

How a “Labor Dispute” Would Help the NCAA

Michael H. LeRoy[†]

INTRODUCTION

When a ruling by a National Labor Relations Board (NLRB) regional director determined that Northwestern University football players who receive athletic scholarships are employees¹ and therefore eligible to vote in a union-representation election, the multi-billion dollar enterprise known as Division I football was rocked to its foundation. Whether this ruling is upheld on appeal or overturned, college football will not be unionized because many players do not fall under the jurisdiction of the NLRB.²

But this unionizing effort will not end there. It is part of a broad array of player lawsuits to challenge the National Collegiate Athletic Association (NCAA).³ These athletes are already following in the path of National Football League (NFL) players, who eventually sued their league under the Sherman Act after their disastrous 1987 strike.⁴ From 1992 to 2011, those players negotiated a series of favorable antitrust settlement agreements that superseded in importance their collective bargaining under the National Labor Relations Act (NLRA).⁵

[†] Professor, School of Labor and Employment Relations and College of Law, University of Illinois at Urbana-Champaign. I dedicate this Essay to the memory of my mother, Carol LeRoy. I also extend appreciation to Margaret Schilt.

¹ *Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner*, 2014 WL 1246914, *1 (NLRB 2014).

² The National Labor Relations Act (NLRA), 29 USC § 151–69, excludes “any individual . . . or any individual employed by . . . any other person who is not an employer as herein defined.” NLRA § 2(3), 29 USC § 152(3). The term “employer” excludes “any State or political subdivision thereof.” NLRA § 2(2), 29 USC § 152(2). Thus, players at public universities cannot form a union under the NLRA.

³ See Tom Farrey, *Jeffrey Kessler Files against NCAA*, ESPN College Sports (ESPN Mar 18, 2014), online at http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model (visited June 7, 2014).

⁴ See Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 Monthly Labor Rev 26, 31 (1988).

⁵ See *White v National Football League*, 766 F Supp 2d 941, 944 n 1 (D Minn 2011) (“The parties amended [their agreement] in 1993, 1996, 2002 and 2006.”).

Ironically, to achieve this success the NFL players *decertified* their union so that they could avoid the duty to bargain under the NLRA.⁶ During this time, there was no legal relevance as to whether NFL players were employees under federal labor law—all that mattered was that their league had imposed unreasonable free agency restrictions that caused monetary damages. A jury determined that the NFL’s restrictions went beyond what was necessary to maintain competitive balance among teams, and the court thus enjoined these restraints.⁷ The resulting Stipulations and Settlement Agreement substituted for a collective bargaining agreement.⁸

This backdrop helps to inform my counterintuitive analysis. The positions and arguments on either side of the player-unionization question are uninformed by a broader understanding of how collective bargaining has disappointed professional athletes and become an unlikely refuge for wealthy owners. Critics of the NCAA are legion and appropriately condemn college football for exploiting players without paying them.⁹ They tend to assume, however, that a union will improve conditions for players.¹⁰

Meanwhile, Northwestern has appealed the regional director’s ruling,¹¹ while the NCAA president has appeared on *Face the Nation* to oppose a players’ union.¹² Other critics of the player-unionization concept worry that paying college football players will: take money away from nonrevenue sports, especially those for women; complete the transformation of Division I sports to

⁶ See *Powell v National Football League*, 764 F Supp 1351, 1354 (D Minn 1991), citing *Powell v National Football League*, 888 F2d 559 (8th Cir 1989) (explaining that the executive committee of the players’ union, after considering the Eighth Circuit’s earlier decision, decided to abandon collective bargaining on December 5, 1989). The players did this again in 2011. See *Brady v National Football League*, 644 F3d 661, 663 (8th Cir 2011).

⁷ See *McNeil v National Football League*, 1992 WL 315292, *1 (D Minn).

⁸ See *Brady*, 644 F3d at 665.

⁹ See generally, for example, Nicolas A. Novy, “*The Emperor Has No Clothes*”: *The NCAA’s Last Chance as the Middle Man in College Athletics*, 21 Sports L J 227 (2014).

¹⁰ See, for example, *Northwestern Players Win Ruling at NLRB, Take Next Step toward Unionization*, Sports Illustrated Campus Union, (Sports Illustrated Mar 27, 2014), online at <http://college-football.si.com/2014/03/26/northwestern-nlr-union-kain-colter> (visited June 7, 2014) (“These players are not only going to be owed salary. They’re going to be owed health benefits, and potentially pension or retirement [benefits].”).

¹¹ See Michael Sanserino, *College Athletes Hit Milestone in Campaign to Form a Union*, Pittsburgh Post-Gazette A-1 (Mar 27, 2014).

