Statement of

Bradford L. Livingston
Seyfarth Shaw LLP

Before the United States House of Representatives
House Committee on Education and Labor

Hearing on "Big Labor on College Campuses: Examining the Consequences of Unionizing Student Athletes"

May 8, 2014

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Good morning, Chairman Kline and Members of the Committee. My name is Bradford L. Livingston, and I am pleased to present this testimony concerning the consequences of permitting collegiate student–athletes to organize and bargain collectively under the National Labor Relations Act (NLRA or Act). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with ten offices nationwide, and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth attorneys provide advice, counsel, and representation in connection with labor and employment matters and litigation affecting employees in their workplaces.[1]

For roughly the past decade, I have served as the Chairperson or Co-Chairperson of Seyfarth's Labor Relations Practice Group, whose practitioners include a former Member of the National Labor Relations Board (NLRB or Board), its former Executive Secretary, and numerous former NLRB attorneys and employees. Our labor lawyers have written and contributed to a number of leading treatises on labor law; advised thousands of employers on NLRA compliance issues; and in numbers too large to count, negotiated collective bargaining agreements, handled and litigated NLRB unfair labor practice charges, advised on grievances under collective bargaining agreements,

[1] I would like to acknowledge Seyfarth Shaw attorneys Mary Kay Klimesh, Anne D. Harris, Bryan Bienias, Kevin A. Fritz, and Ronald J. Kramer for their invaluable assistance in the preparation of this testimony.

litigated labor arbitrations, and trained managers and supervisors with respect to compliance with the NLRA.

For well over 30 years, I have practiced across the country in all these areas of labor law. My office is in Chicago, Illinois, and I am a member of both the Illinois and Wisconsin bars. In addition to my practice, I teach labor law as an Adjunct Professor at John Marshall Law School in Chicago, Illinois.

I. Introduction

I have been invited to provide testimony today on the consequences that will likely occur if college student-athletes are permitted to organize and be represented by a labor union for purposes of collective bargaining under the NLRA. In this case of first impression, let me be clear from the outset that I fully support the purposes behind the NLRA, under which employees can freely choose whether or not to form or assist a labor union and to bargain collectively. But from both a practical and a strictly legal perspective, whatever the equities in college athletics and its economic structures, the NLRA is simply not an appropriate vehicle to address that environment.

Over the past thirty years, I have negotiated for or advised clients in reaching hundreds of collective bargaining agreements. Those negotiations have occurred from coast to coast, covered bargaining units ranging from a handful to tens of thousands of employees, and included most major labor unions. Irrespective of the many additional labor and employment law consequences,[2] on both a legal and practical level, intercollegiate sports are incompatible with scholarship athletes being covered under the NLRA.

This incompatibility stems from the faulty initial premise that college student-athletes are employees covered by Section 2(3) of the Act.[3] Treating

[2] If scholarship recipients are employees, they may have additional rights among a host of other federal, state or local statutes, such as Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Americans with Disabilities Act, ERISA, and state unemployment and workers' compensation and other laws. For example, are student-athletes "on the clock" and entitled to compensation if a coach requires attendance in class or at study halls? If a player is late for practice and as a penalty must spend time in an extra study hall session, is that time compensable? Under the Americans with Disabilities Act, could a player with a doctor's note be excused from practice, but still expect to play in the game? During the break between the Spring and Fall semesters when athletes are no longer receiving their scholarships, are they entitled to unemployment compensation? Could the EEOC challenge a university's scholarship offers and acceptances under a disparate impact analysis? Could the EEOC challenge a failing grade in a class under disparate treatment analysis? If they are considered employees, would student-athletes' scholarships be considered taxable income that is subject to withholding and income tax, and if so, would it make a college education unaffordable for many current scholarship recipients?

[3] Section 2(3) of the NLRA, 29 U.S.C. § 152(3), defines who is covered as an employee under the Act.

them as employees changes students from student-athletes to professional athletes who are also students. And even if these student-athletes could be considered employees within the undefined text of Section 2(3), such employee status is inconsistent with the remaining principles contained within the NLRA covering the employer-employee relationship generally and as to collective bargaining specifically. Yet this eventual conflict is precisely what will happen if scholarship athletes at private colleges and universities are found to be employees covered by the NLRA.

It is also important to note that because most major college football programs are part of public institutions, the NLRB has statutory jurisdiction over only 17 of the roughly 120 colleges and universities that play major college football.[4] In asserting jurisdiction, the NLRB's rules would apply to these teams in ways inapplicable to more than eighty-five percent of their intercollegiate competitors. And those remaining 100 or so public institutions are subject to, where such laws exist, a variety of conflicting state statutes as to whether or not their public universities' student-athletes could organize and, if so, over what subjects they could bargain collectively. The resulting patchwork of laws, differing collective bargaining agreements, and uneven terms governing student-athletes would be unworkable.

