

# Strength in Unity: Reviving the PBA Union

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## I. LET'S GET THE BALL ROLLING

### A. *Sunday Night Lights*

On 14 May 2006, under the bright lights of the Ynares Center, things turned dark for the otherwise promising basketball career of Eugene Tejada.<sup>1</sup>

Three years into his stint in the Philippine Basketball Association (PBA), Tejada fell on the ground after securing a rebound off a miss from his Purefoods teammate, Roger Yap.<sup>2</sup> As he arched backward to the ground, 6'9" center Mick Pennisi landed on him.<sup>3</sup> Pinned between the hardwood and the hefty body of Pennisi, Tejada shouted in pain as his back snapped, and he lost all feeling in parts of his body.<sup>4</sup>

Tejada did not go home that Sunday night. Instead, Tejada found himself in the hospital, paralyzed with a career-ending spinal injury.<sup>5</sup> With parts of his once athletic body now constrained to immobility, he battled depression soon after.<sup>6</sup>

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1. See Reuben Terrado, Remember these scary scenes? Five of the worst accidents in the PBA, available at <https://www.spin.ph/basketball/pba/scariest-pba-injuries-bernie-fabiosa-samboylim-terry-saldana-allan-caidic-eugene-tejada> (last accessed Feb. 1, 2019).
2. See Bill Velasco, *Eugene Tejada: Living one step at a time*, PHIL. STAR, Nov. 14, 2007, available at <https://www.philstar.com/sports/2007/11/14/27459/eugene-tejada-living-one-step-time> (last accessed Feb. 1, 2019).
3. *Id.*
4. Its Pyoo, Video, *The Eugene Tejada injury*, May 18, 2006, YOUTUBE, available at <https://www.youtube.com/watch?v=FjwViHM6iZw> (last accessed Feb. 1, 2019).
5. See Velasco, *supra* note 2.
6. See Paolo Abrera, Eugene Tejada: To hell and back, available at <http://news.abs-cbn.com/sports/03/27/12/eugene-tejada-hell-and-back> (last accessed Feb. 1, 2019).

Today, Tejada's injury continues to cast a shadow on the glitz and glamour of the country's premier professional sports league.<sup>7</sup> For some, it is a reminder of the fickle and tenuous career of an athlete, a warning of how an accident can change everything.<sup>8</sup> For others, it has served as a rallying cry for athlete protection, a call to revive a union to protect PBA players.<sup>9</sup> In a 2016 interview with *Inquirer.net*, then-Alaska team captain Anthony B. "Tony" Dela Cruz recalled how Tejada was left unprotected — and *uninsured* — by both his team and the league after his injury.<sup>10</sup> A union, argued Dela Cruz, could and would have been able to help Tejada, especially as he faced the financial issues of a career cut short.<sup>11</sup>

Tejada's injury was not the first time the call for unionization has been made.<sup>12</sup> While players have grumbled about their rights and treatment for years, these have been mostly kept under wraps and within the confines of the locker room. However, recent years have seen these complaints cause significant rumbling in the sports pages of broadsheets and social media, thrusting the call for unionization into the national sports consciousness.<sup>13</sup>

In 2015, Mahindra player Michael Burtscher expressed his anger and dismay in an expletive-laden Facebook post about his team.<sup>14</sup> He claimed that he had sustained an injury during practice, which his team left untreated

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7. See Bong Lozada, *Tony Dela Cruz calls to revive PBA Player's union*, PHIL. DAILY INQ., July 29, 2016, available at <https://sports.inquirer.net/217630/tony-dela-cruz-calls-to-revive-pba-players-union> (last accessed Feb. 1, 2019).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. See Cariaso says PBA Players Union protects present, post-retirement welfare, PHIL. STAR, Oct. 8, 2015, available at <https://www.philstar.com/sports/2015/10/08/1508854/cariaso-says-pba-players-union-protects-present-post-retirement-welfare> (last accessed Feb. 1, 2019).

13. See Jane Bracher, Nuyles, sports agent explain details of Mahindra contract mess, available at <https://www.rappler.com/sports/by-sport/basketball/pba/107914-alex-nuyles-contract-mahindra-kia> (last accessed Feb. 1, 2019).

14. Michael Burtscher, Status Update, September 29, 2015, FACEBOOK, available at <https://www.facebook.com/michael.burtscher.9/posts/747046078756135> (last accessed Feb. 1, 2019).

for months, and that he could not even pay for his bills because the team management refused to pay his salary.<sup>15</sup>

In the same year, another controversy involving Mahindra occurred when the team changed its name to Kia — along with the head of its basketball operations — and decided to invalidate an existing contract with standout Alex Nuyles.<sup>16</sup> While the controversy was later on chalked up to miscommunication,<sup>17</sup> it was enough to catch the eye of the Trade Union Congress of the Philippines–Nagkaisa (TUCP–Nagkaisa), which stepped in and encouraged the PBA players to unionize and protect themselves from contract manipulations and exploitation.<sup>18</sup> For TUCP–Nagkaisa, the only way the players can obtain better protection through their contracts is if they unionize and stand united.<sup>19</sup>

Better terms. Better protection. Strength in unity.

These are the three underlying themes that we explore. While we do not seek to provide the answer to each and every issue a PBA player will have to deal with in his career, we will provide the legal framework — and the challenges — of a vehicle that can: a players' union.

### *B. Game Plan*

We begin by looking abroad, particularly the United States of America (U.S.), to see the history of players' unions and associations and how these are formed and operated. We then head home to discuss and study the PBA. The PBA serves as a fertile ground for studying the formation of a players' union, especially since it is the country's most well-established professional league. A special portion is carved out to study the PBA standard player contract (SPK) in order to highlight terms and provisions that can be “fixed” by a union negotiating to better protect the players.

We then outline the legal options that PBA players have in order to stand united. This is the meat of this Article, where the legal and skeletal

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15. *Id.*

16. Karlo Sacamos, Mahindra Explains Nuyles Contract Mess, Decision Not to Sign Five Other Players, *available at* <https://www.spin.ph/basketball/pba/mahindra-team-manager-clarifies-alex-nuyles> (last accessed Feb. 1, 2019).

17. *Id.*

18. Dennis Carcamo, *TUCP Calls on PBA Players to Form Labor Union*, PHIL. STAR, Oct. 2, 2015, *available at* <https://www.philstar.com/nation/2015/10/02/1506714/tucp-calls-pba-players-form-labor-union> (last accessed Feb. 1, 2019).

19. *Id.*

blueprint for unions is laid out. Players' associations are also discussed to provide an alternative to unions.

While we focus on the PBA and professional basketball players, our main objective is to educate similarly situated players of other leagues and sports of their right to be protected through a union. The hope is that *all* athletes know that they have a voice. Yes, one voice may not overpower the incessant noise and chatter of controversy, but there is strength in unity, and a collective and unified voice certainly can.

## II. RIGHT OFF THE BAT

### A. *On the Ropes: Players Needed Protection*

When one thinks of professional players' unions, the unions in the United States quickly come to mind. Unions like the National Basketball Players Association (NBPA) and the National Football League Players Association (NFLPA) have had their share of the spotlight in the recent years.<sup>20</sup> In 2016, the NBPA and the National Basketball Association (NBA) entered into a collective bargaining agreement (CBA) which not only increased the maximum salaries of players and added health care benefits for retired players, but also prevented a repeat of the 2011 lockout that kept players from suiting up for their respective teams.<sup>21</sup> The NFLPA has been busy as well, spending more than US\$3.5 million in 2015 and 2016 to help overturn Tom Brady's four-game suspension for allegedly deflating footballs,<sup>22</sup> and

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20. See, e.g., Nate Scott, The NBA's Players Association took a position of strength ... and made history, *available at* <https://ftw.usatoday.com/2016/07/nba-players-union-health-insurance-former-players-history> (last accessed Feb. 1, 2019) & John Delcos, NFL And Players Association Expected To Battle Over Anthem Issue, *available at* <https://www.forbes.com/sites/johndelcos/2018/07/10/nfl-and-players-association-expected-to-battle-over-anthem-issue/#5bda7773e96> (last accessed Feb. 1, 2019).

