Testimony of

Mr. Stan Brand

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Mr. Chairman and Members of the Judiciary Committee, I appreciate the invitation you have extended to me as Vice President of Minor League Baseball? to participate in the hearing today on the application of federal antitrust laws to baseball. In the almost 10 years that I have served as Vice-President of Minor League Baseball?, this is the first opportunity I have had to directly address this Committee on this important subject even though the issue of baseball's antitrust exemption has been actively debated in and acted upon by Congress during that time period.

The recent interest in Congress in baseball's antitrust exemption was generated by the decision by Major League Baseball ("MLB") announced by Commissioner Selig on November 6, 2001 to eliminate two major league clubs for the 2002 season. Discussions to shrink baseball at the Major League level had been previously reported, but the official announcement predictably triggered a host of congressional reactions, including introduction of a bill by Senator Wellstone, (D-MN), the purpose of which was stated to be repeal of baseball's immunity with respect to the elimination or relocation of Major League teams.

This bill produced considerable, and in our view, justifiable alarm throughout Minor League Baseball? which had worked diligently in 1998 to insure that the Curt Flood Act of 1998 included protection for the minor leagues. We believed then, and we still believe today, that further attempts to limit or change baseball's antitrust immunity represents a threat to Minor League Baseball?, is not justified by any compelling public policy and will not achieve the goals for which it is proffered.

Minor League Baseball? is comprised of 206 teams in 18 leagues playing professional baseball in the United States, Canada and Mexico at the AAA, AA, A and rookie levels and consists of approximately 5548 active players. Last year, Minor League Baseball? drew almost 39 million fans during the championship season. Repeal of baseball's antitrust exemption would inevitably affect one important incentive that MLB has to continue its investment in minor league player development, which in turn could result in the elimination of many minor league teams, particularly at the Rookie and A levels.

Last year, MLB spent over $130 million on direct minor league development costs (including minor league player salaries) and another $90 million on player bonuses and scouting as a means of developing talent for the Major Leagues. It is this subsidy that assists in underwriting the presence of Minor League Baseball? in small towns and rural America.

In the event of repeal, the minor league player draft and reserve clause might be challenged as illegal restraints of trade under § 1 of the Sherman Act. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1977). In addition, the Professional Baseball Agreement between the Majors and Minors, which ensures competitive balance among MLB teams in player acquisition and retention, also might be challenged as illegal under §§ 1 or 2 of the Sherman Act. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F.Supp. 462 (E.D. Pa. 1972). NAPBL leagues banding together to affiliate with MLB on uniform terms in the absence of the PBA may likewise be challenged under § 1 of the Sherman Act. FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990). Although we are hopeful that Minor League baseball would prevail against such challenges, the cost of facing them would be enormous and would itself threaten our survival. The upshot is that minor league player development will be stripped of the stability created by the player draft, reserve clause and the PBA. The Minors have virtually no TV revenue, and their ticket sales and fence sign advertising does not generate the kind of cash flow that can support a legion of lawyers.

If MLB determines that the antitrust laws make it too risky to draft and then reserve players for six years, the nature of MLB's investment in minor league players could change dramatically. Without the reserve clause, MLB can be expected to spend money on many fewer minor league players. MLB will not spend money signing prospects in the hope that they develop only to have them subject to being acquired by other teams due to their short-term contracts. With the signing of few minor league players overall, there will naturally be fewer minor league teams. This loss of teams would adversely affect numerous player development investments in facilities. The loss to consumers of affordable, intimate and wholesome entertainment provided by minor league clubs could be extensive, particularly in smaller communities and markets.

Such reduced output is of course antithetical to the policy underlying the antitrust laws to increase - rather than decrease - product. One can speculate that even in the absence of an agreement to sign players to uniform contracts with renewal options, major league organizations individually have superior bargaining power that will permit them to sign hundreds of lower level players to the same kind of one-year agreements with successive yearly options that are now required. If the antitrust laws are applicable, how will MLB clubs assess the risk that such a pattern will be challenged as being illegally collusive? Isn't it likely they will attempt to avoid that risk (and reduce their expenses) by trying to shift the risk and burden of employing the players to the minor league teams (which the minor leagues can ill afford)?

