Apr. 22, 2019).

¹³² *Implied covenant of good faith and fair dealing*, Law.com, <http://dictionary.law.com/Default.aspx?selected=906> (last visited Apr. 22, 2019).

¹³³ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

¹³⁴ *United Steelworkers of America v. New Park Mining Co.*, 273 F.2d 352, 356 (10th Cir. 1959).

¹³⁵ *Id.*

¹³⁶ Restatement (Second) of Contracts § 205 (1981).

¹³⁷ Restatement (Second) of Contracts, § 205 cmt. a (1981).

Despite its wide acceptance in contemporary practice, the covenant of good faith and fair dealing is not applied consistently.¹³⁸ Whether a party is found to have violated the doctrine largely flows from the requirement that parties who have the discretion to carry out certain actions exercise that discretion in line with the spirit of the contract.¹³⁹ In essence, parties will be found to have violated the doctrine if they are found to have utilized discretion in order to “avoid or subvert the express and implied terms and purposes of the contract.”¹⁴⁰

VII. “QUEST FOR A CHAMPIONSHIP”: WHY THIS ARGUMENT LIKELY FAILS

Recent Law Review articles discussing the potential for baseball players to allege violations of the CBA for service time manipulation suggest the “justified expectations” amongst players is that teams will call up players to aid their “quest for a championship.”¹⁴¹ Section 205 of the Restatement (Second) of Contracts states that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.¹⁴² In citing the comment to Section 205, which states that “good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party,” recent articles have suggested that all teams are expected to compete for championships.¹⁴³

Continued, articles have argued the MLBPA, if it filed a grievance on behalf of a player, could assert that the player’s reasonable expectation is that MLB Clubs will call up players to the major leagues when Club officials believe the player has developed fully in the minor leagues and can aid the major league roster in competing for a World Series title.¹⁴⁴ The potential problem with this argument is that, aside from the subjective nature of promotions to the Major Leagues, by keeping a player down and gaining an additional year of control, the team is arguably increasing its championship odds.¹⁴⁵ For instance, if the Chicago Cubs, as they did, sacrifice approximately two weeks of Kris Bryant’s performance on the major league roster during his rookie season in exchange for a full, additional season during what is believed to be his near-prime years, the Cubs are actually maximizing the amount of games they hold the rights to an elite player, and thus increasing their championship odds.¹⁴⁶

¹³⁸ Kessock, *supra* note 31, at 1390 (citing Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2051-52 (2015) (describing the doctrine’s inconsistent application and labeling it as an “underenforced legal norm”).

¹³⁹ Kessock, *supra* note 31, at 1390. (citing Frederick W. Claybrook, *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555, 558 (1997).

¹⁴⁰ Kessock, *supra* note 31, at 1391 (also noting that several jurisdictions have held that the doctrine does not create an independent cause of action. Thus, “any party that wishes to seek respite for breach .. must accuse another party of violating an explicit term of the contract, not a term implied by the good faith obligation).

¹⁴¹ *Supra* note 31.

¹⁴² *Supra* note 137.

¹⁴³ *Supra* note 31; *see also supra* note 137 (explaining it excludes a variety of types of conduct characterized as involving “bad faith” because they violate the community standards of decency, fairness, or reasonableness).

¹⁴⁴ *Supra* note 31.

¹⁴⁵ Baumann, *supra* note 36 (noting the practice of service time manipulation isn’t costing teams wins).

¹⁴⁶ Zimmerman, *supra* note 26 (showing near peak hitting performance can still be expected in age 27-29 seasons, despite the evidence showing that offensive production does not improve over careers; it only declines.)

