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

August 17, 2015

DECISION ON REVIEW AND ORDER

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

Introduction

In this representation case, the Petitioner asks the Board to find that Northwestern University's football players who receive grant-in-aid scholarships are employees within the meaning of Section 2(3) of the National Labor Relations Act and direct an election in a unit of these grant-in-aid players. The Regional Director agreed with the Petitioner, found that the grant-in-aid scholarship players are employees within the meaning of Section 2(3), and directed an election.[1] Because this case raises important issues concerning the scope and application of Section 2(3), as well as whether the Board should assert jurisdiction in the circumstances of this case even if the players in the petitioned-for unit are statutory employees, we granted Northwestern University's request for review and invited the parties and interested amici to file briefs addressing the issues.

After carefully considering the arguments of the parties and interested amici, we find that it would not effectuate the policies of the Act to assert jurisdiction in this case, even if we assume, without deciding, that the grant-in-aid scholarship players are employees within the meaning of Section 2(3). As explained below, we address this case in the absence of explicit congressional direction regarding whether the Board should exercise jurisdiction. We conclude that asserting jurisdiction in this case would not serve to promote stability in labor relations. Our decision today is limited to the grant-in-aid scholarship football players covered by the petition in this particular case; whether we might assert jurisdiction in another case involving grant-in-aid scholarship football players (or other types of scholarship athletes) is a question we need not and do not address at this time.

Background

On March 26, 2014, the Regional Director for Region 13 issued a Decision and Direction of Election in which he found that a petitioned-for unit of all football players receiving grant-in-aid athletic scholarships (scholarship players) from Northwestern University are employees within the meaning of Section 2(3) of the Act and that the petitioned-for unit is appropriate. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Northwestern filed a timely request for review, contending that the scholarship players are not statutory employees. The Petitioner filed an opposition. On April 24, 2014, the Board granted the Employer's request for review.

On May 12, 2014, the Board issued a notice and invitation to file briefs inviting the parties and interested amici to address issues raised by the Regional Director's decision. A broad range of interested parties filed briefs in response to the Board's invitation.[2] Northwestern and several of its supporting amici contend, among other things, that the Board should exercise its discretion to decline jurisdiction over college football or college athletics generally because it would not effectuate the purposes of the Act to assert jurisdiction over such activities. We conclude that the Board should decline jurisdiction, although we limit our holding to the particular circumstances of this case.

Summary of Facts

The facts—which are largely undisputed—are set forth in the Regional Director's decision (pertinent portions of

[1] The election was held on April 25, 2014. The ballots have been impounded.

[2] Northwestern and the Petitioner filed briefs, as did amici The American Federation of Labor and Congress of Industrial Organizations; American Association of University Professors, American Council on Education and Other Higher Education Associations; Association for the Protection of College Athletes; Baylor University, Rice University, Southern Methodist University, Stanford University, Tulane University, University of Southern California, Vanderbilt University, and Wake Forest University; The Big Ten Conference, Inc.; Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, University of Pennsylvania, Princeton University, Massachusetts Institute of Technology, Yale University, and Association of American Universities; Ellen Dannin, Attorney (an individual); Hausfeld LLP; Members of United States Senate Committee on Health Education Labor and Pensions and United States House of Representatives Committee on Education and the Workforce; Higher Education Council of the Employment Law Alliance; Michael Hoerger, PhD (an individual); J. Aloysius Hogan, Esq. (an individual); Alexia M. Kulwiec (an individual); Diana Lang (an individual); Labor Law Professors; Leech Tishman Fuscaldo & Lampl, LLC; Major League Baseball Players' Association, National Hockey Players Union, Major League Soccer Players Union, National Football League Players Association, and National Basketball Players Association; National Association of Collegiate Directors of Athletics and Division 1A Athletic Directors' Association; National Collegiate Athletic Association; National Right to Work Legal Defense and Education Foundation; University of Notre Dame, Trustees of Boston College, and Brigham Young University; and Sports Economists and Professors of Sports Management. Northwestern and the Petitioner also filed reply briefs.

