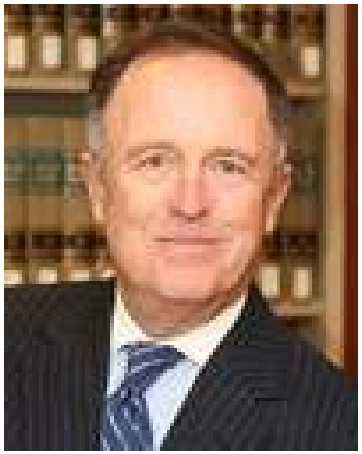
Third Thursday – Crowell & Moring's Labor & Employment Update

April 17, 2014

The webinar will begin shortly. Please stand by.

Today's Presenters



Tom Gies

Laurel Pyke Malson

Michael Appel

Today's Discussion

- The *Northwestern* NLRB Case
- Immediate and longer-term Implications
- Impact on public universities
- What to do now?

Challenges Facing Collegiate Athletics

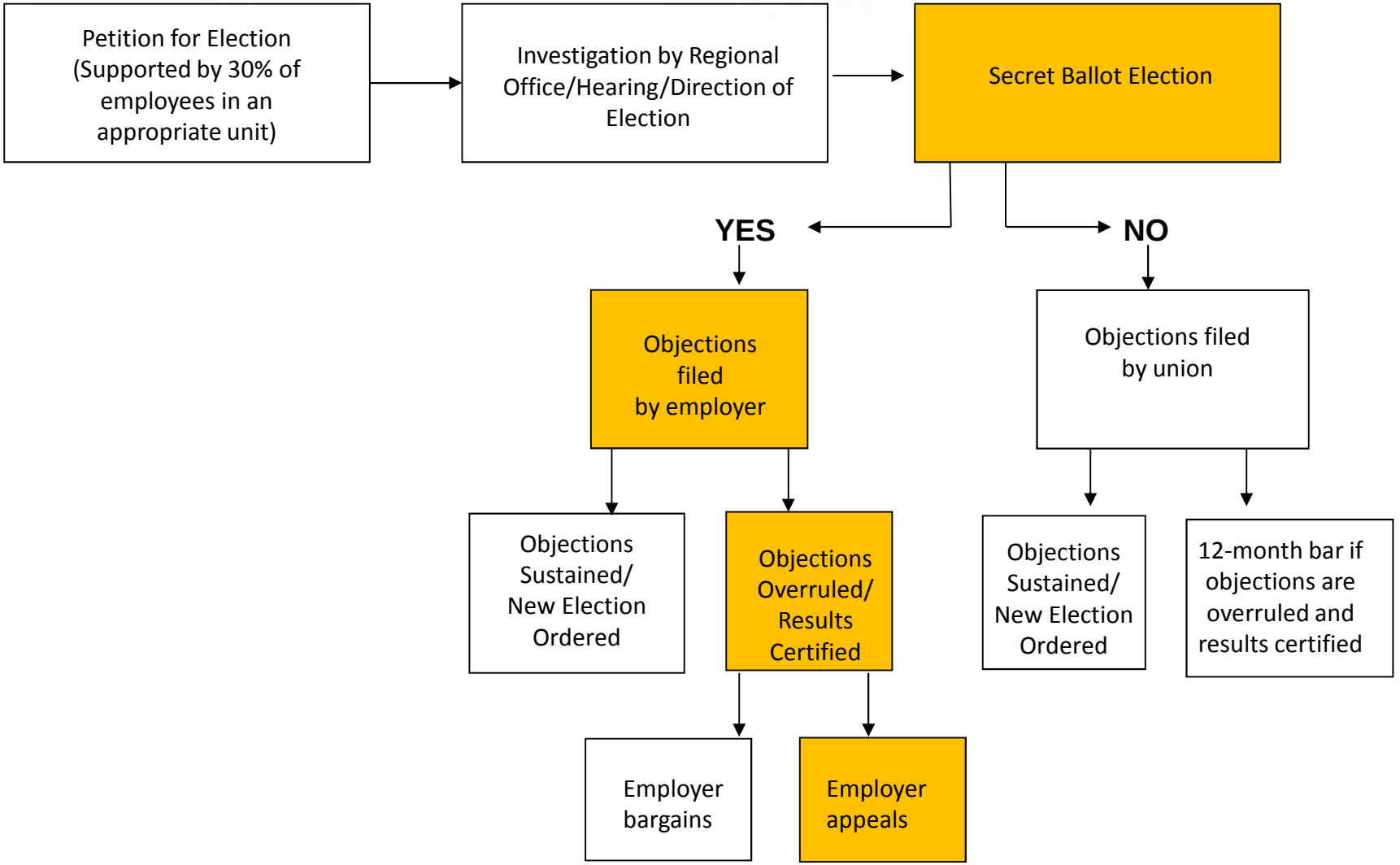
- Assault on “Amateurism” Construct
- O’Bannon Litigation
- Antitrust Challenges
- Public Perception re Exploitation Allegations
- Title IX “Proportionate Funding” Mandate

(whither the NCAA?)

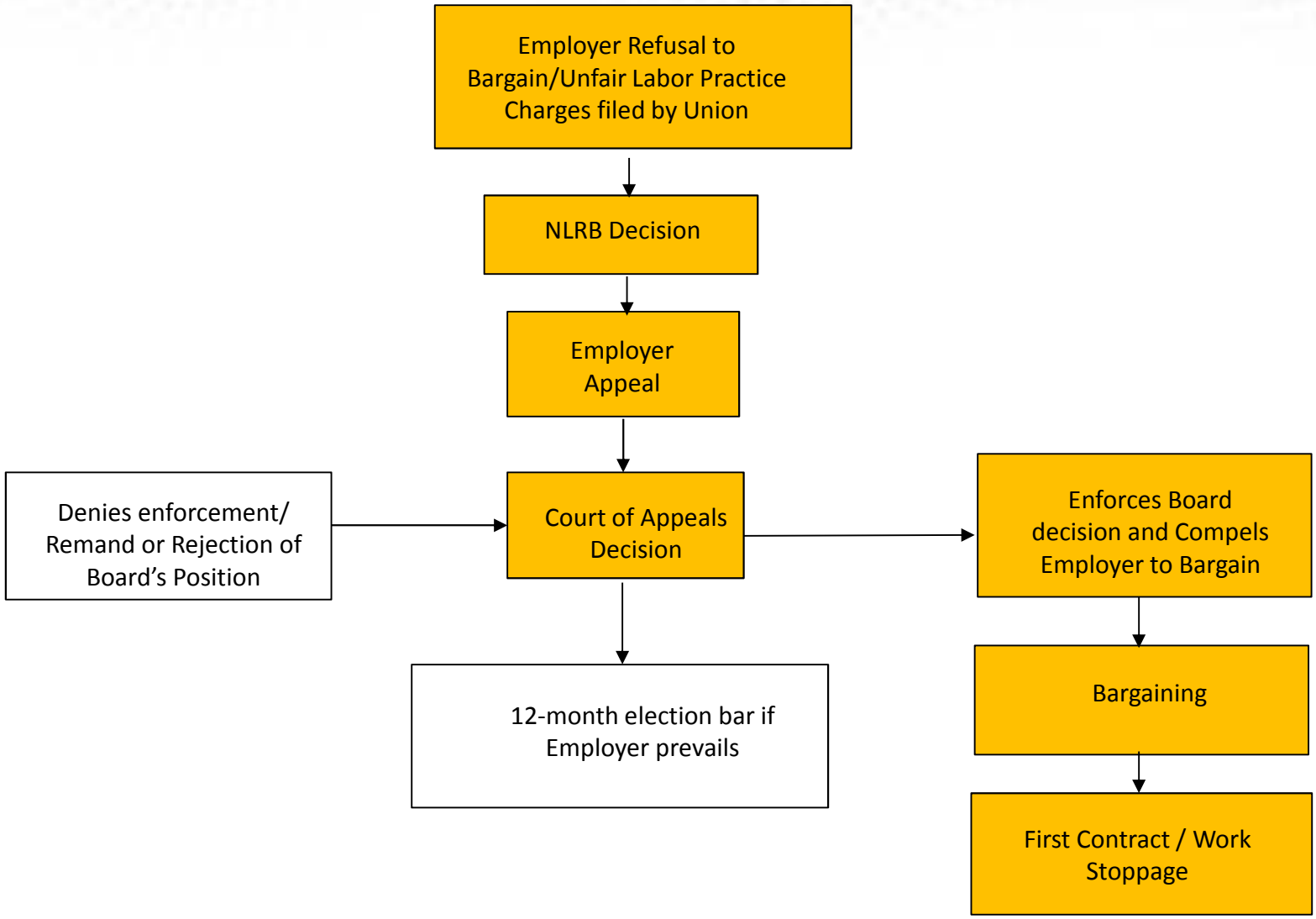
The *Northwestern* NLRB Case

- Current Procedural Status
  - More news yet this week?
- Likely Next Steps

NLRB ELECTION PROCESS



NLRB ELECTION PROCESS (cont'd)



The *Northwestern* NLRB case (cont'd)

- Principal Legal Arguments
  - Employee Status
    - Application of common law test
  - *Brown University*
    - How different are grad students?
  - Appropriate Bargaining Unit Concepts
    - "fragmented unit"
    - "temporary employee" rule

The *Northwestern* Case

- **IF** the union ultimately prevails. . . .
  - The duty to bargain
  - Section 7 rights
    - Right to strike
    - *Weingarten* rights
  - Section 8 employer unfair labor practices
    - Non-discrimination
    - Coercive conduct
    - Retaliation

Employment Law Implications

- FLSA
- Tax
- Coverage under other federal and state laws
  - ADA
  - FMLA
  - Title VII and other EEO statutes
  - Affordable Care Act – Employer mandate
  - ERISA
  - OSHA

Title IX of the Education Amendments of 1972 – 20 U.S.C. § 1618(a)

- "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."
- Defined mostly through agency regulations and interpretations/guidance

Title IX Background – The Regs

- 34 CFR § 106 – Department of Education
  - Intercollegiate Athletics
    - Equal Athletic Financial Assistance: § 106.37(c)
      - I.e., scholarships (in proportion to the numbers of students of each sex participating)
    - Equal Athletic Opportunity: § 106.41(c)
      - Effective Accommodation of Student Interests and Abilities: § 106.41(c)(1)
        - » Measures equity of opportunity to participate in athletics and equity in levels of competition
      - Equivalence in Other Benefits and Opportunities: § 106.41(c)(2) – (10)
        - » Concerns sex-based differences in schedules, equipment, coaching, and other benefits provided athletes

Title IX Background – The Regs

- 34 CFR § 106 – Department of Education
  - Title IX extends to employment in education programs or activities, §§ 106.51 – 106.61
    - § 106.51(a)(3): "A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by [Subpart E*], including relationships with . . . labor unions . . . ."
    - § 106.51(b): ". . . provisions of this subpart apply to . . . (3) Rates of pay or any other form of compensation, and changes in compensation . . . (5) The terms of any collective bargaining agreement . . . ."
  - *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982)

*Substantive standards applied under Subpart E are analogous to Title VII

Open Issues

- How will OCR classify unionized, student athletes?
- How will OCR classify the money paid to unionized athletes?
- If OCR classifies money as “compensation,” do female basketball players and male basketball players perform work that requires “equal skill, effort, and responsibility?”

Other Implications

- Workers compensation
- Unemployment compensation
- Insurance coverage
- Tort claims

Implementation Issues and Other Practical Concerns

- Team dynamics
- Competition
- NCAA reaction?

Who's Next?

- Other Private Universities
- State law initiatives affecting public institutions
  - Pennsylvania
  - Ohio

What to do now?

- Adopt a near-term policy
- Consider training Athletic Department staff
- Take a fresh look at existing practices
- Stay informed of both campus and external developments

Developing an Appropriate Strategy

- Identify the institution's objectives
  - Go Ivy?
  - Establish a football major?
- Risk prevention steps
  - Inventory athletic programs
  - Check insurance
  - Monitor claims
  - Employee benefit plan eligibility language

Citations

- *Brown University,* 342 NLRB 483 (2004)
- *Seattle Opera v. NLRB,* 292 F.3d 757 (D.C. Cir. 2002)
- *Alston v. NCAA, et. al.*, Case No. 3:14-cv-01011 (N.D. Cal.)
- *Jenkins v. NCAA, et. al.*, Case No. 3:33-av-00001 (D. N.J.)
- *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, Case No. 4:09-cv-01967 (N. D. Cal.) ("O'Bannon cases")
- *Parker v. Franklin Cnty. Cmty. Sch.* Corp., 667 F.3d 910 (7th Cir. 2012)

Contacts

Tom Gies
tgies@crowell.com
202.624.2690

Laurel Pyke Malson
lmalson@crowell.com
202.624.2576

Michael Appel
mappel@crowell.com
202.624.2582

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NORTHWESTERN UNIVERSITY

Employer

and **Case 13-RC-121359**

COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA)

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("the Act"), a hearing was held before a hearing officer of the National Labor Relations Board ("the Board"). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to the undersigned its authority in this proceeding.[1]

[1]Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings, made at the hearing, are free from prejudicial error and are affirmed.

2. Northwestern University ("the Employer") is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. College Athletes Players Association ("the Petitioner") is a labor organization within the meaning of the Act. At the hearing, the Employer stipulated that the Petitioner was a labor organization if two conditions were met: (1) its football players who receive grant-in-aid scholarships are found to be "employees" within the meaning of the Act; and (2) the petitioned-for-unit was found to be an appropriate unit within the meaning of the Act. I find that both of these conditions have been met. See also *Boston Medical Center*, 330 NLRB 152, 165 (1999) (where Board found that the petitioner was a labor organization since employer's interns, residents, and fellows were employees within the meaning of Section 2(3) of the Act). Further, notwithstanding the Employer's conditional stipulation, I find that the Petitioner is a labor organization within the meaning of the Act for the reasons set forth in Section IV (F) of this decision.

4. The Petitioner claims to represent certain employees of the Employer in the unit described in the petition it filed herein, but the Employer declines to recognize the Petitioner as the collective-bargaining representative of those employees

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in this petition and the parties do not contend that there is any contract bar to this proceeding.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. ISSUES

The Petitioner contends that football players ("players") receiving grant-in-aid scholarships ("scholarship") from the Employer are "employees" within the meaning of the Act, and therefore are entitled to choose whether or not to be represented for the purposes of collective-bargaining. The Employer, on the other hand, asserts that its football players receiving grant-in-aid scholarships are not "employees" under the Act. It further asserts that these players are more akin to graduate students in *Brown University*, 342 NLRB 483 (2004), whom the Board found not to be "employees" under the Act.

In the alternative, the Employer contends that its players are temporary employees who are not eligible for collective bargaining.

Finally, the Employer contends that the petitioned-for-unit is arbitrary and not appropriate for bargaining.

II. DECISION

For the reasons discussed in detail below, I find that players receiving scholarships from the Employer are "employees" under Section 2(3) of the Act. Accordingly, **IT IS HEREBY ORDERED** that an election be conducted under the direction of the Regional Director for Region 13 in the following appropriate bargaining unit:

> Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer located at 1501 Central Street, Evanston, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

III. STATEMENT OF FACTS

A. Background

The Employer is a private, non-profit, non-sectarian, coeducational teaching university chartered by the State of Illinois, with three campuses, including one located in Evanston, Illinois. It currently has an undergraduate enrollment of about 8,400 students. The academic calendar year for these students is broken down into four quarters: Fall, Winter, Spring, and an optional Summer Session. The schedule for the current academic calendar year shows that classes began on September 24, 2013 and conclude on June 13, 2014.

The Employer maintains an intercollegiate athletic program and is a member of the National Collegiate Athletic Association (NCAA). The NCAA is responsible for formulating and enforcing rules governing intercollegiate sports for participating colleges. The Employer is also a member of the Big Ten Conference and its students compete against the other 11 member schools (as well as non-conference opponents) in various sports. There are currently 19 varsity sports, which the Employer's students can participate in at the Division I level, including 8

varsity sports for men and 11 varsity sports for women. In total, there are about 500 students who compete in one of these sports each year for the Employer.

B. The Employer's Football Staff and Grant-in-Aid Scholarship Players

As part of its athletic program, the Employer has a varsity football team that competes in games against other universities. The team is considered a Football Bowl Subdivision (FBS) Division I program.[2] Since 2006, the head football coach has been Patrick Fitzgerald, Jr., and he has been successful in taking his team to five bowl games. On his football staff, there is a Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, and four graduate assistant coaches who assist him with his various duties. There are also five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns who report to him. In turn, Head Coach Fitzgerald reports to Athletic Director James J. Phillips and President Dr. Morton Shapiro.

The Employer's football team is comprised of about 112 players of which there are 85 players who receive football grant-in-aid scholarships that pay for their tuition, fees, room, board, and books.[3] The players on a scholarship typically receive grant-in-aid totaling $61,000 each academic year.[4] The grant-in-aid for the players' tuition, fees and books is not provided directly to them in the form of a stipend as is sometimes done with room and board. Because the Employer's football team has a rule requiring its players to live on campus during their first two years, these players live in a dorm room and are provided a meal card, which allows them to buy food at the school cafeteria. In contrast, the players who are upperclassmen can elect to live off campus, and scholarship players are provided a monthly stipend totaling between $1,200 and $1,600 to cover their living expenses. Under current NCAA regulations, the Employer is prohibited from offering its players additional compensation for playing football at its institution with one exception. The Employer is permitted to provide its players with additional funds out of a "Student Assistance Fund" to cover certain expenses such as health insurance, dress clothes required to be worn by the team while traveling to games, the cost of traveling home for a family member's funeral, and fees for graduate school admittance tests and tutoring.[5] The players do not have FICA taxes withheld from the scholarship monies they receive. Nor do they receive a W-2 tax form from the Employer.

For a number of years, the NCAA rules provided that players could only receive one-year scholarships that were renewable each year at the discretion of the head coach. But effective the 2012-2013 academic year, the NCAA changed its rule to permit universities to offer four-year scholarships to players. The Employer immediately thereafter began to award its recruits four-

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[2] There are currently 120 to 125 universities with collegiate football teams that compete at the FBS Division I level. Seventeen of these universities, including the Employer, are private institutions.

[3] The remainder of the football players on the team are "walk-ons" who do not receive grant-in-aid scholarships, but may receive need-based financial aid to attend the university which is not contingent on them remaining on the football team. This financial aid can be renewed every year if the player qualifies for it. The walk-ons may also eventually earn a grant-in-aid scholarship and this has in fact happened to 21 players within the past seven years.

[4] This figure increases to about $76,000 if a grant-in-aid scholarship player enrolls in classes during the Summer session.

[5] For academic calendar year 2012-2013, the Employer disbursed about $54,000 from this fund to 30 or 35 of its football players.

year scholarships with an option for a fifth year (typically, in the case of a player who "redshirts" their freshmen year).[6] When Head Coach Fitzgerald makes a scholarship offer to a recruit, he provides the individual both a National Letter of Intent and a four-year scholarship offer that is referred to as a "tender". Both documents must be signed by the recruit and the "tender" describes the terms and conditions of the offer.[7] More specifically, it explains to the recruit that, under NCAA's rules, the scholarship can be reduced or canceled during the term of the award if the player: (1) renders himself ineligible from intercollegiate competition; (2) engages in serious misconduct warranting substantial disciplinary action; (3) engages in conduct resulting in criminal charges; (4) abuses team rules as determined by the coach or athletic administration; (5) voluntarily withdraws from the sport at any time for any reason; (6) accepts compensation for participating in an athletic contest in his sport; or (7) agrees to be represented by an agent. The "tender" further explains to the recruit that the scholarship cannot be reduced during the period of the award on the basis of his athletic ability or an injury.[8] By July 1 of each year, the Employer has to inform its players, in writing, if their scholarships will not be renewed. However, the "tender" provides the players the right to appeal this decision.

In cases where Coach Fitzgerald believes that a player may have engaged in conduct that could result in the cancelation of his scholarship, he will speak to individuals within the athletic department. Athletic Director Phillips, after considering any recommendation offered by Fitzgerald, will then determine whether the conduct warrants cancellation of the scholarship. If the player appeals this decision, the player will meet with the Employer's Director of Financial Aid, the Faculty Representative, and a Representative from the Vice President of Student Affairs. It is undisputed that within the past five years, only one player has had his scholarship canceled for engaging in misconduct (shooting a BB gun in a dormitory) and another player had his scholarship canceled for violating the alcohol and drug policy a second time. In both cases, the athletic director asked for, and followed, Fitzgerald's recommendation to cancel the scholarships.

C. The Employer's Football Players are Subject to Special Rules

As has already been alluded to, the Employer's players (both scholarship players and walk-ons) are subject to certain team and athletic department rules set forth, inter alia, in the Team Handbook that is applicable solely to the Employer's players and Northwestern's Athletic Department Handbook. Northwestern's regular student population is not subject to these rules and policies. Specifically, freshmen and sophomore year players receiving scholarships are required to live in on-campus dormitories. Only upperclassmen players are permitted to live off campus and even then they are required to submit their lease to Fitzgerald for his approval before they can enter into it. If players want to obtain outside employment, they must likewise first obtain permission from the athletic department. This is so that the Employer can monitor whether the player is receiving any sort of additional compensation or benefit because of their

[6] These four year scholarships remain in effect through the end of the players' senior year even if they no longer have any remaining football eligibility.

[7] Once the recruit signs the "tender," its contractual terms are binding on the Employer. However, the recruit is permitted to terminate the "tender" after signing it.

[8] The Employer's own policy is to not cancel a player's scholarship due to injury or position on the team's depth chart as explained in Head Coach Fitzgerald's scholarship offer letter to recruits. If a player has a career ending injury, they are deemed a "medical non-counter" which means that their football scholarship does not count against the NCAA's 85 scholarship limit for Division I football.

athletic ability or reputation.[9] Similarly, players are required to disclose to their coaches detailed information pertaining to the vehicle that they drive. The players must also abide by a social media policy, which restricts what they can post on the internet, including Twitter, Facebook, and Instagram. In fact, the players are prohibited from denying a coach's "friend" request and the former's postings are monitored. The Employer prohibits players from giving media interviews unless they are directed to participate in interviews that are arranged by the Athletic Department. Players are prohibited from swearing in public, and if a player "embarrasses" the team, he can be suspended for one game. A second offense of this nature can result in a suspension up to one year. Players who transfer to another school to play football must sit out a year before they can compete for the new school. Players are prohibited from profiting off their image or reputation, including the selling of merchandise and autographs. Players are also required to sign a release permitting the Employer and the Big Ten Conference to utilize their name, likeness and image for any purpose.[10] The players are subject to strict drug and alcohol policies and must sign a release making themselves subject to drug testing by the Employer, Big Ten Conference, and NCAA. The players are subject to anti-hazing and anti-gambling policies as well.

During the regular season, the players are required to wear a suit to home games and team issued travel sweats when traveling to an away football game. They are also required to remain within a six-hour radius of campus prior to football games. If players are late to practice, they have to attend one hour of study hall on consecutive days for each minute they were tardy. Players may also be required to run laps for violating less egregious team rules. Even the players' academic lives are controlled as evidenced by the fact that they are required to attend study hall if they fail to maintain a certain grade point average (GPA) in their classes. And irrespective of their GPA, all freshmen players must attend six hours of study hall each week.

D. Football Players' Time Commitment to Their Sport

The first week in August, the scholarship and walk-on players begin their football season with a month-long training camp, which is considered the most demanding part of the season. In training camp (and the remainder of the calendar year), the coaching staff prepares and provides the players with daily itineraries that detail which football-related activities they are required to attend and participate in. The itineraries likewise delineate when the players are to eat their meals and receive any necessary medical treatment. For example, the daily itinerary for the first day of training camp in 2012 shows that the athletic training room was open from 6:30 a.m. to 8:00 a.m. so the players could receive medical treatment and rehabilitate any lingering injuries. Because of the physical nature of football, many players were in the training room during these hours. At the same time, the players had breakfast made available to them at the N Club. From 8:00 a.m. to 8:30 a.m., any players who missed a summer workout (discussed below) or who were otherwise deemed unfit by the coaches were required to complete a fitness test. The players were then separated by position and required to attend position meetings from 8:30 am.

[9] If the Employer is found to be in violation of NCAA regulations, it can be penalized by the imposition of practice limitations, scholarship reductions, public reprimands, fines, coach suspensions, personnel limitations, and postseason prohibitions.

