"What the NLRB Giveth The NLRB Taketh Away: Contrasting Views Concerning Graduate Student Unions"

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WHAT THE NLRB GIVETH THE NLRB TAKETH AWAY:

CONTRASTING VIEWS CONCERNING GRADUATE STUDENT UNIONS

By:

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And

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PART I

1. INTRODUCTION

Consider this scenario. Francine, Walter, and Clarke are Teaching Assistants (TAs) at Western University, a private university located in Oakmont, New Jersey. Their “contract of engagement” stipulates that for a waiver of the regular tuition payment, Walter, Francine, and Clark will teach two sections each of the Introduction to College Seminar offered by Western under the direction of a tenured faculty member in Western’s College of Education. In addition, they will perform other duties assigned to them by their “faculty mentor.” The fall semester goes well, but in the spring semester, the mentors require that the three TAs attend each class offered by the mentor and take extensive class notes (for use by students who are deemed to be in need of this “special accommodation” by the Office of Special Services at Western), and grade the mentor’s bi-weekly quizzes and mid-term examinations.

The students first complain to Dean Passarka, who oversees the various programs for graduate students at Western—but to no avail. Finally, after receiving no satisfactory resolution to their concerns, the three graduate students contact twenty-five other students similarly engaged in other Western programs to discuss whether or not they might be able to form a “student union” of some kind in order to protect their rights.

The students prepare the agenda for the meeting and then learn that there are more than seventy-five other students who are acting in various capacities in essentially “office positions” (GAs) at Western who are interested in pursuing a union of their own. They complain that they are overworked (beyond the ten hours a week originally contracted for), asked to work on weekends and evenings, and are even expected to work at the annual Western Hooding Ceremony for its graduating class. In addition, 90 students are acting as Research Assistants (RAs) who are assigned to various faculty members across campus to assist in research projects and in the preparation of research and classroom materials. Several of these RAs noted that they are required to work many hours beyond their assigned number of semester hours and are frequently asked to monitor or
administer classroom examinations for professors, as well as serving as advisors to undergraduate students in terms of their curriculum choices and options.

2. THE CERTIFICATION PROCESS

Whether or not a particular group of employees is or is not entitled to representation by a labor group or union involves a process called certification. The process is managed by the National Labor Relations Board or NLRB. The process begins when a union, a group of employees, or an employer files an election petition with one of the twenty-six regional offices of the NLRB. The Regional Office will open up an investigation in order to determine whether there is a legitimate “question concerning representation” or QCR. A QCR exists if there are no barriers—either procedural or substantive—which might arise as impediments to conducting an election. The Regional Office will typically address the following barriers:

2.1 Substantial Showing of Interest

The first and most important issue for the Regional Office to decide is whether there is a “substantial” showing of interest among employees to invoke the NLRB’s election procedures and its resources. In order to do so, a union or employee-filed petition (termed a RC Petition) must be accompanied by proof that at least 30% of employees in an appropriate unit support the representative named in the petition. Interestingly, a second union may intervene and likewise seek to represent the same employees (in the approximately same unit) if they can show support of at least 10% of employees. An employer petition (termed a RM petition) is filed by an employer to demonstrate that the union, previously certified, has lost its majority support after

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2 From the website of the NLRB: “The National Labor Relations Board (NLRB) is comprised of a team of professionals who work to assure fair labor practices and workplace democracy nationwide. Since its creation by Congress in 1935, this small, highly respected, independent Federal agency has had daily impact on the way America's companies, industries and unions conduct business. Agency staff members investigate and remedy unfair labor practices by unions and employers. They also conduct elections to determine whether employees wish to be represented by a union, and if so, which union.” See www.nlrb.gov (last accessed January 14, 2015).

3 For purposes of this discussion, we will consider the following representing a possible authorization card, used to determine if sufficient interest is indeed present:

“I the undersigned employee of Western University wish to be represented by the American Association of University Professors- Graduate Student Group, Local Union No. 835, for the purpose of bargaining collectively with my employer over the terms and conditions of my employment.”
certification or where the employer believes that a particular union does not enjoy majority support after a demand for recognition by a union or a group of employees has been made. The latter is rarely used in cases of union representation cases.  

2.2 Jurisdiction

After determining that there is sufficient interest on the part of employees, the Regional Office will determine if it has jurisdiction over the employer named in the petition. In general, the Board’s jurisdiction is co-extensive with the Commerce Clause. However, the Board has established certain self-imposed limits on its jurisdiction based on “inflow and outflow requirements that businesses either buy or sell sufficient dollar amounts across state lines to trigger NLRB concern” There also may be statutory limitations on jurisdiction. In addition, the Board may decline to exercise jurisdiction.

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6 Article I, Section 8, Clause 3 states: “The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art 1, §8, cl. 3.


8 It should also be noted that graduate students at public colleges and universities are not “covered employees” under the NLRA. Graduate students at public colleges and universities may be covered by state collective bargaining laws, where these laws exist. Under Taft-Hartley, state and local government employees are excluded from collective bargaining provisions found in the NLRA or the Wagner Act. See 29 U.S.C. §§ 161-168.

There are a number of state variations on the subject of which student employees (graduate students) might be accorded the right to bargain collectively. Historically, a few state laws explicitly excluded them from bargaining. Fourteen states, including California and New York, explicitly gave collective bargaining rights to academic student employees in public colleges and universities; 11 states such as Connecticut and New Mexico gave public university employees the right to collectively bargain, but left eligibility for graduate employees unresolved. At one point, Ohio was the only state to exclude explicitly collective bargaining rights for graduate student employees while still providing the same rights to other university employees; and 23 states denied collective bargaining rights for all public university employees. See Harry C. Katz, Public Service Labor Relations in the Midst of a Transformation? 66 IND. & LAB. REL. REV. 1031, 1042 (2013) (providing statistics on union membership trends). For a discussion of public university experiences with collective bargaining rights and graduate students, see Grant M. Hayden, “The University Works Because We Do”: Collective Bargaining Rights for Graduate Students, 60 FORDHAM L. REV. 1233, 1242-43 (2001). Changes in policies (politics) in Wisconsin, Alaska, Michigan, and Indiana have included removing rights for many public employees to bargain collectively—including graduate student employees if they were so classified. See Michael L. Artz, Beyond Wisconsin: Public Employee Union Rights Amidst State Attacks on Public Sector Collective Bargaining, 2 AM. U. LAB. & EMP. L.F. 1, 3 (2012) (in the author’s words, describing the attacks of conservative politicians who attempted to eliminate unions by restricting their ability to participate in the political arena, lobby effectively, and collectively bargain); Joseph Slater, The Strangely Unsettled State of Public Sector Labor in the Past Thirty Years, 30 HOFSTRA LAB. & EMP. L.J. 511 (2013); William A. Earnhart, Collective Bargaining Rights and Public Employees, 3 ALASKA BAR RAG (Quarterly Newspaper) 8, 8 (2013) (noting
jurisdiction over any employer or industry in a labor dispute having an effect on commerce that is “not sufficiently substantial.”

