OF DUCKS AND DISSERTATIONS: A CALL FOR A RETURN TO THE NATIONAL LABOR RELATIONS BOARD’S “PRIMARY PURPOSE TEST” IN DETERMINING THE STATUS OF GRADUATE ASSISTANTS UNDER THE NATIONAL LABOR RELATIONS ACT

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I. INTRODUCTION

We are all familiar with the old axiom that if it walks and talks like a duck it probably is a duck. While far from scientific, this common sense rule of thumb rings true time and again. But what if the creature walks and talks like a duck, a deer, a cow, and a person? Cute phrases fail us when complexity is introduced. All we are left with are difficult questions and often troubling answers.

A lively debate in labor law has developed around the question of how the law, and more specifically the National Labor Relations Act (“NLRA”) should treat increasingly unwieldy bargaining groups. Recent history has seen labor movements forming in heretofore-unforeseen places.¹ Graduate

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¹. At UCLA, a group of athletes explored the prospects of forming a labor union. See Darryl Richards, Student-Athletes Unite!, FOXsports.com, (Jan. 19, 2001), available at http://www.foxsports.com/columns/stories/cf0119richard.sml. Richards notes that college athletics is “a big business where schools get millions to participate in major bowls and coaches are paid $1 million a year to take them there. Schools make money on licensing agreements and shoe contracts; the athletes don’t see a dime.” He goes on to explain “[t]he UCLA students want better insurance in the off season, a bigger stipend and a chance to earn more money during the academic year ... the formation of a union at UCLA means college athletics’ sleeping giant is slowly waking up.” This phenomenon has not been limited to the popular press. One commentator has called for the formation of student-athlete unions:
level students at universities whose studies are supplemented by a provision of services are, as a group, one example that has seen much litigation. Are they students attempting to further their education and preparation as teachers? Are they employees assisting professors and faculty in the education of other students? Colloquially, is the student a duck or not?

These are important issues, not just occasion to strike a pun, as each affects the dilemma of whether or not to open collective bargaining to a whole new class of "workers" while concurrently having a huge effect on education. This is not purely an intellectual exercise; the National Labor Relations Board ("NLRB" or "Board") has dealt with the topic extensively and may have brought it to its legal end in 2000. The legal debate proved contentious, with recent battles waged initially at both Yale University\(^2\) and New York University,\(^3\) and taken to their logical conclusions in front of the

The arguments previously used to deny the employment status of Division I-A scholarship athletes are no longer applicable. Today's scholarship athletes are not primarily students, rather they are employees who receive compensation and pay taxes in exchange for their services within the billion dollar industry known as intercollegiate athletics.

At minimum, the National Labor Relations Board must create a new category of student-employees. Scholarship athletes, by the nature of their employment, are deserving of protection under the NLRA, as it is clear that the universities are not interested in their best interests. As Charles Craypo discussed, "Unions and collective bargaining are labor responses to the organization of production in a market economy." Unfortunately, under the current system, it is the athletes who generate the revenues, yet they receive the least in return.


2. David L. Gregory, The Problematic Employment Dynamics of Student Internships, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 245-49 (1998). In 1995, a group of Yale graduate assistants held an election and voted in favor of union representation. Yale refused recognition, claiming the relationship was not one of employment. The students responded by withholding grades, but did keep up their other duties (including grading papers and meeting with students). After the Board remanded the teaching assistant union’s unfair labor practice claims to an administrative law judge to determine whether or not the teaching assistants were employees under the act, the two sides settled. Bernhard Wolfgang Rohrbacher, Comment, After Boston Medical Center: Why Teaching Assistants Should Have the Right to Bargain Collectively, 33 LOY. L.A. L. REV. 1849, 1849-50 (2000).

The NLRB’s recent decision allowing New York University teaching assistants—and therefore those of all private universities—to organize and bargain as a unit with the University may have lessened the fervor of the debate. Undoubtedly, many graduate students breathed a sigh of relief (perhaps believing it long overdue) just as readily as school administrators groaned in disbelief.

