UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRUSTEES OF DARTMOUTH COLLEGE, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 560, Petitioner.	Case No. 01-RC-325633

TRUSTEES OF DARTMOUTH COLLEGE'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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Dated: March 5, 2024

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I. INTRODUCTION.

In filing this Request for Review, Dartmouth College is asking the National Labor Relations Board ("NLRB" or "Board") to reverse the Regional Director's Decision and Direction of Election ("Decision" or "DDE"), finding that members of Dartmouth's men's basketball team are employees within the meaning of Section 2(3) of the National Labor Relations Act (the "Act"). In issuing her Decision, the Regional Director made an unprecedented, unwarranted, and unsupported departure from every applicable Supreme Court, federal court and Board precedent and created a new definition of "employee" in a manner that not only exceeded her authority but promises to have significant negative labor and public policy implications. Nothing in the record supports her finding that the basketball players perform work under the direction and control of Dartmouth in exchange for compensation. Only an extraordinary and palpably incorrect reading of the record could have led the Regional Director to her conclusion that such basketball players qualify as employees. This case, then, warrants a review by the full Board, which should reverse the Regional Director's Decision and dismiss the Petition.

Dartmouth places academic excellence at the forefront of its mission and values. Dartmouth seeks to "educat[e] the most promising students and prepare[] them for a lifetime of learning and of responsible leadership through a faculty dedicated to teaching and the creation of knowledge." As a member of the Ivy League, Dartmouth provides financial aid solely based on the financial needs of each student; it does not provide athletic scholarships to students in exchange for playing sports, which further underscores the College's focus on academics. Athletes at Dartmouth College, including those students who participate in men's varsity basketball, are eligible for the same resources and benefits and are expected to follow the same

rules as all other students. In fact, a student may matriculate as a student-athlete,[1] never participate in athletics and continue to receive the need-based award, as athletic participation is not a condition of receipt of financial aid. Thus, students face no consequences for not playing basketball well or at all. Like all other undergraduate students, members of the men's basketball team are also admitted by Dartmouth's Admissions Office, which makes all decisions on admission of undergraduate students, including those students who receive an "early read" for any purpose, including but not limited to athletics. As a member of an athletic conference, the Ivy League, whose teams compete at the Division I level of the National Collegiate Athletic Association ("NCAA"), Dartmouth cannot unilaterally alter the Ivy League's and NCAA's rules governing its sports programs, nor may Dartmouth depart from them and still be permitted to participate in these organizations. Finally, the men's basketball team garners no net revenue for Dartmouth—rather, the program results in an annual financial loss of hundreds of thousands of dollars to Dartmouth. This is unlike the reality with most major college athletic conferences. For example, the *Northwestern* Board likened the Big Ten conference, whose teams played in the Football Bowl Subdivision, to a professional sports league finding a business model and generation of revenue that compared to the professional sports league, given the incredibly high volume of tickets, apparel and concessions sold. This, of course, stands in stark contrast with the Ivy League as a whole, and Dartmouth's basketball program in particular.

II. SUMMARY OF ARGUMENT.

In this case, the Regional Director purported to apply the Board's common law employment test in determining, without support, that Dartmouth's men's basketball players

[1] Dartmouth notes that the Regional Director referred to athletes on the men's basketball team as "student-athletes." That term is used throughout Dartmouth's briefing for consistency and ease of reference. As the Regional Director notes in her decision, the use of the term "Student-Athlete" is not a legal conclusion, although Dartmouth's position is that Student-Athletes are not employees under the National Labor Relations Act.

were "employees" under Section 2(3) of the Act, despite the record being completely devoid of any facts to support that conclusion.

Indeed, under established Board precedent, common law employment *requires* that an employer have the right to direct and control an employee's work, that the work be in service to the employer, *and* that the work be performed in exchange for compensation. The Regional Director erroneously found that Dartmouth's men's basketball players met all these elements. The Regional Director first determined that the "in exchange for compensation" prong was satisfied even though the undisputed evidence revealed that the students who play basketball at Dartmouth do not receive *any* monetary compensation, including athletic scholarships,[2] in accordance with Ivy League and NCAA prohibitions. Consequently, players on the men's basketball team do not receive any monetary compensation in exchange for playing basketball at Dartmouth. In the nearly ninety years of the National Labor Relations Act's (the "Act") existence, there has not been a single case in which the Board or a court found the "compensation" element of this test was met by payment of anything other than monetary compensation. In complete disregard of Board precedent, the Regional Director turned an "early read" by Dartmouth's Admission's Office, free school-branded gear, free tickets to their own games, and the like into "compensation." The Regional Director's conclusion that various non-monetary benefits, constitute "compensation" for purposes of Section 2(3) is, simply, incorrect and underscores the outcome-driven approach she took in this case.

The Regional Director also concluded, incorrectly, that the student-athletes provide a service to Dartmouth when playing basketball for the College because they generate publicity that "leads to student interest and applications." DDE at 18. However, there is absolutely no

[2] Dartmouth does not concede that athletic scholarships are compensation. However, assuming *inter alia*, they are compensation, Dartmouth's student-athletes do not receive them.

support for this conclusory and prejudicial remark in the record. The basketball program also results in a net financial loss to the institution, but the Regional Director did not explain how this is a benefit to Dartmouth.

Compounding this error, the Regional Director found that Dartmouth "controls" the basketball players in a manner sufficient to establish employee status because, *inter alia*, the College decides when practices will take place and chooses the hotels where the team might stay on the road. She relied on those tenuous acts of "control," despite undisputed testimony from both the College *and the Union* that the basketball players enjoy the freedom to miss practices and games (i.e., the "work" they purportedly perform) or to perform poorly on the basketball court *without facing any adverse consequences*. Certainly, it is impossible to imagine any modicum of "control" if there are no consequences for failing to meet set expectations, requirements, or obligations, as is the case here. Moreover, there can be no employment control where, as here, any "control" exists to protect the safety and academic progress of the men's basketball players, similar to the "control" that Dartmouth has over all students, and not any *employment control* as is required by the common law test.

In sum, the Regional Director found employee status where (i) the purported "employees" do not engage in any *employment* tasks (and are permitted to skip "work" without consequence), (ii) the basketball-related activities in which student-athletes engage do not "inherently constitute service to Dartmouth," and (iii) the student-athletes do not receive a cent for their efforts. The Regional Director's decision, if permitted to stand, would render the Act, and any fair and reasonable interpretation of it, meaningless as applied to students.

Under the Regional Director's interpretation, nearly *all* students who engage in any type of extracurricular activity while they pursue their education could be deemed an employee,

provided that the school schedules when the activity will take place, that someone outside of the college takes an interest in it, and the student receives a t-shirt or extra attention from the career center. In fact, under the new common law "employee" standard created by the Regional Director, it would be impossible to distinguish these student-athlete-"employees" from other students at Dartmouth or any other university or college (or even those in high school) that are engaged in extracurricular activities that require their time, talents, skills, and efforts, and for which they receive no monetary compensation but do receive university or activity branded apparel. Such an unprecedented outcome is devoid of any support under Board precedent or grounding in the Act. The student-athlete experience at Dartmouth is completely inapposite to an employment relationship, and the Board's tests are not suited to this type of relationship.

The Regional Director's complete disregard and departure from established precedent will also lead to negative implications far beyond this case, including the type of labor instability of which the *Northwestern* Board warned, disparate consequences for international students and their ability to participate in college athletics or hold other jobs due to student-visa limitations, and that schools may very well run the risk of falling out of compliance with Title IX.

For all the reasons stated herein, the College seeks the Board's review of the Regional Director's Decision and submits that it should be vacated.

III. PROCEDURAL HISTORY.

On September 13, 2023, the Petitioner, the Service Employees International Union, Local 560 ("Petitioner" or "Union") filed a Petition for Representation ("Petition") with Region 1 of the NLRB seeking to represent "Players for Dartmouth Men's Basketball" ("student-athletes"). Dartmouth filed its Statement of Position on September 26, 2023, arguing, *inter alia*, that (1) Dartmouth students who participate in men's varsity basketball do not meet the definition of "employee" outlined in Section 2(3) of the Act, and (2) the Board's assertion of jurisdiction is

inappropriate under *Northwestern University*, 362 NLRB 1350 (2015), as it would undermine stability in labor relations. (Bd. Ex. 3). After a four-day hearing in October 2023, briefs were filed with the Region on October 27, 2023.

On February 5, 2024, the Regional Director issued a DDE, finding that the student-athletes were employees under Section 2(3) of the Act; finding that the petitioned-for unit, consisting of all non-scholarship student-athletes on a single team, was appropriate; and asserting the Board's jurisdiction over them. The Regional Director then directed an election be held on March 5.[3]

IV. STANDARD OF REVIEW.

The Board will grant review of a Regional Director's decision where, as here, compelling reasons exist to do so. Specifically, under Section 102.67(d) of the NLRB Rules and Regulations, the grounds for review include, *inter alia*, that (1) a substantial question of law or policy is raised; (2) the Regional Director departed from officially reported Board precedent; and (3) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record, and such record prejudicially affects the rights of a party. The Request for Review in this case should be granted because each of these compelling reasons exists in this case.

First, substantial questions of law and policy exist. No Board or court has *ever* found a student-athlete to be an employee under the Act and, in fact, the *only* time that the Board has considered this issue, the Board refused to reach the question, instead declining to assert jurisdiction because it would create labor instability and would not effectuate the purpose of the

[3] On February 29, Dartmouth filed with the Board a Motion to Stay the March 5 Election or Impound the ballots in order to resolve the significant errors on the fundamental issues of jurisdiction and statutory interpretation, discussed in more detail here, prior to any election. Dartmouth similarly filed a Motion to Reopen the Record to buttress the already robust record due to the Regional Director's reliance on factors never before considered to satisfy the common law employment test, demonstrating the Regional Director's Decision should be reversed. On March 1, the Regional Director summarily denied Dartmouth's Motion to Reopen the Record. Dartmouth reserves the right to challenge that wrongful denial of Dartmouth's Motion to Reopen.

Act to permit a single-team bargaining unit. *See Northwestern University*, 362 NLRB 1350 (2015). Additionally, assertion of Board jurisdiction and a finding that a single-team bargaining unit is appropriate raises substantial public policy concerns, including preventing international students from participating in college athletics in the United States based on the requirements of the F-1 visa.

