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Exploration of Minimum Age Employment Policies in Professional Sports

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EXPLORATION OF MINIMUM AGE EMPLOYMENT ELIGIBILITY POLICIES IN PROFESSIONAL SPORTS

Adam Epstein *

I. INTRODUCTION

The purpose of this article is to explore the minimum age employment policies in the four major sports leagues (hereinafter “Big Four”) and to consider similar policies among other professional sports leagues as well.¹ Concerns over minimum age employment requirements which set a minimum age, focus on employment eligibility based upon the number of years after high school graduation, or combine the two have resulted in considerable debate among the leagues, lawyers, academicians and others as young athletes continue to excel in professional athletics and are considered a vital part of today’s professional sports scene.²

In the last few years, minimum age rules in the Big Four have been in the national spotlight especially since the 2004 litigation involving the National Football League (NFL) and former Ohio State University football player Maurice Clarett. Clarett unsuccessfully challenged the NFL’s draft eligibility rule which negatively affected his eligibility status for the 2004 player draft.³ That Second Circuit Court of Appeals decision (and the subsequent refusal by the Supreme Court to hear Clarett’s appeal) sent a strong message to sports law practitioners that minimum age eligibility rules are a legitimate and

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¹ The Big Four is a phrase commonly used to describe the four major North American professional sports leagues: the National Basketball Association, the National Football League, Major League Baseball and the National Hockey League. See, e.g., Marc Edelman, *How to Curb Professional Sports’ Bargaining Power Vis-à-vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 291 (2003). See also, Tim Chapin, *Sports Facilities and Development: The Political Economy of Sports Facility Location: An End-of-the-Century Review and Assessment*, 10 MARQ. SPORTS L.J. 361 (2000).

² See generally, Kevin J. Cimino, *The Rebirth of the NBA-Well, Almost: An Analysis of the Maurice Clarett Decision and its Impact on the National Basketball Association*, 108 W.VA. L. REV. 831 (2006). See also, Roscoe Nance, *Teen Draftees Grounded Until 19 Under New Deal*, USATODAY.COM, June 25, 2005, http://www.usatoday.com/sports/basketball/nba/2005-06-21-teens-cba_x.htm.

³ See *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [Clarett I], *rev’d*, 369 F.3d 124 (2d Cir. 2004) [Clarett II], *cert. denied*, 125 S.Ct. 1728 (2005).

legally enforceable subject of the collective bargaining process in professional sports, a natural byproduct of the non-statutory labor exemption and when bargained collectively would not be subject to federal antitrust or labor laws.⁴ Still, some adamantly refuse to accept that the NFL's draft eligibility rule was actually collectively bargained in the first place at arms-length and similarly question the rationality of banning high school players altogether from other professional leagues such as in the National Basketball Association (NBA).⁵

Unlike the NFL, other professional sports leagues such as Major League Baseball (MLB), the National Hockey League (NHL) and the NBA have historically drafted athletes directly from high school. While the NHL and MLB have had few concerns related to signing or drafting teenagers, the NFL and NBA have had prominent legal challenges to their minimum age employment and draft rules. In fact, the NBA significantly altered its policy of drafting high-schoolers with the advent of a new collective bargaining agreement established in 2005.⁶

This article explores the issues, compares the current Big Four employment policies, and provides insight into the legal and historical perspectives on minimum age in the context of professional sports participation. It is important to appreciate the different historical and legal perspectives among the Big Four sports and the relationship between the owners and respective players' associations (i.e. unions) whose relationship is bound by a collective bargaining agreement. In the end, however, while it is still arguable whether or not age limitations constitute a mandatory subject for collective bargaining, the balance weighs heavily in favor of "yes" until there is a decision by the Supreme Court on this issue.⁷

⁴ *Id.* Claret won at the District Court level, but the Second Circuit Court of Appeals reversed. Claret then waited a year and was drafted by the NFL's Denver Broncos in the third round in the 2005 draft (101st overall), but he failed to make the regular season roster. *See also* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (holding that the non-statutory labor agreement barred an antitrust challenge to the NBA's salary cap and college draft since terms were specifically addressed in the collective bargaining agreement); *Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987) (once impasse reached, an employer may unilaterally implement changes that are reasonably comprehended within the pre-impasse proposals). *Compare* Brown v. Pro-Football, Inc., 518 U.S. 231 (1996) (collective bargaining of utmost importance, and implementation of mandatory weekly salary for practice squad players was legitimate after impasse and fell under the non-statutory labor exemption after an expired CBA); *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995) (draft and salary cap were protected by the non-statutory labor exemption and unilateral implementation was acceptable post-impasse as long as in good faith).

⁵ *See, e.g.,* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS AND ENT. L.J. 113 (2004) (McCann part of Maurice Claret's unsuccessful legal team which challenged the legitimacy of the NFL's "Special Eligibility" rule. *See also*, Tyler Pensyl, *Let Claret Play: Why the Nonstatutory Labor Exemption Should Not Exempt the NFL's Draft Eligibility Rule from the Antitrust Laws*, 37 U. TOL. L. REV. 523 (2006).

⁶ *See* NBA CBA, NBPA.COM, http://www.nbpa.com/cba_articles.php (Article X, Player Eligibility and NBA Draft, Section 1. Player Eligibility)(last visited June 3, 2007).

⁷ Claret, *supra*, note 3.

