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## **NLRB Punts on First Down: Declines to Exercise Jurisdiction in Northwestern University Football Players Union Representation Case**

Sean P. McDevitt | [mcdevitts@pepperlaw.com](mailto:mcdevitts@pepperlaw.com)

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**THE NLRB'S DECISION IS LIMITED TO THE FACTS PRESENTED BY THE NORTHWESTERN CASE, AND THE BOARD MAY ASSERT JURISDICTION IN ANOTHER CASE INVOLVING SCHOLARSHIP ATHLETES AT A LATER DATE.**

On August 17th, the National Labor Relations Board (NLRB or Board) declined to exercise jurisdiction over a petition filed by Northwestern University football players seeking to unionize. The NLRB reversed the March 26, 2014 Decision and Direction of

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the Regional Director for Region 13 (which encompasses Illinois). That decision held that scholarship football players from Northwestern University are deemed “employees” within the meaning of section 2(3) of the National Labor Relations Act (Act) and that the petitioned-for unit of scholarship players was appropriate. In essence, the Regional Director concluded that the scholarship players could band together to bargain over the terms and conditions of their “employment” as student athletes.

In reversing the Regional Director, the NLRB concluded that exercising jurisdiction over the Northwestern football players’ petition for union representation had too many moving parts to allow a reliable interpretation under the Act as to when a student athlete is deemed an “employee” for purposes of the Act. In the Board’s parlance, asserting jurisdiction in this case “would not serve to promote stability in labor relations.” The Board was quick to note that its decision is limited to the specific facts presented by the Northwestern players’ petition and that whether the Board might assert jurisdiction in another case involving scholarship players is a question reserved for a later date.

### **Background Facts**

Northwestern University competes in the Big Ten Conference and is a member of the National Collegiate Athletic Association (NCAA). As a member of these organizations, Northwestern must comply with the rules and policies of both the NCAA and the Big Ten. The NCAA specifies minimum academic requirements, determines the number of scholarships a school can award, sets the number of players who can participate in preseason football practices, specifies the number of credit hours a student athlete must carry to maintain eligibility, and restricts a player’s ability to profit from his or her name and likeness. Similarly, the Big Ten (which actually includes 14 members, so much for math education!) sets minimum requirements for team travel policies, scholarship terms, and compliance with school policies and Big Ten regulations. Of the 14 members of the Big Ten, Northwestern is the only private university. The remaining members of the Big Ten are public institutions, which, as public institutions, are not covered by the Act and are subject to state law, which may allow, restrict or prohibit collective bargaining.

The Northwestern University football team comprises 112 members. Of that group, 85 receive scholarships worth approximately \$61,000 per year, which covers the cost of room, board, books, fees and tuition. The remaining players, deemed “walk-ons,” do not receive financial assistance and must pay the cost of education themselves. They were not covered by the petitioned-for bargaining unit. With respect to the scholarship players, none of the tuition money is disbursed directly to the players, except for upperclassmen, who may receive a monthly stipend earmarked for room and board. Consequently, had

the union been certified, only 85 of the 112 team members would have been in the unit and could have bargained for terms and conditions of employment. The non-scholarship players would have been on their own. (So much for team unity.)

Northwestern realizes substantial financial benefit from its football program and the efforts of its players. For the 10-year period ending at the close of the 2012–2013 school year, the football program generated \$235 million in revenue from ticket sales, broadcast rights, licensing revenue and stadium-naming rights, while incurring costs of \$159 million. In sum, over this 10-year period, the football program dropped \$74 million to the athletic department's bottom line to subsidize other sports. Thus, the efforts of the players and coaches to field a competitive football team in a highly competitive conference created a substantial financial benefit for the university. The scholarship players, by attempting to unionize, would attempt to negotiate improved economic benefits for themselves beyond the \$61,000 value of their scholarships.

### **Legal Analysis**

The essential question presented to the Board was whether the scholarship players in the petitioned-for unit are statutory “employees” as that term is defined in section 2(3) of the Act. However, before addressing that question, the Board invoked its discretion not to exercise jurisdiction, stating that “the policies of the Act would not be effectuated by its assertion of jurisdiction.” The Board instead “punted” by concluding that the purposes of the Act would not be promoted nor would the exercise of jurisdiction promote stable labor relations. As a result, whether student athletes can unionize as statutory employees is a question left for a later day.

The Board premised its decision not to exercise jurisdiction on three factors. First, Northwestern represented the only school in the Big Ten that is a private institution. All others are public institutions not covered by the Act. As a consequence, if the Board moved forward to address the statutory employee question for the Northwestern players, it would have only resolved the issue as to the Northwestern players, and its decision would have no impact on the remaining Big Ten schools.

Second, the Northwestern players did not bear sufficient resemblance to professional leagues, where the Board has historically exercised jurisdiction over all players within a league, not just one team. The Board noted that, with respect to professional leagues, league membership promotes uniform rules of competition and compliance. The leagues set forth rules promoting the uniformity and integrity of individual games and, thus, league competition as a whole. The Board noted that, in such cases, there is a symbiotic relationship among the various teams and the leagues. Each team within a conference

needs the other teams to promote competitive games to interest fans. In contrast, Northwestern might be the only school subject to Board jurisdiction, whereas the state institutions and other NCAA members would not be subject to Board jurisdiction. The Board further noted that, unlike professional sports teams, college athletes must be enrolled as full-time students, which further enhances the unique nature of the players' petition. The Board stated that taking up this question would not promote "any degree of stability in labor relations" if the Board were to assert jurisdiction in the Northwestern case.

Third, the Board expressly stated that it might reach a different decision in a later case. The Board noted that there have been calls for the NCAA to undertake further reforms for college athletes, which might result in additional changes to the circumstances of scholarship players, including guaranteed four-year scholarships as opposed to one-year renewable scholarships. Indeed, the recent O'Bannon antitrust court decision against the NCAA gives a college athlete greater rights over the use of his or her image and likeness for commercial purposes, like video game sales. These developments suggest a trend to better recognize the economic rights of student athletes when they create commercial value for their schools or profit-seeking entities. These statements by the Board suggest that this issue is far from resolved, and the Board must await a different factual record on which to make a decision with far-reaching implications.

### **What Does This Mean for College Athletics?**

The Board has sent a clear message to the NCAA, the Big Ten and other conferences that the Northwestern scholarship players' petition did not present the right case to make a broad jurisdictional ruling. The Board clearly noted that another case presenting different facts might result in a different decision concerning the exercise of its jurisdiction. Think of the Board's decision as a "quick kick" to avoid bad field position, but do not view it as the Board's statement that college athletes are not section 2(3) statutory employees. Indeed, the Board's language suggests that if a future case presented facts allowing a broader application to all student athletes within a conference, then the Board's exercise of jurisdiction could well happen.