21. David Aldridge, NBA, NBPA reach tentative seven-year CBA agreement, *available at* <http://www.nba.com/article/2016/12/14/nba-and-nbpa-reach-tentative-labor-deal> (last accessed Feb. 1, 2019). The CBA will last until the end of the 2023-24 season. *Id.*

22. Lester Munson, NFLPA has spent more than \$3.5 million on Deflategate legal fees, *available at* [http://www.espn.com/nfl/story/\\_/id/17164081/nflpa-spent-more-35-million-deflategate-legal-fees](http://www.espn.com/nfl/story/_/id/17164081/nflpa-spent-more-35-million-deflategate-legal-fees) (last accessed Feb. 1, 2019). Sadly, the appeal failed. *Id.* See also Around the NFL Staff, Tom Brady suspension case timeline, *available at* <http://www.nfl.com/news/story/oap3000000492189/article/tom-brady-suspension-case-timeline> (last accessed Feb. 1, 2019).

objecting to a new national anthem policy that purportedly infringes on players' right to protest.<sup>23</sup> Sportswriters have been quick to laud the efforts of the unions, especially in achieving results for its players.<sup>24</sup>

The clout of these unions today has its foundation in their shared history of protecting the rights of players. The players' unions of the "Big Four" American professional leagues have been around for so long that each union is older than the combined ages of the Authors of this Article. The NBPA started in 1954 under the leadership of Celtics backcourt maestro Bob Cousy and triple-double machine Oscar Robertson.<sup>25</sup> The NFLPA followed two years later.<sup>26</sup> In 1967, the National Hockey League Players' Association (NHLPA) was formally recognized as a labor organization and recently celebrated its 50th anniversary.<sup>27</sup> And while the Major League Baseball Players Association (MLBPA) was established in 1965, its roots could be traced back to 1885.<sup>28</sup> To put that into historical perspective, the Brotherhood of Professional Base Ball Players was writing their union articles and opposing baseball's reserve clause<sup>29</sup> at about the same time Jose Rizal was writing *Noli Me Tangere* and opposing the Spanish regime in the Philippines.<sup>30</sup>

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23. Chris Chavez, NFLPA Files Grievance Over NFL's New National Anthem Policy, *available at* <https://www.si.com/nfl/2018/07/10/nflpa-grievance-nfl-national-anthem-policy> (last accessed Feb. 1, 2019).

24. *See, e.g.*, Jill Vejnaska, Michele Roberts: NBA players union head shatters high glass ceiling, *available at* <https://www.myajc.com/sports/michele-roberts-nba-players-union-head-shatters-high-glass-ceiling/mBwgAEjACnjj2N4CezraK> (last accessed Feb. 1, 2019). One only needs to look at Michelle Roberts, the glass-ceiling-busting NBPA Executive Director, for inspiration. *Id.*

25. National Basketball Players Association, About Us, *available at* <https://nbpa.com/about> (last accessed Feb. 1, 2019).

26. National Football League Players Association, History, *available at* <https://www.nflpa.com/about/history> (last accessed Feb. 1, 2019).

27. National Hockey League Players Association, #NHLPA50, *available at* <https://www.nhlpa.com/50-years> (last accessed Feb. 1, 2019).

28. Major League Baseball Players Association, History of the Major League Baseball Players Association, *available at* <https://www.mlbpa.org/history.aspx> (last accessed Feb. 1, 2019).

29. *Id.*

30. *See* Paul A. Dumol, *Rizal Contra European Racism An Autobiography of Jose Rizal Embedded in Blumentritt's Obituary of Rizal*, in *EUROPEAN STUDIES: ESSAYS BY FILIPINO SCHOLARS* 22-23 (Vyva Victoria M. Aguirre ed., 1999).

The reserve clause was one of the driving forces behind the early formation of these unions.<sup>31</sup> The reserve clause prevented players from signing with a different team even after the expiration of their contracts because their original teams still retained their playing rights.<sup>32</sup> This effectively kept a player with one team for his entire career (unless team management decided to let him go),<sup>33</sup> resulting in a monopsony, which unions understandably sought to abolish.<sup>34</sup>

In 1975, the MLBPA successfully challenged the reserve clause and won.<sup>35</sup> The victory opened the league to free agency, giving professional baseball players more control over their careers and lining their pockets with huge paydays from teams now forced to bid for their services.<sup>36</sup> It set a standard for other leagues to follow. Modern day free agency — along with the money,<sup>37</sup> drama,<sup>38</sup> and the news stories<sup>39</sup> that come with it — would not have been possible without the advocacy of players' unions.

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31. James Richard Hill & Jason E. Taylor, *Do Professional Sports Unions Fit the Standard Model of Traditional Unionism?*, 29 J. LABOR RES. 56, 57 (2008).

32. David Berri, *Throwback Thursday: The End of the Reserve Clause*, available at [https://sports.vice.com/en\\_ca/article/qkydzb/throwback-thursday-the-end-of-the-reserve-clause](https://sports.vice.com/en_ca/article/qkydzb/throwback-thursday-the-end-of-the-reserve-clause) (last accessed Feb. 1, 2019).

33. *Id.*

34. Hill & Taylor, *supra* note 31, at 58.

35. Berri, *supra* note 32.

36. See Ted Berg, 5 reasons MLB stars make so much more than other pro athletes, available at <https://ftw.usatoday.com/2014/11/giancarlo-stanton-contract-mlb-money-nba-nfl> (last accessed Feb. 1, 2019).

37. Think of LeBron James' recently inked four-year, \$154 million deal with the Lakers. Ohm Youngmisuk, *LeBron James agrees to four-year, \$154-million contract with Los Angeles Lakers*, available at <http://www.nba.com/article/2018/07/01/lebron-james-agrees-four-year-deal-los-angeles-lakers> (last accessed Feb. 1, 2019).

38. Think of the anguish and uncertainty LeBron James' teams felt every time his contract was about to expire. See, e.g., Herald Sun, *LeBron James settles on Los Angeles Lakers as new NBA home in massive four-year deal*, DAILY TELEGRAPH, July 2, 2018, available at <https://www.dailytelegraph.com.au/sport/basketball/lebron-james-settles-on-los-angeles-lakers-as-new-nba-home-in-massive-four-year-deal/news-story/c28b42dbcf8f7d63bfee327673542e1> (last accessed Feb. 1, 2019).

39. Think of all the sports pundits and writers trying to predict where LeBron James would end up playing next. See, e.g., Adam Reisinger, *Destination LeBron*, available at [http://www.espn.com/espn/feature/story/\\_/id/22453452/](http://www.espn.com/espn/feature/story/_/id/22453452/)

*B. Team(s)work: How American Players' Unions Work*

The long history of players' unions is a testament to the undeniable fact that when players unite together, better terms and better protection are not far behind.<sup>40</sup> Unions *do* work. But the fundamental question is how these unions can exist in the first place. Note that these players' unions operate in a leaguewide scale, spanning multiple teams and employers, as opposed to unions which normally function within a single employer. For example, the NBPA represents LeBron James, Stephen Curry, and Kyrie Irving, despite the three superstars being employed by three different teams.<sup>41</sup> Simply put, how can a union represent players across multiple employers?

This was the issue raised and subsequently answered in *North American Soccer League v. NLRB* (*NASL v. NLRB*).<sup>42</sup> In *NASL v. NLRB*, the proper collective bargaining unit for the players of the North American Soccer League (NASL) was at issue.<sup>43</sup> The U.S. Court of Appeals for the Fifth Circuit ruled that the appropriate collective bargaining unit was composed of *all* the NASL players of clubs based in the U.S.<sup>44</sup>

*NASL v. NLRB* was grounded on the finding that a “joint employer relationship” existed between the league and its member clubs.<sup>45</sup> A joint employer relationship exists when one employer has control, of or the

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destination-lebron-where-king-james-land-free-agency-summer (last accessed Feb. 1, 2019).

