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Graduate Students, Unions, and *Brown University*

Sheldon D. Pollack and Daniel V. Johns*

I. Introduction

On July 13, 2004, the National Labor Relations Board (the Board) overturned its own four-year-old landmark decision and held that graduate teaching assistants and research assistants at private universities do not have a legal right to organize a union under federal law. The broadly worded decision handed down in *Brown University*[1] will likely be fatal toward ongoing efforts to unionize graduate students at other private universities across the country, and it will raise questions about the continued status of those unions previously organized under the authority of the Board's earlier decision in *New York University.*[2] Because public universities are state entities expressly exempt from the definition of "employer" under the National Labor Relations Act (NLRA),[3] graduate students at public universities have never enjoyed the right to unionize under federal law; however, they may possess the right to unionize under state labor law. In fourteen states, graduate students at public universities possess such a statutory right to unionize.[4]

Both the legal and academic communities were anxiously awaiting the Board's decision in the *Brown University* case, as well as several other similar cases that have been pending for several years, which all deal with the same fundamental legal issue: Do graduate students at private universities have the right to unionize under the NLRA? The

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1. Brown Univ., Case No. 1-RC-21368, slip op. 342–42, 342 N.L.R.B. No. 42 (2004); 175 L.R.R.M. (BNA) 1089.

2. New York Univ., 332 N.L.R.B. 1205 (2000); 165 L.R.R.M. (BNA) 1241.

3. Labor Relations Act, 29 U.S.C. § 151 *et seq.* The exemption is found in § 152(2), which provides that: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or *any State or political subdivision thereof* . . ." [emphasis added].

4. Figure cited in Leigh Strope, *Graduate Assistants' Union Right Withdrawn*, PHILADELPHIA INQUIRER, July 16, 2004, at A5. Of course, even where there is no statutory right to unionize, graduate students (and faculty) may form unions if the administration voluntarily recognizes and agrees to bargain with them.

Brown University case was heard by the Board on appeal from a 2001 decision of the regional director, wherein it was held that graduate research assistants and graduate teaching assistants at Brown University were "statutory employees" entitled to collective bargaining under the NLRA.[5] That ruling was an application of the Board's holding in its controversial decision in *New York University*, wherein a majority of a three-member panel of the Board departed from nearly three decades of legal precedent and held that teaching assistants and research assistants at New York University were statutory "employees" under section 2(3) of the NLRA; hence, teaching assistants and research assistants constituted an appropriate bargaining unit entitled to collective bargaining.[6] The regional directors in Regions 1 and 2 subsequently issued similar determinations consistent with *New York University* in unionization disputes at both Columbia University[7] and Tufts University.[8]

The Board accepted those decisions for review, along with the regional director's decision involving the graduate students at Brown University. Similarly, the Board reviewed the regional director's decision to allow graduate students to unionize at the University of Pennsylvania.[9] The long-awaited decision in *Brown University*, decided by a 3–2 vote,[10] holds that graduate research and teaching assistants at private universities, for whom supervised research or teaching is an "integral component" of their academic program of study, are students and not employees covered by the NLRB.[11] As such, the graduate students at Brown University have no legal right to unionize or enter into collective bargaining with the administration. Already, the broad holding of *Brown University* has been applied in other cases. Since the Board's decision in *Brown University* in July 2004, the cases involving the University of Pennsylvania and Columbia University have been dismissed by the regional directors, thereby ending the efforts by graduate students to unionize at those private universities

In recent years, the question of whether graduate students have the legal right to unionize has stirred nationwide controversy on campuses that has resulted in protracted and costly legal disputes. Polarizing confrontations over the efforts of graduate students to unionize have set faculty, students, and administrators against one another. The efforts by graduate students to unionize, as well as the resistance from administrators, are particularly intense at some of the most prestigious private universities, including Brown, Tufts, and Penn. Among gradu-

