

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of: The New School  Employer, And Student Employees at The New School - SENS, UAW  Petitioner.	Case No. 02-RC-143009
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The above-entitled matter came on for hearing pursuant to Notice, before GREGORY B. DAVIS, Hearing Officer, at the National Labor Relations Board, Region 2, 26 Federal Plaza, Suite 3614, New York, NY 10278 on Monday, April 20, 2015, at 2:00 p.m.

A P P E A R A N C E S

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On behalf of the Employer:

DOUGLAS P. CATALANO, ESQUIRE  
Norton, Rose, Fulbright USA LLP  
666 5th Avenue  
New York, NY 10103

ROY MOSKOWITZ, ESQUIRE, Chief Legal Officer  
KEILA TENNENT, EXQUIRE, Associate General Counsel  
The New School  
Office of the General Counsel  
80 Fifth Avenue, Suite 800  
New York, NY 10011  
212-229-5432

On Behalf of the Petitioner:

THOMAS W. MEIKLEJOHN, ESQUIRE  
NICHOLE M. ROTHGEB, ESQUIRE  
Livingston, Adler, Pulda, Meiklejohn & Kelley, P.C.  
557 Prospect Avenue  
Hartford, CT 06105-5922  
860-570-4628

1	<u>E X H I B I T S</u>		
	<u>EXHIBIT NUMBER</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
2	Board's:		
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5	Petitioner's:		
6	P-1	26	28
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P R O C E E D I N G S

(Time Noted: 2:18 p.m.)

HEARING OFFICER DAVIS: On the record. The hearing will now be in order. This is a formal hearing in the matter of The New School, Case Number 02-RC-143009, before the National Labor Relations Board.

The Hearing Officer appearing for the Board is Gregory B. Davis, and the hearing is being conducted at 26 Federal Plaza in a room adjacent to Room 3614, New York, New York.

All parties have been informed of the procedures of formal hearing before the Board by service of a Statement of Standard Procedures with the Notice of Hearing. I have additional copies of the statement for distribution if any party wishes more.

All parties please note that the Official Reporter makes the only official transcript of these proceedings, and all citations, arguments and briefs, if briefs are to be submitted, must refer to the official record.

In the event that any of the parties wish to make off-the-record remarks, requests to make such remarks should be directed to the Hearing Officer and not to the Official Reporter.

Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on

1 appropriate request, be permitted to an entire line of  
2 questioning.

3 The parties are reminded that witnesses should seek nor  
4 receive assistance from others in the hearing room while  
5 testifying.

6 I just want to remind the parties that the Board's new  
7 Official Rules do not apply in this case because the petition  
8 was filed before April 14, 2015.

9 Will Counsel and other representatives please state their  
10 appearances, names and address for the record.

11 For the Petitioner:

12 MR. MEIKLEJOHN: Thomas W. Meiklejohn and Nichole Rothgeb,  
13 Livingston, Adler, Pulda, Meiklejohn & Kelley, 557 Prospect  
14 Avenue, Hartford, CT 06105.

15 HEARING OFFICER DAVIS: For The New School?

16 MR. CATALONO: Douglas P. Catalano, Norton, Rose,  
17 Fulbright USA LLP, 666 Fifth Avenue, New York, New York 10103.

18 HEARING OFFICER DAVIS: Thank you. Are there any other  
19 appearances? Let the record show no response.

20 Are there any other persons, parties or labor  
21 organizations in the hearing room at this time who claim an  
22 interest in this proceeding? Let the record show no response.

23 At this time, I propose to receive the Formal Papers.  
24 They have been marked as Board's Exhibit 1. This exhibit has  
25 already been shown to the parties. Are there any objections to

1 its introduction?

2 (B-1 identified.)

3 MR. MEIKLEJOHN: No objections.

4 MR. CATALANO: None, but it's noted that I would suggest  
5 that nothing in those documents is to be construed to be  
6 submitted for the truth of the matter asserted.

7 HEARING OFFICER DAVIS: Okay. With that, the Formal  
8 Papers are received into evidence.

9 (B-1 received.)

10 MR. CATALANO: Just for a complete record, Mr. Davis,  
11 would you like to know who is sitting next to me?

12 HEARING OFFICER DAVIS: Sure.

13 MR. CATALANO: Counsel Keila and Roy, you might introduce  
14 yourself.

15 MS. TENNENT: Keila Tennent Acaldoral, Associate Counsel  
16 for The New School.

17 HEARING OFFICER DAVIS: Thank you.

18 MR. MOSKOWITZ: Roy Moskowitz, Chief Legal Officer of The  
19 New School.

20 HEARING OFFICER DAVIS: Thank you.

21 Mr. Meiklejohn, please state for the record the correct  
22 and complete name of the Petitioner as set forth in its  
23 Constitution and Bylaws listing any all affiliations. Is that  
24 the name designated on the petition?