Added, several of baseball's most prominent front office executives and national reporters have recognized that baseball's current playoff format creates a higher likelihood that the best or most talented teams are expected to win the World Series less frequently than the best or most talented teams in other sports.¹⁴⁷ In short, baseball's regular season is 162 games, which is significantly longer than any other "Big Four" professional sport.¹⁴⁸ Relatedly, baseball is characterized as a "big sample" sport, which means it can, in fact, take many, many games for more talented teams to significantly separate themselves in the standings.¹⁴⁹ After the regular season, baseball's playoff format provides that each of the six division winners are given automatic bids to the Division Series round.¹⁵⁰ The two, non-division winning teams with the best records in each of the American and National Leagues are then paired for a one-game playoff, with the winner of each game advancing to their league's Division Series, respectively.¹⁵¹ Thus, recipients of wild card berths could be the team with the second best regular season record in a given league.¹⁵² Further, once the Division Series matchups are set, the teams are only slated for a five-game series, which inherently creates a high bit of variance in outcome.¹⁵³ Often, teams who are objectively worse than their opponent will prevail in MLB's playoff setting, because the small sample size of the playoff schedule allows for weaker teams to

¹⁴⁷ Chris Teeter, *How do the season's 'best' teams fare in the playoffs?*, (Oct. 8, 2014), <https://www.beyondtheboxscore.com/2014/10/8/6943391/baseball-playoffs-best-teams-angels-wild-card-era-lds-lcs-variance> (last visited Apr. 22, 2019) ("Good teams are not immune to stretches of poor results; results that are due to a range of factors, some of which are out of the team's control. In the end, being the team with the most wins in the regular season guarantees nothing in the playoffs other than an appearance and an extra home game (if necessary). Even with thousands of games worth of information at our disposal, it remains remarkably difficult to predict the outcomes of a single baseball game and accordingly a short series of games. There is such a great deal of variance in the outcomes that the variance can swamp everything we think we know, especially in a short series.); *see also* Joe Osborne, *Which Sport Do Underdogs Win in the Most Often?*, (Mar. 4, 2019), <https://www.odds shark.com/sports-betting/which-sport-do-betting-underdogs-win-most-often> (last visited Apr. 22, 2019) (from a gambling perspective, MLB underdogs win outright more often than in other sports tracked by the article. With an outright win rate of 42.3 percent, underdogs in baseball out-pace underdogs in the NHL, Ultimate Fighting Championship, NFL, NBA, NCAA Basketball and NCAA Football.).

¹⁴⁸ The NBA and NHL regular seasons are both 82 games in duration, while the NFL regular season is only 16 games per team.

¹⁴⁹ Steve Slowinski, *Sample Size*, (Feb. 18, 2010), <https://library.fangraphs.com/principles/sample-size/> (last visited Apr. 22, 2019) (explaining "sample size" and its significance in baseball.).

¹⁵⁰ Scott Kendrick, *How the MLB Playoffs Work*, (Aug. 12, 2018), <https://www.thoughtco.com/how-mlb-playoffs-work-321331> (last visited Apr. 22, 2019) (explaining MLB's playoff format).

¹⁵¹ *Id.*

¹⁵² *Id.*; *see also* 2018 MLB Standings, <https://www.baseball-reference.com/leagues/MLB/2018-standings.shtml> (last visited Apr. 22, 2019) (The Chicago Cubs finished the 2018 regular season tied for the best record in the National League. However, because division rival Milwaukee also tied for the most wins in the National League, the two teams were forced to play a one-game tiebreaker to determine the winner of the National League Central Division. With Milwaukee edging the Cubs in the tiebreaker game, the Cubs were then slotted to play in the one-game Wild Card game against the Colorado Rockies, which they lost. Despite finishing the regular season tied for the most wins in the National League, the Cubs did not play in the Division Series round.

