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**COLLECTIVE BARGAINING FOR
COLLEGE SPORTS?
NCAA V. ALSTON OPENS THE DOOR
TO LABOR ISSUES**

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Presenters



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LOOKING AHEAD TO STUDENT-ATHLETE ORGANIZING AND BARGAINING

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Labor law basics

National Labor Relations Act (NLRA)

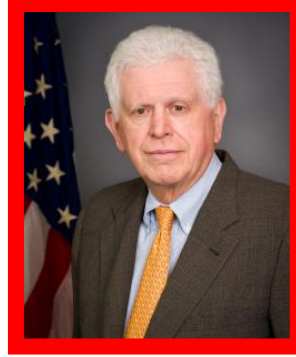
- Federal law governing labor relations for most private sector employers in United States
- Enforced and interpreted by National Labor Relations Board
- Provides employees with right to:
 - engage in “protected concerted activity,”
 - join or refrain from joining labor union,
 - have union collectively bargain their terms and conditions of employment

National Labor Relations Board (NLRB)

- Quasi-judicial body.
- Decides cases on basis of formal administrative proceedings.
- 5 members, appointed by President.
- NLRB members generally conform to labor policy espoused by President’s party.
- Highly politicized. Highly partisan. Abrupt NLRB policy shifts.

NLRB currently

- Democratic Chairperson, but majority Republican



NLRB after August 2021 (?)

- Democratic Chairperson, and majority Democrat



NLRB overrules Regional Director; refuses to assert jurisdiction over student athlete organizing case

**Northwestern University,
362 NLRB 1350 (2015)**

Northwestern University and College Athletes Players Association (CAPA), Petitioner. Case 13-RC-121359

August 17, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

Introduction

In this representation case, the Petitioner asks the Board to find that Northwestern University's football players who receive grant-in-aid scholarships are employees within the meaning of Section 2(3) of the National Labor Relations Act and direct an election in a unit of these grant-in-aid players. The Regional Director agreed with the Petitioner, found that the grant-in-aid scholarship players are employees within the meaning of Section 2(3), and directed an election.¹ Because this case

- “[W]e find that ***it would not effectuate the policies of the Act to assert jurisdiction in this case***, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3).”
- “In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions. ***As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by ‘employers’ within the meaning of Section 2(2) of the Act.***”

NLRB concludes that graduate assistants are employees under the NLRA

Columbia University,
364 NLRB No. 90 (August 23, 2016)

The Trustees of Columbia University in the City of
New York and Graduate Workers of Columbia—
GWC, UAW. Case 02–RC–143012
August 23, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA,
HIROZAWA, AND MCFERRAN

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants.¹ The Board

- Overruled *Brown University* (graduate assistants were not employees and therefore did not have statutory rights to unionize)
- Applied common law principles in analyzing employee status
- Student assistants are employees under the NLRA

Prelude to a new interpretation of “employee” under Section 2(3) of the NLRA

- In January 2017, the NLRB GC at the time (Democrat Richard Griffin – **Deputy GC Jennifer Abruzzo**) issued GC 17-01–General Counsel’s Report on the Statutory Rights of University:
 - Only applied guidance to private colleges and universities
 - GC recommendations/guidance persuasive only
 - Specifically relates only to individual’s rights to seek protection against ULPs
 - Memo withdrawn in December 2017

Accordingly, FBS scholarship football players clearly satisfy the broad Section 2(3) definition of employee and the common-law test. This conclusion is not precluded by the Board's *Northwestern University* decision. There, the Board decided not to assert jurisdiction over a representation petition involving only Northwestern college football players because of the nature of the control exercised by the football leagues over individual teams and because of the composition of Division I FBS football, in which the majority of the teams are public universities not subject to the Board's jurisdiction.¹²² However, those difficulties are not relevant to the question of whether the players are employees under the NLRA.¹²³ The preemptive exclusion of a whole category of employees from the NLRA's protection based on the Board's determination not to proceed in one representation

Mounting federal legislative/public pressures to permit college student/athlete organizing

College Athlete Right to Organize Act

Introduced by Senators Chris Murphy (D-Conn.) and Bernie Sanders (I-Vt.), the *College Athlete Right to Organize Act* asserts what has been clear for too long: college athletes are employees, entitled to the most fundamental of labor rights – the right to organize and collectively bargain for fair pay and equitable conditions.



Kim Kelly ✓ @GrimKim · Aug 31, 2020

...

