April 2008

The 1994-'95 Baseball Strike and National Labor Relations Board: To the Precipice and Back Again

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In a series of strikes and lockouts commencing in 1972, baseball labor and management engaged in what came to be regarded as a near thirty-year war. In 1994, the National Labor Relations Board (NLRB) was at the center of what would become the mother of all Major League Baseball disputes. This did not constitute the first involvement of the Board inasmuch as it had issued a complaint and unsuccessfully attempted to obtain an injunction against the owners in 1981. That petition had been rejected by federal district court. That time, the NLRB case went nowhere as the parties labored onward for more than eighty days until the owners' strike-insurance fund was exhausted. This time around the NLRB obtained the injunction, and, in so doing, it brought the players back to the field and ultimately produced a collective bargaining agreement.

This time around I was to be Chairman of the NLRB, one of the alphabet agencies created during the Roosevelt New Deal, a five-member administrative agency which possesses quasi-judicial authority and responsibility. I had been nominated by President Bill Clinton on June 28, 1993, and after a nine month delay I was confirmed by a vote of 58-38 on March 2, 1994. In those nine months, my writings in support of the National Labor Relations Act (which the NLRB interprets and administers) were debated and attacked by many on the conservative side of politics. My confirmation obtained the greatest number of "no" votes of any Clinton nominee through that date, more than a year into the Clinton Presidency. But the price of my confirmation was acceptance of a right-wing, Republican, conservative board member who was to be a thorn in my side during my NLRB tenure, and who was to cause me considerable problems in the resolution of the baseball dispute itself. Although they were still not in a majority—that was yet to come in the 1994 fall elections—Republicans in the Congress had considerable leverage. Senator Edward Kennedy wrote me the day after my confirmation, "It's a good thing the Republicans decided not to
They had the votes to do it, i.e., to resist the sixty votes which are a prerequisite for cloture and thus shut off debate and have a vote!

Senator Nancy Kassebaum, the ranking Republican minority leader on the Senate Labor and Public Welfare Committee, had interviewed all potential Republican nominees by asking them this question: “If Chairman Gould is in the majority in a policy case of consequence, will you dissent from his position?” A number of individuals could not give that guarantee because, quite obviously, they could not foresee the cases that would come before us and what our respective positions would be in advance of their resolution. Those who regarded this kind of pledge as inconsistent with the independence that is inherent in the NLRB’s quasi-judicial process did not make the cut. Only those aspirants who answered the question affirmatively could be supported by the Republicans, most of whose representatives in Congress would not have voted for the National Labor Relations Act and its promotion of collective bargaining itself! This was then the environment for the baseball dispute which was to emerge during my tenure as NLRB Chairman, and it helps explain the sharp and vigorous dissents rendered against our majority opinion in that case (as well as some other policy cases). These dissents were frequently cited by both the Republicans in the Congress and, in this case, the baseball owners, as evidence for the proposition that the NLRB was not impartial.

Again, the Board was immediately involved in a number of policy issues, and baseball was only one of them, albeit the most visible dispute that we handled while I was in Washington! Before departing from Stanford for the nation’s capitol, I had told the late Leonard Koppett, my good friend and co-teacher at Stanford Law School, that my deepest regret in taking the NLRB job was giving up my baseball salary arbitrations. In ’92-’93 I had arbitrated a series of cases involving then California Angels’ outfielder Luis Polonia, as well as Oakland A’s utility infielder Jerry Browne (often referred to as the Governor), Dale Sveum utility infielder of the Philadelphia Phillies, and the San Diego Padres’ ace starter Andy Benes.

My answering machine told me that my hearing involving Atlanta Braves’ pitcher John Smoltz was cancelled as my plane came to a halt on Chicago O’Hare’s Airport runway just as the parties reached a settlement. Benes was the only one of the above-mentioned foursome whose position I favored. But this award had radiations beyond Benes and the Padres, and appeared to affect the Smoltz settlement as well as that of Kevin Tapani of the Minnesota Twins. Some of the owners pilloried the Benes award. For instance, the Los Angeles Dodgers maintained that they had to enter into a similar settlement with their then ace Ramon Martinez because he had a better “won and lost” record than Benes, ignoring my view expressed at the Benes hearing that “won and lost” records are frequently deceptive as a measure of a pitcher’s worth because

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of the poor hitting, fielding, and bullpen which may surround the pitcher. (Benes had not pitched for many winning Padres' teams at that time and, in my opinion, was a classic illustration of this point.)

