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OUT OF SERVICE: DOES SERVICE TIME MANIPULATION VIOLATE MAJOR LEAGUE BASEBALL'S COLLECTIVE BARGAINING AGREEMENT?

Abstract: Under the current Major League Baseball Collective Bargaining Agreement (“CBA”), professional players are eligible to file for salary arbitration or free agency once they reach certain thresholds of service time in the league. In recent years, however, Major League Baseball teams have taken advantage of the construction of service time rules in order to artificially keep players under their control at lower salaries for one year longer than the rules appear to contemplate. The controversy surrounding service time manipulation hit its apex in 2015, when Chicago Cubs prospect Kris Bryant was kept in the minor league system just long enough to ensure that his team would gain an additional year of control over his contract before he would be eligible to file for free agency. This Note discusses the potential for players like Bryant to allege violations of the current CBA for service time manipulation, and argues that the service time manipulation debate should set the stage for a reformed service time system in negotiations for the next CBA.

INTRODUCTION

After a record-breaking career at the University of San Diego, Kris Bryant was selected by the Chicago Cubs with the second overall pick in the 2013 Major League Baseball (“MLB”) first-year player draft.¹ The Cubs rewarded Bryant with a \$6.7 million signing bonus, and later assigned him to their low A minor league affiliate team.² In his first one and one-half minor league seasons, Bryant hit for a .327 batting average, .428 on-base percentage, and .666 slugging percentage to go along with 52 home runs.³ Against major league

¹ See *Cubs Sign No. 2 Pick Kris Bryant*, ESPN (July 12, 2013), http://espn.go.com/mlb/story/_/id/9473682/kris-bryant-signs-chicago-cubs [<https://perma.cc/GXY5-E62F>].

² See *id.* Every team in Major League Baseball (“MLB”) is affiliated with several minor league teams arranged in a hierarchy according to player skill level. See *FAQs: The Business of MiLB*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business> [<https://perma.cc/L5RU-LVY7>] (last visited Aug. 14, 2016). Players that sign contracts with an MLB organization can be assigned to an affiliate in accordance with their skill level and number of years in professional baseball. See *id.* Players usually spend time in the minor leagues before being called up to play on a team’s major league roster. See *id.*

³ Cliff Corcoran, *For Cubs, There’s No Longer a Reason Not to Call Up Top Prospect Kris Bryant*, SPORTS ILLUSTRATED (Apr. 16, 2015), <http://www.si.com/mlb/2015/04/16/chicago-cubs-kris-bryant-service-time-minor-leagues> [<https://perma.cc/49UR-L99D>]. Batting average measures the percentage of qualified at bats in which a player is awarded a hit. See *Batting Average (AVG)*,

competition in spring training before the 2015 season, Bryant led the Cubs with a .425 batting average, .477 on-base percentage, and 1.175 slugging percentage with nine home runs.⁴

Just before the close of spring training on March 30, 2015, the Cubs assigned their twenty-three-year-old star to their minor league camp instead of keeping him on the major league roster.⁵ Given Bryant's utter dominance of pitchers at both the major and minor league levels, there seemed to be no baseball-related reason to keep Bryant off of the Cubs' major league roster.⁶ In the wake of the decision, baseball pundits predicted that the wait for Bryant would not be long, and that he would be called up on a day in mid-April that happened to coincide with the day that marked exactly 171 days remaining in the 2015 regular season.⁷

On April 17, 2015, just as pundits predicted, Kris Bryant was officially called up to the Cubs' active major league roster.⁸ By the end of the regular season, Bryant led all National League rookies in on-base percentage, slugging percentage, and home runs, proving to be an essential factor in the Cubs' 97-win team.⁹ He went on to win the Sporting News' National League Rookie

MLB.COM, <http://m.mlb.com/glossary/standard-stats/batting-average> [https://perma.cc/8VC8-XEL8] (last visited Aug. 24, 2016). On-base percentage measures the percentage of plate appearances in which a player successfully reaches base by being awarded a hit, walk, or hit-by-pitch. *See On-base Percentage (OBP)*, MLB.COM, <http://m.mlb.com/glossary/standard-stats/on-base-percentage> [https://perma.cc/E899-3PAF]. Slugging percentage measures a player's ability to hit for power, quantified by a weighted formula that includes only singles, doubles, triples, and home-runs, and excludes walks and hit-by-pitch. *Slugging Percentage (SLG)*, MLB.COM, <http://m.mlb.com/glossary/standard-stats/slugging-percentage> [https://perma.cc/4ZFD-JKL9].

⁴ See Corcoran, *supra* note 3.

⁵ *Kris Bryant to Start Year in Minors*, ESPN (Mar. 30, 2015), http://espn.go.com/mlb/story/_/id/12587428/kris-bryant-javier-baez-addison-russell-sent-minors-chicago-cubs [https://perma.cc/BC2H-UMLR].

⁶ See Corcoran, *supra* note 3 (discussing Bryant's stellar minor league and major league batting statistics detailed previously in this Part); Craig Goldstein, *How the System Screws Kris Bryant and Other Rookies*, VICE SPORTS (Mar. 27, 2015), https://sports.vice.com/en_us/article/how-the-system-screws-kris-bryant-and-other-mlb-rookies [https://perma.cc/QKE6-RXX4] (discussing Bryant's selection as Baseball America's Minor League Player of the Year in 2014).

⁷ See AJ Cassavell, *Kris Bryant: Too Good for Opening Day*, SPORTS ON EARTH (Mar. 17, 2015), <http://www.sportsonearth.com/article/113077256/kris-bryant-chicago-cubs-opening-day-mike-olt> [https://perma.cc/N9C8-T8AT]; Goldstein, *supra* note 6.

⁸ Jonathan Bernhardt, *Kris Bryant's Belated Call-Up to Chicago Cubs Exposes Flaw in MLB System*, THE GUARDIAN (Apr. 20, 2015), <http://www.theguardian.com/sport/2015/apr/20/kris-bryants-belated-call-up-to-chicago-cubs-exposes-flaw-in-mlb-system> [https://perma.cc/Y6SC-UEQP].

⁹ *Kris Bryant Named NL's Top Rookie*, ESPN (Nov. 17, 2015), http://espn.go.com/mlb/story/_/id/14148411/2015-mlb-rookie-year-kris-bryant-chicago-cubs-named-nl-winner [https://perma.cc/3VUS-XGFR] [hereinafter *Kris Bryant Named NL's Top Rookie*]; see Ryan Fagan, *Sporting News MLB Awards 2015: Cubs' Kris Bryant Voted NL Rookie of the Year*, SPORTING NEWS (Oct. 26, 2015), <http://www.sportingnews.com/mlb-news/4659279-mlb-awards-2015-national-league-rookie-of-the-year-kris-bryant-matt-duffy> [https://perma.cc/2SS4-PWVX] (discussing Bryant's massive improvements through the end of the 2015 season as the Cubs strove for ninety-seven wins). The MLB in its current form is organized into two separate leagues: the National League and the American League.

Player of the Year award, and became only the third unanimous selection since 2000 for the Baseball Writers' Association of America's National League Rookie of the Year award.¹⁰

In isolation, the Bryant saga seems like a resounding success for the young star, the Cubs' organization, and baseball fans alike.¹¹ The discontent with Bryant's late call-up before his breakout season, however, caused the Major League Baseball Players' Association ("MLBPA") to publicly forewarn litigation against the MLB and the Cubs.¹² Practically, the reason the MLBPA

See generally Linda C. Brinson, *What's the Difference Between the American and National Baseball Leagues?*, HOW STUFF WORKS, <http://entertainment.howstuffworks.com/american-vs-national-baseball-league.htm> [<https://perma.cc/79V5-6QJ6>] (last visited Sept. 11, 2016) (providing an overview of the National and American Leagues that make up the MLB).

¹⁰ Fagan, *supra* note 9 (discussing Bryant's selection as the Sporting News National League Rookie Player of the Year); *Kris Bryant Named NL's Top Rookie*, *supra* note 9 (same). Both of these awards honor the best individual first-year player from each league in the MLB on a yearly basis. *See Rookie of the Year Award by The Sporting News*, BASEBALL ALMANAC, http://www.baseball-almanac.com/awards/aw_snrp3.shtml [<https://perma.cc/9VU9-5NW2>] (last visited Aug. 14, 2016) [hereinafter *Rookie of the Year Award by The Sporting News*] (discussing the criteria for the Sporting News Rookie of the Year Award); *Rookie of the Year Award / Jackie Robinson Award*, BASEBALL ALMANAC, http://www.baseball-almanac.com/awards/aw_roy.shtml [<https://perma.cc/DZL9-RL9N>] (last visited Aug. 14, 2016) (discussing the criteria for the Baseball Writers' Association of America's Player of the Year Award). The Sporting News is one of the most highly regarded sports magazines in the nation. *See Rookie of the Year Award by the Sporting News*, *supra* ("The Sporting News is nothing short of the most respected and legendary magazine / newspaper in sports history. Their coverage of baseball has no rival and they are simply the most respected source of baseball statistics anywhere."). The Sporting News National League Rookie of the Year Award is decided by a ballot of National League players. Fagan, *supra* note 9. The Baseball Writers' Association of America ("BBWAA") is an organization of nearly all of the credentialed writers who cover the MLB. *See About the BBWAA*, BASEBALL WRITERS' ASS'N OF AM., <http://bbwaa.com/about/> [<https://perma.cc/2XHC-JRN4>] (last visited Aug. 14, 2016) (discussing the criteria for membership in the BBWAA). In addition to voting for annual awards such as the Rookie of the Year award, the Most Valuable Player ("MVP") award, the Cy Young award for pitching, and the Manager of the Year award, the BBWAA is also responsible for electing players to the National Baseball Hall of Fame. *Id.*

¹¹ *See supra* notes 8–10 and accompanying text (discussing Bryant's stellar performance and award recognition after his promotion in the 2015 MLB season).

¹² *See* Jason Wojciechowski, *The Kris Bryant Situation, as Explained by a Labor Lawyer*, VICE SPORTS (Apr. 2, 2015), https://sports.vice.com/en_us/article/the-kris-bryant-situation-as-explained-by-a-labor-lawyer [<https://perma.cc/2YL3-PTXB>] (discussing the fallout of Bryant's late promotion and the contemptuous response from the Major League Baseball Players' Association ("MLBPA")). When Bryant was assigned to the Cubs' minor league affiliate, the MLBPA posted the following message in a series of three tweets posted successively on the organization's official Twitter account:

Today is a bad day for baseball. We all know that if [Kris Bryant] were a combination of the greatest players to play our great game, . . . and perhaps he will be before all is said and done, the [Cubs] still would have made the decision they made today. . . . This decision, and other similar decisions made by clubs will be addressed in litigation, bargaining or both.

The Major League Baseball Players Association (@MLB_PLAYERS), TWITTER (Mar. 30, 2015, 3:28 PM), https://twitter.com/MLB_PLAYERS/status/582640656352428032 [<https://perma.cc/2PJ4-JMWE>]; The Major League Baseball Players Association (@MLB_PLAYERS), TWITTER (Mar. 30, 2015, 3:29 PM), https://twitter.com/MLB_PLAYERS/status/582640777941127168 [<https://perma.cc/QR7P->

and Bryant claim to be aggrieved is simple: Kris Bryant had the talent and production to start in the Cubs' major league lineup, but was stashed in the organization's minor league team long enough to ensure that Bryant and his team-friendly rookie contract would be exclusive to the Cubs for one extra year.¹³ Whether the MLBPA's claims have legal merit, and if they will ever reach the courts, however, is a more contentious and nuanced issue.¹⁴

The MLBPA's dispute with the Cubs' treatment of Bryant revolves around the use of a measurement called "service time" to determine when a professional baseball player is eligible to submit his salary to arbitration, or alternatively to become a free agent and negotiate a contract with the team of his choosing.¹⁵ This Note will explore the concept of service time and its implications for rookie-contract players under the MLB and MLBPA's collective bargaining agreement ("CBA"), and examine whether the MLBPA could present a valid claim against an MLB team for violation of the CBA for manipulating a player's service time in the team's favor, or whether there is some viable alternative to service time that may be negotiated when the current CBA expires in December 2016.¹⁶ Part I of this Note provides background information on collective bargaining, the MLBPA, and the CBA.¹⁷ Part II discusses the concept and incentives of service time manipulation and introduces several case studies of potential service time manipulation in recent history.¹⁸ Part III introduces the implied obligation of good faith in contract law and sets out the ways in which it may be violated.¹⁹ Finally, Part IV applies the implied obligation of

DEQE]; The Major League Baseball Players Association (@MLB_PLAYERS), TWITTER (Mar. 30, 2015, 3:29 PM), https://twitter.com/MLB_PLAYERS/status/582640917582123008 [<https://perma.cc/QS5Z-2VTQ>].

¹³ See Wojciechowski, *supra* note 12 (explaining the author's belief that "the Cubs could believe that Bryant is going to post psychedelic Barry Bonds numbers from day one and they'd still have sent him to [the minor league] for the requisite number of weeks"); *Kris Bryant Named NL's Top Rookie*, *supra* note 9 (discussing Bryant's being left in the minor league despite "an outstanding spring training" and his resulting promotion just in time to delay his free agency by one season); see also *infra* notes 68–70 and accompanying text (discussing signing bonuses and major and minor league salary scales).

¹⁴ See Craig Calcaterra, *The Collective Bargaining Agreement Doesn't Even Enter into the Kris Bryant Situation, Right?*, NBC SPORTS (Mar. 31, 2015), <http://mlb.nbcsports.com/2015/03/31/the-collective-bargaining-agreement-doesnt-even-enter-into-the-kris-bryant-situation-right/> [<https://perma.cc/G3AN-5QWG>] (disagreeing with Wojciechowski on the standing and merit of the MLBPA's claims against the MLB in the Kris Bryant case).

