

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

|   |   |                         |
|---|---|-------------------------|
| <b>PENNSYLVANIA INTERSCHOLASTIC</b>       | ) |                         |
| <b>ATHLETIC ASSOCIATION, INC. (PIAA),</b> | ) |                         |
| <b>Employer</b>                           | ) |                         |
|   | ) |                         |
| <b>AND</b>                                | ) | <b>Case 6-RC-152861</b> |
|   | ) |                         |
| <b>OFFICE AND PROFESSIONAL EMPLOYEES</b>  | ) |                         |
| <b>INTERNATIONAL UNION,</b>               | ) |                         |
| <b>Petitioner</b>                         | ) |                         |

**BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF  
STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PIAA**

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## **INTEREST OF AMICUS CURIAE**

The National Federation of State High School Associations (“NFHS”) is the national service and administrative organization of high school athletics. Founded in 1920, the NFHS is composed of one high school athletic or activities association in each of the fifty states and the District of Columbia. Approximately 90 percent of the high schools in the United States are members of state high school athletic or activities associations that are in turn members of the NFHS. In Pennsylvania, the PIAA, the employer in this proceeding, is the NFHS member.

The NFHS’s mission is to provide leadership and national coordination for the administration of interscholastic activities, including athletics. The NFHS works to enhance the educational experiences of high school students through their participation in interscholastic athletics and activities. It strives to promote participation and sportsmanship in athletics, to develop good citizens through this participation, and to enrich the educational experience of students. The NFHS also seeks to protect the role that interscholastic athletics plays in education and to develop solutions to problems related to high school athletics.

Part of the NFHS’s mission is to provide its member associations with proposed playing rules for 15 different high school sports, including lacrosse. Although state associations are not required to use NFHS playing rules, most do, and in turn states that follow NFHS rules in all material respects participate on NFHS sports rules committees. NFHS playing rules typically emphasize minimizing risk, protecting balance between offense and defense, preserving each sport’s traditions, and promoting efficiency in

administration. An important part of the NFHS mission is to provide companion services for coaches, student athletes, and sports officials, through the production of rules books, manuals, exams, rules interpretation meetings, and rules videos. Thus NFHS has considerable familiarity with how officiating works throughout the country in high school sports, and can offer the Board insight on how high school officiating may be adversely affected by the Board's decision in this case.

## **ARGUMENT**

High school sports officials in the United States have traditionally and routinely been treated as independent contractors. The reasons for this are quite practical, given the nature of high school sports. Limited seasons, unpredictable schedules, and the need to master the rules of different sports make full-time officiating impractical, as do limited school budgets for extracurricular activities. Any change that proclaims these part-time sports officials to be employees threatens to disrupt the current structure of high school athletics, not just in Pennsylvania, but throughout the United States. And the Board's own prior decision in the directly analogous realm of college officiating, as affirmed by the Third Circuit, separately confirms that the officials here are independent contractors. The aberrant decision below cannot be justified on either practical or legal grounds.

### **I. The Very Nature of High School Sports Officiating Supports the Conclusion that it is Performed by Independent Contractors Rather than Employees.**

The NFHS works diligently to provide its state associations with rules for each recognized high school sport, rules training materials for individuals officiating those sports, and exams to test their competence. The NFHS is thus familiar with high school

sport officiating and how it has traditionally operated throughout the country. It is concerned that the Regional Director's decision here will disrupt high school officiating, thereby threatening the educational mission of high school athletics that the NFHS works hard to support.

Over 14,000 individuals in Pennsylvania provide part-time services as officials in high school athletic events. Nationally, 300,000 or more officials participate in making high school sports possible for some eight million students. During the regular season, these officials are typically paid not by the supposed "employer" here – the PIAA, or other state athletic associations – but directly by the schools themselves.

The overwhelming majority of these high school officials do not officiate as a career or as a full-time pursuit. Nor could they – the very structure of high school athletics makes this effectively impossible. Depending on the sport, athletic contests can occur at odd times – weekends and evenings – at widely varying locations, rather than at a set location during regularly scheduled hours. While there are many opportunities to officiate high school athletic contests generally throughout a state like Pennsylvania, an individual school's contests are limited, and each sport is limited to a specific season. Critically, each sport has different rules that require study and practice, some to a significant degree. Although officials can successfully officiate in more than one sport, the fact remains that the nature of high school athletic officiating discourages any attempt at full-time employment. It instead tends to attract individuals gainfully employed elsewhere who believe, as do the NFHS and PIAA, that interscholastic sports on the high

school level have significant educational value, and who want to contribute to that mission.

Moreover, most individual schools – the entities actually hiring officials for regular-season events – have limited budgets and staffs. They choose available officials on an event-by-event basis and normally pay them a flat fee to provide the officiating each sport requires. The schools have no real control over how the officiating is performed – that depends on the rules of the sport in question, rules that the officials themselves must learn and apply based on their independent judgment. Indeed, any effort by the schools themselves to control the officials would raise questions of fairness.

