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## Ball, Bat and Bar

Harold Seymour\*

**M**OST AMERICANS ASSUME that they live under one set of laws which govern everybody. They also think that while monopolies and their abuses were once a problem, regulatory measures have long since eliminated or controlled them. The business of organized baseball proves that both these assumptions are mistaken. Recent operations of some baseball "companies" have underscored the falsity of these assumptions.

The baseball business operates under its own complicated body of private law, and has been doing so ever since the business got its real start with the formation of the National League in 1876. Organized baseball is also a monopoly which has long ignored the anti-trust laws and continues to do so with impunity. Its pretense to be a "sport" has become farcical.

The salient facts about the dimensions and operational methods of this commercialized amusement business reveal its monopolistic nature and the methods it uses to enforce its fiat. Organized baseball consists of a vast conglomeration of approximately 243 professional baseball clubs, organized into two eight-club major leagues and about 28 minor leagues; a far-flung network extending throughout the United States and into several foreign countries. Its economic importance is very considerable. Total annual receipts are in the neighborhood of one hundred million dollars. About 10,000 players, besides an enormous number of other men and women, are employed, and over 50,000,000 people attend 30,000 "games" every year.<sup>1</sup>

The sale of the Detroit American League club, for more than five million dollars in 1956, is another measure of its economic proportions.<sup>2</sup>

This combine of clubs and leagues is governed by several major documents: the constitutions of the two major leagues;

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<sup>1</sup> A convenient source for this kind of statistics is *The Baseball Blue Book*, published annually by Heilbroner's Baseball Bureau at Fort Wayne, Indiana.

<sup>2</sup> *Sporting News* (St. Louis), July 18, 1956.

the Major League Agreement and Major League Rules, binding the two majors together; the National Association Agreement, regulating the minor leagues; and the Major-Minor League Agreement and Major-Minor League Rules, tying together the two major and all the minor leagues. These agreements are administered by a so-called Commissioner, assisted by an Executive Council.<sup>3</sup>

Whether or not this combine is big business is a matter of relativity. Compared with General Motors it is small indeed, but on the other hand it is certainly no neighborhood cigar store operation. Club owners, when they concede that they are engaged in a business, plead its smallness. But one of them let the cat out of the bag back in 1951, during their squabble with Happy Chandler, who was then Commissioner. He said: "We can't have a commissioner who makes too many mistakes. We have a big investment in this business. Baseball is big business." Chandler's reply is equally revealing: "Big business, huh? That shows the kind of stupid men I've had to deal with in baseball. For years I have tried to protect baseball from the label of big business in Washington. I steered them to favorable decisions from the courts and the Federal Communications Commission because I could plead we weren't big business. If they want a commissioner for their big business, they'll get one—but he'll be under Federal Government supervision, and subject to all the regulations and restrictions of all other big business. They ought to think about that when they call baseball big business. I always regarded it as our National Game that belonged to 150 million men, women and children, not to 16 special people who happen to own big league teams."<sup>4</sup>

Any evaluation of the economic significance of organized baseball must go beyond the limits of the industry itself and take into consideration numerous auxiliary enterprises, such as the concession business, advertising, sporting goods, transportation, hotels, restaurants, newspapers, and magazines. No business in America gets as much free space in the newspapers as does baseball. Practically every business in any given community has a direct or indirect stake in the local baseball club, and therefore a vested interest in promoting "loyalty" to and enthusiasm for the local nine—or, in the absence of a team, trying to secure one.

<sup>3</sup> The Little Red Book of Major League Baseball (Boston), published annually.

<sup>4</sup> Quoted in *Sporting News*, March 21, 1951.

A recent survey showed that getting a major league baseball club increased business in Milwaukee by more than 25 million dollars, including restaurants (\$2,007,449.73), retail stores (\$1,-632,951.34), night clubs (\$939,265.47), miscellaneous items (\$791,-929.71), hotels (\$110,501.82).<sup>5</sup>

The cash nexus as related to baseball was clearly shown by the New York Board of Trade late in the season of 1955, when it sent a telegram exhorting Casey Stengel, Yankee manager, to win the pennant because a subway World Series with the Dodgers "will bring many visitors to New York and thereby stimulate store sales, hotel reservations and travel accommodations." Clinching the pennant, Stengel was told, would "bring happiness and cheer to all New York businessmen."<sup>6</sup>

