ANY GIVEN SATURDAY: THE NLRB FUMBLES REGARDING STUDENT ATHLETES AS EMPLOYEES

I. INTRODUCTION

On January 28, 2014, collegiate football made history.[1] For the first time ever, a student-athlete filed a petition with the National Labor Relations Board (NLRB) to be represented by a labor union.[2] Scholarship players (Players) for Northwestern University sought to be classified as employees under the National Labor Relations Act.[3] While the Chicago Regional Director held that scholarship players of Northwestern University qualified as employees, The NLRB punted the issue—declining to extend its jurisdiction to collegiate student athletes.[4] The Board's decision creates vast implications and consequences on collegiate football and its student-athletes.

In its decision, the NLRB clearly emphasizes "the novel and unique circumstances" of student-athletes petitioning for representation.[5] The Board held that the aim and purpose of the NLRA would not be effectuated by extending jurisdiction over the Players.[6] Additionally, the Board posited that extending jurisdiction would create chaos in collegiate football, and the National Collegiate Athlete Association (NCAA) already exists to solve many problems that collective bargaining would solve.[7] Lastly, there are only seventeen private universities that are

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[1]Tom Farrey, *Kain Colter Starts Union Movement*, ENTM'T SPORTS PROGRAMMING NETWORK (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.
[2]*Id.*
[3]Petition, Northwestern Univ., N.L.R.B. No. 13-RC-121359 (Jan. 28, 2014), http://www.employerlaborrelations.com/files/2014/02/Northwestern-RC-petition1.pdf. Status as an employee under section 2(3) would allow the Players to attain union representation and collectively bargain with Northwestern University. *See id.*
[4]Northwestern Univ., 362 N.L.R.B. No. 167, slip op at 1 (Aug. 17, 2015). The Board's decision to decline jurisdiction had the same effect as declaring the Players were not employees under the National Labor Relations Act (NLRA). *See id.*
[5]*Id.* at 4.
[6]*Id.* at 1.
[7]*Id.* at 5.

actually under the NLRB's jurisdiction; extending jurisdiction would not be fair to the hundreds of other public universities and their student athletes.[8]

Despite its justification, the purpose of the NLRA would have been better served by finding the Players employees under section 2(3). This article will first analyze the Players' status as employees under section 2(3) of the NLRA. Then, the article will address the NLRB's deference to the NCAA. Finally, the article will examine the consequences and ramifications of its decision in *Northwestern*.

II. *BROWN UNIVERSITY* TEST

When deciding if student workers qualify as Section 2(3) employees, the NLRB must determine if the workers' relationship to the university is primarily educational or economic.[9] The Board returned to this standard in *Brown University*, when it decided that graduate teaching assistants were not employees.[10] The Board used a totality of the circumstances test to determine that the graduate teaching assistants' relationship with Brown was primarily educational.[11] The graduate teaching assistants' job was "part and parcel of the core elements of [their education]."[12] *Brown* relied on four factors in their decision: "(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 University."[13]

While the graduate teaching assistants were deemed not to be employees, the Players' relationship with Northwestern appears to be much more economical. First, the Players

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[8] *Id.* at 6.
[9] Brown Univ., 342 NLRB 483, 487 (July 13, 2004).
[10] *Id.*
[11] *Id.* at 487–88.
[12] *Id.* at 488.
[13] Northwestern Univ., 362 N.L.R.B. No. 167, slip op at 22 (Aug. 17, 2015).

responsibilities go far beyond the classroom. They are required to attend practices, film sessions, and travel with the team for games—sometimes at the expense of class time.[14] The Players' participation does not further their education. The Players also must abide by special rules that restrict them from gambling, working, and receiving gifts.[15] Second, the Players generate tens of millions of dollars of revenue for Northwestern University.[16] Without the Players' participation, none of that revenue would be possible. Finally, scholarships are awarded to players on the basis of talent and football skill. The scholarships do not depend on the Players' academic ability. These factors would strongly indicate that the relationship between the Players and Northwestern is much more economical than educational.