Second, in this case, the Regional Director clearly departed from Board precedent established in *Northwestern University*, *supra*, by asserting jurisdiction over and finding appropriate, a single college basketball team. Moreover, the Regional Director failed to follow clearly established Court and Board precedent outlined in *NLRB v. Town & Country Electric, Inc.*, 526 U.S. 85 (1995), and *Columbia University*, 364 NLRB 1080 (2016), among others, by conferring "employee" status on the student-athletes who do not receive *any* monetary compensation.[4] To reach her conclusion, the Regional Director instead relied on a jumble of "benefits," including team-issued sweatshirts and shoes and the wholly intangible ability for *high school students* to find out the type of need-based financial aid they *might* receive *if* they are admitted to Dartmouth in the future (the "early read"). She similarly failed to follow any existing law in concluding that Dartmouth possessed the requisite "control" over the men's basketball players, absent any evidence of *employment control* or *employment* service and without identifying *any* alleged *work* that the men's basketball players actually perform for Dartmouth. She disregarded the impact of the NCAA and Ivy League rules on Dartmouth's ability to "control" men's basketball players and unnecessarily focused on players' safety measures during team travel as dispositive of "control." The Board has never, in its history, upheld the direction of an election among any college student-athletes, and certainly has not

[4] As well as the Regional Director's own Decision in *Massachusetts Institute of Technology*, Case 01-RC-304042 (Mar. 13, 2023), which, at the very least, should be adhered to by the same Regional Director.

done so for student-athletes who do not receive any scholarship funds based on their sports participation, or where the bargaining unit exclusively consists of a single team's players while excluding all other teams with whom the players compete.

Third, the Board should also grant review in this case because the DDE is predicated on numerous factual findings that are materially incomplete and misstate the factual record. Indeed, the DDE lacks any citation to any evidence in the record, instead making sweeping and inaccurate statements about the content of the record. In contrast, in its Post-Hearing Brief, Dartmouth cited with specificity to portions of the testimony received where such portions support its position and its arguments. The DDE ignores the totality of the evidence and demonstrates the lack of *any* evidence that the basketball players engage in any employment-related service or tasks, are under any type of employment control, or receive actual *monetary* compensation for any "work" performed. Likewise, ignoring the lack of *monetary* compensation for the players, as required by law, the DDE focused only on evidence pertaining to *non-monetary* features associated with participating as a student-athlete on Dartmouth's men's basketball team.

As the standard set forth in Section 102.67 is met here, Dartmouth respectfully requests that the Board grant its request for review.

V. SUMMARY OF THE FACTS.[5]

A. Dartmouth College Athletes Are Students First.

Dartmouth College, located in Hanover, New Hampshire, was founded in 1769 and enrolls approximately 4,400 undergraduate students and 2,100 graduate students. One of the

[5] While Dartmouth provides a brief description of several of the relevant facts, in discussing arguments and the law below, Dartmouth will highlight, in greater detail, specific facts relevant to those arguments.

eight members of the Ivy League[6] – which consists of what is widely considered some of the top academic institutions in the world – Dartmouth prepares students for a lifetime of learning and of responsible leadership through a faculty dedicated to teaching and the creation of knowledge. As part of the College's and the Ivy League's emphasis on academics and holistic approach to education, "it is encouraged that students take part in athletics, whether it be varsity sports or intramural sports." (Tr. 101-02).[7]

Despite understanding the importance of sports as an element of a strong academic program – Dartmouth maintains thirty-five varsity sports teams (Tr. 49, 52) – the Ivy League does not operate like a professional sports league. Indeed, within the Ivy Manual,[8] which "includes the rules and regulations related to governance of the sports programs within the Ivy League[,]" (Tr. 99), the eight participating schools (referred to as "The Ivy Group") agree on a significant and binding principle concerning the value of sports "in the service of higher education," under conditions requiring "that the players shall be truly representative of the student body and not composed of a group of specially recruited athletes," and that "[i]n the total life of the campus, emphasis upon intercollegiate competition must be kept in harmony with the essential educational purposes of the institution." (Er. Ex. 4, at 2).

B. Student-Athletes Participate in the Same Admissions Process Applicable to All Dartmouth Students.

Dartmouth's Athletics Department does not have decision-making authority with respect to the admission of any student, including student-athletes on the men's basketball team. (Tr. 69). Rather, any and all admissions decisions are made by the Office of Admissions. (Tr. 69; Er.

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[6] Brown University, Harvard University, Yale University, Cornell University, Columbia University, University of Pennsylvania and Princeton University are the League's other schools.

[7] Citations to the transcript shall be identified as "(Tr. __)," followed by the page number. Citations to Board exhibits shall be "(Bd Ex. __)." Citations to joint exhibits shall be "(Jt. Ex. __)." Citations to employer exhibits shall be "(Er. Ex. __)." Citations to Petitioner exhibits shall be "(Pet. Ex. __)."

[8] In 1979, the Ivy League agreed to a "Statement of Principles."

Ex. 4, p. 4 ("Student athletes must be admitted and notified of admissions status only by the admissions office, and must be awarded financial aid and notified of financial aid awards only by the office of financial aid.")). As confirmed by Taurian Houston, Dartmouth's Executive Associate Director for Administration in the Athletic Department, athletic talent does not provide a prospective student a lesser threshold when applying to Dartmouth (Tr. 69 ("Q Do those [admissions] decisions have anything to do with a recruit's athletic talent? A No, they do not.")), as all students are considered in the exact same manner.

C. Student-Athletes on the Men's Basketball Team Do Not Receive Monetary Compensation for Playing Basketball at Dartmouth.

It is undisputed that student-athletes do not receive monetary payment for playing basketball at Dartmouth. *See* DDE at 19-20. Indeed, both the Ivy League and the NCAA prohibit compensation in exchange for participation in basketball activity ("pay for play"). (Er. Ex. 4). Faced with the complete absence of any monetary compensation, including athletic scholarships (and, for some players, any financial aid at all), and without citing to any legal authority for doing so, the Regional Director chose to designate as compensation several categories of purported *non-monetary* features associated with participating as a student-athlete on Dartmouth's men's basketball team. Having created an entirely new definition of "compensation" under the common law test, she then determined these student-athletes are "employees" under the Act. The Regional Director was incorrect. Non-monetary "benefits," including those provided to the men's basketball team, do not constitute compensation for the purposes of triggering statutory employee status.

1. Student-Athletes Do Not Receive Athletic Scholarships but May Receive Need-Based Financial Aid, Consistent with All Dartmouth Students.

Dartmouth does not offer athletic scholarships and, as a result, not a single men's basketball player receives an athletic scholarship. Men's basketball players at Dartmouth are,

however, eligible for need-based financial aid, consistent with every other student admitted to Dartmouth, and some do receive such aid, while some players receive no aid from Dartmouth at all. Dartmouth's financial aid assessment and award process is entirely separate from its admissions or athletic recruitment process. (Tr. 191-192). Dartmouth provides need-based financial aid to its students, meeting full financial need regardless of students' participation in athletics or any other student activity. No aspect of a men's basketball player's participation in athletics—e.g., athletic ability, role on the team, or participation on the team—is considered when Dartmouth makes any financial aid decision regarding the student. (Tr. 200). Financial aid is in no way conditioned on or affected by athletic participation. (Tr. 55). A student may come to the College as a student-athlete but never participate in the athletic program, and their financial aid would not be impacted in any manner. (Tr. 56, 211-12). Similarly, if a student comes to Dartmouth planning to play a sport and quits or is dismissed from the team, the student's financial aid could not be rescinded or reduced, and the student would continue to receive the same financial aid that they had previously been awarded. (Tr. 56, 211-12, 214).

The Athletics Department does not have a decision-making role with respect to any decision to award financial aid—including the amount of any award—for any student, including student-athletes on the men's basketball team. (Tr. 195). As Dino Koff, Dartmouth's Director of Financial Aid, described, because the financial aid decision is "driven by the numbers families are giving [Dartmouth], there's no flexibility. There's no merit money on talent or ability, whether it's violin, basketball or singing. And they may be amazing, but we're ... 100% need-based aid." (Tr. 201). Nobody within or outside Financial Aid can put a "thumb on the scale" to award a student more financial aid based on any characteristic, skill, or talent unrelated to demonstrated financial need. (Tr. 202).

2. Other Non-Monetary "Benefits" Provided to Players on the Men's Basketball Team Do Not Constitute Compensation.

In reaching her conclusion that the student-athletes are statutory employees, the Regional Director gave dispositive weight to *non-monetary* "fringe benefits," as the Regional Director described them, that *some* student-athletes received. These included the "'early read' for admission prior to graduating high school"; "equipment and apparel"; "tickets to games, lodging, meals, and the benefits of Dartmouth's Peak Performance program"; and "academic support, career development, sports and counseling psychology, medicine, and integrative health and wellness." *See* DDE at 19–20. None of these items or services constitute "compensation" in any conceivable definition of the word.

a. Early Read Admissions.

Under Ivy League rules, recruited varsity student-athletes can be provided an estimate of their financial aid by January 1 of their junior year in high school, which is referred to as an "Early Read." (Tr. 192). Early Read is not a definitive process or an official award, nor does it constitute any type of decision-making by the Athletics Department – given the Athletics Department does not play a role calculating or providing the information to prospective students; rather, it is an estimated range of what financial aid could potentially look like for the student based on information provided by prospective students and their families. (Tr. 193). Similarly, non-student-athletes and their families can also communicate with Dartmouth's financial aid office to obtain information analogous to the Early Read process. (Tr. 193-94, 204). Mr. Koff testified that the financial aid office is "always speaking with families" and meeting with them, especially regarding Early Decision applicants, because students and their families want to know what their potential financial aid will be before they commit to applying to Dartmouth (and agreeing to enroll at Dartmouth) as part of the Early Decision process. (*Id.*).

This alleged intangible predictive estimate, which is available to all students, regardless of their involvement in basketball or any extracurricular activity (*see* Tr. at 193, 204), is certainly not "compensation," nor is it provided "in exchange for playing basketball."

b. Other "Benefits".

Men's basketball players are provided with various forms of necessary apparel (sneakers, sweats and uniforms) in order to outfit them for practice and games—in other words, the gear is necessary for these students to be able to participate in team activities. (Tr. 77-78, 228). Men's basketball players receive a per diem for meals when the team is not otherwise providing a meal to the team (which is what typically happens); if a meal is provided, players do not receive any per diem. (*Id.*).

Men's basketball players also have access to Dartmouth's Peak Performance Program ("DP2"), which is a program that supports student-athletes' "physical, intellectual and personal growth." (Tr. 312; Er. Ex. 1, p. 5). While DP2 is geared toward student-athletes, students who do not participate in athletics receive similar support, including, in many instances, from the same offices and departments. (Tr. 315-24). For example, *all* students at Dartmouth receive the following support services: academic support, career development, mental health support, nutritional support, leadership and mental performance programs, physical care, and health services. (Tr. 315-22). Thus, student-athletes receive these "benefits" because they are Dartmouth students, not because of or in exchange for playing basketball.

3. Running the Men's Basketball Program Results in a Financial Loss to Dartmouth.

Dartmouth generates no net revenue from its men's basketball program. To the contrary, each year operating the men's basketball program results in a financial loss of hundreds of thousands of dollars to Dartmouth. (Tr. 97; Er. Ex. 5B). In fact, over the last five years,

Dartmouth has not realized any profit through its men's basketball program. (Tr. 97). This underscores that Dartmouth provides this program to its students as part of its holistic approach to education.

4. Dartmouth Does Not Control Student-Athletes on the Men's Basketball Team.

a. Student-Athletes Do Not Perform Employment Services for Dartmouth.