The business realities of this so-called "sport" were even more plainly exposed in the recent efforts of Los Angeles and San Francisco to lure the Giants and Dodgers away from New York. The Giants definitely are leaving New York for San Francisco, making little pretense that "sport" is even *one* of their considerations in so doing. The Dodgers are still chaffering for the most lucrative offer, at this writing. President Abe Stark of New York's City Council accused the mayors of the West Coast cities of "organized piracy," saying that he "deeply resented" the "unsportsmanlike attack" in "attempting to take business away from New York." The San Francisco mayor, George Christopher, was equally statesmanlike in his reply: "If I can steal the Giants away from New York, I will do it"<sup>7</sup>—and he succeeded, too. Theodore Roosevelt knew what he was talking about when he said, "When money comes in at the gate, sport flies out at the window."

Cities rush to give away tax-free assets, at their taxpayers' expense, to get a team. The legality of such gifts is at least questionable. This is compulsory support of the club, by all taxpayers.

Organized baseball uses a number of restrictive practises in order to maintain its monopoly.<sup>8</sup> They may be divided into two broad categories—those governing its employees (the players), and those controlling the consumer market. The industry has

<sup>5</sup> *Ibid.*, May 22, 1957. Also see William B. Furlong, *That "Big League" Yearning*, New York Times Magazine, June 16, 1957, pp. 14, 16.

<sup>6</sup> Cleveland Press, September 10, 1955.

<sup>7</sup> Sporting News, May 29, 1957.

<sup>8</sup> The organizational and administrative structure of organized baseball is set forth in the major documents governing the game, mentioned above.

established a monopsony (buyers' monopoly) control over its manpower; that is, the employers have agreed not to compete for the services of the players. This control is established through use of a uniform contract<sup>9</sup> throughout organized baseball. All material points of this contract, regardless of league or classification, are the same, and the only subject of negotiation between a club and a player is the matter of compensation.

Most important, every contract contains the much-debated "reserve clause," an ingenious device which gives the club a continuing option on the services of the player and protects its property rights in him. Therefore when a player signs his first contract in organized baseball, he is in reality signing for the duration of his baseball career, because he not only agrees to perform for the period specified (usually one season), but allows the club to "reserve" him for the subsequent season. Since each succeeding contract which he signs contains the same provision, he cannot escape. The club can terminate the agreement upon thirty days' notice, or can assign the contract to another club, but the player cannot perform for any other team unless his contract has been assigned or he has been released. By signing with one club, the player surrenders his freedom ever again to bargain with and sell his services to the highest bidder in the baseball marketplace. Once in organized baseball, if a player refuses to sign his contract, or ignores the reserve rule, no other club will employ him. He must either come to terms with his particular club or quit his profession. To enforce the contract, organized baseball uses extra-legal methods, including fines and the blacklist. The reserve clause, introduced in 1879, was originally a secret agreement among owners to hold down salaries by agreeing not to compete for the services of five designated players on each team. Realizing the advantage of such an arrangement, the owners not only extended the reserve until it included all players, but they also used it as a weapon in trade wars with rival leagues, banning reserved players who joined competitors.

Another important factor in organized baseball's labor relations is its system of vertical concentration, more commonly known as the "farm system," which enables the major league clubs to control possibly as much as 90% of the supply of professional players, and hence the careers of these men. Either by

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<sup>9</sup> Uniform Player's Contract, American League of Professional Baseball Clubs. Sample copy in author's personal files.

outright ownership or through various agreements with minor league clubs, a parent major league club may control hundreds of players at one time,<sup>10</sup> keeping them in cold storage with the reserve clause, either to be used later as replacements for the big league club, or just to prevent rival clubs from getting them. To be sure, there are mitigating factors in this situation, such as the draft rule and the waiver rule, but these are largely ineffective and commonly circumvented, so that a big league club can keep a promising player under cover by one means or another for at least seven years, even though he might be good enough to be playing with another major league team.<sup>11</sup>

There is no collective bargaining in the baseball business. Four major attempts at unionization in the course of baseball's history have all met with failure. At present, there is a players' representation plan under which they may petition the owners for changes, but the owners are free to accept or reject the requests. In recent years, the major league owners have granted some important concessions, such as a minimum salary, limitation on salary cuts, expense money during spring training, and a pension plan. But these have come out of fear of competition from the Mexican League, the threat of a players' union, and pressure from the Justice Department.

