

DIALOGUE DELAWARE

SHOULD COLLEGE
SPORTS PLAYERS
UNIONIZE?



Student athletes must prove employee status

SHELDON D. POLLACK AND DANIEL V. JOHNS



On Jan. 28, only days before the NFL held its annual Super Bowl to determine the best team in professional football, a group of amateur athletes on the Northwestern University football team filed a petition with the National Labor Relations Board seeking certification as the union of the players. Led by their quarterback, these student athletes are asking the board to certify them as the "collective bargaining unit" of the team. This determination will be made under federal labor law – specifically, the National Labor Relations Act of 1935.



The student athletes face one major legal hurdle – convincing the board they are "employees" of Northwestern University. That is a tricky issue. Prior decisions of the board

suggest these student athletes will not be successful in their quest to unionize. But the board is comprised of political appointees whose opinions shift in the political wind. When the board last considered a similar question, George Bush, not Barack Obama, was president. Today, the board is comprised of three Democrats and two Republicans. This will improve the chance of a decision favorable to the student athletes.

One major organization keenly interested in the matter is the National Collegiate Athletic Association. Donald Remy, the NCAA's chief legal officer, reacted immediately to the announcement that the students had filed their petition, declaring their attempt to unionize "undermines the purpose of college: an education." If successful, it also could undermine the NCAA's tight grip over collegiate athletics. While the director of athletics at Northwestern, Jim Phillips, praised the athletes as "leaders and independent thinkers," he added "Northwestern believes that our student athletes are not employees and collective bargaining is therefore not the appropriate method to address these con-

See STATUS, Page A34

Players deserve backing of a labor union

JULIUS CEPHAS



In a global market where competition for employment and a livable wage is fierce, the future of labor has become the paramount economic policy issue in the U.S. today.

Labor unions make up 7 percent of the private sector and 30 percent of the public sector. But the re-birth of the labor movement and collective bargaining rights could come from a brave, former quarterback at Northwestern University, Kain Colter.

Across the country, college football and basketball athletic programs are part of universities' "economic engines." The University of Texas football program brought in \$104 million in the 2011-2012 season, which makes up 64 percent (\$163.3 million) of the school's total athletic budget. The head coach of the program is the highest paid state employee earning \$5 million this year. The head basketball coach earning just over \$2 million came in second. In 2012, the nonprofit National Collegiate Athletic Association trumped nearly \$872 million in total revenue and an all-time surplus of \$566 million in year-end net assets.

Over the last decade, the NCAA has returned a 9 percent annualized revenue growth per year even in these uncertain economic times. For the first time in college sports history the football players at Northwestern University, represented by the National College Players Association, petitioned the National Labor Relations Board in Chicago to be represented by a labor union and recognized as employees of the university.

What is their position? Northwestern football players want better health benefits, better treatment for concussions, injury compensation and future medical benefit coverage. Injured "student athletes" are not automatically eligible for these medical benefits as available to university employees. Football scholarships through "grants-in-aid" at some universities are renewed on an annual basis only if the athlete makes the team.

Convincing the NLB that "student-athletes" are employees entitled to protections under National

ILLUSTRATION BY
DAN GARROW/THE
NEWS JOURNAL

A CHALLENGE TO BASKETBALL AND FOOTBALL EMPIRES

This week sports fans turn their attention to college basketball playoffs. "March Madness" has office pools betting on a handful of college-age athletes. Network television will hear the chattering from commercials as advertisers try to get in on the action. Colleges, too, are in the game, with money and prestige at stake as their athletes struggle to be No. 1. Everyone, it seems, is in on the payoff – except the athletes themselves.

This week it's basketball; in the fall it's football. Big money games all. But those who put on the show are putting themselves at risk for a few minutes of glory and perhaps a future big payoff.

But a challenge looms as some college football players have sought to unionize. Their chances are slim but their challenge to the establishment should make fans around the country pay attention.

See BACKING, Page A34

Status: Precedent case concerns grad students unionizing

Continued from Page A33

cerns." It is unclear whether the board will agree. The players' best chance is to convince the board to distinguish their case from its earlier cases. That would take student athletics into uncharted territory – especially big-time Division I football.

