UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

THE NEW SCHOOL,

Employer,

and

CASE NO. 02-RC-143009

STUDENT EMPLOYEES AT THE NEW SCHOOL - SENS/UAW,

Petitioner.

OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

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PRELIMINARY STATEMENT

This brief is submitted by The New School ("The New School" or "University" or "Employer") to the National Labor Relations Board ("NLRB" or "Board") in opposition to the Request for Review, dated August 12, 2015, of the petitioner Student Employees At The New School–SENS/UAW ("Petitioner"). In that Request for Review Petitioner essentially claims that the Supplemental Decision and Order ("Supplemental Decision"), dated July 30, 2015, of Regional Director Karen Fernbach of Region 2 should be overturned upon the basis that Brown University, 342 NLRB 483 (2004), should be reversed, and Petitioner does not suggest in any serious fashion that Brown does not govern the circumstances relating to The New School graduate assistants. As noted in the Supplemental Decision, Brown appropriately required the dismissal of the petition in which the Petitioner seeks to represent various categories of both graduate students and, in a few instances, undergraduate students, who serve as Teaching Assistants, Teaching Fellows, Course Assistants, Tutors, Research Assistants and Research Associates at The New School.

It is clear, most respectfully, that nothing adduced in the form of testimony or documentary evidence during the hearings held before the Regional Director might, in any way, suggest a different result from that set forth in the Supplemental Decision dismissing the petition, as the Regional Director correctly noted that she was dismissing the "petition on the basis that it seeks an election among graduate students who are not 'employees' within the meaning of Section 2(3) of the Act pursuant to Brown." Supplemental Decision, page 21. While Petitioner, in its Request For Review, refers to testimony that seeks to bolster Petitioner's claim that Brown should be overturned, a careful reading of Petitioner's Request For Review confirms that it has ignored (or not addressed) the vast amount of testimony and documentary evidence that verifies that Brown squarely governs the relationship between The New School and its graduate

assistants. Thus, absent a modification or reversal of Brown, the Supplemental Decision must be affirmed.

As the Board knows quite well, Brown holds that graduate research and teaching assistants at private universities are primarily students rather than "employees" within the meaning of NLRA section 2(3). As such, graduate students at Brown University were held by the Board to have no statutory right to unionize or to enter into collective bargaining negotiations with Brown University. As also noted in Brown, the graduate students who were enrolled in a degree program were necessarily engaged in a course of study where research and/or a teaching assignment was concomitant with, or as a requirement for, the degree sought by the student. 342 N.L.R.B. at 488-489. In Brown the Board, expressly overruling its prior decision in New York University[1] and reestablishing well-established caselaw prior to New York University, held that the graduate students at Brown University were primarily students, rather than employees, and stated as follows:

> "[I]n light of the status of graduate students as students, the role of graduate student assistantships in graduate education, the graduate students' relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one."

342 N.L.R.B at 348. The underpinning of Brown is that, as noted by the Board, "the Act is designed to cover economic relationships" (see 342 N.L.R.B. at 488), and it is therefore mystifying that Petitioner might suggest that Brown should be overturned, or is somehow inapplicable, because the relationship of the putative categories of students in the petition allegedly is either "primarily an economic relationship" with The New School, rather than "primarily an educational relationship," or is a relationship where the student can be both a

[1] 332 N.L.R.B. 1205 (2000)(NYU)

student and employee at the same time. The overwhelming evidence adduced at the hearings confirms, to the contrary, that the relationship between The New School and its students in the putative categories is not only "primarily an educational relationship," but it is exclusively a relationship that completely falls within the tenets of Brown. Moreover, whatever minimal differences that may exist between The New School and the great research institutions as far as the roles assumed by the graduate assistants are distinctions without difference, and do not detract from Brown's application — it is inconceivable to claim that the roles assumed by graduate students within any educational institution must be entirely consistent with those roles in other institutions, or fall identically within the tenets of Brown, as there are different programs, areas of study, graduation requirements, financial aid availability and the mission of the particular university that all may, or will, differ from those attributes of other institutions. As a result, any suggestion by Petitioner that this proceeding offers the Board an opportunity to validate Petitioner's claimed reasons for overturning Brown is misplaced, and the facts in this proceeding confirm why Brown was soundly decided, applies to the facts in this proceeding, and should not be overturned.

ARGUMENT

POINT I

THERE ARE NO COMPELLING REASONS FOR REVIEW

Initially, it is significant to note that Petitioner has not presented any "compelling reasons" for granting review of the Regional Director's dismissal of the petition. Pursuant to the Board's Rules and Regulations there are only four grounds for establishing the bases for the Board to grant a Request For Review. Petitioner's instant disagreement with established precedent is not one of enumerated reasons and, of course, it is self-evident that there will always be either a petitioner or an employer which disagrees with a decision of the Regional Director.

Pursuant to Section 102.67 of the Board's Rules and Regulations, however, the Board will grant a Request For Review only upon one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy. (emphasis supplied).

Petitioner must concede that there is no absence of Board precedent and, of course, the Regional Director did not depart from the precedent of Brown. Similarly, Petitioner cannot claim that the Regional Director made any erroneous decisions on substantial factual issues or that there was any prejudicial error by the Regional Director.

In an almost identical scenario the Board denied review of the Regional Director's decision in St. Barnabas, 355 NLRB No. 39 (June 3, 2010), holding that there was no reason to reconsider the Board's decision in Boston Medical Center, 330 NLRB 152 (1999). In St. Barnabas the Board held that the precedent, "which remains the law, and is directly on point. Accordingly, the Employer cannot meet the stringent requirements of Section 102.67 of our Rules and Regulations governing a grant of review." In the same vein, Brown is directly on point and remains the law, and Petitioner also cannot meet the stringent requirements of Section 102.67(c).

Petitioner also provides no evidence of any changed circumstances, or any other reason, why Brown should be reconsidered in light of the facts presented during the hearings held before the Regional Director. Indeed, Petitioner presents no basis for reconsidering Brown that was not also available to the Board at the time of the Brown decision. It is respectfully submitted, therefore, that the Board should ensure stable labor relations with consistent precedent so as to provide unions, employers and employees with certainty in understanding how the Board will interpret and apply the law. Most respectfully, the constituency of the Board is obviously not a "compelling reason" to reargue precedent, and if that were the law, which it is not, the concepts of stare decisis, res judicata, law of the case, and collateral estoppel would all lose meaning. Petitioner does not seriously argue that the facts attendant to the instant proceeding are not governed by Brown, and the matter should end there, with the petition, as held by the Regional Director in her Supplemental Decision, being dismissed.

Not surprisingly, Petitioner has not chosen to address Section 102.67 of the Board's Rules and Regulations and merely (and obviously) assumes that its Request For Review will be granted. Yet the Board and the practitioners before the Board, together with the clients they represent, deserve better than to assume that a result is pre-ordained. There are no "compelling" reasons to grant the Request For Review, and even if Brown were to be modified or reversed, which should not by any means be assured, that does not mean that this proceeding is, or should be, a vehicle to do so — in short, the petition should be, and was, appropriately dismissed under current caselaw.

POINT II

THE FACTS ADDUCED DURING THE HEARINGS

While it is obvious that further briefing is required if the Request For Review is granted, Petitioner's Request For Review has unnecessarily addressed many of the issues presented

during the hearings in this matter, and The New School has therefore been required to respond to them, lest an adverse inference be drawn by the Board from the Employer's failure to do so. Thus, and contrary to the implication set forth in Petitioner's recitation of the facts at pages 4 through 23 of its Request For Review, the facts adduced during the hearings confirm the validity of the Regional Director's finding that Brown requires a dismissal of the petition. As set forth in Brown, and here, each of the principles which prompted the Board to hold that the Brown graduate students acted "primarily" as students in their respective roles was present in the relationship between The New School and its students who serve in the six (6) putative categories of "employment" set forth in the petition: Teaching Assistants, Teaching Fellows, Research Assistants, Research Associates, Course Assistants and Tutors. In that regard, Brown emphasized that the petitioned–for individuals in that proceeding:

> "(1) were 'students and must first be enrolled ... to be awarded a TA, RA, or proctorship;'
>
> (2) were 'graduate student assistants' who spent only a limited number of hours performing their duties;
>
> (3) had their service as a graduate student assistant being either 'part and parcel of the core elements of the PH.D. degree,' or 'integral to the education of the graduate student;' and
>
> (4) received stipends or sums as 'financial support' which was provided to 'graduate students because they are students.'"

