Northwestern Football Players Throw a "Hail Mary" But the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy

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I. INTRODUCTION

On January 28, 2014, just days before the National Football League would hold its annual Super Bowl to determine bragging rights for the top team in professional football, a group of amateur athletes on the Northwestern University football team petitioned the Chicago regional office of the National Labor Relations Board (the "Board"). In their petition, the football players requested an election to recognize the College Athletes Players Association ("CAPA") as their official labor union under federal labor law—specifically, the National Labor Relations Act of 1935 ("NLRA").[1] The petition was signed by a majority of the scholarship athletes on the football team. The initiative to unionize the football players was led by the team's former quarterback, Kain Colter, and supported by CAPA and representatives of the United Steelworkers.

The players did not have long to wait for an answer from the Chicago

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[1] National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. (2015) (often referred to as the Wagner Act). After the Board accepts a petition to hold an election, more than 50% of the eligible bargaining unit employees (in this case, the scholarship athletes) must vote to approve a "labor organization" as the exclusive representative of the unit. Upon such a vote, the Board will certify the labor organization as the union for the collective bargaining unit.

office. In a stunning and unexpected ruling announced on March 26, 2014, Regional Director Peter Sung Ohr held that the scholarship football players were "employees" of Northwestern University entitled to collective bargaining rights under the NLRA.[2] As such, the student athletes had a legal right to conduct an election to decide whether to recognize CAPA as their labor union. Wasting no time, the scholarship athletes cast their votes on April 25, 2014. Immediately thereafter, the ballot boxes were impounded and sealed pending the outcome of Northwestern University's appeal of the Regional Director's ruling to the full Board in Washington.[3] After seventeen months of deliberation and delay, the Board finally announced its much-anticipated decision on August 17, 2015.[4]

In *Northwestern University*, the Board deftly sidestepped the Regional Director's controversial ruling. In a judicious decision, the Board unanimously declined to assert jurisdiction over the case on the grounds that to intervene in the matter "would not serve to promote labor relations" or "effectuate the purposes of the Act [the NLRA]."[5] Without reaching any of the substantive issues raised by the student athletes, the Board declined their invitation to restructure Division I intercollegiate athletics. While the Board left the door ever so slightly open to a future case (perhaps brought by another sports team or an entire league), as a practical matter it is unlikely that the Board will step into these same waters again any time soon.[6] That leaves current law settled for the foreseeable future—namely, student athletes are not entitled to unionize under federal labor law. Conversely, had the Board found for the football players, the administration of Northwestern University could have refused to bargain with the football players—thereby forcing the Board to appeal to the U.S. Court of Appeals. That case could have dragged on

[2] Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), Petitioner, Case 13-RC-121359, 2014 WL 1922054, at *3 (N.L.R.B. Mar. 17, 2014).

[3] Northwestern University's brief of its appeal was filed with the Board on July 3, 2014. Typically, a three-member panel of the Board hears appeals from the regional directors. In cases that are considered of national significance, such as this one, all five members of the Board will hear the appeal.

[4] Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA) Petitioner, Case 13-RC-121359, 362 N.L.R.B. No. 167, at *6 (Aug. 17, 2015).

[5] Id. at *1.

[6] After the decision was announced, the president of CAPA, Ramogi Huma, voiced his disappointment with the outcome but expressed the overly optimistic view that "the door is still open" because the Board did not explicitly rule that the scholarship football players are not employees of Northwestern University. Quoted in Ben Strauss, N.L.R.B. Rejects Northwestern Football Players' Union Bid, N.Y. Times, Aug. 18, 2015, http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrb-says-northwestern-football-players-cannot-unionize.html?_r=0 [http://perma.cc/G7SA-3QA6]; see also Ben Strauss, Supporters of Athletes' Union Stay Hopeful After Setback, N.Y. Times, Aug. 19, 2015, http://www.nytimes.com/2015/08/19/sports/ncaafootball/advocates-for-college-athletes-dig-in-for-long-battle.html [http://perma.cc/3T5J-3FML].

for years, perhaps even eventually reaching the U.S. Supreme Court.[7]

Like many experts, the authors of this study had expected that the student athletes would lose their argument before the Regional Director based on contrary precedent of the Board pertaining to an analogous case which involved graduate students who perform academic services for their university. In the seminal 2004 case of *Brown University*, the Board held that such graduate students do not have bargaining rights under the NLRA.[8] In the face of that adverse precedent, the football players already beat the odds when the Regional Director held that they were employees of Northwestern University entitled to a union. Would they convince the full Board as well? Over the years, there were indications that the pro-labor members of the Board might view the case not only as an opportunity to recognize a right for the student athletes to form a union, but also to reverse its ruling in *Brown University* regarding graduate students. For that reason, a wide variety of academics and practitioners concerned with federal labor law, intercollegiate athletics, and graduate school education anxiously awaited the Boards' decision concerning the football players at Northwestern University.

While the presumption was that the Board would follow its own recent precedent in *Brown University*, consistency is an attribute the Board lacks. Indeed, the Board has already changed its mind several times in recent decades with respect to the question of whether graduate students are entitled to collective bargaining. Overall, the Board reverses itself more often than do courts and other administrative agencies with judicial authority. This variability of opinion can be attributed to the partisan composition of the Board, whose members are appointed by the President (and confirmed by the Senate) largely along partisan lines.[9] Because of this, the opinions of the Board on fundamental policy issues are particularly sensitive to shifts in the political wind.[10] And the political wind certainly has shifted since the

[7] The Board does not have enforcement powers. Hence, if the Board had ruled against Northwestern University but the administration did not comply with its decision (referred to as a "final order"), the Board would have been forced to bring suit in a federal appellate court—either in the Seventh Circuit in Chicago or the D.C. Circuit in Washington. Appeals based on questions of law are heard by federal circuit courts of appeal while questions of fact are heard by the federal district courts. In turn, appellate decisions are appealable to the Supreme Court. See Cole D. Taratoot, The Influence of Administrative Law Judges and Political Appointee Decisions on Appellate Courts in National Labor Relations Board Cases, 36 U. Denv. L. & Pol'y 35, 39 (2014).

[8] Brown Univ. & In'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO, CIO, 342 N.L.R.B. 483 (2004).

[9] NLRA, 29 U.S.C. § 153(a).

[10] The ideological voting patterns on the Board are analyzed in Ronald Turner, Ideological Voting on the National Labor Relations Board, 708 U. Pa. J. of Lab. and Emp. L. 707 (2006) (concluding that "ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues"). Turner focuses on "ideology" (as in whether a member of the Board is generally pro-Labor or pro-business) rather than partisanship; however, this expression of ideology does generally reflect the political affiliation of the President (who makes the appointments) and the

Board last visited the issue of graduate students unions in 2004. At that time, George Bush was President and Republican appointees dominated the Board. Since then, Democrats have regained control of the White House—and with it, control of the Board.

Even with a Democrat majority on the Board, Republicans have exerted considerable influence in the Senate over the appointment process during the Obama years—first as the minority party using the filibuster to thwart Democrat appointees, and then as the majority party following their victory in the November 2014 mid-term elections. That influence was on display when conservative Republicans in the Senate filibustered several Obama appointees to the Board, resulting in three empty seats that left the Board without a quorum to conduct business.[11] President Obama filled two of those empty seats in January 2012 through "recess appointments," but that controversial tactic backfired and produced a contentious legal battle that ultimately reached the U.S. Supreme Court.[12] The Court held that the appointments were unconstitutional—thereby leading to additional uncertainty regarding the Board's prior decision. As part of a deal to resolve the resulting uncertainty following the Court's decision, the Senate approved the President's appointees and then enacted procedural reforms to avoid filibusters of future political appointees.[13] So when the Northwestern football players filed their petition, the Board was already fully staffed and comprised of

composition of the Senate (which confirms the appointees).

[11] For a discussion of Republican filibustering of presidential nominees, see Terry Eastland, After the Filibuster: The coming war over presidential appointments, The Weekly Standard, (Feb. 24, 2014), http://www.weeklystandard.com/articles/after-filibuster_781537.html [http://perma.cc/T98S-NGXF].

[12] President Obama appointed one member to the Board in 2010, and that appointment was confirmed by the Senate. He then filled two seats in January 2012 through so-called recess appointments. The Board's decision-making authority was challenged in the federal courts on the grounds that it lacked a quorum to conduct business because such appointments were improperly made at a time when the Senate was holding *pro forma* sessions rather than in official recess. The case came on appeal to the Supreme Court, which announced its unanimous opinion on June 26, 2014. The Court held for the plaintiff, finding that the President can exercise his authority to make recess appointments only if the recess is of sufficient duration (such as the traditional August recess) or made during an intra-session recess. NLRB v. Noel Canning, 134 S.Ct. 2550 (2014). The implications of the holding for decisions made by the Board during the period when it was unconstitutionally constituted are not clear, although on July 18, 2014, the reconstituted Board ratified "all administrative, personnel, and procurement matters" taken by the Board from January 4, 2012 to August 5, 2013. See Office of Public Affairs, NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed, N.L.R.B. (Aug. 4, 2014), https://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court [http://perma.cc/S8CH-VLYG].