This decision was made possible by the NLRB’s decision to forgo its long held “primary purpose test” in classifying employees with a “service test” in Boston Medical. By focusing on what a teaching assistant did...
rather than why they were doing it, the service test favors the teaching assistants' cause, and led to the recent decision allowing New York University graduate students to organize.8

This comment explores the NLRB's decision in New York University and suggests that the line of decisions leading up to the opinion granting students the right to organize is ill-conceived in its abandonment of the primary purpose test and in the refusal to consider important policy implications. The discussion begins with an exploration of the historical underpinnings of the recent NLRB decisions regarding graduate students, tracing the line of decisions that lead to the New York University ruling, and then examines the policy issues the NLRB should have focused on when considering this case.

II. THE BOARD'S JURISDICTION OVER PRIVATE UNIVERSITIES: APPLYING THE NLRA TO NEW INSTITUTIONS

Historically, the Board was hesitant to bring private universities under the umbrella of the NLRA, but it later acquiesced, paving the way for New York University.9 In the 1950 Columbia University ruling, the NLRB stated that without significant commercial activity and with an educational focus, private universities can escape application of the NLRA. This brief ruling fell short of barring application absolutely but suggested that applying the act to private universities would not "effectuate the policies" of the NLRA and NLRB even though the "activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards...for the normal exercise of its jurisdiction."

Where activities are distinctly "noncommercial in nature," the Board

who perform services are employees, in spite of their other allegiances).
9. N.Y. Univ., 332 N.L.R.B. No. 111, Case 2-RC-22082, 2000 NLRB LEXIS 748 (Oct. 31, 2000). It is possible to view this development as a rejection of the Board "protecting" certain institutions:
Labor law has seen a...turnaround. In a series of cases between 1970 and 1976, the National Labor Relations Board repudiated the long-standing "worthy cause" exemption that had shielded all nonprofits from federal labor law and adopted a policy of treating nonprofit firms on the same terms as ordinary business corporations.
11. Id. at 425.
12. Id.
13. Id. at 426. Commentators have noted the power of this language. In a recent note, Kenneth Brothers quotes Trustees of Columbia University:
Regardless of whether or not the conference report literally recites the Board's
would withhold jurisdiction – reserving it for those cases with “exceptional circumstances and in connection with purely commercial activities.”

Still, as Hansmann notes, this language failed to influence future Board decisions. 15 Columbia was largely vacated (though not overturned) by Cornell University, 16 in which the Board extended the NLRA’s reach to private universities, citing modern education’s tendency to blur the lines between business, education, commercial, and non-commercial activities, often in an effort to expand revenue streams or realize new economic potential. The decision declares that the Board always had jurisdiction over non-profit educational institutions yet declined to exercise it; henceforth the Board will not decline to exercise jurisdiction over these entities as a class. 17 The dividing line between “purely commercial [and] noncommercial activity has not been easily defined.” 18 Now more than ever, educational institutions act like businesses, 19 and though “[n]o claim is made that education is not still the primary goal...to carry out its [massive] functions, the university has become involved in a host of activities which are commercial in [nature].” 20 Cornell met this new reality head on, finding that private universities are indeed focused on and motivated by educational goals, yet competition requires that to meet this goal, universities must take part in increasingly commercial activities. Included in the record was substantial testimony and data as to the finances,
employment statistics, operating budgets and expenditures of major universities, giving compelling evidence that Cornell had a substantial effect on interstate commerce. This evidence, coupled with the Congressional trend (affirmed judicially) towards granting non-profit sector employees the same rights and privileges under the law as those in the for-profit sector, factored heavily into the Board's thinking. Arguments that universities are primarily local institutions were rejected because non-profit work actions, like school strikes and hospital stoppages, routinely impact interstate commerce. That private universities have a remarkably less significant effect on interstate commerce than public universities did not diminish the impression made on the Board.

