Northwestern Football Players' Unionization Remains Long Shot

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Those eligible Northwestern University student football players who receive athletic scholarships have cast their ballots in an April 25 election conducted by the National Labor Relations Board to determine whether they wished to be represented by a union known as College Athletes Players Association. The "walk-on" members of the team, who are not on scholarship, were not permitted to vote. There were 76 eligible voters, most between the ages of 18 and 23.

We do not know the results. We may never know the results. The ballots have been impounded pending the board's review of the unprecedented March 26 decision of the regional director of the board's Chicago Region 13 that the Northwestern football players on scholarship are employees with the right to organize under the National Labor Relations Act. The implications of a binding decision that scholarship football players are employees with the right to organize under the labor law are far-reaching.

Northwestern's president has stated the university will contest this ruling all the way to the U.S. Supreme Court if need be. But, the chances this will get that far are remote. This is a battle the board and the union movement will not win.

With the ballots impounded, what will happen? There are several possible scenarios. In none of the scenarios will the issue of whether college football players have a right to unionize soon be resolved.

- If the board grants Northwestern's request for review and overrules its regional director, it will dismiss the union's petition and the ballots will never be opened. The matter would be over.
- If, as most board watchers anticipate, the board affirms the regional director, the ballots will be opened. For some reason, most commentators assume the union will win the count. Why? The voters are young, fully engaged in academics studying for finals and trying to become starters on the football team. Why would a majority vote for union representation that would not only obligate them to pay union dues but would be viewed as a vote of no confidence in the same head coach and coaching staff that has recruited them? Why would they vote for a result that may put intercollegiate athletics and their own sport in jeopardy? These are smart young men. The Northwestern student athletes have a 97 percent graduation rate. They have now heard the arguments against unionization. The answer may well be that if and when the votes are counted

arguments against unionization. The answer may well be that if and when the votes are counted, a majority will not have voted for the union. And if the union does not win, the issue of union representation for the Northwestern football players would be over. There could be no appeal. However, the ruling that scholarship football players in the private sector are employees subject to the NLRA would still stand as a precedent.

- If, on the other hand, the union wins the election, the board will certify the results and direct the university to bargain with the union. But bargaining will not happen. Northwestern will refuse to bargain. The union would file an unfair labor charge alleging an unlawful refusal to bargain, which in turn will result, after notice and hearing, in the board finding the university has committed an unfair labor practice by refusing to bargain. The university would then appeal the finding of unfair labor practice to the court of appeals and cite the regional director's decision as grounds for its appeal. This is the procedure used by employers under the labor law to obtain appellate review of a board decision. There will be considerable delay before a final ruling by a court of appeals where the odds are against the board because of the reach and unprecedented nature of the decision.

This brings us back to the regional director's decision. If affirmed by the board, it would apply only to the private sector as Northwestern is itself private. It would not apply to the state schools that comprise most of Division I football. While it is possible that if affirmed by the courts it could be used as a persuasive precedent by a state labor board that might have jurisdiction over state schools that comprise the bulk of Division I, the likelihood that the extension of the board's jurisdiction into intercollegiate athletics will be affirmed by the courts is remote.

The decision is at odds with board precedent. Northwestern has argued that based on the board's 2004 decision in Brown University, 342 NLRB 483, holding that graduate assistants who performed services related to their academic program were not employees, the board should dismiss the petition. The regional director distinguished the Northwestern football players from Brown's graduate assistants principally because he found their football-related duties were unrelated to their academic program.

Second, the regional director found the students received scholarships to perform football in return for compensation and consequently should be deemed employees. The notion that a scholarship was tantamount to a contract for hire is a stretch. The lynchpin of the regional director's logic was that a football scholarship was compensation as it had definite value. To be sure, this is so. College education is expensive, but does it make a student nose tackle or quarterback an employee because they receive scholarships? The Northwestern scholarships at issue were four-year scholarships that could not be canceled if the student were injured or lost the skills to compete. Further, scholarships are excluded from income under Section 117 of the Internal Revenue Code, a point the regional director considered irrelevant.

Despite all the hoopla about the decision and its potential impact on intercollegiate sports, the most fundamental objection to the decision to extend the adverse labor law model of union versus management to intercollegiate athletics is that the football players are students. They are not

professionals. They are not hired to play football. The colleges are not the minor leagues for the National Football League, nor should they be. The very reason for the existence of the National Collegiate Athletic Association is to preserve amateurism and to give due emphasis to the fact that college athletes are students, not professionals. It is no accident they are referred to as "student-athletes," and "student" comes first.

The NCAA rules require the students make satisfactory academic progress to keep their eligibility. They are students. To receive a football scholarship, the recruited football player must first be admitted to the college as a student, and to keep it, he must remain in the college's academic program making satisfactory academic progress. To ignore the fact that the players are first students was a stretch by the regional director. The whole of intercollegiate athletics is predicated on their amateur status, a status inconsistent with the view of the regional director that football players are contracted for hire to play college football, the very definition of a professional.

The regional director disregarded the NCAA's comprehensive role in the regulation of amateur college sports, providing as it does in the NCAA manuals, standards of amateurism, rules for initial year eligibility and rules governing practice times, schedules and many other aspects of college athletics. The rules, which provide for sanctioning schools for violations, are predicated on making it clear that these young athletes are students first.

The regional director's decision has been criticized by members of Congress from both sides of the aisle. The decision is controversial and it is unlikely even the most liberal of courts of appeals would be bold enough to affirm the board's extension of its jurisdiction over college sports. In a word, unions in college football will not only not happen soon; it will not happen.