UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY Employer	)	
and	)	Case 02-RC-023481
GSOC/UAW Petitioner	)	
POLYTECHNIC INSTITUTE OF NEW YORK UNIVERSITY Employer	)	
and	)	Case 29-RC-012054
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) Petitioner	)	

BRIEF OF *AMICUS CURIAE* BROWN UNIVERSITY IN SUPPORT OF EMPLOYERS

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INTRODUCTION AND STATEMENT OF INTEREST

It is no exaggeration to state that the future of American private graduate education is at stake in these cases. Their outcome, unfortunately, appears to depend on a change in the Board's majority. Brown University ("Brown") submits that a change in the Board's majority composition, without any change in the facts, is insufficient reason to undermine the very foundation upon which graduate education at Brown and similar institutions is built.

In response to the Board's Notice and Invitation to File Briefs dated June 22, 2012 ("Notice"), Brown, the employer in *Brown University*, 342 N.L.R.B. 483 (2004) ("*Brown*"), submits this brief as *amicus curiae* in support of the Employers in these cases. Brown has a substantial interest in preserving the Board's decision.

Reversal of the *Brown* decision would irreparably damage the essential nature of graduate education in educational institutions, such as Brown, in which graduate student assistants perform teaching and research as an integral part of their degree program. At Brown and similar institutions, being a graduate assistant is synonymous with engaging in teaching and research and being a graduate student. For graduate students at Brown, both teaching and research are required educational components of their departmental curriculum. Financial support for these experiences is part of a comprehensive financial aid package that supports graduate students at a uniform level for their academic program for their first five years of matriculation. This is the case whether the graduate student teaches, performs research or only takes courses during a given semester.

Characterizing graduate students in such fully integrated programs as "employees" would undermine the fundamental nature and purpose of this model of graduate education. Students are admitted to a graduate program -- not hired into a program. Yet such students would likely have

to pay union dues or an agency fee in order to retain their student status if *Brown* were overturned. This result stands Brown's model of graduate education on its head.

The Board has a long-standing practice of not intruding, and should not now intrude, into the special educational relationship between students and the program in which they pursue their degree studies. The suggestion that the niceties of the collective bargaining process can insulate graduate educational institutions from needless unfair labor practice charges, grievances and other disputes concerning appropriate subjects of bargaining, is naïve and shows a startling disregard for the educational process. It assumes that the Board is in a position to referee the inner academic workings of a university. Collective bargaining has no legitimate place in institutions where a student's teaching and research opportunities grow out of and are required by the design of their department's academic program. The Board's expertise and insight about the contours of the bargaining process simply do not extend to serving as arbiter of what is, and is not, a proper subject of negotiation in academic programs.

The Board's Notice invited the parties and interested *amici* to address four questions. Although *Brown* endorses the arguments on each question made by the Employers and other higher education institution *amici* against reversal or modification of the *Brown* decision, *Brown*'s brief focuses on the first question presented by the Board:

> 1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which 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, because they "have a primarily educational, not economic, relationship with their university"? *Brown*, 342 NLRB at 487

For the reasons set forth below, Brown submits that modifying or overruling *Brown* would have permanent and disastrous consequences for private graduate educational institutions whose education model is similar to Brown's.

ARGUMENT

I. Brown's Model Of Graduate Education Necessitates The Conclusion That Graduate Students Are Not Employees Under The Act.

A. Service As A Graduate Student Assistant Is Fully Integrated Into Brown's Graduate School Curriculum.

At Brown, and those institutions whose approach to graduate education follows a similar model[1], the evidence that graduate student assistants "have a primarily educational, not economic, relationship with their university" is overwhelming. As the Board found in *Brown*, "[t]he testimony of nearly 20 department heads, and the contents of numerous departmental brochures and other Brown brochures, all point to graduate programs steeped in the education of graduate students through research and teaching." *Brown*, 342 NLRB at 484. Curricular and programmatic concerns permeate every aspect of graduate student education at Brown. Contrary to the evidence in the original New York University case, *New York University*, 332 N.L.R.B. 1205 (2000) ("NYU-I"), in which the Board found that there was an "absence of any academic credit for virtually all graduate assistant work," and that "…it is undisputed that working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments," *Id.* at 1207, the Brown model makes graduate student status and "graduate student assistant" status virtually indistinguishable. This is manifested in every aspect of the graduate student's relationship with the university, and Brown's model of education:

- Brown's education system is based on the "university/college" model, which views teaching and research as an integrated whole for all students, both undergraduates and graduates. Graduate students participate in teaching as a matter of educational practice. The faculty believes that

[1] The model of graduate education at Polytechnic Institute of New York University closely parallels the Brown model, for example.

participation by graduate students in helping to teach undergraduates is part of the essential education process for both undergraduates and graduates.