Notably, there is not a single mention by the Regional Director of what "work" the student-athletes are performing for Dartmouth. In fact, in her DDE, the Regional Director notes that the "Petitioner does not rely on an argument that all basketball-related activities inherently constitute service to Dartmouth," but then fails to explain which basketball-related activities inherently *do* constitute service to Dartmouth. *See* DDE at 21.[9] Nor could she. The student-athletes do not perform any employment services for Dartmouth, and the Regional Director's finding that the student-athletes are employees is erroneous. Dartmouth provides athletics, along with countless other extracurricular activities, as part of the student experience, but does not operate a sports-related business—unlike professional sports leagues or the other major college sports conferences that similarly generate millions of dollars in revenue and profits (like Northwestern's football program and the Big Ten Conference). Given that Dartmouth's basketball program operates at a loss – and has for years – it is axiomatic that it is not being maintained as a vehicle to boost profits for the College, which is why Dartmouth allows the players to miss practices or games without consequence – a benefit that no other "employee" in the world is afforded. As such, even if the Regional Director specified the "service" that student-

[9] Indeed, as explained in greater detail, *infra*, if "basketball activities" are now considered "employment work," it must include *all* such activities, not just the ones that fit Petitioner's narrative.

athletes provided (and she did not), playing a sport does not constitute work in furtherance of Dartmouth's academic focus and mission.

b. Dartmouth Prioritizes Academics Above All Else and Student-Athletes Are Not Penalized for Failing to Participate in Team Activities.

As explained by Mr. Houston and outlined above, Dartmouth, and the Ivy League as a whole, share the belief that, "to be a member of an athletic program is an additive to your status as a student and your academic obligations with the institutions." (Tr. 55). Dartmouth does not exercise the requisite "employment" control over the student-athletes under the common law test. As was abundantly clear from the record, this was not simply lip service – students are not only permitted but encouraged to, without consequence, put academics above all else, including participating in practices or games.

> **CLASS ABSENCE POLICY**
> The Dartmouth Faculty approves of student participation in athletic activities and wishes to encourage students to take advantage of opportunities at the College in both intramural and intercollegiate athletics. Student-athletes must keep in mind, however, that their primary objective here at Dartmouth is learning. They are students first and athletes second. Dartmouth coaches, as well as faculty accept this proposition. They also understand that **each student must make his/her own decision of the importance of participation in sports and the demands it makes on his/her time**.
>
> With respect to practices or athletic meetings, it is understood by both the faculty and coaching staff that **class attendance takes precedence over participation in athletics**. In addition, per NCAA Rules, **no class time shall be missed at any time (e.g., regular academic term, mini term, summer term) for practice activities except when a team is traveling to an away-from-home contest and the practice is in conjunction with the contest**. Furthermore, **full participation in classes which leads to the missing of practices may not, in itself, prejudice the coaches in the selection of team participants**.
>
> **Although academic schedules may sometimes conflict with College sponsored athletic activities, there are no automatically excused absences for participation in such activities**. Students who participate in athletics should check their calendars to see that events do not conflict with their academic schedules. If conflicts occur, **each student is**

> **responsible for discussing the matter with his/her professors at the beginning of the appropriate term**. **Professors may be accommodating if approached well in advance of the critical date, but they are under no obligation to make special arrangements for make-up opportunities**.

(Er. Ex. 1 at 7-8) (emphasis added). The record not only included this clear policy mandate, but numerous examples of it being applied in practice – both in students choosing to miss practice and games – clearly demonstrating, as Mr. Houston explained, that head basketball coach "[David] McLaughlin definitely does adhere to this [Policy]." (Tr. 62). Mr. Houston similarly provided examples to support his testimony:

> [a]nd two examples that come to mind are situations in which a young man approached Coach McLaughlin, made him aware that he was struggling in the classroom and based upon that young man coming to him, making the decision, it was decided that he was to remain back on campus and not travel with the team for in an away contest due to the fact that he needed to maintain his academic obligations. And then most recently was a situation in which a young man had a lab conflict that occurred during a practice time that came up unexpectedly, and Coach McLaughlin ... -- stressed the importance of his attendance at that lab and thus missed practice in order for him to attend the lab.

(Tr. 62-63). Coach McLaughlin provided additional examples of players missing practice without any consequence: "one of our young men had a physics lab on Tuesday and missed practice ... We had a young man who had a drill, which is a language class here at Dartmouth, and had to leave practice early ... And then we had a young man who had a math test, who had to arrive at practice late and missed a lift that day. And that's all within the last ... 10 to 12 days." (Tr. 229-30). Further, Coach McLaughlin explained that his players are free to miss practice and games for academic purposes, without consequence.

> Q Have you ever disciplined a student athlete for having to attend to their academic program, rather than be at something, an athletic responsibility for the Team?
> A No.

Q Have you ever refused to let them play in a game, for the reason of them having missed part of a practice, or all of a practice, or other athletic activity, because of an academic obligation?
A No.
Q Have you ever detrimented them in any way, in relation to their participation in men's basketball, because they attended to an academic obligation instead of an athletic obligation?
A No.
Q Okay. How about actually missing games themselves? Have you ever in the last couple of years had reason to relieve a student of playing in certain games, because of academic issues?
A We did last season. We had a young man miss multiple away games, due to a class he didn't want to miss on a certain day. And he wanted to make sure that he was doing the work at his highest level.
Q And did you approve that missing of the games?
A I did.
Q Did that student receive any retaliation or other detriment for having missed the games, because of wanting to attend to his studies?
A No.

(Tr. 229-30). The Union's only witness, Cade Haskins, a student-athlete on the team, confirmed this unique freedom to choose whether, on any given day, a player will participate in practice.

Q are there times where you had a conflict between practice and classes?
A Yes.
Q And from your own personal decision, what have you chosen to do on the large part?
A On the large part, go to practice. **But I've made both decisions before.**

(Tr. 385) (emphasis added). Haskins further confirmed that there has "never been any instance" where he was not permitted to miss practice to attend class. (Tr. 469-70). Indeed, not only does NCAA and Ivy Policy require Dartmouth to relinquish most of the typical controls employers have in normal employment settings but, as the record made clear, Dartmouth strictly abides by those requirements.

c. The Ivy League and NCAA Rules and Regulations Govern the Vast Majority of Basketball Operations for All Ivy League Schools.

Further evidence of Dartmouth's lack of "employment control" over the student-athletes includes the requirement that Dartmouth must follow the Ivy League's various rules and

regulations, detailed in the 181-page Ivy Manual, in order to participate in the League. Dartmouth has no discretion regarding its compliance with such rules. (Tr. 99).[10] Mr. Houston testified at length regarding the various ways in which Dartmouth is bound by them. (Tr. 99-110).

Above all else, the rules make it clear that students' academic progress is of paramount importance and requires that student-athletes must be "truly representative of the student body and not composed of a group of specially recruited athletes." (Tr. 101-102; Er. Ex. 4, p. 2). Student-athletes across the Ivy League, in accordance with the Ivy Manual, must be held accountable to the same academic standards as other students. (Tr. 102-103; Er. Ex. 4, p. 2). The Ivy Manual further dictates that athletic participation can never interfere with or otherwise distort normal academic progress toward the degree or post-baccalaureate plans for graduate work or employment, and there is no distinction between a student-athlete and a student in the general population with respect to academic progress requirements. (Tr. 103; Er. Ex. 4, p. 2).

Dartmouth is also subjected to compliance reviews by the Ivy League at least once every eight years. (Tr. 103-104; Er. Ex. 4, p. 36). There are also strict requirements related to rest periods, schedules and travel, academic considerations, a section specifically devoted to basketball rules and requirements, and the Ivy League's (and, in turn, Dartmouth's) lack of participation in the national Letter of Intent program. (Tr. 106-110; *see generally* Er. Ex. 4). As Mr. Houston explained, a national Letter of Intent is a binding agreement between a prospective student-athlete and an institution whereby the student-athlete agrees to enroll at the institution for one year, *in exchange for athletics-based financial aid*. (Tr. 109-110).

[10] Indeed, to even consider a change in Ivy League rules, first a Motion would need to carry with a majority of the policy committee voting in the affirmative. (Er. Ex. 4, at p. 11).

In addition to the league-specific rules set forth in the Ivy Manual, Dartmouth also must comply with all applicable NCAA rules and regulations in order to compete in the NCAA. (Tr. 110-11). These rules are contained in the NCAA manual, many of which are summarized in Dartmouth's Student-Athlete Handbook. (Tr. 111). NCAA rules and regulations cover numerous areas, including but not limited to extra benefits, amateurism, outside competition, player agents, and student-athlete employment, to name a few. (Tr. 110; Er. Ex. 1, pp. 19-23). For example, Dartmouth must strictly adhere to all NCAA rules regarding the recruitment of student-athletes, including rules related to the timing and nature of communications with prospective student-athletes. (Tr. 67-69). If Dartmouth does not comply with Ivy League and/or NCAA rules, a student-athlete's eligibility to participate in athletics would be compromised. (Tr. 116). There could also be financial penalties associated with rules violations. (*Id.*)

Additionally, each of the forms signed by men's basketball players is either required by the NCAA and/or Ivy League, or is generally applicable to all Dartmouth students. (Tr. 487-95). Moreover, the policies applicable to student-athletes contained in the Student-Athlete Handbook consist of Ivy League and/or NCAA rules, as well as rules applicable to ***all*** Dartmouth students. (Er. Ex. 1). For example, the Dartmouth Student Code of Conduct applies to "all . . . students representing Dartmouth College[.]" (Pet. Ex. 3, p. 3; Tr. 490-491).

As such evidence further demonstrates the lack of "employment control" Dartmouth has over its student-athletes, the Regional Director's decision should be vacated.

VI. ARGUMENT.

A. The Regional Director Erred in Finding That Student-Athletes on the Men's Basketball Team at Dartmouth Are Employees Within the Meaning of Section 2(3) of the Act and by Asserting Jurisdiction over Them in Clear Contravention of Established Board Precedent.

In concluding that the students who participate in men's varsity basketball are employees, the Regional Director erred by expanding the Act's definition of "employee" under Section 2(3) of the Act in a clear departure from Board precedent and the common law. The right to select an exclusive bargaining representative under the Act applies only to certain individuals who are defined as employees under Section 2(3) of the Act. 29 U.S.C. § 152(3). In making that determination, the Board applies the common law "right of control test" when deciding who is an "employee," which requires that an employee perform employment services or work for an employer; the employer have the right to control the employee's work; and that the work be performed in exchange for compensation. *See Town & Country Elec., Inc*., 516 U.S at 90; *see also Columbia Univ.*, 364 NLRB 1080, 1094 (2016).[11] Here, the Regional Director incorrectly found all prongs satisfied. The basketball players at Dartmouth engage in extracurricular athletics because they choose to do so, not because they are receiving tuition assistance, athletic scholarships, or conditional funding to support themselves while at Dartmouth. These students have absolutely no employment responsibilities or service requirements nor do they receive any monetary compensation for their efforts. Indeed, they do not receive *any* compensation from Dartmouth, let alone any *in exchange for* playing basketball. While Dartmouth believes that participation in extracurricular athletics – either at the varsity, club, or intramural level – is an important component of a student's overall educational experience, and Dartmouth certainly

[11] While *Columbia* provided that *some* students were employees if they meet these criteria, it did not hold that *all* students are employees.

supports all of its students in all endeavors (athletics or otherwise), the facts here do not support a legal finding that the petitioned-for students are employees under the Act.