¹⁵ See Goldstein, *supra* note 6 (providing an overview of the MLB's "service time" rules and how they relate to the Cubs' treatment of Kris Bryant).

¹⁶ See *infra* notes 21–245 and accompanying text.

¹⁷ See *infra* notes 21–91 and accompanying text.

¹⁸ See *infra* notes 92–140 and accompanying text.

¹⁹ See *infra* notes 150–166 and accompanying text. Though it sometimes goes by other names, perhaps most often "the implied covenant of good faith," this concept is referred to as "the implied obligation of good faith" in this Note. See generally Harold Dubroff, *The Implied Covenant of Good*

good faith to the context of service time manipulation, discusses potential roadblocks to a successful challenge of service time manipulation in the grievance-arbitration process, and analyzes potential alternatives to the service time system that may prevent manipulation when the CBA is renegotiated in 2016.²⁰

I. A BRIEF HISTORY OF (SERVICE) TIME: FROM THE NLRA TO THE MLB

Though America's pastime may seem like just a game, today's professional baseball exists on a foundation of decades of conflict, labor law, and collective bargaining.²¹ Section A of this part gives a brief overview of relevant aspects of U.S. labor law, including the origins of collective bargaining, arbitration as an alternative to litigation, and judicial review of arbitration awards.²² Section B provides a history of the MLB, focusing on the formation of the league as it currently stands, the advent of collective bargaining, and the beginnings of free agency.²³ Finally, Section C discusses several portions of the current MLB CBA that are necessary to examine the concept of service time manipulation.²⁴

A. Collective Bargaining, Arbitration, and Judicial Review

The National Labor Relations Act ("NLRA") was signed into law in 1935, and set out to protect the rights of workers to freely associate and organize into labor organizations (generally referred to as unions) and negotiate with their employers through the collective bargaining process.²⁵ The NLRA de-

Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic, 80 ST. JOHN'S L REV. 559 (2006) (referring to the concept throughout as "the implied covenant of good faith").

²⁰ See *infra* notes 167–245 and accompanying text.

²¹ See Tom C.W. Lin, *National Pastime(s)*, 55 B.C. L. REV. 1197, 1197–98 (2014) (describing baseball as "a morality play for the great issues facing our laws and our nation" and a reflection of conflicts between "individualism and collectivism" and "capital and labor"). See generally Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639 (1999) (discussing the development of the MLB from its inception in the context of player unionization and antitrust challenges).

²² See *infra* notes 25–34 and accompanying text.

²³ See *infra* notes 35–62 and accompanying text.

²⁴ See *infra* notes 63–91 and accompanying text.

²⁵ See National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2006). The National Labor Relations Act ("NLRA") stated its full purpose as follows:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id. at § 151.

finer “collective bargaining” as the obligation of employer and labor organization representatives to negotiate in good faith regarding any and all terms of employment, generally to be executed in a contract setting out the agreed-upon terms.²⁶ The NLRA also codified the refusal by either an employer or an employee to engage in collective bargaining as one of many unfair labor practices whose prevention was entrusted to the newly-created National Labor Relations Board.²⁷

Congress then passed the Labor Management Relations Act of 1947, more commonly known as the “Taft-Hartley” Act, which modified many provisions of the NLRA and created additional substantive law concerning labor management.²⁸ Notably, Taft-Hartley declared that the preferred method of settling labor disputes is a grievance-arbitration procedure voluntarily agreed upon by the parties under a collectively bargained agreement.²⁹ Because arbitration is a term agreed to as part of the negotiations for each individual collective bargaining agreement, parties are free to set their own specific arbitration rules and procedures.³⁰

Though federal courts have jurisdiction to enforce collective bargaining agreements and review violations thereto under Taft-Hartley, the U.S. Supreme Court has held that any grievance and arbitration procedures in such a contract must be exhausted before parties can seek judicial review.³¹ When a court is

²⁶ See 29 U.S.C. § 158(d).

²⁷ See *Id.* §§ 158(a)(5), 158(b)(3), 160(a).

²⁸ See Bashar H. Malkawi, *Labor and Management Relationships in the Twenty-First Century: The Employee/Supervisor Dichotomy*, 12 N.Y. CITY L. REV. 1, 5 (2008) (discussing Taft-Hartley’s modifications of existing NLRA provisions and its creation of new substantive provisions). See generally Labor Management Relations Act of 1947, Pub. L. 80–101 (containing the codified provisions of the Taft-Hartley Act).

²⁹ See 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 the Taft-Hartley Act). Since Taft-Hartley, the U.S. Supreme Court has recognized that “[c]ollective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances.” *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

³⁰ See *United Paperworkers*, 484 U.S. at 38–39 (“Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. . . . The parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they choose.”). A party to a collective bargaining agreement can even bargain away the neutrality of a supposedly “neutral” arbitrator. See *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 548 (2d Cir. 2016) [hereinafter *Deflategate II*]. In 2015, after an investigation into an alleged scheme by New England Patriots employees to intentionally deflate footballs used in professional competitions, National Football League (“NFL”) Commissioner Roger Goodell appointed himself as neutral arbitrator after handing out an initial disciplinary award. See *id.* at 532. By the terms of the NFL’s collective bargaining agreement with the NFL’s Players Association, the commissioner of the NFL may serve as the arbitration hearing officer at his or her discretion. See *id.* at 532, 548.

³¹ See 29 U.S.C. § 185 (placing suits for labor contract violations in the venue of any U.S. District Court with jurisdiction over the parties involved); *United Paperworkers*, 484 U.S. at 37 (holding that

asked to review an arbitration decision arising out of a collective bargaining agreement, it is not authorized to undertake de novo review of the facts and interpretations of the agreed-upon arbitrator.³² If it is at least arguable that the arbitrator is interpreting the collective bargaining agreement subject to the arbitrator's delegated authority, courts are not authorized to second-guess the arbitration award.³³ Unless the arbitration award reflects the arbitrator's bias, the procedure followed by the arbitrator amounts to affirmative misconduct, or the arbitration award is so against public policy that it creates explicit conflict with other laws and legal precedents, the court should confirm the award.³⁴

B. The Fall of the Reserve System and the Development of Free Agency

In 1876, the National League of Professional Baseball Clubs opened for business.³⁵ By 1883, the National League implemented the "reserve system," in which players were permanently bound to the team with which they contracted, and other teams were prevented from negotiating for their services.³⁶ In 1903, the National League and its main competitor, the fledgling American

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).

³² See *Major League Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (discussing the lack of authorization that courts have to review decisions that arbitrators make on the merits, even when a party believes there was some error of fact or that its argument was misconstrued); *United Paperworkers*, 484 U.S. at 37–38 (discussing the extremely limited standard of review in judicial review of arbitration awards); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960) (holding that courts "have no business weighing the merits of the grievance" when reviewing arbitration awards).

³³ See *United Paperworkers*, 484 U.S. at 38 ("[A]s 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.").

³⁴ *Id.* at 36, 40 n.10, 43. Although the Federal Arbitration Act ("FAA") does not apply to collective bargaining agreements coming under the jurisdiction of Taft-Hartley, federal courts often look to it for guidance in the creation of federal common law pertaining to labor. See *United Paperworkers*, 484 U.S. at 40 n.9. See generally Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006) (containing the relevant portions of the FAA often used for guidance). The language concerning affirmative misconduct as a result of arbitration procedure is crafted from similar language in the FAA. See *id.* § 10; *United Paperworkers*, 484 U.S. at 40 nn.9–10. The New England Patriots "deflategate" case illustrates a rare example of an arbitration award actually being overturned upon judicial review. See *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449, 463 (S.D.N.Y. 2015). In that case, the U.S. District Court for the Southern District of New York concluded that NFL Commissioner Roger Goodell's denial of certain evidence's admissibility amounted to procedural misconduct, and that his decision to uphold a four-game suspension of New England Patriots quarterback Tom Brady reflected "his own brand of industrial justice." See *id.* at 466, 471. The U.S. Court of Appeals for the Second Circuit eventually reversed the District Court's decision, concluding that "this case is not an exceptional one that warrants vacatur" under arbitration review's "substantial deference" standard. *Deflategate II*, 820 F.3d at 532.

³⁵ Jones, *supra* note 21, at 644, 647.

³⁶ *Id.* at 644.

League, agreed to honor each other's reserve systems and form the preliminary structure of today's MLB.³⁷

Ten years later, anti-reserve system competitor the Federal League was created, and began to pilfer players from clubs in the National and American Leagues.³⁸ In order to eliminate competition in the market for top players, the MLB agreed to pay the Federal League owners \$600,000 to disband.³⁹ After being excluded from this payment scheme, the Baltimore Terrapins, a Federal League team, sued the MLB for violating antitrust regulations.⁴⁰ In 1922, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, the Supreme Court held that the MLB's arrangement of games between teams from different cities and states was not enough to consider its activity interstate in nature, exempting the MLB from regulation under the Sherman Act.⁴¹

In 1953, the Supreme Court was faced with another Sherman Act claim involving the MLB in *Toolson v. New York Yankees, Inc.*⁴² In the years preceding the case, the New York Yankees of the American League attempted to assign the contract of player George Toolson to another team.⁴³ Toolson, not wishing to report to his new team, sued the Yankees, claiming that the reserve system violated antitrust regulations.⁴⁴ The Court held that it was bound by policy and stare decisis to the *Federal Baseball* decision, and that the MLB would continue to be exempt from antitrust regulation unless Congress lifted the exemption.⁴⁵ After the Court's affirmation of the MLB's antitrust exemp-

³⁷ See *id.* at 644–45. The MLB existed as a cooperative between the legally separate National and American Leagues until 2000, when the league operations were consolidated into a single commissioner's office run by the MLB. *Year in Review: 2000 National League*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/yearly/yr2000n.shtml> [<https://perma.cc/4BYJ-U2NH>] (last visited Aug. 14, 2016).

³⁸ See Jones, *supra* note 21, at 645. Federal League teams offered players long-term contracts in lieu of a reserve system and were successful in luring many lower-paid players from the leagues. *Id.*

³⁹ See *id.* (detailing the “bidding war for players” that broke out between the National and Federal Leagues and the National League's subsequent dissolution agreement with the Federal League).

⁴⁰ See *id.*

⁴¹ See 259 U.S. 200, 208–09 (1922); Jones, *supra* note 21, at 645–46. Notably, this case relies on a notion of interstate commerce as it was construed much more conservatively before the Supreme Court expanded it in 1942 with its decision in *Wickard v. Filburn*. See Jones, *supra* note 21, at 647 (citing *Wickard v. Filburn*, 317 U.S. 111, 133 (1942)) (discussing the Supreme Court's more liberal construction of the interstate commerce doctrine after *Wickard*).

⁴² See 346 U.S. 356, 357 (1953) (comparing the antitrust issues at question to those presented to the Court before in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*); Jones, *supra* note 21, at 648 (discussing the Supreme Court's revisiting the “exemption question” in *Toolson v. New York Yankees, Inc.*).

⁴³ See Jones, *supra* note 21, at 648.

⁴⁴ See *id.*

⁴⁵ See *Toolson*, 346 U.S. at 356–57 (citing the Court's ruling in *Federal Baseball* and the Court's preference that any changes to baseball's antitrust exemption come about by federal legislation);

tion in *Toolson*, it became clear that individual players would not be able to challenge the MLB status quo in courts of law.⁴⁶

From 1885 until 1968, organizations of MLB players made several attempts to unionize, but were largely unsuccessful.⁴⁷ The MLBPA was originally created not as a union, but instead as a fraternal organization.⁴⁸ In 1966, however, the MLBPA hired former chief economist of the United Steel Workers, Marvin Miller, as its executive director.⁴⁹ Soon after, high-profile players began to grow restless with the reserve system.⁵⁰ In 1968, the Miller-led MLBPA was able to negotiate its first collective bargaining agreement, the first of its kind in professional sports.⁵¹

In 1969, veteran center fielder Curt Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies.⁵² Citing his dozen years of service to the league under the reserve system, Flood refused to report to the team and filed suit against the MLB, alleging the reserve system was a collusive price-fixing

Jones, *supra* note 21, at 648 (discussing the MLB's reliance on its antitrust exemption as a reason why the Supreme Court left the status of the exemption in Congress's hands).

⁴⁶ See *supra* notes 42–45 and accompanying text (discussing *Toolson* and the MLB's powerful antitrust exemption).

⁴⁷ See Jones, *supra* note 21, at 653 n.113 (discussing several of the players' attempts to unionize from the 1880s until formation of the MLBPA); *History of the Major League Baseball Players Association*, MLB.COM, http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000 [<https://perma.cc/RKZ8-W5XB>] (last visited Aug. 14, 2016) [hereinafter *History of the Major League Baseball Players Association*] (detailing attempts to unionize from Brotherhood of Professional Base Ball Player in 1885 until the formation of the MLBPA). Marvin Miller, the former chief economist of the United Steel Workers Union who became the executive director of the MLBPA in 1966, attributes the failure of MLB players to unionize for so long to the ignorance of the value of a union as well as hostility to the concept of unions in general. See Jones, *supra* note 21, at 654. Miller stated:

There was a reason for this attitude. From time immemorial, the baseball powers-that-be forcefed the players propaganda: The commissioner (although appointed and paid by the owners) represented the players; players were privileged to be paid to play a kid's game; and (the biggest fairy tale of all) baseball was not a business and, in any case, was unprofitable for the owners.

Id.

⁴⁸ Jones, *supra* note 21, at 653–54.

⁴⁹ *Id.* at 653; *History of the Major League Baseball Players Association*, *supra* note 47.

⁵⁰ See Jones, *supra* note 21, at 654–55 (discussing the beginnings of player opposition to the restrictions of the reserve clause in the 1960s). The unrest became headline news when then-future Hall-of-Famers Don Drysdale and Sandy Koufax staged a double holdout until they both received raises from the Los Angeles Dodgers in 1966. See *id.* See generally Buzzie Bavasi, *The Great Holdout*, SPORTS ILLUSTRATED, May 1967, <http://www.si.com/vault/issue/43018/85/2> [<https://perma.cc/CNF4-XN9B>] (providing an in-depth overview of the holdout efforts of Drysdale and Koufax).