A number of academics have suggested that the first year player draft could be upheld under a "rule of reason" analysis. NCAA v. Bd. of Regents of the University of Oklahoma, 468 U.S. 85 (1984). However, the minor league draft certainly will be subject to challenge since minor league players, unlike players in the NBA and NFL, are not part of any collective bargaining unit and therefore the minor league player draft is not covered by the labor antitrust exemption. This is an important difference from other professional sports; unlike the NBA and NFL, baseball's draft

extends to players who will never be part of the "major league" team and the bargaining agent that represents them.

For all of the foregoing reasons, we, and the Members of Congress representing our clubs and their communities, fought hard to include a clear and comprehensive "carve out" for the minor leagues during enactment of the Curt Flood Act of 1998. The "carve out" was hammered out among representatives of Major League Baseball, the Players Association and Minor League Baseball? and incorporated as agreed to by these entities into the final legislation. When we examined closely the provisions of S. 1704, the bill introduced by Senator Wellstone, we were surprised to find that while the bill was purportedly drafted to parallel the language contained in the Curt Flood Act of 1998, with only language changes to reflect that this bill would lift baseball's antitrust immunity with respect to contraction and franchise relocation rather than major league player matters (the subject of the 1998 Act), the actual language of the current bill has deleted some language from the Curt Flood Act that is unrelated to contraction and franchise relocation. This puzzling deletion of language from the Curt Flood Act has the potential to be argued to a court as having some substantive significance, despite the limited stated purpose of the bill, and thus might lead to unintended consequences damaging to baseball and particularly Minor League Baseball.

The most glaring example of this failure to track the language in the Curt Flood Act is in the express list of matters not affected by the bill in subsection 3(b). The Curt Flood Act had six items in its list of unaffected matters. To accomplish the lifting of the antitrust immunity only for Major League franchise contraction and relocation, the only change in wording in this list should be the removal from item #3 of the words "franchise . . . relocation." However, S. 1704 omits far more language than just these two words.
First, the bill omits entirely all of what were items #1 and #5 in subsection 3(b) of the Curt Flood Act. Those two items stated:
(1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

* * *

(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons;
In addition, the Curt Flood Act's item #3 in the list of unaffected matters (which in the proposed bill is now item #2) has been edited in the proposed bill by deleting the words "franchise expansion, location, and relocation," even though the stated purpose of the bill is to lift the immunity only as to contraction and relocation and only with respect to major league franchises. If the bill's stated purpose is accurate, issues of major league expansion or location that do not

involve relocation, and all franchise issues at the minor league level, should still be covered by the immunity and thus specifically referred to in item #3 (now #2).

These deletions in the proposed bill are very troubling and hold enormous potential mischief for Minor League Baseball. This is particularly so for the deletion of item #1 specifically identifying employment matters at the minor league level, the amateur or first-year player draft, or any reserve clause as applied to minor league players. As stated earlier, together the first year player draft and minor league reserve clause constitute the core incentive for Major League organizations to pay for the development of these players and any change in its foundation could wreak havoc on minor league economic stability. Also, taking out the item referring to umpires has potential implications for the minor leagues. And perhaps most troubling, the deletion in item #3 (#2 in the proposed bill) of the reference to all franchise expansion, location, or relocation matters removes from the bill the express protection for the minor leagues with respect to these types of franchising issues, putting at potential risk all of the minor league rules dealing with territories and territorial rights that protect the viability of all minor league teams, particularly at the lower classification levels in many smaller and rural markets across the country.