[13] See Ramsey Cox, Senate confirms all five NLRB members, The Hill (July 30, 2013 10:15 PM), thehill.com/blogs/floor-action/senate/314503-senate-votes-to-confirm-all-five-nlrb-members [http://perma.cc/DLH4-V9RT]. The successful campaign to amend Senate rules is recounted in Jeremy W. Peters, In Landmark Vote, Senate Limits Use of the Filibuster, N,Y. Times, Nov. 21, 2013, http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html [http://perma.cc/FVC5-GDC6].

three Democrats and two Republicans.[14] This partisan shift certainly improved the odds that the student athletes might prevail before the full Board.

The petition filed by the Northwestern football players was the first ever to come to the Board involving the right of student athletes to unionize under the NLRA.[15] As such, this was a case of first impression. That said, there is a long line of decisions involving graduate students that raise many of the same legal issues. These decisions provide guidance as to what factors the Board has deemed relevant to the analysis. Accordingly, we take this opportunity to update our prior discussion of this line of decisions concerning the rights of graduate students.[16] We then consider the applicability of this precedent to the case brought by the Northwestern football players. Pursuant to our analysis, we focus on the central legal issue of all of these disputes: Do university students who perform services for their school in connection with their education have the right to unionize under the NLRA? This question is relevant to the claims of both graduate students and student athletes. In our effort to discern an answer, we review the Board's seminal decision in *Brown University*. The holding of that case has been questioned in recent years but never overruled. Thus, *Brown University* remains relevant to the determination of the legal rights of graduate students—and arguably, student athletes as well.

We conclude by considering the implications of the Board's decision in *Northwestern University* for student athletes in general as well as graduate students seeking to unionize. Thereafter, we consider several reform proposals for intercollegiate athletics intended to address the legitimate concerns raised by the football players at Northwestern University. Given the Board's refusal to intervene in their case, these options may now emerge as viable alternatives to the players' thwarted campaign for collective bargaining.

[14] In July 2013, the Senate reappointed Mark Gaston Pearce (a Democrat) for another five-year term as chair and confirmed two Democrats and two Republicans. Senate Votes to Fill All Five Seats on Labor Board, N.Y. Times, July 31, 2013, http://www.nytimes.com/2013/07/31/us/politics/senate-votes-to-fill-all-five-seats-on-labor-board.html [http://perma.cc/EZG2-L5WY].

[15] There were several attempts by student athletes to unionize in the late 1930s, but none of these efforts ever came before the Board for review. See Nicholas Fram & T. Ward Frampton, A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics, 60 Buff. L. Rev. 1003, 1005 (2012).

[16] We previously reviewed these decisions as well as the Board's decision in *Brown University* in Sheldon D. Pollack & Daniel V. Johns, Graduate Students, Unions, and *Brown University*, 20 Lab. Law. 243 (2004). The analysis here updates and builds upon our prior research, taking into account developments since that decision.

II. GRADUATE STUDENTS AND UNIONS

A. Background

Because the petition filed by the Northwestern football players was the first known instance of student athletes at a private university seeking to unionize under federal labor law, there was no precedent directly on point concerning this specific question. However, the Board had previously heard an analogous case that sheds light on the legal status of the student athletes: the right of graduate students at private universities to unionize. The legal issues raised by the football players are similar to those of the graduate students, notwithstanding the obvious differences with respect to the type of services performed by these different groups of students. Accordingly, we review the long line of cases involving graduate students that culminated with the Board's decision in *Brown University*. We also consider the aftermath of that decision. Despite criticism in recent years, the holding remains good law with respect to graduate students and the precedent most directly on point to the question of whether student athletes should be deemed employees of their university for purposes of federal labor law.

Like student athletes, graduate students have been a growing presence in universities in the United States since the 1950s.[17] Graduate students who conduct their studies in pursuit of an advanced degree (doctoral or masters) perform a variety of services for their universities in connection with the programs in which they are enrolled. In contrast with the services performed by student athletes (e.g., participation in athletic events at which admission fees are collected by their universities), graduate students perform academic services while working toward a degree. In exchange for performing these services, graduate students typically receive a waiver of tuition and often a monetary stipend as well. Some graduate students work as teaching assistants assisting faculty in the classroom, while others work as research assistants supporting faculty with their research. In most cases, the work is performed by the graduate student in conjunction with coursework required for an academic degree.

Graduate students who perform such services (whether teaching or research) for compensation are "workers" who in most instances, are properly treated as "employees" for a variety of legal purposes—e.g., federal income taxation, employment taxes, and the protections afforded employees under the Fair

[17] For a history of the unionization movement as it evolved on American campuses, see Judith Wagner DeCew, Unionization in the Academy: Visions and Realities (2003).

Labor Standards Act of 1938 (the "FLSA").[18] But the classification of graduate students who perform academic services pursuant to the requirements for their degree program is less clear—specifically with respect to the right to collective bargaining under the NLRA. This is a separate legal issue that has attracted considerable attention in recent decades as graduate teaching and research assistants at a number of prominent national research institutions have pursued efforts to unionize. These cases provide guidance as to the facts and circumstances that the Board has traditionally deemed relevant in generally determining whether university students have the right to unionize under the NLRA.

In those cases previously heard by the Board, administrators contesting the right of graduate students at their universities to unionize have raised much the same argument—that the graduate students are "primarily students" rather than "employees" within the meaning of Section 2(3) of the NLRA.[19] (As we shall see, this also is the central question raised in the case of the student athletes.) This is usually an open and shut case for students who work (whether part-time or full-time) in university facilities such as dining halls, libraries, and dormitories. These students are employees who are paid compensation for their services (which are not related to the academic programs in which they are enrolled), and hence, entitled to collective bargaining under the NLRA. Likewise, they are taxed as employees for purposes of federal income taxation and entitled to the legal protections afforded employees by the FLSA. The difficult case involves graduate students who perform academic services such as research and teaching pursuant to the requirements of the degree program in which they are enrolled. Are they, too, employees entitled to collective bargaining? If university administrators in the contested cases uniformly assert that the graduate students are primarily students, rather than employees covered by federal labor law, the graduate students portray themselves as students who also happen to teach classes or perform research for compensation. They argue that they should be deemed employees entitled to all the legal protections afforded by the NLRA. The case law reveals that both sides of the argument have been alternatively accepted and rejected by the Board over the years.

[18] Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 201.

[19] NLRA, 29 U.S.C. § 152(3) ("The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.").

Finally, all the cases discussed below involve the question of whether students who perform services at private universities have the right to unionize under federal law. These cases say nothing about the rights of students at public universities, which are governed by different legal rules. Public universities are state entities expressly exempt from the definition of "employer" under the NLRA.[20] Hence, graduate students at public universities do not have the right to collective bargaining under federal labor law. The same applies to student athletes at public universities. Graduate students and student athletes, however, may possess the right to unionize under state labor law. Graduate students employees at public universities in fourteen states currently possess a statutory right to unionize under state labor law; in eleven other states, their right to unionize is uncertain.[21] One state expressly denies collective bargaining rights to graduate student employees at its public universities; twenty-three other states exclude all employees at their public universities from collective bargaining.[22] In the wake of the petition filed by the football players at Northwestern University, two states have already adopted legislation to expressly bar student athletes from organizing unions at their public institutions.[23] To further complicate the matter, the rules can be different for students, faculty, and staff depending on the state. Thus, anyone interested in determining whether a particular group of graduate students, student athletes, faculty, or staff at a particular public university have the right to unionize must consult state labor law. We offer no opinion as to the law of any particular state or how the Board's decision in Northwestern University might affect the rights of student athletes at public universities under state law. We do confirm that to date no group of student athletes at any public university has been certified as a collective bargaining unit.

B. Early Decisions of the Board

The question of whether students, faculty, and staff have the right to unionize under federal labor law is a relatively recent phenomenon. For decades

[20] The exemption is found in § 152(2) of the NLRA, which provides that: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or *any State or political subdivision thereof*. . . . [emphasis added]." NLRA, 29 U.S.C. § 152(2).
[21] Neal H. Hutchens & Melissa B. Hutchens, Catching the Bug: Graduate Student Employees and Unionization, 39 Gonz. L. Rev. 105, 108 (2004).
[22] Id. at 108.
[23] Ohio Rev. Code § 3345.56; Mich. Comp. Laws § 423.201(1)(e)(iii) (covering Big Ten members Ohio State University, University of Michigan, and Michigan State University).

after Congress enacted the NLRA in 1935, the Board refused to assert jurisdiction over private non-profit universities such as Northwestern University and Brown University on the grounds that the activities of such educational institutions are "noncommercial" in nature and that asserting jurisdiction would not further the policies expressed by Congress in the NLRA.[24] That perfectly reasonable position was abandoned in 1970 when the Board claimed jurisdiction over Cornell University (a private non-profit university) on the grounds that it is a businesses engaged in interstate commerce.[25] The Board's decision in *Cornell University* was an invitation to faculty and staff at private universities and colleges across the country to seek to unionize under the NLRA.[26] Soon after, graduate students also began to assert the right to collective bargaining.

