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“FORECASTS OF DOOM”: THE DUBIOUS THREAT OF GRADUATE TEACHING ASSISTANT COLLECTIVE BARGAINING TO ACADEMIC FREEDOM

Abstract: On March 29, 2000, an administrative law judge of the National Labor Relations Board approved a settlement between the NLRB and Yale University, which resolved unfair labor practices charges made against the University by its Graduate Employees and Student Organization. This decision, however, did not resolve the underlying question of whether graduate teaching assistants are employees under the National Labor Relations Act. This Note analyzes recent cases concerning the unionization of graduate student teaching assistants at private universities and colleges. This Note argues that the NLRB's application of a “compensated services” test to teaching assistants is correct and that the public policy arguments against collective bargaining for teaching assistants are based on flawed conceptions of the university, the work teaching assistants do, and the purposes of the National Labor Relations Act.

INTRODUCTION

On a chilly night in November of 1995, the membership of the Graduate Employees and Students Organization at Yale University (“GESO”), gathered in the historic Center Church on the New Haven green to take a strike vote.¹ After six years of organizing, three strikes, an election conducted by the League of Women Voters, and countless petitions, rallies, meetings and demonstrations, a majority of teaching assistants at the meeting voted to withhold semester grades until the university administration recognized GESO as the collective bargaining agent of Yale's teaching assistants (TAs).² The teachers at the

¹ Descriptions of the history of GESO and Yale are based on the author's personal observations as a Yale teaching assistant, and as a member and organizer of GESO.

² In this note, the term “teaching assistants” will refer generally to those graduate students enrolled in a college or university who perform a range of academic services for the university. These services may include grading, conducting tutorials, supervising laboratory work, teaching sections of lecture courses, or teaching their own independent courses. See e.g., N.Y. Univ., 332 N.L.R.B. No. 111, (Oct. 31, 2000), 165 L.R.R.M. 1241, 1241 available at 2000 N.L.R.B. LEXIS 748, 1; Yale Univ., 330 N.L.R.B. No. 28, (Nov. 29, 1999), 162 L.R.R.M. 1393, 1393 available at 1999 WL 1076116 1, 12–13. The official treatment of

meeting felt the vote to be a historic decision, and such it proved to be.

The University's reaction was swift and severe. In the days following the vote, the Yale administration circulated letters to the faculty urging them to discuss the strike with their teaching assistants and to rebuke them if they planned to participate. As a direct consequence of this instigation, three TAs were charged with insubordination and threatened with expulsion for refusing to turn in grades before the end of the semester. Within weeks of the vote, the administration fired all participating TAs from their scheduled spring teaching positions. With the mass-firing and the disciplinary hearings of the three striking TAs, the grade strike began to lose support. On January 15, the remaining striking TAs voted to turn in their grades in return for reinstatement to their spring semester jobs.

In spite of losing the strike, however, GESO filed unfair labor practice charges against the Yale administration for violations of sections 8(a)(1) and (3) of the National Labor Relations Act ("NLRA," "the Act").³ The charges alleged that Yale had violated the rights of the TAs under section 7 of the Act. GESO alleged that Yale violated the NLRA, first, by refusing to recognize the teaching assistants as employees covered by the Act and, second, by firing, threatening to expel and to write adverse letters of recommendation, and by subjecting teaching assistants who participated in the strike to increased supervision after the strike.

The National Labor Relations Board ("NLRB," "the Board") issued a complaint against Yale on these charges, and the case was heard.⁴ An administrative law judge ("ALJ") determined that the grade strike was a partial strike and, therefore, unprotected activity.⁵ Accordingly, the ALJ dismissed the charges without reaching the question of whether the TAs are employees within the meaning of the

these teaching assistantships varies from university to university; for example, serving as a TA may or may not be linked to a financial aid package. *See id.* Likewise, some or all of these services may or may not be required. *See id.* Although the factual contexts of these positions may differ, as the Board in *New York University* recognized, the crucial factor of the inquiry into the employee status of teaching assistants is whether the students perform services for an employer for which they are compensated. *See* 2000 N.L.R.B. LEXIS 748 at 10, 65-66.

³ *See Yale Univ.*, 1999 WL 1076116 at 1. Although citations to the NLRA correspond to the Act as amended, throughout this Note I will refer to sections of the NLRA by their popular names, derived from the National Labor Relations Act of 1935. *See* 29 U.S.C. § 141 (1994).

⁴ *See Yale Univ.*, 1999 WL 1076116 at 1.

⁵ *See id.*

Act.⁶ Upon appeal, the NLRB agreed with the ALJ's finding of a partial strike, but remanded the case to the ALJ to determine whether the TAs were employees under the Act.⁷ On March 29, 2000, the ALJ approved a settlement between the NLRB and Yale, which resolved the unfair labor practice charges, without resolving the underlying dispute over the employee status of the TAs. This question of whether Yale TAs have the protection of the NLRA has not yet been answered.⁸

Even as Yale and the NLRB were engaged in settlement discussions, however, the larger debate over student employees was shifting dramatically.⁹ Most significantly, in *Boston Medical Center* the Board rejected its longstanding "primary purpose" test for evaluating the employee status of student employees in favor of a "compensated services" test, holding that medical interns and residents were employees under the Act.¹⁰ Next, in *New York University*, the Board applied this new standard to a case involving an election petition filed by an organization of TAs at New York University.¹¹ Most recently, the NYU administration has announced its intention to recognize and negotiate with the TAs' collective bargaining agent, thus establishing the first TA union at a private university in the United States.¹² Nevertheless, although these developments bode well for the creation of TA unions at private universities, the fact that the Board's recent action represents a major shift in its analysis of the academic work place, and

⁶ See *id.* at 28.

⁷ See *id.* at 6.

⁸ The GESO grade strike received significant national press coverage. See, e.g., Alice Dembner, *Despite Threat, Yale Won't Settle Labor Case*, BOSTON GLOBE, Nov. 20, 1996, at B7; *Union Drive Erupts at Yale*, BOSTON GLOBE, Jan. 10, 1996, at 17; Michael Matza, *Grad Students Striking Out*, HOUSTON CHRON., Jan. 21, 1996, at 11; Gerald Renner, *Demonstrators Take to The Street*, HARTFORD COURANT, Jan. 11, 1996, at A3; Gerald Renner, *Union Movement Tests Yale University*, HARTFORD COURANT, Apr. 27, 1997, at C1; Gerald Renner, *Yale Graduate Students File Complaint with Labor Board*, HARTFORD COURANT, Jan. 12, 1996, at A12; Rene Sanchez, *Graduate Teaching Assistants Press Their Call for Equity in Academia*, WASH. POST, Feb. 4, 1996, at A03; Editorial, *Strike at Yale*, WASH. POST, Jan. 22, 1996, at A18.

⁹ See *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30, 1 (Nov. 26, 1999), available at 1999 WL 1076118 1, discussed *infra* at notes 76-103 and accompanying text.

¹⁰ See *id.*; Bernhard Wolfgang Rohrbacher, Notes and Comments, *After Boston Medical Center: Why Teaching Assistants Should Have the Right to Bargain Collectively*, 33 LOY. L.A. L. REV. 1849, 1849 (2000).

¹¹ See *N.Y. Univ.*, 2000 N.L.R.B. LEXIS 748, 1; *Representation Elections: NLRB Regional Director Orders Election on Representation of NYU Graduate Workers*, 66 DAILY LABOR REPORT (DLR), Apr. 5, 2000, AA-1; *NLRB Regional Director's Decision in New York University and United Auto Workers*, 66 DLR, Apr. 5, 2000, E-22.