[10] It is undisputed that the Employer sells merchandise to the public, such as football jerseys with a player's name and number, that may or may not be autographed by the player.

to 11:00 a.m. so that they could begin to install their plays and work on basic football fundamentals. The players were also required to watch film of their prior practices at this time. Following these meetings, the players had a walk-thru from 11:00 a.m. to 12:00 p.m. at which time they scripted and ran football plays. The players then had a one-hour lunch during which time they could go to the athletic training room, if they needed medical treatment. From 1:00 p.m. to 4:00 p.m., the players had additional meetings that they were required to attend. Afterwards, at 4:00 p.m., they practiced until team dinner, which was held from 6:30 p.m. to 8:00 p.m. at the N Club. The team then had additional position and team meetings for a couple of more hours. At 10:30 p.m., the players were expected to be in bed ("lights out") since they had a full day of football activities and meetings throughout each day of training camp. After about a week of training camp on campus, the Employer's football team made their annual trek to Kenosha, Wisconsin for the remainder of their training camp where the players continued to devote 50 to 60 hours per week on football related activities.

After training camp, the Employer's football team starts its regular season which consists of 12 games played against other colleges, usually played on Saturdays, between the beginning of September and the end of November. During this time, the players devote 40 to 50 hours per week to football-related activities, including travel to and from their scheduled games.[11] During each Monday of the practice week, injured players must report to the athletic training room to receive medical treatment starting at about 6:15 a.m. Afterwards, the football coaches require the players to attend mandatory meetings so that they can begin to install the game plan for their upcoming opponent. However, the only physical activity the coaches expect the players to engage in during this day is weightlifting since they are still recovering from their previous game. The next several days of the week (Tuesday through Thursday), injured players must report to the athletic training room before practice to continue to receive medical treatment. The coaches require all the players to attend mandatory practices and participate in various football-related activities in pads and helmets from about 7:50 a.m. until 11:50 a.m.[12] In addition, the players must attend various team and position meetings during this time period. Upon completion of these practices and meetings, the scholarship players attend a mandatory "training table" at the N Club where they receive food to assist them in their recovery. Attendance is taken at these meals and food is only provided to scholarship players and those walk-ons who choose to pay for it out of their own pocket.[13]

Because NCAA rules limit the players' CARA hours to four per day, the coaches are not permitted to compel the players to practice again later in the day. The players, however,

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[11] NCAA rules limit "countable athletically related activities" (CARA) to 20 hours per week from the first regular season game until the final regular season game (or until the end of the Employer's Fall quarter in the event it qualifies for a Bowl game). The CARA total also cannot exceed four hours per day and the players are required to have one day off every week. However, the fact that the players devote well over 20 actual hours per week on football-related activities does not violate the NCAA's CARA limitations since numerous activities such as travel, mandatory training meetings, voluntary weight conditioning or strength training, medical check-ins, training tape review and required attendance at "training table" are not counted by the NCAA. In the same vein, NCAA limits players to 20 CARA hours during Spring football practice and 8 CARA hours during the remainder of the off-season.

[12] After the classes begin in late September, the football practices are moved up one hour.

[13] To avoid providing an additional benefit to the scholarship players, the Employer will reduce the monthly stipend of any upperclassmen living off campus by about $13 for each "training table."

regularly hold 7-on-7 drills (which involve throwing the football without the participation of the team's offensive and defensive linemen) outside the presence of their coaches. To avoid violating the NCAA's CARA limitations, these drills are scheduled by the quarterback and held in the football team's indoor facility in the evening. A student athletic trainer is also present for these drills to provide medical assistance, if necessary. In the same way, around 8:00 p.m., the players will go to their coaches' offices to watch film on their own for up to a couple of hours.[14]

During the regular competition season, the players' schedule is different on Friday than other days of the week because it is typically a travel day. For home games, the team will initially meet at 3:00 p.m. and have a series of meetings, walk-thrus and film sessions until about 6:00 p.m. The team will then take a bus to a local hotel where the players will be required to have a team dinner and stay overnight. In the evening, the players have the option of attending chapel and then watching a movie. At the conclusion of the movie, the players have a team breakdown meeting at 9:00 p.m. before going to bed.

About half of the games require the players to travel to another university, either by bus or airplane. In the case of an away game against the University of Michigan football team on November 9, 2012,[15] the majority of players were required to report to the N Club by 8:20 a.m. for breakfast. At 8:45 a.m., the offensive and defensive coaches directed a walk-thru for their respective squads. The team then boarded their buses at 10:00 a.m. and traveled about five hours to Ann Arbor, Michigan.[16] At 4:30 p.m. (EST), after arriving at Michigan's campus, the players did a stadium walk-thru and then had position meetings from 5:00 p.m. to 6:00 p.m. The coaches thereafter had the team follow a similar schedule as the home games with a team dinner, optional chapel, and a team movie. The players were once again expected to be in bed by 10:30 p.m.

On Saturday, the day of the Michigan game, the players received a wake-up call at 7:30 a.m. and were required to meet for breakfast in a coat and tie by no later than 8:05 a.m. The team then had 20 minutes of meetings before boarding a bus and departing for the stadium at 8:45 a.m. Upon arriving at the stadium, the players changed into their workout clothes and stretched for a period of time. They afterwards headed to the training room to get taped up, receive any medical treatment, and put on their football gear. About 65 minutes before kickoff, the players took the field and did additional stretches and otherwise warmed-up for the game. At noon, the game kicked off and Head Coach Fitzgerald, in consultation with his assistant coaches, was responsible for determining the starting lineup and which substitutions would be made during the course of the game. While most games normally last about three hours, this one lasted about four hours since it went into overtime. Following the game, the coaches met with the players, and some of those individuals were made available to the media for post-game interviews by the Employer's athletic department staff. Other players had to receive medical

[14] The players watch film of their past games and critique their performance and similarly watch film of an upcoming opponent's prior games to try to gain a competitive advantage.

[15] It is undisputed that the travel itinerary for the Michigan game accurately reflects the players' required time commitment on Friday and Saturday when playing an away game.

[16] The football team's handbook states that "when we travel, we are traveling for one reason: to WIN a football game. We will focus all of our energy on winning the game." However, the players are permitted to spend two or three hours studying for their classes while traveling to a game as long as they, in the words of Head Coach Fitzgerald "get their mind right to get ready to play."

treatment and eventually everyone on the roster changed back into their travel clothes before getting on the bus for the five hour drive back to the Evanston campus. At around 9:00 or 10:00 p.m., the players arrived at the campus.[17]

Although no mandatory practices are scheduled on Sunday following that week's football game, the players are required to report to the team's athletic trainers for a mandatory injury check. Those players who sustained injuries in the game will receive medical treatment at the football facility.

In the years that the team qualifies for a Bowl game, the season will be extended another month such that the players are practicing during the month of December in preparation for their Bowl game – which is usually played in early January. The coaches expect the players to devote the same amount of hours on their football duties during the postseason (40 to 50 hours per week), with one key difference being that the players are no longer taking classes since the academic quarter ends in mid-December.[18] While the players are allowed to leave campus for several days before Christmas, they must report back by Christmas morning. To ensure that the players abide by this schedule, they are required to give their flight itinerary to their position coaches before leaving campus.[19]

Following the Bowl game, there is a two-week discretionary period where the players have the option to go into the weight room to workout.[20] While the weight room is next to the football coaches' offices, NCAA rules prohibit coaches from conducting the players' workouts during this discretionary period. While the Employer's strength and conditioning coaches are allowed to monitor these workouts, various team leaders, including those players on the team leadership council,[21] attempt to ensure that attendance is high at these optional workouts during this and the eight other discretionary weeks throughout the year.

In mid-January, the players begin a one-month period of winter workouts during, which they spend about one hour running and doing agility drills and another hour lifting weights four or five days per week. These mandatory workouts are conducted by the football team's strength and conditioning coaches as they critique each individual player's attitude and performance. During this time the players also receive medical treatment for any ailments or injuries. This treatment could take the form of something as simple as getting into a cold tub or having their ankles taped. As is done in the regular season, the scholarship players are required to attend

[17] Although the players devoted more than 24 hours on Friday and Saturday to travel and football related activities, this only constituted 4.8 CARA hours under the NCAA's guidelines. In fact, the entire game day constituted only three CARA hours under these guidelines.

[18] The players who are living on campus must also move into a hotel since the dorms are closed after final exams are completed.

[19] The players are also required to give their flight itineraries to their position coaches at other times of the year when they desire to fly home.

[20] Between January 1 and the beginning of preseason practice, the NCAA rules mandate that players be provided a total of nine discretionary weeks.

[21] Each season, the football team has a "leadership council" which consists of freshmen, sophomore, junior, and senior players who were voted on by their teammates. These players meet with Coach Fitzgerald and discuss any issues that arise on the team. However, Fitzgerald retains the final decision on all matters raised.

mandatory "training table" after their workouts. In total, the players devote about 12 to 15 hours per week on these workouts.

In mid-February, the players have a one-week period referred to as "Winning Edge" which serves as a transition to Spring football. During this week, the football coaches separate the players into smaller groups and require them to compete with one another in various types of demanding competitions to test their levels of conditioning. The coaches also have the players lift weights in between these scheduled competitions. Overall, the players can expect to spend 15 to 20 hours on this week's mandatory activities.

From the conclusion of the "Winning Edge" until about mid-April, the players participate in Spring football which requires them to devote about 20 to 25 hours per week. In this period, the players wear their pads and helmets and resume practicing football skills. The football coaches also require the players to attend scheduled meetings so they can reinstall their offense and defense for the upcoming season. The players are similarly required to watch film of each day's practice to assist in their development while in these meetings. In addition, the coaches will designate times when the players must lift weights and improve their conditioning. This important two-month period serves as an opportunity for the players to impress their coaches and move up on the depth charts in the various positions they are competing for. At the conclusion of Spring football, the team holds its annual Spring game which is basically a scrimmage between the current eligible players.

Following the conclusion of Spring football, the players have a discretionary week in which there is no expectation that they remain on campus and train. The players then return to campus and begin Spring workouts, which are conducted by the strength and conditioning coaches. These mandatory workouts are similar to those performed in the winter and involve one hour of running and another hour of weightlifting. Besides one discretionary week in the first week in May, the workouts continue until about the beginning of June when the academic year ends.

At the end of the academic year, the players will return to their respective homes for a couple of weeks (which are discretionary weeks) before being required to report back to campus for Summer workouts, which are once again conducted by the strength and conditioning coaches. The team leaders will also use this time to teach the team's offense and defense to incoming freshmen. In fact, the players participate in 7-on-7 drills from 7:00 p.m. to 10:00 p.m., two times per week and watch film as part of their preparation for the upcoming season. In total, both the upperclassmen and incoming freshmen devote 20 to 25 hours per week on summer workouts before the start of training camp.

E. The Recruitment and Academic Life of the Employer's Grant-in-Aid Scholarship Players

The record makes clear that the Employer's scholarship players are identified and recruited in the first instance because of their football prowess and not because of their academic achievement in high school. Only after the Employer's football program becomes interested in a high school player based on the potential benefit he might add to the Employer's football

program does the potential candidate get vetted through the Employer's recruiting and admissions process.

Regarding the Employer's recruitment process, after a potential player comes to the attention of the Employer's football program, Coach Fitzgerald becomes involved. One of Fitzgerald's busiest recruiting periods is in September when he is permitted to evaluate recruits at their respective high schools and attend their football games to observe their football ability first hand. In December and January, he is also permitted to have one in-home visit with each recruit. These home visits provide him the opportunity to explain to the recruit and their parents what it means to be a student-athlete at the Employer. More specifically, Fitzgerald will explain how they will have the opportunity to take certain classes, receive academic and social support, and have certain responsibilities as players. Fitzgerald's assistant coaches are likewise involved in recruiting and can visit recruits at their high schools in April and May. The coaches are also permitted to have six in-home visits with each recruit in December and January. As part of this initial process, after the football staff identifies candidates they are interested in, information regarding a potential recruit's high school transcript, standardized test scores, letters of recommendation and senior class schedule are presented to the Employer's Admission Office to evaluate potential recruits for pre-admission to the University.

During the recruiting process, the Employer's football coaches are not permitted to have direct contact with the Admissions Office so that Christopher Watson, the Dean of Undergraduate Admissions, does not feel pressured to pre-approve a recruit for admission. Head Coach Fitzgerald must instead speak to Janna Blais, who is the Deputy Director of Athletics for Student-Athlete Welfare. She reviews the recruit's high school transcript, standardized test scores, letters of recommendation, and senior year class schedule before making an initial determination as to whether he can be academically successful. If Blais believes the recruit meets this standard, she will speak to and obtain a final decision from Watson concerning that recruit.[22] If the recruit is pre-approved for admission, he completes the formal admissions application with the understanding that he will be admitted as long as his academic record is maintained. However, some recruits are not deemed admissible such that the coaches will have to cease recruiting that individual.

After being pre-approved for admission, recruits selected to receive an offer of scholarship are informed of their pre-admission via letter by Coach Fitzgerald notifying the potential players:

> "CONGRATULATIONS, the Northwestern Football Staff and I would like to offer you a full scholarship… You possess the talent and embody the characteristics and values necessary to succeed at Northwestern University as a student-athlete on our football team."

Subsequently, the Employer extends formal tender offers to recruits which must formally accept and execute. The offers specifically set forth the terms and conditions of the Athletic Tender

[22] According to Blais, there are no written guidelines in terms of a minimum GPA or standardized test score that a football recruit must have to gain admission to the University. She testified that the lowest GPA for a football recruit that she recalled discussing with the admissions office was 2.78 (on scale of 4.0).

Agreement governing the grant of the scholarship. Moreover, the offers provide players with detailed information concerning the duration and conditions under which their scholarship will be continued and includes the explicit admonition that the "tender may be immediately reduced or cancelled during the term of this award per NCAA Bylaw 15.3.4.2" if the player renders himself ineligible for intercollegiate competition; and/or voluntarily withdraws from a sport at any time for any reason.

Further, to be eligible to play on the football team, the players must be: (1) enrolled as full-time students; (2) making adequate progress towards obtaining their degree; and (3) maintain a minimum GPA. For players entering their second year of school, they must pass 36 quarter hours and have a 1.8 GPA. For players entering their third year of school, they must have 40% of their degree applicable units completed and a 1.9 GPA. For players entering their fourth year of school, they must have 60% of their degree applicable units completed and a 2.0 GPA. For players entering their fifth year of school, they must have 80% of their degree applicable units completed and a 2.0 GPA. For this reason, players normally take three to four courses during the Fall, Winter, and Spring Quarters.[23] The players spend about 20 hours per week attending classes each week. The players also have to spend time completing their homework and preparing for exams. Significantly, the players do not receive any academic credit for their playing football and none of their coaches are members of the academic faculty.

According to senior quarterback Kain Colter, following a successful high school football career, the Employer admitted him due to his football skills as his academic record was "decent." He also testified that he based his decision to attend Northwestern on football considerations (i.e. they were going to let him play quarterback). But he still had aspirations of going to medical school and attempted to take a required chemistry class in his sophomore year. At that time, Colter testified that his coaches and advisors discouraged him from taking the class because it conflicted with morning football practices. Colter consequently had to take this class in the Summer session, which caused him to fall behind his classmates who were pursuing the same pre-med major. Ultimately he decided to switch his major to psychology which he believed to be less demanding.

Colter further testified that those players receiving scholarships were not permitted to miss football practice during the regular season if they had a class conflict. On the other hand, walk-ons were permitted to leave practice a little early in order to make it to class.[24] This continued in the Spring with scholarship players being told by their coaches and academic/athletic advisors that they could not take any classes that started before 11:00 a.m. as they would conflict with practice. Even during the Summer session, players were generally only permitted to enroll in classes that were 6 weeks long since the classes that were 8 weeks long would conflict with the start of training camp.

[23] At most, the players only take one or two classes during the Summer session.

[24] During his redshirt sophomore year, walk-on Pace was permitted by Fitzgerald to leave practice early once he had completed his long snapper duties in order to attend a 9:00 a.m. class. This was contingent on Pace returning later in the day to perform his individual drill work. The following year, Pace was also permitted to leave practice early as he had an 11:00 a.m. class. However, scholarship player Ward never took any classes that conflicted with practice during the regular season.

In contrast, Blais and Fitzgerald testified that, if a player had to take a class required for their degree that conflicted with practice, Cody Cejeda (Director of Football Operations) would pull them out of practice about 30 minutes early and provide them a ride to class along with a to-go meal.[25] Fitzgerald also testified that he never told any player that they could not leave practice early because of a class conflict. In addition, if a large number of players had the same class conflict, Fitzgerald testified that he would sometimes move the practice time up to accommodate the class. He cited one Friday during a bye week when he moved up practice for this very reason. Scholarship player Ward corroborated this testimony by citing an example where he and other players had an early class during Spring practice in 2011 so practice was moved up to avoid the conflict.

The Employer's Student-Athlete Handbook states that players' academics must take precedence over athletics. For this reason, the Employer attempts to assist the players with their academics by having: (1) study tables; (2) tutor programs; (3) class attendance policies; (4) travel policies which restrict players from being off campus 48 hours prior to finals; and (5) a policy prohibiting players from missing more than five classes in a quarter due to games. In situations where a player has a game that conflicts with a test or quiz, the player will talk to the professor about the possibility of taking it at some other time. If the professor refuses, the Associate Athletic Director for Academics and Student Development will then speak to the professor and inquire if the test or quiz can be taken at the institution where the game is being held. Generally, the professors are willing to make some type of accommodation for the player. On one occasion, however, during the 2013 regular season, a professor refused to that, which resulted in the Employer holding back one bus so that seven players could take a quiz and then travel to the football game against the University of Iowa.[26] On another occasion last year, Fitzgerald also attempted to accommodate a scholarship player's academic work by permitting him to miss a week of practice and the game against the University of Nebraska. However, no other examples were provided of scholarship players being permitted to miss entire practices and/or games to attend to their studies.

In addition, the Employer's athletic department has student development programs which are referred to as NU P.R.I.D.E. These programs are meant to help the students "find personal success through service to the campus and their community while enhancing their leadership skills, celebrating diversity, and promoting student-athlete welfare through meaningful programming." More specifically, they consist of: (1) Student-Athlete Advisory Committee; (2) P.U.R.P.L.E. Peer Mentor program; (3) Freshmen Year Experiences (F.Y.E.) program; (4) Engage; (5) NU P.R.I.D.E. Program Speaker Series; and (6) P.R.I.D.E. challenge. There is likewise a mandatory four-year NU For Life Program which is designed to assist student-athletes with their professional development so they are able to excel in their chosen field upon completion of their degree.[27] But the players do not receive academic credit for participating in these programs.

[25] In the Fall Quarter of 2012, there were about eight players who had classes that conflicted with practice. But only one of them was on a football scholarship at the time.
[26] The record does not reveal whether any of these players were receiving a football scholarship at the time.
[27] Following their sophomore year, the football players are also assigned a mentor who is an alumni of the team.

It should be noted that the players have a cumulative grade point average of 3.024 and a 97% graduation rate. The players likewise have an Academic Progress Rate (APR) of 996 out of 1000.[28] The players' graduation rate and their APR both rank first in the country among football teams. In addition, the players have about 20 different declared majors, with some of them going on to medical school, law school, and careers in the engineering field after receiving their undergraduate degree.

F. The Revenues and Expenses Generated by the Employer's Football Program

The Employer's football team generates revenue in various ways including: (1) ticket sales; (2) television broadcast contracts with various networks; and (3) the sale of football team merchandise. The Employer reported to the Department of Education that its football team generated total revenues of $235 million and incurred total expenses of $159 million between 2003 and 2012.[29] For the 2012-2013 academic year, the Employer reported that its football program generated $30.1 million in revenue and $21.7 million in expenses. However, the latter figure does not include costs to maintain the stadium which total between $250,000 and $500,000 per calendar year. In addition, the profit realized from the football team's annual revenue is utilized to subsidize the Employer's non-revenue generating sports (i.e. all the other varsity sports with the exception of men's basketball). This, in turn, assists the Employer in ensuring that it offers a proportionate number of men's and women's varsity sports in compliance with Title IX of the Education Amendments of 1972.

IV. DISCUSSION AND ANALYSIS

A. The Burden Of Proof

A party seeking to exclude an otherwise eligible employee from the coverage of the Act bears the burden of establishing a justification for the exclusion.[30] Accordingly, it was the Employer's burden to justify denying its scholarship football players employee status. I find that the Employer failed to carry its burden.

B. The Applicable Legal Standard

Section 2(3) of the Act provides in relevant part that the "term 'employee' shall include any employee . . . " The U.S. Supreme Court has held that in applying this broad definition of "employee" it is necessary to consider the common law definition of "employee." *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995). Under the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. *Brown University*, 342 NLRB 483, 490, fn. 27 (2004) (citing *NLRB v. Town & Country Electric*, 516 U.S. at 94). See also

[28] APR refers to a university's retention of its student-athletes and the eligibility of its student-athletes on each team.
[29] These revenue and expense figures are adjusted for inflation.
[30] See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001) (party seeking to exclude alleged supervisors bears burden of proof); *Montefiore Hospital and Medical Center*, 261 NLRB 569, 572 fn. 17 (1982) (party seeking to exclude alleged managers must "come forward with the evidence necessary to establish such exclusion"); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (independent contractors); *AgriGeneral, L.P.*, 325 NLRB 972 (1998) (agricultural employees).

RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958). As a result, the Board has subsequently applied the common law test to determine that individuals are indeed statutory employees. See e.g., *Seattle Opera v. NLRB*, 292 F.3d 757, 761-62 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (holding that opera's auxiliary choristers are statutory employees).

As the record demonstrates, players receiving scholarships to perform football-related services for the Employer under a contract for hire in return for compensation are subject to the Employer's control and are therefore employees within the meaning of the Act.

1. Grant-in-Aid Scholarship Football Players Perform Services for the Benefit of the Employer for Which They Receive Compensation

Clearly, the Employer's players perform valuable services for their Employer. Monetarily, the Employer's football program generated revenues of approximately $235 million during the nine year period 2003 – 2012 through its participation in the NCAA Division I and Big Ten Conference that were generated through ticket sales, television contracts, merchandise sales and licensing agreements. The Employer was able to utilize this economic benefit provided by the services of its football team in any manner it chose. Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University.

Understandably, the goal of the football program is to field the most competitive team possible. To further this end, players on scholarship are initially sought out, recruited and ultimately granted scholarships because of their athletic prowess on the football field. Thus, it is clear that the scholarships the players receive is compensation for the athletic services they perform for the Employer throughout the calendar year, but especially during the regular season and postseason. That the scholarships are a transfer of economic value is evident from the fact that the Employer pays for the players' tuition, fees, room, board, and books for up to five years. Indeed, the monetary value of these scholarships totals as much as $76,000 per calendar year and results in each player receiving total compensation in excess of one quarter of a million dollars throughout the four or five years they perform football duties for the Employer. While it is true that the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football. And those players who elect to live off campus receive part of their scholarship in the form of a monthly stipend well over $1,000 that can be used to pay their living expenses. The fact that the Employer does not treat these scholarships or stipends as taxable income is not dispositive of whether it is compensation. See *Seattle Opera v. NLRB*, 292 F.3d at 764, fn. 8.

Equally important, the type of compensation that is provided to the players is set forth in a "tender" that they are required to sign before the beginning of each period of the scholarship. This "tender" serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them. Because NCAA rules do not permit the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarships to pay for basic necessities, including food and shelter. Another

consequence of this rule is that all of the players generally receive the same compensation for their services. In other words, the team's best scholarship player is paid as much as any other member of the Employer's football team receiving a scholarship. However, this undeniable fact does not mean that the compensation provided to either player is not a significant transfer of economic value to them. This is especially true given the nature of football and the foreseeable injuries that will occur during the season which can result in backup players assuming starting roles.

In addition, it is clear that the scholarships that players receive are in exchange for the athletic services being performed. Unlike other universities, the Employer, a couple of years ago, decided to move from one-year renewable scholarships to four-year scholarships. This certainly might make the players feel less pressure to perform on the field so as to avoid having their scholarship possibly not renewed for another year.[31] But the fact remains that the Head Coach of the football team, in consultation with the athletic department, can immediately reduce or cancel the players' scholarship for a variety of reasons. Indeed, the scholarship is clearly tied to the player's performance of athletic services as evidenced by the fact that scholarships can be immediately canceled if the player voluntarily withdraws from the team or abuses team rules. Although only two players have had the misfortune of losing their scholarships during the past five years, the threat nevertheless hangs over the entire team and provides a powerful incentive for them to attend practices and games, as well as abide by all the rules they are subject to.

2. Grant-in-Aid Scholarship Football Players are Subject to the Employer's Control in the Performance of Their Duties as Football Players

In the instant case, the record establishes that the players who receive scholarships are under strict and exacting control by their Employer throughout the entire year. Commencing with training camp which begins approximately six weeks before the start of the academic year, the coaches exercise a great deal of control over the players. This is evidenced by the fact that the coaches prepare and provide daily itineraries to the players which set forth, hour by hour, what football related activities the players are to engage in from as early as 5:45 a.m. until 10:30 p.m., when they are expected to be in bed.[32] Not surprisingly, the players spend 50 to 60 hours per week engaging in football-related activities during training camp. In addition, the location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches.