which are attached as an appendix).[3] Northwestern is a university with its main campus in Evanston, Illinois. During the 2013–2014 academic year, about 112 athletes were on the football team, of whom 85 received a grant-in-aid scholarship. The scholarship is worth about $61,000 per year (or more, if the recipient enrolls in summer classes). The scholarship amount is calculated based on tuition, fees, room, board, and books, and the scholarship funds are directly applied to those expenses. As a result, none of the money is directly disbursed to the players, except that upperclassmen living off-campus receive a monthly stipend earmarked for their room and board (and disbursed to them in the form of a personal check).

The football team—along with Northwestern's 18 other varsity sports—is part of the Department of Athletics and Recreation. Head Coach Pat Fitzgerald oversees a staff of 13 assistant coaches; in addition, the team is supported by various other personnel, including strength and conditioning coaches, athletic trainers, video office personnel, and football operations staff. Fitzgerald reports to Athletic Director James J. Phillips, who in turn reports to Northwestern's president, Morton Schapiro.

Northwestern is a member of both the National Collegiate Athletic Association (the NCAA) and The Big Ten Conference (Big Ten). Its athletes compete under the auspices of these organizations, and the school's athletics program operates within certain constraints by which members of these associations agree to be bound. For example, the NCAA dictates the maximum number of grant-in-aid scholarships a school can award, caps the number of players who can participate in preseason football practices, sets the minimum academic requirements that football players must meet to remain eligible to play (including the requirements that players be enrolled as students, carry a full class load, and maintain a certain minimum grade point average (GPA)), controls the terms and content of the scholarship, defines amateur status that players must maintain (including prohibiting players from retaining agents or profiting from their names and likenesses), and regulates the number of mandatory practice hours that can be imposed on the players. The Big Ten further regulates how many players can travel to a football team's away games and also appears to dictate the wording in the scholarship "tender" that a player receives. This "tender" specifies that the scholarship award is subject to the player's compliance with the school's policies and NCAA's and Big Ten's regulations. Northwestern's football team competes in the NCAA Division I Football Bowl Subdivision (FBS), college football's highest level of play. At present, about 125 schools compete at that level. Only 17 of those schools—including Northwestern—are private colleges or universities, and Northwestern is the only private school in the 14-member Big Ten.

Scholarship players are required to devote substantial hours to football activities, but they are also full-time students. They receive no academic credit for their football endeavors. Although some players testified that they learned valuable skills and life lessons from playing football and consider Coach Fitzgerald to be a "teacher," playing football does not fulfill any sort of degree requirement, and no coaches teach courses or are part of the academic faculty.

Northwestern's football program generated some $30 million in revenue during the 2012–2013 academic year, although the program also incurred close to $22 million in expenses. Over a 10-year period ending in 2012–2013, the football program generated about $235 million in revenue and incurred roughly $159 million in expenses. That revenue was derived from ticket sales, Big Ten broadcast contracts, stadium rights, and merchandise sales.[4] According to Department of Athletics Chief Financial Officer Steve Green, although the football program generates net revenue, the Department of Athletics' overall annual expenses exceed revenues, and Northwestern must subsidize the department to balance its budget.

Analysis

The parties and amici have largely focused on whether the scholarship players in the petitioned-for unit are statutory employees.[5] If the players are not statutory em-

[3] The Regional Director's factual findings appear, in the main, to be fully supported by the record. We do not, however, agree with his statement that the players who do not receive grant-in-aid scholarships—the "walk-ons"—appear to have greater flexibility when it comes to missing football practice due to class conflicts during football season. Although former Northwestern football player Kain Colter testified to this effect, the record as a whole is inconclusive on this point. Because we are exercising our discretion to decline jurisdiction in this case, we need not pass on any of the legal conclusions the Regional Director drew from his factual findings.

[4] The revenue figures do not include football-inspired contributions to Northwestern from alumni and others.