¹² See John Feinstein, *Northwestern Players Are Not Demanding to Be Paid; They Are Demanding a Voice*, Wash Post D9 (Apr 1, 2014).

professional competition; create income tax liability for the athletes; and open the door to unionizing other college sports.¹³

Each of these predictions overlooks the antitrust alternative to the player-unionization question that I pose here. These reactions are understandable, but they ignore the NFL's paradoxical embrace of collective bargaining and fail to consider why NFL players have disbanded their union—not once, but twice.¹⁴

This Essay does not take sides, make moralistic judgments, or reformulate hackneyed arguments. Instead, I analyze how antitrust has inverted the preferences of a sports league and players' union so that now, the *league* prefers collective bargaining and the *union* resists it. I show how the players' union turned to antitrust when collective bargaining failed the union and also how a federal district court undermined the NFL's freedom to impose terms on its players. Like their Northwestern counterparts, NFL players formed a union to promote their economic interests. But at the bargaining table their union has been inferior to the more powerful league.¹⁵

My ultimate conclusion is that a “labor dispute,” as defined by the Norris-LaGuardia Act,¹⁶ would benefit the NCAA because it would divest federal courts of jurisdiction to hear an antitrust case.¹⁷ In the long run, antitrust liability poses a bigger threat to NCAA interests than does player unionization. Therefore, it is in the NCAA's interest to: embrace the union-representation process;¹⁸ engage in “hard bargaining,” particularly because its bargaining strength is pitted against the weak bargaining power of college athletes;¹⁹ and anticipate implementing the terms and conditions of a collective bargaining agreement.²⁰ By taking

¹³ See *id.*

¹⁴ See note 6 and text accompanying note 61.

¹⁵ See text accompanying note 61.

¹⁶ 29 USC § 101 et seq.

¹⁷ The law denies federal courts jurisdiction “to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute.” 29 USC § 104.

¹⁸ See Ryan Walters, *Provoking Preemption: Why State Laws Protecting the Right to a Secret Ballot Election Are Preempted by the NLRA*, 52 Santa Clara L Rev 1031, 1036–38 (2012).

¹⁹ See *Plymouth Stamping Division, Eltec Corp, and Local 985, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* 286 NLRB 890, 896 (1987) (“[I]t is not unlawful for a party to take advantage of a shift in economic strength in order to seek more favorable contract terms.”). See also text accompanying note 94.

²⁰ *Brown v Pro Football, Inc*, 518 US 231 (1996), is an analogous case wherein the NFL unilaterally implemented a developmental-squad program that paid every player a mere \$1,000 weekly salary.

these actions, the NCAA would create a “labor dispute” with players—and, according to the strictures of the Norris-LaGuardia Act and the Clayton Act,²¹ such a dispute would shield it from an injunction and potent antitrust remedies.

I. THE ARRESTED DEVELOPMENT OF LABOR LAW FOR PROFESSIONAL SPORTS LEAGUES

A. Baseball

What makes professional sports so compelling? Baseball was the first sport to successfully address this question. Its creators realized that teams must not only employ exceptionally talented athletes but must also create intense competition. To translate this model into a commercial success, the league strictly limited the number of teams.²² Moreover, its governing body imposed severe limits on player mobility in a closed labor market.²³ This combination allocated talent across teams. In essence, baseball thrived by combining a product monopoly with a labor market monopsony that depressed wages.²⁴

In a quirk of fate, baseball’s anticompetitive model survived antitrust lawsuits. This odyssey began when the National League snuffed out a rival, the Federal League.²⁵ After the Baltimore franchise was left without a league, it sued the National League under the Sherman Act.²⁶ The team won treble damages, but lost on the league’s appeal.²⁷ More significant for the present controversy, the Supreme Court, in affirming, ruled that baseball is exempt from antitrust law because the business is confined to a baseball field.²⁸ Therefore, the game is never in interstate commerce, even with ancillary commerce that crosses a

²¹ 38 Stat 730 (1914).

²² See *National League of Professional Baseball Clubs v Federal Baseball Club of Baltimore, Inc.*, 269 F 681, 682–83 (DC Cir 1920).

²³ See Roger I. Abrams, *Legal Bases: Baseball and the Law* 15–16 (Temple 1998) (detailing the National League’s adoption of the reserve clause in 1879 in response to rising player salaries).

²⁴ For an explanation of the reserve clause, see Comment, *Organized Baseball and the Law*, 46 Yale L J 1386, 1386–87 (1937) (“Since the contract entered into in each succeeding season will have a similar provision, the player is really signing for the duration of his baseball life.”).

²⁵ See *National League of Professional Baseball Clubs*, 269 F at 682.

²⁶ *Id.*

²⁷ See *id.* at 682, 688.

²⁸ See *Federal Baseball Club of Baltimore, Inc v National League of Professional Baseball Clubs*, 259 US 200, 208 (1922).

border, such as ticket purchasers, kegs of beer, crates of hot dogs, and the like. The Supreme Court has stubbornly clung to this ruling.²⁹ The vast commercialization of the sport has done nothing to change its view that baseball is beyond the purview of antitrust law.³⁰

Although the baseball experience is odd, it laid the foundation for players to improve their pay by forming a union and bargaining collectively. Baseball players gained partial relief from the reserve clause in an arbitration ruling after pitchers filed a grievance under a collective bargaining agreement.³¹ Later, other players used arbitration to challenge collusion by owners who shunned them in the free agent market.³² Baseball players also used a traditional labor tactic—a strike—when Major League Baseball (MLB) tried to implement the National Basketball Association's (NBA) type of salary cap and revenue sharing structure.³³ The players successfully resisted MLB's aggressive attempts to eliminate salary arbitration and consolidate player contract negotiations under one central entity (removing teams as bidders and employers).³⁴

