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 at the Southeastern Association of Law Schools (SEALS) conference. Featuring a number of scholars, the workshop, moderated by Professor William Berry of the University of Mississippi School of Law, surveyed an array of issues. One issue concerns the implications of whether the football players at Northwestern University, who receive grant-in-aid scholarships, should be treated as employees within the meaning of Section 2(3) of the National Labor Relations Act of 1935 (NLRA).[1] 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

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[1] 29 U.S.C. § 152.

Bowl Subdivision (FBS). Further, 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 as well. 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 and revenues. 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 of the NLRB agreed with the Northwestern football players' contention that the student-athletes were employees within the meaning of the NLRA.[2] The National Labor Relations Board (NLRB), however, determined that it would not effectuate the policies of the Act to assert jurisdiction over this case[3] 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,[4] 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.[5] Future scholarship will be

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[2] Nw. Univ. and Coll. Athletes Players Ass'n, 362 N.L.R.B. No. 167, (Aug. 17, 2015) [hereinafter Nw. Univ., 362 NLRB No. 167].

[3] *Id.*

[4] *See, e.g.,* Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy,* 15 MICH. J. RACE & L. 369, 396-405 (2010) (showing that many of "the original progressive architects, and some New Deal renovators, were partisans of human inequality") (quoting David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177 (2009)). *See also*, Harry G. Hutchison, *Waging War on the "Unfit"? From* Plessy *v. Ferguson to New Deal Labor Law*, 7 STAN. J. C.R. & C.L. 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] For a recent examination of the possibilities associated with collective bargaining for NCAA football players, *see* Michael H. LeRoy, *An Invisible Union for an*

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.[6] Leaders designed early labor movement policies to eliminate "inefficient" entrepreneurs and alleged "unfit" workers from society,[7] a claim that appears consistent with Richard Posner's intuition suggesting that unionization may increase unemployment for some workers.[8] On the other hand, this intuition must be equalized by the notion that it is possible that the NCAA—and the universities it regulates—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 increase the wages of workers who retain their jobs, thereby producing adverse effects that percolate throughout the economy.[9] Despite his skepticism, Posner readily admits that his position weakens in the face of evidence that workers confront an employer monopsony. Although economic theory suggests that one can view the NLRA as a kind of reverse Sherman Act designed to encourage cartelization of labor markets,[10] it is equally possible to adduce

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Invisible Labor Market: College Football and the Union Substitution Effect, 2012 WIS. L. REV. 1077 (2012).

[6] Hutchison, *Waging War on the "Unfit*," *supra* note 3 at 32-33.

[7] *Id*.

[8] RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 342-44 (7th ed., 2007).

[9] *Id*. at 342-43 (showing that, in the absence of labor monopsony, 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 labor for costlier labor; consequently, some workers benefit from unionization while the losers are consumers of the products produced in the unionized industry as employers pass on a portion of their higher labor costs).

[10] *Id*. at 344.

evidence showing that universities, as putative employers that are richly defended by the NCAA,[11] possess unjustified market power.

The NCAA generates enormous wealth for schools, athletic conferences, the NCAA itself, and coaches of college football programs.[12] Professor LeRoy demonstrates that universities were so concerned about the amount of money 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."[13] Clearly "[t]he players who provide this highly marketable product were ignored in this epic litigation."[14] Indeed, some universities defect from one conference to join another, motivated primarily by finances.[15] At the same time, "coaches cash in on their players' success with multi-million dollar employment contracts."[16] Concurrently, the success of players on the playing field "translates into commercial licensing agreements that benefit schools," but not their star athletes.[17] Taken together, this picture illuminates a perverse form of income redistribution that largely benefits well-off Division I football institutions at the expense of athletes who often fail to graduate and where they do so, rarely receive marketable degrees.[18] Hence, Division I football programs, thoroughly enabled by the NCAA and various television networks, appear to be a cartel. One could view a university as a monopsony employer that extracts unjustified benefits from their employees, who possess inferior bargaining power in spite of the NCAA's self-

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[11] For some insight on the origins of NCAA power, *see generally* Jay D. Lonick, *Bargaining with the Real-Boss: How the Joint Employer Doctrine can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. (forthcoming 2015), *available at* http://ssrn.com/abstract=2593835 (showing how the NCAA, in a single year, went from a rule book without legitimacy to a powerful, profitable entity with control over the entire field of college sports).

[12] LeRoy, *supra* note 4, at 1080.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 1080-81.

[18] 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.

proclaimed mission to prevent exploitation of student-athletes under the umbrella of "amateurism".[19]

To see how this process works, observers should note that generally, employers have monopsony power if workers are ignorant of their alternative employment opportunities, have very high relocation costs, or if employers conspire to depress wages.[20] 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.[21] Unless there is a robust effort to increase competition among schools, one calibrated to improve benefits received by student-athletes,[22] 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,[23] it is apparent that observers and the NLRB should examine this second-best solution as a potential 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,[24] declined to exercise jurisdiction over the representation case brought by the

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[19] Lonick, *supra* note 10, at 10.

[20] POSNER, *supra* note 7, at 341.

[21] During the 2012-13 academic year, the Northwestern football program generated $30 million in revenues and over a ten-year period ending in, 2012-13, the football program generated about $235 million in revenue. Nw. Univ., 362 NLRB No. 167 at 1.

[22] *See generally* Lonick, *supra* note 10, at 10-13 (debunking the myth that student-athletes are amateurs).

[23] *See* POSNER, *supra* note 7, 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).

[24] Nw. Univ., 362 No. 167 at 1.

Northwestern football players. The Board reached this decision despite its apparent admission that it viewed the football players as employees within the meaning of the NLRA.[25] The NLRB quite properly insists that this case involves novel and unique circumstances, and it is also clear that the request of Board jurisdiction is unprecedented in a case involving college athletes of any kind.[26] 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, the Board simply limited its holding to the particular circumstances of this case. Given the prospect of continuing conflict between student-athletes and universities going forward, future cases and future scholarship will provide an opportunity to further explore the possible benefits of unionization.

CONCLUSION

This brief essay suggests that a case establishing unionization of Division I football players, grounded in the likelihood that student-athletes face employers with monopsony power, is still a possibility. Complications arise with regard to the possible adverse effects of unionization on both the status of Division II programs, 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 raises the issue, 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,[27] of whether unionization would spread to Division I programs outside of private universities

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[25] *Id.* at 3 (declining to decide that the football players were indeed employees within the meaning of the NLRA).

[26] *Id.*

[27] *Id.* at 2.

despite the NLRB lacking jurisdiction over public universities.[28] Nonetheless, the issue of whether unionization within the parameters of the FBS system is fully justified requires additional analysis.

[28] The NLRA excludes states and their political subdivisions from NLRB jurisdiction. Collection, Collation, and Reports of Labor Statistics, 29 U.S.C. § 2(2). About 125 schools compete at the FBS level, and only seventeen of those are private colleges and universities. *Id.* at 2.