Brown University, 342 N.L.R.B. at 488.

A. The Individuals in the Putative Categories Are Students

Brown's holding emphasized the "simple, undisputed fact that all the petitioned–for individuals are students and must first be enrolled at Brown to be awarded a TA, RA or proctorship." Brown University, 342 N.L.R.B at 488. As testified without contradiction by each of the witnesses during the hearings, the individuals sought to be represented by the Petitioner at

The New School are students, and necessarily so for good reason, as The New School has intentionally fostered the positions at issue to be a significant component of the students' efforts to attain either a Master's or Ph.D. degree. In that regard, and as testified by Deputy Provost Bryna Sanger, the aggregate amount of funds expended by The New School as financial support for the student assistants is approximately 4.9 million dollars per year, and

> "...the intention of these resources and the forms of mone[ies] is to spread it around as best we can to support our students as they go through toward completion of their degree."

(TR. 87, lines 5-6, 25; 85, lines 1-3).[2] As a result, it is self-evident that the positions set forth in the petition are held by students, as the very purpose of fostering these positions is to assist students, and not to create employment opportunities. The documents provided by The New School to the graduate students who serve in the putative categories of the petition underscore the fact that the individuals serving as, for example, a Teaching Assistant:

> "...must be a full-time student in the semester you will be teaching. Most graduate students are considered full time when enrolled in 9 credits, except those in Parsons' MFA and March programs who are considered full-time when enrolled in 12 credits. Doctoral students who are maintaining status are considered full-time students"

(Employer Exh. 39). (emphasis added). It is noteworthy that The New School requires the student to be enrolled in the semester in which he or she is serving in one of the putative categories, as it confirms the fact that the stipend is a form of financial aid to the student who is pursuing his or her studies at that very moment—on the other hand, if serving as a Teaching Assistant were an "employment" circumstance, for what reason would The New School require enrollment as a student? Enrollment as a student is, of course, irrelevant to the duties an employee might discharge, and only underscores the meritless nature of Petitioner's claim. In

[2] References in parentheses are to the pages in the hearing transcripts of the proceeding before the Regional Director, or to the exhibits introduced into evidence during those hearings.

fact, while the Petitioner has suggested that a Teaching Assistant is akin to a "faculty member" the Petitioner will be unable to explain why a Teaching Assistant must be enrolled as a student at the moment he or she is serving, while neither a full-time nor part-time faculty member must be enrolled as a student — the only explanation, of course, is that serving as a Teaching Assistant is part and parcel of his/her status as a student and related to his/her effort to attain a degree. Importantly, in her Supplemental Decision, at page 4, the Regional Director recognized that significant requirement, as she held, quite correctly, that "only graduate students enrolled at The New School are eligible to work in the petitioned-for positions." That fact, by itself, it is respectfully submitted, concludes the matter against Petitioner.

B. The Graduate Student Serves Only a Limited Amount of Time in Performing the Duties of the Student Position

An additional feature noted in the Brown case as to why the petition's putative categories are not employment roles is that the graduate student serves only a limited amount of time in, as an example, the roles of Teaching Assistant or Research Assistant. Indeed, the Regional Director, once again, validated the applicability of Brown and why the graduate assistants are not employees, as she held that "[s]tudents are expected to limit their total time performing tasks in assistant positions to 20 hours per week so as to allow sufficient time to focus on their studies." (Supplemental Decision, pages 4-5). That is also precisely what The New School adheres to in designing each of the six (6) categories in the petition, and for good reason, as those roles are designed by The New School to assist the student, both financially and academically, rather than to create an employment relationship — in fact, if the student's serving in one of those roles at The New School was intended to be one of employer-employee it is obvious that The New School would choose to have the flexibility to require (not permit) the student to serve as many

hours as it chose to mandate in order to have the Teaching Assistantship (as an example) be economically advantageous to The New School.

As is the case with The New School, the Board in Brown stated that:

> "students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree, and, thus, being a student."

Brown University, 342 N.L.R.B at 488. In that regard, as testified by Robert Kostrzewa, the Vice Dean for The New School For Social Research ("NSSR") of The New School:

> "...students should not be engaged in these roles [Research Associate] for more than 20 hours a week. It's a University accepted standard. I don't know whether it actually appears in any regulations, but we try to abide by it. And students and the University should know the effort that they are engaged in these roles, as opposed to other activities on their path to attain the degree, because they have a lot of other responsibilities as graduate students that they have to meet. That's why academic institutions don't allow students to engage in some of these efforts for more than 20 hours."

(TR. 245, lines 14-24). (emphasis supplied).

Once again, no reason other than to assist the student in attaining his or her degree is possible by limiting the number of hours one can serve, as the payment to the graduate student is ordinarily in the form of a stipend, and any employer would therefore seek to maximize the outcomes from an "employee," not limit it, if the relationship were truly one of employer-employee. In fact, The New School ordinarily restricts the weekly hours that a graduate student should expend to ten (10) hours per week if he or she serves as a Teaching Fellow or Teaching Assistant. The 2015-2016 University-Wide Call For Applicants for Teaching Fellowship Opportunities (Employer Exh. 46) provides that the "estimated time commitment is 10 hours per week." In the same vein, a Course Assistant at The New School For Public Engagement ("NSPE") is expected to provide eight (8) hours per week (Employer Exh. 53), and a Teaching

Assistant at NSPE is expected to work 8-10 hours per week (TR. 307, lines 14-16). As explained by Dr. Michael Schober, in response to a question from counsel for Petitioner:

> "Q. And can you tell us whether there is some expectation of hours to be expended in connection with these roles per week ...?
>
> A. It probably varies per course, but there is a maximum number of hours expected in those roles.
>
> Q. And what's the reason that there is some guidance or limitation on the hours that he or she might expend as a Teaching Assistant or Teaching Fellow?
>
> A. The PH.D. student is engaged in their own course work or if they've completed—and also their own research. And so there's a limit to how much time it makes sense to spend on those activities."

(TR. 353, lines 17-25; TR. 354, lines 1-3). (emphasis supplied). That explanation completely undercuts the Petitioner's suggestion that the graduate students are acting as "employees," for would an employer be concerned about an employee's completion of his or her degree requirements? Of course not, and each of the indicia of the student roles is completely consistent with those served by a student, and not by an "employee." The testimony indicated that even the best students, such as Ingrid Kvangraven, who is a Ph.D. student at NSSR, and who received full funding for the next three (3) years, was limited to serving as a Teaching Fellow for 20 hours per week (TR. 422, lines 20-23), again manifesting The New School's objective in ensuring that a graduate student fulfill all of the requirements for attaining a degree. That significant feature of the graduate assistant programs cannot be overstated—the Regional Director recognized in her Supplemental Decision that "[e]ach graduate assistant position typically lasts for one 15-week semester, although some last two ...." (Supplemental Decision, page 5). As with a limitation upon hours per week that a graduate assistant might serve in a particular role (so as to insure that he or she can meet the remaining requirements for a degree), the limitation upon the number of

semesters one can serve confirms the expressed intent of The New School to distribute as widely as is possible its limited financial aid resources—secondarily, of course, this semester limitation is also designed to ensure that the student does not ignore the remaining requirements of attaining the Master's or Ph.D. degree.

C. **The Student Roles Are an Integral Part of the Attainment of a Degree**

The third factor emphasized by Brown in holding that the graduate students were not employees within the meaning of the Act was that "teaching [was] also an important component of most graduate programs," and that the "[g]raduate student assistant positions are, therefore, directly related to the core elements of the Ph.D. degree and the educational reasons that students attend Brown." Brown University, 342 N.L.R.B at 488-489.

Both of those significant factors were presented during testimony before the Hearing Officer and Petitioner's arguments upon the Request For Review are unavailing. Petitioner has made the misplaced argument that not all students at The New School serve in the graduate student roles, and that serving in those roles is not a formal requirement to attaining the degree, which the Regional Director also referred to in stating that "[n]one of the graduate degrees conferred by The New School require students to hold any of the petitioned-for positions." (Supplemental Decision, page 4). See, e.g., page 35 of the Request For Review. Yet Brown noted only that "teaching" was important in most (but not all) programs and, more importantly, irrespective of the number of students serving as Teaching Assistants, Research Assistants, or otherwise, the number of students who serve does not change the fact that serving in those roles is a pedagogical technique assisting the student in attaining his or her degree. Nothing presented during the hearings detracted from the undisputed expressed intent of The New School to assist

the student in "learning" the subject matter by "teaching" it, which was confirmed by Dr. Kathleen Breidenbach, the Vice Dean at NSPE:

> "Q. And this Teaching Fellowship role, has it been created at The New School in order to assist that graduate student in the attainment of his or her degree and if so in what way?
>
> A. Yes, it's very important for graduate students to have opportunities to be able to teach skills of material, understanding how people learn. They also — you know, what's the saying that if you really want to learn something, teach it. And so it provides excellent opportunities to — for graduate students to develop those skills and deepen their knowledge of their material."

