

College Athletes as Employees

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Spring 2014 saw the first ever attempt to form a union among Division I college athletes, specifically the football team at Northwestern University in Evanston, Ill. The National Labor Relation Board's ("NLRB" or "Board") Regional Director ordered an election, and the ballots have been cast.¹ The result remains unknown, as the ballots are sealed and uncounted, awaiting full NLRB review of the basic finding that the scholarship football players can be considered employees for purposes of the National Labor Relations Act ("NLRA"). While much of the media attention focused on whether the union will win or lose the election,² the issue of much greater concern to institutions of higher education should be whether the student football players are found to be employees for purposes of the NLRA, and the rationale employed by the Board in reaching its result. Employee status under the NLRA comes with a suite of rights that adhere regardless of whether the employees ever join or become represented by a union.³ Thus, should the Board hold the Northwestern football players to be employees, the relationship between the student-athletes and the institution would be fundamentally changed, regardless of the outcome of the election. How extensive those changes might be, and the degree to which they will apply outside of Division I football to other athletes and other non-athlete students will depend on the rationale employed by the Board in reaching its result.

The question of how to categorize students who also perform services for their college or university lies along a fault line that has divided the NLRB ever since the 1970's, when it first asserted jurisdiction over institutions of higher learning.⁴ In that time, the Board has gone back, forth and back again on the status of students as employees, employing a diverse set of rationales in reaching the particular results. The cases have involved graduate assistants, interns/residents, student janitors and others. The result and rationale of Northwestern will have consequences for all sorts of student employees, not just athletes. This note will seek to explain the basis of the Regional Director's decision, and then review the different rationales used by past boards to find that students either were or were not employees entitled to bargain with the college or university to which they arguably render a service. Finally the note will explore how the consequences of the Board's decision will vary depending on the rationale employed.

I. WHAT HAS HAPPENED SO FAR

On Tuesday, January 28, 2014, the College Athletes Players Association ("CAPA") filed a representation petition with the NLRB seeking to be recognized as the union bargaining agent for players on the Northwestern University football team.⁵ CAPA currently limits its membership to scholarship athletes who participate in the Football Bowl Subdivision and Division I men's basketball. CAPA's materials claim an interest in bargaining about non-economic issues such as safety, improving health care, graduation rates, revision of NCAA amateurism rules and due process rights.⁶ It has stated an intention to limit its focus to the two sports mentioned.⁷ After a hearing, the Regional Director of Region 13 ordered an election to be held, finding that the athletic scholarship players, but not walk-on players who received need or academically based financial aid, are employees for purposes of the Act.⁸ Northwestern has appealed the determination to the full NLRB in Washington, and that appeal is pending.⁹

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On March 26, 2014, NLRB Regional Director Peter Sung Ohr of the Chicago Regional NLRB office (Region 13) held that the players established that they were employees for purposes of the NLRA, and ordered that an election be held.¹⁰ The decision further held that the roughly 30 walk-on football players were not employees,¹¹ and should be excluded from the bargaining unit. The Regional Director ordered an election in which only athletic grant-in-aid recipients who still had remaining eligibility to play as of the date of the election would vote.

Ohr started with the NLRA's definition of "employee," which rather tautologically states: "The term 'employee' shall include any employee . . . unless this subchapter explicitly states otherwise . . ." ¹² Ohr then cited to the Supreme Court's decision in *National Labor Relations Board v. Town & Country Electric, Inc.*¹³ for the proposition that the statutory language should be interpreted consistently with common law definitions of "employee." Ohr distilled the cases to mean that "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."¹⁴

Ohr found each of these criteria to be met with regard to the scholarship players.¹⁵ The central pillar of Ohr's decision is his conclusion that the athletic grant-in-aid received by the player is properly considered compensation to the player¹⁶ for a service rendered to the University, as opposed to a form of financial aid akin to a need-based or academic merit scholarship.¹⁷ In reaching the conclusion, Ohr relied heavily on the substantial value of the scholarship, the revenue generated to the University, the time commitments of the Players¹⁸ and the high degree of control exercised by the coaching and athletics staff.¹⁹ Together, Ohr concluded that these factors made the player's football activities sufficiently separate and distinct from the player's educational activities such that they were more properly classified as work performed for the University rather than an integral part of the player's role as a student.²⁰

The crux of the decision is Ohr's finding that the scholarship aid was payment in return for the player's providing services to the University.²¹ This conclusion has two elements. First, that playing football provided a service akin to an employee performing work that is incorporated into a product or service sold by the employer.²² Second, that the economic benefit (free education, housing, etc. during their matriculation) received by the players was in exchange for the services being provided.²³ Ohr found that playing football was providing a service to the University based on two factors.²⁴ First he pointed out that the football program generated \$235 million in gross revenue to the university over a nine-year period through television revenue, ticket sales and other sources.²⁵ Second, Ohr relied on what he characterized as the less quantifiable benefits to the University of having a high profile football program: "Less quantifiable but also of great benefit to the Employer is the immeasurable positive impact to Northwestern's reputation a winning football team may have on alumni giving and increase in number of applicants for enrollment at the University."²⁶

Ohr found the needed "bargained for exchange" in the athletic tender letters, characterizing them as a contract of hire.²⁷ Particularly important to Ohr was the fact that the athletic scholarship was terminable upon the player's voluntarily quitting the football program or for serious violation of team rules.²⁸ Second, Ohr relied on the fact the players were recruited to the University specifically for their athletic ability as further evidence that the athletic scholarship was in return for performing services.²⁹ Third, Ohr found that the restrictions imposed on the players' ability to earn additional income due to the time commitment of playing football and NCAA regulations made the players highly dependent on the University. He considered this dependence as further evidence of an employment relationship.³⁰

