UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 2

THE NEW SCHOOL

Employer

and **Case No. 02-RC-143009**

STUDENT EMPLOYEES AT THE NEW SCHOOL – SENS/UAS

Petitioner **February 20, 2015**

PETITIONER'S REQUEST FOR REVIEW

I. INTRODUCTION

The Petitioner, Student Employees at the New School-SENS, UAW, filed this petition on December 17, 2014, claiming to represent a unit of student employees employed by The New School ("the Employer"). This unit includes employees who provide teaching, instructional and research services at the New School. These employees are enrolled as students at The New School and are paid to perform services that generate income for the University. Thus, they are both students at The New School and employees of the New School.

By Order dated February 6, 2015, the Regional Director for Region Two dismissed the petition based upon the categorical holding in Brown University, 342 N.L.R.B. 483 (2004), that graduate student assistants are not employees within the meaning of the Act. Brown is an aberrant decision that cannot be reconciled with the language of the Act or with other decisions of the Board and of the Supreme Court. The Regional Director acknowledged that, on three occasions since 2010, the Board has issued orders stating that it wished to reconsider the holding in Brown. Nevertheless,

the Regional Director concluded that she was "constrained by current Board precedent" to dismiss this petition without a hearing.

The Petitioner respectfully requests that the Board grant review of the dismissal of this petition. The Board has repeatedly questioned the continuing viability of Brown, granting review of decisions that followed the precedent of Brown. As the Board has already concluded that there are compelling reasons to reconsider Brown, it should not require an extended period of consideration to grant review in this case.

II. HISTORY OF NLRB DECISIONS REGARDING STUDENT ORGANIZING

On April 3, 2000, the Regional Director for Region Two issued a Decision and Direction of Election in *New York University*, Case No. 2-RC-22082, finding graduate assistants at NYU to be statutory employees entitled to legal protection for the right to organize. The Regional Director found that existing NLRB precedent supported finding these graduate assistants to be employees. He found that these student employees met the statutory definition of an employee under section 2(2) of the Act, in that they performed services for NYU in exchange for compensation by the university. He found particular support for this holding in Boston Medical Center Corp., 330 N.L.R.B. 152 (1999), where the Board held that interns and residents ("house staff") at a teaching hospital are employees protected by the Act. Just six months later, the Board unanimously affirmed the Regional Director's decision. New York University, 332 N.L.R.B. 1205 (2000) (NYU I). That decision unleashed a flood of pent-up enthusiasm for organizing by student employees at elite private universities in the Northeast. *Brown University*, Case No. 1-RC-21368; *The Trustees of Columbia University in the City of*

New York, Case No. 2-RC-22358; *The Trustees of the University of Pennsylvania*, Case No. 4-RC-20353; *Tufts University*, Case No. 1-RC-21452.

This enthusiastic response was crushed four years later when the Board issued its 3-2 decision in Brown, overruling the unanimous decision in NYU I. The Brown decision was inconsistent with relevant Board and court decisions and cannot be reconciled with the language or intent of the statute. The Brown majority held that graduate assistants are "primarily students" and therefore not employees. The conclusion that one who is "primarily" a student cannot also be an employee has no basis in logic or in the law. The Brown majority stated that NYU I had overruled 25 years of precedent to conclude that graduate assistants could be both students and employees. In fact, NYU I was in line with and consistent with past decisions of the Board and the Supreme Court. Brown is the only current precedent to find some inconsistency between being a student and being an employee. The one case cited by the Board that arguably supported that decision was St. Clare's Hospital, 229 N.L.R.B. 1000 (1977), a decision that had already been overruled when Brown issued and that continues to be discredited. Nevertheless, for ten years, Brown has stood as a barrier to organizing by student employees.

On three occasions over the past five years, the Board has issued orders in which it stated that it had decided to reconsider the Brown decision. In 2010, the Acting Regional Director dismissed the petition in *NYU*, Case No. 2-RC-23481, without a hearing. The Board granted review of that decision, finding "compelling reasons for reconsideration of the decision in *Brown University*." New York University, 356 N.L.R.B. No. 7 (2010) ("NYU II"). The Board reopened the case and remanded for a hearing.

