Bender's Labor & Employment Bulletin

May 2014
VOLUME 14 • ISSUE NO. 5

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Game Changer? NLRB Region 13 Says College Football Players Can Unionize

By Peter J. Moser and Ann Marie Noonan

Editor's Note: On April 25, 2014, after Peter Moser and Ann Marie Noonan submitted the article below for publication, the National Labor Relations Board held an election in the Northwestern University case discussed in their article. However, because the Board granted Northwestern's Request for Review of the Regional Director's Decision, the ballots have been impounded and will not be released unless and until the Board upholds that Decision. As of publication, no schedule for briefing in the matter was set. For more information regarding the appellate process and impacts of an appeal, please see the discussion in this article under the heading "Northwestern University Throws the Challenge Flag; Delay of Game Expected."

Opening Line

Sports pundits and labor law pundits alike are abuzz following a recent decision by Region 13 of the National Labor Relations Board involving the Northwestern University football program. *See Northwestern University and CAPA, Case #13-RC-121359* ("*Northwestern Decision*").[1] On March 26, 2014, to the surprise of many, Chicago area NLRB Regional Director Peter Sung Ohr ruled that scholarship athletes in Northwestern's football program are university "employees" within the meaning of the National Labor Relations Act ("NLRA"), and are therefore entitled to pursue union representation. Shockwaves quickly reverberated across the country as fans, lawyers, and media outlets pondered a world of professionalized college sports in which the Rose Bowl or even the March Madness basketball tournament might be cancelled due to a labor strike.

But does the headline-grabbing decision really mark the beginning of a brave new world in college athletics? Are we truly witnessing the demise of the "student-athlete," a dubious construct, already on life support? Or will the decision prove to be nothing more than a short-lived anomaly, eventually undone by myriad legal and practical challenges?

Pre-Game Analysis

Before analyzing the *Northwestern Decision* it helps to have a basic understanding of the history and controversy that surrounds the term "student-athlete." The notion of the student-athlete first arose in the 1950's. At its best, and as consistently advocated by the National Collegiate

[1] A copy of the *Northwestern Decision* is available on the NLRB's website at http://www.nlrb.gov/news-outreach/news-story/nlrb-director-region-13-issues-decision-northwestern-university-athletes.

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Athletic Association ("NCAA"), the term represents a noble ideal affirming the primacy of academics over athletics in college sports:

> Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second.[2]

But an increasingly vocal chorus of critics claims that the true purpose behind college amateurism, or at least its most unfair aspect, is the financial exploitation of athletes.[3] Even as college football and college basketball have become billion dollar industries, the participating athletes are prohibited from sharing in the profits. According to the College Athletics Players Association ("CAPA"), a would-be labor organization[4] and the petitioner behind the *Northwestern Decision:*

> NCAA sports has used a false notion of amateurism as a guise to siphon revenue that would otherwise be used to protect the college athletes, and NCAA policymakers are paid handsomely to make sure that the system does not change.[5]

Historically, legal attempts to challenge the amateur status of student-athletes have failed. Yet a new spate of lawsuits has caught the public's attention and threatens to gain traction.[6] Momentum, or at least public opinion, appears to be shifting.

It is in this context that, on January 28, 2014, CAPA, with assistance from the United Steelworkers Union, filed a representation petition with NLRB Region 13 seeking to represent Northwestern University's scholarship[7] football players. Led by former Northwestern quarterback Kain Colter, CAPA claims that an "overwhelming majority" of Northwestern's scholarship players have signed authorization cards in the hopes of certifying CAPA as their bargaining representative.[8] The ultimate goal, according to CAPA, is to "eliminate unjust NCAA rules."[9]

***Northwestern Decision*: The Call on the Field**

In response to CAPA's organizing drive, Northwestern University argued that Region 13 should dismiss the representation petition as a matter of law for three reasons:

1. the University's scholarship football players are not "employees" within the meaning of Section 2(3) of the NLRA;
2. the players are temporary employees not eligible for collective bargaining; and

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[2] http://www.ncaa.org/remaining-eligible-amateurism.

[3] *See, e.g.*, "*The Shame of College Sports", The Atlantic, October 2011 (Taylor Branch).* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true.