A. National Basketball Association

The NBA has a history of legal issues with regard to the player draft and minimum age for employment eligibility. Like all of the Big Four leagues, the annual NBA player draft allows the individual league teams to select new members from a large talent pool of players.⁸ In the NBA, that pool traditionally comes from college players, high school players and international players who enter the NBA for the first time.⁹

In the litigation leading up to the brief ruling in *Haywood v. National Basketball Ass'n*, Spencer Haywood successfully challenged (as a violation of antitrust laws) the NBA's rule of the early 1970's mandating that an individual had to be out of high school for four years before even being eligible for the NBA player draft.¹⁰ The Supreme Court's 1971 *Haywood* order to reinstate the District Court injunction in *Denver Rockets v. All-Pro Mgmt., Inc.*, which had been overruled by the Ninth Circuit, effectively held that the NBA rule was invalid.¹¹ This decision ultimately launched the professional careers of high school stars such as Moses Malone, Darryl Dawkins and Bill Willoughby, all of whom jumped directly from high school to the NBA soon thereafter.¹²

The *Haywood* decision cannot be considered outside of its historical context, however. At that time, the American Basketball Association (ABA) was competing with the NBA for talent and market share, and the ABA pursued players other than those already on NBA rosters.¹³ This included Spencer Haywood, a stellar sophomore at the University of Detroit.¹⁴ After one year at Trinidad Junior College (Colorado), Haywood transferred to the University of Detroit and led the nation in rebounds with a 22.1 average and was third in scoring at 32.1 points.¹⁵ Haywood left the University of Detroit after only one season when he signed a \$1.6 million contract with the Denver Rockets of the ABA.

⁸ See NBA Draft Central, ESPN.COM, <http://sports.espn.go.com/nba/draft2005/index> (last visited June 3, 2007).

⁹ The pool of players changed with the NBA CBA established in 2005. See NBA CBA, NBPA.COM, http://www.nbpa.com/cba_articles.php (Article X, Player Eligibility and NBA Draft, Section 1. Player Eligibility)(last visited June 3, 2007). See also Nance, *supra*, note 2.

¹⁰ *Haywood v. Nat'l Basketball Assoc.*, 401 U.S. 1204 (1971). See also, *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F.Supp. 1049, 1057 (C.D. Cal. 1971) (rule stating that an individual "shall not be eligible to be drafted or to be a Player [in the NBA] until four years after . . . his original high school class has been graduated").

¹¹ *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F.Supp. 1049 (C.D. Cal. 1971); *Haywood* at 1206-7.

¹² David Friedman, *Basketball in America*, HOOPSHYPE.COM, April 18, 2005, http://hoopshype.com/articles/america_friedman.htm.

¹³ See Harlan Schreiber, *School's Out: A Legal Analysis of High Schoolers and the NBA Draft*, HOOPSANALYST.COM, December 23, 2003, <http://www.hoopsanalyst.com/draft.htm>.

¹⁴ See Milan Simonich, *Young Pros Owe Spencer Haywood Large Vote of Thanks*, PITTSBURGH POST-GAZETTE, November 8, 2003, <http://www.post-gazette.com/pg/03332/244948.stm>.

¹⁵ See Athlon Sports, *Athlon's No. 42 NBA Greatest: Spencer Haywood*, ATHLONSPORTS.COM, May 9, 2001, <http://www.athlonsports.com/pro-basketball/5465/athlons-no-42-nba-greatest-spencer-haywood>. See also, NBA Media Ventures, LLC, *Spencer Haywood Bio*, NBA.COM, http://www.nba.com/history/players/haywood_bio.html (last visited June 3, 2007).

Haywood earned both the league's Most Valuable Player (MVP) and Rookie-of-the-Year awards.¹⁶

Then, the Seattle Supersonics of the much larger and stronger NBA wanted Haywood to join their team and leave the competing ABA league entirely. At this time, Haywood was not yet four years post high school and playing for Seattle would have violated the NBA employment eligibility policy at that time.¹⁷ Haywood sought a waiver from the NBA rule, but NBA Commissioner Walter Kennedy denied Haywood's request even though he was now a professional athlete in the competing ABA. Haywood subsequently sued the NBA alleging violation of antitrust laws under the Sherman Antitrust Act.¹⁸

The impact of the Supreme Court decision in *Haywood* which overruled the Ninth Circuit's reversal of the District Court's injunction which had allowed him to play was that the NBA's draft rule had anticompetitive effects, and ultimately Haywood could sign a contract in the NBA.¹⁹ Thereafter, the NBA altered its draft eligibility rules to allow any player to enter the draft as long as he had financial need or hardship and this became known as the "hardship rule."²⁰ However, this change was short-lived, essentially dissolved and eventually any player whose class had already graduated from high school became eligible for the draft as the doors to the league were opened to all.²¹

1. The Post-Haywood Effect

After the short influx of star high school players seeking employment in the NBA post-Haywood, only four high school players skipped college and entered the NBA draft from 1975 to 1994.²² In 1988, Shawn Kemp declared for the NBA draft and was drafted by the Seattle Supersonics, but there was virtually no one who challenged the NBA age rule during the 1980s.²³ After 1994, however, the number of high school players seeking employment in the NBA (bypassing college altogether) skyrocketed. In the 1990s, future NBA superstars such as Kevin Garnett (1995), Kobe Bryant and Jermaine O'Neal (1996), and Tracy McGrady (1997) were all drafted directly out of high school.²⁴ In 2000 through 2005, high school players continued the trend to skip college altogether and pursue their NBA hoop dreams.²⁵ The issue of re-establishing the minimum age requirement was

¹⁶ Athlon Sports, *supra*, note 15.

¹⁷ Simonich, *supra*, note 14.

¹⁸ 15 U.S.C. §1 (2007). See *Haywood v. Nat'l Basketball Assoc.*, 401 U.S. 1204 (1971).

¹⁹ *Haywood* at 1207.

²⁰ See generally Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of the Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539 (1998). See also Friedman, *supra*, note 12.

²¹ Rosner at 553. See also Peter Altman, *Stay Out for Three Years After High School or Play in Canada-And for Good Reason an Antitrust Look at Claret v. National Football League*, 70 BROOK. L. REV. 569 (2004).

²² Schreiber, *supra*, note 13.

