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Northwestern University and College Athletes Players Association: Is This the NLRB’s Opportunity to Tackle the Graduate Student-Employee Question?

Amy L. Rosenberger¹

Over the last 15 years, considerable attention has been paid to the question of who is an “employee” of a college or university in the United States, due to a number of organizing drives among students who perform services for compensation at private universities. The major labor relations cases on this issue have involved efforts by graduate assistants to organize and collectively bargain with the private universities at which they are both obtaining a degree and performing teaching, research or other work. Although graduate assistants at a number of public universities across the country have been collectively bargaining with their university employers for decades,² the National Labor Relations Board (“NLRB” or “Board”), which administers the collective bargaining laws governing private employers, including private universities, has continued to struggle with the notion of allowing collective bargaining by student-employees, twice overruling itself, and signaling that it may be poised to do so again.

The most recent case to reach the Board presents the issue in a new context: It involves an effort by grant-in-aid scholarship football players at Northwestern University (“Northwestern”) to form a union and to collectively bargain with Northwestern over the terms and conditions under which they provide services to the university as members of its varsity football team. While the duties performed by a football player are significantly different from, for example, a Ph.D. candidate teaching a course while working on her dissertation, the arguments from both union and employer are familiar, echoing those made in the earlier graduate assistant cases.³

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² The Coalition of Graduate Employee Unions currently boasts 31 member unions, including those at public sector universities in California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Wisconsin. *See* Coalition of Graduate Employee Unions’ list of US student employee member unions, at http://www.thecgeu.org/wiki/United_States.

³ Even if the Board manages to avoid the issue in the case involving Northwestern’s scholarship athletes, it is likely to confront it again eventually. As recently as December 2014, graduate assistants at both Columbia University and the New School have filed petitions for representation with the Board.

Background: The 21st Century Graduate Student Representation Cases

The current debate around the status of student-employees at the NLRB has its roots in a 1999 decision holding that interns, residents and fellows (referred to collectively as “house staff”) at Boston Medical Center were employees entitled to the rights and protections of the National Labor Relations Act (“NLRA” or “Act”), thereby overruling contrary decisions from 20 years earlier.⁴ The Board reached this conclusion by applying the common law definition which it has long used, with U.S. Supreme Court approval, outside the academic context in determining whether or not an individual is an employee covered by the Act. Under that definition, an employee is one who performs services for another, under the other’s control or right of control, generally in return for payment.⁵ Among the factors considered by the Board in reaching the conclusion that the house staff were employees were the numerous cases acknowledging employee status for similar student-employees at public university hospitals, and the absence of any evidence that collective bargaining among such student-employees has caused problems which had prompted the Board in earlier cases to reject employee status (namely, intrusion by collective bargaining into areas of academic decision making) had actually come to pass.⁶

The following year, the NLRB extended its reasoning in *Boston Medical Center* to hold that a group of graduate assistants at New York University (“NYU”) were employees covered by the NLRA.⁷ Once again applying the common law definition, the Board determined that the graduate assistants were employees because they performed services under the control and direction of NYU, and were compensated for those services by NYU.⁸ The Board noted that while the work graduate assistants performed may have educational benefits, it was not a requirement to obtain a degree or even part of the curriculum in most departments.⁹ Board Member Hurtgen, who had dissented from the majority opinion in *Boston Medical Center*, supported the decision in *New York University* specifically because in this case, unlike *Boston Medical Center*, “it is undisputed that working as a graduate assistant is *not* a requirement for completing graduate education. Nor is such work a part of the curriculum. . . .”¹⁰ As in *Boston Medical Center*, the Board rejected the claim that granting collective bargaining rights to graduate assistants would infringe on the university’s academic freedom, noting that this claim was based largely on conjecture about what the graduate assistants might propose in bargaining.¹¹

⁴ *Boston Medical Center Corp.*, 330 NLRB 152 (1999).

⁵ *Id.*, at 160, citing *NLRB v. Town & Country*, 516 U.S. 85, 93-95 (1995).

⁶ *Id.* at 163, 164.

⁷ *New York University*, 332 NLRB 1205 (2000).

⁸ *Id.*, at 1206.

⁹ *Id.*, at 1207.

¹⁰ *Id.* at 1209 (Member Hurtgen, concurring; emphasis in original).

¹¹ *Id.*, at 1208.

In the wake of the *Boston Medical Center* and *NYU* rulings, there was a groundswell of graduate assistant organizing at prominent private universities. Graduate assistants at Brown University, Columbia University, the University of Pennsylvania, Tufts University and Yale University, among others, sought to unionize in order to bargain for improvements to their terms and conditions of employment.

