UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY EMPLOYER, and COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA), PETITIONER.	)	CASE 13-RC-121359

MOTION REQUESTING PERMISSION TO FILE
BRIEF OF *AMICI CURIAE* IN SUPPORT OF NORTHWESTERN UNIVERSITY AND
REQUESTING ORAL ARGUMENT

In response to the National Labor Relations Board's (the "Board") May 12, 2014, Notice and Invitation to File Briefs, The University of Notre Dame, Trustees of Boston College, and Brigham Young University (collectively, "*Amici*") respectfully request permission to file the attached brief as *amici curiae* in support of Northwestern University ("Northwestern") in the above-captioned matter.

Amici have a significant interest and expertise in the questions at issue in this case. *Amici* are highly regarded, nationally recognized teaching and research universities. In addition to pursuing excellence in teaching and scholarship, *Amici* sponsor successful extracurricular programs for their students. These programs include over twenty amateur athletic teams for male and female students, including intercollegiate football teams that compete as part of the National Collegiate Athletic Association's Football Bowl Subdivision.

Amici are uniquely qualified to articulate the views of the educational community with respect to the issues in this case, and seek permission to file the attached brief as *amicus curiae*. Granting *Amici*'s request to participate will not delay resolution of the case. In addition, because this case presents significant issues of first impression before the Board with potentially wide ranging ramifications for universities and student-athletes, *Amici* join Northwestern in requesting that the Board schedule oral argument in this case.

Accordingly, *Amici* respectfully request that the Board GRANT their request for permission to file the attached brief as *amici curiae*, and GRANT oral argument.

Respectfully submitted,

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Dated: July 3, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

BRIEF OF *AMICI CURIAE* UNIVERSITY OF NOTRE DAME, TRUSTEES OF BOSTON COLLEGE, AND BRIGHAM YOUNG UNIVERSITY IN SUPPORT OF NORTHWESTERN UNIVERSITY

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I. STATEMENT OF INTEREST AND REQUEST FOR ORAL ARGUMENT

In response to the National Labor Relations Board's (the "Board") May 12, 2014, Notice and Invitation to File Briefs, the University of Notre Dame ("Notre Dame"), Trustees of Boston College ("Boston College"), and Brigham Young University ("BYU") (collectively, "*Amici*") submit this brief as *amici curiae* in support of Northwestern University ("Northwestern" or the "University") and in opposition to the position advocated by the College Athletes Players Association ("CAPA" or the "Union"). *Amici* are highly regarded, nationally recognized teaching and research universities. In addition to pursuing excellence in teaching and scholarship, *Amici* sponsor successful extracurricular programs for their students. These programs include over twenty amateur athletic teams for male and female students, including intercollegiate football teams that compete as part of the National Collegiate Athletic Association ("NCAA").

Amici have a strong interest in this case, which presents issues of first impression before the Board that go to the fundamental nature of the relationship between universities and matriculating students who receive athletic grants-in-aid to cover all or part of the cost of their education. Depending on its resolution, this case has potentially far reaching ramifications for intercollegiate amateur athletics, raising questions regarding not only the proper treatment of student athletes under the National Labor Relations Act ("NLRA" or the "Act"), but also under a host of federal and state labor and employment, tax, workers' compensation, employee benefit, and other laws potentially applicable to participants in college sports. In this brief, *Amici* respond to Question Nos. 1, 2, and 3 of the five questions included in the Board's Notice and Invitation to File Briefs.[1] *Amici* also join Northwestern in requesting that the Board grant oral argument.

[1] In addition, *Amici* fully support the arguments set forth in the *amicus* brief submitted by Baylor University, Rice University, Southern Methodist University, Stanford University, Tulane University, University of Southern California, Vanderbilt University, and Wake Forest University.

Notre Dame confers approximately 3,000 degrees annually through its seven different schools and colleges, and offers bachelor's degrees in more than 50 fields of study, master's degrees in more than 60 programs, and doctorates in more than 30 programs. Notre Dame has over 11,800 degree-seeking students, including approximately 750 student-athletes competing in 13 varsity teams for men and 13 varsity teams for women. Its football team competes as a Football Bowl Subdivision ("FBS") independent program, while Notre Dame's other men's and women's varsity teams compete as a member of the Atlantic Coast Conference ("ACC"). The NCAA has ranked Notre Dame's overall Graduation Success Rate for its student-athletes as the highest in the nation among all FBS schools for each of the past seven years. The "total cost of attendance"[2] for the average resident student for the 2013-14 academic year was $60,219, with 71% of all students receiving some form of financial aid. Notre Dame's freshman acceptance rate is approximately 21%, with 17,900 applicants for 1,985 openings.

Boston College confers more than 4,000 degrees annually in more than 50 fields of study through eight schools and colleges. Boston College has 14,077 total students in undergraduate and graduate programs of full and part-time study, including 700 student-athletes competing in 14 varsity teams for men and 17 varsity teams for women, all at the NCAA Division I level. Most of its varsity men's and women's athletic teams, including football, compete as a member of the ACC. Boston College's student-athlete graduation rate is among the top ten of NCAA Division I-A universities, with Boston College graduating 100% of student-athletes on 14 teams in 2013. The "total cost of attendance" for the average resident student for the 2013-14 academic year was $61,100, with 70% of all students receiving financial aid. Boston College's freshmen acceptance rate is approximately 32%, with 24,538 applicants for only 2,250 openings.

[2] Total cost of attendance for *Amici* includes tuition, room and board, books, expenses, and fees.

BYU confers approximately 8,000 undergraduate and graduate degrees annually through 10 colleges, and offers bachelor's degrees in more than 180 academic programs, master's degrees in more than 60 programs, and doctorates in 26 programs. BYU has 31,123 (as of Fall 2013) total students, including 596 student-athletes competing in 10 varsity teams for men and 11 varsity teams for women, all at the NCAA Division I level. BYU's football program competes as a FBS independent, while most of its other men's and women's varsity teams participate in the West Coast Conference. BYU's student-athlete graduation success rate is 73%, which includes all athletes who received grants-in-aid from the 2007-08 cohort. "Total cost of attendance" for the 2013-14 academic year is $17,496, with 67% of all students receiving some form of financial aid. BYU's freshman acceptance rate in Fall 2013 was 49%, with 11,423 applicants, of which 4,427 enrolled.

