

CASENOTE

NLRB Refuses to Harm “Academic Freedom” at Universities by Permitting Graduate Student Assistants to Unionize

In *Brown University*,¹ the National Labor Relations Board (“NLRB” or “Board”) held that graduate assistants are students rather than employees, and in doing so, it settled the issue of whether graduate student assistants admitted into a university should be treated as employees for purposes of collective bargaining.² The NLRB declared that the relationship between a university and its graduate student assistants was fundamentally educational rather than economic, and therefore, no union rights exist for graduate students at Brown University (“Brown”).³

In a dissent opinion from the majority’s holding, other NLRB members found that graduate assistants at Brown are employees because they perform services under the control of the university for which they are compensated, and they regularly face work-related issues in their

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1. 342 N.L.R.B. No. 42 (July 13, 2004).
 2. *Id.*
 3. *Id.*

positions as assistants.⁴ Therefore, the dissent opinion determined that graduate assistants should be permitted to form their own bargaining units and collectively bargain with the university as other full-time faculty members do.⁵

I. FACTUAL BACKGROUND

Brown is a private university, which enrolls over 1300 graduate students and emphasizes research and teaching as integral aspects of its graduate program. Brown awards financial assistance to the vast majority of its graduate students through fellowships, teaching or research assistantships, or proctor positions. These financial awards do not include any benefits to the students, such as sick leave or health insurance. Most graduate students who participate in Ph.D. programs are required to serve as teaching assistants, research assistants, or proctors. Brown assigns assistantships to students each semester, and most students who do not receive assistantships obtain fellowships that provide funding for the students without requiring any classroom or departmental assignments. When graduate students act as such aides, they continue to enroll in classes and work on dissertations and thesis projects.⁶

A group of approximately 450 teaching assistants, research assistants, and proctors at Brown wanted to obtain union benefits as employees of Brown. Petitioner United Automobile Workers of America ("UAW") represented this group of graduate students in their efforts to form a union. UAW asserted that, according to guidelines provided in *New York University*,⁷ graduate student assistants were employees and should be able to form a collective bargaining unit. UAW noted that Brown compensated the graduate students in return for their services, and the graduate assistants' need to satisfy an academic requirement did not deprive them of the employee status.⁸

In November 2001 UAW went before the Regional Director for Region 1 of the NLRB seeking collective bargaining rights for Brown graduate student assistants. The Regional Director applied the decision in *New*

4. *Id.* (members Liebman and Walsh, dissenting). See *New York Uniu.*, 332 N.L.R.B. 1205 (2000).

5. *Brown Uniu.*, 342 N.L.R.B. No. 42 (members Liebman and Walsh, dissenting).

6. *Id.*

7. 332 N.L.R.B. 1205 (2000).

8. *Brown Uniu.*, 342 N.L.R.B. No. 42 (July 13, 2004).

*York University*⁸ and held that the graduate assistants at Brown were employees within the meaning of the National Labor Relations Act,¹⁰ entitling graduate students the right to unionize at Brown.”

Brown filed a timely request for review of the Regional Director’s decision, which the NLRB granted in March 2002. The NLRB reviewed the case and decided on July 13, 2004, to overrule *New York University*.¹² The Board held that graduate student assistants were not statutory employees; rather, they were primarily students, receiving assistantships as a form of financial aid because the relationship between a university and its graduate assistants is largely educational rather than economic.¹³

11. LEGAL BACKGROUND

On July 5, 1935, Congress enacted the National Labor Relations Act (“the Act”)¹⁴ to diminish labor disputes and to create a National Labor Relations Board. The Act’s purpose is “to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining.”¹⁵ The Act also protects the exercise of workers in freely forming associations, self-organizing, and designating representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁶

The Act grants employees the right to unionize and collectively bargain with employers in order to prevent burdens upon the flow of commerce or aggravations of recurrent business depressions.¹⁷ By protecting these rights of employees to organize and bargain collectively, the Act “safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest.”¹⁸ In order to diminish and even

9. *New York Univ.*, 332 N.L.R.B. 1205.

10. 29 U.S.C. §§ 151-169 (2000).

11. *Brown Univ.*, 342 N.L.R.B. No. 42.

12. *Id.*

13. *Id.*

14. 29 U.S.C. §§ 151-169 (2000).

15. *Id.* See 48 AM. J. JURIS. 2D, *Labor and Labor Relations* § 1 (2004).

16. 48 AM. J. JURIS. 2D, *Labor and Labor Relations* § 1.

17. 29 U.S.C. §§ 151-169.

18. *Id.*

eradicate these obstructions, the Act encourages employees to form unions and practice collective bargaining.”

