

Behind in the Count: What Major League Baseball Can Do to Avoid Strikes and Lockouts

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Ohio Northern University Law Review

Student Articles

Behind in the Count: What Major League Baseball Can Do to Avoid Strikes and Lockouts

DANIEL W. GUDORF*

I. INTRODUCTION

“It’s not a good thing for the sport. . . . We understand it’s bad for business.”

– Rob Manfred, Commissioner of Major League Baseball¹

“We obviously have had 25-plus years without a work stoppage. The industry has continued to do well and grow. And the first instance in some time of bumpy water, the recourse was a strategic decision to lock players out at midnight.”

– Tony Clark, Head of the Major League Baseball Players Association²

“We’re just trying not to get screwed.”

– Anonymous player³

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1. Chelsea Janes, *MLB Owners, Players’ Union Dig in on Day 1 of Lockout*, WASH. POST (Dec. 2, 2021, 3:12 PM), <https://www.washingtonpost.com/sports/2021/12/02/mlb-lockout-rob-manfred-tony-clark/>.

2. *Id.*

3. Jeff Passan, *Inside the Self-Inflicted Crisis Boiling Over as MLB’s Lockout Deadline Arrives*, ESPN, <https://www.espn.com/espn/print?id=33362477&type=Story&imagesPrint=off> (last updated Mar. 10, 2022, 9:06 AM).

“This bleeping sucks.”

– Seth Rothman, angry baseball fan⁴

These quotes are all from the events relating to the December 2, 2021, Major League Baseball lockout.⁵ This lockout was the ninth work stoppage in the history of the MLB and the first since the 1994-1995 strike.⁶ Despite the disputing owners and players agreeing that lockouts are bad for the business of baseball, the owners chose to lock out the players following failed negotiations to form a collective bargaining agreement (CBA).⁷ Baseball would not commence until the players and owners formed an agreement.⁸

Throughout the entirety of the lockout, there was uncertainty about whether there would even be a 2022 baseball season.⁹ Fans grew increasingly upset as the work stoppage continued.¹⁰ A United States senator threatened the MLB, saying that Congress should remove baseball’s antitrust exemption if the lockout did not end.¹¹ Some players and fans began joking that Bobby Bonilla would be the highest paid baseball player for the cancelled 2022 season.¹²

Then, on March 10, 2022, the lockout ended.¹³ The players and owners agreed to a new CBA, and baseball was back on for 2022.¹⁴ The new CBA is set to last until 2026, and unless some new issue arises, baseball will likely

4. John Healy, *MLB Fans React to Failure to End Lockout, Opening Day Cancelled: ‘This Bleeping Sucks’*, AUDACY (Mar. 1, 2022, 5:55 PM), <https://www.audacy.com/sports/mlb/mlb-fans-react-to-no-deal-on-lockout-this-bleeping-sucks>.

5. Janes, *supra* note 1; Passan, *supra* note 3.

6. Andrew Golden, *A Brief History of MLB Work Stoppages*, WASH. POST (Feb. 17, 2022, 1:47 PM), <https://www.washingtonpost.com/sports/2022/02/17/mlb-work-stoppages-history/>.

7. Janes, *supra* note 1.

8. *Id.*

9. Passan, *supra* note 3.

10. Dave Sheinin, *As the Pandemic Recedes, ‘It’s the Perfect Time for Baseball.’ If Only MLB Could See That.*, WASH. POST (Mar. 6, 2022, 5:00 AM), <https://www.washingtonpost.com/sports/2022/03/06/covid-baseball-lockout/>.

11. Tim Stebbins, *Sen. Durbin to MLB: ‘Unlock the Lockout and Play Ball’*, NBC SPORTS (Mar. 9, 2022), <https://www.nbcsports.com/chicago/cubs/senator-dick-durbin-mlb-unlock-lockout-and-play-ball>.

12. Connor Toole, *Bobby Bonilla Memes Are Hotter Than Ever as the MLB Lockout Stretches On*, BROBIBLE (Mar. 2, 2022, 9:40 AM), <https://brobible.com/sports/article/bobby-bonilla-mlb-lockout-memes-reactions/>. Bobby Bonilla is a former New York met, who, due to a deferred payment plan, continues to be paid roughly \$1.19 million per year, despite having been retired for over two decades. These payments continue until 2035. Bonilla would have been paid despite any cancellation of the 2022 season. See Dan Mullen, *Bobby Bonilla Day Explained: Why the Mets Still Pay Him 1.19M Today and Every July 1*, ESPN (Jul. 1, 2021), https://www.espn.com/mlb/story/_/id/31732959/bobby-bonilla-day-explained-why-mets-pay-119m-today-every-july-1.

13. Alden Gonzalez, *MLB Commissioner Rob Manfred, Union Chief Tony Clark Hail New CBA as Lockout Ends*, ESPN (Mar. 10, 2022), https://www.espn.com/mlb/story/_/id/33470321/sources-mlb-union-reach-tentative-agreement-new-cba-salvage-162-game-season.

14. *Id.*

continue for the next five seasons without any prolonged interruption.¹⁵ With fans, players, and owners celebrating the prospect of a full season, the question remains: Did this lockout have to happen?

Baseball has a long history of work stoppages, but the effectiveness of these stoppages is debatable.¹⁶ Strikes and lockouts cost time and money and strain relationships between players and owners.¹⁷ Most importantly, these interruptions frustrate and, in some cases, drive away fans.¹⁸ Rather than wait for the next strike or lockout to happen, the MLB should act now to put a system in place that will help prevent future work stoppages.

This article examines the two types of work stoppages; the history of these stoppages in the MLB; their effectiveness; and three alternatives, mediation, arbitration, and the non-stoppage strike or lockout, which players and owners could implement to avoid future strikes or lockouts. Mediation is a process by which a neutral third party helps to encourage the two negotiating parties to form an agreement.¹⁹ Arbitration requires the negotiating parties to submit their CBA proposals to a third-party arbitrator (or panel of arbitrators) who chooses one of the two proposals to implement.²⁰ A non-stoppage strike or lockout prevents a work stoppage while encouraging continued negotiations by penalizing teams and players a percentage of money and requiring that money be paid to charity until a new CBA is created.²¹ Each of these methods, whether used individually or collectively, could help baseball avoid another work stoppage.

II. BACKGROUND

A. *Strikes and Lockouts Defined*

In all businesses involving workers' unions, both employees and employers have their own forms of work stoppage that they can institute should negotiations between the parties break down.²² Employees have the ability to strike, a process by which the employees refuse to work until their demands are met.²³ Accordingly, employers have a similar ability to cease

15. *Id.*

16. Golden, *supra* note 6.

17. *See infra* Part III.A.

18. *Id.*

19. *Mediation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20. *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

21. David B. McCalmont, *The Semi-Strike*, 15 INDUS. & LAB. REL. REV. 191, 192 (1962).

22. *See* Willis J. Nordlund, *The Work Stoppage: A Dinosaur or a Lady in Waiting?*, 61 LAB. L. J. 152, 157 (2010).

23. *Strike*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An organized cessation or slowdown of work by employees to compel the employer to meet the employees' demands; a concerted refusal by employees to work for their employer, or to work their customary rate of speed, until the employer grants

operations by imposing a lockout.²⁴ In a lockout, the employers refuse to allow employees to work, effectively closing the business.²⁵

Strikes have existed throughout the entirety of the history of the United States.²⁶ However, it was not until the legislature acknowledged unions as a legitimate entity that the strike became formally recognized as a legal tool that could be used by oppressed workers.²⁷ In 1935, Congress enacted the National Labor Relations Act (NLRA).²⁸ In addition to giving employees a right to join and to participate in unions, the NLRA required employers to collectively bargain in good faith with those unions.²⁹ The NLRA also granted unions the ability to strike in the event that negotiations between the employers and the unions failed.³⁰

Lockouts are even more well-established, existing even before the foundation of the United States.³¹ Despite the long tradition of lockouts, the NLRA contains no language about an employer's right to lock out its employees.³² However, over time, lockouts have been deemed to be acceptable defenses to actual or threatened strikes.³³ Courts have generally held lockouts to be a legal form of work stoppage, provided that they do not conflict with rights granted to workers by statute.³⁴ Lockouts can be an effective way for employers to balance the power of unions and to protect

the concessions that they seek.”); see also FLORENCE PETERSON, STRIKES IN THE UNITED STATES: 1880-1936 3 (U.S. Gov't Printing Office Wash. 1938).