Further, in finding a single college sports team to be an appropriate bargaining unit, the Regional Director failed to apply extant Board precedent declining jurisdiction over a single sports team in a league – college or professional. In doing so, the Regional Director ignored significant public policy considerations, relevant record facts, and misapplied or ignored Supreme Court, federal court, and Board precedent.

B. The Regional Director Erroneously Expanded the Act's Definition of "Employee."

The crux of this case is whether the individuals on the men's basketball team at Dartmouth are employees under Section 2(3) of the Act. As outlined above, requisite in finding employee status is that an employee performs employment services or work for an employer; the employer has the right to control the employee's work; and, that the work be performed in exchange for compensation. As will be explained in greater detail below, the record is clear that *none* of these prongs are satisfied.

1. Definition of "Employee" Under the Act Turns on Common Law Principles.

The term "employee" as used in Section 2(3) of the Act, as well as under other statutes, has been interpreted by the courts as resting upon the common law or the common understanding of the term. For example, in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992), the Supreme Court, in interpreting Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), explained, "[i]n the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master servant relationship *as understood by common law agency doctrine.*" *Darden*, 503 U.S. at 322-23 (emphasis added).

Later, in *NLRB v. Town & Country Electric, Inc.*, the Court first dealt with the statutory language of Section 2(3). Citing *Darden*, the Court held that, "[t]he ordinary dictionary definition of 'employee' includes *any* '*person who works for another in return for financial or other compensation.*' American Heritage Dictionary 604 (3d ed. 1992)." *Town & Country Elec., Inc.*, 526 U.S. at 90 (emphasis added). The Court further reiterated that the term "employee" must be read consistently with its common law meaning.

In the context of student-employees, the Board in *Columbia* held that graduate and undergraduate student research and teaching assistants at that university were employees within the meaning of Section 2(3) of the Act – relying primarily upon an analysis of what constitutes a common law employee and citing the Supreme Court's analysis in *Town & Country Electric.* The Board overruled its previous decision in *Brown University*, 342 NLRB 482 (2004), which held that graduate and undergraduate teaching assistants were not statutory employees because they were "primarily students and have a primarily educational, not economic, relationship with their university." *Id.* at 487.[12] Since *Columbia,* the Board has never extended this ruling to students who do not receive monetary compensation. Furthermore, this same Regional Director, in applying *Columbia*, found that student fellows at the Massachusetts Institute of Technology ("MIT") who ***did*** receive monetary compensation were **not** employees, *because* the monetary compensation they received was *not* in exchange for performing any services for the school. *Mass. Inst. of Tech.*, Case 01-RC-304042 (Mar. 13, 2023) (*MIT*). Thus, the Regional Director recognized, in accordance with Board precedent, that receipt of monetary compensation did not

[12] Notably, it is Dartmouth's position that the Board's rationale in *Brown* was the correct interpretation of the Act and in accordance with the Board's longstanding treatment of students (i.e., that they are not employees under Section 2(3) because they are primarily students) and reserves all rights with regard to that argument. However, Dartmouth similarly acknowledges that *Columbia* is controlling precedent and it is clear that under either Board precedent, the basketball players at Dartmouth are *not* statutory employees.

itself dictate employment status. Here, of course, the student-athletes at issue do not receive *any* compensation.

While *Columbia* made it possible for graduate assistants to unionize at private universities, the decision *did not hold* that *all* students have the right to unionize or that *all* students are employees. Furthermore, the Board did *not* rule that items such as an early admission read, team apparel, and other intangible "benefits" were "compensation," sufficient to attach employee status to students. The Board has no jurisdiction over individuals who are solely students; it has jurisdiction only over statutory employees. Thus, the Board in *Columbia* found only that the "student assistants who have a common-law *employment* relationship with their university are statutory employees under the Act." *Columbia*, 364 NLRB at 1081. This is at the core of the Decision and serves as controlling precedent for the instant case.

2. Since the Enactment of the National Labor Relations Act, the National Labor Relations Board Has Required Monetary Compensation to Establish Employment Status Under the Act, Especially for Students.

The Board has never found employee status where the purported employees did not receive monetary compensation, including in its cases examining whether students at colleges and universities meet the common law definition of "employee." In *Columbia*, the Board found that graduate students who perform teaching and research services for a university in exchange for compensation (typically in the form of a stipend) are employees within the meaning of the Act, despite also being students of the university. In that decision, the Board recognized that compensation flowing from the university to the graduate student was a critical component of the existence of an employment relationship.[13] *Id.* At 1094 (holding that "[c]ommon-law employment ... generally requires that ... the work be performed in exchange for compensation").

[13] Notably, the stipends paid to the graduate students deemed to be employees in *Columbia* were subject to withholdings for employment taxes and were reported on IRS Form W-2.

The Board recognized that, in the absence of such compensation in exchange for services, graduate students would not otherwise be employees, as the Board acknowledged that there may be graduate students whose research is funded by funders who wish to provide unconditional financial aid without regard to the achievement of the funders' research goals. *Id.*

While the full Board has not yet had the opportunity to opine on whether athletic scholarships are "compensation" (and Dartmouth does not concede as much here), it is highly persuasive that in Region 13's Decision and Direction of Election at *Northwestern University*, 13-RC-121359 (Mar. 26, 2014) (which was later mooted due to the Board's decision not to assert jurisdiction over a single team in a multi-team league), *only* the players who received athletic scholarships were considered employees. The Regional Director in that case found that non-scholarship football players (i.e., "walk-ons") at Northwestern University "do not meet the definition of 'employee' for the fundamental reason that **they do not receive compensation for the athletic services that they perform**[,]" *id.* At 20 (emphasis added). Notably, the non-scholarship football players at Northwestern University did not receive athletic scholarships even though they were subject to the same rules and regulations as the scholarship players. *Id.* at 1353, 1357. Further, while the non-scholarship players in *Northwestern* did receive team-issued gear, the Regional Director did not consider such non-monetary benefits to be compensation. Rather, the sole focus in that case was the receipt of athletic scholarships contingent on athletic performance as the necessary "compensation" to find employee status. The factual circumstances concerning the walk-ons at Northwestern, of course, are identical to the basketball players at Dartmouth.

Further, Regional Director Sacks, in *MIT*, embraced the Board's holding in *Columbia University* when determining that a particular group of graduate fellows at MIT were not

employees within the meaning of the Act. In that case, the Regional Director found that the graduate fellows at issue were not employees because "the compensation received by the fellows was not directly tied to completed particular tasks, as directed; rather, it is tied to maintaining academic good standing." *Id.* At 10.[14]

Notably, in the DDE in this case, the Regional Director read facts into the record that simply did not exist, in attempting to overcome this fatal flaw that the student-athletes in this case do not receive compensation from the College.

> Although several members of the team do not receive compensation in the form of a scholarship—and **those players who do receive scholarships *nominally receive*** need-based financial aid rather than athletic scholarships— they nonetheless both receive and anticipate economic compensation from the Employer, they are critical to the success of the team, and they are subject to the Employer's control.

DDE, at 20 (emphasis added). There is nothing in the record to suggest that the need-based financial aid provided to students at Dartmouth is somehow a subterfuge to cover up athletic scholarship that Dartmouth does *not* provide and that the Ivy League prohibits.[15] (Tr. 102; Er. Ex. 4, at 2).

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[14] It is significant that even the current General Counsel Jennifer Abruzzo (as well as prior General Counsel Richard F. Griffin, Jr.), in advising "[a]ll Regional Directors, Officers-in-Charge, and Resident Officers" that *certain* student-athletes are employees, attaches the prerequisite that they receive athletic scholarships. In the two General Counsel Memos on the issue (in the Unfair Labor Practice context), GC 17-01 and GC 21-08, the respective General Counsels opine only that "scholarship" football players are employees under the Act. *See* Memorandum GC 17-01, at 2. Mr. Griffin similarly relied on the fact that the scholarship funds were conditional. "It is also clear that college scholarship football players receive significant compensation in exchange for that service. The players' compensation **is clearly tied to their status and performance as football players, since they risk the loss of their scholarships if they quit the team or are removed because they violate their school's or the NCAA's rules**." *Id.* at 19 (emphasis added). This is not the case at Dartmouth. As the unrebutted evidence made clear, the financial aid provided to Dartmouth students is need-based and students on the basketball teams are *not* at risk of losing it if they quit the team. (Tr. 200, 212). Further, the Board's current GC takes the position that only "certain" student-athletes are employees under the Act, focusing *only* on those individuals receiving scholarships in exchange for performing their sport at schools that are "generating billions of dollars in revenue for their colleges and universities, athletic conferences and the NCAA." Memorandum GC 21-08 at 7-8. Dartmouth generates no net revenue from its men's basketball program. To the contrary, each year the men's basketball program results in a financial loss of hundreds of thousands of dollars to Dartmouth. (Tr. 97; Er. Ex. 5B). In fact, over the last five years, Dartmouth has not realized any profit through its men's basketball program. (Tr. 97).

[15] As conceded by the Union and the Regional Director (despite the misleading language cited above), none of the basketball players receive athletic scholarships (or, any type of scholarship) from Dartmouth and not all of the

As outlined above, the Board has been very careful and clear to differentiate between conditional monetary compensation, which students are "required to work [for] as a condition of receiving this tuition assistance" (which would support a finding of employee status), and "payments that are merely financial aid," which would not support such a finding. The student-athletes at Dartmouth are like the non-scholarship football players at issue in *Northwestern University* and the graduate students contemplated in *Columbia University* and *MIT*, as they do not receive compensation in exchange for performing services. Accordingly, these student-athletes are not employees within the meaning of the Act.

3. Dartmouth Basketball Players Do Not Receive Any Form of Monetary Compensation, Whether Through Athletic Scholarships, Stipends, or Otherwise.[16]

To confer employee status on the basketball players at issue, the Regional Director created a form of compensation that has *never* been applied by the Board during its entire 89-year existence. With no athletic scholarships, stipends, or other monetary compensation provided to the student-athletes at Dartmouth, the Regional Director resorted to intangible and non-monetary "benefits," contrary to Board precedent and the common law.

a. "Early Read".

The Regional Director cited first the "benefits of an 'early read' for admission *prior to graduating high school.*" DDE, at 19 (emphasis added). The Regional Director's own description of this "benefit" demonstrates the infirmity of her Decision. Indeed, "early read" is not a benefit that is even provided to Dartmouth basketball players; *it is a benefit that is provided*

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students on the basketball team receive financial aid. This means that several are paying tuition to Dartmouth to play basketball, yet the Regional Director found them to be employees because they receive an early admission read, apparel, and services that all other Dartmouth students receive.