²³ *Id.*

²⁴ *Id.*

²⁵ See, e.g., WIKIPEDIA.ORG, *NBA High School Players*, http://en.wikipedia.org/wiki/NBA_high_school_players (last visited June 3, 2007).

revisited again publicly by the NBA more than two decades after the *Haywood* decision stirring again great debate.²⁶

Then, in the summer of 2005 during negotiations for a new collective bargaining agreement the NBA and the players' union agreed that there should be some restrictions on the eligibility of players who enter the NBA. It provided a timely opportunity to address minimum "age" concerns in this league following the NFL's favorable *Clarett* decision of 2004-2005.²⁷ A new CBA was negotiated, and the 2005 CBA between the NBA and the National Basketball Players' Association (NBPA) now specifically addresses minimum age requirements.²⁸ The established rule today is that the minimum age is 19.²⁹ Additionally, United States players must be at least one year removed from high school and 19 years of age (by the end of that calendar year) before entering the draft itself. International players eligible for the draft must turn 19 during the calendar year of that draft.³⁰ Interestingly, in the National Basketball Development League (NBDL), the NBA's version of a legitimate sponsored minor league system which began in 2001, the minimum age is now 18 (it was 20 when the league was first established).³¹

Though Spencer Haywood's successful lawsuit demonstrated the arbitrariness of the old NBA minimum age employment policy, today this issue has been established as a matter of collective bargaining and considers a combination of age coupled with at least one year after the high school graduating class.³² Thus, no high school seniors are eligible to enter the NBA draft that same year.³³ Only time will tell how this rule plays out both functionally and in the court of public opinion.³⁴ However, the choices for high school players appear to be either to enter college and possibly play in the NBA the following year, play in a league outside of the United States for a year first, pursue employment with the NBDL (though at a much lower pay scale), or just wait one year altogether.

²⁶ Ian Thomsen, *Older but not Wiser*, SI.COM, March 5, 2003, http://sportsillustrated.cnn.com/si_online/news/2003/03/04/nba/.

²⁷ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [*Clarett I*], *rev'd*, 369 F.3d 124 (2d Cir. 2004) [*Clarett II*], *cert. denied*, 125 S.Ct. 1728 (2005) (challenge to NFL minimum age rule unsuccessful).

²⁸ NBPA.COM, *NBA CBA, Article X, Player Eligibility and NBA Draft, Section 1. Player Eligibility*, http://www.nbpa.com/cba_articles.php (last visited June 3, 2007). See also Nance, *supra*, note 3.

²⁹ NBPA.COM, *supra*, note 28.

³⁰ *Id.* See also Cimino, *supra*, note 3, at 843.

³¹ Sportsticker, *D-League Lowers the Age Requirement to 18*, ESPN.COM, April 13, 2006, <http://sports.espn.go.com/nba/news/story?id=2407522> (last visited August 17, 2006). Compare Christopher L. Brown, *Utilizing the Sherman Act to Defeat Age Discrimination in Professional Basketball*, MURTHALAW.COM, February 2002, http://www.murthalaw.com/_documents/NewsEvent%5CNewsEvent52.pdf (last visited August 17, 2006).

³² NBPA.COM, *supra*, note 26.

³³ *Id.*

³⁴ See generally Daniel A. Applegate, *The NBA Gets a College Education: An Antitrust and Labor Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825 (2006).

B. National Football League

Similar to the NBA, the NFL had issues and legal challenges to its own minimum age employment policy. After Harold “Red” Grange left the University of Illinois at the end of the 1925 college season (his senior year) and turned professional by joining the Chicago Bears, the NFL instituted a policy of four years post high school graduation before an athlete would even be eligible to be drafted.³⁵ This became known as “The Grange Rule” of 1926 in which no NFL member team could pursue a college football player until his college class had graduated.³⁶ Until 1984, the NFL refused to even allow players who had any remaining collegiate eligibility to enter the NFL draft at all with only a few exceptions which also had to be approved by the NFL Commissioner.³⁷ Interestingly, however, the NFL did not set a minimum age *per se*, but rather related employment eligibility to the number of years after high school graduation akin to the NBA policy in the *Haywood* era.

1. Hardship Exception

The NFL policy was inconsistent, however, granting employment eligibility exceptions to the minimum age rule for the vague term “hardship” or, as a practical matter, if the player threatened to sue under federal antitrust laws. For example, in 1964 the NFL allowed Andy Livingston, a nineteen-year-old running back, to sign a contract with the Chicago Bears only one season removed from high school.³⁸ In 1974, Clarence Reece left the University of Southern California following his sophomore year and played in the Canadian Football League (CFL). In 1975 he then signed a contract with the Houston Oilers of the NFL. The contract, however, was voided by NFL Commissioner Pete Rozelle on the grounds that Reece had not satisfied the league’s eligibility requirements.³⁹ Reece claimed that the eligibility rules constituted an illegal group boycott (in violation of antitrust laws) and sued. Upon assurances that no league team had encouraged Reece to leave college, Rozelle backed-down and changed his mind.⁴⁰

There was very little discussion of minimum age in the NFL after either Livingston or Reece. Still, the NFL four-year post high school graduation hurdle was reduced to three years in 1990, before Maurice Claret’s challenge made national

³⁵ See *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 385 (S.D.N.Y. 2004).

³⁶ *Id.* See also, Bob Carroll, *The Grange War: 1926*, FOOTBALLRESEARCH.COM, <http://www.footballresearch.com/articles/frpage.cfm?topic=00-1926> (last visited June 3, 2007).

³⁷ See, e.g., *Boris v. United States Football League*, No. CV 83 4980, 1984 U.S. Dist. LEXIS 19061 (C.D. Cal. Feb. 28, 1984). See generally Robert A. McCormick & Matthew C. McKinnon, *Professional Football’s Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L. J. 375 (1984).

³⁸ McCormick & McKinnon, *supra*, note 37 at 377, n.11.

³⁹ *Id.*

⁴⁰ *Id.* Compare *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (“Rozelle Rule” which restricted player movement between teams was held to be an unreasonable restraint of trade utilizing antitrust analysis).

headlines.⁴¹ This allowed anyone to enter the draft if he was just three years out of high school. This policy was related to a date established by a high school graduating class as opposed to a specific minimum age.