40. See, e.g., Anna Hiatt, Why we should applaud baseball's all-powerful players union, *available at* <https://theweek.com/articles/469877/why-should-applaud-baseballs-allpowerful-players-union> (last accessed Feb. 1, 2019).
41. They are part of the Los Angeles Lakers, the Golden State Warriors, and the Boston Celtics, respectively. Basketball Reference, LeBron James, *available at* <https://www.basketball-reference.com/players/j/jamesle01.html> (last accessed Feb. 1, 2019); Basketball Reference, Stephen Curry, *available at* <https://www.basketball-reference.com/players/c/currysto1.html> (last accessed Feb. 1, 2019); & Basketball Reference, Kyrie Irving, *available at* <https://www.basketball-reference.com/players/i/irvinky01.html> (last accessed Feb. 1, 2019).
42. *North Am. Soccer League v. NLRB*, 613 F.2d 1379 (Ct. App. 5th Cir. 1980) (U.S.).
43. *Id.* at 1380.
44. *Id.* at 1383.
45. *Id.* & MATTHEW J. MITTEN, ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 522-24 (4th ed. 2016).



potential to control, the labor relations policy of another employer.<sup>46</sup> This existence of control by the NASL over its member clubs was pretty apparent, given that the league had a significant influence on the “selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution[,] and player discipline.”<sup>47</sup> Further, the league also controlled the member clubs’ activities, how these member clubs’ acquired players, the transfer of players, the discipline of erring players, and even the contractual relationships between a player and a club through a league-mandated SPK.<sup>48</sup> As the clubs faced common labor problems and were subjected to the centralized control of the league, the court found that a leaguwide bargaining unit — instead of a per team bargaining unit — was appropriate and reasonable.<sup>49</sup>

*NASL v. NLRB* stands on sound public policy. It is essential for athletes because it allows players from different teams and employers to unionize and negotiate for changes in a leaguwide level. This ability to band more players together gives them better leverage in demanding adequate standards of employment. It is essential to management as well, as it helps the league and team owners who sit across the negotiating table by ensuring that they only have to deal with a single bargaining unit. A fragmented framework of separate bargaining units would only slow down the bargaining process and undermine the goal of labor relations stability.<sup>50</sup> It will also bring a whole host of headaches — imagine if a union composed solely of Boston Celtics players decided to go on strike and sit out the rest of the NBA season. What would happen then? Not only would the leverage of the Celtics players be diminished (because their counterparts across the league will continue playing), it would also frustrate NBA fans who would have to deal with a disjointed schedule filled with potholes of would-be Celtics games.

A union representing players across several employers is ideal. It gives more negotiating power to each player, and it puts them in a better position

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46. *North Am. Soccer League*, 613 F.2d at 1382 (citing *Atwood Leasing Corp.* 227 N.L.R.B. 1668, 1669 (1977) (U.S.) & *Southland Corp.*, 170 N.L.R.B. 1332, 1334 (1968) (U.S.)).

47. *North Am. Soccer League*, 613 F.2d at 1382.

48. *Id.*

49. *Id.* at 1383.

50. MITTEN, *supra* note 45 (citing WILLIAM B. GOULD, RE: COLBY ARMSTRONG ET AL AND THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION VS. CLUB DE HOCKEY CANADIEN INC. AND THE NATIONAL HOCKEY LEAGUE (C.M. NO, CM-2012-4431) (2012)).

in labor disputes. On the management side, it simplifies negotiations because owners are able to deal with the players' demands collectively. This favorable set-up seen in the U.S. is an attractive initiative, and, hopefully, it is only a matter of time before it is adopted by other leagues such as the PBA.

*C. The Next Man Up: PBA*

The PBA is a men's professional basketball league where twelve franchised teams compete for three conference cups.<sup>51</sup> These teams are sponsored and owned by companies, which make for an interesting roster of team names.<sup>52</sup> The PBA has the distinction of having two of its most popular teams sponsored by alcoholic beverages (Barangay Ginebra San Miguel and the San Miguel Beermen), two other teams that were once named after the supposed quality of the wieners they sold (Swift Mighty Meaty Hotdogs and the Purefoods Tender Juicy Hotdogs),<sup>53</sup> and a team that had the same storied history and seemingly nonsensical name as the Los Angeles Lakers (looking at you, Crispa Redmanizers).<sup>54</sup>

Established in 1975, the PBA is dubbed as Asia's "first professional basketball league" and the "second oldest continuously existing [league] in the world after the NBA."<sup>55</sup> In terms of organizational structure, it is run by its Board of Governors, which is comprised of representatives of the franchised teams.<sup>56</sup> The Board of Governors, in turn, elect the PBA commissioner who handles and oversees the overall operations of the league.<sup>57</sup> It is worthy to mention that no player is given a seat in the board.

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51. Philippine Basketball Association, About PBA, *available at* <https://www.pba.ph/about-us> (last accessed Feb. 1, 2019).

52. See Joe Pinsker, The Pro Sports League With the Weirdest Team Names in the World, *available at* <https://www.theatlantic.com/business/archive/2016/05/philippine-basketball-association-weird-team-names/484733> (last accessed Feb. 1, 2019).

53. Ceej Tantengco & Toby Amigo, THE WEIRD 16 BRACKET: What's the weirdest PBA team name of all time?, *available at* <https://slamonlineph.com/weird-16-bracket-whats-weirdest-pba-team-name-time> (last accessed Feb. 1, 2019).

54. *Id.* Apparently, the word "Redmanizer" referred to a process that made Crispa shirts softer. *Id.*

55. About PBA, *supra* note 51.

56. The Philippine Basketball Association Constitution.

57. *Id.*

While it has certainly not been the only professional basketball league in the Philippines, it is definitely the most sought-after, as it used to pay some players up to ₱25 million annually.<sup>58</sup> While this lucrative amount has been lowered in recent years, particularly with the introduction of a salary cap that limits a player's monthly salary to ₱420,000,<sup>59</sup> the PBA is still the most viable option for collegiate basketball players who wish to earn a living playing the game they love. The lowest monthly salary a player can get is ₱50,000,<sup>60</sup> an enticing and competitive amount for any fresh graduate from college. Moreover, these monthly salaries are not the only pesos lining a PBA player's pockets. There are other disbursements, both contractual and extra-contractual, that a player can expect when he suits up for a PBA team.

*D. An Employer's Full Court Press: The PBA Standard Player Contract*

Like most professional leagues in the United States, the PBA uses its own version of a SPK to outline the respective rights and obligations of a player with his team and vice-versa: the PBA Uniform Players Contract — Contract of Employment (PBA SPK). The PBA SPK is required across the league's twelve teams. Hence, teams like the San Miguel Beermen and the Meralco Bolts use the same contract of employment for their respective players, despite these teams being owned by different companies.

The SPK has the usual provisions you would expect to find in a normal professional sports contract, such as a morality clause to make sure players behave on and off the court,<sup>61</sup> a unique skills clause that allows teams to enjoin players from playing in a different league,<sup>62</sup> and a trade clause that permits teams to assign a player's contract to another team.<sup>63</sup> The SPK also

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58. GMA News Online, *One-on-One with Alvin Patrimonio*, available at <http://www.gmanetwork.com/news/newstv/sportspilipinas/308848/one-on-one-with-alvin-patrimonio/story> (last accessed Feb. 1, 2019).

59. Spin.ph Staff, *How much can PBA players make in terms of bonuses?* See Spin.ph Q&A, available at <https://www.spin.ph/basketball/pba/how-much-do-pba-players-make-in-terms-of-bonuses-read-spin-q-> (last accessed Feb. 1, 2019).

60. Richard Dy, *Want to know how much the lowest-paid PBA player makes? Go to our Q & A*, available at <http://www.spin.ph/basketball/special-reports/minimum-salary-of-pba-player-maximum-salary-in-pba-duration-of-contract> (last accessed Feb. 1, 2019).

61. Philippine Basketball Association Standard Player Contract, § 5 [hereinafter PBA SPK].

62. *Id.* § 10.

63. *Id.* §§ 11 & 12.

prohibits players from engaging in other sports that may lead to injury, like wrestling, boxing, and go kart racing.<sup>64</sup> It also obliges players to promote the products of their respective teams (through hotdog and beer commercials) and to join advertising activities of the league — without additional pay or compensation.<sup>65</sup>

Teams are also allowed to drop injured players, as long as the teams pay the player his full annual salary for the year of the injury.<sup>66</sup> This would seem benevolent were it not for two things: first, any insurance proceeds received by the player will be deducted from his full year salary;<sup>67</sup> and second, it does not cover instances where a player is injured for more than a year, such as what happened to Eugene Tejada. In fact, the PBA SPK does not mention anything about any help or assistance to players who sustain career-ending injuries — the very problem that contributed to Tejada's depression.

That is not all that the PBA SPK remains mum about. It does not provide any contingencies for national team call-ups. A team has no obligation to release a player for national team duties. And if ever a team *does* allow a player to suit up for the flag, it is at the player's own risk. A player who gets injured while representing the flag will find no solace — whether financially or in terms of job security — in the PBA SPK; the full year pay provision in the previous paragraph only covers injuries “sustained in the course and within the scope of a [player's] employment [with the team].”<sup>68</sup>

It also does not provide revenue-sharing in the profits of the league and the team, a viable avenue for increasing a player's financial take-home. The lack of said provision tacks a player's contract-based income into a stagnant amount. A player's salary does not increase when the team's or the league's profits increase. In fact, a player has no cut or share in the profits from jersey sales or team merchandise with his face or name on it. The PBA SPK does the opposite, as a player cedes his rights to the use of his image or likeness to the league and his team for free. Of course, the team and the league can always give something to the player on the side by way of gratuity but, without anything specific and explicit in the contract, the player has no recourse to profits that he should have a right to share in.