II. College Athletes Are Not Employees under the NLRA

Students who participate in intercollegiate athletics are not "employees," regardless of whether the program generates revenue for the university. The term "employee" in Section 2(3) of the NLRA is not defined in any meaningful way, and as a result, its parameters must be examined based on the Act's purpose and focus,[5] which is to address economic relationships between employer and employees.[6] But "principles developed for the industrial setting cannot be imposed blindly on the academic world."[7] Yet claiming that college student-athletes are employees begets "the problem of attempting to force the student-university relationship into the traditional employer-employee framework."[8] An analysis of the relationship between the academic institution

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[4] Section 2(2) of the Act specifically excludes from coverage as an "employer" any of the states or their political subdivisions, which includes all public colleges and universities. 29 U.S.C. § 152(2).

[5] A fundamental canon of statutory construction is that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *See e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000); *see also Wbai Pacifica Found.,* 328 NLRB 1273, 1275 (1999) (analyzing the purpose behind the NLRA to determine whether volunteer staff constituted employees under Section 2(3) to conclude that these individuals did not meet the definition of employee under the NLRA).

[6] *Brown University*, 342 NLRB 483, 488 (2004).

[7] *Yeshiva*, 444 U.S. at 697.

and its student-athletes can only lead to the conclusion that the NLRA's fundamental purpose does not cover such a relationship, nor should it.

Intercollegiate athletic programs have historically existed as part of the overall collegiate experience. These athletic opportunities have been established in our universities as part of a broad-based scope of educational opportunities that embellish, enhance and shape the experiences provided to students as they prepare for life outside of an academic setting. As stated by US Secretary of Education Arne Duncan:

> Student athletes learn lessons on courts and playing fields that are difficult to pick up in chemistry lab. Resilience in the face of adversity, selflessness, teamwork, self-discipline, and finding your passion are all values that sports can uniquely transmit. Many of those character-building traits are every bit as critical to succeeding in life as sheer book smarts.[9]

One need look no further than former United States Presidents Gerald R. Ford and George H. W. Bush to see examples of successful careers, wholly unrelated to sports, enjoyed by former college student-athletes.

Academic settings themselves are undeniably different from commercial settings in many critical aspects – and this is particularly notable in the relationship between a university and its student-athletes. In order to participate in any athletic endeavor at any institution of higher learning, the athlete must be enrolled and participate as a student in the college or university's academic program. Student-athletes must meet and maintain established academic standards as a pre-condition to their ability to participate on an intercollegiate basis. Unlike a commercial setting, even the nature of the supervision the university has over its student-athletes differs significantly from that between an employer and employee. Through its athletic coaches or staff, the university supervises student-athletes in a manner predicated upon mutual interests in the development of the student's character and advancement of the student's overall university experience.[10]

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[8] *Brown University*, 342 NLRB at 487.

[9] *See* Arne Duncan, *Let's Clean Up College Basketball and Football,* HomeRoom, The Official Blog of The U.S. Dept. of Education (Jan. 15, 2010), http://www.ed.gov/blog/2010/01/lets-clean-up-college-basketball-and-football.

[10] At least one study has shown that student-athletes are at least as engaged overall, and in some areas are more engaged, compared with their non-athlete peers. Student-athletes also report that they perceive their campus to be more supportive of their academic and social needs. *See* Umbach, P. D., Palmer, M. M., Kuh, G. D, & Hannah, S. J., Intercollegiate athletes and effective educational practices: Winning combination or losing effort? *Research in Higher Ed.* 709, 725 (2006).

The NLRB has drawn distinctions between individuals engaged in a commercial relationship and those that – while arguably falling into the most literal definition of "employee" under Section 2(3) – nevertheless fall outside the Act's reach due to the innately non-commercial nature of the educational relationship at issue.[11] The Supreme Court and the NLRB have recognized that the nature of a university "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world."[12] For example, in rejecting petitions to organize students who also worked for their academic institutions as janitors and cafeteria workers, the NLRB refused to direct an election of the student workers despite their dual status as employees, because they were primarily student.[13] In *Brown University,* the Board focused on whether the relationship of the purported employee and the University is primarily educational or primarily economic to conclude that graduate assistants and research assistant were not employees under Section 2(3) because they had a primarily educational relationship with the University.[14]

In determining whether Northwestern University's football players fell within the statutory definition of an "employee" under the NLRA, the Regional Director found *Brown University* to be inapplicable and rather reached his decision by applying the common law definition of an employee, *i.e.*, whether the athletes perform services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. Using the common

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[11] *See Brevard Achievement Center, Inc.,* 342 NLRB 982 (2004); *Goodwill Industries of Denver,* 304 NLRB 764 (1991); *Wbai Pacifica Found.,* 328 NLRB at 1275; *see also NLRB v. Yeshiva University,* 444 U.S. 672, 688 (1980) (in excluding faculty members who exercise managerial judgment from coverage under the Act, the Court observed that "the 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"); *Allied Chem. Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 166 (1971) ("the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire").