24. Nordlund, *supra* note 22, at 157.

25. *Lockout*, BLACK'S LAW DICTIONARY (11th ed. 2019) (“An employer's withholding of work and closing of a business because of a labor dispute.”).

26. See Nordlund, *supra* note 22, at 154; See Vernon H. Jenson, *Notes on the Beginnings of Collective Bargaining*, 9 INDUS. & LAB. REL. REV. 225, 228 (1956). The first known U.S. strike occurred in 1776 and involved printers seeking higher wages.

27. Nordlund, *supra* note 22, at 156.

28. *Id.*; *1935 Passage of the Wagner Act*, NAT'L LAB. REL. BD., <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-of-the-wagner-act> (last visited Mar. 12, 2022) [hereinafter *Passage*].

29. 29 U.S.C. § 157 (2021) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”); see *Passage*, *supra* note 28; see also Dell Bush Johannesen, *Lockouts: Past, Present, and Future*, 1964 DUKE L.J. 257, 258 (1964).

30. 29 U.S.C. § 163 (2021) (“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”); see Nordlund, *supra* note 22, at 156.

31. Susan L. Dolin, *Lockouts in Evolutionary Perspective: The Changing Balance of Power in American Industrial Relations*, 12 VT. L. REV. 335, 338 (1987) (“The earliest lockout in American labor history occurred in 1643 in Gloucester.”).

32. Johannesen, *supra*, note 29, at 258.

33. *Id.*; *American Ship Bldg. Co. v. Nat'l Lab Rel. Bd.*, 380 U.S. 300, 307 (1965).

34. See Robert F. Koretz, *Legality of the Lockout*, 4 SYRACUSE L. REV. 251, 273 (1953) (Lockouts that “frustrate organization or collective bargaining are illegal.”); see also Dolin, *supra* note 31, at 426 (“[E]mployers cannot freely lock out employees simply because they are union members.”).

themselves from future economic losses due to a collective bargaining agreement that does not benefit them.³⁵

Both strikes and lockouts are legal tools that employees and employers can use to exert pressure on each other to seek certain concessions during negotiations.³⁶ While many different industries leverage work stoppages, Major League Baseball has a uniquely long and checkered history of engaging in strikes and lockouts.³⁷

B. *Baseball's History of Work Stoppages*

Baseball has an extensive tradition of broken negotiations and distrust between the players and the owners.³⁸ Before the most recent lockout of 2021-2022, MLB owners and players negotiated eleven collective bargaining agreements, eight of which resulted in some form of work stoppage.³⁹ Of those eight stoppages, five were player strikes, and three were owner-initiated lockouts.⁴⁰ The most recent lockout was the ninth work stoppage in MLB's 146 years.⁴¹

In addition to wages, pensions, and other typical conditions of employment, one of the main points of contention between owners and players over the years has concerned the 1879 adoption of the "reserve clause."⁴² Initially, this clause allowed owners to hold the right to a player's continuing service, despite his contract expiring.⁴³ The reserve clause prevented players from being free agents, eliminating their ability to test their values on the open market.⁴⁴

The desire to eliminate the reserve clause led players to try to consolidate their power.⁴⁵ After several failed attempts to unionize, the Major League

35. Koretz, *supra* note 34, at 254-55.

36. Nordlund, *supra* note 22, at 157.

37. *See infra* Part II.B.

38. *See* Genevieve F. E. Birren, *A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof)*, 10 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 17 (2014).

39. *Id.*

40. *Id.*

41. Golden, *supra* note 6; Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1139 (1982) ("Historians usually trace the beginning of modern baseball to . . . February 2, 1876.").

42. Matthew Henson, *Baseball's Short Summer and Coming Strike*, 36 ENT. & SPORTS LAW. 18 (2020). Players fought the application of the reserve clause from its conception until the 1976 lockout. It was following this lockout that free agency was made official, and the reserve clause was all but declared dead. *See infra* Section II.B.iii.

43. Henson, *supra* note 42; *see infra* Section II.B.iii.

44. McCormick, *supra* note 41, at 1132.

45. *History*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, <https://www.mlbplayers.com/history> (last visited Mar. 12, 2022) [hereinafter *History*].

Baseball Players Association (MLBPA) was formed in 1965.⁴⁶ In 1968, the MLBPA negotiated with the owners and agreed to MLB's first collectively bargained agreement.⁴⁷ While this initial agreement did not succeed in ridding the players of the reserve clause, it did raise the minimum salary for players.⁴⁸ However, any excitement over the 1968 CBA was short lived; by 1972, MLB was faced with its first work stoppage due to the players striking.⁴⁹

i. Strike 1: 1972

The first work stoppage in the MLB was a strike that lasted for thirteen days but that resulted in the cancellation of eighty-six games.⁵⁰ Players and owners disagreed over pension plans and salary arbitration.⁵¹ Eventually, the owners agreed to a \$500,000 increase in pension funds, as well as to allowing players to have an impartial arbitrator in salary disputes.⁵² After settling on a CBA, the cancelled games were not rescheduled.⁵³ By not rescheduling cancelled games, the league may have changed the outcome of the playoffs.⁵⁴ For example, the Detroit Tigers (86-70) made the playoffs over the Boston Red Sox (85-70).⁵⁵ Boston had one fewer game than Detroit and, thus, one fewer opportunity to improve its record.⁵⁶

ii. Lockout 1: 1973

Despite agreeing to salary arbitration following the 1972 strike, owners were still frustrated with the lack of definition in the arbitration process.⁵⁷ On February 8, 1973, when the initial arbitration deal expired, the owners locked out the players.⁵⁸ The lockout lasted seventeen days, and by the end, the two

46. *Id.*

47. *Id.*

48. *Id.*

49. Golden, *supra* note 6.

50. Birren, *supra* note 38, at 5.

51. Golden, *supra* note 6.

52. *Id.*; Birren, *supra* note 38, at 5; McCormick, *supra* note 41, at 1153.

53. Golden, *supra* note 6.

54. *Id.*

55. *Id.*

56. *Id.* Had Boston had the chance to play the same number of games as Detroit and won that missing game, they would have been able to force a play-in game to see which team would represent the American League East in the playoffs. *See also* Dan Flaherty, *The Seasonal Narrative of the 1972 Boston Red Sox*, THESPORTSNOTEBOOK, <https://thesportsnotebook.com/1972-boston-red-sox/> (last visited Apr. 28, 2022).

57. Matt Weyrich, *MLB Work Stoppages: History of Lockouts, Strikes in Baseball*, NAT'L BROAD. CO. SPORTS WASH. (Mar. 13, 2022), <https://www.nbcsports.com/washington/nationals/mlb-work-stoppages-history-lockouts-strikes-baseball>.

