

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,
Employer,

and

13-RC-121359

COLLEGE ATHLETES PLAYERS
ASSOCIATION,
Petitioner.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations submits this brief in response to the National Labor Relations Board’s request for briefs addressed to whether the paid members of the Northwestern University football team are “employees” within the meaning of the National Labor Relations Act. We submit that the paid players are “employees” under the Act.

Section 2(3) of the Act states that “[t]he term ‘employee’ shall include any employee, and shall not be limited to employees of a particular employer, unless this subchapter explicitly states otherwise.” 29 U.S.C. §152(3). The Supreme Court has observed that “[t]he ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation’” and that “[t]he phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition.” *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995) (quoting *American Heritage Dictionary* 604 (3d ed. 1992)). A “broad, literal interpretation of the word ‘employee’ is consistent with several of the Act’s purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process.” *Id.* at 91 (quotation marks and citations omitted).

The Northwestern football program functions as a largely autonomous commercial enterprise that is affiliated with and generates revenue for the University. There is no question that the players in the petitioned-for unit “work for” the Northwestern football program in much the same way as professional athletes. Nor is there any question that the Northwestern football players perform this work “in return for financial . . . compensation.” Not only do the paid Northwestern football players fit the NLRA definition of “employee,” extending NLRA coverage to the football players would promote “the collective-bargaining process,” *Town & Country*, 516 U.S. at 91.

1. The Players “Work For” the Northwestern Football Program.

The Northwestern football program is primarily a commercial operation that raises revenue for the University through the sale of tickets and sports paraphernalia and through the proceeds from television broadcasts. The football program has its own highly paid professional administration, led by head coach Patrick Fitzgerald, Jr. DDE 3. In addition to Coach Fitzgerald, the football program has amassed a substantial management and supervisory staff that includes a Director of Football Operations, Director of Player Personnel, Director of Players Development, nine full-time assistant coaches, and five full-time strength coaches. *Ibid*. The program also retains a nine-member operations staff, a three-member quality control staff, and a video department. Jt. Ex. 17, at 10; Tr. 1021:21-1022:9. , None of the football program’s managers or supervisors are members of the University’s academic faculty. DDE 11.

The football program selects the team’s players. DDE 9; Tr. 1169:11-1170:22, 1199:6-14. Over two-thirds of the players on the football team are compensated for their work with grant-in-aid scholarships covering the cost of tuition, fees, room and board, and books. DDE 3. Each player’s compensation package is set forth in a “tender” that the player is required to sign

before the beginning of each school year. *Id.* at 4. The tender outlines the player's obligations to the football program, identifying the services the player is expected to provide and the extent of the program's control over how the player performs those services. *Ibid.* Players who do not receive compensation do not sign a tender. *Ibid.*

By signing the tender, which includes their compensation package, players commit themselves to furthering the commercial goals of the football program. The University receives substantial economic benefit from the players' services, as the football program brought in \$235 million during the period 2003 through 2012. DDE 13. The players make numerous commitments related to the commercial aspects of the football program. Paid players are required to grant the University the exclusive right to use of their names, images and likenesses, and they relinquish any right to seek direct compensation from the use of their names, images and likenesses. *Id.* at 5. The University secures the exclusive right to use the likeness of the paid players and to market merchandise for commercial purposes. *Id.* at 13. Other Northwestern students, including the uncompensated football players, are not required to relinquish the rights to use their likeness for profit. Paid players must commit themselves to advancing the program's financial goals so completely that the program's administration must give its approval before players may seek other employment to supplement their income. Tr. 192:22-193:11, 1083:15-21. And, if a player transfers to another college, he is restricted by the noncompete clause in the tender from playing football for that college for one year after transferring. Jt. Ex. 22 at 170.

To support the financial goals of the football program, the players devote a substantial amount of time to football. The aggregate number of hours the players devote to football amounts to a full time job. During August training, the players devote 50 to 60 hours per week

to their football obligations. DDE 5-6. Once the regular September-through-November season begins, players devote 40 to 50 hours per week to football activities. *Id.* at 6. If the team makes it to a bowl game, the season is extended through December. *Id.* at 8. While the players devote less time to football during the off-season, they still spend 20 to 25 hours per week on spring football and summer workouts and 12 to 15 hours per week on winter and spring workouts. *Id.* at 8-9.