After 19 days of hearings over 4½ months, the Acting Regional Director again dismissed the petition on the authority of Brown. The Board granted review a second time, reiterating that there are "compelling reasons for reconsideration of *Brown University*." Case No. 2-RC-23481, unpublished Order dated 6/22/12. Another year and one-half passed after this order granting review in NYU II for the second time, but no decision was forthcoming. Finally, in December 2013, three and one-half years after the petition had been filed, the petitioner entered into an agreement with NYU for an alternative method to demonstrate its majority status and withdrew the petition in Case No. 2-RC-23481.

This past May, the Board invited briefs on review in *Northwestern University*, Case No. 13-RC-121359, to address, *inter alia,* whether the Board should "adhere to, modify or overrule the test of employees status" applied in Brown. Order dated May 12, 2014. No decision has issued in that case. In light of these previous orders finding "compelling reasons" to reconsider Brown, the Board should grant review without delay and remand this case to the Regional Director to conduct a hearing to determine whether there is a question concerning representation regarding employees of the Employer.

III. THE BROWN DECISION LACKS ANY LEGAL BASIS

Section 102.67(c)(4) of the Board's Rules and Regulations provides that review should be granted where there are "compelling reasons for reconsideration of an important Board rule or policy." The Board has three times held that Brown should be reconsidered. That decision is inconsistent with law and precedent and is frustrating the

desire of thousands of student employees to organize. There are "compelling reasons" to grant review forthwith.

Brown is inconsistent with the definition of an employee in Section 2(3), which expresses the intent of Congress that the statute be given broad application. An employee for purposes of this law is defined as "any employee." The Supreme Court has repeatedly held that this phrase must be read broadly. In NLRB v. Town & Country, 516 U.S. 85 (1995), a unanimous Supreme Court held, "The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation,'" and the Act's definition of employee as including "*any* employee" "seems to reiterate the breadth of the ordinary dictionary definition." 516 U.S. at 90 (quoting American Heritage Dictionary 604 (3d ed. 1992)) (emphasis in original). Brown conflicts with this holding by finding that individuals who work for a university in return for financial compensation are not employees.

In Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), the Court held that the "breadth" of the definition of "employee" in section 2(3) "is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals supervised by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA." 467 U.S. at 891 (1984). There is no exclusion in the statute for employees who are "also students" or "primarily students."

Consistent with this Supreme Court precedent, the Board has given a broad reading of the definition of an employee. For example, in Sundland Construction Co, 309 N.L.R.B. 1224 (1992), in holding that paid union organizers are employees where

they obtain jobs to try to organize other employees, the Board reaffirmed that the statute applies in the absence of an express exclusion. "Under the well settled principle of statutory construction - expressio unius est exclusio alterius - only these enumerated classifications are excluded from the definition of employee." 309 N.L.R.B. at 1226. Similarly, the Board gave a broad reading to the statutory definition of employee in Seattle Opera Ass'n, 331 N.L.R.B. 1072 (2000), enforced 292 F.3d 757 (D.C. Cir. 2002), holding that auxiliary choristers at non-profit opera company are "employees". In Seattle Opera, the D.C. Circuit distilled the Supreme Court's and Board's broad reading of the statute and the common-law master servant relationship into a two-part test: "[I]t is clear that - where he is not specifically excluded from coverage by one of section 152(3)'s enumerated exemptions - the person asserting statutory employee status does have such status if (1) he works for a statutory employer in return for financial or other compensation; and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed." 292 F.3d at 762 (internal citations omitted). Brown is inconsistent with this Board and Supreme Court precedent in crafting an exclusion that does not appear in the statute in order to find that individuals who provide services for a university in exchange for compensation are not employees.

The decision in Brown likewise cannot be reconciled with the long history of case law holding that an individual can be both a student and an employee. An apprentice, by definition, is both a student and an employee. He or she is required to work as a part of the training for a craft or trade. Apprentices typically work for an employer while taking classes to learn the craft. This work provides on-the-job training that is critical to

learning the craft. An apprentice generally must complete a certain number of hours of classroom training and a specified number of years of work in the field in order to qualify as journeymen. Despite the fact that the work of an apprentice is thus part of training for a career, the Board has consistently treated apprentices as employees.

