Northwestern University : Are Scholarship Football Players "Employees" under the NLRA?

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NORTHWESTERN UNIVERSITY, 13-RC-121359, DECISION & DIRECTION OF ELECTION 3/26/2014

- Representation petition was filed by College Athletes Players Association.
- Petition sought an election among football players receiving grant-in-aid scholarships from Northwestern University.
- Northwestern asserted that these players are akin to graduate student in ***Brown University***, 342 NLRB 483 (20004), in which the Board found graduate students not to be employees under the Act because the relationship with the university was primarily educational.

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Northwestern has a varsity football team that competes against other universities.

The team consists of 112 players, of which there are 85 players who receive football grant-in-aid scholarships that pay for their tuition, fees, room, board and books.

Players typically receive grant-in aid totaling $61,000 each academic year.

Players receive a National Letter of Intent outlining the terms and conditions of the scholarship offer. Scholarship players sign an Athletic Tender Agreement that sets forth terms and conditions of the grant of their scholarship.

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- Scholarships can be reduced or cancelled if the player:
- (1) renders himself ineligible for intercollegiate competition;
- (2) engages in serious misconduct warranting disciplinary action;
- (3) engages in conduct resulting in criminal charges;
- (4) abuses team rules as determined by the coach or athletic administration
- (5) voluntarily withdraws from the sport;
- (6) accepts compensation for participating in an athletic contest; or
- (7) agrees to be represented by an agent.

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- Both Scholarship players and walk-ons are subject to certain team and athletic department rules:

  -Players must obtain permission for outside employment;

  -Players must abide by social media policy;

  -Players are prohibited from giving media interviews unless arranged by the Athletic Department;

  -Players are prohibited from swearing;

  -Players are required to sign a release for use of their name, likeness and image; and

  -Players are subject to strict drug and alcohol policies and anti-hazing and anti-gambling policies.

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- Players generally devote 50 to 60 hours per week on football related activities during training and throughout the football season.
- Scholarship Players are identified and recruited "because of their football prowess and not because of their academic achievement in high school." p.9.
- To be eligible to play on the football team, the players must be enrolled as full-time students, make progress towards obtaining a degree and maintain a minimum GPA (based on the year in school, the GPA minimum ranges from 1.8 to 2.0).
- Scholarship players receive no academic credit for playing football.

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- Players do not have FICA taxes withheld from the scholarship monies they receive. Players do not receive a W-2 tax form from Northwestern.

- For the 2012-2013 academic year, Northwestern reported that its football program generated $30.1 million in revenue and $21.7 million in expenses. Expenses included the costs of maintaining the stadium.

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Legal Standard:

"[A]n employee is a person who performs services for another under a contract of hire, subject to the other's control, and in return for payment. ***Brown University***, 342 NLRB 483, 490 fn. 27 (2004) (citing ***NLRB v. Town & Country Electric***, 516 US at 94)."

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Regional Director Peter Sung Ohr found:

- 1. Grant-in-Aid Scholarship Football Players Perform Services for the Benefit of Northwestern for which They Receive Compensation.
- 2. Grant-in-Aid Scholarship Players are Subject to Northwestern's Control in the Performance of Their Duties as Football Players.
- 3. Therefore, Northwestern's Grant-in-Aid Scholarship Players are Employees Under the Common Law Definition of Employee.

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- RD Ohr distinguished ***Brown University***, 342 NLRB 483 (2004). In ***Brown***, the Board found that graduate students were not "employees" after evaluating four factors: "(1) the status of graduate assistants as students; (2) the role of the graduate student assistantships in graduate education; (3) the graduate student assistants' relationship with the faculty; and (4) the financial support they receive to attend Brown University." ***Northwestern*** at 18.
- Based on these factors, the Board concluded that the relationship between graduate students and their University was primarily educational.

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RD Ohr found this case not controlling because:

1. Northwestern's Grant-in-Aid Scholarship Football Players are not "Primarily Students."
2. Grant-in Aid Scholarship Football Players' Athletic Duties do not Constitute a Core Element of Their Educational Degree Requirements.
3. Northwestern's Academic Faculty does not Supervise Grant-in-Aid Scholarship Players' Athletic Duties.
4. Grant-in-Aid Scholarship Players' Compensation is not Financial Aid.