[12] *Yeshiva*, 444 U.S. at 697.

[13] *Saga Food Service of California, Inc.*, 212 NLRB 786, 787 (1974); *San Francisco Art Inst.*, 226 NLRB 1251 (1976).

[14] In *Brown University*, the Board further emphasized that the individuals at issue were students who were admitted to the University, not hired by it to serve as graduate teaching or research assistants even though the students performed teaching duties and research for the university and received compensation from the University in the form of stipends or grants and tuition remission. The Board was also influenced in its decision by the fact that the continued receipt of a stipend and tuition remission depended on graduate assistants' continued enrollment as students, and was not dependent upon the nature or value of the teaching or research services. *See Brown University*, 342 NLRB at 490 fn. 27, 492.

law test, the Regional Director artificially – and in an unprecedented way – separated the students' athletic from their academic activities.

The purposes of the NLRA and its coverage of economic relationships between employer and employee is inapplicable in the context of students who participate in programs that may, in certain circumstances, generate revenue. Revenue generation should not be determinative of the NLRA's application to any particular student-athletes; the women's water polo and men's cross-country teams, like many other intercollegiate sports teams and other extracurricular organizations, generate negligible if any revenue but have significant costs. In fact, if their student-participants were employees, those student-athletes might have even more reason to unionize due to fears about their programs' possible cancellation that are not felt by athletes in revenue-generating sports. Employees of many unprofitable commercial businesses might be more inclined to organize to negotiate for possible protections from plant closure or layoffs, while their peers in highly-profitable businesses see no need for union representation because they already receive generous wage increases or profit sharing they never sought. Under the NLRA, the economics or profitability of the employer should be irrelevant. Thus, there is no logical distinction between the athletic teams, jazz or string ensembles, and debate teams that generate no revenue but perform a service for the university and the sports teams that generate revenue. And the fact that students in each of these groups are "hired" to perform a "service" for the university in exchange for some perks or "payment" does not make them Section 2(3) employees.

The primary purpose of the University's mission, which includes athletic and many other programs, is to educate its students, including student-athletes. Student-athletes are not "hired" by a college or university and are not providing "services" to the institution; they are participating in the programs of the institution. As such, a determination of whether student-athletes are employees under Section 2(3) of the Act should be based on an analysis of the purposes of the Act and the status of the student-athlete, based on both of the student's roles, not just the role of the student as an athlete. Treating these participants as Section 2(3) employees changes them from students who are student-athletes to professional athletes who are also students.

III. Treating College Athletes as Employees Under the NLRA Is Unworkable

a. The NLRA Rights of Employees Are Incompatible with the College Athletics Environment

College is a different environment from the workplace. Students are subject to rules imposed by their individual academic institutions, including separate codes of conduct, academic standards, and other restrictions. Student-athletes, whether on scholarship or not, are subject to further restrictions imposed by their universities, their athletic conferences, and the NCAA:

> The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's posting are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended… .[15]

Cited by the Regional Director in his Decision and Direction of Election, these and many other similar restrictions apply to all student-athletes (whether on scholarship or not) and stem either from Northwestern University, the Big 10 Conference within which it competes, or the NCAA. Rules like these, whether from a school, its athletic conference, or the NCAA, are applicable at every university to either all students or all student-athletes. As a training ground for future leaders,[16] universities are charged with bridging, often in a close residential environment, the gap between childhood and adulthood. In both an academic and competitive intercollegiate environment, each of these rules makes sense.[17]

All employees covered under the NLRA, however, are guaranteed certain rights whether they are represented by a labor union or not.[18] As employees, student-athletes would be entitled to the full range of protections set out in Section 7 of the NLRA, which includes the right to engage in "concerted" activity for "mutual aid or protection."[19] The mere maintenance of policies that have the potential to "chill" the exercise of those rights is unlawful, even if they are never applied to concerted behavior under the NLRA. And each of the common sense student-athlete rules cited by the NLRB's Regional Director, if applied outside the university environment for which they were specifically established, likely violates the NLRA.[20]

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[15] D&DE, *Northwestern Univ.,* Case No. 13-RC-121359, at *5 (Region 13, March 26, 2014).