2. The *Clarett* Decision

Former Ohio State running back Maurice Clarett sued the NFL in 2004, stirring great debate at the national level over the legality of minimum age policies (or eligibility based upon years post high school graduation) in professional sports. In fact, Clarett's challenge may have been the impetus behind the change in current NBA policy toward disallowing NBA draftees directly from high school.⁴² Clarett's initial victory in United States District Court was pyrrhic as the Second Circuit Court of Appeals overturned the District Court's decision shortly thereafter, affirming that a minimum age policy (or years post-graduation) may be a subject of the collective bargaining process and that Clarett's challenge was without merit in that it fell under the non-statutory labor exemption.⁴³ Therefore, this issue was not a matter for the courts.⁴⁴ In 2005, the Supreme Court declined to hear his appeal that the NFL rule unreasonably violated his right to pursue gainful employment in the NFL.⁴⁵

C. United States Football League

Interestingly, the NFL had a legitimate challenge for the professional football market share in the United States in the 1980's with the establishment of a competing spring football league. The now defunct spring United States Football League (USFL) had antitrust issues related to minimum age and draft eligibility too (in addition to issues with the NFL generally) which could have had an impact on the change in NFL minimum age or draft eligibility policy much earlier than the *Clarett* decisions of 2004 and 2005.⁴⁶ Robert Boris, a varsity football player at the University of Arizona who held junior status, withdrew from college and attempted to enter the USFL draft, but the USFL had a rule calling for a player to be at least 21 years old or completed college before he could be drafted in the USFL. Finding himself barred by this minimum age and draft-eligibility rule, he sued.

⁴¹ Charles Lane, *Clarett Lines Up Against NFL*, THE CINCINNATI POST ONLINE, January 24, 2004, <http://www.cincypost.com/2004/01/24/clarett01-24-2004.html>.

⁴² See Cimino, *supra*, note 2 at 834-835.

⁴³ *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004) [*Clarett II*], *cert. denied*, 125 S.Ct. 1728 (2005).

⁴⁴ *Id.* See also *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (collective bargaining is of utmost importance, as opposed to judicial scrutiny, and implementation of mandatory weekly salary for practice squad players was legitimate after impasse and under the non-statutory labor exemption after an expired CBA).

⁴⁵ *Clarett II*, *supra*, note 43.

⁴⁶ See *United States Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988) (allegations of antitrust violations were successful though being awarded \$1 in nominal damages which trebled to \$3 plus interest).

In *Boris v. United States Football League*, Boris challenged the USFL rule as a violation of the federal antitrust laws. Boris won and the league did not appeal the decision.⁴⁷ The Central District Court of California held that the USFL could not unilaterally impose such a minimum age or minimum age eligibility rule as it was considered an illegal group boycott.⁴⁸ The USFL folded in 1986 and filed for bankruptcy protection after only three seasons as a spring professional football league.⁴⁹

Though Boris's successful challenge to the USFL's minimum age and draft eligibility rules was revisited twenty years later in the *Clarett* decision. *Boris* demonstrates that concerns over minimum age and antitrust matter regardless whether the league is a start-up league or an established one such as the NFL. Still, *Boris* appears to hold little precedential value as it was merely a district court decision and subsequent cases such as *Brown v. Pro Football, Inc.*⁵⁰ (a Supreme Court decision) and the *Clarett* saga (a Second Circuit Court of Appeals decision) have somewhat clarified the antitrust concerns regarding draft and minimum age rules in the NFL.⁵¹

D. Major League Baseball

There have been few issues related to minimum age in professional baseball. MLB has a complex and functional minor league system which thrives on drafting and then developing younger players usually directly out of high school or college. This system is much different than in the NFL or NBA which have traditionally fed off of a talent pool consisting primarily of college players.⁵² The minor league baseball system caters to developing players and providing a solid labor resource for Major League teams.⁵³ In fact it is quite common for a high school graduates to skip college altogether and to later return to pursue college after living their professional baseball dream. This structured minor league system most likely contributes to the lack of legal action

⁴⁷ *Boris v. United States Football League*, No. CV 83 4980, 1984 U.S. Dist. LEXIS 19061 (C.D. Cal. Feb. 28, 1984).

⁴⁸ *Id.*

⁴⁹ See also generally, Robert C. Heintel, *The Need for an Alternative to Antitrust Regulation of the National Football League*, 46 CASE W. RES. 1033 (1996).

⁵⁰ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

⁵¹ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [*Clarett I*], *rev'd*, 369 F.3d 124 (2d Cir. 2004) [*Clarett II*], *cert. denied*, 125 S.Ct. 1728 (2005).

⁵² The NFL's and NBA's "minor league" systems have traditionally been the student-athletes from the National Collegiate Athletic Association (NCAA) member institutions. There is no minimum or maximum age according to NCAA bylaws. See NCAA.ORG, 2006-7 NCAA Division I Manual, http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf (last visited June 3, 2007). But See *Banks v. NCAA*, 977 F.2d 1081, 1089-90 (7th Cir. 1992) ("The NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur athletes pursuing a college education.").

⁵³ See generally, MILB.COM, *Minor League Baseball History*, <http://www.minorleaguebaseball.com/app/milb/history/> (last visited June 3, 2007).

instituted regarding minimum age concerns since draftees and others who sign free agent contracts are well aware that they must work their way up to the Major League.⁵⁴

Still, MLB has had a policy against signing international players to a contract before the player reaches age 16. In 2000, the Los Angeles Dodgers allegedly violated such policy by recruiting and signing Venezuelan pitcher Felix Arreola who was only 15 at the time.⁵⁵ Cuban-born player Adrian Beltre was signed at age 15 in 1994 and the Dodgers were fined accordingly.⁵⁶ The Dodgers were also fined \$200,000 by Commissioner Bud Selig for signing two under-aged Cuban players, Josue Perez and Juan Carlos Diaz in 1999.⁵⁷ In 2002, MLB established a league policy that even batboys or batgirls have to be a minimum of 14 years of age after San Francisco Giants Manager Dusty Baker's three-year-old son Darren was almost run-over during a game in the 2002 World Series.⁵⁸ This has become known as the "Darren Baker Rule."⁵⁹ MLB has not had legal issues related to minimum age other than the policies against drafting international players under the age of 16.⁶⁰

