UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and locations, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research – the principal prerogatives of an educational institution like Brown.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. THE PETITIONED-FOR UNIT IS APPROPRIATE

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

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

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

CONCLUSION

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

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

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

Respectfully submitted,

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Dated: April 16, 2014

CERTIFICATE OF SERVICE

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

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