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64. *Id.* § 16. It does allow a player to play golf, tennis, swimming, biking, and table tennis. It also hilariously allows a player to jog. *Id.*

65. *Id.* § 17.

66. *Id.* § 19 (c).

67. PBA SPK, *supra* note 61, § 19 (c).

68. *Id.*

It is in these glaring pockets of silence that a union can step in with its collective voice.

As the primary instrument that regulates the relationship between the player and the team, the PBA SPK will be the target of any changes advocated by a prospective union. Any CBA entered into will focus on re-drafting the PBA SPK. These specific and possible changes are discussed in Part III (B) (III) of this Article.

But let's keep our eyes on the ball and not get ahead of ourselves. Before a possible CBA can even be discussed, we should first look into the two legal avenues for player protection: the union and the workers' association.

### III. THE LEGAL PLAYBOOK FOR PBA PLAYER PROTECTION

#### *A. Team Philosophy: the Right to Self-Organize*

Unions and workers' associations both stem from the right of workers to self-organize. The right to self-organization is legally protected under both international and Philippine laws. As a member of the International Labour Organization, the Philippines is bound to respect its conventions,<sup>69</sup> particularly Convention No. 87 that states —

#### Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous [authorization].

#### Article 3

1. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities[,] and to formulate their [programs].

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

...

#### Article 8

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69. CESARIO A. AZUCENA JR., *THE LABOR CODE WITH COMMENTS AND CASES: VOLUME II-A AND VOLUME II-B* 16 (2013).

1. In exercising the rights provided for in this [convention,] workers[, ] employers[, ] and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this [convention].<sup>70</sup>

The 1987 Philippine Constitution also guarantees the right of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law.<sup>71</sup> Further, the Constitution expressly protects the right to form unions by declaring “the right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.”<sup>72</sup> It also “affirms labor as a primary social economic force[, and the state] shall protect the rights of workers and promote their welfare.”<sup>73</sup>

This Constitutional mandate is echoed in the Labor Code which makes an express pronouncement that

[a]ll persons employed in commercial, industrial and[,] agricultural enterprises and in religious, charitable, medical or educational institutions whether operating for profit or not, shall have the *right to self-organization and to form, join or assist labor organizations of their own choosing for purposes of collective bargaining*. Ambulant, intermittent and itinerant workers, self-employed people, rural workers[,] and those without any definite employers may form labor organizations for the purpose of enhancing and defending their interests and for their mutual aid and protection.<sup>74</sup>

The right to self-organization involves the right to form or join a labor organization. A labor organization is “any union or association of employees which exists in whole or in part for the purpose of collective bargaining or of dealing with employers concerning the terms and conditions of

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70. Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, arts. 2, 3, & 8, *adopted* July 9, 1948, 68 U.N.T.S. 17.

71. PHIL. CONST. art. XIII, § 3.

72. PHIL. CONST. art. III, § 8.

73. PHIL. CONST. art. II, § 18.

74. A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor and Social Laws to Afford Protection to Labor, Promote Employment and Human Resources Development and Insure Industrial Peace Based on Social Justice [LABOR CODE], Presidential Decree No. 442, art. 253 (1974) (as amended) (emphasis supplied).

employment.”<sup>75</sup> Through labor organizations, workers are able to advance their interests when it comes to wages, hours of labor, and other conditions of employment.<sup>76</sup> At its core, a labor organization’s aim is to ultimately represent and *be* the membership’s “collective voice.”<sup>77</sup>

Atty. Cesario A. Azucena Jr., a lauded expert in Labor Law, identifies three forces that propel workers’ organizations: job security, substitution for the arbitrary and capricious exercise of powers of the boss, and a sense of participation in the business enterprise to which the employees are part of.<sup>78</sup> The natural “human drive towards self-advancement” desires favorable working conditions.<sup>79</sup>

The three forces mentioned by Atty. Azucena likewise fuel the call for self-organization in the context of professional sports. These were seen in the fate of Tejada and a nuanced reading of the PBA SPK. Athletes, despite their sometimes superhuman feats in their respective playing fields, and their status as larger-than-life idols, are humans too. They bleed, and their bones break, just like the rest of us. And like us, they also desire, and rightly deserve, favorable working conditions.

The PBA players have a choice between the two labor organizations recognized by the Labor Code: a union or a workers’ association. As to its purpose, the main distinction between a union and a workers’ association is the ability to collectively bargain. A union, once registered with the Department of Labor and Employment (DOLE) and recognized as the exclusive bargaining representative of the employees, may collectively bargain with an employer.<sup>80</sup> A workers’ association may not, as its definition expressly excludes the power to collectively bargain.<sup>81</sup> However, even without this power to collectively bargain, a workers’ association may still defend and protect the interests of their members through other methods.

### *B. Play One: Unions*

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75. *Id.* art. 219 (g).

76. AZUCENA JR., *supra* note 70, at 15.

77. Hill & Taylor, *supra* note 31, at 62.

78. AZUCENA JR., *supra* note 70, at 15-16.

79. *Id.* at 15.

80. *Id.*

81. Omnibus Rules Implementing the Labor Code, Presidential Decree No. 442, bk. V, rule I, § 1 (ff) (1976) (as amended).

The protective powers of a union notwithstanding, one does not simply establish a union. There are a number of legal hoops that one has to jump through before setting up this entity.

### 1. The Corner Three: Employer-Employee Relationship

First, the union should be made up of employees.<sup>82</sup> This leads to the question on whether professional players are considered employees of their teams in the first place. To answer this, the four-fold test must be used.<sup>83</sup> The elements of this oft-quoted test are: “1) selection and engagement of the employee; 2) payment of wages; 3) power of dismissal; and 4) the employer’s power [of] control [over] the employee’s conduct.”<sup>84</sup> The last element, also known as the control test, is the most determinative factor of the existence of an employer-employee relationship.<sup>85</sup> It examines whether an employer has the right to control the employee as to the means and methods by which his work is to be done.<sup>86</sup> The test beats out whatever the parties name their contract or any stipulation providing otherwise; it is the law — not the parties — that defines and prescribes the employment status of a person.<sup>87</sup>

Applying this test to professional ballers and their teams, the first element is satisfied since teams pick their players through the PBA Draft, or by offering contracts for undrafted players.<sup>88</sup> The second element is complied with because the players are paid by their respective teams a sum stipulated in the PBA SPK.<sup>89</sup> The third element is met because teams likewise retain

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82. *La Suerte Cigar & Cigarette Factory v. Director of the Bureau of Labor Relations*, 123 SCRA 679, 689 (1983).

83. JOSELITO GUIANAN CHAN, *BAR REVIEWER ON LABOR LAW* 220 (2017).

84. *Manila Water Company Inc. v. Dalumpines*, 632 SCRA 76, 92 (2010).

85. *Bernarte v. Philippine Basketball Association (PBA)*, 657 SCRA 745, 754 (2011) (citing *Sycip Gorres Velayo & Company v. De Raedt*, 589 SCRA 160, 167 (2009) & *Sonza v. ABS-CBN Broadcasting Corporation*, 431 SCRA 583, 594-95 (2004)).

86. CHAN, *supra* note 84 (citing *Gallego v. Bayer Philippines Inc.*, 594 SCRA 736 (2009)).

87. *GMA Network, Inc. v. Pabriga*, 710 SCRA 690, 699 (2013).

88. Ignatius Michael D. Ingles, *Playing for Wages: Defining the Legal Relationship Between Professional Athlete and Team, a Sports Law Perspective on Philippine Labor Law*, 59 ATENEO L.J. 783, 797 (2014).

89. *Philippine Basketball Association, Uniform Players Contract: Contract of Employment*, para. 2.



the right to terminate their players,<sup>90</sup> as well as suspend or impose fines upon them.<sup>91</sup> Moreover, the team is entitled to unilaterally sell, exchange, assign, or transfer the player's contract to another team.<sup>92</sup>

Regarding the most important element, which is that of control, learning the different plays of the team and executing it during their games demonstrate how teams control the means and methods by which a basketball player performs his work. Each team has its own way of playing, whether it be executing the triangle offense or zone defense.<sup>93</sup> Control is also evident during practices when the coach decides what drills the players ought to do in order to hone their basketball skills. Off-court, the team exercises control over the players as well.<sup>94</sup> For instance, the team can impose rules to govern the conduct of the players "at home" and "on the road."<sup>95</sup>

In *Negros Slashers, Inc. v. Teng*,<sup>96</sup> the Supreme Court also stated that

[t]ruly, while the employer has the inherent right to discipline, including that of dismissing its employees, this prerogative is subject to the regulation by the State in the exercise of its police power.