[5] There is no dispute that Northwestern is an employer within the meaning of Sec. 2(2) of the Act, nor is there any dispute that it is engaged in commerce within the meaning of the Act. Several briefs appear to suggest that—aside from the disputed employee status of the grant-in-aid players—the Board does not have jurisdiction over college football, either because Congress did not intend the Board to assert jurisdiction over this activity, or because it is not a "commercial endeavor." As discussed below, there is no explicit congressional direction one way or the other concerning jurisdiction over college football. As for the contention that Northwestern's football team is a "noncommercial endeavor," it is a sufficient answer that Northwestern itself is an employer subject to the Act. Originally, the Board maintained a

ployees, then the Board lacks authority to direct an election or certify a representative. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 89 (1995) (rights guaranteed by the Act "belong only to those workers who qualify as 'employees' as that term is defined in the Act"). But as the Supreme Court has stated—and as Northwestern and several amici at least implicitly argue—even when the Board has the statutory authority to act (which it would in this case, were we to find that the scholarship players were statutory employees), "the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 684 (1951); see *NLRB v. Teamsters Local 364*, 274 F.2d 19, 23 (7th Cir. 1960).[6] As noted previously, we address this case without explicit congressional direction, but "[t]he absence of explicit congressional direction . . . does not preclude the Board from reaching any particular type of employment."[7]

After careful consideration of the record and arguments of the parties and amici, we have determined that, even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction. Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.

We emphasize that this case involves novel and unique circumstances. The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind.[8] There has never been a petition for representation before the Board in a unit of a single college team or, for that matter, a group of college teams.[9] And the scholarship players do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes. In this regard, the scholarship players bear little resemblance to the graduate student assistants[10] or student jani-

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policy of declining to assert jurisdiction over private educational institutions "where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution." *Trustees of Columbia University*, 97 NLRB 424, 427 (1951). But the Board abandoned that policy in *Cornell University*, 183 NLRB 329, 331 (1970). Thus, even if the football team is a "noncommercial endeavor," that fact is irrelevant to our statutory jurisdiction (and, since *Cornell University*, it provides no reason to exercise our discretion to decline jurisdiction over this case).

In any event, we note that in overruling *Columbia University* and generally asserting jurisdiction over private colleges and universities, the Board considered revenues generated by football ticket sales, as well as the sale of broadcast rights. See *Cornell University*, supra at 330. Further, the Board found that an employer was engaged in commerce when it had comparable or lesser revenues and expenditures than those of Northwestern's football team. See *American Basketball Assn. Players' Assn.*, 215 NLRB 280, 280 (1974) (jurisdiction over professional sports league established where 10 teams' collective annual revenues and expenses were each "in excess of" $1 million).

[6] For an instance in which the Board exercised its discretion by declining to assert jurisdiction over a particular case, see *Contract Services, Inc.*, 202 NLRB 862 (1973) (invoking *Denver Building Trades Council* to decline jurisdiction based on foreign relations considerations). In other cases, the Board has entertained policy arguments for declining jurisdiction before ultimately rejecting them. See, e.g., *U.S. Corrections Corp.*, 304 NLRB 934, 937 (1991) (after rejecting argument it should decline jurisdiction pursuant to Sec. 14(c)(1), the Board separately considered whether it should decline to assert jurisdiction on basis of public safety); *State Bank of India*, 229 NLRB 838 (1977) (considering whether the Board should decline to assert jurisdiction because an employer is an "agency" or "instrumentality" of a foreign state).

[7] *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980). The Court observed that some aspects of university life "[do] not fit neatly within the statutory scheme we are asked to interpret," id. at 680, and that "the Board has recognized that principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" Id. at 680–681 (citation omitted). Regarding congressional intent, nothing in the Act or its legislative history provides explicit direction regarding the Board's treatment of cases involving college football programs that provide grant-in-aid scholarships to athletes. As the Supreme Court noted in *Yeshiva*, however, the absence of explicit congressional direction does not preclude the Board from reaching any particular type of employment. *Yeshiva*, 444 U.S. at 681.

