

WHAT THE NLRB GIVETH THE NLRB TAKETH AWAY: CONTRASTING VIEWS CONCERNING GRADUATE STUDENT UNIONS

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Abstract

This article considers two issues. First, Part I deals with the following topics: what are the practices and procedures and the National Labor Relations Board in determining questions relating to the certification process and the appropriateness of any proposed bargaining unit in the context of graduate students serving as research and teaching assistants? The second issue found in Part II revolves around the following question: Are these teaching assistants, research assistants, and graduate assistants employees for the purposes of the National Labor Relations Act. Part III offers some commentary on how the Board may have resolved these issues in the context of current labor relations in the United States. The thesis of the paper may be summed up as follows: “What the Board Giveth, the Board Can Taketh Away...”

Key Words: National Labor Relations Act; National Labor Relations Board; Certification; Bargaining Unit; Employee; Brown University; New York University

1. Introduction

Consider this scenario. Francine, Walter, and Clarke are Teaching Assistants (TAs) at Western University, a private university located in Oakmont, New Jersey. Their “contract of engagement” stipulates that for a waiver of the regular tuition payment, Walter, Francine, and Clark will teach two sections each of the Introduction to College Seminar offered by Western under the direction of a tenured faculty member in Western’s College of Education. In addition, they will perform other duties assigned to them by their “faculty mentor.” The fall semester goes well, but in the spring semester, the mentors require that the three TAs attend each class offered by the mentor and take extensive class notes (for use by students who are deemed to be in need of this “special accommodation” by the Office of Special Services at Western), and grade the mentor’s bi-weekly quizzes and mid-term examinations.

The students first complain to Dean Passarka, who oversees the various programs for graduate students at Western—but to no avail. Finally, after receiving no satisfactory resolution to their concerns, the three graduate students contact twenty-five other students similarly engaged in other Western programs to discuss whether or not they might be able to form a “student union” of some kind in order to protect their rights.

The students prepare the agenda for the meeting and then learn that there are more than seventy-five other students who are acting in various capacities in essentially “office positions” (GAs) at Western who are interested in pursuing a union of their own. They complain that they are overworked (beyond the ten hours a week originally contracted for), asked to work on weekends and evenings, and are even expected to work at the annual Western Hooding Ceremony for its graduating class. In addition, 90 students are acting as Research Assistants (RAs) who are assigned to various faculty members across campus to assist in research projects and in the preparation of research and classroom materials.

Several of these RAs noted that they are required to work many hours beyond their assigned number of semester hours and are frequently asked to monitor or administer classroom examinations for professors, as well as serving as advisors to undergraduate students in terms of their curriculum choices and options.

PART I

2. The Certification Process

Whether or not a particular group of employees is or is not entitled to representation by a labor group or union involves a process called *certification*. (Hedian, 2009; NLRB (The Act), 1935/1982). The process is managed by the National Labor Relations Board or NLRB. The website of the NLRB states the following:

The National Labor Relations Board (NLRB) is comprised of a team of professionals who work to assure fair labor practices and workplace democracy nationwide. Since its creation by Congress in 1935, this small, highly respected, independent Federal agency has had daily impact on the way America's companies, industries and unions conduct business. Agency staff members investigate and remedy unfair labor practices by unions and employers. They also conduct elections to determine whether employees wish to be represented by a union, and if so, which union." (NLRB (Website), 2015).

The process begins when a union, a group of employees, or an employer files an election petition with one of the twenty-six regional offices of the NLRB. The Regional Office will open up an investigation in order to determine whether there is a legitimate "question concerning representation" or *QCR*. A QCR exists if there are no barriers—either procedural or substantive—which might arise as impediments to conducting an election. The Regional Office will typically address the following barriers:

2.1 Substantial Showing of Interest

The first and most important issue for the Regional Office to decide is whether there is a "*substantial*" *showing of interest* among employees to invoke the NLRB's election procedures and its resources. In order to do so, a union or employee-filed petition (termed a *RC Petition*) must be accompanied by proof that at least 30% of employees in an appropriate unit support the representative named in the petition. Interestingly, a second union may intervene and likewise seek to represent the same employees (in the approximately same unit) if they can show support of at least 10% of employees. An employer petition (termed a *RM petition*) is filed by an employer to demonstrate that the union, previously certified, has lost its majority support after certification or where the employer believes that a particular union does not enjoy majority support after a demand for recognition by a union or a group of employees has been made. The latter is rarely used in cases of union representation cases. (NLRB (Case Handling Manual), 2007).