5. Brown Univ., Case No. 1-RC-21368 (2001).
6. New York Univ., 332 N.L.R.B. at 1205.
7. Tr. of Columbia Univ., Case No. 2-RC-22358 (2002).
8. Tufts Univ., Case No. 1-RC-21452 (2002).
9. Tr. of the Univ. of Pennsylvania, Case No. 4-RC-20353.
10. The voting in *Brown* strictly followed partisan lines, with three Republicans voting to overturn *New York Univ.* and the two Democrats on the Board dissenting.
11. *Brown Univ.*, 342 N.L.R.B. at 8.

ate students themselves, there is no single, uniform position, as efforts by union organizers strike a favorable chord with graduate students on some campuses, while elsewhere, unionization efforts are soundly rejected by graduate students. For example, efforts by graduate students and the UAW to unionize at Cornell University were stymied when the Cornell graduate students voted, by a 2–1 margin, not to unionize following certification by the regional director of the graduate students as an appropriate bargaining unit.[12] Likewise, graduate students at the University of Minnesota twice voted to reject a union, most recently in May 1999.[13]

Many universities have seen labor strife and even strikes resulting from such unwelcome and contested efforts by graduate students to unionize. Perhaps the most contentious struggle by graduate students was waged at Yale University. Graduate student unionization efforts have long been contentious at Yale University, and, to date, the administration has successfully avoided unionization. Graduate students on campus formed the Graduate Employees and Students Organization (GESO), which has been trying to organize a union on campus for more than a decade. The graduate student organization is not recognized as a collective bargaining unit under federal law, but it has periodically used "wildcat" strikes as a weapon against the administration. In 1995, a strike by graduate student graders led to a contentious dispute that was not resolved until five years later.[14] Ironically, when Yale graduate students voted on NLRA unionization in May 2003, they rejected unionization.[15]

This article will summarize the statutory framework and common law precedents for unionization of graduate student at private universities. In addition, the implications and precedents of the recent *Brown University* decision are considered as they apply to labor strife and continuing efforts by graduate students in the academy to unionize.

II. The Legal Status of Graduate Students Under the NLRA

Graduate student teaching assistants and research assistants (the prime targets for student unionization efforts) are creatures of the mod-

12. For an account of the vote at Cornell Univ., *see* Scott Smallwood, *Cornell's Teaching Assistants Reject Unionization*, CHRON. OF HIGHER EDUC., Nov. 8, 2002, at A12.

13. The vote at the Univ. of Minnesota is recounted in *Teaching Assistants at U. of Minnesota Reject Union*, CHRON. OF HIGHER EDUC., May 21, 1999, at A12.

14. *See* Courtney Leatherman, *Yale Settles Dispute on Grade Strike by Teaching Assistants Seeking a Union*, CHRON. OF HIGHER EDUC., Apr. 14, 2000, at A19.

15. For accounts of the continuing labor strife at Yale, *see* Jay Axelbank, *Graduate Students Strive for Union at Yale*, NEW YORK TIMES, Sept. 19, 1999, at CN 3; Steven Greenhouse, *Grad Students Reject Union in Yale Vote*, NEW YORK TIMES, May 2, 2003, at B1; Scott Smallwood, *Here They Go Again: Yale U. Continues Its Pattern of Labor Woes*, CHRON. OF HIGHER EDUC., Mar. 14, 2003, at A10.

ern research university. Accordingly, the legal issue of graduate student unionization must be viewed in the context of the unique development of the modern American research university as it has evolved since World War II.[16] Pressure for graduate student unionization is strongest on the campuses of the large elite research universities. Here, graduate students in doctoral programs find themselves in sort of a netherworld, something less than pure students but not yet admitted into the ranks of the faculty.