This issue was first raised two years after the Board's decision in *Cornell University* in a case involving graduate students at Adelphi University. The graduate students at issue taught classes and graded papers in exchange for free tuition and a yearly stipend from Adelphi University.[27] The Board considered and rejected the argument advanced by the university's administration that the graduate teaching assistants and research assistants should be included in the faculty collective bargaining unit.[28] Instead, the Board found that the graduate assistants were "students working toward their own advanced academic degrees." They were held to be "primarily students" who "do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit."[29] As such, they were not entitled to collective bargaining rights under the NLRA.

The decision in *Adelphi University* was typical of cases in the early 1970s in which the Board conflated the issue of whether the graduate assistants are

[24] See, e.g., Trs. of Columbia Univ., 97 N.L.R.B. 424, 425 (1951) (the Board declines to assert jurisdiction over a private, non-profit educational institution where its activities are noncommercial in nature and intimately connected with the educational purposes of the institution on the grounds that it would not further the policies of the NLRA).

[25] Cornell Univ., 183 N.L.R.B. 329 (1970) (overruling *Columbia Univ.*). The Board now asserts jurisdiction over any private university that purchases and receives goods and supplies in interstate commerce in excess of $50,000 and has gross revenues in excess of $1 million. N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000).

[26] Efforts by faculty at private universities to unionize continued until the U.S. Supreme Court issued its opinion in NLRB v. Yeshiva Univ., 444 U.S. 672 (1980). There the Court held that faculty at private universities are part of management, and hence, are not employees entitled to collective bargaining under the N.L.R.A. The Court's broad classification of faculty at private universities as "managerial" has recently been challenged by the Board in Pacific Lutheran Univ. v. SEIU, 361 N.L.R.B. No. 157, 24 (Dec. 16, 2014) (finding that for faculty to be found managers, they must have "actual—rather than mere paper—authority").

[27] Adelphi Univ., 195 N.L.R.B. 639, 640 (1972).

[28] Id. at 639. The graduate students at issue received a tuition waiver and a yearly stipend of up to $2,900. Ironically, it was the university and not the labor organizations, who advocated for the inclusion of graduate assistants in the faculty collective bargaining unit.

[29] Id.

employees under the NLRA with the question of whether graduate student employees share a sufficient community of interest with the faculty to join their collective bargaining unit. In fact, the two matters are separate and distinct. Nevertheless, the Board continued to pursue this line of inquiry in subsequent cases. For instance, in a case involving a unit consisting of full and part-time faculty, librarians, and teaching assistants at the College of Pharmaceutical Sciences in the City of New York, the Board similarly held that the teaching assistants were "primarily students and do not share a sufficient community of interest with faculty members to warrant their inclusion" in the same unit.[30] As in Adelphi University, the graduate students at the College of Pharmaceutical Sciences were teaching assistants who received a tuition waiver and annual stipend in exchange for sixteen to twenty hours a week.[31] Here, too, the Board found that because "[t]heir continued employment depends upon satisfactory academic progress," the graduate students were excluded from the faculty collective bargaining unit on the grounds of a distinct lack of common interest.[32] Similarly, graduate assistants at Georgetown University, whose compensation was tied to their financial aid packages and who could not work more than twenty hours a week, were found not to "have a community of interest with other regular part-time employees," and accordingly, were excluded from a university-wide bargaining unit.[33] The Board's emphasis on community of interest separated the graduate students from both faculty and staff workers unions, leaving them without any right to unionize under federal labor law.[34]

The question of whether graduate students are employees with their own distinct interests was again at issue the following year when a group of research assistants in the Department of Physics at Stanford University sought to be recognized as their own separate collective bargaining unit.[35] In a departure from its prior approach, the Board changed direction and now focused on the nature of the

[30] Coll. of Pharm. Scis. in the City of N.Y., 197 N.L.R.B. 959, 960 (1972).
[31] Id.
[32] Id.
[33] Georgetown Univ., 200 N.L.R.B. 215, 216 (1972), superseded in part by Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (P.L. 93-360).
[34] Id. at 216. On the same basis, Barnard College graduate students, who were employed in the residence halls or as bowling alley attendants, were barred from joining a unit of non-professional administrative staff because they were "treated differently . . . with respect to their initial employment, rates of pay, tenure and other employment conditions." The Board recognized the question of whether students working for their university were employees under NLRB Section 2(3) but never reached a decision on that issue. Barnard Coll., 204 N.L.R.B. 1134, 1134–35 (1973). See also Cornell Univ., 202 N.L.R.B. 290 (1973) (student foodservice workers did not share community of interest with non-student workers).
[35] Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974). The unit consisted entirely of graduate students in the physics department.

relationship between the graduate research assistants and the university rather than the terms and conditions of their employment. On this basis, the Board concluded that the research conducted by the graduate assistants was directly connected with obtaining a graduate degree.[36] In its factual determination, the Board found that the work of the graduate assistants furthered their own academic goals rather than those of the university. As such, the assistants were deemed "primarily students" and not employees of the university entitled to protection under the NLRA.[37] After *Stanford*, the Board attempted to clarify the differences between employees and students by focusing on the motive of the students in seeking employment, looking to whether such motive was "directly related to their educational program."[38] The students would be deemed primarily students, rather than employees, and thus not eligible to collective bargaining under of the NLRA. Under this new standard, the student's purpose in seeking employment rather than the nature of the employment was deemed relevant.

Stanford was where the law stood until 1999. At that time, the Board suddenly reversed course again in a case involving the residents in a medical training program at Boston Medical Center.[39] Here the Board eschewed an examination of the motives for employment of the residents in favor of an analysis of their functional status, and on that basis, ruled that the residents at issue were employees.[40] The Board broadly interpreted Section 2(3) of the NLRA, finding an employment relationship wherever there is a "conventional master-servant relationship."[41] The Board found such an employment relationship at Boston Medical Center as the interns at issue spent "up to 80 percent of their time at the Hospital engaged in direct patient care."[42] The Board eschewed an inquiry into the purpose of this employment relationship, holding that the fact that "house staff may also be students does not thereby change the evidence of their 'employee' status," and "nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act [the NLRA]."[43] Under this standard, the Board held in *Boston Medical Center* that the interns, residents, and fellows were employees entitled to collective bargaining under federal law. The decision was recently affirmed and followed by the Regional Director of the NLRB in Brooklyn in a case involving medical residents at the Icahn

[36] Id. at 622–23.
[37] Id. at 623.
[38]See e.g., St. Claire's Hosp. & Health Ctr, 229 N.L.R.B. 1000, 1001–02 (1977).
[39] Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999).
[40] Id. at 168.
[41] Id. at 160.
[42] Id.
[43] Id.

School of Medicine at Mount Sinai.[44]

C. The Board's Decision in New York University

Even after *Boston Medical Center*, it remained possible to argue for a different outcome by distinguishing between graduate students in academic programs and medical residents and interns working in hospitals. After all, the medical residents and interns at issue in Boston Medical Center spent approximately eighty percent of their time performing services for the hospital, while the graduate students at the universities under review typically spent about fifteen percent of their time working as teaching and research assistants—a significant difference. Moreover, graduate students perform their work in furtherance of their academic degree, while the medical staff already had their degrees and were seeking certification for their specialties. Despite this, only one year later in a case involving a group of graduate students at New York University, a majority of a three-member panel of the Board ignored this important distinction and collapsed graduate students and academic medical personnel into one single category, subject to one rule: all are "employees" entitled to unionize under federal labor law.[45]

In *New York University* (2000), the Board again relied on a broad reading of Section 2(3) of the NLRA to find that the graduate assistants "plainly and literally" were employees of the university by virtue of providing services and performing work for compensation.[46] It no longer mattered to the Board that the work performed by the graduate students provided an educational benefit to them. Perhaps the most significant fact in this case was that graduate teaching was not a requirement for most advanced degrees awarded by New York University.[47] There may have been incidental educational benefits to the assistants, such as "learning to teach or research," but the Board saw no inconsistency between their status as employees and any incidental educational benefit they may have received from their work.[48] As employees within the meaning of Section 2(3), the graduate teaching

[44] Icahn School of Medicine at Mount Sinai, Case 29-RC-112517 (N.L.R.B. Feb. 25, 2014). The Regional Director held that the facts were indistinguishable from those in *Boston Medical Center*. He rejected the administration's contention that its internship program was more "educationally focused" than the program at issue in *Boston Medical Center*. On that basis, the medical interns at issue were deemed employees not students.
[45] N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000).
[46] Id. at 1206.
[47] Id. at 1207 ("[I]t is undisputed that working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments. Nor is it a part of the graduate student curriculum in most departments.").
[48] Id.

assistants and research assistants at New York University were deemed to constitute a bargaining unit entitled to collective bargaining under the NLRA.[49] This decision of the Board reversed nearly thirty years of precedent and paved the way for graduate students to organize unions at private universities.