58. Dayn Perry, *MLB Lockout: A Brief History of Strikes and Lockouts as Baseball Comes to a Halt for First Time in 26 Years*, CBS SPORTS (Dec. 5, 2021, 1:50 PM), <https://www.cbssports.com/mlb/>

sides agreed to a three-year deal that granted players who had been in the league at least two years the ability to use arbitration to settle contracts.⁵⁹ Since the lockout took place during spring training, no regular season games were affected.⁶⁰

iii. Lockout 2: 1976

The 1976 lockout happened because of Curt Flood and the player-dreaded reserve clause.⁶¹ In 1969, Curt Flood, a St. Louis Cardinal, was traded to the Philadelphia Phillies.⁶² Flood had been opposed to the trade, and he sued, challenging the trade and the reserve clause.⁶³ In *Flood v. Kuhn*, the Supreme Court “reaffirmed baseball’s immunity from antitrust restrictions.”⁶⁴ However, the Court only did so because Congress chose not to remove the antitrust exemptions following the Court’s prior decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.⁶⁵ Flood’s challenge, though unsuccessful, educated and emboldened players regarding the issue of the reserve clause.⁶⁶

In 1975, a pitcher for the Los Angeles Dodgers, Andy Messersmith, challenged the reserve clause, saying that instead of an owner having a continuous option to a player’s rights, the reserve clause only contained one “renewal year.”⁶⁷ Messersmith asserted that once his contract was up, the Dodgers could exercise its option to keep him for one year, but after that additional year, Messersmith would be free to test the open market.⁶⁸ Another player, Dave McNally of the Montreal Expos, played his renewal year past his contract expiring and joined Messersmith’s challenge.⁶⁹ The case went to arbitration, and the arbitrator agreed with Messersmith and McNally, making them free agents.⁷⁰

news/mlb-lockout-a-brief-history-of-strikes-and-lockouts-as-baseball-comes-to-a-halt-for-first-time-in-26-years/.

59. Golden, *supra* note 6.

60. *Id.*

61. *Id.*

62. McCormick, *supra* note 41, at 1149.

63. *Id.*

64. *Id.*; *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

65. McCormick, *supra* note 41, at 1149; *see* *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding that professional baseball was not involved in interstate commerce, and, therefore, the Sherman Act did not apply to the MLB).

66. *History*, *supra* note 45.

67. McCormick, *supra* note 41, at 1155.

68. *Id.*

69. Steve Springer, *Dave McNally, 60; Pitcher’s Fight Led to Free Agency*, L.A. TIMES (Dec. 3, 2002, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2002-dec-03-me-mcnally3-story.html>.

70. McCormick, *supra* note 41, at 1157.

The owners wanted to rein in this newly established interpretation of the reserve clause, and in 1976, they again chose to lock out the players.⁷¹ However, in the middle of the lockout, a federal appellate court upheld Messersmith's and McNally's arbitration decision.⁷² Seeing that there was no way out of free agency, MLB's commissioner ended the lockout after just sixteen days.⁷³ The lockout did not result in any cancelled games, just a delayed spring training.⁷⁴

iv. Strike 2: 1980

The 1980 players' strike was over free agent compensation.⁷⁵ Free agent compensation required a team that obtained a free agent to provide either player(s) or draft pick(s) to the team losing the free agent.⁷⁶ The owners felt that they deserved compensation if a free agent left their teams.⁷⁷ The players argued that teams would be less likely to sign free agents if they were forced to give up players or draft picks, hurting available players' prospects of being acquired.⁷⁸ Because of this disagreement over free agent compensation, the players walked out of spring training for eight days.⁷⁹ The strike ended with the two sides agreeing to halt negotiations on free agent compensation until the following offseason.⁸⁰

v. Strike 3: 1981

The 1981 strike, like the 1980 strike, was based on the inability of players and owners to agree on the issue of free agent compensation.⁸¹ The strike occurred in the middle of the season, lasted for fifty days, and resulted in the cancellation of 712 games.⁸² In the end, an agreement was reached whereby a league-wide pool of unprotected players was created from which teams losing free agents could select replacement players; the team acquiring a free agent no longer had to give up any players or draft picks.⁸³ Due to the split

71. Golden, *supra* note 6.

72. Perry, *supra* note 58.

73. *Id.*

74. *Id.*

75. Associated Press, *Chronology of the Baseball Strike*, N.Y. TIMES (Aug. 1, 1981), <https://www.nytimes.com/1981/08/01/sports/chronology-of-the-baseball-strike.html> [hereinafter *Chronology*].

76. McCormick, *supra* note 41, at 1133.

77. *Id.*

78. *Id.* at 1134.

79. *Chronology*, *supra* note 75.

80. Golden, *supra* note 6. Despite not agreeing on free agent compensation, the two sides did form a temporary agreement that addressed other contractual issues.

81. *Id.*

82. Perry, *supra* note 58.

83. Golden, *supra* note 6.

nature of the season and the number of games cancelled, the playoff races were severely impacted.⁸⁴

vi. Strike 4: 1985

In 1985, the players went on strike for two days in the middle of the season regarding an argument over pension contributions and salary arbitration.⁸⁵ Negotiations ensued, and the two sides quickly came to an agreement.⁸⁶ Pension contributions were increased, and the minimum salary for players improved by fifty percent.⁸⁷ Twenty-three of the twenty-five games that were canceled as a result of the strike were rescheduled.⁸⁸

vii. Lockout 3: 1990

In 1990, the owners locked out the players due to a number of concerns, one of which was the proposed creation of some type of salary cap system that would limit how much money a team could spend on players.⁸⁹ In addition, for several years, the owners had been colluding to avoid signing free agents, causing multiple players to successfully challenge owners through arbitration hearings.⁹⁰ Because of their losses in arbitration hearings, the owners sought to dispose of the process of salary arbitration.⁹¹ However, as the season drew nearer, the owners, worried over the prospect of losing money due to the cancellation of games, retreated from their position and ended the lockout.⁹² This lockout only lasted thirty-two days.⁹³

viii. Strike 5: 1994-1995

The fifth baseball strike was by far the most disruptive of MLB's work stoppages.⁹⁴ The strike lasted 232 days, and the 1994 World Series was cancelled.⁹⁵ The players and owners argued over a salary cap, the minimum

84. Perry, *supra* note 58. Cincinnati Reds fans had a lot to be angry about that season. Because the season was split into two halves, the divisional winners of each half played against each other in a one-game playoff to determine who would enter the postseason. Despite having the best record overall, the Cincinnati Reds had not been their division's leading team in either half of the season, and, thus, they were left out of the postseason entirely.

85. *Id.*; Golden, *supra* note 6.

86. Golden, *supra* note 6.

87. *Id.*

88. *Id.*

89. Birren, *supra* note 38, at 6.

90. Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 251, 291 (2012).

91. *Id.*

92. *Id.* at 292.

93. Birren, *supra* note 38, at 6.

94. *Id.*

95. *Id.*

play time before free agent eligibility, and salary arbitration.⁹⁶ Toward the end of 1994, the owners, determining that negotiations were deadlocked, unilaterally put a salary cap into effect.⁹⁷ The MLBPA filed a complaint to the National Labor Relations Board, “accusing the owners of a failure to negotiate in good faith and imposing the cap without a genuine impasse.”⁹⁸ The matter advanced to a District Court, where then-Judge Sonia Sotomayor granted an injunction requiring the owners to revoke the salary cap and reinstate the former CBA.⁹⁹ The strike subsequently ended as a result of the injunction.¹⁰⁰

The 1994-1995 strike proved to be the most consequential of baseball’s work stoppages.¹⁰¹ Attendance declined by twenty percent, and some fans chose to abandon the sport, never to return.¹⁰² Not until 2006 did attendance numbers rebound to overtake the previous high mark set in 1994 before the implementation of the strike.¹⁰³ It took the addition of wild card playoff games, a steroid-fueled homerun chase, and an improbable 2004 Red Sox team winning its first World Series in eighty-six years to bring the sport back to popularity.¹⁰⁴ Despite this temporary resurgence, attendance and World Series numbers are much lower than they were prior to the strike in 1994.¹⁰⁵

96. *Id.* at 6-7.

97. Paul D. Staudohar, *The Baseball Strike of 1994-95*, 120 MONTHLY LAB. REV. 21, 25 (1997) [hereinafter *Baseball Strike*].

98. *Id.* at 26.