⁵¹ *History of the Major League Baseball Players Association*, *supra* note 47. This first iteration of the Major League Baseball collective bargaining agreement (“CBA”) focused mainly on raising the minimum player salary. See *id.*

⁵² See Jones, *supra* note 21, at 655.

agreement in violation of the Sherman Act.⁵³ In 1972, the Supreme Court held in *Flood v. Kuhn* that the MLB was, in fact, a business engaged in interstate commerce, but that *Federal Baseball* and *Toolson* created an anomalous exemption that must continue to be observed.⁵⁴

Before *Flood* was decided, however, the MLBPA in 1970 negotiated its first impartial arbitration procedure for the resolution of player grievances under the CBA.⁵⁵ After *Flood*'s attempt to destroy the reserve system failed in the Supreme Court, the MLBPA went on to leverage the arbitration process that it negotiated in order to challenge the system.⁵⁶ In 1975, pitchers Andy Messersmith and Dave McNally filed grievances that charged they should no longer be bound by their contracts after having played out their terms.⁵⁷ The arbitrator found that the reserve system was only valid if it were clearly and explicitly agreed upon within players' contracts.⁵⁸ Because no contracts included clear and explicit language binding players to the reserve system, this decision constituted the system's de facto elimination.⁵⁹

The reserve system was officially eliminated in 1976, when the MLB and MLBPA negotiated a new CBA that created modern free agency, which provided that any player with six years of MLB experience would become a free

⁵³ See *id.* (discussing *Flood*'s discontent and his suit against the MLB).

⁵⁴ See *Flood v. Kuhn*, 407 U.S. 258, 282, 285 (1972); Jones, *supra* note 21, at 656–57 (explaining that the Court “ostensibly disavowed the basic tenets of the *Federal Baseball* decision that created the antitrust exemption,” but still held that the exemption must stand). In *Flood*, Justice Blackmun, writing for the majority, reasoned:

We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

407 U.S. at 283–84 (citing *Toolson*, 346 U.S. at 357).

⁵⁵ Jones, *supra* note 21, at 659. In its original form, players could file grievances to be heard by a panel consisting of an impartial permanent arbiter employed by the MLB, an MLBPA representative, and a commissioner's representative. *Id.*

⁵⁶ See *id.* (characterizing the MLB's victory in *Flood* as “short-lived” and discussing the 1970 CBA's impartial grievance-arbitration process).

⁵⁷ See *id.* at 659–60. Messersmith played in the 1975 season for the Los Angeles Dodgers after refusing to sign the contract that the team offered. *Id.* Once the season ended, he claimed that he should be declared free and clear of his contract, and filed a grievance. *Id.* Dave McNally, a pitcher for the Montreal Expos, had a similar claim. *Id.* at 660.

⁵⁸ *Id.* at 660.

⁵⁹ See *id.* at 660, 661. Although the arbitrator specifically stated that his decision did not declare the reserve system illegal or unable to be effectuated in a contract if clearly and explicitly stated, the decision had the effect of invalidating the reserve system for all existing player contracts. See *id.* at 660.

agent at the end of his contract.⁶⁰ Though teams could no longer control players' contracts for the duration of their professional baseball careers, owners were still able to maintain control for a player's first six years in the major leagues regardless of contract length.⁶¹ Though players were not granted free agent status outright once their contracts ended, they were able to limit the free agent market each offseason, spurring demand for free agents and thereby drastically increasing free agent salaries.⁶²

C. The 2012–2016 Collective Bargaining Agreement

The current version of the CBA between the MLB and the MLBPA went into effect on December 11, 2011, and terminates on December 1, 2016.⁶³ Subsection 1 of this section will provide an overview of player contracts, salary arbitration, and free agency in the current CBA.⁶⁴ Subsection 2 will discuss in-depth the grievance-arbitration process under the current CBA.⁶⁵

1. Initial Contracts, Salary Arbitration, & Free Agency

In the annual first-year player draft, MLB clubs are slotted in reverse order of their standing from the previous season and allowed to select first-year players from the United States, Canada, and U.S. territories whose eligibility is based on various age and education requirements.⁶⁶ After a club selects a player, it has a specified amount of time in which to negotiate a contract with the player or else lose exclusive draft rights.⁶⁷ Under the current CBA, this negoti-

⁶⁰ See Jones, *supra* note 21, at 661 (discussing the 1976 CBA and its new free agency provision).

⁶¹ See *id.*

⁶² See *id.* at 661–62 (discussing MLBPA Executive Director Marvin Miller's supply-and-demand incentives to limit the free agent market under the new CBA).

⁶³ 2012–2016 Collective Bargaining Agreement Between 30 Major League Clubs and the Major League Baseball Players Association 1, 142 (Dec. 12, 2011), available at http://mlb.mlb.com/pa/pdf/cba_english.pdf [<https://perma.cc/LZY2-RVTB>] [hereinafter *2012–2016 Basic Agreement*].

⁶⁴ See *infra* notes 66–77 and accompanying text.

⁶⁵ See *infra* notes 78–91 and accompanying text.

⁶⁶ See MAJOR LEAGUE BASEBALL, THE OFFICIAL PROFESSIONAL BASEBALL RULES BOOK 44–46 (2015), available at <https://registration.mlbpa.org/pdf/2015MajorLeagueRules.pdf> [<https://perma.cc/Z96V-ZG3S>] [hereinafter OFFICIAL PROFESSIONAL BASEBALL RULES BOOK]; *First-Year Player Draft Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> [<https://perma.cc/XFT3-XJ5H>] (last visited Apr. 12, 2016). The MLB defines three categories for draft eligibility based on age and education level:

[(1)] High school players, if they have graduated from high school and have not yet attended college or junior college; [(2)] College players, from four-year colleges who have either completed their junior or senior years or are at least 21 years old; and [(3)] Junior college players, regardless of how many years of school they have completed.

First-Year Player Draft Rules, *supra*.

⁶⁷ See OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, *supra* note 66, at 48–49; *First-Year Player Draft FAQ*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/faq.jsp> [<https://perma.cc/TD8J->

ation almost exclusively consists of reaching agreement on the bonus that the club will pay the player to sign a standard seven-year minor league contract.⁶⁸ After signing his minor league contract, the player's salary is determined by a fixed scale based on his level in the minor league system and his years of experience at that level.⁶⁹ When a player in his initial contract is called up to his club's active major league roster, his salary is determined by the club, subject only to the CBA's minimum salary requirements.⁷⁰

When a player is called up to his club's major league roster, he also begins to accrue "service time," which is determined by the number of days that he spends on the twenty-five-man major league roster during the regular season.⁷¹ According to Article XXI of the CBA, one full year of major league ser-

XM29] (last visited Sept. 12, 2016). As stated on the MLB's website, "[g]enerally, a selected player with college eligibility remaining may sign with the Club that selected the Player from the time of the selection until the second or third Friday of July." *First-Year Player Draft FAQ*, *supra*. Players without college eligibility remaining are eligible to sign with their selecting Club until 12:01 AM ET on the date that is seven days prior to the next year's first-year player draft. See OFFICIAL PROFESSIONAL BASEBALL RULES BOOK, *supra* note 66, at 48–49. If a player fails to sign with the drafting team, the player may be entered back into the draft pool in subsequent years so long as the eligibility requirements are met. See *id.* at 50. If an eligible player is not selected in the first-year player draft, that player may be signed by any major league or minor league club until the relevant signing deadline for college-eligible or non-college eligible players. See *id.* See generally *First-Year Player Draft*, *supra* (providing an overview of the MLB rules for the first-year player draft).

⁶⁸ See Eric Michel, *Amateur Draft "Signing Bonus Pools": The Latest Inequity Made Possible by Baseball's Archaic Antitrust Exemption*, 11 WILLAMETTE SPORTS L.J. 46, 52–53 (2013). Under the previous CBA, teams had the ability to offer draftees major league contracts. See *id.* at 53. These major league contracts allowed teams to specify yearly salaries as well as signing bonuses. See *id.* Under the 2012–2016 CBA, however, teams may only sign draft picks to minor league contracts, so the only real negotiation is over up-front signing bonuses. See *id.*

⁶⁹ Jeff Blank, *Minor League Salary*, JEFF BLANK SPORTS LAW BLOG, <http://www.sportslawblogger.com/baseball/salary-information/minor-league-salary/> [<https://perma.cc/9YZB-56RN>] (last visited Aug. 10, 2016). Minor league players are given monthly salaries. *Id.* Minor league players that are on a team's forty-man roster, or who have previously been on the team's major league roster, however, are given increased annual salaries. See *id.* (providing an overview of salaries for minor league players).

⁷⁰ See Adam Felder, *How MLB Keeps Its Players' Salaries Down*, THE ATLANTIC (Dec. 10, 2015), <http://www.theatlantic.com/business/archive/2015/12/mlb-salaries-labor-contract-negotiations/419889/> [<https://perma.cc/XSY5-RDYK>] (explaining the trajectory of a player's salary from the time the player enters the league).

⁷¹ See *2012–2016 Basic Agreement*, *supra* note 63, at 96 ("One full day of Major League service will be credited for each day of the championship season a Player is on a Major League Club's Active List."). Every MLB team has an "active roster" consisting of 25 players that are eligible to play in MLB games. *Baseball Roster History*, BASEBALL ALMANAC, http://www.baseball-almanac.com/articles/baseball_rosters.shtml [<https://perma.cc/7RZG-KZ67>] (last visited Apr. 12, 2016). In addition, each team has a forty-man roster, consisting of the 25-man active roster and additional players that are eligible to be added to the active roster. *Baseball Roster History*, *supra*; see also Theron Schultz, *The 40-Man Roster: How Does It Work?*, BREW CREW BALL (Jan. 4, 2009), <http://www.brewcrewball.com/2009/1/4/703125/the-40-man-roster-how-does> [<https://perma.cc/B9J4-59AS>] (providing a general overview of the forty-man roster concept in the MLB). A team may also be interested in adding a player to its forty-man roster in order to protect him from "Rule 5," which is a special draft that is separate and distinct from the first-year player draft, in which players with certain years of minor

vice is credited to a player for every 172 “service days” that he accrues.⁷² Once a player accrues three years (516 days) of service time or gets a special designation as a “Super Two” player in the top 22 percent of players with between two and three years of service time, Article VI of the CBA provides that he is eligible to file for salary arbitration.⁷³ In the salary arbitration process, both the team and the player submit their preferred salary for the upcoming season and are able to argue their case to the arbitrator.⁷⁴ After the arbitration panel has heard both sides, it must select one of the two salaries submitted to award the player for the upcoming season.⁷⁵

According to Article XX of the CBA, an MLB player is eligible to become a free agent at the end of the season in which he reaches at least six total

league service who are not on a forty-man roster are eligible to be selected by other MLB teams if placed immediately on their forty-man roster. Schultz, *supra*. In general, once a player is added to a team’s forty-man roster, the team has the option of assigning him to a minor league affiliate as many times as it chooses and for so long as it chooses for three separate seasons. See Thomas Gorman, *The BP Guide to Transaction Rules: Options*, BASEBALL PROSPECTUS (Jan. 10, 2006), <http://www.baseballprospectus.com/article.php?articleid=4700> [<https://perma.cc/74SW-PVMP>] (providing an in-depth explanation of the use of options in the MLB); Jonathan Mayo, ‘Options’ Abound: Common Term Explained, MLB.COM (Mar. 30, 2011), http://mlb.mlb.com/news/print.jsp?ymd=20110329&content_id=17188016 [<https://perma.cc/CTS6-9X68>] (providing simplified explanations and examples of the use of options in the MLB); Schultz, *supra*. If a player on the forty-man roster is assigned to a minor league affiliate for less than twenty days in a single season, however, the team is not considered to have used one of its three options. See Gorman, *supra*; Mayo, *supra*. Players who are assigned to the minor leagues for less than twenty days during a regular season while on a team’s forty-man roster are credited major league service time for each day that they were on their minor league assignment as well as each day they were on the twenty-five-man active roster. See Steve Adams, *Service Time and the 40-Man Roster*, MLB TRADE RUMORS (Apr. 15, 2013), <http://www.mlbradrumors.com/2013/04/service-time-and-the-40-man-roster.html> [<https://perma.cc/S24Q-UP86>] (discussing the intricacies of service time when a player moves between the twenty-five-man and forty-man-rosters).

⁷² See 2012–2016 Basic Agreement, *supra* note 63, at 96. A player can only earn a maximum of 172 service days per regular season. *Id.* If a player is on the major league roster for 182 days of the regular season, for example, he is only credited for 172 “service days” toward his required total for free agency. See *id.* (identifying 172 days as the maximum amount of service time earned in a single season).

⁷³ See *id.* at 17–18. The CBA defines a “Super Two” player as follows:

[A] Player with at least two but less than three years of Major League service shall be eligible for salary arbitration if: (a) he has accumulated at least 86 days of service during the immediately preceding season; and (b) he ranks in the top 22% (rounded to the nearest whole number) in total service in the class of Players who have at least two but less than three years of Major League service, however accumulated, but with at least 86 days of service accumulated during the immediately preceding season. If two or more Players are tied at 22%, all such Players shall be eligible.

Id. at 18.

⁷⁴ See *id.* at 19–20 (providing the form of submission of salary figures in arbitration).