When the regular football season begins, the players do not commence classes for another few weeks so they are still able to devote 40 to 50 hours per week on football related activities. Apart from their practices, meetings, film sessions, and workouts, the players must now also compete in football games against other colleges on Saturdays. These games are clearly a large time commitment for the players regardless of whether it is a home or an away game. In fact, if the team is playing an away game, it is not unusual for the players to have to spend 25 hours over

[31] While Head Coach Fitzgerald's scholarship offer letter to recruits states that players will not lose their scholarship due to injury or position on the team's depth chart, even star quarterback Kain Colter testified that he feared that he might lose his scholarship if he slacked off in his football duties.

[32] Even the players' meals must be eaten at certain times.

a two day period traveling to and from the game, attending practices and meetings, and competing in the game. The team's handbook also makes it clear that the players are "traveling for one reason: to WIN a football game." And of course, the coaches have control over where the team will spend the night before the game (which is done for both home and away games), the travel itinerary which spells out in detail what will occur throughout the trip, the players' dress attire while in travel status, and which players will play in the game and to what extent. While the NCAA limits CARA hours to 20 per week once the academic year begins, the evidence establishes that the players continue to devote 40 to 50 hours per week to their football duties all the way through to the end of the season, which could last until early January.[33]

The football coaches are able to maintain control over the players by monitoring their adherence to NCAA and team rules and disciplining them for any violations that occur. If a player arrives late to practice, they must attend one hour of study hall on consecutive days for each minute they were tardy. The players must also run laps for violating minor team rules. And in instances where a player repeatedly misses practices and/or games, he may be deemed to have voluntarily withdrawn from the team and will lose his scholarship. In the same way, a player who violates a more egregious rule stands to lose his scholarship or be suspended from participating in games.

In addition, the coaches have control over nearly every aspect of the players' private lives by virtue of the fact that there are many rules that they must follow under threat of discipline and/or the loss of a scholarship. The players have restrictions placed on them and/or have to obtain permission from the coaches before they can: (1) make their living arrangements; (2) apply for outside employment;[34] (3) drive personal vehicles; (4) travel off campus; (5) post items on the Internet; (6) speak to the media; (7) use alcohol and drugs; and (8) engage in gambling. The fact that some of these rules are put in place to protect the players and the Employer from running afoul of NCAA rules does not detract from the amount of control the coaches exert over the players' daily lives.

While the football coaches, and the Employer as a whole, appear to value the players' academic education, it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent. This appears to be especially true for the scholarships players as they are sometimes unable to take courses in a certain academic quarters due to conflicts with scheduled practices. The players must also sometimes miss classes due to conflicts with travel to football games, notwithstanding the Employer's laudable efforts to minimize this from occurring. To try to ensure that its players succeed academically, the Employer requires freshmen players (and sometimes upperclassmen) to attend study hall six hours per week and all the players have tutoring and advisory programs that are not available to regular students. Players are likewise required to participate in a four-year NU For Life Program which is meant to further their professional development once they graduate. However, these noble efforts by the Employer, in some ways only further highlight how pervasively the players' lives are controlled when they accept a football scholarship. The special assistance that the

[33] The football coaches' control over the players even extends to the off-season since the latter are expected to devote 12 to 25 hours per week on football related activities.

[34] The players are also prohibited from profiting off their image or reputation, including the selling of merchandise and autographs.

Employer must provide to the players so that they can succeed academically (or at least, maintain the required minimum grade point average and make adequate progress towards obtaining their degrees) likewise shows the extraordinary time demands placed on the players by their athletic duties.

3. The Employer's Grant-in-Aid Scholarship Players are Employees Under the Common Law Definition

In sum, based on the entire record in this case, I find that the Employer's football players who receive scholarships fall squarely within the Act's broad definition of "employee" when one considers the common law definition of "employee." However, I find that the walk-ons do not meet the definition of "employee" for the fundamental reason that they do not receive compensation for the athletic services that they perform. Unlike the scholarship players, the walk-ons do not sign a "tender" or otherwise enter into any type of employment contract with the Employer. The walk-ons also appear to be permitted a greater amount of flexibility by the football coaches when it comes to missing portions of practices and workouts during the football season if they conflict with their class schedule. In this regard, it is noted that both scholarship players who testified, Colter and Ward, testified that they did not enroll in classes that conflicted with their football commitments. This distinction is not surprising given that the players are compelled by the terms of their "tender" to remain on the team and participate in all its activities in order to maintain their scholarship.

The walk-ons, on the other hand, have nothing tying them to the football team except their "love of the game" and the strong camaraderie that exists among the players. That some of the walk-ons may also have aspirations of earning a football scholarship does not change the fact that they do not receive any compensation at that point in their collegiate football careers. Thus, the mere fact that they practice (and sometimes play) alongside the scholarship players is insufficient to meet the definition of "employee." However, if a walk-on were to be awarded a scholarship at some later point, they would then be an "employee" within the meaning of the Act and would be included in the unit. Finally, to ensure that only those players who actually meet the definition of "employee" are included in the unit, I conclude that only players who are currently receiving scholarships and who have not exhausted their four years (or five years, in the case of a "redshirt" player) of NCAA playing eligibility will be eligible to vote.[35] This will serve to exclude from the unit those players whose playing eligibility was exhausted at the conclusion of the 2013 regular football season. In the same way, incoming freshmen

[35] The mere fact that a football player enjoys nine discretionary weeks during the course of the calendar year will not provide a basis for excluding them from the unit since these are properly viewed as vacation weeks (during which the player may nevertheless feel compelled to perform football related activities to improve his skills). Importantly, while some activities during both on and off season such as additional conditioning, weight training and review of game tapes may not be directly mandated to maintain their scholarships and place on the team, such voluntary activity undertaken by football players in order to field a winning team, obtain a starting position or otherwise excel in this their chosen field is akin to the non-paid activities of an actor rehearsing lines or musicians practicing their instrument on their own time to enhance their performance in a commercial production. When these activities are included, it is clear scholarship players devote the bulk of their time and energy towards the football services they provide their Employer.

players will be excluded from the unit until they began to perform athletic services for the Employer in exchange for the compensation set forth in their "tender."

C. *Brown University* is not Applicable

In its brief, the Employer contends that the Employer's football players who receive scholarships are not employees because they do not meet the statutory definition of "employee" articulated in *Brown University*, 342 NLRB 483 (2004). The Union, however, argues that the *Brown University* decision does not control whether the grant-in-aid players are employees. In *Brown University*, the Board found that graduate assistants were not "employees" after considering four factors: (1) the status of graduate assistants as students; (2) the role of the graduate student assistantships in graduate education; (3) the graduate student assistants' relationship with the faculty; and (4) the financial support they receive to attend Brown University. In applying those factors, the Board concluded that the overall relationship between the graduate assistants and their university was primarily an educational one, rather than economic one. Although I find that this statutory test is inapplicable in the instant case because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements, for the reasons discussed below the outcome would not change even after applying the four factors to the facts of this case.

1. The Employer's Grant-in-Aid Scholarship Football Players are not "Primarily Students"

The first factor that the Board considered in *Brown University* was the fact that all the graduate assistants were enrolled as students and that their purported employment status was contingent on their enrollment. *Id.* at 488. But this alone was not dispositive because the Board went on to consider the amount of time the graduate assistants spent on their educational studies as opposed to their work duties. In finding that they were "primarily students," the Board held that "students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student." *Id.*

In contrast, in the instant case it cannot be said the Employer's scholarship players are "primarily students." The players spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three or four month football season. Not only is this more hours than many undisputed full-time employees work at their jobs, it is also many more hours than the players spend on their studies. In fact, the players do not attend academic classes while in training camp or the first few weeks of the regular season. After the academic year begins, the players still continue to devote 40 to 50 hours per week on football-related activities while only spending about 20 hours per week attending classes. Obviously, the players are also required to spend time studying and completing their homework as they have to spend time practicing their football skills even without the direct orders of their coaches. But it cannot be said that they are "primarily students" who "spend only a limited number of hours performing their athletic duties."

2. Grant-in-Aid Scholarship Football Players' Athletic Duties do not Constitute a Core Element of Their Educational Degree Requirements

The second factor that the Board considered in *Brown University* was the extent to which the graduate assistants' teaching and research duties constituted a core element of their graduate degree requirements. *Id.* at 488-89. The Board found that the graduate assistants received both academic credit for performing their duties, and for the substantial majority, these duties were a requirement for them to be able to obtain their graduate degree. *Id.* Due to the fact that the graduate assistants' duties were directly related to their educational requirements, it was determined that their relationship with the university was an academic one as opposed to an economic one. *Id.*

In this case, it is undisputed that the Employer's scholarship players do not receive any academic credit for playing football. They are also not required to play football in order to obtain their undergraduate degree, regardless of which major they pursue. The fact that the players undoubtedly learn great life lessons from participating on the football team and take with them important values such as character, dedication, perseverance, and team work, is insufficient to show that their relationship with the Employer is primarily an academic one. Indeed, as already discussed above, this relationship is an economic one that involves the transfer of great sums of money to the players in the form of scholarships. The Employer expends between $61,000 and $76,000 per scholarship per year or in other words over five million dollars per year for the 85 scholarships.

3. The Employer's Academic Faculty does not Supervise Grant-in-Aid Scholarship Players' Athletic Duties

The third factor that the Board considered in *Brown University* was the graduate assistants' relationship with the faculty. *Id*. at 489. In particular, the Board found that the faculty oversaw the work of graduate assistants and it was a part of the latter's education since the work was typically performed under the direction and control of faculty members from those students' particular educational departments. *Id*. In fact, these same faculty members were responsible for teaching the students and assisting them in the preparation of their dissertations. *Id.*

Here, the Employer's scholarship players are in a different position than the graduate assistants since the academic faculty members do not oversee the athletic duties that the players' perform. Instead, football coaches, who are not members of the academic faculty, are responsible for supervising the players' athletic duties. This critical distinction certainly lessens any concern that imposing collective bargaining would have a "deleterious impact on overall educational decisions" by the Employer's academic faculty. While it is true that the Employer's administration does play a role in determining whether to cancel a scholarship, Fitzgerald's recommendation has been followed in the two instances where this has happened. Accordingly, the players' lack of a relationship with the faculty when performing their athletic duties militates against a finding that they are merely students.

4. Grant-in-Aid Scholarship Players' Compensation is not Financial Aid

The fourth factor that the Board considered in *Brown University* was the fact that the graduate assistants' compensation was not pay for services performed, but rather financial aid to attend the university. *Id*. at 488-89. In discussing this factor, the Board noted two relevant facts: (1) that the graduate assistants received the same compensation as the graduate fellows for whom no teaching or research was required; and (2) that the graduate assistants' compensation was not tied to the quality of their work. *Id*.

Unlike the graduate assistants, the facts here show that the Employer never offer a scholarship to a prospective student unless they intend to provide an athletic service to the Employer. In fact, the players can have their scholarships immediately canceled if they voluntarily withdraw from the football team. Even players who are not starters and consequently do not play in any games, must still attend all of the practices, workouts, and meetings as a condition of retaining their scholarship. In contrast to scholarships, need-based financial aid that walk-ons (and other regular students) receive is not provided in exchange for any type of service to the Employer. For this reason, the walk-ons are free to quit the team at any time without losing their financial aid. This simply is not true for players receiving football scholarships who stand to lose their scholarship if they "voluntarily withdraw" from the team.

D. The Employer's Grant-in-Aid Scholarships Players are not Temporary Employees Within the Meaning of the Act

Under Board law, the general test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. *Marian Medical Center*, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. *Personal Products Corp*., 114 NLRB 959 (1955); *Lloyd A. Fry Roofing Co*., 121 NLRB 1433 (1958); *United States Aluminum Corp*., 305 NLRB 719 (1991); and *NLRB v. New England Lithographic Co*., 589 F.2d 29 (1st Cir. 1978). On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries. *Indiana Bottled Gas Co*., 128 NLRB 1441 fn. 4 (1960); *Owens-Corning Fiberglas Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc*., 125 NLRB 619 (1959); and *E. F. Drew & Co.*, 133 NLRB 155 (1961).

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board considered the employer's contention that its house officers were temporary employees by virtue of the fact that they worked there for a set period of time – albeit, anywhere from three to seven years depending on their particular residency program. The Board there clarified that it will not find individuals to be temporary employees simply because their employment will terminate on a date certain. In reaching this conclusion, it was noted that:

> [T]he Board has never applied the term "temporary" to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and

> we will not do so here. In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date. Athletes who have 1, 2, or greater years' length employment contracts are, theoretically at least, employed for a limited time, unless their contracts are renewed; work at a legal aid office may be for a set 2-year period; a teaching assignment similarly may be on a contract basis. To extend the definition of "temporary employee" to such situations, however, would be to make what was intended to be a limited exception swallow the whole.

Id. at 166.

In the instant case, the Employer's scholarship players have employment that is of a finite duration much like the house officers in *Boston Medical Center*. The players, due to NCAA eligibility rules, may generally only remain on the football team for four years, or at most five years in the case of a "redshirt" player. However, given the substantial length of the players' employment it is clear that they cannot be found to be temporary employees under Board law. Finally, to the extent that the Employer cites *San Francisco Art Institute*, 226 NLRB 1251 (1976), in support of its position that its players are temporary employees, I find that case to be distinguishable. There the Board refused to direct an election for a unit of student janitors, who generally worked 20 hours per week at their art school and were subject to a high turnover rate due to their brief employment tenure, because they were found to be concerned primarily with their studies rather than with their part-time employment. The Employer's scholarship players stand in stark contrast to those student janitors due to the fact that they: (1) work in excess of well over 40 hours per week during training camp and the football season; (2) work virtually year round and have a much longer employment tenure; and (3) do not have a "very tenuous secondary interest" in their employment. This is clearly established by the undeniable fact that the scholarship players' interest and skill in playing football are far greater than a "very tenuous secondary interest" but in fact a primary interest. Moreover, but for their football prowess the players would not have been offered a scholarship by the Employer. Significantly, *San Francisco Art Institute, id.,* has not been relied upon by the Board since it issued in 1976.

E. The Petitioned-for-Unit is an Appropriate Unit

The Employer contends that the petitioned-for-unit is not an appropriate unit for two reasons: (1) the unit consists of scholarship players who are not employees; and (2) the unit is an arbitrary, fractured grouping that that excludes walk-ons who share an overwhelming community of interest with the sought after unit. Having already concluded that the Employer's scholarships players are "employees" under the Act, I will now address its second assertion.

The Board in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 1 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB,* 727 F.3d 552 (6th Cir 2013), held that a petitioned-for-unit is not an appropriate unit if it excludes employees who have an "overwhelming community of interest" with

those employees that the union seeks to represent. Consistent with this decision, the Board shortly thereafter found in *Odwalla, Inc*., 357 NLRB No. 132 slip op. at 5 (2011), that a petitioned-for-unit was not an appropriate unit because it excluded employees who shared an "overwhelming community of interest" with other employees. Thus, it is clear that, "a petitioner cannot fracture a unit, seeking representation in 'an arbitrary segment' of what would be an appropriate unit." *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13, citing *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999).

In its brief, the Employer asserts that the petitioned-for-unit in the instant case is a fractured one because it excludes the walk-ons, who share an "overwhelming community of interest" with the Employer's scholarship players. It points out that the walk-ons are subject to the same rules, attend the same football practices and workouts, and play in the same football games if their skills warrant it. Indeed, the Employer contends that the "only" difference between the two groups is that the scholarship players receive compensation for their athletic services. The receipt of this compensation in and of itself is a substantial difference in whatever community of interests exists between the two groups. Fundamentally, walk-on players do not share the significant threat of possibly losing up to the equivalent of a quarter million dollars in scholarship if they stop playing football for the Employer as do the scholarship players. Moreover, to constitute a fractured unit, the putative group must consist of employees as defined by the Act, and the Employer concedes that the lack of scholarship precludes a finding that the walk-ons are employees under the Act. In the absence of a finding that the walk-on players are employees a fractured unit cannot exist, and the petitioned for unit is an appropriate unit.[36]

F. The Petitioner is a Labor Organization Within the Meaning of the Act

The Employer argues that the Petitioner is not a labor organization within the meaning of the Act unless the following two conditions are met: (1) its players who receive scholarships are found to be "employees" within the meaning of the Act; and (2) the petitioned-for-unit is found to be an appropriate unit within the meaning of the Act.

Section 2(5) of the Act provides the following definition of "labor organization":

> Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The statutory definition of a "labor organization" has long been interpreted broadly. See, *Electromation, Inc.,* 309 NLRB 990, 993-94 (1992), enf'd. 35 F.3d 1148 (7th Cir. 1994). To fall within the definition of a "labor organization," the Board has held that employees must

[36] This would be akin to finding that a unit of employees was an appropriate unit notwithstanding the fact that unpaid interns who may otherwise be subject to similar terms and conditions of employment but received no compensation and as such were not employees within the meaning of the Act were properly not included in the unit because they were not employees. See, *WBAI Pacifica Foundation,* 328 NLRB 1273 (1999).

participate in the organization and it must exist for the purpose, in whole or in part, of dealing with employers on their behalf regarding their wages, hours of employment and other terms and conditions of employment. *Alto Plastic Mfg. Corp.,* 136 NLRB 850, 851-852 (1962).

At the hearing, the Petitioner introduced evidence that it was established to represent and advocate for certain collegiate athletes, including the Employer's players who receive scholarships, in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment. A substantial portion of the Employer's scholarship players have also signed authorization cards seeking to have the Petitioner represent them for the purposes of collective bargaining, and some of them, have taken a more active role with the Petitioner, including Colter. In addition, the players will presumably have the opportunity to participate in contract negotiations if the Petitioner is ultimately certified. Based on the evidence presented at the hearing and the Employer's conditional stipulation which was met, I find that the Petitioner is a labor organization within the meaning of the Act.

V. CONCLUSION

Based on the foregoing and the entire record herein, I have found that all grant-in-aid scholarship players for the Employer's football team who have not exhausted their playing eligibility are "employees" under Section 2(3) of the Act. Thus, I direct an immediate election in this case.

VI. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are all football players receiving football grant-in-aid scholarship and not having exhausted their playing eligibility employed by the Employer located at 1501 Central Street, Evanston, Illinois, but excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by College Athletes Players Association (CAPA).

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Employer*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South, LaSalle Street, Suite 900, Chicago, Illinois 60604 on or before **April 2, 2014.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **April 9, 2014.**

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov tab and click on E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

DATED at Chicago, Illinois this 26th day of March 2014.

/s/ Peter Sung Ohr
Peter Sung Ohr, Regional Director
National Labor Relations Board, Region 13
209 South LaSalle Street, 9th Floor
Chicago, Illinois 60604

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 13

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

NORTHWESTERN'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
	)	
Petitioner.	)	

NORTHWESTERN'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

Northwestern University, pursuant to Section 102.67 of the Board's Rules and Regulations, submits this Request for Review of the Decision and Direction of Election issued by the Regional Director of Region 13 on March 26, 2014 ("DDE").

In this unprecedented decision, the Regional Director set out to alter the underlying premise upon which collegiate varsity sports is based. By finding that Northwestern University's football program is a commercial enterprise and that its football scholarship student-athletes are "employees" within the meaning of the National Labor Relations Act ("Act"), the Regional Director ignored the evidence of Northwestern's primary commitment to the education of all of its student-athletes, evidence that fully supports that its student-athletes are primarily students, and not employees. Based on the testimony of a single player who admitted that he aspires to play professional football, the Regional Director described Northwestern's football program in a way that is unrecognizable from the evidence actually produced at the hearing. Northwestern's football program stands alone as the most successful FBS program for educating athletes to graduation. Whatever one thinks of athletics at other

institutions, Northwestern presented overwhelming evidence establishing that its athletic program is fully integrated with its academic mission, and that it treats its athletes as students first. That CAPA's sole fact witness, Mr. Colter, chose to prioritize his professional athletic aspirations cannot and should not form the basis of any finding about the football program in general and its role in the education of Northwestern's student-athletes.

Instead of objectively setting forth the relevant facts, the Regional Director's decision reads like a brief submitted by an advocate, with the facts he chooses to stress set out in the text of the decision and those which are equally important but which do not support his pre-determined outcome relegated to footnotes or completely ignored. In short, the Regional Director not only ignored much of the record, he also misconstrued, disregarded and misapplied Board precedent and failed to consider, contrary to the dictates of the Act and Supreme Court precedent, the public policy ramifications and practical consequences of his decision to extend the definition of an employee under the Act to collegiate student-athletes at Northwestern.

II. GROUNDS FOR SEEKING REVIEW OF THE REGIONAL DIRECTOR'S DECISION

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, a request for review of a Regional Director's decision in a representation case may be granted, *inter alia,* upon the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

The Board should grant review here because (1) the petition presents a unique, novel issue; (2) the Regional Director has misapplied and departed from officially reported Board precedent,

and (3) the Regional Director's findings on substantial factual issues are clearly erroneous on the record and the errors prejudicially affect Northwestern's rights.

VI. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR IN PLACING THE BURDEN OF PROOF ON THE EMPLOYER

In his Decision and Direction of Election ("DDE"), the Regional Director asserted:

> A party seeking to exclude *an otherwise eligible employee* from the coverage of the Act bears the burden of establishing a justification for the exclusion [citing cases]. Accordingly, it was the Employer's burden to justify denying its scholarship football players employee status. I find that the Employer failed to carry its burden.

(DDE at 13 (emphasis added).) This proposition does not apply in this case because the threshold issue is whether Northwestern's scholarship student-athletes are employees under the Act. This is not a case of an employer seeking to exclude from the Act's coverage individuals already determined to be employees. As the Board's own manual makes clear, representation case proceedings are "nonadversarial" and their purpose is to develop a record upon which the Board can carry out its responsibilities under Section 9 of the Act. NLRB CASEHANDLING MANUAL FOR REPRESENTATION CASES, § 11181, at 74B11181 (August 2007).

The Regional Director's error is particularly stark, given that the issue posed in this case has never previously been addressed by the Board. By ignoring that the burden of proof upon which he relies only applies to an attempt by a party to exclude individuals who otherwise are employees from the Act's coverage or protection, and by improperly placing the burden on Northwestern, the Regional Director committed prejudicial error.

VII. THE REGIONAL DIRECTOR'S DECISION IS CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES

A. SUMMARY OF THE REGIONAL DIRECTOR'S DECISION

The Regional Director found that "all grant-in-aid scholarship players for the Employer's football team who have not exhausted their playing eligibility are 'employees'

under Section 2(3) of the Act" and directed an immediate election in that defined unit. (DDE at 2, 23.)

The Regional Director's conclusion that Northwestern's football student-athletes who receive scholarships are "employees" within the meaning of the Act was based on his application of the ***common law definition of employee***, under which an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment. (DDE at 17.) The Regional Director found authorization for applying the common law test in Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002), which he cited for the proposition that "the Board has [subsequent to NLRB v. Town & Country Electric, 516 U.S. 85 (1995)] applied the common law test to determine that individuals are indeed statutory employees." (DDE at 13-14.)

Applying the common law test to some, but not all, of the record facts, the Regional Director found that playing football is a valuable "service" to Northwestern for which some football student-athletes receive an economic payment in the form of a scholarship, even though the scholarship is not treated as taxable income. (DDE at 14.) The Regional Director characterized the scholarship offer as an "employment contract" which "is clearly tied to the player's performance of athletic services," even though Northwestern football student-athletes receive four-year scholarship offers which are not cancelled if the student is injured or not sufficiently skilled to compete. (Id. at 15.) Lastly, the Regional Director found that football student-athletes are "under strict and exacting control . . . throughout the entire year," without acknowledging any distinction between the activities (whether academic or athletic in nature) that are required versus those that are indisputably voluntary on the part of the student-athlete. (Id.)

In a single sentence, the Regional Director dispensed with the Board's most recent analysis of students in a university setting, Brown University, 342 NLRB 483 (2004) (employing the "primarily educational relationship" test), dismissing it as "inapplicable" because, in his view, individuals cannot be "primarily students" unless they "spend only a limited number of hours performing their athletic duties." (DDE 18.)

The Regional Director further found that scholarship football student-athletes are not temporary employees despite their limited duration and uncertain tenure as students at Northwestern, in reliance on Boston Medical Center, 330 NLRB 152 (1999), and after distinguishing San Francisco Art Institute, 226 NLRB 1251 (1976), which involved students who worked at their art school and were found to be "temporary" employees, if employees at all.