But I had enjoyed these cases and thus expressed to Koppett my deepest regret that I would be giving them up for the NLRB. But, replied Leonard, "You'll be more involved now than you ever were in the past. A big conflict is coming between the parties, and the National Labor Relations Board will be right in the middle of it. You'll see." Truer words were never spoken.

I was confirmed by the Senate as baseball negotiations for a new collective bargaining agreement were proceeding. As late as June of 1994 there was little talk of a strike, although Murray Chass of the *New York Times* reported that a strike threat for August was materializing. Yet, he noted, "in ownership circles there is talk of gloom and doom but not because of the threat of a strike. The atmosphere is bleak because owners of a sizable number of teams believe they face financial doom if they don't get the salary cap they covet."\(^5\)

As in '81, '85, and '90, when labor disputes followed the 1976 agreement which had provided abiding standards for free agency in the wake of Peter Seitz's 1975 award, the owners expressed a firm intention to change the status quo by altering the mechanisms that allowed players to obtain substantial salary increases. It seemed clear that the owners' advocacy of a salary cap would be the major issue in the 1994 negotiations. Some of the owners believed that the players would not strike because they would not want to relinquish their very large salaries. (This view had been manifested earlier at the time of the '72 strike and again in '81 and thereafter!) Directly related to this was the view, held by many, that if there was a strike and the strikers saw replacement players taking the field, the picket lines would quickly dissolve and the players would return on the owners' terms. In the previous negotiations, the lawful replacement tactic—the United States Supreme Court had said in 1938 that strikers may be permanently replaced\(^6\) (apparently, the owners were only thinking of temporary replacements which are also lawful\(^7\)—had not been utilized. This time, reasoned the owners, it would be different. This time around they were unified!

Thus, in the earlier disputes the owners had conceded that the strike brought baseball to an end and that the game could not continue until the issues were resolved. This was not to be the case in 1994 and 1995. Again, the owners' view was that the players would not be able to resist the temptation to return once they saw replacements playing in their positions. (This view of the situation in '94-'95—that is, that the strike would crumble when the players saw

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6 *See generally* NLRB v. Mackay, 304 U.S. 333 (1938).

their positions filled by replacements—appears to be held by a substantial number of owners to this very day).

A peculiar element in the owners' position, however, was that they did not intend to use their very best minor league players as replacements—i.e., those at the Triple A level—but rather would plan to bring in those below them. This was predicated upon the view that eventually the players would return and find it difficult to play with the replacements. Thus, the owners did not want to bring in those players as replacements who would likely play with the incumbent team members at some future date because of concern that this would disrupt team harmony and effort.

The sultry and humid summer of 1994 in Washington D.C. moved on, and telephone calls that I received in my NLRB office from Secretary of Labor, Robert Reich, and others in the Department of Labor reflected their concern that a strike might be imminent. I was queried about both the practice of collective bargaining in baseball as well as the state of the law under the National Labor Relations Act as written. The Clinton Administration wanted to do something, but it did not know what to do.

The players set an August strike deadline and desultory negotiations moved forward intermittently, but they languished right up until the eve of the deadline. The dynamics between the parties and the *American Ship Building v. NLRB* holding (in which the Supreme Court held that, when motivated by an attempt to time the stoppage at a point which will give the employer a bargaining advantage, lockouts are lawful under the NLRA) made the players feel that if they did not strike well in advance of the season’s end, the owners would unilaterally institute their own position on free agency during the winter months and open the camps the following spring without them, relying, if necessary, on the temporary replacements. This tactic is also lawful and was very much a part of the 2004-05 hockey lockout dynamics.

The players felt that threatening a stoppage near or during the post-season playoffs, which brings owners most of their revenues, would give the union the maximum amount of leverage. (This is why employers are able to use the lockout to their bargaining advantage under *American Ship Building* by producing a stoppage when employee earnings will diminish at a time when there is no employer incentive to settle.) For this reason, they viewed as misguided the proposal that Secretary Reich made at Fenway Park in Boston during a game; he wanted the parties to continue talking without resorting to warfare. On August 12, while I was en route to speaking engagements in Vancouver, British Columbia, and Seattle and Spokane, Washington, the players struck.