[16] *See, e.g., Grutter v. Bollinger,* 539 U.S. 306, 332 (2003).

[17] In a broad sense, many of these rules teach the leadership and civic skills that are part of a university's overall mission. And on a much more immediate level, no coach wants an exuberant nineteen year-old player's media interview or Facebook post to become bulletin board fodder for next week's opponent.

[18] *Amglo Kemlite Laboratories, Inc.,* 360 NLRB No. 51, at *5 (2014); *Greater Omaha Packing Co., Inc.,* 360 NLRB No. 62 (2014).

[19] 29 U.S.C. § 157.

[20] S*ee, e.g., Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (2013) (employer ordered to rescind portions of overbroad policy that served as the basis for terminating employees for their Facebook posts); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012)

When employers maintain policies such as these that restrict employees' Section 7 rights, they commit unfair labor practices. Applying settled Board precedent to the rules the NLRB's Regional Director cited in the *Northwestern* case – and undoubtedly they are not unique to Northwestern but very much like most other colleges' rules governing students generally, and athletes (whether on scholarship or not) in particular – such provisions violate NLRA Section 8(a)(1).[21] Their enforcement violates Sections 8(a)(1) and (3).[22] The remedy for these unfair labor practices invariably requires rescission of the unlawful rule and a "make whole" remedy for any discipline that was imposed.[23]

So irrespective of the unique attributes surrounding the collegiate academic environment, if college student-athletes are employees within the meaning of NLRA Section 2(3) – and whether or not they ever consider joining a union – their Section 7 rights supersede and render illegal many of the common sense policies that colleges impose on their students and student-athletes.

b. NLRA Collective Bargaining is Incompatible with the College Student-Athlete Environment

The application of NLRA Section 7 rights to rules governing student-athletes may pale in comparison to the implications for collective bargaining. Irrespective of whatever limited objectives the College Athletes Players Association (CAPA) may currently have or express for collective bargaining, once it is certified at Northwestern, those goals may change. Under pressure from its members, unions often expand their demands. And because CAPA has no exclusive franchise to organize college athletes, neither it nor any other labor unions that organizes college athletes is bound by earlier promises to negotiate over a limited slate of issues.

Under the NLRA, mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment."[24] Not merely limited to

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(employer ordered to rescind policy that prohibited employees from posting electronic statements that could damage the company's reputation); *Karl Knauz Motors, Inc*., 358 NLRB No. 164 (2012) (employer to rescind social media policy requiring employees to be "courteous, polite, and friendly" to customers and employees and not to use "language which injures the image or reputation" of the employer); *DirectTV*, 359 NLRB No. 54 (2013) (employer violated the NLRA when it restricted media interviews); and *Trump Marina Assoc.,* 355 NLRB No. 107 (2010), (employer violated the NLRA when it required employees to receive prior authorization before speaking to the news media).

[21] 29 U.S.C. § 158(a)(1).

[22] 29 U.S.C. § 158(a)(3).

[23] *See, e.g., Design Technology Group LLC d/b/a Bettie Page Clothing,* 359 NLRB No. 96 (2013); *Karl Knauz Motors, Inc.,* 358 NLRB No. 164 (2012).

[24] NLRA Section 8(d), 29 U.S.C. § 158(d).

compensation, health care and any post-retirement benefits, the NLRB construes these subjects very broadly.[25] Typical collective bargaining agreements, which often contain hundreds of pages, include provisions for job assignments, seniority, promotions, working hours, overtime assignment and distribution, discipline and discharge, grievance and arbitration, and many other terms within the workplace.

Applying settled NLRA precedent, scholarship athletes would have the right to negotiate over playing time, whether non-bargaining unit (walk-on) players have the right to perform bargaining unit work by playing in games, and other "working conditions" typically within a coach's discretion. A union could conceivably negotiate over the total number of scholarships available since any NCAA limits would be fair game for discussion. Likewise, mandatory bargaining subjects would include the number of scholarships (and their dollar value) by player position, such as a minimum of three quarterbacks on scholarship at any one time but no more than one full (or two half) scholarships allowed for the kickers on its special teams, the duration of any scholarships, and even the duration of an employee-athlete's eligibility.[26]

A student-athlete-employees' union would likewise have the ability to negotiate over academic standards, ranging from minimum grade point averages, to class attendance requirements, the number and form of examinations or papers in any class, grievance procedures to challenge a poor grade from a professor, and even potentially graduation requirements. In addition to interfering with a college's academic freedom, any "negotiation" and compromise over these standard educational requirements potentially devalues any athlete's degree from that institution.[27] In fact, unions arguably could bargain over whether employee-athletes even need to enroll at the university as a student.

