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Playing Hardball – NLRB Holds High School Lacrosse Referees Are Employees, Not Independent Contractors

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On July 11, the National Labor Relations Board (NLRB) held that junior high and high school lacrosse referees that provided their services through the Pennsylvania Interscholastic Athletic Association (PIAA) were statutory employees under the National Labor Relations Act (NLRA) and not independent contractors. The NLRB's decision clears the way for negotiations between the represented referees and the PIAA based on a vote that favored the union. It also makes way for union organizing for referees providing services under the oversight of similar governing bodies across the country. The NLRB's ruling divided along party lines, with Democratic members Mark Gaston Pearce and Lauren McFerrin finding "employee" status over the strong dissent of Republican chairman Philip Miscimarra. The majority opinion also continued the NLRB's stance that it will "decline to acquiesce in the adverse decision of a court of appeals," as the majority disavowed having to follow existing precedent from the U.S. Court of Appeals for the D.C. Circuit in *FedEx Home Delivery* and a U.S. Court of Appeals for the Third Circuit decision affirming a prior NLRB decision involving basketball referees in *Big East Conference* and *Collegiate Basketball Officials Assn. v. NLRB*, which it found not controlling. The NLRB renounced its decision in *Big East Conference,* which involved basketball referees providing services to an organization similar to the PIAA, by noting it was rather old and outdated and not consistent with the "evolution" of the NLRB's jurisprudence. Employing the multi-factored balancing test articulated by the NLRB democrat majority in *FedEx Home Delivery* (and seemingly rejected by the D.C. Circuit), the NLRB found the nonprofit PIAA to be a NLRA employer of the lacrosse referees who officiated games for junior high and high school events. The NLRB majority relied in part on the fact that the PIAA referees had to follow "specific rules for calling lacrosse games." The majority discounted the fact that the PIAA had no direct supervision over individual referees or how they called any particular game and the referees had their fees paid by the schools, not the PIAA, so no tax withholdings were applied to the fees paid. The NLRB majority also discounted the fact that working single games were more akin to short-term assignments, an incident of independent contractor status. Chairman Miscimarra heavily critiqued the majority decision in his dissent. First, he noted there was a substantial issue whether the NLRB should exercise jurisdiction under the NLRA because under the NLRB's current "evolved" jurisprudence the PIAA and the public schools that actually assign games to and pay the referees (who are public employers not subject to the NLRA) were likely "joint employers" under the NLRB's new joint employer standard articulated in *Browning-Ferris Industries*. He also noted the broad discretion referees have when officiating and the rules the PIAA enforced

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were nothing more than the rules applicable to lacrosse, a game whose rules are established by other governing bodies. As he noted “there must be a common understanding to the game…” and he found no merit to the fact that referees had to wear uniforms to have any indicia of employee status as such things were “…required by the very nature of competitive team sports.” It seems certain that this decision will be appealed given many of the facts relied upon by the majority and the majority’s willingness to turn away from existing federal circuit court authority and its own authority to the contrary.