(TR. 270, lines 12-21). Thus, it is irrelevant whether it is one student or hundreds of students in the putative categories, as the essential framework of the graduate student roles remains undisturbed. Indeed, the contrary assertion of Petitioner leads to the illogical conclusion that unless all graduate students serve in one of the putative categories that fact, by itself, somehow verifies the Petitioner's misplaced claim that the student role must therefore be an "employment" role, which is a stunning claim too ill-conceived to be serious. Moreover, to confirm that the students serving as Teaching Assistants and Teaching Fellows do so for the benefit of their own education, Teaching Assistants and Teaching Fellows are expected to attend courses and workshops, Introduction to Teaching Workshops (Employer Exh. 40) and Topics in Pedagogy (Employer Exh. 41), which are pedagogical exercises in which the Teaching Assistants and Teaching Fellows learn how to interact with the undergraduate students. See the Supplemental Decision, at page 5.

The New School's purpose of fostering the graduate assistant roles was verified by each of the witnesses including, perhaps unwittingly, the student witnesses called by the Petitioner. Dr. Sanger testified, as an example, that The New School was

> "committed to providing our students with the maximum amount of support and mentoring; and in a research-oriented kind of degree, that's critical; but also in an applied part of a degree it is as well. The application on the opportunity of a student to work with a professionally motivated faculty member and learn the way in which they work is critically important to their own experience, development, training."

(TR. 89, lines 16-23). Similarly, Vice Dean Kostrzewa testified that:

> "[I]n [the] case of research assistants and research associates you immerse yourself in what scholars are supposed to do... and these are integral to attainment of a doctoral degree... we advise all entering students to establish relationships with the faculty.... And to serve as a TA, TF, or RA or research associate [as it is] as close as you can get to a meaningful mentorship/relationship with your faculty."

(TR. 202, lines 11-25; 203, lines 1). Dean Kostrzewa's testimony was consistent with Brown, as the Board held in Brown that because "the role of teaching assistant and research assistant is integral to the education of the graduate student Brown's faculty oversees graduate student assistants in their role as research or teaching assistant." Brown University, 342 N.L.R.B at 489 (emphasis supplied). In short, The New School's graduate assistants serve in virtually the same capacities, and for the same reasons, as the graduate students at Brown University.

Irrespective of the School or Division, the graduate student roles at The New School served those two (2) identical purposes, i.e., to provide financial aid and to assist the student academically in attaining a Master's Degree or Ph.D. Thus, in addition to NSSR, about which Vice Dean Kostrzewa testified, Dr. Breidenbach also testified, relating to the graduate Teaching Assistants at NSPE, that "faculty and program chairs will review the application [of the students] most typically to try and identify who would be the best fit for that particular instructor of the course." (TR. 259, lines 25; TR. 260, lines 1-2). No such analysis would occur, of course, if a part-time faculty member (e.g., an employee) were hired to teach a course, as the Teaching Assistantship envisions a close relationship between a faculty member and that graduate student.

Laura Copland, the Assistant Dean For Faculty Affairs at Eugene Lang College, testified that serving as a Teaching Assistant or Teaching Fellow is:

> "an integral part of their education in having them become more fervent in their discipline by being in a classroom for a TA, working with the faculty member and perhaps leading a discussion session, understanding how students receive the material, how they explain the material back in papers... It's vital for the graduate student in understanding his or her own discipline to have that kind of interaction."

(TR. 323, lines 17-25) (emphasis supplied). Adrienne Marcus, the Assistant Provost for University Curriculum, who coordinates the University-wide application process for Teaching Assistants and Teaching Fellows, identified the procedures that are undertaken in the Provost's office. See Employer Exhibits 70, 71, and 72. Pursuant to that process, according to Assistant Provost Marcus, each applicant for a Teaching Assistant or Teaching Fellow position must have a minimum GPA of 3.4 and be within the time limits required for earning a degree, including meeting the requirement of having completed 50 percent of the requirements for attaining a Master's Degree (Tr. 513, lines 8-14). Those requirements underscore the fact that The New School recognizes the remaining obligations of the student to obtain a degree, such as research, attending class, and perhaps writing a dissertation, and The New School has therefore not only limited the hours one can expend in the role of teaching (as an example, 10 hours per week), but it has taken the additional steps of ensuring that the student is in a sound position academically before he or she assumes one of the graduate assistant roles.

The testimony of the two (2) students called by Petitioner actually supported, in part, The New School's claim that the Teaching Assistantship role was distinct from the role of an employee, such as a part-time faculty member. Thus, Ingrid Kvangraven admitted that she became a Teaching Assistant in her "area of studies," that she was "hired" by the "faculty member" as it was a "good fit" with that faculty member, and that writing a paper with faculty

member Reddy was "helpful" in ultimately writing her dissertation. (TR. 434, lines 20-22; Tr. 435, line 19, TR. 440, line 1). But the most significant testimony of Ms. Kvangraven was in connection with her role as a Research Associate for Professor Reddy:

> ". . . we are trying to come up with a theory of the purpose of global goals . . . we have some critical perspective on the way Global Goals are used in development [which is my] area of study."

(TR. 440, lines 7-16). In sum, Ms. Kvangraven, ultimately on her way towards achieving a Ph.D, has been provided with financial aid by The New School as a Research Associate to enhance her learning, in her discipline of choice, by her interacting solely with a faculty member to prepare a paper unrelated to any alleged "employment" goal of The New School.

The testimony of graduate student Zoe Carey was equally instructive, and established, in part, that the petitioned-for roles of the graduate student do not create an employer-employee relationship. Thus, Ms. Carey conceded that while acting as a Teaching Assistant she met with the instructor of record Michelle Jackson, along with 8-15 other Teaching Assistants, on a weekly basis, and that she was given guidance concerning the teaching of the course work. Additionally, Ms. Carey admitted that she enrolled at The New School to obtain an education, and obviously not to become employed: "There were specific faculty that I wanted to work with, but also just the fact that the sociology department was very, very strong." (TR. 489, lines 12-14; page 492, lines 18-23; page 493, lines 4-23). In fact, the stark difference between the prior "employment" enjoyed by the two (2) student witnesses and their matriculation for an education at The New School should not be understated. Ms. Carey was employed for "nine months [after undergraduate school] before [she] moved to Europe to start [her] graduate studies," but she "chose not to continue to work but rather to continue [her] education" (Tr. 488, lines 5-16). Similarly, Ms. Kvangraven "worked for two years in Norway first, and then [she]

wanted to go to The New School." (Tr. 429, lines 1-2). In sum, serving as either a Teaching Assistant or Research Associate for both students is nothing other than an academic ancillary as to why they are enrolled at The New School, not to be employed, but rather to obtain an education and, ultimately, their Ph.D. degrees.

Serving As A Research Associate Cannot Constitute "Employment"

As set forth above, serving in one of the putative categories is "directly related to the ... educational reasons that students attend" The New School. See Brown University, 342 N.L.R.B at 489. The testimony adduced during the hearings relating to serving as a Research Associate not only emphasizes that fact, but it is a particularly tremendous leap for Petitioner to claim that Research Associates are "employees," as it cannot possibly be suggested that their employer, under any circumstances, is The New School.

The Brown Board described the ordinary role of a Research Assistant at Brown, whereby a:

> "faculty member, referred to as a 'principal investigator', typically applies for the grant from the Government or private source, and funds are included for one or more RA's. The general process is for students to work with "or affiliate with" a faculty member, who then applies for funds and awards the student the RA. The student supported by the grant will work on one of the topics described in the grant. ... Although technically the principal investigator on the grant, the faculty member's role is more akin to teacher, mentor, or advisor of students."

Brown University, 342 N.L.R.B at 485.

Those factors, present for the Research Associate positions at The New School, describe several significant features of the role that cannot, in any manner, constitute employment. Thus: (1) it is not The New School, but rather a faculty member, who is supervising the student and determining the features of the research project; (2) the funding source for both the principal investigator and the Research Associate is not The New School, but rather the grantor, in many

instances the United States Government; and (3) the outcome and research are authorized by the funding source and are, in the main, for the benefit of increasing knowledge, and not for the economic benefit of, in this instance, The New School.

