



**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK UNIVERSITY,	X	
	:	
	:	
and	:	Case No. 2-RC-23481
	:	
GSOC/UAW,	:	
	:	
Petitioner.	:	
	X	

**STATEMENT IN OPPOSITION TO REQUEST FOR REVIEW**

The Regional Director dismissed the petition in this case, seeking to represent a unit of New York University (“NYU”) graduate students “who are employed to perform the function of teaching assistants, research assistants, and graduate assistants (regardless of job title)” on the grounds that the petition seeks an election among graduate student assistants who clearly are not statutory employees under Brown University, 342 NLRB 483 (2004). NYU opposes the Request for Review of the Regional Director’s dismissal by Petitioner GSOC/UAW, which asks the Board to reconsider its decision in Brown, for three principal reasons:

1. This case does not present an appropriate occasion for reconsideration of Brown, even if the Board is inclined to re-examine that decision. In particular, NYU has virtually no teaching assistants, as graduate students who choose to teach are appointed as adjunct faculty, are treated by NYU as employees and included in an existing adjunct faculty bargaining unit. Furthermore, even if the Board were to reverse Brown, the Research

Assistants covered by the petition – most of whom perform research on externally-funded grants – are not employees under New York University 332 NLRB 1205 (2000) (“NYU”) and Leland Stanford Junior University, 214 NLRB 621 (1974) (“Stanford”).

2. The Petitioner’s belief that Brown was wrongly decided does not establish a “compelling reason” required for the Board to grant review. To the contrary, reconsideration of the employee status of graduate student assistants for the third time in ten years would undermine predictability and stability in the law.
3. Brown was correctly decided and the Petitioner does not present persuasive reasons for its reconsideration.

## ARGUMENT

### **1. This Is Not An Appropriate Case for Reconsideration of Brown**

Even if the Board believes that the Brown decision should be re-examined, this case does not present an appropriate opportunity to do so.

First, NYU no longer has any appreciable number of graduate students serving as Teaching Assistants. NYU has fundamentally changed the way in which graduate students provide teaching services to the university from the system in place at the time of the representation proceeding ten years ago. Today, virtually all graduate students who want teaching experience are assigned as adjunct faculty. They are treated by NYU as employees and included in an

existing adjunct faculty bargaining unit.<sup>1</sup> Consequently, no issue is presented as to employee status, leaving no occasion for the Board to re-examine the Brown decision as applied to them. Nor would a factual record regarding these graduate students have any relevance in the Board's re-examination of the factual premises underlying the Brown decision. NYU is unlike other universities that may continue to appoint graduate students as Teaching Assistants in the Brown model, and the circumstances at NYU, therefore, are simply not relevant to any consideration by the Board of how that very different model of graduate student teaching should be viewed under the Act.

NYU and the Union dispute whether the graduate student adjunct faculty are properly placed in the bargaining unit with the University's other adjunct faculty (although that unit has included a significant number of graduate students appointed as adjunct faculty since its inception in 2002). To the extent that NYU and the Union disagree on that point, this representation petition is not the vehicle to resolve that dispute and it has nothing to do with the Brown decision. If the graduate student adjunct faculty were the only individuals at issue in this case, there plainly would be no issue presented under Brown, and no justification to grant the Union's request for review.

Second, the Union also seeks to include in the proposed bargaining unit graduate students who serve as Research Assistants. While Brown does require dismissal of the petition as to Research Assistants, it is not Brown by itself that stands in the way of the Union's petition. Rather, the Board's earlier decision in NYU, 332 NLRB 1205 (2000), excluded from the bargaining unit

---

<sup>1</sup> There are no graduate students serving as Teaching Assistants in the Graduate School of Art and Sciences or the Stenhart School of Education, the two schools that previously had the vast majority of Teaching Assistants. There are currently less than 15 teaching assistants in other schools throughout the university. This handful of students in a few schools does not provide a sufficient or representative group to allow any meaningful re-examination of Brown.

Graduate Assistants in NYU's Sackler Institute of Biomedical Sciences and Research Assistants in certain science departments who were funded by external grants. The Board held that because these students were not providing services to the University, they were not employees under the Act. In so holding, the Board relied on long-standing principles adopted in Stanford, 214 NLRB 621 (1974).

Petitioner asserts that there are “compelling reasons to reconsider Brown and to consider whether to return to the holding of NYU.” (Request for Review at 3) But returning to the holding of NYU would leave intact the Board's ruling in NYU that the Graduate Assistants in the Sackler Institute and Research Assistants in the science departments on externally funded grants are not employees, and similarly situated Research Assistants would properly be excluded as non-employees for the same reasons.

Petitioner does not address this aspect of the case at all, although it was presented to the Regional Director and addressed in the order dismissing the Petition. Petitioner asserted below that it seeks to represent all of NYU's Research Assistants, including those who would be excluded by the Board's decision in NYU, but it offers no explanation whatsoever of why the Board should reconsider that aspect of the NYU decision and even less so the Stanford decision which has stood unquestioned for more than 35 years.