that the "rights" and powers of public employee unions are only as created by the legislature or by contract). Attorney Earnhart writes:

Federal law does not provide employees of state and local governments with the right to organize or engage in union activities, except to the extent that the United States Constitution protects their rights to freedom of speech and freedom of association. Thus, there is no protection for governmental employees' right to engage in collective bargaining. While state and local governments cannot retaliate against employees for forming a union, there is no requirement to recognize that union, much less bargain with it. States are, however, free to develop labor relations acts for themselves and their political subdivisions. The state courts will often look to federal law and NLRB guidance to interpret contract terms.

Id.

9 29 U.S.C. § 164(c). Pursuant to Section 14(c)(1) of the National Labor Relations Act or NLRA, the Board has established the following minimum monetary standards for exercising jurisdiction over an employer:

**Type of Employer: Annual gross volume:**

- Retail: $500,000 or more
- Non-retail: Over $50,000 outflow/inflow
- Instrumentalities of interstate commerce: $50,000 or more
- Public utilities: $250,000 or more
- Transit systems (other than taxis): $50,000 or more
- Communications: $1000,000 or more
- National defense: “substantial impact on commerce”
- Proprietary and non-profit hospitals: at least $250,000
- Law firms: at least $250,000

Section 14(c)(1) of the NLRA considers five types of workers who may or may not be treated as the “employer” and denied the opportunity to seek union representation on the ground that their interests may be more closely aligned with management than labor. These include “supervisors, managerial and confidential employees, workers for public sector entities, workers for multiple entities that actually constitute a single employer, and workers for trans-border employers.” An employee who might be excluded as a “supervisor” would include an employee who (a) holds authority in the employer’s interest, (b) exercises, or has power to effectively recommend action as to, one or more of the Section 2(11) functions—i.e., to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, direct work, or adjust grievances; and (c) uses independent judgment in so doing. See generally Catherine L. Fisk, Special Issue of Circuit Splits: Supervisors in a Flat World of Flat Hierarchies, 64 HASTINGS L.J. 1403, 1410 n.28 (2013).

In *NLRB v. Kentucky River Cmty. Care Inc*, the Supreme Court expressed its “unhappiness” with the NLRB’s efforts to determine who is a supervisor and as such would be excluded from the protections of the Act as a part of management. 532 U.S. 706 (2001). For a detailed discussion of the attempt by the NLRB to address these concerns, which the NLRB itself categorized as “admonitions,” see *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Beverly Enters.-Minn. Inc. (Golden Crest Health Care Centers)*, 348 NLRB No. 39 (2006); *Croft Metals Inc.*, 348 NLRB No. 38 (2006). *Oakwood Healthcare* provides extensive commentary and discussion relating to the “assign and responsibility to direct” standard, and the “exercise of independent judgment” standard.

As to managerial and confidential employees, see especially *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In general, managerial employees are defined as those who “formulate and effectuate managerial policies by expressing and making operative the decisions of their employers.” *Id.* at 682. The
2.3 Establishing an Appropriate Bargaining Unit

Having established that there is, in fact, a “substantial showing of interest” on the part of the employees and that the NLRB has jurisdiction over these employees, *Friendly Ice Cream Corporation v. NLRB*[^10] and *American Hospital Association v. NLRB*[^11] provide the context for a discussion of what might constitute an *appropriate bargaining unit*. Both cases extensively reference the National Labor Relations Act in which Congress had found the rationale for the passage of the NLRA: “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”[^12]

What is clear from studying the key legislative findings of the Act is that the “central purpose of the act was to protect and facilitate employees’ opportunity to organize unions to represent them in collective-bargaining negotiations.”[^13]

Section 9(a) of the Act provides that the representative “designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes”[^14] shall then be the exclusive bargaining representative for all the employees in that unit. Justice Stevens, in writing for the Court in *American Hospital Association*, states that this section, “read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees.”[^15]

Given the reality (and perhaps strong possibility) of the potential for disagreement on the appropriateness of a unit selected by the employees or even disagreements extending to claims by rival unions claiming to represent the interests of the same

[^10]: 705 F.2d 570 (1st Cir. 1983).


[^13]: 499 U.S. at 609.


[^15]: Id. at 610.
workers, Section 9(b) authorizes the National Relations Board to decide whether the designated unit is in fact appropriate, in the following language:

The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

In CGE Caresystems, Inc., 16 the NLRB considered what is known as the “community of interest” factor in determining an appropriate unit. 17 The NLRB discussed the difficult balance that must accompany such a determination. In referencing Park Manor Care Ctr., Inc., 18 the NLRB stated:

The Board must steer a careful course between two undesirable extremes. If the unit is too large, it may be difficult to organize, and when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. 19

In Friendly Ice Cream Corporation v. NLRB, 20 Circuit Judge Bownes made the following salient points with reference to the establishing bargaining units:

- Primary responsibility for determining the appropriateness of a collective bargaining unit has been vested in the Board;
- The Board, because of its expertise, has been given extraordinarily broad discretionary power;
- This power is guided by statutory direction that the chosen unit “assure(s) to employees the fullest freedom in exercising the rights guaranteed by [the Act]”;
- The Board is not required to select the most appropriate unit in a particular factual setting;

