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NLRB Punts on College Athlete Unions

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On August 17, 2015, the National Labor Relations Board issued the long awaited decision in the Northwestern University football union case. 362 NLRB No. 167 (8/17/2015). In a rare display of unanimity, the five members of the Board decided that it would not effectuate the purposes of the National Labor Relations Act to assert jurisdiction in the case. As a result, the players' petition to join a union was dismissed, and the ballots, which have been impounded since last August will never be counted. In reaching its decision, the Board refused to decide the question of whether the athletes were employees under the Act; whether bargaining in a single team, as opposed to "league-wide" unit would be appropriate; and various other subsidiary questions that might have shed light on how the Board will act in other higher education or athletics cases. Because the Board specifically reserved the right to revisit the decision should circumstances in college football or at Northwestern change, the decision might more accurately be described as a non-decision.

The Board, acknowledging that the issue of the player's status as employees was anything but clear, refused to even address that question. Instead, the Board held that even assuming the players to be employee's the Act's goals of promoting labor stability and industrial peace would not be served by allowing the petition and organizational effort to go forward. In doing so the Board relied on several considerations. First, the Board pointed to the nature of sports leagues in general. It held that due to the mutual reliance of all the teams in a league to produce a product (no one team could stage a game without other teams) the notion of a bargaining unit limited to a single team, rather than an entire league, created difficulties under standard bargaining doctrines. The Board held that this problem was exacerbated by the fact that the vast majority of FBS level teams were at public universities that would be outside the Board's jurisdiction. In keeping with the Board's non-decision motif, the Board quickly pointed out that these same factors would not necessarily prohibit unionization in contexts outside university athletics.

The Board also acknowledged that the intimate relationship between student and player status created conceptual difficulties, citing to *Brown University,* 342 NLRB 483 (2004) (holding graduate students are "primarily students" and thus not employees); and *SanFrancisco Art Institute,* (relying on a primarily student rationale to hold that requiring bargaining with a union of student janitors would not effectuate the purposes of the Act), but refused to either endorse or critique those decisions. Thus, the Board gave no hints as to where it might come out on other graduate student cases pending before the Board that seek to reverse *Brown. See e.g, The New School,* Case No. 02-RC 143009.

In short, the Board was careful to reach a result that affects only the particular petition in front of it, and leave all other matters open for future cases.

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