



# The Northwestern University Football Case: A Dissent

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## I. INTRODUCTION

In 2014, to much fanfare, members of the Northwestern University football team petitioned the National Labor Relations Board (“NLRB”), asking for a union election to determine whether the College Athletics Player Association (“CAPA”) could exclusively represent them in collective bargaining with Northwestern.<sup>1</sup> Later that year, the NLRB’s Regional Director in Chicago determined both that the players were “employees” and that Northwestern was an “employer” under the National Labor Relations Act (“NLRA” or the “Act”), and then directed a union-representation election for a bargaining unit of Northwestern football players who were recipients of “grant-in-aid” scholarships.<sup>2</sup> Northwestern then appealed to the NLRB in Washington, D.C., and the matter ended in 2015 when a unani-

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<sup>1</sup> See, e.g., Daniel Uthman, *College Athletes Take Steps to Form Labor Union*, USA TODAY (Jan. 29, 2014, 7:37 AM), <https://www.usatoday.com/story/sports/ncaaf/2014/01/28/college-athletes-players-association-northwestern-football/4958861/> [https://perma.cc/NX72-FZC8].

<sup>2</sup> *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at \*2 (2014) (“RD Decision”).

mous Board decided—in its discretion and to foment labor stability—that the NLRA’s jurisdiction should not extend to collegiate football players, even if they are “employees” under the NLRA.<sup>3</sup>

Although several legal scholars weighed in, analyzing and discussing collective bargaining after the NLRB Chicago Regional Director’s decision,<sup>4</sup> few scholars have written about the NLRB’s final decision, and those that have have discussed only the implications of the decision.<sup>5</sup> The Board offered no dissenting opinion in the case, and no scholars have critiqued the Board’s

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<sup>3</sup> *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. 1350 (2015).

<sup>4</sup> See generally Cesar F. Rosado Marzan & Alex Tillett-Saks, *Work! Study! Organize!: Why the Northwestern University Football Players are Employees under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301 (2015); William B. Gould IV, Glenn Wong, Eric Weitz, *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2014); Michael H. LeRoy, *How a “Labor Dispute” Would Help the NCAA*, 81 U. CHI. L. REV. DIALOGUE 44 (2014); David I. Rosen & Damon W. Silver, *Labor and Employment Law Implications of Finding Student Scholarship Athletes to be University Employees*, N.J. L. 59 (Dec. 2014); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65 (2014).

<sup>5</sup> Four commentators have discussed broad future implications of the NLRB’s decision. See Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627 (2017); Sam C. Ehrlich, *The FLSA and the NCAA’s Potential Terrible, Horrible, No Good, Very Bad Day*, 39 LOY. L.A. ENT. L. REV. 77, 107–11 (2019); Richard T. Karcher, *Big-Time College Athletes’ Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 44–47 (2017); Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <https://www.si.com/college/2015/08/17/northwestern-football-players-union-nlr-ruling-analysis> [https://perma.cc/XD2S-T4P5]. While others have analyzed individual specific implications of the decision. See generally Jay D. Lonick, *Bargaining With the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135 (2015) (joint employer issues); Omar A. Barentto, *NCAA, It’s Time to Pay the Piper: The Aftermath of O’Bannon v. NCAA and Northwestern v. College Athletes Players Association*, 12 RUTGERS BUS. L. REV. 1 (2015) (tax implications of college athlete collective bargaining). Only one article, a sports editorial in the Nation magazine, could be called a critique of the NLRB decision. See Dave Zirin, *The Absurd, Cowardly, and Morally Bankrupt NLRB Decision Against the Northwestern Football Union*, THE NATION (Aug. 17, 2015), <https://www.thenation.com/article/the-absurd-cowardly-and-morally-bankrupt-nlr-b-decision-against-the-northwestern-football-union/> [https://perma.cc/EA67-WETM]. While I agree with the points made in the editorial, it does not constitute a real analysis of the NLRB decision itself.

determination. This Article intends to fill this void by discussing and analyzing the NLRB's final decision in *Northwestern University*.

More specifically, this Article argues that the NLRB issued a non-decision in *Northwestern University*. A close look at the opinion shows that the Board refused to make findings it is statutorily required to make when ruling on an election petition. Though the decision buries much of this evidence in its footnotes, this Article unearths this evidence and reveals how the footnotes consistently disclaim statements made by the Board in the decision's text. Moreover, close scrutiny of the precedent cited by the NLRB reveals that the Board may not, in fact, have the authority to exercise the discretion it claims for itself in declining jurisdiction over the matter. Finally, the Article maintains that elite athletes in moneymaking collegiate sports like football and basketball, primarily in Football Bowl Subdivision ("FBS") Division I Power 5 Conferences, are indeed employees that should be able to unionize if they wish.<sup>6</sup>

## II. THE NLRB REGIONAL DIRECTOR'S DECISION IN THE *NORTHWESTERN UNIVERSITY* CASE: THE NORTHWESTERN FOOTBALL TEAM IS A COMMERCIAL ENTERPRISE

The Regional Director's decision in the *Northwestern University* football case shows that the Northwestern University football team is a substantial commercial enterprise in its own right. There are three separate revenue streams for Northwestern related to the football team: (1) football ticket sales, (2) TV broadcast contracts, and (3) sale of football team merchandise. From 2003 to 2012, the Northwestern football team generated \$235 million in total revenues.<sup>7</sup> With expenses totaling around \$159 million, the

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<sup>6</sup> The analysis in this essay focuses on football players, like Northwestern's, in the FBS Division I Power 5 Conferences, but the conclusions would apply to any collegiate sport that independently makes substantial money for the college or university. At that point, as I argue in this Article, the sport is invariably treated by the college or university as a commercial enterprise, and the athletes involved are effectively treated as employees. That essentially means that college basketball athletes in the Power 5 Conferences should also be considered employees under the NLRA. The FBS Power 5 Conferences include the ACC, the Big 10, the Big 12, the PAC 12, and the SEC. These comprise approximately sixty-five football teams including Notre Dame, an independent, counted as an ACC school for Power 5 Conference designation purposes. See generally *Full List of Division 1 Football Teams*, NEXT COLLEGE STUDENT ATHLETE, <https://www.ncsasports.org/football/division-1-colleges> [https://perma.cc/87ZU-A3RF].

<sup>7</sup> RD Decision at \*11 (2014).

team generated a profit over ten years of \$76 million for the University.<sup>8</sup> In the 2012–2013 academic year alone, the University earned profits of approximately \$8 million from the football team.<sup>9</sup>

The team looks like a business, too. It maintains a sizable athletic and administrative support staff.<sup>10</sup> In addition, at the time of the Regional Director’s 2014 decision, the football team itself, an FBS Division I squad, was 112 players strong, eighty-five of whom were “grant-in-aid” scholarship recipients.<sup>11</sup> Annual “grant-in-aid” scholarships at the time paid \$61,000 per player to cover tuition, fees, room, board, and books.<sup>12</sup>

The football team also has a rule that players must reside on campus their first two years, so underclassmen both reside in an on-campus dorm room and use a Northwestern-provided meal card for their meals.<sup>13</sup> Upperclassmen who live off campus receive another \$1,200 to \$1,600 monthly stipend to cover living expenses.<sup>14</sup> Since the 2012–13 academic year, Northwestern has offered non-guaranteed four-year scholarships for incoming freshmen.<sup>15</sup> These “grant in aid” scholarship numbers have increased since the federal court decision in *O’Bannon v. National Collegiate Athletic Ass’n*,<sup>16</sup> in which the United States Court of Appeals for the Ninth Circuit upheld a ruling that colleges and universities could compensate elite college athletes with a stipend up to the full amount of the cost of attending the school.<sup>17</sup> Many schools now pay annual “cost-of-attendance” stipends, valued up to

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<sup>8</sup> *See id.*

<sup>9</sup> *Id.*; *see also* Marzan & Tillett-Saks, *supra* note 4, at 318 (“[I]t is transparent from the facts determined by Region 13, prior studies, and from general knowledge of contemporary college football that commercial relationships have usurped traditional roles in universities, principally in college football, even as college athletes attempt to obtain an education from their university.”).