A. Traditional Approach: Graduate Assistants Are Primarily Students

In *Adelphi University*,²⁰ the NLRB held that teaching and research assistants should not be included with the faculty in a bargaining unit.²¹ The Board concluded that, although graduate assistants conducted faculty-related functions, they did not share a sufficient community interest with regular faculty members to warrant their inclusion.”

Graduate assistants working towards their advanced degrees at Adelphi University (“Adelphi”) sought representation in a unit consisting of full-time and part-time faculty. Adelphi expected these graduate students to devote twenty hours per week towards their assistantship duties for which they were paid stipends and received free tuition for the academic year. Adelphi believed these assistants shared a common enough interest with regular faculty to be included in the same unit. The Board disagreed, reasoning that graduate assistants’ employment depended entirely on their enrollment as students.²³ Furthermore, the assistants lacked faculty rank and enjoyed none of the benefits given to faculty members, except for health insurance. Because regular faculty guided and assisted graduate assistants in the performance of their duties, the graduate assistants’ primary status was that of students and not employees, and therefore, they should not be included in the regular faculty bargaining unit.²⁴

The NLRB reached a similar result in *Leland Stanford Junior University*²⁵ when it held research assistants in the physics department were not employees receiving wages but were primarily students receiving financial aid.²⁶ Petitioner, the Stanford Union of Research Physicists, sought to represent research assistants in the physics department at Stanford Junior University (“Stanford”), declaring the assistants were student-employees within the protection of the Act. The assistants contended the salaries they received were consideration for

19. *Id.*

20. 195 N.L.R.B. 639 (1972).

21. *Id.*

22. *Id.* at 640.

23. *Id.*

24. *Id.* at 639-40.

25. 214 N.L.R.B. 621 (1974).

26. *Id.* See *Adelphi Univ.*, 195 N.L.R.B. at 640.

20051

ACADEMIC FREEDOM

797

work paid through normal pay-roll machinery. Stanford disagreed with this contention because it considered graduate assistants as students rather than employees. The Board agreed with Stanford and described the payments students received as stipends or grants, which enabled them to pursue advanced degrees, not consideration based on the skill or function of the graduate assistant.²⁷ Work performed by graduate assistants went toward the goal of obtaining their Ph.D.s, and Stanford's policy was to provide financial aid for their students. In addition, while graduate assistants shared privileges with other students, such as student healthcare and insurance, graduate assistants shared none of the fringe benefits of university employees. Consequently, research assistants were primarily students and not employees within the meaning of the Act; therefore, they were not entitled to collective bargaining rights.²⁸

Similarly, in *C.W. Post Center of Long Island*,²⁹ the NLRB concluded that regular and part-time faculty at the university with comparable privileges, supervision, and responsibilities were members of a unit appropriate for collective bargaining within the meaning of the Act.³⁰ However, the Board did not include student assistants in this unit because their interests and duties were not compatible with those of the regular faculty.³¹

B. Modern Trend: Graduate Assistants Are Primarily Employees

The NLRB overturned Board precedent with its decision in *New York University* in 2000.³² In that case the NLRB held that a university's graduate assistants were employees within the meaning of the Act³³ and should be permitted to form a unit with collective bargaining rights.³⁴ At the time of the hearing, 1700 of New York University's ("NYU") 17,500 graduate students served as graduate assistants, the majority of which were doctoral students. UAW sought to represent a group of graduate assistants, but NYU contended they were students and not statutory employees within the meaning of the Act. NYU insisted that graduate assistants' work was primarily educational and that extending them bargaining rights would infringe upon the

27. *Leland Stanford Junior Uniu.*, 214 N.L.R.B. at 621.

28. *Id.* at 621-23.

29. 189 N.L.R.B. 904 (1971).

30. *Id.*

31. *Id.*

32. 332 N.L.R.B. 1205 (2000).

33. 29 U.S.C. §§ 151-169.

34. *New York Uniu.*, 332 N.L.R.B. 1205.

university's academic freedom.³⁵ The NLRB determined that graduate assistants' positions as students did not prevent them from being employees within the meaning of the statute.³⁶ The Board found the Act gave no basis for denying collective bargaining rights to assistants because they were predominantly students, and the Act broadly defined the term employee to include any employee.³⁷ Reasoning that graduate assistants are compensated for their services by the university as employer, the Board found assistants should not be excluded from the Act's definition of employee.³⁸