E. National Hockey League

Issues related to minimum age in the NHL have not been much of a concern because most draftees begin their professional careers with the minor league teams that are affiliated with NHL teams, working their way up to the highest level of play in the NHL. This is similar to the minor league system established in MLB.⁶¹ After a year-long lockout which suspended the entire 2004-2005 NHL season, the NHL owners and players finally reached a CBA and returned to action in 2005-2006.⁶² The current six-year CBA

⁵⁴ Generally, person becomes eligible for the MLB draft if he or she is either a high school senior who has graduated or, is not drafted from high school, is a junior at a four-year college, or turns 21 within 45 days following the draft. See, e.g., *First-Year Player Draft*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited June 4, 2007).

⁵⁵ See Andrew Goodman, *Dodgers Investigated Over Foreign Player Recruiting Rules*, SPORTSLAWNEWS.COM, 2000, <http://www.sportslawnews.com/archive/Articles%202000/Dodgerssignings.htm> (last visited June 3, 2007) (Professor Mark Conrad's *Mark's Sportslaw News*).

⁵⁶ *Id.*

⁵⁷ Jim Mandelaro, *A Free Swinger: Cuban Defector Diaz Offers Power*, DEMOCRATANDCHRONICLE.COM, July 7, 2004, http://www.democratandchronicle.com/sports/wings/07072U4R552_sports.shtml.

⁵⁸ Associated Press, *Baker's Son Having a Field Day*, ST. PETERSBURG TIMES ONLINE, February 24, 2003, http://www.sptimes.com/2003/02/24/Sports/Baker_s_son_having_a_.shtml.

⁵⁹ *Id.*

⁶⁰ See also Vanessa Marie Zimmer, *Dragging Their Devotion: The Role of International Law in Major League Baseball's Dominican Affairs*, 4 NW. U.J. OF INT'L HUM. RTS. 418 (2005) <http://www.law.northwestern.edu/journals/jihr/v4/n2/6/> (last visited June 3, 2007).

⁶¹ See, e.g., *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972). See also *NHLPA v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003), *appeal after remand* at 419 F.3d 462 (6th Cir. 2005). See also Rosner, *supra*, note 20 at 553-555.

⁶² Evan Weiner, *Don't Believe the Gripe: The NHL is Back*, N.Y. SUN, June 16, 2006, <http://www.nysun.com/article/34542>.

specifically addresses a minimum age, and all players must be age 18 by September 15 in the year in which the draft is held.⁶³ Minimum age is incorporated in this most recent NHL collective bargaining agreement though years after high school are not addressed at all.

F. World Hockey Association

Former NHL league competitor World Hockey League (WHA) was sued by a nineteen-year-old amateur hockey player who challenged the WHA rule which prohibited a player under the age of 20 from playing with any WHA team. In this case, *Linseman v. World Hockey Ass'n*, the WHA contended that its own minimum age rule was necessary to insure a pool of talented teenagers for the Canadian junior teams which developed players for the WHA in a manner similar to the NHL's minor league system.⁶⁴ Allegedly, without the age rule the Canadian Junior Hockey League would fail because most talented teenagers would sign with other professional teams in other leagues. The United States District Court for Connecticut rejected these arguments, however, and held that an inflexible 20 year-old age minimum rule constituted an unreasonable restraint of trade under section 1 of the Sherman Antitrust Act.⁶⁵ Like *Boris* it appears that *Linseman* holds marginal precedential value as it was only a district court decision and the WHA ultimately fell by the wayside along with the ABA and USFL leagues.

G. Other Professional Sports

Not all professional sports involve the collective bargaining process such as the Big Four, and the legality of the minimum age draft or eligibility requirements in the Big Four might still be challenged again someday by a disgruntled plaintiff. At present, however, the law related to minimum age restrictions in the professional sports leagues weighs heavily in favor as a byproduct of the collective bargaining process as discussed in the *Clarett* saga.⁶⁶ Other professional sports have had a noticeable impact from the advent of very young competitors, too, most notably in tennis and golf. In these sports, the respective organizations set minimum age standards for participation. A big difference from the Big Four, however, is that professional athletes in these sports are usually independent contractors rather than employees of a team or league. Further, non-unionized league commissioners (such as tennis and golf) have considerable leeway to

⁶³ NHL.COM, *NHL CBA, Article 8. Entry Draft*, <http://www.nhl.com/nhlhq/cba/archive/cba/article8.html> (last visited June 3, 2007). *See also*, NHL.COM, *NHL CBA, Article 9. Entry Level Compensation*, <http://www.nhl.com/nhlhq/cba/archive/cba/article9.html> (last visited June 3, 2007) (Players who sign their first NHL contract between the ages 18-21 are required to sign three-year entry level contracts; players age 22-23 are required to sign two-year deals; and players age 24 are required to sign a one-year entry level contract).

⁶⁴ *Linseman v. World Hockey Assoc.*, 439 F. Supp. 1315 (D. Conn. 1977).

⁶⁵ *Id.* (The WHA folded in 1979; four teams joined the NHL). *See Rosner, supra*, note 20 at 554.

