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New York University and GSOC/UAW. Case 2–RC–23481

October 25, 2010

ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

Petitioner’s request for review of the Regional Director’s order dismissing petition without a hearing is granted as it raises compelling reasons warranting review.

The Petitioner seeks to represent a unit of graduate students who, the Petitioner contends, are employed by the Employer, New York University, to provide teaching and research services. The Regional Director dismissed the petition without conducting a hearing, citing the Board’s decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate students performing such services at Brown University are not employees within the meaning of Section 2(3) of the Act.

The Employer’s opposition to the Petitioner’s request for review makes several significant factual representations, and contentions concerning unit placement. Because the Regional Director dismissed the petition without a hearing, we cannot assess the accuracy of these representations or determine the Petitioner’s position on these factual questions or the unit placement issues that they appear to raise.

First, the Employer represents in its opposition that it has substantially altered both its relationship to graduate students who perform teaching duties and its legal position in regard to such individuals since the decisions in *New York University*, 332 NLRB 1205 (2000), and *Brown University*. The Employer represents that it has classified the overwhelming majority of its graduate students who perform teaching duties as adjunct faculty and now concedes that they are employees covered by the Act. The Employer concedes that, unlike the graduate students at issue in *Brown University*, the payments received by graduate students appointed as adjunct faculty are not the same as or similar to the amounts received by students on fellowships without teaching duties. However, the Employer contends that the graduate students appointed as adjunct faculty are properly included in an existing unit of adjunct faculty. The Employer does not make any specific representations concerning what percentage of the graduate students who are appointed as adjunct faculty satisfy the other criteria for inclusion in that unit, including provision “of forty contact hours of

instruction in one or more courses in an academic year . . . or at least a total of 75 contact hours of individual instruction or tutoring during a semester.” The Employer further represents that there are fewer than 15 graduate students performing teaching duties who have not been classified as adjunct faculty. Neither party presents any argument concerning the relevance of the classification of some graduate students performing teaching duties as adjunct faculty to the employee status of the remaining graduate student teachers who are not so classified. The Regional Director therefore did not consider this question.

Second, the Employer also represents in its opposition that some unspecified portion of its graduate students who provide research assistance are “funded by external grants” and, pursuant to the Board’s decision in *New York University*, supra at 1209 fn. 10, they are not employees of the Employer regardless of the validity of the *Brown University* decision. Again, because the Regional Director dismissed the petition without a hearing, we cannot assess the accuracy of these representations and the Petitioner’s position on the factual and legal questions they appear to raise.

Finally, we believe there are compelling reasons for reconsideration of the decision in *Brown University*. The Petitioner points out that *Brown University* overruled the decision in *New York University*, which had been issued just 4 years earlier. The Petitioner argues that the decision in *Brown University* is based on policy considerations extrinsic to the labor law we enforce and thus not properly considered in determining whether the graduate students are employees. The Petitioner also offered to present evidence of collective-bargaining experience in higher education as well as expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the graduate students are appropriately classified as employees under the Act. Finally, the Petitioner argues that the decision in *Brown University* is inconsistent with the broad definition of employee contained in the Act and prior Board and Supreme Court precedent. The Employer, however, contends that *Brown University* was correctly decided.¹

¹ Contrary to our dissenting colleague, we do not read Sec. 102.67(c) of our Rules to bar the Board from considering arguments and factual assertions contained in the responsive papers in determining whether “compelling reasons exist” for granting review. In addition, unlike our colleague, we are unwilling to find, in the absence of any evidence, that the graduate students who have been appointed as adjunct faculty “are currently represented” and that the instant petition is therefore inappropriate. Factual findings must be based on evidence; since no evidence was presented, a remand for a hearing is necessary.

We believe the factual representations, contentions, and arguments of the parties should be considered based on a full evidentiary record addressing the questions raised above as well as any others deemed relevant by the Regional Director. Accordingly, the Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for a hearing and the issuance of a decision.