<sup>10</sup> These include: Head Coach, Director of Football Operations, Director of Player Personnel, Director of Player Development, nine full-time assistant coaches, four graduate assistant coaches, five full-time strength coaches, two full-time video staff employees, two administrative assistants, and various interns.

<sup>11</sup> RD Decision at \*2.

<sup>12</sup> Some argue this is “payment,” and by itself should make players eligible to organize unions and collectively bargain. *See* Zirin, *supra* note 5.

<sup>13</sup> RD Decision at \*2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 802 F.3d 1049 (9th Cir. 2015).

<sup>17</sup> *Id.* at 1053. The Ninth Circuit upheld the cost-of-attendance ruling by the district court but reversed the district court’s determination that schools must pay deferred compensation to student-athletes for use of their likeness. *Id.*

nearly \$6,000.<sup>18</sup> In sum, the Northwestern football team—as a commercial entity—earns extensive revenue for the University, and the University allots some percentage of this revenue to players to cover various educational and living expenses, including tuition.

Clearly, Northwestern University, like any employer controlling its employees, exercises vast control over its players. Indeed, Northwestern football players are subject to special rules not imposed on other students, and their daily schedules are micromanaged in a way that deprives them of the freedom enjoyed by most other college students.<sup>19</sup> Unsurprisingly, they must also dedicate much time to football. During the first week of August—before classes begin—football players must participate in an intense month-long training camp. From 6:30 A.M. to 8 P.M., Northwestern expects football players to engage in various football team activities.<sup>20</sup> After this first week on campus, the team travels to Kenosha, Wisconsin for the rest of training camp, during which time the school expects players to spend fifty to sixty hours per week on football activities.<sup>21</sup> After training camp, the school starts its regular season football schedule, which runs from the beginning of September to the end of November.<sup>22</sup> During the regular season, players spend forty to fifty hours per week on football-related activities, including travel to and from games.<sup>23</sup> During the week, the players not only spend mornings in mandatory practices with helmets and pads on, but also attend various team and position meetings.<sup>24</sup> Since National Collegiate Athletic Association (“NCAA”) rules limit “countable athletic related activi-

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<sup>18</sup> See Jon Solomon, *Alabama's Cost of Attendance Stipend Will Rank Among Highest in Nation*, CBS SPORTS (July 24, 2015, 9:01 AM), <https://www.cbssports.com/college-football/news/alabamas-cost-of-attendance-stipend-will-rank-among-highest-in-nation/> [<https://perma.cc/X6JW-XU2S>] (“For years, athletic scholarships have not covered what university financial aid offices list as the full cost of attending college. That changes this August when athletic scholarships can include not only the traditional tuition, room, board, books and fees, but also incidental costs of attending college. . . . Alabama’s cost of attendance stipends will rank among the leaders nationally at \$5,386 for out-of-state players and \$4,172 for in-state players, according to information the university provided to CBSSports.com.”); see also Hank Kurz, Jr., *ACC Players: Cost of Attendance Stipend is Helpful in Many Ways*, ASSOCIATED PRESS (Oct. 31, 2018), <https://apnews.com/d5bc51a726754b3489151613f6ba3fac> [<https://perma.cc/M45F-U4MG>].

<sup>19</sup> See *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at \*3–\*8 (“RD Decision”).

<sup>20</sup> *Id.* at \*4–\*5.

<sup>21</sup> *Id.* at \*4.

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

ties” per week to twenty hours, the players independently conduct non-countable evening practices without their coaches.<sup>25</sup> After these sessions, players go to their coaches’ offices to watch film on their own for a couple of hours.<sup>26</sup> In short, Northwestern has substantial control over many aspects of their players’ lives, ranging from their source of food, to their living arrangements, to their drug and alcohol use, to their social media presence, among other aspects.<sup>27</sup>

Northwestern, of course, pays some attention to the athlete as a student, but much of that attention focuses on the recruiting process. For example, coaches can visit and watch recruits play high school football in the fall but are limited to six home visits.<sup>28</sup> A special admissions liaison also makes a determination about whether each individual recruit can meet the school’s academic standards.<sup>29</sup> If not, all recruiting must cease. Once in college, to remain eligible to play on the football team, the player must: (1)

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<sup>25</sup> *Id.* at \*5 n.11.

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> Courts analyzing the scope of college athletes’ duties in moneymaking college sports have echoed the Regional Director’s findings and conclusions. For example, a federal district court judge found that FBS Division I football players participate in a competitive labor market that is commercial in nature. *See O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 988–89, 991–94 (N.D. Cal. 2014), *aff’d in relevant part*, 802 F.3d 1049 (9th Cir. 2015). The Ninth Circuit agreed in upholding the district court’s finding of liability. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1066 (9th Cir. 2015) (“[The NCAA’s compensation rules] regulate . . . labor for in-kind compensation[, which is] a quintessentially commercial transaction.”); *see also Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 341 (7th Cir. 2012) (“[T]ransactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.”); *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 837–38 (M.D. Tenn. 2015), *aff’d sub nom. Marshall v. ESPN*, 668 F. App’x 155 (6th Cir. 2016) (“College basketball and football, particularly at the Division I and FBS levels, is big business. Of that there can be little doubt.”); *Bd. of Regents of Univ. of Okla. v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1288–89 (W.D. Okla. 1982), *aff’d in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984) (“[I]t is cavil to suggest that college football, or indeed higher education itself, is not a business. . . . It is a business, and it must behave in a businesslike manner to insure [sic] its future viability. The objectives and the past achievements of our institutions of higher learning have earned them great praise and an exalted position in our social fabric. Nonetheless, it is a business and a business operated by professionals. Like any business, the schools which play intercollegiate football seek to maximize revenue and minimize expense while at the same time maintaining the level of quality which makes their product attractive to the buying public.”).

<sup>28</sup> RD Decision at \*8.

<sup>29</sup> *Id.*

maintain enrollment as a student, (2) progress toward obtaining a degree, and (3) achieve minimum academic standards (requiring both completion of 40% to 80% of degree requirements for the year and a minimum grade point average range of 1.8–2.0).<sup>30</sup> Players generally take three to four courses per quarter.<sup>31</sup>

Overall, a fair reading of the facts in the Chicago Regional Director’s decision in the *Northwestern University* case can yield only one conclusion: Northwestern does not treat its scholarship football players as students; instead, Northwestern treats them all—even those with little hope of becoming professional athletes—more as football-playing employees. It’s obvious that Northwestern recruits and pays their scholarship players in kind to help the football team win games and produce money for the University.

