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Fehr Ball

The bush-league strategy of baseball's player rep.

By Michael McMenamin

Newt Gingrich, speaker of the House of Representatives, and Donald Fehr, executive director of the Baseball Players Association, have exactly two things in common: Both are out of shape and both favor a repeal of baseball's antitrust exemption.

That's where the similarities end. Gingrich is dead right on how baseball should solve its problems. He believes that a negotiated settlement at the bargaining table "would be infinitely preferable to some politician rigging some excuse to coerce people into doing something."

Fehr, by contrast, is wandering out in left field. Fehr wants someone, *anyone*—President Clinton, Congress, the National Labor Relations Board, the courts—to step in and save him from the consequences of the botched strike for which he alone is responsible.

Fehr is the subject of derision and ridicule when labor leaders or their management counterparts gather behind closed doors. Experienced lawyers for union and management feel the same way. Why? Because Fehr committed a cardinal sin for labor leaders: He took his people out on strike without a viable backup plan for getting them back to work if the team owners didn't fold. As a result, the players will *never* make up in future salaries what they lost during the strike.

Almost all strikes occur because one side has misinterpreted the resolve of the other. But experienced labor leaders, which Fehr is not (more on that later), narrow the differences between the parties as much as they can *before* resorting to their ultimate weapon—the strike. They resort to a strike because they believe that management underestimates their resolve. Sometimes they're right and management *has* miscalculated the union's resolve. If so, a strike can bring a quick resolution on more favorable terms for the union.

Fehr certainly expected this to happen with baseball, and he had history on his side. In the past, team owners either caved or had baseball's commissioner impose a settlement. But most labor leaders have a contingency plan, a face-saving way for a quick settlement, should the strike not produce the desired result within a relatively short period, say, two to four weeks maximum. Fehr didn't have a legitimate backup plan.

When the team owners didn't fold and the World Series was cancelled, an experienced labor leader would have gone back to the bargaining table to take as much as he could get. The baseball owners were offering a salary cap with a 50-50 split of revenue. Fehr could have asked for a 60-40 split and gradually bargained down to a 55-45 split. That would be a better split than the 53 percent the players get in the salary-capped National Basketball Association, which is considered by many as the model of a successful sports industry for players and owners alike.

But Fehr isn't really a labor leader. He's a lawyer. And there's the problem. While some lawyers may be good negotiators, Fehr isn't one of them. He's never actually brokered a contract without outside intervention. So instead of negotiating a deal, he engaged in ad hominem attacks on the owners and spouted nonsense about opposing a salary cap because he wanted the "free market" to set salaries for players. But that is precisely the opposite of what trade unions stand for. If you want the free market to set salaries—which is how most Americans have their incomes established—then you don't need a union.

The basic goal of a union is to eliminate labor costs as an element of competition among companies in a particular industry. That is why the country's labor laws encourage multi-employer bargaining—many companies in the same industry sitting down with the same union to negotiate wages. Like trucking companies, the garment industry, printing companies...and sports teams.

It is now painfully clear that the only strategy Fehr has for achieving what he abysmally failed to accomplish at the bargaining table is litigation or the threat of litigation. This is where baseball's antitrust exemption fits into Fehr's strategy. Fehr has long misled the media and politicians into believing that if baseball were covered by antitrust law, the team owners would not be able to stonewall the players, insist on a salary cap, or even hire replacement players, because the union could file an antitrust suit. This is nonsense. Baseball doesn't need an antitrust exemption for the team owners to continue doing precisely what they are doing today with respect to the players.

Contrary to Fehr's claims, if Congress repeals baseball's antitrust exemption, the players' union will *not* be able to successfully sue the team owners for antitrust violations. Why not? Because, like the National Football League, the National Basketball Association, and the National Hockey League, Major League Baseball enjoys a nonstatutory labor exemption from the antitrust laws, as does any other industry in this country with a history of multi-employer bargaining.

To its dismay, the National Basketball Players Association found this out earlier this year, when the U.S. Court of Appeals for the Second Circuit in *NBA v. Williams* ruled that the players' association could not maintain an antitrust action against the NBA even though, as in baseball, the NBA's labor agreement with its players had expired, and the parties were at an impasse in their negotiations over, among other things, a salary cap. The U.S. Court of Appeals affirmed a lower court decision which held that "the Players may not have it both ways. They may not avail themselves to the benefits of federal labor and antitrust laws at the same time."

Plainly put, as long as the baseball players' union remains in the picture representing the players, then no antitrust suit can be successfully maintained against the team owners. Period. End of story.

So why does Fehr want an end to baseball's antitrust exemption and why has he offered to have the players return to work if the exemption is repealed? There are two reasons, and both tie into lawyer Fehr's reliance on litigation or the threat of litigation.

First, Fehr needs a fig leaf to camouflage his failure. Ending baseball's antitrust exemption will give him that fig leaf. If the antitrust exemption were repealed, he can declare victory and go home, even though the players' economic strength will have been greatly diminished.

Second, repeal of baseball's special antitrust exemption will give Fehr a litigation weapon he does not have today. But to use it, he will have to disband his union. Without its antitrust exemption, baseball will be no different from any other professional sport. If the union is no longer representing the players in multi-employer bargaining with the owners, then the team owners may not act together in dealing with their players

without violating the antitrust laws. To take advantage of this, however, the Baseball Players Association must “decertify” as the players’ union, so there is no collective bargaining unit left in the picture. This is what the NFL Players Association did several years ago. The players then filed and won a protracted antitrust case against the NFL and damages were awarded to many NFL players. After the litigation, the NFLPA returned as the union for the players and negotiated a new collective bargaining agreement—with a salary cap.

Antitrust litigation or litigation before the National Labor Relations Board is the only leverage Fehr has left. But such a course will involve years of lengthy litigation where Fehr and his fellow lawyers will end up making more than most of the baseball players they used to represent. In the meantime, while the litigation is pending, the baseball players will be at the mercy of the individual team owners and will have to rely on the free market to set their salaries.

So, end the antitrust exemption. Give Fehr his fig leaf. As long as the players return, and the World Series commences this October at Jacobs Field in Cleveland, the fans couldn’t care less about how a bunch of millionaires go about deciding how to split up their profits.

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