2.2 Jurisdiction

After determining that there is sufficient interest on the part of employees, the Regional Office will determine if it has *jurisdiction over the employer* named in the petition. (Amodeo, 2014). In general, the Board's jurisdiction is co-extensive with the Commerce Clause found in Article I, Section 8, Clause 3 of the Constitution which states: "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." However, the Board has established certain self-imposed limits on its jurisdiction based on "inflow and outflow requirements that businesses either buy or sell sufficient dollar amounts across state lines to trigger NLRB concern." (Dau-Schmidt et al., 2009). There also may be statutory limitations on jurisdiction. For example, it should also be noted that graduate students at *public colleges and universities* are not "covered employees" under the NLRA. Graduate students at public colleges and universities may be covered by state collective bargaining laws, where these laws exist. Under Taft-Hartley, Sections 161-168, state and local government employees are excluded from collective bargaining provisions found in the NLRA or the Wagner Act.

There are a number of state variations on the subject of which student employees (graduate students) might be accorded the right to bargain collectively. Historically, a few state laws explicitly excluded them from bargaining. Fourteen states, including California and New York, explicitly gave collective bargaining rights to academic student employees in public colleges and universities; 11 states such as Connecticut and New Mexico gave public university employees the right to collectively bargain, but left eligibility for graduate employees unresolved.

At one point, Ohio was the only state to exclude explicitly collective bargaining rights for graduate student employees while still providing the same rights to other university employees; and 23 states denied collective bargaining rights for all public university employees. (Katz, 2013; Hayden, 2001). Changes in policies (politics) in Wisconsin, Alaska, Michigan, and Indiana have included removing rights for many public employees to bargain collectively—including graduate student employees if they were so classified. (Artz, p. 1, 2012; Slater, 2013; Earnhart, 2013). Attorney Artz writes:

Federal law does not provide employees of state and local governments with the right to organize or engage in union activities, except to the extent that the United States Constitution protects their rights to freedom of speech and freedom of association. Thus, there is no protection for governmental employees' right to engage in collective bargaining. While state and local governments cannot retaliate against employees for forming a union, there is no requirement to recognize that union, much less bargain with it. States are however free to develop labor relations acts for themselves and their political subdivisions. The state courts will often look to federal law and NLRB guidance to interpret contract terms. (Artz, p. 1, 2012).

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In addition, the Board may *decline* to exercise jurisdiction over any employer or industry in a labor dispute having an effect on commerce that is “not sufficiently substantial.”

Pursuant to Section 14(c)(1) of the National Labor Relations Act or NLRA, the Board has established the following *minimum monetary standards* for exercising jurisdiction over an employer:

Type of Employer: Annual gross volume:

- Retail: \$500,000 or more
- Non-retail: Over \$50,000 outflow/inflow
- Instrumentalities of interstate commerce: \$50,000 or more
- Public utilities: \$250,000 or more
- Transit systems (other than taxis): \$50,000 or more
- Communications: \$1000,000 or more
- National defense: “substantial impact on commerce”
- Proprietary and non-profit hospitals: at least \$250,000
- Law firms: at least \$250,000.

Section 14(c)(1) of the NLRA considers five types of workers who may or may not be treated as the “employer” and denied the opportunity to seek union representation on the ground that their interests may be more closely aligned with management than labor. These include “supervisors, managerial and confidential employees, workers for public sector entities, workers for multiple entities that actually constitute a single employer, and workers for trans-border employers.” An employee who might be excluded as a “supervisor” would include an employee who (a) *holds authority* in the employer’s interest, (b) *exercises, or has power to effectively recommend action* as to, one or more of the Section 2(11) functions—i.e., to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, direct work, or adjust grievances; and (c) *uses independent judgment* in so doing. (Fisk, p. 1410 n.28, 2013).

In *NLRB v. Ky. River Cmty. Care, Inc.* (2001), the Supreme Court expressed its “unhappiness” with the NLRB’s efforts to determine who is a supervisor and as such would be excluded from the protections of the Act as a part of management. In *Oakwood Healthcare, Inc.* (2006), the NLRB provides extensive commentary and discussion relating to the “assign and responsibility to direct” standard, and the “exercise of independent judgment” standard.

As to managerial and confidential employees, *NLRB v. Yeshiva University* (1980) is especially relevant. In general, managerial employees are defined as those who “formulate and effectuate managerial policies by expressing and making operative the decisions of their employers.” (*Yeshiva University*, p. 682, 1980). The Supreme Court noted that the controlling consideration in this case is the fact that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial.” (*Yeshiva University*, p. 686, 1980). Additional considerations included faculty authority in academic matters such as “what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated... When one considers the function of a university, it is difficult to imagine decisions more managerial than these.” (*Yeshiva University*, p. 685, 1980).

2.3 Establishing an Appropriate Bargaining Unit

Having established that there is, in fact, a “substantial showing of interest” on the part of the employees and that the NLRB has jurisdiction over these employees, *Friendly Ice Cream Corporation v. NLRB* (1983) and *American Hospital Association v. NLRB* (1991) provide the context for a discussion of what might constitute an *appropriate bargaining unit*. Both cases extensively reference the National Labor Relations Act in which Congress had found the rationale for the passage of the NLRA: “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” (National Labor Relations Act (29 U.S.C. § 151), 1935/1982). What is clear from studying the key legislative findings of the Act is that the “central purpose of the act was to protect and facilitate employees’ opportunity to organize unions to represent them in collective-bargaining negotiations.” (*American Hospital Association*, p. 609, 1991).

