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SPORTS

A National Labor Relations Board regional director's recent ruling that collegiate student-athletes receiving scholarships are ''employees'' and can form a union, is critically inconsistent with the board's *Brown University* ruling, attorneys Vito A. Gagliardi Jr. and Okechi C. Ogbuokiri say in this BNA Insights article.

If the decision sticks, it could be more expensive than the regional director ever envisioned, for schools, the athletes themselves and other students, the authors say. As just one example, coaches for the Northwestern football players would have to abide by separate rules for walk-on and scholarship athletes, assuming ''employees'' will collectively bargain for different requirements. Then who would be next? the authors ask. Marching band scholarship recipients?

NLRB Will Tackle Northwestern University Football Case

By Vito A. Gagliardi Jr. and Okechi C. Ogbuokiri

Peter Sung Ohr, the regional director of Region 13 of the National Labor Relations Board, recently ruled that collegiate student-athletes who receive grant-in-aid scholarships are considered ''employees'' and entitled to form a union for the purpose of collective bargaining. *Northwestern University*, Case 13-RC-121359 (Mar. 26, 2014).

Ohr argued that these players are employees under 29 U.S.C. § 152(3) because (1) they receive compensation—their scholarships, (2) they perform a service—playing football for the university, and (3) they are subject to the Northwestern football coaching staff exercising control over their schedule pursuant to a contract (58 DLR A-14, 3/26/14).

Ohr directed an election among the ''employees'' in the unit on whether to form a union under the representation of the College Athletes Players Association. He also held that only football players receiving grant-in-aid scholarships are allowed to participate in the election.

The case has raised many issues about whether the regional director made the appropriate decision. Allowing collegiate student-athletes to engage in negotiations over the terms and conditions of their participation in athletics may be sensible. It would allow athletes to address issues such as post-graduate health care for injuries sustained while participating in collegiate sports, health and safety issues during competition, and the highly debated issues of student-athletes' ability to profit from their names and likenesses through endorsements.

However, the regional director may have failed to consider all the ramifications of his ruling. To grasp fully the potential significance of this decision, one must consider first the regional director's misapplica-

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tion and misinterpretation of *Brown University*, 342 N.L.R.B. 483, 175 LRRM 1089 (2004) (136 DLR AA-1, 7/16/04) and, second, the implications of this decision for amateur collegiate athletics and beyond.

Brown University Is Applicable

The regional director, when ruling in favor of the student-athletes, held that *Brown University* did not apply. In that case, the NLRB held that ''graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development'' were not employees within the meaning of the National Labor Relations Act. The NLRB reversed a regional director's decision that found graduate student assistants were employees under the act.

In *Brown*, the NLRB considered 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.

Ohr found that the *Brown* test was inapplicable because ''the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements.''

It's clear the regional director is trying to fit a square peg into a round hole within his interpretation of the applicability of the *Brown* decision.

Are Collegiate Student-Athletes 'Primarily Students'?

In *Brown*, the NLRB reasoned that the graduate student assistants were primarily students because they spent only a limited number of hours performing their ''work'' duties and more time focused on obtaining degrees; therefore they were deemed to be students. In addition, the NLRB noted that the graduate student assistants were enrolled as students and their ''employment'' was contingent upon their enrollment in the school.

In *Northwestern*, the regional director held that the scholarship football players were not primarily students because they spent 50-60 hours per week on their football duties during training camp, which takes place when school is not in session, and 40-50 hours per week on football-related activities during the season, as opposed to 20 hours per week attending class. Notwithstanding the fact that such a time commitment to football-related activities is substantial, the regional director failed to highlight that this 40- to 60-hour time commitment only takes place during four to five months out of a 10-month school year.

On average, all college students, not just student-athletes, are spending approximately 20-25 hours per week attending class. Just because these football players occasionally obtain excused absences from class when there's an athletic scheduling conflict, does not mean they are allowed to forgo attending class or spending additional time on studying and completing homework assignments.

Assuming that during their four-month season the Northwestern football players spend an average of 10 hours per week studying and completing homework assignments, that amounts to at least 30 hours per week on academic-related activities. Also it is likely to assume that when it's not football season, the Northwestern football players spend an average of 25 hours per week in class and 15 hours per week studying and completing homework assignments.

