MONOPSONY POWER, COLLECTIVE BARGAINING AND COLLEGE FOOTBALL

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INTRODUCTION

The collision of sports and labor law has prompted a rise in scholarly activity best exemplified by the recent Workshop on Sports Law sponsored by the Southeastern Association of Law Schools (SEALS). Featuring a number of scholars, the workshop moderated by Professor William Berry surveyed an array of issues. One issue concerns the implications that correspond with the question whether or not the football players at Northwestern University, who receive grant-in-aid scholarships ought to treated as employees within the meaning of Section (2)(3) of the National Labor Relations Act of 1935 (NLRA). The issues raised by this case could have noteworthy ramifications for football programs governed by the National Collegiate Athletic Association (NCAA) and in particular, programs that are regulated via the NCAA’s Division I Football Bowl Subdivision (FBS). Equally true, the weight of scholarly opinion suggests that a successful collective bargaining campaign would have repercussions beyond Division I as the domain of college football extends to Division II and Division III universities. Defenders of Division I programs can rightly stipulate that some of the benefits associated with a university’s football program provide crucial support for other university athletic programs that do not generate large television audiences. It is entirely possible that Division I football supplies financial benefits to the broader university community. Without football revenues, many programs would likely face the prospect of imminent decline.

The Regional Director agreed with the Northwestern football players’ contention that the student-athletes were employees within the meaning of the NLRA. The National Labor Relations Board (NLRB), however, determined that it would not effectuate the policies of the

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1 Northwestern University and College Athletes Players Association (CAPA), Petitioner, Case 13-RC-121359, 362 NLRB No. 167, 1, 1 (August 17, 2015), Decision on Review and Order [hereinafter, Northwestern University and CAPA, 362 NLRB No. 167].
Act to assert jurisdiction over this case because a decision favoring the players would not serve to promote stability in the labor relations arena. Although I have criticized some labor movement activities elsewhere, this article establishes the economic case favoring the players’ petition, a move that could lead to a successful representation election enabling the players to fully participate in the labor movement. To be fair, I set forth the argument favoring unionization in rather sketchy terms. Future scholarship will be required in order to merit a comprehensive case for student-athlete unionization. Part I sets forth the economic case for unionization, and Part II responds to the NLRB’s decision.

I. ECONOMICS, MONOPSONY POWER, AND THE NCAA.

It is clear that contemporary labor union supporters rightly reject the exclusionary objectives of many early supporters of labor unionization. Early labor movement policies were designed to eliminate “inefficient” entrepreneurs and alleged “unfit” workers from society, a claim that appears consistent with Richard Posner’s intuition suggesting that unionization may increase unemployment for some workers. On the other hand, this intuition must be equalized by noting that it is possible that the NCAA, and the universities it regulates, to possess substantial market power. If the NCAA, has dynamic market power consistent with the contours of a cartel there may be an economic justification for unionization. This is so despite Posner’s inclination to disfavor unionization because unions force up the wages of workers who retain their jobs, thereby producing adverse effects that percolate throughout the economy. Despite his

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2 Id.
3 See e.g., Harry G. Hutchison, Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy, 15 Mich. J. of Race & Law 369, 396-405 (2010) (showing that many of the original progressive architects and some New Deal renovators were partisans of human inequality) and Harry G. Hutchison, Waging War on the “Unfit”? From Plessy v. Ferguson to New Deal Labor Law, 7 Stanford J. of Civil Rights & Civil Liberties 1, 31-34 (2011) [hereinafter, Hutchison, Waging War on the “Unfit”] showing how progressive policy makers, committed to interpreting the Constitution according to Darwinian principles successfully implemented sociological jurisprudence and New Deal labor law, which effectively limited the job opportunities for disadvantaged individuals).
5 Hutchison, Waging War on the “Unfit,” supra note ___ at 32-33.
6 Id.
8 Id. at 342-43 (showing that in the absence of labor monopsony that unionization reduces the supply of labor in the unionized sector and as a result of the higher wages obtained by the union, employers substitute capital for labor and also substitute cheaper for costlier labor meaning that some workers benefit from unionization while the losers are
skepticism, Posner readily admits that his position weakens in the face of evidence that workers confront an employer monopsony. Although economic theory suggests that the NLRA can be viewed as a kind of reverse Sherman Act designed to encourage cartelization of labor markets,\(^9\) it is equally possible to adduce evidence showing that universities, as putative employers, richly defended by the NCAA\(^{10}\) possess unjustified market power.