In this regard, it is a hornbook doctrine that *infractions committed by an employee should merit only the corresponding penalty demanded by the circumstance. The penalty must be commensurate with the act, conduct[,] or omission imputed to the employee[,] and must be imposed in connection with the disciplinary authority of the employer.*

In the case at bar, the penalty handed out by the petitioners was the ultimate penalty of dismissal. There was no warning or admonition for respondent's violation of team rules, only outright termination of his services for an act which could have been punished appropriately with a severe reprimand or suspension.<sup>97</sup>

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90. *Id.* para. 15 & 19.

91. *Id.* para. 5 & 7.

92. *Id.* para. 10.

93. Ingles, *supra* note 89, at 802.

94. *Id.* at 804.

95. Philippine Basketball Association, *supra* note 90, para. 5.

96. *Negros Slashers Inc. v. Teng*, 666 SCRA 629 (2012).

97. *Id.* at 643 (citing *Sagales v. Rustan's Commercial Corporation*, 572 SCRA 89, 104 (2008) (citing *Manila Trading and Supply Co. v. Zulueta*, 69 Phil. 485, 486 (1940); *Caltex Refinery Employees Association (CREA) v. National Labor*

The referral by the Court to Alvin Teng as an employee (and the Negros Slashers as its employer) just goes to show how a professional athlete is viewed in a labor angle, by the Supreme Court no less.

There are, however, some differences in treatment between a professional athlete and traditional employees.<sup>98</sup> One difference is how a player may be disciplined and penalized by three different entities: the team, the league, and the Commissioner.<sup>99</sup> In case a player violates team rules, the team can either suspend or fine a player.<sup>100</sup> And when a player violates league rules, the Commissioner can also impose fines upon the player.<sup>101</sup> The Commissioner also has the power to suspend or entirely remove the player from the league if, in the former's *sole judgment*, the player is guilty of betting on or fixing any PBA game.<sup>102</sup> Lastly, the Commissioner may fine or sanction any player who, during the term of his contract, negotiates for or relating to his services with another player or coach of the PBA.<sup>103</sup> These additional layers of disciplinary authority certainly differ from a traditional employment arrangement where there are only two parties involved: the employer and the employee.

The effect of termination also differs between a traditional employee and a PBA player. For a traditional employee, termination naturally has a bad connotation that often leads to sleepless nights and endless days of job hunting. In professional sports, the termination of athletes, whether by the natural expiration of his contract or by disciplinary reasons, results in "the ultimate privilege of free agency."<sup>104</sup> For some players, the penalty of termination may be a privilege especially if they want to opt out of the contract while the team has a right of first refusal over them. NBA 90s star Latrell Sprewell was a prime example; after being expelled by the Warriors

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Relations Commission (Third Division), 246 SCRA 271, 279 (1995); & Radio Communications of the Phils., Inc. v. NLRC, 223 SCRA 656, 667 (1993)).

98. Robert D. Manfred, Jr., *Labor Law and the Sports Industry*, 17 HOFSTRA LAB. & EMP. L.J., 133, 134-37 (1999).

99. *Id.* at 134 (citing Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 179 (1995)).

100. Philippine Basketball Association, *supra* note 90, para. 5.

101. *Id.* para. 14.

102. *Id.* para. 15 (emphasis supplied).

103. *Id.* para. 18.

104. Manfred, Jr., *supra* note 99, at 135.

for choking his coach, Sprewell became a free agent and landed a fat contract with the New York Knicks.<sup>105</sup>

Speaking of expiring contracts, the PBA used to have a right of first refusal in its SPK — and this looked a lot like the reserve clause which drove professional players in the U.S. to unionize more than fifty years ago.<sup>106</sup> According to Spin.ph, our own version of the reserve clause worked like this:

Under the old rule, teams retain the right of first refusal on players with expired contracts, meaning they can simply *match any offer sheet from other ballclubs to retain the right on their free agents.*

If a player decides to sit out or play in another league, as was the case with Asi Taulava and Meralco a few years ago, his *mother team needs only to make a qualifying offer not lower than his salary in the final year of his old contract to retain the right on the player in perpetuity.*

For a player to become an unrestricted free agent, he must be dropped unconditionally by his mother ballclub, which rarely happens, more so for star players.<sup>107</sup>

Fortunately, former Commissioner Chito Salud and the PBA Board have come up with a new rule offering unrestricted free agency in 2021.<sup>108</sup> Under the new rule, players belonging to the rookie draft class of 2014 with expired contracts at the end of their seventh season will automatically be free to sign with any team of their choice.<sup>109</sup> However, the team is not left paralyzed since they have the option to offer monthly salaries of 20% above the salary cap to keep their unrestricted free agents.<sup>110</sup> At the end of the day, the player has the last say.<sup>111</sup>

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105. *Id.* at 136-37.

106. Berri, *supra* note 32.

107. Dodo Catacutan, PBA's first free agent class rolls out in 2021, but Fajardo, Romeo, Abueva won't be in it, *available at* <https://www.spin.ph/basketball/pba/special-reports/meet-the-first-real-free-agent-class-of-the-pba-2021> (last accessed Feb. 1, 2019) (emphases supplied).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* This new rule will not, however, be available to PBA players prior to the 2014 rookie draft class as the rule is non-retroactive. As a result, three-peat MVP Junmar Fajardo, Greg Slaughter, Calvin Abueva, and Terrence Romeo,

As an aside, given that the reserve clause has long been out of vogue in the U.S. professional scene, it makes one wonder why it took the PBA so long to phase out such scheme. While we do not want to dive into speculation and what-ifs, maybe the lack of a union to advocate for its removal is the culprit.

## 2. The Pick-and-Roll: Appropriate Bargaining Unit and Multi-Employer Bargaining

Once the employer-employee relationship has been established, the players can now form and register as an independent labor union. Players can do this by filling out an application form and submitting documents to the DOLE Regional Office where they principally operate.<sup>112</sup> These documents include the minutes of the organizational meeting of the players and the would-be union's constitution and by-laws.<sup>113</sup>

Pay close attention to the two requirements involving the union's bargaining unit. First, the union must submit an approximate number of the employees in the bargaining unit where it will operate.<sup>114</sup> Second, the union must also submit a list of at least 20% of employees in the bargaining unit.<sup>115</sup> Registration is essential because an unregistered union is precluded from even representing the employees in a bargaining unit.

This leads us to the tricky issue of determining the bargaining unit in the PBA.

A collective bargaining unit (CBU) is a "group of employees sharing mutual interests within a given employer unit[.]"<sup>116</sup> A union operates within the CBU and seeks to represent the interests of the folks in the CBU.<sup>117</sup> A CBU must also be *appropriate*, and this is determined by the commonality of interests of the members.<sup>118</sup> To determine this, one must answer two things:

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who will be at their prime by 2021, will not be benefiting from the new rule of unrestricted free agents. *Id.*

112. Omnibus Rules Implementing the Labor Code, bk. V, rule II, §§ 1-2.

113. *Id.* bk. V, rule III, § 2.

114. *Id.* bk. V, rule III, § 2 (1).

115. *Id.* bk. V, rule III, § 2 (3).

116. *Id.* bk. V, rule I, § 1 (d).

117. This assumes that the union is the exclusive bargaining agent for the CBU.

118. CESARIO A. AZUCENA JR., EVERYONE'S LABOR CODE 268-69 (2007 ed.) [hereinafter EVERYONE'S LABOR CODE].

first, is there a shared mutual interest? And, second, what is the proper unit to consider?

The first question is like 7'3" NBA behemoth Boban Marjanovic dunking without even jumping: easy.<sup>119</sup> PBA players have a shared mutual interest. They are all bound by the same PBA SPK and subject to the disciplinary powers of their team and their league.

The second question is more like trying to make a full-court heave while wearing a blindfold. The difficulty lies on the basic rule that “two different employers make two different bargaining units.”<sup>120</sup> This essentially means that a union’s registration, operation, and representation will only pertain to a single employer. The implication in the PBA — a league where each team is its own employer to its players — is that CBUs will be team-based and, in turn, players will have to unionize *per* team. The Road Warriors will have its own union. The Beermen will have its own. The same can be said about the Bolts.