25 MR. MEIKLEJOHN: The name designated on the petition is

1 the official name of the petitioning organization, yes. That  
2 organization does not have a formal constitution at this time.

3 HEARING OFFICER DAVIS: Thank you.

4 Mr. Catalano, is the current name of the Employer correct  
5 as it appears on the petition?

6 MR. CATALANO: The New School is correct. The address --  
7 there are a number of offices; I want to make sure that the  
8 address is correct.

9 HEARING OFFICER DAVIS: Sure.

10 MR. CATALANO: 66 West 12th Street, New York, New York.

11 HEARING OFFICER DAVIS: Okay. So that's right.

12 Are there any motions to intervene in these proceedings to  
13 be submitted to the Hearing Officer at this time? Let the  
14 record show no response.

15 It is my understanding from off-the-record discussions  
16 that the parties intend to join in stipulations as to the  
17 following:

18 With respect to commerce, the parties have agreed to  
19 stipulate to the following:

20 The Employer --

21 MR. CATALANO: I'm sorry; there are modifications to this  
22 document.

23 MR. MEIKLEJOHN: He's already got a copy.

24 HEARING OFFICER DAVIS: I'm going to read it into the  
25 record.

1 MR. CATALANO: Yes. Thank you. As long as you are aware  
2 of that.

3 HEARING OFFICER DAVIS: Okay. The New School, a New York  
4 not-for-profit corporation, with a place of business located in  
5 New York, New York, is engaged in the operations of  
6 institutions for higher education. Annually, The New School,  
7 in the course and conduct of its business operations, derives  
8 gross revenues in excess of one million dollars, excluding  
9 contributions which, because of limitations by the Grantor, are  
10 not available for operating expenses.

11 Additionally, in the course and conduct of its business  
12 operations, the Respondent purchases and receives at its New  
13 York, New York facility products, goods and materials valued in  
14 excess of \$50,000 directly from points outside the State of New  
15 York.

16 Does the -- well, does the Respondent for this school  
17 stipulate to that?

18 MR. CATALANO: The New School agrees to that recitation.

19 HEARING OFFICER DAVIS:

20 MR. MEIKLEJOHN: Petitioner so stipulates as well.

21 HEARING OFFICER DAVIS: Thank you, the stipulation is  
22 received.

23 The next stipulation regards a labor organization status  
24 of the Petitioner. During an off-the-record discussion, it is  
25 my understanding that The New School would agree that the

1 Student Employees at The New School -- SENS, UAW is a labor  
2 organization within the meaning of Section 25 of the National  
3 Labor Relations Act only upon the finding of the Board that the  
4 petition for a unit is found to be employees; is that correct?

5 MR. CATALANO: Well, I didn't say at the Board level. I  
6 said ultimately -- because I don't know where ultimately this  
7 will be resolved, in what forum or before the NLRB; but in the  
8 event that the individuals are -- certain of the individuals  
9 described in the petition for a unit are ultimately found to be  
10 statutory employees, then we would have no objection; or we  
11 would agree that this is a labor organization. We wouldn't  
12 litigate that issue.

13 But only if, because our contention is, as you know, and  
14 as the Regional Director has found, these graduate students are  
15 not employees.

16 HEARING OFFICER DAVIS: I understand your position. Thank  
17 you.

18 Mr. Meiklejohn, obviously do you stipulate that the  
19 petitioner is a labor organization?

20 MR. MEIKLEJOHN: Our position is that I represent a labor  
21 organization.

22 HEARING OFFICER DAVIS: So the stipulation, conditional  
23 though it is, is received.

24 Does The New School decline at this time to recognize the  
25 Petitioner as the exclusive bargaining representatives for the

1 employees' petition for until such time it is certified in an  
2 appropriate bargaining unit termed by the Board?

3 MR. CATALANO: Yes.

4 HEARING OFFICER DAVIS: It is my understanding that The  
5 New School has no history of collective bargaining with the  
6 Petitioner. Do you so stipulate?

7 MR. CATALANO: With the Petitioner, that's correct, as set  
8 forth in the caption of the proceeding. I understand that this  
9 is an affiliate of the UAW --

10 HEARING OFFICER DAVIS: Yes.

11 MR. CATALANO: -- with whom the part-time faculty at The  
12 New School -- not the graduate students --

13 HEARING OFFICER DAVIS: Yes.

14 MR. CATALANO: -- have a relationship that's been ongoing  
15 since 2005.

16 HEARING OFFICER DAVIS: And Mr. Meiklejohn, is it correct  
17 that there is no history of bargaining between the Petitioner  
18 in this case and The New School?

19 MR. MEIKLEJOHN: That's correct.

20 HEARING OFFICER DAVIS: Thank you; the stipulation is  
21 received.

22 Do any of the parties contend that there's a Collective  
23 Bargaining Agreement covering the employees sought by the  
24 Petitioner which bars the holding of an election?