The testimony of Dr. Michael Schober, a Professor of Psychology and Associate Provost for Research at NSSR, verified the lack of "employment" by a Research Associate with The New School, specifically with respect to a research grant he, along with collaborators from the University of Michigan, received from the National Science Foundation. See Employer Exhibits 63, 64 and 65. In short, the research pertained to surveys conducted on various devices or in different modes, and whether the outcomes might differ by reason of the mode and/or device utilized to conduct the survey. (TR. 359-360). Among other things, Dr. Schober testified that neither The New School nor any Administrator had a role in, or directed, the research as it developed (TR. 362, lines 10-16), the stipend for the Research Associates was received from the United States Government (TR. 363, lines 13-15), and that there was extensive mentoring of the Research Associate by Dr. Schober:

> "[the] Research Associates ... joined in weekly and more than weekly team meetings ... in which we plotted ... the steps ... selected the survey items ... thinking through the logistics of doing text messaging interviews ... so there was every week multiple conversations and assignments of work. ..."

(TR. 361, lines 14-25, TR. 362, lines 1-9). Most importantly, and that which completely debunks the baseless claim that the Research Associate was "employed" by The New School, Dr. Schober testified as follows:

> "Q. And can you tell us whether there was an extensive amount of mentoring by you with the Research Associate?
>
> A. Extensive, absolutely. So this particular Research Associate I was mentoring is now about to defend her dissertation proposal ... which is using the data we

collected here ... so her participation in the project led to her being able to propose this dissertation."

(TR. 364, lines 6-15). In view of that uncontroverted testimony, and the fact that the research will be used in the student's dissertation, it is inconceivable that the Petitioner can claim that a Research Associate is an "employee," but even if so, an employee of what or whom? Assuming, arguendo, that the Research Associate is a member of a collective bargaining unit and the Union, having failed to reach the terms of a collective bargaining agreement with The New School, "strikes" or engages in a "work stoppage" -- it may be asked from whom the Research Associate is withholding her services? Is she "striking" as an "employee" against the United States Government, who "paid" her, or is it Dr. Schober, who mentored her, or is she striking against "herself," as she is failing to continue the very research that she will use, in part, in her dissertation. On the other hand, for Petitioner to claim that that Research Associate is striking against The New School defies logic, as it neither "paid" her nor expects to receive any "work product" or outcome from her.

In addition, it is not only Brown that stands in the way of the petition with respect to Research Assistants, or Research Associates, but the Board, in advance of Brown it its earlier decision in NYU, 332 N.L.R.B 1205 (2000) ("NYU I"), excluded from the bargaining unit research assistants in science departments who were funded by external grants. The Board held that because these students were not providing services to the university, they were not employees under the Act. In so holding, the Board relied on long-standing principles adopted in Stanford University, 214 N.L.R.B 621 (1974), and affirmed the Regional Director's express rejection of the same contention apparently made by the Union here, i.e., that Research Assistants are employees because they allegedly provide services to the University by assisting the University, and its principal investigator, in performing those obligations required under

research grants. 332 N.L.R.B at 1220 n. 50. Thus, even if the Board were to somehow conclude that the facts pertaining to Research Assistants and Research Associates working on grant-funded projects in the instant matter somehow renders this case distinguishable from Brown, the status of those graduate assistants would be controlled by Stanford and NYU I, which were consistent with Brown, and which would require the exclusion of similarly-situated Research Assistants and Research Associates at The New School as non-employees for the same reasons.

The Regional Director recognized these important features of the role Research Assistants and Research Associates play at The New School in her Supplemental Decision. With respect to Research Associates, she held as follows:

> "Most Research Associate positions are supported by externally-generated research grants. As is the case with Research Assistants, Research Associates may only receive funding for work on projects supported by outside grants if they are conducting activities necessary to the goals described in the grant .... The Principal Investigators for the grant selected the Research Associates because of their prior experience, as well as their expectation that work would be educationally fruitful for them." (emphasis supplied) (Supplemental Decision, page 8)

In sum, and as recognized by the Regional Director, these Research Associates and Research Assistants are not acting in employment roles, as the roles are designed to be "educationally fruitful" to the graduate assistant.

D. The Stipends Are Intended to Be Financial Aid

The fourth factor emphasized by Brown's holding that the graduate students in the petitioned-for positions were "students" was the fact that the monetary assistance provided to them was a form of financial aid. Thus, the Board in Brown held as follows:

> "... some incoming students are told in their award letters that if they maintain satisfactory progress toward the PH.D. [they] will continue to receive some form of financial aid in [their] second

> through fourth years of graduate study ... most probably as a teaching assistant or research assistant."

Brown University, 342 N.L.R.B at 485. No difference obtains with respect to the sums provided by The New School to its graduate students serving in one of the petitioned-for categories, as it is undisputed that the stipends are meant to be a form of financial aid.

Apart from the expressed intent by The New School to provide financial support to the graduate students, which was testified to at length during the hearings by any number of witnesses, there are a number of inferences to be garnered from the relationship The New School has with its graduate students. First, and most importantly, while The New School would not eliminate the graduate assistant positions, several witnesses testified that those positions are unnecessary to the functioning of The New School and that they had been created solely to assist the students academically and financially. Thus, Dr. Sanger testified that the Teaching Fellowship is thought of as being "of critical importance to the professional development of our doctoral students," but:

> "we could, in theory, replace them with part-time faculty members, easily. We wouldn't want to do that. ... We want to get as much aid to students as we can ... we don't look upon this as an employment situation."

(TR. 91, lines 3-7). In the same vein, Nadine Bourgeois, the Dean for Academic Planning of Parsons, which has approximately 5,000 of the 10,000 students at The New School, confirmed the University's intent of providing financial aid to the students by creating the student assistant positions.

> "Q. If these five out of the six roles that are at Parsons, all except course assistants, were not a form of financial aid, would it be necessary at Parsons to provide these services?
>
> A. No, it would not.
>
> Q. Could Parsons ... provide these services less expensively?

A. Absolutely. ... The programs require a fair amount of administrative oversight in order to implement."

(TR. 553, lines 3-16).

Common sense dictates the result – with thousands of part-time faculty and 420 full-time faculty (TR. 43, lines 17-25), for what reason would any university and, more specifically, The New School, create such positions if it were not to assist the students both academically and financially? Yet one need not "assume" The New School's purpose, as the testimony adduced at the hearings confirms that the University has gone to great lengths in the last several years to increase its aid to the graduate assistants. In that regard, Dean Bourgeois testified that she was actively engaged with the Provost's office in the development of a faculty support fund:

> "... The program was established ... to give students more financial support to their educational experience and also to provide faculty support in the form of student research assistants and engagement. So the program was rolled out about three years ago, and the faculty and students have gained tremendously from that direct work."

(TR. 554, lines 3-9). Additionally, and in the face of a lack of need by The New School for those positions, she also testified that the "programs that the provost office has established ... have radically increased the number of graduate students in general and also at Parsons receiving financial support." (TR. 553, lines 17-20). In short, apart from the uncontradicted testimony, it is illogical for Petitioner to assume, or argue, that these graduate assistant roles have been created as a form of employment.

It is also of moment that The New School, with its limited resources, particularly as compared to the large research institutions, has chosen to distribute its limited resources to as many graduate students as is possible, once again validating its intent to have the stipends or hourly sums serve as financial aid. Indeed, Dr. Sanger testified that the intent of The New School was to "spread" the aid as widely to its students as it could (TR. 85, lines 1-5), an "intent"

which is totally incompatible with the Petitioner's claim that the graduate students are somehow "employees." That intent also prompts The New School to ordinarily provide the aid after a student is enrolled, as it will be disbursed after applications are received from the students which, of course, precludes offering the aid prior to enrollment. Whether offered prior to enrollment, as in Brown, or after enrollment is obviously a distinction without a difference.