II. SUMMARY OF ARGUMENT

In determining that Northwestern's football student-athletes receiving grants-in-aid are "employees" under Section 2(3) of the National Labor Relations Act ("NLRA" or the "Act"), the Regional Director plainly misapplied the common law "employee" test, as well as the Board's particularized test under *St. Clare's Hospital and Health Center*, 229 NLRB 1000 (1977), and *Brown University*, 342 NLRB 483 (2004), regarding the extension of Section 7 bargaining rights to students. Proper application of these tests compels the conclusions that: (1) Northwestern's student-athletes are not "employees" within the meaning of Section 7; and (2) even if they were common law employees, Section 7 rights would not extend to them.

In his application of the common law test, the Regional Director failed to analyze correctly whether the student-athletes are employed under a contract "for hire." Employment is fundamentally a contractual relationship. In order for a "for hire" employment contract to exist, the parties must intend to enter into such a relationship. Yet here, the Regional Director failed

even to consider the intent of the parties, and ignored the record evidence clearly demonstrating that neither party intended to enter into a "for hire" employment relationship. The Regional Director also erred in concluding that student-athletes' grants-in-aid are compensation in return for work. The weight of the record evidence compels the conclusion that the athletic grants-in-aid of the costs of higher education are a form of financial aid to cover the costs of education; not compensation for work under a common law employment relationship.

The Regional Director also misapplied the Board's test -- in *St. Clare's Hospital* and *Brown University* -- for determining whether students are employees to whom Section 7 rights extend under the Act. The primary interest of the student-athletes here is in acquiring an education, and participation on the football team is dependent on their enrollment and academic standing. Even if the Board were to conclude that Northwestern's football student-athletes are common law employees -- which they are not -- the Board should affirm and apply *St. Clare's Hospital* and *Brown University*, and refrain from regulating the relationship between the University and its matriculating student-athletes.

III. ARGUMENT

A. Under the Common Law Test Applied by the Regional Director, Student-Athletes Receiving Grants-In-Aid of Educational Costs Are Not University Employees.

As the Regional Director noted, the Supreme Court has held that, in determining whether an individual is an "employee" for purposes of Section 2(3) of the Act, the Board and courts must consider the common law definition of "employee." (Dec. at 13, citing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).)[3] An often cited common law definition of

[3] The Regional Director's Decision and Direction of Election, dated March 26, 2014, is cited herein as "Dec." The Official Report of Proceedings Before the National Labor Relations Board is cited herein as "Tr." Employer's

"employee" is "any person who works for another in return for financial or other compensation" under a "contract of hire." *Town & Country Electric, Inc.*, 516 U.S. at 90. The Regional Director observed that "[u]nder the common law definition, an employee is a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment." (Dec. at 13, citing *Brown University*, 342 NLRB 483, 490, fn. 27 (2004) (citing *Town & Country Electric, Inc.*).)

In applying this threshold common law "employee" test, the Regional Director concluded Northwestern's student-athletes receiving grants-in-aid "perform football-related services for the [University] under a contract for hire in return for compensation … and are therefore employees within the meaning of the Act." (Dec. at 14.) The Regional Director erred in concluding that a "contract for hire" existed without any evidence, or consideration, of the intent of Northwestern and those in the petitioned-for bargaining unit regarding the nature of their relationship, and in finding the grants-in-aid are compensation for the performance of work rather than financial aid for the costs of higher education.

1. The Regional Director Erred in Concluding Student-Athletes Are Employed by the University Under a Contract "For Hire."

a. An Employment Contract "For Hire" Cannot Exist Absent the Intent of the Parties to Enter Into Such a Relationship.

The Regional Director found the "Big Ten Tender of Financial Aid Signed for Enrollment in Academic Year 2013-2014" that Northwestern and its student-athletes sign (E-5 at NU 969-71) ("Tender of Financial Aid") "serves as an employment contract." (Dec. at 14.) At the same time, the Regional Director excluded from the bargaining unit those Northwestern

(continued…)

exhibits for the proceedings are indicated with an "E" prefix (e.g., E-5 at NU 971), while Joint Exhibits are indicated with a "J" prefix (e.g., J-16 at NU 4).

football student-athletes who do not receive an athletic grant-in-aid ("walk-ons") because "[u]nlike scholarship players," they "do not sign a 'tender' or otherwise enter into any type of employment contract with the [University]." (Dec. at 17.) The Regional Director found the walk-ons participate on the team for "their 'love of the game' and the strong camaraderie that exists among the players." (Id.)

It is well established that an employment relationship is fundamentally contractual in nature. *See* Williston on Contracts § 54:8. As such, crucial to determining whether parties have formed an employment contract is examining whether they intended to enter into a contract for hire. *See id.* ("For purposes of determining whether an employer-employee relationship and contract exist, the primary consideration is whether there was an intent that a contract of employment exist; in other words, both the employer and the employee *must intend and believe that there is to be an employer-employee relationship*.") (emphasis added).

In many cases the intent of the parties to enter into a contract for hire is obvious. Courts and other fact finders in employment related disputes are ordinarily not faced with the question of whether the parties intended to form any sort of "for hire" relationship. Common cases involve whether an individual has been "hired" as a contractor but should properly be classified as an employee. In these worker classification cases, the focus of the inquiry is on issues about the degree of control exercised by the employing or contracting entity over the manner and means with which the work is performed. However, such employee / independent contractor classification cases are irrelevant to the question presented here because in those cases there is no dispute that the parties intended to enter into *some sort* of engagement "for hire." Here, the threshold question presented is whether the parties intended to enter into an engagement under a contract "for hire."

Where there is a question about whether a "for hire" employment relationship exists, courts look to the intent of the parties. In *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), the Board considered whether "unpaid staff" who performed volunteer work for a non-profit radio station were employees under the Act. Reversing the Regional Director, the Board concluded the unpaid staff were not employees because:

> The testimony of the unpaid staff members shows that they do not work for "hire" in the ordinary sense of the word. They work out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community.

Id. at 1275 (emphasis added).

In this regard, the unpaid staff in *WBAI Pacifica Foundation* are analogous to Northwestern's football student-athletes. Indeed, the Regional Director here excluded non-scholarship / walk-on football players from the bargaining unit because they "have nothing tying them to the football team except their 'love of the game' and the strong camaraderie that exists among the players." (Dec. at 17.) In *WBAI Pacifica Foundation*, the employer did provide the "unpaid staff" with money to finance the production of their own radio programs, but the Board found these amounts were not compensation given in return for work because "the record shows that the *purpose* of these funds is to pay for the expenses of producing the programs, such as engineering and publicity." 328 NLRB at 1276 (emphasis added). Here, the record clearly demonstrates that the grants-in-aid are provided exclusively to satisfy the cost of their education at Northwestern, and are not in return for labor. (Tr. 244:8-245:22; 247:2-251:6.) Significantly, there is no competent evidence here to suggest that grant-in-aid student-athletes, like their walk-on, non-scholarship teammates, were not also motivated to participate on the football team by their love of the game and the camaraderie among players. *See also*, *Borden v. United States*, 1991 U.S. App. LEXIS 29288 at 7-8 (10th Cir. 1991) (finding that a crop sprayer was not a

government employee or contractor where the facts did not indicate the parties "intended to enter into any type of employment relationship, be it employer/independent contractor or employer/employee").