For @TeenVogue, I wrote about professional sports strikes, student worker exploitation, NCAA union-busting, and why college athletes really, really need a union



Ian Rapoport ✓ @RapSheet · Aug 9, 2020

...

Imagine if college football had the kind of leadership that the NFL and the NFLPA showed over the last few months to put the league and its players in position to play a full season amid a pandemic. Just the incredible hours of work and teamwork. And the NCAA is the opposite.



Bernie Sanders ✓
@BernieSanders

...

The NCAA will fight any attempt to share their billions with players. College athletes are workers. They deserve pay, a union, and to own their own name, image, and likeness.

College Sports • Perspective

For college athletes seeking to organize, Biden administration offers hope

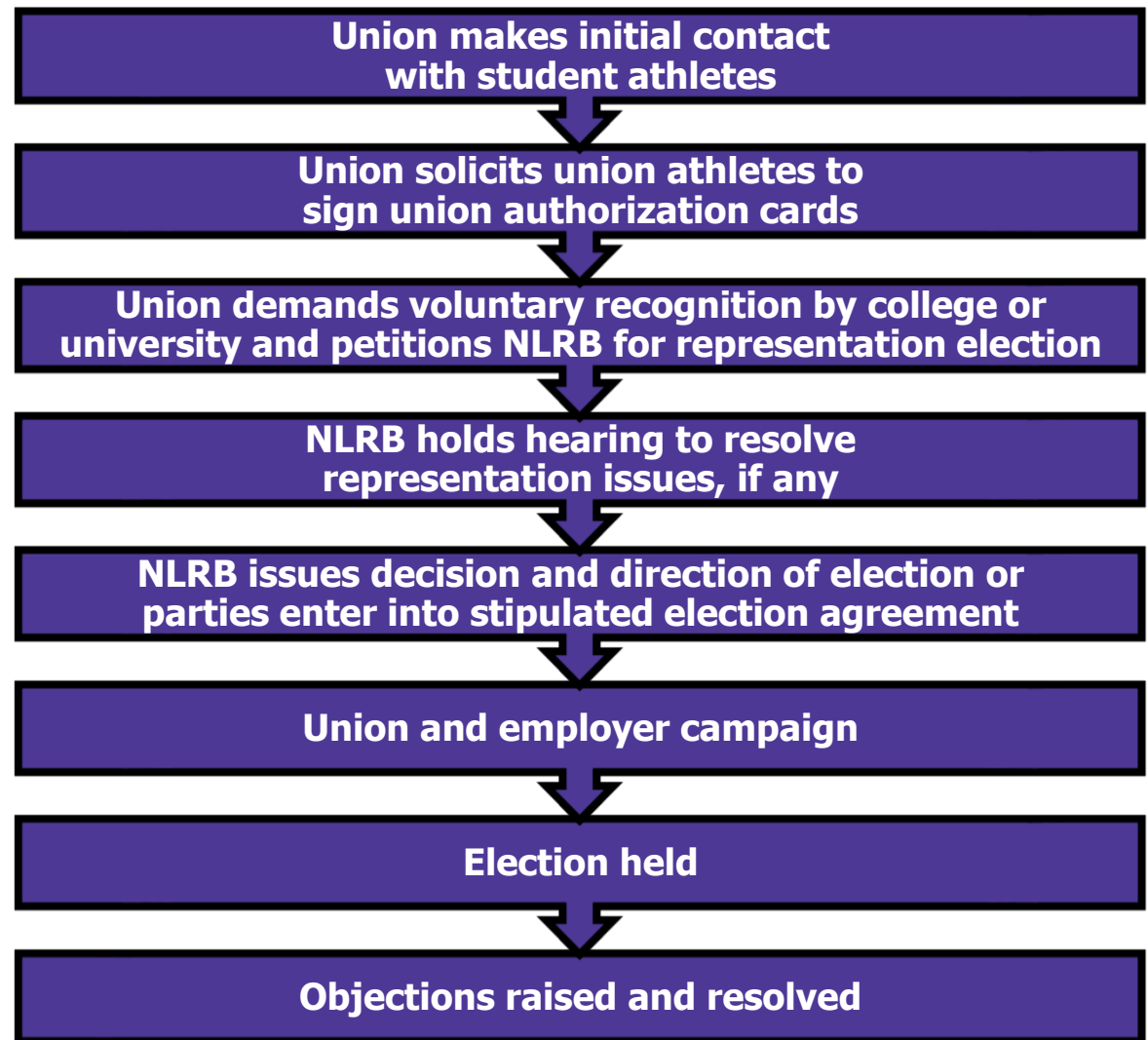
The Board's rationale in *Northwestern University* appears to be on the way out...