⁷⁵ *Id.* at 22. The arbitrator has no authority to choose a salary other than one of the two that are submitted. *Id.* This system of arbitration is commonly referred to as “final-offer arbitration.” See David M. Frederick et al., *Race, Risk, and Repeated Arbitration*, in *BASEBALL ECONOMICS* 129, 130 (John Fixel et al. eds., 1996) (describing the final-offer arbitration model generally and discussing its use in baseball).

years of Major League service time.⁷⁶ Therefore, if a player has been on a Major League active roster for a total of at least 1032 “service days” in his career at the end of any given season, he becomes a free agent and is allowed to negotiate a new contract with any team without any restrictions.⁷⁷

2. The Grievance-Arbitration Process

The grievance-arbitration process is covered by Article XI of the CBA.⁷⁸ In “Step 1” of the traditional non-discipline-related grievance process, any player who believes he has a valid grievance for a violation of the CBA must hold a meeting on his potential grievance with his club.⁷⁹ If the player and the club cannot come to an agreement on a resolution, the player must file the grievance with the club within forty-five days of the events that led to the grievance.⁸⁰ At this point, the club has ten days to make a decision in writing on the grievance and supply copies of the decision to the player and the MLBPA.⁸¹

The player or the MLBPA must then submit a written appeal to the MLB’s Labor Relations Department (“LRD”) within fifteen days of the club’s decision, or the grievance ends at Step 1.⁸² After an appeal is filed, “Step 2” begins, and representatives from the LRD and the MLBPA have thirty-five days to meet regarding the grievance and provide each other with any evidence relating thereto.⁸³ No more than ten days after the meeting, the LRD must decide on the grievance and supply copies of the decision to the player and the MLBPA.⁸⁴ If the player or the MLBPA decide not to appeal, the grievance process ends at Step 2.⁸⁵ Upon further appeal, however, the arbitration process begins.⁸⁶

⁷⁶ 2012–2016 Basic Agreement, *supra* note 63, at 86.

⁷⁷ See *supra* notes 72–76 and accompanying text (discussing service time calculation and free agent eligibility).

⁷⁸ See 2012–2016 Basic Agreement, *supra* note 63, at 38–48 (providing definitions, procedures, and miscellaneous terms of the MLB grievance-arbitration procedure). Appendix A to the CBA identifies rules of procedure for grievance hearings before an arbitration panel. *Id.* at 295–98.

⁷⁹ *Id.* at 42. If the grievance involves more than one club or a player who is not under contract to a club, but is still party to the grievance, the grievance may skip “Step 1” and be filed initially in “Step 2.” *Id.* at 43.

⁸⁰ *Id.* at 43 A player may also file the grievance within forty-five days of “the date on which the facts of the matter became known or reasonably should have become known to the player.” *Id.*

⁸¹ *Id.*

⁸² *Id.* at 42.

⁸³ *Id.* Representatives from the related player and club may also be included at this discussion upon mutual agreement of the MLBPA and the MLB’s Labor Relations Department (“LRD”). *Id.*

⁸⁴ *Id.* at 43.

⁸⁵ *Id.*

⁸⁶ See *id.* at 43 (providing guidelines for the transition from Step 2 to the arbitration process).

To begin the arbitration process, the player or the MLBPA must submit a written appeal within fifteen days of the LRD's decision to a "Panel Chair," which is an impartial arbitrator agreed upon by both the MLBPA and the LRD.⁸⁷ The Panel Chair then schedules and presides over a hearing on the grievance.⁸⁸ As soon as possible after the close of the hearing, the arbitral panel must issue a decision consistent with its authority on the grievance.⁸⁹ After the decision has been issued, the grievance-arbitration procedures of the CBA are considered finalized.⁹⁰ Parties can seek confirmation or appeal of this disposition in federal court.⁹¹

II. THE SERVICE TIME MACHINE

An MLB player becomes eligible for salary arbitration or free agency once he reaches certain thresholds of service time measured in service years, each consisting of 172 service days.⁹² This part will discuss the ways in which MLB teams utilize the service time accrued by players under team control to the team's advantage.⁹³ Section A of this part examines the method by which teams manipulate a player's service time in order to prevent the player from reaching salary arbitration eligibility for one extra year.⁹⁴ Section B of this part examines a separate method by which teams manipulate a player's service time in order to prevent the player from reaching free agency eligibility for one extra year.⁹⁵

⁸⁷ *Id.* at 41–43. If the MLBPA and the LRD cannot come to an agreement, the two parties can choose to request a list of "prominent, professional arbitrators" from the American Arbitration Association and strike names from the list one at a time until one arbitrator remains as the Panel Chair. *Id.* at 41–42. In advance of the arbitration hearing, either party can alternatively elect to commission a three-member panel consisting of the Panel Chair and one arbitrator appointed by each party. *Id.* at 42.

⁸⁸ *Id.* at 43–44. Once the arbitration hearing has commenced, the arbitration panel must follow all the rules of procedure described in Appendix A of the CBA. *Id.* at 44. The Panel Chair or Arbitration Panel's authority in the arbitration process is given by the CBA as follows:

With regard to the arbitration of Grievances, the Arbitration Panel shall have jurisdiction and authority only to determine the existence of or compliance with, or to interpret or apply agreements or provisions of agreements between the Association and the Clubs or any of them, or between individual Players and Clubs. The Arbitration Panel shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.

Id. at 44.

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See supra* notes 31–34 and accompanying text (discussing judicial review of labor-related arbitration awards in federal courts).

⁹² *See supra* notes 71–77 and accompanying text (providing an overview of service time).

⁹³ *See infra* notes 96–109 and accompanying text.

⁹⁴ *See infra* notes 96–109 and accompanying text.

⁹⁵ *See infra* notes 110–140 and accompanying text.

A. Avoiding Salary Arbitration

Until a player reaches the salary arbitration threshold, his club is not required to pay him anything more than the minimum salary, which is currently set at \$507,500 for the MLB and set at a significantly lower monthly scale for each level of the minor leagues.⁹⁶ Once a player is determined to be eligible for salary arbitration by either reaching three full years of service time or qualifying as a Super Two player, he is able to petition for incremental increases in salary depending on his level of performance in the MLB.⁹⁷ Though the salary arbitration process is not perfect at determining a player's true value on the open free agent market, salaries agreed upon during or in advance of salary arbitration generally constitute a significant increase over the near-minimum salaries paid pre-arbitration.⁹⁸ MLB teams, therefore, have an incentive to keep a player from salary arbitration eligibility for as long as possible.⁹⁹

⁹⁶ See *MLB Minimum Salary Remains at \$507,500 for 2016*, ESPN (Nov. 18, 2015), http://espn.com/mlb/story/_/id/14161690/mlb-minimum-salary-remains-507500-2016 [<https://perma.cc/5D5A-FU9N>]; see also *supra* note 70 and accompanying text (discussing salaries for newly-promoted major league players on their rookie contracts).

⁹⁷ See *supra* notes 73–75 and accompanying text (discussing the criteria for salary arbitration eligibility).

⁹⁸ See, e.g., Justin Sievert, *Breaking Down the MLB Salary Arbitration Process*, SPORTING NEWS (Jan. 12, 2016), <http://www.sportingnews.com/mlb-news/4690998-mlb-salary-arbitration-process-breakdown-spring-training-2016> [<https://perma.cc/49BZ-B353>]. At their hearings, players and teams are only able to use information specifically allowed by Article VI of the CBA, which includes player performance in the previous season, the consistency of such performance over a player's career, the player's previous salaries, any physical or mental injuries, the performance of the team itself, and salaries of other players. *Id.*; see also *2012–2016 Basic Agreement*, *supra* note 63, at 20–21 (providing the allowable criteria for the arbitrator's consideration in salary arbitration hearings). Arbitration panels themselves tend to be even more conservative than the CBA allows, focusing on traditional statistics and comparisons between performance and compensation of players. See *Salary Arbitration*, FANGRAPHS, <http://www.fangraphs.com/library/business/mlb-salary-arbitration-rules/> [<https://perma.cc/54AH-KADN>] (last visited Aug. 10, 2016) (remarking on the “old school” tendencies and limited criteria used by arbitration panels in salary arbitration hearings). Because salary arbitration follows the final-offer arbitration model, players and teams have are disincentivized to make their offers too high or low, respectively. Frederick et al., *supra* note 75, at 130. In the absence of competitive offers from other teams that give players leverage during free agency, players will typically be awarded lower than their true free agent value. See Sievert, *supra*.

⁹⁹ See *supra* notes 96–98 and accompanying text (identifying financial incentives to keeping a player from reaching salary arbitration). The performance and salary trajectory of Philadelphia Phillies' first-baseman Ryan Howard at the beginning of his career helps to illustrate this point. See *Street Wins AL Rookie of Year; Howard Wins NL*, ESPN (Nov. 7, 2005), <http://espn.com/mlb/news/story?id=2216645> [<https://perma.cc/P92A-82DX>]. Howard debuted as a regular in the Phillies' lineup in July 2005 after an injury to starting first-baseman Jim Thome, and went on to win the National League Rookie of the Year award. *Id.* The next season, Howard earned only \$355,000 en route to winning the 2006 National League MVP award. Rob Maaddi, *Ryan Howard Beats Phillies in Arbitration and Will Earn \$10 million*, USA TODAY (Feb. 21, 2008), http://usatoday30.usatoday.com/sports/baseball/2008-02-21-1845392834_x.htm [<https://perma.cc/9BJL-RRTV>]. In 2007, the Phillies rewarded Howard with a raise to \$900,000, which at the time tied the record for the largest one-year salary for a non-arbitration eligible player. Todd Zolecki, *The \$900,000 Man*, PHILA. INQUIRER, Mar.

Of course, a team can choose to keep a player in the minor leagues during the seven-year minor league contract that he is required to sign upon being drafted.¹⁰⁰ If, however, a player has the skill to play on the major league roster and the team wishes to utilize his services as such, the team may engage in service time manipulation by calling the player up late enough to prevent him from qualifying for Super Two status after his third season on the team.¹⁰¹ Though the cutoff for the top twenty-two percent of service time between two and three years moves annually, a team can generally ensure that its prospect will never reach Super Two status if it promotes the player for the first time in mid-June, thereby giving the team a fourth year of the player's services without the threat of salary arbitration.¹⁰²

The treatment of outfielder Gregory Polanco serves as an illustration of service time manipulation conducted to avoid salary arbitration by preventing a player from reaching Super Two status.¹⁰³ Polanco was signed by the Pittsburgh Pirates as a free agent in 2009.¹⁰⁴ Polanco struggled until he broke out in late 2012, going from an unranked prospect to the number fifty-one-ranked prospect by Baseball America in 2013 and their number ten-ranked prospect in 2014.¹⁰⁵ In early 2014, Polanco was excelling at the Pirates' AAA affiliate

3, 2007, http://articles.philly.com/2007-03-03/sports/25235733_1_phillies-hope-ryan-howard-bright-house-networks-field [<https://perma.cc/MP7N-4F2L>]. After a 2007 season in which he placed fifth in NL MVP voting, Howard became eligible for salary arbitration, and was offered a \$7 million salary by the Phillies. Maaddi, *supra*; *Ryan Howard Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/h/howarry01.shtml> [<https://perma.cc/9KXZ-D2RR>] (last visited Apr. 12, 2016). Howard elected to send his case to arbitration, where he won the highest salary in arbitration history at \$10 million. Maaddi, *supra*. Howard went on to sign a three-year, \$54 million contract after the 2008 season, and a five-year, \$125 million contract after the 2011 season. See *Ryan Howard Contract, Salary Cap Details & Breakdown*, SPOTRAC, <http://www.spotrac.com/mlb/philadelphia-phillies/ryan-howard/> [<https://perma.cc/5XDJ-RVH3>] (last visited Apr. 12, 2016) (providing an overview of Howard's contract history).

¹⁰⁰ See Josh Leventhal, *Minor League Players Sue for Better Salaries*, BASEBALL AMERICA (Apr. 1, 2014), <http://www.baseballamerica.com/minors/players-sue-for-better-salaries/> [<https://perma.cc/DV3C-3FYW>] (explaining that first-year players' uniform contracts bind them to their respective organizations for seven years).

¹⁰¹ See Charlie Wilmoth, *Should the Super Two Designation Be Changed?*, MLB TRADE RUMORS (June 21, 2014), <http://www.mlptraderumors.com/2014/06/should-the-super-two-designation-be-changed.html> [<https://perma.cc/F5JC-H7G3>] (explaining how Major League organizations can promote its players and still "feel safe" that he will not reach Super Two status).

¹⁰² *Id.*

¹⁰³ See *infra* notes 104–109 and accompanying text.

¹⁰⁴ *Gregory Polanco Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/p/polangr01.shtml> [<https://perma.cc/D2WZ-5UAS>] (last visited Apr. 12, 2016).

¹⁰⁵ See Tyler Kepner, *Pirates' Gamble Produces a Star*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/26/sports/baseball/pirates-gambled-to-get-gregory-polanco-where-he-belongs.html> [<https://perma.cc/3N4L-F2BN>] (providing an overview of Polanco's rise to success in the MLB); *Gregory Polanco Register Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/register/player.cgi?id=polanc001gre> [<https://perma.cc/AC6Q-UH7S>] (last visited Apr. 12, 2016) (providing an overview of Polanco's career statistics).

while both of the Pirates' major league right fielders struggled mightily.¹⁰⁶ Through fans' and pundits' calls for promotion, the Pirates kept Polanco in the minor leagues until June 2014.¹⁰⁷ In doing so, the Pirates were accused of manipulating Polanco's service time so that he will fall short of Super Two status and salary arbitration eligibility at the end of his 2016 season.¹⁰⁸ Polanco went on to record the longest hitting streak to begin a career in Pirates history after his promotion.¹⁰⁹

B. Avoiding Free Agency

Though salary arbitration can increase a player's salary incrementally, salaries and lengths of deals increase dramatically in the competitive nature of free agency.¹¹⁰ When a team allows a player to become eligible for free agency, it runs the risk of significant salary increases as well as the possibility of losing the player altogether.¹¹¹ Therefore, a team's greatest incentive is to keep a player from eligibility for free agency for as long as possible.¹¹²

¹⁰⁶ See Wilmoth, *supra* note 101 (discussing Polanco's experience with the Pirate's minor league affiliate team).