The Regional Director also found that the petitioned-for-unit was appropriate for bargaining despite its exclusion of non-scholarship football student-athletes who practice with and play alongside the scholarship players. The Regional Director found that the mere receipt of a scholarship was sufficient under Specialty Healthcare and Rehabilitation Ctr. of Mobile, 357 NLRB No. 83 (2011), to overcome the evidence demonstrating an overwhelming community of interest between the two sets of student-athletes. Through misplaced reliance on WBAI Pacifica Foundation, 328 NLRB 1273 (1999), and using circular logic, the Regional Director concluded that a fractured unit cannot exist between scholarship and non-scholarship football student-athletes because the latter are not employees within the meaning of the Act. (DDE at 22.)

Lastly, the Regional Director found that CAPA was a "labor organization" within the meaning of Section 2(5) of the Act, relying on Alto Plastic Mfg. Corp., 136 NLRB 850, 851-852 (1962), and Electromation, Inc., 309 NLRB 990, 993-94 (1992), to support a broad

interpretation of that term. (DDE at 22-23.)

The Regional Director did not consider any of the broader policy concerns raised by Northwestern. That failure is another compelling reason why, in addition to the errors of fact and law emphasized below, this decision merits review by the Board.

B. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY MISCHARACTERIZING AND SLANTING RELEVANT FACTS

The Regional Director's decision is replete with factual errors and mischaracterizations, including:

- The remarkable 97% graduation rate for student-athletes in Northwestern's football program—the highest FBS graduation rate in the country—is not something that should merely "be noted" in passing, as the Regional Director did, but instead demonstrates the emphasis that Northwestern places on the academic success of its student-athletes. (Compare DDE at 13 with Tr. 500-01, 912-13, 1025.) Likewise, the fact that Northwestern's football student-athletes consistently maintain an exceptional cumulative GPA average of over 3.00 is telling of Northwestern's focus on its student-athletes as *students*. (Tr. 499, 1025.)
- Northwestern's football program includes 85 student-athletes on athletic scholarships, per NCAA regulation, as well as walk-on student athletes. (Tr. 733, 1034-1035.) Although the Regional Director was quick to draw an arbitrary (and incorrect) distinction between the walk-ons and grant-in-aid student-athletes in order to justify the petitioned-for-unit (DDE at 21-22), the *only* distinction between

walk-ons and student-athletes on athletic scholarship is that walk-ons do not receive athletic scholarships.[1] (Tr. 1036.)

- Contrary to the Regional Director's findings, Northwestern scholarship football student-athletes are not "initially sought out, recruited and ultimately granted scholarships because of their athletic prowess on the football field." (DDE at 14.) The Regional Director also incorrectly found that "but for their football prowess the players would not have been offered a scholarship." (DDE at 21.) Rather, the record is clear that recruitment of student-athletes—just like recruitment of all Northwestern undergraduates—focuses on academics. (Tr. 813-815, 1188-1190.) After a coach preliminarily determines that the prospective student-athlete can meet Northwestern's academic standards, the candidate is presented to Janna Blais ("Blais"), Deputy Director of Athletics for Student-Athlete Welfare. (Compare Tr. 815-16, 1031-33.) Blais then makes an independent evaluation as to whether the prospect will be able to succeed academically, and only if she concludes he will, Blais presents the prospective student-athlete to Christopher Watson ("Watson"), the Dean of Undergraduate Admission. (Tr. 816, 1033, 1186-87.) Likewise, Watson's focus is on whether the prospective student-athlete is equipped to succeed academically at Northwestern. (Tr. 1190.)
- The Regional Director's lengthy discussion of the time that student-athletes in the football program spend on their sport (DDE 5-9) is based exclusively on the testimony of CAPA's sole fact witness, Kain Colter ("Colter"). Colter admitted that he aspired to play professional football, so it is hardly surprising that he

[1] Many walk-ons receive need-based financial aid. (Tr. 1036.) In addition, walk-ons who stay with the football program often receive athletic financial aid toward the end of their playing eligibility. (Tr. 1038-1039, 1222, 1264-1265.)

devoted a substantial amount of time to pursuing his dream. But there was no evidence that Colter could speak either for Northwestern's values or the priorities of his teammates. There was abundant evidence that the time student-athletes spend on football-related activities is subject to strict time limitations set by the NCAA, which vary over the year, to which Northwestern must and does adhere. (Tr. 118-120, 508-509, 513-518, Jt. Ex. 22 at NU 753-755.)

- Although the Regional Director acknowledged that football student-athletes participate in optional and student-run workouts, he combined those voluntary activity hours with mandatory hours to conclude that the time spent in football-related activities precludes a finding that the scholarship football student-athletes are primarily students. (DDE at 6-8, 18.) Moreover it is hardly surprising that student-athletes would voluntarily choose to spend their available time working together to improve. Except for Colter's testimony, there is no evidence that these voluntary activities were at the expense of academic pursuits, as opposed to other leisure activities available to college students.
- The Regional Director slanted the facts to support his conclusion that over the entire year, student-athletes spend more time engaged in football-related activities than they devote to academic pursuits. (DDE at 5-9.) The record shows that full-time students spend at least 20 hours a week attending class. (Tr. 176.) Students spend additional time studying and preparing outside of class. (Tr. 1236-1237, 1276, 1291, 1308, 1320.) Based on published empirical data from the National

Survey of Student Engagement (NSSE),[2] undergraduate students spend, on average, between 14 and 19 hours[3] per week studying and preparing outside class. Thus, student-athletes at Northwestern on average likely spend more than 40 hours per week in purely academic activities during the academic year. (DDE at 11.) The Regional Director also did not fully account for the fact that the academic year covers nine months whereas the football season is only four months long, including training camp, which concludes before school even starts. (Em. Ex. 9.)

- Contrary to the Regional Director's finding, the record does not establish that scholarship student-athletes in the football program cannot miss practices if they have a class conflict. (Compare DDE at 11, 17 with Tr. 1042-1043, 1272-1273.) Moreover, In his recitation of the facts the Regional Director acknowledged the steps Northwestern has taken to avoid conflicts between football student-athletes' class schedules and football practices, but ignored those steps in his analysis. (See DDE at 12.) For example, the Regional Director ignored the numerous steps Coach Fitzgerald took to minimize conflicts between practice and student-athletes' academic schedules, including moving practices to the mornings to allow student-athletes to take afternoon classes. (Tr. 842-43, 1040-41.) Coach Fitzgerald has also allowed a player to miss practice for an entire week, and to miss an away game that weekend, without penalty, to allow the student-athlete to attend to his studies. (Tr. 1061.) Students with scheduling conflicts are also pulled from practice early by Director of Football Operations Cody Cejda, who ensures that the student-athlete

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[2] *See* National Survey of Student Engagement. (2012). *Promoting Student Learning and Institutional Improvement: Lessons from NSSE at 13.* Bloomington, IN: Indiana University Center for Postsecondary Research. (NU Brief to the Regional Director at 71.)

[3] Due to Northwestern's rigorous academic standards, the average hours per week devoted to academic studies in the NSSE survey undoubtedly are on the conservative side.

gets to class on time. (Tr. 843-44.) This situation is not infrequent and the student-athlete is always accommodated, without regard to whether he receives an athletic scholarship or is a walk-on. (Tr. 848-849, 854, 1274.) Notably, as the Regional Director acknowledges and then ignores in his analysis, at least one of the student-athletes who had class conflicts in Fall Quarter 2012 was on a football scholarship. (DDE at 12, n. 25.)

- Presumably relying on Colter's testimony that he chose to change majors from "pre-med" to psychology (which does not preclude a pre-med course of study), the Regional Director found that "players are sometimes unable to take courses in certain academic quarters due to conflicts with scheduled practice" and "players are controlled to such a degree that it does impact their academic pursuits to a certain extent." (Compare DDE at 11, 16 with Tr. 1051 and Jt. Ex. 28 at NU 002513.) The record shows the opposite: Bartels (now a medical student) graduated with a degree in biological anthropology, and Pace and Ward graduated with degrees in mechanical engineering. (Tr. 1215, 1270, 1293-94.) The record also demonstrates that in the last two years, football student-athletes have pursued over 20 distinct majors. (Tr. 879-882; Em. Ex. 26; Em. Ex. 27.)
- The Regional Director incorrectly found the National Letter of Intent and accompanying scholarship tender is "an employment contract" that "gives the players detailed information concerning the duration and conditions under which the compensation will be provided to them," when in reality, these documents are

offers of financial aid.[4] (Compare DDE at 10-11, 14-15 with Tr. 487-489, 733-35; Em. Ex. 5 at NU 00969-974.) These financial aid award letters are made on forms that are prepared by the NCAA and the Big Ten and advise the prospective student-athlete about the conditions under which the scholarship will be renewed. (Tr. 729, 730, 743; Jt. Ex. 22 at NU 000717-740.) The tender also conditions receipt of aid on "the fulfillment of admissions requirements." (Em. Ex. 5 at NU 00969.) Students who receive need-based aid also have the duration and conditions of the aid spelled out in an award letter, and such students must affirmatively accept the offer or award of aid. (Tr. 720-21; Em. Exs. 14, 15.)

- The scholarship tender's non-renewal and cancellation provisions are not akin to employment "terms and conditions," as found by the Regional Director, but are provisions required to maintain compliance with NCAA and Big Ten regulations. (Compare DDE 10-11 with Tr. 239, 739-740.) Further, by relying on the Big Ten "abuse of team rules" language in the tender, the Regional Director gives short shrift to the compelling evidence that Northwestern's policy provides that an athletic scholarship will be cancelled only if the student-athlete engages in egregious misconduct. (Tr. 1045, 1053.)
- The Regional Director misstated the decision-making process with respect to non-renewals, finding that Fitzgerald recommended that two scholarships be canceled during his time as Head Coach. (DDE at 4.) Coach Fitzgerald testified that after talking with the two respective students and their families, both wanted to pursue

[4] Northwestern annually provides approximately $139 million in financial assistance to its students. (Tr. 720.) Of the $139 million, approximately $15 million is athletic aid and approximately $124 million is need-based assistance. (Id.; Em. Ex. 16.)

playing football at other schools, and Coach Fitzgerald assisted them with doing so. (Tr. 1174-76.)

- The Regional Director incorrectly found that even though there have only been two non-renewals in the last five years, the "threat" of revocation nevertheless "hangs over the entire team and provides a powerful incentive for them to attend practices and games, as well as abide by all the rules they are subject to." (DDE at 15.) In fact, the two non-renewals were for violations of rules applicable to *all* Northwestern students and had nothing to do with practice or game attendance. (See, e.g., DDE at 4; Tr. 739-741, 1045.) And the Regional Director gives short shrift to the fact that non-renewals can be appealed to officials outside the athletic department, including the director of financial aid, the Big Ten faculty representative, and a representative of the vice president for student affairs. (Compare DDE 4 with Tr. 636, 740-742.)
- The Regional Director also found irrelevant the uncontested fact that athletic scholarships are not treated as compensation for tax purposes. (Compare DDE at 3, 14 with Tr. 788-89.) Student-athletes at Northwestern do not pay taxes on the athletic grant-in-aid, which is not processed through payroll, and do not receive W-2 forms. (Tr. 751, 788-89.)
- The Regional Director unfairly presented certain policies as firm prohibitions. (DDE at 5.) For example, the Regional Director regarded the football program's social media policy as placing prohibitions on social media use and restriction on speech. (Id.) Yet, as is clear from the record, the social media policy merely contains guidelines which are designed to promote good behavior among student-

athletes and to help ensure that student-athletes' comments on social media do not run afoul of NCAA rules. (Tr. at 475-476; Jt. Ex. 17 at NU 158-164.)

- Some of the other rules upon which the Regional Director relied, such as the "lights out" policies, are not enforced. (Tr. 1275-1276, 1291, 1309-1310.) In fact, Pace and Ward recalled that "lights out" time was truly personal time, and they were able to do whatever they desired at that time, including study, without issue or even monitoring by the coaching staff. (Tr. 1291, 1309-1310.) Similarly, non-athlete students who live in campus residences must also observe "quiet hours" from midnight to 8:00 a.m. Sunday through Thursday. (Jt. Ex. 19 at 30.)
- The Regional Director erroneously downplayed the host of academic services Northwestern provides its student-athletes, mischaracterizing the programs as a mere "*attempts* to assist the players with their academics," and, ironically, as "athletic duties" that the football program has in place to "pervasively control" the lives of the student-athletes. (DDE at 12, 16-17 (emphasis added).) This powerfully shows the Regional Director's distortion of the record. He treats a commitment to education of student-athletes as additional *athletic* duties. He repeats the same error when he says that the goal of study hall is to "control" student-athletes' lives. In fact, the goal is to help prepare the student-athletes to become 100 percent responsible for their *academic* achievement and to assist all student-athletes in transitioning from high school academics to college academics. (Compare DDE at 5 with Tr. 856, 859.)
- Similarly, the Regional Director presented a jaded and inaccurate description of the NU For Life Program, concluding that "required" participation in the program "further highlight how pervasively the players' lives are controlled when they

accept a football scholarship" and "likewise shows the extraordinary time demands placed on the players by their athletic duties." (DDE at 12, 16-17.) NU for Life is one of three categories of personal development programs offered by the Athletic Department, which also includes the P.R.I.D.E. Program[5] and community outreach. (Tr. 811-813, 884.) NU for Life provides professional development opportunities and experiences for student-athletes throughout their time at Northwestern, some of which are mandatory, such as the Freshman Year Experience, and some of which are not, such as the informational interviews in the sophomore year. (Tr. 904-910.)

- In discussing the purported "profits" of the football program, the Regional Director erroneously concluded that Northwestern can "utilize this economic benefit provided by the services of its football team in any manner it chose." (DDE at 14.) In reality, Northwestern *cannot* and *does not* utilize the "economic benefit" in "any manner it cho[oses]." Federal law does not permit Northwestern to offer academic scholarships to male football athletes alone. So revenues from the football program must be used to support other Athletic Department expenses. (Tr. 685-687, Em. Ex. 11.) Each year, after allocating the revenues generated to the Athletic Department's expenses, the University must subsidize the Athletic Department in order to make up for the remaining deficit. (Tr. 651-53, Em. Ex. 11.) For example, in the 2012-2013 reporting period, Northwestern subsidized its Athletic Department by $12.7 million. (Tr. 676-677; Em. Ex. 11.) Northwestern subsidizes its Athletic Department because it has a commitment to offer a world-class educational

[5] The mission of the P.R.I.D.E. program is to help student-athletes find personal success through service to the campus and the community while enhancing leadership skills, celebrating diversity, and promoting student-athlete welfare through meaningful programming, such as the student-athlete advisory committee, the P.U.R.P.L.E. peer mentor program, the First Year Experience program, the Engage program, the P.R.I.D.E. program speaker series, and the P.R.I.D.E. challenge. (Tr. 885; Em. Ex. 28.)

experience, which includes an athletic program for male and female students in addition to premier academics—a fact that the Regional Director yet again ignored. (Tr. 677.)

C. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY IGNORING RELEVANT FACTS

The Regional Director also completely ignored evidence and critical facts that did not support his pre-determined outcome, including:

- Northwestern is a premier academic institution recognized among private American research universities for its high quality educational programs. (Tr. 1220; Jt. Ex. 21.) If in a "business" at all, Northwestern is in the business of providing a world-class education to its undergraduate, graduate and professional school students by offering the broadest range of academic and co-curricular offerings. The University is not in the business of football. (Tr. 681-85, Jt. Ex. 19 at 4; Jt. Ex. 28 at NU 002379-2380; Em. Ex. 32.)
- Intercollegiate athletics at Northwestern are inextricably linked to the educational mission of the University, and represent just one of the 480 co-curricular opportunities that Northwestern offers its students for purposes of providing the broadest educational experience available. (Jt. Ex. 21; Jt. Ex. 28 at NU 002380.) Intercollegiate athletics at the University is focused on developing student-athletes who "succeed in their academic work as well as in their chosen sport and whose careers after graduation are a tribute both to them and their university." (Jt. Ex. 21.)
- Northwestern views participation in intercollegiate athletics as part of the educational process. High level competitive athletics teaches valuable and

transferable life skills that Northwestern hopes to transmit to all of its students. (Tr. 174, 263-264, 266, 1233-1234, 1277--1280, 1298-99, 1312-13.)

- Even if a prospective-student-athlete is offered pre-approval, the student-athlete must still successfully apply for undergraduate admission. (Tr. 1033.)
- Shortly after becoming head coach, Patrick Fitzgerald changed practice times to the morning, which was designed to minimize the times that practice overlapped with student-athletes' class schedules. (Tr. 842-43, 1040-41.)
- Northwestern honors its athletic scholarships even if a student-athlete does not play in a single football game. (Tr. 493.) This is especially noteworthy in light of the fact that Northwestern offers scholarships which are guaranteed for four-years, and which may also be renewable for a fifth year of academic study. (Tr. 469; 779.) Thus, student-athletes who take a "redshirt" season (i.e., do not participate in a game), continue to receive the benefits of their athletic scholarships. (Tr. 537-38, 748-49, 1044-45.)
- All student-athletes in Northwestern's football program, not just student-athletes who receive grant-in-aid scholarships, are subject to the same rules and regulations. (Tr. 1036, 1222, 1228.) The rules do not distinguish between scholarship and non-scholarship athletes. (Tr. 1036, 1222, 1228.)
- Many of the "special rules" with which the Regional Director takes issue fall under the authority of the NCAA and the Big Ten[6]—not Northwestern. (Compare DDE at 4-5, 16 with Jt. Ex. 20, Jt. Ex. 22.) For example, the Regional Director relied on and emphasized rules pertaining to the types of residential leases student-athletes

[6] As a member of the NCAA and Big Ten, Northwestern is subject to certain rules, policies, and requirements, with which it must comply or otherwise be subject to penalties. (Jt. Ex. 20, Jt. Ex. 22.)

enter into, the types of outside employment student-athletes obtain, the requirement that attendance be taken at training table, and the requirement that student-athletes submit to random drug testing, but all of those requirements are implemented and enforced by the NCAA. (Jt. Ex. 10, Drug Testing Consent Forms; Jt. Ex. 20 at NU 000284, 000356, 000407-421; Jt. Ex. 22 at NU 000534, 000591-592, 000618, 000744-745; Tr. at 477-479, 505-506, 622-623.) Likewise, the forms that student-athletes in the football program must execute, such as the waiver of rights to image or likeness which prohibits student-athletes from profiting from their image or reputation, and the vehicle disclosure form, are mandated by the NCAA, not Northwestern. (Id.)

- The majority of the rules in the football team handbook mirror rules that are applied to all students at Northwestern. (NU Brief at 40-41.) For instance, the football program's policy on "Character" is parallel to the University's general "Code of Conduct," which requires all students to promote civility, respect and mature behavior within the context of the educational community. (Compare Jt. Ex. 17 at NU 176 ("If you embarrass our team. . . ") with Jt. Ex. 19 at 12.)
- All Northwestern students, not just student-athletes in the football program, must adhere to policies on hazing, gambling, academic dishonesty, drug and alcohol use, IT systems use, and possession or use of weapons. (Compare Jt. Ex. 17 at NU 157, 174, 176, 189-190, 209, 210, 230 with Jt. Ex. 19 at 9-11, 14, 32, 36-40, 44-45, 47, 48.)
- All Northwestern students, not just student-athletes in the football program, are required to attend class, and students who fail to maintain satisfactory academic

progress may be subject to the revocation of need-based financial aid. (Compare Jt. Ex. 28 at NU 002388, 002394 with Jt. Ex. 17 at NU 190-91, 215 *and* Jt. Ex. 10.)

- Many students in "Northwestern's regular student population" are also subject to rules that go above and beyond the general University policies. (Jt. Ex. 28.) For example, students who live in undergraduate housing must abide by a host of what could easily be described as "controlling" regulations. (Jt. Ex. 28.) Similarly, students who participate in student-run organizations–such as fraternities, sororities, affinity groups, and student government–must enter into a "behavioral agreement" before being allowed to travel as a representative of the University. (Em. Ex. 32.)
- The Athletic Department at Northwestern operates at a loss, and there is a significant revenue shortfall on an annual basis. (Tr. 652-653.) For the 2012-2013 reporting period expenses included over $16 million in athletically-related student aid, $945,000 in recruiting expenses, and $19.6 million in total unallocated expenses, which are expenses related to administration, media, marketing, and sports medicine that are not attributable to any particular program. (Tr. 656, 671-672; Em. Ex. 11 at NU 001961-1962.) These expenses are in addition to the expenses allocated by gender and sport. (Tr. 671-672.) For example, football games create an additional $3.4 million in expenses. (Tr. 667-668; Em. Ex. 11 at NU 001961.)

VIII. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY INCORRECTLY APPLYING BOARD PRECEDENT

A. THE REGIONAL DIRECTOR ERRED IN HOLDING THAT *BROWN UNIVERSITY* DOES NOT APPLY

The Regional Director held that the test articulated in Brown University, 342 NLRB 483 (2004), to determine whether students fall within the statutory definition of an "employee" is "inapplicable in the instant case." (DDE at 18.) In doing so, the Regional Director departed from Board precedent. Brown articulates the test currently applied by the Board to determine whether students enrolled at a private college or university, who also perform services for the institution, are engaged in a predominantly academic or a predominantly economic relationship. Instead of applying Brown University, the Regional Director applied the common law right of control test. This error is critical: if the Regional Director had applied the proper test, the result would have been different.

B. THE COMMON LAW TEST DOES NOT APPLY TO STUDENTS ENROLLED AT THE UNIVERSITY

Although he never cited New York University, 332 NLRB 1205 (2000), ("NYU I"), the Regional Director applied the legal standard from that overruled decision. (DDE at 13-18.) The Board and the Supreme Court have both concluded that a "blind" application of NLRA principles is inappropriate in the educational setting, NLRB v. Yeshiva University, 444 U.S. 672, 680-81 (1980), and is particularly inappropriate where the petitioned-for unit includes students enrolled at the university in question. Brown University, 342 NLRB 483, 491 (2004) ("the issue is not to be decided purely on the basis of older common-law concepts"); The Leland Stanford Junior University, 214 NLRB 621, 623 (1974); Adelphi University, 195 NLRB 639, 640 (1972). Post-Brown University, the Board has continued to apply the primarily economic versus primarily educational relationship test rather than the common law

test. See, e.g., Research Foundation of SUNY, 350 NLRB 197 (2007) (holding that the university-affiliated research foundation was not an "academic institution" and thus the research project assistants who were not enrolled and did not receive tuition remission had a primarily economic, rather than academic, relationship with the foundation); Research Foundation of CUNY, 350 NLRB 201 (2007) (same). Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002), the *sole* Board case upon which the Regional Director relied, is inapposite because the employer in that case was not an academic institution.

The Board has repeatedly expressed its concern with "the problem of attempting to force the student-university relationship into the traditional employer-employee framework."[7] Brown University, 342 NLRB at 487. That is precisely what the Regional Director did here, by focusing almost exclusively on the amount of time a football student-athlete spends in athletic activities during just a portion of the academic year. However, a student's load – whether solely academic or combined with other co-curricular activities – is generally demanding. That is what is required of students at a prestigious institution whose mission it is to foster the intellectual, social and personal maturation of its students so they will be prepared for the rest of their lives. In the end, the student chooses his own commitment level; some select heavy course loads and some decide to also compete in athletics at a collegiate level and even accept the benefit of tuition remission to offset the cost of the education. The time

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[7] Boston Medical Center aptly crystallizes the Board's precedent on the distinction between enrolled students and others in true economic relationships with an employer. Although the post-graduate house staff in Boston Medical Center were still receiving medical training, the Board was influenced in its finding of employee status (as opposed to students) by the fact that the house staff were more analogous to "apprentices" and were otherwise:

> . . . unlike many others in the traditional academic setting. Interns, residents and fellows do not pay tuition or student fees. They do not take typical examinations in a class room setting, nor do they receive grades as such. They do not register in a traditional fashion.

330 NLRB 152, 161 (1999). By contrast, in Brown University, which is the controlling authority and from which the Regional Director had no authority to veer, the graduate assistants "must first be enrolled at Brown to be awarded" the subject teaching, research and proctor positions. 342 NLRB at 488.

challenges and benefits associated with those choices do not make one a student and the other an employee.