Section 9(a) of the Act provides that the representative “designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes” shall then be the exclusive bargaining representative for all the employees in that unit. Justice Stevens, in writing for the Court in *American Hospital Association*, states that this section, “read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees.” (*American Hospital Association*, p. 610, 1991).

Given the reality (and perhaps strong possibility) of the potential for disagreement on the appropriateness of a unit selected by the employees or even disagreements extending to claims by rival unions claiming to represent the interests of the same workers, Section 9(b) authorizes the National Relations Board to decide whether the designated unit is in fact appropriate, in the following language:

The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

In *CGE CareSystems, Inc.* (1999), the NLRB considered what is known as the “community of interest” factor in determining an appropriate unit. (Hull, 2001). The NLRB discussed the difficult balance that must accompany such a determination. In referencing *Park Manor Care Ctr., Inc.* (1991), the NLRB stated:

The Board must steer a careful course between two undesirable extremes. If the unit is too large, it may be difficult to organize, and when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. (*Park Manor Care Ctr., Inc.*, p. 876, 1991).

In *Friendly Ice Cream Corporation v. NLRB* (1983), Circuit Judge Bownes made the following salient points with reference to the establishing bargaining units:

- Primary responsibility for determining the appropriateness of a collective bargaining unit has been vested in the Board;
- The Board, because of its expertise, has been given extraordinarily broad discretionary power;

- This power is guided by statutory direction that the chosen unit “assure(s) to employees the fullest freedom in exercising the rights guaranteed by [the Act]”;
- The Board is not required to select *the most appropriate unit* in a particular factual setting;
- The Board need only select *an* appropriate unit from the range of units appropriate under the circumstances; (Becker, 2012)
- An employer seeking to challenge the Board’s determination of a unit cannot merely point to a *more appropriate unit*;
- The burden of proof is on the employer to show that the Board’s determination of a unit is *clearly inappropriate*.

Under current labor law in the United States, an employer is not able to obtain direct review of the Board’s unit determination. Rather, an employer must refuse to bargain with the designated unit and then raise the issue of the unit’s appropriateness in a subsequent unfair labor practice proceeding. (*Pacific Southwest Airlines*, p. 1035 n.3, 1978).

Judge Bownes then underscored several important points made in *American Hospital Association* and noted that in making its determination of an appropriate unit, the Board’s primary duty is to effect the National Labor Relation Act’s policy of assuring the employees the “fullest freedom” in the exercise of their rights to bargain collectively. In terms of the possibility of a multiplicity of bargaining units, the Board must accommodate the employer’s interest in bargaining with the “most convenient possible unit,” but this interest is secondary to the employees’ interest in being represented by a representative of their own choosing. “The Act expressly dictates that employee freedom of choice must be paramount in any unit determination.” (*Friendly Ice Cream*, p. 575, 1983).

In *Friendly Ice Cream* (1983), the Circuit Court laid out the basic premise that “the critical consideration in determining the appropriateness of a proposed unit is whether the employees comprising the unit share a ‘community of interest.’” (*Friendly Ice Cream*, pp. 575-576, 1983). And, the Board is not bound to follow any “rigid rule laid down by the law or prior decisions. Since each unit determination is dependent upon factual variations, the Board is free to decide each case on an ad hoc basis.” (*Friendly Ice Cream*, p. 576, 1983). The evaluation consists of a determination of whether the employees in each unit “share a community of interest with each other in wages, hours and terms and conditions of employment.” (Dau-Schmidt et al., p. 383, 2009).

2.4 Spacing of Certification-Election activities

In order to avoid the potential problems that would accompany a repetitive number of elections in any given workplace or unit, the NLRB has developed several doctrines relating to the *spacing* of union certification or decertification activities. These include:

- The NLRB provides some election protection for a union that has gained *voluntary recognition* by an employer. (Liebman, 2009). In such a case, employees must be given written notice that they have 45 days to file a decertification petition. After the required 45 days has passed without the employees having filed the decertification petition, the union will have a “reasonable period of time” to bargain with the employer without fear of a rival union petition. (*Dana Corporation*, 2007); *Brennan Cadillac, Inc.*, 1977). It is ironic that sometimes an employer who might otherwise be opposed to unionization might voluntarily recognize a union. Professors Dau-Schmidt et al. suggest that employer might do so because the employer is already dealing with a union under other circumstances; the employer believes it will *eventually* become unionized and the union seeking recognition “is better than any number of potential alternative unions”; or the employer fears recognition picketing. (Dau-Schmidt, p. 432, 2009; Modjeska, 1983).
- There is also a *statutory election bar*. Section 9(c)(3) states that, “[n]o election shall be directed in any bargaining unit... within which in the preceding twelve month period a valid election shall have been held.” During the last 60 days prior to the expiration of the one-year period of the bar, *the election petition may be filed so long as the election itself does not take place within the one year bar period*. This provision only applies to a valid election and does not apply to a situation where the Board has mandated a re-run election. (Meeker, 1999).