As far back as 1944, the Board held that apprentices who attended a school as part of a 4 or 5 year training program and worked under the supervision of training supervisors for two and one-half years while learning shipbuilding skills were employees within the meaning of the Act. Newport News Shipbuilding and Dry Dock Co., 57 N.L.R.B. 1053, 1058-59 (1944). Similarly, in General Motors Corp., 133 N.L.R.B. 1063, 1064-65 (1961), the Board found apprentices who were required to complete a set number of hours of on-the-job training, combined with related classroom work in order to achieve journeyman status, to be employees. See also UTD Corp., 165 N.L.R.B. 346 (1967) (apprentices included in bargaining unit); Chinatown Planning Council, Inc., 290 N.L.R.B. 1091, 1095 (1988) (describing apprentices "working at regular trade occupations while receiving on-the-job training"), enf'd, 875 F.2d 395 (2d Cir. 1989). All of these apprentices were students and employees at the same time. Their work was related to their schooling. They learned while working and earning money. In short, they were students and employees simultaneously. The Board has never suggested that, in order to find an apprentice to be an employee, it was necessary to weigh the educational benefit that he received from working with a journeyman against the economic benefit his employer derived in order to decide whether the relationship was "primarily educational."

In a similar vein, the Board held in Boston Medical Center, 330 N.L.R.B. 152 (1999) that medical interns, residents and fellows are "employees," despite the fact that they are also students. The Board in Boston Medical emphatically rejected the idea that there is some kind of inconsistency between being an employee and being a student:

> Their status as students is not mutually exclusive of a finding that they are employees.
>
> As 'junior professional associates,' interns, residents and fellows bear a close analogy to apprentices in the traditional sense. It has never been doubted that apprentices are statutory employees.... Nor does the fact that interns, residents and fellows are continually acquiring new skills negate their status as employees. Members of all professions continue learning throughout their careers.... Plainly, many employees engage in long-term programs designed to impart and improve skills and knowledge. Such individuals are still employees, regardless of other intended benefits and consequences of these programs.

330 N.L.R.B. at 161 (citations and footnotes omitted). "[I]t has never been doubted that apprentices are statutory employees ..." because there is no inconsistency between working and learning. Id.

The holding of Boston Medical has not been questioned by the courts of appeals, has resulted in fruitful collective bargaining, and remains good law. The Board reaffirmed the holding that medical residents and interns can be both students and employees in St. Barnabas Hospital, 355 N.L.R.B. No. 39 (2010). Thus, the holding of Brown that a class of individuals cannot be employees because they are also students represents an outlier – a decision so at odds with other decisions regarding the employee status of other classes of student workers that it should be overruled forthwith.

The only distinction between graduate assistants and apprentices in the trades, whose status as employees has never been questioned, lies in the level of

their education and the intellectual nature of their work. That cannot be a basis for excluding graduate assistants from the statutory definition of employee, as section 2(12) explicitly includes employees whose work is intellectual in nature within the coverage of the Act. Indeed, section 2(12)(b) sets forth a definition of professional employee that fits graduate assistants precisely. The term "professional employee" includes "any employee who (i) has completed the courses of specialized intellectual instruction ... and (ii) is performing related work under the supervision of a professional person...." See Boston Medical, 330 N.L.R.B. at 161. Graduate assistants therefore cannot be distinguished from apprentices on the ground that their courses involve "intellectual instruction" rather than instruction in a trade. Moreover, the residents and interns found to be employees in Boston Medical and St. Barnabas have achieved at least as high a level of intellectual accomplishment as graduate assistants. Thus, Board precedent holds that employees who work in connection with their studies are employees. Brown is inconsistent with that precedent.

The Board majority in Brown purported to base its holding on two decisions involving universities, Adelphi University, 195 N.L.R.B. 639 (1972), and Leland Stanford Junior University, 214 N.L.R.B. 621 (1974). Neither of these cases lends any support to the proposition that graduate students cannot also be employees. In Adelphi, the Board did hold that the graduate student teaching and research assistants were "primarily students." There is not the slightest suggestion in that decision, however, that the Board believed that this was somehow inconsistent with employee status. Rather, the Board held that student status distinguished

teaching assistants from regular faculty members, so that they had a community of interest separate from regular faculty members. "[W]e find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit." 195 N.L.R.B. at 640. NYU I, by finding a separate unit of student employees to be appropriate, was entirely consistent with Adelphi. The Board, in Brown, did not "return to the holding" of Adelphi. Instead, the Board distorted the holding of a case which actually supports a finding that graduate assistants are employees who have a separate community of interest from other employees.

