

NLRB's Northwestern decision will climb the courts

By Eli M. Kantor

In a groundbreaking decision changing the playing field, on March 26 Peter Sung Ohr, the regional director of National Labor Relations Board in Chicago, held that student athletes on Northwestern University's football team receiving scholarships are employees of the university within the meaning of Section 2(3) of the National Labor Relations Act, and therefore eligible to form a union. *Northwestern University and College Athletes Players Association*, NLRB Case No. 13-RC-121359.

This decision is a major departure from prior board precedent, distinguishing *Brown University*, 342 NLRB 483 (2004), which held that graduate assistants were not employees within the meaning of Section 2(3) of the act.

The central issue in the case was whether the football players who received scholarships from the university were employees within the meaning of the act. The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law definition of "employee." *NLRB v. Town & Country Electric*, 516 U.S. 85,92 (1995). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, in return for payment.

The NLRB found that the players receiving scholarships to perform football-related services for their employer, Northwestern University, are paid by the university and are subject to the employer's control. Therefore, they are employees within the meaning of the act who have the right to form a union.

The NLRB based its decision on the following findings:

- The players spent 50-60 hours a week on their "football duties" during the one-month training camp in August before the school year even started.

- The players spent an additional 40-50 hours per week during the 4-5 month football season.

- These hour commitments are "more hours than many undisputed full-time employees work at their jobs." They also are "many more hours than the players spend on their studies." During the training camp, the players did not attend classes, and even during the academic year, players spend 20 hours a week in class, and over twice as much time with football duties. Even incorporating study time for class, the NLRB was not convinced that academics were "primary." Thus, the NLRB found the football players are not primarily students.

- The football players perform services for the benefit of the employer for which they receive compensation, finding that the \$61,000 per year grant-in-aid scholarship was compensation.

- The grant-in-aid scholarship football players are subject to the employer's control in the performance of their duties as football players, regulating their daily routines from 5:45 a.m. to 10:30 p.m.: They have set schedules; are required to attend meetings and practices; and are subject to a strict code of conduct that other students are not subject to.

- The football players provide "valuable services" for the university, because the football team generates significant revenues for the university from ticket sales, television contracts, merchandise sales, and alumni donations.

- The student athletes sign a "tender," which allows a scholarship to be canceled if a student athlete voluntarily leaves the football team or violates the university's code of conduct. The NLRB found that this "tender" was an employment contract, and therefore the scholarships received are compensation.

This decision is not final and will be appealed to the full five-member NLRB. Since the "Obama board" currently has three members who formerly represented unions, it is almost certain that the decision will be upheld. Thereafter, it will then be appealed to the 7th U.S. Circuit Court of Appeals or the D.C. Circuit, and ultimately to the U.S. Supreme Court. While technically the decision only applies to Northwestern University, it could potentially affect all private universities.

More broadly, the decision has the potential to affect the entire nature of collegiate athletics, forcing the National Collegiate Athletic Association and the universities to make fundamental changes in the way the billions of dollars that are generated are divided.

The key demands of the College Athlete Players Association, which is the petitioner, are:

- Medical coverage for sport-related expenses;

- Players being eligible to receive workers compensation;

- Measures to reduce concussion risks, including an independent monitor on the sidelines to determine whether a player can return to the game after being hit;

- Scholarship amounts to be increased;

- Plans to improve graduation rates; and, most importantly,

- Players being allowed to be paid for commercial sponsorships.

This ruling highlights a growing battle at to how the billions of dollars generated by college athletics should be divided.

Johnny Manziel, known as "Johnny Football," only cost Texas A & M a little more than \$100,000 in scholarships during the three years that he attended the university. Yet during 2012 and 2013, donations to the university jumped by \$300 million from the previous year to \$740 million.

If the free market were operating in college football like the NFL, college players would be getting roughly 50 percent of the revenues they create. Only time will tell the outcome.

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