The large research universities literally have thousands of graduate students who perform an assortment of academic services for compensation (which, on some campuses, can take the form of a waiver of tuition and, on others, may include tuition waivers and a cash stipend). Some of these students work as graduate teaching assistants or research assistants while completing their own graduate coursework, while others who work do so as graduate teaching assistants or research assistants after finishing their own required coursework. Such work may be done during the period (which often drags on for years) when the student is completing the required thesis required for his or her degree, which, in most cases, is the Ph.D. The fact that all such graduate students who perform services (whether teaching or research) for compensation are "workers" is clear. However, whether they are "employees" for purposes of the federal labor statutes is a recurring and difficult legal issue for the Board and the courts.

In this netherworld of post-coursework graduate study, graduate students assume an important role on campuses by serving as teaching assistants in large undergraduate classes. As teaching assistants, graduate students typically teach a smaller weekly discussion session and grade papers and exams for their professor or mentor. Graduate students also provide services as research assistants for faculty members who conduct funded research, typically in the "hard" sciences, but also in the humanities and social sciences. Across the country, graduate teaching assistants play a vital role in teaching undergraduate courses and assisting faculty members in carrying out their own research projects. The pressure for graduate student unionization is strongest at these institutions.

In all of the recent cases before the Board, the university administrations contesting graduate students' rights to unionize under the NLRA have argued that those who serve as teaching assistants and research assistants are primarily students rather than "employees" within the meaning of NLRA section 2(3). Where the graduate students are enrolled in a degree program (almost always doctoral programs,

16. For a general history of the unionization movement as it evolved on American campuses, *see* JUDITH WAGNER DECEW, UNIONIZATION IN THE ACADEMY: VISIONS AND REALITIES (2003).

but in some cases Masters programs), administrators argue that graduate students are engaged in a course of study that requires research and teaching as requirements for the degree. Typically, administration also argues that the Board, courts, and the legislature should not intrude upon the relationship between faculty and graduate students and should refrain from interfering with the academic freedom afforded private educational institutions. It may be conceded by administrators that workers in the dining facilities and other service providers are employees entitled to collective bargaining under the NLRA; however, they typically argue that graduate students who teach and conduct research are participants in the academic programs themselves and, hence, not covered by federal labor law. Needless to say, the graduate students portray themselves as students, who are also independently working part-time, teaching classes, and performing research for compensation; as such, the students are employees covered by the NLRA.

A. *Early Decisions on Graduate Student Unions*

For decades, the prevailing sentiment on the Board was that graduate students were *not* employees entitled to collective bargaining under the NLRA. Indeed, the Board consistently refused jurisdiction over private nonprofit universities altogether on the theory that the activities of such institutions are "noncommercial" in nature, and the underlying policies behind the NLRA would not be furthered by asserting jurisdiction over such educational institutions.[17] In 1970, in a significant departure from that precedent, the Board asserted jurisdiction over private universities in *Cornell University* as businesses engaged in interstate commerce.[18] Based upon this determination, the Board held that the private university was subject to the NLRA.[19] This decision opened the door to widespread union organization among university faculty and staff.[20] Likewise, students working at these private universities soon began to assert rights to collective bargaining under the NLRA.

In a case involving Adelphi University, two years after the Board's decision in *Cornell University*, the Board first considered and rejected the notion that a bargaining unit should include the various graduate

17. *See, e.g.*, Tr. of Columbia Univ., 97 N.L.R.B. 424 (1951); 29 L.R.R.M. (BNA) 1098 (the Board declines to assert jurisdiction over a private, nonprofit educational institution where its activities are noncommercial in nature and intimately connected with the charitable and educational purposes of the institution on the grounds that it would not further or effectuate the policies of the NLRA).

18. *See* Cornell Univ., 183 N.L.R.B. 329 (1970); 74 L.R.R.M. (BNA) 1269, *overruling Columbia Univ.* The Board now asserts jurisdiction over any private university that purchases and receives goods and supplies in interstate commerce in excess of $50,000 and has gross revenues in excess of $1 million. *See New York Univ.*, 332 N.L.R.B. at 1205.

19. *Cornell Univ.*, 183 N.L.R.B. at 334.