- The curriculum of virtually all of Brown's approximately 45 graduate-degree-granting departments requires teaching and research as a degree requirement for graduate students. Unlike the current situation at New York University, in which graduate students may elect to teach as adjunct faculty, teaching is a prerequisite for the graduate degree at Brown. The faculty of each department establishes requirements for the degree, and each department maintains records of, and evaluates, the teaching and research activities of its graduate students. Graduate students serve as teaching assistants in their discipline and their assignments are closely tailored to their academic preparation and interests.
- At Brown, teaching and research are so functionally integrated into the academic program of each department that service either as a teaching assistant (TA), a research assistant (RA) or a proctor is considered the equivalent of a course. Thus, the University's maximum course load for graduate students is four courses per semester, but those who are appointed as graduate assistants may only enroll in three courses.
- Graduate students must be enrolled at Brown in order to be awarded a TA, RA or proctorship.
- At the time of the *Brown* decision, sixty-nine percent of all graduate students were enrolled in departments which required teaching as a

condition of obtaining the Ph.D. Currently, eighty percent of all graduate students at Brown are enrolled in such departments. Even in the limited instances in which graduate students do not receive financial aid from Brown, or are paying for their own education, students in those departments *must* fulfill their teaching requirement as part of their graduate curriculum.

- Brown TAs and RAs are overseen by faculty members in the performance of these assistantships.
- Brown graduate students do not "apply" for "jobs" as TAs, RAs or proctors. These positions are awarded to students as part of their financial aid package, which is administered as part of the University's financial aid budget, not its personnel budget. Financial aid is generally offered to graduate students for five years, "typically with a fellowship in the first and fifth years, and TA or RA positions in the intervening years." *Brown*, 342 N.L.R.B. at 485. The financial aid package includes not only a stipend for living expenses, but payment of the university health fee and of the student's tuition. *Id.* at 486. The funding for each position – whether a TA, RA, proctorship or fellowship – is generally the same in each department, and is awarded without regard to the amount of time spent studying or performing assistantship duties.

Characterizing Brown's graduate assistants as employees in light of the complete integration of their TA, RA and proctorship responsibilities with their academic curriculum

would wreak havoc with Brown's educational model, and the similar models adopted by so many private American institutions of graduate education.

B. The Suggestion That Collective Bargaining Would Be Compatible With Integrated Degree Programs Defies Common Sense.

The oft-quoted suggestion made by the Board in *NYU- I* that "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,'" *NYU-I,* 332 N.L.R.B. at 1208, quoting *Boston Medical Ctr. Corp.*, 330 N.L.R.B. 152, 164 (1999) (*Boston Medical Center*), reflects a misconception of the subtleties of attempting to separate academic subjects from collective bargaining subjects.

Common sense tells us that graduate students who apply for acceptance as students make a choice to adhere to the degree requirements of the institution to which they are accepted. Unlike the graduate students at New York University, who apply for their teaching positions independently of their degree program,[2] graduate students at Brown and similar institutions are not applying for a job; they are applying to be students. They do not anticipate that they may have to pay union dues or an agency fee as a condition of being a student. They do not expect to bargain about the financial aid they may be granted by their university.

Where the model of graduate education parallels that of Brown, the complexities of collective bargaining would be overwhelming. Literally any identifiable "term" or "condition" of employment of graduate students serving as assistants as part of their degree program would *require* Brown and similar institutions to bargain over the *academic* terms and conditions of the degree programs in which graduate students are enrolled. Because stipends in each department are equal for all graduate students funded by Brown, and they involve tuition remission,

[2] The same is widely true in public institutions of graduate education.

bargaining over the "wages" of graduate assistants in the bargaining unit would necessarily require Brown to bargain over *financial aid policies and tuition rates for all students.* Because serving as a graduate assistant is synonymous with being a graduate student, bargaining about such typical employment issues as seniority, discipline, class size, evaluations, job descriptions, hours of work, number of courses necessary to teach for a degree, and the types of activities required by TAs in their courses, to name but a few, *would all require Brown to bargain over the right of each department to establish degree requirements, determine eligibility for financial aid, assess and evaluate students and determine curricular and programmatic details.* These subjects go to the very essence of academic freedom: the freedom to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).[3]