25 MR. CATALANO: No.

1 MR. MEIKLEJOHN: No.

2 HEARING OFFICER DAVIS: Okay. The unit sought by the  
3 Petitioner, as set forth in the petition is as follows:

4 "Including all student employees who provide teaching,  
5 instructionally-related or research services, including  
6 Teaching Assistants, (Course Assistants, Teaching Assistants,  
7 Teaching Fellow and Tutors) and Research Assistants (Research  
8 Assistants and Research Assistants).

9 "Excluded are all other employees, guards and Supervisors  
10 as defined in the Act."

11 It is my understanding after an off-the-record discussion,  
12 it's the Employer's position that this is not an appropriate  
13 unit; is that correct, Mr. Catalano?

14 MR. CATALANO: That's correct.

15 HEARING OFFICER DAVIS: Mr. Meiklejohn, in the event the  
16 Board decides to modify the unit set forth in the petition,  
17 would the Petitioner still desire to proceed to an election in  
18 a unit four appropriate by the Board, if any?

19 MR. MEIKLEJOHN: Yes.

20 HEARING OFFICER DAVIS: Okay. I think now would be a  
21 great time for the parties to make opening statements. Since  
22 it's the Petitioner's burden, I ask you to make your opening  
23 statement.

24 MR. MEIKLEJOHN: Thank you. As I think everybody here  
25 knows, the main issue -- perhaps the only issue in this case --

1 is whether people who do work for The New School and help The  
2 New School to fulfill its mission and purpose and who get paid  
3 for doing that work should be denied the right to invoke the  
4 procedures of the National Labor Relations Board to organize  
5 into a Union merely because they also happen to be students at  
6 that institution.

7 As we will start demonstrating, hopefully after the  
8 opening statements are concluded, student employees around the  
9 country are organizing. They are organizing in the public  
10 sector. At New York University, a unit of public -- I mean a  
11 unit of graduate student employees has been recognized by New  
12 York University; but because of the Brown Decision, which again  
13 everyone is familiar with -- it's referred to in the Formal  
14 Papers -- employees are prevented from invoking the procedures  
15 of the National Labor Relations Board in order to organize.

16 As we are concurrently a related or affiliated labor  
17 organization is now contending at Columbia University and as we  
18 have previously argued here, Brown is a complete anomaly in  
19 NLRB law. It ignores the broad language of Section 2.3 of the  
20 Act; it ignores Supreme Court and other National Labor  
21 Relations Board precedent, giving a broad sweep and  
22 interpretation of Section 2.3; and it does this solely on the  
23 grounds that the individuals seeking to organize -- these  
24 employees -- are "primarily students at the institution."

25 There is nothing legally or logically inconsistent about

1 being a student and an employee of the same institution. From  
2 the earliest days of the National Labor Relations Act,  
3 Apprentices, who are by definition students and employees, have  
4 been recognized as employees; and I note that institutions of  
5 higher education frequently refer to graduate student employees  
6 who teach or who do research as Apprentices.

7 Residents and Interns who provide medical services while  
8 learning have been recognized by the Board for over 15 years  
9 now to be employees.

10 The fact that these individuals are students at the same  
11 institution means that they have a separate and distinct  
12 community of interest from other employees at the institution,  
13 but there is no logical basis for concluding that they are not  
14 also employees.

15 These are, in most cases, employees who are embarking on  
16 the first stage of a professional career. The New School's  
17 philosophy, I guess you would call it, is that -- is to promote  
18 and encourage a lifetime of learning; something that applies to  
19 individuals in the earliest stage of their professional career  
20 and in the latest stage of their professional career. They  
21 continue to learn while working.

22 By concluding or by arguing here that individuals are not  
23 employees merely because they learn while they're performing  
24 services for the institution flies in the face of one of the  
25 principles that The New School is founded on.

1           This case presents an even more stark illustration of the  
2 absurdity of the Brown Decision than does the case -- Columbia  
3 that is now pending in this Region as well.

4           Students in the classes -- the job classifications sought  
5 in the petition teach or do research for faculty members and  
6 get paid squarely and directly for doing that work, only during  
7 the periods of time when they've been hired to perform that  
8 work.

9           The pay for RA's or for the Research classifications and  
10 the Teaching classifications under this petition is not part of  
11 a larger funding package like it is at Columbia. They don't  
12 receive a stipend for which they have to work part of their  
13 career -- part of their period in which they're enrolled as PhD  
14 students.

15           These individuals are paid directly for the work they do  
16 for the time period that they perform that work. Some are paid  
17 hourly; some are paid salary, but all of them are paid for just  
18 doing the work.

19           Performing these teaching or research responsibilities is  
20 not a requirement for earning degree for most -- possibly all  
21 -- of the employees covered by this petition.

22           And finally, when this case is concluded and we submit our  
23 briefs, we will be arguing that the Regional Director should  
24 not consider herself to be bound by the Brown Decision when she  
25 issues her Decision in this case.