[16] By converting the intangible and non-monetary "benefits" to compensation, another possible consequence of the Regional Director's decision is converting some of these items to imputed income to the students, which would require the students to pay taxes on these "benefits," assuming a value can be attached to them.

to high school students,[17] including those who may never set foot on Dartmouth's campus. Further, an "early read" "is not an official [financial aid] award letter." It merely provides a prospective student an assessment of a range of *potential* financial aid at that point in time, based completely on the need of the student. (Tr. 193-94).

Of course, if a *high school student* who was provided an "early read" is ultimately admitted and attends Dartmouth, this non-monetary form of "compensation" is superseded by the actual assessment of the student's need reflected in any financial aid award letter. As such, it completely evaporates the moment the student gets to campus and enrolls at Dartmouth (regardless of whether he ever plays basketball) and therefore is not provided *in exchange for* playing basketball *for Dartmouth.* The Regional Director's characterization of an "early read" as compensation in exchange for playing is completely unfounded.

b. <u>Admissions and Access to Alumni.</u>

With regard to admissions and "access to alumni," the Regional Director again misrepresented the record facts and erred in improperly relying upon intangible "benefits" that *all* students at Dartmouth enjoy. There is no evidence that supports the finding that such benefits are provided to student-athletes in exchange for playing basketball. On this point, the Regional Director stated the following:

> The coaching staff is allotted a certain number of highly coveted admission spots for players they scout based upon their basketball skills, and encourages players to matriculate at Dartmouth rather than at a school which might offer them an athletic scholarship because of the lifelong benefits that accrue to an alumnus of an Ivy League institution.

[17] This predictive function is not solely provided to students who *might* play basketball at Dartmouth. As Mr. Koff explained, Dartmouth provides this benefit to *all* potential students who have an interest in attending Dartmouth. (Tr. 192-94).

DDE, at 19. This is false. Coaches are not allotted admission spots that are held open for basketball players. Coach McLaughlin testified very clearly on this issue, "[w]ith the supports, **you don't automatically get people in**. Those are people that you can bring to the table, get feedback from Admissions, and ... if they do get approved, its's either Early Decision or Regular Decision[,]" (Tr. 260 (emphasis added)), which is the exact same process for all other prospective students. Significantly, the Union's own witness's testimony (and related exhibits) proves this point. Despite his unsubstantiated claims to the contrary, Mr. Haskins was not "admitted" early into Dartmouth in August – indeed, it was not until *December 16* that he was offered admission to the College, in accordance with the same process (and at the same time) as everyone else who successfully applied for early admission. (Tr. 350; Pet. Ex. 1 (Dec. 16 Admission Letter)); *see also* https://admissions.dartmouth.edu/glossary-term/ early-decision (last accessed on Mar. 4) ("Early Decision (ED) is an early admission round in which students submit their application by November 1 and receive an admission decision **by mid-December**.").

Further, Mr. Houston described, without rebuttal, the actual admissions process, which is completed independently and without influence from the coaching staff. (Tr. 69). Thus, even if the admissions process were a form of "compensation," the record is clear that student-athletes do not "receive" it in exchange for *possibly* playing basketball in the future.

The Regional Director's reliance on the perceived "lifelong benefits that accrue to an alumnus of an Ivy League institution" is even more tenuous and certainly does not meet the Board's test as being "compensation" provided in exchange for playing basketball. Dartmouth encourages and assists all of its students in connecting them with alumni. (Tr. 317). Indeed, Dartmouth has an entire alumni relations office, and its website (https://alumni.dartmouth.edu/) has a wide range of services, listed events, connection portals and numerous other means of

connecting *all* of its students, not just athletes, with alumni. It also has numerous affinity groups on campus that are similarly supported by the College and alumni, for all students.[18]

c. Access to Dartmouth's Peak Performance Program.

The Regional Director further expanded the common law by finding "the benefits of Dartmouth's Peak Performance program" to be "compensation." The record reflects that similar benefits to those provided student-athletes in this program are also provided to all students at Dartmouth. (Tr. 481-82). Notwithstanding the record, the Regional Director focused on the supposed distinction that some of the benefits shared by all students are enhanced in the Peak Performance program, including the assignment of an additional faculty member.[19] DDE, at 13-14.

If the Regional Director's Decision is upheld, and the difference in benefits sufficient to constitute compensation literally comes down to whether a student has one dedicated faculty member assisting with academics, as opposed to two students sharing one faculty member, then there will be no reasonable scenario where the compensation prong will not be met – an unrealistic, untenable expansion of the law.

d. Sneakers and Other Apparel.

The Regional Director's reliance on tangible "benefits" equating to compensation is even less compelling and should again be disregarded by the Board. As Mr. Houston and Coach

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[18] For example, the First Year Student Enrichment Program ("FYSEP") is a four-week program in which about eighty incoming first-generation low-income students participate each year. Dartmouth pays for the students to travel to campus four weeks prior to orientation and also funds their room and board as they take courses designed to help them acclimate to the college experience. The program costs Dartmouth likely more than $100,000 each year. The First Generation Office provides goods such as t-shirts and notebooks to its students. (Tr. 307-10). Notably, the FYSEP markets itself through its website, which contains pictures of students wearing Dartmouth apparel. *See* https://students.dartmouth.edu/fgo/programs/first-year-student-enrichment-program. Like the basketball program, the FYSEP encourages and fosters alumni engagement, which in turn leads to donations. *Id.*

[19] The Regional Director later contradicted herself by stating the difference in the level of benefit is irrelevant to the Board's determination of "compensation." DDE, at 20, citing *Seattle Opera Association, 331 NLRB 1072 (2000)* ("payments need not be large or otherwise significant in amount.").

McLaughlin testified, men's basketball players are provided with certain athletic gear in order to be able to participate in the men's basketball program. (Tr. 77). Players are provided with shoes, uniforms, practice gear, sweats and t-shirts, gym bags and undergarments. (Tr. 77-78, 228). The purpose of providing men's basketball players with this gear is to outfit them for practice and games—in other words, the gear is necessary for these students to be able to participate in team activities. (Tr. 78, 228). As mentioned above, apparel has *never* once been determined by the Board to be a form of compensation and there is no compelling reason to do so here.[20]

This, of course, further underscores the significant error on the part of the Regional Director in disregarding 89 years of Board precedent and finding that intangible and non-monetary benefits are considered compensation. By creating this new form of compensation, instead of applying the well-established (and proper) common law and asking – *did this individual receive monetary compensation in exchange for services?* – the Board (and litigants) will be forever analyzing whether providing equipment to students so they may participate in a sport or offering them a free meal turns students into employees.

Lastly, with regard to the receipt of sneakers, this type of apparel is provided to varsity athletes, club sport athletes, non-athletes participating in other school-sponsors' extracurricular activities, and the like. It should not be lost on the Board that if being deemed an employee hinges on a college *voluntarily* providing equipment for the activity – i.e., sneakers and sweatshirts – then all they will need to do is cease that practice and have students buy their own

[20] Even Region 13's Decision in *Northwestern* (which was subsequently mooted by the Board's decision not to assert jurisdiction) found that students that did not *at least* receive an athletic scholarship (considered compensation for playing football by the Board) were *not* employees. Significantly, players in that case similarly received apparel "issued by the team" and that was not found to be sufficient to confer employee status on those students who did not receive other forms of *monetary* compensation. *See Northwestern* R-Case Transcript, Vol. 5, p. 1083 (Feb. 21, 2014) ("Our team travel, when we depart the University for the -- either the bus and/or plane trip, **we'll be in travel sweats that are issued by the team**." (emphasis added)).

athletic shoes and sweatpants to convert them to non-employees. Such an unstable basis for finding employee status does not effectuate the purposes of the Act.

e. <u>Tickets to Their Own Games.</u>

Even more tenuous is the Regional Director's designation of the receipt of game tickets as a form of "compensation," sufficient to attach employee status on the players, despite acknowledging that the tickets the players receive have *zero value to them*. While the Union and, in turn, the Regional Director attempted to obfuscate this issue by citing an estimated "street" value to them ("These tickets have an estimated value of $1,200 over the course of a 30-game season[,]" DDE, at 11), the players are *not* permitted to sell them or in any way benefit off that alleged "value." (Tr. 228). The Regional Director's reliance on *Seattle Opera* in this regard is once again misplaced. DDE at 20. The Regional Director relies on the Board's decision in *Seattle Opera* for the proposition that "[c]ompensation can also include various fringe benefit payments." DDE at 20. The Regional Director noted that the auxiliary choristers at issue in that case received free tickets to opera performances, and the Board found that they were employees under the Act. However, that was *not* the Board's basis for finding employee status– the Regional Director conveniently ignores that the auxiliary choristers in *Seattle Opera* also were paid $214 for their performance services,[21] and *that* was the fact upon which the Board based its determination that an economic relationship existed between Seattle Opera and the auxiliary choristers:

[21] The Board also found significant the fact that the auxiliary choristers were treated exactly like the employees of the Seattle Opera – they signed a letter of intent, performed with the employer's employees, were subject to the same rules as the employees, and used the same dressing room as the employees. Here, there is no evidence that student-athletes are treated in any way like an employee of their institution – they are not subject to the same employee handbooks and policies as a university employee, they do not attend meetings with university employees, they do not receive W-2 forms or complete I-9 forms, they are not eligible to participate in the same benefit plans as university employees, etc.

> Central to our analysis is that there is an economic relationship with the Employer. ***Auxiliary choristers receive monetary remuneration.*** The Employer argues that the auxiliaries' remuneration is intended to defray transportation and parking costs incurred while auxiliaries attend rehearsals and performances. However, auxiliaries, unlike other individuals whose expenses are reimbursed by the Employer, are not required to submit receipts or expense reports, and they receive remuneration in the amount of $214 at the end of a production whether or not they incur costs. ***Therefore we find the auxiliaries' remuneration to be compensation for their work.***

Seattle Opera, 331 NLRB at 1073 (emphasis added); *see also WBAI Pacifica Found.*, 328 NLRB 1273, 1274 (1999) (rejecting Regional Director's finding that "the Board would be defining 'employee' narrowly and restrictively if it were to require the receipt of wages," and noting that there must be "at least a rudimentary economic relationship, actual or anticipated, between employee and employer").[22] The free tickets to performances that auxiliary choristers received were mentioned only twice in the Board's decision, but not in the analysis of whether the auxiliary choristers were employees. Rather, as noted above, the Board's analysis focused on the $214 payment that they received when determining that an economic relationship existed, and that the auxiliary choristers were performing services in exchange for compensation.[23]

Finally, the intangible non-monetary "benefits"[24] that the Regional Director declared as compensation – including the early read, apparel, and access to alumni – have never been found

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[22] Notably, the *Columbia* Board, in interpreting *Seattle Opera*, specifically distinguished non-monetary benefits – which are not sufficient to find Section 2(3) employment status – with the commonly accepted form of compensation, holding, "while auxiliary choristers received some nonmonetary benefit in the form of personal satisfaction at their involvement in the opera, which is characteristic of a volunteer relationship, **they also received monetary compensation** for their effort, **and this fact**, along with employer control, **made them employees under the Act**[.]" *Columbia*, 364 NLRB at 1101, n.51 (emphasis added), *citing Seattle Opera*, 331 NLRB, at 1073.