D. The Board's Decision in Brown University

Following the Board's surprising decision in New York University, the administration of the university paused to weigh its options. First, the administration waited to see whether the union would be approved by a majority of the graduate students in the collective bargaining unit.[50] That turned out to be a foregone conclusion as an overwhelming majority of the NYU graduate students voted to form a union. This was the Graduate Students Organizing Committee ("GSOC"), an affiliate of the United Auto Workers ("UAW"). Thereafter, the administration pondered whether to continue to refuse to bargain with the organization, as a number of their peer institutions were urging them to do. Such a refusal would have forced the Board to bring a legal action against New York University in federal court where the university administration then would have had the opportunity to make its case. During the period when the administration initially resisted the Board's decision, there were threats of a university-wide strike by the graduate students. A strike never materialized because suddenly and unexpectedly, the administration of New York University announced on March 1, 2001 that it would give up the fight and officially recognize and negotiate with the graduate student union.[51] Two years later, the GSOC became the first student union to enter into a collective bargaining agreement with a private university. Reports suggest that the graduate students received a substantial increase in their compensation and benefits pursuant to the collective bargaining agreement.[52]

Administrators at other elite private universities closely followed New York University's decision to recognize and bargain with the graduate student union

[49] Id. at 1205.
[50] Courtney Leatherman, NLRB Rules T.A.'s at Private Universities Have the Right to Unionize, Chron. of Higher Educ. (Mar. 10, 2000), http://chronicle.com/article/NLRB-Rules-TAs-at-Private/9890 [http://perma.cc/SQX7-HKXA].
[51] Scott Smallwood, A Big Breakthrough for T.A. Unions, Chron. of Higher Educ. (March 16, 2001), http://chronicle.com/article/A-Big-Breakthrough-for-TA/29246 [http://perma.cc/5VQD-DMN9].
[52] For a review of the long contest over the right of graduate student at NYU to unionize and the contract they eventually negotiated, see Steven Greenhouse & Ariel Kaminer, With New Agreement, N.Y.U. Would Again Recognize Graduate Assistants' Union, N.Y. Times, Nov. 26, 2013, http://www.nytimes.com/2013/11/27/nyregion/with-new-agreement-nyu-would-again-recognize-graduate-assistants-union.html [http://perma.cc/4E9S-G4D4].

rather than appeal to the federal courts. Many of these universities were engaged in their own legal confrontations with student unionization. These included Yale University (where the contest was extremely bitter and dragged on for years), Cornell University (where the administration did not challenge the petition filed by its graduate students but won the election), the University of Pennsylvania, Columbia University, and Brown University. The case arising out of Brown University, which led to the seminal ruling, came to the Board on appeal from a 2001 decision of the Regional Director wherein it was held that graduate research assistants and graduate teaching assistants at Brown University were "statutory employees" entitled to collective bargaining under the NLRA.[53] The ruling by the Regional Director was a straightforward application of the Board's decision in *New York University*. The Regional Directors in Regions 1 and 2 had previously issued similar determinations consistent with New York University in disputes over unionization at Columbia University[54] and Tufts University.[55] The Board accepted all these decisions for review along with the Regional Director's decision to allow graduate students to unionize at the University of Pennsylvania.[56] While the Board probably did not expect to re-visit this controversial issue so soon, it was compelled to do so by the sheer number of important cases demanding review.

The lead case among those on appeal to the Board was that involving the graduate students at Brown University. In November 2001, the Regional Director for Region 1 had held that approximately 450 graduate students who worked as teaching assistants and research assistants in social science and humanities departments at Brown University were employees within the meaning of Section 2(3) of the NLRA.[57] The Board granted Brown University's request for an appeal, and in dramatic and decisive fashion, the administration's position was vindicated by the full Board. On July 13, 2004, the Board announced its opinion in *Brown University*, expressly overruling its prior decision in *New York University* from only four years before and re-establishing prior law and legal principles with respect to the right of graduate students to collective bargaining.[58] By a vote of three to two, the Board broadly held that graduate research and teaching assistants at private universities for whom supervised research or teaching is an "integral component" of their academic program of study are "primarily students" and not employees

[53] Brown Univ. & In'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO, CIO, 342 N.L.R.B. 483 (2004).
[54] Trs. of Columbia Univ., Case 2-RC-22358 (N.L.R.B. Feb. 11, 2002).
[55] Tufts Univ., Case 1-RC-21452 (N.L.R.B. Mar. 29, 2002).
[56] Trs. of the Univ. of Pa., Case 4-RC-20353 (N.L.R.B. Nov. 21, 2002).
[57] *Brown Univ.*, 342 N.L.R.B. 483.
[58] *Brown Univ.*, 342 N.L.R.B. at 42.

covered by the NLRB.[59] Accordingly, the graduate students at Brown University had no legal right to unionize or engage in collective bargaining under federal law.[60]

Arguably, there were factual matters present at Brown University that were distinguishable from those in several of the other cases. For that reason, a closer look at the facts and circumstances of this case is warranted. First, twenty-one of the thirty-two academic departments that offer the Ph.D. degree at Brown University require teaching as a condition for conferral of the degree. That was not so at New York University, where a much lower percentage of graduate programs require teaching duties of graduate students enrolled in doctoral programs. On this basis, the Board concluded that: "The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational."[61] Furthermore, only enrolled graduate students are awarded teaching assistantships at Brown University; there are no teaching assistants at Brown University who are not pursuing academic studies in a graduate program. That reinforced the connection between the activities of the graduate students in their capacity as teaching assistants as well as the connection to their graduate education. Having classified the graduate teaching assistants as primarily students, the Board then considered how they receive compensation. Some eighty-five percent of graduate students receive financial aid at Brown University. Some of these are granted full funding through fellowships, while others receive lesser funding and perform teaching services. Both the graduate teaching assistants and the funded fellows receive a similar package of financial aid, although the fully-funded fellows are not required to teach classes. According to the Board, this further evidenced that the funds paid to the graduate students are provided by Brown University as financial aid for academic study, rather than as compensation for work.

Upon these facts, the Board concluded that the graduate students at Brown University are primarily students, rather than employees: "[I]n light of the status of graduate students as students, the role of graduate student assistantships in graduate education, the graduate students' relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one."[62] Most important, the Board characterized the relationship between the graduate assistants and the university as "educational"

[59] Id. at 8.
[60] Id.
[61] Id. at 7.
[62] Id.

rather than economic.[63] Hence, the graduate assistants were deemed not to be employees within the meaning of Section 2(3), and thus not entitled to collective bargaining rights under the NLRA. The position of the administration of Brown University was affirmed (along with that of the other elite private universities), and the Board's decision in *New York University* was overturned.

The Board's decision in *Brown University* had immediate and wide-ranging implications for efforts to unionize graduate students at other private universities. The broad holding of the case was soon applied in a number of other cases involving efforts by other graduate students to unionize. As such, the *Brown University* decision effectively ended pending attempts to organize graduate students at the several universities that had originally appealed their cases to the Board in light of *New York University*. The cases involving the University of Pennsylvania and Columbia University were immediately dismissed by the applicable Regional Directors in light of the ruling in *Brown University*, thereby ending the efforts by graduate students to unionize at those private universities.[64] In light of the breadth of the Board's decision in *Brown University*, efforts to organize graduate student unions at private universities continued only in the expectation that the Board might be persuaded one day to reverse itself yet again and reinstate its holding in *New York University* following some future change in the partisan composition of the Board. Given past reversals by the Board of its own decisions, that was an entirely reasonable expectation.

The implications of *Brown University* extend beyond the realm of collective bargaining and traditional labor law. The question of whether a graduate student serving as a teaching or research assistant is an employee affects other areas of law. For example, if teaching and research assistants are not employees under the NLRA, should they be considered employees for purposes of workers compensation and unemployment compensation benefits?[65] Likewise, the determination of student versus employee has relevance to determinations of coverage under the FLSA for a wide variety of student workers as well as student athletes.[66] The *Brown University*

[63] Id.

[64] Leigh Strope, Graduate Assistants' Union Right Withdrawn, Philadelphia Inquirer, July 16, 2004, at A05.

[65] See, e.g., Lopez v. City Univ. of N.Y., 750 N.Y.S.2d 194, 195 (N.Y. App. Div. 2002) (awarding workers' compensation benefits to student who worked in federal work study program); Evanson v. Univ. of Hawaii, 483 P.2d 187, 191 (Haw. 1971) (awarding workers' compensation benefits to student killed while performing work in an agricultural practice course).

[66] See, e.g., Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327 (10th Cir. 1981) (holding that FLSA does not apply to student resident assistants at a college); Bobilin v. Bd. of Educ., 403 F. Supp. 1095, 1106–08 (D. Ha. 1975) (student cafeteria workers not employees under the FLSA). In a recent case perhaps inspired by the Northwestern football players, student athletes on the University of Pennsylvania women's track team have brought a case alleging that they are "employees" of their

decision also potentially affects the tax treatment of grants-in-aid scholarships and stipend monies received by graduate assistants under both federal and state law.[67] It is fair to say that more than ten years later, we still do not fully comprehend the long-term impact of *Brown University*.