1           As you know, this petition was once already dismissed by  
2 the Regional Director on the authority of Brown; and it was  
3 promptly reinstated by the Board on the authority or citing New  
4 York University 356 NLRB 7; which at least one time, I was  
5 referring to as NYU-2. I think it's still an appropriate  
6 denomination for that case. That was a unanimous decision of  
7 the Board.

8           The NYU-2 Decision, the one cited by the Board in  
9 reinstating this case, holds that there are compelling reasons  
10 to reconsider Brown. The Decision reopening this case includes  
11 a footnote stating that the Regional Director acted properly in  
12 applying Brown the first time around in this case. That  
13 footnote is only signed by two members of the Board; which, I  
14 would submit, is a clear signal to the Regional Director that  
15 three members of the Board are saying that she should not feel  
16 herself to be bound by the Board's Decision in Brown anymore,  
17 after the repeated statements by the Board in numerous  
18 situations that the Brown Decision should be reconsidered; and  
19 in light of the fact that Brown is an anomalous Decision that  
20 cannot be reconciled with the language of the Statute or with  
21 any other precedent.

22           So we would be asking the Regional Director to direct an  
23 election in this case without further action from the Board.

24           Thank you.

25           HEARING OFFICER DAVIS: Thank you. Mr. Catalano.

1 MR. CATALANO: I'm somewhat overwhelmed by Mr.  
2 Meiklejohn's quantum leap to suggest that a footnote not only  
3 authorizes the Regional Director to do something she hasn't  
4 done but also implies that she somehow had the capacity to be  
5 the NLRB itself, rather than a Regional Director.

6 I challenge that kind of suggestion that the Regional  
7 Director somehow enabled to overturn Brown because of some  
8 footnote allegedly advising the Regional Director that she has  
9 the authority to do so.

10 Words have meaning. If the Board wanted to overturn  
11 Brown, it could have done so a long time ago. It chose not to;  
12 nor did the Regional Director suggest that she had any  
13 authority to do so.

14 One need only go to the first Order to Show Cause to  
15 determine what she believes about this case. It was directed  
16 at the Petitioner. It wasn't directed at The New School; and  
17 pardon me if I ever slip by utilizing the term that Mr.  
18 Meiklejohn seized upon, "Employer;" because this is not an  
19 employment circumstance.

20 So I suggest that the Hearing Officer throughout, if I  
21 ever said "Employer," it's clearly a mistake and not intended.

22 So let's go through this in perhaps a more protracted  
23 sense than Mr. Meiklejohn went through it.

24 But as set forth in the Order of the Regional Director  
25 dated February 6, 2015, dismissing the petition wherein she

1 stated clearly and unambiguously, "Graduate students are not  
2 employees within the meaning of Section 2.3 of the Act pursuant  
3 to Brown."

4 As conceded by the Petitioner's Affiliate, UAW, in the  
5 NYU-2 proceeding, which Mr. Meiklejohn adverts to, the petition  
6 also should be dismissed because it's governed by the dictates  
7 of Brown.

8 So you have the Regional Director; you have the UAW  
9 affiliate, and guess who else we have? We have Mr. Meiklejohn,  
10 in his original petition's response dated January 20, 2015 at  
11 Page Four. "Petitioner intends to argue that Brown should be  
12 overruled."

13 Clearly Brown covers the waterfront. Brown dictates the  
14 result, irrespective of how many of hearing or whatever  
15 arguments that Counsel, in his elegant way, might choose to  
16 provide to the Hearing Officer.

17 Then we need only get to the facts, as you will hear.

18 Yes; Mr. Meiklejohn stated that certain stipends or  
19 dollars are somehow being received by the students, which  
20 somehow implies that there's an employment relationship. It's  
21 intended to be financial aid. This is not one of the mammoth  
22 research institutions with five billion dollars' worth of  
23 funding available to it in form of revenue and grants that  
24 permits it to provide the students with the kind of financial  
25 aid that we would like to give them.

1           Therefore, there is not an ability to have every PhD  
2 student who comes in with the ability to receive that financial  
3 aid; but it is intended to be financial aid.

4           One of the things that I'm stunned by is how I haven't  
5 seen it argued anywhere that common sense dictates the result  
6 that the Brown Board found. I challenge one of his witnesses  
7 to get up on the stand and tell you that he or she came to The  
8 New School in order to become employed rather than to get a PhD  
9 or to get a Masters Degree.

10           They came to The New School not to receive compensation  
11 but to receive an education; and we are assisting them in the  
12 attainment of that degree through the form that we are capable  
13 of providing them, and that is to say financial aid.

14           Common sense. Let's just assume for sake of argument  
15 there is an ultimate holding, which we challenge vociferously  
16 and vigorously, that the Petition for Unit is comprised of  
17 somehow employees and not students. Let's just assume also  
18 that the parties can't reach some sort of agreement in going  
19 forward as to the terms of a Contract, if it ever got to that  
20 stage.