¹² See Rachel Einschlag, *NYU Recognizes Grad Student Union*, CORNELL [UNIV.] DAILY SUN, Mar. 13, 2001; Matthew Matera, *NYU to Bargain with Grad Union*, YALE DAILY NEWS, Mar. 2, 2001.

given the Yale administration's oft-stated refusal to enter into a collective bargaining relationship with its TAs, the likelihood of protracted litigation concerning the collective bargaining rights of student employees remains high.¹³

This Note analyzes recent cases concerning the unionization of graduate student TAs at private universities and colleges. In these cases, the NLRB has overturned nearly thirty years of precedent by holding that TAs and medical interns and residents are now to be considered employees under § 2(3) of the Act. Because of the Board's dramatic action in this area and the probable appeals by the university employers, this subject will likely be debated in court over the next few years. The first section of Part I of this Note will discuss the relevant provisions of the NLRA as applied to the question of the employee status of graduate student TAs. The second section of Part I will consider the arguments relating to issues of academic freedom by considering the guidelines established by two major collective bargaining organizations for higher education teachers: the American Association of University Professors (AAUP) and the National Education Association (NEA). Part II will describe the history of the NLRB's consideration of graduate student unionization and discuss recent scholarship relating to the unionization of TAs at private universities as turning upon two questions: first, was the NLRB correct in its rejection of its former "primarily students" rule in favor of the new "compensated services" test, which established the TAs and house staff as employees under the Act; and second, would the granting of collective bargaining rights to TAs infringe upon the employer's privileges of academic freedom in running the university. Finally, in Part III, by analyzing the recent legal developments of TA unionization in the context of the principles of academic freedom, this Note will argue first, that the Board's application of the compensated services test to the situation of teaching assistants is correct, and second, that the public policy arguments against collective bargaining for TAs are based on flawed conceptions of the university, the work TAs do, and, indeed, the purposes of the NLRA itself.¹⁴

¹³ Yale President Richard Levin, reacting to the decision of NYU to recognize and bargain with its TA union, restated that he "believe[d] that most students at Yale . . . will decide that unionization is not in their best interest." Matera, *supra* note 12.

¹⁴ Using its authority under the commerce clause of the U.S. Constitution, Art. I, Section 9, Congress passed the NLRA in 1935 to promote industrial peace and stability. See U.S. CONST. art. I, § 9, cl. 2; NLRA, 29 U.S.C. § 141(b) (1994). The purpose of the legisla-

I. USING THE NLRA TO PROTECT ACADEMIC FREEDOM

A. *The National Labor Relations Act*

The central point of contention between TAs and university administrations is whether TAs should be considered employees and, as such, covered by the NLRA. Furthermore, there is considerable disagreement about whether TAs should be treated collectively as "employees" and moreover, whether the problems faced by TAs can or should be the subject of collective bargaining. The primary questions, therefore, involve the definition of "employee," "labor organization," "appropriate bargaining unit," and "terms and conditions of employment" within the NLRA, as interpreted by the Board and the courts.

The right to representation through collective bargaining is the central principle of the Act.¹⁵ Section 7 of the NLRA, as amended, reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.¹⁶

This principle of broad coverage is reinforced by the expansive definition of "employee" in section 2(3) of the Act, which provides, "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise."¹⁷ Central to the Board's adjudication of

tion, as amended in 1947 by the Labor Management Relations Act, is announced in 29 U.S.C. § 141(b) (1994):

[T]o promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with disputes affecting commerce.

Id.

¹⁵ See Douglas Sorrelle Streitz & Jennifer Allyson Hunkler, *Teaching or Learning: Are Teaching Assistants Students or Employees?*, 24 J.C. & U.L., No. 2, 349, 352-56 (1997).

¹⁶ 29 U.S.C. § 157 (1994).

¹⁷ *Id.* at § 152.

the TA question has been the question of how the Act excludes certain types of employees; thus, the Act states that the NLRA:

shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.¹⁸

In considering the question of the statutory protection of TAs under the Act, what is immediately apparent from this long list of exclusions—agricultural workers, supervisors, independent contractors—is that no such exclusion is made for teaching assistants or student employees.¹⁹

Nevertheless, until only recently, TAs, as students of the universities for which they teach, have been excluded from coverage of the Act by virtue of the Board's interpretation of this section of the Act.²⁰ A series of Board decisions from the 1970s established that those employees who are "primarily students" should nevertheless be excluded from the Act on the grounds that their employment is "incidental" to their academic objectives.²¹ As discussed below, two more recent cases hinge on whether these precedents regarding employee status should remain Board law.

In addition to the question of the employee status of TAs, there is further disagreement about the types of employee organizations that could be formed by TAs and whether these organizations have issues

¹⁸ *Id.*

¹⁹ *See id.* Until 1970, the Board had held that private colleges and universities were exempt from the strictures of the Act because the activities of these employers were not commercial in nature and therefore operated outside the jurisdiction of the Board. *See Columbia Univ.*, 97 N.L.R.B. 424, 427 (1951). In 1970, however, the Board changed direction by determining that the impact of private universities on interstate commerce was, in fact, huge. *See Cornell Univ.*, 183 N.L.R.B. 329, 331-33 (1970). Because there is no argument in the instant cases that either Yale or NYU should fall outside the jurisdictional limits of the NLRA, the control of the NLRB over private universities and colleges is not an issue in this essay.

²⁰ *See* 29 U.S.C. § 157; *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1001 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976); *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974); *Cornell Univ.*, 202 N.L.R.B. 290, 292 (1973); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

²¹ *See* 29 U.S.C. § 157; *St. Clare's*, 229 N.L.R.B. at 1001; *Cedars-Sinai*, 223 N.L.R.B. at 253.

that can properly be addressed through the mechanisms of collective bargaining. Section 2(5) of the Act states: "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers."²²

In essence, this provision of the Act allows a wide range of organizations to receive protection under the Act so long as the initial requirement that the individuals be "employees" is satisfied.²³ The Board looks to the community of interest of the proposed organization to determine whether to mandate that the employer negotiate with the organization over the "rates of pay, wages, hours of employment, or other conditions of employment," as stipulated in section 9.²⁴

As noted, the case involving Yale University arose specifically in the context of unfair labor practice charges against the University.²⁵ Thus, whether particular actions toward or treatment of TAs constitute unfair labor practices is essential in evaluating the protection of TAs under the Act. The NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7],"²⁶ "to encourage or discourage membership in any labor organization,"²⁷ or to "refuse to bargain collectively with the representatives of his employees"²⁸ subject to the provisions of section 9, discussed above.

B. Academic Freedom

In addition to arguments regarding the appropriate interpretation of the NLRA to TAs, the question of whether collective bargaining by TAs would violate the academic freedom of institutions of higher education is also likely to frame the debate over TA unionization. Critics of unionization, both inside and outside the university,

²² 29 U.S.C. § 152(5) (1994).

²³ See *id.*

²⁴ *Id.* at § 159 (a).

²⁵ The charges arising from the Yale grade strike allege violations of § 8(a)(1) and (3); first, in Yale's refusal to recognize the teaching assistants as employees covered by the Act and, second, by firing, threatening to expel, and subjecting to increased supervision teaching assistants who participated in the strike. *Yale Univ.*, N.L.R.B. No. 28, (Nov. 29, 1998), 162 L.R.R.N. 1393, 1393 available at 1999 WL 1076116 1, 1.