In fact, this aspect of the players’ strategy misfired. The owners did not back away from their positions, and the remainder of the 1994 season and the

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8 380 U.S. 300 (1965).
9 See, e.g., John Wawrow, *NHL asks union to disavow threats to punish agents*, USA TODAY, Mar. 29, 2005.
World Series were cancelled—a result that the players did not seem to anticipate. This was the first time that the World Series had been cancelled since 1904, and it seemed unimaginable and unthinkable. But nonetheless, it was the reality! The Federal Mediation and Conciliation Service—the principal mediation office in the United States Government and entirely separate from the National Labor Relations Board—viewed it as a victory when, in early September, they were able to get the players and the owners to simply go through the motions of having a meeting together. The Service was able to get the parties to return to the bargaining table, the talks having been in recess since late August. But that was about all that they were able to do. They were not able to get the parties to discuss the issues or agree on anything.

After the season’s collapse, negotiations continued but with little impetus until December when the owners sought to change the negotiating environment. Under American labor law, when labor and management have bargained to the point of impasse or deadlock, employers may unilaterally institute either the last offer or a package which is substantially equivalent to it when they have bargained in good faith on so-called “mandatory subjects” relating directly to wages, hours, and conditions of employment.

On December 20, Jerry McMorris, owner of the Colorado Rockies, had an evening meeting with Don Fehr, the executive director of the Players Association and advised him that the owners needed a “significant drag” on players’ salaries—considerably more than what the union was offering. McMorris told the mediator that he did see any way to reach agreement. Fehr stated that he did not agree with McMorris’s assessment.

Two days later, on December 22, the owners unilaterally implemented their salary cap proposals and eliminated salary arbitration for certain players. However, the owners’ argument that there was deadlock or impasse was somewhat undermined by the fact that a series of union and owners’ proposals had been passed back and forth on both salary arbitration and free agency during the previous week. Subsequently, the owners were to take the position that, though clearly they had not bargained to impasse on salary arbitration, this was irrelevant because salary arbitration was not a mandatory subject affecting conditions of employment within the meaning of the National Labor Relations Act on which they were obliged to bargain to impasse. (Grievance arbitration involving the interpretation of terms of the collective bargaining agreement is a mandatory subject of bargaining and interest arbitration, relating to new terms of the collective agreement, is not—the owners apparently viewed salary arbitration as more akin to the latter.).

10 "Just as an employer must bargain with the representative of his employees on grievances so must he about a method of resolving them." United States Gypsum Co., 94 N.L.R.B. 112, 131 (1951).

11 N.L.R.B. v. Columbus Printing Pressman Local 252, 543 F.2d 1161, 1166 (5th Cir. 1976): "We... hold that such an arbitration clause is not a mandatory subject of bargaining, since its effect on terms and conditions of employment during the contract period is at best remote." See
On that fateful day of December 22, the union, for the first time, presented a revised proposal that included a marginal tax plan that would address profligate owners through taxation rather than a cap. The negotiations resumed. Five hours later, however, the owners rejected the players' proposal, noting that, while the new position represented a major philosophical shift for the union, a more stringent tax was needed to alter salary patterns. When the players asked for a counter proposal, the owners replied that they saw no reason to believe that a counter proposal, within the same framework, would significantly lower the salary brackets or that increasing the tax rates would help. They announced that, in their view, the negotiations had reached an impasse. Accordingly, the owners then unilaterally instituted or put into effect their position on both free agency and salary arbitration.

The Major League Players Association filed unfair labor practices with our regional office of the NLRB in New York City, alleging that the unilateral declaration of an impasse and change in employment conditions by the owners was a refusal to bargain in good faith and that impasse or deadlock had not in fact been reached. Subsequently, the owners stated in proceedings before the New York City office that they had changed the method of free agent negotiation so that it would proceed on a centralized basis rather than club by club. But again, the issue was whether the system of free agent compensation could be altered under these circumstances. If the clubs had been successful in centralizing the negotiations as they intended to do subsequent to their unilateral change in working conditions, the response of the union might have been to dissolve what the Supreme Court came to characterize in *Brown v. Pro Football, Inc.* as multi-employer association bargaining. Though a union effort to organize the players in 1946 was aimed at a club, the Pittsburgh Pirates, it is difficult to imagine bargaining between the union and individual clubs given the mutual dependency of all of them in a league situation, scheduling problems, etc. But since the union could always assert its role to bargain on all matters as the exclusive bargaining representative under *J. J. Case Co. v. NLRB*, it could withdraw its delegation to individual players and ultimately withdraw from multi-employer bargaining—though not in the midst of collective bargaining itself.