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17 See generally Rikardo J. Hull, Berks/Lehigh Valley College Faculty Association v. Pennsylvania Labor Relations Board: What Exactly is an Identifiable Community of Interests, 10 WIDENER J. PUB. L. 381 (2001).
19 Id. at 876 (quoting 56 Fed. Reg. 33904).
20 705 F.2d 570 (1st Cir. 1983).
• The Board need only select an appropriate unit from the range of units appropriate under the circumstances;\textsuperscript{21}
• An employer seeking to challenge the Board’s determination of a unit cannot merely point to a more appropriate unit;
• The burden of proof is on the employer to show that the Board’s determination of a unit is clearly inappropriate.\textsuperscript{22}

Judge Bownes then underscored several important points made in \textit{American Hospital Association} and noted that in making its determination of an appropriate unit, the Board’s primary duty is to effect the National Labor Relation Act’s policy of assuring the employees the “fullest freedom” in the exercise of their rights to bargain collectively. In terms of the possibility of a multiplicity of bargaining units, the Board must accommodate the employer’s interest in bargaining with the “most convenient possible unit,” but this interest is secondary to the employees’ interest in being represented by a representative of their own choosing. “The Act expressly dictates that employee freedom of choice must be paramount in any unit determination.”\textsuperscript{23}

In \textit{Friendly Ice Cream},\textsuperscript{24} the Circuit Court laid out the basic premise that “the critical consideration in determining the appropriateness of a proposed unit is whether the employees comprising the unit share a ‘community of interest.’”\textsuperscript{25} And, the Board is not bound to follow any “rigid rule laid down by the law or prior decisions. Since each unit determination is dependent upon factual variations, the Board is free to decide each case on an ad hoc basis.”\textsuperscript{26} The evaluation consists of a determination of whether the employees in each unit “share a community of interest with each other in wages, hours and terms and conditions of employment.”\textsuperscript{27}

2.4 Spacing of Certification-Election activities

In order to avoid the potential problems that would accompany a repetitive number of elections in any given workplace or unit, the NLRB has developed several


\textsuperscript{22} Under current labor law in the United States, an employer is not able to obtain direct review of the Board’s unit determination. Rather, an employer must refuse to bargain with the designated unit and then raise the issue of the unit’s appropriateness in a subsequent unfair labor practice proceeding. \textit{See} Pac. Sw. Airlines v. NLRB, 587 F.2d 1032, 1035 n.3 (9th Cir. 1978).

\textsuperscript{23} \textit{Friendly Ice Cream}, 705 F.2d at 575.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.} at 575-76.

\textsuperscript{26} \textit{Id.} at 576.

\textsuperscript{27} \textit{DAU-SCHMIDT ET AL. supra} note 7, at 383.
doctrines relating to the *spacing* of union certification or de-certification activities. These include:

- The NLRB provides some election protection for a union that has gained *voluntary recognition* by an employer. In such a case, employees must be given written notice that they have 45 days to file a decertification petition. After the required 45 days has passed without the employees having filed the decertification petition, the union will have a "reasonable period of time" to bargain with the employer without fear of a rival union petition. It is ironic that sometimes an employer who might otherwise be opposed to unionization might voluntarily recognize a union. Professors Dau-Schmidt et al. suggest that employer might do so because the employer is already dealing with a union under other circumstances; the employer believes it will eventually become unionized and the union seeking recognition "is better than any number of potential alternative unions"; or the employer fears recognitional picketing.

- There is also a *statutory election* bar. Section 9(c)(3) states that, “[n]o election shall be directed in any bargaining unit… within which in the preceding twelve month period a valid election shall have been held.” During the last 60 days prior to the expiration of the one-year period of the bar, the election petition may be filed so long as the election itself does not take place within the one year bar period. This provision only applies to a valid election and does not apply to a situation where the Board has mandated a re-run election.

- The NLRB generally requires that the status of a certified union will remain unchallenged for a one-year period, absent unusual circumstances such as “a schism” within a union, or its becoming a non-entity, or a “radical change” in the size of a unit over a short period of time has occurred.

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29 See Dana Corporation, 351 NLRB. No. 28 (2007); Brennan Cadillac, 231 NLRB 225 (1977) (determining that three months is reasonable).  


In addition, there is also a mechanism called a “contract bar” under which the NLRB has required that a legitimate collective bargaining agreement (called the “contract”) will bar a certification election. The “contract” must be binding on the parties; must be of definite duration; and must contain terms and conditions of employment that are both lawful and consistent with the purposes NLRA. In this case, the contract bar will not bar an election for more than 3 years.

The NLRB will not hold an election in cases where there are substantial pending unfair labor practice allegations or where there are cases which have already been filed which affect the bargaining unit. Because these allegations block the holding of an election, they are referred to as “blocking charges.” The election may effectively be “unblocked” if the charges are resolved or if the party that would be affected adversely by the alleged unfair labor practices agrees to go forward with an election, even though the charges have not yet been resolved.

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34 See NATIONAL LABOR RELATIONS BOARD, THIRTY SEVENTH ANNUAL REPORT 52 (1972). In Dana Corp, however, the contract bar was significantly modified by the NLRB. The Board held that a contract will not bar an election in voluntary recognition cases unless: (1) employees have been given notice of their right to file a de-certification petition within 45 days of voluntary recognition, and (2) 45 days have passed without the filing of a valid petition. Dana Corp., 351 NLRB No. 28 (2007).

35 See Matthew Tymann, Locked Out Without a Key: How the Eighth Circuit Wielded a Pro-Labor Statute as a Sword Against Labor, 99 CORNELL L. REV. 953 (2014) (citing MICHAEL C. HARPER & SAMUEL EISTREICHER, LABOR LAW: CASES, MATERIALS & PROBLEMS 403-04 (7th ed. 2011)) (“Unions win only 30 percent of decertification elections. Roughly 50 percent of decertification petitions, however, never culminate in an election. One reason nearly half of decertification petitions do not lead to an election is the Board’s blocking charge policy. Unions have a strong incentive to file unfair labor practice charges that will stave off an election that may well result in their ouster.”). See also generally Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform, 58 DUKE L.J. 2013, 2061-62 (2009) (citing ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 53-83 (2d ed. West 2004) (explaining the procedures for representation cases)).

