UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	Case No. 2-RC-23481
GSOC/UAW,	:	
Petitioner.	:	
	:	
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OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

It may well be that reversal of *Brown* by the current Board is a "preordained result", as Member Hayes has predicted. *New York University*, 356 NLRB No. 7 at 3 (Oct. 25, 2010) (dissenting opinion) ("*NYU II*"). In its headlong rush to reverse *Brown*, however, the Board should pause long enough to consider the actual facts of this case. In doing so, it will be readily apparent that the status of NYU graduate students under *Brown* is not and never has been at issue here. Only by reaching out inappropriately to decide a question that was not litigated by the parties and is not presented on this factual record, could the Board majority accomplish its evident goal of overturning *Brown*.

Petitioner's Request for Review argues that *Brown* should be reconsidered and reversed based on its assertion that NYU graduate students appointed as adjunct faculty are "employees" under Section 2(3) of the Act. But NYU did not contest the employee status of graduate student adjuncts. It agreed that they were statutory employees. Indeed, NYU applied the terms of its collective bargaining agreement with UAW Local 7902 covering adjunct faculty to their employment in all significant respects. The issue presented at the hearing as to the graduate student adjuncts was not their employee status, but whether they were properly treated as part of the existing adjunct bargaining unit.

Petitioner treats this case as if the clock can simply be rolled back 11 years, stating it seeks to represent the same unit of graduate student employees of NYU that it represented following the decision in *New York University*, 332 NLRB 1205 (2000) ("*NYU I*"). (Request for Review at 1) It pretends that the case involves teaching assistants, who no longer exist at NYU, asserting that "[t]he only difference between teaching assistants and graduate students who receive adjunct appointments . . . is the label placed on the payments to student

employees" (Request for Review at 29) Petitioner thus disingenuously disregards the fundamental restructuring of graduate student financial aid program that resulted in the elimination of teaching assistants.

Under financial aid reform adopted in the Graduate School of Arts and Sciences in 2009, and the Steinhardt School of Culture, Education and Human Development in 2010, all doctoral students receive the same components of support, including a stipend, tuition remission and student health insurance. In a significant departure from requirements under prior financial aid programs (including those in effect at the time of *NYU I*) students are not required to perform any services in exchange for this support. By eliminating any service requirement, these reforms were intended to decrease the time to degree by allowing students to dedicate more time to their studies. (Tr. 481 (Benhabib); Tr. 1588 (Popik); Tr. 892 (Halkitis)) Students who wish to teach now do so on a voluntary basis as adjunct instructors. They are paid a salary for their work as adjuncts over and above the uniform stipend in accordance with the salary schedule set forth in the Adjunct CBA. (Tr. 372, 376, 386 (Benhabib); Tr. 714-15 (Nolan); EX 11) As such, they are treated the same as hundreds of graduate students who were not eligible for financial support as TAs, and who have been appointed as adjunct faculty each year for many years,

Petitioner ignores these fundamental changes, suggesting that NYU "magically" transformed teaching assistants into adjunct employees. (Request for Review at 8) The record, however, demonstrates the significant changes made by NYU in connection with graduate student financial aid reforms, which separated, to the greatest extent possible, the work done by graduate students as teachers from their other activities as students. As a result, the current graduate student adjuncts are different in a number of important respects

from the teaching assistants whose status was examined by the Board in both *NYU I* and *Brown.*

- In *Brown*, all doctoral students received the same level of financial support whether they were on fellowship or performing services as TAs. 342 NLRB 483, 485 (2004). Thus, as the Board reasoned, the services provided by the TAs were "not related to the money received." *Id.* In *NYU I* as well, all funded students received the same amount of funding each year regardless of whether they provided services to the University. 332 NLRB at 1206-1207. In contrast, NYU graduate students who serve as adjunct instructors are compensated separately for their efforts and receive this pay in addition to the standard support provided for all graduate students as financial aid in connection with their academic pursuits. (Tr. 372, 372 (c), (Benhabib); Tr. 714-15 (Nolan); Tr. 818 (Halkitis))
- The majority of the TAs at issue in *Brown* were required to teach as a condition of both their degrees and university funding. 423 NLRB at 485. The same was true in *NYU I*, where many students had to serve as TAs to receive a degree and all were required to provide service of some kind to the University in order to receive funding. 332 NLRB at 1212, 1215. Now teaching is entirely voluntary. The only requirements for a degree and funding are that NYU students maintain their full-time status and make "satisfactory progress" toward their dissertation; (Tr. 372, 375, 379, 395-96 (Benhabib); Tr. 511 (Kohn); Tr. 817, 820 (Halkitis); Tr. 1162, 1196 (Grier); Tr. 1365 (Gallagher); Tr. 1483 (Ferraro); Tr. 1584 (Popik))
- Finally, in *Brown* and *NYU I*, the TAs had to be enrolled as students. 342 NLRB at 488; 332 NLRB at 1212. Here, student status is not required to serve as an adjunct

instructor. (*See, e.g.,* Tr. 361-62 (Benhabib); Tr. 509 (Kohn); Tr. 697 (Nolan); Tr. 823 (Halkitis); Tr. 1081 (Renzi); Tr. 1165 (Grier); EX 54, EX 58) Indeed, some 291 individuals have held adjunct appointments as both students and non-students – often serving for multiple years as adjuncts in each capacity. (EX 120)

Under these circumstances, the question of whether the Board should continue to apply *Brown* to the type of teaching assistants considered in that case and *NYU I* is simply not presented, and the Petitioner's Request for Review should be denied on that basis alone.