C. EVEN IF THE COMMON LAW TEST APPLIED, NORTHWESTERN'S SCHOLARSHIP FOOTBALL STUDENT-ATHLETES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE ACT

Even if the common law test applies, the Regional Director erred because he ignored the realities of the relationship between Northwestern and its scholarship football student-athletes and he ignored Board precedent. The Regional Director artificially divorced the student-athletes' participation in the football program from every other aspect of their university life. But neither Colter nor any other scholarship football student-athlete can even participate in the football program unless and until they are admitted, enrolled, and participating as a full-time student at the University. That Colter, aspiring to the NFL, treated academics as "fit[ting] in" after football, and only "if you can" (Tr. 177), does not establish any truth about the role Northwestern football plays for its student-athletes in general. In fact, the record contains compelling evidence that the University puts academics first and provides a developmental environment for its football student-athletes that promotes social, intellectual, personal and professional growth.

1. The Scholarship Football Student-Athletes Are Not "Hired" To Perform Services

Scholarship football student-athletes are not "hired" by the University; they are admitted as full-time students after the University determines, based on a rigorous and multi-layered review, that the prospective student has the ability to succeed *academically*. (Tr. 813-17, 1026, 1031.) The University does not even scout them unless they have already demonstrated academic "prowess" in addition to their athletic talent. (Tr. 814-816, 1031-32, 1163.) More importantly, they are not admitted or enrolled until the University is confident of

their academic capabilities.[8] (Tr. 819-820, 1033.) While it is true that the football program recruits prospects to play football at Northwestern, no amount of football talent will win admission for a student incapable of succeeding academically to Northwestern.

In analyzing whether the scholarship football student-athletes are "hired" by Northwestern to perform "services," the Regional Director superficially focuses on the fact that the football program generates positive revenue.[9] (DDE at 14.) As he puts it, because the football activities are "valuable" to the University, the time spent in those voluntary activities is somehow necessarily converted to "work" or "services for hire." (Id.) The Regional Director cites no Board authority for the proposition that an employer's profitability – or, conversely, lack thereof – is relevant to the first prong of the common law test.[10] Indeed, in Brown University there was no doubt that the graduate assistants performed "valuable services"; indeed, the vast majority of the graduate assistants were teaching undergraduate students, thus providing the very educational services that the university was in business to offer. 342 NLRB at 484-85. Nevertheless, because they were enrolled as students, pursuing their own degrees, the Board concluded that they were not in fact "hired" to perform services for the university. Id. at 488-89.

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[8] The football program's recruiting materials make it clear that academics are the priority. (See, e.g., Em. Ex. 5 at NU 000967 (noting graduation rates and other academic honors); Em. Ex. 28 (identifying internship opportunities); Em Ex. 29 (emphasizing a commitment to "equip our student-athletes with the resources necessary to excel professionally upon completion of their athletic careers.").)

[9] Even so, what this analysis fails to recognize is that the revenue figures cited by CAPA ($283 million over 10 years figure) are not discounted by expenses also reported on the EADA, which makes the gross revenue for football about $8 million annually. (Em. Ex. 11.) Similarly, the purported revenue figures do not account for other expenses that are at least partially attributable to the football program such as marketing, ticket office, media services and maintenance of the stadium, locker rooms and weight training rooms. (Tr. at 671-72.)

[10] Even the Hearing Officer struggled with admitting this evidence and affirmatively stated whether a sport actually creates *positive revenue is irrelevant.* (Tr. 658-659, 662.)

The Regional Director also ignored every aspect of the football student-athlete's university life other than his participation in the football program.[11] Playing collegiate football, particularly at Northwestern, is an entirely voluntary activity on the part of the student-athletes who choose to participate while, at the same time, obtain the benefit of a world class education. Northwestern is in the "business" of holistically educating its students by offering the widest range of academic and co-curricular programs. (Jt. Ex. 19 at 4; Jt. Ex. 28 at NU 002379-2380; Em. Ex. 32.) It is not in the business of football, which is just one of 480 co-curricular activities to provide its students with the broadest possible educational experience, which includes comprehensive attention to academic, personal and career pursuits. (Jt. Ex. 28 at NU 002380; Tr. 1220, 1230-35, 1277-80, 1298-1300.). That the football program may attract more interest, and thus more revenue, than other co-curricular activities at Northwestern does not convert the avocational nature of participation in the program into a vocation.

In artificially separating football from academic activities, the Regional Director also leaped to the conclusion, without justification, that all of the time student-athletes devote to football-related activities is economic in nature and amounts to "work." However, the amount of time devoted to football has no bearing on employee status under the Act where the football activities are inextricably intertwined with the educational experience. Brown, 342 NLRB at 489. The Regional Director also ignored the fact that many of the hours devoted to football-related activities at various times of the year are voluntary. (DDE at 18.) Colter thus testified that more than one-half of the time he spent on football-related activities was entirely voluntary. (Tr. 66-74, 77-85.) Additionally, in finding that Northwestern student-athletes

[11] Brown University, however, instructs that the student/educator relationship cannot be analyzed out of the educational context. 342 NLRB at 487-88.

devote approximately 20 hours a week to classroom activities, the Regional Director completely ignored the testimony of former Northwestern student-athletes Bartels and Ward, both of whom testified that they devoted far more than 20 hours a week to pursuing their academic studies. (Tr. 1236-1237, 1276, 1320.)

When only the hours that Northwestern football players devote to *mandatory* football-related activities are considered, and study and preparation time is added to the time that student-athletes spend attending classes,[12] the record clearly fails to support the Regional Director's conclusion that Northwestern's football student-athletes spend many more hours engaged in football-related activities than they spend on their studies. (DDE at 18.)

2. The Financial Grant-In Aid Is Not Compensation

The financial aid Northwestern provides to some of its football student-athletes is not compensation for services.[13] The aid is not tied to hours worked or to the performance of the individual student or the team as a whole. The benefits derived from an athletic scholarship, which are guaranteed for four years, are unrelated to the quantity or quality of the student-athletes' performance on the field and bear none of the hallmarks of "compensation for services."[14] The amount of a full athletic scholarship remains constant regardless of the

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[12] In its post-hearing brief to the Regional Director, Northwestern cited published empirical data from the National Survey of Student Engagement (NSSE) showing that undergraduate students spend, on average, 14-19 hours a week studying and preparing outside of class. See National Survey of Student Engagement (2012). *Promoting Student Learning and Institutional Improvement: Lessons from NSSE at 13.* Bloomington, IN: Indiana University Center for Postsecondary Research. (NU Brief to the Regional Director at 71.)

[13] The Regional Director seems to suggest that scholarship football athletes are somehow more dependent upon financial aid than other students. He thus found that "Because NCAA rules do not permit the players to receive any additional compensation or otherwise profit from their athletic ability and/or reputation, the scholarship players are truly dependent on their scholarship to pay for basic necessities, including food and shelter." (DDE at 14.) Quite frankly, most undergraduate students are dependent upon some form of aid (whether family, government or institutional) to help pay for basic necessities and often have to take out loans to "make ends meet." (Tr. 743.)

[14] Apart from Internal Revenue Code provisions, at least one Court of Appeals has concluded that college athletic scholarship benefits should not be considered compensation for services rendered:

> We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in aid athletic scholarships offered to college players when the value of the scholarship is

student-athlete's or the team's success or lack thereof.[15] In attempting to distinguish the athletic scholarships received by some Northwestern student-athletes, the Regional Director completely ignored the undisputed fact that if a Northwestern football scholarship athlete is injured, he continues to receive the full benefits of his scholarship even if he never practices or plays football. (Tr. 493.) In other words, using the Regional Director's tortured analysis, the player continues to receive the benefits of his scholarship even if he performs no "work" or "services" for the University.

Once the student-athlete accepts the scholarship tender offer, signs a letter of intent, and enrolls in the University, his financial aid is guaranteed as long as he shows up for practice and follows the rules. This is not pay for performance. It is a scholarship to facilitate education. The scholarship demonstrates Northwestern's commitment to educate, to graduation, every student it admits on an athletic scholarship. Whether they continue to play, or cannot play due to injury, or their playing time is reduced because their performance is sub-par, Northwestern remains committed to educating them and that is what the scholarship ultimately supports.

Additionally, the fact that walk-ons receive no monetary compensation in the form of an athletic scholarship, but are treated the same and are subject to the same rules, expectations and terms and conditions of their football-related activities, strongly supports the conclusion

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> based on the school's tuition and room and board, not by the supply and demand for players. .....The dissent takes a surprisingly cynical view of college athletics and contends that "colleges squeeze out of their players one or two more years of service" because the no-draft rule forces the player to choose between continued collegiate eligibility and entering the draft....The fact that a minority of schools (such as the University of Houston) "use" athletes rather than encourage and foster their student's academic pursuits, does not negate the fact that all NCAA member colleges encourage and require their student-athletes to carry a minimum number of semester credits and maintain a minimum grade point average equivalent to the academic program the university's non-athletic students follow.

Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1091-92 (7th Cir. 1992).

[15] If a quarterback throws an interception, the place kicker misses a field goal, or a player misses a tackle that results in the loss of a game, they are not subject to disciplinary action or removal from the team, nor is their financial aid placed in jeopardy.

that the financial aid given in the form of athletic scholarships represents a form of aid to offset the cost of tuition, room and board, and books as opposed to compensation for services rendered.

Just as importantly, the "tender" that the scholarship football student-athlete signs is not an employment contract between the student and the University, as the Regional Director found. (DDE at 14.) It is an "award" letter, informing the student of the amount and duration of financial aid, along with information about circumstances under which the aid may or may not be renewed. The content of the tender is dictated by the Big Ten– not the University – and sets forth the rights and responsibilities the student-athlete has under Big Ten and NCAA regulations related to aid. Importantly, the tender is plainly conditioned upon the student-athlete's "fulfillment of the admission process requirements of this institution." (Em. Ex. 5 at 5 at NU 00969.) Thus, like the graduate assistants in Brown University, the scholarship aid received by football student-athletes is dependent first and foremost on their status as *students*.

The "tender" also has much in common with the award letters which are distributed to the 60 percent of students at Northwestern who receive need-based financial aid. (Tr. at 720-21; Em. Ex. 14 at 1-2.) These award letters explain the amount and type of aid being given to the student, and must be affirmatively accepted by the student. (Em. Ex. 14.) Just like athletic aid, need-based aid is subject to revocation for failure to maintain satisfactory academic progress as well as failure to remain in "good standing"[16] (e.g., for violating University rules). (Tr. at 786-87.) Like student-athletes, students who have their aid revoked also may appeal

[16] The assertion that the scholarship football athletes operate under the "threat" of having their grant-in-aid pulled at the sole discretion of the coach or the athletic department, even for merely "slacking off in football duties" is wholly unsupported by the record. (DDE at 15 and n.31.) On the contrary, as set forth in footnote 10, the evidence is plain that the only revocations of aid in the last six years were for serious violations of University rules, not for "slacking off." The record if devoid of *any* evidence of arbitrary revocation of athletic aid, and there is no evidence that Coach Fitzgerald made any decisions to cancel scholarships. Indeed, cancelation is a rare event, and certainly not an "immediate" event as the Regional Director states, since such cancellation is subject to appeal. (Compare DDE at 15 with Tr. at 636, 740-42.)

such decisions. (Id.) While it is true that the scholarship will be canceled if the student-athlete quits the team, that does not make it compensation for services under a contract for hire. Similarly, the debate student who stops participating in debate tournaments stands to lose his scholarship. (Tr. 771-72; Em. Ex. 15 at 7.)

The Regional Director's conclusion that the athletic scholarship is "not financial aid," is faulty for the additional reason that it is not supported by IRS code and regulatory provisions, which specifically provide that athletic scholarships are not taxable income so long as the student is enrolled. Consistent with that, the athletic scholarship funds are not treated as income by the football student-athletes or the University. (Tr. 247-248, 751, 788-89.) The University does not issue W-2's for athletic financial aid, nor are the student-athletes required to pay taxes on that aid. (Id.) The University does not remit the financial aid through payroll, and the student-athletes do not receive payroll checks with taxes or other withholdings deducted. (Tr. 247, 250.) Rather, like in Brown University, tuition, room and board and fee payments are made directly from the financial aid accounts to the students' accounts. (Tr. 247-248, 649.)

The Regional Director's reliance on a footnote in Seattle Opera v. NLRB, 292 F.3d 757, 764, n.8 (D.C. Cir. 2002), for the proposition that the lack of taxation of the grant-in-aid funds is immaterial is erroneous, as is the proposition itself. (DDE at 14.) In Seattle Opera, the record was devoid of any evidence regarding the tax treatment of stipends paid to auxiliary choristers, and the court did not even rule on whether the stipends were taxable income was relevant to the analysis of employee status. 292 F.3d 764, n.8. Rather, in *dicta*, the court noted that the lack of taxation of payments to employees who were improperly classified as independent contractors did not preclude a finding of employee status under the Act. Id.

In any event, nothing in the Internal Revenue Code or regulations exempts the sort of remuneration received by the auxiliary choristers in Seattle Opera from taxable income. By contrast, Section 117 of the Internal Revenue Code provides that "gross income does not include any amount received as a qualified scholarship [including athletic scholarships] by an individual who is a candidate for a degree at an educational organization." 26 U.S.C.A. §§117(a), (b)(1). See also Rev. Rul. 77-263, 1977-2 CB 47. The Board in Leland Stanford found it "significant[]" that "the payments to the [research assistants] are tax exempt income." 214 NLRB 621, 622 (1974); see also Brown University, 342 NLRB at 486, 488; and Boston Medical Center, 330 NLRB at 160 (both finding the treatment of the aid in question to be a critical (if not entirely dispositive) factor in determining whether the individuals at issue in each case were students or employees).

In sum, the evidence demonstrates that the sole purpose of athletic scholarships received by some of Northwestern's football student-athletes is to finance their educations.

3. The Fact That Scholarship Football Athletes Are Subject To Rules And Discipline Does Not Make Them Employees

University life is communal. Students are subject to schedules of all sorts, as dictated initially and primarily by their own choices. Students are also subject to rules and discipline for violations of those rules. Members of an athletic team must adhere to schedules and rules in order to achieve the common goals of competitive advantage and efficiency. These truisms do not make football student-athletes who receive athletic aid employees, particularly when one considers that those who do *not* receive athletic aid are subject to precisely the same schedules and rules. The rules are essential for a functioning *team set in a residential college;* they are not in place to enable an employer to monitor and control its employees.

Although the record is replete with evidence of rules and schedules that apply to all students at Northwestern, the Regional Director ignored any rule or schedule other than those that apply solely to football student-athletes (even conveniently ignoring that such rules are applicable to *all* the football student-athletes, not just the aid recipients). The Regional Director characterizes the football program schedules as "strict and exacting" and adds that the "location, duration, and manner in which the players carry out their football duties are all within the control of the football coaches." (DDE at 15.) But there is no other way a functioning football team can operate. Thus, the fact that the participants in the football program practice and meet together at times selected by Coach Fitzgerald, travel together, and even eat together does not make them subject to the sort of control inherent in an employer/employee relationship.

The type of scheduling control that the coaches have over the football student-athletes (scholarship and non-scholarship alike) is no different than the type of scheduling and control that other educators at the University have over enrolled students. Just as a football student-athlete is free to choose whether to participate in the football program, a student is free to choose a particular course of study. Once chosen, certain requirements of both endeavors (the co-curricular athletic and the curricular endeavor alike) must ultimately be met. As Colter himself acknowledged, once he selected Psychology as a course of study, there were certain classes he was required to take. (Tr. 232.). Those classes were chosen by the department and were offered on days and at times decided upon by academic personnel, without input from Colter. (Tr. 232-34.) Once enrolled in a course, Colter, like any undergraduate student, was subject to the syllabus which detailed what material would be covered during which period of time. (Tr. 234-35.) His instructors selected the course material, decided what assignments to give and when they would be due, decided when to administer exams and what material would

be covered in exams, and had the authority to discipline students for infractions, such as being late or failing to turn in assignments. (Id.) Those "restrictions" and "scheduling control" are all part of the life of a student.

Finally, community participation requires adherence to rules that promote civility among community members. University life is no different in that regard. Nevertheless, the Regional Director found employee status in part because the scholarship football athletes are subject to certain rules and controls. (DDE at 16.) His analysis is flawed in two key ways. First, the vast majority of the rules he cites are related to regulations imposed upon the University by reason of its membership in the NCAA and the Big Ten Conference (e.g., rules related to residential leases, personal vehicles, outside employment). (Jt. Ex. 20 at NU 000284, 000356, 000407-421; Jt. Ex. 22 at NU 000591-592, 000534, 000618, 000744-745; Tr. at 477-479, 505-506, 622-624.) The Regional Director's conclusion that NCAA and Big Ten regulations and prohibitions do "not detract from the amount of control the coaches exert" (DDE at 16) miscomprehends the fundamental problem with CAPA's petition. If there is any real "control" over the lives of the football student-athletes, it emanates from those outside organizations. Northwestern does not control those rules or regulations in any respect; it merely provides the framework for the student-athletes in the form of a Handbook so they do not need to be individually responsible for knowing the details of more than 600 pages of NCAA and Big 10 manuals. Northwestern is a conduit of information – not an employer that promulgates and enforces rules to increase productivity and profitability, as is the case in an industrial context.

Moreover, the rules which do not emanate from the NCAA or the Big Ten are no different from the types of rules applicable to all students – and certainly no different than the rules to which non-scholarship football student-athletes are subject. Although the Regional

Director totally disregarded the types of rules in place for all students, this chart shows the similarities in the two sets of rules:

RULE	SCHOLARSHIP AND WALK-ON FOOTBALL STUDENT-ATHLETE	UNDERGRADUATE STUDENT
GAMBLING	Jt. Ex. 17 at NU 176, 209	Jt. Ex. 19 at NU 47
ALCOHOL & DRUG USE	Jt. Ex. 17 at NU 174	Jt. Ex. 19 at NU 32-33, 44-45
GOOD BEHAVIOR	Jt. Ex. 17 at NU 173, 188-190, 234	Jt. Ex. 19 at NU 4-5, 7-31, 36; Jt. Ex. 28 at NU 2394-2395
LIGHTS OUT/ QUIET HOURS	Jt. Ex. 17 at NU 234	Jt. Ex. 19 at NU 30
PROHIBITIONS ON OFF-CAMPUS RESIDENCE	Jt. Ex. 17 at NU 225	Jt. Ex. 19 at NU 46-47
ACADEMIC PROGRESS	Jt. Ex. 17 at NU 190-191	Jt. Ex. 28 at NU 2388, 2408-2637
CLASS ATTENDANCE	Jt. Ex. 17at NU 192	Jt. Ex. 28 at NU 2394
HAZING	Jt. Ex. 17 at NU 157, 210	Jt. Ex. 19 at NU 48-49
IT USAGE[17]	Jt. Ex. 17 at NU 190	Jt. Ex. 19 at NU 36-40

Violations of these rules subject students to a variety of discipline, including loss of financial aid. (Jt. Ex. 19 at 12-24.) These rules are part and parcel of a functioning educational community, inclusive of co-curricular activities.

Finally, it is completely wrong and wholly contrary to the record to suggest that Northwestern controls the academic development of its football student-athletes for the

[17] The Regional Director incorrectly states that the football student-athletes are restricted in what they can post on the internet. (DDE at 5.) Rather the Football Handbook provides guidelines that it encourages the football student-athletes to follow when posting online. (Jt. Ex. 17 at 158-164.) Even so, the only evidence in the record of a restriction on internet postings is a single tweet by Colter that the football program required him to remove because of a concern about compliance with NCAA regulations, not Northwestern rules. (Tr. 153-154, 475-476.) Moreover, a quick review of Colter's more than 400 Twitter postings over the last 20 months – which are publicly available – demonstrates that he has tweeted or re-tweeted on the following topics without reprisal of any sort: marijuana legalization; "chasing women"; politics; religion; a toilet golf game (including posting an image of a man with his pants around his ankles sitting on a toilet seat playing golf); the cartoon character SpongeBob SquarePants; and going to the movies, bowling, golfing and Burger King; among other topics. Similarly, Colter was apparently not required to remove a tweet that contained the "LMFAO" acronym, short for "Laughing My Fucking Ass Off."

purpose of ensuring they remain minimally eligible to participate in athletics under NCAA guidelines. Indeed, in referring to participation in the academic support programs offered by the University as "athletic duties," the Regional Director severely mischaracterizes the nature of the academic services provided to student athletes. (DDE at 16-17.) By portraying the additional tutoring, academic advising and professional development services as just another series of time-intensive burdens or "duties" imposed by athletic department personnel and coaches (id.), the Regional Director strangely transforms Northwestern's basic, unshakeable commitment to the education of all of its students into yet another athletic obligation. The Regional Director baselessly ignored the holistic approach the University pursues to help its student-athletes develop into individuals who will leave the University and be well-positioned to contribute to the larger community.

The graduation rate and cumulative GPA of its football players speaks to Northwestern's educational commitment. Northwestern has the highest graduation rate (97 percent) of all FBS schools; Northwestern's football student-athletes have maintained a cumulative average GPA over 3.0 for several years in a row; Northwestern had 36 Academic All-Big Ten honorees last year; and Northwestern's football program graduates have gone on to become aerospace engineers, physicians, lawyers, bankers and NFL football players, among other professionals. Contrary to what the Regional Director implies, the record establishes without contradiction that the University takes great pains to ensure that its football student-athletes – indeed all of its student-athletes – are exposed to the types of opportunities and experiences, on and off the field, which will help them succeed in life after college. (Tr. 811-13, 855-56, 861-62, 869-73, 884, 900-912; Em. Exs. 23, 28, 30.) To suggest that the University is merely coddling its "assets" so it can continue to benefit financially from their athletic abilities is directly and repeatedly contradicted by the record. (Id.)

D. THE REGIONAL DIRECTOR MISAPPLIED *BROWN UNIVERSITY*

In addition to erroneously holding that the test articulated in Brown does not apply in this case, the Regional Director compounded his error by ignoring the statutory and public policy ramifications of a finding that students who perform services at the university in which they are enrolled fall within the definition of an employee under the Act, as mandated by Brown.

In trying to find factual distinctions between the graduate assistants in Brown and the scholarship athletes in the instant case, the Regional Director misrepresented the facts. Thus, in concluding that the athletic activities performed by Northwestern scholarship football players are not a core element of their educational degree requirements, the Regional Director cited Brown University for the proposition that the graduate students in that case, unlike Northwestern's scholarship football players, received academic credit for their teaching and research activities. (DDE at 19.) In any event, whether or not Northwestern's scholarship athletes receive academic credit for their football activities is irrelevant to whether their experience is integral to the pursuit of their academic studies. As Northwestern overwhelmingly established at the hearing, its athletics program is part and parcel of the University's educational mission. Northwestern's institutional purpose and athletics philosophy, as articulated by President Morton Shapiro, thus states in part:

> Intercollegiate athletics has long been an integral part of Northwestern University life. The success of the athletic program is inextricably linked to the educational mission of the University, especially with regard to the academic and personal development of student-athletes and the institution's commitment to honoring the highest standards of amateur competition. It is not measured solely by wins and losses.
>
> The well-being of its student-athletes is an integral part of what constitutes success. A truly effective athletic program produces student-athletes who succeed in their academic work as well as in their chosen sport and whose

> careers after graduation are a tribute both to them and their university. As part of the educational mission of the University, the athletic program should provide student-athletes with the opportunity to exercise leadership, to develop the ability to work with others as a team, to accept the discipline of sustained practice and training, and to realize the value of good sportsmanship.
>
> Observance of rules and awareness of policies are integral to the success of a program. It is the responsibility of the University administration and the Department of Athletics and Recreation to adhere to all regulations promulgated for the governance of intercollegiate athletics by the Big Ten Conference, the NCAA, and other groups to which the University belongs. Beyond these controls, and in the interest of its student-athletes, Northwestern has adopted procedures, guidelines, and policies that are more stringent than those for which it is held accountable externally. The University administration and the Department of Athletics and Recreation are equally responsible for observing these internal standards. Northwestern must have a system that enables it to monitor its adherence to these standards. This system must provide all the assurances necessary to anticipate and prevent any breach of the rules.
>
> The joining of academic experience with athletic performance is the guiding principle behind Northwestern's participation in Division I athletics. To accomplish this goal, Northwestern University offers its student-athletes a comprehensive system of services and resources, including excellent athletic and recreational facilities, high-quality coaching, academic counseling and assistance, first-rate medical care, and highly competitive athletic programs.

(Jt. Ex. 21.)

The Regional Director downplayed the integration with academics and life lessons that players learn from participating in Northwestern's football program (DDE at 19), and also largely ignored the evidence showing that academics at the University always takes precedence over athletic activities. The record shows that Northwestern, first and foremost, is a premier academic institution and that academics always take precedence over extracurricular programs, including football.[18] The Regional Director simply ignored this evidence and concluded that

[18] By way of example, student-athletes are expected to attend class; Coach Fitzgerald moved the timing of practices to allow greater course options; the athletic department works with individual professors regarding exams; no competition may be played within 48 hours of final exams; no travel may be scheduled for the week of exams; football student-athletes are released early from practice to attend class; football student-athletes are

"this relationship is an economic one that involves the transfer of great sums of money to the players in the form of scholarships," noting that Northwestern expends over $5 million a year to fund the 85 football scholarships. (DDE at 19.) If this is the test for establishing whether an economic relationship, and concomitant employee status, exist, it would necessarily follow that all Northwestern students athletes who receive athletic scholarships, regardless of the team—whether it be the women's lacrosse team or the men's wrestling team—would be employees under the Act.