The sentiment among pro-labor advocates is that any individual (whether student or not) who performs services in exchange for compensation (whether in the form of cash or grant-in-aid scholarship) should be treated as an employee under federal labor law. Certainly, the graduate students at many private universities hope that the Board's decision in *Brown University* will eventually be seen as a temporary deviation from an emerging consensus that all students who provide services are included in the protected class of "employee." It is unclear, however, if that is the direction of federal labor law. Indeed, *Brown University* may eventually emerge as settled law, establishing the principle that where a student's primary relationship to a university is educational, he is not an employee for purposes of federal labor law. At the very least, *Brown University* and the controversy at these elite private universities (including New York University) demonstrates the difficulty of applying the kind of economic analysis traditionally applied in cases involving the collective bargaining rights of workers in other sectors of the economy (for instance, manufacturing) to an analysis of the educational relationship between students and their university. Indeed, the framework of collective bargaining seems more appropriate and better suited to the industrial and manufacturing sectors than the academy and the world of student athletics. As we shall see, the Board may very well feel the same way given its refusal to assert jurisdiction in the case involving *Northwestern University*. In any event, even following its definitive ruling in *Brown University*, one could not help but sense that the Board was not yet done with the issue of graduate students.

E. New York University Revisited

Following the Board's decision in *New York University*, the administration of New York University recognized and bargained with the newly organized graduate students union. Soon after, the administration entered into a collective bargaining agreement with the union. That is where things stood when the Board

university and hence, entitled to minimum wages for all the time spent participating in intercollegiate athletics. The case is currently before the federal district court in Indiana. Berger et al. v. NCAA, Civil Action No. 1: 14-CV-1710 WTL-MJD (Mar. 18, 2015). Not surprisingly, the NCAA has moved to dismiss the case on the grounds that the student athletes are not employees of their university.

[67] See, e.g., 26 U.S.C. § 117(d) (2002).

announced its decision in *Brown University* on July 13, 2004. Because that decision expressly overruled the Board's prior ruling in *New York University*, the bargaining position of the union that represented the graduate students at New York University was seriously undermined. Would the administration of New York University continue to bargain with the GSOC student union after the expiration of its collective bargaining agreement in light of the Board's decision in *Brown University*? While the *Brown University* case was working its way through the legal process, there was a feeling that if the Board ruled against the graduate students at Brown University, the administration at New York University would withdraw its recognition of its student union and repudiate collective bargaining with its graduate assistants—and that is exactly what happened. In the wake of *Brown University*, the administration of New York University announced on August 5, 2005 that it would not negotiate a new contract with the graduate student union following the expiration of their current contract. Collective bargaining with the graduate students at New York University would end. Or so it appeared.

After the administration made its announcement, the graduate students initiated a strike in November 2005. However, the strike faltered the next spring when the administration threatened to dismiss (and in fact, did dismiss) those graduate teaching assistants who continued to strike. Before the fall 2006 semester began, the graduate students capitulated and called off their strike.[68] Thereafter, the administration refused all requests from the graduate students and the UAW to bargain. After pondering their position for several years, the leadership of the graduate student group filed yet another petition with the Board in 2010, again seeking certification of the union under the NLRA.[69] Initially, the Regional Director rejected the petition on the obvious grounds that the Board's decision in *Brown University* had already settled the matter in favor of the university administration. But the full Board reversed the Regional Director's decision by a vote of three to one, with two commissioners suggesting in their opinion that there were "compelling reasons" for reconsidering the Board's prior ruling in *Brown University*.[70] The nature of those compelling reasons was left unstated, but the Board agreed to hear the case of the New York University graduate students and

[68] Graduate Union at New York U. Abandons Strike That Had Faltered Since Spring, Chron. of Higher Educ. (Sept. 7, 2006), http://chronicle.com/article/Graduate-Union-at-New-York-U/37530/#st_refDomain=&st_refQuery= [http://perma.cc/F857-FDXV].

[69] Audrey Williams June, Graduate Students to New York U.: Recognize Our Union Now, Chron. of Higher Educ. (Apr. 28, 2010), http://chronicle.com/article/Graduate-Students-to-New-York/65273/ [http://perma.cc/BH8W-R8TM].

[70] Katherine Mangan, Labor Board Gives NYU Graduate Students Another Shot at Union Vote, Chron. of Higher Educ. (Oct. 28, 2010), http://chronicle.com/article/Labor-Board-Gives-NYU-Graduate/125135/ [http://perma.cc/6L4J-WS4U].

reconsider their decision in *Brown University*.[71] In June 2012, the Board invited briefs on the core question of whether graduate students are employees within the meaning of Section 2(3) of the NLRA. In addition, it requested that the parties state their positions on whether the Board should modify or overrule its prior decision in *Brown University*. The case was then remanded to the regional office to develop a factual record amidst widespread anticipation that the newly reconstituted Board (now comprised of three Democrats and two Republicans) would take this opportunity to reverse itself yet again. The opportunity never came.

In unexpected developments in November 2013, before the case came back to the Board for its final decision, the administration of New York University decided to withdraw its objections to a graduate student union and bargain once again with the UAW-affiliated group as the legal representative of the teaching assistants and graduate teaching assistants. In exchange for that commitment, the graduate student group agreed to withdraw its case then pending before the Board.[72] With that, collective bargaining for graduate students returned to New York University. With the dispute settled between New York University and the graduate student organization, the Board never had the opportunity to revisit the issue. As such, *Brown University* remains good law. Of course, if the Board is ever determined to overturn a prior decision, another good case is always just around the corner. Among a multitude of labor disputes involving graduate students, the football players at Northwestern University provided just such an opportunity.[73]

III. STUDENT ATHLETES AND UNIONS

Notwithstanding the Board's decision in *Brown University*, holding that graduate students at private universities are not employees of their university and hence not entitled to unionize under federal labor law, the Regional Director of the

[71] Stacey Patton, NLRB Will Revisit Issue of Graduate Students' Right to Unionize, Chron. of Higher Educ. (June 25, 2012), http://chronicle.com/article/NLRB-Will-Revisit-Issue-of/132583/ [http://perma.cc/D52G-DUTB].

[72] See Greenhouse & Kaminer, supra note 52; see also Charles Huckabee, NYU Graduate Employees Vote to Unionize, Chron. of Higher Educ. (Dec. 12, 2013), http://chronicle.com/blogs/ticker/nyu-graduate-employees-vote-to-unionize/70417 [http://perma.cc/WF7T-DDBR].

[73] A group of graduate students at Columbia University seeking to form a union filed a petition with the Regional Director in December 2014. That petition was rejected by the Regional Director; however, the Board reversed that decision on the grounds that the case "raises substantial issues warranting review." The Board remanded the case to the Regional Director for a hearing. Columbia Univ., Case 02-RC-143012 (N.L.R.B. Mar. 13, 2015). The two Republican members of the Board argued that the case was properly rejected by the Regional Director based on existing law—namely, *Brown Univ.*, 342 NLRB 483 (2004).

Chicago office reached a very different conclusion with respect to the football players at Northwestern University. Distinguishing the facts and circumstances surrounding the Northwestern scholarship football players from those of the graduate students at Brown University, the Regional Director fell back on prior law to hold that the football players are employees of the university within the meaning of Section 2(3) of the NLRA. Based on this factual finding, the Regional Director held that Northwestern University football players are entitled to collective bargaining, and accordingly, certified the election. Because the Regional Director found that the facts of the case were distinguishable from those involving the graduate students at Brown University, he was able to reach a conclusion contrary to what the Board had found in *Brown University*. In this way, the Regional Director did not explicitly overturn the Board's decision in *Brown University* but rather distinguished the two cases.

Contrary to the Regional Director, the Board refused to address the substantive question of whether the football players are employees of their university. We now examine the decisions of the Regional Director and the Board in *Northwestern University*. Thereafter, we consider the direct implications of the Board's decision for student athletes at other private universities as well as potential indirect implications for graduate students who perform academic services for their universities.