B. Basketball

In sharp contrast to baseball, professional basketball players turned to antitrust law to find relief from labor market restrictions such as the draft and limits on free agency. Oscar Robertson, a Hall of Fame basketball player who also presided over the players' union, filed a class action suit against the NBA when his league arranged a merger with the American Basketball Association (ABA).³⁵ The ABA broke the NBA's monopsony

²⁹ See, for example, *Toolson v New York Yankees, Inc.*, 346 US 356, 357 (1953) (relying on *Federal Baseball Club of Baltimore* to dismiss an antitrust suit on the grounds that baseball was “left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation”).

³⁰ See *Flood v Kuhn*, 407 US 258, 282 (1972) (noting that baseball's antitrust exemption “is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce”).

³¹ See *Kansas City Royals v Major League Baseball Players*, 532 F2d 615, 617 (8th Cir 1976).

³² See *Major League Baseball Players Association v Garvey*, 532 US 504, 505–07 (2001).

³³ See *Silverman v Major League Baseball Player Relations Committee, Inc.*, 67 F3d 1054, 1058 (2d Cir 1995).

³⁴ See *id.* at 1059, 1062.

³⁵ See *Robertson v National Basketball Association*, 389 F Supp 867, 872–73 (SDNY 1975).

by luring away established players.³⁶ However, the elimination of the ABA meant the end of labor market competition for players.³⁷

After six years of settlement talks, the league and Robertson reached an agreement to end the litigation.³⁸ This was good for the players. They did not have to strike or face a lockout during negotiations. The league agreed to limit a team’s perpetual hold on a drafted player and loosen the player-compensation rule.³⁹ The players accomplished more at the courthouse bargaining table under the Sherman Act than they would have achieved at the NLRA’s collective bargaining table.

C. Football

Like their basketball counterparts, football players were more successful in utilizing the Sherman Act than the NLRA. In 1987, football players used the NLRA to challenge similar labor market restrictions by going on strike.⁴⁰ Players objected to the league’s proposal to continue the compensation rule,⁴¹ which provided that valuable players could not sign with another team unless the acquiring team compensated the original team with a player of equal value.⁴²

The strike was a disaster for the players. After several weeks, NFL teams resumed play by hiring replacement players.⁴³ The NFL had a right to hire replacements due to the Supreme Court’s seminal decision, *National Labor Relations Board v Mackay Radio & Telegraph Co.*⁴⁴ During this era, numerous employers—not just NFL teams—hired replacements for strikers.⁴⁵ Even the president tried his hand at replacing striking air

³⁶ See *id.* at 876 (explaining the plaintiffs’ claim that a rival league provided players an alternative market to the NBA’s anticompetitive rules).

³⁷ See *id.*

³⁸ See *Robertson v National Basketball Association*, 72 FRD 64, 65–67 (SDNY 1976).

³⁹ See *Wood v National Basketball Association*, 809 F2d 954, 957 (2d Cir 1987).

⁴⁰ See *Powell v National Football League*, 764 F Supp 1351, 1354 (D Minn 1991).

⁴¹ See *Powell v National Football League*, 888 F2d 559, 561 (8th Cir 1989).

⁴² See *Mackey v National Football League*, 543 F2d 606, 610–11 (8th Cir 1976) (detailing the provision that later became known as the Rozelle Rule).

⁴³ See Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L J 339, 403–04 (noting that many fans attended games involving replacement players during the strike).

⁴⁴ 304 US 333, 345–46 (1938).

⁴⁵ See Michael H. LeRoy, *Employer Treatment of Permanently Replaced Strikers, 1935–1991: Public Policy Implications*, 13 Yale L & Pol Rev 1, 1 n 5 (1995).

traffic controllers a few years before the NFL used a similar tactic.⁴⁶

Football players had miscalculated their odds of prevailing in their strike. Over the next two decades, however, they turned their defeat into victory. After the strike, the league implemented its proposal to restrict free agency.⁴⁷ By this time, however, the players had sued the NFL under the Sherman Act. The Eighth Circuit in *Powell v National Football League*⁴⁸ thought that this lawsuit was not ripe for antitrust adjudication because the league and players had other options to end their bargaining impasse.⁴⁹

Powell unwittingly opened a new chapter in the relationship between the players and the NFL. The court endorsed the NFL's argument that the Sherman Act would apply, for example, if the players ceased to be represented by a union.⁵⁰ A month later, the players effectively decertified their union.⁵¹ Eight individual players challenged the NFL's restrictions on free agency as Sherman Act violations.⁵² The NFL argued in response that the union engaged in a sham decertification.⁵³

But the district court ruled for the players. The fact that the National Football League Players Association (NFLPA) engineered the loss of its majority status was irrelevant because a formal NLRB decertification vote is not necessary for a union to end its own bargaining authority.⁵⁴ Thus, the NFL lost its anti-trust exemption because it lacked an ongoing collective bargaining relationship with the disbanded union.⁵⁵ A jury ordered damages.⁵⁶ Facing more antitrust litigation, the NFL came to terms with players in a comprehensive settlement of antitrust claims.⁵⁷

⁴⁶ See *United States v Professional Air Traffic Controllers Organization (PATCO)*, 525 F Supp 820, 822 (ED Mich 1981).