¹⁵³ *Supra* note 150; *see also* FoxSports, *The inevitable variance of postseason baseball*, <https://www.foxsports.com/mlb/just-a-bit-outside/story/mike-trout-clayton-kershaw-and-the-inevitable-variance-of-postseason-baseball-100714> (last visited Apr. 22, 2019) (highlighting examples of the high variance nature of the MLB postseason).

advance during a small, non-determinative window.¹⁵⁴ In short, teams have to be both very fortunate and very good to advance in baseball's playoff format.¹⁵⁵

The greater point is that it is extremely difficult to win a World Series, even if you have the strongest team in baseball in a given season.¹⁵⁶ With that general understanding, team executives often characterize their team building strategy as one that gives their respective team as many postseason opportunities as possible, knowing just one playoff appearance does not yield a high probability of winning a title.¹⁵⁷ The corollary is that teams will attempt to build rosters that have a good probability of reaching the playoffs for multiple seasons—meaning teams prioritize the acquisition of players who are under team control and not a threat to leave via free agency.¹⁵⁸ Using the Kris Bryant example once more, the Cubs have been expected to compete not just during Bryant's initial six years of service, but beyond that as well.¹⁵⁹ Thus, it can be argued that teams are doing their best to compete for a championship by taking advantage of the current CBA's service time rules and holding a player down doesn't necessarily harm their "quest for a championship."

¹⁵⁴ *Id.*

¹⁵⁵ Julian Ryan and Barrett Hansen, *UNDESERVING CHAMPIONS: EXAMINING VARIANCE IN THE POSTSEASON*, (Sept. 30, 2013), <http://harvardsportsanalysis.org/2013/09/undeserving-champions-examining-variance-in-the-postseason/> (last visited Apr. 22, 2019) (noting MLB produces postseason champions least aligned with regular season performance; "What is remarkable is just how bad the MLB playoffs really are. Owing to the length of its 162 game season, one might think that regular season performance would actually be a fairly good indicator." Continued, "the MLB can lay claim to the least deserving postseason winner.").

¹⁵⁶ *Id.*

¹⁵⁷ Adam Kilgore, *'Watching the fates unwind'*, (Oct. 8, 2009), https://www.boston.com/sports/extra-bases/2009/10/08/watching_the_fa (last visited Apr. 22, 2019) (Theo Epstein is quoted, describing the mission statement of the Boston Red Sox, "In our mission statement, part of it is we want to operate with a long-term view to put ourselves in a position to win 95 games and get in the playoffs as often as we possibly. Now we've done it six out of seven years. Part of the thinking is that if you make the postseason multiple times, you improve your chances of making the World Series. Theoretically, if you're in eight times, you'll win one World Series. Well, we've been in five times. This is our sixth time in. The first five times in, we won two World Series. I'm not going to [complain] about that. I don't believe in building a team with the season goal of winning the World Series, and the next year you look up, you're old all of a sudden, you don't have any options. 'Now we're a 75-win team. Hey, we won the World Series two years ago.' It doesn't work that way. We want to try to always operate with the broadest possible lens, so we have a solid foundation so that every year, or just about every year, we'll be in a position to win 95 games and get in, and then trust our players, trust our manager, trust our coaching staff, trust our advanced scouting, trust our ability to perform under pressure to go win a World Series." In addition, Oakland Athletics executive Billy Beane stated, in *Moneyball*, that "My job is to get us to the playoffs. What happens after that is [expletive] luck.").

¹⁵⁸ Patrick Mooney, *Is Theo working on another big deal for Cubs? 'Ask wetbutt'*, (July 14, 2017), <https://www.nbcsports.com/chicago/chicago-cubs/theo-working-another-big-deal-cubs-ask-wetbutt> (last visited Apr. 23, 2019) (Theo Epstein is quoted, describing how the Cubs' acquisition of Jose Quintana in 2017 and how his manageable contract opens up the possibility of acquiring another player.).