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Northwestern's principle argument was based on the NLRB's decision in *Brown University*.³¹ In *Brown*, the NLRB held by a 3-2 majority that graduate assistants who taught classes, assisted with research or performed unspecified administrative duties were not employees under the NLRA, despite their receipt of economic benefits similar to those received by the Northwestern football players.³² The Board focused on determining whether the nature of the relationship between Brown University and the graduate assistants was primarily educational or economic. Each of the graduate assistants received tuition remission and a cash stipend between \$12,800 and \$14,000 per year. The stipend was paid both in years in which the graduate students served as teaching/research assistants or proctors and in years in which the graduate students were not providing any services. The Board based its decision on several factors; emphasizing in particular:

1. the fact that all of the graduate assistants were also students;
2. that Brown made the tuition remission and stipends available only to persons who were enrolled students;
3. that much, but not all of the duties performed under the stipend were related to the academic program in which the student was enrolled; and
4. the stipends/aid received was similar to the payments made to graduate students (fellows) who were not required to perform teaching, research or administrative duties, but simply to either take classes or work on their dissertations.³³

The Board acknowledged that the graduate assistants might well meet the common law test of employment in years in which they performed services, but rejected the union's argument that the NLRA's coverage had to be extended to all common law employees.³⁴

Ohr held *Brown* to be both irrelevant and distinguishable.³⁵ Ohr held *Brown* inapplicable because he considered the players' football activities to be wholly "unrelated" to their academic studies, whereas, he considered the *Brown* graduate assistants' teaching and research duties to be "inextricably related to their graduate degree requirements."³⁶ Ohr went on to hold that even if applicable, *Brown* was distinguishable because the scholarship football players were not primarily students. While conceding that only enrolled students in good standing could play on the football team, Ohr held that this was insufficient to establish an integral link to student status or that the relationship was primarily one of student-educator rather than employee-employer.³⁷ Rather, Ohr held that the amount of time spent on football related activities, which he characterized as exceeding time spent on academics during certain portions of the year, precluded a finding that the scholarship players were "primarily students."³⁸ He further relied on the fact that football related activities were not directly tied to the students' academic program as they received no course credit for playing football and the coaching staff who supervised the football related activities were not faculty.³⁹ Finally, Ohr found that unlike *Brown*, the financial emolument received by the players was qualitatively different than the aid received by those who performed no services for the University in that the players' aid was specifically tied to their continuing to play football.⁴⁰

Northwestern filed, and the Board accepted, its petition for review of Regional Director Ohr's determination.⁴¹ The Board invited briefing on the subject from interested parties, asking amici to address the following six questions:

- What is the proper test to determine if grant-in-aid football players are employees within the meaning of the Act?

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- Should *Brown* be reaffirmed, modified or overruled?
- What policy considerations should inform the Board's decision?
- How should the Board consider the existence or absence of decisions regarding student athlete employee status under other federal laws?
- The extent, if any, to which employment discrimination provisions of Title VII, in comparison to Title IX should be considerations.
- If the players are found to be statutory employees, to what extent should outside constraints, such as NCAA rules, affect the bargaining obligations imposed and alternatively whether the Board should discretionarily preclude employee-players from bargaining units while extending other protections of the act to the players as it does with confidential employees?⁴²

Amicus briefs were due on June 26, 2014, and the case is now under advisement.⁴³ No deadline for a ruling has been set or exists under the NLRA.

II. THE BOARD'S VARYING TREATMENT OF STUDENT EMPLOYEES OVER TIME

The issue of how to treat students who also perform services for the institution they attend has been the subject of several decisions by the Board dating back to the 1970's, when the Board first asserted jurisdiction over colleges and universities. The history of those decisions reflects the divisive nature of the issue and the results do not present a clear or coherent pattern. The results change with the composition of the Board and tend to pull on several different strands of thought.

The earliest decisions resulted in findings that students who also worked for the educational institution which they were attending had a primarily educational interest in the relationship, and thus would either not be considered employees or would be excluded from bargaining units. In one of its earliest decisions, *Adelphi University*,⁴⁴ the Board held that graduate teaching assistants and research assistants had to be excluded from a bargaining unit composed of regular faculty members and librarians.⁴⁵ All of the graduate assistants were also students at the University. Each was expected to commit at least 20 hours per week to supervising undergraduates in labs, grading papers or teaching classes. The graduate assistants received stipends and tuition remission which together exceeded some part-time faculty salaries. The Board noted that although the graduate assistants performed some faculty functions, they lacked many hallmarks of regular faculty, such as participation in faculty votes.⁴⁶ Ultimately the Board concluded that the graduate students "are primarily students" and excluded them from the unit because they lacked a community of interest.⁴⁷ The Board did not address the question of whether the graduate students in *Adelphi* were employees, as it does not even appear to have been presented.⁴⁸

A few years later, in *Stanford University*,⁴⁹ the Board ruled that research assistants in the Stanford physics department were "primarily students" and thus not employees within the meaning of the NLRA.⁵⁰ There, the research assistants were all graduate students working toward a Ph.D. They were provided a mix of stipends, loans, teaching and research assistantships that together added to the same amount for each research assistant. The Board noted that much of the work done by the research assistants was accepted in partial satisfaction of degree requirements and often formed the basis of the student thesis.⁵¹ The Board distinguished a separate category of research associates, who were already

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organized into a union and were seeking to organize the assistants.⁵² The Board noted that the associates already had terminal degrees, were not simultaneously students working toward a degree and worked largely at the direction of senior researchers to advance projects undertaken by the University under grants or contracts.⁵³ By contrast the Board found the research assistants were “seeking to advance their own academic standing and were engaging in research as a means of achieving that advancement.”⁵⁴ The Board then equated the research assistants at Stanford to the graduate assistants at Adelphi and held that they were not employees under the NLRA. “In sum, we believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in Adelphi University. We find therefore that the research assistants are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act.”⁵⁵

The Board’s next major decision regarding “students” as employees came in *Cedars-Sinai Medical Center*.⁵⁶ There, the Board held that medical residents, interns and fellows at the hospital (“housestaff”) were engaged in a primarily educational endeavor and therefore not employees of the Hospital. The housestaff received monetary compensation and some fringe benefits. They spent a significant amount of time in minimally or unsupervised care of patients, which generated revenues for the Hospital.