20. Efforts by faculty to unionize continued until the U.S. Supreme Court issued its opinion in NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); 103 L.R.R.M. (BNA) 2526. There the Court generally held that faculty at some private universities are part of management and, hence, are not employees entitled to collective bargaining under the NLRA. *Id.*

teaching assistants and research assistants who perform services for a university.[21] The Board acknowledged that the 150 students in question taught classes, graded papers, and not only received free tuition for their efforts, but also were paid a yearly stipend of up to $2,900.[22] Nevertheless, the Board found that the assistants were "graduate students working toward their own advanced academic degrees" who benefited from few, if any, of the trappings of university employment.[23] They could not vote at faculty meetings, they had no standing with the grievance committee, and their engagement with the university was conditional upon their continued status as students. The Board concluded that the assistants were "primarily students" who "do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit."[24]

In many respects, the *Adelphi University* decision is typical of a glut of cases in the early seventies, in that the Board conflated the issue of whether the graduate assistants are employees under the NLRA with the question of whether those employees share a sufficient community of interest with the other faculty to join their unit. For example, less than four months later, the Board, in ruling on the propriety of a unit including full- and part-time faculty, librarians, and teaching assistants at the College of Pharmaceutical Sciences in the City of New York, held that the "teaching assistants" were "primarily students and do not share a sufficient community of interest with faculty members to warrant their inclusion" in the same unit.[25] As in *Adelphi University*, the students received a tuition waiver, earned an annual stipend (in this case, $2,700), and worked about sixteen to twenty hours a week.[26] But the Board, noting that "[t]heir continued employment depends upon satisfactory academic progress," excluded the graduate students for want of common interest.[27] Similarly, Georgetown University graduate assistants, whose pay was tied to their financial aid packages, who could not work more than twenty hours a week, and who were considered "temporary employees," did "not appear to have a community of interest with other regular part-time employees" and, accordingly, were excluded from a universitywide bargaining unit.[28]

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21. Adelphi Univ., 195 N.L.R.B. 639 (1972); 79 L.R.R.M. (BNA) 1545. Ironically, it was the university, and not the labor organizations, which advocated for the inclusion of graduate assistants. *Id.*

22. *Id.* at 640.

23. *Id.*

24. *Id.*

25. Coll. of Pharm. Sci. in the City of New York, 197 N.L.R.B. 959, 960 (1972); 80 L.R.R.M. (BNA) 1456.

26. *Id.* at 961.

27. *Id.*

28. Georgetown Univ., 200 N.L.R.B. 215, 216 (1972); 82 L.R.R.M. (BNA) 1046, superceded in part by Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (Pub.L. No. 93–360).

The community-of-interest framework, wherein the unique terms and conditions of student employment isolated graduate students from organized nonstudent labor, applied equally whether those students worked in an academic capacity or as part-time support and clerical staff.[29] On the same basis, Barnard College graduate students, who were employed in the residence halls or as bowling alley attendants, were barred from joining a unit of nonprofessional administrative staff because they were "treated differently . . . with respect to their initial employment, rates of pay, tenure and other employment conditions."[30] In *Barnard College*, the Board recognized the emerging question of whether students working for their university were employees under NLRB section 2(3), but omitted the matter as moot.[31]

The issue of whether students are employees under the NLRB moved to the forefront of the debate a year later, when eighty-three Stanford physics research assistants sought recognition as a unit of their own.[32] Here, the Board could not simply dismiss the petition of the students for want of a community of interest under the reasoning in *Adelphi University* that student employment was distinct from all others. The unit consisted entirely of graduate students in the physics department.[33] Instead the Board investigated, for the first time, the nature of the relationship between the assistants and the university and the purpose for which the assistants engaged in research, rather than the terms and conditions of their employment.[34] The Board noted that all of the assistants' research "lead to the thesis and are toward the goal of obtaining the Ph.D. degree" and that they were "seeking to advance their academic standing."[35] In the Board's view, the labor of the assistants was not on behalf of Stanford but was the individual's own "novel research"; therefore, assistants were deemed *primarily students* and not employees under the NLRB.[36]

After *Stanford*, the Board clarified the line of demarcation between employee and student by focusing on whether the student's motive for

29. *Id.* at 216.