Other restrictive practises employed by organized baseball establish a monopoly of consumer markets. Ever since the business was established, it has divided the consumer markets by giving each club "territorial rights" over the area in which it operates. The idea was to prevent several clubs from competing in one city and consequently having attendance spread so thin among them that none could keep out of the red. Territorial rights limit the number of exhibitions given and the customer's choice of those he will see. The system also makes it possible for clubs to fix admission prices.

Territorial rights also make it virtually impossible for outsiders to enter the baseball business. In instances where they have tried, they have been branded "outlaw" by organized baseball. Bitter trade wars have ensued, in which organized baseball fought with boycotts, blacklists, bidding up player salaries, and

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<sup>10</sup> *Sporting News*, July 3, 1957.

<sup>11</sup> *Organized Baseball*; Report of the Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary, House Report, No. 2002, 82d Congress, 2d Session (Washington, 1952), pp. 144-156, 158.

court action; resulting either in the destruction of the rival group or its merger with organized baseball.<sup>12</sup>

Not only can each major league club veto the entrance of a rival club into its territory, but it is also prevented from moving its own franchise to another city without the unanimous consent of the clubs in its own league and a majority approval of those in the other major league. As a result, the major leagues have not kept abreast of the great population shifts which have been taking place in America. The alignment of their clubs remained the same for half a century after being set up in 1903, and it was not until 1953 that the mold was broken with the shift of the Boston National League team to Milwaukee. As a result of this rigidity, clubs fortunate enough to be located in lucrative cities prospered, while those stuck with smaller ones did not. The disparity in financial resources was reflected in the caliber of their teams. So a system supposedly established "to preserve and stimulate competition for the League pennants"<sup>13</sup> has had the opposite effect.

Organized baseball has frequently been piously equated with democracy, or at least pointed to as a symbol of it. As a newspaper columnist once expressed it, "You would think that the Declaration of Independence carried a complete set of baseball rules as a postscript."<sup>14</sup>

During World War I, John K. Tener, then President of the National League, asserted: "This is a war of democracy against bureaucracy. And I tell you that baseball is the very watchword of democracy. There is no other sport or business or anything under heaven which exerts the leveling influence that baseball does. Neither the public school nor the church can approach it. Baseball is unique. England is a democratic country, but it lacks the finishing touch of baseball."<sup>15</sup>

More recently, Commissioner Ford Frick said that baseball exemplified the Bill of Rights because of its freedom of assembly, religion, speech, and opportunity.<sup>16</sup> There is much to be said for

<sup>12</sup> See, for example, Harold Seymour, *St. Louis and the Union Baseball War*, 51 *Missouri Historical Review*, 257-269 (Kirksville, Missouri, April, 1957).

<sup>13</sup> Major League Rules, 1C, in, *Organized Baseball; Hearings Before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives, Serial No. 1, Part 6, 82d Congress, 1st Session* (Washington, 1952), p. 1125.

<sup>14</sup> *Cleveland Press*, October 5, 1950.

<sup>15</sup> 19 *Baseball Magazine*, 227 (Boston, May, 1917).

<sup>16</sup> Speech, November 10, 1951, before the City Club, Cleveland, Ohio.

Frick's contention, as far as it applies to the atmosphere on the playing field and in the ball park, and to the opportunities for young men trying to become professional players—especially after baseball erased the color line which it had maintained for decades. But the Commissioner neglected to point out that the organization and economic structure of the game is anything but democratic. Its restrictive labor practises and monopolistic division and control of consumer markets are hardly in keeping with traditional American belief in freedom of individual opportunity, free enterprise, and competition. They do not square with the American ideas that people should be free to work for whom they please, offer their services to the highest bidder, and enter any business they wish.

What has been the position of the courts with respect to organized baseball? <sup>17</sup> The key case, of course, is *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), in which Justice Holmes ruled that the business of giving baseball exhibitions for profit was not "trade or commerce in the commonly-accepted use of those words," because "personal effort, not related to production, is not a subject of commerce"; nor was it inter-state, because the movement of clubs across state lines was merely "incidental" to the business. It should be noted that, contrary to what many believe, Holmes did call baseball a business. Time and again those who have not bothered to read the text of Holmes's decision have claimed that he said that baseball was a sport and not a business; or in discussing the baseball business they often introduce a note of doubt with the qualifying phrase, "if it is a business."