- NLRB impending flip to Democrat-controlled Board—end of summer 2021
 - Dave Prouty, former MLBPA GC, nominated for seat
- “Uniqueness of student-athlete” destroyed by Supreme Court—*Alston* now makes clear court approves of some freedom for compensation negotiations and maybe (Kavanaugh) collective bargaining
- Prior assumption of inconsistent/partial regulation is now gone—NCAA is also allowing NIL negotiation and many individual states allowing at least NIL negotiation

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ORGANIZING STUDENT ATHLETES: A PRIMER

Union organizing process/timeline



Unions organize using “authorization cards.”

- Union authorization cards—
 - Legally binding contracts
 - Traditionally paper, but increasingly digital
 - Designate union as bargaining representative
 - Means to formal union election or voluntary employer recognition



YES! I WANT TO CREATE A UNION WITH MY COLLEAGUES.

I want to work together to advance the academic mission of the University by ensuring that faculty have the support they need to carry out that mission. Therefore, I hereby authorize the United Steelworkers (USW) to represent me for purposes of collective bargaining.

Print Name: _____

Home Address: _____

City: _____ State: _____ Zip: _____

Cell Phone: _____

Personal Email: _____

Department: _____

Job Title: _____

Signature: _____ Date: _____

Would you like to receive monthly union updates via email? ☐ Yes

Would you like to receive text messages about the campaign? ☐ Yes

By submitting your mobile phone number and e-mail address you are agreeing to receive messages from the United Steelworkers (USW). You can opt out at any time. Standard data and message rates may apply. For full terms and conditions: <http://usw.to/2c>

Witness Signature: _____

NLRB election petition

- Upon gathering enough authorization cards, unions will:
 - (1) file election petition with NLRB or
 - (2) demand voluntary recognition by employer
- Law requires 30% “showing of interest”—i.e., authorization cards from at least 30% of potential bargaining unit—in order to file petition
- But most unions won’t file without at least 70% card support

FORM NLRB-502 (RC) (2-18)				UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD RC PETITION		DO NOT WRITE IN THIS SPACE	
				Case No.		Date Filed	
INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov , submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.							
1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.							
2a. Name of Employer:				2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code):			
3a. Employer Representative - Name and Title:				3b. Address (if same as 2b - state same):			
3c. Tel. No.		3d. Cell No.		3e. Fax No.		3f. E-Mail Address	
4a. Type of Establishment (Factory, mine, wholesaler, etc.)				4b. Principal Product or Service		5a. City and State where unit is located:	
5b. Description of Unit Involved:						6a. Number of Employees in Unit:	
Included:							
Excluded:						6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? <input type="checkbox"/> Yes <input type="checkbox"/> No	
Check One: <input type="checkbox"/> 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (if no reply received, so state). <input type="checkbox"/> 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.							
8a. Name of Recognized or Certified Bargaining Agent (if none, so state)				8b. Address:			
8c. Tel. No.		8d. Cell No.		8e. Fax No.		8f. E-Mail Address	

Union organizing process/timeline

Once the union is certified, the employer and union must begin negotiating on the collective bargaining agreement in good faith

The collective bargaining agreement defines the terms and conditions of employment for all the members of the bargaining unit

First contracts can often take more than one year to reach and execute, if agreement is ever reached

During the initial contract year, the employer must maintain the status quo and must not take unilateral action

In traditional workplaces, negotiable items often include salary and salary increase increments; work hours and break times; types of insurance plans; calculation of vacation time and sick days; and other issues, such as mileage or uniform costs

Early signals of union organizing/activity

Increased activism focused on playing conditions/pay

Wearing union logo apparel or same color or style of clothes as expression of solidarity

Use of common labor terms—contract, grievance, etc.—Or demands to include student athletes in meetings with team or school leadership

Increasingly defiant posture toward team or school leadership/ increasing trend of group complaints or actions

Baiting team or school leadership into discipline or other sanctions

Rumors, reports, or other indicators of union contact with student athletes—meetings, mailers, etc.