The NCAA generates enormous wealth for schools, athletic conferences, the NCAA itself and coaches of big-time college football programs.\(^{11}\) Professor LeRoy demonstrates that universities were so concerned about the amount of money that could be generated by televising football games that they took their revenue dispute with the NCAA to the Supreme Court and won the right to make their own TV deals.\(^{12}\) Clearly “[t]he players who provide this highly marketable product were ignored in this epic litigation.”\(^{13}\) Indeed some universities defect from one conference to join another motivated primarily by finances.\(^{14}\) Neither academics nor the plight of the players provide any motivation whatsoever. At the same time coaches cash in on their players’ success with multi-million dollar employment contracts.\(^{15}\) Concurrently, the success of players on the playing field translates into commercial licensing agreements that benefit the schools but not their star athletes.\(^{16}\) Taken together, this picture illuminates a perverse form of income redistribution that largely benefits well-off institutions at the expense of athletes who rarely graduate and where they do so, rarely receive marketable degrees.\(^{17}\) Hence Division I football programs, thoroughly facilitated by the NCAA and various television networks appear to be a cartel. If universities are properly seen as employers, they can be viewed as monopsonies that extract unjustified benefits from their employees who possess inferior bargaining power in consumers of the products produced in the unionized industry as employers pass on a portion of their higher labor costs).

\(^{9}\) Id. at 344.


\(^{11}\) LeRoy, *supra* note ___ at 5.

\(^{12}\) Id.

\(^{13}\) Id.

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Id.

\(^{17}\) SEALs panelists agreed that university football coaches within Division I conferences often schedule practices so as to conflict with demanding university academic programs thus depriving athletes of the opportunity to earn marketable degrees.
spite of the NCAA’s self-proclaimed mission to prevent exploitation of student-athletes under the umbrella of “amateurism.”

To see how this process works, observers should note that generally employers have monopsony power if workers are ignorant of their alternative employment opportunities, or have very high relocation costs, or if employers conspire to depress wages. It seems likely that Division I universities in combination with the NCAA and perhaps with the implicit assistance of the television networks have conspired to depress the income received by college athletes, a move that corresponds with the explosive growth in revenues received by universities. In the absence of a robust effort to increase competition among schools, one that is calibrated to improve benefits received by players who cannot plausibly be seen as amateurs, it is unlikely that FBS athletes will receive market wages. Although, unionization that is designed to shrink employer monopsony power creates a labor monopoly that leads to bilateral monopoly issues, this second best solution should be contemplated as a pathway to increase wages and balance the economic scales, despite the possible adverse collateral effects of unionization on a range of universities constituencies and on Division II and Division III schools in particular.

II. THE NLRB’S DECISION

Notwithstanding the above-referenced argument, the NLRB, after receiving briefs from numerous amici, accepted Northwestern University’s invitation to decline to accept jurisdiction over the representation case brought by the Northwestern football players. The Board reached this decision despite its apparent admission that the football players could be seen as employees within the meaning of the NLRA. The NLRB quite properly insists that this case involves novel and unique circumstances and it is also clear that the Board has never before been asked to

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18 Lonick, supra note ___ at 10.
19 POSNER, supra note ___ at 341.
20 During the 2012-2013 academic year, the Northwestern football program generated $30 million in revenues and over a ten year period ending in 2012-2013, the football program generated about $235 million in revenue. Northwestern University and CAPA, 362 NLRB No. 167, at 2.
21 See generally Lonick, supra note ___ at 10-13 (exploding the myth that student-athletes are amateurs)
22 See Posner, supra note ___ at 342 (asserting that if the employer is a monopsonist, the consequent creation of a labor union creates a labor monopoly with both sides trying to limit the supply of labor for different reasons thus supply will not reach the competitive level although wage will be higher than if there is just a monopsony).
23 Northwestern University and CAPA, 362 No. 167 at 1.
24 Id. at 3 (declining to decide that the football players were indeed employees within the meaning of the NLRA).
assert jurisdiction in a case involving college athletes of any kind. Moreover scholarship players do not fit within the analytical framework that the Board has used in any prior case involving students. Still, the fact remains that student-athletes likely confront an entrenched employer monopsony. That fact alone warrants a more robust response from the NLRB. In a somewhat hopeful sign, the NLRB rejected the university’s contention that the Board ought to decline jurisdiction over college football and college athletes generally, and instead simply limited its holding to the particular circumstances of this case. Given the prospect of continuing conflict between student-athletes and universities going forward, hopefully future cases and future scholarship will further explore the possible benefits of unionization.

III. Conclusion

This brief essay suggests that a case can be established favoring the unionization of Division I football players grounded in the likelihood that college players face employers with monopsony power. Complications arise with regard to the possible adverse effects of unionization on both the status of Division II and Division III programs and university athletic programs outside of the domain of football. Additional difficulties arise because the NLRB has limited statutory jurisdiction. This situation signifies that even if the Board were to grant the Northwestern football players’ petition grounded in the observation that Northwestern University is an employer within the meaning of the NLRA, it is questionable whether unionization would spread to Division I programs outside of private universities, simply because the NLRB lacks jurisdiction over public universities. Nonetheless, the issue of whether unionization within the parameters of the FBS system is fully justified requires additional analysis.

25 Id.
26 Id. at 2.
27 The NLRA excludes states and their political subdivisions from NLRB jurisdiction. NLRA, 49 Stat. 449 (1935), as amended; 29 U. S. C. § 2(2). About 125 schools compete at the FBS level and only 17 of those are private colleges and universities. Id. at 2.