Lately, much has been heard of the comfortable cliché that baseball is too much of a sport to be a business and too much of a business to be a sport.<sup>18</sup> Actually, the professional end of it is not a sport at all. Sport means participation in an activity for its own sake—for the sheer pleasure and recreation one derives from it. Professional ball players, as one of them once pointed out, are first of all businessmen.<sup>19</sup> Some have even incorporated themselves. Their primary reason for playing is to

<sup>17</sup> Of the scholarly articles on this subject, probably the best and most comprehensive is Peter S. Craig, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 *Yale L. J.*, 576-639 (1953).

<sup>18</sup> Attributed originally to Phillip K. Wrigley, Jr., President of the Chicago National League Club.

<sup>19</sup> Grover Cleveland Alexander, cited in John R. Tunis, *Sport\$, Heroics, and Hysterics*, p. 5 (New York, 1928).



get their pay checks and maybe the world series pot of gold. Furthermore, the ethic of the professional game is anything but sporting. It condones taking all one can get under the rules and a little bit more. Arguing and brawling with opposing players and umpires are part of the struggle for victory. The role of the spectators is basically passive. Their thrills are vicarious. Other than using their lung power, about the only exercise they get is on the seat of their pants.

All this is not to say that professional baseball is not a good thing, or does not have any beneficial attributes. To the contrary, a lengthy catalogue in its favor could easily be prepared. But it should not be regarded as a sport any more than any other entertainment business, professionalized college football included.

If the Holmes interpretation ever made sense, it soon was completely discredited by changes in the Supreme Court's view of the criteria of interstate commerce, and by changes in professional baseball itself, such as its use of radio and TV in promoting the game across interstate lines. Nevertheless, organized baseball sheltered safely under the Holmes decision until 1949, when the Second Circuit Court of Appeals, in *Gardella v. Chandler*, 172 F. 2d 402 (C. C. A. 2, 1949), upheld the complaint of a player blacklisted by organized baseball for jumping to the then "outlaw" Mexican League in response to a higher bid for his services. In this case Judge Frank called the Holmes decision an "impotent zombie" and the reserve clause monopolistic. But organized baseball staved off further difficulty by settling the *Gardella* case and that of another player, Stuart Martin, out of court.

Several years later the Supreme Court, in *Toolson v. N. Y. Yankees*, 346 U. S. 356 (1953) rehearing denied, 346 U. S. 917 (1953), turned down an appeal from the lower courts as follows: "Without re-examination of the underlying issues, the judgments below are affirmed on the authority" of the Federal Baseball case "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." Justices Burton and Reed dissented. This denial also included two other similar cases.

This year the relation between the Supreme Court and organized baseball was climaxed, oddly, by the court's decision in a football case, *Radovich v. National Football League*, 25 L. W. 4152 (U. S., 1957). The court held against professional football,

deciding that it came within the jurisdiction of the antitrust laws. Apparently feeling the need to explain why professional baseball was not treated the same, the court said:

"In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by Federal baseball. The Court did this because it was concluded that more harm would be done in overruling Federal baseball than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority stretching over many years . . . were we considering the question of baseball for the first time upon a clean slate we would have no doubts"—that baseball should come under the antitrust laws.

This placed the court in the seemingly absurd position of, first, discriminating against one professional sport as against another; second, admitting that the *Holmes* decision was an error; and third, compounding the error by upholding it, purely on the basis of expediency.

This anomaly should give pause to those who always contend that we live under a government of laws, not of men—always, that is, until the Supreme Court upsets them with decisions like the recent ones upholding fundamental American civil rights. The work of the Court in these baseball cases should dispel any doubt that laws must necessarily be interpreted by men. It should make plain that the Supreme Court justices do not dwell on Mount Olympus in lofty objectivity, handing down decisions coldly, dispassionately, and impersonally. The baseball decisions demonstrate what has been shown in countless past instances—that the Supreme Court justices interpret the law in the light of their own knowledge, background, and experience, and in keeping with the climate of opinion which prevails at the time.