At some point, it is just common sense that a university will view an athletic team that produces millions of dollars of profits annually as an independent, profitable business enterprise—and thus will treat the revenue-generating students involved as employees. Therefore, not only the Northwestern University football team, but also, as this Article argues, all FBS Power 5 Conference Division I teams that earn significant revenue, are separate, wholly owned commercial entities. In addition, elite Division I Power 5 Conference basketball teams, including perhaps some of the top women’s teams, fall into the same earnings category. But virtually no other college athletics teams do.

### III. GIVEN THAT THE NORTHWESTERN FOOTBALL TEAM IS A COMMERCIAL ENTERPRISE, A UNANIMOUS NLRB GOT IT WRONG IN THE *NORTHWESTERN UNIVERSITY* CASE

#### A. *Introduction And Summary Of Decision*

The full NLRB (Chairman Mark Pearce and Members Philip Miscimarra, Kent Hirozawa, Harry Johnson III, and Lauren McFerran) reversed the decision of the Chicago Regional Director, refusing to assert jurisdiction over college football players.<sup>32</sup> In its opinion, the NLRB first explained that

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<sup>30</sup> *Id.* at \*9.

<sup>31</sup> *Id.*

<sup>32</sup> It is remarkable that members of an Obama Board unanimously penned the NLRB decision declining jurisdiction over the Northwestern football team. Many expected Democrats Pearce, Hirozawa, and McFerran to uphold the RD’s decision and find the election petition valid. Or, at the very least, one would have expected Pearce, Hirozawa, or McFerran to write a substantial dissent. That there was no dissenting opinion at all suggests that the decision was the product of a political

it would not decide whether Northwestern's football players were employees under the NLRA.<sup>33</sup> Indeed, even if they were employees, the NLRB refused to assert jurisdiction.<sup>34</sup> The Board premised its decision on two structural factors uniquely related to college athletics: First, the NCAA and the conference to which Northwestern belongs exercise control over individual teams, and, second, almost all of Northwestern's competitors are public universities and colleges over which the Board cannot assert jurisdiction.<sup>35</sup> According to the Board, "it would not promote stability in labor relations to assert jurisdiction in this case."<sup>36</sup>

The Board justified its decision by stating that this case was unique in that the Board had never been asked to assert jurisdiction over college athletes of any kind.<sup>37</sup> The Board further explained that—for three reasons—the Northwestern football players resemble neither the students nor the professional athletes that have previously petitioned for union representation, and thus, no analytical framework existed for assessing their petition.<sup>38</sup> First,

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compromise. Perhaps the Democrats, not willing to spend political capital on a single petition that may have proven relatively insignificant, contented themselves with receiving some concessions in the draft of the decision itself. Thus, political considerations might explain the substantial disclaimers and caveats toward the end of the decision.

<sup>33</sup> *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1350 (2015).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1352. According to one commentator on the labor-stability point, "[w]hat the hell does that mean? . . . The argument is that since it would be imposing a different set of rules for the 17 private institutions [in NCAA Division I football], this would send the entire system out of whack, injecting 'instability' into a climate that is currently stable. This is absolute hogwash. Northwestern is its own entity where football players generate huge amounts of revenue and have their own grievances with coaches and administrators. . . . As people who generate income, and, as was ruled earlier by the NLRB, are 'paid' with a scholarship, room, and board, they should have every right to organize themselves to achieve whatever else they feel they are denied, like decent medical care or better concussion protocols." See Zirin, *supra* note 5.

<sup>37</sup> *Northwestern Univ.*, 362 N.L.R.B. at 1352. The NLRB has asserted jurisdiction over an NCAA Division I athletic conference in the context of a unionized group of basketball referees contracted by the conference itself "which the Board found was an independent private entity created by the member schools." *Id.* at 3 n.9 (emphasis added). See *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* *Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987) (asserting jurisdiction but dismissing the case because referees are independent contractors, not employees).

<sup>38</sup> *Northwestern Univ.*, 362 N.L.R.B. at 1352–53.



unlike graduate teaching assistants who have petitioned the Board for representation in the past, college football players: (1) are not graduate students (most football players are undergraduates), and (2) engage in football activities unrelated to their course of study. Indeed, according to the Board, college football scholarships are for extracurricular, not academic, activity.<sup>39</sup> Second, the Northwestern football players are also unlike professional athletes, both because they are enrolled as students who must meet academic requirements and because they are subject to NCAA limitations on profiting from the use of their names or likenesses.<sup>40</sup> And third, even if college foot-

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<sup>39</sup> *Id.* at 1353 n.10.

<sup>40</sup> *Id.* at 1353. The NCAA's "names and likenesses" restrictions may not survive for long. In *O'Bannon v. National Collegiate Athletic Ass'n*, for example, the court found, applying the Rule of Reason, that the NCAA's rules on "names and likenesses" are more restrictive than necessary, and violate the antitrust laws. See 802 F.3d 1049, 1079 (9th Cir. 2015). Although the *O'Bannon* court limited the remedy to amounts equaling the full cost of attending college, elite college football players are looking more like their NFL counterparts every day. See also *supra* notes 16–18 and accompanying text. Indeed, after this Article had been written and submitted for publication, on September 10, 2019, the California Assembly passed a bill allowing student-athletes at California colleges to hire agents and be paid for the use of their name, image, or likeness. The Fair Pay to Play Act, S.B. 206 (Cal. 2019); see also Steve Berkowitz, *California Assembly Passes Bill that Brings State to Verge of Rules Showdown with NCAA*, USA TODAY (Sept. 10, 2019), <https://www.usatoday.com/story/sports/2019/09/09/california-assembly-bill-allows-college-athletes-use-likeness/2269869001/> [<https://perma.cc/2TVJ-LYPC>]. Jeremy Bauer Wolf, *One Step Closer to Pay for College Athletes*, INSIDE HIGHER ED (Sept. 11, 2019), <https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness> [<https://perma.cc/GP4G-VPEZ>]. The California law goes into effect in 2023. See Berkowitz, *supra*. Florida proposed legislation that is modeled after California's. See Bobby Caina Calvan, *Florida following California's example*, U.S. NEWS (Oct. 25, 2019), <https://www.usnews.com/news/us/articles/2019-10-24/florida-considers-allowing-college-athletes-to-earn-money> [<https://perma.cc/29BV-AX86>]. The biggest football states are likely to follow since none of them wants to cede a recruiting advantage. Indeed, bills modeled on California's have been passed or proposed in Illinois, New Jersey, Georgia, and Wisconsin. Not surprisingly, the NCAA was quick to change course after the possibility of Florida legislation was announced. See Ralph D. Russo, *NCAA Allows profit for athletes, but lots of questions remain*, ASSOCIATED PRESS (Oct. 30, 2019), <https://apnews.com/70081cee181a447ebe97727441b5e509> [<https://perma.cc/LJQ6-PY3C>]. The NCAA Board of Governors will allow student-athletes to receive pay for use of their name, image, or likeness. However, the NCAA Board "is emphasizing that change must be consistent with the values of college sports and higher education and not turn student-athletes into employees of institutions. *Id.*

ball and professional players were alike, the NLRB has never authorized a bargaining unit consisting of an individual team's players.<sup>41</sup>