- The NLRB generally requires that the status of a certified union will remain unchallenged for a *one-year period*, absent unusual circumstances such as a “a schism” within a union, or its becoming a non-entity, or a “radical change” in the size of a unit over a short period of time has occurred. (*Brooks v. NLRB*, 1954).
- In addition, there is also a mechanism called a “*contract bar*” under which the NLRB has required that a legitimate collective bargaining agreement (called the “contract”) will bar a certification election. (O’Gorman, 2012, citing *NLRB v. Burns International Security Services, Inc.*, 1972). The “contract” must be binding on the parties; must be of definite duration; and must contain terms and conditions of employment that are both lawful and consistent with the purposes NLRA. In this case, the contract bar will not bar an election for more than 3 years. (NLRB, 1972). In *Dana Corp.* (2007), however, the contract bar was significantly modified by the NLRB. The Board held that a contract will not bar an election in voluntary recognition cases unless: (1) employees have been given notice of their right to file a de-certification petition within 45 days of voluntary recognition, and (2) 45 days have passed without the filing of a valid petition. (*Dana Corp.*, 2007).
- The NLRB will not hold an election in cases where there are *substantial pending unfair labor practice allegations* or where there are cases which have already been filed which affect the bargaining unit. Because these allegations *block* the holding of an election, they are referred to as “blocking charges.” (Tymann, 2014; Harper & Eistreich, 2011, citing Fisk & Malamud, 2009 and citing Gorman & Finken, 2004). The election may effectively be “unblocked” if the charges are resolved or if the party that would be affected adversely by the alleged unfair labor practices agrees to go forward with an election, even though the charges have not yet been resolved.

The author of the NLRA, Senator Robert Wagner of New York, had insisted that activities that would interfere with employees’ right should be specified. These activities were termed “unfair labor practices” and were found in Section 8 of the Act. Section 8(a)(1) forbids employers to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” This section generally prohibits “management threats, surveillance, espionage, restrictions on employee solicitation and communication, violence and promises of benefits.” (Dau-Schmidt et al, p. 55, 2009). Section 8(a)(2) prohibits employers in their attempts to “dominate or interfere with the formation or administration of any labor organization or contribute financial support to it.” Section 8(a)(3) prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(4) provides that employers shall not “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act.” And, section 8(a)(5) requires employers to “bargain collectively” with the representatives of employees. In conjunction with section 8(d), this provision requires employers to engage in “good faith negotiations” with a duly-selected labor organization. The NLRA was upheld by the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.* (1937) on the ground that it was based on a proper “commerce clause analysis.” (Hunter, Shannon & Blodgett, 2011).

The Taft-Hartley Act of 1947 added a statement to the Wagner Act’s pronouncement that employees had the right to organize with language that expressly affirmed workers’ rights *not* to join a union. The Taft-Hartley Act also added six provisions (Section 8)(b)(1-6)) that defined *union unfair labor practices*, including interfering with employees’ rights not to join a union, and making it unlawful for a union to cause an employer to discriminate against an employee with regard to encouraging or discouraging union membership. Taft-Hartley imposes an obligation on a union to “bargain collectively,” outlaws so-called secondary boycotts (making it unfair for a union that has a “primary dispute” with one employer to put pressure on a second employer to cause that employer to stop doing business with the first employer), prohibits strikes in “jurisdictional disputes,” prohibits a union from charging excessive dues or initiation fees, and prohibits the practice known as “featherbedding”—essentially requiring employers to pay for services that are not actually performed. (McCulloch & Bornstein, pp. 39-42, 1974).

PART II

3. Are these Teaching Assistants, Research Assistants, and Graduate Assistants Employees for the Purposes of the Act?: What the Board Giveth, the Board Can Taketh Away...”

All of the previous discussion, however, begs the real question: *Are these graduate students—teaching assistants (TAs), research assistants (RAs) and Graduate assistants (GAs)—employees?* Or do they occupy a different status under American labor law? In order to answer this question, two decisions of the National Labor Relations Board will be analyzed: *New York University* (2000) and *Brown University* (2004)—yielding very different results and very different consequences!

3.1 The Board Giveth...

The principle issue presented in *New York University* is whether a university's graduate assistants (teaching assistants, graduate assistants, and research assistants) are employees within the meaning of Section 2(3) of the National Labor Relations Act?