In any event, as we shall see below, none of this and the legal issues associated with it came to pass.

*also Plumbers Local No. 387, 266 NLRB 30: "The Board...has consistently held that interest arbitration, despite its arguable benefits, is not a mandatory subject of bargaining and that neither party can compel the other to negotiate about a contract clause that would, in the event of new contract negotiation disagreement, in effect substitute a third party as final decisionmaker of disputed contractual terms."*


Thus, the issue that was to come before the Board was whether proper procedures had been followed. The popular perception, that the NLRB had substantively sided with the players, was different. As a Stanford baseball aide said to me at an exhibition game at Sunken Diamond in late 2007 as we were discussing the Stanford slugger Joe Borchard's $5 million plus bonus when he signed with the Chicago White Sox, "He has you to thank!" I reflected for a moment and then replied to her, "Oh, because of the NLRB injunction?" She nodded affirmatively.

Of course, in a vague and generalized way, one could say that this was the result of our injunction, i.e., that the parties were able to bargain a series of collective bargaining agreements which expanded free agency and may be said to have created prosperity for draftees as well. But we were never to be involved in the rights or wrongs or efficacy of the players' and owners' substantive positions—under the American system of collective bargaining and labor law, that is for the parties themselves and not for any government agency. Again, the question was whether the parties had followed the proper procedures.

Another issue, which troubled many outside observers, was the law relating to bargaining itself. I was interviewed by radio stations which wondered why, if the owners were prohibited from unilaterally changing terms and conditions of employment without bargaining to impasse, there was not a similar obligation to be imposed upon the players before striking. Of course, we followed the law as Congress had written it, and this is what it provided. Moreover, these commentators failed to note that the owners had the right to lock out, to replace strikers, and perhaps even the players who were locked out, and to unilaterally change conditions subsequent to impasse. Essentially, the strike is all that labor possesses. In any event, the Board had to follow the law as it was written and interpret it as best we could on the basis of the facts of the baseball dispute.

Now, in the wake of December 22, two fronts of negotiations began to open. One was the litigation before the Board which was investigated by our regional offices acting under the authority of the General Counsel under a bifurcated arrangement which exists in the agency. The General Counsel, like the Board Members, is also a Presidential appointee, and is the prosecuting and investigative independent arm of the Board. Though some of the newspapers tended to confuse this—and the then incumbent General Counsel sought to confuse it as well—his office does not speak for the Board which retains final authority over all issues. The General Counsel makes argument and recommenda-

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15 See generally American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).
16 See generally NLRB v. Mackay, 304 U.S. 333 (1938).
tions to the Board Members. The matter could not go to the courts without the Board’s approval in one way or another. Again, the Board had the final say!

The second front became Congress and President Clinton’s attempts to resolve the matter. The previous August 2, while at the White House for a social function involving California Democrats, I chatted with President Clinton in a receiving line. I remarked that Secretary of Labor Bob Reich and I had been discussing the baseball negotiations. The President expressed dismay at the prospect of a strike and said, “This is the best year in a long time,” referring to the home run records that might be set by such sluggers as Ken Griffey, Mark McGwire, Matt Williams and others. He remarked that it was hard to have sympathy for either side, given their wealth and “greed.” As we parted he said to me, “If you guys could resolve this, they would elect me president for life!” (Subsequently when we did intervene effectively—some of the regional directors advised me that Secretary Reich had said that President Clinton was “jealous” of us and wished that he had settled the matter himself!)

Now as the new year of ’95 unfolded, some members of Congress began to focus on the question of whether the antitrust exemption provided by the Supreme Court’s holding in *Federal Baseball Club of Baltimore v. Nat’l League of Professional Baseball Clubs*[^19] should be eliminated or revised, thus arguably allowing players to sue the owners in federal district court for any restrictions placed upon free agency. The White House flirted with the possibility of compulsory arbitration or some other third party mechanism to dissolve the labor dispute, but the new Republican-controlled congress was against it.