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- The Grant-in-Aid Scholarship Players were Found not to be Temporary Employees.

  -Players remained on the team for four years and possibly five. Therefore, this substantial length of time prevents a finding of temporary employees.

In ***Boston Medical Center***, 330 NLRB 152 (1999), the Board stated:

"[T]he Board has never applied the term 'temporary' to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here." Id. 166.

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- RD Ohr found that the Petitioned for Unit of Grant-in-Aid Scholarship Players is an Appropriate Unit, applying ***Specialty Healthcare and Rehabilitation Center***, 357 NLRB No. 83 (2011), enfd. Sub nom. ***Kindred Nursing Centers, LLC v. NLRB***, 727 F.3d 552 (6th Cir. 2013).
- Walk-ons were found not to share a substantial community of interest because walk-ons do not receive compensation and do not share the "significant threat of possibly losing the equivalent of a quarter million dollars in scholarship if they stop playing football for the Employer as do the scholarship players." ***Northwestern*** at 22.

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- RD Ohr found the Petitioner to be a labor organization since employees participate in it and it exists for the purpose of representing employees in dealing with employers regarding their wages and other terms and conditions of employment. ***Alto Plastics Mfg. Corp.***, 136 NLRB 850, 851-52 (1962).

- RD Ohr then directed an election among all Grant-in-Aid Scholarship Players of Northwestern who have not exhausted their playing eligibility.

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Northwestern University and CAPA

The NLRB and College Football

Cornell University – ILR School

May 2, 2014

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What Has Happened Since the Regional Director's Decision

- Northwestern filed its Request for Board Review – April 9
- CAPA filed its Opposition to Request for Review – April 16
- The Board granted the Request for Review – April 24
  - Stated it will be issuing a subsequent notice establishing a briefing schedule and inviting *amici*
- Players voted in NLRB election – April 25
  - Votes impounded pending the Board's final decision.

What Lies Ahead

- If the Board reverses the Regional Director's decision – the end.
- If the Board affirms the decision or result (in a modified decision) – votes will be tallied & results certified (absent need for a rerun).
  - *If the Union loses election* – this case ends and court review of the Board's decision will wait until a union wins an election; *in the meantime, the Board will process union petitions*.
  - *If the Union wins the vote*, Northwestern may set the stage for court review by refusing to bargain.
    - Possible forums are the D.C. or Seventh Circuits.
  - Eventual Supreme Court review a distinct possibility.
  - Unless and until reversed by the Supreme Court, the Board would continue to process future petitions and union organizing efforts would be expected to continue.

Collegiate Athletic Environment

- 460,000 student-athletes in the NCAA, including 150,000 men and women playing more than 20 different Division I sports.
- 15% of Div. I student-athletes are the first in their families to attend college.
- 90% of NCAA revenue is redistributed to member schools.
- $2.7 Billion is provided in athletic scholarships, in addition to other direct support to student-athletes.
- Only 23 out of 1,100 member schools generated more money than they spent on athletics in the past fiscal year.
- Only 17 of the NCAA Div. I FBS schools are private universities, while more than 100 FBS schools are public universities governed by state labor laws
- Less than 2% of men's basketball and football student-athletes go on to compete professionally in their sport.
- The National College Players Association has determined the four-year cost of a college-athlete starts at $178,000.
- A recent ESPN report estimated the annual increase in costs to athletic departments if student-athletes are treated as employees at $2 million to pay for health insurance and employment taxes.

Definition of Employee under the NLRA

- Section 2(3) of the NLRA unhelpfully defines "employee" as "any employee." The Supreme Court has interpreted using the common law.
- ***NLRB V. Town & Country Electric, Inc.***, 516 U.S. 85 (1995) – "Employee" includes "any person who works for another in return for financial or other compensation." Includes a "person in the service of another under any contract of hire … where the employer has the power of right to control and direct … how the work is to be performed."
- **Seattle Opera v. NLRB**, 292 F.3d 757, 762 (D.C. Cir. 2002), *enf*. 331 NLRB 1072 (2000). An employee is one who (1) works for a statutory employer in return for financial or other compensation; and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed.
- *But see* ***Allied Chem. Alkali Workers of Am., Local Union No. 1 v. Pittsburg Plate Glass Co.***, 404 U.S. 157, 166 (1971) ("the legislative history of Section 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire").