Background (Adapted from *New York University*, 2000)

New York University (NYU) is a large and prestigious private university located in New York City. Approximately 35,000 students attend the school, with the student body evenly divided between undergraduate and graduate students. Each year, NYU engages (hires) nearly 1,700 graduate students as graduate assistants, graders, and tutors, mainly in their undergraduate division. (The Regional Director of the NLRB later excluded graders and tutors from the bargaining unit.) The vast majority of graduate assistants were doctoral students. The United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, sought to represent a unit of graduate assistants (excluding the Sackler School of Medicine graduate assistants and the science research assistants in the Physics and Biology departments). NYU contended that the proposed unit was not appropriate because the graduate assistants were “students” and not employees within the meaning of Section 2(3) of the NLRA. As an alternate, NYU argued that, even assuming the graduate students were found to be statutory employees, “policy considerations” required their exclusion from coverage under the Act. NYU also contended that if the graduate assistants were determined to be statutory employees, only a university-wide unit of all graduate and research assistants (including those in the Sackler School of Medicine and science departments) would be an appropriate unit for representational purposes.

Analysis

Section 2(3) of the Act broadly defines the term “employee” to include “*any employee.*” This interpretation is supported by a series of cases which evidenced the Supreme Court's long support for the NLRB’s “historic, broad and literal reading of the statute.” (*NLRB v. Town & Country*, 1995; *Sure-Tan, Inc. v. NLRB*, 1984; *Hendricks County Rural Elec. Mbrshp. Corp.*, 1981) *Phelps Dodge Corp. v. NLRB*, 1941). The Supreme Court has explained that unless a category of workers is among the few groups specifically exempted from the Act's coverage, the group plainly comes within the statutory definition of “employee.” (*Sure Tan*, pp. 891-892, 1984). As Andrew Metcalf wrote: “The NLRA applies broadly to all employers whose businesses affect interstate commerce, with the exception of a few specific occupations: agricultural laborers, domestic workers, employees of a parent or spouse, independent contractors, and “individuals employed by an employer subject to the Railway Labor Act.”” (Metcalf, 2013, p. 1549 n. 31, 2013, citing 229 U.S.C. § 1522).

The Board noted that the definition of the term “employee” reflected the common law agency doctrine of the conventional master-servant relationship. In *Baker v. Flint Eng'g & Constr. Co.* (1998), the Tenth Circuit cited the elements of the economic reality test which is used in conjunction with assessing the existence of the master-servant relationship. The test encompasses the following six factors: (1) The degree of control exerted by the alleged employer over the worker; (2) The worker's opportunity for profit or loss; (3) The worker's investment in the business; (4) The permanence of the working relationship; (5) The degree of skill required to perform the work; and (6) The extent to which the work is an integral part of the alleged employer's business.). This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for a payment.

The Board stated that it was undisputed that graduate assistants are not within any category of workers that would be automatically excluded from the definition of “employee” in Section 2(3). In support of its master-servant analysis, the Board pointed to the following facts: graduate assistants perform services under the control and direction of the employer; they are compensated for these services by NYU; graduate assistants work as teachers or researchers; they perform their duties for, and under the control of, the employer's departments or programs; and graduate assistants are paid for their work and are carried on NYU’s payroll system.

The Board concluded that the graduate assistants' relationship with NYU is thus indistinguishable from a traditional master-servant relationship and thus clearly met the definition of a *statutory employee*.

In arriving at its decision, the Board found no substantial reason to distinguish this case from *Boston Medical Center* (1982), a case in which the NLRB had analyzed employee status for its graduate assistants. First, the Board considered the question of the part-time status of a graduate assistant in contrast to that of a full-time employee. Even agreeing that graduate assistants may spend a relatively smaller portion of their time working than did the house staff in *Boston Medical Center*, they were no less “employees” than part-time or others of limited tenure or status. “Time spent” was not the critical factor. (*University of San Francisco*, 1982). NYU’s comparison of the relative time the house staff and graduate assistants spent providing services for their respective employers ignored the fact that the NYU graduate assistants, just like the house staff, perform work for their employer, under their employer's control. That was the critical factor and not the time spent in this pursuit.

Second, the Board rejected NYU’s argument that the graduate assistants were not paid for their work. The Board concluded that the graduate assistants did in fact work in exchange for pay (their stipend), and not solely for the pursuit of education. However NYU may have wished to characterize a graduate assistant position, “the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the employer, and in exchange for consideration.” (*New York University*, p. 1207, 2000).

Third, the Board disagreed with NYU’s argument that work of a graduate assistant is primarily *educational*, claiming that graduate assistants perform this work in order to obtain their degrees in contrast to the house staff in *Boston Medical Center* who already had earned their degrees and were receiving advanced training in their profession. The Board agreed that working as a graduate assistant may yield an educational benefit, such as learning to teach or research. However, the receipt of such a benefit was not inconsistent with employee status. The Board also noted that it was undisputed that working as a graduate assistant was not a requirement for obtaining a graduate degree in most departments. Nor was it a part of the graduate student curriculum in most departments. Therefore, the Board concluded that “notwithstanding any educational benefit derived from graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective bargaining rights because their work is primarily educational.” (*New York University*, p. 1207, 2000).