In January, the White House appointed special mediator W.J. Usery, the former Secretary of Labor in the Ford Administration. As he saw it, part of his job was to recommend terms for an agreement. President Clinton announced that the Administration was “turning up the heat” on the parties and was setting a February 6 deadline for them to resolve matters themselves before government intervention. Stating that “I want this thing settled,” President Clinton summoned the players and owners to the White House a few days later.

Soon thereafter, it appeared as though mediator Usery might provide recommendations that would take the form of legislation. But the newly arrived Republican majority in Congress—this was the first few months of the heady “Gingrich revolution” (Congressman Gingrich, the Speaker of House called it “contract with America” but we called it the “contract on America”)—pulled the rug from under the White House and refused to support legislation through which Usery’s recommendations could be implemented.

Now the White House, faced with Republican reticence, went into retreat. Thus, both negotiations and government intervention in the form of legislation seemed to dissipate. Prospects for settlement were becoming far less promising. Meanwhile, the Players Association had begun to display dissatis-

[^19]: 259 U.S. 200 (1922) (holding that the Sherman Anti-trust Act was not applicable to baseball). See generally Gould, *supra* note 2.
faction with mediator Usery. This feeling arose out of distrust when Usery had expressed displeasure with their position while at the White House. The Players Association thought that Usery was siding with the owners.

As spring training was about to commence, the owners were ready to do the unthinkable, i.e., to use replacement players, and Congress was signaling that it would not intervene in any way, shape, or form. (Again, to compound matters, the clubs did not plan to use their best minor league players at the Triple A level as replacements for the striking players because of their concern that the difficulties such players would have with the Players Association, as they subsequently progressed to the major league level, would pose a disruptive distraction for them.)

Into this vacuum stepped the NLRB. The players were attempting to obtain support from the Board for an injunction against the unilateral changes made on December 22. This was the very legal tactic that had failed in the 1981 strike, albeit in a different context which did not present any issue relating to an employer obligation to open their books or to disclose financial information as was the case in that dispute. This question of whether the Board could go to federal district court, under a special procedure placed in the law in 1947, to obtain an injunction against the changes in free agency and salary arbitration became the key issue before us in March.20

I had a number of speaking engagements in the West and was in Los Angeles on March 17, 1995, when the matter was submitted to the Board. By the time I returned on March 22, two of the Board members, both Democrats, had voted for an injunction and two of the others, both Republicans, had voted against it. I was the man in the middle—a position not dissimilar to the one which I occupied on a number of policy issues during my tenure where the two Democrats and two Republicans were almost invariably aligned with labor and management respectively.

I had not expressed a view on the question of whether the facts and law authorized us to say that there was reasonable cause to believe that the owners had not bargained in good faith and whether it was necessary to proceed into federal district court without delay. These considerations were acknowledged to be the applicable statutory prerequisites for an injunction of this kind. (My Board, particularly during my first two years—but also throughout my entire four and a half year tenure as Chairman—had issued the greatest number of these injunctions in the history of the NLRB! From March of 1994 to March of 1998, the board authorized 292 injunctions, an average of 73 per year.21 From March 1998 to January 2001, the Board only authorized an average of 58 per

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21 For more on the climate during this period at the NLRB, see Gould, supra note 1, at Chapter 6.
year. This was a matter that quickly caught the attention of a hostile Republican Congress which frequently tried to come to the rescue of the defendant employers.)

When I returned to my Washington office early in the evening of March 22, my chief counsel, the late Bill Stewart (later to receive the most prestigious award that a career employee can have from the White House\textsuperscript{23}), had left a note for me that Usery had left a message that he would like the Board to delay its decision in the baseball case and he would like me to call him. I did so between 8:00 and 8:30 that night.

Usery told me that he had had two “constructive days” with the parties on a “confidential and fairly quiet” basis. He said that he was trying to establish a meeting between then Acting Commissioner, Bud Selig, and Players Association Executive Director, Donald Fehr, for the following Saturday and Sunday, and that these meetings might possibly run into Monday. Usery expressed concern to me that if we issued an authorization for an injunction in federal district court we would run the risk of impeding negotiations and inflaming the relationship between the parties. Usery also said that he had spoken with fourteen owners and that there was a group that would meet with the Union to discuss a framework or approach that he was recommending. He also told me that Gene Orza, then General Counsel of the Players Association, had asked him not to interfere with the unfair labor practice aspects of the case—though that is exactly what he was doing through the phone call.