Nor is there any basis for reconsideration of *Brown* with respect to other categories of graduate students involved in this case. Indeed, Petitioner's Request for Review does not even mention the two other groups of students that the Acting Regional Director included in a potential bargaining unit in the event *Brown* is reversed: research assistants and hourly-paid student workers in certain job titles. As NYU has demonstrated in its Conditional Request for Review, neither group can properly be considered employees under the Act, regardless of whether *Brown* is reconsidered and reversed. The Board has long held that research assistants in the sciences who are supported on grants while performing research leading to their dissertations are not employees. *See NYU I*; *Leland Stanford*, 214 NLRB 621 (1974). Here, the Acting Regional Director held "the research assistants in the hard sciences are indistinguishable from the RAs in the humanities and social sciences. . ." (Decision at 27) Thus, there is no basis on the record of this case to draw any such distinction, or to reconsider *Brown* solely in the context of the relatively few RAs outside of the natural sciences. Similarly, *Brown* has no applicability to the hourly-paid student workers who should be excluded from collective bargaining because they are temporary or casual employees. *See San Francisco Art Inst.,* 226 NLRB 1251, 1252 (1976).

Even if this case could be viewed as an appropriate occasion to reconsider *Brown*, the record developed at the hearing does not support the majority's belief that "compelling circumstances" exist to do so. (*NYU II*, at 1) Petitioner asks the Board to reconsider and reverse *Brown* based almost entirely on nothing more than a rehashing of the same arguments presented to and considered by the Board in *Brown*. Indeed, Petitioner's Request for Review relies extensively on the dissenting opinion in that case. There is no need for repetition here of the reasons that those arguments were correctly rejected by the majority opinion in *Brown*.

The Board has an overriding obligation to ensure stable labor relations and decisions based on a sound rational basis – rather than changing precedent with every Presidential election. Doing so only serves to create an atmosphere which denies the Act any predictability and deprives both employers and employees of any certainty in understanding how the Board will interpret and apply the law. To revise precedent relating to the employee status of graduate students for the third time in ten years based on nothing more than the changed political composition of the Board would not only rob the Act of all predictability over this important issue, but call into serious question the Board's expertise in interpreting the relevant statutory provision. 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 (2010).

The only new evidence relied on by Petitioner to supplement the same stale arguments rejected in *Brown* consists of (i) a preliminary study of the attitudes of students at

public universities about the effects of unionization which was properly disregarded by the Acting Regional Director; and (ii) a distorted view of NYU's experience under its collective bargaining agreement covering graduate assistants. As discussed below, neither provides support for reconsideration of *Brown.* Despite some 1700 transcript pages and 200 exhibits compiled over 19 days of hearing, it remains true that Petitioner is unable to "raise, allege, or reference a single fact, circumstance, arguments, legal precedent or claim that was not in existence and clearly before the Board when it rendered its decision in *Brown*" (*NYU II* at 2 (dissenting opinion)).

1. *NYU's Experience Under the Graduate Assistant CBA*

Contrary to Petitioner's assertions, NYU's experience under the Graduate Assistant Collective Bargaining Agreement from 2002-2005 confirmed the Board's concerns in Brown over the impact of collective bargaining on academic freedom and student/faculty relationships.

Notwithstanding provisions in the CBA providing NYU with broad authority over academic decision-making,[1] the University was faced with multiple grievances and arbitrations that threatened its academic autonomy. Petitioner's claim that there was no harm because NYU succeeded in defending itself against the threats is cold comfort. (Request for Review at 26) What is significant is not the results of the arbitration decisions, but the union's repeated assaults on NYU's academic freedom. Surely, it is not necessary to wait for one or more of the assaults to succeed to appreciate the very real threat that they posed.

[1] The provisions are quoted at pages 4-5 of the Request for Review.

Petitioner points out that three separate University committees studied NYU's experience with graduate assistant collective bargaining, but seriously distorts what the committees found. All of the committees agreed that the threat posed by continued representation of the UAW was an unacceptable risk to the University, and recommended withdrawal of recognition in order to safeguard the University's academic freedom.