⁴⁷ See *McNeil v National Football League*, 790 F Supp 871, 887 n 4 (D Minn 1992).

⁴⁸ 930 F2d 1293 (8th Cir 1989).

⁴⁹ See *id* at 1302–03.

⁵⁰ *Id* at 1303 n 12.

⁵¹ See *Powell*, 764 F Supp at 1354.

⁵² See generally *McNeil v National Football League*, 777 F Supp 1475 (D Minn 1991).

⁵³ See *Powell*, 764 F Supp at 1354.

⁵⁴ See *id* at 1358.

⁵⁵ See *McNeil*, 790 F Supp at 883 n 14 (explaining that the labor exemption ended when NFLPA representatives voted to end the union's existence).

⁵⁶ *McNeil v National Football League*, 1992 WL 315292, *1 (D Minn).

⁵⁷ See *White v National Football League*, 822 F Supp 1389, 1395 (D Minn 1993).

For the following eighteen years, the NFL and the NFLPA were not permitted to engage in regular collective bargaining. Instead, a judge monitored their labor talks. The players gained ground through this complex litigation:

[T]he 1993 settlement did achieve considerable benefits for players whose careers had ended during the battle. For example, all players’ pensions, whether active or retired, were retroactively increased by 40% as a result of the settlement. Those who played prior to 1959 achieved their first pension. Also, players who played in 1989 and thereafter have collectively received \$110 million in damages from the White settlement. And, backpay checks from 1987, plus 60% interest, were sent to 1987 strikers in November 1994 as a result of the 1993 settlement. Thus, the NFLPA had again met its commitment to all players, “past, present and future.”⁵⁸

As if to emphasize the futility of collective bargaining, the players’ union recalls: “The 1993 settlement gained for the players two things they had fought for *but lost in previous bargaining efforts*: free agency, and a guaranteed percentage of the gross revenues.”⁵⁹

Once the players settled their antitrust claims with the NFL, they were required by the terms of the agreement to recertify their union.⁶⁰ This is a moment in sports history that calls out to the NCAA today: a league that once resisted the establishment of a players’ union realized over time that it has superior bargaining power under the NLRA but less leverage under the Sherman Act. The 1993 settlement agreement was in effect until it expired in 2011. Fearing a lockout, the players disbanded their union in order to bargain as class action plaintiffs in federal court under the shelter of the Sherman Act.⁶¹

Forging ahead, the NFL imposed a bargaining lockout to pressure the union into concessions.⁶² Judge Susan Nelson in the District of Minnesota enjoined the lockout. By her logic, “To propose, as the NFL does, that a labor dispute extends indefinitely beyond the disclaimer of union representation is fraught with

⁵⁸ NFL Players Association, *History*, online at <https://www.nflplayers.com/About-us/History> (visited June 7, 2014).

⁵⁹ *Id.* (emphasis added).

⁶⁰ See *Brady v National Football League*, 779 F Supp 2d 992, 1002 (D Minn 2011).

⁶¹ See *id.* at 1003–04.

⁶² See *id.* at 1004.

peril.”⁶³ This view was short-lived. After a few months, the Eighth Circuit vacated the injunction, prompting the NFL to resume its lockout.⁶⁴

What did the appeals court see that Judge Nelson missed? It took a realistic view of the players’ strategy to end their union: “At that point, the parties were involved in a classic ‘labor dispute’ by the Players’ own definition.”⁶⁵ The court observed that “the *labor dispute* did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.”⁶⁶ Emphasis is added because the Norris-LaGuardia Act forbids federal courts from issuing an injunction, or otherwise asserting jurisdiction, in a labor dispute.⁶⁷ With this in mind, the appeals court reasoned: “This dispute is between one or more employers or associations of employers (the League and the NFL teams) and one or more employees (the Players under contract). By the plain terms of the Act, this case ‘shall be held to involve or grow out of a labor dispute.’”⁶⁸

D. Hockey

Like the other major sports, the National Hockey League (NHL) had a longstanding practice of using a reserve clause to spread talent among teams.⁶⁹ Apart from a minor antitrust case,⁷⁰ courts typically have enjoined the NHL from enforcing its reserve clause.⁷¹ The NHL did not qualify for the labor exemption because the league “was primarily responsible for devising and perpetuating a monopoly over the product market of all professional hockey players via the reserve system.”⁷² The court determined that the reserve clause violated the Sherman Act.⁷³

⁶³ Id at 1027.

⁶⁴ See *Brady v National Football League*, 644 F3d 661, 680–81 (8th Cir 2011).

⁶⁵ Id at 673.

⁶⁶ Id (emphasis added).