36 The author of the NLRA, Senator Robert Wagner of New York, had insisted that activities that would interfere with employees’ right should be specified. These activities were termed “unfair labor practices” and were found in Section 8 of the Act. Section 8(a)(1) forbids employers to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” This section generally prohibits “management threats, surveillance, espionage, restrictions on employee solicitation and communication, violence and promises of benefits.” See DAU-SCHMIDT ET AL., supra note  , at 55. Section 8(a)(2) prohibits employers in their attempts to “dominate or interfere with the formation or administration of any labor organization or contribute financial support to it.” Section 8(a)(3) prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Section 8(a)(4) provides that employers shall not “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act.” And, section 8(a)(5) requires employers to “bargain collectively” with the representatives of employees. In conjunction with section 8(d), this provision requires employers to engage
PART II


All of the previous discussion, however, begs the real question: Are these graduate students—teaching assistants (TAs), research assistants (RAs) and Graduate assistants (GAs)—employees? Or do they occupy a different status under contemporary American labor law? In order to answer this question, two decisions of the National Labor Relations Board will be analyzed: New York University[37] and Brown University[38]—yielding very different results and very different consequences!

3.1 The Board Giveth…

The principle issue presented in New York University is whether a university's graduate assistants (teaching assistants, graduate assistants, and research assistants) are employees within the meaning of Section 2(3) of the National Labor Relations Act (“the Act”)?

in “good faith negotiations” with a duly-selected labor organization. The NLRA was upheld by the Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) on the ground that it was based on a proper “commerce clause analysis.” For a discussion of the commerce clause and its central importance in the area of regulation, see Richard J. Hunter, Jr., John H. Shannon & Mark Blodgett, Regulation: A Historical Perspective and Discussion of the Impact of the Commerce Clause and the Fourteenth Amendment and the Move to Deregulate the American Economy, 32 U. LAVERNE L. REV. 137 (2011).

The Taft-Hartley Act of 1947 added a statement to the Wagner Act’s pronouncement that employees had the right to organize with language that expressly affirmed workers’ rights not to join a union. The Taft-Hartley Act also added six provisions (Section 8(b)(1-6)) that defined union unfair labor practices, including interfering with employees’ rights not to join a union, and making it unlawful for a union to cause an employer to discriminate against an employee with regard to encouraging or discouraging union membership. Taft-Hartley imposes an obligation on a union to “bargain collectively,” outlaws so-called secondary boycotts (making it unfair for a union that has a “primary dispute” with one employer to put pressure on a second employer to cause that employer to stop doing business with the first employer), prohibits strikes in “jurisdictional disputes,” prohibits a union from charging excessive dues or initiation fees, and prohibits the practice known as “featherbedding”—essentially requiring employers to pay for services that are not actually performed. See FRANK W. McCULLOCH & TIM BORNSTEIN, THE NATIONAL LABOR RELATIONS BOARD 39-42 (1974) (describing the legislative history of Taft-Hartley). Congressman Hartley represented the Congressional District that at the time included Seton Hall University. He retired from Congress in 1948 and was succeeded by Peter Rodino who gained much fame in another important setting!

37 332 NLRB 1205 (2000).
New York University (NYU) is a large and prestigious private university located in New York City. Approximately 35,000 students attend the school, with the student body evenly divided between undergraduate and graduate students. Each year, NYU engages (hires) nearly 1,700 graduate students as graduate assistants, graders, and tutors, mainly in their undergraduate division. (The Regional Director of the NLRB later excluded graders and tutors from the bargaining unit.) The vast majority of graduate assistants were doctoral students. The United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, sought to represent a unit of graduate assistants (excluding the Sackler School of Medicine graduate assistants and the science research assistants in the Physics and Biology departments). NYU contended that the proposed unit was not appropriate because the graduate assistants were “students” and not employees within the meaning of Section 2(3) of the NLRA. As an alternate, NYU argued that, even assuming the graduate students were found to be statutory employees, “policy considerations” required their exclusion from coverage under the Act. NYU also contended that if the graduate assistants were determined to be statutory employees, only a university-wide unit of all graduate and research assistants (including those in the Sackler School of Medicine and science departments) would be an appropriate unit for representational purposes.

Analysis

Section 2(3) of the Act broadly defines the term "employee" to include "any employee." This interpretation is supported by a series of cases which evidenced the Supreme Court's long support for the NLRB's "historic, broad and literal reading of the statute." The Supreme Court has explained that unless a category of workers is among the few groups specifically exempted from the Act's coverage, the group plainly comes within the statutory definition of "employee." As Andrew Metcalf wrote: "The NLRA applies broadly to all employers whose businesses affect interstate commerce, with the exception of a few specific occupations: agricultural laborers, domestic workers, employees of a parent or spouse, independent contractors, and "individuals employed by an employer subject to the Railway Labor Act."
The Board noted that the definition of the term "employee" reflected the common law agency doctrine of the conventional master-servant relationship. This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for a payment.

The Board stated that it was undisputed that graduate assistants are not within any category of workers that would be automatically excluded from the definition of "employee" in Section 2(3). In support of its master-servant analysis, the Board pointed to the following facts: graduate assistants perform services under the control and direction of the employer; they are compensated for these services by NYU; graduate assistants work as teachers or researchers; they perform their duties for, and under the control of, the employer's departments or programs; and graduate assistants are paid for their work and are carried on NYU's payroll system. The Board concluded that the graduate assistants' relationship with NYU is thus indistinguishable from a traditional master-servant relationship and thus clearly met the definition of a statutory employee.

In arriving at its decision, the Board found no substantial reason to distinguish this case from Boston Medical Center, a case in which the NLRB had analyzed employee status for its graduate assistants. First, the Board considered the question of the part-time status of a graduate assistant in contrast to that of a full-time employee. Even agreeing that graduate assistants may spend a relatively smaller portion of their time working than did the house staff in Boston Medical Center, they were no less "employees" than part-time or others of limited tenure or status. "Time spent" was not the critical factor. NYU's comparison of the relative time the house staff and graduate assistants spent providing services for their respective employers ignored the fact that that the NYU graduate assistants, just like the house staff, perform work for their employer, under their employer's control. That was the critical factor and not the time spent in this pursuit.