21           And now the Grad Students are allegedly going out on  
22 strike. Who are they going out on strike against? Are they  
23 going on strike against themselves? Are they going on strike  
24 against the faculty member who has asked a Research Associate  
25 to help him or her in the gaining of knowledge and the

1 distribution of knowledge? Who are they going on strike  
2 against?

3 They're going on strike against themselves or else a  
4 faculty member; but they're not going out on strike on "against  
5 an institution that is dictating to the plan persons or  
6 personnel -- this the way we're going to do something."

7 That special relationship between a faculty member and the  
8 Research Assistant -- Research Associate -- is one that does  
9 not submit to Collective Bargaining Agreement -- to collective  
10 bargaining and/or Collective Bargaining Agreements.

11 Now I have seen through NYC-1 or 2 -- and I think that you  
12 were Hearing Officer in one of those proceedings -- it claimed  
13 that well, we won't trespass upon academic freedoms or the  
14 relationship between a faculty member and their student.

15 Well, I dare say that that's impossible to suggest; that  
16 necessarily, it will impede upon that relationship because whom  
17 does the student interact with? They interact with the faculty  
18 member in the main; and he or she is advising the graduate  
19 student about how to go forward in the attainment of their  
20 degree. That's the relationship that you have here with these  
21 students.

22 Now, the fact presented here, despite Mr. Meiklejohn's  
23 eloquence, are consistent with Brown. As Brown said, these  
24 individuals are primarily students rather than employees. And  
25 how could it be otherwise, as I just made note of?

1           What did Brown say? It says, "In light of the status of  
2 graduate students as students at The New School, the role of  
3 graduate students assistantships and graduate education, The  
4 New School, the graduate students' relationship with the  
5 faculty The New School, and the financial support that they  
6 receive to attend Brown, The New School."

7           All of those factors are prevalent and cover the issues  
8 that you will hear during the course of this. So this is a  
9 relationship between faculty member and student; and, of  
10 course, The New School has some role, but there are a number of  
11 cases -- like the San Francisco case -- I'm somewhat startled  
12 by Mr. Meiklejohn saying that Brown's the apparition. It was  
13 40 years otherwise where graduate students were excluded from  
14 bargaining either in the main or being associated with others  
15 in inappropriate unit. That's the case law; not NYU.

16           And name one private university which has, other than  
17 voluntarily, recognized a unit of graduate students. NYU is  
18 it. The case -- and this is after Brown as well. There are  
19 any number of cases where, after hearings just as here, the  
20 petition was dismissed.

21           So when Mr. Meiklejohn draws the conclusion that this is  
22 aberrational, I might argue that NYU is particularly  
23 aberrational. Brown is the case law and for good reason.

24           All Mr. Meiklejohn can say is, "This should be  
25 overturned."

1           Now, can Petitioner seriously argue that The New School is  
2   intending to employ individuals -- when you talk about the  
3   master/servant common law and all the rest of it? The New  
4   School, if it chose not to distribute financial aid to the  
5   students, could have far fewer Teaching Assistants or Teaching  
6   Fellows or Research Assistants or Research Fellows.

7           With respect to a Research Fellow -- excuse me -- a  
8   Research Associate -- who is receiving dollars from the U. S.  
9   Government, if the Graduate Student "goes out strike," is he or  
10  she striking against the U. S. Government which provided the  
11  dollars -- the \$5100 that gets from The New School through the  
12  faculty member to the student? Whom is she striking against --  
13  that graduate student?

14          So the master/servant claim ordinarily made by the UAW and  
15  all of these proceedings common law is contrary to common  
16  sense. This is not an employer/employee relationship.

17          If we chose to, we could use far fewer Teaching  
18  Assistants; we could use part-time faculty members or  
19  otherwise. We're not seeking to do other than provide them  
20  with financial aid and not to employ them.

21          The Petitioner argues that Brown creates some artificial  
22  dichotomy between the so-called employees and employers; but  
23  we're not talking about a student who is out, as I was on the  
24  Tomeco job back in the '60's, working for a school district and  
25  putting paint on a backstop or working in the cafeteria. What

1 we're talking about here is: Assisting the student in  
2 obtaining his or her degree, and it's nothing more.

3 Temporary employee. Let us just assume for sake of  
4 argument that Brown is somehow overturned, which I question  
5 vigorously as to that possible determination in this case.  
6 Let's talk about temporary employees.

7 First of all, there is no expectation of these students to  
8 have a recurring role. They are not, unlike the research  
9 institutions, provided with a Research Associate role for two,  
10 three, four or five years. It might be one semester; it might  
11 be two semesters. You might have a Teaching Assistantship for  
12 indeed perhaps even less than a semester or during a summer or  
13 one semester or two semesters. So there is no recurring  
14 possibility which would suggest of so-called employment, which  
15 we challenge, in order to suggest that these are employees.