Another interesting element of this case was the nod to increasing levels of government involvement in higher education via federal aid and student loans and the increasing union fervor on college campuses. Both of these were cited by the NLRB as further reason to take an active role in private universities. It is no wonder the Board took increasing levels of aid into consideration; in the twelve years prior to this decision, three separate acts authorized millions of dollars in federal aid for education.

III. ANIMAL, VEGETABLE OR MINERAL? AN INTRODUCTION TO THE "PRIMARY PURPOSE" TEST

The so-called "primary purpose test" came to the fore in a series of decisions in which the Board decided on the validity of a bargaining unit by examining a plaintiff unit's primary purpose as a whole. If the primary purpose of the unit is economic, then they can form a unit and bargain. If it is instead primarily educational, and only secondarily economic, then it is not a valid unit under the act.

The first case of import is Adelphi University. In this case, one hundred graduate students who were also teaching assistants were denied

22. Id. at 194-95.
24. Id. at 332-34.
25. Id. at 332 n.22.
26. The primary purpose test was relied upon by the NLRB but was construed widely in various state courts. See Simmonds v. State Employees' Ret. Sys., 663 A.2d 304 (Pa. Commw. Ct. 1995) (holding that a medical resident at a state hospital could receive credit for time spent at the hospital despite the transitory nature of the work); Kapilian v. State Employees' Ret. Sys., 600 A.2d 698 (Pa. Commw. Ct. 1991), appeal denied, 608 A.2d 31 (Pa. 1992) (holding that a graduate student was not ineligible to purchase service credit for work as a professor because state statutes did not distinguish between student and instructor). Both decisions acknowledged the primary purpose test yet ruled on other legal grounds.
the ability to bargain as a unit by the NLRB. The students were required to
devote twenty hours per week to their duties as assistants, for which they
were paid between $1200 and $2900 per academic year. The Board
distinguished then based primarily on economic benefits held by full time
faculty but denied to the teaching assistants, and secondarily on the fact
that full time faculty and professors oversee the educational progress of the
teaching assistants.28 The teaching assistants take part in this as a step
towards attaining a degree and have no hopes of advancing in position prior
to achieving that degree. Therefore, the Board found that the unit was
motivated by an educational purpose, not an economic one; the group in
question was made up of people who were primarily students and lacked a
“sufficient community of interest with the regular faculty” to warrant
inclusion in a unit.29 Professor Gregory explains:

In 1972, in Adelphi University, the NLRB held that graduate
assistants were “graduate students working toward their own
advanced academic degree, and that their employment depended
entirely on their continued status as such.” The decision focused
on the students’ primary interest in acquiring an education and
deemed the teaching to be incidental since it was “guided,
instructed, assisted and corrected.”30

The NLRB used a similar analysis in the subsequent case Leland
Stanford Junior University.31 In that case, research assistants who were
also Ph.D. candidates were denied the right to form a unit to bargain
collectively with the university at which they were enrolled. The NLRB
noted that in addition to playing a role in the research process, the plaintiffs
were students and that the research performed by the assistants was often a
valuable aid in the academic process. Research can “prepare the student
for selection of a topic for a dissertation and serve as a trial period for both
the student and the faculty adviser to determine the student’s interest and
ability.”32 Also compelling was that faculty do not oversee the research
assistants on a day-to-day basis. Because assignments are centralized and
the assistants pursue their own academic interests, these assistants do not
constitute employees under the act. Allowing the students to work on a
variety of projects before choosing their dissertation topic provides the
opportunity to develop and hone new interests. Therefore, “all steps lead to
the thesis.”33

The analysis moved on to examine finances. All monies issued to

28. Id. at 640.
29. Id.
32. Id. at 622.
33. Id.
students are fixed, tax-exempt, and not linked to achievement; instead stipends are in accord with the National Science Foundation Fellowship and in many cases were lowered in proportion to the level of outside funds received.\textsuperscript{34} Similar to the \textit{Adelphi} decision, the Board noted that no benefits were given to the research assistants, but that benefits were awarded to full time faculty. Instead, the assistants share in the benefits native to a traditional student.\textsuperscript{35}