Many of the special rules and policies governing intercollegiate athletes that are designed to create a level playing field for all teams – whether imposed by a college, its athletic conference, or the NCAA – are mandatory subjects of bargaining under the NLRA. The NLRB's Regional Director noted many such

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[25] Mandatory subjects of bargaining include such esoteric issues as the prices of snacks in employee cafeteria vending machines and the existence of and potential locations for hidden surveillance cameras in the workplace. *See Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979); *Anheuser-Busch, Inc.,* 342 NLRB No. 49 (2004).

[26] Under the NLRA, there is no reason why players should be limited to only four years of eligibility.

[27] *See, e.g.,Yeshiva*, 444 U.S. at 680-81 (1980) (noting that "principles developed for the industrial setting cannot be imposed blindly on the academic world").

rules governing practice time, dress codes, and other conduct in his decision, each of which is negotiable under the NLRA.[28]

And it would be no defense to argue that Northwestern or any other university is merely complying with its athletic conference's or NCAA rules. The NLRA's obligation to bargain in good faith does not automatically allow an employer to avoid good faith negotiations merely because it is complying with external guidelines. First, even if Big 10 Conference or NCAA rules limited the maximum practice time, a union could always demand lesser requirements. Just as minimum wage laws and statutory overtime requirements do not prohibit employees from bargaining for more than the minimum (or less than the maximum), conference or NCAA limits will not prevent a union from bargaining for more or less than those rules allow. And as described more fully below, any differences in the rules by which collegiate teams compete will have profound implications for the continued viability of competitive college sports.

More important, however, the individual conference and NCAA guidelines will likely not be a defense to any university's refusal to bargain over them. It is unclear whether any rules on transferring among institutions, limits on years of playing eligibility, and even limits on the number of scholarships would be able to withstand scrutiny.

Additionally, the NLRB arguably might assert jurisdiction over individual athletic conferences and the NCAA itself as a joint employer with any individual college or university. Joint employers are businesses that are entirely separate entities except that they both codetermine or "take part in determining the essential terms and conditions" of employment of a group of employees.[29] Given the extensive regulation of and revenue sharing within college athletics, it takes little imagination to believe that the NLRB could find either a conference or the NCAA to be a joint employer with any member institution. As a joint employer, the college or university along with its athletic conference or the NCAA would be required to bargain together with any union representing that college's employee-athletes. In Northwestern's case, as the only private university in its conference, this might mean that the Big 10 Conference and Northwestern would jointly bargain with a union for Northwestern's players, while the remaining 13 public institutions in the Big 10 would not be covered by any resulting labor agreement.

Further, if Northwestern and the Big 10 were to bargain jointly, it is no defense for the conference (or the NCAA) to claim that it is merely applying the same rules it applies to all its other "non-union" facilities. While the NLRA does not require either an employer or union to make concessions, Section 8(d)'s

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[28] *See e.g., Pittsburgh Plate Glass,* 404 U.S. at 157-58; *NLRB v. Borg-Warner Corp.,* 356 US 342 (1958).

[29] *Capitol EMI Music, Inc.,* 311 N.L.R.B. 997, 999 (1993).

requirements make clear that an employer must engage in a good faith attempt to reach an agreement. The unwillingness to deviate from terms at non-union facilities (i.e., colleges and universities where athletes are not represented by a union) may be inconsistent with bargaining in good faith.[30]

Even if Northwestern or any other academic institution could negotiate an individual collective bargaining agreement to cover its athletes, however, other NLRA principles present additional practical problems. It has been widely reported that vast disparities exist among the fortunes of college athletic programs, with some making a so-called profit while many other institutions have expenses that exceed revenue. Any institution claiming that its finances do not permit it to meet its players' economic demands will have a well-established obligation to justify those claims under the NLRA.[31] And once the college or university opens the books, will a union be able to argue that the institution should "shut down" its money-losing sports in favor of those that generate greater revenue such as men's football or basketball?

Other NLRB rules about bargaining a first labor contract and the hiatus period between labor contracts create special conflicts for college athletics. The NLRB holds that "waivers," terms in a labor contract that give management a right to act unilaterally (typically imposing discipline, laying off employees, and possibly making changes to some benefit plans), normally expire during the hiatus period after expiration of and before execution of a new collective bargaining agreement.[32] And there are no waivers during first contract negotiations; employers are obligated to notify a union and upon request confer before imposing discipline on any bargaining unit member.[33] Whether the discipline involves a violation of NCAA, conference, team, or even academic rules applicable to all that college's students, would that institution need to confer with its players' union before ruling a player ineligible for that Saturday's game? If a student alleges that a bad grade is in retaliation for union activity, would a history professor need to confer with a union representative before imposing the grade or defend an unfair labor practice charge for giving a college athlete a C- or D+ in a class or on a mid-term exam?