Second, the Board rejected NYU's argument that the graduate assistants were not paid for their work. The Board concluded that the graduate assistants did in fact work in exchange for pay (their stipend), and not solely for the pursuit of education. However NYU may have wished to characterize a graduate assistant position, "the fulfillment of

See, e.g., Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998) (citing the elements of the economic reality test which is used in conjunction with assessing the existence of the master-servant relationship. The test encompasses the following six factors: (1) The degree of control exerted by the alleged employer over the worker; (2) The worker's opportunity for profit or loss; (3) The worker's investment in the business; (4) The permanence of the working relationship; (5) The degree of skill required to perform the work; and (6) The extent to which the work is an integral part of the alleged employer's business.).

330 NLRB. No. 178 (1982).

See University of San Francisco, 265 NLRB 1221 (1982) (part-time faculty constitute an appropriate unit).
the duties of a graduate assistant requires performance of work, controlled by the employer, and in exchange for consideration.\textsuperscript{46}

Third, the Board disagreed with NYU’s argument that work of a graduate assistant is primarily educational, claiming that graduate assistants perform this work in order to obtain their degrees in contrast to the house staff in Boston Medical Center who already had earned their degrees and were receiving advanced training in their profession. The Board agreed that working as a graduate assistant may yield an educational benefit, such as learning to teach or research. However, the receipt of such a benefit was not inconsistent with employee status. The Board also noted that it was undisputed that working as a graduate assistant was not a requirement for obtaining a graduate degree in most departments. Nor was it a part of the graduate student curriculum in most departments. Therefore, the Board concluded that “notwithstanding any educational benefit derived from graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective bargaining rights because their work is primarily educational.”\textsuperscript{47}

NYU also raised a “policy argument” that extending collective-bargaining rights to graduate assistants would infringe on its academic freedom. The Board rejected this argument as well, noting that “Thirty years ago the Board asserted jurisdiction over private, nonprofit universities and colleges.\textsuperscript{48} Shortly thereafter, the Board approved units composed of faculty members, and it continues to do so today.”\textsuperscript{49} The Board also noted that it had in Boston Medical Center “squarely addressed and rejected the argument that granting employee status to employees who are also students would improperly permit intrusion by collective bargaining into areas of academic freedom. After nearly 30 years of experience with bargaining units of faculty members, we are confident that in bargaining concerning units of graduate assistants, the parties can "confront any issues of academic freedom as they would any other issue in collective bargaining."\textsuperscript{50} The Board concluded: “While mindful and respectful of the academic prerogatives of our Nation's great colleges and universities, we cannot say as a matter of law or policy that permitting graduate assistants to be considered employees entitled to the benefits of the Act will result in improper interference with the academic freedom of the institution they serve.”\textsuperscript{51}

\textsuperscript{46} New York Univ. 332 NLRB at 1207.

\textsuperscript{47} Id.

\textsuperscript{48} Cornell University, 183 NLRB 329 (1971).

\textsuperscript{49} C.W. Post Center, 189 NLRB 904 (1971); University of Great Falls, 325 NLRB 83 (1997), and 331 NLRB No. 188 (2000); and Lorretto Heights College, 264 NLRB 1107 (1982), enf'd. 742 F.2d 1245 (10th Cir. 1984).

\textsuperscript{50} New York Univ., 332 NLRB at 1208.

\textsuperscript{51} Id. at 1208-09.
Based on a thorough discussion of the issues and contentions presented by NYU, the Board agreed with the Regional Director's finding that most of the graduate assistants were in fact statutory employees, notwithstanding that they simultaneously were enrolled as students.\textsuperscript{52} “Accordingly, we will not deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they also are students.”\textsuperscript{53}

3.2 And the Board Taketh Away…

The Board would get a chance just four years later to revisit the status of graduate students. Would a different composition on the Board—perhaps one with a very different view of the collective bargaining process and higher education—come to a different conclusion?

\textit{Brown University Background}\textsuperscript{54}

Brown is a private university located in Providence, Rhode Island. It was founded in 1764 and is one of the oldest and most prestigious universities in the United States. Most graduate students were enrolled in Ph.D. programs, with an estimated 1,132 seeking doctorates and 178 seeking master's degrees as of May 1, 2001.

Each semester many of these graduate students were awarded a teaching assistantship (TA), research assistantship (RA), or proctorship, and others receive a fellowship. At the time of the hearing before the Regional Director of the NLRB, approximately 375 of these graduate students were serving as TAs, 220 served as RAs, 60 were proctors, and an additional number received fellowships.

The Board took notice and gave great weight to the testimony of nearly twenty department heads, and the contents of numerous departmental brochures and other Brown University brochures, all pointing to graduate programs “steeped in the education of graduate students through research and teaching.”\textsuperscript{55}

The Petitioner, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO, sought to represent a unit of approximately 450 graduate students employed as teaching assistants (TAs), research

\textsuperscript{52} The Board decided that the Sackler graduate assistants and the few science department research assistants \textit{funded by external grants} were properly excluded from the unit on the ground that the evidence failed to establish that the research assistants performed a service for the employer and, therefore, they were not employees as defined in Section 2(3) of the Act. \textit{See also} Leland Stanford Junior Univ., 214 NLRB 621 (1974).

\textsuperscript{53} \textit{New York Univ.}, 332 NLRB at 1209.

\textsuperscript{54} The facts of the case are taken and adapted from \textit{Brown University}, 342 NLRB 483 (2004).

\textsuperscript{55} \textit{Id.} at 485.
assistants (RAs) in certain social sciences and humanities departments, and proctors. The Petitioner, relying on *New York University*, contended that the petitioned-for TAs, RAs, and proctors were *employees* within the meaning of Section 2(3) of the Act and that they constituted an appropriate unit for collective bargaining.