⁶⁶ *See Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) [*Clarett I*], *rev'd*, 369 F.3d 124 (2d Cir. 2004) [*Clarett II*], *cert. denied*, 125 S.Ct. 1728 (2005).

waive minimum age standards on a case-by-case basis and have done so recently especially in women's golf.⁶⁷

1. Tennis

Professional tennis does not have minor league systems such as those found in the NHL or MLB though it does have different levels of play. The Women's Tennis Association (WTA) Tour governs women's professional tennis and has set up age eligibility rules primarily over concerns related to young women burning burnout in the sport even before the age of 22.⁶⁸ There have been numerous examples of very young and talented tennis players who have competed successfully as professionals. For example, American Jennifer Capriati became the youngest Grand Slam semifinalist ever at age 14 in the 1990 French Open. Capriati started as a professional tennis player at age 13 and, after personal and legal problems, reportedly became burned out at the age of 17 prompting enactment of the WTA's Jennifer "Capriati Rule" now limiting the number of tournaments an underage female pro can play.⁶⁹ Today, women under the age of 14 cannot play professionally, and beyond that age may only participate in a maximum number of pro tournaments until they reach the age of 18.⁷⁰ Men under the age of 14 are not permitted to play professionally on the ATP Tour (formerly Association of Tennis Professionals). From the ages of 14 to 16 they may only play a limited number of pro tournaments.⁷¹

⁶⁷ See Associated Press, *LPGA Waives Age Limit for Morgan Pressel*, USATODAY.COM, December 19, 2005, http://www.usatoday.com/sports/golf/lpga/2005-12-19-pressel-age-limit_x.htm. (Pressel granted an exemption though only 17). See also, News Reports, *Dowd, 12, Given LPGA Exemption for Sick Mom*, ESPN.COM, <http://sports.espn.go.com/golf/news/story?id=2218526> (last visited June 3, 2007) (Dowd granted an exemption though only 12 since her mother's illness sparked national interest and concern).

⁶⁸ See WTATOUR.COM, *Age Eligibility and Professional Development*, <http://www.sonyericssonwtatour.com/global/includes/TrackIt.asp?file=/global/pdfs/shared/pd/aer.pdf> (last visited June 3, 2007). There are a variety of levels of play involving different levels of professional tournaments. The International Tennis Federation (ITF), for example, has jurisdiction over the four "Grand Slam" tournaments: the Australian Open, the French Open, the Lawn Tennis Championships (also known as Wimbledon), and the U.S. Open. The ATP (formerly the Association of Tennis Professionals), has jurisdiction over the men's professional events except for the Grand Slam tournaments.

⁶⁹ WTATOUR.COM, *supra*, note 67. (Consider that American Aaron Krickstein became the youngest player (age 16) to win on the ATP Tour and was ranked in the top 10 in the world at age 17. Three-time Australian Open winner Martina Hingis of Switzerland turned professional at age 14 in 1994 while Russian Anna Kournikova, who also turned professional at age 14, won her first professional title at age 15. Martina Navratilova turned professional at age 16, Maria Sharapova turned professional in 2001 at age 14, and the list goes on).

⁷⁰ *Id.* See also Christine Brennan, *Youngsters As Pros a Topic of Major Concern*, USAToday.com, December 8, 2005, http://usatoday.com/sports/columnist/brennan/2005-12-08-brennan-young-professionals_x.htm.

⁷¹ ATPTENNIS.COM, *2007 Rulebook*, http://www.atptennis.com/en/common/TrackIt.asp?file=http://www.atptennis.com/en/players/ATP_Rulebook2007.pdf (last visited June 3, 2007). See also, Janice Combs, *Alternate Circuits*,

2. Golf

In professional golf, the Ladies Professional Golf Association (LPGA) has stood firm by not allowing membership unless the player is at least 18 years old.⁷² Still, if the amateur is between the age of 15 and 18, she can petition the LPGA commissioner for membership exemption.⁷³ That policy can be waived if the player demonstrates both the playing ability and the financial resources to survive on tour. If a player obtains her pro card through qualifying school (Q-school), then she may ask for a waiver of the minimum age policy as well.⁷⁴

At the end of 2005, LPGA Commissioner Carolyn Bivens granted American high-schooler Morgan Pressel full LPGA Tour membership effective January, 2006.⁷⁵ Pressel actually turned professional in November, 2005, six months before she was eligible to join the LPGA Tour. She even qualified for the U.S. Women's Open at age 12. While the LPGA Tour originally denied her request, it did allow her to go to Q-school. One may still turn professional, such as Michelle Wie, at any time, but the player may not join the LPGA Tour until she is 18 as a general rule.⁷⁶

In men's golf, all members of the PGA Tour must be at least 18 years old after Ty Tryon, at age 16, became the youngest to qualify as a full-time member in 2001 (known as the "Tryon Rule").⁷⁷ The PGA Tour is a membership group of professional golfers that actually plays on the following three tours: the PGA Tour, the Champions Tour and the Nationwide Tour. There are various "majors" in this sport including the Masters Tournament, U.S. Open, British Open and PGA Championship. To participate on the Champions Tour (formerly known as the "Senior Tour"), one must be at least 50 years old prior to the first tournament of that given year.⁷⁸

II. ANTITRUST CONSIDERATIONS

The courts have held that section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade.⁷⁹ Key to understanding this section of the Sherman Act is that

TENNISTRAINER.COM, n.d., <http://www.tennistrainer.com/alternatecircuits.html> (last visited June 3, 2007).

⁷² Steve Elling, *Talented Youths Take Aim at LPGA*, ORLANDO SENTINEL.COM, July 19, 2005, http://www.lpga.com/content_1.aspx?pid=4345&mid=4.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* See also, Associated Press, *supra*, note 67.

⁷⁶ USGA.org., *Michelle Wie Accepts Special Exemption to 2004 U.S. Women's Open*, USGA.ORG, May 20, 2004, http://www.usga.org/news/2004/May/2004_44.html. (Michelle Wie at age 14 granted special exemption to play in the 2004 U.S. Women's Open sponsored by the U.S. Golf Association (USGA)).

⁷⁷ Mark Hyman, *A Frantic Search for the Next Tiger*, BUSINESSWEEK.COM, November 26, 2001, http://www.businessweek.com/magazine/content/01_48/b3759102.htm. (rule now bars players under 18 from Tour membership).

⁷⁸ See, Greg Hardwig, *When to Join Champions Tour a Tough Decision*, NAPLESNEWS.COM, February 19, 2006, http://www.naplesnews.com/news/2006/feb/19/when_join_champions_tour_tough_decision/?ace.