The Board did not limit the primary purpose test to cases involving teaching or research assistants; instead, they applied it to almost any situation where a student who also received monetary compensation hoped to bargain collectively. Two examples are \textit{Cedars-Sinai Medical Center}\textsuperscript{36} and the affirming \textit{St. Clare's Hospital and Health Center}.\textsuperscript{37} In \textit{Cedars-Sinai}, the Board was presented with a group of hospital interns\textsuperscript{38} who attempted to form a bargaining unit. The Board found that the unit was similar to one of hospital employees, but failed to find proper justification to classify the interns as employees. The decision turned on the fact that the interns pursued these activities primarily for an academic purpose, to earn a higher degree. Therefore, the relationship the internists had with the hospital was not akin to an employer and employee but to a student and her teacher. The internists, while "they possess certain employee characteristics, are primarily students."\textsuperscript{39} Money received as a stipend was viewed as a "scholarship for graduate study,"\textsuperscript{40} and interns were "to pursue the graduate medical education that is a requirement for the practice of medicine," not to earn a living.\textsuperscript{41}

Attached to this opinion was an influential dissent by Chairman Fanning which criticized efforts to bar students from forming and joining bargaining units.\textsuperscript{42} He initially takes umbrage with the Board's insistence that people who are "primarily students" cannot be "employees" within the act. According to Chairman Fanning, in conceiving of student-employees differently from regular employees, the Board misconstrued the intent of the Act. The NLRA, section 2, subsection 3, refers to "any employee,"\textsuperscript{43}

\begin{enumerate}
\item Id.
\item Id.
\item 223 N.L.R.B. 251 (1976).
\item 229 N.L.R.B. 1000 (1977).
\item In this article "interns" refers to graduate level medical students working in a private, nonprofit hospital.
\item \textit{Cedars-Sinai Med. Ctr.}, 223 N.L.R.B. at 251.
\item Id. at 252.
\item Id. at 253.
\item Id. (Fanning, dissenting).
\item The cited section reads:
\begin{quote}
The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly
\end{quote}
\end{enumerate}
and the Chairman believed that such language dictates that the act be applied liberally. The point that Chairman Fanning believes the Board should take to heart is that even where the worker is "primarily a carpenter" or "primarily a student," [she] is nevertheless, an "employee" under the Act.

Chairman Fanning also took a curious step in examining the etymology of the word "employee." "Employee," Chairman Fanning argues, is derived from traditional notions of "servant." The Chairman argues that employees provide services and that this provision of services is the primary factor in determining whether one is an employee or not. The Chairman's analysis goes on to suggest that teaching and research assistants provide valuable services to their schools, and therefore should be considered employees. Leland Stanford is distinguished since the plaintiffs in that case researched independently and served only themselves and their own academic interests instead of those of the university. Chairman Fanning believed the stipend received for these services (according to the record, often in excess of $20,000) offers further evidence that these people are employees. Chairman Fanning also disputes the majority's opinion that the income is non-taxable since it is paid in exchange of services rendered.

St. Clare's Hospital followed closely on the heels of Cedars-Sinai Medical Center, defending and clarifying the stance taken in Cedars-Sinai by averring that the latter case was a decision about students overall and not healthcare in particular. Therefore, in the majority's view, it fits in
perfectly with national labor policy. The case is important for barring students working in a non-academic manner for the university from which they are to receive their degree from joining with non-students in a bargaining unit.

_St. Clare's_ defines four categories in which students attempting to organize can be classified and explains the employee status of each class. These four categories represent a spectrum, with employment entirely unrelated to their studies on one end and the employee and student status closely linked on the other.