What, then, is the prospect for organized baseball and the antitrust laws, now that the Supreme Court has, in effect, handed the problem over to Congress?<sup>20</sup> Undoubtedly, changes will be made. The question is, what will they be? There are three

<sup>20</sup> For a good brief summary of the current situation, see report of Spencer M. Beresford, American Law Division, Library of Congress, published in the Congressional Record, Wednesday, July 3, 1957, p. A5325.

broad possibilities: Congress can exempt baseball from the antitrust laws; it can place the business under them; or it can take the middle ground of partial application of the laws.

Baseball executives and their supporters in Congress want their blanket exemption continued. It is doubtful if they will succeed in getting it. Organized baseball has some very obvious abuses. The Commissioner and the owners admitted as much when they appointed committees to re-examine the structure of the business, following the Congressional investigation of 1951. How much progress will be made as a result remains to be seen. Baseball's past history reveals little evidence of the owners' ability to police themselves. And even if they did succeed in cleaning their own house, it is still doubtful that they should have immunity. There would be no assurance that such benevolent self-regulation would continue. Giving special dispensation to professional baseball would probably also open the way for other types of business to plead for similar special privileges. As far as that goes, the goodness or badness of the baseball monopoly is beside the point. The issue is whether it is legal or illegal. Judge Frank was getting at this point in his reply to former baseball Commissioner Chandler's comment that "No major leaguer makes less than \$5000 a year<sup>21</sup> and some make up to \$100,000. If you call that peonage, then a lot of us would like to be in on it";<sup>22</sup> to which Judge Frank answered, "Only the totalitarian-minded will believe that high pay excuses virtual slavery."<sup>23</sup>

On the other hand, it is equally unlikely that Congress will invoke the antitrust laws and compel baseball to engage in free competition. While it is true that almost any business can claim unique features, nevertheless organized baseball does have distinct peculiarities. It sells baseball games, but to do so the contestants must approximate each other in skill. People would scarcely pay to see the champion New York Yankees play a sandlot team. No single owner can market the product by himself; he must market it in conjunction with his fellows. Therefore the major league club owners are not only competitors, they are at the same time partners who must cooperate with each other to a much greater degree than in conventional business enterprises.

<sup>21</sup> Increased to \$6000 in 1954.

<sup>22</sup> Jay H. Topkis, *Monopoly in Professional Sports*, 58 Yale L. J., 694 (1949).

<sup>23</sup> *Gardella v. Chandler*, 172 F. 2d 402 (C. C. A. 2, 1949).

To achieve this competitive balance, the owners and their supporters argue, restrictive measures like the reserve clause, territorial rights, and the farm system are essential. The arguments for and against these measures are many, and they have been urged from time to time ever since the devices were instituted. Although there are some who maintain that the reserve clause could be eliminated without destroying the business, the preponderance of opinion among those who have studied the problem is that the reserve is necessary, but with modifications and safeguards set up to eliminate its abuses. Advocacy of baseball's other restrictive practises is less vehement, although the Commissioner has claimed that territorial rights are essential; and Branch Rickey, who perfected the farm system, has upheld its merits.<sup>24</sup> The consensus of belief, therefore, is that the cure would be worse than the disease. Invoking the antitrust laws would either destroy the business or alter it so greatly as to make it unrecognizable.

Aside from these considerations, Congress is apt to go slow, because organized baseball has a strong hold on the emotions of the American people. Although it was derived from English rounders, baseball has long been regarded as the American National Game, much as cricket is associated with England, and it has become an important institution in our society.<sup>25</sup> Congressmen realize this, and will gauge possible repercussions in the ballot-box before taking any extreme measures. As far as that goes, governments have never succeeded in curbing really popular amusements. As long ago as the second century B. C., gambling was forbidden in India, but was never stamped out; and the mime flourished in Rome despite the opposition of the Church and the Emperor.<sup>26</sup>

The chances are, therefore, that the middle course will be taken. Baseball will be given limited exemption. The antitrust laws will be applied to the business except for those practices and restrictions deemed necessary to its successful operation. In spite of itself, the business of organized baseball will probably be pulled out of the industrial Middle Ages and brought closer to the economic practices of mid-twentieth century America.

<sup>24</sup> House Report, pp. 190, 69.

<sup>25</sup> See Harold Seymour, *How Baseball Began*, 50 *The New-York Historical Society Quarterly*, 369-385 (New York, October, 1956).

<sup>26</sup> 14 *Encyclopedia of the Social Sciences*, 305-308 (New York, 1934).