But whether or not a waiver exists and there is an obligation to confer before imposing discipline, the NLRA's unfair labor practice processes could be invoked to challenge any discipline. If a player were suspended for a game due to the violation of that team's social media rules, for example, the player or his

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[30] *See, e.g., Ampersand Publishing, LLC,* 358 NLRB No. 141 (2012).

[31] *Nielsen Lithographing Co.,* 305 NLRB 697 (1991).

[32] *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 636 (2001).

[33] *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012).

union could not only file an unfair labor practice charge, but potentially seek injunctive relief under NLRA Section 10(j).[34] With a limited playing career of 12 to 14 games over each of four seasons, the claim of irreparable injury from a college football player missing even one game would be a significant consideration. If a player is reinstated and ruled eligible for a game by the court for conduct that violates NCAA rules, the team's penalties for the player's participation under NCAA guidelines could include forfeiture of the game. If the player were allowed to dress for the game but received no actual playing time, the university would likely face either contempt charges from the federal court or new unfair labor practice charges for retaliation. How much playing time does the player deserve? Could holding a player out for the first half (or first set of downs) constitute an unfair labor practice? Would a federal district court eventually issue a Section 10(j) injunction ordering that a player be put in the game? And as discussed above, if the discipline was for an academic rules violation, the NLRB's processes interfere with a university's academic freedom.

c. The NLRA's Organizing Process is Incompatible with the College Athletic Environment

The right of student athletes to organize and form bargaining units under the NLRA presents substantial practical problems. First, while the College Athletes Players Association seeks to represent the scholarship athletes on Northwestern's football team, the NLRB has made it clear that a union need not organize and seek to negotiate for entire teams.[35] If college football players are Section 2(3) employees, Section 9(a) of the NLRA makes it clear that employees may organize in an appropriate bargaining unit, not the most appropriate bargaining unit.[36]

Section 9(b) of the NLRA describes that bargaining units can be based on a craft, department, facility, or employer-wide.[37] As this Section of the Act and NLRB precedent in other industries shows, organizing and collective bargaining need not be limited to a single athletic team at any college or university.

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[34] 29 U.S.C. § 160(j).

[35] While other bargaining units may be appropriate, in approving a bargaining unit of only scholarship players at Northwestern, the NLRB would be creating a fractured unit – one of the few units it has tried to avoid. *See, e.g., Becker College*, 01-RC-081265 (June 12, 2012). Scholarship and walk-on players play the same positions for the same coaches, attend the same practices and games, receive and wear the identical uniforms and practice gear, are subject to the same rules, eat the same meals and share almost all terms except the value of a scholarship. Even if some other units might be appropriate, the one approved by the NLRB's Regional Director in *Northwestern* is difficult to justify.

[36] 29 U.S.C. § 159(a).

[37] 29 U.S.C. § 159(b).

Potential bargaining units at any NLRA-covered university include all intercollegiate athletes receiving a scholarship, all men's scholarship athletes, the joint men's and women's basketball or cross-country teams, or any of a number of other groups of student-athletes.

Relatively recently, the NLRB has expanded the types of groups that may organize into smaller separate bargaining units. In *Specialty Healthcare of Mobile*, the NLRB found that a petitioned for unit will be considered appropriate unless a larger group shares an "overwhelming community of interest" with that group.[38] An employer that wants to challenge a petitioned-for group must establish that others share this "overwhelming" community of interest with the group the union seeks. As the dissent noted in *Specialty Healthcare*, this gives a union a significant advantage in being able to petition for a bargaining unit within which it can win an election.[39] But even with the typical bargaining units historically approved by the Board, the NLRB's current standard would permit further divisions and potentially multiple bargaining units within any team.[40]

With separate offensive and defensive coordinators, position coaches, playbooks, and game plans, a college would face an uphill battle in meeting its burden of proving that the remainder of the football team share an overwhelming community of interests if a labor union seek to represent just the team's offense or defense. Likewise, offensive linemen, defensive backs or quarterbacks each may share their own separate community of interests. And because unions petition for bargaining units where they believe they can win an NLRB election, these types of units are inevitable.[41]

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[38] 357 NLRB No. 83 (2011)(emphasis added).

[39] *Id.* at *21-28.