²⁶ 29 U.S.C. § 158 (a)(1) (1994).

²⁷ *Id.* at § 158 (a)(3).

²⁸ *Id.* at § 158 (a)(5).

fret that graduate student unions will employ the techniques of collective action—from negotiating to striking—to intrude upon the universities' rights to set degree requirements, evaluate student progress and control curriculum. This section attempts to trace briefly the history of the idea of academic freedom as well as its subsequent role in the establishment of unions for teachers and professors in the United States.

The American Association of University Professors ("AAUP") was established in 1915 by college and university faculty as an organization dedicated to the protection and promotion of principles of academic freedom.²⁹ At its heart, academic freedom may be understood to involve three related and, at times, potentially conflicting concepts: the freedom to teach, do research, and publish without interference; the freedom of individual teachers to exercise the same rights as other citizens without endangering their academic status; and the collective right of autonomy covering the academic profession as a whole.³⁰ In 1915, in the "American Association of University Professors, Declaration of Principles," Arthur O. Lovejoy warned of the threat of "corruption" of the teaching profession "to the degree that professional scholars, in the formation and promulgation of their opinions, are, or by the character of their tenure appear to be, subject to any motive other than their own scientific conscience and a desire for the respect of their fellow experts."³¹ The central principle of academic freedom contained within Lovejoy's declaration is that there should be a code

²⁹ For discussions of the legacy of the AAUP and academic freedom, see JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION* (1992); *REGULATING THE INTELLECTUALS: PERSPECTIVES ON ACADEMIC FREEDOM IN THE 1980s* (Craig Kaplan & Ellen Schrecker eds., Praeger Special Studies, 1983) [hereinafter *REGULATING THE INTELLECTUALS*].

³⁰ See Ellen Schrecker, *Academic Freedom: The Historical View*, in *REGULATING THE INTELLECTUALS*, *supra* note 29, at 26.

³¹ Arthur O. Lovejoy, *American Association of University Professors, Declaration of Principles* (1915), reprinted in GETMAN, *supra* note 29, at 74–75. Lovejoy states:

[I]f the universities are to render any such service toward the right solution of social problems in the future, it is essential that the scholars who carry on the work of universities shall not be in a position of dependence upon the favor of any social class or group, that the disinterestedness and impartiality of their inquiries and their conclusions shall be so far as humanly possibly beyond the reach of suspicious.

for scholarly behavior, the enforcement of which should be entirely in the hands of one's professional peers.³²

From the outset, the two primary mechanisms for insuring academic freedom were peer review and tenure.³³ Peer review, it was hoped, would ensure that decisions relating to one's professional status—such as hiring, promotion, and benefits—would be made by disinterested colleagues on the basis of one's scholarship rather than on sectarian political or ideological biases.³⁴ Likewise, tenure would insure the intellectual autonomy of the scholar by allowing scientific inquiry to lead where it might without fear that the consideration of unpopular ideas would lead to loss of employment.³⁵

Although the AAUP did not originally participate in the formation of faculty unions, since 1973, the sponsorship of collective bargaining on university campuses has been a growing, albeit controversial, component of the mission of the AAUP.³⁶ The AAUP Collective Bargaining Congress ("CBC") is the wing of the AAUP dedicated to the development and dissemination of information and resources in support of the collective bargaining activities of the AAUP.³⁷ Through the CBC, the AAUP has supported the rights of faculty to engage in collective bargaining.³⁸ In its *Statement on Collective Bargaining* ("Statement"), the AAUP declared that collective bargaining was an "effective instrument" for achieving the organization's "basic purposes," chief among them being the preservation and promotion of academic freedom.³⁹

³² See Ellen Schrecker, *Academic Freedom: The Historical View*, in REGULATING THE INTELLECTUALS, *supra* note 29, at 28.

³³ See REGULATING THE INTELLECTUALS, *supra* note 29, at 15.

³⁴ See GETMAN, *supra* note 29, at 109–13; REGULATING THE INTELLECTUALS, *supra* note 29, at 15; Frances Fox Piven, *Academic Freedom and Political Dissent*, in REGULATING THE INTELLECTUALS, *supra* note 29, at 17–21.

³⁵ See GETMAN, *supra* note 29, at 109–13; REGULATING THE INTELLECTUALS, *supra* note 29, at 15; Frances Fox Piven, *Academic Freedom and Political Dissent*, in REGULATING THE INTELLECTUALS, *supra* note 29, at 17–21.

³⁶ See GETMAN, *supra* note 29, at 101–03.

³⁷ AAUP Department of Organizing and Services, *CBC Bylaws* (Rev. 1996), at <http://www.aaup.org/Cbbylaws.htm> (last visited Apr. 12, 2001).

³⁸ AAUP, *Statement on Collective Bargaining*, at <http://www.aaup.org/cbpage.htm> (last visited Apr. 12, 2001). The AAUP currently claims more than 70 AAUP chapters serving as faculty collective bargaining representatives.

³⁹ See *id.* The AAUP website notes that a brief period of faculty bargaining occurred between 1970, when the NLRB asserted jurisdiction over private universities in *Cornell University*, and the Supreme Court's decision in *NLRB v. Yeshiva University* in 1980. See 444 U.S. 672 (1980). Nevertheless, the website states that some private sector AAUP Collective Bar-

The AAUP's Statement was revised in 1984, and again in 1993.⁴⁰ The 1993 version restates the AAUP's dual commitment to the principles of academic freedom and collective bargaining.⁴¹ Additionally, the 1993 Statement asserts that through collective bargaining the "principles of academic freedom and tenure, fair procedures, faculty participation in governance, and the primary responsibility of the faculty for determining academic policy will thereby be secured."⁴² The Statement goes on to declare that when a chapter of the AAUP enters into collective bargaining, it should "obtain explicit guarantees of academic freedom and tenure in accordance with the principles and stated policies of the association."⁴³

Although the 1993 Statement does not in any way define issues that AAUP chapters should consider in negotiations for a collective bargaining agreement, the AAUP does state that, where a faculty chooses collective bargaining, "the trustees and the administration have a corresponding obligation to bargain in good faith with the faculty-selected representative and should not resort to litigation or any other means intended to avoid this obligation."⁴⁴ Nevertheless, in its 1988 *Statement on Academic Government for Institutions Engaged in Collective Bargaining*, the AAUP stated that: "[T]he scope of bargaining should not be limited in ways that prevent mutual employment of the bargaining process for the clarification, improvement, and assurance of a sound structure of shared governance."⁴⁵

As regards graduate teaching assistants, the AAUP supports the principle of academic freedom for graduate students as well as for permanent faculty.⁴⁶ In its 1940 *Statement of Principles of Academic Freedom and Tenure*, the AAUP declared that "both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time tenured and probationary faculty teacher, but

gaining chapters have been able to maintain the benefits and protections of collective bargaining. *See id.*

⁴⁰ AAUP, *Statement on Collective Bargaining*, at <http://www.aaup.org/rfcb.htm> (last visited Apr. 12, 2001).

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ AAUP, *Statement on Academic Government for Institutions Engaged in Collective Bargaining*, at <http://www.aaup.org/rfcbgov.htm> (last visited Apr. 12, 2001).