Brown argued that the TAs, RAs, and proctors should not be considered statutory employees and that this case was *factually distinguishable from NYU*. The University asserted that, unlike NYU, where only a few departments required students to serve as a TA or RA in order to receive a degree, most university departments at Brown required a student to serve as a TA or RA to obtain a degree. Brown contended that these degree requirements demonstrated that the students had an *educational relationship* and not an employment relationship with Brown. Brown also argued that even assuming that the individuals were statutory employees, they were temporary employees who do not have sufficient interest in their ongoing employment to entitle them to collectively bargain.

The Regional Director of the NLRB, applying *NYU*, rejected Brown's contentions and concluded that the petitioned-for unit was appropriate, and she directed an election. The election was conducted on December 6, 2001, and the ballots were impounded pending the disposition of the request for review by Brown.

What was the substance of Brown’s argument before the Board? In its *Brief on Review*, Brown not only challenged the factual basis of the Regional Director’s decision, but also its legal competence. Brown argued that *NYU had been decided wrongly*, and that it had mistakenly reversed twenty-five years of NLRB precedent "without paying adequate attention to the Board's role in making sensible policy decisions that effectuate the purposes of the Act." Brown contended that the Board "did not adequately consider that the relationship between a research university and its graduate students is not fundamentally an economic one but an educational one." Further, Brown contended that the support afforded to students is part of a financial aid program that compensates graduate students the same amount, regardless of their work, and without reference to the value of those services if they had been purchased by Brown on the open market (i.e., by hiring a fully-qualified Ph.D. or an adjunct faculty member or instructor). Brown also emphasized that "common sense dictates that students who teach and perform research as part of their academic curriculum cannot properly be considered employees without entangling the … Act into the intricacies of graduate education." 

The Petitioner argued that the Regional Director correctly followed the Board's decision in *NYU*, and that *NYU* must be upheld. The Petitioner contended that the “petitioned-for employees” had met the statutory definition of "employee" because they meet the common law test enunciated in *NYU*. Further, even assuming that these individuals usually were satisfying an academic requirement, this is not determinative of employee status.

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57 *Brown Univ.*, 342 NLRB at 486 (containing the substance of Brown’s argument).
Would the Board overrule its previous decision in *NYU*?

At the outset, the Board analyzed its *pre-NYU* decisions in *Adelphi University*, in which it held that graduate student assistants were primarily students and should be excluded from a unit of regular faculty. Two years later, in *Leland Stanford*, the Board had decided that graduate student assistants "are not employees within the meaning of Section 2(3) of the Act."

In support of this conclusion, the Board in *Brown* cited to the following specific facts established in *Leland Stanford*: (1) the research assistants were graduate students who were enrolled in the Stanford physics department as Ph.D. candidates; (2) they were *required to perform research to obtain their degree*; (3) they received *academic credit* for their research work; and (4) while they received a *stipend* from Stanford, “the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support.”

In attempting to distinguish this case from *New York University* and to frame the issue in a different light than in a traditional industrial setting, the Board noted that the United States Supreme Court has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." The Board cited its concern for attempting to force the student-university relationship into the traditional employer-employee framework.

After carefully analyzing the issues presented, the Board came to the conclusion that its twenty-year “*pre-NYU*” principle of regarding graduate students as nonemployees was both sound and well reasoned. It stated: “It is clear to us that graduate student assistants, including those at *Brown*, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule *NYU* and return to the *pre-NYU* Board precedent.” The Board continued, “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.” It found:

Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the

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58 195 NLRB 639 (1972).
60 *Brown Univ.*, 342 NLRB at 487.
61 See NLRB v. Yeshiva University, 444 U.S. 672, 680-81 (1980) (citing Syracuse University, 204 NLRB 641, 643 (1973)).
62 *Brown Univ.*, 342 NLRB at 487.
63 *Id.* at 489.
collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require--and in fact precludes--the extension of collective-bargaining rights and obligations to situations such as the one now before us.\footnote{Id. (citing St. Clare’s Hospital, 229 NLRB 1000, 1002 (1997)).}

The Board explained, "it is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship." The Board concluded that the student-teacher relationship is based on the "mutual interest in the advancement of the student's education," while the employer-employee relationship is "largely predicated on the often conflicting interests over economic issues.” Recognizing that the collective-bargaining process is fundamentally an \textit{economic process}, the Board concluded that subjecting educational decisions to such a process would be of "dubious value" because educational concerns are largely irrelevant to wages, hours, and working conditions. In short, the Board determined that collective bargaining is not particularly well suited to educational decision-making and that any change in emphasis from quality education to economic concerns will "prove detrimental to both labor and educational policies."\footnote{Id. at 489-90.}

The Board also noted that "the educational process--particularly at the graduate and professional levels--is an intensely personal one." The Board emphasized that the process is personal, not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. The Board observed that in many respects, collective treatment is "the very antithesis of personal individualized education."\footnote{St. Clare’s Hospital, 229 NLRB 1000, 1003 (1977).}

Finally, the Board concluded that collective bargaining would unduly infringe upon traditional academic freedoms. It cited a list of freedoms detailed in \textit{St. Clare’s Hospital}, which included not only the right to speak freely in the classroom, but to many "fundamental matters" involving traditional academic decisions, including course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns. The Board opined that once academic freedoms become the subject of collective bargaining, "Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away."\footnote{Brown Univ., 342 NLRB at 490 (citing 229 NLRB at 1003).}
Based upon both statutory and policy considerations, the Board concluded that the graduate student assistants were not employees within the meaning of Section 2(3) of the Act. Accordingly, the Board declined to extend collective bargaining rights to them, and dismissed the petition. The Board then offered a summary of its core reasoning for the decision:

For the reasons we have outlined in this opinion, there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation's excellent private educational system. Although under a variety of state laws, some states permit collective bargaining at public universities, we choose to interpret and apply a single federal law differently to the large numbers of private universities under our jurisdiction. Consistent with long standing Board precedent, and for the reasons set forth in this decision, we declare the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act. 69

The decision, however, was not unanimous. Board Members Liebman and Walsh strongly disagreed with the majority. The essence of their dissenting views may be found in the following paragraph:

Today's decision is woefully out of touch with contemporary academic reality. Based on an image of the university that was already outdated when the decisions the majority looks back to, Leland Stanford and St. Clare's Hospital, were issued in the 1970's, it shows a troubling lack of interest in empirical evidence. Even worse, perhaps, is the majority's approach to applying the Act. It disregards the plain language of the statute--which defines "employees" so broadly that graduate students who perform services for, and under the control of, their universities are easily covered--to make a policy decision that rightly belongs to Congress…. The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions. 70

Was the issue once again “settled”?