Backdrop of Board Decisions

- ***St. Clare's Hospital*** (1977): In a 4-1 decision, the Board declined to extend collective bargaining rights to students performing services at educational institutions that were related to their educational program.
- The Majority also noted that in "[a] second category of Board decisions involving students … employed by their own educational institutions in a capacity unrelated to their course of study," it has historically denied them bargaining rights, reasoning the "employment is merely incidental to the students' primary interest of acquiring an education, and in most instances is designed to supplement financial resources."
- "Our conclusion that house staff are 'primarily students' rather than 'employees' connotes nothing more than the simple fact that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic … We do not think such a relationship should be regulated through collective bargaining."

Backdrop of Board Decisions (cont.)

- ***WBAI Pacifica Foundation*** (1999): In a 3-0 decision, held volunteer staff at a non-profit radio station were not employees; no compensation for work meant not suitable for collective bargaining.
- ***Boston Medical Center*** (1999): Reversing 20+ years of precedent, a 3-2 Democratic majority Board held that medical interns, residents, and fellows ("house staff") were employees under the NLRA where BMC withheld federal and state taxes from their stipend, provided workers' compensation, paid vacation and insurance benefits the same as for other BMC employees, and where the house staff "spend up to 80 percent of their time at the Hospital engaged in direct patient care."
- ***New York University*** (2000): In a 3-0 decision, the Board found graduate student assistants who received a combination of stipends and other financial aid, and spent 15% of their time performing services for the university were statutory employees where the work was not a requirement for their degree.

Backdrop of Board Decisions (cont.)

- ***Brown University*** (2004): In a 3-2 decision, a Republican majority reversed NYU, "return[ing] to the Board's pre-NYU precedent that graduate student assistants are not statutory employees" because they are primarily students.
- The majority noted "the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship."
- "Because they are first and foremost students, and their status as a graduate student assistant is contingent on their continued enrollment as students, we find that they are primarily students."
- "We also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not 'consideration for work.' It is financial aid to a student."
- "The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational."

Board Review:

- **Issue: Are students, who as a condition of their scholarship participate in school athletic or other programs that benefit the university but are not required for a degree, employees with collective bargaining rights under the NLRA?**
- In its Request for Review, Northwestern argued the Regional Director erred in applying only the common law employer-employee test applicable outside the educational setting.
- Instead, the Regional Director should have applied the Board's test under *Brown University* and *St. Clare's Hospital*, wherein the Board has supplemented the common law test, holding that students allegedly employed by an educational institution to finance their education are primarily students and not employees with collective bargaining rights under the NLRA.
- On review, the Board is expected to address the continued viability of *Brown University* and *St. Clare's Hospital*.
- The Union urges the Board to overrule *Brown University*.

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Board Review (cont.)

- It is undisputed that Northwestern's football student-athletes are *bona fide* students (not merely contracted football players).
  - Northwestern's football team has a 97% player graduation rate (highest among all FBS schools), and football student-athletes have maintained a cumulative average GPA over 3.0 for the last several years.
- The scholarship players are students who are alleged to be working for Northwestern in return for an athletic scholarship that funds their education.
- Correct application of *Brown University* and *St. Clare's Hospital* leads to conclusion these scholarship student-athletes are not Section 2(3) employees with bargaining rights under the NLRA.
- Could get a 3-2 decision at the Board, reversing *Brown University* and *St. Clare's Hospital*, and following *NYU.*
  - Will set the stage for eventual appellate court review.

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Participation in Athletics Is Related to Academic Life

- In *Brown Univ.* and *St. Clare's Hospital,* the Board correctly decided to not regulate the relationship between students and their school.
- The RD erred in concluding that participation in athletics is not related to students' academic studies. The two are directly related.
  - Participation in athletics provides many students opportunities to study at universities they otherwise may not have been able to attend.
  - The structure and discipline of team sport, including mandatory study halls, class attendance, and academic tutoring, allow many students to complete degrees they otherwise would not have achieved.
- Choosing to attend and participate on an athletic team at a university is a choice students make about the educational experience they want.
- "[T]he opportunity for students to participate in intercollegiate athletics is a vital component of educational development." *Mansourian v. Bd. Of Regents of Univ. of Calif. at Davis*, 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011).