99. *Id.*

100. *Id.*

101. See Bill Shaikin, *MLB 1994 Strike Anniversary: Lessons from a Disastrous Work Stoppage Apply Now*, L.A. TIMES (Aug. 11, 2019, 6:00 AM), <https://www.latimes.com/sports/dodgers/story/2019-08-10/mlb-1994-strike-anniversary-work-stoppage-players-thwarted-salary-cap>; see also Travis Sawchik, *Do Baseball’s Labor Fights Drive Fans Away?*, FIVETHIRTYEIGHT, (June 12, 2020, 1:30 PM) <https://fivethirtyeight.com/features/do-baseballs-labor-fights-drive-fans-away/>.

102. Sawchik, *supra* note 101; Tim Kurkjian, ‘Oh My God, How Can We Do This?’: *An Oral History of the 1994 MLB Strike*, ESPN (Aug. 12, 2019), https://www.espn.com/mlb/story/_/id/27161035/oh-my-god-how-do-oral-history-1994-mlb-strike. Tom Glavine, former Atlanta Braves pitcher, is quoted in the Kurkjian article as saying, “What it meant then was a death sentence for baseball. People were genuinely pissed that we went on strike. I still run into people who tell me they swore off baseball, but eventually came back. Others have told me that they swore off baseball, and never came back. That was a small percentage of people, but I get it.”

103. Hayes Gardner, *25 Year Ago, We Saw Baseball Return from Historic Monthslong Strike*, LOUISVILLE COURIER J. (last updated May 1, 2020, 2:18 PM), <https://www.courier-journal.com/story/sports/mlb/2020/04/23/mlb-strike-25-years-later-what-happened-when-baseball-returned/2982700001/>.

104. *Postseason History: Wild Card*, MLB, <https://www.mlb.com/postseason/history/wild-card> (last visited Apr. 22, 2022); Shaikin, *supra* note 101; Ian Browne, *Best Season Ever? Hard to Top 2004 Red Sox*, MLB (Dec. 26, 2021), <https://www.mlb.com/news/classic-seasons-2004-red-sox>; *World Series Television Ratings (1968-2019)*, BASEBALL ALMANAC, <https://www.baseball-almanac.com/ws/wstv.shtml> (last visited Mar. 19, 2022) [hereinafter *Ratings*].

105. *Ratings*, *supra* note 104.

ix. Lockout 4: 2021-2022

On December 2, 2021, Commissioner Rob Manfred announced that the owners would be locking out players in an effort to “jump-start” negotiations with the MLBPA.¹⁰⁶ Players, seeing their salaries decrease over a four-year period despite an increase in overall team revenue, were looking for a greater share of the profits.¹⁰⁷ In addition, the MLBPA sought higher initial salaries, new rules preventing teams from trying to lengthen the amount of time players were required to serve before becoming free agents (frequently referred to as service-time manipulation), limitations to prevent teams from tanking, and fewer restrictions on free agency.¹⁰⁸ Owners were seeking expanded playoffs and uniform sponsorship deals.¹⁰⁹

On March 10, 2022, a tentative agreement between the owners and players was reached.¹¹⁰ As part of the agreement, minimum salaries increased, the playoffs expanded from ten teams to twelve, and the league instituted new service-time manipulation rules, agreed to uniform advertising deals, and created an international draft.¹¹¹ The lockout lasted ninety-nine days (the second longest work stoppage in the sport); however, although Opening Day was pushed back to April 7, the regular season games were not affected.¹¹²

III. ANALYSIS

If anything can be determined after looking at the history of Major League Baseball, it is that work stoppages are ever-present threats looming over fans’ enjoyment of the game.¹¹³ Baseball’s owners and players are constantly at odds, and strikes or lockouts will likely occur in the future.¹¹⁴ Two questions arise following this most recent lockout: Are work stoppages worth it? If not, what can be done to avoid these stoppages?

If work stoppages are effective tools in negotiating, then it is possible that the league is justified in continuing to use them. However, if there is a detrimental cost from locking out the players or from the union striking, then something should be done to change the paradigm so that future work

106. Passan, *supra* note 3.

107. *Id.*

108. *Id.*

109. *Id.*

110. Gonzalez, *supra* note 13.

111. *Id.*; Gabe Lacques, *MLB’s Playoffs Are About to Get Bigger – But Will They Be Better?*, USA TODAY (Mar. 11, 2022, 2:38 PM), <https://www.usatoday.com/story/sports/mlb/2022/03/11/new-mlb-play-off-format-how-expanded-postseason-work/9331660002/>.

112. Gonzalez, *supra* note 13. Despite cancelling the games that were to be played before April 7, Commissioner Manfred indicated that all 162 regular season games will be played for the 2022 season.

113. *See supra* Part II.B.

114. *Id.*

stoppages can be prevented. While it may be too late for this current CBA, the next time the owners and the MLBPA negotiate, it may benefit both sides to agree in advance to one or more of the following three structures to prevent another work stoppage: mediation, arbitration, or a non-stoppage strike or lockout system. A consideration of new strategies would be in the best interest of MLB fans, and new negotiation tactics could plausibly mend resentment held by owners and players.

A. Are Work Stoppages Worth It?

Clearly, the work stoppage is a powerful tool held by the owners and the MLBPA.¹¹⁵ However, it is important to balance any benefits of work stoppages against their costs in analyzing their effectiveness in achieving their goals.

The benefits of strikes and lockouts may seem obvious. Work stoppages and the threat of work stoppages can be used to exert pressure on the other side while negotiating.¹¹⁶ Collective bargaining is often adversarial, and the work stoppage allows opposing sides to exert bargaining power.¹¹⁷ Without the ability to strike or to lock out players, it is possible that negotiations would continue without end. By stopping the work process, owners or players can compel the other side to the table, showing that they are serious about the proposals they are advancing.¹¹⁸ In the end, work stoppages, as messy as they might become, can help to get a deal done.¹¹⁹

Strikes and lockouts serve their purposes. Without the ability to strike, unions would have little to no leverage over management.¹²⁰ By holding the power to strike when working conditions have diminished below an acceptable level, a union can compel employers to raise wages and to improve other aspects of the work environment.¹²¹ Indirectly, striking can create deeper, more unified bonds among participating employees as they join together in advocating for a focused cause.¹²²

Lockouts exist as ways to balance the power that unions hold by being able to strike.¹²³ They are meant to be methods used to protect employers' interests, such as by preventing economic loss or by halting expensive

115. *Id.* The frequency with which the players or the owners have halted operations shows that the parties believe in the power of work stoppages.

116. Nordlund, *supra* note 22, at 157.

117. Dolin, *supra* note 31 at 339-40.

118. *See generally supra* Part II.B.

119. *See generally id.*

120. Nordlund, *supra* note 22, at 157.

121. *Id.* at 158.

122. Randy Hodson et al., *Who Crosses the Picket Line: An Analysis of the CWA Strike of 1983*, 12 LAB. STUD. J. 19, 24 (1987) ("Shared picket line experience promotes camaraderie . . .").

123. Koretz, *supra* note 34, at 251, 253.

production.¹²⁴ Employers may also commence a lockout when negotiations are deadlocked.¹²⁵

The benefits of striking are clearly noticeable in baseball. For the MLBPA, striking or the threat of striking has considerably worked to its advantage.¹²⁶ When they have gone on strike, baseball players have mostly succeeded in achieving their goals.¹²⁷ A detailed look at player-initiated work stoppages shows that players received quantifiable benefits from strikes.¹²⁸ From this perspective, perhaps it is in the best interest for the MLBPA to always consider striking when met with opposition from the owners.¹²⁹

While, theoretically, lockouts benefit the owners by providing them leverage in negotiations, similar to how a strike benefits the players, history makes it a bit more difficult to determine the specific advantages of locking out the players in baseball.¹³⁰ The owners simply have not had as much success as the players in achieving their goals through work stoppages.¹³¹ While history may judge otherwise, it would seem that the most recent lockout of 2021-2022 was the most successful lockout for the owners.¹³² Although they made some concessions to the players, the owners expanded the playoffs, which will undoubtedly increase revenue and television ratings, and they also convinced the union to agree to uniform sponsorship.¹³³

124. *Id.* at 254-55. “The NLRB has . . . held that an employer who had suffered substantial financial loss while operating under the terms of a collective agreement . . . was justified” in commencing a lockout.