Despite these differences, the Board went on to discuss how FBS Division I football "does resemble a professional sport in a number of ways."<sup>42</sup> For example, the Board noted that college and pro football resemble each other in that both have a group of teams in an association or conference that stage athletic contests from which they derive substantial revenue.<sup>43</sup> Like the National Football League ("NFL"), according to the Board, the NCAA resulted from colleges and universities banding together to set common rules and govern competition.<sup>44</sup> And again, like the NFL, the NCAA wields considerable influence and control over its members. Indeed, NCAA member schools have affirmatively given the NCAA the authority to police and enforce rules governing eligibility, practice, and competition, arguing that there is a symbiotic relationship among the various teams, conferences, and the NCAA.<sup>45</sup> As a result, according to the Board, "terms applied to one team would likely have ramifications for other teams."<sup>46</sup> The Board concluded, based on its analysis of the control of FBS teams by the NCAA, that if it were to assert jurisdiction in a single-team case, then labor-relations stability would be undermined.<sup>47</sup> Surprisingly, though, in a footnote, the Board emphasized that NCAA control over many terms and conditions of a college football player's activity was *not* an independent reason that the Board declined to assert jurisdiction in the case.<sup>48</sup> But even so, the Board gave no example of how recognizing a single-team bargaining unit would destabilize labor relations. Instead, the Board merely noted that all previous Board cases regarding professional sports involved leaguewide bargaining units.<sup>49</sup>

The Board did acknowledge that the NCAA had recently reformed rules involving scholarship players, in particular allowing FBS Division I teams to award four-year—as opposed to renewable one-year—contracts, reducing athletes' risk of losing educational funding and being unable to graduate college.<sup>50</sup> The Board then suggested that it might be open to col-

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<sup>41</sup> *Northwestern Univ.*, 362 N.L.R.B. at 1354 n.16.

<sup>42</sup> *Id.* at 1353.

<sup>43</sup> *Id.* According to the NLRB, "there is no 'product' without direct interaction among the players and cooperation among the various teams." *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1353.

<sup>46</sup> *Id.* at 1354. (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1354 n.15.

<sup>49</sup> *Id.* at 1354.

<sup>50</sup> *Id.* at 1355.

lege football unionization in the future, even for Northwestern's team, because further such changes in the NCAA's treatment of scholarship players could outweigh the motivations behind the Board's decision to decline to assert jurisdiction in the *Northwestern University* case before it.<sup>51</sup>

In the last several paragraphs of its opinion, the Board reiterated the limited nature of its decision. Indeed, the Board stated that its "decision today does not concern other individuals associated with FBS football, but is limited to Northwestern's scholarship football players."<sup>52</sup> Next, the Board again emphasized that the case was limited to Northwestern, noting that it does "not address what the Board's approach might be to a petition for *all* FBS scholarship football players (or at least those at private colleges and universities)."<sup>53</sup> Finally, the Board stated that its decision, "does not preclude a reconsideration of this issue in the future."<sup>54</sup>

In a footnote, the Board also rejected an argument made by Northwestern that the Board should use its discretion under the Act to decline jurisdiction over college football in general.<sup>55</sup> Indeed, the Board emphasized that it already asserts jurisdiction over private colleges and universities, that no party disputes that Northwestern is an "employer" under the Act, and that it was unwilling to find that FBS Division I football does not have a "sufficiently substantial" effect on commerce.<sup>56</sup> The Board did finally state, however, that its statutory jurisdictional mandate allows it to decline asserting jurisdiction in individual cases, like Northwestern's, where doing so would not advance the policy goals of the Act.<sup>57</sup>

### B. *The NLRB's Decision: an Analysis*

The NLRB's decision to decline jurisdiction over FBS Division I college athletes in *Northwestern University* rests on two of its findings. First, that the Northwestern football team's petition is unique and unprecedented.<sup>58</sup> Thus, there is no precedent to apply in assessing the petition, and likewise

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The Board acknowledged that it has asserted jurisdiction in other cases involving college athletics, including coaches, referees, and even college physical plant employees working on athletic events.

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1355 n.28.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (citing *NLRB v. Denver Building Trades*, 341 U.S. 675 (1951); *NLRB v. Teamsters Local 274* F.2d 19 (7th Cir. 1960); *Council 19, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968)).

<sup>58</sup> *Id.* at 1352.

no precedent compelling the Board to assert jurisdiction in the case. Second, that asserting jurisdiction over the Northwestern University football team, in particular, would undermine labor stability. While Northwestern University's football team is a single team and would constitute a single bargaining unit, college football operates on a league-wide, or even a national, level regulated by the various leagues and the NCAA. Thus, the exercise of jurisdiction over an individual team would threaten labor stability.<sup>59</sup>

In making these arguments, however, the Board also stated that: (1) Northwestern University is an "employer" under the Act, (2) Northwestern's football players may well be "employees" under the Act, and (3) individual FBS Division I college football teams and college football in general may well substantially affect commerce.<sup>60</sup> These three legal findings—employer status, employee status, and substantially affecting commerce—typically lead to, and indeed require, the NLRB to assert jurisdiction. This Article, in turn, will analyze both of the Board's stated reasons for refusing to assert jurisdiction.

1. The Uniqueness of the Northwestern Football Team's Petition, the Undermining of Labor Stability, and the NLRB's Jurisdictional Mandate

The Board stressed not only that it had never reviewed a petition by college athletes or individual teams but also that college football players are both athletes and students, making their case unique.<sup>61</sup> Admittedly, the Northwestern petition was a case of first impression for the NLRB. But that is all irrelevant in determining jurisdiction. Rather, it is relevant to the question of precedent.

For example, consider the Board's position that, because football players in the *Northwestern University* case seem less like students and more like athletes, the NLRB's decisions involving graduate assistants are rendered inapplicable. Had the Board not adopted this position, the uniqueness of the players' petition would have been unimportant to the Board's ultimate determination. But on closer examination, the Board's position in *Northwestern University*—that the players seem less student and more athlete—actually makes the case much easier! Indeed, while the NLRB may have needed to take great pains to determine whether graduate assistants impact interstate commerce, making the same determination vis-à-vis FBS Division I college

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<sup>59</sup> *Id.* at 1354.

<sup>60</sup> *Id.* at 1351 n.5.

<sup>61</sup> *See id.* at 1352–53.

football players is quite straightforward: the answer is resoundingly yes. In other words, if assertion of jurisdiction over college graduate assistants is a close call, as evidenced by a series of Board decisions flip-flopping on the issue,<sup>62</sup> the jurisdictional case in *Northwestern University* is much easier for all of the reasons the NLRB gives related to college football players' uniqueness and their strong comparison to professional athletes.<sup>63</sup> Remarkably, the NLRB dodged the issue of whether the Northwestern football team is a "commercial endeavor" by simply stating that it need not decide the issue since it is enough that Northwestern University itself is a commercial enterprise and an "employer" under the Act.<sup>64</sup> But the Board is arguably required to make a determination about whether the football team itself is a commercial endeavor. Such a finding would seem central to whether the Board should assert jurisdiction in the case—since the team's commercial impact goes both to the Board's jurisdictional touchstone ("substantially affects commerce") and to whether football players are "employees" under the Act. And while it is true that Northwestern University's impact on

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<sup>62</sup> See *Trustees of Columbia Univ. in the City of New York & Graduate Workers of Columbia GWC, UAW*, 364 N.L.R.B. 90 (2016), *overruling Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO, Petitioner*, 342 N.L.R.B. 483 (2004).