In *Pappas v. City of Calumet City*, 9 F. Supp. 2d 943 (N.D. Ill. 1998), the fact that a municipality referred illegally parked cars to a towing service, which the service impounded for a profit, did not create a "for hire" employment relationship. *Pappas*, 9 F. Supp. 2d at 950. Instead, the court found that:

> Pappas and the Calumet Police had a mutually beneficial relationship; however, nothing about their relationship suggests that the Calumet Police or the City ever employed or considered employing Capital Towing or Pappas. Likewise, the record contains no evidence that the City intended to enter into an employment relationship with Capital Towing or Pappas.

Id. (emphasis added); *see also Bd. of Ed. of City of Chicago v. Industrial Com'n*, 53 Ill. 2d 167, 171 (Ill. 1972) ("[T]he relationship of an employer and employee is a product of mutual assent.").

Likewise, courts examining the employment status of collegiate student-athletes in analogous situations have also, of course, looked to whether the parties intended to form an employment "for hire" relationship. Such cases have arisen, for example, in the context of workers' compensation claims following athletic injuries. In *Waldrep v. Texas Employers Insurance Association*, the Texas court of appeals upheld the jury's finding that a Texas Christian University ("TCU") football player was not an employee of the university. 21 S.W.3d 692 (Tex. App. 2000). In analyzing whether there was a contract of hire, the court first looked to the parties' Letter of Intent and Financial Aid documents and concluded the document "[a]t best . . . only partially set forth the relationship between Waldrep and TCU." *Id.* at 698.

Next, the court looked to whether it was the expectation of Waldrep and TCU that Waldrep would become TCU's employee. *Id*. at 699. The court concluded that the actions of the parties confirmed there was a joint expectation that Waldrep would play football as an amateur,

agreeing to follow the rules of the NCAA, which "made the principle of amateurism foremost and established several requirements to ensure that the student-athlete would not be considered a professional." *Id*. at 700. Moreover, the court noted the absence of evidence of intent to create an employment relationship between the student-athlete and university:

> The evidence further reflects that Waldrep and TCU intended that Waldrep participate at TCU as a student, not as an employee. During the recruitment process, TCU never told Waldrep that he would be an employee, and Waldrep never told TCU that he considered himself to be employed. Moreover, a basic purpose of the NCAA, which governed Waldrep's intercollegiate football career, was to make the student-athlete an integral part of the student body.

Id. at 701 (emphasis added).

Similarly, in *Kavanaugh v. Trs. of Boston Univ*., 440 Mass. 195 (Mass. 2003), the Massachusetts Supreme Judicial Court considered the question of whether a basketball player at Boston University was an employee of the university for purposes of vicarious employer liability. Among the factors considered in deciding whether the student-athlete was an employee, the court reviewed "whether the parties themselves *believe* they have created an employer-employee relationship." *Id.* at 198 (emphasis added). The court noted that students "attend school to serve their own interests, not the interests of the school," and, notwithstanding any benefit received by the school, "the student does not attend school to do the school's bidding." *Id*. at 198-99. In finding the student-athlete was not a university employee, the court reiterated: "scholarship or financial aid notwithstanding, neither side *understand*s the relationship to be that of employer-employee or principal-agent." *Id*. at 199 (emphasis added).

In *Rensing v. Indiana State Univ. Board of Trustees*, 444 N.E.2d 1170 (Ind. 1983), the Indiana Supreme Court examined a similar question concerning an injured college football player's workers' compensation claim. The lower court found the student was an employee under the relevant workers' compensation law, but the Indiana Supreme Court reversed. On

appeal, the university's principal argument was that "there was no contract of hire . . . and that a student who accepts an athletic "'grant-in-aid' from the [u]niversity does not become an 'employee' of the [u]niversity." *Id.* at 1172. The court first noted that "the primary consideration" in determining whether an employment relationship existed "is that there was *an intent* that a contract of employment, either express or implied, did exist." *Id*. at 1173 (emphasis added). Based on a review of the letter of intent and scholarship documents, the court found it was "evident . . . that *there was no intent to enter into an employee-employer relationship* at the time the parties entered into the agreement." *Id*. (emphasis added). As in *Waldrep*, the court also looked to the NCAA's by-laws and its commitment to amateur status and academic performance for student athletes. *Id*. The court concluded that "[w]hile there was an agreement between Rensing and the Trustees which established certain obligations for both parties, the agreement was not a contract of employment." *Id*. at 1174.

b. The Regional Director Erred in Concluding that Northwestern and the Student-Athletes Had Entered into a "For Hire" Employment Contract Absent Evidence of Intent to Do So.

Here, as in the cases discussed above, there is no evidence that Northwestern and the student-athletes included in the bargaining unit ever intended or understood that when signing the Tender of Financial Aid they were entering into a "for hire" employment contract. On the contrary, the record evidence is that, starting with the recruitment process through their academic and athletic careers at Northwestern, the mutual understanding of the parties was that an educational relationship had been formed among matriculating students and an institution of higher education. As Northwestern Football Coach Patrick Fitzgerald ("Fitzgerald") testified:

> Q: And when you visit the potential candidates in their homes and you're talking not only to the young man but also to the parents, what is your basic message? What do you tell these potential candidates?

A: Well, I'm going to be honest with them. With everything that we do, that's what we try to start our relationship with, is building a bridge of trust through honest communication. Explaining exactly what it means to be a Wildcat, from being a student-athlete, the classes that they're going to be able to take, the academic support that we have, the social preparation that we have, what it means to be a player. All the questions that we have, from the standpoint of what it is to be a student-athlete at Northwestern….

(Tr. 1029:1-17.)

Fitzgerald also testified that his determination on whether to offer a prospective student-athlete a scholarship is not based solely on the individual's athletic ability:

Q (by counsel for CAPA): But by and large, I mean, your job is to – your job is much more than this. But one of your jobs is to put the best possible football team out on the field that you possibly can, consistent with the rules and regulations of all these various entities. Is that a fair statement?

A: Well, I believe that my first job is to recruit the right fit to our university.

* * *

That's from an academic standpoint, to bring in the right young men. They are going to graduate in four years and have themselves prepared for life. To make the right character evaluation and character assessment of the guys, based on our values. And then the combination of that with their athletic ability, is whether or not we choose to offer them a scholarship or not.