In short, this case does not present an issue as to the employee status of “Teaching Assistants” under Brown, and the Petitioner presents no basis at all – let alone the required compelling circumstances – for reconsideration of the exclusion of Research Assistants from coverage under the Act under both NYU and Stanford.

**2. Petitioner's Belief that Brown Was Decided Incorrectly Does Not Provide Compelling Reasons for Review**

Even if this case squarely presented an appropriate opportunity for reconsideration of Brown, Petitioner has not presented any compelling reasons for granting review of the Regional Director's dismissal of the petition.

Petitioner's belief that Brown was inconsistent with the Act and "lacks any sound logical basis" (Request for Review at 3) is not an acceptable reason for the Board to grant review. Pursuant to the Board's Rules and Regulations there are only four grounds for establishing the "compelling reasons" necessary for the Board to grant a request for review; a petitioner's disagreement with established precedent is not one of enumerated reasons.

Under Section 102.67(c) of the Board's Rules and Regulations:

The Board will grant a request for review only where compelling reasons exist therefore. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Petitioner readily concedes that there is no absence of Board precedent nor did the Regional Director depart from such precedent. Similarly, Petitioner cannot claim that the Regional Director made any erroneous decisions on substantial factual issues or that there was any

prejudicial error by the Regional Director. Indeed, in its Response to the Regional Director's Order to Show Cause, Petitioner clearly states, "the Petitioner agrees that the law, as it currently stands under Brown requires the dismissal of the petition."

In an almost identical scenario, the Board recently denied review of the Regional Director's decision in St. Barnabas, 355 NLRB No. 39 (June 3, 2010), holding that there was no reason to reconsider the Board's decision in Boston Medical Center, 330 NLRB 152 (1999). In St. Barnabas, the Board held that the precedent, "which remains the law, is directly on point. Accordingly, the Employer cannot meet the stringent requirements of Section 102.67(c) of our Rules and Regulations governing a grant of review." Similarly here, Brown is directly on point and remains the law; Petitioner, therefore cannot meet the stringent requirements of Section 102.67(c).

Petitioner puts forward no evidence of any changed circumstances, or any other reason why Brown should be reconsidered in light of present facts. Indeed, Petitioner presents no basis for reconsidering Brown that was not available to the Board at the time of the Brown decision.

Accepting this case for review only will encourage parties who disagree with a Board decision to request review of that decision as soon as the political make-up of the Board changes. The Board has an overriding obligation to ensure stable labor relations that begins with consistent precedent, rather than changing course with every Presidential election. Doing so creates an atmosphere that eliminates predictability and deprives both employers and employees of any certainty in understanding how the Board will interpret and apply the law. For the Board to consider reversing precedent relating to graduate students for the third time in ten years would be the epitome of instability. Such "[c]onstant reversals and re-reversals rob the law of

predictability and undermine the Board's integrity as its decisions look inherently political." "Students or Employees? The Struggle Over Graduate Student Unions in America's Private Colleges and Universities," 36 Journal of College and University Law 615, 638-39 (2010).

**3. Brown was Properly Decided and Petitioner Provides No Persuasive Arguments to the Contrary**

As discussed above, this case does not present an appropriate occasion for a re-examination of Brown. Because Petitioner attacks the Brown decision, however, we briefly respond to explain that Brown was correctly decided and that Petitioner has not provided any sound basis for the Board to reconsider that decision.

The Board's 2004 decision in Brown correctly returned to the precedent in place for more than 25 years prior to its 2000 decision in NYU, that graduate students who provide services to their educational institution in connection with their educational programs are not employees within the meaning of Section 2(3) of the Act. The Brown Board correctly looked to the underlying premise of the Act to determine that that "the Act is designed to cover economic relationships" and not primarily educational relationships. Brown, 342 NLRB at 488. Such a review of the Act's underlying premise is not novel, but, rather, a practice expressly deemed appropriate by the Supreme Court in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

NYU agrees with Petitioner that graduate students can be both students and employees, when the services provided to the University are separated from their educational programs – as is the case with the graduate student adjunct faculty. Brown dealt with a different situation in which "service as a graduate student assistant is part and parcel of the Ph.D degree." Brown, 342

NLRB at 488. That core holding of Brown remains the law and is fully applicable to NYU's Research Assistants, who perform research as an integral part of their educational programs.<sup>2</sup>

Petitioner claims that the Board should grant review in this case and reverse Brown for the sole reason that Brown was wrongly decided. Petitioner's arguments against the Board's decision however, do not supply a compelling basis for the Board to reconsider that decision.

Contrary to Petitioner's assertions, the Board did not disregard the case law that it claims supports an expansive definition of "employee." (Request for Review at 5) Rather, the majority in Brown clearly considered that case law and, looking to the intent of the Act, concluded that those cases did not require an extension of Sec. 2(3) to the graduate assistants at Brown or other universities. In fact, the Board made it plain that it "examine[s] the underlying purposes of the Act," not just the language of statute that really is a "tautology" insofar as Sec. 2(3) simply states that "the term 'employee' shall include any employee." (Request for Review at 5) Accordingly, following the relevant Supreme Court decisions, the Board looked to Congressional policies "for guidance in determining the outer limits of statutory employee status" to hold that Congress intended for the Act to cover economic relationships, not primarily educational relationships. Brown, 342 NLRB at 488; see also, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984).

