UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 13

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

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

TABLE OF CONTENTS

I. INTRODUCTION 1

II. GROUNDS FOR SEEKING REVIEW OF THE REGIONAL DIRECTOR'S DECISION 2

III. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR IN PLACING THE BURDEN OF PROOF ON THE EMPLOYER 3

IV. THE REGIONAL DIRECTOR'S DECISION IS CLEARLY ERRONEOUS ON SUBSTANTIAL FACTUAL ISSUES 3

A. SUMMARY OF THE REGIONAL DIRECTOR'S DECISION 3

B. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY MISCHARACTERIZING AND SLANTING RELEVANT FACTS 6

C. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY IGNORING RELEVANT FACTS 15

V. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR BY INCORRECTLY APPLYING BOARD PRECEDENT 19

A. THE REGIONAL DIRECTOR ERRED IN HOLDING THAT *BROWN UNIVERSITY* DOES NOT APPLY 19

B. THE COMMON LAW TEST DOES NOT APPLY TO STUDENTS ENROLLED AT THE UNIVERSITY 19

C. EVEN IF THE COMMON LAW TEST APPLIED, NORTHWESTERN'S SCHOLARSHIP FOOTBALL STUDENT-ATHLETES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE ACT 21

1. The Scholarship Football Student-Athletes Are Not "Hired" To Perform Services 21

2. The Financial Grant-In Aid Is Not Compensation. 24

3. The Fact That Scholarship Football Athletes Are Subject To Rules And Discipline Does Not Make Them Employees 28

D. THE REGIONAL DIRECTOR MISAPPLIED *BROWN UNIVERSITY* 33

E. APPLICATION OF THE CORRECT TEST ARTICULATED IN *BROWN UNIVERSITY* DICTATES THAT NORTHWESTERN'S SCHOLARSHIP STUDENT ATHLETES ARE PRIMARILY STUDENTS 36

1. The Regional Director Failed To Consider That The Unionization Of Northwestern's Student-Athletes Would Create Chaos Due To The Wide Variation Among Federal And State Labor Laws 39

2. The Regional Director Failed To Consider The Tax Implications For Student-Athletes Receiving Scholarships If They Are Employees Under The Act 41

3. The Regional Director Failed To Consider That CAPA's Objectives Cannot Be Achieved By Collective Bargaining With Northwestern Due To NCAA Regulation 43

4. The Regional Director Failed To Consider That Extending Collective Bargaining Rights To Northwestern Football Players Will Have Title IX Ramifications 44

F. THE REGIONAL DIRECTOR COMMITTED PREJUDICIAL ERROR IN HOLDING THAT CAPA IS A LABOR ORGANIZATION WITHIN THE MEANING OF THE ACT 45

G. THE FOOTBALL STUDENT-ATHLETES ARE TEMPORARY EMPLOYEES, IF EMPLOYEES AT ALL 46

H. THE REGIONAL DIRECTOR ERRED IN FINDING THAT THE PETITIONED-FOR-UNIT IS AN APPROPRIATE UNIT 48

Vi. CONCLUSION 49

TABLE OF AUTHORITIES

CASES

Adelphi University, 195 NLRB 639 (1972) 19

Allied Chemical and Alkali Workers v. Pittsburgh Glass, 404 U.S. 157 (1971) 38

Alto Plastic Mfg. Corp., 136 NLRB 850 (1962) 5

Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992) 25, 43

Biediger v. Quinnipiac Univ., 928 F. Supp. 2d 414 (D. Conn. 2013) 44

Bingler v. Johnson, 394 U.S. 741 (1969)..... 42

Boston Medical Center Corp., 330 NLRB 152 (1999) 5, 20, 28, 46, 47

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

City of Phoenix v. Phx. Employment Relations Board,
86 P.2d 917 (Ariz. Ct. App. 2004)..... 40

Electromation, Inc., 309 NLRB 990 (1992) 5

Mansourian v. Bd. Of Regents of Univ. of Calif. at Davis,
816 F. Supp. 2d 869 (E.D. Cal. 2011) 44

McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988)..... 43

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984)..... 43

New York University, 332 NLRB 1205 (2000) 19

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)..... 38

NLRB v. Town & Country Electric, 516 U.S. 85 (1995)..... 4

NLRB v. Yeshiva University, 444 U.S. 672 (1980).....19, 38

Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910 (7th Cir. 2012)..... 44

Parr v. U.S., 469 F.2d 1156 (5th Cir. 1972)..... 42

Research Foundation of SUNY, 350 NLRB 197 (2007)..... 20

Research Foundation of CUNY, 350 NLRB 201 (2007)..... 20

San Francisco Art Institute, 226 NLRB 1251 (1976) 5, 46, 47

Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002)..... 4, 20, 27, 28

Specialty Healthcare and Rehabilitation Center of Mobile,
357 NLRB No. 83 (2011) 5

St. Clare's Hospital & Health Center, 223 NLRB 251 (1976) 39

The Leland Stanford Junior University, 214 NLRB 621 (1974) 19, 28, 46

WBAI Pacifica Foundation, 328 NLRB 1273 (1999) 5

Wertzberger v. U.S., 441 F.2d 1166 (8th Cir. 1971) 42

STATUTES

5 ILCS § 315/1 *et seq.* (West 2014)..... 40

115 ILCS § 5/1 *et seq.* (West 2014)..... 40

20 U.S.C. §1681(a) 44

26 U.S.C.A. §§117 (a), (b)(1) 28

2011 WIS. ACT 10 (March 11, 2011) 40

REGULATIONS

34 C.F.R. § 106.41(c) 44

H.B. 1872 (Virginia, 1993) 40

S.B. 962 (Virginia, 1993) 40

H.B. 483, 130th Gen. Assemb., 2013-2014 Sess., amend. no. HC-0548 (Apr. 7, 2014)……...40

ADDITIONAL AUTHORITY

National Survey of Student Engagement. (2012). *Promoting Student Learning and Institutional Improvement: Lessons from NSSE at 13*. Bloomington, IN: Indiana University Center for Postsecondary Research…… 9, 24

NLRB CASEHANDLING MANUAL FOR REPRESENTATION CASES, § 11181 (August 2007)..... 3

Rul. 77-263, 1977-2 CB 47..... 28

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. SUMMARY OF THE REGIONAL DIRECTOR'S DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

2. The Financial Grant-In Aid Is Not Compensation

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. THE REGIONAL DIRECTOR MISAPPLIED *BROWN UNIVERSITY*

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

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

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

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

(Jt. Ex. 21.)

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The student-athletes, who participate as teammates in every sense of the word, will have a sharp line drawn between them based not on their exercise of free-choice rights under the Act, but instead based on whether the financial aid they receive is need-based aid or an athletic scholarship. Creating this forced, artificial divide is contrary to the best interest of the University and the student-athletes themselves.

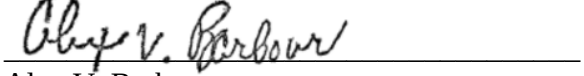
Northwestern is not arguing that walk-on football players are employees – they most assuredly are not. However, the community of interests they share with their teammates, many of whom receive athletic scholarships, is so strong and so overwhelming that to exclude them from the unit is to exclude an arbitrary segment and render the petitioned-for-unit inappropriate.

IX. CONCLUSION

For the reasons set forth above, Northwestern respectfully requests that its Request for Review be granted, the Regional Director's Decision be reversed, a finding that Northwestern's football scholarship student-athletes are not employees within the meaning of the Act, and the petition in this case should be dismissed.

Dated: April 9, 2014

Respectfully submitted,



Alex V. Barbour
One of the Attorneys for
Northwestern University

Joseph E. Tilson
Alex V. Barbour
Anneliese Wermuth
Jeremy J. Glenn
Meckler Bulger Tilson Marick & Pearson LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-4450
(312) 474-7898 (Fax)

CERTIFICATE OF SERVICE

I, Alex V. Barbour, an attorney, state under oath that I caused a copy of the foregoing **Northwestern's Request For Review Of Regional Director's Decision and Direction of Election** to be electronically filed with the National Labor Relations Board and electronically served upon the following on this 9th day of April, 2014.

Peter Sung Ohr
Regional Director
National Labor Relations Board
Region 13
209 South LaSalle Street, Ste. 900
Chicago, IL 60604
www.nlrb.gov

John G. Adam
Legghio & Israel, P.C.
306 South Washington, Ste. 600
Royal Oak, MI 48067
jga@legghioisrael.com

W. Gary Kohlman
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Washington, DC 20005
gkohlman@bredhoff.com

Stephen A. Yokich
Cornfield and Feldman
25 East Washington Street, Ste. 1400
Chicago, IL 60602
syokich@cornfieldandfeldman.com

Alex V. Barbour