(Tr. 1161:23-1162:17.)

Indeed, the Regional Director acknowledged that during visits to the homes of prospective student-athletes in December and January "Fitzgerald will explain how they will have the opportunity to take certain classes, receive academic and social support and have certain responsibilities as players." (Dec. at 10; Tr. 1029:1-17.) Moreover, the University's Admission Office evaluates potential recruits for pre-admission. If a recruit is "not deemed admissible" as a Northwestern student, the recruitment ceases. (Dec. at 10; Tr. 1032:17-1034:11) If the recruit is pre-approved for admission, the first communication recruits receive from Fitzgerald states:

> CONGRATULATIONS, the Northwestern Football Staff and I would like to offer you a full scholarship . . . You possess the talent and embody the characteristics and values necessary to succeed at Northwestern University as a student-athlete on our football team.

(Dec. at 10; E-5 at NU 967 (emphasis added).)

Consistent with Coach Fitzgerald's message about being a student-athlete, former Northwestern football student-athlete Douglas William Bartels ("Bartels") testified that Fitzgerald and other members of the coaching staff frequently spoke to the team as well as to him individually about academic studies, explaining that: "in my interactions with the coaching staff, and every time that they were with us in a large group setting, they were nothing but supportive and saying that we are there to get an education. We are student-athletes, student being the emphasis." (Tr. 1233:6-15 (emphasis added).) Bartels also testified that when he informed Fitzgerald during the recruiting process about his desire to go to medical school Fitzgerald was "nothing but supportive," and the entire coaching staff made "it explicitly clear that they were going to be willing to work with me and do everything they could to make sure I completed a premed coursework." (Tr. 1218:17-1219:19.)

Similarly, former Northwestern football student-athlete John Henry Pace ("Pace") testified that Fitzgerald spoke to the players "[v]ery frequently" about their academic studies and balancing studying with football. Reinforcing the point, Pace testified about a plaque that hung in the team meeting room "with our team goals," and stating "the number one goal is to earn a Northwestern degree." (Tr. 1278:2-14.) Pace also testified that during his career as a Northwestern student-athlete receiving a grant-in-aid he "fairly frequently" left practice early or missed team meetings at the end of practice in order to make it to class on time, that he was never discouraged from leaving practice early to attend class, and he saw other student-athletes leave practice early to attend class. (Tr. 1273:19-1274:16.)

Consistent with this mutual understanding of the University and student-athletes that the essence of the relationship was educational, and not an employee-employer relationship, the Tender of Financial Aid expressly states it is an offer of financial aid "signed for enrollment in academic year 2013-2014," and that it is for a four-year "period of award" that runs through the 2016-2017 academic year. (E-5 at NU 969.) The Tender of Financial Aid also sets forth certain "Conditions of Financial Aid," including those under the NCAA's Bylaws to preserve the amateur status of intercollegiate athletics. (E-5 at NU 970-71.) Notably absent from the Tender of Financial Aid is any statement indicating the parties intended or understood the Tender of Financial Aid to be an offer of employment or to constitute the terms of a "for hire" employment contract. To the contrary, the Tender of Financial Aid states it will be immediately reduced or canceled if a student-athlete withdraws as a student at the University. (E-5 at NU 971.)

With respect to athletic performance, the Tender of Financial Aid, which is signed by the student-athlete and his parent or legal guardian,[4] expressly states:

> I understand that this tender will not be reduced or canceled during the period of award per NCAA Bylaw 15.3.4.3:
>
> - On the basis of my athletics ability, performance or contribution to the team's success;
> - Because of an injury, illness, or physical or mental condition (except as permitted pursuant to [NCAA] Bylaw 15.3.4.2); or
> - For any other athletics reason[.]

(E-5 at NU 971 (emphasis added).)

While there are no athletic performance standards that must be achieved in order to continue to receive financial aid, to maintain football eligibility the student-athletes must satisfy a series of *academic* standards, including "making adequate progress towards obtaining their

[4] The Tender of Financial Aid is signed on behalf of Northwestern by the University Director of Financial Aid and the Senior Associate Athletic Director. (E-5 at NU 971.)

degree" and "maintaining a minimum GPA." (Dec. at 11; Tr. 496:25-499:4.) Student-athletes entering their second year of school "must pass 36 quarter hours and have a 1.8 GPA"; student-athletes "entering their third year of school must have 40% of their degree applicable units completed and a 1.9 GPA"; student-athletes "entering their fourth year of school . . . must have 60% of their degree applicable units completed and a 2.0 GPA"; and student-athletes "entering their fifth year of school . . . must have 80% of their degree applicable units completed and a 2.0 GPA." (Id.)

Similarly, the Northwestern Student-Athlete Handbook "states that players' academics must take precedence over athletics," and for this reason the Regional Director found Northwestern "attempts to assist the [student-athletes] with their academics by having: (1) study tables; (2) tutor programs; (3) class attendance policies; (4) travel policies which restrict players from being off campus 48 hours prior to finals; and (5) a policy prohibiting players from missing more than five classes in a quarter due to games." (Dec. at 12; J-16 at NU 15.) In addition, the University provides student-athletes with development programs referred to as "NU P.R.I.D.E.," which are intended "to help the students 'find personal success through service to the campus and their community while enhancing their leadership skills, celebrating diversity, and promoting student-athlete welfare through meaningful programming." (Dec. at 12; J-16 at NU 4.) There is also "a mandatory four-year NU For Life Program . . . designed to assist student-athletes with their professional development so they are able to excel in their chosen field upon completion of their degree." (Dec. at 12; J-16 at NU 21.)

The Tender of Financial Aid does provide that the grant-in-aid may be reduced or canceled during the award period, pursuant to NCAA Bylaw 15.3.4.2, if a student-athlete "[v]oluntarily withdraw[s] from a sport at any time for any reason." (E-5 at NU 971.) However,

the reduction or cancellation of an athletic grant-in-aid does *not* change the student's enrollment status with the University. It simply means the student must use other means, including other forms of available financial aid, for the cost of continuing his education. Moreover, as former Northwestern football student-athlete Patrick Michael Ward ("Ward") testified, this result made sense to him as a student because such a result was similar to a student losing an academic scholarship if he "failed to live up to the academic standards" required. (Tr. 1315:11-1316:25.) Finally, in circumstances where a Tender of Financial Aid is to be reduced or canceled for some reason, it is not a decision that rests with Northwestern's Head Coach or Athletic Department. Instead, the terms of the Tender of Financial Aid expressly provide the student-athlete with the opportunity to request a hearing before the University's "regular financial aid authority," which "shall not delegate the responsibility for conducting the hearing to the [U]niversity's athletic department or its faculty athletics committee." (E-5 at NU 971.)