Presence of strangers on/near school property before/after games, practices, or workouts

Frequent team huddles or meetings/elevation of vocal individual leaders

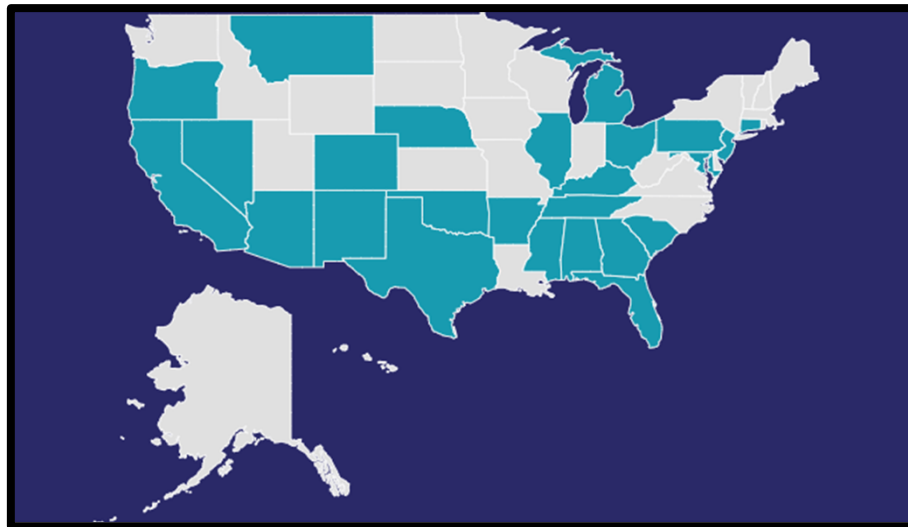
Social media and hashtag activism (#paytheplayers, #notncaaproperty)

Increasing activism nationwide a likely precursor to union organizing activity

- **University of Minnesota—September 2020**—200 student athletes and coaches protest in response to university cuts of multiple sports
- **University of Texas—June 2020**—athletes threatened to forgo participating in recruiting and donor-related events if campus and athletic leadership failed to implement demands aimed at supporting students of color
- **Pac-12—August 2020**—football players threaten to sit out amid pandemic, inequality concerns
- **Trevor Lawrence (Clemson) and Justin Fields (Ohio State)** repeatedly call for formal student athlete players association
- USW subsidizing efforts of National College Players Association

Impact on public universities?

- Student athletes at public universities would likely be considered state employees not covered by NLRA
- Nevertheless, numerous states have passed laws on college student athletes being compensated for use of their NIL, with other states planning or considering such legislation
- Federal College Athlete Right To Organize Act under consideration by Congress could preempt state laws if passed



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CONSIDERATIONS FOR STUDENT ATHLETE COLLECTIVE BARGAINING

What could college student athlete bargaining units look like in the future?

- Single college or single sport/team bargaining units
- Single conference bargaining units (ACC, Big 12)
- Single division bargaining units (D1, D2...)
- Private universities only (Ivy)
- NCAA-wide bargaining unit

***Significant employer implications for NCAA
and divisions/conferences/schools***

How should universities respond?

- Allow/oppose union efforts on individual university basis
- Establish multiuniversity association/coalition to develop consolidated union response
- Educate student athletes on what unionization could mean for them—
 - Uniformity vs. individuality
 - Cooperation vs. conflict
- Train university administrators on how to manage/interact with student athletes during union recognition/election campaign

Aspects of collegiate athletic environment that might be subject to collective bargaining

Revenue shares
"Salary caps"
Name, image and likeness
Number of games and practices
Allocation of funds amongst players within revenue-generating sports
Allocation of funds between revenue-generating and nonrevenue-generating sports
Number of sports teams
Tutors and other education assistance programs
NFT rights
Title IX implications
Travel accommodations
Field/surface/stadium requirements
Family tickets

What unions might target college student athletes?

UAW

- Represents graduate and undergraduate students at Columbia University

AFT

- Deep knowledge of education sector and affiliated with Georgetown Alliance of Graduate Employees

SEIU

- Long history of engaging in national campaigns targeting universities and represents/has targeted adjunct faculty at colleges/universities across the country

USW

- Funded CAPA's organizing efforts at Northwestern University

Pro Sports Unions

- National Football League Players Association already partnered with National College Players Association to jointly explore marketing and licensing of all college student athletes through NFLPA's licensing affiliated entity

AFSCME

- Uniquely positioned to manage employer-employee relations in public sector because it represents state, county, and municipal employees throughout country

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



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Europe
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Middle East
North America

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