The first category deals with students employed outside the university working in a capacity in no way related to their scholarship. Only if the students lack a common interest with non-student employees must the Board consider a student-only bargaining unit.53

The second category consists of students employed by their university in a capacity unrelated to their studies. In such a case, one's status as a "student" is of minimal importance, affecting little more than hours of employment. Just as in the first category, students can be viewed primarily as employees, for developing a bargaining unit.54

The third category is of students employed outside the university in a capacity related to the student's course of study. In such a case, the students are to be excluded from a unit of full-time, non-student employees since the student's primary concern is educational, not economic, and wages, hours, and conditions of employment are of minimal interest.55

The final category is comprised of students who perform services for their university that are directly related to their educational program, exactly the situation the Board dealt with in _St. Clare's_. The Board had traditionally denied collective bargaining to such students.

Working from this spectrum, the Board in _St. Clare's_ concluded that the primary relationship of the plaintiffs to the university was educational, with employment only incidental to that goal.56 The Board was able to make such a "fundamental distinction" because the mutual interests of the students and the educational institution in the services being rendered are predominantly academic. Such interests are completely foreign to the normal employment relationship and "in the Board's view" not "readily adaptable to the collective bargaining process."57

The conclusion in _St. Clare's_ is that the primary relationship of plaintiffs to the university is educational, while employment is only

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53. _Id._ at 1000-01.
54. _Id._ at 1001.
55. _Id._
56. _Id._ at 1002.
57. _Id._
incidental to that goal. The Board took great care in making such a "fundamental distinction for it [meant] that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and [in the Board's view] are not readily adaptable to the collective bargaining process." St. Clare's made clear the Board's position that any analogy between student-teacher and employer-employee is clearly erroneous, and cemented this view with the argument that "subjecting academic decision making to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment." In other words, the relationship developed in an academic situation is unique to academia and differs greatly from the employer-employee relationship. Emphasizing economic concerns over academic ones frustrates the goals of academia.

This decision is not without its critics. Professor Jewett writes:

In addition to directly contradicting the professionals in-training language of the NLRA, the Board's analysis relies on an outdated model of professional mentoring. Its emphasis on the "personal" relationship between instructor and student disregards the economic realities of contemporary professional training, where students must often undergo long apprenticeships or training relationships in which they actually perform full professional duties. In fact, the housestaff position represents the M.D.'s entry into the world of medical employment as a doctor at the lowest level. The NLRB's concern that collective bargaining would undermine the "personal" nature of the student-teacher relationship recalls the same paternalism that once granted industrial employers greater power over employees. It was this kind of bald power that the NLRA itself, in the form of the Wagner Act, sought to diminish.

Professor Jewett's analysis fails to consider many of the pertinent policy implications that the Board used in its decision.

58. Id.
59. Id.
60. Id.
62. Eva M. Panchysshyn described some of these policy issues in a recent comment:

The Board cited a danger that collective bargaining may infringe on "traditional academic freedoms," including the right to determine course length and content, standards for advancement and graduation, and exams. Such topics might become "bargainable" as wages, hours, and terms and conditions of
It comes as no surprise that Chairman Fanning authored another dissent in this decision criticizing most of the Board’s reasoning. Fanning disagreed most vehemently with the Board’s suggestion that the decision was steeped in any “‘longstanding policy’ which denies representation rights completely to ‘students’ who are also ‘employees’ within the meaning of Section 2(3).” Chairman Fanning points out a number of cases the majority looked to for support and distinguishes them as not actually turning on student status:

The first three cases, Giordano Lumber, Post Houses, and Crest Wine, however, merely denied, respectively, one temporary employee, several seasonal employees, and one casual employee, inclusion in a broader unit with nonstudent employees. In fact, in Giordano Lumber, three students were included in the broader unit . . . because they were found not to be temporary employees. Clearly, the fact that the excluded individuals were students was essentially irrelevant. It was their temporary, seasonal, or casual status which caused their exclusion, status they could just as easily have had whether or not they were students. Just as significantly, if we are, as my colleagues would have it, to believe that Cedars’ foundation was built on analogy to cases involving “students,” the proper student cases to allude to would be those which involved (a) students who were regular full-time or part-time employees, and (b) a request for the separate representation of these students (since the housestaff unit is composed exclusively of individuals the majority denominates students).  