In seeking an overly broad definition of "employee" under the Act, Petitioner suggests that the Board should reconcile the purported conflict between precedents regarding medical housestaff in Boston Medical and graduate students in Brown. (Request for Review at 6) As recognized by

---

<sup>2</sup> In addition, as discussed above, while Brown requires dismissal of the petition insofar as it seeks representation of NYU's Research Assistants, reversal of Brown would not affect the Board's ruling in NYU that NYU's Research Assistants performing research on externally funded grants are not employees under the Act.

the Board in St. Barnabas, 355 NLRB No. 39 (June 3, 2010), however, Boston Medical should not be viewed as controlling with respect to graduate students because the economic reality for medical housestaff is significantly different from that of graduate students at issue in Brown. There are substantial differences between the graduate students serving as Teaching or Research Assistants while pursuing their doctoral research in Brown and the post-graduate medical housestaff in Boston Medical who were seeking to enhance their credentials in a medical specialty after having completed their formal medical studies.

Similarly, graduate students are not equivalent to apprentices. (Request for Review at 6) Apprentices are employees because their relationship, in a traditional workplace, is predominantly economic. They have the goal of being promoted to “journeyman” or other senior positions. In essence, apprentices are akin to entry level workers who are promoted to more senior positions when they gain technical competence. In contrast, graduate students spend the majority of their time studying in classrooms within the setting of a large educational institution. Rather than seeking promotion, graduate students are almost always seeking employment with outside employers, whether in the private sector or academia.

Petitioner also argues that the Board’s Brown decision is contradicted by a significant body of research. (Request for Review at 6) Petitioner, however, fails to identify such research. There is no indication whether it was addressed to public universities, operating under a different legal framework, or whether it covered science research assistants as well as teaching assistants. In any event, such research cannot supplant the Board’s expertise as demonstrated in consistent precedent for 32 of the last 36 years holding that graduate students enjoy a predominately academic relationship with their respective universities. Petitioner cannot demonstrate any change in the student/university relationship that changes this conclusion.

Finally, Petitioner attempts to minimize the problems associated with inserting collective bargaining into an educational relationship. (Request for Review at 7-8) Following the NYU decision, there was only a single collective bargaining agreement agreed-upon between NYU and the Union. A single agreement hardly demonstrates a consistent history of stable labor relations. NYU, furthermore, disagrees that the brief experience under that agreement was benign. To the contrary, a number of faculty committees studying that experience determined that continued recognition of the Union after expiration of the agreement in 2005 would pose a significant threat to academic decision-making in graduate educational programs. Furthermore, within the last three years alone, certified graduate assistant unions at public universities have engaged in strikes at least three times, at University of Illinois at Urbana-Champaign, University of Michigan and University of California. There also have been numerous other threats of disrupting educational activities. The Petitioner's claim that graduate assistants collective bargaining has functioned successfully is questionable at best.

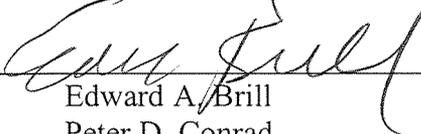
### CONCLUSION

Petitioner has failed to demonstrate the compelling reasons necessary for the Board to grant review of the administrative dismissal of the petition in this case. There is no sound reason for the Board to reconsider its decision in Brown, and certainly not to reverse Brown without the benefit of a factual record. Even if the Board were to agree with Petitioner that Brown was incorrectly decided and should be reconsidered, this is not an appropriate case for any such reconsideration.

In sum, the Board should deny the Union's Request for Review and affirm the Regional Director's dismissal of the petition.

Dated: July 6, 2010

Respectfully Submitted,  
PROSKAUER ROSE LLP



---

Edward A. Brill  
Peter D. Conrad  
Brian S. Rauch

1585 Broadway  
New York, NY 10036  
(212) 969-3015  
ebrill@proskauer.com

**CERTIFICATION OF SERVICE**

The undersigned counsel for the Employer hereby certifies that the within Statement In Opposition to Request For Review has been served by overnight and electronic mail on Tuesday, July 6, 2010 on:

Catherine Trafton, Esq.,  
Associate General Counsel  
International Union, UAW  
8000 East Jefferson Avenue  
Detroit, MI 48214  
ctrafton@uaw.net

Thomas W. Meiklejohn, Esq.,  
Livingston, Adler, Pulda, Meiklejohn and Kelly, P.C.  
557 Prospect Avenue  
Hartford, CT 06105  
twmeiklejohn@lapm.org

Celeste Mattina, Regional Director,  
Allen Rose, Esq.,  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, NY 10278-0104  
celeste.mattina@nlrb.gov  
allen.rose@nlrb.gov



---

Brian S. Rauch