Furthermore, in subsection d(1) of the Curt Flood Act, it states in the second sentence: "As used in this section, the National Association of Professional Baseball Leagues, its member leagues and the clubs of those leagues, are not 'in the business of organized professional major league baseball'." This language has been deleted from the proposed bill. Again, the reason for the deletion is not at all clear, but its absence - when compared with the Curt Flood Act - is striking and might well be misinterpreted by a court some day as a deliberate statement of congressional purpose that could subject the minor leagues to significant antitrust risk.
The potential for using the absence of all of the language contained in the Curt Flood Act to imply that the antitrust immunity no longer applies to minor league player, umpire, or franchise issues is not insubstantial, and it would certainly encourage potential plaintiffs to file lawsuits that might test this question, cause the minor leagues crippling expense, and possibly produce holdings that would be very damaging to Minor League Baseball. It is particularly troubling that this language was omitted given the long and arduous efforts we made to have it included in the final version of the Curt Flood Act.

Beyond the impact of deleting these paragraphs from the Curt Flood Act, there are two more indirect ways in which it might have serious long term detrimental effects, especially to the extent the bill lifts the immunity for major league franchise relocation instead of just contraction.

First, the bill apparently would subject Major League Baseball to potential treble damage antitrust liability for any action relating to franchise relocation. As we have seen in other sports, particularly football, this has caused such an in terrorem effect on leagues that individual franchises are now essentially free to relocate without any league oversight. In other sports, this has created the phenomenon of teams essentially putting themselves up for auction to the highest bidding community and forcing taxpayers in many communities to provide hundreds of millions

of dollars in direct and indirect subsidies to teams in order to attract or avoid losing a team. It is puzzling why, in response to Major League Baseball's announced efforts to contract by two teams, Congress would want to pass legislation lifting the antitrust immunity for both contraction and relocation. The historic baseball antitrust immunity has had an obvious restraining effect on relocations at the major league level and has served the public interest well by reducing the ability of teams to force huge public subsidies out of local communities. Denying immunity for relocation decisions could also create disruption in certain AAA minor league markets as well by subjecting those cities to uncertainties for the future of their AAA clubs, and bidding wars to attract major league clubs. Lifting the immunity with respect to contraction is one thing; lifting it with respect to relocation is entirely another that is not at all justified or even suggested by the current efforts of Major League Baseball to eliminate two teams.

How did we get from the carefully crafted and agreed upon provisions of the Curt Flood Act to the reduced and inadequate minor league protections of S. 1704. Sponsors of this legislation - and the Major League Players Association - have cavalierly and falsely asserted that the minor league exemption on "carve out" remains intact. I cannot explain why S. 1704 is drafted in this manner but I can tell you this: On April 10, 1994, Don Fehr stated in the L.A. Times that "[t]oo much money is being wasted in the minor leagues." Since that time, the MLBPA has been the principal and relentless proponent of total and outright repeal of the antitrust exemption. During consideration of the Curt Flood Act, the union steadfastly resisted adding language to the legislation making clear the protection of the minor leagues, and only relented under pressure from its own congressional allies when it became apparent no legislation could be passed without such language and the support of the minor leagues.

I can only conclude that the Players Association seeks total repeal in order to destroy minor league baseball so that Mr. Fehr can lay claim to the money "wasted" on the minors and divert it to his players.

Beyond the deletion of key protections for the minor leagues, the legislation would erode baseball's immunity for another aspect of its business without any demonstration that it will solve the problems for which it is advanced. It accelerates the unjustified momentum begun with the Curt Flood Act of lifting aspects of the antitrust immunity on a piecemeal basis whenever baseball makes a difficult or unpopular decision. Rather than deal directly with the event that generated concern (planned contraction), the bill, like the Curt Flood Act, erodes a long-standing legal principle that has served the public well. This in turn makes it politically easier to lift the immunity even further when the next problem arises, a trend that will undoubtedly have adverse affects on Minor League baseball. It's bad public policy and could hasten the demise of grassroots baseball with no assurance that it will achieve its desired result.

There has been much discussion concerning the lack of competitive balance at the Major League level and the economic remedies available to restore healthy on-field competition to baseball. What is seldom discussed is the role of the exemption in buttressing competition at the Major League level through minor league player development. In the event of repeal, major and minor league teams will presumably be free to compete openly for the signing of baseball player prospects. Players signed by major league teams could presumably be placed either on the major league roster (currently 40 players) or assigned to minor league teams for further development.