¹⁰⁷ See Ryan Gaule, *Now Is the Time for Pittsburgh Pirates to Call Up Gregory Polanco*, BLEACHER REPORT (Apr. 28, 2014), <http://bleacherreport.com/articles/2044682-now-is-the-time-for-pittsburgh-pirates-to-call-up-gregory-polanco> [<https://perma.cc/AE6S-4EXM>] (advocating for Pirates to promote Polanco to its major league team); Wilmoth, *supra* note 101.

¹⁰⁸ See Bob Nightengale, *Pirates Defend Gregory Polanco Move, But Will It Cost Them?*, INDIANAPOLIS STAR (June 18, 2014), <http://www.indystar.com/story/sports/baseball/minors/2014/06/17/gregory-polanco-caught-mlbs-super-rule/10716883/> [<https://perma.cc/8RFA-BAFR>] (discussing the accusations that the Pirates organization faced for its handling of Polanco); Wilmoth, *supra* note 101 (using Polanco's situation with the Pirates to argue that MLB teams may be manipulating the service time and Super Two rules).

¹⁰⁹ Travis Sawchik, *Polanco Sets Pirates Record for Longest Hitting Streak to Start Career*, PITTSBURGH TRIBUNE-REVIEW (June 19, 2014), <http://triblive.com/sports/pirates/6311679-74/polanco-game-career> [<https://perma.cc/2HM6-4ZNK>].

¹¹⁰ See Sievert, *supra* note 98 (explaining that any increases in salary as a result of salary arbitration "will still likely earn [a player] a salary lower than their true value on the free agent market).

¹¹¹ See *id.*; see also, e.g., Quinn Roberts, *Price Charms as Red Sox Announce 7-Year Deal*, MLB.COM (Dec. 4, 2015), <http://m.mlb.com/news/article/158847426/red-sox-sign-david-price-to-seven-year-deal> [<https://perma.cc/6G5Q-KYLU>] (discussing the Red Sox's free agent signing of pitcher David Price). In 2015, for example, Detroit Tigers pitcher David Price entered his final year of salary arbitration eligibility before free agency. Mike Axisa, *David Price Smashes Arbitration Record with \$19.75 Million Payday*, CBS SPORTS (Jan. 16, 2015), <http://www.cbssports.com/mlb/eye-on-baseball/24967075/david-price-smashes-arbitration-record-with-1975-million-payday> [<https://perma.cc/67R5-EDUJ>]. Price, an elite talent, received the largest one-year salary for an arbitration-eligible player in MLB history at \$19.75 million for the 2015 season. *Id.* Mid season, the Toronto Blue Jays traded for Price with a package that included Baseball America's eighteenth-ranked prospect in professional baseball, Daniel Norris. Jeff Todd, *Blue Jays Acquire David Price for Three Prospects*, MLB TRADE RUMORS (July 30, 2015), <http://www.mlptraderumors.com/2015/07/blue-jays-to-acquire-david-price.html> [<https://perma.cc/U9WV-Y7S2>]. After the season ended, however, Price became a free agent and left the Blue Jays for a seven-year, \$217 million contract with the Boston Red Sox. See Roberts, *supra* (discussing Price's contract with the Red Sox). By allowing Price to become a free agent, the Blue Jays, who paid a significant price just to acquire him, watched even his record-

As with salary arbitration, 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.¹¹³ 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.¹¹⁴ 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.¹¹⁵ Practically, the player is prevented from becoming a free agent until he has accumulated six years and 171 days of service time.¹¹⁶

A comparison of the Houston Astros' treatment of outfielder George Springer with that of first-basemen Jon Singleton provides a particularly interesting look into the problem of service time manipulation conducted to prevent a player from reaching free agency.¹¹⁷ George Springer was selected by the Houston Astros with the eleventh overall pick in the 2011 MLB first-year player draft.¹¹⁸ After receiving a \$2.5 million signing bonus, Springer was assigned to Astros' low A minor league affiliate Tri-City.¹¹⁹ By September 2013,

breaking yearly salary increase by over 50% and lost his services to another team. *See* Axisa, *supra*; Roberts, *supra*; Todd, *supra*.

¹¹² *See supra* notes 110–111 and accompanying text.

¹¹³ *See supra* note 100 and accompanying text.

¹¹⁴ *See, e.g.*, Ryan Davis, *Kris Bryant, the CBA, and the Grievance That Is and Might Be*, BASEBALL PROSPECTUS (Dec. 15, 2015), <http://wrigleyville.locals.baseballprospectus.com/2015/12/15/kris-bryant-the-cba-and-the-grievance-that-is-and-might-be/> [https://perma.cc/SPF5-GYYM] (discussing service time manipulation generally and the pertinent example of Chicago Cub Kris Bryant). There are other instances in which teams may manipulate service time by other means. *See, e.g.*, Jeff Passan, *Sources: Kris Bryant, Maikel Franco Filed Grievances Over Manipulation of Service Time*, YAHOO SPORTS (Dec. 7, 2015), <http://sports.yahoo.com/news/sources--kris-bryant--maikel-franco-filed-grievances-over-manipulation-of-service-time-213422124-mlb.html> [https://perma.cc/G7EJ-LZVE] (discussing the potential service time manipulation of Philadelphia Phillies player Maikel Franco). For example, Philadelphia Phillies third basemen Maikel Franco alleges that the Phillies engaged in service time manipulation by promoting him to the major league roster at the close of the 2014 season, then keeping him in the minor leagues at the beginning of the 2015 season until his service time between the two seasons would add up to less than 172 days. *Id.*

¹¹⁵ *See, e.g.*, Bryan Kilpatrick, *Explaining MLB's Service Time Rules*, PURPLE ROW (Mar. 31, 2015), <http://www.purplerow.com/2015/3/31/8323263/kris-bryant-service-time-cubs-mlb-rockies-jon-gray> [https://perma.cc/3V7S-FTUB] (explaining that Chicago Cub Kris Bryant and Colorado Rockie Jon Gray will both finish one day short of six service years at the end of their sixth seasons).

¹¹⁶ *See, e.g., id.*

¹¹⁷ *See infra* notes 118–140 and accompanying text.

¹¹⁸ *George Springer Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/s/springe01.shtml> [https://perma.cc/BZP2-PMEK] (last visited Apr. 12, 2016).

¹¹⁹ Brian McTaggart, *Astros Sign First-Round Draft Pick Springer*, MLB.COM (Aug. 16, 2011), <http://m.mlb.com/news/article/23257134/> [https://perma.cc/RSZ7-ELUF]; *George Springer Register Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/register/player.cgi?id=spring001geo> [https://perma.cc/4MV6-LN3T] (last visited Apr. 12, 2016) [hereinafter *George Springer Register Statistics and History*].

Springer had been escalated to the Astros AAA-level affiliate, and was thoroughly dominating minor league competition.¹²⁰ Before even adding Springer to their forty-man roster, the Astros offered him a seven-year major league contract valued at a guaranteed \$23 million.¹²¹ Had Springer accepted the deal, he would have been guaranteed a long-term deal, but also would have been put under guaranteed team control through all three years of his salary arbitration eligibility and his first year of free agency eligibility.¹²² Springer turned down the guaranteed contract, electing to play his trade at the league minimum salary until he reached salary arbitration and eventually free agency.¹²³

The surging twenty-four-year-old who was offered a \$23 million major league contract, however, was not added to the Astros' twenty-five-man active roster.¹²⁴ Springer was not even added to the team's expanded forty-man roster.¹²⁵ Instead, he was kept in the Astros' minor league system.¹²⁶ When spring training began for the 2014 season, Springer was again assigned to minor league camp without being added to the team's forty-man roster.¹²⁷ Instead of playing for a guaranteed salary or even the league minimum salary on the major league roster, Springer toiled away at the Astros AAA affiliate, while accruing no service time that would inch him toward salary arbitration and free agency.¹²⁸

Just over two weeks into the 2014 MLB season, George Springer was called up to the Houston Astros major league roster.¹²⁹ Because the Astros

¹²⁰ See Mark Townsend, *MLBPA and George Springer's Agent May File Grievance Over Service Time Issues with Astros*, YAHOO SPORTS (Mar. 23, 2014), <http://sports.yahoo.com/blogs/mlb-big-league-stew/mlbpa-george-springer-agent-may-file-grievance-over-171248101--mlb.html> [<https://perma.cc/DES4-UHMH>] (“At the time, the 24-year-old outfielder was absolutely tearing it up at Double-A and Triple-A, posting a .303/.411/.600 with 37 home runs and 45 stolen bases in 135 games.”).

¹²¹ See *id.* (explaining that the Astros offered Springer a seven-year, \$23 million contract in September 2014, but still had not added him to the Astros forty-man roster as of March 2014).

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.* In response to Springer's continued residence in the minor leagues, Fox Sports analyst Ken Rosenthal wrote, “[t]he obvious question: [i]f Springer was good enough to be offered \$23 million, why isn't he good enough to crack the 25-man roster of a team that has finished with the worst record in the majors in each of the past three seasons?” Ken Rosenthal, *System Discourages Teams from Promoting Top Prospects*, FOX SPORTS (Mar. 19, 2014), <http://www.foxsports.com/mlb/story/system-discourages-teams-like-astros-from-promoting-top-prospects-to-majors-031914> [<https://perma.cc/PTJ2-P8XD>].

¹²⁵ Townsend, *supra* note 120.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *id.* (explaining that Springer was placed in the Astros' minor league camp at the beginning of the season after being deemed “good enough to be offered \$23 million” in a major league contract at the end of the previous season).

¹²⁹ Zachary Levine, *How MLB Service Time Dictates Top-Prospect Promotions*, FOX SPORTS (Apr. 19, 2014), <http://www.foxsports.com/mlb/story/how-mlb-service-time-dictates-top-prospect-promotions-041914> [<https://perma.cc/8SJM-KVE5>].

waited to call up Springer until mid-April, he was unable to earn a full year (172 days) of service time, which means that he will fall just short of the six-year service time free agency eligibility requirement at the end of his 2019 season.¹³⁰ Effectively, the Astros guaranteed that Springer would remain under team control until the end of the 2020 season before having the ability to enter the free agent market.¹³¹ Springer finished 2014 with the second most Wins Above Replacement (“WAR”) of any position player on the Astros.¹³²

In contrast, Jon Singleton’s path to the MLB was very different from that of George Springer, his own teammate.¹³³ Singleton was selected by the Philadelphia Phillies in the eighth round of the 2009 first-year player draft.¹³⁴ He received only a \$200,000 signing bonus and was assigned to the Phillies’ rookie league affiliate.¹³⁵ Singleton worked slowly through the minors, progressing to high A level before he was traded to the Houston Astros in 2011.¹³⁶ By 2013, Singleton, who worked his way up to be ranked the number twenty-seven prospect in all of baseball by Baseball America, joined Springer at the Astros AAA-level affiliate.¹³⁷ In June 2014, Singleton accepted a contract similar in structure to the one Springer turned down; in exchange for giving up

¹³⁰ See *id.* Because Springer was called up in April and not later in the season, he will still likely be eligible for Super Two status at the end of his third season and be able to submit to arbitration early. See Tyler Drenon, *George Springer Call Up: Did the Astros Get Strong-Armed into this Promotion?*, MLB DAILY DISH (Apr. 16, 2014), <http://www.mlbailydish.com/2014/4/16/5619644/george-springer-call-up-astros-bradley-diamondbacks> [https://perma.cc/Z8EB-MBYZ]. There is speculation that the Astros called up Springer before assuring that he would not get Super Two status because his agent threatened to file a service time manipulation grievance. See Drenon, *supra* (speculating that Springer’s agent threatened to file a grievance and explaining the unorthodoxy of the promotion).

¹³¹ See Levine, *supra* note 129 (discussing the effects that the Astros decision will have on Springer’s career).

¹³² *2014 Houston Astros Batting Statistics*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/HOU/2014-batting.shtml> [https://perma.cc/45VL-MZ9X] (last visited Apr. 12, 2016). WAR is an advanced statistic that calculates the number of wins a particular player can be expected to add to his team over that of a replacement-level player. *WAR Explained*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/about/war_explained.shtml [https://perma.cc/95WB-9XCS] (last visited Sept. 12, 2016).

¹³³ Compare *supra* notes 117–132 and accompanying text (discussing George Springer’s path to the MLB), with *infra* notes 134–140 and accompanying text (discussing Jon Singleton’s path to the MLB).

¹³⁴ *Jon Singleton Register Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/register/player.cgi?id=single001jon> [https://perma.cc/NW4Q-E424] (last visited Apr. 12, 2016) [hereinafter *Jon Singleton Register Statistics and History*].

¹³⁵ See Craig Edwards, *Reviewing Jon Singleton’s Contract One Year Later*, FANGRAPHS, <http://www.fangraphs.com/blogs/reviewing-jon-singletons-contract-one-year-later/> [https://perma.cc/L6HV-JSBT] (last visited Aug. 14, 2016) (explaining that Singleton was given a \$200,000 signing bonus after the Phillies drafted him); *Jon Singleton Register Statistics and History*, *supra* note 134 (showing Singleton’s placement in the Phillies’ rookie-league affiliate in 2009).

¹³⁶ See *Jon Singleton Register Statistics and History*, *supra* note 134.