However, in 2004, those groups suffered a setback when the NLRB reversed course, holding that graduate assistants at Brown University (“Brown”) were not employees within the meaning of the NLRA, and overruling *New York University*.¹² In *Brown University*, the employer argued, in part, that *New York University* did not control because the facts at Brown were different in one significant respect: In most departments at Brown, students were required to serve as a teaching or research assistant in order to obtain their degree. Nonetheless, the Board did not merely decline to extend *New York University* to these different circumstances; it overruled *New York University* (notably, however, it left *Boston Medical Center* undisturbed).¹³

The Board held that the NLRA is designed to cover economic relationships, and so the NLRB should not assert jurisdiction over relationships that are “primarily educational.” In determining that the relationship between graduate assistants and Brown was primarily educational, the Board found it significant that in order to serve as a graduate assistant, the individuals in the proposed bargaining unit must first be enrolled as students; that they spend less time performing their duties than on being a student; and that service as a graduate assistant is “part and parcel of the core elements of the Ph.D. degree” and is undertaken not independently, but under the oversight of faculty members from their particular department.¹⁴ Also significant to the Board was the fact that the assistants received the same monetary compensation as fellows, who did not teach. “Thus, the money is not ‘consideration for work.’ It is financial aid to a student.”¹⁵

As support for its decision to overrule *New York University*, the Board reiterated the academic freedom concerns that had been discredited in *Boston Medical Center*:

Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what and where to teach or research – the principal prerogatives of an educational institution like Brown. Although these issues give the

¹² *Brown University*, 342 NLRB 483 (2004).

¹³ *Id.* at 483 & n.4.

¹⁴ *Id.*, at 488-489.

¹⁵ *Id.*, at 488.

appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.¹⁶

Board members Liebman and Walsh dissented from this ruling, and opened their opinion by noting that “[c]ollective bargaining by graduate student employees is increasingly a fact of American university life;” that “[g]raduate student unions have been recognized at campuses from coast to coast;” and that the majority opinion’s “claim that graduate student collective bargaining is simply incompatible with the nature and mission of the university” “will surely come as a surprise on many campuses – not least at New York University, a first-rate institution where graduate students now work under a collective-bargaining agreement reached in the wake of the decision that is overruled here.”¹⁷

Nonetheless, the three-member majority won the day, and graduate assistants at Brown were denied the opportunity to collectively bargain. Immediately afterward, the Board directed several of its regions to reconsider their decisions to direct representation elections among graduate students at Columbia University, Tufts University and the University of Pennsylvania in light of the *Brown University* decision. The regions in each of those cases reversed course, holding that, under *Brown University*, the graduate students involved were not employees. At NYU, when the first collective bargaining agreement covering graduate assistants expired in 2005, the university withdrew recognition of the union, citing *Brown University*.

Six years later, graduate assistants at NYU once again sought an election to determine whether to be represented by a union. After the region dismissed their petition citing *Brown University*,¹⁸ the union requested review by the Board. The NLRB granted the request, in part on grounds that it believed there were “compelling reasons for reconsideration of the decision in *Brown University*,” but first sent the case back to the region to hold a hearing so that a factual record could be developed, from which to decide the case.¹⁹ Member Hayes dissented from the decision granting review, suggesting that the only reason to grant review was the change in membership of the Board following the 2008 presidential election.²⁰ Of course, that complaint begs the question why the Board in 2004, whose membership had changed following the 2000 presidential election, overruled *New York University* a mere four years after it was issued.

¹⁶ *Id.*, at 490 (footnote omitted).

¹⁷ *Id.* at 493 (Members Liebman and Walsh, dissenting).

¹⁸ *New York University*, NLRB Case No. 2-RC-23481 (Order Dismissing Petition, 2010), available at http://www.nlr.gov/cases-decisions/regional-election-decisions?date_issued=2010&page=14&order=date_issued&sort=desc (follow New York University hyperlink).

¹⁹ *New York University*, 356 NLRB No. 7 (2010).

²⁰ *New York University*, 356 NLRB No. 7 at 2 (Member Hayes, dissenting)

In any event, on remand, the region conducted a hearing, and again dismissed, based on *Brown University*. The Board again granted the union's request for review, in part to reconsider *Brown University*.²¹ However, before the Board could render its decision, the union and NYU reached an agreement to conduct a representation election under the supervision of the American Arbitration Association. As a result, the petition for representation was withdrawn, and no decision was issued by the Board. At the election, the graduate assistants voted overwhelmingly in favor of union representation. As of this writing, negotiations for a new collective bargaining agreement are ongoing.