[23] At least the free tickets to performances in *Seattle Opera* had an economic value that could be ascertained. The Regional Director relied on the "early read" that student-athletes may receive, which has no economic value whatsoever. That is particularly true in the case of a student who is informed during their "early read" that their financial aid will be zero.

[24] Notably, these items generally are things the students need to play basketball, not things they need to live or can use for any other purpose, which typically is how compensation from an employer works – the employee uses the compensation received from the employer to pay for food, housing, clothing, medical care, transportation, recreation, etc. Also, as it relates to free tickets to competitions, at a number of Ivy League institutions, all students of the institution receive free tickets to competitions based on their student status.

to violate the NCAA's Rules, with which Dartmouth must comply. (Er. Ex. 19). In fact, the NCAA prohibits student-athletes from receiving "extra benefits," defined as "an extra benefit as any special arrangement by an institution or a representative of the institution's athletic interests ('booster') to provide a student-athlete (or a student-athlete's relative or friend) a benefit (services or goods) that is not generally available to other Dartmouth College students and their relatives and/or friends (free of charge or discounted)." (*Id.*). Hence, Dartmouth athletes are prohibited from receiving any such benefits that are not provided to all Dartmouth students.

Thus, the Regional Director's determination that gear and other equipment constitute compensation is wholly inconsistent with existing Board precedent and should be rejected.

4. The Men's Varsity Basketball Players Do Not Perform Employment Services or Work for Dartmouth in Exchange for Monetary Compensation and Therefore Are Not Employees Under Section 2(3) of the Act.

The students who participate in men's varsity basketball do not receive monetary compensation, and the intangible, non-monetary benefits relied upon by the Regional Director to try to overcome this fact do not satisfy the common law test for finding employee status. These student-athletes do not receive athletic scholarships, and any financial aid received by student-athletes at Dartmouth is need-based and not conditioned on nor provided in exchange for them playing basketball. Also, like other Dartmouth students, the student-athletes receive the "early read" for admission prior to graduating high school, equipment and apparel, academic support, career development, counseling psychology, health and wellness support, tickets to games, and so on because they are students at Dartmouth, not in exchange for playing basketball. Or to put it another way, the student-athletes do not have to play basketball to receive these benefits. The student-athletes, like the radio staff in *WBAI Pacifica Foundation*, are not engaged in "work for hire." *WBAI*, 328 NLRB at 1275-76 (finding that reimbursement for travel and eligibility for a

childcare allowance were *not* compensation, the Board held that radio staff were not employees under the Act because they are not engaged in "work for hire").

Performance of "sport" by the student-athletes is not providing employment service to Dartmouth, and the College does not derive any tangible benefit from running the team; rather, the College sponsors sports because they are an important part of the students' educational experience.[25] (Tr. 55, 101-02; Er. Ex. 4, at 2). Despite the College realizing a *net loss* through running a basketball program (in the last year, Dartmouth realized a net loss of over $800,000), and the reality that basketball is an activity in which the students voluntarily engage, and which benefits them, the Regional Director found that when playing basketball for the College, the players are "performing work which benefits Dartmouth." In support of this statement, she concluded, without record support, that the publicity generated by the basketball team "leads to student interest and applications." DDE at 18. The Regional Director does not provide any factual basis for that conclusory statement – because she cannot. Although Dartmouth is proud of its students and their accomplishments, including its basketball players, there is simply nothing to support the statement that simply by maintaining a basketball team, Dartmouth is increasing interest in and applications to the College. As Dartmouth is one of the most prestigious schools in the world (it ranks 18th out of the 439 schools in the *U.S. World Report,* https://www.usnews.com/best-colleges/rankings/national-universities), it is reasonable to conclude that its academic reputation -- and not its basketball program– is what drives admissions.[26]

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[25] To suggest that the student-athletes seek admission to Dartmouth for apparel and a few tickets to their own competitions is the height of absurdity.

[26] Further, a simple review of Dartmouth's website provides a plethora of examples of students in Dartmouth gear promoting the College and connecting with alumni. *See, e.g.,* https://students.dartmouth.edu/fgo/programs/first-year-student-enrichment-program (see photos of Dartmouth students in Dartmouth apparel, promoting the FYSEP) (last accessed Mar. 4, 2024); *see also* https://hop.dartmouth.edu/live-events/ensembles/dartmouth-college-marching-

In fact, as an academic institution, Dartmouth provides athletics, along with countless other extracurricular activities, as part of the student experience, but does not operate a sports-related business—unlike professional sports leagues or even other major college sports conferences. As such, even if the Regional Director specified the "service" that student-athletes provided (and she did not), playing a sport does not constitute work in furtherance of Dartmouth's academic focus and mission.

5. Dartmouth Does Not Have the Right to Control the Student-Athletes.

The Regional Director also erred in finding that Dartmouth exercises the requisite employment control over the players to support a finding that they are employees pursuant to Section 2(3). As a threshold matter, due to the unique setting of collegiate sports and because Dartmouth must comply with both Ivy League and NCAA rules and regulations (Tr. 110-11; Er. Ex. 1), normal indicia of control an employer might normally possess is not present here.[27]

Most obvious, of course, is that Dartmouth has no control over compensation. As detailed throughout this brief – Dartmouth does not and cannot provide compensation to its students, which is one of the most important control features employers possess.

Dartmouth is similarly restricted in the number of hours it can direct, which are established by the NCAA and which Dartmouth has no authority to alter. Indeed, the Countable Athletically Related Activity ("CARA"), which cannot exceed 20 hours per week, is set by the NCAA and includes practice, competition, strength and conditioning activities, as well as off-

band (Dartmouth's March Band: "Many band alumni return every year to play at the Homecoming game and parade.") (last accessed Mar. 4, 2024).

[27] None of the evidence relied on by the Regional Director to demonstrate alleged indicia of control was actually indicative of *employment* control as required by the common law test. On the contrary, the evidence relied on by the Regional Director to establish "control" demonstrated student-athlete athletic *choice*. Namely, that it is the student-athlete's choice to play and practice, to perform well and win, and to abide by certain rules in order to participate in athletic leagues and conferences as part of their educational experience at an elite academic institution. It is *not*, as the Regional Director concluded, evidence of any employment control required under the law.

court activities such as film review or meetings with the coaches specific to their time with the program. (Tr. 70). Dartmouth cannot exceed or violate these restrictions and remain able to participate in NCAA or Ivy League-sponsored contests. The Regional Director, with yet another qualifier in her recognizing the absence of control in the record, asserted that, "while the coaching staff cannot ask the players to take part in CARA in excess of the Ivy League maximum, for example, it can allow the players to take part in less than the maximum." DDE, at 19. This, of course, is a red herring and ignores the reality and factual circumstances presented here. The hypothetical does not demonstrate control as it compares a situation where an employer has no ability to assign "work" due to the hours limitation, and one where the only thing that can be negotiated is the *reducing* of the hours of work.

Much more significant, however, is the fact that Dartmouth is not permitted to discipline its players if they skip practices or games for academic reasons. Inherent in employment control, of course, is a mechanism to take adverse action against an "employee" for failing to perform the duties of their "job" (if you do not come to work, you do not get paid and you may get disciplined). That authority is not present at Dartmouth. Not only is that because of Ivy League policy that allows players to skip practices and games for academic reasons without consequence (Er. Ex. 4 ("full participation in classes which leads to the missing of practices may not, in itself, prejudice the coaches in the selection of team participants")), but also, because the players do not receive any compensation, there is no risk of losing anything if a player skips practice, does not exert full effort, or engages in any number of actions that would be considered misconduct in an employment setting. *Compare Columbia*, at 1094. ("Receipt of full financial award is conditioned upon their performance of teaching duties. When they do not perform their assigned instructional duties ... they will not be paid."). No such consequence is available here as only

some of the students receive financial aid (some receive none), receipt of which is not dependent upon participation and performance on the basketball team. (Tr. 62-63, 212, 229-30, 385).

Further, while the Regional Director stated that "[t]he players have no input into the practice schedule," DDE, at 8, this too misrepresents the record. First, Dartmouth does not have total control over scheduling games, which is generally done within the framework of the league and in conjunction with other schools. (Tr. 245) ("Scheduling of Ivy League games is done through the league."). Second, the coaches schedule practices based on availability of the gym, given it is shared with two other teams. More importantly, though, the coaches *do* seek input from the students before confirming the practice schedule. "We typically try to see what classes they've already registered for, if they have class. Sometimes they do not have classes picked out yet. And we try to get a feel for when that is. Or we work with the other staff to say okay, here's where windows might potentially work. And they might not be consistent. It might be different times of the day[.]" (Tr. 244). The record is devoid of any evidence of the typical "employment control" an employer generally exerts.[28]

6. Historically, Dartmouth Has Never Considered nor Treated Its Men's Basketball Players as Employees and No Indicia of Employment Exists.

It is also important that Dartmouth has *never* considered its student-athletes to be employees, nor has it subjected them to the various requirements of employment. Not only do they not receive compensation (and therefore are not taxed), but student-athletes cannot be "fired" or suffer negative economic or academic consequences as a result of subpar performance

[28] The Board should also reject the Regional Director's finding that Dartmouth exerts the requisite employment control over its players to establish employee status because it essentially chaperones players during road trips. Dartmouth is responsible for its students both on its campus and when they travel. As Mr. Houston explained, student safety is of the utmost importance when the team travels. (Tr. 502-03). Indeed, the very public incident concerning the St. John's basketball team players who got in serious trouble while on a road trip to this day provides a cautionary tale of letting college students out and about without restriction in a different city. https://www.latimes.com/archives/la-xpm-2004-feb-12-sp-norwood12-story.html. Control over students while traveling is a function of safety and not "employment control" over the students.

or for skipping "work." Additionally, players do not receive standard employment benefits, such as health insurance, paid time off, etc., in exchange for services. Similarly, players do not pay taxes on any of the benefits they receive and do not receive Forms W-2, nor are they required to complete I-9 Verification as are all other College employees. (Tr. 54). *See Columbia*, at 1094 (finding employee status where "the stipend portion of the financial package given to assistants is generally treated as part of the university payroll and is subject to W-2 reporting and I-9 employment verification requirements"). The same Regional Director in *MIT* found the absence of these benefits and requirements to be relevant in determining that the fellows in that case (who did not receive compensation in exchange for providing services to the University) were *not* employees under Section 2(3). *See MIT*, at 11 ("Unlike the student-employees at issue in *Columbia*, fellows do not receive W-2 forms and need not fill out I-9 employment verification requirements."). The Regional Director should have likewise found the student-athletes here were not employees under Section 2(3) of the Act.

C. The Regional Director Ignored Binding Board Precedent Under *Northwestern* By Exercising Jurisdiction Over Dartmouth's Basketball Players and Finding that the Men's Basketball Team Constitutes an Appropriate Bargaining Unit.

