

Labor Board Punts on Northwestern Football Case, by Roger Abrams

(reprinted from Huffington Post, http://www.huffingtonpost.com/roger-i-abrams/labor-board-punts-on-nort_b_8016084.html)

Congress created the National Labor Relations Board in 1935 to administer national labor policy. For the most part, over eighty years of decision making, the Labor Board has protected the rights of employees to decide whether they wish to unionize or to remain non-union free. The Labor Board has used the sacred American mechanism of the secret election to insulate workers from undue pressure in making that choice. Congress specifically excluded certain classes of employees from the coverage of the Labor Act, but otherwise left it to the Labor Board to decide when it might decline to accept jurisdiction.

The Labor Board exercised that discretion to decline to assert jurisdiction over big-time college athletics, in particular, the Northwestern University football team, because of "the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of [Division 1] football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction)." It concluded that "it would not promote stability in labor relations to assert jurisdiction in this case." The media had no idea what any of this meant and simply reported the decision as NCAA 1, rights of employees 0.

The Labor Board offers little more by way of explanation, other than that it had never before been asked to assert jurisdiction in a case involving college athletes. That is true, but, from its earliest days, the Labor Board has always been presented by cases of "first impression." The Regional Director in Chicago had concluded in 2014 that the so-called "student athletes" were "employees" covered by the Labor Act. The Labor Board repeatedly states in its opinion that it was not facing that core issue in the Northwestern case, although that was the question upon which the case was argued.

What could the Labor Board have meant? The villain in the piece is once again the NCAA, which has set the detailed rules of college athletics in order to maintain a level playing field. Colleges and universities, we are told, "have banded together" to form the NCAA and delegated authority to the Association to enforce its rules and regulations. Let's assume that the Regional Director was correct that the Wildcat football players were employees (as well as students) and a majority then voted to be represented by the College Athletes Players Association. How could collective bargaining in Evanston, Illinois upset this arrangement?

The Labor Board says that bargaining between one team and one school "would likely have ramifications for other teams." This is always the case with collective bargaining. If one employer in a non-unionized industry is compelled by law to bargain collectively with a union of its employees, that "would likely have ramifications" for other employers. That has never stopped the Labor Board in the past, because the Labor Act protects the employees' right to organize.

The Labor Board appears to be concerned that most big-time, football-playing schools are public entities not covered by the Labor Act. Why should that fact mean that employees of a private university cannot unionize? What could happen in negotiations that would create the "instability" in labor relations about which the Labor Board seems so concerned?

If the parties in bargaining agreed to terms and conditions of employment that would violate NCAA rules, that would be most disruptive. Much the same result could follow in any industry that is non-union. Yet, parties can through negotiation address terms and conditions of employment that do not have any impact on sports competitors or NCAA regulations. Were the union of Northwestern football players to propose improvements that would conflict with NCAA rules, the University could just say "no." The Labor Act does not require either party to make a concession of any kind as long as it bargains in good faith.

The Labor Board ends its opinion by noting how the life of college athletes has improved in recent years. Now players can be given guaranteed four-year scholarships, as opposed to the one-year renewable scholarships previously allowed. Players can now receive scholarships that cover the full cost of attendance. Does anyone think this would have occurred in the absence of the threat of unionization? Unions change employee work lives even if they are not successful in organizing. Now, of course, the NCAA and the major football conferences no longer need to fear the prospect of organization. Does this effectuate the purposes of the Labor Act?

The Ghost of Justice Blackmun Haunts 14th & L, by Stephen Ross

For decades, Major League Baseball owners had agreed among themselves to limit competition for the services of their player-employees. When Curt Flood challenged this agreement, MLB argued to the Supreme Court that the rules of competition would ruin the sport and that baseball should not be subject to the same rules that apply to other businesses. Writing for a 5-3 majority, Justice Harry A. Blackmun agreed, declaring in *Flood v. Kuhn*, 407 U.S. 258 (1972), that the business of baseball was exempt from the Sherman Act because of the sport's "unique characteristics and needs."