Players are subject to the pervasive control of the football program in the performance of their duties as football players. The coaches prepare daily itineraries for the players that detail the players' days, hour by hour, running on some days from 5:30 a.m. to 10:30 p.m. DDE 15. The program requires the players to obtain permission from the coaches before driving personal vehicles, speaking to the media, traveling off campus and engaging in a number of other activities. *Id.* at 15-16.

In scheduling the players' time, their obligations to the football program take precedence over their academic endeavors. Players do not receive academic credit for participating in football, and only rarely are accommodations made if a student has a course conflict with the training schedule. DDE 11. *See* Tr. 848:24-849:2; 1007:1-9. Players are unable to study abroad, hold full time internships or take a full load of summer classes due to their football commitments.

Although the football program is associated with Northwestern, the services the players provide directly benefit the program's commercial operations and are wholly separate from the players' status as students. The commitment required of the players and the money they generate as part of the football program is commensurate with the kinds of requirements that ordinary commercial sports enterprises impose on professional football players. The University has a

commercial interest in seeing that the players excel as football players, given the revenue generated by the program. In that regard, the football players are clearly not ordinary student-athletes, especially in light of the commercialization of the athletic services the player is recruited to perform for the University. The athletes clearly perform services for the university under the control of the University through the coaches, in return for compensation. The football program has the power to control and direct the players in the “material details” of their work. As such, the players are employees since “an employee is a person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the materials details of how the work is to be performed.” *Town & County Elec.*, 516 U.S. at 90.

Playing football is work, and the control the football program exercises over the players is that of an employer over an employee. The football program controls the players’ services through the direction of the coach and by subjecting the players to numerous rules applicable only to them as football players and not to students generally. DDE 4-5. The players must receive permission from the athletic department before obtaining outside employment and must submit in advance to the football coach any lease for off-campus housing. Players must “friend” the coach so that all social media accounts can be monitored and subject themselves to random drug testing and alcohol testing.

Section 2(2) of the Restatement of Agency states, “a servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.” *Restatement (Second) of Agency* § 2(2) (1958). There is no question that the revenue generating services provided to the University by the Northwestern football players are rendered under the control of the

University's football program, making the players textbook "servants" of the University.

2. The Players Perform their Work "in Return for Financial Compensation."

The Northwestern football program recruits players and offers them paid positions solely on the basis of their football ability. DDE 3. The grant-in-aid the players receive is remuneration for their work both on the playing field and in the program's promotional endeavors off the field. *Ibid.* The players provide services in return for compensation taking the form of a free college education and a stipend covering their living expenses. *Ibid.* The players' compensation also includes a valuable education at Northwestern University. *Ibid.* A player will lose the scholarship if he voluntarily leaves the team or is dismissed from the team, demonstrating that these payments are offered in exchange for the football services a player provides.

Although the players receive an education as part of their compensation for playing football, their football services are entirely separate from their studies. The academic faculty plays no role in supervising the players' performance of their athletic services to the University, and no academic credit is received for playing football. Given the financial benefit the University derives from the revenue generated by the football program, it is clear the players have a primarily economic, rather than academic relationship with the University. Undoubtedly, the players' role in the football program is distinct from their role as students seeking to obtain an education from Northwestern. The academic faculty of Northwestern do not supervise the players' football activities, nor do the football players receive any academic credit for playing football. Therefore, granting collective bargaining rights to the paid football players will not intrude into the educational process since the football program is not part of the educational

process at the University.¹ Indeed, teachers and other employees of private universities have engaged in collective bargaining without diminishing or impairing the academic independence of the university.

