

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,

Employer

and

Case No. 2-RC-23481

GSOC/UAW,

Petitioner.

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PETITIONER GSOC/UAW'S REQUEST FOR REVIEW

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Introduction

The petition in this matter, which seeks union representation for a unit of graduate student employees at New York University, was dismissed by the Regional Director for Region 2 on the ground that dismissal was compelled by the Board's decision in *Brown University* ("*Brown*"), 342 NLRB 483 (2004). It is undisputed that the *Brown* decision compels that result. The Petitioner files this Request for Review to ask that the Board reconsider that decision, which categorically excluded graduate student employees from the coverage of the Act based not on the specific facts of that case, but on a *priori* determinations about the relationship between graduate student employees and the universities that employ them.

Procedural History

On May 3, 2010, GSOC/UAW ("Petitioner") filed this petition, seeking to represent a bargaining unit of "all individuals enrolled in graduate-level programs at New York University who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title)." In response, New York University ("Employer") filed a motion to dismiss the petition, and on May 14, 2010, Regional Director Celeste Mattina issued an Order to Show Cause as to whether the petition should be dismissed based on the Board's decision in *Brown*. Both the Petitioner and the Employer filed responses to the Order to Show Cause. On June 7, 2010, the Regional Director issued an Order Dismissing Petition, based on the administrative determination

that "it seeks an election among graduate student assistants that are clearly not statutory employees under *Brown* for the reason set forth therein." *Order* at 4.

Grounds for Review

The Petitioner requests review of the Regional Director's decision to dismiss its petition pursuant to Section 102.67(c)(4) of the Board's Rules and Regulations, as there are "compelling reasons for reconsideration" of the Board's *Brown* decision. In *Brown*, the Board reversed the decision in *New York University ("NYU")*, 332 NLRB 1205 (2000), decided just four years earlier, in which the Board held that "graduate assistants are employees within the meaning of Section 2(3) [of the Act]," and that there was "no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students." *Id.* at 1205. There are compelling reasons for the Board to reconsider *Brown* and to consider whether to return to the holding of *NYU*. In particular, the Board should consider whether *Brown's* categorical exclusion of graduate student employees is inconsistent with the language and intent of the Act, whether *Brown* was based upon unsubstantiated assumptions, whether the decision relied upon policy considerations that are incompatible with the statute, whether the decision is inconsistent with other NLRB precedent and whether that decision lacks any sound logical basis.

The Legal Foundations of the *Brown* Decision

The basis of the Board's decision in *NYU* was the singularly expansive definition of "employee" provided in the Act. The relevant statutory language provides as follows:

The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C. § 152(3) (emphasis added).

In interpreting this language, the Board in *NYU* noted that the Supreme Court has provided "long support for [the Board's] historic, broad and literal reading of the statute." *NYU* at 1205, citing *NLRB v. Town & Country*, 516 U.S. 85, 91-92 (1995); *Sure-Tan, Inc. v. NLRB*, 467 NLRB 883, 891-892 (1984); *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186 (1941). The Board in *NYU* was careful to point out that under Supreme Court precedent, "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." *NYU* at 1205, citing *Sure-Tan*, 467 U.S. at 891-892.

The Board in *NYU* further explained that "[t]he definition of the term 'employee' reflects the common law agency doctrine of the conventional master-servant relationship. This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment." *NYU*, 332 NLRB at 1205-1206 (citations omitted). Applying this definition to the facts regarding *NYU*, the Board easily found that the graduate assistants at issue were employees under the Act.

The *NYU* decision built upon the foundation laid in *Boston Medical Center Corp.* ("*Boston Medical*"), 330 NLRB 152 (1999), where the Board held that interns and residents ("house staff") at a teaching hospital are employees protected by the Act. The Board held that the house staff had the right to organize, notwithstanding the fact that the services that they performed at the hospital were part of their medical education. "Their status as students is not mutually exclusive of a finding that they are employees." 330 NLRB at 161. The Board in *NYU* similarly concluded that graduate assistants could be both students and employees within the meaning of the Act.