NYU also raised a “policy argument” that extending collective-bargaining rights to graduate assistants would infringe on its academic freedom. The Board rejected this argument as well, noting that “Thirty years ago the Board asserted jurisdiction over private, nonprofit universities and colleges. (*Cornell University*, 1971) Shortly thereafter, the Board approved units composed of faculty members, and it continues to do so today.” (*C.W. Post Center*, 1971; *Univ. of Great Falls*, 1997; *Univ. of Great Falls*, 2000); *Lorretto Heights College*, 1982, enforced 1984).

The Board also noted that it had in *Boston Medical Center* “squarely addressed and rejected the argument that granting employee status to employees who are also students would improperly permit intrusion by collective bargaining into areas of academic freedom. After nearly 30 years of experience with bargaining units of faculty members, we are confident that in bargaining concerning units of graduate assistants, the parties can “confront any issues of academic freedom as they would any other issue in collective bargaining.”” (*New York University*, p. 1208, 2000). The Board concluded: “While mindful and respectful of the academic prerogatives of our Nation's great colleges and universities, we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve.” (*New York University*, pp. 1208-1209, 2000).

Based on a thorough discussion of the issues and contentions presented by NYU, the Board agreed with the Regional Director's finding that most of the graduate assistants were in fact statutory employees, notwithstanding that they simultaneously were enrolled as students. (It should be noted that the Board decided that the Sackler graduate assistants and the few science department research assistants *funded by external grants* were properly excluded from the unit on the ground that the evidence failed to establish that the research assistants performed a service for the employer and, therefore, they were not employees as defined in Section 2(3) of the Act.) “Accordingly, we will not deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they also are students.” (*New York University*, p. 1209, 2000).

3.2 And the Board Taketh Away...

The Board would get a chance just four years later to revisit the status of graduate students. Would a different composition on the Board—perhaps one with a very different view of the collective bargaining process and higher education—come to a different conclusion?

Brown University—Background (Brown University, 2004)

Brown is a private university located in Providence, Rhode Island. It was founded in 1764 and is one of the oldest and most prestigious universities in the United States. Most graduate students were enrolled in Ph.D. programs, with an estimated 1,132 seeking doctorates and 178 seeking master's degrees as of May 1, 2001.

Each semester many of these graduate students were awarded a teaching assistantship (TA), research assistantship (RA), or proctorship, and others receive a fellowship. At the time of the hearing before the Regional Director of the NLRB, approximately 375 of these graduate students were serving as TAs, 220 served as RAs, 60 were proctors, and an additional number received fellowships.

The Board took notice and gave great weight to the testimony of nearly twenty department heads, and the contents of numerous departmental brochures and other Brown University brochures, all pointing to graduate programs “steeped in the education of graduate students through research and teaching.” (*Brown University*, p. 485, 2004).

The Petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO, sought to represent a unit of approximately 450 graduate students employed as teaching assistants (TAs), research assistants (RAs) in certain social sciences and humanities departments, and proctors. The Petitioner, relying on *New York University* (2000) contended that the petitioned-for TAs, RAs, and proctors were *employees* within the meaning of Section 2(3) of the Act and that they constituted an appropriate unit for collective bargaining.

Brown argued that the TAs, RAs, and proctors should not be considered statutory employees and that this case was *factually distinguishable from NYU*. The University asserted that, unlike NYU, where only a few departments required students to serve as a TA or RA in order to receive a degree, most university departments at Brown *required* a student to serve as a TA or RA to obtain a degree. Brown contended that these degree requirements demonstrated that the students had an *educational relationship* and not an employment relationship with Brown. Brown also argued that even assuming that the individuals were statutory employees, they were temporary employees who do not have sufficient interest in their ongoing employment to entitle them to collectively bargain.

The Regional Director of the NLRB, applying *NYU*, rejected Brown's contentions and concluded that the petitioned-for unit was appropriate, and she directed an election. The election was conducted on December 6, 2001, and the ballots were impounded pending the disposition of the request for review by Brown.

What was the substance of Brown's argument before the Board? In its *Brief on Review*, Brown not only challenged the factual basis of the Regional Director's decision, but also its legal competence. Brown argued that *NYU had been decided wrongly*, and that it had mistakenly reversed twenty-five years of NLRB precedent "without paying adequate attention to the Board's role in making sensible policy decisions that effectuate the purposes of the Act." Brown contended that the Board "did not adequately consider that the relationship between a research university and its graduate students is not fundamentally an economic one but an educational one." Further, Brown contended that the support afforded to students is part of a financial aid program that compensates graduate students the same amount, regardless of their work, and without reference to the value of those services if they had been purchased by Brown on the open market (i.e., by hiring a fully-qualified Ph.D. or an adjunct faculty member or instructor). Brown also emphasized that "common sense dictates that students who teach and perform research as part of their academic curriculum cannot properly be considered employees without entangling the ... Act into the intricacies of graduate education." (*Brown Univ.*, p. 486, 2004).