⁶⁷ See id at 673–74, citing 29 USC § 104.

⁶⁸ *Brady*, 644 F3d at 671.

⁶⁹ See *Neeld v National Hockey League*, 439 F Supp 446, 455 (WDNY 1977) (“*Neeld I*”). See also generally *Neeld v National Hockey League*, 594 F2d 1297 (9th Cir 1979) (“*Neeld II*”).

⁷⁰ See generally *Neeld I*, 439 F Supp 446; *Neeld II*, 594 F2d 1297.

⁷¹ See, for example, *Philadelphia World Hockey Club, Inc v Philadelphia Hockey Club, Inc*, 351 F Supp 462, 517–18 (ED Pa 1972).

⁷² Id at 500.

⁷³ See id at 467.

E. The End of Antitrust in Sports Labor Disputes?

This brief history reveals a series of paradoxes. To engender competition among teams, professional sports leagues implemented highly anticompetitive labor market rules, exemplified by the reserve clause. Baseball evolved into a colossal commercial success, but due to a quirky case with an extremely narrow theory of interstate commerce, the sport remained exempt from antitrust law. Later, in another paradox, basketball, football, and hockey players formed unions under the NLRA for the purpose of bargaining collectively with their employers, but they abandoned this approach in favor of pursuing antitrust claims after realizing they had weak bargaining power.

This particular paradox—epitomized by a union disbanding in order to enhance its members’ bargaining power as class action plaintiffs in antitrust—probably ended when the Eighth Circuit ruled that NFL players had no recourse under the Sherman Act to enjoin a lockout. This ruling paved the way to a quick settlement at the collective bargaining table.⁷⁴ It also sent a message to other leagues and players’ unions to bargain their differences under the NLRA rather than to pursue litigation under the Sherman Act. For proof of this message, consider that the NHL, with the similar goal of extracting player concessions, engaged in a lockout.⁷⁵ The same thing happened between the NBA and its players when their collective bargaining agreement expired.⁷⁶ Did these players decertify their union and follow New England Patriots quarterback Tom Brady’s example of running to federal court for an antitrust injunction? No. This is because players understood that neither impasse nor decertification marks the end of labor law and starting point for antitrust law. *Brady v National Football League*⁷⁷ makes clear that that impasse is simply another phase of the bargaining process that the NLRA encompasses.

⁷⁴ See Chris Deubert, Glenn M. Wong, and John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 UCLA Enter L Rev 1 at 44–75 (2012).

⁷⁵ See Katie Carrera, *NHL Lockout: Owners, Players Reach Tentative Agreement on CBA Framework*, Capitals Insider (Wash Post Jan 6, 2013), online at <http://www.washingtonpost.com/blogs/capitals-insider/wp/2013/01/06/nhl-lockout-owners-players-reach-tentative-agreement-on-cba-framework> (visited June 7, 2014).

⁷⁶ See Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 Vand J Enter & Tech L 473, 494–97 (2013).

⁷⁷ 644 F3d 661 (8th Cir 2011).

II. HOW A “LABOR DISPUTE” WOULD HELP THE NCAA

A. The NCAA Patterns Itself after Professional Sports Leagues

The foregoing history is relevant to Division I football. Most notably, each school is subject to a cap on scholarships.⁷⁸ This tends to allocate talent according to available openings. Players cannot transfer without incurring a significant penalty.⁷⁹ This rule is like a restriction on free agency.

The NCAA has largely avoided antitrust enforcement to date by proclaiming that its athletic competitions are on a higher ground than commerce.⁸⁰ Its bylaws define players as “student-athletes.”⁸¹ Thus, Division I football players have consistently lost antitrust lawsuits that challenged their immobility.⁸² Courts have told them they are not in a labor market.⁸³ This judicial view is exposed as an absurdity, however, every time a TV announcer, beat writer, or blog evaluates a player’s potential to play professional football. NCAA football is not only the NFL’s minor league—it is also the NFL’s sole pipeline for talent.⁸⁴ Where else do NFL scouts go to evaluate prospects? The union-representation election at Northwestern may undermine the NCAA’s avoidance of antitrust scrutiny by exposing the business side of Division I football.

⁷⁸ See NCAA, *2013–14 NCAA Division I Manual* Rule 15.5.6 at 207–08 (NCAA 2013), online at <http://www.ncaapublications.com/productdownloads/D114.pdf> (visited June 7, 2014).

⁷⁹ See *id.* at Rule 14.5.1 at 168–69.

⁸⁰ See NCAA, *Investing Where It Matters*, NCAA.org Media Center, online at <http://www.ncaa.org/about/resources/media-center/investing-where-it-matters> (visited June 7, 2014) (“There is a lot of talk about how much money college sports generates. But did you know that more than 90 percent of the NCAA’s revenue goes to support student-athletes?”).

⁸¹ See NCAA, *2013–14 NCAA Division I Manual* at xiv (cited in note 78).