125. *Id.*

126. Birren, *supra* note 38, at 18; *see also* Baumann, *supra* note 90, at 293 (“Unique to baseball [as opposed to the NFL, NBA, and NHL] is the fact that the players seem to hold the majority of the power in these negotiations, as they won major victories in each negotiation.”).

127. Birren, *supra* note 38, at 18. The author quotes Eric Chavez, former Oakland A’s Third Baseman as saying, “If history repeats itself, we’ll go on strike.”

128. McCormick, *supra* note 41, at 1133, 1135, 1154-55; Perry, *supra* note 58; Golden, *supra* note 6; Baumann, *supra* note 90 at 292; Christopher J. Fisher, *The 1994-95 Baseball Strike: A Case Study in Myopic Subconscious Macrocosmic Response to Conflict*, 6 SETON HALL J. SPORT L. 367, 394 (1996). The first strike resulted in the owners having to contribute more money toward pensions, and it stripped those owners of their total power to determine players’ salaries by creating binding salary arbitration. In the 1980 and 1981 strikes, the players, having recently received free agency, did not want teams who were acquiring free agents to be forced to give up some form of compensation. After these strikes, free agent compensation did not exist. Teams losing free agents could select from a newly created pool of players, but the acquiring teams were not penalized for participating in free agency. The 1985 strike resulted in players again getting more in pension contributions from the owners and, also, an increase in the minimum salary. Finally, the 1994-1995 strike allowed players to keep a free market and to thwart the owners’ plans for instituting a leaguewide salary cap.

129. Birren, *supra* note 38, at 18.

130. *See generally* Perry, *supra* note 58.

131. *Id.*; Golden, *supra* note 6; Birren, *supra* note 38, at 6; Baumann, *supra* note 90, at 291-92. In 1973, the owners were unhappy with the salary arbitration process and locked out the players over the issue. However, salary arbitration remained. The 1976 lockout occurred to prevent free agency, but by the time the lockout had ended, free agency was alive and well. The third lockout in 1990 was initiated due to the owners’ desire to have a salary cap and to get rid of salary arbitration. However, the owners abandoned both of these positions for fear of losing money.

132. *See generally* Gonzalez, *supra* note 13.

133. *Id.*

The negatives of work stoppages are many. First, there is the loss of salary and revenue for both players and owners.¹³⁴ Players may eventually get some of their salaries repaid from strike funds, but their losses are still great.¹³⁵ During the 1994-1995 strike, it was estimated that the players lost \$230 million in wages.¹³⁶ Owners also stand to lose large amounts of money anytime games are cancelled.¹³⁷ The owners lost over \$1 billion from the 1994-1995 strike.¹³⁸ Lockouts are equally financially destructive.¹³⁹ Had the most recent lockout continued into the season, it was estimated that players would have lost a combined \$20.5 million for each day of cancelled games.¹⁴⁰ Owners would have likely lost at least that much per cancelled game.¹⁴¹ It is unquestionable that work stoppages, at least for the short term, are financially disastrous.

Beyond the financial considerations, work stoppages cost fans. The most obvious way in which this is true is that fans are deprived of watching their prized teams compete.¹⁴² This disappointment causes some fans to become frustrated with both players and owners.¹⁴³ Accordingly, strikes and lockouts have devastated attendance numbers.¹⁴⁴ The three work stoppages that had the largest number of cancelled games, the 1972, 1981, and 1994-1995 strikes, resulted in reductions in attendance of ten percent, twelve percent, and twenty-four percent, respectively.¹⁴⁵ Even the work stoppages that did not cancel games resulted in attendance reductions of between three percent and seven percent.¹⁴⁶ While it is unclear whether this trend is also reflected in the television ratings, the number of viewers abandoning baseball has been increasing yearly, as evidenced by declining World Series audiences.¹⁴⁷

134. See *Baseball Strike*, *supra* note 97, at 26; see also Eric Colclasure, *Everything You Wanted to Know About the 1994 Strike and Its Aftermath (But Were Afraid to Ask)*, SPORTS ILLUSTRATED (Aug. 16, 2019, 3:17 PM), <https://www.si.com/mlb/whitesox/history/everything-you-wanted-to-know-about-the-1994-strike-and-its-aftermath-but-were-afraid-to-ask>.

135. *Baseball Strike*, *supra* note 97, at 26.

136. Colclasure, *supra* note 134.

137. *Id.*

138. *Baseball Strike*, *supra* note 97, at 26.

139. See generally Associated Press, *MLB Lockout Could Cost Scherzer \$232K Daily, Cole \$193K*, NBC SPORTS (Feb. 23, 2022, 4:18 PM), <https://mlb.nbcsports.com/2022/02/23/mlb-lockout-could-cost-scherzer-232k-daily-cole-193k/>.

140. *Id.*

141. *Id.*

142. Baumann, *supra* note 90, at 295.

143. *Baseball Strike*, *supra* note 97, at 26-27.

144. Dennis Coates & Thane Harrison, *Baseball Strikes and the Demand for Attendance*, 6 J. SPORTS ECON. 282, 283 (2005).

145. *Id.*

146. *Id.*

147. *Ratings*, *supra* note 104. In 1973, the World Series had 34,750,000 viewers. In 2019, it only had 13,912,000.

When baseball fans choose to leave the sport, their withdrawal inhibits the growth and financial well-being of the league.

One reason some fans might forsake the sport after a work stoppage is because of how cancelled games have affected records and playoffs.¹⁴⁸ In 1994, when the players went on strike, Ken Griffey, Jr., and Matt Williams were both on their way to hitting over fifty home runs.¹⁴⁹ The World Series was also cancelled that year, costing fans and players a chance to celebrate a baseball champion.¹⁵⁰ During the 1981 strike, the season was split in half, and the formula for determining which teams made it to the playoffs was altered for that year, omitting some teams that normally would have made the playoffs.¹⁵¹ Likewise, in 1972, playoff teams did not complete the same number of games by the conclusion of the regular season due to cancellations, affecting teams' odds of advancing to the postseason.¹⁵² It is plausible that these atypical outcomes frustrated fans.

Of course, there are other possible effects from long work stoppages. Players could become out of shape, and their subsequent lack of fitness could increase the threat of injury. They could also lose their jobs to replacement players.¹⁵³ Television and advertising deals could expire. People in other lines of work surrounding baseball (managers, grounds crew, umpires, concession sales staff, etc.) all stand to lose wages and, possibly, employment. Work stoppages, if long enough, could affect players' careers and free agencies.

While the power of work stoppages is undeniable, strikes and lockouts come at a high price to the owners, players, fans, and other parties related to baseball. When the owners or the MLBPA choose to enact a work stoppage, they cost themselves money and fans. If strikes or lockouts are to be used, the high costs of their implementation and the diminishing fan attendance that usually results would indicate that work stoppages should be employed only in the most drastic of circumstances.

B. It Is Time to Try Something Else!

Since work stoppages are risky ventures, professional baseball should explore alternatives. There are three methods that owners and players could

148. *Baseball Strike*, *supra* note 97, at 26.