While it is true that academic faculty members do not oversee the athletic activities of Northwestern's scholarship football players (DDE at 19), this distinction does not support the Regional Director's view that there is little reason to be concerned "that imposing collective bargaining would have a 'deleterious impact on overall educational decisions' by the Employer's academic faculty." (DDE at 19.) As noted above, Northwestern does not treat its athletic program as separate from its educational commitment. Academic credit is not the *sine qua non* of educational value; if it was, the school's investment in the resources to support literally hundreds of co-curricular activities would make little sense. In fact, Northwestern recognizes that education happens in more than just the classroom. And it most certainly believes education takes place on the athletic field.

The Regional Director also concluded that the grant-in-aid scholarships received by Northwestern's football players are different than the stipends received by the graduate assistants in the Brown case, finding that the aid is in effect compensation for services rendered. Once again, his analysis is wrong.[19] First, he noted that the graduate assistants in

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permitted to register before other non-student-athletes; and student-athletes are provided substantial academic support services to assist them in their academic endeavors. (Tr. 823, 826-27, 1025.)

[19] See *supra* at Section V.C.1for a more detailed discussion on the fallacy of concluding that grant-in-aid funds are compensation for services. Despite the undisputed evidence that scholarship proceeds are not distributed through the University's payroll system (TR. 250), the Regional Director obviously has disregarded

Brown received the same stipend as the graduate fellows for whom no teaching or research was required, and secondly, the graduate assistant stipends in Brown were not tied to the quality of their work. (DDE at 20.) However, just as in Brown University, Northwestern grants aid to its football student-athletes, who are enrolled as students to offset the cost of tuition and other academic-related expenses such as room, board, books and fees. Moreover, the Regional Director assumed, with no support whatsoever, that the graduate assistants in Brown would have continued to receive stipends even if they withdrew from the graduate program in which they were enrolled. Second, here, as in Brown, it is undisputed that the athletic scholarships bear no relationship whatsoever to the quality or quantity of the student-athletes' performance on the athletic field.

E. APPLICATION OF THE CORRECT TEST ARTICULATED IN *BROWN UNIVERSITY* DICTATES THAT NORTHWESTERN'S SCHOLARSHIP STUDENT ATHLETES ARE PRIMARILY STUDENTS

In Brown, the Board evaluated whether the relationship between the graduate assistants and the university was "primarily educational," as opposed to an "economic relationship." The Board began by noting "the simple, undisputed fact that all of the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a [graduate student assistant position]." 342 NLRB at 488. Because they were, first and foremost, students, and their status as graduate assistants was contingent on their continued enrollment as students, they were found to be primarily students. The same is true here. Significantly, the Board in Brown also found that the monetary stipend received by a graduate assistant was not "consideration for work." Instead, it was financial aid to a student. Id. In contrasting the aid received by graduate assistants to that received by other Brown students, the Board noted that 85 percent of

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that evidence and views scholarship football student-athletes the same as other University employees since the Region has insisted that Northwestern provide its most recent "payroll date" for University staff employees prior to the Regional Director's Decision in making arrangements for the election herein.

continuing students and 75 percent of incoming students received some form of financial assistance from the university.[20] Id. at 485. In particular, the amount of aid received by graduate assistants was the same or similar to that received by students who received funds for a fellowship, which did not require any teaching or research duties.[21] Id. at 486. Moreover, a significant portion of the financial assistance received by graduate assistants was for tuition. Id. at 489. Based on the status of graduate assistants as students, the role their assistantships played in their education, the relationship between the graduate assistants and faculty, and the nature of the financial support they received, the Board concluded that the overall relationship between the graduate assistants and the university was primarily educational as opposed to economic.

Here, if CAPA is certified as the bargaining representative of Northwestern's scholarship football student-athletes, there is a real prospect that imposing collective bargaining upon the relationship between the student-athletes and the University would interfere with traditional academic freedoms. For example, if a student-athlete's scholarship was revoked because he plagiarized a course paper, or because he failed to attend classes, or because he failed to maintain the required minimum grade point average, those decisions would be subject to the grievance-arbitration process, which would obviously interfere with academic decision-making that has nothing whatsoever to do with the purported economic relationship between the student-athlete and the University. Similarly, issues such as relaxed

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[20] During the 2012-2013 academic year, about 60 percent of Northwestern's undergraduate students received some form of financial aid. Of the $139 million Northwestern annually awards in financial aid, only about $15 million is distributed in the form of athletic scholarships; the balance is based on demonstrated financial need. (Tr. 720-723; Em. Ex. 16).

[21] Here too, the amount of financial aid received by football scholarship athletes – $61,063 during the 2013-2014 academic year (Em. Ex. 16) – is similar to but slightly less than full-ride need-based financial aid scholarship because athletic scholarships do not include a stipend for living expenses due to NCAA regulations. (Tr. 729, 730, 743; Jt. Ex. 22 at NU 000717-740). Yet, like in Brown, students who receive need-based financial aid, including a number of the walk-on football players, are not expected or required to perform any services, other than to remain enrolled in the University, as a condition of receiving the financial aid.

admission standards for student athletes, minimum grade point requirements for student-athletes, whether student-athletes receiving financial aid to play football should be subject to less stringent course requirements, reduced graduation requirements for student–athletes, whether student-athletes should be allowed to miss classes to attend football practice, whether class attendance is mandatory, or whether student-athletes should be excused from academic exams or course paper deadlines that interfere with football activities, are some of the issues that potentially fall within the realm of mandatory subjects of bargaining but which relate to predominantly academic as opposed to economic issues. All of these issues potentially would unduly interfere with and intrude into educational matters which, as the Board noted in Brown, are based on unique, individualized considerations and are not well-suited to the collective-bargaining process. Id. at 490.

In short, as the Board explained in Brown, the issue of employee status under the Act turns on whether Congress intended to cover the individual in question, not on a wooden analysis of the common law test. Thus, for example, managerial employees technically may perform services for, and be under the control of an employer, but are excluded from coverage under the Act by the Supreme Court's decision in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). See also NLRB v. Yeshiva University, 444 U.S. 672, 688 (1980) (in excluding faculty members who exercise managerial judgment from coverage under the Act, the Court observed that "the 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions"); Allied Chem. Alkali Workers of Am., Local Union No. 1 v. Pittsburg Plate Glass Co., 404 U.S. 157, 166 (1971) ("the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire").

In Brown, the Board also endorsed the need to consider the public policy ramifications, earlier raised in St. Clare's Hospital & Health Center, 229 NLRB 1000 (1977), if graduate assistants were found to be employees, namely that the "student-teacher relationship is not at all analogous to the employee-employer relationship;" that collective bargaining is designed to promote equality of bargaining power, "another concept [that is] largely foreign to higher education," and that imposing collective bargaining on the student-teacher relationship "may unduly infringe upon traditional academic freedoms." Id. at 1002-1003. Here, however, the Regional Director completely ignored the policy considerations that formed the basis of the decision in Brown. At the hearing and in its brief to the Regional Director, Northwestern identified the following public policy issues and practical ramifications that must be addressed in considering whether its football scholarship student-athletes are employees within the meaning of the Act:

1. The Regional Director Failed To Consider That The Unionization Of Northwestern's Student-Athletes Would Create Chaos Due To The Wide Variation Among Federal And State Labor Laws

If football student-athletes are allowed to unionize, the patch-work of labor laws that govern colleges playing Division I FBS football would have a chaotic impact on the sport and the respective universities' administration of the sport. In Brown University, the Board recognized that some states permit collective bargaining at public universities, but it decided "to interpret and apply a single Federal law *differently* to the large numbers of private universities under our jurisdiction." 342 NLRB at 493 (emphasis added). However, among the NCAA Division I FBS schools, only 17 schools are private universities subject to the Board's jurisdiction. (Tr. 439.) The public universities, more than 100 in FBS alone, are governed by state labor laws, if any, allowing collective bargaining.

For example, the Act applies to just one Big Ten school—Northwestern. State labor laws apply, in widely varying degrees, to eight Big Ten Schools—Illinois, Iowa, Michigan, Michigan State, Minnesota, Ohio State, Penn State, Wisconsin. Three other Big Ten schools—Indiana, Nebraska, and Purdue—are governed by no state or federal collective bargaining law. In states that have applicable laws, wide variations also exist.[22] Beyond the Big Ten, even more variation exists where some states do not allow for public-sector collective bargaining[23] and others have local, rather than state laws, allowing for public sector collective bargaining.[24] A variety of state and local laws define mandatory and permissible bargaining subjects, economic weapons and dispute resolution procedures, many of which differ dramatically from the Act and from each other. Thus, no uniform law would apply to the student-athletes, and the rules would be dramatically different depending on what school the student chose to attend.

Likewise, there would be no level playing field. Some student-athletes would be able to unionize, negotiate over economic and non-economic conditions and even strike, while others competing in the same sport and within the same organized structure of competition would not. In practicality, the result would be chaotic. Assume, for example, that Northwestern's football student-athletes decided to strike. Would Northwestern then recruit replacements among the walk-ons, and if so, must the University locate additional funding to pay them for "services" during the strike? And if the walk-ons refuse to play during a strike,

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[22] In fact, in direct response to the Regional Director's Decision, states are already taking legislative action on the issue. For example, on April 7, 2014, the Ohio legislature proposed an amendment to a budget bill which provides that state university students are not "public employees" as a result of their participation in intercollegiate athletics. See H.B. 483, 130th Gen. Assemb., 2013-2014 Sess. (Oh. 2014), *amend. no.* HC-0548 (Apr. 7, 2014). Currently, Wisconsin law prohibits public-sector unions from bargaining over workplace safety, pensions, health coverage, hours, sick leave or vacations, which would bar University of Wisconsin student-athletes from bargaining with their employers on these issues. See 2011 WIS. ACT 10 (March 11, 2011). In Illinois, two different laws apply to public sector employees and both, or neither, could apply to student-athletes at the University of Illinois. See 5 ILCS § 315/1 et seq. (West 2014); 115 ILCS § 5/1 et seq. (West 2014).

[23] For example, in 1993, Gov. Doug Wilder signed into law H.B. 1872 and S.B. 962, which prohibited collective bargaining by public sector employees in Virginia.

[24] For example, Arizona has no collective bargaining law for public employees, but the City of Phoenix does. See e.g., City of Phoenix v. Phx. Employment Relations Board, 86 P.2d 917 (Ariz. Ct. App. 2004).

would Northwestern have to forfeit competitions scheduled during the strike which could preclude the University from competing in bowl games? And if pay – that is athletic scholarships – was suspended during the strike, how would the student-athletes fund their educations? Conversely, the same questions would arise if the University decided to "lock out" the student-athletes.[25]

The Regional Director's broad ruling that football student-athletes are "employees" within the meaning of the Act also will have far-reaching consequences potentially impacting scholarship funds for thousands of athletes at private colleges and universities throughout the nation. According to the Regional Director, the decisive factor on employee status is the receipt of scholarship aid. Consequently, any student-athlete at Northwestern who receives a scholarship could arguably organize under the NLRA.

In utter disregard for the novelty of the issues presented by CAPA's petition, the Regional Director failed even to consider that deviating from Brown University would lead to a chaotic environment without any indication of Congressional intent to permit collective bargaining where it has never occurred before.

2. *The Regional Director Failed To Consider The Tax Implications For Student-Athletes Receiving Scholarships If They Are Employees Under The Act*

During the 2013-2014 academic year, 88 out of 113 football student-athletes received athletic scholarships, which neither the University nor the student-athletes treated as wages or income. (Tr. 247-248, 751, 788-89.) Consistent with Section 117 of the Internal Revenue Code which exempts scholarship aid to *students* from taxable income, the University does not

[25] Any attempt to analogize the situation to that of professional athletics unions is meritless. In professional sports leagues, the players' union negotiates on behalf of *all players* with the *collective ownership of every team in the league*. In no professional sports league in North America do players negotiate on a team-by-team basis. (Tr. 417-418.)

issue W-2's for athletic financial aid; nor are the student-athletes required to pay taxes on that aid. (Id.)

In light of the Regional Director's decision that the scholarship football student-athletes are "employees" who are compensated for their "services," it is quite possible that the Internal Revenue Service will consider the amount of the scholarship – along with in-kind benefits, such as athletic equipment and clothing – as taxable income. See, e.g., Bingler v. Johnson, 394 U.S. 741 (1969) (holding that "bargained for" compensation relating to "employment services," is taxable income even when it takes the form of a scholarship gift for educational purposes). See also Parr v. U.S., 469 F.2d 1156 (5th Cir. 1972); Wertzberger v. U.S., 441 F.2d 1166 (8th Cir. 1971) (holding that medical resident salaries were not scholarships or fellowships for purposes of I.R.C. Section 117).

As the Regional Director acknowledged, Northwestern's football student-athletes typically receive grant-in-aids totaling $61,000, or more, per academic year, which over four to five years totals between $244,000 and $305,000. (DDE at 3.) Thus, finding that the student-athletes are "employees" under the Act who receive compensation for their services may have the unintended consequence of student-athletes being taxed tens of thousands of dollars on their athletic scholarships over time. As such, the tax consequences may cause a student-athlete to be unable to attain the Northwestern University education he is being offered because he lacks the cash to satisfy his tax obligations. This would have the perverse effect of making a *loan* more attractive than a scholarship. An athlete admitted to Northwestern who receives a loan package may be obliged to pay less in cash than an athlete admitted with a full athletic scholarship. No legitimate interest can be served by compelling a student-athlete to choose a college or to structure his payment for college based on labor or tax laws. Erroneously, the Regional Director did not even address the potential tax consequences facing Northwestern's

student-athletes and the effects it may have on their ability and willingness to attend Northwestern.

3. The Regional Director Failed To Consider That CAPA's Objectives Cannot Be Achieved By Collective Bargaining With Northwestern Due To NCAA Regulation

The Regional Director also failed to consider that Northwestern does not have the authority to deviate from the NCAA and Big Ten Conference Rules, unless it is willing to forego a football program altogether, which would make CAPA's goals not attainable through bilateral negotiations. Northwestern would be in a classic "Catch-22" situation if it is forced to collectively bargain with a student-athlete union. On the one hand, Northwestern would face unfair labor practice charges for refusing to negotiate over many mandatory subjects of bargaining that are strictly regulated by the NCAA and Big Ten Conference, such as the amount of scholarships, awards and benefits and medical insurance. On the other hand, Northwestern would face severe NCAA sanctions, including the end of its inter-collegiate athletic program, for *even offering* any NCAA-prohibited economic benefit.[26]

While CAPA claims that it does not intend to bargain over subjects controlled by the NCAA, including economic issues that are NCAA-regulated, nothing stops those demands or CAPA's full use of the tactics permitted by the Act. Forcing a university into this position is unprecedented and should not have been done here. The effort to force collective bargaining over issues controlled by the NCAA is self-defeating: Northwestern's scholarship student-athletes might have a union, but in the process, they could lose their football team because the NCAA would likely ban Northwestern from participating in games for violating its rules.

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[26] NCAA v. Bd. Of Regents of Univ. of Oklahoma, 468 U.S. 85, 88-89 (1984); Banks v. NCAA, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (NCAA rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (NCAA rules limited compensation for football players to scholarships with limited financial benefits).

4. The Regional Director Failed To Consider That Extending Collective Bargaining Rights To Northwestern Football Players Will Have Title IX Ramifications

Title IX of the Education Amendments of 1972 ("Title IX") requires colleges and universities who receive federal funding to afford equal opportunities in varsity sports to female students. 20 U.S.C. §1681(a); 34 C.F.R. §106.41(c). Therefore, Title IX requires equality in: (1) effective accommodation of student interests and abilities (participation), (2) athletic financial assistance (scholarships), and (3) other program components (the "laundry list" of benefits to and treatment of student-athletes). The "laundry list" includes equipment and supplies, scheduling of games and practice times, travel and daily per diem allowances, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, publicity, recruitment of student-athletes and support services. See id.

If Northwestern were to provide through collective bargaining to a male student-athlete or team an enhancement to any item from the "laundry list," Title IX would require Northwestern to offer the same proportional benefits for female student-athletes and teams. (Tr. 918-920); see e.g., Biediger v. Quinnipiac Univ., 928 F. Supp. 2d 414 (D. Conn. 2013); Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 916 (7th Cir. 2012); Mansourian v. Bd. Of Regents of Univ. of Calif. at Davis, 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011) ("the opportunity for students to participate in intercollegiate athletics is a vital component of educational development."). The reality is that a union of football players can and would bargain for compensation and other economic benefits. Pursuant to Title IX, every dollar of economic benefit to a male student-athlete secured through collective bargaining would have to be matched proportionately for female student-athletes.

A union of football student-athletes would also impact the student-athletes who participate in the non-revenue sports at Northwestern. Other than football and men's basketball, every varsity sport at Northwestern, including all 11 of the women's teams, operates at a loss. The overall revenue of Northwestern athletics is far less than its expenses and would not balance but for a $12.7 million subsidy from the University. (Em. Ex. 11; Tr. 652-653.) The football program revenue is an essential part of Northwestern's ability to offer varsity sports to both its men and women student-athletes.

The Regional Director failed to consider that collective bargaining with student-athletes in profitable men's sports will affect all of an institution's student-athletes, and every private university offering varsity athletics will have to deal with ramifications that go far beyond what CAPA acknowledges.

F. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR IN HOLDING THAT CAPA IS A LABOR ORGANIZATION WITHIN THE MEANING OF THE ACT

The Regional Director's finding that CAPA is a labor organization within the meaning of the Act was premised upon his determination that Northwestern's student-athletes who receive football scholarships are employees within the meaning of the Act. He also found that CAPA was formed to represent "certain collegiate athletes" (failing to acknowledge the exclusion of all females) and that Northwestern's football scholarship athletes are included among the collegiate athletes CAPA seeks to represent. (DDE at 23.) In fact, however, CAPA's founding statement limits its membership to scholarship athletes who participate in the NCAA Football Bowl Subdivision ("FBS") and NCAA Division I men's basketball. (Jt. Exh. 1; Tr. 283-284.) The Regional Director also ignored the fact that CAPA is not currently a party to any collective bargaining agreements and does not have a collective bargaining relationship with any employer. (Jt. Ex. 1.)

If Northwestern football scholarship athletes are found not to be employees within the meaning of the Act, it is clear that CAPA does not meet the Section 2(5) definition of a labor organization since it does not admit or represent any statutory employees. The Leland Stanford Junior University, 214 NLRB 621 (1974) (finding that Physics department research assistants were not "employees" and since petitioner did not seek to represent any other category which may be "employees," the petitioner was not a labor organization within the meaning of the Act). Because the Regional Director erred in finding that Northwestern's football scholarship athletes are employees within the meaning of the Act, he likewise erred in finding that CAPA is a labor organization within the meaning of the Act.

G. THE FOOTBALL STUDENT-ATHLETES ARE TEMPORARY EMPLOYEES, IF EMPLOYEES AT ALL

By failing to recognize the unique relationship attendant to the educational setting, the Regional Director discounted the undisputed evidence that the relationship between the football student-athletes and the University is inherently transitory. Moreover, by relying on Boston Medical and attempting to distinguish San Francisco Art Institute, the Regional Director disregarded the legal standards applicable to students enrolled at the institution which they are also claiming is their employer.

The relationship between the football student-athlete and the University is necessarily finite. For one, as a general proposition, students do not *enroll* in institutes of higher education with the expectation that their relationship will continue beyond the time necessary to complete their educational coursework. More importantly, and based on the Regional Director's own definition of the "appropriate bargaining unit," the football student-athletes with scholarship aid will *never* be "employees" for more than 3.5 or 4.5 years, at the very longest. Indeed, some of the football student-athletes who do not receive athletic scholarships until their final year at

the University, like John Henry Pace, would be considered an "employee" for only a single football season – a matter of months at most.

For these reasons, the situation here is *not* distinguishable from the student janitors in San Francisco Art Institute, as the Regional Director contends.[27] There, the two testifying students worked as janitors for 2.5 and 3.5 years respectively and worked an average of 35 to 45 hours per week. San Francisco Art Institute, 226 NLRB 1251, n.2, 1254 (1976). In full acknowledgment of the intrinsically "brief nature" of a student's tenure at an institute of higher education where the "employee" is *enrolled* as a student, the Board noted that "no student janitor has ever stayed on *past graduation* to assume a position as full-time janitor." Id. at 1251-52 (emphasis added). The Board's reference to "*naturally* occur[ring]" turnover among the student janitors relates not to the fact that the students do not stay in the janitor jobs all that long (since, in fact, some did), but rather to the fact that the students stay at the institution only long enough to complete their studies. Id. at 1252 (emphasis added).

The Regional Director incorrectly relies on Boston Medical Center for the notion that truly economic contracts that last merely one to two years, with renewal options, do not make such employees "temporary." Unlike the various employees (outside the educational setting) that the Regional Director cited in his decision (DDE at 21), the Northwestern football student-athletes have *no* prospect of a continued relationship with the University. They *must* leave the football program when their eligibility is exhausted. As the Board pointed out in San Francisco Art Institute, the temporary nature of the student-employee's relationship with his educational institution creates the "vexsome" problem "that by the time an election were

[27] While the Regional Director asserts that San Francisco Art Institute "has not been relied upon by the Board since it issued in 1976" (DDE at 21), he does not – and cannot – cite a single case where the Board has found that students who are enrolled at a university or college are also employees of that same university or college, as that term is defined by the Act. In other words, the issue of temporary status (and the application of San Francisco Art Institute) is not reached where there is no finding that the members of petitioning unit are employees.

conducted and the results certified the composition of the unit would have changed substantially." 226 NLRB at 1252. With scholarship football student-athletes – having between one and five seasons of NCAA-eligibility – voting in a representation election, there is no question but that the proposed unit will change radically before CAPA is even possibly certified as the bargaining representative. It would frustrate the purposes of the Act to direct an election with the scholarship football student-athletes. Id.

In light of this erroneous application of law and disregard of the relevant facts, the Board should grant review of the Regional Director's decision that the football student athletes who receive scholarship are not temporary employees.

H. THE REGIONAL DIRECTOR ERRED IN FINDING THAT THE PETITIONED-FOR-UNIT IS AN APPROPRIATE UNIT

The Regional Director found that the petitioned-for-unit was appropriate because (a) scholarship football players are employees within the meaning of the Act, and (b) walk-on football players do not share an overwhelming community of interests with scholarship football players because walk-ons do not receive athletic scholarships. (DDE at 22.) The Regional Director also used this fact to conclude that a fractured unit does not exist because the walk-on football players cannot be employees within the meaning of the Act. (Id.) The Regional Director's findings, and the conclusions based on those findings, are clearly erroneous on the record and those errors prejudicially affect not only Northwestern's rights, but those of the student-athletes as well.

Even if the student-athletes who receive athletic scholarships are employees, the inquiry is not over. The Board should still dismiss the petition because the petitioned-for-unit excludes student-athletes who participate on the same team under the same terms and conditions, and therefore the petitioned-for-unit is an improperly fractured unit.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	No. 13-RC-121359
	)	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	)	
	)	
Petitioner.	)	

PETITIONER'S RESPONSE TO REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

John G. Adam
Stuart M. Israel
Legghio & Israel, P.C.
306 S Washington Ave., Suite 600
Royal Oak, MI 48067-3837

Jeremiah A. Collins
Ramya Ravindran
Bredhoff & Kaiser, P.L.L.C
805 15th Street., N.W., Suite 1000
Washington, DC 20005-2207

Stephen A. Yokich
Cornfield and Feldman LLP
25 E. Washington St., Suite 1400
Chicago, IL 60616-8203

Dated: April 16, 2014

Attorneys for Petitioner College Athletes Players Association (CAPA)

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INTRODUCTION

Northwestern University's scholarship football players ("the players"), on whose behalf a petition for an election has been filed by the College Athletes Players Association ("CAPA"), are extraordinarily successful in two distinct fields. As football players, their work enables Northwestern's football program to compete at the highest level of the National College Athletic Association ("NCAA"), frequently appearing in postseason bowl games, and to realize millions of dollars in profit for the University each and every year. And as students participating in the "high quality educational programs" of what all acknowledge to be a "premier . . . private . . . research universit[y]," Request for Review ("RFR") at 15, almost all of them obtain their degrees, often with good grades.