[8] This is despite a history of intercollegiate athletics, particularly football, that predates the enactment of the National Labor Relations Act. Although the present structure of college football (with what is now called FBS as the highest level) was established in 1978, intercollegiate football has a history stretching back to the late 19th century. See Crowley, *In the Arena: The NCAA's First Century* 2, 43 (Digital ed. 2006), available at http://www.ncaapublications.com/productdownloads/INARENA06.pdf. Further, the NCAA has sanctioned scholarships based on athletic ability since 1956 (after banning the practice in 1948), so scholarship football players are also not a recent development. See, e.g., McCormick & McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 Wash. L. Rev. 71, 111–112 (2006).

[9] The Board has, however, asserted jurisdiction over an NCAA Division I athletics conference. See *Big East Conference*, 282 NLRB 335 (1986), enfd. sub nom. *Collegiate Basketball Officials Assn. v. NLRB*, 836 F.2d 143 (3d Cir. 1987). That case did not involve the member institutions or their athletics teams; instead, it involved a complaint allegation that the conference violated Sec. 8(a)(5) of the Act, as a successor employer, by refusing to recognize and bargain with a union representing basketball referees contracted by the conference itself, which the Board found was an independent private entity created by the member schools. See id. at 340–342. The Board dismissed the complaint, finding that the referees were independent contractors, not employees.

[10] See, e.g., *Brown University*, 342 NLRB 483 (2004) (finding graduate student assistants are not statutory employees), overruling *New York University*, 332 NLRB 1205 (2000) (finding graduate student

tors and cafeteria workers[11] whose employee status the Board has considered in other cases.[12] The fact that the scholarship players are students who are also athletes receiving a scholarship to participate in what has traditionally been regarded as an extracurricular activity (albeit a nationally prominent and extraordinarily lucrative one for many universities, conferences, and the NCAA) materially sets them apart from the Board's student precedent.[13] Yet at the same time, the scholarship players are unlike athletes in undisputedly professional leagues, given that the scholarship players are required, inter alia, to be enrolled full time as students and meet various academic requirements, and they are prohibited by NCAA regulations from engaging in many of the types of activities that professional athletes are free to engage in, such as profiting from the use of their names or likenesses. Moreover, as explained below, even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players, where the players for competing teams were unrepresented or entirely outside the Board's jurisdiction. As a result, nothing in our precedent requires us to assert jurisdiction in this case. Given the absence of any controlling precedent, we find it appropriate to consider whether the Board should exercise its discretion to decline to assert jurisdiction in this case, even assuming the Board is otherwise authorized to act.

Notwithstanding the dissimilarities, discussed above, FBS football does resemble a professional sport in a number of relevant ways. In particular, institutions that have FBS teams are engaged in the business of staging football contests from which they receive substantial revenues (via gate receipts, concessions and merchandise sales, and broadcasting contracts). See, e.g., *American Basketball Assn.,* supra at 280; *American League of Professional Baseball Clubs*, 180 NLRB 190, 190 (1969). As in professional sports, the activity of staging athletic contests must be carried out jointly by the teams in the league or association involved. See *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984) ("Some activities can only be carried out jointly. Perhaps the leading example is league sports.") (quotations omitted); *North American Soccer League*, 236 NLRB 1317, 1321 (1978) ("Each club operates on an independent basis, although, of course, each team is dependent upon every other team for its financial success, as is true in other organized team sports."). Put differently, unlike other industries, in professional sports, as in FBS football, there is no "product" without direct interaction among the players and cooperation among the various teams.