⁸² See, for example, *Banks v National Collegiate Athletic Association*, 977 F2d 1081, 1094 (7th Cir 1992) (affirming the dismissal of a college football player’s Sherman Act lawsuit); *Tanaka v University of Southern California*, 252 F3d 1059, 1064–65 (9th Cir 2001) (affirming the dismissal of a student-athlete’s Sherman Act claim over the NCAA transfer rule).

⁸³ See *Banks*, 977 F2d at 1090–91. The court said that the NCAA’s loss-of-eligibility rule for players who declare for the NFL draft is a “desirable and legitimate attempt ‘to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.’” *Id.* at 1090, quoting *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma*, 468 US 85, 123 (1984) (White dissenting).

⁸⁴ See Ben LeDoux, *5 NFL Players That Did Not Go to College*, (Made Man Apr 3, 2010), online at <http://www.mademan.com/mm/5-nfl-players-did-not-go-college.html> (visited June 7, 2014).

B. The NCAA Overestimates the Threat of Unionization

Unionization of college football players is not around the corner. True, the NLRB representation election for Northwestern players is a historic moment. As the following scenarios show, however, the path to unionization is strewn with boulders. While no one can predict the future of the unionization effort, the possibilities are finite.

First, the unionization effort by the College Athletes Players Association (CAPA) could end with a court ruling that Northwestern University football players are not employees under the NLRA. The regional director’s decision conflicts with the Board’s precedent in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO*.⁸⁵ This case presented the question of whether graduate students who served as teaching assistants as part of their academic development may be considered school employees under the NLRA. Because the students were in school to pursue a degree, the *Brown* court ruled that they were not employees under the NLRA. The court reasoned that “it simply does not effectuate the national labor policy to accord them collective bargaining rights.”⁸⁶ Certainly, Division I football players are in a different situation than graduate assistants because they are critical inputs for huge TV revenues. But again, the unionization effort could end with a court ruling that applies *Brown* to Northwestern University.

Second, a vote might show that less than a majority of players favor union representation. Northwestern’s new quarterback denounced the union.⁸⁷ A “no” vote would push back this organizing effort for at least one year due to an election bar in the NLRA,⁸⁸ or end it completely if the vote discourages organizers.

⁸⁵ 342 NLRB 483 (2004). The regional director’s decision in *Northwestern University, Employer, and College Athletes Players Association (CAPA), Petitioner*, 2014 WL 1246914 (NLRB 2014), cited the long hours that players spend on football—fifty to sixty hours per week—to distinguish players from the graduate students in *Brown*. See *id.* at *16.

⁸⁶ See *Brown*, 342 NLRB at 492.

⁸⁷ See Eric Olson, *Northwestern QB Says Players Should Have Taken Concerns to Higher-Ups before Pushing for Union*, US News & World Report (Apr 9, 2014), online at <http://www.usnews.com/news/sports/articles/2014/04/09/northwestern-qb-says-union-push-was-rushed-wrong> (visited June 7, 2014).

⁸⁸ See John D. Finerty Jr, *One Year of Quiet: Honoring the Decision to Vote No*, 11 Labor L 353, 355 (1995) (explaining that § 9(c)(3) of the NLRA prohibits an election for one year after the date of balloting in a prior election).

Third, if a majority favors union representation, CAPA would be certified as the bargaining representative. Northwestern would be required to bargain with the union over wages, hours, and terms and conditions of employment.⁸⁹ From there, a wide variety of scenarios are possible, but three stand out as more likely than others. First, Northwestern might bargain so slowly that players could become frustrated and petition the NLRB to decertify their union. This is not unprecedented.⁹⁰ Second, the school might reach an agreement with the union that is patterned after the expanded-benefits model the NCAA is currently planning.⁹¹ Third, the school might bargain hard by offering players less than the NCAA model of expanded benefits for nonunion programs.⁹²

Northwestern football players—who turned to the United Steelworkers for organizing help,⁹³ just as baseball players did when they formed their union⁹⁴—are likely to face steep obstacles in collective bargaining. Do they have the same bargaining power as MLB players? Would they have a visionary leader—a skillful internal organizer who could keep a diverse group of players together—as baseball players had in Major League Baseball Players Association executive director Marvin Miller?⁹⁵ Could they stare down senior administrators during contentious negotiations at their prestigious school? Could they resist the inevitable taunts that they are ruining college football? Could they go to class regularly and make academic progress while

⁸⁹ See NLRA § 8(d), 29 USC § 158(d).

⁹⁰ For a comparable situation, see *Mark Burnett Productions and Stephen R. Frederick, Petitioner, and International Alliance of Theatrical Stage Employees*, 349 NLRB 706, 706 (2007).

⁹¹ Steve Eder, *N.C.A.A. Planning to Address Benefits for Some of Its Players*, *Officials Say*, NY Times D4 (Apr 7, 2014).

⁹² For a comparison to the NFL's tough bargaining stance in 2011—which proposed numerous player concessions—see Deubert, Wong, and Howe, 19 UCLA Enter L Rev at 44–75 (cited in note 74).

⁹³ See Alejandra Cancino, *Unions Get a Boost from Northwestern Athletes*, Chicago Tribune (Jan 30, 2014), online at http://articles.chicagotribune.com/2014-01-30/site/ct-college-athletes-organize-0130-biz--20140130_1_labor-unions-football-players-united-steelworkers (visited June 7, 2014).