[40] Different unions frequently represent different crafts and production employees within a single facility. For example, within a single manufacturing facility, the International Union of Operating Engineers may represent employees in the boilerhouse, International Brotherhood of Electrical Workers the plant's electricians, International Association of Machinists the remainder of the maintenance workforce, the United Steelworkers the production employees, and the International Brotherhood of Teamsters the warehouse employees.

[41] Likewise any group of students who perform a "service" for a college or university may now fit the NLRB's definition of a Section 2(3) employee. Under the Regional Director's Decision in *Northwestern*, it is not inconceivable to envision bargaining units of a university's marching band, its symphony orchestra, its cheerleaders, or debate team – or smaller "appropriate" groups within them such as the brass section or percussionists. Depending on whether those students receive scholarships or other compensation (if that is to be the standard) in exchange for their participation, the test laid out in *Northwestern* would support employee status and union organizing rights. This, of course, returns to the threshold issue concerning the principal purpose behind most extracurricular activities.

Each bargaining unit – potentially represented by different unions – would be able to bargain separately over that group's terms and conditions of "employment." The possibility exists that within any team, different groups of players would be unrepresented, while other groups would be covered under different collective bargaining agreements, terms, and rules. While these differences are workable in an industrial or office setting, they would be difficult to apply in a team sport context.[42]

d. NLRA Collective Bargaining among College Athletic Teams Would Create Competitive Imbalances

The practical problems in applying different rules to discrete groups within the same team pale in comparison to those that would arise when different college teams compete under different sets of rules negotiated with their unions. It would be unprecedented in American sports to have some teams populated with "employees" covered by collective bargaining agreements, while other teams are not. From a practical standpoint, the basis for both college and professional sports is a level playing field. The NCAA has different Divisions, each of which has its own rules and competes with others in that group. Likewise, Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League all have multi-employer collective bargaining agreements covering the league and every team. Each league's collective bargaining agreements provide a level playing field, whether with salary caps, minimum wage progressions, free agency, drug testing protocols, and even revenue sharing. And in professional sports, every team is a private employer under the NLRB's jurisdiction that can therefore be covered under a single collective bargaining agreement.

This level playing field in professional sports occurs because the different teams – all competitors with each other – can "fix" labor terms under a well-acknowledged non-statutory labor exemption from the antitrust laws.[43] Because labor law requires collective action, the exemption applies to employers "where its application is necessary to make the statutorily authorized collective bargaining process work as Congress intended."[44] Stated simply, because the

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[42] For example, the offense might negotiate to practice in the morning, while the defense demanded afternoon practices. To press their bargaining demands for better training table meals or nicer hotels with single rather than double-occupancy rooms when traveling for away games, just the quarterbacks – as a separate bargaining unit – might decide to go on strike just before a big game.

[43] Specifically, protections of unions from antitrust actions by the Clayton and Norris-LaGuardia Acts are intertwined with the congressional policy to promote collective bargaining expressed in the NLRA. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988 & Supp. 11 1990); Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914); and the NLRA, 49 Stat. 435 (1935), *amended by* 61 Stat. 141 (1947), 29 U.S.C. §§ 151-169 (1988).

[44] *Brown v. Pro Football, Inc*., 518 U.S. 231, 237 (1996).

product of collective bargaining can be argued to stifle competition, the contracts – whether with a single employer or multi-employer association such as an entire sports league – negotiated by organized labor have been largely exempted from antitrust scrutiny.

Unlike professional leagues, the same will not be true in college athletics. Because the NLRA does not apply to the public institutions, the NLRB is creating rules for "employee"-athletes who represent less than fifteen percent of the participants. And it is almost certain that the NLRA's regime for recognizing and bargaining with unions will not apply to the remaining eighty-five percent. In the Big 10 Conference, for example, only Northwestern is a private institution. In the Pac-12 Conference, only Stanford and the University of Southern California are private institutions. The remaining thirteen members of the Big 10 and ten members of the Pac-12 are all public universities. Without a single, common collective bargaining agreement covering every team in a conference or the NCAA, any attempt among the separate "employer-universities" to "fix" the compensation of "employee-athletes" in that conference enjoys no labor antitrust exemption.

Some states expressly regulate public sector employee collective bargaining, often either limiting it to certain subjects or types of employees.[45] Other states prohibit public sector bargaining altogether or have no laws on the subject.[46] And while it is far from clear whether public university student-athletes could be considered employees within the meaning of even those state laws that do permit public sector organizing and bargaining, the likely patchwork of different terms and rules will lead to vastly different playing fields among different teams.[47]

With no single collective bargaining agreement to cover all participants and any intentional fixing of "employee-athletes'" compensation not covered by the labor antitrust exemption, every team must fend for itself with its "employee-athletes." Those universities or athletic departments that can afford it may attract the best players by either themselves providing (if their athletes are non-union) or negotiating with a union for signing and retention bonuses, higher stipends and other more generous "employment" terms. After all, sports are competitive and

[45]Ohio and Wisconsin are expressly stating that college athletes are not public employees, and Texas bars public sector collective-bargaining rights aside from police officers and firefighters.