A. The Regional Director's Decision in *Northwestern University*

In reaching his decision, the Regional Director focused on the nature of the activities performed by the Northwestern football players—specifically the scholarship players. The Northwestern football team is comprised of approximately 112 players, of whom 85 receive grant-in-aid scholarships that cover their tuition, fees, room, board, and books. The value of these scholarships was found to be approximately $61,000 per year, and in some cases, as much as $76,000 per year.[74] Certainly, the scholarship players (as opposed to "walk-on" athletes who do not receive scholarships or tuition waivers) receive something of substantial

[74] Nw. Univ., Case 13-RC-121359, 2014 WL 1246914, at *14 (N.L.R.B. Mar. 26, 2014). Upperclassmen who live off campus with permission of the coaching staff also receive monthly stipends ranging from $1,200 to $1,600 per month to cover the extra cost of their living expenses. Certain other additional funds are made available to student athletes to compensate them for other expenses they may incur as participants in intercollegiate athletics. These include expenses to attend a family member's funeral, dress clothing required for attending away games, and health insurance. These additional costs account for the greater value attached to the subsidy to a student athlete.

value from Northwestern University in exchange for their participation of the university team. These athletic scholarships may be withdrawn by the coaching staff for non-compliance with a variety of university and NCAA rules and requirements specifically applicable to student athletes but not students in general. Likewise, the coaching staff plays a leading role in determining whether a particular student athlete is admitted to Northwestern University with an athletic scholarship. The Regional Director stressed both that the football players were under the direct supervision of the coaching staff and the members of the coaching staff are not members of the faculty of the university. The latter point was deemed relevant by the Regional Director in establishing the lack of a direct connection between the players' activities as athletes and as students. Significantly, no academic credit is provided for their football activities.

The Regional Director also emphasized the great time commitment that the student athletes devote to training, conditioning, and playing football for Northwestern University. Estimates are that the football players dedicate 50 to 60 hours per week to their football duties during the one-month pre-season that precedes the academic year and some 40 to 50 hours per week during the football season. Considerable time is also devoted by the football players to their academic studies, but in some cases, less than to football. While the Northwestern University Student-Athlete Handbook states that players' academics must take precedence over athletics, the Regional Director found that scholarship athletes frequently miss scholastic classes for football practice and games. He decided that in reality athletics takes precedence over academics:

> While the football coaches, and the Employer as a whole, appear to value the players' academic education, it is clear that the players are controlled to such a degree that it does impact their academic pursuits to a certain extent. This appears to be especially true for the scholarships players as they are sometimes unable to take courses in a certain academic quarters due to conflicts with scheduled practices.[75]

On these facts, the Regional Director found that the players were not primarily students. Football is not a "core element" of the academic studies of the players, nor does it compliment their studies. No academic credit is given for training or playing football. Rather, football is a separate non-academic activity for which in-kind compensation is provided.

Finally, the Regional Director noted that Northwestern University earned considerable revenue from its Division I football program. It was found that the

[75] Id. at *16.

university derived total revenues of $235 million and incurred total expenses of $159 million between 2003 and 2012 in connection with the football team. However, those figures do not include the cost of maintaining the football stadium or the foregone revenue from the football grant-in-aid scholarships. It is not clear from the record whether Northwestern University actually makes any profit from its football team; however, it is clear that the gross revenue generated from the football program is used to help fund other sports teams, which generally produce little or no revenue.

Based on these factual determinations, the Regional Director distinguished the case of the football players at Northwestern University from that of the graduate students at Brown University. He found the holding of the *Brown University* decision "inapplicable in the instant case because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements."[76] In this way, he avoided the outcome of the Brown University decision, which held that the graduate students at issue were not employees of the university. Instead, he found that the situation of the football players more closely resembled that of the medical interns, residents, and fellows working at Boston Medical Center. Like the medical interns, residents, and fellows at issue in *Boston Medical Center*, the football players at Northwestern University were not "primarily students" but rather "employees" of the university who also happen to be engaged in academic studies there. The fact that a high percentage (97%) of the Northwestern football players graduate with degrees and maintain respectable cumulative grade point averages did not change that result. The football players perform valuable non-academic services (i.e., playing on the football team) and are compensated with valuable consideration (i.e., the grants-in-aid scholarships). Based on these findings, the Regional Director held that "all grant-in-aid scholarship players for the [Northwestern] football team who have not exhausted their playing eligibility are 'employees' under Section 2(3) of the Act."[77] As such, the Regional Director found that the football players are entitled to collective bargaining. Furthermore, the Regional Director found that the football team is the appropriate collective bargaining unit and that CAPE is a "labor organization" under Section 2(5) of the NLRA.[78] Consequently, the football players were entitled to an election to determine whether CAPE should represent them in collective bargaining. Under the supervision of his office, that election was conducted on April 25, 2014.

[76] Id. at *18.
[77] Id. at *23.
[78] Id. at *22–23.

B. Northwestern University's Appeal

The administration of Northwestern University filed an appeal of the Regional Director's decision with the Board on July 3, 2014. In its brief, the administration took issue with many of the factual findings of the Regional Director, claiming that he improperly employed a common law test of "control" to find an employment relationship between Northwestern University and the scholarship athletes while refusing to apply the correct legal standard set forth by the Board in Brown University. The administration argued that the *Brown University* test for distinguishing between students and employees properly takes into account statutory and policy considerations, and that approach should be applied in determining that Northwestern's scholarship football players are "fundamentally Northwestern students, and not Northwestern employees" within the meaning of Section 2(3) of the NLRA.[79] Furthermore, the administration urged the Board not to overrule *Brown University*, but rather to reaffirm its general approach to treating all students (both graduate students and student athletes) who perform services in conjunction with their academic experience as primarily students, and not employees.

In its brief, the administration of Northwestern University stressed that its athletics programs (including football) compliment and are part of the academic mission of the University. As an elite academic institution, Northwestern University sets rigorous standards for its student athletes, and football players must satisfy those academic standards just like any other student. Unlike most other high profile football programs, Northwestern University grants athletic scholarships for four years rather than on a year-by-year basis. Furthermore, those "athletic scholarships cannot be canceled due to a student's athletic ability, contributions (or lack thereof) to the team's success, injury or other athletic reason."[80] Based on these facts, the administration characterizes its scholarship football players as students on financial aid who also engage in athletics pursuant to their overall university experience: "Northwestern offers some of its intercollegiate student athletes full scholarships to support their education, but Northwestern makes no distinction between scholarship athletes and non-scholarship athletes in terms of educational opportunities or responsibilities."[81] The administration argued that other students on financial aid and those students who participate in other university programs are not employees of the university and that the football players should not be treated any differently.

In addition to the standard argument that student athletes are primarily

[79] *Nw. Univ.*, 2014 WL 1246914, at *14.
[80] Id. at *4.
[81] Id. at *1.

students rather than employees, the brief for Northwestern University also offered several other interesting arguments in support of its position. Stressing that the football players receive no remuneration for playing on the team but only "talent-based" financial aid, the administration asserts that a determination that the scholarships are remuneration for services would subject them to federal income taxation on the fair market value of their scholarships.[82] The administration also argued that to treat the student athletes as employees would have numerous adverse policy implications, dragging the Board and the courts into an unwanted role in supervising the academic affairs of universities—such as setting academic standards for athletes. Furthermore, the administration criticized the Regional Director's finding that because Northwestern University derives significant revenue from its football program, it is in the "business of football" and hiring football players as "employees." Many other programs and activities at Northwestern raise revenue for the University (such as theater productions), but the students who participate in such programs and activities are not thereby employees of Northwestern any more than the football players. Finally, the administration noted that the Regional Director attached great significance to the fact that the football players do not receive academic credit for their duties. In response, they pointed out that students engaged in many other activities at Northwestern likewise do not receive academic credit for their efforts.[83] Those students may receive scholarships but nevertheless are not employees of the university. For instance, students enrolled in a theater or music program may receive scholarships that reduce or eliminate tuition for them, and they may perform in student productions at which audience members pay to watch them perform, even while the performers do not receive academic credit for their work. Notwithstanding, these students are still primarily students rather than professional actors or musicians who are employees of Northwestern University.

C. The Board's Decision in *Northwestern University*

In its decision announced on August 17, 2015, the Board avoided answering the question of whether the football players are employees of Northwestern University by refusing to assert jurisdiction over the case. The Board reasoned that it was best to decline jurisdiction over the petition in order to

[82] Id. at *29–30. That argument is not persuasive to the extent that the treatment of tuition waivers for purposes of federal income taxation is an entirely different question—one that could produce a different result. Certainly, the Internal Revenue Service is not bound by the decisions of the Board.
[83] Id. at *42–43.

effectuate the policies of the NLRA, which include a duty to maintain stability in labor relations. In reaching this decision, the Board stressed that scholarship athletes "do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes."[84] In this way, the Board suggested that there was a relevant difference between scholarship athletes and graduate students for purposes of federal labor law. Moreover, the Board implied that even if the football players were found to be "employees" of Northwestern University, it was leery of recognizing a bargaining unit that consisted of a single sports team. To do so would have unsettling consequences for intercollegiate sports. The implication was that the Board might reach a different conclusion if it were dealing with an entire sports league. Even then, amateur student athletics must be distinguished from professional sports leagues.