Brown's pedagogical method is worlds apart from academic models such as that of New York University, or the many public universities in which teaching is unrelated to degree requirements in particular departments. At Brown and similar universities, where teaching assignments are calibrated as much as possible to match the student with his or her field of interest and preparation, collective bargaining over basic issues such as assignments and evaluations would require Brown to bargain over the confidential academic records of its

[3] Consider, for example, the concept of "workload." This is a standard term and condition of employment subject to bargaining in any workplace. Suppose graduate teaching assistants were assigned to assist an undergraduate section which required two examinations in a semester. Suppose further that the faculty in the department changed the course to require two term papers instead, requiring the assistants to spend considerably more time grading papers. Would a union representing graduate assistants have the right to bargain over this change in "workload"? If the university resisted, would resolution of the matter require a trial before an Administrative Law Judge and if so, would the Judge be in a position to separate the "academic" from the "employment" concerns? This is just one minute example of the types of issues that would constantly arise if graduate assistants who are required to teach as part of their academic program were considered "employees."

students. Unlike a customary employment situation (or, for that matter, at NYU), where, for example, poor performance could lead to termination or transfer but "…there would be no *academic* reprisals for poor teaching," *NYU-I*, 332 N.L.R.B. at 1219, poor teaching at Brown or a similar institution might affect a student's academic evaluation and eventual completion of the degree requirements. Collective bargaining is not designed to intrude into that arena.

C. Brown's Real Concerns About The Intersection Of Collective Bargaining With Degree Requirements Are Not Mere Speculation.

The Board in *NYU-I* dismissed the employer's concerns about "the potential for infringement with academic freedom that collective bargaining with graduate assistants might impose" as turning "largely on speculation over what the Petitioner might seek to achieve in collective bargaining, or what might become part of an agreement between the Employer and the Petitioner." *NYU-I*, 332 N.L.R.B. at 1208. Indeed, the Board characterized such concerns as "conjecture." *Id.* Perhaps such considerations were dismissed as speculative in *NYU-I* because the facts in that case differed so much from the facts in *Brown*. But when considered in light of Brown's (and similar institutions') model of graduate education, the incompatibility of collective bargaining and real life academic decision-making becomes painfully obvious and cannot be blithely dismissed as "conjecture" or "speculation."

It is therefore not surprising that no Board decisions have imposed collective bargaining on institutions, whether graduate, undergraduate or otherwise, in which performance of student services is fully integrated into a degree program. The absence of such decisions reflects the common sense understanding that no educational institution should be required to bargain over subjects which affect the core status of its students.

D. There Is No Empirical Evidence Of The Effect Of Collective Bargaining On Institutions In Which Serving As A Graduate Assistant Is Fully Integrated Into Graduate Degree Programs.

One apparent basis upon which the Board granted review in *New York University*, 2010 NLRB LEXIS 430, 189 L.R.R.M. (BNA) 1329, 356 N.L.R.B. No. 7 (October 9, 2010) ("*NYU-II*"), was to enable the petitioner to submit empirical evidence of the impact of collective bargaining on graduate education. As noted by the Regional Director in his decision in that case, Paula Voos, Professor of Labor Studies at Rutgers University, testified about an *unpublished study* on the impact of representation of graduate student employees on the faculty/student relationship and on academic freedom. Professor Voos surveyed approximately eight hundred graduate assistants at eight large *public* research universities. The Regional Director noted that:

> The preliminary conclusions of the study are that there is no evidence that the student/teacher relationship is worse or damaged in the context of graduate student representation. On the issue of academic freedom, the study indicated that there was no statistically significant difference in the union versus non-union settings. (*NYU-II*, Case 02-RC-023481, RD Decision and Order, (June 16, 2011) at 25)

The Regional Director also admitted that "[t]he preliminary results have neither been fully analyzed nor subjected to the peer-review process." *Id.* at 24.

Another study cited by the petitioner before the Regional Director in Case 02-RC-023481– and noted by the dissent in *Brown* – was conducted by a Tufts University graduate student in 2000, which involved a survey of faculty at five *public* higher education institutions. Gordon Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship Between Faculty and Graduate Students*, 29 J. Collective Negotiations in the Public Sector 153 (2000). The Regional Director noted that Hewitt found that "on a business level, faculty are concerned with procedural and financial limitations imposed on them by the agreement. On an educational level, the collective-bargaining agreement does not play a role in

defining faculty's relationships with graduate students." RD Decision and Order at 25. Based on his study, which involved a small group of faculty whose "open-ended comments…temper the results of the quantitative results," Hewitt, *supra*, at 164, Hewitt suggested that his study could be used as a tool for union organizing:

> Labor unions attempting to organize graduate assistants and graduate student organizations seeking collective bargaining rights can use the results of this study to refute claims by university administrators that collective bargaining inhibits the educational relationship between faculty and graduate students…..*Id.*

Whether or not designed or utilized as rationales for union organizing, it is clear that neither these studies, nor any other reported empirical research, address the fundamental issue of the potential impact of collective bargaining on private higher education institutions in which service as a graduate assistant is fully integrated into the graduate student's curriculum. Neither the Voos study, nor the Hewitt study, even deal with private higher education institutions. Nor was there any apparent attempt to determine whether any of the graduate students or faculty surveyed were enrolled in programs in which service as a graduate assistant was integrated into the curriculum.