The Faculty Advisory Committee on Academic Priorities (consisting of senior faculty members who advise the Provost on academic matters) expressed its "concern" that grievances filed in connection with the Graduate Assistant CBA had "threatened to impede the academic decision-making authority of the faculty" over several issues, including the staffing of the undergraduate curriculum, the appropriate measure of academic progress and the terms and conditions of fellowships that do not involve assistantships. (EX 39 at 2) Specifically, the Faculty Advisory Committee noted the willingness of the union to arbitrate such grievances and the possibility that an arbitrator not familiar with the University environment would severely restrict the faculty's academic freedom. As the Committee stated:

> The readiness of the United Auto Workers to grieve issues of academic decision-making and the nature of the arbitration process leads the Committee to conclude that it is too risky to the future academic progress of NYU for it to have graduate assistants represented by a union that has exhibited little sensitivity to academic values and traditions....

(*Id.*)

Similarly, the Senate Academic Affairs Committee and Executive Committee (each of which consists of students, faculty and administrators) jointly reported that notwithstanding some benefits from collective bargaining, "it became obvious that there have also been substantial disadvantages from union representation by the UAW." (EX 38)

Specifically, the Senate Committees worried that "[o]ver time, a number of these grievances, if successful, have the potential to impair or eviscerate the management rights and academic judgment of the University faculty to determine who will teach, what is taught, and how it is taught." (EX 38 at 8)

Petitioner's imaginative attempt to portray the committee reports as finding only positive effects from unionization turns the reports upside down. It presents only selected comments by individuals that were meant to reflect the diversity of the opinions throughout NYU, and not the findings or conclusions of the reports. Petitioner simply ignores numerous comments in the committee reports stating that unionization did have a negative impact on areas such as recruitment, the quality of student-faculty relationships, and other areas (EX 38 at 9-10; EX 39 at 1-2), as well as the unanimous conclusion of all three committees that it was in the best interests of the University to withdraw recognition from the union.

2. *The Voos Study*

Petitioner presented testimony by Dr. Paula Voos, a professor in the Department of Labor Studies and Employment Relations of Rutgers University, about a study comparing the attitudes of graduate students at selected public universities with and without unions, regarding faculty/student relationships and academic freedom. As the Acting Regional Director found, the testimony presented only "preliminary results of an unpublished study...which have neither been fully analyzed nor subjected to the peer-review process." (Decision at 24). Petitioner nevertheless asks the Board to rely on the study as disproving assumptions made by the Board in *Brown*. In doing so, Petitioner misrepresents both the

results of the study, as testified to by Voos, and the serious criticisms of the study by Dr. Henry Farber, a Professor of Economics at Princeton University.

The most Voos could conclude, based on the incomplete study, was that the study "*found no evidence*" that either the student/teacher relationship or academic freedom "was worse or damaged in the context of graduate student representation." (Tr. 57-59) As Dr. Farber explained, while Professor Voos' preliminary results indeed "found no evidence that the student/teacher relationship was worse or damaged in the context of graduate student representation" (Tr. 1028-29), it also found no evidence that that student/teacher relationship was *not* worse in the context of graduate student representation either. Dr. Farber pointed out that:

> at the end of the day you can't draw with confidence any conclusions about union/non union differences in the measures she's looking at. Based on the evidence that Professor Voos presents, there is a reasonable possibility that the relationship [between student and teacher] was worsened [by the presence of a union] just as there is some probability as it was helped. You just can't really learn much because of the imprecision of the evidence.

(Tr. 1031-33)

In addition, Dr. Farber explained that the study was not predictive of relationships "where there is a union and . . . about what would happen if you took a place that was non union and made it union". (Tr. 1035) Because the study looks only at certain differences, and not underlying causation, "at the end of the day . . . you can learn precisely nothing from Voos' study about what would happen at a place like NYU [or at some other university] were they to move from being non union to union." (Tr. 1037-38 (Farber))[2]

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[2] Farber similarly explained why the study by Gordon Hewitt of faculty attitudes provided no basis for drawing conclusions about the effect of unionization of graduate students. (Tr. 1039-41) Hewitt's study, in any event, was available at the time of the *Brown* decision, and, indeed, was cited by the dissent in *Brown*. It therefore does not represent any changed circumstances that would justify reconsideration of that decision.

In short, Petitioner has presented nothing that contradicts the Board's view in *Brown* that treating graduate assistants as employees would risk interference with student-faculty relations and threaten to interfere with a University's academic freedom. Neither the Voos study nor the experience at NYU supports Petitioner's request that *Brown* be reconsidered.

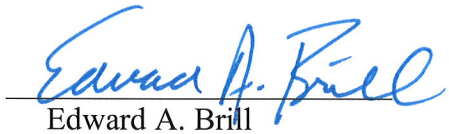
Conclusion

The Board should deny Petitioner's Request for Review and affirm the Acting Regional Director's Decision and Order Dismissing the Petition.

New York, New York
July 14, 2011

Respectfully submitted,

PROSKAUER ROSE LLP



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CERTIFICATE OF SERVICE

This is to certify that copies of the within Opposition To Petitioner's Request For Review in Case No. 2-RC-23481 has been served by electronic mail on this date on:

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