Insight

IN-DEPTH DISCUSSION

AUGUST 25, 2016

NLRB Rules that Student Assistants Can Unionize; Debate May Now Shift to Whether They Should

BY WALTER C. HUNTER

In a sweeping decision issued on August 23, 2016, the National Labor Relations Board reversed its 2004 holding in *Brown University*[1] that graduate students are not employees under the National Labor Relations Act. The Board ruled that graduate and undergraduate student assistants at Columbia University are employees who have the right to unionize, including those assistants engaged in research funded by external grants. The broadly worded decision has far-reaching ramifications for private sector universities because of its apparently intended wide-spread applicability.

For many years, the focus of the debate has been whether graduate students have the right to unionize. The debate will likely now shift to whether they should.

Background

In Brown, the NLRB held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. It did so because the students "have a primarily educational, not economic, relationship with their university." Except for a brief four year period covered by the NLRB's divided decision in *New York University (NYU)*,[2] the Board's decision in Brown followed the Board's long history of treating graduate students as non-employees.

The *NYU* decision was issued by the Board appointed by President Clinton; the Brown decision was issued by the Board appointed by President Bush. It has been clear for some time that the Board appointed by President Obama has been eager to reverse Brown.

1 342 NLRB 483 (2004).

2 332 NLRB 1205 (2000).

In 2010, the Board issued an order granting review of a Regional Director's decision dismissing a new graduate student petition at NYU, ruling that the request for review raised compelling issues warranting review.[3] The Board stated: "we believe there are compelling reasons for reconsideration of the decision in *Brown University*." Republican appointee Brian Hayes wrote a dissenting opinion at the time arguing incisively that granting review "serves to reinforce the views of the Board's critics who charge that its view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership."

The new NYU case was never heard by the Board, however, because NYU voluntarily granted recognition to the union. NYU and the UAW issued a joint statement that they had agreed "on principles under which covered graduate students will make their choice on unionization without influence or campaigning by the University administration and without further delay." The statement added that the "parties concur that the 'academic management rights' of the University to make academic decisions separate from the bargaining relationship will be honored by the Union, making clear that academic decisions are not subject to bargaining." Based upon this agreement, the NYU/UAW case pending before the NLRB was withdrawn, which meant that reversal of *Brown* had to wait for another case on another day. With the Columbia decision, that day has come.

The *Columbia* Decision

On December 17, 2014, the Graduate Workers of Columbia-GWC, UAW, filed a petition seeking to represent a unit of graduate and undergraduate teaching assistants, and graduate research assistants at Columbia University.[4] The NLRB's Regional Director in New York held a hearing, applied the then existing precedent in *Brown* and dismissed the petition. The NLRB granted review of the Regional Director's decision on December 23, 2015, however, and shortly thereafter issued a notice and invitation to the public to file micus briefs. The Board reviewed the briefs of the parties and amici and issued its final decision on August 23, 2016.

The Board's decision stated that the threshold question was whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. It overruled *Brown University* and concluded that they are statutory employees. It criticized the *Brown* decision as depriving "an entire category of workers of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act."

The Board majority rejected the Brown decision's conclusion that graduate assistants cannot be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university."[5] The majority opinion stated, "[t]he Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach." Basically, the Board is saying they can be both students and employees.

---

3 New York University and GSOC/UAW. Case 2–RC–23481 (2010).

4 The petition defined the bargaining unit sought as follows:

> Included: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

5 *Brown University*, 342 NLRB at 487.

The Board also rejected the argument in Brown that imposing collective bargaining on a university's relationship with graduate students would "improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act." The majority stated this fundamental belief is "unsupported by legal authority, by empirical evidence, or by the Board's actual experience."

The NLRB's decision in *Columbia* not only gave the Union everything it asked for, but also broke new ground by including grant funded research assistants. The Board concluded: "(1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master's degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who may not be included in the unit."

The Board stressed that the definition of employee in the NLRA is broad, and minimized the chance of a successful appellate challenge by citing to Supreme Court precedent that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act.'"

The Board explained that the Brown Board's rationale was based in part on its belief that collective bargaining is not well suited to educational decision-making and that shifting focus from quality education to economic concerns would be detrimental to both labor and educational policies. The Board noted this "determination ostensibly was supported by several factors: (1) that the student-teacher relationship is based on mutual academic interests, in contrast to the conflicting economic interests that inform the employer-employee relationship; (2) that the educational process is a personal one, in contrast to the group character of collective bargaining; (3) that the goal of collective bargaining, promoting equality of bargaining power, is 'largely foreign to higher education'; and (4) that collective bargaining would 'unduly infringe upon traditional academic freedoms.'" In *Columbia*, the Board rejected all these justifications. The decision reflects a strong preference for collective bargaining as the appropriate model to address issues in an academic setting, expresses complete confidence that the parties would be able to negotiate appropriate limits on intrusions into academic decision-making and seems remarkably unconcerned over the consequences of a failure to reach an agreement stating, "labor disputes are a fact of economic life – and the Act is intended to address them."