In its opinion, the Board stressed that while college football under the supervision of the National Collegiate Athletic Association (NCAA) bears some resemblance to the organizational structure of a professional sports league, there are important differences. For one thing, the Board's authority does not extend over all of the teams in the amateur football leagues, as it does with professional sports leagues. This is because many of the intercollegiate sports teams are part of public universities, and hence, not subject to the NLRA. The Board specifically noted that Northwestern is the only private university in the fourteen-member Big Ten league—one of the premier intercollegiate football leagues. Indeed, Northwestern is but one of seventeen private schools among the 125 universities that compete in the top-ranked Division I Football Bowl Subdivision (FBS).[85] Because only private schools are subject to federal labor law and the jurisdiction of the Board, any substantive decision of the Board would affect only a small number of the teams that field Division I football teams. Thus, only a handful of Division I teams would be eligible to unionize even if the Board found for the Northwestern football players. This inconsistency in outcome supported the Board's decision to decline jurisdiction over the case.

As previously discussed, the Regional Director had determined that the Board's decision in *Brown University* did not apply to the Northwestern football players because student athletes, unlike the graduate and research assistants in *Brown University*, were not "primarily students," nor were their athletic duties "a core element of their educational degree requirements," among other differences. Since the Board refused to assert jurisdiction over the case, this factual finding was

[84] Nw. Univ. Employer & Coll. Athletes Players Ass'n (CAPA) Petitioner, Case 13-RC-121359, 362 N.L.R.B. No. 167, *3 (Aug. 17, 2015).
[85] Id. at *2.

never addressed. This leaves the Board's holding in *Brown University* intact—although there were hints that the Board would be willing to consider these issues in some future case. For instance, the Board noted in dictum that its decision is limited only to the Northwestern student athletes who brought the petition, reserving the right to exercise jurisdiction in future cases involving scholarship collegiate athletes at other private universities—whether in football or some other sport. Likewise, the Board suggested that it might hear a case that would affect an entire league. But future cases do not make current law, and for now, scholarship student athletes at private universities are not employees of those universities for purposes of federal labor law. Neither are graduate students who perform academic services for their universities. Accordingly, neither graduate students nor student athletes at private universities have the right to collective bargaining.

D. The Board Got It Right

Because the Board declined jurisdiction over the case brought by the football players at Northwestern University, we do not know exactly how the current Board views its prior decision in *Brown University* dealing with the legal rights of graduate students. We also know very little of substance about how the Board viewed the claims of the Northwestern football players. For reasons of discretion, the Board did not say much about the substance and strength of their case. But nothing prevents academics and practitioners from weighing in and evaluating the arguments presented to the Board by the Regional Director in his decision as well as those raised by the administration of Northwestern University in its appeal. And so, we now consider the various arguments that came before the Board but were never evaluated.

Certainly, there was merit in the Regional Director's claim that the two cases are distinguishable. After all, football players are not graduate students—just as graduate students are not hospital workers or medical interns. There are major differences that could support a different outcome than what the Board had previously decided in *Brown University*. Thus, the Board could have ruled in favor of the student athletes even while leaving *Brown University* intact as it applies to graduate students. On the other hand, the facts surrounding the student athletes also could have given support for an even more definitive denial of collective bargaining rights to the football players. What are the salient differences? Significantly, the football players are not paid any salary. Graduate teaching, research assistants, and medical interns often receive monetary compensation in the form of financial

stipends. To be sure, the student athletes receive scholarships, which have a significant monetary value. But they do not receive any monetary compensation. (Arguably, they should be paid compensation, but that is a very different matter.) Indeed, payments of compensation or any special benefits provided to the Northwestern football players would be a violation of NCAA rules governing scholarship athletics.[86] Universities are very careful to not pay compensation or provide any special benefits to student athletes lest they violate NCAA prohibitions against such transfers. Such violations could result in serious sanctions imposed against a team by the NCAA.

While important, compensation is not the only factor to consider. The Regional Director certainly was correct that the football players devote a significant amount of time to their athletic endeavors—arguably, more time than they do to their academic studies. They may even devote more time to football than graduate students devote to their teaching or research duties. During the football season, the football players spend as much time on their athletic endeavors as medical interns and residents devote to performing medical services. But the time spent on athletics should not be the determinate factor. As much time as Division I scholarship football players allocate to their sport, their activity still is not work performed for their university for compensation. Athletic programs for students have long been seen as part of the "educational experience" offered by universities to their students—just as playing a musical instrument in the marching band or acting in a student theater production is viewed as part of the same educational experience. Moreover, the athletes must be enrolled as students, and they will lose their eligibility for their scholarships if they do not meet the academic standards set by their university and the NCAA.[87] Even if the football players do not receive academic credit for playing on the team, their activities are linked to their academic performance as students. That said, the Regional Director certainly is correct that football is not academics in the traditional sense. And as any professor who has taught Division I football players knows, student athletes often do put football practice and games ahead of their academic studies.

Finally, the Regional Director stressed the significant revenue derived by the university from tickets sold to those who attend and watch the home football games. That revenue is funneled back into the athletic program to finance other athletic teams. As previously noted, it is unclear whether Northwestern University actually derives any profit from the football program. Of course, Northwestern

[86] A student athlete or a family member may not receive any "pay" or "extra benefit." NCAA, 2013–14 NCAA Division I Manual, art. 16.01.1, at 215 (2013) [hereinafter NCAA Manual].
[87] Id. art. 14 at 135–190.

University is not one of the top FBS schools, which do indeed derive significant profits from their football teams. Conversely, all but a handful of the top teams lose money on football.[88] In any event, it is unclear why this should affect the determination of whether the athletes are employees of the university. Some businesses earn profits and others lose money. In both cases, the status of their workers as employees for purposes of federal labor law is unaffected. Furthermore, Northwestern University derives revenue (if not profit) from its university orchestra and theater program, but that does not mean that the student musicians and student actors are employees of the university. No academic credit is given to those students either, but their activities are connected to the broader educational experience at Northwestern University. Are the student athletes really in a category separate and distinguishable from all those other students who participate in all the other non-academic activities during their years at Northwestern University?

While critics (including many members of the faculty) rightly complain that student athletes spend more time on their athletic activities than their academic studies, the Northwestern football players still should be viewed by the Board through the lens of the Brown decision, and as such, classified as "primarily students" rather than employees of their university. They should not be viewed as employees merely because they receive waivers of tuition and fees. Such waivers are not exclusive to student athletes. Many students receive tuition waivers, including members of the marching band and theater programs, students from economically deprived backgrounds, and those deemed outstanding academic performers. Tuition waivers for these students do not make them employees of their universities or colleges, and the student athletes should not be treated differently on this basis either.

Finally, all the factors that led the Board to find that medical interns, residents, and researchers were employees entitled to collective bargaining are absent in the case of student athletes. In *Boston Medical Center*, the Board held that such workers were employees on the basis of finding that there was a conventional master-servant relationship between the workers and the hospital. The interns and residents worked as many as 80 hours per week in the hospital, and while they may have derived an educational benefit from their work, that was deemed incidental.

[88] Daniel L. Fulks, Revenues & Expenses 2004–2011: NCAA Division I Intercollegiate Athletics Programs Report, NCAA 13 (Apr. 2012), http://www.ncaapublications.com/productdownloads/D12011REVEXP.pdf [http://perma.cc/DSF4-BD6D] (finding that only 23 Division I athletic programs reported positive net revenue in 2011; these were all in the elite Football Bowl Subdivision.); see also Doug Lederman, 'USA Today': Few Sports Programs Show a Profit, Inside Higher Ed (May 27, 2015), https://www.insidehighered.com/quicktakes/2015/05/27/usa-today-few-sports-programs-show-profit [http://perma.cc/X5B5-K2GA].

Even if the Board were to apply this analysis to the case of student athletes (without expressly overruling *Brown University*), the football players still should not be deemed employees. It is unlikely that very many student athletes work 80 hours a week, even during the height of their athletic season. But even if they do work such long hours, strictly speaking they are not performing services for the university; most of the time, they are practicing and perfecting their own athletic skills. Some of these students develop their skills and take them to the professional game following their intercollegiate years. True, the university may derive revenue from the spectators who pay to watch the intercollegiate athletic competition at which those skills are on display, but that does not make all the time spent on the practice fields and during game time into work for compensation. The activity of practicing and playing football is not work, and the students are not paid compensation for performing such activity.

E. Impact on Intercollegiate Athletics

While the Board did not find that student athletes have a statutory right to unionize, the administration of any university (whether private or public) may voluntarily agree to bargain with anyone it chooses. That includes faculty, graduate students, or student athletes. After all, New York University has voluntarily recognized and bargained with the union representing its graduate students notwithstanding the Board's decision in *Brown*. Likewise, a handful of private colleges (mostly religious institutions) have voluntarily recognized faculty unions—despite the fact that the U.S. Supreme Court has held that faculty at private universities and colleges do not have the right to collective bargaining.[89] That said, no university (private or public) to date has voluntarily recognized and negotiated with a union representing its student athletes, and given the Board's decision in *Northwestern University*, there is no reason to expect that to change any time soon. Nevertheless, the campaign to unionize the football players at Northwestern University has drawn considerable attention to the situation of Division I student athletes—especially football players. Certainly, one of the parties most interested in the outcome of that case from has been the National Collegiate Athletic Association (the "NCAA").