⁴⁶ AAUP, *Welcome Letter to Graduate Students from General Secretary Mary Burgan*, at <http://www.aaup.org/Gradhome.htm> (last visited Apr. 12, 2001).

also to all others, such as part-time faculty and *teaching assistants*, who exercise teaching responsibilities.⁴⁷

Unlike the AAUP, the National Education Association ("NEA") has been active in organizing members of the teaching profession into collective bargaining units since its creation. The NEA, founded in Philadelphia in 1857, now represents over two million teachers at all grade levels.⁴⁸ The NEA became active in the sponsorship and defense of academic freedom in the 1920s and 1930s.⁴⁹ In 1935, the NEA established a "Committee on Academic Freedom to 'investigate and report' on cases involving 'the violation of the principle of academic freedom' and to 'assist in every way' members who were 'deprived of their positions in violation of the principles of academic freedom.'"⁵⁰ Throughout the first half of the twentieth century the NEA passed numerous resolutions defining and asserting the academic freedom rights of its members.⁵¹

The NEA's current statement on academic freedom asserts at the outset that the support of academic freedom rights is aided by the presence of collective bargaining.⁵² *Academic and Intellectual Freedom and Tenure in Higher Education* begins, "The National Education Association affirms that academic and intellectual freedom in institutions of higher education are best protected and promoted by tenure, academic due process, and faculty self-governance. Such protection is enhanced by including—where possible—these items in a collectively bargained contract enforced by binding arbitration."⁵³

⁴⁷ *Id.*, quoting AAUP, *Statement of Principles of Academic Freedom and Tenure* (1940), at <http://www.aaup.org/Gradhome.htm> (last visited Apr. 12, 2001) (emphasis added). Emily K. Abel argues that the profound change in the economics of the university has, in fact, meant that academic freedom is almost entirely absent for the "fastest growing segment of the academic workforce:" graduate students and adjunct faculty. See Emily K. Abel, *The Employment Crisis in the Academy*, in REGULATING THE INTELLECTUALS, *supra* note 29, at 124–26.

⁴⁸ NEA, *National Education Association FAQ*, at <http://www.nea.org/aboutnea/faq.html> (last visited Apr. 12, 2001).

⁴⁹ NEA, *NEA and Academe Through the Years: The Higher Education Roots of NEA, 1857–Present*, at <http://www.nea.org/hc/roots.html> (last visited Apr. 12, 2001).

⁵⁰ *Id.*

⁵¹ *Id.* In 1928, the NEA adopted a resolution on the *Freedom of the Teacher*. See *id.* Later, the NEA adopted resolutions condemning loyalty oaths, book burnings, ideological purges, and censorship of instructional materials and opinions. See *id.* The NEA was also active in lobbying against legislation denying salary to "any employee in the District of Columbia who 'taught or advocated Communism.'" See *id.*

⁵² NEA, *NEA Policy Statements: Academic and Intellectual Freedom and Tenure in Higher Education*, at <http://www.nea.org/hc/policy1.html#top> (last visited Apr. 12, 2001).

⁵³ *Id.*

The statement then defines intellectual and academic freedom as the "free search for truth and its free exposition" for both individuals and institutions.⁵⁴ The NEA places particular emphasis on the connection between the freedoms that belong to each individual—to publish the results of scholarship, to retain rights to intellectual property—with the rights of the faculty generally to participate in the governance of the institution, to "when necessary . . . criticize administrators, trustees, and other public officials without recrimination" and, most significantly, to use the techniques of collective action to "assist colleagues whose academic freedom and professional rights have been violated."⁵⁵ Yet, in spite of the evidence of the NEA and AAUP's near-century of successful experience balancing collective bargaining and academic freedom in academic settings, the NLRB has until recently seen collective bargaining by TAs as a threat to the academic freedom of universities and colleges.

II. THE LEGAL HISTORY OF THE NATIONAL LABOR RELATIONS BOARD AND STUDENT-EMPLOYEES

A proper analysis of the Board's recent holdings regarding student-employees requires an awareness of the Board's past decisions regarding TA unionization.⁵⁶ Since the NLRB first exercised jurisdic-

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See N.Y. Univ., 332 N.L.R.B. No. 111 (Oct. 31, 2000), 165 L.R.R.M. 1241, 1241, available at 2000 N.L.R.B. LEXIS 748 1, 4-18. The current debate over TA unionization discussed in this Note concerns exclusively the rights of TAs at private, as opposed to public, universities. Teaching assistants at public universities and colleges are considered public employees and thus exempt from the terms of the NLRA, 29 U.S.C. § 152(2) (1994) reads: "The term 'employer' . . . shall not include . . . any State or political subdivision thereof." 29 U.S.C. § 152(2) (1994). Nevertheless, as public employees, these TAs are commonly afforded the rights of collective bargaining and representation by state statute. As a result of state statutes modeled upon the NLRA, several states, including California, New York, Michigan, Wisconsin, Iowa, and Kansas, have extended the rights of collective bargaining to public-sector and state government employees. See, e.g., Labor-Mediation-Public Employment-Fair Employment Practices, MICH. COMP. LAWS ANN. §§ 17.454(1)-(2) (West 1995); New York State Labor Relations Act, N.Y. LAB. LAW. §§ 700-717 (1988). See N.L.R.B. v. Comm. of Interns and Residents, 426 F. Supp. 438, 452-54 (S.D.N.Y. 1977) (holding that student-employees of public hospital are "employees" under state labor law); see also Streitz & Hunkler, *supra* note 15, at 352 (citing Michigan, New Jersey, New York, and Wisconsin statutes); Rohrbacher, *supra* note 10, at 1852 (citing California's Higher Education Employer-Employee Relations Act (HEERA), CAL. GOV'T CODE §§ 3560-3595 (West 1999 & Supp. 2000)). Although state labor statutes are largely modeled on the NLRA, Streitz and Hunkler argue that, in evaluating unionization efforts, state public employee relations Boards have not applied the NLRB's "primarily students" analysis to teaching assistants. See Rohrbacher, *supra* note 10, at 1881-82; Streitz & Hunkler, *supra* note 15, at 364.

tion over private universities in 1970, the Board has struggled to define a clear and consistent standard regarding the employee status of students.⁵⁷ In 1970, in *Cornell University*, the Board rejected the proposed inclusion of student employees in a non-student employee bargaining unit on the grounds that for the students their employment was "incidental" to their academic objectives.⁵⁸ In subsequent cases the Board maintained its "primarily students" standard, holding that even though student employees serving as research and teaching assistants performed "some faculty functions" they were not covered by the Act.⁵⁹

In other cases in which the Board rejected attempts to form mixed student-faculty bargaining units on community of interest grounds, the Board did not describe a single line of reasoning to make its determination. Rather, in addition to those cited above, the Board also considered the fact that the TAs received compensation in a different form than other non-student employees, and that student employment was "incidental to the students' academic objectives."⁶⁰

Later, in *San Francisco Art Institute*, the Board rejected an attempt to seek recognition for student-only bargaining units by applying its *Cornell* test—whether employment was incidental to academic goals—and holding that the students did not fall within the statutory definition of employee.⁶¹ In addition to the factors it had applied to mixed student bargaining units, the Board also analyzed whether the work done in the course of employment satisfied any academic degree

⁵⁷ See, e.g., *Cornell Univ.*, 202 N.L.R.B. No. 41 201, 291-92 (1973). This Note is concerned with the status of students employed by the university in which they are enrolled, rather than by private employers. See Martin H. Malin, *Student Employees and Collective Bargaining*, 69 Ky. L.J. 1, 1 (1980-81).