There is thus no empirical research whatsoever suggesting that collective bargaining could be reconciled with the right of faculty to establish degree and curricular requirements at private institutions of higher education.

E. Graduate Assistants Are Not "Apprentices."

Petitioners argue that graduate assistants are "apprentices," whom the Board has found to be employees under the Act. The argument is that graduate assistants are akin to "apprentice" faculty members, and as such, they should be considered employees because the Board compared medical house staff to apprentices in *Boston Medical Center*, 330 N.L.R.B. 152, 161 (1999). Brown submits that this analogy is clearly flawed and inapplicable. First, apprentices

are individuals training to become journeymen in a particular field, usually at the same employer. Graduate students are training to become members of the academy, but that training is three-pronged: mastery of knowledge (coursework), teaching and original research. In each of these three areas they are serving as students, fulfilling degree requirements. No reported Board cases hold such individuals to be apprentices. But even if one were to accept that term in its commonly understood sense, that is, the graduate students are learning to become teachers or researchers, that conclusion would not be dispositive, because they are doing it in an academic rubric.

Moreover, the analogy used by the Board in *Boston Medical Center* was predicated on the finding that interns and residents were "junior professional associates" who "…possess the types of skills and are required to perform the types of job duties common to other physicians, at similar, albeit not identical, skill levels." Id. at 161, 167 As a result, the Board placed the house staff in the same bargaining unit as salaried physicians. This is simply not the case at Brown and institutions following a similar model. Graduate assistants are genuinely different from either tenure track or non-tenure track faculty. The Board has never included students in the same bargaining unit as faculty. *See, e.g., Adelphi University*, 195 N.L.R.B. 639 (1972). And unlike medical residents and interns, who have the same terminal degree as their physician colleagues, graduate assistants do not have their professional degree, the Ph.D. They work under the supervision of faculty members, who have ultimate responsibility for the teaching or research in which they are involved. Moreover, the Board does not find *all* apprentices to be employees. *Firmat Manufacturing Corp.*, 255 N.L.R.B. 1213 (1981) (a student apprentice hired as part of a cooperative education program at a local high school held not an employee under the Act).

F. There Is A Legitimate Dichotomy Between "Working" And "Learning": The *Brown* Majority's Interpretation Of Section 2 (3) Of The Act Was Correct.

Petitioners in Case 2-RC-23481 contend that there is a "false dichotomy between working and learning that has no foundation in law, evidence or logic." *NYU-II*, Petitioner's Request for Review, Case 2-RC-23481 at 18. They, along with the dissent in *Brown,* argue that the Board must give effect to the "plain meaning" of section 2 (3) of the Act's broad definition of "employee," without regard to the context in which graduate assistants provide service to their universities. Petitioner's assertion ignores the reality of graduate education in institutions such as Brown, where graduate assistants perform teaching and research as an integral part of their degree program. Injecting collective bargaining into the academic relationship in these circumstances is simply a prescription for disaster.

The majority in *Brown* correctly concluded that, when examined in light of the underlying purposes of the Act, the graduate assistants at Brown are students whose relationship with the university is primarily academic, not economic. This has not changed. The determination of employee status cannot be made by the mere mechanical application of statutory language taken out of context. *See, e.g., Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) ("In doubtful cases resort must still be had to economic and policy considerations to infuse § 2 (3) with meaning."); *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999)("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background and purposes of the Act.")

The *Brown* majority's interpretation of section 2 (3)of the Act in the context of private graduate higher education was correct.

CONCLUSION

For all of the foregoing reasons, Brown urges the Board to adhere to its decision in *Brown* without modification. A change in the Board majority, without any change in the facts, is insufficient justification to throw American private graduate education into turmoil.

Respectfully submitted,

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I, the undersigned, hereby certify that on this 23rd day of July, 2012, I served the foregoing *amicus* brief, via the Board's electronic filing system and via e-mail, upon the following:

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