

NLRB Blocks Drive to Unionize Northwestern Football

In a closely watched case with potentially broad ramifications for college sports, the NLRB declined to exercise jurisdiction over a union petition to represent Northwestern University's scholarship football players. In a unanimous decision on August 17, the board dismissed the petition without deciding whether student-athletes are "employees" within the meaning of the National Labor Relations Act and union-eligible. While the decision may deter student-athlete unionizing efforts for now, the NLRB left the door open to someday reconsider the issue.

Background

The [National Labor Relations Act](#) (NLRA), which applies to private — but not public — sector employers, protects the rights of "employees" to self-organize, form or join a union and bargain collectively through representatives of their own choosing. The National Labor Relations Board (NLRB or "board"), which enforces the NLRA, has broad statutory jurisdiction over private employers — including private and nonprofit colleges, universities and other schools whose activity in interstate commerce exceeds \$1 million annually.

Northwestern University is a private, nonprofit teaching university, with its main campus in Evanston, Illinois. It is a member of the National Collegiate Athletic Association (NCAA), which makes and enforces rules governing intercollegiate sports for participating schools, and of the Big Ten Conference. As part of its athletic program, Northwestern has a varsity football team — with an overwhelming majority of its members on athletic scholarships — that competes against other schools in the NCAA Division 1 Football Bowl Subdivision (FBS) and in the Big Ten. Roughly 125 college and university teams — 108 of which are from state-run schools — play Division 1 FBS football. With the exception of Northwestern, every school in the Big Ten is a state-run institution.

In January 2014, the College Athletes Players Association (CAPA) — a new union formed with the support of the United Steelworkers — filed a petition with the NLRB to represent Northwestern's grant-in-aid scholarship football players. Because the NLRA only entitles statutory employees to choose or reject union representation, Northwestern challenged the employee status of the student-athletes. Following hearing, the NLRB Regional Director for Region 13 [ruled](#) that the school's scholarship football players who have not exhausted their playing eligibility are "employees" within the meaning of the NLRA and



directed a secret ballot election. The election took place on April 25, 2014, but the votes were impounded pending review of Northwestern's challenge by the full NLRB. (See our [May 13, 2014 For Your Information](#).)

The Board Benches CAPA

On August 17, the full NLRB issued a unanimous [decision](#) dismissing CAPA's representation petition. The board noted that Northwestern is an employer subject to the NLRA and the jurisdiction of the NLRB, while acknowledging that whether Northwestern's scholarship football players "meet the Board's test for employee status is a question that does not have an obvious answer." Declining to assert jurisdiction in this case, the NLRB did not determine whether Northwestern's scholarship football players are "employees" of the university within the meaning of the NLRA. Rather, it concluded that — even if the players are statutory employees — exercising jurisdiction over a single team would not effectuate the policies of the NLRA to promote stability in labor relations across the league given the nature and structure of NCAA Division 1 FBS.

The NLRB emphasized the novel circumstances and unique facts of the Northwestern case — the first case to ask the board to assert jurisdiction over college football players or college athletes of any kind. In support of its decision not to assert jurisdiction, the board cited two key factors:

- The nature of NCAA Division 1 FBS football
- The composition and structure of FBS football

The board noted that NCAA Division 1 FBS football exercises a substantial degree of control over individual member teams, including the terms and conditions under which the scholarship players practice and play. Further, the vast majority of competitors are public colleges and universities that are not subject to the NLRA and over which the board cannot assert jurisdiction.

The board emphasized that this decision is limited in scope to Northwestern's scholarship football players. It does not extend to other individuals associated with FBS football, or to university personnel associated with athletic programs such as coaching staff. Because decisions of the NLRB in representation cases like this cannot be appealed, the board's ruling effectively ends CAPA's unionizing drive at Northwestern at this time.

While the board made clear that its ruling is narrow and applies only to the exercise of jurisdiction over the Northwestern players in this case, it hinted that it might take a different approach to a petition for all FBS scholarship football players (or at least those in private colleges and universities). In a final note, the NLRB also made clear that its decision "not to assert jurisdiction does not preclude a reconsideration of this issue in the future."

Preemptive Moves

After the filing of the representation petition in this case, both Ohio and Michigan enacted laws specifying that student-athletes at their public universities are not employees under state laws that give public employees the right to organize. Ohio and Michigan have three schools in the Big Ten (Ohio State University, University of Michigan and Michigan State University).

In Closing

The votes cast by Northwestern football players for or against union representation in April 2014 will never be counted. The ballots will be destroyed, and we will never know whether the union would have won or lost. While the board ended CAPA's organizing bid, it declined to address the employee status of student-athletes under the NLRA and left the issue for another day. But for now, Northwestern, the NCAA and college football have avoided a potential game-changer.

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