Free of standardized player contracts with fixed salaries and reserve periods, major league teams would compete for the top prospects. Minor League Baseball? believes this competition will upset the competitive balance that is essential for Baseball's viability. The wealthier teams would be in a position to outbid smaller market teams for available first year draft talent. This can only exacerbate the competitive problems detailed in the Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics (July, 2000).

If repeal triggers unbridled competition in the payment of salaries for minor league players, Minor League Baseball? believes the rich will simply get richer at the expense of less prosperous clubs. This scenario is identical to that of the 1940's-50's when Branch Rickey of the St. Louis Cardinals purchased a large number of minor league teams from which he could stock the major league Cardinals. It was this very practice, which led to the player draft, which was designed to ensure balance in the hiring of players.
While professional football and basketball look to college for developing professional players, there exists grave doubt that colleges could - or should - fill the void likely to be created by the reduction in minor league clubs that will result from repeal of the baseball antitrust exemption.

As colleges currently organize their baseball programs, there is little prospect colleges could train baseball players as effectively as do the minor leagues. Baseball is played primarily during the summer when colleges are closed. The NCAA will not permit students to play in the minor leagues without forfeiting their college baseball eligibility. Some have argued that the "summer leagues," such as the Alaskan and the Cape Code leagues, may fill the gap during the summer months when colleges are closed. However, in the view of baseball experts, such leagues are simply not competitive enough and their seasons not long enough to develop the talent as well as traditional minor leagues. It's problematic too whether even their existing caliber of play could be preserved if summer leagues were expanded as needed if minor league teams fail.

In addition, as a general rule, minor league teams have better coaches, facilities and competition than is found in college ranks. Colleges are still not likely to develop players as effectively as do the minor leagues. In college, students may play baseball at most 3 to 4 times per week for three months. And yet, baseball is an extremely difficult sport requiring considerable skill and finesse. These skills can best be developed only in the minor leagues where players play every day, 6 to 7 months of the year. Only then can prospects advance to the major leagues in, on average, 3 to 4 years' time. As it is, college baseball players usually require 2 to 3 years' additional development before they are prepared to play in the major leagues. College All-Americans frequently languish in Rookie League baseball before quitting the game altogether.

We have serious doubts that the NCAA would permit MLB to invest in college baseball programs on terms that are acceptable to MLB. Surely the NCAA would require that all of the hundreds of NCAA baseball programs be treated alike, all receiving the same level of financial support from MLB teams. The logistics of financing such a system would in our view be insurmountable, not to mention the chaos likely to be created by mixing professional and

amateur sports programs and their respective purposes and goals.
Minor League Baseball? believes it is inadvisable to create an alternative player development system that merges, or at least commingles, professionalism and education. We believe that our colleges ought to concentrate on developing major league doctors, scientists and educators, not major league ballplayers. We cannot foresee how creating greater reliance on college baseball, as a player development system will do anything but expose baseball to the scandals that have blemished other college athletics.
Finally, I have been asked to address the impact of contraction at the Major League level upon Minor League Baseball.? As the President of Minor League Baseball?, Mike Moore, stated on November 6, 2001:

We plan on baseball being played by all of our franchises next season. Commissioner Selig has indicated to me that following any definitive decisions on contraction, we will work closely in formulating solutions pertaining to the Minor Leagues. The Commissioner has been a strong supporter and ally of Minor League Baseball? and we will continue to work together toward our common goals.
Indeed, Commissioner Selig in testifying last December before the House Judiciary Committee stated that it was not necessarily the case that minor league clubs would be contracted if their affiliated Major League club ceased to exist. There are a number of ways in which this issue can be addressed, including: 1) assumption by other Major League clubs of the contracted clubs minor league professional development agreements; or 2) maintenance of the contracted minor league clubs player development contract on a "cooperative" or shared basis among several Major League clubs. Suffice it to say that we will be working cooperatively to preserve our viable minor league clubs in the event of Major League contraction.