Even if, arguendo, the Dartmouth basketball players were employees under Section 2(3) of the Act, the Board should follow its own precedent in *Northwestern* (and the cases cited therein) and (1) not assert its jurisdiction in this case, and (2) overrule the Regional Director's conclusion that the men's basketball team constitutes an appropriate bargaining unit. In *Northwestern*, the Board held that, even when it may have the statutory authority to act, "the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 684 (1951); *see NLRB v. Teamsters Local 364*, 274 F.2d 19, 23 (7th Cir. 1960).

The facts relied upon by the Board in *Northwestern* in declining to assert jurisdiction are similarly present here, and the Board should exercise the same measured restraint.

The Board in *Northwestern* noted there had never been a petition for representation of a unit of a single college team, or a group of college teams. *Id.* The *Northwestern* Board observed that the case presented "novel and unique" circumstances given that *scholarship* players "do not fit into any analytical framework that the Board has used in cases involving other types of students or athletes" as they "bear little resemblance to the graduate student assistants or student janitors and cafeteria workers whose employee status the Board has considered in other cases." *Id.* at 1352-53.

Although the Board found that professional sports teams were distinguishable from the Northwestern football players, it stated that the Football Bowl Subdivision ("FBS")[29] did resemble a professional sport because FBS institutions engaged in the "business" of staging football contests from which they receive "substantial revenues" from gate receipts, concessions and merchandise sales, and broadcasting contracts. *Id.* Northwestern's football program generated $30 million in revenue (and $8 million in profit) during the 2012-13 academic year. *Id.* at 1351. Over a ten-year period, the program generated $235 million in revenue and approximately $76 million in profits to the university. *Id.* That business model and generation of revenue is simply not present with Dartmouth's basketball program. Dartmouth does not, and has never, realized any profits from its men's basketball program. Rather, Dartmouth ***loses*** hundreds of thousands of dollars each year to operate its team (Tr. 97; Er. Ex. 5B) and, separately, the Ivy League basketball division is unlikely to be compared to a professional sports league. Any minimal "revenue" received by the men's basketball program goes toward paying a portion of its

[29] The FBS consists of 125 NCAA Division I colleges and is college football's highest level of play.

expenses, with Dartmouth covering the rest. The program, of course, does not make a profit but is maintained for the benefit of the students, given the importance Dartmouth places on extracurricular activities on its students' overall college experience.

While the Regional Director ignored these realities and downplayed their significance as a general matter, DDE at 18 ("While there is some factual dispute as to how much revenue is generated by the men's basketball program, and whether that program is profitable, the profitability of any given business does not affect the employee status of the individuals who perform work for that business"), her view on this issue is clearly misplaced and contrary to the Board's previous findings. Given that the Board's view that issues surrounding college athletics are "novel and unique," the Regional Director erred by disregarding Dartmouth's citing to revenues and profits of a college program[30] as a factor in determining employee status and jurisdictional questions. Given Dartmouth's basketball team has been *running a net deficit* (compared to $76 million in profits generated by Northwestern), it is clear that the analogy to a professional sports team, which the Board found significant, simply does not exist here.

Notwithstanding the foregoing, even under the facts in *Northwestern* regarding that football program's participation in FBS football, its "business" of staging football contests, and its generation of millions of dollars in revenues and profits, the Board still found that: "the activity of staging athletic contests must be carried out jointly by the teams in the league or association involved" and "unlike other industries, in professional sports, as in FBS football, there is no 'product' without direct interaction among the players and cooperation among the various teams." *Id.* The Board explained:

> For this reason, as in other sports leagues, academic institutions that sponsor Intercollegiate athletics have banded together and formed the

[30] The General Counsel's Office similarly cites to the revenues and profits as a relevant factor in the memorandum cited, *supra*.

> NCAA to, among other things, set common rules and standards governing their competitions, including those applicable to FBS football. The NCAA's members have also given the NCAA the authority to police and enforce the rules and regulations that govern eligibility, practice, and competition. The record demonstrates that the **NCAA now exercises a substantial degree of control over the operations of individual member teams**, including many of the terms and conditions under which the scholarship players (as well as walk-on players) practice and play the game. As in professional sports, **such an arrangement is necessary because uniform rules of competition and compliance with them ensure the uniformity and integrity of individual games, and thus league competition as a whole**. **There is thus a symbiotic relationship among the various teams, the conferences, and the NCAA**.

Id. at 1353-54 (emphasis added). Because of this significant degree of control exercised by the NCAA over Northwestern, as well as other FBS institutions, the Board held that, "[a]s a result, labor issues directly involving only an individual team and its players would also affect the NCAA, the Big Ten, and the other member institutions. Many terms applied to one team therefore would likely have ramifications for other teams." *Id.* at 1354. It would therefore be "'difficult to imagine any degree of stability in labor relations' if we were to assert jurisdiction in this single-team case." *Id.*, citing *N. Am. Soccer League*, 236 NLRB 1317, 1321-22 (1978). Indeed, such an arrangement would be "unprecedented" as "all previous Board cases concerning professional sports involve leaguewide bargaining units." *Id.*, citing *Nat'l Football League*, 309 NLRB 78, 78 (1992); *Blast Soccer Assocs.*, 289 NLRB 84, 85 (1988) (league-wide representation for Major Indoor Soccer League players); *Major League Rodeo*, 246 NLRB 743 (1979); *N. Am. Soccer League*, 245 NLRB 1301, 1304 (1979); *Am. Basketball Ass'n,* 215 NLRB, 280, 281 (1974); *Nat'l Football League Mgmt. Council*, 203 NLRB 958, 961 (1973) (indicating that before the National Football League merged with the rival American Football League, the latter league's players had league-wide representation).

The same "symbiotic relationship" exists in the present matter. Dartmouth's obligation is to comply with Ivy League and NCAA rules in numerous ways, and the men's basketball

program operates—to a significant and overwhelming degree—based on those rules. Dartmouth does not set those rules, cannot unilaterally change them, and is bound by them in order to compete in the Ivy League and NCAA. Any men's basketball contests, like the Northwestern football games, are carried out based on cooperation, communication, and rules compliance among all schools involved—meaning issues or concerns regarding the Dartmouth men's basketball team and its players would nevertheless affect and be affected by the NCAA, the Ivy League, and the other member institutions. One individual institution, acting alone, cannot possibly compete in intercollegiate sports.

Notably, the Regional Director ignored nearly all of the above *Northwestern* Board's admonitions and distinguished only one aspect of *Northwestern* – the Board's observation that public schools (that are not subject to the Act) and private schools played each other. However, the Regional Director's analysis on this one point was similarly flawed. While the Ivy League consists of eight private schools, Dartmouth competes against public and religious schools on a regular basis. In fact, during the last full season (2022-23), nearly **40% of its games (11 out of 28)** were played against public (ten) or religious (one) schools. *See* https://dartmouthsports.com/sports/mens-basketball/schedule/2022-23?grid=true. Additionally, as the Board in *Northwestern* did, Dartmouth must also be viewed through the lens of its entire group of its Division I competitors, which formed the basis of the Board's determination *not* to assert jurisdiction.

> In particular, of the roughly 125 colleges and universities that participate in FBS football, all but 17 are state-run institutions**. As a result, the Board cannot assert jurisdiction over the vast majority of FBS teams because they are not operated by "employers" within the meaning of Section 2(2) of the Act.** ... This too is a situation without precedent because in all of our past cases involving professional sports, the Board was able to regulate all, or at least most, of the teams in the relevant league or association.

Id. at 1354 (emphasis added). These same concerns are present here. Of the 351 Division I schools with a basketball program, **235 or 67% are public schools**,[31] of which the Board could not assert jurisdiction because they are *not* operated by "employers" within the meaning of the Act.

In completely disregarding the Board's binding precedent in *Northwestern* – which specifically concerned *college student-athletes* – the Regional Director seized on dicta in an inapposite footnote in *North American Soccer League*, 236 NLRB at 1321, which stated generally that "*single-location*" units "where a degree of day-to-day autonomy or control is exercised are usually presumptively appropriate no matter what industry is involved[.]" *Id.*; *see also* DDE at 22. Without citing the exceptions the Board cited in that case (or the actual holding), the Regional Director inappropriately relied on that footnote as an accepted principle in all instances. However, the Board was clear that while single-club units *could* be appropriate under certain circumstances, that was far from the rule.

> 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.

N. Am. Soccer League, 236 NLRB at 1321 (emphasis added). Ultimately, the Board in that case held, as it subsequently did in *Northwestern*, that the facts did *not* support asserting jurisdiction over one club in a multi-team league.

> In conclusion, it is clear that the League, through the commissioner, exercises a substantial degree of control over the individual clubs, including the terms and conditions of employment of the players, **so much so in fact that it would be difficult to imagine any degree of stability in labor relations if we were to find appropriate single-club units.**

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[31] *See* https://web3.ncaa.org/directory/memberList?type=12&division=I; *see also* https://www.collegevine.com/schools/private-colleges-with-d1-basketball

Id., at 1321-22 (emphasis added). Further, the Board rejected a single-team unit despite all teams being in the private sector. As such, even if the Regional Director properly exercised jurisdiction in this case—and she did not—finding Dartmouth's single men's basketball team to be an appropriate unit ignored well-established Board precedent as well as the realities of the highly interconnected nature of collegiate athletics. While the DDE cites dicta from *North American Soccer League*, it fails to acknowledge or distinguish the Board's ultimate finding in that case that, "it would be difficult to imagine any degree of stability in labor relations" for a single team unit. *North American Soccer League*, 236 NLRB 1317, 1321-1322 (1978). *See also*, *Northwestern University*, 362 NLRB at 1354, (all previous Board cases concerning sports involve league wide units, citing *National Football League*, 309 NLRB 78, 78 (1992); *Blast Soccer Associates*, 289 NLRB 84, 85 (1988); *Major League Rodeo*, 246 NLRB 743 (1979); *North American Soccer League*, 245 NLRB 1301, 1304 (1979); *American Basketball Assn*., 215 NLRB at 281; *National Football League Management Council*, 203 NLRB 958, 961 (1973).

Because *Northwestern* remains binding precedent and because the considerations upon which it is founded are present here, the Board should adhere to its own precedent for the reasons that were compelling to it eight years ago. To hold otherwise would create the very instability in labor relations that the Board in *Northwestern* concluded did not serve the purposes of the Act.

D. Adverse and Unintended Consequences for the College, the Petitioner and to the Players if They Are Found to Be Employees Under the Act.[32]

1. Federal Immigration Rules Differentiate Between Basketball Activities and Employment Services and Determining That Men's Basketball Players Are "Employees" Under the Act Will Have Significant, Negative Consequences for International Students.

International students make up at least 20% of Dartmouth's basketball team, all of whom are likely on either F-1 or J-1 visas. (Pet. Ex. 13). Students on F-1 and J-1 visas must pursue a "full course of study" throughout their academic programs in order to maintain active immigration status. 8 C.F.R. § 214.2(f)(6); 22 C.F.R. § 62.4(a). A full course of study includes undergraduate study at a college or university as certified by the appropriate university official. 8 C.F.R. § 214.2(f)(6)(i)(B); 22 C.F.R. § 62.2.