Remember that professional athlete unions in the U.S. are league-wide unions. As seen in *NASL v. NLRB*, the union represents a bargaining unit that cuts across all teams. This means more players are covered which, in turn, means more leverage in negotiating and collective bargaining. The CBAs affect the entire league. If the players want to strike, then *all* the players will strike — regardless of their individual teams. Strength in unity.

This differs in the Philippines. As we have yet to recognize joint-employer relationships similar to that in *NASL v. NLRB*,<sup>121</sup> PBA players will be left with these “mini” team-based unions to negotiate and collectively bargain. This is not exactly the best thing for leverage and affecting league-wide changes. Imagine if each team *does* come up with its own player union. If the Road Warriors Players Union wants to collectively bargain for better protection and pay, they can; however, whatever CBA they enter into will only affect the Road Warriors. If the Beermen Players Union decided to go on strike, then the strike will be limited to them; the rest of the PBA will go their merry way. Strength in unity? Not quite.

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119. Kristian Winfield, Boban Marjanovic can dunk without jumping. Send help, available at <https://www.sbnation.com/2018/10/18/17994184/boban-marjanovic-dunk-without-jumping-clippers-nuggets-my-god> (last accessed Feb. 1, 2019).

120. EVERYONE’S LABOR CODE, *supra* note 119.

121. See Ingles, *supra* note 89.

The Rules do offer a glimmer of hope in the form of multi-employer bargaining.<sup>122</sup> Multi-employer bargaining allows several unions and employers to come together and collectively bargain.<sup>123</sup> This can potentially lead to a league-wide CBA. Again, the operative word here is “potentially” because it will take a ton of effort to tick all the boxes required for multi-employer bargaining to take place.

First, “only legitimate labor unions who are [also the] incumbent exclusive bargaining agents” may join.<sup>124</sup> This presupposes that there already exists a union within a team and that this particular union had been chosen by the players to represent them.<sup>125</sup>

Second, only employers with their counterpart labor unions may join.<sup>126</sup> This means that only an employer-team that is already dealing with its union can join. If a team doesn’t have a union, then it cannot join the negotiations.

Third, only those legitimate unions from employer units who actually consent to the whole process may join.<sup>127</sup> This last requirement of consent is vital. Unlike single enterprise bargaining where the employer and the union have the duty to sit down in good faith to collectively bargain,<sup>128</sup> the duty in multi-employer bargaining only pops up if the employers or concerned labor unions want to. The obligation to collectively bargain in multi-employer bargaining is conditioned on consent.<sup>129</sup> Negotiations will only take place between those employers and labor unions who want to join,<sup>130</sup> and whatever CBA they come up with will only affect and cover the consenting parties.<sup>131</sup>

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122. Omnibus Rules Implementing the Labor Code, bk. V, rule XVI, § 5.

123. *Id.*

124. *Id.*

125. Theoretically, there can be multiple unions within a CBU. These different unions will compete amongst themselves which union will have the right to represent the CBU. This probably will not be the case for team-based unions as the CBU will be small, i.e., limited to the team roster.

126. Omnibus Rules Implementing the Labor Code, bk. V, rule XVI, § 5.

127. *Id.*

128. LABOR CODE, arts. 262-63.

129. Omnibus Rules Implementing the Labor Code, bk. V, rule XVI, § 5 (c).

130. *Id.* bk. V, rule XVI, § 6 (c).

131. *Id.* bk. V, rule XVI, § 6 (d).

Let's take a quick look on how multi-employer bargaining can apply to the PBA.

First, there must be an existing union within each of the 12 teams. Hence, the players of the NLEX Road Warriors must unionize. The same goes with the players of the Alaska Aces, Barangay Ginebra, Columbian Dyip, Meralco Bolts, TNT KaTropa, San Miguel Beermen, Blackwater Elite, Magnolia Hotshots, Northport Batang Pier, Rain or Shine Elastopainters, and the Phoenix Fuelmasters. A union per team will cover the first and second requirements for multi-employer bargaining.

Next, each team *and* each team's players union must consent to multi-employer bargaining. There should be no hold-outs. That is the ideal situation for a league-wide CBA to come to fruition. That's the dream: 12 teams negotiating collectively with 12 player unions, with one CBA to rule them all.

If just one team or one players' union refuses to join, then true league-wide collective bargaining will be for naught. Imagine the absurd situation where everyone *except* for Columbian Dyip consents to multi-employer bargaining and a league-wide CBA is agreed upon — all the teams will be governed by the league-wide CBA, except for Columbian Dyip which is free to do whatever it wants with its own players union. "One CBA to rule them all — oh, except for *that* team" just doesn't have the same persuasive and catchy ring to it.

### 3. Locker Room Talk: Collective Bargaining and Possible Points of Negotiation in the CBA

The roots of collective bargaining stem from the Labor Code. The duty to bargain collectively is mandated under Articles 262 and 263.<sup>132</sup> At its core,

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132. Article 262 provides —

Art. 262. Duty to Bargain Collectively in the Absence of Collective Bargaining Agreements. - In the absence of an agreement or other voluntary arrangement providing for a more expeditious manner of collective bargaining, it shall be the duty of the employer and the representatives of the employees to bargain collectively in accordance with the provisions of this Code.

LABOR CODE, art. 262.

On the other hand, Article 263 states —

Art. 263. Meaning of Duty to Bargain Collectively. — The duty to bargain collectively means the performance of a mutual obligation to meet and convene promptly and expeditiously in good faith for the

collective bargaining means “negotiations towards a collective agreement, [which are] designed to stabilize the relation between labor and management[,] and to create a climate of sound and stable industrial peace.”<sup>133</sup>

Through this, a collective voice is upheld through the representatives of the employees who establish the terms and conditions of their employment.<sup>134</sup> Indeed, whatever is agreed upon becomes the rule between the parties, except for cases where what they agreed upon violates the law.<sup>135</sup> With the average career of a PBA player lasting only between five to ten years,<sup>136</sup> one can easily see how collective bargaining can help the player make the most out of his short career. As noted earlier, the PBA SPK seems to hamper a PBA player’s full potential because of the unilateral imposition of rules, which are usually more favorable to the team owners and/or league.<sup>137</sup>

Assuming everyone decides to sit down for multi-employer bargaining, what are possible points for negotiation?

There are four mandatory stipulations of a CBA.<sup>138</sup>

First, the CBA must outline a grievance procedure which allows the union or the employer to question any issue regarding the interpretation of the CBA, interpretation or enforcement of company personnel policies, or any other claim violating the CBA or company personnel policies.<sup>139</sup> The Labor Code provides that parties must “establish a machinery for the adjustment and resolution of grievances arising from the interpretation or

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purpose of negotiating an agreement with respect to wages, hours of work[,] and all other terms and conditions of employment including proposals for adjusting any grievances or questions arising under such agreement and executing a contract incorporating such agreements if requested by either party, but such duty does not compel any party to agree to a proposal or to make concessions.

*Id.* art. 263.

133. *Kiok Loy v. NLRC*, 141 SCRA 179, 185 (1986) (citing *Pampanga Bus Company v. Pambusco Employees’ Union*, 68 Phil. 541 (1939)).

134. *AZUCENA JR.*, *supra* note 70, at 356.

135. *Id.*

136. Interview *with* Sports Agent PJ Pilares, *through* Phone Call (June 7, 2018).

137. See *Philippine Basketball Association*, *supra* note 90.

138. *CHAN*, *supra* note 84, at 555 (citing LABOR CODE, arts. 273, 274, & 267).

139. Omnibus Rules Implementing the Labor Code, bk. V, rule I, § 1 (u).



implementation of their [c]ollective [b]argaining [a]greement[,] and those arising from the interpretation or enforcement of company personnel policies.”<sup>140</sup>

The PBA SPK points to the PBA Constitution of Association in dealing with players who violate team and league policies. For player misconduct, the Commissioner has the power to suspend or fine erring players.<sup>141</sup> All the decisions of the Commissioner are appealable to the Board of Governors,<sup>142</sup> which, as mentioned earlier, is made up of representatives from the teams,<sup>143</sup> with not a single player representative in sight.<sup>144</sup>

Imagine a situation where a player is sanctioned by the Commissioner and this is brought up to the Board of Governors on appeal. The likelihood that the Board overturns this sanction is slim; the Board of Governors, consisting of team representatives, can hardly be considered independent and impartial. This issue on partiality is further magnified by the fact that two groups — San Miguel Corporation and Metro Pacific Investments Corporation — dominate ownership of teams in the PBA.<sup>145</sup>

Grievances over penalties imposed by the team or league have often been overturned by arbitrators in other countries,<sup>146</sup> but these have been predicated on impartial and independent arbitrators, which segues smoothly to the second mandatory stipulation of a CBA.