<sup>63</sup> See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 13-RC-121359, 2014-15 NLRB Dec. P 15781, 2014 WL 1246914, at \*15 (2014) ("[P]layers' football related duties are unrelated to their academic studies, unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements."); Richard T. Karcher, *Big-Time College Athletes' Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 43–44 (2018). Of course, the fact that college football players have athletic duties, not academic ones, is beside the point. Graduate research assistants do not bring in grants that fund their employment; the faculty and the college do that. College football players in FBS Division I schools are the very reason the money comes in. Indeed, in 2016 and 2017, after the *Northwestern University* decision, the NLRB issued an advice memorandum and then later a report detailing why Northwestern football players were in fact employees under the Act. See Memorandum from Barry J. Kearney, Associate General Counsel, NLRB Division of Advice, to Peter Sung Ohr, Regional Director, Region 13 (Sept. 22, 2016), <http://apps.nlr.gov/link/document.aspx/09031d4582210c1b>; Memorandum from Richard F. Griffin, Jr., General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, GC 17-01 (Jan. 31, 2017), [http://hr.cch.com/ELD/GCMemo17\\_01.pdf](http://hr.cch.com/ELD/GCMemo17_01.pdf) [<https://perma.cc/54FA-GMTM>], *rescinded by* Memorandum from Peter B. Robb, General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, GC 18-02 (Dec. 1, 2017), [http://hr.cch.com/ELD/GC18\\_02MandatorySubmissionstoAdvice.pdf](http://hr.cch.com/ELD/GC18_02MandatorySubmissionstoAdvice.pdf) [<https://perma.cc/CC9R-UC66>].

<sup>64</sup> *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1351 n.5 (2015).

interstate commerce alone suffices for its qualification as an employer under the Act—and thus for the Board to assert jurisdiction here—the fact that the football team *independently* meets the Act’s jurisdictional requirement underscores why the NLRB should have asserted jurisdiction.

Notably, in prior similar circumstances—ironically involving the NLRB’s jurisdiction over colleges and universities themselves—the Board affirmatively asserted jurisdiction. In 1970, the NLRB confronted another similar “unique” set of petitions when it asserted jurisdiction over a pair of nonprofit educational institutions for the first time in *Cornell University*.<sup>65</sup> In *Cornell University*—which involved not only Cornell but also Syracuse University—the Board found that despite their nonprofit status, the universities substantially affected interstate commerce as commercial enterprises.<sup>66</sup> And though the NLRB had steadfastly refused to assert jurisdiction over universities before 1970 due to the noncommercial nature of higher education, the Board stated in *Cornell University* that “an analysis of cases reveal[ed] that the dividing line separating purely commercial from noncommercial activity has not been easily defined.”<sup>67</sup> The Board recognized that to ensure uniformity and stability in labor policy it should assert jurisdiction over these institutions even though “a portion of the industry is relegated to the State or other control.”<sup>68</sup> The Board asserted jurisdiction over Cornell and Syracuse while refusing to set a minimum dollar-volume standard for asserting jurisdiction over universities in general,<sup>69</sup> reasoning that “[w]hatever dollar-volume standard we ultimately adopt for asserting jurisdiction over educational institutions can best be left to determination in future situations involving institutions which are far nearer the appropriate dividing line.”<sup>70</sup> Clearly, asserting jurisdiction over two universities—yet leaving for future determination the standard by which it would regulate other similar institutions—did not bother the Board in *Cornell University*. Indeed, the Board’s sole concern about first exercising jurisdiction over private universities was whether the universities were commercial—that is, whether they affected commerce. That private universities both belong to national associations (e.g., the NCAA or athletic conferences)—and have to follow rules imposed by accrediting bodies and state and federal governments—apparently did not deserve even a mention in *Cornell University*.

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<sup>65</sup> *Cornell Univ. & Ass’n of Cornell Emp’rs-Libraries*, 183 N.L.R.B. 329 (1970).

<sup>66</sup> *Id.* at 332.

<sup>67</sup> *Id.* at 331.

<sup>68</sup> *Id.* at 333.

<sup>69</sup> *Id.* at 334.

<sup>70</sup> *Id.*

Moreover, that the Board declined jurisdiction in a case involving FBS Power 5 Conferences Division I college football players despite college football's (and the university's) substantial commercial impact is not just unusual—it also conflicts with the Board's statutory jurisdictional mandate. Indeed, an examination—both of the NLRB's history of exercising jurisdiction and of the controlling law from the NLRA (the Board's "jurisdictional mandate")—proves this to be the case. After the Board refused to assert jurisdiction in a series of cases in the 1950s, and out of concern that the preemptive effect of the NLRA would therefore leave a void in the labor regulation of important industries, Congress added § 14(c)(1) to the Act in the Landrum Griffin amendments of 1959.<sup>71</sup> Section 14(c)(1) provides:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, *the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction*; Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.<sup>72</sup>

At the very least, § 14(c)(1) reveals a clear legislative intent to ensure that the NLRB asserts jurisdiction over businesses and industries that substantially affect interstate commerce.<sup>73</sup> In other words, Congress added § 14(c)(1) to ensure that the Board did not decrease its jurisdiction over industries or businesses impacting interstate commerce.<sup>74</sup> Congress did so

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<sup>71</sup> Labor Management Reporting & Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 164 (2018).

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> The Board's jurisdiction broadly extends to all enterprises with operations that directly or indirectly affect interstate or foreign commerce. 29 U.S.C. §§ 159(c), 160(a) (2018); *see also* BRENT Garren, John E. Higgins, Jr., & David A. Kadela, *How To Take a Case Before the NLRB* 3-1, 3-2 (9th ed. 2016). Courts have construed this to mean that the Board's jurisdiction encompasses "the fullest jurisdictional breadth constitutionally permissible under the commerce clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *San Manuel Indian Casino v. NLRB*, 475 F.3d 1306, 1316 (D.C. Cir. 2007) (citing *Reliance Fuel*, 371 U.S. at 226); *see also* GARREN, HIGGINS, & KADELA, *supra*, at 3-2 n.2.

<sup>74</sup> The Board's discretion to decline jurisdiction has been limited by the Supreme Court and by Congress. After the Board refused to assert jurisdiction over employees of labor unions and over the hotel industry as a class, the Supreme Court rebuffed the Board. *See Office Emps.' Local 11 v. NLRB*, 353 U.S. 313, 320 (1957); *Hotel & Rest. Emps. Local 255 v. Leedom*, 358 U.S. 99 (1958). And Congress in the Landrum Griffin Act, Pub. L. No. 86-257, § 14(c)(1), ensured that the Board would

because these entities are most likely to be the cause of significant labor disruption.<sup>75</sup> Indeed, virtually all NLRB decisions declining jurisdiction concern the Board's discretion to stay away from businesses or industries that *do not* substantially affect commerce, even though they may fall within the reach of the Commerce Clause.<sup>76</sup>

And while it is true that the NLRB, at times, declines jurisdiction because, in its judgment, asserting jurisdiction would not serve the overall policies of the Act, these instances rarely, if ever, involve industries that substantially affect interstate commerce.<sup>77</sup> In fact, of the three cases cited by the Board to show that it may decline jurisdiction in individual cases, all three concern whether the employer substantially affected commerce.<sup>78</sup>

First, in *NLRB v. Denver Building Trades Council*,<sup>79</sup> a U.S. Supreme Court case, the employer contended that the Board lacked jurisdiction because the subcontractor involved in the case did not substantially affect interstate commerce. The Court, however, found that the Board's assertion of jurisdiction was appropriate.<sup>80</sup> In dicta, the Court said, "[e]ven when the effect of activities on interstate commerce is sufficient to enable the Board to

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not neglect its mandate to regulate industries and businesses that have a substantial effect on interstate commerce. See *supra*, notes 67–69; see also JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 27-16 to 27-18 (7th ed. 2017).