Intrusions on Academic Freedom and Decision Making.

A major concern of universities, and graduate students opposed to unionization, is that the collective bargaining model could interfere with academic freedom and academic policy decision making. Columbia University, drafters of amicus briefs and the *Brown* Board all contended that collective bargaining could prove detrimental to a school's educational goals – that disputes could interfere with academic decisions on topics such as class size, time, length and location, formatting of exams, new methods of instruction and decisions over who is taught, what is taught, how it is taught and who does the teaching. The *Columbia* Board was not persuaded, and offered two solutions to these concerns: appropriate boundaries, it said, could result either from an NLRB conclusion that the topic is not a mandatory subject of bargaining, or from the parties' own negotiation process. The majority wrote: "the Board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems. Moreover, there is no good reason to doubt that unions and universities will be able to negotiate contract language to delineate mutually satisfactory boundaries of their respective rights and obligations. Indeed, faculty members have successfully negotiated collective-bargaining agreements that address terms and conditions of employment at private universities while contractually ensuring academic freedom for decades."

Although on the one hand the Board professes confidence that intrusions on academic decision-making can be avoided by operation of law or mutual agreement, it is also clear that the Board prefers the collective bargaining model as the mechanism to address these issues. The Board said, "the University of Illinois, Michigan State University, and Wayne State University include language in their graduate-assistant collective-bargaining agreements giving management defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students' progress on their own degrees. This is not to suggest a prescription for how individual collective-bargaining agreements should resolve matters related to the protection of academic freedom and educational prerogatives. Rather, these agreements show that parties can and successfully have navigated delicate topics near the intersection of the university's dual role as educator and employer." As for what happens if there is a strike when such issues are not satisfactorily resolved, the Board simply applies the industrial model to the academic setting stating: "Columbia and amici, as well as our dissenting colleague, also raise the specter of strikes (and lockouts), and the impact they might have on the educational trajectory of students and on their considerable investment in their education; but the problems raised by strikes are common to nearly all industries in which the Board accords employees bargaining rights." The Board's lack of concern over possible strikes was particularly concerning to dissenting Board Member Miscimarra.

The Dissent

Board Member Philip Miscimarra prepared a lengthy dissent challenging the majority's ruling and analysis. He wrote:

> The question here is not whether colleges and universities should constructively engage their students, including student assistants, in a variety of ways. The question is whether Congress intended—and whether our statute can be reasonably interpreted—to make the NLRA govern the relationship between students and their universities merely because students may occupy a variety of academic positions in connection with their education. As noted above, for most students including student assistants, attending college is the most important investment they will ever make. I do not believe our statute contemplates that it should be governed by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other.

Member Miscimarra expressed concern about the impact of strikes on the students' academic development, economic burden and attainment of a degree. He wrote that, "applying our statute to university student assistants may prevent them from completing undergraduate and graduate degree requirements in the allotted time, which is the primary reason they attend colleges and universities at such great expense. It is not an adequate response to summarily dismiss this issue, as the majority does, with the commonplace observation that 'labor disputes are a fact of economic life.' For the students who may find themselves embroiled in them, labor disputes between universities and student assistants may have devastating consequences."

Member Miscimarra was also critical of the composition of the final bargaining unit. He noted that "'the petitioned-for bargaining unit includes all 'student employees' who engage in 'instructional services,' including 'graduate and undergraduate Teaching Assistants,' 'Teaching Fellows,' 'Preceptors,' 'Course Assistants,' 'Readers,' and 'Graders,' plus 'Graduate Research Assistants' and 'Departmental Research Assistants.' No distinctions are drawn based on subject, department, whether the student must already possess a bachelor's or master's degree, whether a particular position has other minimum qualifications, whether graduation is conditioned on successful performance in the position, or whether different positions

are differently remunerated. As a result of today's decision, all of these university student assistant positions are made part of a single, expansive, multi-faceted bargaining unit."

The majority in *Columbia* pointed out that the next student assistant bargaining unit petition need not be similarly expansive, noting that in its decision "[i]n *Specialty Healthcare and Rehabilitation Center of Mobile*,[6] the Board held that a unit is appropriate if the employees in the proposed unit constitute a readily identifiable grouping and share a community of interest… [A]lthough there might potentially be other appropriate unit groupings among these student assistants—the petitioned-for classifications share a sufficient community of interest to form an appropriate unit." In other words, while the next petition could conceivably include only teaching assistants, research assistants, or even teaching assistants in a particular department, the Board will accept any unit proposed by a petitioning union that it deems to have a sufficient community of interest.