PART III

69 Id. at 492.

70 Id. at 493-94.
4. COMMENTARY AND CONCLUSIONS

The majority in Brown University made several rather sweeping claims about the “academy” that merit some attention. As we noted before, the majority maintained that that collective bargaining can only harm "academic freedom" and educational quality. The majority emphasized that the process of collective bargaining is "predicated on the collective or group treatment of represented individuals," while the "educational process" involves personal relationships between individual students and faculty members in a unique “mentoring relationship” which would somehow be destroyed if graduate students in these circumstances were permitted to have unions.

The minority in Brown University, however, cited Daniel Julius and Patricia Gumport who had concluded not only that "fears that [collective bargaining] will undermine mentoring relationships . . . appear to be foundationless," but also that data "suggest that the clarification of roles and employment policies can enhance mentoring relationships."71 NLRB Members Liebman and Walsh also noted that Gordon Hewitt had reached a similar conclusion based on his analysis of the attitudes of almost 300 faculty members at five university campuses with at least four-year histories of graduate-student collective bargaining. Hewitt noted that:

It is clear . . . that faculty do not have a negative attitude toward graduate student collective bargaining. It is important to reiterate that the results show faculty feel graduate assistants are employees of the university, support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. It is even more important to restate that, based on their experiences, collective bargaining does not inhibit their ability to advise, instruct, or mentor their graduate students.72

More than ten years later, Rogers, Eaton, and Voss conducted research that suggested that unionization does not negatively affect academic freedom nor did it harm faculty-student relationships.73

It is also worth noting that the majority in Brown had also invoked "academic freedom" as a basis for denying graduate student employees the right to organize under

71 Id. at 500 (citing Daniel J. Julius & Patricia J. Gumport, Graduate Student Unionization: Catalysts and Consequences, 26(2) REV. OF HIGHER EDUC. 187, 201, 209 (2002) (emphasis added; citations omitted in the original)).

72 Id. at 500 (citing Gordon J. Hewitt, Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students, 29 J. COLLECTIVE NEGOTIATIONS IN THE PUB. SECTOR 153, 164 (2000)).

the Act. The dissenting Members, however, stated: “This rationale adds insult to injury.”74 The continued by noting that the majority had arrived at its definition of “academic freedom” in such a way as to broadly assert that academic freedom is “necessarily incompatible with any constraint on the managerial prerogatives of university administrators.”75 The dissenting Members pointed out that academic freedom has its main focus on attempts to regulate the "content of the speech engaged in by the university or those affiliated with it"76 and with efforts to bring a modicum of equity and fairness into the relationship between graduate students and faculty through a collective process of good faith bargaining.

Following the Brown decision, NYU refused to bargain with its graduate student union after the expiration of their initial contract in 2005. Despite a 2005-2006 strike, NYU graduate student employees were not able to obtain union recognition. That did not settle the issue. In April 2010, more than 1,000 NYU graduate assistants again filed an election petition with the NLRB. Applying its 2004 decision, Acting Regional 2 Director Elbert F. Tellem denied the petition. However, Tellem weighed in with his own views and observed that "The instant record clearly shows that these graduate assistants are performing services under the control and direction of New York University for which they are compensated. It is also clear on the record that these services remain an integral component of graduate education."77 NYU graduate students later filed a petition to overturn Brown University, which the NLRB agreed to review in 2012. Once again the “politics” of the NLRB had changed with the Obama administration. However, the case was withdrawn in 2013 in an agreement with the university to re-establish union recognition on a voluntary basis.

Should we take the majority opinion in New York University on its own merits as standing for academic freedom in the academy? Could there be a more simplistic (or perhaps caustic) answer to why the Board was so split on the issue of possible unionization for graduate students? Interestingly, Members Battista, Schaumber, and Meisburg were all Republicans and Members Liebman and Walsh were Democrats. New York University was decided under Democratic control of the Board and Brown University was decided under Republican control.78 Reflecting this decidedly political

74 Id.

75 Id.

76 Id. (citing University of Pennsylvania v. EEOC, 493 U.S. 182, 197 (1990)).


78 This point was raised in Harold J. Datz, When One Board Reverses Another: A Chief Counsel Perspective, 1 AMER. U. LABOR & EMPL. L.F. 67 (2001) (citing Leland Stanford, 214 NLRB 621 (1974)). The author make the point, however, that while Brown overruled New York University, New York University itself overruled an earlier line of precedents. Mr. Datz served for 17 years as Chief Counsel to a succession of five members of the NLRB and also as Chief Counsel to the Chairman for six years. Counselor Datz wrote:
viewpoint, Scott Jascik reported that “the NLRB under President Obama has been the site of intense partisan battles, controversial rulings, blocked nominees and threats by Congressional Republicans to legislate to counter some NLRB rulings.”

Sometimes the more obvious answer is the correct one!

**APPENDIX – THE YESHIVA DECISION**

The following are quotations from the *Lawyers Edition* Headnotes to the Yeshiva Decision:

The judgment of the appellate court was affirmed on the basis that the faculty members of appellee university were in effect substantially and pervasively operating the enterprise. The extensive control of the faculty over academic and personnel decisions and its crucial role in determining other central policies of appellee endowed them with managerial status sufficient to remove them from the coverage of the National Labor Relations Act

Full-time faculty members at a private university are managerial employees excluded from the coverage of the National Labor Relations Act and are therefore not entitled to the benefits of collective bargaining under the Act, where the faculty members, as to academic matters at the university, exercise absolute authority, which in any other context would

… [T]here are cases where the Board simply concludes, on its own, that the precedent does not make sense and opts for a different rule. In these cases--where none of the elements set forth… [acquiescing to adverse court precedents; sharing the misgivings of a Court; conflict of precedents; and restoring an older precedent] are present--the Board simply disagrees with the precedent of a prior Board. As stated at the outset, changes like these lead to instability, unpredictability, and disrespect for the law. Thus, in my view, the burden is on the reversing Board to justify the change.