<sup>75</sup> See *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944); see also GARREN, HIGGINS & KADELA, *supra* note 73, at 3–6 ("In approving this practice [of allowing the Board not to exercise its full jurisdictional authority], the U.S. Supreme Court has noted that Congress left it to the Board to ascertain whether proscribed practices would, in particular situations, adversely affect commerce.").

<sup>76</sup> See GARREN, HIGGINS & KADELA, *supra* note 73, at 3–6 ("Despite its extensive statutory grant of jurisdiction, the Board has never exercised its full authority. *Instead, it considers only those cases that, in its opinion, have a substantial effect on commerce.*" (emphasis added)).

<sup>77</sup> The most notable example, perhaps, of the Board's refusal to assert jurisdiction over an industry, because doing so would not effectuate the policies of the Act despite the industry's effect on commerce, is horse and dog racing. See *N.Y. Racing Ass'n v. NLRB*, 708 F.2d 46, 54 (2d Cir. 1983). The primary reason for the Board's declination of jurisdiction was state government's extensive involvement in regulating the industry already. *Id.* at 48; HIGGINS, JR., *supra* note 74, at 27-116 n.626. Unlike in *Northwestern University*, the Board's reasoning is deep, comprehensive, and extensive. State government regulation of an industry really cannot be analogized to a private entity like the NCAA. And, of course, the NLRB in the *Northwestern* case does not even try.

<sup>78</sup> See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355 n.28 (2015); *Council 19, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. NLRB*, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968).

<sup>79</sup> 341 U.S. 675, 682–83 (1951).

<sup>80</sup> *Id.* at 683.



take jurisdiction of a complaint, the Board sometimes properly declines to do so . . . .”<sup>81</sup> But the statement’s context makes it clear that the Court meant that some industries have a *sufficient* effect on interstate commerce to allow the Board to assert jurisdiction even if the effect is not *substantial*. Critically, nothing in the case even hints at the idea that the Board may decline jurisdiction over an entity that “substantially affects” interstate commerce.

Second, in *NLRB v. Teamsters Local 364*,<sup>82</sup> the United States Court of Appeals for the Seventh Circuit simply cited *Denver Building Trades*, repeating the Supreme Court’s language to uphold the Board’s determination in a secondary boycott case that it was appropriate for the Board to combine the dollar amount of primary and secondary employer business in determining impact on commerce.<sup>83</sup> Again, in that case, the employer barely met the jurisdictional standard for affecting interstate commerce and certainly did not “substantially” affect interstate commerce.

Third, the NLRB cited *AFSCME v. NLRB*,<sup>84</sup> a 1968 federal district court opinion where the NLRB declined jurisdiction over a nonprofit nursing home because it, unlike for-profit enterprises, had no net earnings to “benefit any private shareholder or individual.”<sup>85</sup> The district court found that the Board’s failure to assert jurisdiction in the case violated constitutional due process because distinguishing for-profit and nonprofit nursing homes was arbitrary.<sup>86</sup> According to the court, “[s]uch a distinction, on its face at least, bears no reasonable relationship to the homes’ impact on commerce or to the Act’s goal of assuring employees the right to organize and bargain collectively.”<sup>87</sup> The decision fails to support the Board’s allegation that it may decline jurisdiction when interstate commerce is substantially affected. In fact, the district court miscited *Denver Building Trades*, implying that the decision meant that the Board may decline jurisdiction broadly in an individual case if doing so would not effectuate the policies of the Act.<sup>88</sup>

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<sup>81</sup> *Id.* at 684.

<sup>82</sup> 274 F.2d 19, 23 (7th Cir. 1960).

<sup>83</sup> *Id.* at 24.

<sup>84</sup> See *Northwestern Univ. & College Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. 1350, 1355 n.28 (2015) (citing Council 19, Am. Fed’n of State, Cty. & Mun. Emps., AFL-CIO v. NLRB, 296 F. Supp. 1100, 1104 (N.D. Ill. 1968)).

<sup>85</sup> 296 F. Supp 1100, 1104 (N.D. Ill. 1968).

<sup>86</sup> *Id.* at 1105.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1104. Why does the Board cite a 1951 U.S. Supreme Court decision followed by a 1968 federal district court opinion? Is it possibly because the Supreme Court’s 1951 opinion does not clearly support the Board’s statement about declining jurisdiction (the district court has better language but miscites the U.S. Su-

On the contrary, the Board properly exercises its discretion to decline jurisdiction only when the entity involved does *not* substantially affect commerce.<sup>89</sup> Thus, the very decisions the Board relied on to decline jurisdiction in the Northwestern University football case actually show that the Act *requires* the NLRB to assert jurisdiction. The NLRB might respond that § 14(c)(1)'s language explicitly mentions only "*classes or categories*" of employers, thus giving them the right to pass on *individual* cases. But neither the law nor the legislative history of § 14(c)(1) implies that there is a discretionary "individual case exception" within the NLRA's mandate that allows the NLRB to look beyond whether an employer substantially affects commerce.<sup>90</sup>

In any case, the decisions cited in *Northwestern University* do not support the Board's contention that it has independent jurisdictional discretion in individual cases beyond analyzing the employer's impact on commerce. A fair reading of the NLRA, and the caselaw interpreting it, reveals that if the parties involved in the dispute are statutory "employers" and "employees," and the employer has a "substantial" effect on interstate commerce, the NLRB is compelled to assert jurisdiction.

## 2. League-Wide Versus Single-Team Bargaining Units

Another basis for the *Northwestern University* Board's decision to decline jurisdiction was that the election petition was only for a single unit—the Northwestern football team—even though the team is a member of the Big Ten conference and the NCAA. Though the NLRB noted the potential difficulties involved in asserting jurisdiction over only one team in a multi-team conference or association, the Board has recognized units at the individual team, plant, or store level despite these entities' membership in, or subsidiary relationship with, a larger organization. Indeed, the Board has twice confronted situations involving sports leagues in which it asserted jurisdic-

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preme Court decision) and, perhaps also, because the 1951 Supreme Court opinion precedes § 14(c)(1), the 1959 amendment to the Act explicitly limiting the Board's ability to decline jurisdiction.

<sup>89</sup> *Id.*

<sup>90</sup> This is not to say that the Board cannot deny jurisdiction in an individual case if the parties are not "employers" or "employees" as defined by the Act, or certainly if the Board finds the collective bargaining unit inappropriate. But the Board refused to deny the Northwestern football team's election petition on any of these grounds.

tion over fewer than *all* the teams in the league.<sup>91</sup> In these cases, the Board explicitly mentioned the propriety of single-team units.