[4] According to its Post-Hearing Brief in the *Northwestern University* case, CAPA was formed as a labor organization in January 2014. *See CAPA Post-Hearing Brief* at p.3. http://i.usatoday.net/sports/college/2014-03-17-CAPA-Post-Hearing-Brief-Final.pdf.

[5] http://www.collegeathletespa.org/why.

[6] *See, e.g.*, O'Bannon v. NCAA, No. CV 09-3329 (N.D. Cal. July 21, 2009). The lead plaintiff in this antitrust class action lawsuit is former UCLA basketball player Ed O'Bannon. The case involves a challenge to the commercial use of college athletes' names and likenesses. Trial is scheduled to begin June 9, 2014.

[7] The proposed bargaining unit consists of scholarship athletes only. The University's football team has approximately 112 players, 85 of whom receive athletic scholarships that pay for tuition, fees, room, board, and books. According to CAPA, even though its membership is currently only open to scholarship athletes who participate in the Football Bowl Subdivision ("FBS") and Division I men's basketball, this "initial objective" will "be amended as CAPA evolves." CAPA says it would "welcome into the proposed bargaining unit walk-on players" if those players are found by the Board to meet the definition of employee under the NLRA. *See* CAPA Post-Hearing Brief at n.2.

[8] http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.

[9] http://www.collegeathletespa.org/more. Specifically, CAPA claims that it is focused on improving safety and is not seeking financial compensation for players – at least not yet:

Faced with the serious risk of concussions and long-term injuries, the Players seek to bargain over health and safety issues like other employees protected by the Act. CAPA will not jeopardize the Players' eligibility by bargaining compensation not permitted by National Collegiate Athletic Association rules, but can bargain additional financial support and protections within the existing NCAA rules, and will speak for the Players as the NCAA landscape continues to evolve.

See CAPA Post-Hearing Brief at p.1. http://i.usatoday.net/sports/college/2014-03-17-CAPA-Post-Hearing-Brief-Final.pdf.

3. the petitioned-for unit — consisting only of scholarship athletes — is arbitrary and not appropriate for bargaining.

A hearing was held at the NLRB's regional offices in Chicago over the course of five days in February 2014. Several former student-athletes testified, including one on behalf of CAPA (Kain Colter) and two on behalf of the University. Both parties submitted detailed post-hearing briefs.[10] In the end, each of the University's arguments was rejected by the Regional Director.

Scholarship Football Players are Employees

In determining whether Northwestern University's scholarship football players are "employees" within the meaning of the NLRA, the Regional Director applied the Supreme Court's common law definition of employee.[11] Under this definition, an employee is anyone who (1) "performs services for another under a contract of hire"; (2) is "subject to the other's control or right of control"; and (3) performs services "in return for payment."[12]

With regard to services rendered, the Regional Director found that Northwestern's football players "perform valuable services for [the University]" as evidenced by the revenue generated by the football program.[13] In addition, the Regional Director cited the "less quantifiable" benefit of the "positive impact" a winning football team has on the school's reputation, which results in increased alumni giving and student applications.[14]

As for compensation, the Regional Director noted that players are recruited and granted scholarships based on their football skills, not their academic potential. As such, he found "it is clear" that the scholarships are "compensation for the athletic services [the football players] perform for the [University] throughout the calendar year . . ."[15] The Regional Director noted the scholarships have a monetary value of up to $76,000 per year.[16] Relying on *Seattle Opera v. NLRB*, without providing any explanation, the Regional Director held that it does not matter that this "compensation" is not taxable income.[17]

The Regional Director found it compelling that the "compensation" was expressed in a "tender" that student-athletes must sign before receiving their scholarship,[18] and held that the tender constituted an employment contract setting forth the "duration and conditions" of compensation. Moreover, he found that, because the football coach can cancel a scholarship for a number of reasons, and because a player's withdrawal from the football program will result in scholarship cancellation, the scholarship is "clearly tied to the player's performance of athletic services."[19]

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[10] Copies of the parties' post-hearing briefs are available at http://i.usatoday.net/sports/college/2014-03-17-NU-Brief-to-RD.PDF (Northwestern University) and http://i.usatoday.net/sports/college/2014-03-17-CAPA-Post-Hearing-Brief-Final.pdf (CAPA).