30. Barnard Coll., 204 N.L.R.B. 1134, 1134–35 (1973); 83 L.R.R.M. (BNA) 1483. *See also* Cornell Univ., 202 N.L.R.B. 290 (1973); 82 L.R.R.M. (BNA) 1614 (student foodservice workers did not share community of interest with nonstudent workers).

31. *See id.* at 1135 n.5.

32. Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974); 87 L.R.R.M. (BNA) 1519.

33. *Id.* at 621.

34. *Id.* at 622–23. The Board did note in *Barnard* that the students' employment was "incidental" to their studies. 204 N.LR.B. at 1135. But both *Barnard* and later decisions show that this observation is more a comment on the short duration of student employment and how it severs the community of interest with permanent employees. *See* St. Claire's Hosp., 229 N.L.R.B. 1000, 1002 (1977); 95 L.R.R.M. (BNA) 1180; *rev'd*, Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999); 8 L.R.R.M. (BNA) 37 ("[Students'] relationship to the bargaining unit is usually viewed as transitory. It is primarily for this reason that he Board generally excludes students. . . .").

35. *Stanford*, 214 N.L.R.B. at 622–23.

36. *Id.* at 623.

seeking employment "cannot be deemed educational" and the work does not "directly enhance their education," or whether it is "directly related to their educational program."[37] In the case of the former, the students are employees and might be entitled to organize, subject to the "traditional community-of-interest" standard applied in cases like *Barnard College.*[38] If the latter, the students are not employees and fall outside the NLRB's protections. The decision is driven by the student's purpose in seeking employment, and not the nature of the employment itself.

This framework readily explains the Board's holding in *Cedars-Sinai Medical Center.*[39] At the medical center, interns and residents looked to the Board for certification of a bargaining unit. The program had strong educational elements; the interns and residents, each licensed to practice medicine in some limited capacity, enrolled in one- to five-year programs of instruction, after which they would become board certified in various specialties, such as surgery or pediatrics.[40] Each intern or resident was under the supervision of a UCLA Medical School faculty member, each was hired through a national matching program, and each was paid a flat-rate annual stipend.[41] Yet compared to the *Stanford* research assistants, whose activities were purely directed toward earning their degrees, the situation of the residents fell more into a gray area. The product of the day-to-day labor of the residents was not data for their own research but medical services performed on behalf of the hospital. As the dissenting opinion stressed, the residents performed vital hospital work, at times laboring more than 100 hours per week at an annual, taxable salary of $20,000, and were called upon to perform such activities as "open the chest wall of a 3-year-old child; hold the heart of a patient in his hands; remove breast tissues, kidneys, veins," and "deliver babies."[42]

The interns and residents clearly reaped an educational benefit from their positions, while, at the same time, delivering medical services and providing patient care similar to that of a regular employee of the hospital. By the common meanings of both words, the residents were *both* employees and students. But the Board's motive-driven framework resolved the matter otherwise. The Board emphasized the educational elements of the program and concluded that the residents were students.[43] To the majority, the residents participated in the programs not "for the purpose of earning a living" but to pursue their medical education.[44] The "primary function" of the residency program

37. *St. Claire's Hosp.*, 229 N.L.R.B. at 1001–02.
38. *Id.*
39. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976); 91 L.R.R.M. (BNA) 1398.
40. *Id.* at 253.
41. *Id.* at 252.
42. *Id.* at 255 (Fanning, Member, dissenting).
43. *Id.* at 253.
44. *Id.*

was educational, and so the residents were "primarily students."[45] The fact that the residents bore the incidents of employment was inconsequential to the *Cedars-Sinai* majority in light of the "difference between an educational and an employment relationship."[46]