The Northwestern Case

Against this legal backdrop, on January 28, 2014, a group of scholarship football players at Northwestern University filed a petition for an election to choose whether or not to select the College Athletes Players Association (CAPA) as their representative for collective bargaining with Northwestern over the terms of their employment on the varsity football team.²² On March 26, 2014, the Regional Director for NLRB Region 13, located in Chicago, issued a Decision and Direction of Election in which he found that varsity football scholarship athletes at Northwestern University are "employees" within the meaning of the NLRA, and directing that an election be held.

Northwestern requested review and, on April 24, 2014, the Board granted the request. As a result, the ballots cast in the April 25, 2014 election were impounded, pending the Board's decision. The Board later requested briefing on a number of specific issues, including: "Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to the College Athletes Players Association's petition, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis?"

A Brief Summary of the Facts

The duties performed by the scholarship athletes are different, in a number of significant respects, from those involved in the graduate assistant cases, and *Brown University* in particular. According to the Regional Director's factual findings (many of which are not in serious dispute), Northwestern has two types of football players on its varsity team – those who receive athletic scholarships to attend and play football, and those who do not (commonly referred to as "walk-on" players). Scholarship athletes make up about three quarters of the varsity team. Scholarship athletes are initially recruited for their athletic ability, before considering whether or not they

²¹ *New York University*, 2012 NLRB LEXIS 365, 2012 WL 2366171 (2012)

²² Most of the documents filed in this case, including the decisions of the Regional Director and the Board, are available at the NLRB's website, at <http://www.nlr.gov/case/13-RC-121359>.

satisfy Northwestern's academic admissions standards. If they satisfy those standards, they are offered a scholarship (valued at over \$60,000 per year), which includes a "full-ride" for tuition, fees, room and board. The scholarship is not reduced or eliminated based upon the player's athletic ability, performance on the field, or injury. However, it is contingent on the players' continued membership on the team, compliance with numerous rules of conduct, full-time student status, and satisfaction of minimum academic performance.²³

In addition to the rules that apply to any Northwestern student, there are unique rules of conduct that apply only to players (both scholarship players and walk-ons). These rules control where the players may live, whether they may obtain outside employment, what they can post on social media (and in fact, they must accept a coach's social media "friend" request), when they must be present for practice and other football-related activities,²⁴ when they may speak to the media (only when directed to do so by Northwestern), and what they may wear, among other things. They are prohibited from profiting from their position through, for example, merchandise or autograph sales; and must sign a release allowing Northwestern to use their name and likeness for any purpose (for example, to sell jerseys with player names on them).²⁵ If they choose to transfer to another university, they are prohibited from playing football there for one year.

Additionally, generally, scholarship players must schedule their classes around the football schedule. This means that a player cannot schedule a class before 11:00 a.m. Although some flexibility has been granted to walk-ons, the evidence indicated virtually no flexibility in application of this rule to scholarship athletes.

There are several significant factual differences between the circumstances under which the scholarship players perform at Northwestern, and those under which the graduate assistants in *Brown University* worked. Topping the list is the fact that football-related duties are not academically required for the Northwestern scholarship athletes to obtain their degree, and the coaches who oversee the football activities of the scholarship athletes are not members of the faculty at Northwestern. Also notable is the fact that while some of the walk-on athletes receive need-based financial aid from the university, it is far less than the full ride provided to scholarship players. In *Brown University*, the Board found it significant that the fellows who did not perform services required of graduate assistants received the same payment, and based on that fact the Board considered the funds to be financial aid, not compensation for services rendered.

²³ Players must meet minimum standards for grade point average and progress toward their degree.

²⁴ The punishment for being tardy to practice is one hour of study hall for each minute the player is tardy.

²⁵ The Regional Director found that Northwestern earns millions of dollars in profits each year from its football program, through ticket sales, television broadcasts, merchandise and the like, and uses those funds to subsidize other athletic programs that do not generate such significant sums.

Additionally, unlike the teaching and research duties of the graduate assistants in *Brown University*, football-related duties actually consume more of the players' time at Northwestern than their studies do. Their football responsibilities are not limited to the official football season; they occur year round (with certain designated breaks), and extend beyond the academic year. Depending on the time of year, they can consume between 20 and 60 hours per week, in addition to conditioning and other activities that the players engage in on their own time for the purpose of improving their football performance. By comparison, players spend about 20 hours per week during the academic year in classes, with additional time devoted to homework or studying for exams.

Potential Impact on *Brown University*

Despite the factual differences between this case and the graduate assistant cases, the parties' principal arguments echo those made by the unions and employers in *Boston Medical College*, *New York University* and *Brown University*.