¹⁵⁹ CBS, *Theo Epstein Has A Response Off The Top Rope For Anyone Worried About What's Left In Cubs' Farm System*, (July 19, 2017), <https://chicago.cbslocal.com/2017/07/19/theo-epstein-cubs-farm-system-response-criticism/> (last visited Apr. 23, 2019) (Theo Epstein, in discussing the state of the Cubs' farm system in 2017, mentioned he was hopeful the team was in a long cycle of winning. He added, "[Y]ou could say it started in 2015, we'd like it to last at least seven years. If we have an unbelievable run – which we haven't accomplished yet and there's so much work to do – but if we have a run of contention from 2015 through 2021, I guarantee you that at that point we will have fully replenished the farm system, and the cycle starts over again."); *see also* Craig Edwards, *A Modest Proposal to End Service Time Manipulation*, (Feb. 27, 2019), <https://blogs.fangraphs.com/a-modest-proposal-to-end-service-time-manipulation/> (last visited Apr. 23, 2019) (noting that Kris Bryant, had he not been held down at the beginning of the 2015 season, would have been eligible for free agency after 2020. Now, he will first reach free agency following the conclusion of the 2021 season.).

In addition, it's unclear whether the MLBPA, if it were to file a grievance on behalf of a player, would have any success asserting players' had a "justified expectation" that teams would not operate for profit. Baseball's collective bargaining agreement outlines the league's revenue sharing plan.¹⁶⁰ Moreover, the CBA's Management Rights section notes that "nothing in this Agreement shall be construed to restrict the rights of the Clubs to manage and direct their operations in any manner whatsoever except as specifically limited by the terms of this Agreement."¹⁶¹

VIII. AN ALTERNATIVE ROUTE: THWARTING UNION ENTRY FOR MONETARY GAIN

While recent articles present a plausible argument for defeating service time manipulation, a stronger argument may exist based on the same legal theory.¹⁶² As stated, the covenant of good faith and fair dealing is imposed on parties to every contract.¹⁶³ Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.¹⁶⁴ Instead of relying on teams' "quest for a championship," the MLBPA could assert that service time manipulation thwarts a player's entry into the union, and thus is a breach of the covenant of good faith and fair dealing.¹⁶⁵ Minor league baseball players are not recognized as union members until they are called up to the big leagues.¹⁶⁶ Based on Article II of the CBA, the MLBPA could assert that players are justified in expecting that MLB teams will not attempt to thwart a player's entry into the union for monetary gain.¹⁶⁷ The pertinent language from Article II provides, "the Clubs recognize the Association as the sole and exclusive collective bargaining agent for all Major League Players, and *individual players who may become Major League Players during the term of this Agreement*, with regard to all terms and conditions of employment."¹⁶⁸ (emphasis added).

The covenant of good faith and fair dealing is meant to protect the spirit of the CBA, not necessarily the letter, and that is the basis of this argument.¹⁶⁹ While the CBA does not explicitly provide for union membership until players are called up, it does expressly provide that the

¹⁶⁰ 2017-2021 *Basic Agreement*, at 130-149.

¹⁶¹ *Id.* at 105.

¹⁶² Ring, *supra* note 37.

¹⁶³ *Supra* note 136.

¹⁶⁴ *Id.*

¹⁶⁵ Ring, *supra* note 37.

¹⁶⁶ *Id.*; see also *MLBPA's Frequently Asked Questions*, *supra* note 38 (explaining eligibility for membership, "All players, managers, coaches and trainers who hold a signed contract with a Major League Club are eligible for membership in the Association. In collective bargaining, the Association represents around 1,200 players, or the number of players on each Club's 40-man roster, in addition to any players on the disabled list.").

¹⁶⁷ Ring, *supra* note 37.

¹⁶⁸ 2017-2021 *Basic Agreement*, at 1.

¹⁶⁹ Ring, *supra* note 37; see also Catherine Pastrikos Kelly, *What You Should Know about the Implied Duty of Good Faith and Fair Dealing*, (July 26, 2016), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2016/duty-of-good-faith-fair-dealing/> (last visited Apr. 23, 2019) (noting "'Fair dealing' usually requires more than just honesty. It generally requires that a party cannot act contrary to the 'spirit' of the contract, even if you give the opposing party notice that you intend to do so. In general, the duty of good faith and fair dealing means, for example, that parties cannot evade the spirit of the bargain.").