The *Cedars-Sinai* and the *St. Claire's Hospital* cases dictated the state of the law as it stood in 1976, based on the Board's holdings in *Cedars-Sinai* and its companion case, *St. Claire's Hospital.*[47] These cases acted as precedent for twenty-three years, at which time, in a dramatic reversal by the Board, both cases were overruled in *Boston Medical Center Corporation.*[48] Based on a nearly identical set of facts as in *Cedars-Sinai*, the Board eschewed an examination of the motives for employment of the residents in favor of an analysis of their functional status and ruled that the residents at issue were indeed employees.[49]

To the Board that heard *Boston Medical Center*, this investigation was paramount. The Board pointed to the expansive statutory reading ordinarily required of section 2(3), under which an employment relationship is commonly found whenever a "conventional master-servant relationship" exits.[50] This relationship was clearly present in the eyes of the Board, as the interns spent "nearly 80 percent of their time in the Hospital engaged in direct patient care."[51] An inquiry into the purpose of this employment relationship was irrelevant. In *Boston Medical Center*, the Board concluded: "That house staff may also be students does not thereby change the evidence of their 'employee' status" and "nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act [the NLRB]."[52]

In *Boston Medical Center*, the Board acknowledged that it was criticized for having ignored the *Cedars-Sinai* elements of the legislative history of the 1974 Healthcare Amendments, which favored resident organization.[53] The Board also commented that in the years since *Cedars-Sinai*, every "other court, agency, and legal analyst to have grappled with this issue has concluded that interns, residents, and fel-

45. *Id.*

46. *Id.*

47. *Cedars-Sinai Med. Ctr.* sparked both state and federal litigation as to whether the Board's decision preempted state organizations from asserting jurisdiction over the residents, *see* NLRB v. Comm. of Interns & Residents, 426 F. Supp. 438 (S.D.N.Y. 1977) (describing litigation), which ultimately required the Board to clarify its position in *St. Claire's Hosp.*, 229 N.L.R.B. at 1000 ("we may not have been as precise as we might have been in articulating our views"), an identical ruling on identical facts.

48. Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999); 162 L.R.R.M. (BNA) 1329.

49. *Id.* at 168.

50. *Id.* at 160.

51. *Id.*

52. *Id.*

53. *Id.* at 161–62.

lows are employees."[54] Where the Board in *Cedars-Sinai* saw fit to deny collective bargaining rights to residents who were "primarily students," in *Boston Medical Center*, the Board opined that "we do not believe that the fact that house staff are also students warrants depriving them of collective-bargaining rights," as a policy matter.[55] Hence, the interns, residents, and fellows were classified as employees entitled to form unions and enter into collective bargaining under federal law.

B. *Landmark Decision:* New York University

Arguably, even after *Boston Medical Center*, grounds remained for continuing to distinguish between graduate students in academic programs and interns, residents, and fellows working in hospitals. After all, in subsequent cases, it was recognized that the medical staff at issue in *Boston Medical Center* spent about 80 percent of their time performing services for the hospital, while the graduate students at issue in other cases spent only about 15 percent of their time performing services as teaching and research assistants.[56] Furthermore, the graduate students perform their work in "furtherance" of their academic degree, while the medical staff already had their degrees and were seeking certification for their specialties. However, only one year after its decision in *Boston Medical Center*, the Board chose to ignore any such distinctions and collapsed graduate students and academic medical personnel into one category and subject to one rule: all are "employees" entitled to unions and collective bargaining under the NLRB.[57]

The Board applied the "function-over-purpose" analysis from *Boston Medical Center* in a case involving graduate students at New York University. Reversing nearly thirty years of precedent, the Board held in *New York University* that graduate students are statutory employees who enjoy the right to organize under the NLRB.[58] The Board reiterated its broad reading of section 2(3) and found that, like the residents in *Boston Medical Center*, the NYU graduate assistants "plainly and literally" were employees simply by virtue of providing services and performing work for pay.[59] And, as in *Boston Medical Center*, once the Board so held, it was of little moment to it that the work of the assistants yielded an educational benefit to them. Indeed, to the Board, *New York University* presented an easier case than *Boston Medical Center* in this regard. Where residents worked in furtherance of medical certification, graduate teaching was not a requirement for most advanced