Northwestern argues that intercollegiate athletic programs, including football, have always been part and parcel of the educational experience at Northwestern, and so "imposing" collective bargaining on the parties would infringe upon Northwestern's academic decision making. By way of example, it expresses concern that revocation of scholarship funds due to an alleged violation of an academic policy, or failure to attain the minimum GPA, or adequate progress toward a player's degree, would be subject to grievance arbitration, or bargaining, if the players were permitted to unionize. Northwestern argues that *Brown University* governs, and requires a determination that the relationship between Northwestern and the players is "primarily educational" essentially because their participation in the football program is an integral part of their education.²⁶

For its part, CAPA argues that the proper test for establishing employee status is the common law test endorsed by the Board in *Boston Medical Center* and reiterated in the Board's 2000 *New York University* ruling. Applying that test, CAPA argues (and the Regional Director

²⁶ Northwestern has raised several additional issues in this case that did not appear in the graduate assistant cases, such as whether regulation by outside entities such as the National Collegiate Athletic Association may constrain bargaining between the parties; the possible impact of collective bargaining on compliance with Title IX requirements for equal educational opportunities in athletic activities; and the potential for collective bargaining to change the competitive position of Northwestern's football team (for better or for worse) in relation to its opponent teams from other institutions. These issues, however, do not really address the question of whether the scholarship football players are employees. They merely speak to some of the types of factors inform, or constrain, any collective bargaining relationship, for no such relationship exists in a vacuum. For example, virtually all collective bargaining must be conducted within the bounds of state and federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964. Likewise, a business engaged in bargaining with a union must balance bargaining concerns with concerns about its market position relative to its competitors.

held) it is clear that the players perform a service (and a lucrative one) for Northwestern; that they do so subject to Northwestern's control, as evidenced by the strict rules and schedules imposed upon the players; and that they receive compensation in return for their services. Northwestern counters that universities have many rules that control student conduct, and so the enforcement of rules against the players is no more indicative of employment than it is of student status.

CAPA asserts *Brown University* is inapplicable because of the different circumstances under which the players are employed, as compared with the graduate assistants at Brown. The athletes are recruited in the first place because of their playing ability, receive no academic credit for playing, football duties take more of the players' time than academics, and take priority over academics. Therefore, the relationship between the scholarship athletes and Northwestern is an economic one, and not "primarily educational."

Perhaps not surprisingly, CAPA urges the Board to read the *Brown University* decision narrowly, to prohibit collective bargaining only where the job duties in question are "part and parcel of the students' core academic programs to such an extent that duties would constitute bargaining over the academic process itself rather than over an economic relationship." Northwestern, on the other hand presses for an expansive reading of the case, arguing that what activities constitute part of the education provided by a university is determined by the university itself. Here, Northwestern states that it, like many colleges and universities, has decided, in its educational judgment, that intercollegiate athletics – including its football program – are a component of its academic mission, and that the Board has no business second guessing its judgment on that point. Given these arguments, it is difficult to see how the Board could avoid addressing *Brown University*, if not to overrule it, then at least to clarify the extent of its reach.

Without a doubt, if the Board upholds the finding of employee status for Northwestern's scholarship athletes, it would be breaking new ground. For the first time, college athletes would have the opportunity to engage in collective bargaining over terms and conditions of their employment as athletes. Whether or not such a change would drastically change college sports as we know it would remain to be seen. Since collective bargaining in has never occurred in this context, one cannot say with certainty what the consequences of such a decision would be.

However, the experience of universities and graduate assistant unions across the country suggests that fears about the impact of player bargaining on educational decision making may be overstated. Despite similar fears voiced by colleges and universities in regard to graduate assistant bargaining, there is evidence to suggest that collective bargaining by such student-

employees has not proved detrimental to the university employer's educational mission.²⁷ Indeed, the fact that NYU chose to allow bargaining by its graduate students in 2013, rather than continue to push for affirmance of *Brown University* before the NLRB and, if necessary, on appeal to the courts, suggests that its own experience of collective bargaining before the *Brown University* decision did not unduly infringe on its academic freedom. If, as this evidence suggests, the university's academic decision making and educational mission are not undermined by bargaining with students whose services involve teaching and research, then one might wonder how bargaining by scholarship athletes could do so. If the Board upholds the Regional Director's ruling, we may soon find out.

²⁷ See, e.g., Rogers, Sean E., Adrienne E. Eaton, Paula B. Voos (2013). "Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay." *ILRReview*. Vol. 66, No. 2, Article 8; *Brown University*, 342 NLRB at 493 (Members Liebman and Walsh, dissenting).