I then called President Clinton’s Counsel, Ab Mikva, previously on the Circuit Court of Appeals for the District of Columbia. Mikva, after checking with his sources, said that, while Usery is “technically still our mediator,” nobody thought he could reach the players. “He has lost his influence,” said Mikva. I then advised the Democrats on the Board of this conversation, but only told the Republicans about the Usery conversation and recommended to both that we address Usery’s recommendation, though I was personally disquieted by Mikva’s assessment of the negotiations. The Board followed my recommendations.

But Usery’s communication to us was soon revealed in the press, and the Players Association was immediately critical of him. He turned around and told the Association that I had called him and that he had not called me. Welcome to the world of Washington realpolitik!

I called Usery back about this and he agreed that, of course, he had called me but did not deny his characterization of our conversation. Now the weekend was coming and New York Times’ sports columnist, Murray Chass,

\textsuperscript{22} Memorandum from Arthur F. Rosenfeld, General Counsel, NLRB to all Regional Directors, Officers-in-Charge, and Resident Officers, \textit{Utilization of Section 10(j) Proceedings} (Aug. 9, 2002), available at http://www.lawmemo.com/nlrb/gc02-07.

\textsuperscript{23} This happened in 1997 and was the first time in the history of the NLRB that any of its employees had ever received this prestigious award, the President’s Award for Distinguished Federal Civilian Service. No one from the NLRB has received it since!
reported that no negotiations had been scheduled for the weekend, and that the future of the talks did not “appear promising.”

On Friday afternoon, March 24, I went to both the General Counsel and the other Board members, recommending that we meet on Sunday or Monday morning and resolve this matter at that time. Ultimately, notwithstanding the protestations of some Board Members, a meeting was set for Sunday afternoon on March 26 and, after a very sleepless night, I walked from my condominium on Pennsylvania Avenue to the Board’s offices on L and 14th. As I arrived at the office, television cameras were staked out in front of our building, and they remained there as we deliberated on this matter. Indeed, so visible was the Board at that time that television anchor David Brinkley commented on how unusual it was for Government employees to work on the weekend (I had actually worked not only a large number of weekends but also the day of President Nixon’s funeral earlier in the year when all the air-conditioning was cut off). A nationally published cartoon had one character asking the other to refresh his recollection about baseball abbreviations (i.e., R.B.I.) and the abbreviations included the NLRB as well!

That day the Board voted on the question of whether we should seek an injunction in the baseball dispute, and I cast the deciding vote to authorize an injunction, 3-2. I decided, as a matter of law, that the injunction was appropriate. But this did not happen until countless and difficult controversies about contacts with journalists and the question of whether the vote should be revealed. Most of the Board Members did not want to reveal anything or have any contact with journalists—but I said that, in my capacity as Chairman, I would not be muzzled. When I said this, one of the dissenting Republicans said that he would reveal his opinion and when criticized (improperly in my view) for doing this he said that I was responsible because I was against secrecy!

One Board Member, John Truesdale, who always kept a wet finger in the air to determine which way the wind was blowing, said that if the vote was revealed this would be the “worst thing that could happen.” These were the words of a career Washington bureaucrat which I found difficult to believe or accept because, in my view, the votes and opinions of Board members should always be made known to the public notwithstanding any traditional custom that Truesdale had relied upon to the contrary. After all, this was the public’s business, and in my view, it should be revealed to the public! Indeed, after we made a decision to publicize our views, the President’s Counsel, Judge Mikva, commended us. For, as he said, it is always a good idea in “high visibility or important cases” for the Board to make its views and reasoning known.

Continuing, however, in the opposite vein, Truesdale excoriated me for speaking with the press about our activities on the injunction, and, at times,
shouted in such a loud voice that he frightened the secretaries who were sitting in the anteroom near my office. (Subsequent to my departure as Chairman in 1998, Truesdale became Chairman as a result of support provided by the segregationist friendly Senator Trent Lott of Mississippi!)