Furthermore, the Board reasoned graduate assistant positions were not primarily educational.³⁹ Because graduate students were not required to serve as assistants to obtain their degrees at NYU, there was more than an educational benefit to performing their duties as assistants. The university benefited in having students act as employees, teaching and conducting research for a fraction of the cost of full-time faculty. The Board also rejected the notion that academic freedom would be harmed were graduate students to have collective bargaining rights.⁴⁰ The Board concluded that issues of academic freedom could be confronted as easily as any other in collective bargaining and that collective bargaining was a "dynamic institution[] capable of adjusting to new and changing work contexts"⁴¹ The NLRB ultimately decided it could not deprive employees compensated by a university of their fundamental statutory rights to organize and bargain with their employer simply because they were students.⁴²

The issue presented in *Brown University*⁴³ was whether graduate student assistants should be treated as employees for purposes of collective bargaining under section 2(3) of the Act⁴⁴ when they were admitted into a university and required to teach or conduct research as an integral part of their education.⁴⁵

35. *Id.*

36. *Id.*

37. *Id.* See 29 U.S.C. §§ 151-169.

38. *New York Uniu.*, 332 N.L.R.B. 1205.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. 342 N.L.R.B.No. 42.

44. 29 U.S.C. §§ 151-169.

45. *Brown Uniu.*, 342 N.L.R.B.No. 42.

111. COURT'S RATIONALE

The decision in *Brown University*⁴⁶ marks the NLRB's return to its pre-*New York University*⁴⁷ position. In concluding that graduate assistants were primarily students and not entitled the right to organize or collectively bargain, the Board determined the relationship between a university and its graduate student assistants was fundamentally educational rather than economic.⁴⁸

In contrast, the dissent agreed with the Board's conclusion in *New York University*, finding that because graduate assistants were compensated for services performed under the control of the university, their relationship with the university had an economic component.⁴⁹ Consequently, graduate assistants fell within the statutory meaning of "employee" in section 2(3) of the Act⁵⁰ and should have the right to unionize and collectively bargain with the university as their employer.⁵¹

A. Majority

In *Brown University* the majority held that because the relationship between Brown and its graduate student assistants was fundamentally educational rather than economic, graduate student assistants were not statutory employees within the meaning of the Act.⁵² As such, they were not entitled to collective bargaining rights.⁵³ This decision reversed the Board's holding in *New York University*, where it concluded that graduate assistants were employees who should be permitted the right to organize.⁵⁴

The basis for the majority Board's decision was as follows: (1) graduate assistants' employment was contingent upon their working toward advanced degrees and their enrollment at the university; (2) most graduate students, especially Ph.D. candidates, were required to conduct research or teach as an integral part of obtaining their degree; (3) money received by graduate student assistants was financial aid rather than

46. 342 NLRB No. 42 (July 13, 2004).

47. 332 N.L.R.B. 1205 (2000).

48. *Brown Univ.*, 342 N.L.R.B. No. 42.

49. *Id.* (members Liebman and Walsh, dissenting).

50. 29 U.S.C. §§ 151-169.

51. *Brown Univ.*, 342 NLRB.No. 42 (members Liebman and Walsh, dissenting).

52. *Id.*; 29 U.S.C. §§ 151-169.

53. *Brown Uniu.*, 342 NLRB.No. 42.

54. *New York Univ.*, 332 N.L.R.B. 1205.

consideration for work; (4) the purposes and policies of the Act, which were intended for employer-employee relationships, should not apply to student-university relationships; and (5) permitting collective bargaining in the university setting would infringe upon academic freedom.⁵⁵

The NLRB further reasoned that because the mutual interests of a university and its students were based on the advancement of a student's education, those interests were not readily adaptable to the collective bargaining process.⁵⁶ Collective bargaining was designed to promote equality of bargaining power, a concept foreign to higher education. In contrast, the interests of an employer and employee were largely predicated on conflicting interests over economic issues. The Board concluded that extending collective bargaining to a university setting would infringe upon such academic freedoms as an ability to speak freely in the classroom, length and content of courses, standards for advancement and graduation, and administration of exams.⁵⁷ Hence, the majority concluded graduate assistants were primarily students rather than employees.⁵⁸

B. Dissent

The dissent opinion in *Brown University* agreed with the NLRB's holding in *New York University*, concluding that graduate assistants were employees within the meaning of the Act and should be permitted to form a unit to collectively bargain with the university.⁵⁹ The dissent urged that the relationship between graduate assistants and a university was more than an educational one, as graduate assistants "perform[] services under the direction and control of Brown, and were compensated for those services"⁶⁰

The dissent opinion reasoned as follows: (1) the majority had no basis to deny collective bargaining rights to statutory employees merely because they were employed by an educational institution in which they were enrolled as students; (2) the Board was not free to exclude a category of workers from coverage by the Act when they met the statutory definition of employee; (3) while the Act required the existence of an economic relationship, it did not require the relationship between an employer and employee be primarily economic; (4) educational institutions were a workplace for many graduate students, which

55. *Brown Univ.*, 342 N.L.R.B. No. 42.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (members Liebman and Walsh, dissenting).