As these are student visas, not employment visas, federal immigration regulations set strict rules regarding the limited availability of employment opportunities for international students. Specifically, both F-1 and J-1 students are *limited to twenty hours per week of on-campus employment during academic terms*. 8 C.F.R. § 214.2(f)(9)(i); 22 C.F.R. §62.23(g)(2)(iii). This is because international students are expected to be making satisfactory progress toward their degree and not focused on employment. Prior to the Regional Director's Decision, basketball and basketball-related activity were not considered employment (and the basketball players were not considered employees), given the voluntary and extracurricular nature of it, which contributes to the students' academic experience. As a result, no basketball activity was counted against this twenty-hour/week cap. This is significant because, as was

[32] In this Request for Review, Dartmouth notes several public policy considerations that counsel against the NLRB asserting jurisdiction over student-athletes, including but not limited to the fact that it could jeopardize Olympic sports in America and disproportionately negatively impact sports that have historically been non-revenue generating, including almost all women's sports.

described in painstaking detail by the Union during the hearing – and then cited by the Regional Director in the Decision (pp. 9-10 (twenty-five hours over two days in a week in January)) – between CARA and Voluntary Athletically Related Activities ("VARA") students on the basketball team spend far more than twenty-hours per week engaged in some type of basketball activities, or, what the Regional Director has now deemed to be "work." If the Regional Director's Decision is upheld, then Dartmouth will no longer be permitted to exclude these many, many hours from counting against the twenty-hour employment cap set by federal immigration regulations.[33] In such a scenario, Dartmouth would be required by federal law to ensure that international students on F-1 and J-1 visas spend no more than twenty total hours per week engaged in basketball activities, as any international student who exceeds that limit would be in violation of the terms of his student visa and subject to deportation. Consequently, the Regional Director's Decision will essentially preclude international students from being able to participate in collegiate athletics, given these restrictions and the amount of time per week that the Union's own witness confirmed are spent on basketball activities. (Pet. Ex. 6; Tr. 396-408).[34]

In a cruel twist, seemingly disregarded by both the Petitioner and Region, determining that time spent performing basketball activities is "work" in service to the College would not

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[33] Note, the Regional Director's unsubstantiated comment in the Decision that, "[t]he Petitioner in this matter does not rely on an argument that all basketball-related activities inherently constitute service to Dartmouth; rather, **it argues, rightly, that some basketball-related activities constitute service to Dartmouth and are subject to Dartmouth's control**, and that the basketball players receive compensation in response" (emphasis added) – does not act as a workaround to federal immigration laws. Indeed, if playing basketball for Dartmouth is considered "employment," then all basketball-related activities (which would include the substantial number of "voluntary, athletic related activities" hours) would count toward the twenty-hour cap. Similar to other employment settings (e.g., non-exempt employees performing work during off-hours, even when not directed to do so), there would be an obligation to monitor if a student on the team is shooting around, lifting weights, etc. and, because of the risk of losing visa status, all of this will need to cease for the international players.

[34] Notably, in the 2019 GOALS Study conducted by the NCAA (the same study from 2016 that was relied upon in Memorandum GC 17-01, at 20, in determining how many hours were spent by college football players performing football-related tasks) found that the median hours spent per week on athletic activities in-season by men's basketball players was **thirty-two hours**, far exceeding the limit set by federal immigration law. https://ncaaorg.s3.amazonaws.com/research/goals/2020D1RES_GOALS2020con.pdf (slides 13-14).

only limit the time international students could spend involved in basketball but, even worse, it would prohibit those students from separately pursuing other wage-paying employment on campus, which may have been necessary to support their academic progress. Indeed, the position advanced by the Union and endorsed by the Region will result in an inequitable two-tiered system that systemically disadvantages international students. Against this backdrop, it is quite telling that, even though international students constitute at least 20% of the team, the Union *did not call a single one* to testify.

Notably, the same Regional Director in *MIT* correctly cited this issue and the direct and downstream negative impact it would have on international students in finding that the "fellows" at issue in that case were not employees.

> Lastly, the Employer notes that equating research with employment could have unintended consequences. The distinction between RAs and fellows is made in federal immigration law. . . . With respect to immigration regulations, there are strict rules regarding **a 20-hour cap per week of on-campus employment during academic terms**. If all thesis research performed by graduate students constitutes service to MIT, then hours previously deemed academic in nature will be counted against the 20-hour employment caps set by federal immigration regulations. Further, the Internal Revenue Service defines a fellowship as tax free, so long as the funding is not conditioned on the student providing any services to the academic institution. . . . It is evident that, contrary to the Petitioner's assertion, all thesis research performed by graduate students cannot constitute service to MIT, lest international students be placed at a grave disadvantage by the 20-hour employment caps set by federal immigration regulations.

MIT, at *9-10 (emphasis added). Here, like the fellow's research in question in *MIT*, if all basketball activity is considered work and service to Dartmouth (and there is no reasonable means to parse which basketball activity is service to Dartmouth, given the far-reaching holding that playing basketball and engaging in such related activity "benefits" the College), then those same international students will be placed at the same "grave disadvantage by the 20-hour employment caps set by federal immigration regulations."

However, despite the facts in this case being on all fours with *MIT*, the Regional Director, confusingly, shifts the discussion to whether *joining a union* violates federal immigration law –

> [t]he Decision and Order [in *MIT*] . . . did not hold that no international students **can be members of a labor organization** without compromising their immigration status.

DDE at 21 (emphasis added). This, of course, is irrelevant to the *work limitation* related to student visas. Dartmouth is not arguing that becoming a member of a labor organization compromises an individual's immigration status (the employer in *MIT* did not raise that argument either). However, if playing basketball for Dartmouth confers employee status on the players because those activities are considered employment, then *all* basketball and related activities will be deemed "work" for purposes of federal immigration laws and, as explained above, will have an unfair and negative effect on *all* international students engaged in athletics – a chilling result that should be avoided, as it was in *MIT*.

2. The Issues Surrounding the Student-Athletes Are Not Conducive to Collective Bargaining.

As set forth herein, Dartmouth is required to comply with the Ivy League and NCAA's requirements, including those concerning compensation and hour restrictions, to participate in these organizations. A consequence of allowing the student-athletes at Dartmouth to unionize creates a near impossible bargaining scenario in which Dartmouth will be precluded from negotiating over wages and many terms and conditions of *employment* that would otherwise be considered mandatory in all other settings, in order to comply with the Ivy League and NCAA's requirements. This, of course, will set up inevitable conflicts between the League/NCAA rules and requirements under the Act. Issues will arise over union security and dues deductions as students in the Ivy League that do not receive monetary compensation will be required to pay out

of pocket or run the risk of being precluded from engaging in these extracurricular activities – which is something Dartmouth sees as an important part of the students' education.

Further, the compacted temporal duration of any student-athlete's time on any team and the transitory and instable nature of any college team's roster create additional obstacles to the legally required bargaining process and do not make collegiate athletics well suited for the Board to exercise jurisdiction.

3. Conferring Employee Status On The Men's Basketball Players Could Create Title IX Issues.

Additionally, finding that a single men's team will be subject to the Board's jurisdiction (and the resulting bargaining over the players' terms and conditions) could raise compliance questions under Title IX of the Education Amendments of 1972. For example, paying monetary compensation to players on a men's athletic team as employees of a university raises questions about whether women on their athletic teams (and, potentially, in the same athletic sport) should receive comparable compensation to comply with Title IX. 20 U.S.C. §§1681-1688.

4. Given the Regional Director's New Definition of Compensation and Control, Any Student Who Engages in Any Conceivable Visible Student Activity That Provides a Modicum of a Benefit, Including Apparel, Could Be Deemed an Employee.

Lastly, the Regional Director's expansion of the definition of the employee beyond the clear elements of the common law definition is unworkable and will have far-reaching, negative consequences. The Regional Director places educational institutions in the position of reviewing whether they must cancel a variety of collegiate sports programs because the cost involved in providing collectively bargained-for compensation and benefits for that many students is untenable. Additionally, the Regional Director's Decision invites labor instability by blurring what constitutes work, compensation, and control. There will be endless litigation over student activities where incidental benefits are provided (rather than monetary compensation) and

whether those students are employees; student theater, educational trips where travel cost is paid by the College, etc., could all be deemed control and compensation sufficient under the Regional Director's new standard to confer employee status. The Regional Director removed any and all demarcations between student and employee, in contravention of Board and federal court precedent, without any consideration of the consequences for the students and the schools. All of these issues, which the Board should consider, weigh in favor of vacating the Decision.

E. The Issue of Classification and Treatment of Collegiate Student-Athletes Constitutes a Major Question on Which The Board Is Not Authorized or Equipped to Answer.

Lastly, the Regional Director's Decision should be overturned on the grounds that the employment status of college student-athletes constitutes a "major question" that only Congress – not the Board – is equipped or authorized to answer. Under the Supreme Court's "major questions" doctrine, a clear statement of congressional approval, through an amendment of the Act, is required to support the extreme and far-reaching expansion of the Act to define student-athletes as employees. *See Nat'l Fed'n of Indep. Bus. V. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

On this issue, the Court has been unequivocal: "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Id.*, quoting *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). "As its name suggests, the major-questions doctrine applies only when the question at issue – *i.e.*, the authority the agency is claimed to have – is a major one. That is, the question must have significant political and economic consequences." *N.C. Coastal Fisheries Reform Grp. V. Capt. Gaston LLC*, 76 F.4th 291, 297 (4th Cir. 2023). The major-questions doctrine "has a constitutional basis – safeguarding the 'separation of powers' by ensuring that agencies do not

use statutory ambiguities to make decisions vested in our elected representatives." *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. Env't Prot. Agency*, 71 F.4th 59, 67 (D.C. Cir. 2023). That is exactly what the Regional Director has done here in conferring employee status on students who do not receive monetary compensation in exchange for engaging in the extracurricular activity of basketball purportedly in service to Dartmouth. The reasoning set forth in the Regional Director's Decision, if upheld, would create an entirely new class of employees that, for nearly a century, has not existed. Courts are "more hesitant to recognize new-found powers in old statutes against a backdrop of an agency failing to invoke them previously." *N.C. Coastal Fisheries*, 76 F.4th at 297. The Board, in its eighty-nine years of existence, has never interpreted the Act to include student-athletes—to the contrary, it *expressly declined* to do so when given the opportunity in *Northwestern*. This "lack of historical precedent," coupled with the "breadth of authority" the Regional Director now claims, is a "telling indication" that the interpretation of Section 2(3) to include student-athletes extends beyond the Board's legitimate reach. *See Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 119.

VII. CONCLUSION.

If the Regional Director's Decision is allowed to stand, it will be a dramatic and far-reaching deviation from well-settled Board precedent that employers should be able to confidently rely upon. With full recognition that the decision of the Board to grant a Request for Review is discretionary, the College would submit that this particular case provides ample justification and compelling reasons to grant its Request. For all the reasons cited, the College urges the Board to grant this Request for Review.

Respectfully submitted,

TRUSTEES OF DARTMOUTH COLLEGE

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March 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Employer's Request for Review was served on the following parties this day, March 5, 2024:

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