There was yet another controversy relating to publicity. A television crew had asked us if they could bring television cameras into our agenda room and do some filming, preferably while Board Members were present at the time of the week-end vote. A majority eventually rejected the request. But before the vote, Republican Board Member Cohen told my Chief Counsel that he could not make up his mind on the camera question until he knew whether, if the television cameras didn’t have access to our headquarters, they would come to the Chairman’s office. He said to my Chief, “I can’t vote on this issue until I know what the answer is.”

My Chief Counsel replied that he had no idea what the television people intended—and I didn’t either. He gained the very distinct impression that Cohen’s overriding concern was insuring that no attention be given to the Chairman’s role in the dispute. If anyone was to receive attention, he appeared to reason, it should be the Board as a whole. This almost puerile obsession and resentment of the press’ focus on me as Chairman manifested itself again and again!

After the Board authorized the injunction over the strong dissent of the two Republican members, our staff lawyers, as well as those of the Players Association, went before Judge Sonia Sotomayor of the federal district court in New York City to request the injunction. Her opinion and order exceeded our expectations. Since, as she found in agreement with a majority of our Board, impasse had not been reached in the bargaining process and therefore the unilateral changes in work rules on free agency itself and salary arbitration were unlawful, the parties were required to return to her court prior to the implementation of any new set of working conditions. This was an additional bonus which made our victory complete in that it gave us considerable leverage should the owners attempt to make a new change in working conditions at some point down the road. The Board had been able to demonstrate to the public that the labor law of the nation, however hobbled and deficient, could operate effectively and expeditiously.

Back on the playing field itself, the owners, having already used temporary replacements in spring training, had planned to use them in the regular season itself. As Baltimore Orioles owner Peter Angelos stated, this would have deprived the team’s shortstop Cal Ripken of his chance to break Lou Gehrig’s consecutive game record. Luckily because of the Board’s decision to seek injunctive relief and Judge Sotomayor’s grant of it, this did not happen. Later in the season, months after our successful injunction in New York, Ripken would break the record and I was able to sit in Angelos’ special box along with President Clinton, Vice-President Gore, and other dignitaries to celebrate this great event!
Meanwhile, in April, not long after Opening Day, I had traveled to Hofstra Law School in New York to speak at a conference celebrating the 100th anniversary of Babe Ruth’s birth. New York City labor arbitrator, Dean Eric Schmertz, introduced me as the head of the agency that had brought about the resumption of baseball. Earlier in the evening I had met Phil Rizzuto, the Yankees’ shortstop when I was growing up in New Jersey. When he heard Schmertz’s introduction he exclaimed to me excitedly, “You didn’t tell me that! You didn’t tell me that!” That Spring, the injunction which restored baseball received a good deal of attention, most of it laudatory.

Meanwhile, the owners snarled angrily. They remained bitter with the injunction long after it was issued, because they thought that if they had been able to use replacements they would have been able to break the players’ resolve and dissipate their solidarity. Yet their forecast about player resolve was an old one and had proved erroneous in every single dispute from 1972 onward. This did not stop them from stating to me and others on a number of occasions after the strike was concluded and a collective bargaining agreement had been negotiated, that, if we had not intervened, they could have imposed their terms on the players because the picket line would have disappeared once a large number of temporary replacements were going on the field.

Indeed, the owners were so angry with me that, two years later at the 50th anniversary of Jackie Robinson’s rookie Brooklyn Dodger season, when they held a party at the New York Mets’ Shea Stadium where I and an entourage of Clinton appointees arrived with the President, they sent word to a good friend that I was not invited! (Nonetheless, I was able to enjoy myself at this important function and to meet Robinson’s widow, Rachel Robinson.).

In any event, on April 2, 1995 in the wake of Judge Sotomayor’s approval of our decision, the owners decided not to lock the players out, the players agreed to return to the field, and the parties agreed to start the season on April 26. As it turned out, the Board’s position was not only correct on the law, but also, as the law contemplates, enhanced the collective bargaining process and provided for a resumption of the baseball season itself. In the following September, just as Sparky Anderson’s Detroit Tigers pulled into town to play the Orioles (Anderson had also been out of favor because of his opposition to the replacement strategy) the Court of Appeals for the Second Circuit enforced the district court’s order.26 Meanwhile, in the wake of the injunction, the 1995 season ran its course and the Boston Red Sox finished first in the Eastern Division—a championship not recaptured again until 2007 when the Red Sox became world champions for the second time in four years!