⁵⁸ See 202 N.L.R.B. at 292. See also *Coll. of Pharm. Sci.*, 197 N.L.R.B. 959, 960 (1972) (holding student employees should be excluded because employment by the university was dependent upon their enrollment as students and upon their "satisfactory academic progress"); *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972) (holding graduate assistants did not share a sufficient community of interest with regular faculty to warrant inclusion in a faculty bargaining unit, largely because their employment depended on continued enrollment as students).

⁵⁹ See *Cornell Univ.*, 202 N.L.R.B. at 292.

⁶⁰ See *id.* (citing such factors as different hiring procedures, different rates of pay and different terms of employment for student/non-student employees to demonstrate absence of community of interest); *Georgetown Univ.*, 200 N.L.R.B. 215, 216 (1972) (refusing to allow student employee bargaining unit including non-student part-time employees, citing lack of community of interest).

⁶¹ See *S.F. Art Inst.*, 226 N.L.R.B. 1251, 1251 (1976) (holding that students employed part-time as janitors were concerned "primarily" with their studies and were not therefore employees within the meaning of the NLRA); Streitz & Hunkler, *supra* note 15, at 368.

requirements.⁶² Similarly, in 1973, in *Barnard College*, the Board applied its *Cornell* standard in rejecting an all-student bargaining unit composed of graduate students of other institutions employed as dormitory resident assistants at Barnard.⁶³ Finding their employment incidental to academic objectives, the Board cited, among other factors, the way in which graduate assistants were hired, and the fact that the students did not work during school vacation periods or did not receive the usual employee benefits.⁶⁴

One of the areas in which the issue of student-employee unionization has been most hotly contested has been the effort to organize medical interns and residents, or "house staff."⁶⁵ A central case in this context was the Board's decision in 1976 in *Cedars-Sinai Medical Center*.⁶⁶ There, the Board refused to extend coverage of the NLRA to house staff on the grounds that they were not statutory employees.⁶⁷ Using the analysis derived from the line of cases since *Cornell*, the Board held that the house staff was "primarily engaged in graduate educational training" and could not, therefore, be considered employees.⁶⁸

Board member John H. Fanning's dissent in this case argued strongly against the majority's "primary purpose test"; Fanning pointed out the absence of any exclusion of students from the text of the Act or any reference in the statute to the relevance of the "purposes" for which one might take employment.⁶⁹ In essence, Fanning argued that nothing in the Act requires that being a "student" precludes also being an "employee."⁷⁰

In 1977, in *St. Clare's Hospital & Health Center*, the Board again took up the issue of the unionization of medical house staff, with similar results.⁷¹ In finding that the interns and residents were not employees, however, the Board asserted that policy considerations, in addition to an inquiry into the subjective "purpose" for employment,

⁶² See *S.F. Art Inst.*, 226 N.L.R.B. at 1252; *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 622 (1974).

⁶³ See *Barnard Coll.*, 204 N.L.R.B. 1134, 1134-35 (1973).

⁶⁴ See *id.*

⁶⁵ See *Streitz & Hunkler*, *supra* note 15, at 369.

⁶⁶ See 223 N.L.R.B. 251, 251 (1976).

⁶⁷ See *id.* at 253-54.

⁶⁸ *Id.* at 253.

⁶⁹ See *id.* at 253 (Fanning, Member, dissenting).

⁷⁰ See *id.* at 253-54 (Fanning, Member, dissenting).

⁷¹ See 229 N.L.R.B. 1000, 1000-02 (1977).

necessitated their exclusion.⁷² In particular, the Board held that collective bargaining rights for house staff would be inconsistent with federal labor policy in that the student's primary academic interests were at odds with the tools of economic warfare inherent to the collective bargaining process.⁷³ Specifically, the Board worried that by allowing collective bargaining rights, academic matters, such as grades, curriculum, and testing would improperly be brought into the collective bargaining arena.⁷⁴ This, according to the Board would, in turn, infringe upon the academic freedom of the institution to conduct its educational mission.⁷⁵

Recently, the Board's approach to student employees, both house staff and TAs, has taken a major shift. In 1999, in *Boston Medical Center*, the Board undertook a review of a decision by the Regional Director of NLRB Region One dismissing a certification petition for a unit of house staff on the grounds that, under the controlling precedents of *Cedars-Sinai* and *St. Clare's*, the petitioners were "primarily students rather than employees."⁷⁶ Upon appeal to the Board, the petitioning house staff acknowledged these precedents, but urged the Board to overrule them.⁷⁷ The Board used this occasion to undertake an extensive and detailed review of its *Cedars-Sinai* and *St. Clare's* holdings, declaring finally that its prior determinations of the status of medical house staff were "flawed in many respects."⁷⁸

First, the Board considered the statutory definition of employee and the catalog of exclusions from that definition in § 2(3), noting that the exclusions from the Act's definitions are "limited and narrow" and do not cover the category of students.⁷⁹ The Board stated that unless other specific statutory or policy reasons dictate the exclusion of students from the Act, they must be included.⁸⁰ The Board

⁷² See *id.* at 1002-03.

⁷³ *Id.* at 1003.

⁷⁴ See *id.*

⁷⁵ See *id.* at 1002-03. Streitz and Hunkler contend that the Board's reasoning, its policy argument, and its categorization scheme in the *St. Clare's* decision was an attempt to respond to Member Fanning's critique in the earlier *Cedars-Sinai* decision. See Streitz & Hunkler, *supra* note 15, at 369-70. Malin notes that the *St. Clare's* decision effectively reversed the Board's holding in *Cedars-Sinai* that student status would not necessarily be inconsistent with that of employee. See Malin, *supra* note 57, at 22 n.104.

⁷⁶ *Boston Med. Ctr.*, 330 N.L.R.B. 1, 1 (Nov. 26, 1999), available at 1999 WL 1076118 1.

⁷⁷ See *id.*

⁷⁸ *Id.* at 13.

⁷⁹ *Id.*

⁸⁰ *Id.*

then stated that it had found no such countervailing reasons.⁸¹ Furthermore, the Board stated that a broad, literal interpretation of the Act is consistent with several of the Act's purposes, most fundamentally "the right of employees to organize for mutual aid without employer interference" and "encouraging and protecting the collective bargaining process."⁸²

The Board analyzed the concept of employment in light of the master-servant relationship and standard agency principles to arrive at a definition of employee that better comported with the statutory definition.⁸³ Significantly, the Board relied on Member Fanning's dissent in the *Cedars-Sinai* decision in articulating the appropriate definitional standard to be "any 'person who works for another in return for financial or other compensation.'"⁸⁴ In a direct response to the "primarily students" exclusion derived from *Cornell*, the Board in *Boston Medical Center* stated that the mere fact that house staff may also be students does not change the evidence of their employee status.⁸⁵ The Board applied its new standard, explaining, "[F]irst, house staff work for an employer within the meaning of the Act. Second, house staff are compensated for their services."⁸⁶

The Board rejected the assertion that house staff were not employees because they received compensation in the form of a stipend, noting that under the Internal Revenue Code there is no exclusion for stipends and that, as it does for its other employees, the Hospital withheld Federal and state income taxes as well as Social Security from their pay checks.⁸⁷ Furthermore, the Board found the fact that house staff spends approximately 80 percent of their time providing direct patient care weighed in favor of NLRA coverage of house staff.⁸⁸

⁸¹ See *Boston Med. Ctr.*, 330 N.L.R.B. at 13.

⁸² *Id.* at 14.

⁸³ See *id.* at 13.

⁸⁴ *Id.*

⁸⁵ See *id.*

⁸⁶ *Boston Med. Ctr.*, 330 N.L.R.B. at 14.

