

Babe Ruth: Sultan of Sweets

By David Krell

Baseball's treasure chest of lore rests on the achievements of standouts, those players that break records, win championships, and exemplify excellence. From Al Kaline to Zack Wheat and everyone in between, baseball's greatest players define, enhance, and, in some cases, revolutionize the National Pastime.

In the 1993 film *The Sandlot*, a great player's ghost advises Benny Rodriguez—the best of the sandlot players—“Remember, kid. There's heroes and there's legends. Heroes get remembered, but legends never die. Follow your heart, kid. And you'll never go wrong.”

Heroes and legends. The baseball player fell into both categories

George Herman Ruth.

The Babe.

Beginning his career with the Boston Red Sox in 1914 as a pitcher, Babe Ruth found himself in a New York Yankees uniform for the 1920 season. The reason for the trade stemmed from Red Sox owner Harry Frazee's financial situation. Simply, he could not afford to keep Ruth on the Red Sox payroll because of debts due plus financial interests in the theatrical arena.

Baseball lore depicted Frazee as bargaining Ruth for money to invest in the Broadway musical *No, No, Nanette*. The story appeared logical. But it's only half true.

No, No, Nanette debuted on Broadway in 1925—five years after the trade to the Yankees. Its genesis, however, was another play that sourced Frazee's reasons for getting rid of Ruth. Waite Hoyt explained the details in an interview for the Baseball Hall of Fame. Hoyt was on the Boston Red Sox roster for the 1920 season.

Before the season opened, we played an exhibition series with the New York Giants at the Polo Grounds. There was a notice posted on our bulletin board that we were invited to a theatrical performance, a light comedy, called *My Lady Friends*, that Harry Frazee was producing. There would be tickets at the box office.

We went to the show, and it was quite amusing, very good. We enjoyed it a great deal.

That show was put to music in 1924 and became *No, No, Nanette*.... If you trace it back, it was the sale of Babe Ruth that provided Harry Frazee with the \$125,000 to produce that show.¹

Ruth found a home in New York City, a metropolis where exploits appeared larger. In Ruth's case, the appearances were not deceiving. A 22-year career from 1914 to 1935 yielded a .342 batting average, 714 home runs, and 2873 hits.

His record of 714 home runs stood for nearly 40 years until Henry Aaron broke it in 1974. Aaron ended his career with 755 home runs. Barry Bonds ended his career in 2007 with 762 home runs, but the verdict is shaky regarding acceptance by baseball historians, scholars, and fans because of Bonds's controversies regarding steroid use.

In 1927, Ruth crashed 60 home runs. It was a feat that remained unreachable till Roger Maris hit 61 in 1961. Hank Greenberg came close in 1938 when he hit 58 home runs.

Ruth dominated the 1920s, a gust of fresh air after the Black Sox scandal of 1919 tarnished the game when eight players from the Chicago White Sox were accused of fixing the World Series so the Cincinnati Reds could win it. Though the players were acquitted, the black mark left on the game inspired the newly hired commissioner, Kenesaw Mountain Landis, to bar them from baseball for life. Ruth's success brought people back to the ballpark and inspired the nickname “The House That Ruth Built” for Yankee Stadium.

Ruth's exploits provided a new chapter for baseball and a much needed distraction. The 1920s matched him perfectly—a free-wheeling era in cities where speakeasies violated Prohibition. “In a time of venial sin in a city of venial sin, the man of magnified venial sin would become the Sultan of Swat, the Caliph of Clout, the Wizard of Whack, the Rajah of Rap, the Wazir of Wham, the Mammoth of Maul, the Maharajah of Mash, the Bambino. The Bam. The Big Bam.”²

Babe Ruth found that the sweetness of success could turn bitter, though. When Ruth tried to register “Ruth's Home Run” and “George H. ‘Babe’ Ruth” as trademarks for candy in 1926, he struck out.

In *George H. Ruth Candy Co., Inc. v. Curtiss Candy Co.*,³ the Court of Customs and Patent Appeals held that Cur-

tiss Candy Company's "Baby Ruth" mark for candy bars trumped Babe Ruth's name because of prior use.