Looking at the totality of the 10-month academic school year, the Northwestern football players are likely spending, at minimum, 500 more hours per school year on academic-related activities than on athletic-related activities.

It is axiomatic that the Northwestern football players, as well as all student-athletes, are ''primarily students.'' The regional director seems to have failed to evaluate the complete academic school year. Again, most student-athletes at Northwestern use their ability to obtain a collegiate athletic scholarship as a means to an end—obtaining a bachelor's degree at no expense to them or their parents—and therefore make the necessary commitment to complete their degrees.

To fully grasp the potential significance of this decision, the authors say, one must consider first the regional director's misapplication and misinterpretation of *Brown University* and, second, the implications of this decision for amateur collegiate athletics and beyond.

Yes, the athletic time commitment for student-athletes is greater than the academic commitment while in season, but that equation flips when the student-athlete is not in season. As such, contrary to the regional director's holding, the Northwestern football players are more appropriately considered ''primarily students'' in accordance with *Brown*.

Is Athletic Role of a Student-Athlete a Core Element of a Degree Requirement?

In *Brown*, the NLRB found that, because the graduate assistant students received academic credit for performing the ''work'' assigned to them, they were not employees under the NLRA. The NLRB found that, because there was a direct relationship between the graduate assistant students' duties and their overall educational requirements, their relationship with Brown was more academic than economic.

In *Northwestern*, the regional director held that because the student-athletes did not receive any academic credit for their participation in collegiate football, the nature of their relationship with the university was more economic than academic. He also noted that the student-athletes were not required to play football in order to obtain their undergraduate degree. The regional director argued that although the students learn ''great life lessons'' through their participation in football, it is ''insufficient to show that their relationship with the [university] is primarily an academic one.''

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Again the regional director seems to lose sight that an athletic scholarship is simply a means to an end. Although participating in a collegiate sport is not a requirement for obtaining a particular degree, a student-athlete who withdraws from a sport must find another form of financial aid to continue the degree process.

For some students, this is not an option, and thus withdrawing from a sport will mean the person can no longer pursue an education. For many student-athletes, participation in sports is the only way to leave their home state for college or to attend a prestigious private institution that will help catapult their professional careers.

Participation in collegiate athletics may not allow student-athletes to obtain academic credit; however, there is still a relationship between the two, as participation provides the financial opportunity for student-athletes to obtain their degrees. The regional director completely ignores this concept.

In addition, at some universities and colleges, for example the University of Notre Dame, student-athletes obtain academic credit for the first-year required physical education course for participating in athletics, which is another example of how a student-athlete's academic and athletic lives are closely related.

The regional director boldly insisted that a student-athlete's main purpose for attending institutions of higher education is athletic glory; this is quite far from reality. Similar to the graduate assistant students in *Brown*, student-athletes' academic requirements and athletic duties are directly related, as their athletic ability gave them the opportunity to be awarded with an athletic scholarship, and their academic prowess allows them to maintain it. As such, the Northwestern football players should not be considered employees within the meaning of the act.

Do Student-Athletes Have a Relationship With Faculty?

The NLRB also considered the relationship between the graduate assistant students and the faculty at Brown to determine whether the students were employees. In *Brown*, the NLRB held that, because the faculty exercised control over and oversaw their ''work'' duties, the students did not qualify as employees under the NLRA. The NLRB noted that the faculty was also involved in teaching the students, which evidenced less of a master-agent relationship and more of a teacher-student relationship.

Contrary to the regional director's decision in *Northwestern*, just because the Northwestern football coaches are not members of the faculty, does not mean they are not involved with teaching the student-athletes. The regional director emphasizes that the football coaches are ''responsible for supervising the players' athletic duties.'' He said because the coaches do not take part in the football players' formal instruction, imposing collective bargaining will not have a ''deleterious impact on overall educational decisions.''

The premise of his opinion is erroneous because coaches are involved in educating student-athletes. A student-athlete gains valuable knowledge outside the classroom, which in turn helps with academic pursuits. The regional director asserts that, because coaches are not a part of a school's faculty, they do not assist student-athletes in obtaining their degrees.

However, coaches and supporting staff teach discipline, hard work, dedication, and time-management to student-athletes—all tools necessary to complete their degrees. A college or university can resolve the regional director's dilemma regarding this issue and simply require that coaches of each sport teach a first-year required course.