The testimony and documents verify that The New School has, in fact, carried out its intent by distributing its financial aid widely, and Employer Exhibit 7 indicates that there were 1,455 students who received payments as graduate student assistants in the two years between Summer 2013 and the conclusion of the Spring, 2015 semester. As indicated by the appointment letters and the testimony introduced during the hearings, a graduate student who serves as a Teaching Assistant ordinarily receives approximately $4,125 per semester, while a Research Assistant receives approximately $5,100 per academic year. See the testimony of Vice-Dean Kostrzewa, TR. 229, lines 24-25; TR. 230, lines 1-13. See also Employer Exhibits 31 and Employer Exhibit 7. Significantly, not only has The New School chosen a higher amount to provide to Teaching Assistants than would be earned by a part-time faculty member, e.g., $4,125 as opposed to $4,000 to teach a course (Testimony of Dean Nadine Bourgeois, TR. 563, lines 2-6), but the Teaching Assistant is not the instructor of record, and he or she is only assisting the faculty member, full-time or part-time, who is the actual instructor of record, and who will be receiving compensation for teaching that course. See Dean Bourgeois' testimony as to the role of a Teaching Assistant:

> "TA's.....conduct recitation or breakout sessions related to a large lecture...They...meet with a smaller group of students to conduct conversations...to support peer to peer learning between the students." (emphasis added)

(TR. 544, lines 11-16). As a result, The New School's intent to provide financial aid to its graduate students is glaringly found in its providing $4,125 to a graduate assistant, which might be more than a part-time faculty member might earn for actually teaching that course.

Petitioner has argued at pages 34 and 35 of its Request For Review that not all graduate assistants receive financial aid at The New School, thereby allegedly undercutting it similarity with Brown, where a large majority of incoming students at Brown had received a commitment that they would receive such aid "in the future." Brown University, 342 N.L.R.B at 485. Yet The New School's effort to expand its modest ability ($300,000,000 in annual revenues, largely tuition driven)[3] to provide financial aid to its graduate assistants, when measured against vast resources available to the large research institutions (which derive most of their revenue from government grants[4]), only validates The New School's articulated position that the graduate assistants are not employees, and that the stipends provided to them are necessarily a form of financial aid – obviously, no "employer" would reach widely to provide scarce funds to a graduate assistant if, as described during the hearings, the alleged employer did not need the services of that individual as an "employee." In sum, it is clear that The New School is providing financial aid, and not compensation to its graduate student assistants.

Contrary to Petitioner's claim at page 17 of its Request for Review the stipends provided to the graduate assistants are not determined by the number of hours expended by the student, as he or she receives a fixed sum irrespective of the hours that are expended in the graduate student's role. In fact, and similar to the circumstances in Brown, the stipend is also paid by The New School during a period when no services are performed by the graduate assistant. As

[3] Testimony of Dr. Sanger, TR. 42, lines 15-19.
[4] Testimony of Dr. Sanger, TR. 64, lines 21-25; TR. 65, lines 1-10.

attested by graduate student Ingrid Kvangraven, when describing the services she expended as a Research Assistant to Professor Reddy, and her concomitant receipt of a stipend of $5,100:

> "Q. Did there come a time in a week or two weeks where ... you didn't do Research Assistant work?
>
> A. ... I don't know that I do work for him every single week of the year. There was probably a seven-day period that I didn't do anything at all.
>
> Q. Okay, did you receive this bi-weekly payment for that period of time as well?
>
> A. Yes."

(TR. 445, lines 18-25; TR. 446, lines 1-8). Thus, as in Brown, where it was emphasized that students serving as graduate assistants might receive aid irrespective of whether they "performed services as a TA", The New School is also not "compensating" its students, as it neither records the time expended nor is concerned with whether "services" are performed on a daily, or weekly, basis by the graduate assistant. See Brown, 342 NLRB at 488, and the transcript, page 491, lines 5-25, where student Zoe Carey testified that no time sheets were maintained, the hours she served as a Teaching Assistant varied, and that no individual was "tracking" her hours. In sum, these payments are, of course, financial aid, and not compensation to an "employee."

POINT III

BROWN SHOULD NOT BE REVERSED

The actual gravamen of Petitioner's claim, found at page 24 and following of its Request For Review, is not that Brown does not apply to this proceeding, but rather that Brown should be reversed. Yet it is precisely because of the rationale underlying the creation of the positions of teaching assistants, research assistants, or the remaining putative categories, that should decide the issue – for as was attested by several witnesses for The New School, the sole reason for the creation of these positions is, and was, to assist the graduate students in the attainment of their

degree and to provide them with a form of financial aid. Any effort to modify Brown is therefore necessarily misplaced.

In its Request For Review, Petitioner characterizes Brown and other long-standing Board precedent as wrongly decided. Contrary to that claim, however, and as set forth below, the essential mission of a university or college has not changed, which mission depends upon the university's academic freedom to make decisions affecting the relationship between its students and faculty, an altogether different role than that of an employer/employee role. As a result, the Supreme Court and the NLRB have long recognized that the nature of the university "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world," NLRB v. Yeshiva University, 444 U.S. 672, 697 (1980), citing Adelphi University, 195 NLRB 639, 648 (1972), and that "the principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" Id. at 681, citing, Syracuse University, 204 NLRB 641, 643 (1973). That rationale necessarily applies to the student-teacher relationship, which is materially different than the master-servant relationship to which Section 2(3) of the Act applies.

The correctly-decided underpinnings of Brown are decades–long precedent. Thus, in Adelphi Univ., 195 N.L.R.B 639, 640 (1972), the Board determined that graduate teaching and research assistants at the university were "primarily students" and were not to be included in the proposed bargaining unit of faculty. The graduate students at issue in Adelphi were: (i) expected to devote 20 hours per week to their assistantship duties; (ii) paid from $1,200 to $2,900 per academic year (depending on the degree toward which they were working and the subject area in which they were involved) plus free tuition for their courses; and (iii) generally enrolled in courses for up to 12 hours per week. Id. at 639-640. In holding that the graduate assistants were

not employees of the university and rejecting their inclusion in a bargaining unit, the Board observed that, among other things, "graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such." Id. at 640. The Board further observed that "graduate assistants are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned. In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students." Id. Each of those factors set forth in the Adelphi case is particularly apt to the facts adduced during the hearings in this proceeding, and necessarily recognized as such by the Regional Director in her dismissal of the petition.

The Board reaffirmed its analysis of the relationship between graduate and research assistants and universities two years after Adelphi in Leland Stanford Junior Univ., 214 N.L.R.B 621 (1974). In Leland Stanford, the Board decided that physics research assistants pursuing graduate degrees at Stanford University who performed various research tasks, both independently and under faculty supervision, and who received financial aid in the form of a living allowance, were not "employees" entitled to organize and bargain collectively under the Act. 214 N.L.R.B. 621. In reaching that conclusion, the Board examined the relationship between the university and the research assistants, with emphasis on the economic aspects of the relationship. In particular, the Board noted that the "the payments to the [research assistants] are in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual or the nature of the research performed." Id. at 621. The Board also noted that all the research assistants were Ph. D. candidates and were "seeking to advance their own academic standing and are engaging in

research as a means of achieving that advancement." Id. at 622. For these reasons, and because the specific research tasks were performed in pursuit of a graduate degree, the Board held that those graduate research assistants were not employees covered by the Act. Id. at 623. Importantly, no greater manifestation of those factors was confirmed other than through the testimony of Dr. Michael Schober, a Professor of Psychology and Associate Provost for Research at NSSR. See the hearing transcript at pages 364 and 365.

Finally, in San Francisco Art Institute, 226 N.L.R.B. 1251 (1976), the Board decided that undergraduate students working part-time as janitors for the university at which they attended class were not "employees" entitled to collective bargaining rights, and therefore the Board refused to certify a unit composed exclusively of such individuals. The students, many of whom were paid by either scholarship or work-study funds, were considered non-employees because their "campus employment at the institution they [] attend[ed] [was] incidental to their academic objectives," Id. at 1251, thus leaving them with only a "tenuous secondary interest" in their employment. Id. at 1252. In the end, the Board believed that classifying these individuals as employees would "not effectuate the policies of the Act" due primarily to "the brief nature of the students' employment tenure, [] the nature of compensation for some of the students, and [] the fact that students are concerned primarily with their studies rather than with their part-time employment." Id. Against that precedent, therefore, Petitioner's argument that Brown, which is consistent with the Board's analysis in each of Adelphi, Leland Stanford, and San Francisco Art Institute, should be overturned as it is not premised upon prior caselaw, is incorrect, and such a reversal would necessarily, and inappropriately, expand the Act's coverage by attempting to transform a student-teacher relationship into an employment relationship.