The Board majority rested its holding on the conclusion that the housestaff “participate in these programs not for the purpose of earning a living; instead they are there to pursue [a] graduate medical education[.]” at Cedars-Sinai and “that their status is therefore that of students rather than of employees.”⁵⁷ The majority pointed to the role of accrediting agencies in setting content requirements for the resident and intern programs, that the internships and residencies were integral parts of the licensing/certification procedures, that compensation was based on covering living costs during the completion of the program rather than quality or quantity of work performed, and that the housestaff selected programs based on the quality of the training available rather than financial rewards.⁵⁸ By contrast, the dissent pointed out that all of the housestaff already had terminal degrees, received no grades or degrees from the Hospital and analogized any education received by the housestaff to the normal learning curve of any new member of a trade or profession.⁵⁹ Thus, the minority would have found that regardless of any educational purpose, the basic relationship was an employment entitling the housestaff to bargaining rights under the Act.

In the same year as *Cedars-Sinai*, the Board decided *San Francisco Art Institute*,⁶⁰ the case that is perhaps most akin to the football players’ situation. There, the institution provided some of its students with tuition remission, a small salary or a combination of both in return for the students performing 20 to 35 hours per week of janitorial work around the school. The Board, by a 3-2 vote, declined to hold an election in a proposed bargaining unit consisting of the student janitors. The Board side-stepped the question of whether the student-janitors were “employees.” Instead, the Board majority held that because the employment tenure was limited to the period of enrollment at the school and because “students are concerned primarily with their studies rather than with terms of their part-time employment,” it would not effectuate the purposes of the act to recognize such a bargaining unit or allow collective bargaining on behalf of the student janitors as a group.⁶¹ The majority distinguished cases in which students working on a seasonal or part time basis were included in bargaining units of other full-time regular employees on the grounds that those cases involved students working for a third party commercial enterprise, and not for the institution at which they were students.⁶² The majority opinion was implicitly influenced by the notion that the primacy of the academic relationship, together with the inherently limited term of the employment, reduced the significance of bargaining over wages and other terms of the janitorial employment to the point that it should be deemed outside the Act’s main purpose of reducing industrial

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strife.⁶³ The dissent, by contrast, found no reason to differentiate between the students in their roles as janitors, and janitors working for a commercial cleaning company.⁶⁴

A year later, in *St. Clare's Hospital*,⁶⁵ the Board majority tried to clarify the basis of its holding in *Cedars-Sinai*, and harmonize the various decisions that preceded it. The majority posited four different types of student employment scenarios that would lead to different considerations under the Act, three of which are relevant here. The first was situations in which students are employed by commercial third parties to perform work unrelated to their field of study.⁶⁶ The Board posited that no special considerations of unit placement or coverage by the Act were presented.⁶⁷ The second scenario was a situation in which the student works for the institution he or she attends, but in a capacity unrelated to the course of study.⁶⁸ The Board conceded that this scenario was very close to a regular employment relationship, but nonetheless stated that extension of bargaining rights to the students, either as part of a larger unit or in a unit composed entirely of student employees, was inappropriate under the Act.⁶⁹ The Board supported this conclusion by noting that "in these situations, employment is merely incidental to the student's primary interest of acquiring an education, and in most instances is designed to supplement financial resources."⁷⁰ The Board further noted that because continuation of the employment is normally dependent on maintenance of the student relationship, the interconnectedness of the two and the inherently transitory nature of the employment render collective bargaining inappropriate.⁷¹ The third scenario consisted of students performing work for the institution at which they were enrolled and which had a direct relation to the student's education program.⁷² In such cases, the Board held bargaining would never be appropriate.⁷³

The general policy of denying bargaining rights to students doing work at the institution in which they were enrolled remained the Board's position for the next two decades and the Board was not called upon to seriously revisit the issue until the 1990's. The later decisions reversed course, either overturning the older precedent or finding grounds of distinction. In *Boston Medical Center Corporation*,⁷⁴ the Board, again by a 3-2 vote, overruled *Cedars-Sinai* and held that interns, residents, and clinical fellows were all employees who could obtain collective bargaining rights through a board sponsored election.⁷⁵ The facts of *Boston Medical* and *Cedars-Sinai* are indistinguishable. The change in result reflects a change in attitude and membership of the Board. In *Boston Medical*, the Board emphasized that the housestaff spent eighty percent of their time in direct delivery of care to the Hospital's patients and received compensation in the form of stipends, vacation pay, sick pay, and fringe benefits such as health and dental insurance. The majority held that these facts alone brought the housestaff within the broad common law definition of an "employee."⁷⁶ Since neither "students" nor "housestaff" are expressly excluded from the statutory definition of "employee," the majority then considered and rejected various reasons for making a policy-based exception. The majority specifically rejected arguments that imposition of collective bargaining would threaten academic freedom if the Hospital were required to bargain about items such as rotation assignments that were set by the accrediting associations.⁷⁷ The majority rejected these concerns, finding them premature, and suggested that the "intelligence and ingenuity" of the bargaining parties should avoid any issues.⁷⁸ The majority further suggested that in appropriate future cases, limits on the scope of permissible bargaining in student units could be considered.⁷⁹ In the course of rejecting any basis for an exception, the majority clearly held that student and employee status were not mutually exclusive categories: "while they may be students learning their chosen medical craft, [housestaff] are also employees within the meaning of Section 2(3) of the Act."⁸⁰