149. *Id.*

150. *Id.*

151. Perry, *supra* note 58.

152. Golden, *supra* note 6.

153. *Baseball Strike*, *supra* note 97, at 25-26. During the 1994-1995 strike, the owners had indicated their willingness to employ replacement players due to the MLBPA's opposition to playing games. However, this strategy fell apart when a few owners broke ranks and refused to consider hiring replacement players.

use to facilitate better negotiations and to help avoid defaulting in a strike or lockout: mediation, arbitration, and non-stoppage strikes or lockouts. Any or all of these methods could be written into future CBAs to provide a layer of protection against entering a work stoppage.

i. Mediation

Mediation has been practiced both domestically and internationally for centuries.¹⁵⁴ Simply defined, mediation is “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.”¹⁵⁵ The neutral third party is known as the mediator, and this person actively participates in the negotiations.¹⁵⁶ The mediator should come into the mediation process knowing about the parties, the industry, the issues being negotiated, and the conflicts.¹⁵⁷ After initial meetings with the parties, the mediator should attempt to clarify the dispute and should work with each side to provide creative solutions.¹⁵⁸ Like the typical negotiation process, mediation provides an agreement that is the product of the parties and not the mediator.¹⁵⁹

Mediation has worked for other sports leagues in the past.¹⁶⁰ In 2012, the National Hockey League (NHL) owners locked out the players.¹⁶¹ The two sides were \$200 million apart on the issue of revenue sharing, and cancelling the season was a very real possibility.¹⁶² A few days before the season would have been cancelled due to a failure to reach a new CBA, the NHL and the National Hockey League Players’ Association (NHLPA) agreed to enter mediation.¹⁶³ The mediator worked with the owners and the union and helped to keep an open channel of communication between them.¹⁶⁴ The two sides met with the mediator several times, and, eventually, the mediator was able to help the owners and players make concessions and agree to a deal.¹⁶⁵

154. Jay Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1983 *MEDIATION Q.* 3, 4-5 (1983).

155. *Mediation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

156. John W. Cooley, *Arbitration vs. Mediation – Explaining the Differences*, 69 *JUDICATURE* 263, 264 (1986).

157. *Id.*

158. *Id.* at 267.

159. *Id.*

160. Robert Pannullo, *Facilitating Change: Addressing the Underutilization of Mediation in Professional Sports*, 25 *HARV. NEGOT. L. REV.* 103, 151 (2019).

161. *Id.*

162. *Id.*; see Paul D. Staudohar, *The Hockey Lockout of 2004-05*, 128 *MONTHLY LAB. REV.* 23 (2005) [hereinafter *Hockey Lockout*]. The NHL and the NHLPA had a long history of disputes. In 2004-2005, the entire season was cancelled over a failure to come to terms on a collective bargaining agreement.

163. Pannullo, *supra* note 160, at 152.

164. *Id.*

165. *Id.* at 151.

Finally, at the end of a sixteen-hour mediation session, an agreement was formed, and the 113-day lockout ended.¹⁶⁶

This NHL example demonstrates how mediation could be used in the MLB to help negotiate a CBA.¹⁶⁷ Like the MLB, the NHL has had a long history of cancelling games and even seasons.¹⁶⁸ The NHL mediation success implies that the MLB should seriously consider adding mediation as a step in the negotiations process that could be utilized before entering a work stoppage.¹⁶⁹ However, in order to be a meaningful endeavor, the owners and the MLBPA would have to commit to the mediation process, much like the NHL and the NHLPA did.¹⁷⁰ Mediation would likely be of no use if the owners and players only partially committed to actively work with a mediator.

The advantages to mediation are many.¹⁷¹ Mediation is generally considered a cheaper and quicker alternative than arbitration or a work stoppage.¹⁷² Unlike arbitration, in which one side is considered the “winner” and the other the “loser,” mediation allows both sides to work together to create a deal that allows winning to be shared.¹⁷³ The goal of mediation is to achieve a “mutually satisfactory resolution.”¹⁷⁴ Because this solution was achieved through the efforts of the parties, rather than created by an outside decisionmaker, the resulting CBA often provides all parties with more satisfaction.¹⁷⁵ Opposing sides do not have to worry about the mediator being unfair or biased since the final agreement is created by the parties and not the mediator.¹⁷⁶ Also, a successfully mediated agreement can provide a path toward opposing sides rebuilding a working relationship with each other for future negotiations.¹⁷⁷

There are few drawbacks to mediation, but they do exist. One obvious negative to mediation is the amount of time that the process requires. In

166. *Id.*

167. *Id.*

168. Pannullo, *supra* note 160, at 151; *see Hockey Lockout*, *supra* note 162, at 23; *see Baumann supra* note 90, at 280-85.

169. Pannullo, *supra* note 160, at 151. It is worth mentioning that mediation was implemented in the NHL only after the owners had already locked out the players. Whether mediation would have been as effective if there had been no lockout is debatable.

170. *Id.* at 152 (“[T]he parties had to be willing to allow the mediator to facilitate discussions in the first place.”).

171. *See* Deborah A. Ferguson, *Eight Benefits of Mediation*, 55 *ADVOCATE* 44, 44-45 (2012).

172. *Id.* at 45; Pannullo, *supra* note 160, at 150-51; Stephen B. Goldberg, *Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 *NW. U. L. REV.* 270, 282 (1982-1983).

173. Ferguson, *supra* note 171, at 44; Cooley, *supra* note 156, at 265-66.

174. Goldberg, *supra* note 172, at 283.

175. *Id.* at 284; Ferguson, *supra* note 171, at 44.

176. Cooley, *supra* note 156, at 267.

177. Ferguson, *supra* note 171, at 45.

mediation, both sides are given the opportunity to describe their issues in the presence of the mediator, and this enumeration may draw out the process as the neutral party must be fully briefed on the conflict that has since led to the current negotiations.¹⁷⁸ It may also take time for the mediator to establish a relationship and to gain the trust of the players and the owners so that meaningful dialogue can occur.¹⁷⁹ Mediators cost money; however, in comparison to the amount of money that is being collectively bargained between the owners and the MLBPA, a mediator's fee is likely negligible.¹⁸⁰ Finally, a common complaint is that the mediator's opinion is only advisory.¹⁸¹ The mediator cannot bind the parties to an agreement; only the parties possess that power.¹⁸² Two opposing sides can go through an entire mediation process, and, at the end, it is possible that they would remain in the exact same deadlock as before the process began.¹⁸³

Due to the MLB's long history of distrust and opposition between the players and the owners, mediation would be an effective step toward building a bridge back to a meaningful relationship between the parties. The final product of an agreement, which solely belongs to the parties, is one of the major reasons mediation should be implemented in future collective bargaining negotiations. Mediation seems to be the logical first step toward making negotiations more effective and maintaining civility between owners and players.

ii. Arbitration

Another option for the MLB would be the implementation of an arbitration process before defaulting into a work stoppage. Arbitration is "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute."¹⁸⁴ The third party is called the arbitrator, and this person, not the parties, is the one ultimately responsible for producing an agreement.¹⁸⁵ An arbitrator's role is mostly passive, unlike that of a mediator, who works with

178. Cooley, *supra* note 156, at 267.

179. *Id.* at 266. It is worth mentioning that if mediation would take place after a work stoppage instead of before a work stoppage, this timely process might prove to be expensive, since games would continue to be cancelled. Thus, it would likely be in the MLB's best interest to attempt mediation prior to declaring a work stoppage.

180. Ferguson, *supra* note 171, at 45; *see generally* Passan, *supra* note 3.

181. Goldberg, *supra* note 172, at 281.

182. Cooley, *supra* note 156, at 269. This is a major difference between mediation and arbitration, in which the arbitrator can bind the parties to an agreement. *See infra* Section III.B.ii.

183. Cooley, *supra* note 156, at 269.

184. *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.").