⁷⁹ See Rosner, *supra*, note 20 at 547-550.

only unreasonable restraints of trade violate the Act.⁸⁰ Thus, an important issue for a court is to determine whether or not league or organizational minimum age rules constitute an unreasonable restraint of trade. The ability to determine whether something is or is not unreasonable cuts to the core challenge for courts, and decisions simply are not crystal clear in American jurisprudence. Minimum age issues now lean toward an “affirmative” response since it appears after *Clarett* that age is a mandatory subject of collective bargaining and that this is more a matter of labor law since it falls under the non-statutory labor exemption.⁸¹ This exemption, of course, stands for the position that when players form a union that they cannot challenge a restraint which is considered a mandatory subject of collective bargaining since it falls under labor law, not antitrust law.⁸²

Courts will utilize three methods to determine whether or not the rules (i.e., “restraints”) are unreasonable. The three methods include the established “rule of reason” analysis (an agreement is considered unlawful if it causes an anticompetitive injury that outweighs any pro-competitive effects), the “per se” analysis (some agreements have such a pernicious anticompetitive effect such as group boycotts, price-fixing schemes or refusals to deal), and the recent “quick look” analysis test (used when a restraint is not per se unlawful, but is sufficiently anticompetitive on its face that a full rule of reason analysis is not necessary, allowing a court to avoid the elaborate and expensive rule of reason analysis).⁸³ All three methods of analysis have been created and utilized by the courts when interpreting the federal antitrust laws over the last century.⁸⁴

Though there is no bright-line judicial test to determine whether minimum age for employment purposes in professional sports is best suited for collective bargaining rather than judicial intervention, the courts (including the Supreme Court) have sent a strong message that the scales lean heavily toward it as a matter for the collective bargaining process (i.e. labor law) after the Supreme Court decision in *Brown v. Pro Football, Inc.*⁸⁵

⁸⁰ See Applegate, *supra*, note 34 at 827, citing *Standard Oil Co. v. United States*, 221 U.S. 1, 86-92 (1911).

⁸¹ *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004) [*Clarett II*], *cert. denied*, 125 S.Ct. 1728 (2005).

⁸² *Brown v. Pro Football, Inc.* 518 U.S. 231 (1996) (Supreme Court sent a strong message that mandatory subjects such as wages in collective bargaining process are better suited as a labor issue, not an antitrust issue and not a matter for the courts). See also, Stephen F. Ross, *International Sports Law & Business in the 21st Century: Player Restraints and Competition Throughout the World*, 15 Marq. Sports L. Rev. 49, 57-58 (2004).

⁸³ See *California Dental Ass'n v. FTC*, 526 U.S. 756, 769-70 (1999) (abbreviated “quick-look” analysis acceptable method to analyze possible antitrust violation). See also Rosner, *supra*, note 20 at 543-547. See also, Michael A. McCann & Joseph S. Rosen, Law, Technology and the Arts Symposium: *Sports and Eligibility-Who is Eligible to Play?: Legality of Age Restrictions in the NBA and NFL*, 56 CASE W. RES. 731, 734-736 (2006).

⁸⁴ See *Standard Oil v. U.S.*, 221 U.S. 1 (1911); *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231 (1918); *Allen Bradley Co. v. Intellectual Bhd. of Elec. Workers*, 325 U.S. 797 (1945); *Northern Pacific Ry. v. U.S.*, 356 U.S. 1 (1957); *United Mine Workers Ass'n v. Pennington*, 381 U.S. 657 (1965); *Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965); *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

⁸⁵ *Brown v. Pro Football, Inc.* 518 U.S. 231 (1996).

and the Second Circuit decision in *Clarett*.⁸⁶ However, both *Brown* and *Clarett* were responses to antitrust challenges to an expired collective bargaining agreement or the minimum age requirement respectively, the *Clarett* decision was only a Second Circuit Court of Appeals decision, and the *Brown* decision did not involve minimum age but rather salary issues unilaterally imposed after impasse.⁸⁷ Another federal circuit might rule differently in the future under different circumstances due to the lack of a clear ruling on this issue by the Supreme Court.⁸⁸ There still remains an argument as to whether “age” was actually collectively bargained in the first place with regard to the *Clarett* case since the evidence demonstrated that it was at best negotiated in a side letter or agreement between the NFL and the NFLPA (the players’ union), but debate over the rationality of any minimum age rule in professional sports is likely moot until the Supreme Court rules differently than the *Clarett* case.⁸⁹

The two other professional leagues (NBA and NHL) specifically addressed minimum age post-*Clarett* in their own collective bargaining agreements. A hybrid of sorts, the NBA established that there would not only be a minimum age of 19 for players, but also that they had to be at least one-year removed from their high school graduation.⁹⁰ The NHL rule focuses on minimum age only without consideration of high school graduation.⁹¹ Again, addressing minimum age issues in these leagues coupled with *Clarett* tips the balance towards as minimum age as a legitimate and mandatory subject for collective bargaining. In the end, a plaintiff who alleges that an employer’s refusal to hire them (or draft them) based upon an established policy which requires a certain minimum age or years post-high school will have a heavy burden to demonstrate that minimum age rules indeed are not exempt from antitrust scrutiny and therefore do not fall under the mandatory subjects of the collective bargaining process.

⁸⁶ *But see*, Rosner, *supra*, note 20 at 559-561 referencing the “Mackey Test” as formulated in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (8th Circuit established a three-prong analysis for applying the non-statutory labor exemption, most notably that an issue must arise out of bona fide arm’s length bargaining in order to fall under the exemption). The Eighth Circuit held that the NFL’s “Rozelle Rule” was an unreasonable restraint of trade because it was not a byproduct of bona fide arm’s length negotiations. *See also* Applegate, *supra*, note 34 at 831-832, noting that only the Sixth and Ninth Circuits have adopted the “Mackey Test” for guidance as to whether the non-statutory labor exemption applies.

