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A New Hurdle For Higher Education: College Football Players Huddle Up for Union Organizing

Last week, the Northwestern University football team shook up the playbook by taking the unprecedented step of petitioning the National Labor Relations Board for a union election. The result to be determined will have a significant impact on the relationship between higher education institutions and their student-athletes, as well as potentially many other students who receive aid in consideration of services performed to the benefit of the schools, such as graduate assistants.

Under the leadership of star quarterback Kain Colter and with financial support from the United Steelworkers, the players argue they are not just simply players or student athletes, but employees who have generated hundreds of millions of dollars for their respective schools. Calling the NCAA a dictatorship run without student input, the athletes say they want to be treated better by both the universities and the NCAA, with access to benefits such as long-term health care and education assistance if unable to complete their degrees due to injury.

Do the athletes have the right to organize a union? The NCAA has argued no. But that is not an open-and-shut question. Of course, students and athletes can organize to collectively work together to improve conditions. Look no further than student rallys at the Minnesota Capitol that have directly impacted student tuition and conditions. The critical question in the football players organizing effort is whether the athletes will be afforded the protections of the National Labor Relations Act (NLRA), meaning whether the universities could take action against them, such as revoking scholarships or enforcing penalties, because of their engaging in such activity, or would the federal labor law protect them against such a response?

To have such NLRA protection, the athletes must show that they are employees. This is where the controversy lies. The NCAA has stated its position is an emphatic no. The players on the other hand argue that their scholarships are compensation for services, setting up what is essentially an employment relationship.

Whether or not the NLRB will conduct a union election among the players and protect them against any response of their university will, indeed, turn on whether the NLRB finds the players are *employees* for purposes of the labor law. That will be the subject of an investigative hearing on the relevant underlying facts about the relationship of the players with the university, which is currently scheduled to be conducted on February 12 by the NLRB Regional Office in Chicago where the

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petition was filed. Following the hearing, one option available to the Regional Director will be to seek the help of the NLRBs lawyers of the NLRB Division of Advice about how to apply the federal labor law to these circumstances.

It may seem unlikely that the NLRB will decide to move forward with conducting a union election among the players. After all, does anyone really think college football players are employees by virtue of their scholarships?

It is important to this picture to know that in a 2004 Brown University decision, the NLRB held that graduate students, research assistants, and proctors were not employees, but primarily students who were not afforded the protections under the NLRA. Since and in spite of that decision, New York University graduate students are now recognized members of the United Autoworkers union, and other higher ed institutions may follow suit in recognizing unions as representatives of students for collective bargaining.

There have been fairly recent indications that some current members of the NLRB might be inclined in that new direction. In 2012, the NLRB invited friend-of-the court briefing on whether it should conduct an election among the graduate assistants at NYU; that case was resolved between the union and the schools (with union recognition) involved before the NLRB issued its decision.

The NLRB in *Brown* relied on nearly thirty years of settled precedent when it concluded that graduate student assistants are not employees under the NLRB. The question now for the Obama-appointed NLRB to decide is whether the reasoning in *Brown* is still valid.

Management and university-side parties will presumably be arguing loudly and long that collective bargaining (for the protection of the individual worker through the power of the group) is the antithesis of the type of individualized, educational decision-making that is necessary to recruit, coach and reward athlete-scholars. Clearly, there is a strong case to be made that such athletic/educational decisions in higher education are not appropriate for the collective bargaining context, which, because of its adversarial, economic nature could be thought to undermine the relationship between coaches, the schools, and student athletes.

We expect this issue to have a prolonged life, extending far beyond the end of Kain Colters college career. And the impact of this case may be felt in institutions of higher education well beyond their relationships with student athletes, potentially extending into many other school-student relationships. This will be a very important issue for many schools to watch closely, and we will blog about key developments as they occur.