16 If anything -- even if Brown were to somehow be questioned  
17 by the Board, what we have at The New School, particularly, are  
18 temporary circumstances pertaining to those six categories that  
19 the Petitioner seeks to recognize.

20 The NLRB itself, at Page 259, states as follows: "Where  
21 employees are employed for one job only or for a set duration  
22 or have no substantial expectancy of continued employment and  
23 are notified of that fact, such employees are excluded as  
24 temporary."

25 As far as that, any number of statements of the Regional

1 Director and the NLRB case handling matter which concludes the  
2 issue even if Brown were to be overturned.

3 The NLRB has also held that similar tests are applied to  
4 students employed on a part-time or temporary basis. In fact,  
5 in NYU-1, the Regional Director held that: "The parties  
6 stipulated that they receive appointments lasting from one week  
7 to one semester and that cash disbursements related to those  
8 activities vary according to academic department policy.

9 "The vary assignments are for relatively small finite  
10 periods of time, and there was no evidence that Graders and  
11 Tutors can anticipate a string of assignments or the same  
12 assignment one semester after another. Thus, Graders and  
13 Tutors are temporary employees."

14 That's this Region; right here, NYU-1. So there is an  
15 abundance of case law that suggests: (1) that these are  
16 students -- yes; primarily students, but in the main, students  
17 -- not employees -- that there is no intendant of a  
18 relationship of an employer/employee; and even if the Board was  
19 to hold otherwise, the Regional Director has held, and the  
20 party and affiliate has stipulated, that these are temporary  
21 employees.

22 Columbia, in 2002, was no different; where certain TA's  
23 and Course Assistants and Teaching Fellows, some of whom were  
24 appointed up to two semesters, were excluded from the punitive  
25 unit. So you have NYU; you have Columbia -- both deciding the

1 issue.

2 Now as I said, here The New School -- yes; the framework  
3 is not the same as big research institutions; but at the same  
4 time, certain of those facts point to the indisputable fact  
5 that these individuals sought to be represented are students,  
6 not employees.

7 As to the June 11 Decision in NYU-2, Mr. Meiklejohn is  
8 famously aware of, "It is indisputable that teaching and  
9 research are vital components of the Doctoral Program." We'll  
10 prove it.

11 This petition should be dismissed.

12 HEARING OFFICER DAVIS: Thank you. Mr. Meiklejohn, in  
13 view of the fact that briefs are going to be submitted in this  
14 matter and also in view of Mr. Catalano's longer opening  
15 statement, do you feel compelled to make a reply argument at  
16 this time?

17 MR. CATALANO: I will let most of it go. I'll just make  
18 one -- I'll say a couple things.

19 First of all, I don't believe -- Counsel still has not  
20 explained how there is an inconsistency with being a student  
21 and being an employee.

22 Second, I would just note that the Board has recently made  
23 it clear that while temporary employees may be excluded from  
24 bargaining units of what used to be called permanent employees  
25 -- which, I guess employees of indefinite duration; that

1 temporary employees nevertheless are employees and have a right  
2 to organize.

3 And the third point I'd make is that while it may be true  
4 that the individuals in dispute in this case attend The New  
5 School -- selected The New School to attend because that's  
6 where they wanted to get an education, the reason they take --  
7 one of the reasons they take jobs that are at issue in this  
8 case is because they want to make money.

9 HEARING OFFICER DAVIS: Okay. Thank you for the brevity  
10 of your response.

11 MR. CATALANO: You're welcome.

12 HEARING OFFICER DAVIS: Mr. Catalano, do you want to say  
13 anything else at this time?

14 MR. CATALANO: Mr. Meiklejohn invites the response they  
15 want financial aid just the same extent as they want whatever  
16 he characterized as "those dollars."

17 HEARING OFFICER DAVIS: Okay.

18 MR. CATALANO: And we give it to them.

19 HEARING OFFICER DAVIS: Well, thank you both for your  
20 arguments at this time. If there's nothing more, we're going  
21 to -- it's my understanding from off-the-record discussions  
22 that we're not going to have any witness testimony today, but  
23 that the Petitioner seeks to produce some exhibits; is that  
24 correct, Mr. Meiklejohn?

25 MR. MEIKLEJOHN: That's correct.

1 HEARING OFFICER DAVIS: Okay.

2 MR. MEIKLEJOHN: I have provided copies to Counsel  
3 previously. You said you didn't need hard copies; right?

4 MR. CATALANO: I said I didn't need hard copies unless we  
5 were going to have a witness testify to them.

6 MR. MEIKLEJOHN: Yes. So provide these twelve documents  
7 to Court Reporter. Do you want to go off the record to mark  
8 them, or --

9 HEARING OFFICER DAVIS: Let's go off the record at this  
10 point.

11 (Whereupon, a brief recess was taken.)