Dated, Washington, D.C. October 25, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would deny the Petitioner's request for review inasmuch as the Regional Director's dismissal of the instant petition is entirely consistent with existing Board precedent, and the Petitioner has set forth no compelling reasons for reconsideration of any Board rule or policy. Thus, the request for review fails to meet the most basic requirements for granting review under the Board's own Rules and Regulations. Additionally, I disagree with my colleagues that any of the papers before us creates a material issue of fact that would require a hearing in order to affirm the Regional Director's determination.

The Petitioner here has sought a unit composed of "all individuals enrolled in graduate level programs . . . who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title)." The unit sought is not appropriate under the Board's decision in *Brown University*, 342 NLRB 483 (2004). This is a fact which the Petitioner freely concedes. Thus, it notes that: "It is undisputed that the *Brown* decision compels . . . [the dismissal of the petition]."

The Petitioner makes absolutely no assertion, proffer, or claim that there are any facts at all that would distinguish any of the individuals sought by its petition from those found not to be statutory employees in *Brown*. Indeed, the Petitioner scrupulously notes that its request for review is based solely on Section 102.67 (c) (4) in urging that there are "compelling reasons for reconsideration of the Board's *Brown* decision." The Petitioner is completely candid about the objective of its request for review—it wants the Board to grant the request, overrule *Brown*, and reinstate the Board's prior holding in *New*

York University, 332 NLRB 1205 (2000) (*NYU*), that most of the individuals in the petitioned-for unit are statutory employees.

The request for review itself sets forth no proper, let alone "compelling" reasons for reconsideration. The request does not raise, allege, or reference a single fact, circumstance, argument, legal precedent, or claim that was not in existence and clearly before the Board when it rendered its decision in *Brown*. Thus, the request for review does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board, but reach an opposite result. This is not a proper basis for "reconsideration." To suggest that it is merely 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.¹

The deficiencies in the Petitioner's request for review are patent, and my colleagues' effort to overcome them serves only to cast the problems in bolder relief. Rather than basing their grant of review and direction of a hearing on compelling reasons stated by the Petitioner, the party requesting review, my colleagues' take their basis for granting review *from the Employer's opposition*. Thus, they note that the Employer asserts (1) it has included some graduate students in an adjunct faculty bargaining unit; and (2) some graduate students in the petitioned for unit would not only be excludible under the *Brown*, but under the prior *NYU* decision as well.

Neither of these factual assertions presents a "compelling" reason to grant review of *Brown's* holding, nor do they require a hearing. As far as the graduate students in the adjunct faculty unit are concerned, if their circumstances are no different from the time of the prior *NYU* decision, then under *Brown* they are not statutory employees. The Employer may voluntarily engage in collective-bargaining for a unit including such individuals, but that does not make them statutory employees. On the other hand, if their circumstances have changed such that they *are* now statutory employees, then they are currently represented and the petition to include them in a separate unit is inappropriate.

As for the Employer's claim that certain individuals in the petitioned-for unit were also excluded as nonemployees in *NYU*, the alleged necessity for a hearing to assess the "accuracy of [the Employer's] representations" exists

¹ "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn. 30 (1987) (citations and internal quotations omitted).

only if *Brown* is overruled. It is otherwise immaterial. Granting review on this basis unavoidably suggests that overruling *Brown* is a preordained result.

The remainder of my colleagues' stated reasons for granting review unfortunately suffers from the same infirmity as the Petitioner's arguments. Thus, there is nothing referenced that was not, or could not have been duly considered by the Board when it reached its decision in *Brown*. The Board then was well aware of the "evidence of collective-bargaining in higher education," including, most notably the experience of the individuals and Employer that are the object of the instant petition.²

² Amicus curiae briefs in *Brown* were filed, inter alia, by: the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Penn-

In sum, the Petitioner's request for review has failed to state any compelling reasons for reconsideration of *Brown*, and the majority unsuccessfully refer to statements in the Employer's opposition as a basis for granting a hearing. I would instead deny review of the Regional Director's correct application of *Brown* to dismiss the petition.

Dated, Washington, D.C. October 25, 2010

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

sylvania, University of Southern California, Washington University in St. Louis, and Yale University; and Trustees of Boston University. 342 NLRB 483 fn. 1.