3. The “Collective-Bargaining Process” Would Be Served by Allowing the Players to Select a Bargaining Representative.

The players have several significant interests that could be effectively addressed through collective bargaining. These interests are essentially the same as those of professional football players and include key terms and conditions of employment, such as health insurance, safety, scheduling, and workers’ compensation.² As the experience of unions that bargain with professional sports leagues demonstrates, the unique health and safety concerns that athletes face are particularly well-suited to resolution in a collective bargaining agreement. For example, the

¹ Given the unique circumstances presented by this case, it does not present an appropriate vehicle for the Board to revisit its decision in *Brown University*, 342 NLRB 463 (2004). In *Brown*, the majority emphasized that teaching was a required component of the graduate assistants’ academic program, *id.* at 484-85, and that faculty members and departments decided most matters that affected the assistants’ working conditions, *id.* at 485 & 489. Because the majority regarded the relationship between the graduate assistants and the university as “primarily academic” and questioned whether bargaining might infringe traditional academic freedoms, it concluded that the students were not “employees.” *Id.* at 490 & 492. While we maintain that *Brown* was wrongly decided, *see id.* at 493-500 (Members Liebman and Walsh, dissenting), the Board has no occasion to address that decision here. The football and academic programs at Northwestern University are entirely distinct: players do not receive any academic credit for rendering services to the football program, and the team’s coaches are not faculty members. DDE 11. Accordingly, there is no basis for concluding that the relationship between the players and the football program is “primarily academic” or that bargaining could affect areas of traditional academic freedom, so *Brown* is not implicated.

² That bargaining over the players’ compensation might be limited has no bearing on whether Northwestern and the players could successfully bargain over the myriad other terms and conditions of employment that are currently within the football program’s exclusive control. As the Board has observed, “successful and effective bargaining already occurs on a large scale in circumstances where economic benefits play a small role, *i.e.*, bargaining under the Federal Services Labor Management Relations Statute, as well as public sector bargaining on the state and local level.” *Mgmt. Training Corp.*, 317 NLRB 1355, 1357 (1995) (citation omitted).

Northwestern players could bargain about health insurance coverage, the right to seek a second medical opinion about an injury, to establish formal safety complaint procedures, or to form a joint management-labor safety committee. Recognizing that the players are “employees” who are entitled to the protection of the Act would alleviate concerns about retaliation against players who report health and safety concerns. Similarly, just as professional athletes have successfully done, Northwestern players could bargain over the scheduling of practices, days off, holidays, and offseason workouts and commitments. Accordingly, recognizing that the players are employees would “further the purposes of the NLRA.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

The University argues that NCAA and Big Ten Conference rules limit its ability to bargain over the football players’ terms and conditions of employment. Request for Rev. 30 & 43. But that would not preclude a finding that the players are “employees.” This argument is not responsive to the question at issue: whether the players are “employees” so as to bring them within the Board’s jurisdiction and ensure that they are entitled to protection under the Act. *Mgmt. Training Corp.*, 317 NLRB at 1358 (“[I]t is not proper for the Board to decide whether to assert jurisdiction based on the Board’s assessment of the quality and/or quantity of factors available for negotiation.”).

Even if the football program is subject to certain constraints with respect to player compensation, it can still engage in meaningful bargaining regarding the many matters over which it exercises control and discretion. *Community Transit Servs., Inc.*, 290 NLRB 1167, 1170 (1988) (“To decline jurisdiction in this case based solely on the basis of these limitations would understate all the other areas over which the Employer exercises effective control”). As the Board has long held, employers that must take actions to comply with statutory or regulatory

requirements nevertheless have a duty to bargain “regarding the discretionary action taken to comply with the law” so long as there is a range of “actions available to ensure compliance.” *Watsonville Newspaper, LLC*, 327 NLRB 957, 959 (1999). *See also Long Island Day Care Servs., Inc.*, 303 NLRB 112, 116 (1991) (unlawful for an employer to make unilateral changes regarding decisions “within [its] discretion on which bargaining could focus”). Because the NCAA and Big Ten rules leave substantial room for football coaches to exercise discretion that affects players’ terms and conditions of employment, there is no obstacle to effective bargaining over the wide array of terms of employment that are within the football program’s sole control.

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For the above stated reasons, the Board should affirm the decision of the Regional Director.

Respectfully submitted,

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