Voluntary arbitration should also be stipulated in the CBA. The Labor Code mandates that unsettled grievances should be submitted to a voluntary arbitrator (or panel of voluntary arbitrators) who is either named in the CBA

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140. LABOR CODE, art. 273.

141. Philippine Basketball Association, *supra* note 56.

142. PBA Constitution of Association: Misconduct of Players.

143. Francis N. Tolentino, ‘PBA governance should include players’, MANILA BULL., Nov. 12, 2017, available at <https://news.mb.com.ph/2017/11/12/pba-governance-should-include-players> (last accessed Feb. 1, 2019).

144. *Id.*

145. Oscar P. Lagman Jr., *Will There Be a Philippine Basketball Association Season 43?*, BUSINESSWORLD, Nov. 14, 2017, available at <http://bworldonline.com/will-philippine-basketball-association-season-43> (last accessed Feb. 1, 2019). San Miguel Corporation owns the San Miguel Beermen, Ginebra Gin Kings, and Purefoods Star Hot Shots, while MPIC owns TNT KaTropa, Meralco Bolts, and NLEX Road Warriors. *Id.*

146. Hill & Taylor, *supra* note 31, at 63.

or is selected through a process outlined in the CBA.<sup>147</sup> The selection of a voluntary arbitrator or group of voluntary arbitrators shields the controversy between the team and the player away from bias and partiality. It also removes the trouble of having to go to courts to fight each other during litigation.

Who this voluntary arbitrator will actually be is subject to negotiation. The obvious baseline qualification is that the arbitrator should be neutral, independent, and impartial. The most ideal situation is that this arbitrator is completely free from any control by the PBA or has no interest in the league at all. Likewise, if there's anything to be learned from the Deflategate witch hunt against New England Patriots quarterback Tom Brady in 2015 and 2016, the arbitrator should *not* be the commissioner, who can hardly be considered independent and whose arbitral decisions will be given extra deference by courts.<sup>148</sup>

Third, a "No Strike, No Lockout" clause is necessary in the CBA. This provision assures everyone involved that the employer and employee will not conduct lockouts and strikes during the lifetime of the CBA. This theoretically guarantees a smooth season free from game cancellations, an assurance that will surely be welcomed by players (who will continue to earn for every game they play), teams (who will benefit from ticket sales and licensing royalties), and especially the fans (whose lives revolve around the fortunes and misfortunes of their favorite teams and players). Note, however, that unfair labor practices committed by either the employer or employee can still lead to lockouts and strikes.<sup>149</sup>

Finally, a labor management council must be created to implement the workers' right to participate in the decision-making process of the employer.<sup>150</sup> Remember that there's not a player in sight in the PBA Board of Governors. It would be a welcome change for the players to finally have a say on decisions that ultimately affect their careers.

Although no strikes or similar incidents have been staged by PBA players or teams, it will be a good idea early on to establish a mechanism where the players can participate in decision-making, especially in light of the NBA

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147. LABOR CODE, art. 273.

148. See Michael McCann, Tom Brady faces long odds after NFL wins Deflategate appeal, *available at* <https://www.si.com/nfl/2016/04/25/tom-brady-deflategate-suspension-nfl-appeal-roger-goodell> (last accessed Feb. 1, 2019).

149. See LABOR CODE, art. 259 for complete list.

150. CHAN, *supra* note 84, at 588.

lockout that transpired in 2011.<sup>151</sup> Transparency among players, teams, and the league can help prevent a similar unfortunate event from making its way to the PBA. If there's one thing the PBA doesn't want to *import* from the U.S., it's the lockout.

Aside from these four, there are also mandatory subjects in bargaining, which strike deep into the PBA SPK. If team management refuses to even bargain for these subjects, it would result to unfair labor practice.<sup>152</sup> These are:

- (1) Wages and other types of compensation, including merit increases;
- (2) Working hours and working days, including work shifts;
- (3) Vacation and holidays;
- (4) Bonuses;
- (5) Pensions and retirement plans;
- (6) Seniority;
- (7) Transfer;
- (8) Layoffs;
- (9) Employee workloads;
- (10) Work rule and regulations;
- (11) Rent of company houses; and
- (12) Union security agreements.<sup>153</sup>

These are CBA subjects that may be bargained to the point of impasse without being considered bargaining in bad faith.<sup>154</sup>

Perhaps the most important provision up for negotiation is the salary of the players. This can be a vehicle to properly enforcing the PBA's salary cap and ensuring financial fair play. As of this writing, a team's total salary for its

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151. ESPN, Report: NBA to cancel more games, *available at* [http://www.espn.com/nba/story/\\_/id/7146097/nba-lockout-2011-league-cancel-two-more-weeks-regular-season-according-report](http://www.espn.com/nba/story/_/id/7146097/nba-lockout-2011-league-cancel-two-more-weeks-regular-season-according-report) (last accessed Feb. 1, 2019).

152. AZUCENA JR., *supra* note 70, at 380.

153. *Id.* at 82.

154. *Id.* at 83.

players must not be lower than ₱27 million, nor more than ₱36 million.<sup>155</sup> According to a source, five of the 12 PBA teams do not follow the salary cap.<sup>156</sup> Alaska Aces owner Wilfred Uytengsu has also already expressed his own doubts on whether the salary cap is being followed, saying that

[i]f you look at the composition of SMB and Ginebra, you will see they are stacked with first to third picks ... Many of those players came to them from curious trades. SMB's starting five is: June Mar Fajardo (no. 1 pick), Arwind Santos (no. 2 pick), Alex Cabagnot (no. 2 pick), Chris Ross (no. 3 pick), and Marcio Lassiter (no. 4 pick). Ginebra has Greg Slaughter (no. 1 pick), Japeth Aguilar (no. 1 pick), Joe Devance (no. 1 pick), Kevin Ferrer (no. 3 pick), LA Tenorio (no. 4 pick)[,] and Scottie Thompson (no. 4 pick).

[It is] difficult to comprehend how a team can fit within the team salary cap, playing those players, all at approved maximum PBA salaries[,] while still maintaining [ ] strong sixth to eighth players. [I have] done the math[,] and it [does not] work[.]<sup>157</sup>

Uytengsu has basic arithmetic on his side. Currently, a PBA basketball player should not earn less than ₱50,000 a month<sup>158</sup> and not more than ₱420,000 a month.<sup>159</sup> Even if excluded from the salary cap, bonuses for games won are also limited to ₱6,000 for eliminations, ₱8,000 for semifinals, and ₱10,000 for finals.<sup>160</sup> No ceiling is set for championship bonuses.<sup>161</sup> Considering that teams can only place a maximum of 14 players in its active roster list,<sup>162</sup> it is no small wonder how some teams can manage to field so many A-list players and still stay under the ₱36 million salary cap. Rumors abound that some player payments are off-the-books and, therefore, not accounted for in the salary cap.

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155. Dy, *supra* note 60.

156. Interview *with* Sports Agent (Name Requested Not to be Disclosed), *through* Phone Call (June 6, 2018).

157. Rey Joble, *Alaska Milk Top Honcho Wants PBA Commissioner To Monitor Salary Cap*, BUSINESSWORLD, Oct. 27, 2017, *available at* <http://bworldonline.com/alaska-milk-top-honcho-wants-pba-commissioner-monitor-salary-cap> (last accessed Feb. 1, 2019).

158. How much can PBA players make in terms of bonuses? *See* Spin.ph Q&A, *supra* note 59.

159. *Id.*

160. *Id.*

161. *Id.*

162. Dy, *supra* note 60.

Collective bargaining may help solve the problem. The teams, the owners, and the league may agree on a luxury tax that can be imposed on teams who go over the salary cap, similar to the luxury tax imposed by the NBA.<sup>163</sup> While actually implementing and monitoring compliance to the salary cap may still be difficult (given the off-the-book payments presumably done behind closed doors), addressing the issue in the CBA will at least give the league and lesser-funded teams the moral and legal leverage to push for better enforcement. Further, the amounts can be adjusted to reflect the financial capacity of each team. A cap on championship bonuses and even other forms of remuneration can be placed to ensure that a level playing field starts in the board room and contract negotiations. Maybe then, lesser-funded teams will have a chance to attract bigger stars who command larger salaries. Furthermore, majority of the players who will benefit from this will be the underrepresented players or those who are not as “influential” as the big stars.<sup>164</sup> With proper salary adjustments and stricter implementation of the salary cap, the hope is for a more even distribution of wealth that will trickle down to role players and benchwarmers.