[46] North Carolina and Virginia prohibit all collective-bargaining rights for public employees. Arizona, Arkansas, Colorado, Mississippi, and West Virginia have no laws on the subject.

[47] For example, a bill is advancing in Ohio's House of Representatives clarifying that athletes at that State's public colleges and universities are not employees. *See* H.B. 483, 130th Gen. Assemb. (Oh. 2014) On the other hand, some legislators in Connecticut, including State Rep. Patricia Dillon, D-New Haven, have suggested that they will introduce legislation stating that its public college athletes are, in fact, employees.

every athletic department wants to win. And because those institutions whose fortunes are not as great may be left with less attractive "compensation" to offer and therefore less highly-recruited talent, the resulting competitive imbalance will profoundly change the nature of college sports.[48]

IV. The NLRB Should Decline to Assert Jurisdiction Over College Athletics

For all these reasons, the NLRA cannot effectively apply to college athletics. College student-athletes are not employees under NLRA Section 2(3). Even if they were considered so, however, applying the Act's other provisions and bargaining rules to the 17 teams over which the NLRB may claim jurisdiction creates an unworkable series of legal and practical problems. Applying the NLRA, a statute that covers fewer than fifteen percent of the competitors in major college football, is a mistake that would profoundly change the nature of intercollegiate sports.

Even where it has jurisdiction, however, in its discretion under Section 14(c) of the Act, the NLRB may "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."[49]

For over half a century, the NLRB has consistently declined to assert jurisdiction over labor disputes in the horseracing and dog racing industries as well as over labor disputes involving employers whose operations are an integral part of these racing industries, even where there is evidence of an effect on commerce.[50] In declining jurisdiction, and like the extensive conference and NCAA regulation over college athletics, the Board noted the extensive state laws and regulations already in place, such as state laws governing the racing dates at the tracks, the state's share of gross wagers, the licensing of the industries' employees, the supervision over the industries through state racing

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[48] Rather than improving the lot of the college athlete, the NLRB's decision that scholarship athletes are employees may have the perverse effect of causing some colleges and universities to eliminate athletic scholarships entirely. As a result and for the vast majority of college athletes who will never play professional sports, many students who are now receiving scholarships could find a college education unaffordable and beyond their and their family's means.

[49] 29 U.S.C. § 164(c).

[50] 29 C.F.R. 103.3; *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950) (horseracing track); *Jefferson Downs, Inc.*, 125 NLRB 386 (1959) (horseracing track); *Meadow Stud Inc.*, 130 NLRB 1202 (1961) (horse owner/breeder); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959) (horseracing track); *Walter A. Kelley*, 139 NLRB 744 (1962) (horse owners/breeders); *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971) (horseracing track); *Yonkers Raceway Inc.*, 196 NLRB 373 (1972) (horseracing track); *Jacksonville Kennel Club*, Case 12–RC–3815 (May 5, 1971) (dog racing track) (not reported in NLRB volumes).

commissions, and the ability of certain states to discharge employees whose conduct jeopardized the "integrity" of the industries.[51]

Likewise and like with the limited tenure and rapid turnover of college athletes, the NLRB has historically considered the sporadic nature of the employment in the racing industries, including high turnover resulting in a relatively unstable work force. The Board recognized serious administrative problems that would be posed both by attempts to conduct elections and effectively remedy alleged violations of the NLRA within the highly compressed timespan of active employment characteristic of the industries.[52]

Even if it were to conclude that college athletes are employees within the meaning of the NLRA, the Board – which could only claim jurisdiction over 17 of the 120 or so teams that play major college football – should exercise its discretion and decline to assert jurisdiction over college football programs and scholarship athletes at private colleges and universities.

V. Conclusion

I believe the National Labor Relations Act is not an appropriate vehicle to address student-athletes' concerns or disputes with their colleges and universities, athletic conferences, or the NCAA. The legal and practical results of deeming these student-athletes to be employees within the meaning of the Act would be profound and unworkable. Chairman Kline and Members of the Committee, I thank you for the opportunity to share my thoughts with you today. Please do not hesitate to contact me if I can be of any help in further addressing the implications of student-athletes being allowed to organize and bargain under the NLRA.

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[51] *See, e.g.*, *Walter A. Kelly*, 139 NLRB 744 (1962).

[52] 29 C.F.R. 103.3.