In addition to the caselaw the legislative and precedential foundation of both the text and purposes of the Act, as reflected in Brown, establish that individuals in a non-economic relationship with an employer are not employees. While Petitioner claims at page 26 of its Request For Review that Section 2(3) of the Act defines an "employee" broadly so as to implicate the common law master-servant relationship, that argument is unavailing under the facts presented in this proceeding. Thus, and as an example, the Board and the courts have repeatedly held that a number of categories of individuals (apart from the graduate students in Brown who were held to be "primarily students") did not qualify for "employee" status under the Act. See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (managerial employees); Allied Chemical & Alkali Workers of Am., Local U. No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) (retirees); WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 (1999) (unpaid staff); Goodwill Indus. of Tidewater, 304 N.L.R.B. 767 (1991) (disabled workers). See WBAI Pacifica Foundation, 328 N.L.R.B. No. 179 at *4 ("At the heart of each of the Court's decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act."). Thus, there is no question that Brown was correctly decided, as "resort must be had to economic and policy considerations to infuse § 2(3) with meaning." Allied Chemical, 404 U.S. at 168. As held in Allied Chemical, the existence of employee status is to be determined "by underlying economic facts, rather than technically and exclusively by previously established legal classifications." Id. at 166-67.

Similarly, where an employer's relationship with the individuals at issue was not guided by economic business considerations, but rather was "primarily rehabilitative" with working conditions that are not typical of the private sector, the Board has refused to find employee status. Goodwill Indus., 304 N.L.R.B. at 768. It is this absence of a truly economic relationship,

or a demonstrable interest in the economic aspects of the relationship, that traditionally caused the Board to exclude students performing services for the institution they attended from the Act's definition of "employee," particularly where those services were compatible or consistent with educational objectives. See Leland Stanford Junior University, 214 N.L.R.B. 621 (1974); San Francisco Art Institute, 226 N.L.R.B. 1251 (1976).

Finally, the Northwestern University case, 13-RC-121359, 362 NLRB No. 167 (August 17, 2015), additionally argues for a dismissal of the petition. As in the NLRB v. Bell Aerospace Co., Allied Chemical & Alkali Workers of Am., Local U. No. 1 v. Pittsburgh Plate Glass Co., WBAI Pacifica Foundation, and Goodwill Indus. of Tidewater cases, set forth infra, the Board held in Northwestern that certain arguable "employees" (as claimed by petitioner) were not entitled to collective bargaining rights, in this instance with the Board declining to assert jurisdiction over the grant-in-aid scholarship football players at Northwestern. While the Board concededly restricted its decision to those putative alleged "employee" football players at Northwestern, the rationale underlying the decision is equally applicable here. The Petitioner cannot seriously contend that there is an actual "economic relationship" between The New School and its graduate students rather than "primarily" a student relationship with The New School. In short, the graduate assistants are either not employees within Section 2.3 of the Act or the Board should, as in Northwestern, decline to assent jurisdiction over the individuals in the putative class at The New School.

In fact, Northwestern provides a perfectly sound basis for dismissing the petition or declining jurisdiction over the graduate students in this proceeding. As the Board held in Northwestern:

> "[E]ven when the Board has the statutory authority to act (which it would in this case, were we to find that the scholarship players were statutory employees), 'the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case.'"

Northwestern University, 13-RC-121359, 362 NLRB No. 167 at page 3 (quoting NLRB v. Denver Building Trades Council, 341 U.S. 675, 684 (1951)). It is also significant that in declining jurisdiction over the Northwestern football players the Board noted certain similarities that the football players had with The New School graduate students in that they "are full-time students [and] receive no academic credit for their football endeavors (here graduate assistant endeavors)." See Northwestern University, 362 NLRB No. 167 at page 2. In sum, The New School respectfully submits that this proceeding, as with the football players at Northwestern, should not serve as a basis for holding that the graduate students are "employees," as there is sound precedent in Brown and the policy reasons underlying a dismissal of the petition are in accord with the Supreme Court's decision in NLRB v. Yeshiva University, 444 U.S. 672, 681 (1980), also cited by the Board in the Northwestern decision, at footnote 7:

> "The Court observed that some aspects of university life '[do] not fit neatly within the statutory scheme we are asked to interpret,' id at 680, and that 'the Board has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world."' Id. at 680-681 (citation omitted). Regarding congressional intent, nothing in the Act or its legislative history provides explicit direction regarding the Board's treatment of cases involving college football programs that provide grant-in-aid scholarships to athletes."

Northwestern University, 13-RC-121359, 362 NLRB No. 167 at page 3, footnote 7. No difference obtains here, as there is nothing in congressional intent negatively implicating Brown, and the Request for Review should therefore be denied.

POINT IV

THE FAILURE TO DISMISS THE PETITION WILL INFRINGE UPON ACADEMIC JUDGMENTS

Petitioner has argued in its Request For Review that there is no evidence as to how representation of the graduate students would infringe upon the University's exercise of its academic judgment relating to the services that are provided by them. See page 36 of its Request For Review. In fact, and to the contrary, Petitioner's own witness, Ms. Zoe Carey, actually confirmed the very essence of why the petition should be dismissed. Moreover, when her testimony is coupled with the terms of a collective bargaining agreement between New York University and International Union, UAW, and Local 2110, UAW (Petitioner's Exh. 29), the point is dramatically proven.

The NYU Agreement relating to its graduate students provides, in pertinent part, at Article VIII B, as follows:

> "Consistent with program guidelines, Graduate Employees shall have reasonable latitude, where appropriate, to exercise their professional judgment within their area of expertise in deciding how best to accomplish their assignments within the scope of the directions given by the individual supervisor as well as fiscal and time constraints. In addition, graduate employees shall receive appropriate acknowledgement of their projects or contributions to projects in such instances in which acknowledgement is customarily publicly given by the University."

In short, that provision necessarily implies that when acting as, among other positions, a Research Associate, who has received funding from the United States Government, the graduate student "employee" is entitled to "exercise [his or her professional judgment] within their area of expertise in deciding how best to accomplish their assignments within the scope of the directions given by the individual supervisor . . ." Against that collective bargaining provision (introduced

into evidence by Petitioners), the testimony of Ms. Carey must be gauged when she responded to a question upon cross-examination, as follows:

> "Q. Now if you are serving as an RA with Holland, Professor Holland, and you and he -- is it a he?
>
> A. He.
>
> Q. And you and he were to have a disagreement over some aspect of the research position, would you adhere to what he told you?
>
> A. I'm not sure.
>
> Q. Are you saying, therefore, even though he told you to do it in a particular way, that you might not abide by what his guidance is intentionally?
>
> A. I think it depends on the context.
>
> Q. Let's assume he's dead wrong.
>
> A. About?
>
> Q. Some aspect of the research that's being engaged in. And you say in writing a paper or conducting the research, but, Professor Holland, that's just absolutely incorrect and I believe we're going to do it this way, this is what I'm going to write in one half of the paper or in the complete paper, and he says, no, I would prefer that you do it this way, would you do what he said?
>
> A. I think it depends on what the issue is.
>
> Q. Let's assume there were a good faith disagreement between you and him, and perhaps even you were right because he mis-recalled some facts or learning and you were right, how would you resolve that? Would you need a third party to resolve that for you or the chairperson of the department?
>
> A. Possibly."

(TR. 501, line 21-25, 502, lines 1-22). In sum, it is perfectly reasonable to assume that the Union, upon the behalf of Ms. Carey, may arbitrate a claim concerning her refusal to adhere to

the directions given to her, or judgments exercised by, the principal investigator upon a research grant. Thus, her testimony, coupled with the NYU Collective Bargaining provision, provides an avenue for her to delay, or hinder, the implementation of a research project by reason of her allegedly exercising her "professional judgment." Ms. Carey's admission should be measured against Petitioner's reference to Ms. Basta's testimony, at page 23 of Petitioner' Request for Review, who did not articulate a specific basis as to how academic freedom would be impinged if Petitioner were to succeed. As a result, the admission of Ms. Carey clearly outweighs any inference Petitioner seeks to draw from Ms. Basta's testimony, which by no means detracted from the Carey admission that academic judgments would be trespassed upon by unionization.

Expert testimony adduced at Congressional hearings verifies the reason why the petition must be dismissed. Thus, before the United States House of Representatives at the Joint Hearing before the Subcommittee on Health, Employment, Labor, and Pensions and the Subcommittee on Higher Education and Workforce Training of the Committee on Education and the Workforce, on September 12, 2012, Dr. Peter Weber, the Dean of Brown University, stated as follows:

> "What I do know is that in private universities such as Brown engaging in collective bargaining about the core of the academic curriculum would wreak havoc with academic freedom. It makes no sense for a university like Brown to have to bargain over the terms and conditions of service by students who teach or research as an integral part of their academic training. Are we to bargain about course selection, course content, course length, the number of exams or papers in a course, the year in which a student serves as an assistant? What if a student performs poorly as a teaching assistant? Are we to bargain over the just cost for the discipline imposed? These are very legitimate concerns when one contemplates that a curriculum may be transformed into a job merely because that curriculum requires students to learn how to teach and engage in academic research."