12 HEARING OFFICER DAVIS: Okay. So this is going to beg the  
13 question. Do you want to be heard?

14 MR. MEIKLEJOHN: We'd offer -- I'd like the following  
15 documents marked as Petitioner's Exhibit 1, Memorandum of  
16 Agreement between Rutgers and the Rutgers Council of AAUP  
17 Chapters.

18 (P-1 identified.)

19 MR. MEIKLEJOHN: As Petitioners 2, Collective Bargaining  
20 Agreement between the Oregon State Board of Higher Education  
21 and the Collation of Graduate Employees.

22 (P-2 identified.)

23 MR. MEIKLEJOHN: Petitioner's Exhibit 3, Agreement between  
24 the Regents of the University of Michigan and Graduate  
25 Employees Organization AFT.

1 (P-3 identified.)

2 MR. MEIKLEJOHN: Petitioner's 4, Agreement between the  
3 Board of Trustees of the University of Illinois and Graduate  
4 Employees Organization, AFT.

5 (P-4 identified.)

6 MR. MEIKLEJOHN: Petitioner's 5, Collective Bargaining  
7 Agreement between the University of Oregon and Graduate  
8 Teaching Fellows Federation, AFT.

9 (P-5 identified.)

10 MR. MEIKLEJOHN: Petitioner's 6, Collective Bargaining  
11 Agreement between Florida State University and United Faculty  
12 of Florida, Florida State University, Graduate Assistants  
13 United.

14 (P-6 identified.)

15 MR. MEIKLEJOHN: Petitioner's 7, Agreement between the  
16 University of Florida Board of Trustees and Graduate Assistants  
17 United.

18 (P-7 identified.)

19 MR. MEIKLEJOHN: Petitioner's 8, Collective Bargaining  
20 Agreement between the City University of New York and  
21 Professional Staff Congress, CUNY.

22 (P-8 identified.)

23 MR. MEIKLEJOHN: Petitioner's Exhibit 9, Collective  
24 Bargaining Agreement between the Board of Trustees of the  
25 California State University and United Auto Workers.

1 (P-9 identified.)

2 MR. MEIKLEJOHN: Petitioner's 10, Agreement between  
3 Graduate Employee Organization, UAW and the University of  
4 Massachusetts, Amherst.

5 (P-10 identified.)

6 MR. MEIKLEJOHN: Petitioner's 11, Collective Bargaining  
7 Agreement between University of Washington and UAW Local 4121,  
8 Academic Student Employee.

9 (P-11 identified.)

10 MR. MEIKLEJOHN: And Petitioner's 12, Agreement between the  
11 Regents of the University of California and UMUAW, Academic  
12 Student Employees' Union.

13 (P-12 identified.)

14 MR. MEIKLEJOHN: I'm offering these for the same reason  
15 that the same documents were offered in the pending Columbia  
16 case. I would cite principally to the Board's Decision in  
17 reopening this case in which the Board in turn cited the NYU  
18 Decision, 356 NLRB 7. In that Decision -- in the NYU Decision,  
19 the Board specifically noted that one of the issues -- or one  
20 of the areas of inquiry for the hearing remanding NYU was  
21 evidence of collective bargaining experience in higher  
22 education.

23 So our claim that this is relevant relies heavily, if not  
24 exclusively, on the fact that in the Decision in reopening NYU,  
25 the Board indicated that evidence of collective bargaining in

1 higher education was relevant; and the fact that in reopening  
2 this case, the Board cited that NYU Decision.

3 And then I would note the fact that on that basis, the  
4 Hearing Officer accepted the same 12 documents as exhibits in  
5 the currently pending Columbia case, Case No. 2-RC-143012.

6 HEARING OFFICER DAVIS: Okay. Mr. Catalano?

7 MR. CATALANO: First of all, these documents by themselves  
8 actually, while I object to their introduction, point to the  
9 very suggestion I made in my opening; and that is that Brown is  
10 not aberrant; Brown controls the waterfront.

11 These are all State cases. They are not circumstances  
12 which arose out of a determination by the NLRB. They're all  
13 guided by whatever the specific statutory steam is in that  
14 State. And in fact, any interest to be garnered is just the  
15 opposite of what the Union is trying to prove; and that is to  
16 say that there are no private employment circumstances, other  
17 than NYU, which was volitional, that point to graduate students  
18 as being employed; so I object.

19 They are not relevant because they are formed as a result  
20 of legislation that does not impact the National Labor  
21 Relations Act or arise under the National Labor Relations Act.  
22 In fact, the reason I adverted to this when I had my discussion  
23 with Mr. Meiklejohn, "Are you going to have a witness who can  
24 be cross-examined as to whether or not the various trappings  
25 that exist between employer and employee under the National

1 Labor Relations Act are the same as in these State Statutes?"

2 What's excluded from bargaining? Is academic freedom  
3 trespassed upon in these statutes or under these schemes? Can  
4 they strike? Can they use economic force as an employee -- not  
5 the graduate student -- but as an employee can do so in a  
6 private setting?