The PIAA is similarly limited in its ability to control the thousands upon thousands of Pennsylvania high school officials. Budgetary considerations and staff limitations confine it to performing the essential functions necessary to make high school sports competition succeed. In addition to establishing uniformity throughout the state in areas like rules for individual sports and length of seasons, and sanctioning championships, the PIAA performs an important service in making available to schools lists of designated officials for each sport. These officials have asserted in advance their competence to apply a particular sport's rules, have been tested and approved as knowledgeable, and have passed criminal background checks. They make their personal schedule known beforehand, consistent with their regular job and family commitments, so that schools will have a pool of officials available to officiate interscholastic athletic events. Although they have made their general availability known, the officials always remain free to decline any request by any school to officiate a particular game or event.

Typically, the PIAA and other state associations only pay for officiating services during end-of-season tournaments and events like the state championships that the associations themselves conduct. But even then, participation by officials in particular events remains purely voluntary. Importantly, the PIAA in no way restricts the ability of officials to pursue other employment opportunities beyond the individual sporting events that they contract to officiate. Although the PIAA and other associations monitor officials in a general way, attempting to maintain a basic level of competence, any serious attempt to supervise or control the officiating activities of some 14,000 individuals would be far beyond the capabilities or budget of the PIAA, or indeed of any state high school association.

This time-tested arrangement exemplifies the spirit of athletics at the high school level. While the compensation may not be high – nor could it be, given the limited budgets – these officials typically have a devotion to their sport and a firm belief in the educational value of athletic competition. The present system makes participation in interscholastic athletic competition possible for millions of high school students. With the help of state associations like the PIAA, and the devoted efforts of hundreds of thousands of part-time officials throughout the country, it has worked well for generations.

The Regional Director’s decision here classifying these individuals as PIAA “employees” threatens this traditional system in obvious ways, as well as in ways that may not be fully understood. Treating officials as employees of the schools that actually pay them on a per-event basis, or as in the present case, as employees of state

associations like the PIAA that have even less direct involvement with their officiating, would impose on schools or state associations new and daunting administrative tasks. The PIAA alone would be required to deal with the administrative burden of adding 14,000 state sports officials as its employees under Petitioner's arguments.

The Board should set aside the Regional Director's decision and recognize the clear and practical reality – high school sports officiating generally, and the lacrosse officials in this case specifically, are classic independent contractors.

**II. This Board's Prior Decisions, Particularly a Directly Analogous Decision Affirmed by the Third Circuit, Establish that Sports Officials Here are Independent Contractors.**

Not only do tradition and the very nature of high school sports support the current treatment of high schools sports officials in independent contractors, but an earlier decision by the Board, affirmed by the Third Circuit, dictates the same result.

The Board specifically addressed the status of sports officiating in *Big East Conference*, 282 NLRB 335 (1986), *aff'd sub nom. Collegiate Basketball Officials Ass'n v. NLRB*, 836 F2d 143 (3d Cir. 1987). That decision turned entirely on whether *college* sports officials were employees or independent contractors. *See* 282 NLRB at 342 (noting that “key issue in the case was whether the ... officials are independent contractors or employees,” and applying the common-law “right to control” test). The Board correctly determined in *Big East* that the officials were independent contractors, a decision unanimously affirmed by the Third Circuit. If the more sophisticated competition and more formal structure of college athletic officiating supported an independent contractor determination, the much more diffused and informal nature of

high school contests, where many more part-time individuals officiate at varsity, junior varsity and freshman contests, should not support a different outcome.

In affirming the Board in *Big East*, the Third Circuit applied the classic common-law “right to control” test. As the Court stated, 836 F.3d at 145 (citations omitted):

Whether the officials are employees or independent contractors under the Act is a question of common law agency. The officials’ status is determined by the degree to which the ECBA may intervene to control the details of the officials’ performance, commonly referred to as a “right to control” test.

This test is not materially different from the common-law test applied today. *See, e.g., Fed. Ex Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). Although the Board has recently clarified that the “entrepreneurial opportunity” factor must focus on actual rather than theoretical opportunity, *see Fed Ex Home Delivery*, 361 NLRB 55 (2014), nothing about the limited relationship here between part-time high school officials and the PIAA (or Pennsylvania schools) restricts their *actual* opportunity to earn additional income by either expanding their officiating, or working elsewhere, as virtually all do already. The *Big East* decision, dealing as it does with the analogous sphere of college sports officiating, controls the present case of high school officials, and confirms the practical reality that these individuals cannot sensibly be considered PIAA employees.

### **CONCLUSION**

The Board should reverse the Regional Director’s determination, and rule that Pennsylvania high school lacrosse officials are not statutory employees.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2016, an electronic copy of the foregoing Brief was served by email at the following email address and was electronically filed with the Regional Director for Region Six:

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