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THE STRIKE AND NLRB AFTERMATH

That summer of 1995 I was invited by Baltimore’s Peter Angelos to throw out the ceremonial first pitch when the Red Sox came to Camden Yards in Baltimore. The Baltimore Sun commented that the owners “despised” me more than they did Angelos, who had incurred their wrath because of his opposition to the owners’ temporary replacement plan. But the Boston Globe also had this to say:

A cloud of smoke from Boog Powell’s tasty barbecue stand hovered over right field in front of the brick warehouse. Last Aug. 11, the last time these two teams played here, the smoke was black and ominous, signaling the end of baseball because of a work stoppage. Last night it was like a breath of fresh air. . . . baseball was alive and well, at least here, where these two teams ended their seasons prematurely last year. There was a touch of irony to Bill Gould, chairman of the National Labor Relations Board whose decisions against the owners got the game back on the field, throwing out the first pitch. [Pitcher Roger] Clemens did the most effective throwing after that.

Later in the year, I was able to avail myself of the peaceful relations created by our order and to get back to Fenway Park to see the Red Sox once again and one of Tim Wakefield’s many 1995 gems that he twirled in his best season ever—and Luis Alicea turn the most acrobatically beautiful double play that one can imagine, as the Red Sox marched toward an Eastern Division championship only to be knocked off by the World Series-bound (soon to be American League Champions) Cleveland Indians. Old friend, catcher Tony Peñas’ home run in Cleveland in the second game of the playoffs truly sank our ship. I took it all in during the wee hours of the morning watching my TV in my Washington condominium. But, forever hopeful, I nonetheless jumped on a plane to see the anticlimactic third game at Fenway in which Wakefield was beaten and the Sox were eliminated.

During the following year, we were able to see more directly the policy-relevant fruits of the NLRB’s work. In late 1996 after the completion of the next season, the parties negotiated a comprehensive collective bargaining agreement that resolved many of their outstanding differences. But, important though it was, it was not simply the NLRB’s restoration of the collective bargaining process that had produced the agreement. One of the owners who was an outspoken “hawk” arguing for player salary restraint, Jerry Reinsdorf of the Chicago White Sox, gave former Cleveland Indian slugger Albert Belle a record

27 Gould, Labored Relations, supra note 1, at 120.
28 Nick Cafardo, Sox Drop Orioles; Clemens on Target; Vaughn Hits No. 18, Boston Globe, June 23, 1995, at 37.
$55 million contract. He argued for a salary cap and decried the proposed collective bargaining agreement as inadequate! Reinsdorf’s adherence to this double standard convinced a number of owners previously opposed to the agreement to switch their vote and to ratify it, notwithstanding the absence of a salary cap.

Almost a year to the date of the agreement in November, the Boston Red Sox obtained Pedro Martinez from the Montreal Expos for two promising pitchers. Martinez was to become one of the winningest pitchers for the Red Sox during the seven years of his contract, which brought him the then unprecedented amount of $92 million. I was to see him in the opening series with the Mariners in the spring of 1998—the same one in which “Mo” Vaughn smashed a bases loaded homer to right in the bottom of the ninth to defeat the M’s on the Good Friday Fenway Opening Day itself. Pedro Perfecto, as I liked to call him, had a winning percentage higher than any Red Sox pitcher with at least 100 decisions in the seven seasons with the Red Sox—760 for a 117-30 second record. When he was to bid the Red Sox farewell in late ’04, bound for a $52 million, four-year contract with the New York Mets, it constituted perhaps the most traumatic of the free agent divorces that the Red Sox had had—including “Mo” Vaughn’s departure to the California Angels and that of fireballing Roger Clemens in ’96 and the loss of “El Maestro” Luis Tiant in 1980 to the hated Yankees.

But it was in 1997 that the ’96 agreement was to establish the framework for the Bosox acquisition of Pedro and the new free agent environment and to dim the unpleasant memories of the losses of Tiant, Clemens and, to assuage hurt from the one to come in 2000, “Mo” Vaughn. And it was NLRB intervention that launched baseball on the road to uninterrupted peace between labor and management and unprecedented prosperity, along with ever escalating salaries!

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