MLBPA is the sole and exclusive bargaining agent of “individual players who may become Major League Players during the term of this Agreement.”¹⁷⁰ The argument is that players are justifiably expecting Clubs not to artificially delay union membership, as future players were an anticipated part of the CBA.¹⁷¹ Union membership entails several benefits, including minimum salary, which is significantly higher than that of non-union members.¹⁷² Meanwhile, minor league players are not unionized, nor do they have the support of the MLBPA.¹⁷³ Most minor league baseball players make between \$3,000 and \$7,500 over a five month season.¹⁷⁴ Notoriously, Major League Baseball teams are under no obligation to pay minor league baseball players the federally-mandated minimum wage.¹⁷⁵

As discussed later, teams are readily aware of the dangers in discussing how service time fits into the decision of promoting minor league players.¹⁷⁶ Even so, recent law review articles have deduced that the MLBPA would be able to use circumstantial evidence in its claim that service time manipulation is a violation of the CBA.¹⁷⁷ Included in this suggestion is the idea that the Players Association could point to the dates when certain players were called up to the big leagues, specifically those that were called up in close proximity to the 172-day deadline.¹⁷⁸ Added, the MLBPA could call on team staff to see if any actual development was required of the player in between their demotion and eventual call up.¹⁷⁹ In sum, individual grievances would have case-specific circumstantial evidence to rely on, and the MLBPA would not be without options in refuting a Club’s claim that a player’s call-up was entirely removed from any service time-related consideration.¹⁸⁰

IX. POTENTIAL COUNTER-ARGUMENTS

Any argument asserting service time manipulation is a violation of baseball’s CBA must first establish the existence of service time manipulation by Clubs in the first place.¹⁸¹ The

¹⁷⁰ 2017-2021 *Basic Agreement*, at 1.

¹⁷¹ Ring, *supra* note 37.

¹⁷² *Id.*; see also *MLBPA Frequently Asked Questions*, *supra* note 38 (“The MLBPA is the collective bargaining representative for all current Major League Baseball players. The Association also assists players with grievances and salary arbitration. The Association works closely with MLB in ensuring that the playing conditions for all games involving Major League players, whether the games are played in MLB stadiums or elsewhere, including internationally, meet proper safety guidelines. The Association also serves as the group licensing agent on behalf of the players . . . “The minimum salary for the 2019 season is \$555,000.”).

¹⁷³ Michael Arria, *Organize the Minor Leagues*, (Sept. 29, 2017), <https://www.jacobinmag.com/2017/09/minor-league-baseball-union> (last visited Apr. 23, 2019).

¹⁷⁴ *Id.*

¹⁷⁵ Associated Press, *Baseball minor leaguers to lose minimum wage protection*, (Mar. 22, 2018), <https://www.usatoday.com/story/sports/mlb/2018/03/22/baseball-players-in-minors-to-lose-minimum-wage-protection/33184955/> (last visited Apr. 23, 2019) (noting MLB spent “\$1.32 million on lobbying expenses in both 2016 and 2017, up from \$330,000 in 2015, according to the nonpartisan Center for Responsive Politics. MLB paid \$400,000 each of those years to an outside firm, the Duberstein Group, which reported lobbying the House and Senate on the issue, as did MLB’s in-house lobbyist.”).

¹⁷⁶ Kessock, *supra* note 31, at 1393. (noting teams are cognizant of the issue with admitting ulterior motives and vehemently deny that service time is a factor in the decision to promote or demote or player).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1394. (noting that Kris Bryant, as one example, was called up just one day after the deadline).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Frederick W. Claybrook, *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555, 558 (1997). (discussing inquiries into violation of the obligation of good faith).

inherent difficulty in doing so is that there is not a standard by which a player, his representatives, or the MLBPA can work from.¹⁸² The CBA does not provide a baseline for when players can reasonably expect to be called up to the Major League roster, nor do grievances establish any sort of precedent on when holding a player down transforms to manipulation.¹⁸³ Determining when a player is “ready” to be called up is largely subjective, no matter the circumstances.¹⁸⁴ All told, no player could be described as having no flaws.¹⁸⁵ Even in the cases of Bryant, Acuña, and Guerrero Jr., scouting reports suggested the players were not elite in every measure of evaluation from a “tools” perspective.¹⁸⁶