The fact that the Players must first be students would indicate that the relationship is at least partly educational. However, that factor alone does not indicate that the Players are not employees or that the NLRB should not extend its jurisdiction. The vast revenue the Players made for the university indicates that the relationship clearly rose above a primarily educational one. Any student worker's relationship to their university is going to have some educational component, however the Players' relationship with Northwestern goes beyond that of a graduate teaching assistant.

III. DEFERENCE TO THE NCAA AND THE NCAA AS A JOINT EMPLOYER

The NLRB partially founded its decision to decline jurisdiction over the Players on the NCAA's existence.[17] Since the NCAA's job is to solve many of the issues that collective bargaining would solve, the NLRB felt that the aim of the NLRA would not be achieved.[18] This has problematic results for two reasons. First, the NCAA qualifies as a joint employer under

[14]Northwestern Univ., 362 N.L.R.B. No. 167, slip op at 2 (Aug. 17, 2015).
[15]*Id.* at 2.
[16]*Id.* at 3.
[17]*Id*. at 5.

recent standards set out by the NLRB. As a joint employer, the NCAA should have been a party to the collective bargaining process and not a party that the NLRB defers to. Second, the NCAA serves, first and foremost, as a representation of its universities. A conflict of interest exists between what is best for student athletes and what is best for the universities.

A. The NCAA is a Joint Employer.

Mere weeks after its decision in *Northwestern*, the NLRB revisited its standard for joint employers.[19] A joint employer shares in setting terms and condition of employment and exerts control over the employee.[20] To determine if an entity is a joint employer, (1) it must be established that the worker is an employee under the NLRA, then, (2) "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."[21] The amount of control the joint employer possesses and exerts its control over the employee is the key to determining a joint employer.[22]

In *Browning-Ferris*, a factory contracted with a labor service provider to provide employees.[23] While the provider exerted much more control, both the factory and the provider co-determined certain aspects of the employee's terms and conditions such as, hiring, firing, discipline, scheduling, wages, and training among other aspects of the terms of employment.[24]

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[18]*See id.*
[19]*See generally* Browning-Ferris Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015) (expanding the definition of joint employers).
[20]*Board issues decision in Browning-Ferris Industries*, NAT'L LAB. REL. BD. (Aug. 27, 2015), https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries
[21]*Browning-Ferris Inc.*, 362 N.L.R.B. at 19.
[22]*Id.* A joint employer does not have to possess direct control over the employee; indirect control will suffice to prove a joint employer. *Id.*
[23]*Id.* at 3
[24]*Id.* at 4–8.

The NLRB found that the factory met the joint employer standard because they had control over key points of the terms and conditions of employment.[25]

The new standard for joint employer status greatly broadens the definition of joint employers. This makes it much more likely that the NCAA should have been a party to the action in *Northwestern*. The NCAA does exert control over the Players. They have special rules, outside of those set by the Northwestern Athletic department, that players must abide by. They even have their own handbook for the Players to follow. The NCAA caps how much players can receive from scholarships and how many games and practices universities can hold. Players must even meet the NCAA's eligibility standards before they can even take part in collegiate football. Even if the universities hold the majority of the control, it does not mean that the NCAA does not possess sufficient control to qualify as a joint employer.

When considering these facts together, the NCAA clearly co-determines conditions of the Players' employment. The NLRB's deference to the NCAA, though only part of its justification, was inappropriate because it is akin to the NLRB deferring to an employer instead of exercising its jurisdiction. Since the NCAA is not a governmental organization, the better approach to collegiate athletic labor is to find the NCAA as an employer and allow athletes from all universities to collectively bargain with the NCAA, instead of their respective universities. This would eliminate nearly a majority of the negative consequences that unionization would cause.

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[25] *Id.* at 4.