[11] The NLRA's definition of "employee" offers little guidance, as the statute was drafted at a time when traditional employment roles were more easily recognizable. "Employee" is broadly defined as including "any employee." *See* 29 U.S.C. § 152(3).

[12] *See Northwestern Decision* at p.13 (citing *Brown University*, 343 N.L.R.B. 483, 490 n. 27 (2004) (citing *Town & Country Electric*, 516 U.S. 85, 94 (1995)).

[13] *Northwestern Decision* at pp.13-14. Between 2003 and 2012, the Northwestern football program generated $235 million in revenue and incurred $159 million in expenses. Between 2012 and 2013 the football program generated $30.1 million in revenue and incurred $21.7 million in expenses. The latter expense figure does not take into account the cost of stadium maintenance (estimated to be between $250,000 and $500,000 annually), or the fact that football revenue subsidizes non-revenue generating sports (every other sport except men's basketball).

[14] *Northwestern Decision* at p.14.

[15] *Northwestern Decision* at p.14.

[16] *Northwestern Decision* at pp.3, 14. Scholarship aid totals approximately $61,000 per academic year, or $76,000 if a student-athlete enrolls in summer courses. The aid is not considered wages by the University. Students do not receive W-2s and their scholarships are not subject to FICA taxes.

[17] *Northwestern Decision* at p.14 (citing *Seattle Opera v. NLRB*, 292 F.3d 757, 764 n.8 (2000)).

[18] *Northwestern Decision* at pp.14-15. The tender describes the terms and conditions of the scholarship offer. Both it and a Letter of Intent must be signed by the student-athlete.

[19] *Northwestern Decision* at p.15. The tender itself indicates a scholarship may be reduced or canceled if the student renders himself ineligible to play, engages in serious misconduct warranting substantial disciplinary action, engages in conduct resulting in criminal charges, abuses rules as determined by the coach or athletic administration, voluntarily withdraws from the sport, accepts compensation for participating in an athletic competition in his sport, or agrees to be represented by an agent. Northwestern Decision at p.4.

As for control, the Regional Director determined that Northwestern University's scholarship football players are under "strict and exacting control" of the University throughout the year.[20] He pointed to daily itineraries provided by coaches to players that determine where, how, and for how long players will engage in football activities.[21] Coaches have the authority to monitor the players' adherence to team, University, and NCAA rules and to discipline players who violate those rules.[22] Coaches control where the players will live, whether they can engage in other employment, what vehicles they can drive, whether they can travel, their ability to use social media and speak with the media, the use of drugs and/or alcohol, and gambling.[23] He noted that in some instances student-athletes were not able to take classes because of a conflict with football activities.[24]

Conversely, the Regional Director held that the "walk-on" players were not employees "for the fundamental reason that they do not receive compensation for the athletic services that they perform."[25] They do not sign a tender and therefore do not enter into a contract with the University. In addition, the Director found they were given more "flexibility" when it came to missing practices. He found that the "mere fact that they practice (and sometimes play) alongside the scholarship players is insufficient to meet the definition of 'employee.' "[26] Despite this, he noted that if a walk-on athlete later receives an athletic scholarship, he would become an employee and be included within the unit.[27]

Accordingly, in determining who was eligible to vote in a representation election, the Regional Director restricted voting rights to student-athletes who are currently receiving a scholarship and who have not exhausted their "four years (or five years, in the case of a 'redshirt' player)" of NCAA eligibility. This excludes those who have completed their eligibility as well as freshmen who have not yet begun "perform[ing] athletic services for the [University]."[28]

Scholarship Athletes are Not Temporary Employees

The Regional Director rejected the University's alternative argument that student-athletes are, at most, temporary employees. He noted that although their "employment" is limited in duration, it nonetheless could extend four or five years.[29] Citing and quoting the Board's decision in *Boston Medical Center,*[30] the Regional Director found that this period was too long to be considered temporary.[31] He also differentiated the football players from the student-janitors at issue in the Board's decision in *San Francisco Art Institute,*[32] because the student janitors had only a "tenuous secondary interest" in their employment, whereas Northwestern's scholarship athletes have a "primary interest" in their football activities.[33]

The Petitioned-for Bargaining Unit Is Appropriate

The University argued that the petitioned-for unit was inappropriate because it was an "arbitrary, fractured grouping that that excludes walk-ons who share an overwhelming community of interest with the sought after unit."[34] The University pointed out that walk-ons are subject to the same rules, attend the same football practices and workouts, and play in the same football games if their skills warrant it. The Regional Director acknowledged that "a petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would

[20] *Northwestern Decision* at p.15.