IV. YOU SCRATCH MY BACK AND I’LL SCRATCH YOURS: THE BOARD MOVES FROM THE PRIMARY PURPOSE ANALYSIS TO A “SERVICE TEST”

The latter portion of the twentieth century saw the NLRB embrace employment.

The Board considered the fact that educational processes, such as examinations, could be the subject of bargaining was against public policy. “We simply do not view such intrusions into traditional academic freedoms as being in the public interest.” Therefore, the overriding argument for not recognizing medical residents and interns as not being employees seems to be public policy and the effects such employee status would have on the public and patient care.

Eva M. Panchyshyn, Medical Resident Unionization: Collective Bargaining By Non-Employees for Better Patient Care, 9 ALB. L.J. SCI. & TECH. 111, 121 (1998). It is interesting to note that the Board’s recent rejection of these policy arguments is the impetus behind this comment.

63. St. Clare’s Hosp., 229 N.L.R.B. at 1007. (Fanning, dissenting.)
64. Id. (citations omitted).
Fanning's analysis and expand the NLRA's definition of "employee." The definition is first broadened in *Sure-Tan, Inc. v. NLRB.* In *Sure-Tan,* the Supreme Court ruled that unregistered aliens are still employees under the act, which the board used later as an imprimatur to define "employee" broadly.

While *Sure-Tan* is important as an introduction, *Boston Medical Center Corporation* serves as the lynchpin case of this time period. As the Board found itself on the brink of a new millennium, it penned a monumental decision, overturning both *Cedars-Sinai* and *St. Clare's* while finding that medical interns who are also students working towards a degree are employees within the NLRA's definition. This decision is essentially a sweeping endorsement of Fanning's dissenting opinions penned some twenty-five years earlier, affirming his employer-servant analysis while citing supposed Supreme Court endorsement in *NLRB v. Town and Country Electric, Inc.*

However, emphasis on that decision is misplaced. In *Town and Country,* the Court acknowledges that where no replacement definition for "employee" is provided, the master-servant relationship of the common law of agency is what Congress envisioned; still, the Court admits that the Board should be granted "considerable deference" except when it is so unreasonable it has stepped beyond its bounds. The Board instead took to heart only what they read to be an endorsement of the Fanning view rather than using the broad deference granted by the Court.

Possibly in an attempt to supplement Fanning's etymological view, the Board turned to an examination of "ordinary dictionary" definitions, citing the *American Heritage Dictionary* and *Black's Law Dictionary.* The *American Heritage Dictionary* defines employee as any "person who works for another in return for financial or other compensation." The definition in *Black's Law Dictionary* turns on whether or not services are provided for compensation and another has control.

Confusingly, the Board found similar notions inherent in the statute's circular language "[t]he term 'employee' shall include any employee..."
The Board's explanation of the opinion extends to an earnest attempt to defend the most predictable and persuasive criticism: that opening the Pandora's box of student unionization creates critical problems for the educational process. The Board seemed to realize the tension created by deciding that courts may pick and choose which areas are educational and which are economic, what can be subject to the bargaining process and what cannot.\(^7\) And while such a practice is not unheard of in the courts,\(^7\) such a blase attitude is not a standard to which the Board should strive to meet.

Whether or not the Board was correct in its decision, momentum prevailed and the analysis was predictably extended to cover all graduate, teaching, and research assistants in the landmark New York University decision of October 2000.\(^7\) That decision essentially embraced the Boston Medical and Fanning analysis, finding no reason to deny students who are also employees the right to organize and bargain collectively. The Board rejected the main policy argument, that academic freedom will be impeded by the bargaining process, citing the jurisdiction the Board has held for some time over private universities\(^8\) and its history of decision making in this area\(^8\) as ample reason to rule for the plaintiff graduate assistants. This holding provides a frustrated university little solace.