B. NCAA and Conflict of Interest

The NCAA first developed as an organization to curb violence and protect the safety of collegiate football players.[26] The NCAA today, serves as the representative body for the student athletes and universities that participate in inter-collegiate sports.[27] However, the universities have predominately more representatives than the student athletes at the NCAA.[28] The NCAA has taken steps to include more student athlete representation, however, they are still vastly underrepresented.[29] A conflict of interest between the NCAA and student-athletes has emerged as a result of the profit driven model of the NCAA. Because of its large contingent of representatives, the vast amount of revenue made by the NCAA goes back to the universities rather than the students.[30] The NCAA naturally favors its universities because "[j]ust as for-profit directors have traditionally managed with their shareholders in mind, the NCAA is run by and for its member institutions rather than for student-athletes."[31]

This conflict of interest extends beyond just financial interests. For example, consider the NCAA's concussion protocol. The NCAA's concussion protocol requires each individual member school to formulate and implement its own concussion management plans.[32] However, in the six years since the rule, no school as ever been charged with violating the protocol, despite numerous rules violations.[33] The intended effect was to harshly punish universities for such violations, while protecting student athletes from further injury. These rules have been in play

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[26]Rodney K. Smith, A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics, 11 MARQ.. SPORTS L. REV. 9, 10-11 (2000).
[27]David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669, 670 (1995).
[28]*Id.* at 701.
[29]*Id.*
[30]*Id.*
[31]*Id.* at 671.
[32]*NCAA Approach to Concussions: Behind the Blue Disk*, NAT'L COLL. ATHLETIC ASSOC., https://www.ncaa.org/about/resources/media-center/ncaa-approach-concussions

since 2010, however, the NCAA's concussion protocol is considered by many as largely ineffective.[34]

Allowing student-athletes the right to collectively bargain goes a long way in remedying the NCAA's bias toward the university. When student athletes feel as though their rights and interests are not being properly represented they would be able to bring these grievances to the bargaining table. It would directly give student athletes a voice in the development of safety and innovation in the game. The student athletes would serve as a counter-check to ensure that their interests are not set aside by the NCAA or their universities. The NCAA's record revenues would not be possible without student athletes and labor representation is the best way to amplify their voice at the NCAA level.

IV. RAMIFICATIONS OF THE NLRB'S DECISION

The NRLB's decision to decline jurisdiction in *Northwestern* created many consequences for the Players. This part will first examine the potential for retaliation against the Players for their petition. The part will then address the consequences this decision could have on collegiate football. Finally, the NLRB is on the verge of overturning its decision regarding graduate teaching assistants.[35] This part will analyze the negative policy ramifications the NLRB has created by doing so.

By not tackling the actual issue in *Northwestern*, the NLRB has opened the door to the potential for retaliation against the Players who filed the petition. The NLRA provides protection against retaliation, however the NLRA's protection is not viable since the Board chose

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[33]Nathan Fenno, *NCAA's Concussion Culture Rooted in Denial*, WASH. TIMES (July 22, 2013), http://www.washingtontimes.com/news/2013/jul/22/ncaa-concussion-culture-rooted-denial/?page=all.
[34]*Id.*
[35]*See* The New Sch., 2015 NLRB LEXIS 771, slip op. at 1 (N.L.R.B. Oct. 21, 2015). (Granting review of the issue of graduate teaching students' status as employees).

not to determine if the Players were actually employees or not.[36] If Northwestern decided to strip players' scholarships, limit playing time, cut players from the team, or took any other adverse action, the Players would not have any remedial action they could take. This concern was shared by the dissent in the *Brown* decision.[37] The NLRB could have achieved the same result—not allowing the Players to collectively bargain—by deciding that the Players were employees, just ones who could not collectively bargain. This would have afforded the Players protection against Northwestern from any potential retaliation.