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Following *Boston Medical*, a three-member panel of the Board decided *New York University*.⁸¹ There, the Board held that graduate students who received stipends in addition to tuition remission, and who performed as teaching and research assistants, should be considered employees eligible for collective bargaining rights under the Act.⁸² In reaching the decision, the Board did not overturn *Stanford*. Instead, the Board found that the NYU teaching assistants' duties involved primarily delivering education to undergraduate students, which was the essence of the service provided by the University.⁸³ The Board further relied on the fact that the number of Teaching Assistant (T.A.) positions was driven by the University's need for the service, that is undergraduate enrollment levels, rather than the number of graduate students in need of financial aid.⁸⁴ The majority emphasized that the graduate assistants at NYU received no direct academic benefit from their teaching duties, suffered no adverse academic consequence if they taught poorly, were paid through NYU's regular payroll system, and, though still "enrolled" at NYU, had completed their course work and were completing dissertations.⁸⁵ Citing to *Boston Medical*,⁸⁶ the Board rejected the notion that the mere fact that the teaching assistants were simultaneously students of the institution called for any special consideration, thereby rejecting arguments based on academic freedom and the potential for bargaining to intrude on purely academic matters. The Board did however hold that certain graduate students, who were classified as research assistants or graduate assistants in the Sackler Institute, were not employees.⁸⁷ The Board found that these two groups were largely engaged in research to be used in their dissertations and thus were not providing a service to the University.⁸⁸

A mere four years after the *New York University* decision, the Board reversed course yet again. In *Brown University*,⁸⁹ a reconstituted Board, by a 3-2 margin, overruled *New York University*, and held that graduate assistants who performed undergraduate teaching, assisted with research or worked as "proctors" performing miscellaneous administrative duties, were "primarily students" and thus not employees under the act.⁹⁰ The majority's focus in *Brown* was the inseparability of the individual's role as a student from the role as a T.A. or proctor. The Board majority emphasized that being an enrolled student was a threshold requirement of obtaining and keeping one of the positions and that the number of positions and the amounts paid as a stipend were calibrated to the costs of being a student and not the value of the services performed.⁹¹ The *Brown* majority found further support in the fact that over sixty percent of the students who received T.A. positions were required to engage in teaching to earn their degree, and the majority of the T.A.s were doing work that arguably related to their field of study.⁹² The majority held that in light of the integral relation between the work performed and "student" status, collective bargaining would inherently interfere with academic freedom.⁹³ Finally the majority believed that allowing potential bargaining over academic matters was fundamentally inconsistent with the Act's basic premise of encouraging industrial peace by balancing the rights of management and labor.⁹⁴

As a group, these decisions are striking in several regards. First, while all of the majority opinions claim to reach the result most consistent with the Act and the policies behind it, they also concede that the question of student status as employees and bargaining rights involves policy choices over which the Board has some discretion.⁹⁵ Each side can point to Supreme Court decisions that support a non-literal interpretation of the "employee" definition and the discretionary withholding of bargaining rights from certain classes of employees that are not expressly excluded by the statute.⁹⁶ Likewise, while both sides claim to find support in Supreme Court decisions, none of those decisions involving application of the definition of "employee" shed any real light on the issue of students who also perform services for the institution they attend, let alone compel a particular result.⁹⁷

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Second, all of the cases seem to agree that purely educational relationships and matters should be beyond the scope of collective bargaining. However, they differ in how purely educational the relationship needs to be before an exemption from employee status and bargaining will be found appropriate. All of the decisions focus on each party's purpose in entering into the relationship, the characterization of any economic benefit granted to the putative employee, the degree to which the "work" performed can be said to benefit the institution, and how those three factors intersect with the purposes and requirements of the Act. The earlier decisions, rejecting employee status, tend to proceed from an unstated assumption that a single either/or characterization of the entire relationship is necessary, with the predominant purpose governing the outcome. The later decisions, with the exception of *Brown*, are more comfortable with a dual status of individuals being both students and employees. These decisions tend to segregate out the economic and employee-like aspects of the relationship from the more traditionally academic aspects, and make the decision by consideration of the economic aspects of the relationship alone. This is seen most clearly in *San Francisco Art Institute*.⁹⁸ There the Board, by looking to the entirety of the relationship, determined that the art student janitors were "primarily students." Thus, despite the lack of relation between their janitorial duties and their academic work, the Board could reasonably consider the job and the pay received as a form of financial aid, rather than as compensation for work done.⁹⁹ It would seem clear that application of *Boston Medical* or *New York University* would lead to an opposite result.

III. POSSIBLE BOARD RESOLUTIONS AND THEIR IMPLICATIONS

How the Board ultimately resolves the issue, and how that affects other private colleges or universities, will ultimately depend on which strains of the various past rationales the Board uses to support its outcome or whether it strikes out on a new path. The Board has at least three possible paths that it may pursue. First, it might simply overrule *Brown* and reinstate *New York University*. Second, it could adhere to *Brown*, with some modification. Third, it might attempt a middle course that resolves the tensions reflected by the sharp swings in the Board's treatment of student employees over time. The path selected will dictate the likelihood of unionization in other sports and may well affect organizing among other student groups.

For example, one potential limit on how far bargaining rights might extend to sports beyond FBS Football and Division I Basketball is the distinction between revenue and non-revenue sports. If the Board were to follow the *New York University*-type of analysis this distinction would be less important and lead to broader bargaining rights. *New York University* focused on how the duties performed by the graduate assistants related to the institution's business purposes and whether the funding received was in return for the service provided (i.e. where the T.A.s largely taught and graded undergrads; teaching undergraduate students was the institution's essential product and they were paid for their role in producing it).¹⁰⁰ The Board did not even mention whether the particular classes taught were operating at a positive or negative net revenue to the institution. Under such an approach, the fact that a particular sport raises or does not raise significant revenue on its own would arguably be immaterial. The Board would not want to create a precedent linking employee bargaining rights to whether the employer was profitable. The fact that the putative employer chooses to engage in the activity is sufficient to establish that it was viewed as having a benefit to the employer, and thus anyone "paid" to participate in that activity would be an employee with bargaining rights. The logic would run that the institution saw business value in having a quality sports program (e.g. the intangibles of which Regional Director Ohr wrote) was willing to pay at least some athletes with scholarships to achieve the result and, at least as to the athletic endeavor, exercised sufficient control to make the athletes employees and not independent contractors. This line of

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analysis would lead to a finding that essentially all athletic scholarship students were employees with collective bargaining rights.