⁸⁷ See *id.* As factors demonstrating their employee status, the Board also noted that house staff receive other fringe benefits including worker's compensation benefits, paid vacations, sick leave, parental and bereavement leaves, as well as health, dental, life, and malpractice insurance. See *id.*

⁸⁸ See *id.* at 15. The Board noted that the mere fact that the employees are also learning new skills does not negate their being employees. See *id.* Indeed, the Board remarked that such life-long learning is inherent to a professional career. See *id.* Additionally, the Board compared the house staff to "apprentices," noting that it "has never been doubted that apprentices are statutory employees." *Id.*

The Board's reversal of long-standing doctrine in *Boston Medical Center* depends in no small measure on developments in the years since the Board's *Cedars-Sinai* and *St. Clare's* decisions.⁸⁹ In particular, the Board found compelling the fact that "almost without exception, every other court, agency and legal analyst to have grappled with this issue has concluded that interns, residents, and fellows are, in large measure, employees."⁹⁰ Indeed, the Board cited the approach taken by Michigan, Nebraska, Ohio, California, Mississippi, New York, New Jersey, Massachusetts, and Minnesota in rejecting the Board's *Cedars-Sinai* analysis as important evidence that the Board's prior treatment of the employment status of house staff was flawed.⁹¹

Furthermore, the Board noted that the experience of these other judicial bodies demonstrated that the commonly-expressed fear that collective bargaining would engender a legion of problems ranging from strikes to intrusion into the preserves of academic freedom has proven unfounded.⁹² To the contrary, the Board found that affording collective bargaining rights to house staff would have the effect of bringing them within the ambit of the Act, and therefore, "providing a mechanism for resolving recognition and other representation issues without resort" to economic warfare.⁹³

Having overruled precedential definitions of employees that excluded student-employees, the Board next took up the policy arguments that supported the coverage of medical house staff by the Act.⁹⁴ The Board stated that a broad, literal interpretation of the word "employee" is justified because it would fulfill the purposes of the Act itself—namely, upholding the right of employees to organize themselves for "mutual aid and protection" and encouraging the collective bargaining process as a means of resolving workplace disputes.⁹⁵ Furthermore, based upon the experience of the states in overseeing the collective bargaining relationship of house staff, the Board concluded that the worry that collective bargaining will violate the academic freedom of teaching hospitals is groundless.⁹⁶ Asserting that such fears "put the proverbial cart before the horse," the Board noted that

⁸⁹ See *id.* at 19.

⁹⁰ See *id.*

⁹¹ See *Boston Med. Ctr.*, 330 N.L.R.B. at 20–22.

⁹² See *id.*

⁹³ *Id.* at 20.

⁹⁴ *Id.* at 14.

⁹⁵ See *id.*

⁹⁶ See *Boston Med. Ctr.*, 330 N.L.R.B. at 19–21.

the collective bargaining process envisioned by the Act is, by design, flexible and responsive to the needs of any particular bargaining situation: the parties to such a relationship attempt to achieve resolution of their differences through negotiation over specific interests.⁹⁷ While other issues may be bargained for at the consent of both parties, neither party is legally obligated to bargain over anything outside the "terms and conditions of employment."⁹⁸ Indeed, the history of the Board's interpretation of the Act suggests, in fact, that a well-defined body of law has developed which provides adequate guidance to parties to the collective bargaining process in determining what issues lie within and without these statutory strictures.⁹⁹

With respect to the specific allegation that collective bargaining threatens academic freedom because university employers would be forced by TA unions to bargain over matters at the heart of their exercise of academic freedom, such as curriculum and degree requirements, the Board found the experience of the states persuasive.¹⁰⁰ The Board quoted at length a holding of the Michigan Supreme Court ruling that because of the "unique nature" of the University of Michigan, the scope of bargaining with house staff "may be limited" if the matter fell "clearly" within the educational sphere.¹⁰¹ Likewise, the Board cited a California court which reasoned that, in addition to being a mere "doomsday cry," the hospital administration's claim that collective bargaining would threaten the institution's rights was "premature" because it "basically concerns the appropriate scope of representation under the Act . . . Such issues will undoubtedly arise in specific factual contexts . . . [and] may be resolved by the [California Public Employee Relations Board] when they arise."¹⁰² The Board concluded by dismissing the "forecast of doom" for educational institutions whose house staff unionizes, declaring that such pessimism gives little credit to the intelligence of student employees and their

⁹⁷ *See id.*

⁹⁸ *See id.* at 19-21.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Boston Med. Ctr.*, 330 N.L.R.B. at 20 (citing *Regents of the Univ. of Mich. v. ERC*, 204 N.W.2d 218, 224 (Mich. 1973)) (holding salary is bargainable issue because a matter of "terms and conditions of employment," whereas not working in the pathology department because work is "distasteful" is within educational realm).

¹⁰² *Id.* at 19-21 (quoting *Regents of Univ. of Cal. v. PERB*, 715 P.2d 590, 604 (Cal. 1986)).

employers or to the collective bargaining process envisioned and sponsored by the Act.¹⁰³

In 2000, the Board again took up the issue of student employees in the context of an election certification petition filed by TAs at New York University. In *New York University*, the Board undertook a review of New York Regional Director Daniel Silverman's Decision and Direction of Election in which he applied the Board's *Boston Medical Center* "compensated services" test to determine that the NYU TAs were employees within the scope of § 2(3) of the National Labor Relations Act.¹⁰⁴ Upon review, the NLRB affirmed the Regional Director's decision, rejecting the employer's contention that the TAs were not employees covered by the Act.¹⁰⁵ In particular, the Board rejected the argument that, because graduate students may be "predominately students," they may not also be statutory employees.¹⁰⁶ In its determination, the Board affirmed its holding in *Boston Medical Center* concluding that because the NYU TAs receive compensation in exchange

¹⁰³ See *id.* The Board concluded:

We cannot subscribe to dissenting Member Braem's forecast of doom to medical education as a consequence of our decision today. We simply cannot say, either as a matter of law or as a matter of policy, that permitting medical interns, residents and fellows to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer or to their patients. Nor can we assume that the unions that represent them will make demands upon them or extract concessions from [sic] their employers that will interfere with the educational mission of the institutions they serve, or prevent them from obtaining the education necessary to complete their professional training. If there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy. . . . To assume otherwise is not only needlessly pessimistic, but gives little credit to the intelligence and ingenuity of the parties.

Id.

¹⁰⁴ 332 N.L.R.B. No. 111 (Oct. 31, 2000), 165 L.R.R.M. 1241, 1241, available at 2000 N.L.R.B. LEXIS 748, 1. On April 3, 2000, Regional Director Silverman had applied the Board's new "service test" as articulated in the Board's *Boston Medical Center* decision to a representation petition filed by TAs at NYU. See *id.* Regional Director Silverman determined that most of the TAs are employees under the Act and are entitled to a Board-sponsored union certification election. See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 4.

for their service as instructors, they fall within the protections of the Act.¹⁰⁷

In making its determination, the Board first rejected the University's argument that the facts of the graduate student relationship to the university distinguish this case from the facts of *Boston Medical Center*.¹⁰⁸ In particular, the Board stated that whatever superficial differences may seem to distinguish house staff and TAs, with respect to the crucial inquiry of whether the alleged employees receive compensation for services performed for and upon the direction and control of another, the graduate student teachers and the medical house staff both fall within the ambit of the NLRA.¹⁰⁹ Furthermore, the Board found that the fact that TAs do not receive academic credit for their teaching services also supported a rejection of the University's contention that the students are not compensated for their services.¹¹⁰ Similarly, reiterating that the possibility of educational benefits does not preclude employee status, the Board rejected the University's argument that the TAs should not be considered employees because they receive an educational benefit from the teaching they perform.¹¹¹

Next, the Board addressed the University's policy arguments in support of their contention that TAs should not be considered employees under the Act.¹¹² The Board first rejected the University's argument that the proper controlling precedent in this case was *Goodwill of Tidewater*, where the Board held that disabled individuals who provided janitorial services to U.S. Naval bases as part of a program of counseling and rehabilitation were not employees under the Act.¹¹³ The Board distinguished its holding in the *Goodwill* decision, stating that its denial of employee status in that case turned upon the fact that "the relationship of the employer to the employee was primarily rehabilitative and that the working conditions are not typical of the private sector."¹¹⁴ Thus, for the Board, the situation of graduate TAs is unlike that of the janitors in *Goodwill* because the working conditions of TAs are no different from those of a university's regular faculty.¹¹⁵

¹⁰⁷ See *id.* at 6-7.