[21] *Northwestern Decision* at pp.5-6, 15-16. The Regional Director devoted several pages of his decision to the schedules and itineraries of the student-athletes both during football season and during the "off" season. Student-athletes spend over forty hours per week engaged in "football related activities" during both the pre-season and season, which can run from August through early January, depending on the team's success. Even during the post-season, there are mandatory workouts and conditioning exercises, as well meetings and spring practices.

[22] *Northwestern Decision* at p.16. The University noted in its Post-Hearing Brief that many of these rules overlap with general campus rules.

[23] *Northwestern Decision* at p.16. The Regional Director found it irrelevant that many of these rules are in place to comply with NCAA requirements.

[24] *Northwestern Decision* at p.16.

[25] *Northwestern Decision* at p.17.

[26] *Northwestern Decision* at p.17.

[27] *Northwestern Decision* at p.17.

[28] *Northwestern Decision* at pp.17-18.

[29] *Northwestern Decision* at p.21.

[30] 330 N.L.R.B. 152 (1999) ("Board has never applied the term 'temporary' to employees whose employment, albeit of finite duration, might last for 3 to 7 or more years . . .").

[31] *Northwestern Decision* at p.21.

[32] 226 N.L.R.B. 1251 (1976).

[33] *Northwestern Decision* at p.21.

[34] *Northwestern Decision* at p.21.

be an appropriate unit."[35] However, the Regional Director found that because walk-ons were not "employees" under the NLRA – given their lack of financial compensation by the University — the petitioned-for group could not be deemed fractured:

> Fundamentally, walk-on players do not share the significant threat of possibly losing up to the equivalent of a quarter million dollars in scholarship if they stop playing football for the Employer as do the scholarship players. Moreover, to constitute a fractured unit, the putative group must consist of employees as defined by the Act, and the Employer concedes that the lack of scholarship precludes a finding that the walk-ons are employees under the Act. In the absence of a finding that the walk-on players are employees a fractured unit cannot exist, and the petitioned for unit is an appropriate unit.[36]

In a footnote, the Regional Director compared the walk-on athletes to "unpaid interns."[37]

Northwestern University Throws the Challenge Flag; Delay of Game Expected

Northwestern University has appealed the Regional Director's decision to the full National Labor Relations Board.[38] The appellate process promises to be a long one.

For starters, the appeal will wind its way through the Board. The Board's Office of Representational Appeals in Washington D.C. will assign an attorney and a supervisor to the case, and eventually the case will be presented to the Board for review. The Board may deny or grant review. If review is granted, further hearings and briefings by the parties will occur. Eventually, the Board will issue a decision that may be appealed in court. Given the high stakes involved and the high profile nature of the dispute, a judicial appeal could conceivably wind up before the United States Supreme Court.

An alternative track leads to the same destination. Even if the Board upholds the Decision and CAPA wins, Northwestern University could simply refuse to bargain. CAPA would then presumably file an unfair labor practice charge with Region 13, presenting another opportunity for the University to advance its arguments before the Region, the Board, and ultimately the courts.

Given the slow pace of appeals before both the Board and courts, it could be years before a final decision is reached. Suffice it to say that Northwestern University's 2014 incoming class of freshman football recruits may no longer have eligibility to play by the time all appeals are resolved.

Game Changer?

Even leaving aside the lengthy appellate process, there are a number of reasons why the *Northwestern Decision* will not likely prove to be an immediate and dramatic game changer.

The Scope of the Decision is Limited

Because the NLRA only governs private sector employers, the *Northwestern Decision* only applies to private colleges and universities. Currently, only seventeen out of the approximately one hundred and twenty colleges and universities that compete in the FBS are private, including Northwestern University.[39]

Public universities are subject to state laws governing labor relations, but in some states – particularly in southern and Midwestern states, traditional bastions of college football – state law prohibits public sector collective bargaining.[40] Public universities in these states need not bargain with their traditional employees, let alone their student-athletes. In a number of other states public sector collective bargaining rights are currently under legislative attack.[41]

The Scope of Bargaining Would be Limited

Many of the restrictions on athletes decried by CAPA – especially those regarding compensation[42] – are the result of NCAA rules. CAPA has declared that its ultimate goal is to eliminate "unjust NCAA rules", yet the *Northwestern Decision* does not make the NCAA an employer for purposes of recognizing and bargaining with CAPA.