The CBA can also help protect veteran players by incentivizing long careers. For example, the NBA and the NFL have taken players’ seniority in consideration by increasing the minimum salary of a player depending on the number of years he’s been in the league, to wit —

[T]he CBA-mandated minimum salary rises with years of service. While a second round draft pick in the NBA earned the rookie minimum of [US]\$366,931 for the 2004–2005 season, a 10-year veteran was guaranteed a minimum salary of [US]\$1,070,000. In addition to affecting provisions for minimum pay, seniority also plays a role in the aforementioned maximum individual salary limits in the NBA. For the 2005–2006 season the maximum salary was 25% of the salary cap or [US]\$12 million for players with 0–6 years of service, 30% of the salary cap or [US]\$14.4 million for players with 7–9 years of service, and 35% or [US]\$16.8 million for players with 10 or more years of service.<sup>165</sup>

This is vital, considering the nature of the relatively short career of a basketball player, which can be further shortened by career-ending injuries similar to that of Eugene Tejada.

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163. See generally Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615 (2004).

164. Interview with Sports Agent (Name Requested Not to be Disclosed), through Phone Call (June 6, 2018).

165. Hill & Taylor, *supra* note 31, at 64.

Speaking of career-ending injuries, post-career financial protection is an important provision that must be addressed in the CBA. As noted earlier, the PBA SPK does not offer that many options for a player like Tejada. Considering all the risk of injuries these players face each and every practice or game, it seems unjust that the issue is unaddressed. In contrast, the NBA/NPBA CBA provides for Health and Welfare benefit plans for its players.<sup>166</sup> In addition, monthly pension benefits are also allocated to its players in the amount of US\$572.13, subject to CBA-stipulated increases.<sup>167</sup> These are the kinds of benefits that PBA basketball players should have during and after their career.

The need for such benefits is underscored by the fact that exhibition games have to be organized by former PBA basketball players just to raise funds for their colleagues who have suffered accidents or those in need of medical assistance.<sup>168</sup> Former players have even established the *Samahan ng mga Dating Professional na Basketbolista* Foundation just to create a safety net for retired basketball players in need of financial assistance.<sup>169</sup> While the foundation's objectives are laudable, the responsibility to provide programs for players' post-employment financial stability still falls on the teams and the league. The PBA and the teams are nothing without the players — and if they remain unprotected, or, at the very least, unguided to navigate post-career financial decisions and circumstances, the players are treated more like discarded toys whose useful lives have run its course.

Lastly, the CBA can also pave the way for drug testing and rehabilitation.<sup>170</sup> It can also provide programs for mental health well-being, especially in light of PBA player Mac Cardona's depression and drug

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166. 2017 NBA-CPBA Collective Bargaining Agreement (2017 NBA-NBPA Collective Bargaining Agreement) art. IV § 3 (a), available at <http://3c90sm37lsaecdwt32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (last accessed Feb. 1, 2019).

167. *Id.* art. IV § 1 (a) (2017).

168. UNTV News, New Foundation Created to Help Former Basketball Professionals, available at <https://www.untvweb.com/news/new-foundation-created-help-former-basketball-professionals> (last accessed Feb. 1, 2019).

169. *Id.*

170. Hill & Taylor, *supra* note 31, at 65.

problem.<sup>171</sup> The former De La Salle University stand-out disclosed that the reason for his suicide attempt from overdosing in pills was depression caused by the fact that his team was not giving him much playing time anymore.<sup>172</sup> Dwindling time on the court, impending retirement, adjusting to life post-basketball — these are inevitable and foreseeable problems faced by every single player, problems that weigh heavily on one’s mental health. Surely these have to be addressed by the league and the teams.

The inclusion in the CBA of a grievance procedure, voluntary arbitration, “No Strike, No Lockout” Clause, and a labor management council are the four pillars of protection a PBA player must have under the law. Provisions on players’ salary, retirement plan, vacation leave, and rules or restrictions on transfers to other teams are also among the most important subjects that have to be ironed out. These matters give players more power to demand certain benefits that would otherwise be unilaterally fixed (or absent) in a PBA SPK. The ability of players to demand the best and just possible offers is important because of their short-lived careers<sup>173</sup> that can even be cut even shorter by injuries. Like any other employee, PBA players should not be denied the right to assert what is granted to them under the law.

### *C. Play Two: Workers’ Associations*

Unions are not the only way to protect players. The law also permits the creation of workers’ associations.<sup>174</sup> To recap, workers’ associations are organizations established for the mutual aid and protection of its members or for any legitimate purpose *other* than collective bargaining.<sup>175</sup> While associations for mutual aid and protection are *not* allowed to enter into collective bargaining, they can still work to protect players’ rights and deal with teams and the league.

The advantage of a players’ association is that they do not require that all the players are under a sole employer. Unlike a union, the existence of employer-employee relationship is not mandatory to form these

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171. Khrisma Virgilio, Cardona Reveals Reason for Attempting Suicide, *available at* <http://news.abs-cbn.com/sports/08/14/17/cardona-reveals-reason-for-attempting-suicide> (last accessed Feb. 1, 2019).

172. *Id.*

173. Most basketball players retire by the age of 35.

174. LABOR CODE, art. 219 (g).

175. Omnibus Rules Implementing the Labor Code, bk. V, rule I, § 1 (ff).

associations.<sup>176</sup> This means that all the players across the league can join one single organization, despite having different employers, and skip the issue on multi-employer bargaining. Players from the NLEX Road Warriors can band together with folks from Blackwater Elite without a problem. This sends a strong message of unity as compared against unions where players would have to form unions *per team*.

Two significant disadvantages, however, may outweigh the practical expedience and convenience of forming a players' association.

First, a players' association, unlike a union, cannot compel the teams to negotiate and come up with a CBA. There is no duty to bargain in good faith with a workers' association. Hence, any negotiations between a players' association and the different teams will be founded on goodwill, rather than the letter of the law.

Second, a players' association cannot go on strike or perform work stoppages if negotiations break down. Only unions can strike.<sup>177</sup> This leaves players' associations without a helpful and legal tool it can use for leverage. The threat of strikes, coupled with the loss of revenues for the team owners and the bad publicity caused by empty stadiums and irate fans, has been an incredible tool of leverage for players' unions in the U.S. to push for better standards and protection of players.

Despite these disadvantages, a players' association may be a good place to start to show a unified front. If the teams and the league don't protect its players, then the players should take care of themselves. A PBA players' association may take up the cudgels to aid and protect its own. It can collect a small percentage of its members' salaries in trust and for distribution upon retirement. It can also hold events and pool funds for retired or injured players, similar to the *Samahan ng mga Dating Professional na Basketbolista* Foundation. And even if it is barred from collectively bargaining, its collective voice may just be the moral pressure needed to advocate change.

Strength in unity begins with small victories, and a players' association will be a victory in its own right.

#### IV. DOWN TO THE WIRE

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176. *Samahan ng Manggagagawa sa Hanjin v. Bureau of Labor Relations*, 772 SCRA 613, 629 (2015).

177. See AZUCENA JR., *supra* note 69, at 370.



The aftermath of Eugene Tejada's and Michael Burtscher's injuries should not be repeated. The contractual dispute of Alex Nuyle should not have been a dispute in the first place. Mac Cardona's mental health should have been addressed as early as possible. And while Tejada, Burtscher, Nuyles, and Cardona are all basketball players, their problems are not basketball-centric. They share the same problems and issues with any athlete, be it a goalkeeper from Ceres-Negros FC or a setter from the Creamline Cool Smashers.

While we have focused solely on the PBA, the same options are available to athletes of other professional leagues in the country, such as the Philippine Premier League (PPL) and the Premier Volleyball League (PVL). The PPL and the PVL are in its infancy stages compared to the PBA, and the two leagues might just be the chance for player protection to grow hand-in-hand with the growth of the league and team revenues. Whether the players choose the route of unionization and collective bargaining or the formation of players' associations for their own mutual aid and protection, one thing is clear: these leagues should learn from 40 years' worth of lessons and experience of the PBA. It is never too early to start looking forward.

Strength in unity starts today.