¹⁰⁸ *Id.* at 8-9.

¹⁰⁹ See *N.Y. Univ.*, 2000 N.L.R.B. LEXIS at 8-9.

¹¹⁰ See *id.* at 10.

¹¹¹ See *id.* at 11-12.

¹¹² See *id.* at 13.

¹¹³ See *id.* at 13, (citing *Goodwill of Tidewater*, 304 N.L.R.B. 767, 768 (1991)).

¹¹⁴ *N.Y. Univ.*, 2000 N.L.R.B. LEXIS 748 at 14.

¹¹⁵ See *id.* at 15.

The Board then rejected—as it had in *Boston Medical Center*—the University’s argument that extending collective bargaining rights to graduate assistants would violate the employer’s academic freedom.¹¹⁶ The Board stated that since its assertion of jurisdiction over private, nonprofit universities nearly thirty years ago, and its subsequent approval of collective bargaining units composed of faculty members, “We are confident that in bargaining concerning units of graduate assistants, the parties can ‘confront any issues of academic freedom as they would any other issue in collective bargaining.’”¹¹⁷ In essence, the Board’s holding restates its preference for the flexible process of collective bargaining over the uncertainty of workplace disruption caused by unregulated economic warfare.¹¹⁸ Moreover, the Board rejected the University’s concerns regarding threats to its academic freedom as purely speculative.¹¹⁹ Indeed, in its holding, the Board reiterated its belief, expressed in *Boston Medical Center*, that the process of collective bargaining is dynamic “with new issues frequently arising out of new factual contexts”; moreover, the Board stated, “what can be bargained about, what the parties wish to bargain about or concentrate on, and what the parties are free to bargain about, may change.”¹²⁰ The Board’s confidence about the bargaining process is buttressed by its recognition that the inclusion of any group of employees within the Act does not mean that the Act “compels” the parties to agree.¹²¹ Indeed, as the Board noted in *Boston Medical Center*, the range of issues over which bargaining must occur—aside from the question of agreement—is limited to a narrow band touching upon “terms and conditions of employment” that has been well-defined over time and can be adjudged by the Board at such time as it becomes necessary.¹²²

Months before the *Boston Medical Center* and *New York University* decisions, the Board had an opportunity to evaluate the collective bargaining rights of TAs at Yale University. Upon exceptions filed by the General Counsel of the NLRB to an order of an ALJ dismissing the complaint of the GESO against Yale University for unfair labor

¹¹⁶ See *id.* at 15–19.

¹¹⁷ *Id.* at 15–16 (quoting *Boston Med. Ctr.*, 330 N.L.R.B. at 13).

¹¹⁸ See *id.* at 15–16.

¹¹⁹ See *New York Univ.*, 2000 N.L.R.B. LEXIS at 17.

¹²⁰ *Id.* at 18. See *Wentworth Institute v. N.L.R.B.*, 515 F.2d 550, 556 (1st Cir. 1975) (rejecting employer’s contention that recognition of faculty collective bargaining unit would result in the erosion of academic and meritocratic values).

¹²¹ See *N.Y. Univ.*, 2000 N.L.R.B. LEXIS at 17–18.

¹²² See *Boston Med. Ctr.*, 330 N.L.R.B. at 20.

practices resulting from a grade strike in 1995, the Board in *Yale University* affirmed the ALJ's determination that, as a partial strike, the action was unprotected activity.¹²³ However, the Board remanded the case to the judge for a determination as to whether certain statements made by faculty to the TAs outside of the immediate context of the grade strike would constitute violations of § 8(a)(1).¹²⁴

Although the case was settled before the ALJ could determine the answers to the questions regarding these statements, the case, as remanded, would have turned upon the question of whether the Yale TAs would be considered statutory employees under § 2(3) of the Act, a question the Board did not address in this opinion.¹²⁵ In the wake of the Board's decisions in *Boston Medical Center* and *New York University*, however, GESO has initiated a card-check authorization campaign and hopes to file for an NLRB sponsored election within the year.¹²⁶

III. ANALYSIS: THE NLRB'S REVISED FORECAST FOR TA COLLECTIVE BARGAINING: FAIR, MOSTLY SUNNY

The recent Board decisions in *Boston Medical Center* and *New York University*, which overturned nearly thirty years of precedent, were proper and necessary reconsideration of a deeply flawed interpretation of the NLRA as it pertains to the academic workforce.¹²⁷ The Board's action in these cases puts its statutory interpretation of § 2(3) on sound footing, applicable not only to the situation of graduate TAs and medical house staff but to any person who performs compensated services for another.¹²⁸

Prior to the *Boston Medical Center* and *New York University* decisions, the Board's interpretation of § 2(3) in the context of house staff and TAs was based on an arbitrary, subjective test of the "purpose" for which one worked.¹²⁹ Thus, in the case of students performing services for the college or university in which they were enrolled, the Board looked into the motivation of the employee in determining whether the work was or was not "incidental" to one's academic progress within the institution.¹³⁰ As noted by Member Fanning in his dis-

¹²³ See *Yale Univ.*, 1999 WL 1076116.

¹²⁴ See *id.* at 4-6.

¹²⁵ See *id.* at 6.

¹²⁶ Personal conversation with GESO staff organizer Rachel Sulkes, Mar. 24, 2001.

¹²⁷ See *supra* text accompanying note 74.

¹²⁸ See *supra* text accompanying note 82.

¹²⁹ See *supra* text accompanying notes 58-67.

¹³⁰ See *supra* text accompanying notes 60-63.

senting opinion in *Cedars-Sinai*, this type of inquiry is neither required nor, for that matter, authorized, either by the Act or by prior Board cases.¹³¹ Furthermore, as Fanning argued, because § 2(3) is quite explicit about those groups of employees who are excluded from the Act, the Board's invention of a "purpose" test to create new exclusions is especially dubious.¹³²

The Board's new approach—evaluating the employment relationship on the basis of services provided for compensation—corrects the errors of the purpose test.¹³³ First, it observes the statutory principle of broad inclusion of different types of workers under the Act.¹³⁴ Second, it does not add, by Board legerdemain, exclusions that are not stated in the Act.¹³⁵ Third, and most important for achieving consistency of evaluation by courts, the Board's *Boston Medical Center* analysis replaces a fundamentally subjective inquiry with basic, objective legal principles derived from the master-servant and agency doctrines.¹³⁶

In addition to being supported by traditional legal principles, the Board's new test for employee status is widely shared by state labor statutes.¹³⁷ As noted above, these state statutes extend collective bargaining rights to public employees, including house staff and teaching assistants who work for state-chartered hospitals, colleges and universities.¹³⁸ Furthermore, the extensive experience of state labor boards in overseeing TA organizing campaigns and collective bargaining relationships at colleges and universities will provide the NLRB and federal courts with helpful models for adjudicating future disputes at private universities.¹³⁹

Nevertheless, although embodying sound principles of legal analysis and statutory construction, the Board's action in *Boston Medical Center* and *New York University* is likely to face careful examination upon appeal because of its reversal of decades of Board interpretation and its effective extension of collective bargaining rights to a significant number of workers. In particular, it is likely that, because of the soundness of the rationale for the Board's compensated serv-

¹³¹ See *supra* text accompanying note 58.