If CAPA prevails in a representation election it only earns the right to bargain with Northwestern University, one school among many in the FBS. The NCAA would be under no obligation to bargain with CAPA, and it may not feel compelled to engage with CAPA at all given

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[35] *Northwestern Decision* at p.22 (quoting *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83, 2011 NLRB LEXIS 489, at *56 (NLRB, August 26, 2011).

[36] *Northwestern Decision* at p.22.

[37] *Northwestern Decision* at n.36.

[38] http://dradis.ur.northwestern.edu/multimedia/pdf/nlrb.pdf.

[39] *Northwestern Decision* at n 2.

[40] *See, e.g.*, http://www.people.fas.harvard.edu/~ehan/AEA_2013_Han.pdf.

[41] *See, e.g.*, http://www.people.fas.harvard.edu/~ehan/AEA_2013_Han.pdf.

[42] The NCAA maintains strict regulations prohibiting colleges and universities from "compensating" players beyond scholarships. Schools may only provide "Student Assistance Funds" to cover health insurance, dress clothes for pre-game travel, travel to a family member's funeral, and fees for graduate school admittance tests and tutoring. *See Northwestern Decision* at p.3.

that only a minority of schools within the FBS are subject to the *Northwestern Decision*. Contrast this with the National Football League where the players association bargains directly with the league.

There Is a Reasonable Chance the Northwestern Decision Will Be Overturned on Appeal.

The *Northwestern Decision* has been hailed as groundbreaking, yet it is not the first time that the Board has found university students to be "employees" and those earlier holdings have lacked staying power.

In *New York University*[43] graduate students were found to be employees, with the Board reasoning that student-employees are not removed from the Act's protections merely because they are enrolled in the institution at which they work. Instead, the Board found, similar to the Regional Director's reasoning in the *Northwestern Decision*, that the NLRA utilizes a broad definition of the term "employee" and that common law notions of employment warranted a finding of employee status.[44]

The Board's decision in *New York University* reversed twenty-five years of Board precedent; however, just four years later the Board expressly overturned *New York University*. In *Brown University*[45] the Board held that graduate students' primary relationship with their school is academic in nature, not economic. The Board in *Brown University* conceded that pursuant to common law principles graduate students may indeed be "employees", but the Board noted that it has consistently held that the common law alone does not control employment determinations under the NLRA. Instead, Congressional intent must be reviewed to determine whether the individuals at issue were intended to be covered by the Act.[46]

The Regional Director in the *Northwestern Decision* attempted to distinguish *Brown University*, but the reasoning is circular and lacks any case citations.[47] It seems quite possible that upon review the Board or a federal court may either disagree with the reasoning in the *Northwestern Decision*[48] or find that, even though

[43] 332 N.L.R.B. 1205 (2000).

[44] Interestingly, the Board in *New York University* asserted that it did not matter how many hours graduate assistants spent on their "work" for the University, in this case only 15% of their time. And, similar to the Director here, the Board differentiated between financial aid other students might receive that was not contingent on services performed and the "compensation" the graduate assistants received in exchange for the services they performed. Moreover, the Board held there was no academic credit for the work these graduate assistants performed and therefore the work was not "primarily educational."

[45] 342 N.L.R.B. 483 (2004).

[46] *Brown*, at 491 (noting for example that managers come within the common law definition of employee but are not employees within the meaning of the NLRA).

[47] In *Brown University* the Board found that university graduate assistants were not "employees" based on factors which included (1) the status of the graduate assistants as students, and (2) the financial support they received from their school. These two factors are clearly applicable to Northwestern's scholarship football players, yet the Regional Director decided that the statutory test used in *Brown University* did not apply because a football players' duties are "unrelated to their academic studies unlike the graduate assistants . . ." This determination – essentially a finding of employee vs. student status – should be the conclusion of the analysis not a starting-point assumption shaping the analysis. The Regional Director did go on to note that graduate students spend only a "limited number of hours" performing their duties, whereas football players devote full-time hours to football related activities. In addition, unlike the graduate students who receive academic credit for their teaching, which is "directly related to their educational requirements," football players receive no academic credit for their football activities nor are they required to play football as part of their degree. Also, the graduate students' "work" is overseen by faculty, whereas there is no oversight by the academic faculty over the football program. *See Northwestern Decision* at pp.18-20.