Member Miscimarra also listed numerous unfortunate consequences that could flow from the conclusion that teaching assistants are employees – consequences unrelated to collective bargaining. He wrote, "[i]t is also a mistake to assume that today's decision relates only to the creation of collective-bargaining rights. Our statute involves wide-ranging requirements and obligations. For example, existing Board cases require employers subject to the NLRA to tolerate actions by employees that most reasonable people would find objectionable, and it is unlawful for employers to adopt overly broad work rules to promote respect and civility by employees. Therefore, parents take heed: if you send your teenage sons or daughters to college, the Board majority's decision today will affect their 'college experience' in the following ways… ." He then listed rules that would be viewed as impermissible, such as routinely asking student-assistant witnesses to maintain confidentiality during harassment investigations, rules promoting civility, rules banning profanity and abuse, rules prohibiting outrageous conduct by student assistants and rules governing outrageous social media postings.

The majority was unconcerned about these points raised by Miscimarra. It wrote, "we cannot give credence to the dissent's speculation that, among other things, the provisions of the Act might negatively interfere with university confidentiality practices or standards of decorum, for example by authorizing abusive language by student assistants directed against faculty. The Act's provisions pertaining to document production and the boundaries of protected conduct are, and always have been, contextual. The Board evaluates such claims in light of workplace standards and other relevant rules and practices." Nothing in the *Columbia* decision suggests it is likely, however, that the current Board will show deference to rules universities adopt regarding standards of community behavior and decorum when applied to conduct such as obscene tirades against management, which the Board has traditionally held to be protected conduct under Section 7 of the Act.

Although not mentioned in the decision, one problem with the Board's position in *Columbia* is that by declaring student assistants to be employees, the Board risks depriving university communities (students and administrations) of the choice between a collective bargaining model and a "traditional model of relations." Because of NLRB proscriptions against "company unions" in the industrial context, this decision could impose a one-size-fits-all model on the majority of university communities that now thrive under a collaborative, shared governance, representative model characteristic of the academic community.

Shift in Debate From Can They Unionize, to Should They Unionize

Regardless of whether this decision is appealed, it will likely lead to discussions at other schools. The debates on many campuses will likely focus on whether unionization of student assistants is in the best interests of the students or their institution. The debate shifts from whether they should have a choice, to

6 357 NLRB at 946.

what the choice should be. And the debates will likely cover many of the same policy arguments made before the NLRB.

In the Board's view, "the eagerness of at least some student assistants to engage in bargaining suggests that the traditional model of relations between university and student assistants is insufficiently responsive to student assistants' needs. That is not to say collective bargaining will necessarily be a panacea for such discontent, but it further favors coverage by the Act, which was designed to ameliorate labor unrest."

It is not a foregone conclusion that graduate students will abandon the current collaborative model in higher education for a collective bargaining model. Students have rejected unionization by wide margins at several schools, and many organizing efforts have not gotten off the ground.

Where Do Schools Go From Here?

1. The *Columbia* decision may trigger a renewed discussion among university leaders regarding what their position should be regarding unionization of student assistants. These decisions will require careful analysis of each institution's core values, culture and educational objectives.
2. While *Columbia* permits unions to file election petitions on behalf of graduate student assistants, it may encourage demands for universities to enter into neutrality agreements, card check arrangements or other ways for unions to become certified collective bargaining representatives without winning an election. Agreement to any such alternative could have very serious repercussions and requires careful consideration of both legal and practical consequences.
3. It would be ill-advised to allow the discussion to degenerate into a debate between the administration and the students. Students have rejected unionization at institutions where the strongest advocates against unionization were the students themselves. The best approach is to foster open and informed debate regarding the pros and cons of unionization. Consult with counsel about how Board rules apply to attempts by an administration to support students advocating one position or another.
4. Schools should ensure that current mechanisms for student input are effective – that students have a real voice, that their voices have impact, and that they have a seat at the table. Consult with counsel on appropriate mechanisms for such input.
5. If there is a decision to embrace unionization of students, ensure that you establish a framework that delineates satisfactory boundaries of the parties' respective rights and obligations. The first agreement regarding such boundaries will be the most critical.
6. Recognize that these discussions involve more than bread and butter issues for graduate students. Students are deeply concerned about the impact unionization could have on mentorship, academic freedom, independence, academic advancement, culture, collaboration, collegiality and quality.