Similarly, Leland Stanford did not hold that a graduate student could not be simultaneously a student and an employee. Rather, the Board found the graduate students were not employees on the particular facts of that case. The Board found that the tax-exempt stipends received by the students from outside funding agencies were not payment for services performed for the university. "Based on all the facts, we are persuaded that the relationship of the RAs and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer." 214 N.L.R.B. at 623. There is nothing in Leland Stanford to support Brown's holding that a graduate assistant cannot be an employee where the student does perform tasks under the direction and for the benefit of the university.

The Board in Brown went on to find that student employees are not statutory employees because their relationship to the university is "primarily educational." As

discussed above, there is nothing in either Adelphi or Leland Stanford that would support a holding that one cannot be both student and employee. Indeed, the false dichotomy between working and learning was forcefully rejected by the Board in Boston Medical and is inconsistent with decades of case law finding apprentices to be employees. In the face of this precedent, the Brown majority turned to St. Clare's Hospital, 229 N.L.R.B. 1000 (1977), to provide support for excluding an entire class of employees from the protections of the Act. St. Clare's, however, had been expressly overruled in Boston Medical. 330 N.L.R.B. at 152. Thus, the only case cited by the majority in Brown which supports the holding of that case is a case that has been overruled.

To summarize, the Brown decision was unsupported by the language of the statute, Supreme Court precedent, and the Board decisions upon which the Board purported to rely. The Board failed to consider the language of the statute. The Board failed to follow repeated admonitions by the Supreme Court that section 2(3) is to be read broadly. The Board cited Adelphi and Leland Stanford for the proposition that there is some inconsistency between being a student and being an employee, but there is nothing in those cases to support a finding that there is such an inconsistency. In finding this inconsistency, the Board ignored its long history of finding apprentices to be employees. Finally, the Board relied upon a decision that had been expressly overruled. Clearly, the Brown decision is an outlier: a decision which cannot be reconciled with the statute or with other interpretations of the Act.

Accordingly, there are compelling reasons to grant review and reinstate this petition.

IV. CONCLUSION

The Board should act promptly to reinstate this petition. As an academic institution, The New School's operations are seasonal. In order to ensure a prompt and orderly hearing, this case needs to be remanded in time to enable the Region to conduct a hearing before the end of the current school semester. A hearing over the summer might greatly inconvenience witnesses, particularly representatives of the Employer, forcing them to appear and give testimony during a period when they customarily would be traveling for academic purposes. As the Board has previously found that there are compelling reasons to reconsider Brown, there should be no reason that the Board cannot grant review and reinstate this petition promptly, so that the Region can conduct a hearing that can be concluded by April.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served copies of the Petitioner's Request for Review on each of the following parties by electronic mail on February 20, 2015:

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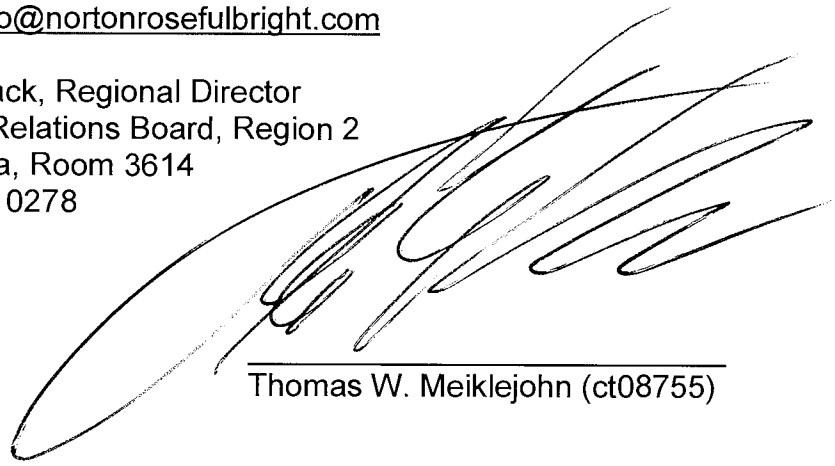

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