[48] There are a number of instances in which the Regional Director appears to have cherry-picked facts in order establish a critical point. As summarized by Northwestern University in its appeal brief, "Based on the testimony of a single player who admitted that he aspires to play professional football, the Regional Director described Northwestern's football program in a way that is unrecognizable from the evidence actually produced at the hearing." http://dradis.ur.northwestern.edu/multimedia/pdf/nlrb.pdf. It is true that the Regional Director found that athletics dominated over academics for student-athletes at Northwestern University based in large part on the lone student who testified on behalf of CAPA, Kain Colter. Mr. Colter testified he was not able to take a class he wanted because it conflicted with football practice, and that as a result he had to take the course over the summer and then subsequently had to change his major from pre-med to psychology. Yet several former student-athletes testified on behalf of the University and presented evidence regarding the school assisting them in completing their degrees and working with their academic schedule so they could obtain the degrees they desired. Further, the football coach testified that he never prohibited students from taking classes and in fact changed practice time on some occasions to accommodate academic courses. Northwestern University has study hours, tutor programs, mandatory class attendance policies, and travel polices that restrict travel for sports during exams. The average GPA of a player on the University's football team is 3.024 and the team has a graduation rate of ninety-seven percent.

student-athletes fit within the common law definition of employee, they do not fall within the intended coverage of the NLRA. Courts have already held that the primary feature of a student-athlete's relationship with his school is academic.[49] It is therefore not difficult to imagine the Board or an appeals court finding that student-athletes are primarily students, and that national labor policy is not served by treating them as employees.

Unintended Consequences

The impact of the *Northwestern Decision* could be limited by unintended consequences emerging from the ruling. To highlight one example, some elite private institutions instead of living with the consequences of the *Northwestern Decision* could choose to opt out of big time college sports altogether, much in the way that the Ivy League schools did decades ago.[50]

Many of the private colleges and universities currently competing in the FBS pride themselves on their academic, not athletic, reputation. If such a school is already failing to reap significant financial benefits from its so-called "revenue generating" sports programs, and if that school is already finding it difficult to compete in the increasingly competitive world of Division 1 college athletics, the school might simply decide that the forced professionalization of its student-athletes is the last straw; that being forced to further elevate the already lofty status of athletes on campus is unacceptably distasteful and contrary to the school's mission. Pressure could conceivably come from alumni, student groups, and from athletes and coaches in the school's other sports.

Even if only one well respected private institution were to depart the field it might trigger a backlash, as it would be seen as a development detrimental to both college sports and to aspiring high school athletes.

Congressional Intervention

The *Northwestern Decision* can be legislatively undone simply by amending Section 2(3) of the NLRA to clarify that the term "employee" does not include collegiate student-athletes. Given the popularity of sports in America, and given the Board's lack of popularity among conservative legislators, the potential for Congressional intervention seems very real should the *Northwestern Decision* be upheld on appeal. Congress did not hesitate to insert itself into the professional baseball steroid scandal, and conservative legislators have not passed up opportunities in recent years to apply political pressure to attack activist Board rulings. There is every reason to believe that Congress might insert itself into college athletics/organized labor battle if the *Northwestern Decision* remains a controversial topic of public interest.

The Stated Goals of CAPA Can Be Achieved by Other Means

In the end, the *Northwestern Decision* may indeed help usher in positive changes for college athletics, but probably not through collective bargaining. More likely, as is often the case following a union organizing drive or major lawsuit, the event serves as a wake-up call to the employer and its industry. Voluntarily changes tend to occur as a reaction. With regard to college sports, public opinion also seems to be building in favor of change. The time may simply be right for the NCAA to act.

Even though labor law prohibits Northwestern University from making changes while the representation petition is pending, there is nothing to prevent the NCAA from reassessing its rules, analyzing athlete concerns, and making changes.