Participation in Athletics Is Not "Work"

- The Regional Director erroneously concluded that because the popularity of college football benefits Northwestern, the scholarship players' participation is in the nature of "work for" an employer.
  - However, the RD also found that non-scholarship players are not employees but play only for "love of the game" and the "camaraderie" of their teammates.
  - But if performing the same "work," are they just unpaid employees?
  - Why should funding one's education through an athletic scholarship instead of need based financial aid convert a student's participation on a team into "work" and make the student an employee?
- The RD's decision logically extends to students on full and partial scholarships in non-revenue sports, as well as those at private high schools. What about those on band or music scholarships?
- The students, all of them, participate for themselves, their teammates, and parents, as an integral part of their educational experience and development – not as "work for" an employer.

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Athletic Scholarships Are Not "Compensation"

- The RD erred in finding that athletic scholarships are "compensation" in return for work.
- Athletic scholarships are not dependent on performance on the field or team, and are unrelated to the hours "worked."
- Athletic scholarships are conditioned on students being enrolled, in good standing, and participating on the team.
  - No different from conditions on other types of scholarship.
- Athletic scholarships fund education and are excluded from taxable income under the Internal Revenue Code.
- To prospective student-athletes, there is no difference among schools based on the economic value of an athletic scholarship; all present a free educational opportunity.
- Students choose based on the type of educational experience they want; not competing job offers.

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Intercollegiate Athletics Are Not Amenable to Collective Bargaining

- The Regional Director's decision would not advance national labor policy. It would create an unworkable and ineffective mess that is not amenable to collective bargaining.
- Private universities are a small number of schools participating in intercollegiate athletics. The vast majority are public under state laws.
- While many states have labor laws modeled on the NLRA, other states prohibit or restrict collective bargaining by public employees.
- Universities participate in intercollegiate athletics through a competitive balance provided by compliance with uniform NCAA rules, which do not permit individual schools to bargain or offer increased benefits to student athletes and still maintain the team's eligibility to participate.
- A determination that student-athletes are employees with collective bargaining rights may result in another set of private schools leaving scholarship athletics altogether (like the Ivy League), which could result in a loss of academic opportunities.

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Title IX and Scope of Unit Issues

- Title IX requires universities who receive federal funding to afford equal opportunities in varsity sports to female students.
  - Requires equality in: (1) effective accommodation of student interests and abilities (participation), (2) athletic financial assistance (scholarships), and (3) other program components (the "laundry list" of benefits to and treatment of student-athletes).
  - The "laundry list" includes equipment and supplies, scheduling of games and practice times, travel and daily per diem allowances, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, publicity, recruitment of student-athletes and support services.
- Title IX and the split between revenue and non-revenue sports create unique bargaining issues for scholarship athletes.
  - What does Title IX require if a football only unit bargained for better terms of accommodation, scholarship terms, or increased benefits?
  - If effectively bargaining on behalf of all scholarship athletes because of Title IX and the economic reality that those in non-revenue sports have no option for effective separate representation, then must an appropriate unit include, at a minimum, all those on full athletic scholarship?

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Host of Tax and Wage-Hour Issues

- If athletic scholarships are compensation for work performed by student-athletes who are university employees, it raises a number of potential tax and wage-hour issues and costs, *for both universities and students*.
- Are universities liable for OT under the FLSA and state wage laws if athletes are allowed to "work" >40 hours/wk (or > 8/day in some states)?
- Are there potential minimum wage violations for athletes on partial scholarships in non-revenue sports?
- Would the value of athletic scholarships be reported as taxable income?
  - Students at more expensive schools would be taxed more. How many can afford the taxes? Disparate impact on minority students?
  - Would students be financially better off taking need based financial aid that is not taxable over an athletic scholarship?
- The RD's decision that walk-ons are not employees because they are not compensated is inconsistent with the DOL's stance on unpaid interns.
- If a student is dismissed from a team for violation of university or team rules, may he/she file for unemployment?
- Would student-athlete-employees be covered by state workers' compensation systems?

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Questions?