

Still Early In The Game For College Players' Union Drive

By **Ben James**

Law360, New York (March 26, 2014, 8:33 PM ET) -- Northwestern University football players scored in their quest to unionize Wednesday, but lawyers say the battle over whether college athletes can form unions is still in the first quarter, and a federal circuit court — or even the U.S. Supreme Court — may end up making the final call, as opposed to what critics call an “activist” National Labor Relations Board.

An NLRB Regional Director raised eyebrows with a groundbreaking decision that said Northwestern football players who receive scholarships are employees under the National Labor Relations Act and thus have the right to form a union.

But while the players and the union seeking to represent them — the College Athletes Players Association — made forward progress, lawyers say the determination that they can unionize could be an early salvo in what turns into a lengthy legal battle.

“It seems to me that it's going to be a fight for the ages,” said John Langel, chairman of Ballard Spahr LLP's litigation department.

Northwestern has vowed to appeal, and the NLRB could decide to review Wednesday's decision from Regional Director Peter Sung Ohr. But the labor board could opt not to review the decision and let the election go forward.

If the players pick CAPA as their representative and Northwestern refuses to bargain with the union, the matter would head to the NLRB, and if the NLRB says that the school's refusal to bargain is an unfair labor practice, that ruling can be challenged in federal appeals court.

“If this decision turns out to be correct and turns out to reflect policy as decided by the NLRB in Washington, it will be a blockbuster decision,” added Seyfarth Shaw LLP partner and former NLRB member Marshall Babson.

Some lawyers saw the regional director's decision as a symptom of an aggressive labor board under President Barack Obama that's looking to reverse precedent and push the envelope when it comes to the protections of the NLRA.

“Regional directors are well aware of board tendencies, and the board majority clearly favors expanding the scope of the term 'employee' as used in the act,” said Glankler Brown PLLC member Arnold Perl. “The regional director's unprecedented decision must be looked at in the context of an activist NLRB where the board majority currently is preparing to make sweeping changes to its election rules.”

Langel said he saw Wednesday's ruling as a manifestation of the NLRB's propensity to flip-flop on hot-button issues when the political climate changes, noting that Ohr went to “great lengths” to distinguish the Northwestern case from a 2004 NLRB ruling on a somewhat similar issue that said Brown University graduate assistants were not employees.

What Ohr came up with resembled the 2000 NLRB decision that the Brown ruling reversed.

“The decision is built around distinguishing itself from Brown,” said Langel.

The NLRB could nip the whole debate in the bud by overturning Ohr's decision, but some attorneys see the current NLRB — composed of five Obama appointees — as likely to affirm rather than nix the regional director's finding that the Northwestern players are employees.

“If I were to guess,” said Morgan Lewis & Bockius LLP partner Jonathan Fritts, “I would guess that the current board would agree with the regional director.”

There's speculation that Wednesday's ruling could lead to more college athletes seeking union representation and, according to some, could ruin college sports.

“This is an absurd decision that will destroy intercollegiate athletics as we know it,” Sen. Lamar Alexander, R-Tenn., said in a statement Wednesday.

Some observers also see a possibility that designating college athletes as “employees” could incite a surge in wage claims from students who claim they were wrongly denied minimum wage or overtime.

But there seems to be consensus on the point that Wednesday's decision marked an early development in, not the resolution of, a dispute over unions in college sports.

If the NLRB sticks to its guns, the battle between Northwestern and CAPA could rage for years and reach the nation's high court.

“I think that if the board affirms the holding of the regional director that these student athletes are workers masquerading as football players, that a U.S. court of appeals would review this case, and it certainly would present issues that could very possibly end up in the ... Supreme Court,” said Perl. “The NLRB is an agency that is entrusted to make these determinations but by no means is it the last word in determining these labor issues.”

--Editing by John Quinn and Philip Shea.