By contrast, an approach which incorporated the primarily educational versus primarily economic concepts of *Brown* and its predecessors would not find collective bargaining rights or would find them only in limited cases of revenue sports and perhaps only revenue sports at institutions that lived up to the negative “sports factory” stereotype. In this sort of approach, the Board would need to look at the overall relationship and the parties’ motivation for entering into it to ascertain whether it was primarily educational or primarily of an economic character. The key question would become whether the students were playing football primarily as a part of obtaining an education as opposed to playing football as an end in itself. A fact scenario like Northwestern would present a very close case. The substantial economic benefit of the specific program to the institution is undeniable.¹⁰¹ However, given the graduation rates, the adherence to general student admission criteria, and the nature of the “compensation” provided, it would be hard to deny that the typical football player is using the football program as a means to an educational end, rather than as a more typical job by which to support himself.¹⁰² In other programs, where the student aspect of the relationship might be shown to be less substantial, by demonstrating very low graduation rates, assignment to non-substantive classes or majors or the other parade of abuses that motivate many of the commentators favoring union status, this approach could lead to a primarily employee finding and bargaining. In non-revenue sports, the absence of a material financial benefit to the institution would likely lead to a conclusion that the institution was providing an augmentation of its educational service to the student-athlete, rather than the student-athlete providing a service to the institution. Therefore, bargaining would be unwarranted.

These same differences could affect the extension of bargaining rights based on unit composition issues. As noted above, Regional Director Ohr held that the 27 non-athletic scholarship players were clearly not employees and thus not eligible to vote or to be represented for purposes of bargaining like the 85 athletic scholarship recipients.¹⁰³ As one moves away from FBS football and Division I basketball, the number of allowed athletic scholarships and its equivalencies diminishes in absolute numbers and in proportion to the overall roster.¹⁰⁴ While it might be intuitively appealing to assume that this would decrease the likelihood of the Board extending bargaining rights to the team, traditional labor law is anything but intuitive. Under the *New York University* line of analysis, any disproportion in the number of athletes who were athletic aid recipients and walk-ons would be unlikely to affect the Board’s extension of bargaining rights to the athletes deemed to be employees. *New York University* directly rejected an argument that, because most of NYU’s graduate students received stipends without having to perform T.A. work, no bargaining rights should be extended to those that did.¹⁰⁵ Board precedent also contains examples of bargaining units in which employees were greatly outnumbered by non-employee volunteers.¹⁰⁶ By contrast, a purely *Brown* approach would likely view the level of “non-employee” players as strong evidence supporting a finding that the overall relationship of athletes in the sport to their college or university was “primarily educational” and thus deny bargaining.

Finally, one has to consider the possibility that the Board will strike out on a completely different path in recognition that neither the purely student nor purely economic employee model fits this situation very well. The see-sawing the Board has done in the past reflects dissatisfaction with both approaches. The *New York University* approach leads to treating a relationship that undeniably has academic aspects requiring special consideration no differently than that between factory operatives and their employer. On the other hand, the *Brown* approach gives such deference to the educational aspect of the relationship that the significant economic ramifications of the relationship are ignored. The Board’s

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invitation to briefing suggests exactly this possibility. Specifically in question 6, the Board asked for briefs as to whether any bargaining obligation should be limited due to external constraints like NCAA rules or whether the employees should be excluded from bargaining units as are “confidential” employees.¹⁰⁷ The first half of the question suggests that the Board at least acknowledges the difficulty of simply applying collective bargaining rules to the economic aspects of the athletes’ relations with their schools, and perhaps some level of discomfort certifying a union that says it does not want to bargain about wages and other forms of compensation. Typically unions bargain over wages, hours, and other terms and conditions of the employment. The compensation found by Ohr is composed exclusively of scholarship amounts which by NCAA rule are limited to cost of attendance, with no room for additions.¹⁰⁸ Thus, the main topic of most collective bargaining, compensation, would be off-limits to the bargaining parties here.¹⁰⁹ The Board could attempt to resolve this problem by recognizing a bargaining obligation, but restricting the topics on which bargaining would be required in school-athlete negotiations to non-economic matters or to matters that did not conflict with NCAA obligations. The Board already divides the general bargaining obligation by topics into mandatory, permissive, and prohibited subjects of bargaining, and the Board could theoretically carve out a special set of rules to cover student employees. While this might have some facial appeal, the problems of such an approach would be legion. The Board is unlikely to want to create a precedent that would allow employers to limit their bargaining obligations by contracts with a third party or trade association. It is easy to see how this loophole once opened could be abused. However, requiring the college or university to bargain over demands for benefits beyond those allowed by NCAA rules (e.g. pay for players) would be futile in that accession to the demands by the institution could quickly lead to loss of ability to compete in the NCAA and the end of the program. It is unlikely that the Board would want to open these Pandora’s boxes.

The second aspect of the question with its reference to “confidential” employees does however suggest a viable and interesting idea for a compromise resolution that the Board might explore. Under existing Board law, “confidential” employees are individuals who are clearly employees under the Act, but who work in positions that have access to confidential and sensitive information about the employer’s labor relations and, particularly, its bargaining.¹¹⁰ The most common example would be the executive assistant to the V.P. of Labor Relations. These employees have generally been excluded from collective bargaining, despite their clear status as employees.¹¹¹ In the case of confidential employees, the basis of the exclusion is that their inclusion in a bargaining unit with other employees would divide their loyalty and give the union an unfair advantage. The Board has relied on these same concerns to deny confidential employees representation in a separate unit of only confidential employees. Despite their lack of a right to bargain collectively, the Board holds that confidential employees remain entitled to the other rights granted to employees under the Act.¹¹² These include the protections extended to employees who engage in other concerted activity for mutual aid and protection, as well as the provisions prohibiting discrimination and retaliation for engaging in such activities.¹¹³