The Union introduced no evidence of the intent of Northwestern and those in the petitioned-for unit to enter into a "for hire" employment contract. On the contrary, the record evidence clearly established that Northwestern did not consider or treat student-athletes as employees for any purpose. (Tr. 250:7-251:6.) The only "evidence" the Union attempted to offer on this essential element of a contract for hire was the post hoc declaration of former Northwestern student-athlete Kain Colter ("Colter"), who when asked how he currently viewed himself, declared: "[w]e are first and foremost an athlete, an employee of the school who provides an athletic service." (Tr. 166:18-20.)

Significantly, however, when asked why he viewed himself as a Northwestern employee, Colter pointed only to the time demands of his football activities and the impact on his academic schedule. (Tr. 166:21-25.) However, this is no evidence at all of intent by the parties to form a

"for hire" employment relationship. Nor is the scholarship football player distinguishable from non-scholarship / walk-on players, who are subject to the same team rules and participate in the same team practice, meeting, and game schedule as those receiving grants-in-aid. (Tr. 1035:16-1036:24; 1227:25-1228:24; 1269:12-1270:7.) With respect to Colter's intentions or understanding when he first enrolled at Northwestern in the summer of 2010, his testimony was limited to recounting that his "dream" was "to be an orthopedic surgeon and eventually be a team doctor." (Tr. 167:4-7.) To this end, Colter testified that when he first arrived on Northwestern's campus he was intent on achieving academic success as a student-athlete, stating that he "was on the premed track" and "really eager to knock out chemistry and some other classes." (Tr. 167:1-16.).

Applying the record facts to the common law test discussed in the cases above, it is clear that Northwestern and the football student-athletes receiving athletic grants-in-aid did not intend to form a "for hire" employment contract. The Regional Director erred in his application of the common law "employee" test by failing to consider this essential element of the intent of the parties. The Regional Director also erred in not finding the University and the student-athletes entered into a fundamentally different relationship, that is an educational relationship between an institution of higher education and matriculating student-athletes, who choose to participate in amateur intercollegiate athletics as part of their educational experience and as a way of satisfying the cost of obtaining their degree through an athletic grant-in-aid.

2. The Regional Director Erred in Concluding Athletic Grants-in-Aid of Educational Costs Are Compensation for Work.

The Regional Director erred when he concluded the athletic grants-in-aid received by student-athletes are "compensation for the athletic services they perform for the [University]," rather than financial aid provided for the exclusive purpose of satisfying the cost of the student-athletes' education. (Dec. at 14.) The Regional Director's conclusion is contrary to established Board law, as well as federal and state court decisions, and Internal Revenue Service ("IRS") rulings. It is also contrary to the express terms of the Tender of Financial Aid, as well as the record testimony, regarding the intent, nature, and treatment of the grants-in-aid by all parties.

a. Grants-In-Aid of Educational Costs Are Not Compensation for Work Where Such Grants Are Not in Exchange for the Performance of Labor, and the Amounts Do Not Vary Based on Time, Effort, or Results Achieved.

As an initial matter, a "for hire" employment relationship requires there to be a stipulated compensation provided in exchange for the labor or services provided. In *WBAI Pacifica Foundation*, the Board rejected a Regional Director's finding that "unpaid staff" at a non-profit radio station could qualify as "employees" under the Act merely "because they provide an essential service to the [e]mployer and are subject to the [e]mployer's control." 328 NLRB at 1273. The Board found "[t]he ordinary meaning of employee does not include unpaid staff" because working for another for hire requires receipt of "compensation for labor or services." *Id.* at 1275. The Board also noted that such "compensation" is defined in Black's Law Dictionary (6th ed. 1990) as: "Remuneration for services rendered, whether in salary, fees, or commissions." *Id*. at 1274.

However, the definition cited by the Board does not include grants or scholarships. Instead, it is limited to forms of stipulated compensation given in exchange for the actual performance or completion of contracted labor services. *Id*. Applying this definition, the Board

rejected the Regional Director's conclusion that "occasional reimbursement for travel" together with the unpaid staff's mere "contractual eligibility for a child care allowance" satisfied the requirement for compensation exchanged for labor services. *Id*. at 1276. The Board further found that financing the employer provided to the unpaid staff to pay the engineering and publicity costs of producing their own radio programs was "not a form of remuneration for services they have rendered to the [e]mployer." *Id*. As such, the Board concluded the radio station's unpaid staff were not employees under Section 2(3) of the Act. *Id*.

The Board has similarly rejected the argument that university financial aid provided to students is compensation paid in return for labor services. Most recently, in *Brown University* 342 NLRB 483 (2004), the Board expressly rejected the notion that financial aid provided to graduate teaching assistants, research assistants, and proctors was compensation for labor. There, the financial aid was conditioned on the students maintaining satisfactory progress toward their graduate degrees, and was provided in the form of a stipend to cover living expenses, as well as the forgiveness of tuition and a university fee for health services. *Id*. at 485-86. Of note, the Board stated: "We also emphasize that the money received by TAs, RAs, and proctors is the same as that received by fellows," who performed no service to the university. *Id.* at 488. The Board concluded: "The money is not 'consideration for work.' It is financial aid to a student." *Id*.

Similarly, in *Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976), the Board dismissed a petition, finding that interns, residents, and clinical fellows were not "employees." *Id*. at 254. The students received an annual stipend, the amount of which increased each year from a first-year intern to fifth-year resident, but was not determined by the nature of services rendered or the number of hours spent in patient care. *Id*. at 252. The interns, residents, and clinical fellows did receive fringe benefits, including medical and dental care, vacation, paid holidays, uniforms,

meals, and malpractice insurance. *Id*. However, the Board concluded they were not "employees" but students, in part because "[t]he number of hours worked or the quality of the care rendered to the patients does not result in any change in monetary compensation paid." *Id*. at 253; *see also Leland Stanford Junior University*, 214 NLRB 621, 622-23 (1974) (finding graduate research assistants were not "employees" where there was no correlation between their efforts or hours spent conducting research and the amount of financial assistance they received).

Courts too have rejected the contention that financial aid grants constitute compensation for work. In *Crue v. Aiken*, 204 F. Supp. 2d 1130 (C.D. Ill. 2002), the court rejected an argument by the University of Illinois that graduate students were university employees. There, students and faculty members sued the university after they were prohibited from contacting prospective students about their opposition to the university's Native-American mascot. *Id*. at 1134. The university argued that one plaintiff was not a student but an employee because she was paid for her services as a graduate teaching assistant. *Id*. at 1140. The court disagreed, concluding that graduate assistants were not employees where they were required to be enrolled as students and were not paid a salary but, instead, received only "financial aid in the form of a monthly stipend and waiver of tuition and fees." *Id*. (citing *Graduate Employees Organization, et. al., v. Illinois Educational Labor Relations Board*, 733 N.E.2d 759, 762 (Ill. App. Ct. 2000)); s*ee also Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983) (finding financial aid for a student-athlete was not compensation where it was "not considered by the parties involved to be pay or income").