It should help that a number of CAPA's stated goals are actually shared by the NCAA. According to CAPA, its mission and goals include: minimizing college athletes' brain trauma risks, preventing players from having to pay sports-related medical expenses, increasing graduation rates, protecting educational opportunities for student-athletes and making safety guidelines uniform to prevent serious injuries.[51] Similarly, the NCAA maintains that its top priorities include "student-athlete health, safety and well-being"[52] and that "graduating from college is as important an achievement as winning on the fields well."[53]

The NCAA would be wise to take this opportunity to effect positive change for all student-athletes, not just those in Division 1 football and basketball programs. One idea for

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[49] *See, e.g.*, Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992) (noting that college sports are not a "minor league training ground" and that instead the NCAA exists to provide "opportunity for competition among amateur students pursuing a collegiate education").

[50] *See* www.cnn.com/2014/26/us/northwestern-football-union/. In fact, Northwestern University's president emeritus, Henry Bienen, stated that if the football players were successful in forming a union, "he could see the prestigious private institution giving up Division I football." www.cnn.com/2014/26/us/northwestern-football-union/. He went on to indicate that other schools, including Duke and Stanford, could also abandon sports in favor of retaining their "academic integrity." www.cnn.com/2014/26/us/northwestern-football-union/.

[51] www.ncpanow.org/about/mission-goals.

[52] http://www.ncaa.org/health-and-safety.

[53] http://www.ncaa.org/about/what-we-do/academics.

change would be for the NCAA to more aggressively enforce and more conservatively interpret its existing twenty-hour countable athletically related activities (''CARA'') requirement (i.e., the existing 20 hour per week cap on the amount of time a student-athlete may be required to participate in athletic activities at the direction of, or supervised by, coaching staff).[54] By eliminating the many current exceptions and allowances for uncounted time, student-athletes could devote more time to academics. The NCAA could restore the original notion of the student-athlete and thereby restore its own image and quiet critics. Ironically, this move could also fatally undercut a key basis of the *Northwestern Decision*, i.e., that scholarship athletes are primarily focused on athletics rather than academics given the inordinate amount of time they devote to football-related activities. Resistance from member schools is perhaps to be expected, but so long as all teams are held to the same standard no team or school can be said to be disadvantaged.

With respect to medical concerns, the NCAA could take the opportunity to more aggressively safeguard athlete health and well-being. The NCAA has already created a platform for change in the form of its ''Sports Science Institute'' (SSI). The SSI, according to the NCAA, focuses on ''providing the leading voice in promoting and developing safety, excellence, and wellness in athletes of all ages.''[55]

With respect to the thorny issue of athlete compensation, there is a compromise approach the NCAA could take. For starters, scholarships could be increased to cover the small shortfall that currently exists when student expenses are fully factored. In addition, qualifying students could be permitted to receive additional aid in the form of a stipend based on financial need. By focusing on financial need instead of ''profit sharing'', the fears and controversy surrounding professionalization are largely avoided.

The NCAA could also relax the significant restrictions on student-athletes who wish to transfer from one Division 1 program to another. Currently, a transferring student-athlete may be required to sit out up to two years. To some critics this has the ring of indentured servitude. Again, member schools may resist change in this area but no individual school would be disadvantaged and it may simply be an idea whose time has come.

The NCAA has recently shown some willingness to make changes of the type advocated by critics like CAPA. Prior to the 2012-13 academic year, student-athletes were only permitted one-year scholarships that were renewable annually at the coach's discretion. Beginning that year, however, the NCAA modified its rules to permit universities to offer four-year scholarships.

The Final Score

Given the myriad practical and legal challenges ahead, and the very real possibility that positive change will arrive in college sports via other means, it seems unlikely that the *Northwestern Decision* will usher in a new era of collective bargaining in college athletics. Positive changes may indeed come for student-athletes, but probably not through collective bargaining. In the end, the *Northwestern Decision* may prove to be simply a shot across the bow of universities and the NCAA, adding momentum to a movement for change that is already underway, yet ultimately having little impact on the amateur status of college athletes.

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[54] *See* http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2013-14/misc_non_event/ncaa-manual.pdf.

[55] http://www.ncaa.org/health-and-safety/ncaa-sport-science-institute.