Ideally, one would hope for empirical data showing that the precedent has had undesirable economic consequences or has had results that are inconsistent with the policies of the Act. However, under Section 4(a) of the Act, the Board is forbidden to hire staff persons to perform "economic analysis." Notwithstanding this, there is nothing to preclude the Board from relying on academic or other studies, or to receive and rely upon Brandeis briefs. Absent such empirical support, it is my view that the Board should be reluctant to reverse precedent in this situation.

*Id.* at 82-83.


80 63 L. Ed. 2d 115 (1980).
unquestionably be managerial, insofar as they (1) decide what courses will be offered, when they will be scheduled, and to whom they will be taught, (2) debate and determine teaching methods, grading policies and matriculation standards, (3) effectively decide which students will be admitted, retained, and graduated, and (4) determine, on occasion, the size of the student body, the tuition to be charged, and the location of the university's schools; application of the managerial exclusion is not inappropriate on the theory that the faculty are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance, and to pursue professional values rather than institutional interests. (Brennan, White, Marshall, and Blackmun, JJ., dissented from this holding.)

Professional persons, like other employees, may be exempted from coverage under the National Labor Relations Act either under the Act's exclusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer or under the judicially-implied exclusion for managerial employees who are involved in developing and enforcing employer policy.

The judicially-implied exclusion from the coverage of the National Labor Relations Act for "managerial" employees applies to those employees who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy; managerial employees must exercise discretion within, or even independently of, established employer policy, and must be aligned with management.

The relevant consideration in determining whether a particular employee is a supervisor within the meaning of and thereby excluded from the coverage of the National Labor Relations Act concerns that employee's ability to effectively recommend or control those actions enumerated in Section 152(11), and not the employee's possession of final authority; the same rationale applies with equal force to the judicially-implied exclusion from the Act for managerial employees.

It should be noted that the decision in Yeshiva was a 5-4 decision, with Justice Powell writing for the Court, joined by Justices Burger, Stewart, Rehnquist and Stevens. Justice Brennan wrote the dissenting opinion and was joined by Justices White, Marshall and Blackmun.

AN UPDATE....
On September 23, 2013, the NLRB (Chairman Pearce, Members Miscimarra and Hirozawa) granted the Employer’s Request for Review of the Regional Director’s Decision and Direction of Election because it raised “substantial issues warranting review…with respect to the assertion of jurisdiction over the Employer and the determination that certain faculty members are not managerial employees” under the Act.

At that time, the Board invited comments from interested parties and others in relation to the following questions:

1. What is the test the Board should apply under NLRB v. Catholic Bishop, 440 U.S. 490 (1979), to determine whether self-identified “religiously affiliated educational institutions” are exempt from the Board’s jurisdiction?

2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under Catholic Bishop?

3. Applying the appropriate test, should the Board assert jurisdiction over this Employer?

4. Which of the factors identified in NLRB v. Yeshiva University, 444 U.S. 672 (1980), and the relevant cases decided by the Board since Yeshiva are most significant in making a finding of managerial status for university faculty members and why?

5. In the areas identified as “significant,” what evidence should be required to establish that faculty make or “effectively control” decisions?

6. Are the factors identified in the Board case law to date sufficient to correctly determine which faculty are managerial?

7. If the factors are not sufficient, what additional factors would aid the Board in making a determination of managerial status for faculty?

8. Is the Board’s application of the Yeshiva factors to faculty consistent with its determination of the managerial status of other categories of employees and, if not, (a) May the Board adopt a distinct approach for such determinations in an academic context, or (b) can the Board more closely align its determinations in an academic context with its determinations in non-academic contexts in a manner that remains consistent with the decision in Yeshiva?

9. Do the factors employed by the Board in determining the status of university faculty members properly distinguish between indicia of managerial status and indicia of professional status under the Act?

10. Have there been developments in models of decision making in private universities since the issuance of Yeshiva that are relevant to the factors the Board
should consider in making a determination of faculty managerial status? If so, what are those developments and how should they influence the Board’s analysis?

11. As suggested in footnote 31 of the Yeshiva decision, are there useful distinctions to be drawn between and among different job classifications within a faculty—such as between professors, associate professors, assistant professors, and lecturers or between tenured and untenured faculty—depending on the faculty’s structure and practices?

12. Did the Regional Director correctly find the faculty members involved in this case to be employees?

On December 16, 2014 the Board issued a Decision and order which is summarized below in Pacific Lutheran and Service Employees International, Local 925, Petitioner. Case 19-RC-105251, dated December 16, 2014. The Decision and Order is found below:

In this case, we reexamine two significant bodies of our case law pertaining to the collective-bargaining rights under the National Labor Relations Act of faculty members at private colleges and universities. First, we reexamine the standard we apply for determining, in accordance with the Supreme Court’s decision in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), when we should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities.

Second, we reexamine our standard for determining, in accordance with NLRB v. Yeshiva University, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.

After careful consideration of applicable case law, as well as the positions of the parties and amici, we have decided that we will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution unless the college or university first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds out those faculty as performing a specific role in creating or maintaining the university’s religious educational environment. Applying that test to the facts here, we find, with respect to the petitioned-for unit of contingent (i.e., nontenure track) faculty at Pacific Lutheran University (“PLU” or “the Employer”), that although PLU has met the threshold requirement, it has failed to establish that it holds out its contingent faculty members as performing a religious function. Accordingly, we will assert jurisdiction in this case.
With respect to the managerial status of faculty members, after again taking careful consideration of our precedent and the positions of the parties and amici, we have decided to refine the standard by which we determine the managerial status of faculty pursuant to *NLRB v. Yeshiva University*. [Below], we explain which factors are significant in assessing managerial status, and why, and the weight to be accorded such factors. Applying that standard here, we conclude that the University has failed to demonstrate that full-time contingent faculty members are managerial employees.