60. *Id.*

commonly involved work-related issues such as low pay and long hours; and (5) unionization of graduate assistants was driven by economic realities and collective bargaining over such issues was being conducted successfully in universities nationwide.⁶¹ Ultimately, the dissent concluded that graduate assistants are employees and thus entitled to collective bargaining rights.⁶²

IV. IMPLICATIONS

The NLRB's decision in *Brown University*⁶³ determined that graduate assistants enrolled at a university did not constitute employees within the statutory meaning of the Act.⁶⁴ The Board concluded that graduate assistants were primarily students, maintaining an educational rather than an economic relationship with their university.⁶⁵

Graduate employee unions originated because of the increasing need for bargaining power for graduate assistants. Some universities depend more frequently on graduate assistants to fill positions formerly held by tenured faculty.⁶⁶ The length of time graduate degrees require, the desire to begin families, and the need for healthcare coverage and job security, encourage graduate assistants to form units to protect themselves.⁶⁷ Graduate assistants want the ability to negotiate with their employers regarding stipends, pay periods, discipline, and benefits.⁶⁸ Because graduate assistants are such a crucial part of the university workforce, they believe they should be entitled the right to organize unions and negotiate contracts with their employers. Graduate employee unions currently exist on more than sixty campuses across the country, while even more union campaigns are forming regularly.⁶⁹

When graduate student assistants first attempted to unionize, full-time faculty bargaining unions resisted their participation. Some faculty bargaining units expressly excluded graduate students from joining by signing a stipulation to that effect. Gradually, full-time faculty began

61. *Id.*

62. *Id.*

63. 342 N.L.R.B. No. 42 (July 13, 2004).

64. *Id.*; 29 U.S.C. § 151-169.

65. *Brown Univ.*, 342 N.L.R.B. No. 42.

66. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Employee Unions*, at <http://www.cgeu.org/FAQbasics.html>.

67. *Brown Univ.*, 342 N.L.R.B. No. 42.

68. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Employee Unions*, at <http://www.cgeu.org/FAQbasics.html>.

69. *Id.*

to display a willingness to include graduate students in their unions.⁷⁰ Despite this change in the perspective of university faculty, the **NLRB** consistently refused to recognize graduate students in these collective bargaining units because the interests of faculty and students were too dissimilar, and graduate students performed only limited faculty-related functions.⁷¹

Although organizing efforts by graduate assistants have received varied responses from universities, many graduate unions continue to persist.⁷² Private universities are less receptive to the union campaigns of their graduate students, as evidenced by Brown's reaction in *Brown University*.⁷³ However, graduate assistants are hopeful that eventually both public and private institutions will recognize their efforts to form units that enable them to collectively bargain with their universities, the universities which admit them as students and employ their services as teaching and research assistants.⁷⁴

The **NLRB's** decision in *Brown University* does little to further graduate assistants' hopes of increased unionization at private universities. The **NLRB** does, however, provide the public with a strong basis for why it finds graduate assistants lack the right to unionize. Graduate students enroll in a university to obtain degrees that often require they serve as assistants, the compensation for which is awarded as financial aid. Entitling graduate students to bargaining rights enjoyed by full-time faculty would do little to further the academic structure of a university. Graduate students, who perform faculty duties such as teaching, researching, and administering exams, receive these positions strictly because they are students accepted into a program for a particular stint of time in order to obtain a degree.

Graduate students are able to work as assistants because of their admission into a university for the specific purpose of pursuing an advanced degree. Unlike professors, who have completed the necessary requirements to allow them membership on a university's full-time faculty, graduate students are still in the process of achieving this end. In fact, most college professors were once graduate assistants themselves and used their experiences to prepare for their roles as full-time professors. When graduate students fulfill university requirements for completion of their desired degrees, these students, too, may enjoy the

70. Grant M. Hayden, "The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants, 69 *FORDHAM L. REV.* 1233, 1237-38 (2001).

71. *Id.*

72. Hayden, *supra* note 70, at 1233-34.

73. 342 N.L.R.B. No. 42.

74. Hayden, *supra* note 70, at 1233-35.

20051

ACADEMIC FREEDOM

803

privileges of being hired by a university as a member of its faculty and, thus, may also enjoy the benefits of being able to collectively bargain with their employer. Therefore, the NLRB's conclusion seems to be a fair one: graduate student assistants are precisely what their title already declares them to be, students.

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