¹³⁷ See *George Springer Register Statistics and History*, *supra* note 119 (showing Springer’s placement in the Astros’ AAA-level affiliate in 2013); *Jon Singleton Register Statistics and History*, *supra* note 134 (showing Singleton’s promotion to the Astros’ AAA-level affiliate in 2013).

potential earnings in salary arbitration, Singleton would be guaranteed \$10 million spread over five years.¹³⁸ Singleton's deal also came with a promise that he would be promoted to the Houston Astros major league roster upon signing.¹³⁹ Singleton played the rest of the season on the Astros' major league roster, finishing with the team's third lowest WAR.¹⁴⁰

III. THE IMPLIED OBLIGATION OF GOOD FAITH

The implied obligation of good faith and fair dealing is recognized as one of the foundational tools for post-execution contract interpretation.¹⁴¹ This Part provides an overview of the implied obligation of good faith doctrine in preparation for a discussion of its application to service time manipulation in Part IV of this Note.¹⁴²

The implied obligation of good faith can trace its genesis in American jurisprudence to the latter part of the Nineteenth Century.¹⁴³ In order to avoid the heavy-handed consequences of strict formalist contract interpretation, the common-law doctrine was created to allow for courts to interpret the "spirit" of a contract and make decisions on the implied terms that embody that spirit.¹⁴⁴ Since then, both the term "good faith" and the associated legal doctrine have grown significantly in definition and acceptance in American courts.¹⁴⁵ In 1951, the implied obligation of good faith was incorporated into the Uniform Commercial Code.¹⁴⁶ Later, the implied obligation of good faith became so

¹³⁸ See Cliff Corcoran, *Astros Sign First-Base Prospect Jon Singleton to Five-Year Deal, Call Him Up to Majors*, SPORTS ILLUSTRATED (June 2, 2014), <http://www.si.com/mlb/strike-zone/2014/06/02/astros-sign-jon-singleton-to-five-year-deal> [<https://perma.cc/AGR5-BK8P>] (explaining the details of Singleton's contract).

¹³⁹ Mike Bates, *The Astros' Jon Singleton and an Offer He Couldn't Refuse*, SB NATION (June 4, 2014), <http://www.sbnation.com/mlb/2014/6/4/5776248/jonathan-singleton-astros-springer-extortion-extension-norris> [<https://perma.cc/DZ3F-VEC6>].

¹⁴⁰ See *2014 Houston Astros Batting Statistics*, *supra* note 132 (displaying the WAR of 2014 Astros batters, including Singleton's third-lowest WAR of -0.8).

¹⁴¹ See Dubroff, *supra* note 19, at 559, 561 (explaining that the implied obligation of good faith has become a "fundamental concept" of contract law, especially in the context of post-execution contract interpretation).

¹⁴² See *infra* notes 143–166 and accompanying text.

¹⁴³ Dubroff, *supra* note 19, at 559.

¹⁴⁴ See *id.* at 562 (discussing the implied obligation of good faith's role as a counterbalance to "conservative interpretation and gap-filling rules prevalent in the Nineteenth and early Twentieth centuries").

¹⁴⁵ See *id.* 559–61.

¹⁴⁶ *Id.* The Uniform Commercial Code ("U.C.C."), first published in 1951 by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, "is a comprehensive modernization of various statutes relating to commercial transactions including sales, leases, negotiable instruments, bank deposits and collections, fund transfers, letters of credit, bulk sales, documents of title, investment securities, and secured transactions." *Uniform Commercial Code*, AM. LAW INST., <https://www.ali.org/publications/show/uniform-commercial-code/> [<https://perma.cc/Y28Z-EPCE>] (last visited Apr. 12, 2016); see also Dubroff, *supra* note 19, at 609 (discussing the U.C.C.). Though

widely accepted in American jurisprudence that it was also adopted by the renowned *Restatement (Second) of Contracts*.¹⁴⁷ Federal courts have recognized that the implied obligation of good faith is applicable to collective bargaining agreements.¹⁴⁸ The doctrine is also used in arbitration proceedings regarding potential breaches of collective bargaining agreements.¹⁴⁹

As it now exists, the term “good faith” is used to refer to a multitude of contexts such that no one definition is all-encompassing.¹⁵⁰ The *Restatement (Second) of Contracts* definition that applies most contextually with this Note defines good faith as “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”¹⁵¹ The popular treatise *American Jurisprudence* intuits that the implied obligation of good faith in this context prevents either party from “injuring the right of the other party to receive the fruits of the contract.”¹⁵²

the U.C.C. itself applies generally to the categories stated previously, its adoption of the implied obligation of good faith is considered “the most significant development in the history of the implied covenant of good faith.” Dubroff, *supra* note 19, at 609.

¹⁴⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST., 1981); see also Dubroff, *supra* note 19, at 559–60 (discussing the implied obligation of good faith’s inclusion in the *Restatement (Second) of Contracts*). Section 205 of the *Restatement (Second) of Contracts* states, “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205.

¹⁴⁸ See *United Steelworkers of Am., Local Union No. 4264 v. New Park Mining Co.*, 273 F.2d 352, 356 (10th Cir. 1959) (“[T]he covenant of good faith and fair dealings . . . must inhere in every collective bargaining contract if it is to serve its institutional purposes.”); *Pilot Freight Carriers, Inc. v. Int’l Bhd. of Teamsters*, 495 F. Supp. 619, 636 (M.D.N.C. 1980), *vacated on other grounds*, 659 F.2d 1252 (4th. 1981) (noting that federal courts routinely read the obligation of good faith into collective bargaining agreements).

¹⁴⁹ See ELKOURI & ELKOURI: HOW ARBITRATION WORKS 9-50 to -51 (Kenneth May ed., 7th ed. 2012) (discussing the common use of the implied obligation of good faith in both judicial and arbitration settings); see also *Int’l Bhd. of Teamsters, Local Union No. 439 v. Sierra Chem. Co.*, (CCH) 06-1 ARB ¶ 3390, 2005 WL 7992061 (2005) (Pool, Arb.) (“It has long been held that every CBA imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

¹⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

¹⁵¹ See *id.* Professor Robert Summers refers to good faith as a “highly versatile doctrine,” identifying the performance of contracts, the negotiation and formation of contracts, and the raising and resolving of contract disputes as the three broad categories in which it can be invoked. Robert Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 216, 220, 232, 243 (1968). Professor Summers further identifies several specific instances in which bad faith can be alleged:

[N]egotiating without serious intent to contract, abusing the privilege to break off negotiations, entering a transaction without intending to perform or in reckless disregard of prospective inability to perform, nondisclosure of known defects in the subject of a sale, abusing superior bargaining power, evading the spirit of a transaction, lack of diligence, willfully rendering only substantial performance, and abusing the power to specify terms or to determine compliance.

Summers, *supra*, at 216.

¹⁵² 17A AM. JUR. 2D *Contracts* § 362.

That the good faith doctrine is widely accepted does not mean that it is uniformly construed and applied.¹⁵³ Scholars point to differing judicial interpretations, tests applied to establish breach of the obligation, and standards of review as the leading causes of shortcomings in the good faith doctrine.¹⁵⁴ Still others refer to it as an “under-enforced legal norm,” or an “empty vessel.”¹⁵⁵ When the good faith doctrine is applied at common law, however, there are two concepts that the courts seem to have generally agreed upon.¹⁵⁶ First is that the implied obligation of good faith should be used only to protect the intents of each party as they expressed them in their initial contract.¹⁵⁷ Second is that the good faith obligation requires that the party with the discretion to perform certain actions exercise that discretion in tune with the spirit of the contract.¹⁵⁸

An investigation into whether a party has violated the implied obligation of good faith flows from the second concept.¹⁵⁹ In forming such an investigation, a factfinder must determine whether the discretionary party used its contractual discretion for reasons outside the justified and “reasonable expectations” of the parties when they entered into the agreement.¹⁶⁰ The factfinder may also inquire into whether a party abused its discretion in order to obtain a result that should have been surrendered as a result of the contract.¹⁶¹ Essentially, if a party uses its discretion in order to avoid or subvert the express and implied terms and purposes of the contract, it should be found to have acted in violation of the implied obligation of good faith.¹⁶²

Several courts have limited the obligation of good faith by finding that the doctrine cannot be used to overrule a provision explicitly stated in the contract.¹⁶³ It also may not be employed to add terms with new and reasonably

¹⁵³ See Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2051–52 (2015) (discussing the lack of consistency that has characterized courts’ application of the good faith doctrine).

¹⁵⁴ See *id.* at 2052–53.

¹⁵⁵ Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 4 (using the phrase “empty vessel”); MacMahon, *supra* note 153, at 2051 (using the phrase “under-enforced legal norm”).

¹⁵⁶ Frederick W. Claybrook, *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555, 558 (1997).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 558–59.

¹⁶⁰ *Id.* at 558.

¹⁶¹ *Id.* at 558–59.

¹⁶² See *supra* notes 159–161 and accompanying text (setting out the inquiry that leads to a finding of bad faith).

¹⁶³ See *Gen. Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1041 (6th Cir. 1990) (noting that the “obligation of good faith cannot be employed, in interpreting a contract, to override express contract terms”); *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 679 (2d Cir. 1985) (finding that the implied obligation of good faith in the context of the U.C.C. “may not be used to

unexpected duties to a contract.¹⁶⁴ Many jurisdictions have also found that the implied obligation of good faith does not create an independent cause of action for breach of a contract.¹⁶⁵ That is, any party that wishes to seek respite for breach utilizing the implied obligation of good faith must accuse another party of violating an explicit term of the contract, not a term implied by the good faith obligation.¹⁶⁶

IV. GOOD FAITH SOLUTIONS TO THE SERVICE TIME PROBLEM

As recently as the 2015 season, players and the MLBPA have filed grievances regarding service time manipulation with the MLB.¹⁶⁷ Section A of this part will discuss a potential grievance for service time manipulation in the context of the MLB's grievance-arbitration procedures, analyzing both the strength of a player's claim and the hurdles that he must overcome in succeeding with his grievance.¹⁶⁸ Section B of this part will discuss potential alternatives to the MLB's current formulation of service time that could mitigate service time manipulation claims in the next CBA.¹⁶⁹

A. Challenging Service Time Manipulation as a Violation of the CBA

Players have a colorable argument under the implied obligation of good faith that the manipulation of their service time violates the CBA between the MLB and the MLBPA.¹⁷⁰ There is, however, no article of the CBA that sets, suggests, or even intimates rules that require an MLB club to assign players to various levels of professional baseball based on that player's performance.¹⁷¹

override explicit contractual terms"); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129, 138 (5th Cir. 1979) (finding the implied obligation of good faith cannot be used to imply a restriction on an explicitly stated provision of a contract).

¹⁶⁴ See ELKOURI & ELKOURI: HOW ARBITRATION WORKS, *supra* note 149, at 9-51 (concluding that the implied obligation of good faith cannot be used to add terms that create duties or obligations for parties subject to a collective bargaining agreement).

¹⁶⁵ See *id.* at 9-51 n.264 ("It is clear from a review of the judicial and arbitration decisions that a claim of breach of the implied covenant of good faith and fair dealing will not stand on its own.").

¹⁶⁶ See *id.* (concluding that a plaintiff must allege a violation of statute or of an explicit term of the collective bargaining agreement in order before claiming that a violation constituted a breach of the implied obligation of good faith).

¹⁶⁷ See David Brown, *Report: Kris Bryant, Maikel Franco File Service-Time Grievances*, CBS SPORTS (Dec. 7, 2015), <http://www.cbssports.com/mlb/eye-on-baseball/25405003/report-kris-bryant-maikel-franco-file-service-time-grievances> [<https://perma.cc/9TQF-NTHZ>] (providing an overview of the service time grievances filed by Kris Bryant and Maikel Franco).

¹⁶⁸ See *infra* notes 170–200 and accompanying text.

¹⁶⁹ See *infra* notes 201–245 and accompanying text.

¹⁷⁰ See *infra* notes 171–189 and accompanying text (discussing the argument for service time manipulation as a violation of the CBA)

¹⁷¹ See generally *2012–2016 Basic Agreement*, *supra* note 63 (providing the entire CBA agreement reached between the MLBPA and 30 Major League Clubs).

Because new draftees and minor league players that have yet to appear on a major league roster are not yet members of the MLBPA, the CBA does not even seem to cover their initial promotion into the major leagues.¹⁷²

The first step in such a claim is identifying and defining the justified and reasonable expectations of the MLBPA in regards to its agreement with the MLB.¹⁷³ The MLBPA's argument should be based on the notion that the CBA and the competitive nature of professional baseball itself identify the goals that the MLBPA reasonably expects MLB clubs to pursue: fully developing young talent, competing for championships, and profiting from the benefits of success.¹⁷⁴ The MLBPA can insist that the service time provisions of Article XXI, the salary arbitration provisions of Article VI, and the free agency eligibility provisions of Article XX of the CBA were negotiated with the expectation that clubs would act in concert with the goals that the MLBPA expected clubs to pursue.¹⁷⁵ The MLBPA can assert that its reasonable expectation is that MLB clubs will assign players to the major league roster once club executives believe that players have reached full minor league development and can help the team compete for a championship.¹⁷⁶

Once it defines its reasonable expectations in regards to the relevant portions of the CBA, the MLBPA can allege that MLB clubs that engage in service time manipulation are acting outside of those expectations, counter to their implied obligation of good faith.¹⁷⁷ When an MLB club uses its discretion to keep a player off of the major league roster in order to prevent that player from accruing service time, it acts to prevent players from receiving the "fruits of their contracts" in the form of eventual salary arbitration and free agency eligibility.¹⁷⁸ The MLB can then assert that, instead of acting in pursuit of competition and "let[ting] the service time chips fall where they may from

¹⁷² See *id.* at 1 (identifying the MLBPA as the representative of "Major League Baseball Players and individuals who may become Major League Baseball Players during the term of this Agreement").

¹⁷³ See *supra* note 160 and accompanying text (discussing the first step in an inquiry into violation of the obligation of good faith).

¹⁷⁴ See Wojciechowski, *supra* note 12 (discussing the competitive nature of baseball along with the express elements of the CBA giving rise to an implied obligation of good faith in player assignment). See generally *2012–2016 Basic Agreement*, *supra* note 63 (the CBA agreement between the MLBPA and 30 Major League Clubs).

¹⁷⁵ See *supra* notes 72, 73, 76 and accompanying text (discussing the relevant provisions of the CBA).

¹⁷⁶ See *supra* notes 173–175 and accompanying text (developing the MLB's reasonable expectations for the purposes of a claim for violation of the implied obligation of good faith).