⁸⁷ *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996) (collective bargaining is of utmost importance, and implementation of mandatory weekly salary for practice squad players was legitimate even after impasse and fell under the non-statutory labor exemption even after an expired CBA).

⁸⁸ *E.g.*, *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (“Rozelle Rule” held to be an unreasonable restraint of trade utilizing antitrust analysis).

⁸⁹ *See* McCann & Rosen, *supra*, note 82 at 733-734 (arguing that unilaterally imposed side agreement or letter was clearly not a matter of arms-length collective bargaining). *Compare* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS AND ENT. L.J. 113 (2004).

⁹⁰ NBA CBA, NBPA.COM, http://www.nbpa.com/cba_articles.php (Article X, Player Eligibility and NBA Draft, Section 1. Player Eligibility)(last visited June 3, 2007).

⁹¹ NHL.COM, *NHL CBA, Article 8. Entry Draft*, <http://www.nhl.com/nhlhq/cba/archive/cba/article8.html> (last visited June 3, 2007).

III. POLICY CONSIDERATIONS

It is interesting to see how the league commissioners and courts have addressed challenges to minimum age rules over time both as a matter of judicial scrutiny and as a subject of collective bargaining. There have been differences in approach with regard to dealing with this issue and many questions remain unanswered. In tennis, concerns over early burnout and “growing up too soon” appear to justify such minimum age policies. In golf, though age policies exist, one can apply for an exemption and in both men’s and women’s golf such exemptions have been granted. No unions exist to challenge minimum age rules in these organizations, however, making the context of imposing such restraints remarkably different than in the Big Four.

In the Big Four, however, where unionized relationships prevail, debate over minimum age policy takes on different perspective which has often required litigation (or the threat of litigation) for a determination on the merits of such a rule. Additionally, in the Big Four, the minimum age rules have been applied inconsistently. Why, for example, did the NFL grant Andy Livingston a hardship waiver in the 1960s without opposition from the NFLPA, but then the NFL fought Maurice Clarett’s minimum age challenges in 2004? Contemporaneous to the *Clarett* decision, the NFL granted a waiver allowing Larry Fitzgerald, a wide-receiver from the University of Pittsburgh, to participate in the 2004 draft even though only two and a half years had passed from the date of his high school graduation instead of the requisite three.⁹² Are the minimum age rules designed to demonstrate a paternalistic approach to protect the health and safety of younger players especially in the violent sport of football as noted in *Clarett* case who might not be mentally or physically mature for their league?⁹³ Is it to keep professional coaches and general managers out of high school gyms?⁹⁴ Is it to protect older employees’ jobs from a pool of players who are not yet even old enough to vote? Is it a deterrent to using performance-enhancing drugs in accelerating one’s athletic performance so that a young athlete might be able to gain a non-natural athletic advantage?⁹⁵ These questions are not easily answered, but after the *Clarett* decision the rationality of the policy reasons behind such minimum age rules might be irrelevant if age is characterized as a mandatory subject of collective bargaining thereby receiving immunity from antitrust scrutiny under the non-statutory labor exemption, and the Supreme Court refuses to address this issue specifically.⁹⁶

IV. CONCLUSION

Minimum age for employment purposes in professional sports remains prominent in discussion and debate. Though current Big Four policies regarding minimum age or

⁹² Simonich, *supra*, note 14. See also, McCann & Rosen, *supra*, note 81 at 732-733.

⁹³ McCann & Rosen, *supra*, note 82 at 732-733.

⁹⁴ Applegate, *supra*, note 34 citing Michael Lee, *Pro Ball Calls, Not All Ready; Commissioner Tries to Slow High School Flow into NBA*, ATLANTA J.-CONST., June 20, 2004, at 1E, at note 5.

⁹⁵ See *Clarett v. Nat’l Football League*, 306 F. Supp. 2d 379, 387 (S.D.N.Y. 2004) [*Clarett I*] (challenge to NFL minimum age rule unsuccessful).

⁹⁶ But see Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 Va. Sports & Ent. L.J. 113 (2004).

participant eligibility might change over time, the current rules are a byproduct of judicial decisions or the arms-length collective bargaining process. Spencer Haywood successfully challenged the NBA policy in the 1970s and that brief yet powerful Supreme Court decision to reinstate an injunction imposed by the District Court which allowed Haywood to play sent a message that such employment rules must be collectively bargained in that union context. In the 1996 decision of *Brown v. Pro Football, Inc.*, the Supreme Court also sent a message that labor law and the collective bargaining process is more favorable for mandatory subjects of collective bargaining (even after the expiration of a collective bargaining agreement) rather than resorting to litigation in the judicial system under allegations of violations of federal antitrust principles.

In non-unionized sports such as tennis and golf, the relationship between minimum age policies and the granting of case-by-case exemptions by organizational commissioners seem to be functional and effective and have yet to be challenged in the courts. Also, these commissioners have addressed such concerns without union interference since there are no unions. These organizations are much different than the environment of the Big Four. In golf and tennis the sports are generally individual sports (as opposed to team sports of the Big Four), the culture is different, the athletes are not drafted, the sports are non-contact, the leagues or tournaments do not have minor league farm systems, and the participants also would not normally be characterized as employees but rather independent contractors.

As of today, the NBA is the only league that has a strict minimum age policy coupled with a one-year wait after high school graduation for initial draft eligibility or for employment in that league at all. The NHL and MLB do not address minimum age in a similar combination, but the NHL minimum age rule appears to allow for virtually no exceptions in its new CBA and MLB does have a specific minimum-age rule with regard to drafting international players. The possible policy reasons for instituting a minimum age rule depend upon the history and development of the individual league and the relationship between the owners and the players. However, after the Supreme Court decisions in *Haywood* and *Brown*, and then the Court's refusal to grant certiorari to *Clarett*, the policy reasons might not matter, and there is little use for debate as long as the minimum age issue is interpreted to be a byproduct of the collective bargaining process even if it was formed or simply found in a side agreement or basic memorandum.