Here, the Regional Director's finding that the grants-in-aid amount to employment compensation paid in return for labor services is clearly wrong. Northwestern's four-year athletic grant-in-aid is applied to satisfy the cost of the student-athlete's education. There is no indication

the parties ever intended the Tender of Financial Aid as compensation for work. As in the cases discussed above, the value of the grant-in-aid is the same for all the football student-athletes, regardless of their performance or position on the depth chart. The amount is not correlated to the number of hours the student-athlete spends during a given day, week, or month on football related activities. *See Banks v. Nat'l Collegiate Athletic Ass'n*., 977 F.2d 1081, 1091-92 (7th Cir. 1992) (rejecting contention that athletic grants-in-aid may be considered compensation for labor "when the value of the scholarship is based on the school's tuition and room and board, not by the supply and demand for players.").

Moreover, the terms of the Tender of Financial Aid expressly state the grant-in-aid may not be reduced or canceled based on the student's athletic performance, including the total inability to participate on the football team "[b]ecause of an injury, illness, or physical or mental condition." (E-5 at NU 971.) All of the former Northwestern football student-athletes who testified on the subject, including Colter, confirmed that their grants were never reduced because of an injury or other inability to participate in football. (Tr. 241:6-243:15; 1227: 6-24; 1287:4-25.) Indeed, Coach Fitzgerald testified that on one occasion a football grant-in-aid student-athlete was excused from participating in practice as well as the game at the University of Nebraska in order to study for a course. (Tr. 1061:4-1062:16.)

b. The Recognized Exclusion of Student-Athlete Grants-In-Aid of Educational Costs from Taxable Income Compels the Conclusion They Are Not Compensation for Employment.

The Regional Director also erred in failing to consider the exclusion of athletic grants-in-aid from taxable income in deciding whether the grants constitute compensation paid in exchange for employment services. (Dec. at 14.) Indeed, the Regional Director virtually ignores the issue in the Decision, choosing not to discuss or distinguish a single case and, instead, merely citing a single footnote in the D.C. Circuit's decision in *Seattle Opera v. NLRB*, 292 F.3d 757,

764, fn. 8 (2002), for the proposition that tax treatment of payments to individuals is not by itself dispositive of whether the payments are compensation for work. (Dec. at 14.) However, the parties' tax treatment of the alleged compensation is at the very least relevant to such a determination because it reflects the parties' intent. *See, e.g.*, *Leland Stanford Junior University*, 214 NLRB at 622 ("Significantly, the payments to the RA's are tax exempt income."); c*ompare Boston Med. Ctr. Corp.*, 330 NLRB 152, 160 (1999) (finding that house staff who received compensation were employees where "[t]here is no exclusion under the Internal Revenue Code for such stipends" and federal and state taxes were withheld). In addition, in this case, the tax authorities provide an important source of generally accepted, persuasive authority as to what constitutes compensation received in return for employment services. The Regional Director erred in not considering the persuasive authority respecting tax treatment of this aid provided to student-athletes. This authority weighs heavily against the Regional Director's finding that grants are compensation for employment.

In *Heidel v. Commissioner*, 56 T.C. 95 (1971), the United States Tax Court considered whether the "value of a Southeastern Conference grant-in-aid athletic scholarship" provided by the University of Mississippi ("Ole Miss") to a football student-athlete constituted taxable, earned income where the student-athlete "claim[ed] it was a special kind of scholarship in that he was required to play football for Ole Miss to continue to receive it." *Id*. at 100-04. In response, the court observed that Section 1.117-3 of the Income Tax Regulations "defines a scholarship as generally meaning an amount paid or allowed to, or for the benefit of, a student, to aid such individual in pursuing his studies." *Id*. at 102. The court noted that Section 117(a) of the Internal Revenue Code "provides that the gross income of an individual does not include any amount received as a scholarship at an educational institution," while "Subsection (b) provides that …

[S]ubsection (a) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship." *Id*. (emphasis added). The court also considered the Supreme Court's opinion in *Bingler v. Johnson*, 394 U.S. 741 (1969), noting:

> [In *Bingler*] the [Supreme] Court recognized the ordinary understanding of "scholarships" "as relatively disinterested, 'no-strings' educational grants, with no requirement of any substantial *quid pro quo* from the recipients," and upheld the regulations under [S]ection 117 dealing with compensation which provided in effect that bargained-for payments, given only as a "*quo*" in return for the "*quid*" of services rendered, should not be excludable from income as "scholarship" funds. Thus, if we accept the premise that the grant-in-aid was received by petitioner in return for his services as a football player … it would not qualify as an amount received as a scholarship, and excludable from income. On the other hand, if the value of the grant-in-aid is to qualify as a scholarship and excludable from income, it must be considered as having been furnished by the university as a "no-strings educational grant" …..

Id. at 104 (underlining added).

Applying the *Bingler* standard to the Southeastern Conference athletic grant-in-aid, the *Heidel* court observed the petitioner (former student-athlete) "cannot have it both ways," then concluded that: "even leaving aside the implications *inherent* in treating the value of his scholarship as received . . . in return for playing college football, it is more consistent with the ordinary understanding of athletic scholarships . . . to conclude that the value of the grant-in-aid afforded to petitioner . . . cannot be included" as income earned. *Id*. (emphasis in original).

Thereafter, the Internal Revenue Service ("IRS") issued Revenue Ruling 77-263, which squarely addresses whether "the value of scholarships awarded by a university to students who expect to participate in the university's intercollegiate athletic program is excludable from their gross incomes under [S]ection 117 of the Internal Revenue Code of 1954." In it, the IRS observes that athletic grants-in-aid that do not exceed the cost for tuition, fees, room, board, and necessary educational supplies are not taxable if: (1) the grant-in-aid is awarded to students by a

university that expects, but does not require, the students to participate in the sport; (2) the university does not require a particular activity in lieu of athletic participation; and (3) the university cannot cancel the grant-in-aid if the student cannot participate in the sport. Rev. Rul. 77-263, 1977-2 C.B. 47.[5] Applying this standard to athletic grants-in-aid, the IRS concluded:

> In the instant case, the university requires no particular activity of any of its scholarship recipients. Although students who receive athletic scholarships do so because of their special abilities in a particular sport and are expected to participate in the sport, the scholarship is not cancelled in the event the student cannot participate and the student is not required to engage in any other activities in lieu of participating in the sport.
>
> Accordingly, in the instant case, the athletic scholarships are awarded by the university primarily to aid the recipients in pursuing their studies, and therefore, the value of the scholarships is excludable from the recipients' gross incomes under section 117 of the Code.