⁹⁴ *MLBPA Info: Frequently Asked Questions*, MLBPlayers.com, online at <http://mlb.mlb.com/pa/info/faq.jsp#created> (visited June 7, 2014). For the relationship between CAPA and the United Steelworkers, see CAPA, Press Release, *Historic Northwestern Football Players' Union Vote Is a Win-Win* (Apr 25, 2014), online at <http://www.collegeathletespa.org/news/historic-northwestern-football-players> (visited June 7, 2014).

⁹⁵ For an explanation of Miller's role, see Paul D. Staudohar, *Baseball Labor Relations: The Lockout of 1990*, 113 Monthly Labor Rev 32, 32 (1990).

embroiled in a sour and consuming labor negotiation? Could they vote as a majority to strike? Could they faithfully walk a picket line while Northwestern assembles a hasty walk-on crew of replacement players? Could they continue to attend school if their scholarships were held in abeyance pending the outcome of a negotiation? These are the practical and legal implications of forming a union and bargaining with an employer under the NLRA.

However the future unfolds, there is no denying that players have weak bargaining power. The players who are on track to complete a degree would be reluctant to risk permanent replacement under *Mackay Radio*.⁹⁶ Replacement could put them at risk for losing their scholarships. The better players who could be drafted or signed as free agents would be reluctant to miss a shot at the NFL. More generally, it is hard to imagine a freshman player mustering the courage to go on strike. It is equally difficult to picture a senior risking the loss of part or all of his last season. The five-year eligibility limit for players means that the union would have less bargaining power than the NFL players association—itsself a weak union.

C. Antitrust Is a Larger Threat to the NCAA

College players might conclude that a better bargaining table is available through an antitrust lawsuit.

First, every sports union at the major league level—except baseball due to *Federal Baseball Club of Baltimore, Inc v National League of Professional Baseball Clubs*⁹⁷—successfully used antitrust in its early history to compensate for their weak bargaining power. A reasonable conjecture is that courts favored players because teams were wealthy and players were paid little.

Consider this history: NBA players succeeded in their initial antitrust litigation.⁹⁸ Courts were also receptive to NFL players’ antitrust claims. Active and retired football players filed a Sherman Act lawsuit in 1972 to challenge the NFL’s Rozelle Rule in *Mackey v National Football League*.⁹⁹ Judge Earl Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation because it deterred free agent signings.¹⁰⁰ After

⁹⁶ See 304 US at 345–46.

⁹⁷ 259 US 200 (1922).

⁹⁸ See Part I.B.

⁹⁹ 407 F Supp 1000, 1002 (D Minn 1975).

¹⁰⁰ *Id* at 1006–07.

the Eighth Circuit affirmed the ruling,¹⁰¹ the NFL settled for \$13 million in damages.¹⁰²

Second, antitrust law can be used to certify the entire class of Division I football players and overcome the fragmentation problem under the NLRA. A possible blueprint for the players is *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.¹⁰³ Sam Keller, a former quarterback at Arizona State University, alleged that a video game developer exploited his likeness for commercial advantage.¹⁰⁴ The litigation involves former—not current—players, and the complaint involves player publicity rights, which are unrelated to antitrust.¹⁰⁵ Nonetheless, *NCAA Student-Athlete Name & Likeness* has nine named plaintiffs from major private and public Division I football and basketball programs, the class has been certified, the NCAA is a defendant, and the lawsuit mirrors the efforts by CAPA to gain more of the wealth that Northwestern University players generate. This complex litigation is on a favorable track for players.¹⁰⁶

Third, while NCAA rules and bylaws differ from those in the NFL, they have important linkages and similarities. The linkages involve rules that make college players ineligible for further NCAA participation.¹⁰⁷ An example is a rule that strips scholarships from players who declare for the NFL draft.¹⁰⁸ The NFL's reciprocal rule restricts a professional player's eligibility until three years from the time his high school class graduates.¹⁰⁹ In other words, once a player finishes his junior season and declares for the NFL draft, he cannot come back to an NCAA school and reclaim his scholarship for a senior season if he is disappointed with his selection or is undrafted. This rule linkage has no connection to the educational mission espoused by the NCAA; it simply implies that the NCAA and NFL allocate the

¹⁰¹ *Mackey v National Football League*, 543 F2d 606, 623 (8th Cir 1976).

¹⁰² See *Brady v National Football League*, 779 F Supp 2d 992, 998 (D Minn 2011).

¹⁰³ 724 F3d 1268 (9th Cir 2013).

¹⁰⁴ *Id* at 1271.

¹⁰⁵ See *id*. Keller filed a class action complaint alleging that the video game producer violated his publicity rights under California Civil Code § 3344 and California common law. *Id* at 1272.

¹⁰⁶ See *id* at 1284 (rejecting the game producer's defense that the First Amendment protects its use of the likenesses of college athletes).