For the football program, the players work long hours year-round – 40 to 60 hours a week from summer training camp through the end of the regular season (which, in a bowl year, is in January) and many hours during the rest of the calendar year as well. *See* Decision and Direction of Election ("DDE") at 15-16, 18. In practicing, playing in games, and performing their numerous other football duties, the players are supervised by Northwestern's coaching staff, which also enforces rules controlling many aspects of the players' private lives in furtherance of the football team's success. *See id.* at 16. The coaches are not members of the faculty, and they teach no courses. The players receive no academic credit for participation in the football program, and that participation has nothing to do with earning their degrees.

As the Regional Director found, for their efforts and commitment to the football program, the players receive room, board, tuition reimbursement and other benefits, which are provided to them solely because of their selection by the coaching staff as particularly talented football players, and which they lose if they leave the team voluntarily or for misconduct. *See id*. at 14-

15. This compensation differs markedly from the financial aid Northwestern provides to other students, who are not required to perform services in return for financial assistance and whose assistance is determined by the student's financial need and consists in large part of loans rather than grants. *See infra* at 24 n.7.

The players' football services thus have all the hallmarks of an employment relationship. Indeed, the situation is very similar to professional football (albeit at what might be regarded as a minor league level), both in the nature of the work performed (Tr. 345:10-17, 381:16-20; Pet. Ex. 5 at 6, 10) and in the ways in which that work produces revenue to the employer, including ticket sales, broadcast rights, and the merchandising of the players' likenesses – the right to which each player must relinquish to Northwestern for his entire life. Pet. Ex. 2; Pet. Ex. 5 at 3-7; Er. Ex. 31 at 41; Jt. Ex. 10 at "Student-Athlete Name and Likeness Release"; Tr. 155:2.

But Northwestern refuses to acknowledge the players' status as employees. Indeed, Northwestern denies that *any* student providing services to his school can "simultaneously be a student and an employee." Brief to the Regional Director on Behalf of the Northwestern University at 77. *See also* RFR at 33 (asserting that "students who perform services at the university in which they are enrolled [cannot] fall within the definition of an employee under the Act"). That is the purest legal fiction. *Of course* an individual can be both a student and an employee. *See Boston Medical Center Corp.,* 330 NLRB 152, 164 (1999) ("[W]e do not believe that the fact that house staff are also students warrants depriving them of collective bargaining rights"). Northwestern's entire position in this case is a castle built on sand.

In a meticulous and carefully reasoned decision, the Regional Director determined that the players satisfy the common law test of employee status mandated by *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995), under which an employee is a person who performs

services for another subject to the other's right of control, in return for payment. DDE at 13-18. And the Regional Director cogently explained why the players cannot be denied the status of employees under the Act on the ground, urged by Northwestern, that they are "primarily students." *Id.* at 18-20.

Northwestern begins its Request for Review with an *ad* hominem attack on the Regional Director that is as unfounded as it is strident. The University claims to have identified numerous instances in which the Director "committed prejudicial error by mischaracterizing and slanting relevant facts" or by "ignoring relevant facts." RFR at 13, 15. But Northwestern is wrong as to every one of those accusations. *See infra* at 5-14.

On the legal issues, Northwestern maintains that "[t]he common law test [of employee status] does not apply to students enrolled at the university." *Id.* at 19. Relying on *Brown University*, 342 NLRB 483 (2004) – a decision as to which the Board has perceived "compelling reasons for reconsideration," *New York University*, 356 NLRB No. 7 (2010)[1] – Northwestern argues that whether an individual has rights under the Act depends entirely on whether he is "primarily" an employee or "primarily" a student. RFR at 36. And in Northwestern's view, whenever an individual providing services is enrolled as a student, the Board must conclude that he is *primarily* a student. *Id.*

The Regional Director's conclusion that the common law test of employee status is satisfied here does not warrant review, because Northwestern did not dispute that point in its brief to the Director and its new arguments are insubstantial. *See infra* at 15-18. The only substantial disputed question in this case is whether (or in what circumstances) individuals who perform services for their university must be denied the right to organize and bargain collectively

[1] *See also New York University*, 2012 WL 2366171 (NLRB June 22, 2012) (same).

even if they would be employees at common law, on the ground that they are "primarily" students.

If review is granted, consideration of that question should include whether the majority in *Brown* was correct in its analysis with respect to the kind of services that were at issue in that case – teaching duties performed by graduate students as part of their degree requirements. Among other issues, this would include reconsideration of the *Brown* majority's unexplained conclusion that, because a union of graduate students might at some point seek to bargain over core academic decisions, the right to bargain over *every other* aspect of their teaching duties should also be denied. *See infra* at 19-22. Only if the Board were to conclude that the *Brown* majority was correct in its analysis with regard to graduate student teaching functions would the question whether that analysis applies to *football* duties, which are *not* part of a student's core academic program, present itself. *See infra* at 22-24.

Northwestern also makes irrelevant "policy" arguments against allowing college football players to organize, which are nothing more than complaints that unionization might be bad for the business of college football. Even if those fears were not exaggerated out of all proportion, they would have no more legal weight here than in other contexts where employers may resist unionization. If the Board grants review, those issues should be excluded. *See infra* at 24-27. The same is true of Northwestern's contentions (RFR at 46-48) that the players are "temporary" employees and that the petitioned-for-unit is inappropriate. *See infra* at 27-29.

I. NORTHWESTERN HAS NOT ESTABLISHED GROUNDS FOR REVIEW OF THE REGIONAL DIRECTOR'S FACTFINDING

The Board's review of the Regional Director's factfinding in a representation case is confined to "*substantial* factual issue[s]" as to which it appears that a "*clearly erroneous*"

finding has "*prejudicially affect[ed] the rights* of a party." Rules and Regulations § 102.67(c) (emphasis added). Northwestern's attack on the Regional Director's factfinding, although expressed with vehemence, does not to satisfy those standards.

Many of the supposed errors and omissions of fact Northwestern attributes to the Regional Director do not qualify for review under Rule 102.67(c) even on their face, so we will not waste the Board's time with a point-by-point rebuttal. [2] Instead, we confine our response to matters raised by Northwestern that might appear at first blush to have some relevance. As we will show, on a fair examination of the record none of Northwestern's factual contentions holds up.

1. Northwestern suggests that the players receive football scholarships for some reason other than their commitment to play football. *Id*. at 7. That is not so. Prospective recruits for the football team are identified by the coaches based on their football ability, as

[2] For example, the University begins its list of supposedly "mischaracteriz[ed] and slant[ed]" findings by faulting the Regional Director for having merely "noted" that Northwestern's football program has the highest graduation rate of big-time college football programs. RFR at 6. Northwestern apparently feels that the Regional Director should have praised its support of the players' academic efforts more lavishly than he did. But the Regional Director cited several indicia of the players' academic success, *see* DDE at 13, and he pointed to "laudable" efforts on the part of the University "[t]o try to ensure that its players succeed academically," *id.* at 16. No more was required; the Regional Director was resolving a legal issue, not composing a Northwestern publicity piece. Similarly, when Northwestern turns to the "critical facts" that the Regional Director "completely ignored," it begins by complaining that the Regional Director failed to recite that "Northwestern is a premier academic institution recognized among private American research universities for its high quality educational programs" (RFR at 15) – as if anyone was unaware of this, and as if only students at universities that are not "premier" and whose educational programs are not "high quality" can be statutory employees. Northwestern also depicts as factual errors findings it concedes were factually *correct* but which it maintains should have led to a different *legal* conclusion. Thus, Northwestern makes much of the fact that the only distinction the Regional Director drew between walk-ons and scholarship players is that the former receive no compensation. RFR at 6-7. But Northwestern does not contend that other distinctions should have been noted; it simply quarrels with the legal significance of the fact that the walk-ons receive no compensation. Northwestern must lose that quarrel for the reasons we discuss *infra* at 29.

identified through a variety of sources including recruiting services, position coaches, alumni, and fans. Tr. 1169:11-1170:18, 1199. That identification can begin as early as the recruit's freshman or sophomore year of high school. Tr. 1170:9-12. Only after the recruit is identified as a potential candidate for the football team does the academic "vetting process" begin. Tr. 1170:19-22.

The scholarship offer explicitly states that it is made by "the Northwestern Football Staff and [Coach Fitzgerald]." Er. Ex. 5 at NU000967. It further states that the Player "understand[s] this tender may be immediately reduced or canceled" if he becomes "ineligible for intercollegiate competition" or "voluntarily withdraw[s] from [the] sport at any time for any reason." *Id.* at NU000971. In the hearing, the scholarship players confirmed that their scholarships were for playing football. Tr. 145:11-14 (Colter) (scholarship was awarded to him "[t]o play football, to perform the athletic service"); Tr. 1314:24-1315:6 (Ward) ("The scholarship itself was for athletic purposes.").[3] Northwestern witnesses confirmed that an individual must remain on the football team to continue to receive a football scholarship. Tr. 576:24-77:3, 768:11-19.

2. Former Northwestern co-captain Kain Colter's testimony regarding the amount of time the players are required to devote to football was not, as Northwestern suggests, RFR at 7-8, confined to Colter's individual experience. Colter has direct personal knowledge of the time required *generally* of the players,[4] and his testimony is confirmed by schedules prepared by

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[3] Northwestern makes much of the fact that if a player is injured or benched, it is theoretically possible that he could receive his scholarship even if "[he] does not play in a single football game." RFR at 16. But professional athletes also may receive pay in such situations. Tr. 423:8-424:1, 441:6-19**.** This kind of income protection is not inconsistent with an employer-employee relationship.

[4] Colter, who is a founding member of CAPA, played football at Northwestern for four seasons, was a team co-captain for his last two years, and served on the team's leadership council. Jt. Exs. 2, 7; Tr. 57:3-8, 58:25-29:4.

Coach Fitzgerald which reflect the players' daily schedule of mandatory football activities. Jt. Ex. 18; Tr. 1102:17-1103:9, 1111:2-1112:4. Northwestern witness Janna Blais corroborated Colter, agreeing that "when you aggregate the amount of hours that Mr. Colter talked about that were mandatory – the travel, the games, the meetings, the practices" – Colter's time estimates were reasonable. Tr. 996:17-997:2.

Northwestern suggests that Colter's testimony is rebutted by NCAA rules limiting the time to be spent on certain football activities. *See* RFR at 8. But the University's own witnesses admitted that the NCAA rules omit many hours the players are required to work. Tr. 509:16-17, 567:4-568:10, 573:7-10, 1126:5-21. For example, the NCAA rules state that football activities on a game day are to be reported as only three hours. Tr. 567:14-16. But the evidence shows that even if the game itself may last only three hours (although games sometimes run longer), the players spend an additional four to ten hours on scheduled football activities *before the game even begins*. Tr. 116:12-17, 1123:22-1124:2; Jt. Ex. 18 at NU001259, 1267, 1276, 1284, 1292, 1302, 1306, 1320, 1329, 1343, 1347, 1443, 1450, 1460, 1473, 1482, 1492, 1500, 1509, 1525, 1532, 1542. Similarly, none of the time spent on required football activities during the August training camp period is counted under NCAA rules. Tr. 514:13-17. The Regional Director correctly based his decision on the evidence demonstrating the actual time spent by the players on football activities, rather than the NCAA rules that omit much of that time. DDE at 6 n.11, 8 n.17.

3. Northwestern's attack on what it describes as "[t]he Regional Director['s] . . . conclusion that . . . [the players] spend more time engaged in football-related activities than they devote to academic pursuits," RFR at 8, is misguided. The Director did not rely on any such

conclusion, although the record supports it.[5] The Director recognized that the enormous time commitment required by the players' football duties is relevant in showing that these are duties of *employment*. But only Northwestern, not the Director or CAPA, suggests that the players' legal status under the Act depends on whether the hours they are required to devote to football are greater or less than the hours they devote to academics. And employee status certainly does depend on whether the time the players spend on the various activities that Northwestern mistakenly characterizes as "voluntary"[6] is spent "at the expense of academic pursuits, as opposed to other leisure activities." RFR at 8.

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[5] The Director's findings regarding the time the players devote to football duties, *see supra* at 1, are supported by the record. *See* Jt. Ex. 18 at NU001221-1386, 1405-1533; Tr. 70:17-22, 71:5-12, 117:21-118:6, 995:5-21, 996:17-997:2, 1125:17-1126:16. The time devoted to football over the course of the year clearly exceeds the approximately 20 hours a week the record shows players spend attending class, Tr. 176:14-18, and Colter testified that players spend "a lot more time dedicating ourselves to football, performing football activities…than academics." Tr. 177:7-15. While Northwestern now attempts to cite a study that the "average" undergraduate student – whoever that may be – spends 14-19 hours studying outside of class, RFR 8-9, the record contains no evidence as to the number of hours Northwestern football players spend on their studies. Moreover, while Northwestern claims that the Regional Director "did not fully account for the fact that the academic year covers nine months whereas the football season is only four months long, including training camp," RFR 9, in fact it is Northwestern that ignores the fact that players continue to have mandatory football-related duties throughout the offseason. Jt. Ex. 18 at NU001390, 1535-36 (winter workouts); NU001390 (Winning Edge); NU001390-1392, 1536-1538 (spring football); NU001392-1394 (spring workouts); NU001395, 1397-98 (summer workouts); Tr. 74:2-5, 77:14-16, 78:21-24, 79:3-8, 86:2-5.

[6] The three categories of assertedly "voluntary" activities – additional study of film, "7 on 7" drills, and strength and conditioning workouts during the NCAA-mandated "discretionary" weeks – are activities that are directly connected to the players' core job duties and in which the players are expected to participate. The film that the players watch in the evenings is prepared by administrative staff within the football program, which has its own video department that is responsible for filming every practice and uploading these videos to a database accessible from computers in the football facility. Tr. 141:9-13, 1022:7-9; Jt. Ex. 17 at 10. The players watch this film at the football facility with their teammates for the purpose of improving their football performance. Tr. 104:5-107:4, 140:19-141:20. During the season, the players also watch film of their opponents to prepare for the upcoming games by studying their opponents' tendencies and the type of plays they run. Tr. 106:13-107:4. Similarly, team leaders are responsible for running the "7 on 7" drills to help train younger team members and get them prepared for the upcoming

4. Northwestern misstates the evidence as to how conflicts between class schedules and practice are addressed. RFR at 9-10. While Northwestern asserts that "academics at the University always takes precedence over athletic activities," *id.* at 34, the record shows otherwise. Northwestern witness Blais confirmed that Northwestern's academic advisers "help [the Players] stay away from" courses that would conflict with practice, Tr. 841:15-20, and that the timing of football practice determines "[the] class options [the Players may] select from," Tr. 842:15-843:2. Colter testified that, other than during the summer, "you're basically just not allowed to schedule things early in the morning that would conflict with football," Tr. 144:4-11, and thus players "were not allowed to" schedule a class before 11:00. Tr. 137:8-10, 144:4-11; *see also* Tr. 143:7-144:11, 169:4-170:2, 172:5-17, 222:6, 223:1. Former player Ward, called to testify by Northwestern, also stated that he did not schedule classes that conflicted with practice during the season. Tr. 1302:17-19.

Northwestern emphasizes Coach Fitzgerald's decision to move practices from the afternoon to the morning, RFR at 9, 34 n.18, but fails to understand the import of that decision. Coach Fitzgerald explained that he made this change because he "wanted to try to get our class-missed opportunities mitigated," and since there were fewer classes scheduled in the mornings, moving the practice time would "*allow* our young men to take more classes." Tr. 1040:11-

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season. Tr. 66:25-67:3, 83:13-84:4, 86:6-18. As for the "discretionary" workouts, all of them take place at the football facility; the strength and conditioning coaches prepare instructional sheets for the players with the exercises they can perform; those coaches are permitted to monitor the workouts; and obtaining "high attendance" at these workouts was a topic of discussion at the players' leadership council meetings run by Coach Fitzgerald. Tr. 80:20-23, 130:1-14, 133:5-14, 304:6-22; 620:15-18, 621:16-622:3, 1116:3-23; Pet. Ex. 7. Indeed, Coach Fitzgerald acknowledged that one of his goals in creating the leadership council was to develop a process by which team leaders would exert influence on their teammates "to improve…the running of the program," Tr. 1116:8-18; and peer influence was in fact used to ensure high attendance at discretionary workouts, Tr. 306:19-307:10 (Colter).

1041:1 (emphasis added). That testimony shows that *football* takes precedence, and players are expected to schedule their classes around football practice. Indeed, Northwestern's documents show that football players rarely schedule any morning classes at all, except notably on Fridays when there is no practice. Jt. Ex. 22; Tr. 848:24-849:2. Northwestern official Blais could identify only a single instance in which a scholarship player scheduled a class earlier than 11:00 on any practice day. Tr. 1007:1-9.[7] This is not surprising, for as Blais explained, the occasions on which a football player is permitted to "take [a] class [that conflicts with practice] and our coaches work around it" are limited to circumstances where the course is "a requirement" and the player cannot "reasonably" take that course in the summer. Tr. 841:24-842:6.

The testimony of former player Pace confirms how limited are the circumstances in which accommodations are made that permit a player to be excused from any of his football duties. Pace needed to take a 9 a.m. class or he would not "be able to graduate and keep on track." Tr. 1272:19-21. Pace was a "long snapper," and "all the team duties as a long snapper start at the beginning of practice." Tr. 1272:24-1273:1. In addition, he needed only one team member to be present in order to perform his drills. Tr. 1284:17-1285:11. Under those circumstances, Coach Fitzgerald allowed Pace to leave practice early after he first completed his "team duties," but only "on the promise that [he] would come back and do individual drill work later in the day, which [he] always did." Tr. 1273:2-7.[8]

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[7] Classes that begin at 11:00 do not present a serious conflict because, as Coach Fitzgerald explained, practice typically starts at 6:50 am "and then we're typically done at 10:30, from a meeting standpoint." Tr. 1041:17-18.

[8] The record also reveals only one instance in which a player was excused from a week of practice because he had fallen behind academically. Tr. 1061:8-1062:7.

In short, to the very limited extent that any accommodations are made when football duties conflict with class obligations, they represent the kind of flexibility common to many employers and do *not* suggest that the players are not employees.

5. Northwestern attempts to deflect the force of the fact that a player loses his scholarship (that is to say his pay) if he voluntarily withdraws from the football team or is removed from the team for a severe infraction of team rules, arguing that these "non-renewal and cancellation provisions are not akin to employment 'terms and conditions'" because they are specified by NCAA rules. RFR at 11. *See also id*. at 16-17. But the NCAA is a voluntary association, of which Northwestern is a voluntary member. The rules that specify when Northwestern's players will lose their jobs and their pay are terms and conditions of employment whether Northwestern formulates them on its own or by agreement with the NCAA.

6. Northwestern asserts that Director "misstated the decision-making process" involved in the two most recent occasions on which players lost their scholarships due to misconduct. RFR at 11. But it is Northwestern that misstates the evidence. The University suggests that the two players wished to transfer to other schools, when in fact Northwestern's football authorities told them, in effect, to resign or be fired.[9] And Northwestern's assertion that "the two non-renewals were for violations of rules applicable to *all* Northwestern students," RFR at 12 (emphasis in original), is contrary to the testimony of its own witness who, when asked what type of misconduct was involved in the most recent case, responded that it was "[v]iolation of *team* rules." Tr. 741:14 (emphasis added).

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[9] On questioning from the Hearing Examiner, Coach Fitzgerald admitted that in both instances, prior to the decision being made by University administration to cancel the player's scholarship, he was asked to provide his recommendation, and in both instances, his recommendation was followed and the scholarships were "cancelled or not renewed." Tr. 1045:5-17,1175:6-1176:3.

7. Claiming that the Director characterized the academic support programs provided to the players by the University as "additional *athletic duties,*" Northwestern portrays this as "powerfully show[ing] the Regional Director's distortion of the record." RFR at 13. But the Director did *not* characterize the academic support programs as "additional athletic duties;" he simply made the accurate observation that the players' *need* for those academic support programs is a result of "the extraordinary time demands placed on the[m] by their athletic duties." DDE at 16-17.

8. Northwestern does not dispute the Director's finding that the football program has generated revenues of approximately $235 million over the past nine years. *See* DDE at 14. Northwestern's own reports show that those revenues exceeded football expenses by $76.3 million over that period, Tr. 371:15-16; Pet. Ex. 5 at 5-6; Pet. Exs. 6a-6b,[10] even after Northwestern paid the head football coach approximately $2 million per year, Tr. 696:10-20**.**

Northwestern does, however, criticize the Director's observation that it can "utilize this economic benefit provided by the services of its football team in any manner it cho[oses]," RFR at 14, quoting DDE at 14, on the ground that it uses its football profits to subsidize other sports. RFR at 14. [11] But that is merely the "manner [Northwestern] chooses" to use the money. To be sure, Northwestern claims that there is one thing it could *not* do with its football profits, which

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[10] Northwestern attempts to muddy the waters by noting that the Athletic Department incurs certain expenses that are not allocated to particular sports. RFR at 18. However, unallocated *revenue* exceeds unallocated *expenses.* S*ee* Er. Ex. 11 at NU 001962-1963. There is no evidence to suggest that if it were possible to attribute the unallocated items to particular teams, the unallocated *expenses* attributable to football would exceed the unallocated *revenues* attributable to football. In this connection, Northwestern's assertion that $3.4 million in gameday expenses attributable to football is placed in the unallocated category, RFR at 18, is false. That cost is allocated to the football program. *See* Er. Ex. 11 at NU 001961.

[11] The fact that Northwestern's Athletic Department "operates at a loss" while the football program operates at a substantial profit, RFR at 18, simply demonstrates the great value to the University of the unique profit center that is the football program.

would be to spend all of the money to increase scholarships for male athletes. *Id.* That is not so clear, *see infra* at 26, but in any event it does not detract from the point the Director was making: through the players' services, Northwestern receives direct financial benefit in excess of many millions of dollars per year, as well as other benefits that are "[l]ess quantifiable but also of great benefit to the Employer." DDE at 14.

9. Although the Director acknowledged that "the players undoubtedly learn great life lessons from participating on the football team and take with them important values such as character, dedication, perseverance, and team work," DDE at 19, Northwestern complains that he should have treated such work experience as part of the University's *academic* program. *See* RFR at 15-16. But "life lessons" conveyed by coaches (who are not members of Northwestern's faculty) are not matters on which the players are graded, and play no part in earning a degree. Tr. 173:4-10, 174:11-23, 178:9-13, Tr. 608:25-609:6, 636:22-637:6. Furthermore, such "life lessons" are as much a part of an *employment* relationship as an academic one. Tr. 174:18-23 (Colter) ("Performing any type of job helps build . . . these human values . . . . They didn't help me get my psychology degree."); Tr. 1139:25-1141:3 (Fitzgerald) (life lessons he imparts on his players are similar to those he learned from his boss while employed as an assistant coach).

10. In response to the Directors' finding that the players are subject to special rules that do not apply to the student body, *see* DDE at 4-5, Northwestern asserts that "[t]he majority of the rules in the football team handbook mirror rules that are applied to all students at Northwestern." RFR at 17. Northwestern thus acknowledges indirectly that many of the team rules do *not* "mirror" general student rules.

Moreover, many of the rules Northwestern cites are in fact much more stringent for the football players than for the student body. For example, football players are subject to a social

media policy, separate from the policy applicable to students, which is enforced by the Athletic Department. Jt. Ex. 17 at NU00158-164; Tr. 151:7-152:8. Without any basis, Northwestern refers to this policy as "mere[]… guidelines," RFR at 12, when the policy contains detailed provisions governing what players may and may not post, including a list of "words and/or phrases not permitted anywhere on your networking page," Jt. Ex. 17 at NU000160, and states that players "*must* provide full access to members of your coaching staff and/or selected members of the Athletics Department for any and all personal online networking pages," *id.* at NU000159 (emphasis in original); Tr. 152:9-21, 153:12-154:12. Violations of this policy can result in a variety of sanctions, including "dismissal from the program, and loss of athletics aid." Jt. Ex. 17 at NU000160, 161; Tr. 625:22-626:10.

Players also are subject to a separate drug and alcohol policy in addition to the policy applicable to the regular student body, including mandatory random drug testing. Tr. 164:9-14, 1082:6-10; Jt. Ex. 10; Jt. Ex. 22 at 141. Unlike regular students, players' communications with the media are controlled by the Athletic Department. Players must make media appearances as directed by the University, Tr. 117:10-16, 1083:8-14; Jt. Ex. 17 at NU00177, and are prohibited from providing any media interview unless arranged by the Athletic Department, Jt. Ex. 17 at NU00179; Tr. 1083:8-14. Players must get approval from the Athletic Department before they can work anywhere else. Tr. 192:22-193:11, 1083:15-21. A player who wants to transfer to another school to play football must sit out a year before he can compete for the new school. Jt. Ex. 22 at 170. Each player must relinquish all rights to any compensation from the use of his name, image, and likeness. Jt. Ex. 10 at "Student-Athlete Name and Likeness Release"; Tr. 157:12-158:9, 1081:23-1082:5. None of these restrictions is "mirrored" in the rules for the regular student body.