54. *Id.* at 163.
55. *Id.* at 164.
56. *New York Univ.*, 332 N.L.R.B. at 1206.
57. *Id.* at 1209.
58. *Id.*
59. *Id.* at 1206.

degrees at New York University.[60] There may have been incidental educational benefits to the assistants, such as "learning to teach or research," but after *Boston Medical Center* the Board saw no inconsistency between employee status and educational benefit.[61]

The Board also rejected several policy arguments that were advanced by the New York University administration, most notably the "needlessly pessimistic" assertion that graduate assistant organization would infringe on academic freedom. Though the Board could not refute the argument completely, it put its faith in the "dynamic" nature of collective bargaining to prevent "improper interference" with academic prerogatives.[62]

In dictum reduced to a footnote, the Board elected to exclude "science department research assistants" from the newly formed unit.[63] The Board cited its prior decision in *Stanford*,[64] but here excluded the science assistants on a completely different basis. In both cases, the "evidence fail[ed] to show that the research assistants performed a service for the Employer," since all the research assistants' efforts were applied to the completion of a thesis.[65] To the *Stanford* Board, this was probative of the fact that assistants were primarily students. Since *New York University* disclaimed motive as the determinative analysis, not providing a service was in and of itself sufficient to prevent employee status under the NLRB. That is, *Stanford* assistants were students, and therefore could not be employees, while research assistants at New York University simply were not employees at all.

III. The Board's Holding in *Brown University*

In November 2001, the regional director for Region 1 held that approximately 450 graduate students, who were working as teaching assistants and research assistants in certain social science and humanities departments at Brown University, were employees within the meaning of section 2(3) of the NLRA.[66] The administration of Brown University requested a review of that decision by the Board, which was granted. On July 13, 2004, the Board issued its decision, expressly overruling its prior decision in *New York University* and reestablishing legal principles in place prior to that case—at least with respect to the

60. *Id.* at 1207 ("[I]t is undisputed that working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments. Nor is it a part of the graduate student curriculum in most departments.").

61. *Id.*

62. *Id.* at 1208.

63. *Id.* at 1209 n.10.

64. *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 621. *See supra* text accompanying notes 25–27.

65. See *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 622.

66. *Brown Univ.*, Case No. 1-RC-21368 (2001).

right of graduate students to form unions and engage in collective bargaining.[67]

In many ways, the *Brown University* facts are similar to those present in *New York University*, as well as the other cases involving the other private research universities. The graduate students perform essentially the same services at all of these universities, in both teaching classes and conducting research for faculty. However, there were some distinguishing facts present in *Brown University*. The role that these facts played in the Board's decision is uncertain.

First, twenty-one of the thirty-two academic departments that offer the Ph.D. degree at Brown University require teaching as a condition for getting the degree. That was not the case at New York University, where a much lower percentage of graduate programs required teaching of graduate students in doctoral programs. This led the Board to conclude that: "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."[68] Furthermore, only enrolled graduate students are awarded teaching assistantships. That further reinforced the close connection between the activities of the graduate students in their capacity as teaching assistants, as well as their close connection to graduate education.

Having classified the graduate teaching assistants as primarily students, the Board also looked at the question of how they receive compensation. Some 85 percent of graduate students receive financial aid at Brown University. Some of these receive full funding as fellowships, while others receive lesser funding and perform teaching services. Both the graduate teaching assistants and the fully funded fellows receive much the same total amount of financial aid, even though the fellows do not have to teach classes. According to the Board, this further evidenced that the monies paid to the graduate students are provided as *financial aid*, rather than as compensation for work.