¹⁰⁷ See Sarah M. Kinsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U Chi L Rev 1581, 1602–03 (2003) (comparing NCAA transfer rules and penalties to restrictions on professional employees).

¹⁰⁸ See generally *Banks*, 977 F2d 1081.

¹⁰⁹ See *Clarett v National Football League*, 369 F3d 124, 130 (2d Cir 2004).

most talented football players in a way that limits their direct competition with each other.

There are more similarities. Like the NFL, the NCAA has its version of the reserve clause.¹¹⁰ If the player wants to move to another team, he must sit for an entire season and forfeit one year of eligibility.¹¹¹ This is a high price for mobility. A coach can remove a player, however, or pressure him to quit.¹¹² The player has no recourse.

CONCLUSION

In a recent interview, the NCAA’s president, Mark Emmert, declared that unionization of college athletes is “grossly inappropriate.”¹¹³ He objected to the idea that student-athletes fit a “union-employee model” because this type of relationship would “throw away the entire collegiate model for athletics.”¹¹⁴ But the NCAA is blinded by wealth. Emmert made these comments during the NCAA March Madness basketball tournament, which earns the NCAA \$10.8 billion in TV revenue.¹¹⁵

The NCAA assumes that it can successfully resist player efforts to redistribute this wealth by winning the current legal dispute before the NLRB. This is wishful thinking. Having pocketed billions of dollars in TV and related revenue from the labor of football players, the NCAA has lost credibility by portraying these players solely as college students. The fact that only 1–2 percent of these players actually perform in the NFL is beside the point.¹¹⁶ This statistic implies nothing more than that the NFL has too few player slots to hire the NCAA’s output of talent.

¹¹⁰ See NCAA, *2013–14 NCAA Division I Manual* Rule 14.5.1 at 168–69 (cited in note 78).

¹¹¹ See *id.* at Rule 14.5.1 at 168.

¹¹² See, for example, Kate Hairopolous, *SMU’s Brown Trims 4 Players from Roster*, Dallas Morning News C11 (Apr 28, 2012).

¹¹³ Eddie Pells, *NCAA President Mark Emmert: Unionization “Strikes Most People As . . . Grossly Inappropriate,”* (Huffington Post Apr 6, 2014), online at http://www.huffingtonpost.com/2014/04/06/mark-emmert-union_n_5102239.html (visited June 7, 2014).

¹¹⁴ *Id.*

¹¹⁵ NCAA, Press Release, *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement* (Apr 22, 2010), online at <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement> (visited June 7, 2014).

¹¹⁶ NCAA leaders use this statistic to argue that college athletes should retain their amateur status. See, for example, Louanna Simon and Nathan Hatch, *Why Unionizing College Sports Is a Bad Call*, Wall St J (Apr 7, 2014), online at <http://online.wsj.com/news/articles/SB10001424052702304441304579480013097853156> (visited June 7, 2014).

The modest graduation rates for football players show that the NCAA does not use football programs to elevate the academic achievements of universities.¹¹⁷

Why shouldn't the NCAA encourage its member, Northwestern University, to voluntarily recognize the players' union? Even if the initial bargaining is limited to insurance and educational benefits, these would be mandatory subjects of bargaining under the NLRA. By taking this course, the NCAA would improve its chances of deflecting current and future lawsuits under the doctrine of preemption.¹¹⁸ The NCAA would also follow the NFL down the path of preserving its strong bargaining advantage. And in an antitrust lawsuit to challenge player compensation and mobility restrictions, the NCAA would have a proven defense to avoid antitrust jurisdiction: the same "labor dispute" provision under the Norris-LaGuardia Act that defeated the NFL players in 2011,¹¹⁹ allowing the league to pocket huge sums of money.

¹¹⁷ See Patrick James Rische, *A Reexamination of How Athletic Success Impacts Graduation Rates: Comparing Student-Athletes to All Other Undergraduates*, 62 *Am J Econ & Sociology* 407, 415 (2003) (finding that the graduation rate of football players in the freshman cohorts from 1988–91 at Division I schools was 52.46 percent).

¹¹⁸ For an example of how the NFL successfully shielded itself from a wrongful death action, see *Stringer v National Football League*, 474 F Supp 2d 894, 909 (SD Ohio 2007) (arguing that its collective bargaining agreement preempted state claims under § 301 of the Labor Management Relations Act). Current litigation includes *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 2013 WL 6825602 (JPML) (involving former NCAA athletes in football, soccer, and hockey who have sued over concussion injuries). See also generally Class Action Complaint, *Arrington v National Collegiate Athletic Association*, No 1:11-cv-06356 (ND Ill filed Sept 12, 2011) (available on Westlaw at 2011 WL 4374451). The NCAA also faces a class action lawsuit for failing to pay a scholarship shortfall. See Stefanie Mosca, *NCAA Faces Lawsuit for Capping Athletic Scholarships*, Inside Counsel (Summit Mar 11, 2014), online at <http://www.insidecounsel.com/2014/03/11/ncaa-faces-lawsuit-for-capping-athletic-scholarshi> (visited June 7, 2014).

¹¹⁹ See text accompanying notes 66–68.