As a matter of black letter law, *Flood* has no relevance here. The Court made clear that the antitrust laws do apply to commercial aspects of intercollegiate sports (*NCAA v. Board of Regents*, 458 U.S. 85 (1984)), and the NLRB held that the baseball's unique characteristics and needs did not preclude application of the NLRA even to the National Pastime. *American League & Ass'n of Nat'l Baseball League Umpires*, 180 N.L.R.B. 190 (1969). But its spirit prevailed in the recent Board decision.

The Board found, in effect (unfortunately, without signaling its intentions for the benefit of argument by the parties) that the Northwestern football players were not an "appropriate bargaining unit." The result does not mesh well with standard labor law doctrine, but, like Justice Blackmun, the Board members believe that sports are different, and the only meaningful form of collective negotiation about wages, hours, and working conditions comes from joint negotiation between a union representing players and a sports league representing the employers. Since that result is precluded by the failure of

the NLRA to cover employees of state universities, the ability of Northwestern player-employees to select a union as their exclusive bargaining representative with their employer was precluded.

The issue of appropriate bargaining unit has arisen before, in the professional context. One reported opinion, *NASL v. NLRB*, 613 F.2d 1379 (5th Cir. 1980), upheld a Board determination that a league-wide unit was “an appropriate unit” for a soccer players union. The opinion does not stand as a precedent that a single-club unit would not be a “unit appropriate for purposes of collective bargaining” under §9(b) of the Labor Act if such a unit determination were sought by a union. However, virtually every labor law expert with whom I have discussed the matter believes that single-club bargaining is not appropriate.

Several decades ago, when labor relations in baseball were quite poor due to management efforts to limit free agency, I suggested to then-MLBPA chief Donald Fehr that, before the beginning of the next bargaining cycle, the union unequivocally declare that it was not going to engage in multi-employer bargaining and would insist on single-employer bargaining about matters such as minimum pay, injury protection, pensions, and discipline. (My idea was that this would preclude any claim that salary caps or free agency limits were mandatory subjects of bargaining protected by the labor exemption.) Fehr took another route, but more recently several Canadian hockey clubs have secured provincial labor relations board decisions refusing jurisdiction over claims for single-employer bargaining.

When pressed for a non-sports example of industries where workers could not opt for single-employer bargaining, my friends in the labor law academy agreed that sports are different. Likewise, most labor law experts agree that collective bargaining, and not free competition (including pro-competitive restraints sanctioned by the antitrust rule of reason), is the preferred way that relations between clubs and players should be organized in professional sports.

I’m not a labor law expert; coming from an antitrust law background, I see European soccer leagues operating just fine in free markets. If there are non-commercial reasons why college sports should be treated differently, this is a matter for Congress, not the NLRB or courts. See Matthew Mitten and Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 Ore. L. Rev. 838 (2014), https://pennstatelaw.psu.edu/sites/default/files/last%20Mitten%20page%20proofs_0.pdf.

I agree with Roger Abrams that the Board could have recognized the Northwestern players and allowed them to negotiate with their employer, and that their employer could discharge its duty to bargain in good faith by refusing to agree to any terms inconsistent with current NCAA regulations. But the conventional wisdom is that sports are different, application of standard law would ruin sports, and all important terms of the wages, hours, and working conditions of players have to be set collectively.

In short, I disagree that the Board “punted” in the sense that it refused to decide an issue. The Board did decide the issue: it is not appropriate to negotiate with a single employer in a sporting competition. (Fortunately, not officially, so a future Board could change its mind here.) But Abrams’ use of the football analogy is apt. In the NFL, teams facing 4th down with less than a yard to go succeed in 75% of their attempts to do so. However, teams go for it only 16% of the time. Why? Conventional wisdom.