¹³² See *supra* text accompanying note 58.

¹³³ See *supra* text accompanying notes 81–82.

¹³⁴ See *supra* text accompanying notes 81–82.

¹³⁵ See *supra* text accompanying notes 81–82.

¹³⁶ See *supra* text accompanying notes 81–82.

¹³⁷ See *supra* text accompanying notes 86–88.

¹³⁸ See *supra* text accompanying notes 86–88.

¹³⁹ See *supra* text accompanying notes 86–88.

ices test, the primary grounds for appeal will likely be that the extension of collective bargaining rights to TAs runs counter to public policy—namely, the preservation of the academic freedom of colleges and universities.

The academic freedom argument against unionization, as discussed in the *Boston Medical Center* and *New York University* decisions, is based upon the allegation that the TA unions could force, through hard bargaining or economic warfare, bargaining over issues such as grades and grading procedures, curriculum, class sizes, instructional methods, etc., which go to the very heart of the educational mission of the institution.¹⁴⁰ In its most extreme form, this argument imagines a scenario in which a TA, disgruntled over a bad grade, files an unfair labor practice charge against the professor and the university.¹⁴¹ The Board's response to such dire predictions is both practical and philosophical.

First, as the Board in *Boston Medical Center* recognized, the Board's responsibility is to administer the Act so as to insure industrial stability while guaranteeing the rights of employees to designate representatives of their own choosing for the purposes of collective bargaining.¹⁴² By contrast, the Board has no statutory or constitutionally-mandated responsibility to maintain an employer's academic freedom at the expense of employees seeking to exercise their statutory right to collective bargaining.¹⁴³ As Martin Malin has pointed out, the NLRB may exclude a particular type of employee from the jurisdiction of the Act only if such exclusion is based on "considerations of national labor policy."¹⁴⁴ Malin argues convincingly that the exclusion of student employees on grounds of the preservation of university employers' academic freedom represents an unsustainable, ultra vires intrusion of the Board into matters of national education policy.¹⁴⁵ For this reason alone, Board decisions excluding TAs on academic freedom grounds merit little deference and, in fact, require extra skepticism.¹⁴⁶ Thus, even if the Board were to find that collective bargaining *did* pose a threat to the university employer's exercise of aca-

¹⁴⁰ See *supra* text accompanying notes 89, 90, 93-95, 98-100, 101-102.

¹⁴¹ See *supra* text accompanying notes 89, 90, 93-95, 98-100, 101-102.

¹⁴² See *supra* text accompanying notes 89, 90, 93-95, 98-100, 101-102.

¹⁴³ See *supra* text accompanying notes 77-83, 85, 92.

¹⁴⁴ See Malin, *supra* note 57, at 26 (emphasis added).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

ademic freedom, this would not be grounds for the Board to refuse to recognize TAs as statutory employees.¹⁴⁷

Furthermore, as a practical matter, the Board's *Boston Medical Center* and *New York University* decisions at last bring national labor policy into harmony with that of the states.¹⁴⁸ Citing the experience of California and Michigan specifically, the Board in *Boston Medical Center* recognized that the question of what issues may be bargained over is a matter of the scope of bargaining, rather than representation, and, therefore, cannot serve to exclude a whole class of employees from the protections of the Act.¹⁴⁹ The NLRB, like its state counterparts, has a long history of refereeing collective bargaining relationships by distinguishing mandatory from permissive subjects.¹⁵⁰ The Board, like the states, correctly concluded that there is nothing so peculiar about the academic workplace that renders the Board's institutional expertise inapplicable to overseeing university-based bargaining.¹⁵¹ Furthermore, an appeals court is likely to follow the Board in seeing the history of state hospital and university bargaining as relevant and sufficient evidence that collective bargaining does not destroy the academic freedom of the institutions in which it occurs.¹⁵² For that matter, the fact that the AAUP—the organization which first defined and asserted the principles of academic freedom and has fought longest for their preservation—has promoted and sponsored collective bargaining through its Collective Bargaining Congress since 1973 strongly supports the assertion that academic freedom and collective bargaining are not merely compatible but may be mutually reinforcing.¹⁵³ Likewise, the Board and courts may draw encouragement from the fact that other leading teachers' unions, like the NEA, have for years advocated the preservation and cultivation of academic freedom through the mechanisms of collective bargaining and union representation.

Although the specific incidents and allegations of the GESO grade strike of 1995 have been temporarily resolved, the ultimate status of the Yale TAs remains unknown. Within the next year, however, the members of GESO plan to request a certification election

¹⁴⁷ See *id.*

¹⁴⁸ See *supra* text accompanying note 89.

¹⁴⁹ See *supra* text accompanying notes 90–102.

¹⁵⁰ See *id.*

¹⁵¹ See *supra* text accompanying note 102.

¹⁵² See Malin *supra* note 57, at 29 n.139.

¹⁵³ See *supra* text accompanying note 38.

from the NLRB based upon its holdings in *Boston Medical Center* and, more directly, *New York University*.¹⁵⁴

In any hearing on the petition, a host of facts will be considered: the fact that the compensation of Yale TAs is subject to state and federal taxes, the fact that Yale TAs are responsible for a large percentage of the direct contact with undergraduates at Yale in their labs, tutorials, sections, and language courses, the fact that Yale TAs commonly teach outside their immediate field of expertise, and the fact that Yale TAs do not receive grades or academic credit, let alone supervision, for their teaching. The tremulous "doomsday cry" of the imminent demise of academic freedom will certainly be heard as well. In such an atmosphere, the clarifying rightness of the Board's *Boston Medical Center* and *New York University* holdings will be obvious. Instead of debating a long list of particulars and a short list of unfounded fears, we may now simply ask: do the TAs provide services to an employer for which they are compensated? The answer is yes. For this simple reason alone, the teaching assistants at Yale must have collective bargaining rights.

CONCLUSION

The NLRA does not, on its face, exclude graduate TAs as a category of employees from its coverage. Nothing in the principle of academic freedom as developed and sponsored by organizations like the AAUP and NEA is incompatible with the processes or goals of collective bargaining. Nevertheless, until only recently, the NLRB has refused to extend collective bargaining rights to TAs on the ground that TAs are not employees within the meaning of the Act because their employment is incidental to the purpose for which they enrolled as graduate students. The Board's holdings in *Boston Medical Center* and *New York University* extended collective bargaining rights to house staff and TAs by overruling this "purpose" test in favor of a "compensated services" test derived from agency principles. These decisions have put the Board's handling of university workplace disputes on sound legal and intellectual footing, and have rightly opened the way for the unionization of teaching assistants at Yale and other private universities.

JOSHUA ROWLAND

¹⁵⁴ Personal communication with GESO staff organizer Rachel Sulkes, Mar. 24, 2001.