¹⁷⁷ See *supra* notes 159–162 (describing the inquiry into a violation of the implied obligation of good faith).

¹⁷⁸ See *supra* notes 71–77, 100–102, 113–116, 152 and accompanying text (describing the Articles in question, the methods by which teams intentionally manipulate service time, and the protection against preventing a party from receiving the "fruits of a contract" inherent in the implied obligation of good faith).

those *baseball* decisions” as the MLBPA reasonably expects, MLB clubs engaging in service time manipulation act in pursuit of an unexpected goal: using service time as a tool to artificially lengthen the amount of time a player is under team control at the lowest possible salary.¹⁷⁹

Though it seems obvious in some of the service time manipulation case studies that MLB clubs are acting with the goal of preventing a player from accruing service time, it may be difficult to allege that the club did not still act within the MLBPA’s reasonable expectations.¹⁸⁰ Assignment to the major league roster involves discretion that is exercised by highly sophisticated player personnel departments.¹⁸¹ 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.¹⁸² Likely cognizant of this, club officials in the case studies examined in this Note vehemently deny that a player’s assignment to the minor league roster has anything to do with service time.¹⁸³

In many cases of service time manipulation, however, the MLBPA would be able to use circumstantial evidence place serious doubt on the presumption that personnel departments of MLB clubs are acting in pursuit of non-service

¹⁷⁹ Wojciechowski, *supra* note 12.

¹⁸⁰ See Davis, *supra* note 114 (describing MLB teams’ use of “subjective reasons for calling up players at arbitrary times” and claims of no service time connection as a “pack of lies”); Wojciechowski, *supra* note 12 (touting the belief that Kris Bryant’s demotion was entirely due to service time considerations while discussing the difficulty of proving such a claim).

¹⁸¹ See Gordon Wittenmyer, *Boras: Resolve Bryant-like Service-time Disputes with Review System*, CHI. SUN-TIMES (Apr. 21, 2015, 7:38PM), <http://chicago.suntimes.com/sports/boras-resolve-bryant-like-service-time-disputes-with-review-system/> [<https://perma.cc/84NT-58SZ>] (noting that “[p]ossible issues include the direct intrusion into clubs’ personnel decisions that may involve multiple roster issues (another player’s options, 40-man considerations, etc.)”).

¹⁸² See Wojciechowski, *supra* note 12 (“The arbitrator would likely defer, to a certain extent, to the team’s explanations for [a player’s] demotion. It would be up to the union to show that those explanations are bunk, which is a complicated thing to prove.”).

¹⁸³ See *id.* (describing team executives’ reasoning for high-profile, service time-related player demotions as “less to do with offending fans than . . . fear of providing the union ammunition in grievance”). When Gregory Polanco was kept at the Pirates’ AAA affiliate until June 2014, team president Frank Connelly and general manager Neal Huntington denied any service time connection, citing their personal “comfort level” with his development. Nightengale, *supra* note 108. In the midst of the George Springer saga, Astros general manager Jeff Luhnow stressed minor league prospects’ readiness and opportunity to play meaningful time at the major league level when considering player promotion, declining to comment on “contract status or any of that stuff.” Evan Drellich, *George Springer’s Promotion Date a Key Issue for Astros’ Future*, HOUS. CHRON. (Jan. 16, 2014), <http://blog.chron.com/ultimateastros/2014/01/16/george-springers-promotion-date-a-key-issue-for-astros-future/> [<https://perma.cc/8JBA-G2KU>]. When Kris Bryant was assigned to the Cubs’ AAA affiliate at the beginning of the 2014 season, team president Theo Epstein asserted that it was to continue his development, especially on defense, at the minor league level. Mark Gonzales, *Cubs’ Demotion of Kris Bryant Sparks Outcry*, CHI. TRIB., Mar. 30, 2015, <http://www.chicagotribune.com/sports/baseball/cubs/chi-kris-bryant-javier-baez-addison-russell-demotions-20150330-story.html> [<https://perma.cc/M5FL-YWVA>].

time-related agenda.¹⁸⁴ In cases where teams attempt to avoid free agent eligibility, the MLBPA should point to the fact that a player was promoted to the major league roster just after he could no longer accrue a full 172 days of service time in his first major league season.¹⁸⁵ Though service time manipulation pursued to avoid salary arbitration eligibility may be more difficult to specifically refute, statistical analysis would allow the MLBPA to identify trends in player promotion that lead to avoidance of Super Two status.¹⁸⁶ The MLBPA can also question and pursue definitive answers from coaching or scouting staff on whether there was any true development that was expected or that occurred in the time that a player like Bryant, Polanco, or Springer was kept in the minor league system.¹⁸⁷ Furthermore, each case of service time manipulation is likely to have its own player and team-specific circumstantial evidence that refutes club claims that service time was not a factor in player promotion.¹⁸⁸

After taking all of these aspects into consideration, it seems the MLBPA has an argument that is at least believable if not moderately strong.¹⁸⁹ The claim's viability, however, enters the great unknown when it is brought into the practical reality of the MLB grievance-arbitration procedures.¹⁹⁰ At the many levels before a player or the MLBPA's grievance reaches an arbitrator, the two

¹⁸⁴ See Davis, *supra* note 114. Davis posits that the MLBPA would not need "substantial proof," but rather that it would need only to convince arbitrators that there is enough circumstantial evidence to support the notion that a delayed promotion was for the purpose of manipulating service time. *Id.*

¹⁸⁵ See *supra* notes 113–116 and accompanying text (discussing the service time manipulation method by which teams prevent players from reaching free agency).

¹⁸⁶ See Levine, *supra* note 129 (noting spikes in the top-ten prospect promotion between days sixty and ninety of the regular season, and suggesting that teams do so as a way to avoid the Super Two cutoff); see also *supra* note 102 and accompanying text (pointing out that the cutoff for Super Two status moves every year).

¹⁸⁷ See Davis, *supra* note 114 (noting the type of evidence that may be useful to claim that a club was not forthcoming about their intentions with a player); Wojciechowski, *supra* note 12 (discussing the questions that the MLBPA or affected players could ask team executives and coaches to point out a disparity between what clubs say and what they actually do).

¹⁸⁸ See, e.g., *supra* notes 106, 121–128, 133–140 and accompanying text (describing specific pieces of relevant circumstantial evidence in the Gregory Polanco and George Springer sagas). In Polanco's case, such evidence may include the abysmal performance of all of the Pirates' outfielders as the Pirates were involved in a close playoff race. See *supra* note 106 and accompanying text. Springer could introduce evidence regarding his being kept in the minor leagues after turning down a lucrative contract that likely would have guaranteed his promotion. See *supra* notes 121–128 and accompanying text. Springer would also have the ammunition of the Astros' dealings with Jon Singleton, who was promoted immediately after signing his long-term contract. See *supra* notes 133–140 and accompanying text.

¹⁸⁹ See *supra* notes 173–188 and accompanying text (developing the MLBPA's potential claim against the MLB).

¹⁹⁰ See *infra* notes 191–200 and accompanying text (discussing the various potential outcomes in the grievance-arbitration process).

sides can reach a resolution that prevents the case from going to arbitration.¹⁹¹ If the grievance eventually makes it through to a neutral arbitrator or arbitration panel, the outcome of the grievance is almost entirely up to the judgment of the arbitrators.¹⁹²

The difficulty in analyzing the potential outcome of a service time manipulation grievance if it ever reached a neutral arbitrator comes from both the MLB's grievance-arbitration procedure and federal case law concerning arbitration awards.¹⁹³ First, the MLB does not significantly outline the procedures or precedent that an arbitrator must follow.¹⁹⁴ An arbitrator is not bound to use legal precedent that may lend support to an MLBPA claim that the implied obligation of good faith is generally found to exist in contracts at common law or that the implied obligation of good faith applies specifically in this situation.¹⁹⁵ At least one baseball analyst suggests that arbitrators often specifically avoid construing contracts using such uncertain legal doctrines.¹⁹⁶ The widely regarded treatise, *Elkouri & Elkouri: How Arbitration Works*, however, explicitly calls out the implied obligation of good faith as a frequently used arbitration tool, and encourages its use as a means of making fact-specific judgments on contract breach issues.¹⁹⁷ The treatise encourages the use of the doctrine to uncover bad-faith abuses of contractual discretion.¹⁹⁸

Even if the MLBPA did succeed in convincing an arbitrator of these two necessary pillars of its argument, there is no indication of the standard of deference that the arbitrator would have to give to the explanations that clubs put forward for a player's assignment, or how much evidence the arbitrator would allow into the case to refute such an explanation.¹⁹⁹ If the arbitrator were to use

¹⁹¹ See Davis, *supra* note 114 (noting that Kris Bryant's grievance will only lead to impartial arbitration if the MLBPA and the MLB do not settle beforehand); Passan, *supra* note 114 (noting that open grievances concerning service time manipulation may never reach an arbitration panel, and that they could even be resolved in the bargaining process).

¹⁹² See Davis, *supra* note 114 (noting that arbitrators are not required to follow precedent, and that decisions are ultimately theirs to make freely); Wojciechowski, *supra* note 12 (noting that an arbitrator would likely give some deference to teams' reasons for delayed promotions, and that arbitrator's decision-making processes are difficult to predict).

¹⁹³ See *infra* notes 194–200 and accompanying text (discussing the lack of guidance for arbitrators in the grievance-arbitration process and the vast deference given to arbitrators in federal courts).

¹⁹⁴ See *2012–2016 Basic Agreement*, *supra* note 63, at 295–98 (establishing arbitration procedures).

¹⁹⁵ See Davis, *supra* note 114 (pointing out that arbitrators are not required to follow precedent).

¹⁹⁶ See *id.* (quoting analyst Ryan Davis of Baseball Prospectus who points out that “spirit of the contract” violations are generally a “slippery slope” that arbitrators tend to avoid).

¹⁹⁷ ELKOURI & ELKOURI: HOW ARBITRATION WORKS, *supra* note 149, at 9-50.

¹⁹⁸ See *id.* at 9-51 (“Thus, the covenant serves as the basis for the proposition that managerial discretion must be exercised reasonably and discretionary management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory.”).

¹⁹⁹ *2012–2016 Basic Agreement*, *supra* note 63, at 296 (noting that the Arbitration Panel Chair rules on the “relevancy and materiality” of evidence, and that it need not utilize formal legal rules of

its discretion and rule in favor of an MLB club accused of service time manipulation, it is unlikely that the aggrieved party could find any respite in judicial review due to the immense deference given to arbitration awards in federal courts.²⁰⁰

B. Service Time Alternatives

Given the difficulty and uncertainty of winning a grievance based on service time manipulation, pundits have suggested that the recent service time manipulation grievances will work more effectively as a bargaining chip to revamp the service time rules when the current CBA expires in December 2016.²⁰¹ A fix to the service time rules is not as simple as scrapping it in favor of immediate free agency, however, because of the value placed on competitive balance in the MLB.²⁰² By depressing the salaries of young, talented players and keeping those players under team control for long periods of time, the service time rules allow for small-market teams to compete with large-market big spenders.²⁰³ The service time rules thereby help to maintain competitive balance in a non-salary-capped league that would otherwise allow teams with the most money to run roughshod over those that may not be as flush with disposable income.²⁰⁴ According to one analyst, officials from both the MLB and the MLBPA concede that the current service time rules need to be altered, but none can figure out how to fix them.²⁰⁵ This section will discuss several alternatives

evidence); see Wojciechowski, *supra* note 12 (pointing out that an arbitrator would likely give some deference to teams' reasons for delayed promotions).

²⁰⁰ See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 532 (2d Cir. 2016); see also *supra* notes 31–34 and accompanying text (discussing the deference given to arbitration awards on judicial review in federal courts).

²⁰¹ See Brown, *supra* note 167 (noting that the difficulty of proving service time manipulation should shift the MLBPA's focus toward better-bargained service time manipulation and free agency rules); Davis, *supra* note 114 (insisting that mainstream publicity and open grievances regarding service time manipulation give the MLBPA leverage to find a solution in the collective bargaining process).

²⁰² See Grant Brisbee, *Noah Syndergaard, George Springer, and Playing Around with Service Time*, SB NATION (Mar. 21, 2014), <http://www.sbnation.com/mlb/2014/3/21/5531100/noah-syndergaard-george-springer-THE-SYSTEM> [<https://perma.cc/8SMZ-GZLD>] (discussing service time and instances of service time manipulation as necessary evils of competitive balance).

²⁰³ See *id.* (explaining that the current service time rules allow well-managed teams with less spending power to develop and field young talent at an affordable price, allowing for a more competitive MLB).

²⁰⁴ See *id.* (“If baseball were some sort of Milton Friedman hellscape, with players becoming free agents after every season, it really would be the rich teams that won it all, every year.”).

²⁰⁵ See Ken Rosenthal, *Delaying Arrival of Young Baseball Talent in Majors Is Getting Old*, FOX SPORTS (Mar. 17, 2015), <http://www.foxsports.com/mlb/just-a-bit-outside/story/delaying-arrival-of-young-baseball-talent-in-majors-is-getting-old-031715> [<https://perma.cc/HF6L-DVBD>] (Fox Sports analyst Ken Rosenthal discussing the challenges with trying to arrive at a new set of service time rules).

to the current service time rules, analyzing which may be the best candidates for the next CBA.²⁰⁶

1. The Petriello Model

One alternative model put forth by Mike Petriello of FanGraphs suggests changing the conception of a service year and reducing the number of days a player must accrue to constitute a year of service time.²⁰⁷ Petriello's conception of a full year of service time focuses primarily on "qualified seasons" instead of a running accumulation of service days.²⁰⁸ In Petriello's model, a player must be on a major league roster for one hundred days of a single regular season to accrue one "qualified season" of service time.²⁰⁹

As in the current model, players are required to accrue three years of service to be eligible for salary arbitration and six years of service to be eligible for free agency.²¹⁰ In order to take into account "replacement players," who move from the major to the minor leagues for short periods of time for most of their careers, Petriello also suggests that a secondary running accumulation qualifies a player for free agency once he has reached one thousand service days, even if he has not yet reached six qualified seasons of service.²¹¹ This, he says, would allow owners some flexibility to use part-time players for almost the same number of service days as the current service time rules allow, while also not allowing a single team to control part-time players for more than ten years.²¹²

Petriello's alternative model of service time, conceptualized in the days after the Bryant saga began, makes a good deal of sense to remedy the issue of promoting a player just after he can no longer accrue 172 days of service time.²¹³ For a team that has made a commitment to competing for a championship and that has a star like Kris Bryant waiting in the minor leagues, the potential consequences of waiting until late June to promote him in the Petriello model seem to significantly outweigh the benefits of added years of team con-

²⁰⁶ See *infra* notes 207–245 and accompanying text.