The Brown Decision

Four years after its decision in *NYU*, the Board reversed the decision, dismissing its prior plain reading of the definition of "employee" as a mere "tautology." *Brown*, 342 NLRB at 491. The Board disregarded the extensive case law, cited above, that supports the proposition that "employee" should be given a broad and expansive reading. Instead, the Board created a categorical

exclusion for graduate student employees by relying on the false dichotomy between students and employees, holding that "graduate student assistants ... are primarily students and have a primarily educational, not economic, relationship with their university." *Brown*, 342 NLRB at 487. This categorical exclusion directly contradicts the holding in *Boston Medical* that there is no inconsistency between student and employee status. The Board should resolve this inconsistency in the case law by granting review and rejecting this false dichotomy.

From the earliest days of the NLRA, the Board has recognized that an employee who learns by providing services can nevertheless be an employee. Thus, the Board has never questioned the proposition that apprentices are employees protected by the Act, entitled to representation in collective bargaining. *Newport News Shipbuilding*, 57 NLRB 1053, 1058-59 (1944); *The Vanta Co.*, 66 NLRB 912, 914-15 (1946); *General Motors Corp.*, 133 NLRB 1063, 1064-65 (1961). The Board's conclusion in *Brown* that the relationship between graduate assistants and their university is "educational" rather than economic is contradicted by a significant body of research demonstrating the opposite, that the relationship between graduate assistants and private universities is increasingly an economic one, fully consistent with the traditional employer-employee relationship. There is simply no reason why graduate assistants cannot be both students **and** employees. Therefore, the Board's finding is based upon logical fallacy, upon assumptions that are contradicted by academic study,

and is inconsistent with a very long line of precedent finding apprentices to be employees even while they are learning their craft.

The majority in *Brown* also relied upon a summary conclusion that "collective bargaining is designed to promote equality of bargaining power, 'another concept that is largely foreign to higher education.'" *Brown*, 342 NLRB at 490. The evidence is contrary to this abstract supposition. Collective bargaining has, in fact, functioned successfully among graduate assistants at NYU itself, as well as at public institutions around the country. In the four years after the *NYU* decision, the parties in that case successfully negotiated and abided by a collective bargaining agreement. This history of successful collective bargaining stands in the stark contrast to the Board's unsupported predictions, and highlights the very compelling reasons that exist for reconsidering the *Brown* decision.

The Board's final justification for its reversal of *NYU* was its determination that "collective bargaining would unduly infringe upon traditional academic freedom." *Id.* The "academic freedom" referred to by the Board "include[d] not only the right to speak freely in the classroom, but 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." *Id.* Again, the history of collective bargaining at NYU and public universities belies this claim. The collective bargaining agreement at New York University successfully addressed the particular issue of academic freedom, which the Board identified as an

insurmountable obstacle to collective bargaining. Again, academic research indicates that collective bargaining may enhance rather than impair academic freedom.

Thus, the majority decision in *Brown* is not persuasive precedent. It is based on the assumption that employee status is inconsistent with student status. It is based upon assumptions about the relationships between graduate assistants and universities which are unsupported by any research or evidence. The majority's conclusions are contradicted by the success of collective bargaining at NYU itself, as well as at public sector universities. The decision is also inconsistent with the cases finding apprentices, who are students like the graduate assistants, to be employees. Finally, the decision is inconsistent with the Board's decision in *Boston Medical*, which was recently reaffirmed by the Board. *St. Barnabas Hospital*, 355 NLRB No. 39 (6/3/10) (See Member Schaumber's dissenting opinion, noting the conflict between *Brown* and *Boston Medical*.) The Board should reconsider *Brown* in light of this conflict.

Conclusion

The Petitioner requests review of the Regional Director's dismissal of the instant petition based on the 2004 decision in the *Brown University* case. Specifically, the Petitioner requests that the Board reverse the *Brown* decision, rejecting *Brown's a priori* determination that graduate student employees are categorically excluded from the coverage of the Act, and order that a hearing be conducted to determine – based on the particulars of this case – whether the

petitioned-for-unit is appropriate. If the Board grants review without, at this point, reversing the categorical exclusion created in *Brown*, the Petitioner requests that a hearing be ordered in which evidence can be offered regarding not only the appropriateness of the unit but also the underlying premises of the *Brown* decision, as discussed above.

Respectfully submitted,

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Dated: June 21, 2010

STATEMENT OF SERVICE

The undersigned hereby certifies and declares that one (1) copy of the document referenced below was served as follows:

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I certify and declare under penalty of perjury that the foregoing is true and correct.

s/Catherine Trafton
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