For this reason, as in other sports leagues, academic institutions that sponsor intercollegiate athletics have banded together and formed the NCAA to, among other things, set common rules and standards governing their competitions, including those applicable to FBS football.[14] The NCAA's members have also given the NCAA the authority to police and enforce the rules and regulations that govern eligibility, practice, and competition. The record demonstrates that the NCAA now exercises a substantial degree of control over the operations of individual member teams, including many of the terms and conditions under which the scholarship players (as well as walk-on players) practice and play the game. As in professional sports, such an arrangement is necessary because uniform rules of competition and compliance with them ensure the uniformity and integrity of individual games, and thus league competition as a whole. There is thus a symbiotic relationship among the various teams, the conferences, and the NCAA. As a result, labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions.[15] Many terms applied to

assistants are statutory employees). Unlike those graduate assistants, the scholarship players are undergraduates, and—with the potential exception of students seeking undergraduate degrees in physical education—the football activities they engage in are unrelated to their course of study or educational programs.

[11] See *San Francisco Art Institute*, 226 NLRB 1251 (1976) (student janitors); *Saga Food Service of California*, 212 NLRB 786 (1974) (student cafeteria workers). Unlike the scholarship players, those student workers do not appear to have received anything resembling a grant-in-aid scholarship, they were not subject to the types of requirements (academic or otherwise) that the scholarship players are subject to, and their jobs were not necessarily contingent on their enrollment as students at the institution they worked for.

[12] In discussing *Brown University*, *San Francisco Art Institute*, and *Saga Food Service*, supra, we express no opinion as to whether those cases were correctly decided or whether they might be relevant to assessing whether the scholarship players are statutory employees. We observe only that the Board has never confronted a case involving students who are similarly situated to the scholarship players at issue in this case.

[13] Although we do not decide the issue here, we acknowledge that whether such individuals meet the Board's test for employee status is a question that does not have an obvious answer.

[14] Although regulating college sports has always been among the NCAA's objectives, the direct impetus for the NCAA's creation was concern over the violent nature of football, as well as irregularities in recruiting and subsidizing football players. See Crowley, supra at 1–15.

[15] To be clear, we are not suggesting that the NCAA's control over many of the terms and conditions under which college football players conduct their activities is an independent reason to decline to assert jurisdiction. We merely observe that bargaining in a single-team unit will not promote labor stability in this case.

one team therefore would likely have ramifications for other teams. Consequently, "it would be difficult to imagine any degree of stability in labor relations" if we were to assert jurisdiction in this single-team case. *North American Soccer League*, 236 NLRB at 1321–1322. Indeed, such an arrangement is seemingly unprecedented; all previous Board cases concerning professional sports involve leaguewide bargaining units. See, e.g., *National Football League*, 309 NLRB 78, 78 (1992); *Blast Soccer Associates*, 289 NLRB 84, 85 (1988) (leaguewide representation for Major Indoor Soccer League players); *Major League Rodeo*, 246 NLRB 743 (1979); *North American Soccer League*, 245 NLRB 1301, 1304 (1979); *American Basketball Assn.,* 215 NLRB at 281; *National Football League Management Council*, 203 NLRB 958, 961 (1973) (indicating that before the National Football League (NFL) merged with the rival American Football League, the latter league's players had leaguewide representation).[16]

Just as the nature of league sports and the NCAA's oversight renders individual team bargaining problematic, the way that FBS football itself is structured and the nature of the colleges and universities involved strongly suggest that asserting jurisdiction in this case would not promote stability in labor relations. Despite the similarities between FBS football and professional sports leagues, FBS is also a markedly different type of enterprise. In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions. As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by "employers" within the meaning of Section 2(2) of the Act. See, e.g., *Big East Conference*, 282 NLRB at 340. More starkly, Northwestern is the only private school that is a member of the Big Ten, and thus the Board cannot assert jurisdiction over any of Northwestern's primary competitors. This too is a situation without precedent because in all of our past cases involving professional sports, the Board was able to regulate all, or at least most, of the teams in the relevant league or association.[17]

In such a situation, asserting jurisdiction in this case would not promote stability in labor relations. Because most FBS teams are created by state institutions, they may be subject to state labor laws governing public employees. Some states, of course, permit collective bargaining by public employees, but others limit or prohibit such bargaining.[18] At least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees.[19] Under these circumstances, there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams. In other contexts, the Board's assertion of jurisdiction helps promote uniformity and stability,[20] but in this case, asserting jurisdiction would not have that effect because the Board cannot regulate most FBS teams.[21] Accordingly, asserting jurisdiction would not promote stability in labor relations.[22]