First, in *North American Soccer League*,<sup>92</sup> the NLRB received a petition from the North American Soccer League Players' Association ("NASLPA") seeking to represent soccer players employed by nineteen soccer clubs in the North American Soccer League ("NASL"). The NLRB upheld the petition but refused to assert jurisdiction over the only two NASL soccer clubs outside the United States, the Toronto Metros and the Vancouver Whitecaps.<sup>93</sup> The Board felt that, since those teams were subject to Canadian law and had strong connections to Canada (but not to the United States), the NLRB should exclude them from jurisdiction.<sup>94</sup> In a lengthy partial dissent, Member Murphy argued for Board jurisdiction over the Canadian teams, reasoning that the teams substantially affected United States commerce and had significant ties to the United States despite being foreign employers.<sup>95</sup> Neither the majority nor the dissent discussed the propriety or difficulty of asserting jurisdiction over some, but not all, members of a league. Indeed, the employers' primary argument against Board jurisdiction over NASL was that each team was autonomous and therefore single-team units were, in fact, more appropriate.<sup>96</sup> The employers argued that union representation should be on a team-by-team basis. The Board agreed that single-team units were appropriate but felt that a league-wide unit was appropriate as well.<sup>97</sup> In fact, the Board mentioned that individual team bargaining might be problematic as a matter of labor policy only because the NASL had such extensive control over labor relations that "it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single club units."<sup>98</sup> The Board may have been concerned that seventeen teams

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<sup>91</sup> *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* *Collegiate Basketball Officials Ass'n v. NLRB*, 836 F.2d 143 (3d Cir. 1987); *N. Am. Soccer League & its Constituent Member Clubs & the N. Am. Soccer League Players' Ass'n*, 236 N.L.R.B. 1317 (1978).

<sup>92</sup> *N. Am. Soccer League & its Constituent Member Clubs & the N. Am. Soccer League Players' Ass'n*, 236 N.L.R.B. 1317 (1978).

<sup>93</sup> *Id.* at 1319.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1323–25 (Member Murphy, dissenting in part).

<sup>96</sup> *Id.* at 1320 (decision of the Board).

<sup>97</sup> *Id.* at 1321 ("While these facts might support a finding that single-club units may be appropriate, they do not establish that such units are alone appropriate or that the petitioned-for overall unit is inappropriate. The only unit sought is leaguewide, with the exceptions of the Canadian clubs, and it is presumptively appropriate as an employerwide [sic] unit.").

<sup>98</sup> *Id.* at 1321–22.

would have their own representatives and collective bargaining agreements, creating a fragmented bargaining landscape. The Board would not have the same concerns about labor stability, however, if only one team in a league or conference could seek representation. Because Northwestern University is the only private university in the Big Ten conference, it is the only Big Ten team under the NLRB's jurisdiction. One unionized team is hardly enough to paralyze the Big Ten. Moreover, Northwestern University seems to be the ideal school and team to first collectively bargain under the NLRA: the single-team bargaining unit would allow the Board to observe college-football collective bargaining in a relatively closed environment that is unlikely to yield a strike due to lack of player leverage.<sup>99</sup>

Second, in *Big East Conference*,<sup>100</sup> the Board asserted jurisdiction over a collegiate conference as an employer even though conference members included two public, state-run colleges.<sup>101</sup> According to the Board, jurisdiction was appropriate since the Big East Conference was a private entity and the two public colleges, despite having seats on the board of directors, did not have enough control to dictate the decisions of the league.<sup>102</sup> At no point did the Board discuss the impropriety or difficulty of asserting jurisdiction over an entity that included organizations over which the NLRB had no jurisdiction. Northwestern University, as the only private school in the Big Ten, likewise would not have enough control to dictate the decisions of the Big Ten Conference. Further, the *Northwestern University* decision itself, according to the Board, does not foreclose a later union petition by a larger group of FBS Division I football players, including *all* FBS Division I football players in private colleges or universities.<sup>103</sup> The Board seems unaware that this statement undermines the Board's argument that it could not regulate football teams when so many are public and beyond the Board's jurisdiction. A bargaining unit with *all* eligible (i.e., private) FBS Division I Power 5 universities would comprise some seventeen members. Why would

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<sup>99</sup> In fact, the only college football FBS Power 5 Conference scenario that would raise the same concerns for the NLRB that it had in *NASL* would perhaps be an election petition from a private school in the ACC. That conference has five private college team members. So as not to unduly fragment the conference and create labor instability there, perhaps the NLRB could find a single unit to be inappropriate. A five-team unit might be the only appropriate bargaining unit in the ACC.

<sup>100</sup> *Big East Conference & Collegiate Basketball Officials Ass'n, Inc.*, 282 N.L.R.B. 335 (1986), *enforced sub nom.* Collegiate Basketball Officials Ass'n. v. NLRB, 836 F.2d 143 (3d Cir. 1987).

<sup>101</sup> *Id.* at 341.

<sup>102</sup> *Id.*

<sup>103</sup> See *Northwestern Univ. & College Athletes Players Ass'n (CAPA)*, 362 N.L.R.B. 1350, 1355 (2015).

this scenario not threaten labor stability if the single Northwestern football union would?

Continuing the speculation over why the NLRB declared that recognizing a petition by Northwestern's football team might undermine labor stability, perhaps the NLRB was worried about what might happen if only one team, Northwestern, could go on strike, but others could not. If that was the concern, the NLRB need not worry. A strike's power is severely limited if the collective leverage to influence collective bargaining negotiations resides with a single football team. Northwestern would likely maintain leverage in any negotiations since there is only the single unit of its football players. The collective power of football players in a leaguewide unit would be much greater. Moreover, the Northwestern players would be unlikely to strike.<sup>104</sup> Not only would they have little leverage, but unlike most employees, they are in school for a short time. They would likely be even more loathe than longer-term employees to jeopardize one of their precious years of college football play, unless, of course, the need to do so is substantial. Further, the Northwestern football players are likely to be satisfied that their union is pursuing their desired ends through collective bargaining. That is essentially the entire idea behind the NLRA and the policy reasons for the Act's passage. Even if the players decided to strike, the other teams in the conference would have advance notice under the NLRA and could either rest their players for a week or arrange to play a team from another conference. In that case, only the employer—Northwestern University—would suffer a negative impact, in the form of lost revenue. After all, Congress did not intend for the NLRB to shield employers from strikes.

And why wouldn't labor stability instead improve? The demands of one team's players can be a litmus test for the rest of the league. Northwestern University could be a model for the rest of the college football. For example, players could request provisions or benefits that schools simply may not have thought of, but are not necessarily against. If Northwestern and its players could figure out a more flexible training schedule that would

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<sup>104</sup> That they are unlikely to strike does not mean they are unlikely to walk out if the student-athletes do not perceive their needs are being met, or if they perceive they are not being heard. The issues that caused the Northwestern team to file an election petition may be replicated. A severe injury to a poor student on scholarship who is denied critical healthcare, or a student with strong academic aspirations prevented from taking important classes, may be just the right kind of complications to trigger a walkout. In the walkout situation, as opposed to an economic strike, the students even at an individual school might have some leverage over the school. For this reason, the NLRB has a duty to assert jurisdiction if the statutory prerequisites are met.

allow students to take classes they need without affecting team preparation, other schools could simply institute the Northwestern plan without engaging in collective bargaining. Indeed, if Northwestern were to recruit while citing its flexible academic schedule to gain top talent, other teams in the league might adopt the plan just to negate Northwestern's competitive advantage.