The Petitioner argued that the Regional Director correctly followed the Board's decision in *NYU*, and that *NYU* must be upheld. The Petitioner contended that the “petitioned-for employees” had met the statutory definition of “employee” because they meet the common law test enunciated in *NYU*. Further, even assuming that these individuals usually were satisfying an academic requirement, this is not determinative of employee status.

Would the Board overrule its previous decision in *NYU*?

At the outset, the Board analyzed its *pre-NYU* decisions in *Adelphi University* (1972), in which it held that graduate student assistants were primarily students and should be excluded from a unit of regular faculty. Two years later, in *Leland Stanford* (1974), the Board had decided that graduate student assistants "are not employees within the meaning of Section 2(3) of the Act."

In support of this conclusion, the Board in *Brown* cited to the following specific facts established in *Leland Stanford*: (1) the research assistants were graduate students who were enrolled in the Stanford physics department as Ph.D. candidates; (2) they were *required to perform research to obtain their degree*; (3) they received *academic credit* for their research work; and (4) while they received a *stipend* from Stanford, "the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support." (*Brown University*, p. 487, 2004).

In attempting to distinguish this case from *New York University* and to frame the issue in a different light than in a traditional industrial setting, the Board noted that the United States Supreme Court has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." (*NLRB v. Yeshiva University*, pp. 680-81, 1980, citing *Syracuse University*, p. 643, 1973). The Board cited its concern for attempting to force the student-university relationship into the traditional employer-employee framework.

After carefully analyzing the issues presented, the Board came to the conclusion that its twenty-year "*pre-NYU*" principle of regarding graduate students as nonemployees was both sound and well reasoned. It stated: "It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule NYU and return to the *pre-NYU* Board precedent." (*Brown University*, p. 487, 2004). The Board continued, "The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational." (*Brown University*, p. 489, 2004). It found:

Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require--and in fact precludes--the extension of collective-bargaining rights and obligations to situations such as the one now before us. (*Brown University*, p. 489, 2004, citing *St. Clare's Hospital*, p. 1002, 1977).

The Board explained, "it is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship." The Board concluded that the student-teacher relationship is based on the "mutual interest in the advancement of the student's education," while the employer-employee relationship is "largely predicated on the often conflicting interests over economic issues." Recognizing that the collective-bargaining process is fundamentally an *economic process*, the Board concluded that subjecting educational decisions to such a process would be of "dubious value" because educational concerns are largely irrelevant to wages, hours, and working conditions. In short, the Board determined that collective bargaining is not particularly well suited to educational decision-making and that any change in emphasis from quality education to economic concerns will "prove detrimental to both labor and educational policies." (*Brown University*, p. 489, 2004, citing *St. Clare's Hospital*, p. 1002, 1977).

The Board also noted that "the educational process--particularly at the graduate and professional levels--is an intensely personal one." The Board emphasized that the process is personal, not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. The Board observed that in many respects, collective treatment is "the very antithesis of personal individualized education." (*Brown University*, p. 489-490, 2004).

Finally, the Board concluded that collective bargaining would unduly infringe upon traditional academic freedoms. It cited a list of freedoms detailed in *St. Clare's Hospital* (1977), which included not only the right to speak freely in the classroom, but to many "fundamental matters" involving traditional academic decisions, including course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns.

The Board opined that once academic freedoms become the subject of collective bargaining, "Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away." (*Brown University*, p. 490, 2004, citing *St. Clare's Hospital*, p. 1003, 1977).

Based upon both statutory and policy considerations, the Board concluded that the graduate student assistants were not employees within the meaning of Section 2(3) of the Act. Accordingly, the Board declined to extend collective bargaining rights to them, and dismissed the petition. The Board then offered a summary of its core reasoning for the decision:

For the reasons we have outlined in this opinion, there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation's excellent private educational system. Although under a variety of state laws, some states permit collective bargaining at public universities, we choose to interpret and apply a single federal law differently to the large numbers of private universities under our jurisdiction. Consistent with long standing Board precedent, and for the reasons set forth in this decision, we declare the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act. (*Brown University*, p. 492, 2004).

The decision, however, was not unanimous. Board Members Liebman and Walsh strongly disagreed with the majority. The essence of their dissenting views may be found in the following paragraph:

Today's decision is woefully out of touch with contemporary academic reality. Based on an image of the university that was already outdated when the decisions the majority looks back to, Leland Stanford and St. Clare's Hospital, were issued in the 1970's, it shows a troubling lack of interest in empirical evidence. Even worse, perhaps, is the majority's approach to applying the Act. It disregards the plain language of the statute--which defines "employees" so broadly that graduate students who perform services for, and under the control of, their universities are easily covered--to make a policy decision that rightly belongs to Congress.... The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions. (*Brown University*, pp. 493-494, 2004).