(September 12, 2012 Hearing Transcript pages 10-11). This sentiment was echoed by Walter Hunter, a shareholder of Littler Mendelson, P.C., who also testified that: "Collective bargaining is an inappropriate model to resolve broad academic issues with graduate students, such as class size, financial aid, who, what, when and where to teach or conduct research. Collective bargaining is also an inappropriate model to govern the relationship between faculty members and the students whom they mentor." (September 12, 2012 Hearing Transcript, page 25). Mr. Hunter also observed:

> "So what would be covered in a contract? Another principle that we have to deal with if there is a union present is that if a union represents individuals, it represents employees. It is the exclusive representative with respect to all wages, hours and working conditions. Direct dealing isn't permitted between the organization and those, quote—''employees.'' So, for example, in situations where you would be able to work one-on-one—a faculty member dealing with two students, a department dealing with three students—in the absence of a collective bargaining relationship that direct dealing is perfectly permissible. . . Needs can be met individually with each student, and address their needs as would be appropriate for the institution and those students. Now, clearly, a union can waive its right to insist that there not be direct dealing. But as a matter of law, direct dealing with students, if they were deemed to be employees, on wages, hours and working conditions wouldn't be permissible absent waiver or absent having the union involved in that discussion. And sometimes the interests of the union might not be aligned with the interests of the people who are trying to work out a deal with their university."

(September 12, 2012 Hearing Transcript, page 22). Moreover, on May 8, 2014, Judge Ken Starr provided testimony at the House Education and Workforce Committee, concerning the Regional Director's decision in Northwestern University. Judge Starr noted the issues which would arise if student-athletes were recognized as "employees," including among other things:

> "[T]he Regional Director's decision will likely leave in its wake years of litigation with respect to the appropriate scope of bargaining as to "wages, hours, and other terms and conditions of employment." In view of the threshold requirement of student

> status, that status would seem to constitute a bedrock condition of employment subject to mandatory bargaining.
>
> For example, a student-athlete must maintain the proper grade point average and make satisfactory progress toward receiving an academic degree. Because these requirements could well be considered "conditions of employment" under the Regional Director's decision, those requirements would likely fall within the scope of mandatory bargaining. If such fundamental academic issues do indeed fit within mandatory bargaining's scope, then academic hours and hours of athletics could all become compensable and thus lead to bargaining about (or statutory entitlement to) employment benefits impacting the academic setting. If some student-athletes could unionize and bargain about academic issues that constitute "conditions of employment," it will predictably create division and friction within the student body, inasmuch as the university (by definition) will be required to treat some students differently than others.
>
> As a further example, if maintenance of "student" status is a condition of employment as a student-athlete, then all rules relating to student status may become negotiable (with respect to student-athletes). For example, while student conduct administration has historically been viewed rightly as an internal process, it is foreseeable that issues of misconduct, including academic and honor code violations, may become negotiable for some (but not the vast majority of) students. In short, in light of the Regional Director's decision, it appears that institutions would be required to treat student-athletes differently as students, not just as "employees."
>
> It would also appear that such basic issues as the length of practice sessions and the season schedule itself may likewise fall within the scope of mandatory bargaining. Even more troubling, the ultimate tools of the employee-employer bargaining relationship are the strike and lockout. Not only that, schedules may be disrupted because of impasses reached during the course of the bargaining process. Additionally, the most traditional academic activities of a student-athlete may be threatened. For example, would student-athletes on strike sit out of classes and avoid other university-related functions? Would they be protected in doing so?"

(May 8, 2014 Hearing Transcript, Starr Testimony, pp. 4-5). The testimony at these hearings, and the resulting Northwestern decision, serve to highlight and confirm the negative impact that

collective bargaining will have upon the ability of universities to engage in academic judgments and exercise their academic freedoms.

Petitioner argues at page 36 of its Request For Review that collective bargaining on behalf of the graduate assistants would not infringe upon the traditional role between students and faculty members, and cites a study entitled "Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay." Rogers, Eaton and Voos, 66 ILR Review 485 (4-15-2013). First, and most importantly, this study relates to public sector universities, which necessarily by statute have had the relevant unions' collective bargaining rights narrowed, modified, or rendered a nullity, a decidedly different model than contemplated by Petitioner under the Act.[5] Secondly, the Petitioner's own witness Zoe Carey testified, as noted above, that the academic freedom enjoyed by a faculty member or, in turn, the University, would necessarily be trespassed upon by the filing of an arbitration proceeding relating to a research grant if her "professional judgment" differed from that of the principal investigator's. See transcript, page 501, lines 21-25, and page 502, lines 1-22. As a result, the study referred to

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[5] See (with thanks to the American Council on Education ("ACE") from The New School) the Amicus Brief to the Board, dated July 23, 2012 in NYU II, (2-RC-23481), filed upon ACE's behalf, which noted the following statutory authorizations, restrictions, or bargaining proposals made in the public sector which implicate academic freedom:

> "For example, graduate students at Southern Illinois University sought to bargain for the "freedom to create syllabi, select course materials and to determine grades" and "to freely express in their work environment their political beliefs and/or affiliations." See, http://gaunited.fUes.Wordpress.com/2010/09/contract2007-2010.pdf; Temple University's graduate students bargained for an Affirmative Action Plan for "the selection of graduate and undergraduate candidates for admission," and increased "funding for Future Faculty Fellowships targeted towards graduate students from minority groups." See http://tugsa.org/wordpress/history-2/the-8-point-platform/; http:tugsa.org/wordpress/wp-content/uploads/2010/08/contract2010.pdf. Graduate students at the University of Illinois and the University of Wisconsin bargained for provisions that prevent faculty from evaluating student teachers through unannounced visits. See http://www2.uic.edu/stud_orgs/gsc/documents/bor.20090616.pdf; http://taa-madison.org/wp-content/pdf/TAA_07-09_CBA.pdf; and the University of Michigan graduate students sought a contract provision that non-native English speakers who passed a qualifying test would "not be pulled from their teaching assignment on the grounds that they lack English language proficiency[,]" even if class room performance was inconsistent with the test results." See "GEO Bargaining Platform," at http://www.umgeo.org/bargaining-2010-11/bargaining-platform-2010-11/."

by Petitioner, fashioned by an analysis of public sector university students and not subject to the rigors of cross-examination at the hearings in this proceeding, is irrelevant.

POINT V

IN ANY EVENT, THE GRADUATE STUDENT ASSISTANTS WOULD BE TEMPORARY OR CASUAL EMPLOYEES EVEN IF THE PETITION WERE NOT ULTIMATELY DISMISSED

Petitioner incorrectly argues that The New School has not "raised issues regarding the scope of the unit or claim that these individuals [in the putative categories] lack a community of interest with one another." See footnote "4" on page four (4) of Petitioner's Request For Review. Indeed, a significant segment of the hearings related to The New School's argument that an overwhelming number of the graduate assistants were "temporary or casual" even if they were ultimately characterized as "employees" (which should not be the case), as the evidence adduced during the hearings confirms that there was absolutely no expectation of serving continuously in the putative category roles, either by The New School or by the graduate student assistants.

In San Francisco Art Institute, 226 N.L.R.B. No. 204 (1976) the Board held, in refusing to direct an election in a unit consisting of student janitors only, as follows:

> "Upon close consideration of the matter, we are of the opinion that it will not effectuate the policies of the Act to direct an election in a unit consisting of student janitors only. We are influenced in our decision chiefly by the brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part-time employment. In our view, the student janitors are best likened to temporary or casual employees, whose certification would predictably present unusually vexsome problems. For instance, owing to the rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially."

San Francisco Art Institute, 226 NLRB No. 204 (1976). No difference was proven during the hearings which would somehow construe the graduate students to be either "employees," or surely not "employees" whose service in a continuing role in the putative category was assured. In that regard, Dr. Sanger testified as follows:

> "These tend to be courses that have technical components where we need to help students progress through the courses. And so, generally speaking, we budget for either TA's or Teaching Fellows for these kinds of courses ahead of time; and so we know within the budgets of divisions of the University, they would budget separately for these kinds of resources which then go to students in the form of this kind of financial aid."