185. Cooley, *supra* note 156, at 264.

the two sides in conjunction to produce a cooperative agreement.¹⁸⁶ Instead, the arbitrator is required to listen to evidence from both sides at an arbitration hearing before ultimately making a final decision as to which proposal wins.¹⁸⁷

Arbitration is frequently used in professional sports.¹⁸⁸ All four of the major American sports leagues (MLB, NBA, NFL, and NHL) use arbitration in some form.¹⁸⁹ Most commonly, arbitration is utilized for resolving salary disputes.¹⁹⁰ However, arbitration is also employed in many leagues to solve grievances between the players and the league.¹⁹¹ In addition, the NFL uses arbitration to aid in providing resolutions for players' appeals to league punishments.¹⁹²

The MLB uses this process (although it has often been a point of contention during CBA negotiations) for players wishing to be paid more than the minimum salary.¹⁹³ A player wishing to increase his salary first enters into negotiations with the team.¹⁹⁴ If a deal cannot be made, the matter is sent to arbitration.¹⁹⁵ Both the player and the team then submit a "final offer" in terms of a desired salary amount to a panel of arbitrators.¹⁹⁶ At the arbitration hearing, both sides are allowed to present their cases as to why their number is optimal, and, at the end, the arbitrators pick one of the two final offers as the winning salary.¹⁹⁷ In addition to salary arbitration, the MLB uses arbitration to settle grievances between players and owners.¹⁹⁸ Therefore, players and owners are not only familiar with the arbitration process but also with its advantages, and its disadvantages.¹⁹⁹

Though arbitration is more costly than mediation, it is meant to be a less-expensive option than a trial or a work stoppage.²⁰⁰ The parties can choose whether they would like a single arbitrator or a panel of arbitrators to preside over the case.²⁰¹ Regardless of their choice, the arbitrator(s) will be highly

186. *Id.*

187. *Id.*

188. Pannullo, *supra* note 160, at 105.

189. *Id.*

190. *Id.*

191. *Id.* at 106.

192. *Id.* at 111-12.

193. Pannullo, *supra* note 160, at 106-07; *see generally supra* Part II.B.

194. Pannullo, *supra* note 160, at 106-07.

195. *Id.* at 107.

196. *Id.*

197. *Id.* at 107-08.

198. *Id.* at 109.

199. *See* Pannullo, *supra* note 160, at 107-09.

200. Jean E. Faure, *The Arbitration Alternative: Its Time Has Come*, 46 MONT. L. REV. 199, 207 (1985); Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1, 27 (2010).

201. Cooley, *supra* note 156, at 264.

informed about the subject matter of the issue at hand.²⁰² An arbitrator with an educational background of the contested matter will produce a more desirable solution in a quicker fashion than true outsiders, like a judge or a jury.²⁰³ Unlike a suit in open court, an arbitration hearing is confidential, which allows the parties' to keep their proposals from being publicized.²⁰⁴ The arbitrator is normally not permitted to discuss the nature of the arbitration hearing or the final decision rendered.²⁰⁵ Finally, unlike mediation, arbitration provides a final decision.²⁰⁶ There is no risk of going through an arbitration process only to be left without a final resolution at the end of the process.²⁰⁷ Arbitrations inevitably resolve impasses.²⁰⁸

However, arbitration also has its disadvantages. The main drawback to arbitration is that the resulting decision is not a product of the parties' negotiations.²⁰⁹ An arbitrator's decision is not a compromise;²¹⁰ rather, one side wins, and one side loses.²¹¹ This can create and exacerbate resentments between opposing sides.²¹² For example, while providing resolutions to disputes, salary arbitrations in baseball have had a negative effect on the relationship between players and teams.²¹³ Arbitration hearings can sometimes lead to players being disgruntled and, possibly, to players requesting a trade.²¹⁴ Rather than helping to mend relationships, the adversarial nature of arbitration may only work to further separate parties in conflict.²¹⁵ Another problem with using arbitration comes from the difficulties in finding neutral arbitrators to adjudicate hearings between players and owners.

The MLB's familiarity with the arbitration process implies that arbitration might be a sufficient way to avoid work stoppages. Both the players and owners have gone through countless arbitrations, which gives them a reason to trust the process.²¹⁶ However, it is also conceivable that due to possible dissatisfaction with the current salary arbitration structure, players or owners might not wish to use arbitration to resolve their collective

202. Faure, *supra* note 200, at 206.

203. *Id.*

204. *Id.* at 207.

205. Cooley, *supra* note 156, at 267.

206. *Id.* at 265-66.

207. *Id.*

208. Pannullo, *supra* note 160, at 123.

209. Cooley, *supra* note 156, at 265-66.

210. Faure, *supra* note 200, at 212.

211. Cooley, *supra* note 156, at 265-66; Ferguson, *supra* note 171, at 44.

212. Pannullo, *supra* note 160, at 123; Stipanowich, *supra* note 200, at 28.

213. Pannullo, *supra* note 160, at 123.

214. *Id.* at 123-24.

215. Stipanowich, *supra* note 200, at 28.

216. Pannullo, *supra* note 160, at 106, 109.

bargaining issues.²¹⁷ Perhaps the MLB could use arbitration as a strategy that is only utilized following unsuccessful attempts at negotiation and mediation. In this way, the parties would have a chance to construct their own CBA in collaboration with one another, but if they were unable to come to an agreement, arbitration would still be an option. As a last resort, an arbitrator's ruling would allow the league to avoid a work stoppage while also providing a binding agreement until future negotiations are required.

iii. Non-Stoppage Strikes and Lockouts

A creative alternative to work stoppages that has been used in the public sector is the non-stoppage strike or lockout ("NSSL"), alternatively referred to as a semi-strike.²¹⁸ While this method has not yet had widespread use, the non-stoppage strike or lockout is a concept that has existed for decades.²¹⁹ If used in baseball, it could provide a way for games to continue being played while still incentivizing players and owners to negotiate in earnest.

In a non-stoppage strike or lockout, the parties negotiate, as they normally would, until they are on the edge of a potential work stoppage.²²⁰ At this point, an NSSL could be instituted by either the employees or the employers.²²¹ The NSSL would require that business be operated as usual, despite the employees being on strike.²²² This is because during an NSSL, the employees would continue showing up to work, and the employers would continue to open their businesses to employees.²²³ However, throughout the duration of the NSSL, both employers and employees would take a pay cut.²²⁴

Prior to the institution of an NSSL, the employers and employees would have had to collectively agree to a percentage cut that they would be willing to take in the event of an NSSL (for the sake of keeping this explanation simple, this number will be fifty percent).²²⁵ While the NSSL was ongoing, employees would make only fifty percent of their usual wages, and the remainder of their earnings would be deposited in a charitable fund.²²⁶ Employers would also be forced to write a weekly (though this could be changed to daily, monthly, etc.) check to the same charity.²²⁷ This check

217. *Id.* at 123.

218. McCalmont, *supra* note 21, at 192.

219. *Id.* at 191.

220. Merton C. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 470 (1971).

221. *Id.*

222. McCalmont, *supra* note 21, at 192.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. McCalmont, *supra* note 21, at 192.

written by the employers would be worth exactly half of the difference in the employers' net earnings between what they normally would receive and the amount received if an actual work stoppage had occurred.²²⁸ For example, if a business normally brought in \$10,000,000 weekly, but during an actual strike, it would only net \$2,000,000, then the employers would have to write a check for \$4,000,000 to charity, which is half of the difference between the regular net earnings and the net earnings during a strike.

There are several ways in which parties can customize an NSSL to best suit their needs.²²⁹ For instance, the percentage of the pay cut does not have to be fifty percent.²³⁰ Instead, the parties can negotiate amongst themselves as to what they think would be a sufficient number for their pay cut prior to an NSSL.²³¹ Depending upon the length of an NSSL, this percentage could be prearranged to increase as time passes to encourage the parties to come to an agreement.²³² In addition, the parties may also negotiate as to which charity the funds should be deposited.²³³ The charity could change on a set basis, providing funds to different causes throughout the period of an NSSL.

While there are no examples of NSSLs in sports, this method has been used in other professions.²³⁴ In Miami, the first ever NSSL occurred in October of 1960, when negotiations between Miami bus drivers and the Miami Transit Company ("MTC") failed.²³⁵ Initially, the bus drivers chose to strike, but after three days, an agreement was formed between the MTC and the drivers.²³⁶ The terms of the NSSL agreement required the bus drivers to continue operating the busses while receiving no wages.²³⁷ The agreement also provided free bussing to the public during the NSSL.²³⁸ By providing free public transportation, the MTC was sacrificing any revenue to be made from bussing during the period of the NSSL.²³⁹ The NSSL lasted for four days, during which the two parties were able to continue negotiating while sparing the public any difficulties that might arise from a lack of bussing.²⁴⁰ Unfortunately, the Miami NSSL ended without a collective bargaining

228. *Id.*

229. *See id.* at 198; Bernstein, *supra* note 220, at 470.