* * * *

In sum, Northwestern's criticisms of the Regional Director's factfinding are wrong at every turn and provide no basis for review.

II. THE REGIONAL DIRECTOR'S CONCLUSION THAT THE PLAYERS ARE EMPLOYEES UNDER THE COMMON LAW TEST DOES NOT WARRANT REVIEW

A. In *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995), the Supreme Court explained that a determination as to employee status under the Act must begin with the ordinary meaning of the term "employee," as reflected in the common law doctrine of a master-servant relationship. *Id.* at 89-94. And the inquiry normally stops at that point, because, "when Congress use[s] the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] ter[m],' which is "the conventional master-servant relationship as understood by common-law agency doctrine.'" *Id.* at 94 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)). In short, there is a "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Darden*, 503 U.S. at 325. *See Roadway Package Sys., Inc.,* 326 NLRB 842, 849 (1998) (*Town & Country* and *Darden* "teach us not only that the common law of agency is the standard to measure employee status but also that [the Board has] no authority to change it").

The Board "often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." *Town & Country*, 516 U.S. at 90. Consequently, in resolving employee status, there may be occasions where the policies of the Act call for a "departure from the common law of agency with respect to particular questions and in a particular statutory context."

Id. at 455. But the starting place is the common law of agency, and a party seeking to have the Board depart from that law must point to a basis in the statutory policies for any departure.[12]

B. In its brief to the Regional Director, Northwestern did not argue that the players are not employees under the common law test. Rather, the University argued that the common law test is irrelevant. *See* Northwestern's Brief to the Regional Director at 51-52. Northwestern likewise argues here that "the common law test does not apply." RFR at 19. Although Northwestern also now asserts in the alternative that the players would not be employees "even if the common law test applied," *id.* at 21, its contentions are insubstantial.

1. The Regional Director stated, and Northwestern does not dispute, that, "[u]nder the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." DDE at 13, quoting *Brown*, 342 NLRB at 490 n.27. The Director's decision clearly establishes that the players perform extensive services for the University under the comprehensive control of the coaching staff, in return for payment in the form of a scholarship that is dependent on the player not withdrawing from the team or being removed for misconduct. *See* DDE at 14-17. That establishes employee status under the common law test.

2. Northwestern's contentions in response are without substance.

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[12] Northwestern is incorrect in asserting that the Regional Director "committed prejudicial error in placing the burden of proof on the employer." RFR at 3. The Director found that the evidence supports CAPA on all relevant points. CAPA therefore would prevail no matter how the burden of proof were assigned. Second, where an employer argues that an individual is not a statutory employee because the individual falls into some other category – here, "primarily an employee" – the employer has the burden of justifying the exclusion. *See, e.g., BKN, Inc.,* 333 NLRB 143, 144 (2001) (in determining whether an individual is a statutory employee or an independent contractor, "the party asserting that an individual is an independent contractor has the burden of establishing that status").

a. Northwestern suggests that the word "hire" connotes some formality that is absent here. *See* RFR at 21-22. That is not so. A "contract of hire" is "an agreement in which an employee provides labor or personal services to an employer for wages or remuneration or other thing of value supplied by the employer." *Daleiden v. Jefferson City. Jt. Sch. Dist. No. 251*, 80 P.3d 1067, 1070 (Idaho. 2003), quoting Larson, *The Law of Workmen's Compensation* 47.10 at 8 (1973). The term simply connotes that there is an agreement as to the remuneration or "other thing of value" that the employee will receive for his services. [13] That is established here. Northwestern's football scholarships are offered by "the Northwestern Football Staff and [the Head Coach]," Er. Ex. 5 at NU00967, on a form the player must sign which specifies what he will receive, on condition that he participate in the football program. *See supra* at 6.

b. Northwestern extols its "holistic[ ]" view of the relationship between football and academics. RFR at 23. That characterization is off the mark, *see supra* at 12; *infra* at 23, but in any event, it has nothing to do with the common law test of employee status.

c. Northwestern argues that its football scholarships cannot be payment for services because a player may continue to receive the scholarship if he does not play due to injury or poor performance. RFR at 24-25. But professional athletes likewise often are paid while injured or benched. *See* note 3 *supra.* What is significant is that a player will not continue to receive his scholarship if he voluntarily withdraws from the team or is removed for misconduct. Thus, the

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[13] It also should be noted that Restatement (Second) of Agency § 2(2) does not use the words "contract" or "hires," but defines a "servant" simply as "an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Courts and commentators have noted that the elements of "contract" or "hire" are not essential to employee status at common law, but are additional elements found in workers' compensation statutes that adopt a narrower definition of "employee." *See Hubbard v. Henry*, 231 S.W.3d 124, 129 (Ky. 2007) ("[U]nlike the common law of master and servant, most compensation acts impose 'contract' and 'hire' requirements as pre-requisites to employee status"); *Daleiden*, 80 P.3d at 1070 (same).

scholarship is payment for services, albeit with income protection for players who are injured or benched. That the payment takes a form that is not taxable, *see* RFR at 27, is beside the point. Many forms of employee benefits, such as insurance and tuition reimbursement, are not taxable. *See* I.R.C. § 117(d) ("gross income shall not include any qualified tuition reduction" provided "to an employee of [a university]").

d. The common law test requires that the employer has "control or right of control" over *the performance of services* by the employee. Northwestern does not dispute that the players' performance of their football services is under the control of its coaches. *See* DDE at 15-16. And the University's assertion that "there is no other way a functioning football team can operate," RFR at 29, misses the point. If a "functioning football team" provides its members with payment and requires that they perform exacting duties under the coaches' control, then that team, like an NFL team, is "operat[ing]" through an employer-employee relationship.

Northwestern argues that some of the *conduct* rules the Regional Director cited are similar to rules applicable to its students generally. *See* RFR at 30-31. But, as we have shown, *supra* at 13-14, many of the conduct rules applicable to the players *as players* are far more restrictive and demanding than the rules applicable to students *as students* – with the differences being calculated to serve the interests of the football business.

In short, the players are employees under the common law test. Northwestern's contentions to the contrary, were not advanced to the Regional Director, are without merit and do not warrant review.

III. NORTHWESTERN'S ARGUMENT THAT THE PLAYERS CANNOT BE EMPLOYEES UNDER THE ACT BECAUSE THEY ARE "PRIMARILY STUDENTS" IS BASED ON THE UNTENABLE DECISION IN *BROWN UNIVERSITY*, WHICH SHOULD BE OVERRULED, BUT NORTHWESTERN'S ARGUMENT WOULD LACK MERIT EVEN IF *BROWN* WERE REAFFIRMED

Northwestern's primary contention, invoking *Brown University*, is that the common law test does not apply to "students enrolled at a private college or university, who also perform services for the institution," RFR at 19, and that the only question to be considered in such a case is whether the individual is "primarily" an employee or "primarily" a student, *id.* at 36. Under Northwestern's theory, that question must *always* be answered in the employer's favor. *Id.*

A. Northwestern never explains why, if an individual is both an employee and a student – a situation that exists even though Northwestern would have the Board adopt the legal fiction that it cannot – his employee status must be disregarded and only his student status honored.

There is no logic in such a position. If an individual works 30 hours a week as a laborer on a university grounds crew and is paid for his labors, is he not an employee merely because the university may offer those positions only to enrolled students? Does his employee status depend on whether the time he devotes to his classes and studies is less than the 30 hours a week he spends on the grounds crew? Does it depend on whether he considers it important to do a good job as a member of the grounds crew? Does it depend on whether he is concerned about the safety hazards to which his labor exposes him, and about whether he is fairly compensated? Does it depend on whether the university's president has declared that part of the university's mission is to instill in its students a respect for the dignity of physical labor and to cultivate the life skills of performing mundane duties without complaint and working as part of a team? *Cf.*

RFR at 33-34 (quoting the statement of Northwestern's President that "the educational mission of the University" includes "develop[ing] the ability to work with others as a team, [and] to accept the discipline of sustained [duties]").

Northwestern cites *San Francisco Art Institute*, 226 NLRB 1251 (1976), in which a divided Board refused to approve a unit of art school students who worked for their school as part-time janitors. Stating that "the resolution of this question turns on whether the student janitors manifest a sufficient interest in their conditions of employment to warrant representation," *id.* at 1252, the Board majority answered that question in the negative, concluding that the students had only a "very tenuous secondary interest . . . in their part-time employment," *id.*[14] Members Fanning and Jenkins dissented, finding that "the student janitors have a sufficient interest in employment to warrant their inclusion in a unit for collective-bargaining purposes." *Id.* at 1254.

If an inquiry into the "sufficien[cy]" of students' "interest in their conditions of employment" as undertaken in *San Francisco Art Institute* were considered a proper test, Northwestern's football players have an interest in their employment that vastly exceeds the interest of art students in janitorial duties. But that standardless and subjective inquiry is *not* appropriate; and *Brown University*, on which Northwestern relies, did not rely on *San Francisco Art Institute.*

The *Brown* majority engaged in a different analysis, directed at a different issue. *Brown* involved a situation where "individuals are rendering services which are directly related to – and indeed constitute an integral part of – their educational program." 342 NLRB at 489 (quoting *St.*

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[14] Northwestern's assertion that the Board found the student janitors to be "temporary" employees, *see* RFR at 5, 47, is incorrect. *See infra* at 28-29.

Clare's Hosp., 229 NLRB 1000, 1002 (1977)).[15] The teaching duties of the graduate assistants who were seeking to organize were "part and parcel of the core elements of the Ph.D. degree." *Id.* at 488. "[F]or a substantial majority of graduate students, teaching [wa]s so integral to their education that they w[ould] not get the degree until they satisf[ied] that requirement." *Id.* In most cases, the graduate assistants' teaching was supervised by the faculty of the academic department in which the assistants were earning their degrees. *Id.* at 489. Furthermore, the teaching duties involved "only a limited number of hours" on the students' part. *Id.* at 488.

Because the assistants' teaching functions constituted part of their core academic program, the majority reasoned that bargaining with respect to the teaching would "subject[ ] educational decisions to [the bargaining] process," *id*. at 489, and "[such] collective bargaining would unduly infringe upon traditional academic freedoms," *id.* at 490*,* which "includes the right of a university 'to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught,'" *id.* at 490 n.26 (quoting *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter J., concurring)).[16]

The Board has recognized that there are "compelling reasons for reconsideration of the decision in *Brown*." *See supra* at 3. We believe that *Brown* is erroneous in numerous

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[15] *Brown* expressed reservations as to other aspects of the analysis in *St. Clare's Hospital*. *See* 342 NLRB at 490 n.25.

[16] As the majority put it, *id.* at 490:

> 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 locations, 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.

fundamental respects, several of which were noted in the dissent of Members Liebman and Walsh, 342 NLRB at 493-500.

One is the majority's failure to explain why, if collective bargaining with respect to graduate students' teaching duties might potentially involve academic decisions, the graduate students should be denied the right to organize and to bargain over matters that do *not* involve academic decisions. Academics is not the only area in which the Act recognizes "an employer's need for unencumbered decisionmaking" as to certain subjects. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Normally, that need is satisfied by defining the mandatory subjects of bargaining in a way that gives due weight to the employer's interests. *Id. See also Peerless Publ'g,* 283 NLRB 334, 336 (1987) (explaining that subjects of bargaining may be restricted in order to preserve a newspaper's right to promote "editorial integrity"). To deny the right to organize altogether out of concern that employees might at some time seek to bargain over matters the employer should be free to decide unilaterally is to throw the baby out with the bathwater. *Brown* articulates no reason why this should be done.

Accordingly, if review is granted, the Board should reconsider *Brown's* analysis at the most fundamental level. Only if the Board were to conclude that the *Brown* majority reached the right conclusion with regard to duties that are "part and parcel of the core elements of the . . . degree," 342 NLRB at 488, would it become necessary to decide whether that conclusion should be extended to duties, such as those at issue here, that are *not* part of a student's degree requirements.

B. Apropos of that question, Northwestern claims that football is "just one of the 480 co-curricular opportunities that Northwestern offers its students," RFR at 15, and the University proclaims that what it calls these "co-curricular opportunities" are connected "holistically" with

the academic program. But the document Northwestern cites – its Undergraduate Catalog – refers to these as "*extra*curricular," not "*co*-curricular," activities. Jt. Ex. 28 at NU002380 (emphasis added). Northwestern's semantical move speaks volumes as to what is an absence of any real connection between the 480 *extra*curricular activities and Northwestern's academics.

Whatever adjectives Northwestern may seek to apply to the relationship between football and the "high quality educational programs" of this "premier . . . research universit[y]," *see supra* at 1, playing football is not an "integral part of . . . the[ ] educational program" at Northwestern, *Brown*, 342 NLRB at 489, and the football operations do not involve the kinds of "genuinely academic decision[s]," *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985), into which courts and agencies hesitate to intrude, which were the majority's concern in *Brown*. *See also Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2419 (2013) ("some . . . deference" was owed to a university's "academic judgment," but not to other decisions by the university); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547 (3d Cir. 1980) ("[i]t does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution").

The most that Northwestern can say is that participation in football can impart "life lessons" or "life skills." As much as Northwestern may believe that these comport with its academic mission, the record establishes that imparting such lessons and skills is, if anything, more the hallmark of a job than of an academic program. *See supra* at 13. That is not to denigrate such lessons or skills – because, after all, employment is not less worthy than education. But *Brown,* assuming *arguendo* it was rightly decided, was concerned with preserving a university's academic freedom with respect to *degree requirements* and *core*

academic decisions, not with everything a university might declare to be part of the "holistic" experience it offers to its students.[17]

Seeking a "student employee exception" to the Act, Northwestern reaches far beyond *Brown*. *Brown* was wrong, but Northwestern would be wrong even if *Brown* was right. If the Board grants review, *Brown* should be reconsidered. Only if the Board were to reaffirm *Brown* would it be necessary to consider whether *Brown* should be extended to the very different context presented here. As we have shown, it should not.

IV. NORTHWESTERN'S "POLICY" ARGUMENTS HAVE NO CONNECTION WITH THE ACT AND PRESENT NO GROUNDS FOR REVIEW

Northwestern faults the Regional Director for having "fail[ed] to consider" various "policy" arguments. RFR at 39, 41, 43, 44. But those arguments have nothing to do with employee status under the Act. At bottom, Northwestern asks the Board to deny the players their statutory rights because it fears that bargaining may be harmful. The fears are false and exaggerated, but employers – even universities – cannot be excused from the Act merely because they may think that bargaining would be bad for business.

1. Northwestern asserts that if only a few of the FBS schools were to end up with unionized football programs, this "would have a chaotic impact on the sport and the respective

[17] Furthermore, the *Brown* majority asserted that collective bargaining is predicated on "collective or group treatment" while "the educational process . . . is an intensely personal one." 342 NLRB at 489-90. Whatever relevance that distinction may have with respect to bargaining over truly academic decisions, it has no force with respect to football duties, which Northwestern itself extols as a *group* endeavor. And in *Brown* "the money received by [the graduate assistants who taught was] the same as that received by fellows [who did not teach]," 342 NLRB at 488, which the majority viewed as inconsistent with the proposition that those who taught were being paid for those services. Here, in contrast, scholarship football players receive what Northwestern describes as the equivalent of a "full ride," while students who do not receive a football scholarship receive only the amount of assistance that corresponds to with their demonstrated need, much of it in the form of a loan rather than a grant. *See* Er. Ex. 13 at 4-6.

universities' administration of the sport." RFR at 39. Northwestern and its NCAA partners may like the present system of uniform rules featuring fixed, capped pay for the players, but that business model (even assuming *arguendo* that it is not an antitrust violation) is not one that the Board has any statutory duty, or indeed any statutory authority, to promote at the expense of employee rights.

2. Northwestern's suggestion that holding the players to be statutory employees may or could render their scholarships taxable, RFR at 41-43, is unfounded. To the extent that a scholarship is "used for qualified tuition and related expenses," it is a "qualified scholarship" and is not taxed, unless it "represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction." IRC § 117(a), (b)(1), (c)(1). That language does not refer to whether a student is or is not an "employee," nor does it incorporate any terms or polices of the NLRA.

Whether a football scholarship is taxable turns on how the *IRS* – not the NLRB – construes the terms of the Internal Revenue Code and the principles and policies of the tax laws in determining whether a scholarship "represents payment" for "teaching, research, or other services" that are "required as a condition" for receiving the scholarship. The IRS is well aware that football scholarships are received in return for a commitment to play football, and has not regarded that fact as rendering the scholarships taxable under the applicable provisions of the Internal Revenue Code. That the players nevertheless should be found to be employees for purposes of the NLRA simply reflects that we are dealing with separate questions under two statutes that have different provisions and purposes.

3. Northwestern claims that "CAPA's objectives cannot be achieved by collective bargaining with Northwestern due to NCAA regulation." RFR at 43. While CAPA will not

endanger the players' eligibility by bargaining for terms that are prohibited by NCAA rules, there are many things, including safety protections, insurance and certain other financial benefits, that CAPA could negotiate without violating NCAA rules – which are in a process of change anyway. Tr. 291:25-293:3, 293:6-9.

Even where an employer has no authority to set compensation, collective bargaining is permitted. *Management Training Corp.*, 317 NLRB 1355, 1357-58 (1995). It is not for the Board to make an "assessment of the quality and/or quantity of factors available for negotiation." *Id.* at 1358. Rather, it is for the employees to "decide for themselves" whether they wish to engage in collective bargaining under whatever scope is available. *Id.*[18]

4. Northwestern argues that "extending collective bargaining rights to Northwestern football players will have Title IX ramifications." RFR at 44. The ramification Northwestern has in mind is that if collective bargaining were to produce benefits for the football players, Northwestern might have to provide such benefits to female athletes as well. *Id.* Northwestern's premise is wrong: Title IX does not require the kind of equivalence of benefits Northwestern is suggesting. The Department of Education recognizes that "differences . . . will occur in programs offering football, and . . . these differences will favor men." *See* A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413-71,416 (Dec. 11, 1979).[19] Indeed, the University already spends more on the football team than on all of its women's teams combined. *See* Er. Ex. 11 at NU001962.

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[18] Northwestern states that "nothing stops" CAPA from bargaining for compensation not permitted by NCAA rules. RFR at 43. But something *does* stop this: CAPA is a membership organization of and for the players, and it will never take steps that could cause its members to "lose their football team." RFR at 43.

[19] The cases Northwestern cites, RFR at 44, deal with rights of *participation,* not rights to *benefits*.

However, if Northwestern were correct that some of the gains achieved by a union of football players might be passed along to other athletes, it is often the case that collective bargaining leads to gains by some unrepresented groups. The Act does not exempt an employer from collective bargaining based on fears about what this might cost – fears that are unwarranted here, given CAPA's actual objectives.

Northwestern's suggestion that there is some kind of public policy that calls for enabling the University to make as large a profit as possible on its football operations in order to subsidize non-revenue sports, RFR at 45, is unfounded. It may be laudable that Northwestern offers many non-revenue sports. But there is no reason why the source of money to pay for those programs must be the football program, or why the University's desire to maximize its football profits must require minimizing the benefits the players receive. Northwestern has other sources of revenues, and the football program has other ways to save money. No public policy dictates that college football players should work to pay for the costs of a university's other athletic programs.

Thus, although CAPA has no intention of taking any steps that might jeopardize other sports at Northwestern, this is simply not a proper matter for consideration by the Board under the Act.

V. THE REGIONAL DIRECTOR'S DETERMINATION THAT THE PLAYERS ARE NOT TEMPORARY EMPLOYEES WHO SHOULD BE DENIED THE RIGHT TO ORGANIZE WAS PLAINLY CORRECT

The Director correctly found that the players are not "temporary employees" under the Act. The Director correctly relied on *Boston Medical Center*, 330 NLRB 152 (1999), which is right on point.

There, the Board rejected the employer's argument that its medical residents were temporary employees because they worked for a finite period, ranging from three to seven years depending on residency program. The Board held (350 NLRB at 166):

> [T]he Board has never applied the term "temporary" to employees whose employment, albeit of finite duration, might last from 3 to 7 or more years, and we will not do so here. In many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date. Athletes who have 1, 2, or greater years' length employment contracts are, theoretically at least, employed for a limited time, unless their contracts are renewed; work at a legal aid office may be for a set 2-year period; a teaching assignment similarly may be on a contract basis. To extend the definition of "temporary employee" to such situations, however, would be to make what was intended to be a limited exception swallow the whole.

Here, the scholarship players have employment ranging from three to five years, directly comparable to *Boston Medical Center,* where the Board described the employees as serving "for a set period of time," often only three years, after which "nearly all" of them left the employer. The Board's holding was that such employment was not "temporary" even though it was "of finite duration." 330 NLRB at 166.[20]

Contrary to Northwestern's assertion, the Board's earlier decision in *San Francisco Art Institute* did not refuse to approve the proposed unit of student janitors on the ground that they were "temporary employees." As we have discussed, *supra* at 20, that decision "turn[ed] on whether the student janitors manifest[ed] a sufficient interest in their conditions of employment to warrant representation." 226 NLRB at 1252. The majority cited several factors which (to the majority) *collectively* showed that the students had only a "very tenuous secondary interest . . . in their part-time employment." *Id.* As one of those factors, the majority "likened" the student

[20] As is clear from that reference to "finite duration," the Board's decision in *Boston Medical Center* was not based on the fact that a few individuals might stay on at the hospital after their residency concluded.

janitors to "temporary or casual employees." *Id.* "Temporary" and "casual" employees are two separate categories, and in "likening" the student janitors' situation to one or the other the Board was not holding that the student janitors were in fact either "temporary" or "casual" as those terms are used in Board law.

The Board's subsequent decision in *Boston Medical* is what controls, and that decision could not be clearer in holding that employment of the duration at issue here cannot be considered to be "temporary" so as to deny employees the right to organize.[21]

VI. THE PETITIONED-FOR UNIT IS APPROPRIATE

Because the Board has held that employee status cannot be found where an individual receives no compensation, *see WBAI Pacifica Found.*, 328 NLRB 1273 (1998), the Regional Director held that the unit could exclude walk-on players who are not receiving a football scholarship. DDE at 22. Northwestern asserts that this creates "an improperly fractured unit." RFR at 48. That contention is without merit. A unit is "fractured" only where it has been confined to "'an arbitrary segment' of what would be an appropriate unit." *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13 (2011). A unit including nonemployees would not be an appropriate unit.[22]

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[21] Whether an individual's employment is "temporary" such that the individual should not be included *in a unit with permanent employees* is a separate question not at issue here. Most Board cases involving 'temporary employee" status have presented only that separate question.

[22] If the walk-ons *were* considered employees – which Northwestern does not assert – it still would be the case that they stand on very different footing from the scholarship players as regards compensation. Even as among statutory employees, there is nothing arbitrary in drawing a unit "in accordance with methods of compensation." *Odwalla, Inc.,* 357 NLRB No. 132, slip op. at 6 (2011).

CONCLUSION

The Request for Review should be denied. In the alternative, if review is granted, it should be confined to the following questions:

1. Should *Brown University*, 342 NLRB 483 (2004), be overruled insofar as it held that "individuals [who] are rendering services which are directly related to – and indeed constitute an integral part of their educational program" cannot be "employees" within the meaning of the Act?

2. If *Brown University* is not overruled, should its holding be extended to college football players under the facts as found by the Regional Director?

Respectfully submitted,

s/ Jeremiah A. Collins

Jeremiah A. Collins
Ramya Ravindran
Bredhoff & Kaiser, P.L.L.C
805 15th Street., N.W., Suite 1000
Washington, DC 20005-2207

John G. Adam
Stuart M. Israel
Legghio & Israel, P.C.
306 S Washington Ave., Suite 600
Royal Oak, MI 48067-3837

Stephen A. Yokich
Cornfield and Feldman LLP
25 E. Washington St., Suite 1400
Chicago, IL 60616-8203

Attorneys for Petitioner College Athletes Players Association (CAPA)

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CERTIFICATE OF SERVICE

I certify that CAPA's Response to Request for Review of Regional Director's Decision and Direction of Election was served via email on April 16, 2014 to:

Alex V. Barbour
Anna Wermuth
Jeremy Glenn
Meckler Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, Illinois 60606
alex.barbour@mbtlaw.com
anna.wermuth@mbtlaw.com
jeremy.glenn@mbtlaw.com

s/ Jeremiah A. Collins