

August 20, 2015

National Labor Relations Board Releases Unanimous Decision in Favor of Northwestern University and the NCAA

On August 17, 2015, the National Labor Relations Board (NLRB) declined to assert jurisdiction in *Northwestern University and College Athletes Players Association (CAPA)*, the union-organizing case involving grant-in-aid scholarship football players at Northwestern University. The NLRB's unanimous decision effectively reverses a March 26, 2014, decision by the Regional Director for Region 13 directing that an election be held to determine whether the athletes desire to be represented by the College Athletes Players Association. The election was held on April 25, 2014, with the results impounded pending the most recent decision by the NLRB. As a result of the NLRB ruling, the ballots will not be counted, and the Northwestern scholarship football players will not be unionized.

In this new ruling, the Board did not address whether Northwestern scholarship football players are employees within the meaning of Section 2(e) of the National Labor Relations Act (NLRA) (which status is required for these players to be covered by, and have the right to unionize under, the NLRA). Instead, the NLRB concluded that asserting jurisdiction would not serve to promote stability in labor relations. In reaching this conclusion, the NLRB stated:

Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.

Because the National Collegiate Athletic Association (NCAA) already exercises a substantial degree of control over the operations of individual member terms, including many of the terms and conditions applicable to scholarship (and other) players, the NLRB found that "labor issues directly involving only an individual team and its players would also affect the NCAA, Big Ten and the other member institutions." Therefore, "it would be difficult to imagine any degree of stability in labor relations" if the NLRB "were to assert jurisdiction in this single-team case."

The NLRB also noted that Northwestern University is the only private institution in the 14-member Big Ten Conference and one of only 17 private colleges or universities out of the 125 colleges and universities that compete in the Division I Football Bowl Subdivision (FBS) of the NCAA. By law, the NLRB cannot exercise jurisdiction over public state-run colleges and universities (which are instead subject to state labor laws, some of which limit or prohibit bargaining by student athletes). The NLRB noted that this case was one of first impression, and in all past cases involving professional sports, the Board was able to regulate most, if not all, of the teams in the relevant league or association.

In declining jurisdiction, the Board was careful to note that its decision is limited to the football players at Northwestern University, therefore holding open the possibility that all FBS scholarship football players at private colleges and universities collectively might successfully petition to be deemed "employees" under the NLRA and therefore be permitted to unionize. Further, the Board noted that its decision does not preclude a reconsideration of this issue in the future following a change to any of the underlying facts (e.g., an adverse change in the treatment of scholarship players by Northwestern or the NCAA).

While the Board's decision is likely to dissuade other scholarship athletes from making similar claims, it does not entirely foreclose such petitions. Moreover, it may encourage student athletes to pursue other legal avenues to enforce their rights. Current litigation challenging terms and conditions applicable to student athletes includes *O'Bannon v. NCAA* pending in the United States Court of Appeals for the Ninth Circuit (challenging player image use) and *Jenkins v. NCAA* pending in the United States District Court for the Northern District of California (seeking the invalidation of certain limits and restrictions imposed on scholarships and other benefits provided to student athletes).

For more information, see the *Northwestern University* decision [here](#), and commentary from Ropes & Gray attorneys in [USA Today](#) and [Inside Higher Ed](#). For advice or assistance in dealing with the issues raised by the decision, contact any member of the Ropes & Gray [sports practice group](#).