“What” you may ask, “could any of this have to do with college football players?” The answer to that question is found in *San Francisco Art Institute*. There, as in *Adelphi*, the Board avoided a direct holding that the students in question were not employees, by holding instead that requiring collective bargaining on their behalf was inconsistent with the purposes of the Act.¹¹⁴ Should the Board use *San Francisco Art Institute* to create a new category of employees akin to confidential employees, the result would be an interesting hybrid of typical industrial relations and a student governance model. Because the athletes would not be includible in any bargaining unit, they would not be able to elect a third party union to negotiate a collective bargaining agreement on their behalf. However, their status as “employees,” without any further action on their part, would entitle them to the Act’s other protections that extend to

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employees generally. Thus, they would be free to work in concert, without employee interference, to discuss and resolve grievances with the institution, to strike in support of their proposed resolutions, and be free from discrimination or retaliation for having engaged in the joint activities. Such a compromise result, while probably a long-shot, would be consistent with the Obama Board's prioritization and interest in the Act's protection of worker rights, regardless of union membership/representation, over employer rights or the rights of unions as institutions.

If the players are held to be employees, then they will have all of the rights mentioned above even if it turns out that they have voted against union representation. Many forget that the panoply of rights summarized above (generally referred to as Section 7 rights) adhere to all statutory employees, whether they belong to a union or not. The need to take into account Section 7 rights with regard to some or all of an institution's student athletes will create a much bigger adjustment for athletic departments than will the potential need to sit across a bargaining table every few years with a player rep from CAPA.

IV. PRACTICAL APPLICATION

For now, there may not be a great deal that institutions of higher learning can do proactively, given the uncertainty of the result, the potentially varying rationales that might come out, and the possibility of congressional action to dictate a result. However, the cautious college or university may want to start to think through a few matters.

First, the essential element of employee status, regardless of the rationale adopted by the Board, will remain a finding that the scholarship aid is a form of payment given in return for the performance of the athletic services. Thus, an institution that wishes to minimize the risk of its athletes being considered employees should look to see if it can decouple the grant in aid from athletic performance while staying in compliance with its NCAA Division and athletic conference rules. If athletes on a team received scholarships that were terminable only by academic personnel for academically/disciplinary related reasons generally applicable to all students, it would be near impossible for the Board to find employee status. While reaching that paradigm may be impossible, the closer one approaches it the less likely one's athletes will be found to be employees. Thus, placing more active control of athletic aid in the hands of financial aid administrators and faculty committees would, in a future case, undercut a finding that the scholarship is a payment for athletic services. Short of offering a major in "Football Science" in which academic credit is given for playing and studying the game, this is probably the best one can do to support an argument that the academic nature of the relationship so dominates that the athlete should not be found to be an employee.

Second, an institution may want to start reviewing its policies and treatment of athletes as a group in light of the Board law regarding the Section 7 rights of employees generally. Now that CAPA's election petition has put the issue on the table, an alternative route to obtaining employee status for athletes would be for a player to claim that some aspect of his/her treatment constituted interference with Section 7 rights. A necessary predicate to such a claim would be a decision as to whether the athlete was an employee who had such rights to begin with. Avoiding conduct that would be an overt violation of Section 7 rights could help you avoid being a test case. In addition, should the Board allow bargaining for all or some college or university athletes, the Board will sometimes rely on an employer's historic pattern of violations to order union recognition and bargaining without an election.¹¹⁵

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Third, institutions should be attuned to changes being proposed by their NCAA Division and conferences or state legislatures. The issue has captured enough public attention that action by public institutions appears likely in several states.

ENDNOTES

1. Alejandra Cancino & Teddy Greenstein, *Northwestern Football Players Cast Ballots in Union Vote*, CHI TRIBUNE, Apr. 25, 2014.
2. Id. See also, e.g., Mason Levinson, *Northwestern Players Complete Union Vote; NLRB Review Under Way*, BLOOMBERG (Apr. 25, 2014); Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y.TIMES, April 25, 2014.
3. As discussed more fully below, the National Labor Relations Act defines “employee” somewhat tautologically as including “any employee.” Despite the broad language, the Board and courts have historically excluded various categories of employees such as those deemed “managerial” or “confidential” employees. See *infra* note 94.
4. Prior to 1970, the Board discretionarily refused to exercise jurisdiction over private, not-for-profit colleges and universities unless the activities involved were clearly of a commercial and non-educational nature. *Trustees of Columbia University*, 9794 N.L.R.B. 424 (1951). In 1970, the Board held that changes in the nature of higher education and its influence on interstate commerce justified asserting jurisdiction over colleges and universities generally. *Cornell University*, 183 N.L.R.B. 329 (1970).
5. Under the NLRA, a Union seeking to represent a group of employees files a petition with the NLRB for a government supervised election. To file a valid petition, the union needs to have proof that at least 30 percent of the employees in the unit wish to be represented by the union for purposes of collective bargaining. If an election is held, a union needs to obtain affirmative votes from 50% plus one of the bargaining unit members who actually vote. An employer has two choices in response to the Petition. It can either agree to have the election and then stipulate to a date and location and other particulars, or it can challenge the bona fides of the petition on limited grounds. *Conduct Elections*, NAT’L LABOR RELATIONS BD., (last visited Nov. 17, 2014). In this instance, Northwestern refused to agree to a Board supervised election, and the case was sent to a hearing before the Regional Director of the Chicago Office of the National Labor Relations Board. The basis of Northwestern’s challenge is that the football players cannot be considered employees as defined in the NLRA. It made secondary arguments to the effect that CAPA is not a “labor organization” within the meaning of the Act, that the unit sought was improper because it excludes non-scholarship players, and that the players are at most “temporary employees.” *N.W. Univ.*, Case No. 13-RC-121359, (Post-Hearing Brief of Respondent Northwestern University, 2014).
6. COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA) (last visited Oct. 17, 2014).
7. Id.
8. *N.W. Univ.*, Case No. 13-RC-121359 (Decision and Direction of Election 2014) (hereinafter “Decision and Direction”).