While this is the first known case to come before the board involving student athletes, there is precedent concerning the right of graduate students seeking to unionize. That case involved teaching assistants and research assistants at Brown University who petitioned the board to certify their union on the grounds that they were "employees" of the university. In July 2004, the board held that the graduate students did not have a legal right to unionize under federal law. As such, the board's decision in Brown could be fatal to efforts to unionize student athletes at private universities across the country – just as it was for other graduate students. There was speculation the board would overturn its decision in Brown in a dispute involving graduate students at New York University, but that case recently settled and the board never had a chance to change its mind.

What was the basis for the board's decision in Brown? The graduate students who sought to unionize performed services typical of all graduate students – teaching classes and conducting research for faculty. Most doctoral programs at Brown University require teaching as a condition for the degree. Only enrolled graduate students are awarded teaching assistantships. There is a strong connection between the work of the graduate students and their education. Indeed, the board viewed the money paid to the graduate students for their service as financial aid rather than compensation. Accordingly, the board held that the graduate students are primarily students, not employees, and hence, are not entitled to unionize under federal labor law.



Northwestern University football team players filed a petition with the National Labor Relations Board seeking certification as the union of the players. GETTY IMAGES

The board's reasoning in Brown will provide the framework for evaluating the claims of the football players at Northwestern. Significantly, the football players are not paid any salary. They do receive scholarships, which are tuition waivers. They do devote a significant amount of time to their athletic endeavors – arguably, as much time as graduate students devote to teaching or research. They must be enrolled as students and will lose their eligibility as scholarship athletes if they do not meet the academic standards set by their university and the NCAA. While critics of big-time Division I sports programs complain athletes spend more time with football than with their academic studies, they still will likely be viewed by the board as students rather than employees of Northwestern University.

Under the Brown decision, graduate students at private universities do not enjoy the right to unionize under federal law – but public universities are governed by different legal rules. This is because public universities are state entities expressly exempt from the definition of "employer" under the NLRA. So students' efforts at public universities to unionize are governed by state labor law. In 14 states, gradu-

ate students at public universities possess the right to unionize. In 11 other states (including Delaware), the right of graduate students to unionize is uncertain. But even where there is no statutory right to unionize, the administration of a public or private university might voluntarily agree to bargain with anyone – faculty, graduate students or student athletes. New York University has voluntarily recognized a union for some graduate students. And a handful of private colleges have recognized faculty unions. But so far, no university has recognized a union representing its student athletes.

If football players or other student athletes at public universities in states with favorable state labor law successfully petition to unionize, or if the administration of any university wants to blaze a new trail for student athletics, things would really get interesting. Inevitably, there would be a showdown with the NCAA. While merely negotiating with a union representing student athletes might not necessarily violate NCAA rules governing amateur athletics, paying amateur student athletes a salary certainly would. (It is unclear whether bargaining over improved health care and working conditions for student athletes would be acceptable;

even that could be viewed as providing something of value to the athletes, and thus a violation of NCAA rules.) Certainly paying student athletes a salary or giving their union a share of the vast profits derived from big-time Division I sports would violate NCAA rules and lead to disqualification from NCAA tournaments. For that reason, it is most unlikely that any university, whether public or private, with Division I athletics will voluntarily recognize a union representing their student athletes. So we aren't likely to witness a confrontation with the NCAA unless the board overturns Brown and holds that the Northwestern football players are university employees.

Critics of big-time Division I sports programs have proposed universities "spin off" their football teams (probably, the top 20 teams that earn big revenue from TV appearances) to "for-profit" subsidiaries. This would turn their teams into a minor league for the NFL. These would-be professional teams' players would be paid salaries. The players could enroll as students at the affiliated university, but they need not. As such, the players clearly would be employees, and hence, eligible to unionize under the NLRA. The remaining programs might move toward the Division III model – putting education above TV revenue. Players would be students who happen to do athletics on the side. But until that happens or the board overturns Brown, football players at private universities such as Northwestern will be deemed students, not employees – no matter how many hours they devote to their sport and no matter how much money their team brings in.

Still, one can't help but admire the effort of the Northwestern football players. Interesting play, guys, but no touchdown. Probably, not even a field goal.

Sheldon D. Pollack is Professor of Law and Legal Studies at the University of Delaware. Daniel V. Johns is a partner in the Philadelphia office of the law firm of Ballard Spahr LLP.