As an additional consideration, we observe that the terms and conditions of Northwestern's players have changed markedly in recent years and that there have been calls for the NCAA to undertake further reforms that may result in additional changes to the circumstanc-

[16] We do not reach whether and do not decide that team-by-team organizing and bargaining is foreclosed or that we would never assert jurisdiction over an individual team. Indeed, despite its statement that single-club units would not promote labor stability, the Board in *North American Soccer League*, 236 NLRB at 1321 and fn. 11, also observed that evidence of each team's day-to-day autonomy "might support a finding that single-club units may be appropriate." There, however, the petitioner sought only a leaguewide unit. The Board has never addressed the appropriateness of single-team bargaining units within a professional sports league.

[17] In *North American Soccer League*, 236 NLRB at 1319, 1321, the Board asserted jurisdiction over both the league and most of its constituent teams, but declined to assert jurisdiction over two Canadian teams due to extraterritorial considerations. In *Big East Conference*, supra at 340–342, the Board asserted jurisdiction over the conference, based on the theory that it was an independent, private entity created by the member schools; although two of those schools were public institutions, the Board noted that the public schools could not control the conference's operations as they were but two of nine voting members. Thus, aside from the fact that those cases presented different legal issues than are presented here, in both of those cases the Board was able to assert jurisdiction over most of the teams involved.

[18] See, e.g., Wis. Stat. § 111.91(3)(a) (limiting public sector union collective bargaining to "total base wages"); N.C. Gen. Stat. Ann. § 95–98 (declaring public sector collective bargaining illegal and unlawful).

[19] See Ohio Rev. Code Sec. 3345.56; Mich. Comp. Laws Sec. 423.201(1)(e)(iii) (covering Big Ten members Ohio State University, University of Michigan, and Michigan State University). Both statutes were enacted after the petition in this case was filed.

[20] See, e.g., *Cornell University*, 183 NLRB at 334 (commenting that asserting jurisdiction would ensure the "orderly, effective, and uniform application of the national labor policy"); *American League*, 180 NLRB at 192 (asserting jurisdiction partly because doing so would bring regulatory uniformity to the industry at issue).

[21] Indeed, the private FBS schools are not even grouped into a single conference or division. As of the 2014–2015 academic year, 15 of the private FBS schools are scattered among 6 conferences, and 2 are not part of any conference. The highest concentration of private schools is in the 14-team Atlantic Coast Conference, which has 5 such members.

[22] We emphasize that this consideration is peculiar to this case. Other industries may well be composed of some employers subject to the Board's jurisdiction and some not. Other industries, however, are not characterized by the degree of interrelationship present among and between teams in a sports league.

es of scholarship players.[23] For example, the NCAA's decision to allow FBS teams to award guaranteed 4-year scholarships, as opposed to 1-year renewable scholarships, has reduced the likelihood that scholarship players who become unable to play will lose their educational funding, and possibly their educational opportunity.[24] We note that our decision to decline jurisdiction in this case is based on the facts in the record before us, and that subsequent changes in the treatment of scholarship players could outweigh the considerations that motivate our decision today.

For these reasons, we conclude, without deciding whether the scholarship players are employees under Section 2(3), that it would not effectuate the policies of the Act to assert jurisdiction in this case.

We emphasize that our decision today does not concern other individuals associated with FBS football, but is limited to Northwestern's scholarship football players. In this regard, we observe that the Board has exercised jurisdiction in other contexts involving college athletics. The Board has, for example, adjudicated cases involving athletic coaches,[25] college physical plant employees who performed functions in support of athletic events,[26] and referees.[27] Our decision today should not be understood to extend to university personnel associated with athletic programs.