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⁹. *N.W. Univ.*, Case No. 13-RC-121359 (Request for Review of Decision and Direction of Election 2014), (hereinafter “Request for Review”).

¹⁰. Decision and Direction, *supra* note 8.

¹¹. *Id.* at 17. The football team is composed of about 112 players, of which 85 received full grant-in-aid athletic scholarships after being recruited by the coaching staff. The remaining 27 are deemed “walk-ons” who may or may not receive need based or academically awarded financial aid.

¹². 29 U.S.C. § 152(3) (2012).

¹³. 516 U.S. 85, 94 (1995).

¹⁴. Decision and Direction, *supra* note 8, at 13.

¹⁵. *Id.* at 14.

¹⁶. Per NCAA rules, the scholarships may pay for tuition, fees, room and board, and books up to the University’s cost of attendance. *NCAA Division I Manual* (Jan. 2014) Rule 15.02.5. In Northwestern’s case, these were valued at approximately \$61,000 per academic year (\$76,000 if the player takes summer classes). Most of the amount is in the form of tuition/room and board charge remission. Book reimbursement is paid in cash as may be a housing/food allowance of between \$1,200 and \$1,600 per month for players who live off-campus. All players are required to live on campus during their first two years, so the housing and food stipends are available only to juniors, seniors, and fifth year redshirts. The amount of the food and housing stipend is limited per NCAA rules. In addition, *de minimis* payments may be made for family emergency travel and on a need basis to acquire appropriate clothing for team events/travel. Again, the amounts are limited per NCAA rules.

¹⁷. Decision and Direction, *supra* note 8, at 14.

¹⁸. See Decision and Direction, *supra* note 8, at 5–9. The decision describes in detail the time players devote to the football program and the coaching staff’s control of the players’ schedule. Players start with a training camp in August. During Summer camp in August, players devote 50 to 60 hours a week to football related activities. During the playing season, the team plays 12 games, and players devote 40 to 50 hours a week to football related activities. If the team qualifies for a Bowl game, the players continue to spend the same amount of time in preparation for the game. During the Winter and Spring non-playing seasons, Ohr found that players spend between 12 and 20 hours per week on football activities. Players have nine “discretionary” weeks a year in which they are not required to participate in any football related activities. Throughout this time, a players’ schedule was also highly regulated by the coaching staff with medical check-ins, training table attendance for meals, film sessions and the like all scheduled for the player.

¹⁹. See Decision and Direction, *supra* note 8, at 12. The team has a Handbook applicable to all players, which sets forth specific rules and regulations applicable to the players. The Handbook requires that freshman and sophomore players live on campus, that any players living off-campus have their leases approved by the football department, that any outside employment be approved by the football department, and that all players provide access to their social media sites to the department. Additionally, players are prohibited from swearing in public and “embarrassing” the team. The players are also subject to strict drug and alcohol policies, random drug tests, and anti-hazing and anti-gambling

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policies.

20. See Decision and Direction, *supra* note 8, at 18.

21. Decision and Direction, *supra* note 8, at 13.

22. *Id.*

23. *Id.*

24. *Id.* at 12–, 13.

25. *Id.* The exact amount of net revenue was a matter of debate between the parties, just as it is on college and university campuses throughout the country.

26. *Id.* at 12.

27. Decision and Direction, *supra* note 8, at 13.

28. *Id.* CAPA conceded that only two players had their scholarships revoked in the prior five years, and that unlike many schools, Northwestern granted the scholarship for four years regardless of injury or level of actual play. It was undisputed that the amount of the scholarship was equal for all players and not dependent on the amount of playing time or quality of the “services” rendered. Ohr found the threat of revocation for cessation of football activity was sufficient to establish that the scholarship was given in exchange for the “service” of playing football performed by the player.

29. *Id.* at 13.

30. *Id.* at 14.

31. 342 N.L.R.B. 483 (2004).

32. *Id.* at 492.

33. *Id.* at 488–89.

34. *Id.* at 490.

35. Decision and Direction, *supra* note 8, at 15.

36. *Id.* at 15.

37. *Id.*

38. *Id.* at 16. Ohr did not address how this rationale would affect the status of the 40 or so walk-on football players who were subject to all of the same scheduling demands and time commitments as the scholarship players. Rather, he held that their lack of compensation excluded them from the definition of an employee, and thus they could have no bargaining rights under the statute.

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39. *Id.* at 17.

40. *Id.* at 18.

41. Request for Review, *supra* note 9.

42. *N.W. Univ.*, Case No. 13-RC-121359 (Notice and Invitation to File Briefs 2014).

43. *N.W. Univ.*, Case No. 13-RC-121359 (Grant of Extension 2014).

44. 195 N.L.R.B. 639 (1972).

45. *Id.* at 640.

46. *Id.*

47. *Id.*

48. In *Adelphi*, it was the employer who proposed adding the graduate students to the unit proposed by the Union. Thus, a challenge to their employee status would have been unlikely. *Id.*

49. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

50. *Id.* at 623. 51. *Id.* at 621-22.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Leland Stanford*, 214 N.L.R.B. at 621.

56. *Cedar-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

57. *Id.* at 253.

58. *Id.*

59. *Id.* at 256.

60. 226 N.L.R.B. 1251 (1976).

61. *Id.* at 1252.

62. *Id.*

63. *Id.*

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64. *Id.* at 1254--55.

65. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977).

66. *Id.*

67. *Id.* at 1001.

68. *Id.*

69. *Id.*

70. *Id.* at 1001.

71. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. at 1001.

72. *Id.* at 1002.

73. *Id.* at 1002–03. The fourth scenario involved situations in which student's work for a third party commercial entity as part of their educational program e.g. clinical education and internships. *Id.*

74. 330 N.L.R.B. 152 (1999).