Major league Clubs have also been wise to not create a trail of blatant and obvious service time manipulation in discussing specific players with the press.¹⁸⁷ Any potential grievance would largely be aided by a team executive’s admission that the purpose of not calling a player up was service time-related. However, only extremely rarely do teams even hint at the service time issue when discussing a prospect’s potential call-up.¹⁸⁸ These practical concerns are multiplied by the difficulty which exists in gauging MLB’s grievance procedure.¹⁸⁹

X. USING COLLECTIVE BARGAINING TO RESOLVE THE ISSUE

Acknowledging the challenges of successfully remedying service time manipulation, the players’ best opportunity to eliminate the issue likely lies within its collective bargaining rights.¹⁹⁰ After the expiration of the current CBA in 2021, the owners and the MLBPA will have to reach another agreement, if the sport is to continue its uninterrupted run of labor peace.¹⁹¹ The most obvious proposal from the players’ perspective is a reduction in required service time prior to free agency rights kicking in. If, for instance, free agency occurred after five years instead of

¹⁸² Kessock, *supra* note 31, at 1394. (noting a claim’s viability “enters the great unknown when it is brought into the practical reality of the MLB grievance-arbitration procedures.”).

¹⁸³ *See generally* 2017-2021 Basic Agreement (CBA agreement between the 30 Major League Clubs and the MLBPA).

¹⁸⁴ Kessock, *supra* note 31, at 1393. (noting “assignment to the major league roster involves discretion that is exercised by highly sophisticated player personnel departments. Alleging that a Club used this vast discretion for unexpected reasons may be a daunting task unless a Club official clearly admits to ulterior motives.”).

¹⁸⁵ Ring, *supra* note 37.

¹⁸⁶ MLB Pipeline, 2013 Kris Bryant scouting report, <http://mlb.mlb.com/mlb/prospects/watch/y2013/> (last visited Apr. 23, 2019) (MLB.com rated Kris Bryant’s present running and fielding tools as 40 (on the 20-80 scouting scale); *see also* Kiley McDaniel, *Scouting Explained: The 20-80 Scouting Scale*, (Sept. 4, 2014), <https://blogs.fangraphs.com/scouting-explained-the-20-80-scouting-scale/> (last visited Apr. 23, 2019) (which means Bryant was rated as having below average fielding and running tools); *see also* MLB Pipeline, Vladimir Guerrero, Jr.’s scouting report, <http://m.mlb.com/prospects/2018> (last visited Apr. 23, 2109) (denoting Guerrero Jr.’s running and fielding as 45-grade tools.); *see also* Jonathan Mayo, *Believe the hype: Why Acuna is No. 2 Prospect*, (Apr. 25, 2018), <https://www.mlb.com/news/what-to-expect-from-ronald-acuna-in-mlb-c273777824> (last visited Apr. 23, 2019) (noting Acuña’s strike-out rate as a potential weakness in his game).

¹⁸⁷ Baumann, *supra* note 36. (noting that Twins general manager Thad Levine received substantial backlash after commenting on the Club’s decision not to bring Byron Buxton back to the majors in September of 2018: “I think part of our jobs is we’re supposed to be responsible to factoring service time into every decision we make.”).

¹⁸⁸ *Id.*; *see also* Kessock, *supra* note 31, at 1393 n. 183 (noting several case studies where team executives vehemently denied a team’s decision to promote a player had anything to do with service time.).

¹⁸⁹ Kessock, *supra* note 31, at 1394 (acknowledging “the claim’s viability, however, enters the great unknown when it is brought into the practical reality of the MLB grievance-arbitration procedures.”).