An athletic labor dispute at the collegiate level could have been helpful to both the NCAA, as well as student athletes. Simply because the Players would have the right to collectively bargain, does not mean that the NCAA or Northwestern University could not negotiate a better situation for themselves. Therefore, collective bargaining does not only benefit students. However, it could also have solved many of the problems that still exist today in collegiate sports. For instance, injuries occurred to roughly eight of every 1000 players in collegiate football.[38] However, in the current system, players who are injured must foot the entire bill of the injury, and can even lose their scholarship because of the injury.[39] Those types of problems are exactly what collective bargaining can fix. Finally, it can improve the NCAA's overall image. The NCAA can strive to maintain its amateurism model, while not appearing greedy because the Players would have an avenue to protect themselves and their interests.

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[36]*See* 29 U.S.C. § 158 (2012).
[37]Ryan Patrick Dunn, *Get A Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities Are Not "Employees" Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851, 861 (2006).
[38]*See Football Injuries*, NAT'L COLL. ATHLETICS ASS'N, https://www.ncaa.org/sites/default/files/NCAA_Football_Injury_WEB.pdf.
[39]Anthony R. Caruso, *Collegiate Collisions on the Field and in the Courtroom: Will Labor Peace Save Student-Athletes from Further Injury?*, 10 J. BUS. & TECH. L. 15, 20 (2015).

The Board has recently agreed in *New School* to revisit its decision in *Brown* that graduate teaching assistants are outside of the NLRB's jurisdiction.[40] One inference that can be drawn from this decision is that the NLRB is poised to overturn its decision in *Brown* and find that graduate teaching assistants are employees.[41] To do so would create a horrible public policy precedent.

The Board could retain the test it set out in *Brown,* but change its decision on graduate teaching assistants. This would not look favorably for the NLRB, because the Players are much more likely to be employees under the test than graduate teaching assistants themselves. The Players' relationship with the university is clearly less educational and much more economical. However, the Board could also decide to scrap the *Brown* test altogether. This still is problematic for the NLRB. A recent report from the NCAA states that a majority of collegiate football players are African American.[42] For graduate teaching assistants, nearly three fourths are Caucasian.[43] This type of precedent creates a racial bias amongst student athletes and graduate teaching assistants at universities. Whether the intended effect or not, the Board's action sends the message that the Board's policies and decisions are racially motivated.

Despite its facial neutrality, many feel that the NCAA's amateurism model perpetuates racial bias.[44] As Dale Brown, former Louisiana State University basketball coach put it, "Look

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[40]See The New Sch., 2015 NLRB LEXIS 771, slip op. at 1 (N.L.R.B. Oct. 21, 2015). (Granting review of the issue of graduate teaching students' status as employees).
[41]*Id.*
[42]*Blacks now a majority on football teams*, ENTM'T SPORTS PROGRAMING NETWORK, (Dec. 9, 2010), http://sports.espn.go.com/ncaa/news/story?id=5901855 (finding that African Americans accounted for 45.8% of all collegiate football players.)
[43]Nat'l Ctr. for Educ. Stats., *Digest of education statistics,* (2009) https://nces.ed.gov/programs/digest/d11/tables/dt11_260.asp. No other race represented more than twenty percent of graduate teaching assistants. *See Id.*
[44]Amy C. McCormick & Robert A. McCormick, *Race and Interest Converge in NCAA Sports*, 2 WAKE FOREST J.L. & POL'Y 17, 42 (2012).

at the money we make off predominantly poor black kids. We're the whoremasters."[45] Coupled with the Board's decision, the racial barriers of collegiate sports are exacerbated. Consequently, race should be considered in collegiate athletic labor disputes.[46]

V. CONCLUSION

The Player's clearly fit the definition of employee set out by the NLRB. By dodging the issue, the NLRB has created many consequences. Further, the NLRB's justification was inappropriate, as the NCAA meets the joint employer standard. The decision clearly states that it is only narrowly applicable to the Northwestern Players. Therefore, the NLRB still has an opportunity to rectify its mistake.

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[45]Nicholas Fram & T. Ward Frampton, A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics, 60 BUFF. L. REV. 1003, 1029 (2012).
[46]*Id.*