Id. (emphasis added).

Here, consistent with the IRS revenue ruling, Northwestern's student-athletes do not lose their athletic grants-in-aid in the event they "cannot participate" in football.[6] The Tender of Financial Aid expressly states the grant "will not be reduced or canceled" due to a student-athlete's "athletics ability, performance or contribution to the team's success," "[b]ecause of an injury, illness, or physical or mental condition," or "[f]or any other athletics reason." (E-5 at NU-971.) By signing the Tender of Financial Aid, every student-athlete acknowledges that he understands his grant-in-aid may not be reduced or canceled based on his athletic performance. Moreover, Fitzgerald made clear in his testimony that, in fact, no football student-athlete has had his grant-in-aid reduced or cancelled for any athletic reason. (Tr. 1045:5-17.) As such, the grants-

[5] More recently, the IRS issued Publication 970 (2013), Tax Benefits for Education, which reiterates that athletic grants-in-aid are excludable from taxable income. *See* http://www.irs.gov/publications/p970/ch01.html.

[6] As set forth in the Tender of Financial Aid, the "Period of Award" for the Northwestern grants-in-aid at issue is four academic years, which may be extended for a fifth year of undergraduate or graduate study where the student-athlete has a year of athletic eligibility remaining. (E-5 at NU 967; Tr. 486:5-22.)

in-aid the football student-athletes receive are not taxable, and no one has treated them as taxable for employment purposes. (Tr. 250:7-19.)

In support of his conclusion to the contrary, the Regional Director offers a theoretical and somewhat misleading characterization of the operative effect of the Tender of Financial Aid, which the Big 10 Conference drafts and mandates that Northwestern use. The Regional Director asserts that Fitzgerald "in consultation with the athletic department, can immediately reduce or cancel the players' scholarship for a variety of reasons." (Dec. at 15.) However, the Regional Director fails to note that there can be no reduction or cancellation of the grant-in-aid on account of athletic performance or the student's inability to participate in football. (Dec. 15; E-5 at NU 971; Tr. 1045:5-17.) In *WBAI Pacifica Foundation*, 328 NLRB 1273, 1276 (1999), the Board rejected a similar sort of speculative reasoning where there was no evidence of it having actually happened. In that case, the Board rejected the Regional Director's conclusion that "contractual eligibility for a child care allowance" alone could constitute compensation given in exchange for labor where "[t]here is no evidence that any unpaid staff have ever received a child care allowance." *Id*. at 1275-76. Likewise, here, the Regional Director relies on a hypothetical "what if" scenario based on the Big 10 Conference's mandated language in the Tender of Financial Aid, despite the un-refuted testimony by Fitzgerald that no student has had their grant-in-aid reduced based on athletic performance. There is no "threat" of such "hang[ing] over the entire team." (Dec. at 15.) The Regional Director's conclusions in this regard are misplaced and unsupported.

The only other supporting "evidence" the Regional Director mentions in the Decision is in Footnote 31, wherein the Regional Director states "even star quarterback Kain Colter testified that he feared that he might lose his scholarship if he slacked off in his football duties." (Dec. at 15.) However, Colter did not testify that this purported "fear" of losing his scholarship was based

on any term in the Tender of Financial Aid or other documents provided by Northwestern, or any statement by Fitzgerald, any member of the coaching staff, or any other Northwestern representative. Colter's subjective and unwarranted anxiety is irrelevant where not attributable to any statement or action of Northwestern. Indeed, Colter testified that in the previous season he missed games and practices as a result of injuries but his aid was never reduced. (Tr. 243:1-15.)

Based on the foregoing Board law and tax authority, the athletic grants-in-aid Northwestern provides to its football students-athletes are clearly not compensation for work, but rather student financial aid.

B. Under the Board's Holdings in *St. Clare's Hospital* and *Brown University*, Even if Student-Athletes Receiving Grants-in-Aid of Educational Costs Are Common Law Employees, They Are Not Covered By the National Labor Relations Act.

Even assuming *arguendo* that Northwestern's football student-athletes receiving grants-in-aid are employees for common law purposes, it does not necessarily follow that they are employees with collective bargaining rights under the Act. Instead, the Board has repeatedly made clear that certain types of workers, "while not excluded from the definition of an employee in Section 2(3) [of the Act], nevertheless are not statutory employees." *Brown University*, 342 NLRB 483, 488 (2004). For such categories of "employees," including university students, it is *not enough* to simply be an employee at common law. Thus, if the students' asserted employment "is merely incidental to the students' primary interest of acquiring an education," they are not afforded collective bargaining rights under the NLRA. *St. Clare's Hospital and Healthcare*, 229 NLRB 1000, 1001 (1977).

In concluding that Northwestern's football student-athletes receiving grants-in-aid are employees under the Act, the Regional Director simply dismissed *Brown University* as "not applicable." (Dec. at 18.) Then, as noted below, the Regional Director nevertheless proceeded to

misapply its holding. (Dec. at 18-20.) In so doing, the Regional Director erred by ignoring the Board's authority and reasoning applicable under *St. Clare's Hospital* and *Brown University*, which focuses on the primary interest of the students in their relationship to the university. Under the proper application of the Board's analysis and reasoning in *St. Clare's Hospital* and *Brown University*, the Northwestern football student-athletes are not employees with collective bargaining rights under the Act.

1. Where the Students Are Engaged in Extracurricular Athletic Activities Incidental to Their Education, They Are Not Employees to Whom Collective Bargaining Rights Are Extended, Even if the Activities Are Unrelated to Their Course of Study.

In *St. Clare's Hospital and Healthcare*, 229 NLRB 1000 (1977), the Board described four categories of cases involving students in petitioned-for bargaining units. 229 NLRB at 1000-02. As the Board explained, two categories involve students working for commercial employers, while two categories involve students "working for" the educational institution in which they are also enrolled. *Id.* The Board in *St. Clare's* dealt directly with the factual situation, also at issue in *Brown University*, where the services performed by the students "constitute[d] an integral part of [] their educational program," leading to the conclusion that the relationship between the parties was "predominantly academic rather than economic in nature." *St. Clare's*, 229 NLRB at 1002.