Furthermore, the finding that the Northwestern faculty lacks any relationship with the football players' performance of their athletic duties is incorrect. A student who skips class, cheats on an exam, or completely fails a course is in jeopardy of falling below National Collegiate Athletic Association (NCAA) and university academic standards.

Student-athletes must comply with academic requirements established by the school faculty in order to maintain their athletic scholarships and be allowed to compete as student-athletes. The faculty may not have control over what academic duties students have or how they are performed. However, the regional director ignores that student-athletes must perform at a certain academic level to ensure that they can compete in their respective sports.

Again it is clear that the *Brown* decision is controlling in this case and thus the Northwestern football players should not have been held to be employees under the Act.

Are Student-Athletes Compensated or Given Financial Aid?

In *Brown*, the NLRB held that the graduate assistant students received financial aid to attend Brown, and were not compensated for the ''work'' they completed while obtaining their graduate degrees. The NLRB opined that because ''(1) the graduate assistants received the same compensation as the graduate fellows for whom no teaching or research was required; and (2) the graduate assistants' compensation was not tied to the quality of their work,'' they were not employees of Brown.

In *Northwestern*, the regional director noted that the university never offered a scholarship to prospective students unless they intended to provide athletic services to the university. Ohr held that, because of this exchange of services, scholarship student-athletes cannot maintain their financial aid without participating in athletics. He made the comparison between scholarship student-athletes and walk-on student-athletes and noted that the latter group can withdraw from the sport with no consequences.

However, he failed to consider another point of comparison. For a general student applying for an *educational* scholarship, which too comes with requirements to maintain the scholarship, it is his or her means to achieve the end goal—a college degree. An athletic scholarship is similar to an educational one.

Normally, a general educational scholarship is not tied to any particular degree, but does require a general student to maintain a certain grade point average; and this requires the student to study hard. The same must be said about student-athletes as they have *both* academic (i.e., a minimum grade point average each year of school, a minimum number of credits per semester, attendance in class, etc.) and athletic benchmarks to maintain in order to keep their athletic scholarships.

Not all students can simply ''walk away'' from the ''services'' they are required to perform in exchange for financial aid. If students receiving educational scholarships are not employees, then student-athletes are not employees under the NLRA.

Implications of *Northwestern*

As set forth above, the *Northwestern* decision is critically inconsistent with the principles of *Brown*. The Northwestern football players met the *Brown* test and should be considered students and not employees.

There will be a lengthy appeal process that presumably will stay the regional director's decision and the Northwestern football players will be required to maintain status quo for some time. However, if the decision is upheld, what could this mean?

First, as set forth in the regional director's decision, only a student-athlete who receives grant-in-aid will be allowed to form a union. This will leave the Northwestern football coaching staff to abide by separate rules for walk-on athletes and for scholarship athletes, assuming the latter will collectively bargain for different requirements. It would be remarkably difficult for any employer to operate a business with a group of employees who complete the exact same duties, but are held to different standards.

Second, assuming this decision was applied to other collegiate athletic programs, it presumably should apply to other nonacademic grant-in-aid scholarship recipients. For example, some university and college marching bands distribute scholarships. Such band directors exercise control over students by requiring them to report to practice, athletic games, and competitions, and the students are providing a service (i.e., their musical talents) in exchange for financial aid. In accordance with *Northwestern*, these students would be permitted to unionize. The regional director probably did not consider how expansive his decision would be if upheld.

Third, this decision is directly in contrast with the principle of amateurism that the NCAA upholds and to which Northwestern is subject. That principle holds: ''Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.'' NCAA Bylaw 12.02.4(B).

If the football players are able to bargain over their ''compensation,'' they will be in jeopardy of losing their amateur status if they receive more than the cost of attending school and other approved expenses, and thus unable to compete. In addition, the revenue generated from a player's name or likeness not only pays the salaries of the coaching staff, but more importantly funds non-revenue sports under Title IX of the Education Amendments of 1972. If fewer funds are accessible for programs such as women's track-and-field, it could lead to schools losing such programs, which would harm many ''nonunion'' student athletes.

It's unclear from the regional director's decision whether he considered the effects of his analysis on other student-athletes, other college students, or other work places. The NLRB itself and one or more circuit courts of appeal will weigh in before this is over. No game is ever decided in the first quarter.

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