230. McCalmont, *supra* note 21, at 198.

231. *Id.* at 192.

232. Bernstein, *supra* note 220, at 470.

233. McCalmont, *supra* note 21, at 192. In the McCalmont article, the author proposed giving the money to a local school board, but since the MLB is nationwide, a school board would be inappropriate. Instead, a national charitable cause would be a more fitting recipient of the NSSL funds.

234. *Id.* at 191.

235. *Id.*

236. *Id.*

237. *Id.*

238. McCalmont, *supra* note 21, at 191.

239. *Id.*

240. *Id.*

agreement when the president of the MTC discovered that drivers were getting around the “no wage” requirement by collecting monetary tips from riders.²⁴¹ The NSSL was subsequently cancelled, and the original strike by the bus drivers resumed.²⁴²

Although the short-lived Miami NSSL did not result in a satisfactory ending, it did serve as a prime example of how an NSSL could work. In the Miami NSSL, the parties agreed to a one hundred percent “charitable contribution.”²⁴³ The bus drivers sacrificed all of their earnings, and the MTC provided their usual bussing services at no charge.²⁴⁴ Instead of paying a charity, the Miami NSSL provided free bussing to the public.²⁴⁵ Had the Miami NSSL continued, the drivers and the MTC could have continued attempting to work out their differences while preventing a major inconvenience to the public due to a shutdown of the bussing system. Although the Miami NSSL was short in duration, its application can be easily transferred to the MLB provided that there are adjustments to prevent violations by either side.

The benefits of an NSSL for the MLB would be many. First, the games would be able to continue as normal. Players and owners would take less of a personal economic hit than if an actual work stoppage were to have occurred because they would still be allowed to keep part of their earnings.²⁴⁶ Players would be able to stay in shape and continue playing, and owners would be able to keep their ballparks open. Baseball players would also be able to continue working toward statistical records, unlike when an actual work stoppage occurs.²⁴⁷ Furthermore, players who might be near retirement would not lose a season due to an untimely work stoppage at the end of their careers.

In addition, all other professions and agreements that work in relationship to baseball (such as television deals, advertising deals, umpires, grounds crew, etc.) could continue to function and be paid. Moreover, the players would not have to fear the hiring of replacement players like they would

241. *Id.* These tips caused the sacrifice of wages, meant to compel continued negotiations, to be offset.

242. *Id.*

243. McCalmont, *supra* note 21, at 191.

244. *Id.*

245. *Id.*

246. Colclasure, *supra* note 134; *see also Baseball Strike*, *supra* note 97, at 26. In the 1994-1995 strike, players and owners lost as much as a combined \$1.23 billion. If an NSSL were in place, this number could be cut down by the agreed upon percentage.

247. *See Baseball Strike*, *supra* note 97, at 25-26. An NSSL would have allowed Ken Griffey, Jr., and Matt Williams to continue to amass homeruns in 1994, a season cancelled by a strike that resulted in the forgoing of the World Series.

during a strike or a lockout.²⁴⁸ The players and owners would also suffer less reputational damage than they would from a regular work stoppage, both because games would be ongoing and because charitable donations would be given.²⁴⁹ Some charities might stand to make millions of dollars in the wake of an NSSL. Furthermore, fans would not be driven away from the sport, and attendance numbers and television ratings would likely not see the type of decline that they would during a strike or a lockout.²⁵⁰

Finally, and probably most importantly, these benefits remain available throughout the duration of the negotiations to reach a CBA.²⁵¹ Normally, during an actual work stoppage players and owners might not interact, but during an NSSL, games would continue to be played, making it more likely for the two sides to remain in communication.²⁵² This communication might prevent any further erosion in the relationship between the two sides as they work toward an agreement.

It is also possible to see some disadvantages to calling an NSSL. An NSSL is clearly less impactful than an actual work stoppage since both the players and the owners would continue to earn a portion of their income.²⁵³ This ability to earn a percentage of income could cause the CBA negotiations to go on longer than they would have if a regular work stoppage occurred. If an NSSL were to go on too long, it is possible that the overall amount lost by the players and the owners (and, thus, given to charity) would be more than the amount that would have been sacrificed during a regular work stoppage.²⁵⁴

Another disadvantage would be that, in order to successfully navigate an NSSL, the old CBA would likely have to remain in place for purposes of payment and working conditions.²⁵⁵ Using the old CBA during an NSSL

248. See Colclasure, *supra* note 134; see also Bernstein, *supra* note 220, at 472. The possible use of replacement players was a real threat during the 1994-1995 strike.

249. McCalmont, *supra* note 21, at 192 (“[N]o one would have suffered any loss whatever except the immediate parties to the dispute, and even their losses would have been fully offset by community gains.”).

250. See Coates & Harrison, *supra* note 144, at 283. Work stoppages have caused attendance numbers to drop. An NSSL would help avoid this decline by continuing games throughout the negotiations process.

251. Damon W. Harrison Jr., *The Strike and Its Alternatives: The Public Employment Experience*, 63 KY. L.J. 430, 464 (1975); see McCalmont, *supra* note 21, at 192; see also Bernstein, *supra* note 220, at 470-71.

252. See Passan *supra* note 3. During the 2021-2022 baseball lockout, the owners waited forty-three days before communicating with the players following the institution of the lockout. This drought in communication would be less likely to happen in an NSSL with games still being played. Since operations would be ongoing, there would be more of a chance for the two sides to interact.

253. McCalmont, *supra* note 21, at 207.

254. *Id.* at 195-97.

255. *Id.* at 200. It is possible that a separate agreement would have to be negotiated that would exist outside of the CBA. The players and the owners could agree to a contract that would act as a framework to detail the responsibilities of both sides during the NSSL.

might be a cause for consternation if either the players or the owners viewed the old CBA as disproportionately favorable to the other side. Continuing to operate under the rules of the old CBA would preserve any inequities that might be contained within the prior agreement, causing further resentments to build between the two parties.

While it is clear that there would be much to work out ahead of an NSSL, the advantages seem to outweigh the disadvantages. Implementing an NSSL would provide the MLB with ways to continue negotiations, to keep fans, to continue to make some money, and to contribute to charity. Before the MLB declares another work stoppage due to a failure to reach a CBA, it should consider employing an NSSL. The players and owners should try this method, and if it fails to provide satisfactory results, they could always resort to a regular work stoppage.

IV. CONCLUSION

If the history of the MLB demonstrates anything, it is that there is likely to be another work stoppage at some point in the future.²⁵⁶ Any future strike or lockout will likely continue to drive away fans and cost the sport unnecessary and ridiculous amounts of money. These costs clearly outweigh any negligible gains achieved by a work stoppage.

Baseball has an opportunity to learn from the 2021-2022 lockout and to act accordingly. Despite this recent lockout ending without games being lost, there was a clear toll on the players, the owners, and the fans.²⁵⁷ The owners and the MLBPA should attempt to use mediation, arbitration, an NSSL, or a combination of these before defaulting to a work stoppage. Each of these methods could produce positive outcomes that could help to form new CBAs, save money, and repair the nearly nonexistent relationship between players and owners. Baseball has no excuse for not trying something different. If the collective bargaining process remains as it is now, in five years when the current CBA expires, another work stoppage will likely occur. In the words of the late New York Yankee Yogi Berra, it would be “like déjà vu all over again.”²⁵⁸

256. See *supra* Part II.B.

257. See Passan, *supra* note 3; see also Gonzalez, *supra* note 13.

258. Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY: FOR THE WIN (Mar. 28, 2019, 8:00 AM), <https://ftw.usatoday.com/2019/03/the-50-greatest-yogi-berra-quotes>.