75. *Id.* at 168.

76. *Id.* at 160--61.

77. *Id.* at 163--64.

78. *Id.* at 164--65.

79. *Id.*

80. *Bos. Med. Ctr. Corp.*, 300 N.L.R.B. at 152.

81. 332 N.L.R.B. 1205 (2000).

82. *Id.* at 1206.

83. *Id.* at 1219.

84. *Id.*

85. *Id.* at 1206, 1207, 1214, 1219.

86. *Id.* at 1208.

87. *N.Y. Univ.*, 332 N.L.R.B. at 1221.

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88. *Id.* at 1220--21 n.10.

89. 342 N.L.R.B. 483 (2004).

90. *Id.* at 487--88.

91. *Id.* at 488.

92. *Id.* at 488--98. These facts were not essential to the holding as a sizable number of the members of the proposed unit were "proctors" who were engaged in miscellaneous tasks not necessarily directly connected to teaching or their educational program. *Id.* at 485 & n. 24.

93. *Id.* at 490.

94. *Id.* at 489.

95. See, e.g., *Bos. Med. Cent. Corp.*, 330 N.L.R.B. at 152, 164 (majority characterizes its holding as a "reasonable" interpretation of the Act); *Id.* at 168 (Member Hurtgen in dissent noting while it may be permissible to treat housestaff as employees under the Act, it is not compelled).

96. See, e.g., *Nat'l Labor Relations Bd. v. Bell Aerospace*, 416 U.S. 267 (1974) (excluding non-supervisory managerial employees from protections of the Act); *Nat'l Labor Relations Bd. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (approving Board policy of excluding confidential employees from bargaining units, despite lack of explicit exclusion by statute); *Nat'l Labor Relations Bd. v. Yeshiva Univ.*, 444 U.S. 672 (1980) (applying managerial exception to tenured university faculty).

97. Other than in the context of distinguishing employees from independent contractors, the question of who is an "employee" has arisen with surprising infrequency. The Supreme Court has decided only three such cases beyond those cited in n. 96. *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995) (holding that union salts, i.e. persons seeking employment for the purpose of organizing a non-union employer's work-force from the inside, did not lose their employee status due to divided loyalty); *Sure-Tan v. Nat'l Labor Relations Bd.* *Nat'l*, 47 U.S. 883 (1984) (holding that undocumented workers remain employees for purposes of the Act, although status might affect remedies available); *Allied Chem. & Alkali Workers Local Union No.1 v. Pittsburgh Plate & Glass Co.*, 404 U.S. 157 (1971) (holding that retirees are not employees covered by the bargaining obligations of the Act).

98. *San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976).

99. *Id.*

100. *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206--07 (2000).

101. Decision and Direction, *supra* note 8, at 13.

102. The bulk of the compensation provided is in the form of tuition remission, good only at Northwestern. The only cash compensation is a housing/food allowance of \$1,200-\$1,600/month available only to those players who elect to live off campus after completing their second year.

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103. Decision and Direction, *supra* note 8, at 17; see also, *supra* note 11.

104. Compare *NCAA Division I Manual* (January 2014) Rule 15.5.6 page 206, allowing 85 scholarships for Football Bowl Subdivision team and 63 scholarship equivalencies for Championship Division football teams; with *NCAA Division II 2013-2014 Manual*, Rule 15.5.2.1 (page 15249) allowing 36 scholarship equivalences for football. These same rules establish the number of allowed scholarship equivalencies within each NCAA Division for particular sports.

105. *N.Y. Univ.*, 332 N.L.R.B., at 1206–1207, 1215.

106. See e.g. *WBAI Pacifica Foundation*, 328 N.L.R.B. 1273 (1999) (the Board issued a unit clarification order excluding 200 unpaid staff, who were essentially volunteers, from a unit that contained only 25 paid staff).

107. Confidential employees are “those employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations.” *Nat’l Labor Relations Bd. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189 (1981), quoting *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

108. Decision and Direction, *supra* note 8, at 14.

109. Indeed, a union that pushed for compensation in amounts greater than that allowed by NCAA rules could effectively cause their programs to be severely sanctioned by NCAA.

110. *Hendricks*, 454 U.S. at 170.

111. *Id.*

112. *Peavey Co.*, 249 N.L.R.B. 853, n.3 (1980). The Board’s position has met with mixed reception in the Courts of Appeal. Compare: *Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970) (Enforcing Board order to reinstate confidential employee who respected picket line set up by bargaining unit employees) and *Nat’l Labor Relations Bd. v. Poultrymen’s Serv. Corp.*, 138 F.2d 204, 210 (3d Cir. 1943) with, *Peerless of America v. Nat’l Labor Relations Bd.*, 484 F.2d 1108, 1112 (7th Cir. 1973) and *Nat’l Labor Relations Bd. v. Wheeling Elec. Co.*, 444 F.2d 783 (4th Cir. 1971) (each holding that confidential employees, like supervisors, have no rights as employees under the Act). The rationale used in *Peerless* and *Wheeling*, that the legislative history to the 1947 amendments to the Act dictate that confidential employees be deemed non- employees for all purposes, was undermined in *Hendricks County Rural Electric*, where the Supreme Court held that the 1947 Amendments did not resolve this issue 454 U.S., at nn. 10 and 19.

113. The current Board has taken an expansive view of these protections for employees who are not in collective bargaining units represented by a union, particularly in the area of policies limiting or chilling employee expression regarding their employer or issues that might be of concern to other employees. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014) (holding that employer social media policy prohibiting “inappropriate” discussions was overly broad and a violation of unorganized employees’ rights); *Durham School Services*, 360 NLRB No. 85 (2014) (restrictions on employee access to facilities and communication thereon violated Act).

114. *S.F. Art Inst.*, *supra* note 98, at 1254.

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¹¹⁵. See, e.g., *Nat'l Labor Relations Bd. v. Gissel Packing Co.*, 395 U.S. 575 (1969).