²⁰⁷ See Mike Petriello, *It's Time to Fix Baseball's Broken Service Time System*, FANGRAPHS (Mar. 16, 2015), <http://www.fangraphs.com/blogs/its-time-to-fix-baseballs-broken-service-time-system/> [<https://perma.cc/CH5C-7RAX>] (discussing the inequities of the MLB's current service time system and proposing a new conceptual model).

²⁰⁸ See *id.*

²⁰⁹ See *id.* For example, if a player is on the major league roster for thirty days in season one, eighty days in season two, and ninety days in season three, he has accumulated two hundred total service days, but has still yet to accrue one qualified season of service time. See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See *id.* (acknowledging that part-time players may not reach the requisite threshold for a qualified season, and devising the one-thousand-day fallback option).

²¹³ See Petriello, *supra* note 207; Rosenthal, *supra* note 205 (expressing limited approval of Petriello's model).

trol.²¹⁴ If a team is in the midst of a losing season or the prospect is less of a juggernaut than someone like Bryant, however, there seem to be few consequences for waiting the additional seventy days in the Petriello model.²¹⁵

There is also, however, an advantage to the concept of the “qualified season” for mid-level prospects or for prospects on non-competing teams.²¹⁶ Under the current model, a losing team or a team with a mid-level prospect with some upside is incentivized to keep prospects in the minor leagues until it is willing to start the clock on service time.²¹⁷ Though teams in this situation will continue to be incentivized to keep players in the minor leagues for a certain amount of time under the Petriello model, there are few consequences to promoting a player after the one hundred days deadline has passed.²¹⁸ Though the clock will start on the potential for a player to reach the secondary requirement of one thousand service days to be eligible for free agency, the player will not accrue a qualified season.²¹⁹ He will, however, have the opportunity to show his skill against major league competition and have an opportunity to learn what it is like to play on a major league team for at least a short amount of time.²²⁰

2. The Rosenthal Model

Fox Sports Analyst Ken Rosenthal suggests that the current service time system can remain intact with only one small change.²²¹ In this model, a club that promotes a rookie to its major league roster on Opening Day is granted a seventh year of control over the player in exchange for salary arbitration eligibility after the player’s second year in the major league.²²² Though Rosenthal’s idea makes sense in theory—both the club and the player benefit in some way—it only seems to address a Bryant-like situation, and fails to take into account the possibility that a player will be returned to the minor leagues for

²¹⁴ See Petriello, *supra* note 207. Petriello posits that, “for a player of Braynt’s caliber, it would be far more difficult for the Cubs to weather three months of public angst—not to mention a real, actual hit to playoff hopes—than it would be form them to do it for under two weeks.” *Id.*

²¹⁵ See Rosenthal, *supra* note 205 (explaining that service time manipulation would likely still be a problem in different situations or for lesser prospects under the Petriello model).

²¹⁶ See *infra* notes 217–220 and accompanying text.

²¹⁷ Cf. *supra* notes 96–99, 110–112 and accompanying text (discussing the incentives for players to keep prospects in the minors under the current service time system).

²¹⁸ See Petriello, *supra* note 207 (noting that players will accrue time toward a potential one thousand service day free agency threshold, but that they will not accrue “qualified seasons” if promoted with less than one hundred days left in the season).

²¹⁹ See *id.*

²²⁰ Cf. AJ Cassavell, *Proposing a Callup Rule Change*, SPORTS ON EARTH (Aug. 30, 2015), <http://www.sportsonearth.com/article/146182478/september-callups-longer-games-lineup-moves> [https://perma.cc/78ZF-XR6E] (describing similar incentives for players who are called up to the major league roster in September, when MLB active rosters expand from the usual twenty-five-man roster to the forty-man roster).

²²¹ See *infra* note 222 and accompanying text.

²²² Rosenthal, *supra* note 205 (discussing Rosenthal’s conceptual model of service time).

any period of time.²²³ Rosenthal admits as much, adding that neither the players nor the owners would likely be open to the concessions.²²⁴

3. The Age Model

Another potential model ties salary arbitration and free agent eligibility directly to a player's age, eliminating the conception of service time altogether.²²⁵ Because there is nothing a team can do about a player's age, it follows that all decisions to assign a player to the major or minor league roster would necessarily be purely performance-based.²²⁶ No matter whether it is formulated as a strict age rule or a sliding scale of years from signing, however, an eligibility age negatively impacts players who are drafted young and quickly make it to a major league roster.²²⁷ And in the opposite scenario, when a player takes a long period of time to develop, eligibility ages negatively impact clubs that have put in significant work to mold a prospect into an MLB player.²²⁸

4. The Promotion Review Models

Other models turn away from the service time rules and toward methods of reviewing player promotions in order to curb service time manipulation.²²⁹ After Kris Bryant was placed in the minor leagues to begin the 2015 MLB season, agent Scott Boras began a public rally against the current reality of service

²²³ See *id.* (Rosenthal explaining that his theory only applies to players who will remain on a Major League team for “the vast majority” of their careers).

²²⁴ See *id.* (Rosenthal conceding that his theory would be face issues with reaching a consensus among players and MLB organization owners).

²²⁵ See *id.* (discussing a proposal to tether service time rules to a player's age).

²²⁶ See *id.*

²²⁷ See *id.* (considering the disparate impact that this model would have on a young, talented major league players). Fox Sport's Ken Rosenthal considers the unfortunate impact such a model would have had on the Los Angeles Angels' star outfielder Mike Trout. See *id.* Trout made his major league debut with the Angels in 2011, at nineteen-years-old. *Mike Trout Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/t/troutmi01.shtml> [<https://perma.cc/HQ9A-CDB9>] (last visited Sept. 12, 2016). Since 2012, Trout has received awards for American League Rookie of the Year and American League MVP, and he has never finished below second place in MVP voting. See *id.* (providing in-depth statistics on Trout's career). Under this type of model that is tethered to age, therefore, a player identical to Trout, who became so successful at a young age, would not be eligible for free agency until he had already accrued the equivalent of seven years and seventy days of of service time. See Rosenthal, *supra* note 205; *Mike Trout Statistics and History*, *supra*.

²²⁸ Cf. Lee Trocinski, *Late Major League Debuts*, SB NATION (Apr. 6, 2013), <http://www.beyondtheboxscore.com/2013/4/6/4190260/late-major-league-debuts> [<https://perma.cc/MX25-CPG9>] (describing instances of players making impacts on their major league clubs after debuting late in their careers).

²²⁹ See *infra* notes 230–239 and accompanying text.

time manipulation.²³⁰ To prevent service time manipulation, Boras suggested that a process be put in place in which the MLBPA or a player formally file a claim that a player should be placed on a club's major league roster.²³¹ If an objective panel with scouting experience decides that a player is too advanced for the minor leagues, the player is placed on the major league roster.²³² Alternatively, MLB players have suggested that a special post-promotion grievance procedure could be created to allow them to challenge decisions made in pursuit of service time manipulation.²³³

Boras's formulation of a promotion review panel seems to tamper too much with a club's discretion to evaluate talent and make roster decisions.²³⁴ A post-promotion review procedure, similar to what the players suggest, however, seems to be an ideal solution.²³⁵ In that type of model, once a player is promoted to the major league roster, he should be allowed a certain period of time to file a grievance alleging his promotion date was intended to circumvent good faith adherence to the CBA's service time rules.²³⁶ Because this grievance process would specifically address the fact that service time manipulation exists and does so in violation of the implied obligation of good faith, the mystery of the arbitration procedure would be greatly reduced.²³⁷ If a player can convince a neutral arbitrator that a team's behavior was based on service time concerns (which is still no easy task), he can be eligible to be credited service days and possibly even back pay for a certain period of time.²³⁸ This model seems to be beneficial for both parties, keeping service time intact while allow-

²³⁰ See Boras: *Resolve Bryant-like Service-time Disputes with Review System*, *supra* note 181 (recounting Boras's conversations with reporters on the inequities of service time manipulation).

²³¹ *Id.*

²³² See *id.* (explaining that an objective panel would have to perform a "talent evaluation" and determine to what degree a player is ready for the major leagues).

²³³ See Rosenthal, *supra* note 205 (describing this type of procedure that would allow players to submit roster decisions to review).

²³⁴ See Boras: *Resolve Bryant-like Service-time Disputes with Review System*, *supra* note 181 (pointing out flaws in Boras's model for interfering with roster decisions).

²³⁵ See Rosenthal, *supra* note 205 (discussing the players' suggestion that a specific grievance process be created for service time manipulation claims).

²³⁶ Cf. Wojciechowski, *supra* note 12 (noting that a player alleging service time manipulation "would be in the strongest position to win after the inevitable call-up" because he would have more evidence of the manipulation at this point).

²³⁷ See *supra* notes 192–200 and accompanying text (discussing the difficulty of predicting the outcome of a service time manipulation case once it reaches arbitration under the current arbitration procedures).

²³⁸ See Wojciechowski, *supra* note 12 (noting that the MLBPA can attempt to seek back pay and service time credit in Kris Bryant's grievance); *2012–2016 Basic Agreement*, *supra* note 63, at 48, 94 (governing scenarios in which players can be awarded back pay as a result of team misconduct); see also *supra* notes 173–188 and accompanying text (discussing methods of proving that a team violated the implied obligation of good faith by intentionally engaging in service time manipulation).

ing for players to more easily challenge their alleged bad treatment at the hands of MLB clubs.²³⁹

5. Toward an Ideal Hybrid Model

Of the models suggested thus far, the Petriello model and the players' post-promotion review model stand out as the most sensible and practical, and may be combined to create the MLB's best solution.²⁴⁰ Although teams would likely have to give up some of their current tactics under the Petriello model's reduced service time system, they are still able to keep players under control for up to six years in the major league, as is currently allowed by the CBA.²⁴¹ Teams also have the added advantage of being able to showcase talent at the end of the regular season without too much consequence to a player's service time clock.²⁴² Though some players who do not mean as much to their teams or who play for teams that do not have playoff hopes may still suffer service time manipulation consequences, high-profile cases of manipulation like those of George Springer and Kris Bryant would likely be eliminated.²⁴³ A hybrid would combine the Petriello model with the player-friendly post-promotion review model in which a player has the ability to assert a service time manipulation claim after he has been promoted to a club's major league roster.²⁴⁴ Though this hybrid model would have to employ a standard of post-promotion review that would likely make it difficult for a player to prove manipulation, it still has the potential to provide an outlet for all of those athletes who may miss the benefits of the shortened service year rules created by the Petriello model.²⁴⁵

²³⁹ See *supra* notes 235–238 and accompanying text (noting that the players would receive a specialized grievance-arbitration procedure to address service time manipulation that would not require owners to agree to a fundamentally different concept of service time).

²⁴⁰ See Petriello, *supra* note 207 (discussing Petriello's "qualified season" conceptual model of service time); Rosenthal, *supra* note 205 (discussing the players' post-promotion review procedure for service time manipulation).

²⁴¹ See Petriello, *supra* note 207 (noting that teams would be disincentivized to delay promotions and manipulate service time for top prospects, but that they would still control players for six seasons). See generally *2012–2016 Basic Agreement*, *supra* note 63 (providing the entire CBA agreement between the MLBPA and 30 Major League Clubs).

²⁴² See *supra* notes 218–220 and accompanying text (discussing incentives to call up players late in the season under the Petriello model).

²⁴³ See *supra* notes 214–215 and accompanying text (discussing potential differing treatment of players with different talent levels under the Petriello model).

²⁴⁴ See *supra* notes 229–233 and accompanying text (describing the basics of the post-promotion review model).

²⁴⁵ See *supra* notes 180–183 and accompanying text (discussing the difficulties of proving that a team violated the implied obligation of good faith by intentionally engaging in service time manipulation); *supra* notes 214–215 and accompanying text (discussing scenarios in which some players' service time may still be manipulated under the Petriello model).

CONCLUSION

Since its inception, the MLB has employed a system in which clubs are allowed to reserve the rights to players for long periods of their careers in order to promote player development and competition. In recent years, however, MLB clubs have utilized deficiencies in the service time system to gain extra years of control not contemplated by the MLBPA in their CBA. MLB teams' service time manipulation of players like Gregory Polanco, George Springer, and most recently Kris Bryant has been met with outrage from players, pundits, and fans. Whether the seemingly unfair treatment of these players can constitute a breach of the CBA between the MLB and the MLBPA, however, is a difficult issue to solve. The MLBPA has a moderately strong argument that service time manipulation violates the CBA by violating the implied obligation of good faith. On the other hand, the many unknown aspects of the MLB's grievance processes and arbitration procedures, as well as the vast deference given to arbitration awards by federal courts, make it difficult to determine whether the MLBPA or any of its members would be able to succeed with a service time manipulation claim. With the dawn of a new CBA on the horizon, the MLB and MLBPA would be best served by negotiating a new model of service time that disincentivizes delayed promotions and affords a remedy to players whose service time has been manipulated, while still allowing teams to develop home-grown talent at affordable costs.

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