

COLLEGE SPORTS

College Football Players Can Unionize, NLRB Says

In a ruling that could change the face of college athletics, the Chicago district of the National Labor Relations Board has held that Northwestern University football players are “employees” of the school and can unionize.

Northwestern University and College Athletes Players Association, No. 13-RC-121359, 2014 WL 1246914 (N.L.R.B., Region 13 Mar. 26, 2014).

Finding that the Northwestern football players are compensated through tuition and other expenses, practice long hours, and bring in a substantial amount of revenue for the school, NLRB Regional Director Peter Sung Ohr said the players have the right to form a union and collectively bargain with the university.

The College Athletes Players Association filed the petition with the NLRB on Jan. 28 on behalf of the Northwestern football players looking to unionize.

NCAA chief legal officer Donald Remy said in a statement that the organization is disappointed with the ruling. The NCAA was not a party to the case.

THE NLRB RULING

According to Ohr’s decision, the players are employees of the university because they brought in \$235 million in revenue from 2002 to 2013 for the school; they are compensated with tuition, fees, room and board, and books; and they spend 40 to 50 hours per week on football-related activities.

Gordon Schnell, a partner at **Constantine Cannon LLP** who is not involved in the case, called the decision “well-reasoned.”

“[I]t was premised on a flat-out rejection of the notion that big-time college sports are amateur pursuits by ‘student-athletes’ who are students first, and athletes a distant second,” he said.

Northwestern announced March 26 that it plans to appeal to ruling to the full NLRB in Washington.

Schnell said, “[I]f any part of this decision survives ... it would go a long way in undercutting the Orwellian concept of ‘amateurism’ that for years the NCAA and its defenders have hid behind to justify what can only be described as the ultimate exploitation of the so-called ‘student-athlete’ in big-time college sports.”

David J. Reis, a partner at **Arnold & Porter** who is not involved the case, said the decision “may be a neat syllogism, but it’s bad policy and leads to lots of thorny unintended consequences.”

He wondered how minimum-wage requirements, overtime laws and employment taxes will apply to student-athletes.



ANTITRUST SUITS

In addition to worrying about the impact of the NLRB decision on college athletics, the NCAA is currently dealing with several antitrust lawsuits against it.

In one suit, former college athletes allege that the organization conspired to fix the amount of compensation that students can receive from colleges for the use of their names and images in video games, apparel and other merchandise.

Video game developer Electronic Arts and Collegiate Licensing Co. agreed to settle with the student-athletes out of court for \$40 million, leaving the NCAA as the sole defendant in the suit.

The NCAA lost a bid to dismiss the case last October, when U.S. District Judge Claudia Wilken of the Northern District of California held that the NCAA is not immune to antitrust challenges from student-athletes. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-cv-1967, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013).

Judge Wilken said the plaintiffs' allegations that the NCAA hinders competition for student-athletes by preventing colleges from offering money are sufficient to move beyond the motion-to-dismiss stage of litigation.

High-profile labor and antitrust attorney Jeffrey Kessler filed a lawsuit against the NCAA and five major conferences March 17 on behalf of four current college football players. The suit says the NCAA's current compensation model for student-athletes is a "patently unlawful price-fixing and group boycott arrangement." *Jenkins et al. v. NCAA et al.*, No. 14-cv-01678, *complaint filed* (D.N.J. Mar. 17, 2014).

IMPLICATIONS FOR THE ANTITRUST PLAINTIFFS

"The NLRB ruling, if upheld on appeal, will definitely have an impact on the ongoing antitrust suits challenging the NCAA's ban on player compensation," Schnell said.

The decision will not directly affect the antitrust cases but it will have a "powerful impact" on the NCAA, he said, because the NLRB's ruling comes from the government agency "most qualified" to determine whether a student-athlete is an amateur or an employee.

"It will be very difficult for a court to ignore these findings by the NLRB when assessing the NCAA's argument that big-time college athletes are students first, and athletes second and thus amateurs merely playing for the love of the game," he added.



The decision "may be a neat syllogism, but it's bad policy and leads to lots of thorny unintended consequences," said Arnold & Porter attorney David J. Reis.



"The ruling plus any collective bargaining by a union representing student-athletes ... should immunize the NCAA and universities' joint rule making in the future from antitrust attack," attorney Dan W. Goldfine of Snell & Wilmer said.

Dan W. Goldfine, a partner at **Snell & Wilmer** who is not involved with the NLRB decision or the antitrust cases, said the ruling should not impact the merits of the antitrust suits but it may increase pressure on the NCAA to settle.

He noted that the NCAA may see the ruling as an opportunity to avoid antitrust exposure.

“The ruling plus any collective bargaining by a union representing student-athletes — even if that bargaining reaches an impasse and fails to result in a collectively bargained agreement with the union — should immunize the NCAA and universities’ joint rule making in the future from antitrust attack,” Goldfine said.

Labor unions are exempt from antitrust scrutiny under a non-statutory exemption recognized by the U.S. Supreme Court in *United States v. Hutcheson et al.*, 61 S. Ct. 463 (1941).

OFF TO WASHINGTON

ESPN reported March 31 that the president of the College Athletes Players Association, Ramogi Huma, and former Northwestern quarterback Kain Colter are traveling to Washington to meet with legislators.

“We want them to understand why we’re doing what we’re doing,” Huma told ESPN. “Obviously, Congress has the power to affect conditions for college athletes as well, and we want to correct some of the false statements that have been made about what we’re trying to do.”

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