Moreover, Northwestern would gain another recruitment advantage over other FBS schools. Northwestern could promise recruits that playing for Northwestern is better preparation for the NFL since a collective bargaining agreement governs Northwestern players, just like unionized NFL players. And, for those without NFL dreams, Northwestern could tout the rock-solid protection the collective bargaining agreement affords players as students.

Ironically, recognizing college football players as employees might lead to better education-related benefits for them as well. For example, the NCAA rule that limits "countable athletic related activities" to twenty hours per week is currently honored more in the breach than the observance. If student-athletes thought that failure to police the rule was abusive, they might seek to address this in collective bargaining. In addition, if student-athletes later played professionally, they would already have experience in an environment involving unions and collective bargaining. That would mean less of an adjustment between college and professional football. And, if collective bargaining turns out to be a recruitment advantage for private schools, the public schools in the conference might well pressure their state legislatures to allow at least some limited form of collective bargaining for their schools as well.<sup>105</sup>

Despite dicta to the contrary in the *North American Soccer League* and *Big East*, the NLRB in *Northwestern University* suggests that, if it cannot assert jurisdiction over most of the teams in a league, then labor stability will be undermined. Yet, in footnote 16 in *Northwestern University*—and consistent with its position in the *NASL* and *Big East* cases—the NLRB emphasized that it "do[es] not reach and do[es] not decide that team-by-team organizing and bargaining is foreclosed or that [it] would never assert jurisdiction over an individual team."<sup>106</sup> Moreover, in the same footnote, the Board, citing *North American Soccer League*, stated that "evidence of each team's day-to-

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<sup>105</sup> See Zirin, *supra* note 5 ("As for players at state universities, they have the freedom to do exactly what the Northwestern players did and organize themselves in an effort to then approach their own state boards and ask for union recognition. That is how national campaigns work. Different states have different laws, different union freedoms, and unions still make efforts to organize across state lines.")

<sup>106</sup> *Northwestern Univ.*, 362 N.L.R.B. at 1354 n.16.

day autonomy ‘might support a finding that single-club units may be appropriate.’”<sup>107</sup>

### C. *The NLRB’s Non-Decision in the Northwestern University Case*

A close reading of the Board’s *Northwestern University* decision leaves one wondering what exactly the NLRB did decide in the case. Indeed, both the NLRB’s disclaimers tacked on to the end of the opinion, as well as its substantial hedging on major points (found buried in the footnotes) undermines the certainty of the Board’s unanimous decision. Arguably, *Northwestern University* barely constitutes a decision at all, and can hardly be called precedent-setting. And the Board, throughout the opinion, repeatedly failed to make findings it is arguably required to make by law: whether Northwestern football substantially affects commerce and whether Northwestern football players are employees.<sup>108</sup> The number of times the NLRB stated what it was *not* deciding is so substantial that the ultimate decision might even meet the threshold for an abdication of administrative responsibility. Indeed, the NLRB even declined to make findings and conclusions about the necessary prerequisites for NLRB jurisdiction, such as whether the Northwestern football players are “employees”.<sup>109</sup> Interestingly, the NLRB’s express refusal to decide presumably leaves the Regional Director’s reasoning that they are employees intact. The NLRB also declined to address whether the Northwestern football team substantially affects commerce—paradoxically, the Board suggested that the Northwestern team actually *does* affect commerce by indicating that it had asserted jurisdiction over entities that have less of an impact on commerce.<sup>110</sup> The NLRB also hints, without explicitly finding, that Northwestern University is an employer.<sup>111</sup> The NLRB refused to hold that a single-team unit, like Northwestern’s, is inappropriate, instead suggesting that in some cases (where the Board has made certain factual determinations) it might well be appropriate.<sup>112</sup> Finally, the Board refused to find that the NCAA’s regulation of, and control over, col-

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<sup>107</sup> *Id.*

<sup>108</sup> In fact, the only NLRB position on the point of whether Northwestern football players are employees, is the Chicago Regional Director’s decision that they are. The NLRB punted on the issue and did not reverse the Regional Director’s findings, reasoning, or conclusions on that score.

<sup>109</sup> *Northwestern Univ.*, 362 N.L.R.B. at 1350, 1355.

<sup>110</sup> *Id.* at 1355 n.28 (“[W]e are unwilling to find that a labor dispute involving an FBS football team would not have a ‘sufficiently substantial’ effect on commerce to warrant declining to assert jurisdiction.”).

<sup>111</sup> *Id.* (“[N]o party disputes that Northwestern is an employer under the Act.”).

<sup>112</sup> *Id.* at 1354 n.16.

lege football constitutes a reason to decline jurisdiction.<sup>113</sup> The NLRB has an affirmative duty to make these determinations when confronted with a representation petition under the Act, yet the Board time and again refused to do so.

The Board not only failed to make these basic statutory determinations, but it also withheld other important guidance, while suggesting that Northwestern's petition may well be valid. For example, the Board reserved the right to reconsider this very same case in the future, allowing for the possibility that someday it will find a single-team unit involving an FBS Power 5 Division I private school appropriate, even at Northwestern.<sup>114</sup> The Board also stated that its decision does not concern other individuals associated with FBS football.<sup>115</sup> In the end, the NLRB, an administrative agency of the federal government, decided only that it will not accept the Northwestern University football team's election petition *at this time*.<sup>116</sup> A close reading of the opinion shows that the Board effectively decided without offering a cogent reason. The NLRB's *Northwestern University* decision, then, arguably failed to abide by the NLRA's procedural requirements, and offends even the most basic notions of administrative due process.

#### IV. CONCLUSION

Arguably, the NLRB's *Northwestern University* decision represents the same abdication of responsibility that spurred both the United States Supreme Court and Congress to act from 1957–1959. Under § 14(c)(1), the Board can discretionarily decline jurisdiction only where it finds employers do not have a substantial effect on interstate commerce. Indeed, the same type of arbitrary declination of jurisdiction present in *Northwestern University* prompted Congress to add the amendment in 1959.

Even more importantly, the NLRB's decision bypasses critical findings of fact and conclusions of law in the name of labor stability and the policies of the Act, while leaving us to guess why a Northwestern football union would undermine these objectives.

The Board's declination of jurisdiction in the *Northwestern University* football case also goes against fundamental labor policy at the core of the NLRA. The labor policy of the United States is set out in § 1 of the National Labor Relations Act:

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<sup>113</sup> *Id.* at 1354 n.15.

<sup>114</sup> *Id.* at 1355.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*



Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>117</sup>

Declination of jurisdiction by the NLRB over an activity, FBS Division I college football, that clearly has a substantial effect on interstate commerce, both denies labor rights to college football players and presents a potential threat to commerce from future disruption due to labor strife.

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<sup>117</sup> National Labor Relations Act, 29 U.S.C. § 151 (2018); *see also* Frederick Sherman & Dennis Black, *The Labor Board and the Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 1323, 1350 (1970) (In the context of NLRB declination of jurisdiction over charitable employers despite their impact on interstate commerce, “[t]he Board’s practice of declination, then, rejects the [National Labor Relations] Act’s explicit finding that the best way to minimize destructive labor disputes is to place employees and employers within a statutorily defined framework for bargaining . . . .”).