(TR. 85, lines 14-20). Similarly Vice Dean Kostrzewa also testified that there would be no expectation of continuing service as follows:

> "The opportunities generally are offered for one to two semesters. We -- every spring we make announcements about those opportunities and we, together with faculty, select the candidates for these opportunities. So there's no expectation that they will continue."

(TR. 218, line 3-7). Associate Provost for University Curriculum, Adrienne Marcus, confirmed that there was no expectation of recurring service by the graduate students:

> "A. There is a desire to spread the availability of these positions out to as many graduate students as possible. The reason reflects on my other response, which is that we want as many students as possible to have the experience of instructing, being a classroom, because it aids in their learning and also because it serves as aid for them.
>
> Q What's the ordinary length of time based on your experience that one serves as a teaching assistant or a teaching fellow?
>
> A. Well, each teaching assistantship and fellowship lasts for an academic semester, so that's usually 15 weeks."

(TR. 520, line 16-25, page 521, line 1). Finally, although others testified similarly, Dean Bourgeois testified as follows:

"Q. Now at Parsons, does the TA have an expectation that he or she will continue in that role beyond the one semester?

A. No.

A. Yes, that program is used to identify and award teaching fellows.

Q. Ordinarily, for what period of time is the teaching fellow appointed?

A. Ordinarily, one semester.

Q. Does there ever come a time that possibly a teaching fellow is retained or is serving in that role for less than a semester?

A. Yes. At Parsons, the one difference would be in a boot camp program that we offer in the summer that is a compressed, so a bit shorter. It's an intensive program. The teaching fellows are used in that program."

(TR. 545, lines 10-12, 548, lines 3-14).

The documentary evidence confirmed that there was no expectation to be had by a graduate student assistant that he or she would serve in one of the putative categories on a repeated basis. Employer Exhibit 75, which was prepared by Shawn Ogiba, Director of Human Resources Systems, Reporting and Analysis, starkly presented the expectation that one would not serve in one of the putative categories on a repetitive basis. Thus, as set forth in Employer Exhibit 75, which was for the six semesters or sessions during the period from the summer of 2013 through the Spring of 2015, of the 1,455 students who served in these roles 523 served in only one semester, 59 students served in two semesters (non-consecutive) and only 659 students (45%) served in two consecutive semesters during those six consecutive semesters.

Employer Exhibit 76, which separates the services performed by the graduate assistants into the putative categories, dramatically emphasizes the point. As noted in footnote 1 of Employer Exhibit 76, the categories shaded in purple are Research Assistants, although

characterized differently, so that the exhibit refers to each of the six (6) categories, and the services provided by the graduate student, during the six (6) semesters between Summer, 2013 and Spring, 2015 (including Summer), or by excluding Summer in both 2013 and 2014.

By referring to the schedule set forth in Employer Exhibit 76 which includes the summer sessions, so that each consecutive summer or session is addressed, the sporadic, casual and non-recurring roles of the students becomes obvious. In that regard, the number of position titles in which students served during those six (6) semesters (perhaps more than once during the six semesters) in either only one semester or in merely two consecutive semesters reflects the fact that the student service is pointedly casual:

	1 Semester Only	2 Consecutive Semesters
1. Course Assistants	127 out of 180	40 out of 180
2. 8 categories of Research Assistants (including the 7 categories shaded in purple)	495 out of 1097	436 out of 1097
3. Research Associate	42 out of 84	22 out of 84
4. Teaching Fellow	99 out of 173	57 out of 173
5. Teaching Assistant	178 out of 436	233 out of 436
6. 2 categories of Tutors	52 out of 128	60 out of 128

In sum, slightly more than 50% of the positions was served by an individual student in only one of the six consecutive semesters, and only 40% of the positions was served by a student in two (2) consecutive semesters.

As a result, and as articulated in St. Thomas, set forth below, the graduate student assistants at The New School are clearly temporary employees, if they are somehow construed to be employees by the Board. Thus, the Board held in that case, as follows:

> "It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit.... The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain. . . . [The] "date certain" eligibility test for temporary employees . . . does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired."

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992). The proffer made by The New School concerning the testimony of Valerie Feuer, Employer Exhibit 67, confirms the casual nature of the positions inasmuch as at Mannes, which offers various programs in music, faculty members are choosing the tutors and, because they are hourly appointments, there necessarily cannot be any expectation of the duration of the appointment, as there can be no guarantee that the appointment will last on a weekly or semester basis. Moreover, by reason of a faculty member choosing the tutor to work with a student the expectation of a continued role diminishes further, as either the faculty member or the tutored student may determine that the need for the tutor's service is no longer necessary. That fact, consistent with the testimony of the other academics and administrators of The New School, debunks any claim that there could be a recurring "employment" of tutors. Finally, even if Brown had not held that the graduate student assistants at issue herein are "primarily students" and not employees, Region 2 had already held, in any event, that the characteristics of the students serving in the putative categories should be excluded from collective bargaining. Thus, in NYU I graduate students working as graders and tutors were excluded from the unit as temporary employees, where they worked for varying

periods of time (from one week to one semester) and had no substantial expectancy of continued employment in those jobs. 332 N.L.R.B. at 1221.

POINT VI

THE RELIEF SET FORTH IN PETITIONER'S REQUEST FOR REVIEW

At page 39 of its Request For Review Petitioner has argued that the "Board should act forthwith to grant review and overrule Brown, [as the] record is more than adequate to enable the Board to decide this question promptly." While Petitioner does not directly make such a request, one inappropriate possible inference to be garnered from Petitioner's statement is that the processes of Section 102.67 of the Board's Rules and Regulations should be ignored, and that upon this Request For Review the Board should rule upon the merits of the petition, determine whether Brown should be modified or overturned, and direct an election, apparently without the benefit of further and full briefing by the parties. In further support of its apparent suggestion Petitioner states that the "issue has been extensively briefed, including nine amicus briefs [having been] submitted in New York University Case No-2-RC-23481." That may very well be true, but those briefs had nothing to do with The New School, which was not a party to any proceeding at that time and, in fact, The New School has never had the opportunity to fully brief this matter before the Board — thus, whether amicus briefs had been submitted in NYU II is of no moment to this proceeding. It is also of note that the Regional Director of Region 2 is currently considering the issues presented in The Trustees of Columbia in the City of New York, 2-RC-143012. While the facts presented in the Columbia proceeding are similar, they are not identical, and the decision of the Regional Director may have either some, or extensive, relevance to this proceeding. When coupled with the pendency of the Regional Director's

decision in that proceeding, therefore, any suggestion that this very significant proceeding should be truncated by precluding further briefing is simply misplaced.

In fact, even if the Request For Review is granted, the Regional Director specifically held that the "petitioned-for unit are not employees [and she did] not reach the issue of whether they are temporary or casual," thereby leaving the question open as to whether those graduate students are "temporary" or not. (Supplemental Decision, page 20). Nor did she address the issue whether a "one or two semester" appointment would qualify a graduate student to be eligible to vote, even if he or she were an "employee" (Supplemental Decision, page 21), and she noted that the Board might "devise a standard adopted to the university setting." (Supplemental Decision, page 21). As a result, since the Regional Director did not determine an "appropriate" unit (if Brown were to be modified), what is that unit, and does it include the graduate students that The New School contends are "temporary" employees or those other individuals who should otherwise be excluded from the unit (e.g., undergraduates)?

In similar circumstances the Board has remanded the matter to the Regional Director on unit scope. See, e.g. A.S. Abell Publishing Co., 270 NLRB No. 181 (1984), where the Regional Director had dismissed a petition, necessarily therefore not reaching a decision on the proposed unit, and the Board remanded the "case to the Regional Director for a decision on the unit scope absent agreement by the parties." (270 NLRB No. 181, footnote 7). See also Devils Lake Sioux Mfg. Corp., 243 NLRB No. 28 (1979) (Board remanded the case to the Regional Director for further hearing to determine the appropriate unit or units and such further action as is required to conduct election).

Finally, it is self-evident that the parties should be provided with an opportunity to brief the import of the Northwestern case as it may, or may not, apply to this proceeding. In sum, if

the Request for Review is granted, The New School respectfully requests a further opportunity to brief the issues presented to the Board, or as requested by the Board.

CONCLUSION

For all the foregoing reasons, the petition should be dismissed.

Dated: August 20, 2015
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served a copy of the employer The New School's Opposition To The Request For Review on the following parties by electronic mail on August 20, 2015:

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/S/
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