Further, we are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board's approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities). The record before us deals solely with Northwestern's football team and, in the absence of any evidence concerning the players and athletes at other schools, we do not decide any issues about them today.[28]

As a final note, the Board's decision not to assert jurisdiction does not preclude a reconsideration of this issue in the future. For example, if the circumstances of Northwestern's players or FBS football change such that the underpinnings of our conclusions regarding jurisdiction warrant reassessment, the Board may revisit its policy in this area. See *Walter A. Kelley*, 139 NLRB 744, 747 (1962) (citing *Leedom v. Fitch Sanitarium, Inc.*, 294 F.2d 251, 255 (D.C. Cir. 1961)).

Conclusion

The Board has never asserted jurisdiction, or even been asked to assert jurisdiction, in a case involving scholarship football players or similarly situated individuals, and for the reasons stated above, we decline to do so in this case. Processing a petition for the scholarship players at this single institution under the circumstances presented here would not promote stability in labor relations. Moreover, recent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future. For these

[23] See, e.g., Promoting the Well-Being and Academic Success of College Athletes, Hearing, U.S. Senate Committee on Commerce, Science, and Transportation, Jul 9, 2014 (transcript and archived webcast available at http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=48f489fd-720f-44d7-8a68-53efaecf8139&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=7&YearDisplay=2014).

[24] And, beginning in the 2015–2016 academic year, scholarship players may receive an additional stipend. See, e.g., Berkowitz, *NCAA increases value of scholarships in historic vote*, USAToday.com, Jan. 17, 2015 (available at http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/).

[25] See, e.g., *University of Bridgeport*, 229 NLRB 1074, 1075 (1977) (faculty bargaining unit included athletic coaches); *Manhattan College*, 195 NLRB 65, 66 (1972) (nonteaching athletic coaches should be included in faculty unit).

[26] See *Providence College*, 340 NLRB 966, 971–972 (2003) (Board found respondent violated Sec. 8(a)(5) by unilaterally changing staffing policy at men's ice hockey games).

[27] See *Big East Conference*, 282 NLRB at 340–342 (1986) (asserting jurisdiction over an NCAA Division I athletics conference that directly employed basketball referees).

[28] In addition to the authority to decline jurisdiction in a particular case pursuant to *Denver Building Trades Council*, 341 U.S. 675 (1951), the Board also has discretion pursuant to Sec. 14(c)(1) of the Act to "decline to assert jurisdiction over any labor dispute involving any class or category of employers" where the Board concludes that "the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction." (The Board cannot, however, decline to assert jurisdiction over "any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.") The discretion to decline to assert jurisdiction in an individual case is distinct from the discretion granted by Sec. 14(c)(1) to decline to assert jurisdiction over labor disputes involving any "class or category" of employer. See, e.g., *Council 19, American Federation of State, County and Municipal Employees, AFL–CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968).

Northwestern and several other amici have suggested that the Board should use Sec. 14(c)(1), or some similar rationale, as a basis for declining to assert jurisdiction over college football in general. We do not reach or pass on these suggestions. However, the Board already asserts jurisdiction over private colleges and universities like Northwestern and, as noted above, no party disputes that Northwestern is an employer under the Act. In any event, we are unwilling to find that a labor dispute involving an FBS football team would not have a "sufficiently substantial" effect on commerce to warrant declining to assert jurisdiction.

reasons and the others set forth above, even if the scholarship players were statutory employees (which the Board does not here decide), we have concluded that it will not effectuate the policies of the Act to assert jurisdiction in this case.

ORDER

The petition is dismissed.

Dated, Washington, D.C., August 17, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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]

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, Illi-

[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.

nois. 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-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.

[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.

[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.

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 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. 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

[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.

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, 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

[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."

[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."

department staff. Other players had to receive medical 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 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

[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.

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 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

[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).

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

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.

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.

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

[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.

[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.

[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.

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 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 with-

[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).

[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.

draws 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 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 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"

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

[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.

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 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

[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.

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 as-

> signment 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 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 em-

[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).

ployment 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.

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.

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