7 So they are not relevant, particularly since I have no --  
8 this interesting too. I have no ability to cross-examine this  
9 piece of paper, so they're dramatically hearsay as the ordinary  
10 term is used in practicing law. I can't cross-examine why or  
11 why not this came about -- the Legislators or Governors who  
12 signed these statutes that enabled this to be -- but what is  
13 interesting to me further is that here is the Board, according  
14 to Mr. Meiklejohn, suggesting that it's going to do something  
15 dramatic with respect to Brown, and let's have hearings to that  
16 effect in order to develop a record.

17 Yet now he goes in 180 degrees in the other direction; and  
18 without any factual underpinnings, attempts to offer a document  
19 which I cannot cross-examine as if there is no hearing. These  
20 are some documents that are hearsay. I can't cross-examine  
21 anyone; and this is supposed to be somehow relevant to a  
22 private employment circumstance; which, of course, it's not.

23 So I object.

24 HEARING OFFICER DAVIS: Your objection, I think you stated  
25 this off the record, but I just want to make it clear; you

1 don't object to the authenticity of the documents?

2 MR. CATALANO: Well that's fair, so long as Mr. Meiklejohn  
3 represents that to his knowledge these are true and correct  
4 copies of Collective Bargaining Agreements as he knows them to  
5 be.

6 MR. MEIKLEJOHN: Yes.

7 MR. CATALANO: I accept his representation.

8 MR. MEIKLEJOHN: Well, there's one that expired in August  
9 of 2014.

10 MR. CATALANO: I'll accept his representation. I don't  
11 question authenticity with that representation. Relevance?  
12 Different story.

13 HEARING OFFICER DAVIS: Okay.

14 MR. CATALANO: And I object on that ground.

15 HEARING OFFICER DAVIS: Okay. Sorry if I cut you off.

16 MR. CATALANO: No; you didn't. Thank you.

17 HEARING OFFICER DAVIS: Normally, in the normal course of  
18 things, particularly when we're talking about the testimony of  
19 witnesses, objections and cross-objections would be really  
20 short.

21 This is a different circumstance. These are documents  
22 which are not based on witness testimony, so I just, you know,  
23 give the parties leeway to make their arguments.

24 Just for the record, Mr. Meiklejohn, these documents  
25 represent examples of collective bargaining in the public

1 sector?

2 MR. MEIKLEJOHN: Correct. Obviously the reason there are  
3 that more example of collective bargaining in the private  
4 sector is because Brown put a stop to a movement of organizing  
5 by graduate students that was going on in the early years of  
6 this millennium.

7 HEARING OFFICER DAVIS: Well, I don't want to cut you off  
8 too much, but that's going to bring us a little far afield, and  
9 we'll be unimpressed, so --

10 MR. MEIKLEJOHN: I think Mr. Catalano and I have the  
11 capability of arguing -- if you're going to --

12 MR. CATALANO: I'm not as voluble as he is.

13 HEARING OFFICER DAVIS: All right. I'm going to take  
14 three minutes, and we're going to go off the record, and I'll  
15 come back and review my Decision.

16 (Whereupon, a brief recess was taken.)

17 HEARING OFFICER DAVIS: With respect to the documents  
18 offered by Petitioner, specifically Petitioner's Exhibits one  
19 through twelve, I am going to admit those documents, noting  
20 that in Brown -- in the Brown Decision and the rest of the  
21 Decisions, they did make reference to -- or take cognizance of  
22 bargaining in the public sector as a factor; and in remanding  
23 this case back to the Region, the Board did refer to the  
24 Decision in NYU previously which basically said that we believe  
25 the factual representation, contentions and arguments of the

1 parties should be considered based on a full evidentiary record  
2 addressing the questions raised in that case as well as any  
3 others deemed relevant by the Regional Director; so since this  
4 was a factor at least discussed in Brown, whatever it's worth;  
5 and it was remanded to the Region with the directive that we  
6 open a full evidentiary record on relevant issues, whatever  
7 it's worth, I'm going to admit Petitioner's Exhibits one  
8 through twelve.

9 (P-1 through P-12 received.)

10 MR. MEIKLEJOHN: Thank you.

11 HEARING OFFICER DAVIS: If there's nothing further, we  
12 will adjourn until tomorrow at ten o'clock.

13 (Whereupon, at 3:20 p.m., the hearing was adjourned until  
14 Wednesday, April 21, 2015.)

15

16

C E R T I F I C A T E

This is to certify that the attached proceedings done before the NATIONAL LABOR RELATIONS BOARD REGION TWO.

In the Matter of:

The New School

Employer,

And

Student Employees at The New School - SENS, UAW

Petitioner.

Case No.: 02-RC-143009

Date: April 20, 2015

Place: New York, New York

Were held as therein appears, and that this is the original transcript thereof for the files of the Board

\_\_\_\_\_  
Official Reporter

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1044 Route 23 North, Suite 206  
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(973) 692-0660