Based on these facts, the Board held that the graduate students at Brown University are primarily students, rather than employees. "[I]n light of the status of graduate students as students, the role of graduate student assistantships in graduate education, the graduate students' relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one."[69] Reaffirming the reasons behind its prior decision in *St. Claire's Hospital*, the Board characterized the relationship between the graduate assistants and the university as

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67. *Brown Univ.*, 342 NLRB No. 42.
68. *Id.* at 7.
69. *Id.*

"educational," rather than economic.[70] Based on that, and expressly overruling *New York University*, the graduate assistants were held not to be employees within the meaning of section 2(3), and hence, not entitled to collective bargaining rights.

IV. Implications of *Brown University*

The NLRB's decision in *Brown University* obviously has immediate and wide-ranging implications for efforts to unionize graduate students at private universities. Most immediately, the *Brown University* decision effectively ends unions' pending attempts to organize graduate students at the several universities that, like Brown University, had appealed representation cases to the NLRB in light of *New York University.* At the time of this writing, the respective NLRB regional directors have already dismissed the petitions against the University of Pennsylvania and Columbia University in light of the ruling in *Brown University.* Indeed, in light of the breadth of the *Brown University* decision, union efforts to organize graduate students at private universities now rest solely on the hope that, following a change in the composition of the Board, the NLRB might be persuaded to reverse itself yet again and reinstate its holding in *New York University.* Such a result does not seem likely in the near future.

Moreover, the *Brown University* decision also calls into question the continued vitality of the union that represents graduate students at NYU. It is unclear whether NYU will continue to bargain with that union upon the expiration of its collective bargaining agreement.[71] Given the fact that the NLRB specifically overruled the *New York University* decision in *Brown University*, NYU may decide to withdraw recognition of the union and walk away from collective bargaining with its graduate assistants.

The implications of *Brown University*, however, extend beyond the realm of collective bargaining and traditional labor law. Indeed, the question of whether a graduate student serving as a teaching or research assistant is an employee impacts many other areas. For example, if teaching and research assistants are not employees under the NLRA, should they be considered employees for purposes of workers' compensation and unemployment compensation benefits?[72] Likewise,

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70. *Id.*

71. *Brown Univ.* also may impact any state labor relations boards that followed and relied upon *New York Univ.* in holding that graduate students have the right to organize. In the aftermath of *Brown Univ.*, such Boards may decide to revert to pre–*New York Univ.* holdings concerning the status of graduate students and the right to unionize.

72. *See, e.g.*, Lopez v. City Univ. of New York, 750 N.Y.S.2d 194, 195 (N.Y. App. Div. 2002) (awarding workers' compensation benefits to student who worked in federal work-study program); Evanson v. Univ. of Hawaii, 483 P.2d 187, 191 (Haw. 1971) (awarding workers' compensation benefits to student killed while performing work in an agricultural practice course).

the determination of student versus employee has relevance to determinations of coverage under the Fair Labor Standards Act.[73] The *Brown University* decision also potentially implicates the tax treatment of stipend monies received by graduate assistants under both federal and state law.[74]

In the end, it may take years to understand the full impact of *Brown University.* The case may be a mere speed bump on the highway leading to the inevitable conclusion that any individual who performs service in exchange for money constitutes an employee. Or *Brown University* may represent an alternative analysis for such questions, where an individual's primary relationship to the entity for which he or she performs service governs the question of whether an employment relationship exists. At the very least, *Brown University* clearly demonstrates the difficulties of attempting to drop the traditional economic overlay of collective bargaining onto the nontraditional and educational relationship between graduate student and university.

73. *See, e.g.*, Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1327 (10th Cir. 1981) (holding that the FLSA does not apply to student resident assistants at a college); Bobilin v. Bd. of Educ., 403 F. Supp. 1095, 1106–08 (D. Ha. 1975) (student cafeteria workers not employees under the FLSA).

74. *See, e.g.*, 26 U.S.C. § 117(d).