The other relevant situation the Board discussed in *St. Clare's* involved students "employed by their own educational institutions in a capacity unrelated to their course of study." 229 NLRB at 1001. In this category too, the Board observed that students are excluded from bargaining units that include non-students, and are not permitted to be represented separately, because their "employment is merely incidental to the students' primary interest of acquiring an education, and in most instances is designed to supplement financial resources." *Id.* Moreover,

the Board explained that such students' "status as employees is in most instances directly related to their continued enrollment at the educational institution." *Id.*

2. The Regional Director Erred in the Application of the Board's Holdings in *St. Clare's Hospital* and *Brown University*.

Even assuming *arguendo* that the Northwestern football student-athletes are "employed" by the University for common law purposes, the Regional Director then should have looked to the Board's analysis and reasoning in *St. Clare's* and *Brown University* concerning both the category of cases where "students [are] employed by their own educational institutions in a capacity unrelated to their course of study," and where the students' services "are directly related to their educational program." *St. Clare's*, 229 NLRB at 1001-02. The proper focus of such an analysis should have been on the nature of the relationship between, and the interests of, the grant-in-aid student-athletes and the University -- not the mechanical comparison of estimated hours spent on football related activities versus non-football related activities.

The Regional Director's approach is not consistent with the Board's underlying reasoning in *St. Clare's* and *Brown University*, and will inevitably lead to inconsistent results in cases where the evidentiary record differs as to the number of athletic versus academic hours, even where the grant-in-aid student-athletes are engaged in the same activities and have the same fundamental relationship to their respective universities. Consider, for example, the Board's decision in *Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976). There, the Board found that, despite the payment of a stipend and receipt of insurance and other paid benefits, interns, residents, and clinical fellows were not "employees" but students who: "participate in these programs not for the *purpose* of earning a living" but "to pursue the graduate medical education." *Id*. at 253 (emphasis added). As such, the Board concluded the students did not attach "any great

significance to the amount of the stipend," but made their choices "based on the quality of the educational program and the opportunity for an extensive training experience." *Id*.

Here, the student-athletes in the petitioned-for bargaining unit are indisputably *bona fide* students, whose grants-in-aid are used exclusively to offset the cost of their education. (E-5 at NU 969; Tr. 244:8-25.) Indeed, the record evidence is that Northwestern's football team has a 97% graduation rate and a team GPA over 3.0. Moreover, the student-athletes' ability to participate on the football team is contingent on their continued enrollment as students, and then satisfactory progress towards their degrees (both in terms of academic credits completed and maintenance of a minimum GPA). (Tr. 496:25-499:4.); *see Waldrep*, 21 S.W.3d at 701 ("[The student-athlete's] academic responsibilities dictated whether he could continue to play football.").

Also, as described by Northwestern in its brief, and discussed extensively in the briefs of other *amici* in support of Northwestern, participation in intercollegiate athletics is itself an integral part of the educational experience and academic life of student-athletes. This is reflected in the valuable lessons learned through athletic competition and team sport. (Tr. 267:7-21; 1233:20-1234:15; 1277:7-1278:1; 1298:9-1299:24.) It is also reflected in the comprehensive academic support services and resources Northwestern provides to student-athletes to help them succeed, including Athletic Academic Advisors, a mandatory class attendance policy and freshman study skills program, and personal development programs emphasizing community service, diversity and leadership, and professional development. (Tr. 809:3-18; 857:9-878:10; 861:6-862:22; 885:2-15.) The combination of student-athletes' academic studies, the values and life skills learned from their participation in team sport, and personal development programs are intended to promote well-rounded, educated and responsible student-athletes fully prepared to succeed after graduation. (Tr. 1062:22-1064:1.)

As such, the Northwestern student-athletes remain "primarily students," whose participation on the football team is an element of their educational experience and academic life. Moreover, even if unrelated to their course of study, participation in football remains "incidental to the students' primary interest in acquiring an education," and, through the athletic grants-in-aid "in most instances is designed to supplement [the] financial resources" of students in satisfying the costs of their education. Accordingly, under the applicable reasoning of the Board's decisions in *St. Clare's Hospital* and *Brown University*, the student-athletes, even if assumed *arguendo* to be common law employees, are still not employees to whom Section 7 collective bargaining rights are extended under the Act.

As the Board observed in *Cedars-Sinai Med. Ctr.*, there is no indication from the record that Northwestern's football student-athletes attached "any great significance" to the dollar value of the grant-in-aid aside from it covering or reducing the costs of the students' education. The Regional Director erroneously places great importance on the reported dollar value of the grant-in-aid in concluding it somehow transforms the relationship between the student-athletes and the University into a primarily economic one. (Dec. at 14-15.) However, there is no evidence the dollar value of the grant-in-aid played any role in the decision of student-athletes to attend Northwestern. The grants-in-aid are not financial sums transferred to the student-athletes. Except for the small portion comprising a stipend for living expenses, most of the reported value cited by the Regional Director is the amount of the educational costs that Northwestern is simply not charging the student-athletes. To prospective student-athletes in the recruiting process, competing offers of a full athletic grant-in-aid from different universities offer no more or less than the opportunity to attend college at no cost while participating in intercollegiate athletics.

That is worlds apart from prospective employees choosing between differing salaries or wage rates of competing job offers in the employment setting.

Like the students in *Cedars-Sinai Med. Ctr.*, the record here reflects that Northwestern recruits student-athletes because of the value of a Northwestern education. (E-5 at NU 967; Tr. 244:8-25.) The testimony of former football student-athletes, including Colter, confirms that their choice to enroll as a Northwestern student-athlete was based on the quality of the University's educational programs as well as the opportunity to participate in amateur intercollegiate athletics at the Division I level. (Tr. 209:3-7; 1219:23-1220:6; 1306:7-13.) Accordingly, Northwestern grant-in-aid student-athletes on the football team are "primarily students," and not contracted employees hired by the University to play football. Consistent with *St. Clare's Hospital* and *Brown University*, student-athletes who receive financial aid to satisfy the costs of their education by participating in an extracurricular program (such as football) are not employees to whom collective bargaining rights extend under the Act because their interests in the program are incidental to their primary interest of acquiring an education.

IV. CONCLUSION

For the foregoing reasons, the Board should reverse the Regional Director's Decision, find that Northwestern's football grant-in-aid student-athletes are not "employees" within the meaning of Section 2(3) of the Act, and dismiss CAPA's petition for representation.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July 2014, an electronic copy of this Brief of *Amici Curiae* University of Notre Dame, Trustees of Boston College, and Brigham Young University In Support Of Northwestern University was electronically filed with the National Labor Relations Board via its Internet website at http://mynlrb.nlrb.gov/efile. In addition, true and correct copies of the brief were served by email or overnight delivery as follows:

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