From the first, the NCAA has been keenly interested in the case brought by the scholarship football players at Northwestern University. Donald Remy, the

[89] See NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

NCAA's chief legal officer, reacted immediately to the announcement that the Northwestern football players had filed their petition in January 2014, declaring that the players' attempt to unionize "undermines the purpose of college: an education."[90] Likewise, the director of athletics at Northwestern University, Jim Phillips, warned that "Northwestern believes that our student-athletes are not employees and collective bargaining is therefore not the appropriate method to address these concerns."[91] If the Board had upheld the Regional Director, student athletics at private universities such as Northwestern would have entered into uncharted territory—especially those with big-time Division I football programs, which bring in millions of dollars in revenue for the top teams. While merely negotiating with a union representing student athletes would not necessarily violate NCAA rules governing amateur athletics, paying amateur student athletes a salary certainly would. Even bargaining over improved health care and living conditions for student athletes could be viewed as providing something extra of value to the athletes not otherwise available to other students. That would likely be a violation of NCAA rules.[92]

Perhaps to blunt the incentive of student athletes to pursue the legal path taken by the Northwestern scholarship football players, the NCAA Legislative Council modified several of its rules to accommodate some of the concerns voiced by these student athletes. In April 2014, the Legislative Council approved a rule change to allow universities to provide extra meals and snacks to student athletes.[93] Then, in January 2015, the Legislative Council voted overwhelmingly to allow (but not require) Division I schools to expand scholarships to cover the incidental costs of attending college (such as transportation and personal expenses). This could add up to a few thousand dollars a year in increased scholarships for athletes. At the same meeting, the Legislative Council narrowly approved another rule change that would prevent schools from not renewing an athlete's scholarship for "athletic reasons." However, there remain other grounds for terminating an athletic scholarship—such as failure to comply with academic standards and rule violations. Unlike Northwestern University, which already awards scholarships for four years, most big-time football programs only award athletic scholarships on a year-by-year

[90] George Schroeder, Northwestern football raises complicated labor questions, USA Today (Jan. 29, 2014, 8:43 AM), http://www.usatoday.com/story/sports/ncaaf/2014/01/28/northwestern-football-capa-union-labor/4978823/ [http://perma.cc/2ZMB-Y6Y3].
[91] Id.
[92] NCAA Manual, supra note 86, art. 16.5.1 at 218.
[93] The rule change (effective August 1, 2014) is described in Zach Schonbrun, N.C.A.A. Ensures Athletes Will Get All They Can Eat, N.Y.Times, Apr. 25, 2014, http://www.nytimes.com/2014/04/25/sports/ncaa-ensures-athletes-will-get-all-they-can-eat.html [http://perma.cc/F43X-U8C9].

basis. That will now likely change. Finally, new rules adopted by the NCAA will allow a student athlete to protect future earnings by purchasing so-called loss-of-value insurance.[94]

In addition to these voluntary concessions by the NCAA, certain concessions have been suggested by the federal courts in response to various lawsuits brought by former players. The impact of such lawsuits remains unclear at this time.[95] What is clear is that paying student athletes a salary or distributing to their union a share of the vast profits derived from big-time Division I sports like football and basketball would violate current NCAA rules and lead to disqualification from NCAA post-season tournaments. Absent a complete and radical restructuring of Division I athletics by the NCAA, no university is likely to go down that road. Accordingly, no school with a Division I intercollegiate athletic program is likely to recognize and bargain with a union representing their student athletes unless mandated by federal law. Given that the Board did not find a right to collective bargaining for student athletics, we are not likely to witness such a direct confrontation with NCAA rules.

Is it possible to restructure collegiate athletics to avoid a conflict between NCAA rules and unionized sports teams? In pursuit of that goal, critics of big-time Division I sports programs have proposed that certain universities "spin-off" their football teams (probably the top 20 or so teams that earn significant revenue from TV appearances) to wholly-owned "for profit" subsidiaries. This would transform their teams into a minor league of sorts for the NFL. Perhaps the same would be done for the top-tier basketball teams. To be sure, these programs would become professional teams whose players would be paid salaries. The players could, but need not, enroll as students at the affiliated university.[96] Under such an arrangement,

[94] For a detailed description of the rules adopted by the NCAA Legislative Council in January 2015, see Brad Wolverton, NCAA's Top Conferences to Allow Additional Aid for Athletes, Chron. of Higher Educ. (Jan. 14, 2015), http://chronicle.com/article/NCAA-s-Top-Conferences-to/151299/ [http://perma.cc/S9VD-CBAS].

[95] Former UCLA basketball player Ed O'Bannon brought a suit on behalf of Division I football and basketball players against the NCAA, arguing that the student athletes were entitled to be paid after graduation for use of their images by the NCAA. On August 8, 2014, a federal district court held that the NCAA exercised an unreasonable restraint of trade in prohibiting such compensation and declared that the former players were entitled to as much as $5,000 for each year of eligibility for use of their image. The judge also held that schools should be allowed to offer full cost-of-attendance scholarships to cover cost of living expenses that were not then permitted under NCAA rules (but have since been revised). O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014). The portion of the decision allowing for the $5,000 per year payments has since been vacated by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit. O'Bannon v. NCAA, Nos. 14–16601 & 14–17068, 2015 WL 5712106, (9th Cir. Sept. 30, 2015).

[96] One version of this plan is discussed in William Casement, College Sports: Revising the Playbook, 26 Acad. Question 59, 59–64 (2013). For a critical assessment of collegiate athletics, see Taylor Branch, The Shame of College Sports, The Atlantic (Oct. 2011),

the players would clearly be employees of the "for profit" corporations, and hence, eligible to unionize under the NLRA. This is not much different than NFL and NBA players who have voted to unionize. These professional teams would not be subject to NCAA rules governing amateur athletics. The remaining collegiate programs could adopt the model of the Ivy league or Division III sports programs, which do not give athletic scholarships. The goal would be to put education above athletics. Their players would be students who happen to do amateur athletics on the side. This is the original model for the "student athlete."[97] The football players at Northwestern University (an elite academic institution with its high graduation rates for its athletes) more closely resemble amateur student athletes than professional football players, while those football players at the top-tier Division I teams long ago departed from the ideal.[98] The universities that remain with amateur football programs would simply be facing reality. Most would not be giving up that much since they do not derive profits from their football teams and typically do not earn revenue from televising their football games.[99] Of course, some Division I schools might decide to retain athletic scholarships based on the hope of one day breaking into the upper echelons of collegiate athletics. The choice will be theirs to make. Their student athletes would remain amateurs without the legal right to collective bargaining. These amateur student athletes could then devote greater time to their classes and academic work than to football. Or at least, that would be the goal.

http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/ [http://perma.cc/PJ37-4GSJ].

[97] The ideal (dare we say "myth") of the "student athlete" was propagated by the NCAA itself. The story is recounted in Murray Sperber, Onward to Victory: The Crises That Shaped College Sports 445–57 (1998); see also, Robert A. McCormick & Amy C. McCormick, The Myth of the Student-Athlete: The College Athlete as Employee, 81 Wash. L. Rev. 71, 84 (2006).

[98] Recent scandals at North Carolina University suggestion that many "student athletes" at schools with major athletic programs barely attend classes and fail to attain even a minimum level of proficiency in their academic studies. The story is reported in Sarah Lyall, A's for Athletes, but Charges of Fraud at North Carolina, N.Y. Times, Jan. 1, 2014, http://www.nytimes.com/2014/01/01/sports/as-for-athletes-but-charges-of-tar-heel-fraud.html [http://perma.cc/DZ8F-3G6H].

[99] The top leagues and teams earn significant revenue from televised intercollegiate sports. See Andrew Soergel, The Money Behind the Bowl Games, US News & World Rep. (Dec. 23, 2014, 12:27 PM), http://www.usnews.com/news/blogs/data-mine/2014/12/23/the-money-behind-the-college-football-playoff-bowl-games [http://perma.cc/2MW5-58VH]. The FBS teams make significant profits from their football teams. Some teams and conferences have their own television cable networks. However, the weaker athletic leagues often have "contracts" with networks that do not pay any compensation to the teams or leagues. For instance, Comcast SportsNet and the NBC Sport Network televise football and basketball games in the Colonial Athletic Association but do not pay for those rights. In lieu of money, the networks broadcast promotional spots on behalf of the universities with teams playing the games.

IV. CONCLUSION

When the Board refused to assert jurisdiction over the case brought by the Northwestern football players, they thereby allowed the precedent of *Brown University* to stand. As a result of the *Northwestern University* decision, all football players at private universities will be treated as primarily students, and not employees of their universities—no matter how many hours they devote to their sport and no matter how much money their team brings in for their school. At the same time, while the case was pending before the Board for seventeen months, the NCAA revised a number of rules that may improve the conditions for scholarship athletes at big-time football programs. So if the Northwestern football players did not succeed in their petition before the Board, they did have a substantive and beneficial impact on their sport. Filing their petition was an interesting play, even if they did not score a touchdown. More like a "Hail Mary" pass into the end zone.