Appellee sets up adoption and use, through predecessors in business, of the notation "Baby Ruth" as early as 1919, and use continually since said year, upon the same class of goods, viz., candy. Ownership of registration of said mark "Baby Ruth" for chocolate coated candy bars is also set up by appellee, said registration having been issued on May 27, 1924.⁴

The court addressed the trademark examiner's view of Babe Ruth's trademark rights regarding registration. The rights were strong, but not limitless—the trademark examiner had found that the name "George H. 'Babe' Ruth" was registrable under the Trade-Mark Act of February 20, 1905 (15 USCA § 85) because it was written in a "particular or distinctive manner."⁵

The Commissioner of Patents, however, reversed the examiner's ruling because of the similarities between the words "Babe" and "Baby" despite Ruth's universal association with the former.

The commissioner held that while the name "George H. Ruth," so written, would be registrable under said provision, the nickname "Babe" should not be regarded as a part of the name of the athlete George H. Ruth to the extent of permitting registration of it long years after another has used the quite similar word "Baby" in connection with the word "Ruth" as a mark for this common class of goods, and it was upon this ground that the decision of the examiner was reversed.⁶

So, Ruth's attempt at registering "Babe" was too late given the length of time enjoyed by the "Baby Ruth" mark in commerce. The court, however, avoided discussion of Ruth's underlying rights in using the "Babe" mark at all. It focused solely on the matter at hand—trademark registration.

We would emphasize the fact that the proceeding before us is statutory, and the question of whether appellant has the right to use said mark is not before us. We simply hold, for the reason hereinbefore stated, that appellant's mark is not registrable under the provisions of said section 5.⁷

The court relied on testimony and the case of *J.B. Williams Co. v. Ernest W. Williams*⁸ for its decision regarding confusion between the two marks. *Williams* involved men's grooming products.

[A] mark "E.W. Williams," presented in the form of a facsimile signature, used upon an

after-shaving cream or lotion, was likely to cause confusion with a registration of the word "Williams," used upon shaving soap and an after-shaving preparation prior to any use by the appellee, E.W. Williams, of his mark, and therefore its registration was barred by the first proviso of said section 5 (15 USCA § 85).⁹

Ruth, despite enormous name recognition concerning the "Babe" nickname, could not contravene the principles applied in *Williams* and the cornerstone of trademark law—likelihood of confusion.

That confusion is likely between appellee's mark, "Baby Ruth," and appellant's mark, "Ruth's Home Run, George H. 'Babe' Ruth," is apparent. It is clear from the testimony that the connection of George H. Ruth with appellant was for the purpose of capitalizing his nickname "Babe" Ruth, used upon candy.¹⁰

Babe Ruth was an icon responsible for perpetuating the popularity of baseball in the 1920s by smashing home runs, setting records, and leading the Yankees to dominance.

Yet in the field of trademark law, Babe Ruth struck out.

Endnotes

1. Leigh Montville, *The Big Bam: The Life and Times of Babe Ruth* 102 (First Anchor Books (Broadway Books) (2006)).
2. *Id.* at 107.
3. *George H. Ruth Candy Co. v. Curtiss Candy Co.*, 49 F.2d 1033 (1931).
4. *Id.*
5. *Id.* at 1033-1034.
6. *Id.* at 1034.
7. *Id.* Section 5 of the Trade-Mark Act of February 20, 1905 (15 § 85) states: "Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association, not written printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act." The section further states that a name can be registered: "Provided further, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof."
8. *Curtiss*, 48 F.2d at 398.
9. *Id.* at 1034.
10. *Id.*

David Krell is the baseball historian for the web site TheSportsPost.com. He is also writing a book about the Brooklyn Dodgers. It will be published in 2015 by McFarland. David is also the Co-Editor of the NYSBA's sports law book *In the Arena* and authored the chapter about mascots. David is a member of the bar in New York, New Jersey, and Pennsylvania. He blogs about popular culture history at his web site—www.davidkrell.com.

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