¹⁹⁰ Kessock, *supra* note 31, at 1396 n. 201.

¹⁹¹ 2017-2021 Basic Agreement, at 1. (providing the CBA covers 2017-2021 seasons.).

the current six, players on average would reach free agency at a younger age, and thus would be more attractive on the open market, creating an increase in demand.¹⁹² Another popular proposal amongst pundits is the reduction of “service days” required to establish a service year.¹⁹³ If players have to accrue fewer service days to establish a year of service, teams may be incentivized to call them up earlier, as the potential loss in production would increase the longer the player is left off the big league roster.¹⁹⁴

At the outset, it would seem that owners would be unwilling to agree to either of these proposals without some type of compromise on the players end on some other bargaining piece. In addition, any reduction in service days or years required before free agency would still leave the door open for service time manipulation. No matter where lines are drawn, the possibility that teams will artificially hold players back will always remain if free agency is dictated by service time.

Another potential avenue for bargaining from the players’ perspective is the minimum league salary. Players in seasons one to three of their careers are subject to team set salaries.¹⁹⁵ If league minimums are increased, this would ensure an automatic boost to every player that reaches the big leagues and collects a salary, off-setting a portion of losses due to service time restraints. In comparison to the loss of a year of free agency, however, any gain in league minimum salary may appear nominal.

Other commentary on the subject has focused on why using age, instead of service time, may be the best avenue for determining players’ eligibility for free agency.¹⁹⁶ The rationale for a change to this system is that it would preserve team’s control over the earliest seasons of a player’s career, while eliminating any benefits to manipulating when a player actually gets called up.¹⁹⁷ By nature, free agency would then be dictated by players’ date of birth, rather than the Club’s discretion.¹⁹⁸

XI. CONCLUSION

Major League Baseball has sustained labor peace between team owners and the MLBPA for nearly 25 years. Troubled by issues with free agency and the control teams are leveraging over players’ services, however, notable figures amongst the Players Association have already threatened a strike when the current CBA is set to expire in 2021. A tenable argument seemingly exists if the MLBPA asserts that its “justified expectations” were that teams would not thwart players’ entry into the union for pecuniary gain, as Article II of the CBA recognizes that the MLBPA is the sole and exclusive bargaining agent for all Major League Players, and individual

¹⁹² Zimmerman, *supra* note 26 (investigating players’ aging curves.)

¹⁹³ Mike Petriello, *It’s Time to Fix Baseball’s Broken Service Time System*, (Mar. 16, 2015), <https://blogs.fangraphs.com/its-time-to-fix-baseballs-broken-service-time-system/> (last visited Apr. 23, 2019).

¹⁹⁴ *Id.*

¹⁹⁵ *Supra* note 77.

¹⁹⁶ Mike Axisa, *Instituting a free agency age could solve MLBPA’s two biggest problems in the next CBA*, (Sept. 7, 2018), <https://www.cbssports.com/mlb/news/instituting-a-free-agency-age-could-solve-the-mlbpas-two-biggest-problems-in-the-next-cba/> (last visited Apr. 23, 2019); *see also* Jonah Keri, *How to fix MLB service time dilemma impacting Vlad Jr.*, (Sept. 7, 2018), <https://www.sportsnet.ca/baseball/mlb/fix-mlbs-service-time-dilemma/> (last visited Apr. 23, 2019); *see also* Carleton, *supra* note 83.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

players who may become Major League Players during the term of the agreement. While unknown features of grievance procedure and subsequent arbitrations leave outsiders in the dark concerning the viability of an MLBPA challenge to teams' abuse of the clearly-defective service time system, there is a plausible argument that service time manipulation violates the spirit of the CBA, which is what the covenant of good faith and fair dealing is in place to protect against. To avoid a work stoppage from occurring at the expiration of the current CBA, MLB and the Players Association would be best served to address the issue of service time manipulation at the outset during collective bargaining negotiations, as the practice has contributed greatly to disagreements concerning the economic landscape of the game.