Was the issue once again "settled"?

PART III

4. Commentary and Conclusions

The majority in *Brown University* made several rather sweeping claims about the "academy" that merit some attention. As we noted before, the majority maintained that that collective bargaining can only harm "academic freedom" and educational quality. The majority emphasized that the process of collective bargaining is "predicated on the collective or group treatment of represented individuals," while the "educational process" involves personal relationships between individual students and faculty members in a unique "mentoring relationship" which would some how be destroyed if graduate students in these circumstances were permitted to have unions.

The minority in *Brown University*, however, cited Daniel Julius and Patricia Gumport who had concluded not only that "fears that [collective bargaining] will undermine mentoring relationships . . . appear to be foundationless," but also that data "suggest that the clarification of roles and employment policies can enhance mentoring relationships." (*Brown University*, p. 500, 2004, citing Julius & Gumport, pp. 201, 209, 2002). NLRB Members Liebman and Walsh also noted that Gordon Hewitt had reached a similar conclusion based on his analysis of the attitudes of almost 300 faculty members at five university campuses with at least four-year histories of graduate-student collective bargaining. Hewitt noted that:

It is clear . . . that faculty do not have a negative attitude toward graduate student collective bargaining. It is important to reiterate that the results show faculty feel graduate assistants are employees of the university, support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. It is even more important to restate that, based on their experiences, collective bargaining does not inhibit their ability to advise, instruct, or mentor their graduate students. (*Brown University*, p. 500, 2004, citing Hewitt, p. 164, 2000).

More than ten years later, Rogers, Eaton, and Voss (2013) conducted research that suggested that unionization does not negatively affect academic freedom nor did it harm faculty-student relationships.

It is also worth noting that the majority in *Brown* had also invoked "academic freedom" as a basis for denying graduate student employees the right to organize under the Act. The dissenting Members, however, stated: "This rationale adds insult to injury." (*Brown University*, p. 500, 2004). The continued by noting that the majority had arrived at its definition of "academic freedom" in such a way as to broadly assert that academic freedom is "necessarily incompatible with any constraint on the managerial prerogatives of university administrators." (*Brown University*, p. 500, 2004). The dissenting Members pointed out that academic freedom has its main focus on attempts to regulate the "content of the speech engaged in by the university or those affiliated with it" (*Brown University*, p. 500, 2004, citing *Univ. of Pennsylvania v. EEOC*, p. 197, 1990) and with efforts to bring a modicum of equity and fairness into the relationship between graduate students and faculty through a collective process of good faith bargaining.

Following the *Brown* decision, NYU refused to bargain with its graduate student union after the expiration of their initial contract in 2005. Despite a 2005-2006 strike, NYU graduate student employees were not able to obtain union recognition. That did not settle the issue. In April 2010, more than 1,000 NYU graduate assistants again filed an election petition with the NLRB. Applying its 2004 decision, Acting Regional 2 Director Elbert F. Tellem denied the petition. However, Tellem weighed in with his own views and observed that "The instant record clearly shows that these graduate assistants are performing services under the control and direction of New York University for which they are compensated. It is also clear on the record that these services remain an integral component of graduate education." (Greenhouse, 2011). NYU graduate students later filed a petition to overturn *Brown University*, which the NLRB agreed to review in 2012. Once again the "politics" of the NLRB had changed with the Obama administration. However, the case was withdrawn in 2013 in an agreement with the university to re-establish union recognition on a voluntary basis.

Should we take the majority opinion in *New York University* on its own merits as standing for academic freedom in the academy? Could there be a more simplistic (or perhaps caustic) answer to why the Board was so split on the issue of possible unionization for graduate students? Interestingly, Members Battista, Schaumber, and Meisburg were all Republicans and Members Liebman and Walsh were Democrats. *New York University* was decided under Democratic control of the Board and *Brown University* was decided under Republican control. (Datz, 2001). Reflecting this decidedly political viewpoint, Scott Jaschik reported that "the NLRB under President Obama has been the site of intense partisan battles, controversial rulings, blocked nominees and threats by Congressional Republicans to legislate to counter some NLRB rulings." (Jascik, 2012).

As of the summer of 2015, the NLRB is finally at "full strength." After an elongated and sometimes bitter confrontation between the Republican U.S. Senate and President Obama, the Board now is comprised of the following members with a 3-2 Democratic Party majority:

- Mark Gaston Pearce, Chairman (Democrat)
- Kent Y. Hirozawa (Democrat)
- Phillip A. Miscimarra (Republican)
- Harry I. Johnson, III (Republican)
- Lauren McFerran (Democrat)

The stakes could not be higher—at least is you are a fan of "big time" collegiate football. Sometimes the more obvious answer *is* the correct one!

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