Beginning with the foundation that Section 2, subsection 3 of the NLRA "states that the term 'employee' is meant 'to include any employee . . . unless the Act explicitly states otherwise,'”\(^8\) the Board notes that the Supreme Court subscribes to common law principles of agency\(^8\) in

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78. This sort of decision-making is not atypical of the Board's history, and has long been subject of criticism. As Joan Flynn, NLRB staff counsel, commented:

By . . . burying its rules under totality-of-the-circumstances tests and mountains of case law, the Board virtually invites parties to engage in highly disfavored conduct, and makes the use of prohibitory injunctions highly impracticable . . . . [T]he lengthiness of litigation and the weakness of Board remedies guarantee that the Act's purposes will nonetheless be subverted.

80. See Cornell Univ., 183 N.L.R.B. 329 (1971) (finding that, since Cornell and Syracuse Universities engaged in interstate commerce, federal jurisdiction was appropriate).
83. Restatement (Second) of Agency, § 220 provides in part:

(1) A servant is a person employed to perform services in the affairs of another
The Board reviewed other cases in which it construed "employee" widely to effectuate the Act's "stated purpose of encouraging and protecting the collective bargaining process." 85

Citing *Town & Country*’s common law 86 and dictionary definitions test, 87 the Board rightfully declares that the Supreme Court "has repeatedly

and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment whether by the time or by the job;

(h) whether the work is part of the regular business of the employer;

(i) whether the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.


84. For an example of the Supreme Court’s agency analysis, see Cmty. for Creative Nonviolence v. Reid, 490 U.S. 730 (1989); see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (noting that § 2(3) of the Act is to be construed widely.).


86. The Board notes:

In *Town & Country*, the Court, using a common law test, reasoned that although someone may be paid by a Union to organize a company, this individual is still an “employee” if he or she is working for the Employer for compensation. The Court stated, “in the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”

Id. at *58 (quoting NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 94 (1995)). As the Court pointed out, there are other examples in which the Board employed a common law approach to defining “employee.” See WBAI Pacifica Foundation, 328 N.L.R.B. 1273 (1999).

87. The Board’s language best explains its view:
noted that the Board’s historic reading of the definition of ‘employee’ under the Act has been literal and broad.” Finally, the Board explained that its journey towards accepting graduate students with employment responsibilities as employees for purposes of the act has come to a close:

Recently, the Board, in *Boston Medical Center Corp.*, overruled *Cedars-Sinai Medical Center* and *St. Clare’s Hospital & Health Center*, and held that the housestaff employed by a hospital are “employees” within the meaning of Section 2(3) of the Act, even though at the same time they are employed, they are students learning their chosen medical craft. After many years of excluding those interns and residents who otherwise fit the definition of “employee” under common law because they were also students, the Board adopted former Member Fanning’s view in his dissent in *Cedars-Sinai*.

Clearly, *New York University* was conceptualized as an opportunity for the Board to close the book on this matter. As one follows the intellectual progression summarized above, it becomes obvious that the Board hopes to prove that the legal progression it made is reasonable and fundamentally sound.

The Board may have succeeded. While the rejection by both the Board and the courts of the supposed deference the Board is owed proves troubling and perplexing, *New York University* reads as an entirely reasonable decision. But in completely throwing open the “Pandora’s box” of educational unionization, the Board created a troubling and unfortunate environment for modern graduate education. And, as the next section will show, it need not have occurred.

V. A CALL FOR A RETURN TO THE “PRIMARY PURPOSE” TEST: YOU ARE MORE THAN WHAT YOU DO

I do not attempt to suggest that the precedents set in *Boston Medical*, and especially in *New York University*, stem from bad law—far from it.

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After looking to the definition of “employee” in the American Heritage Dictionary (“any person who works for another in return for financial or other compensation”) and Black’s Law Dictionary (“a person in service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed”), the *Town & Country* Court concluded that, “the phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition for it says, ‘the term “employee” shall include any employee,’” 28 U.S.C. § 152(3) (1988). *N.Y. Univ.*, 2000 NLRB LEXIS 748, at *58.

88. Id. at *59.
89. Id. at *62.
While the lack of deference to Board opinions is troubling, the conclusions made by the Supreme Court and recently adopted by the Board are logical. However, the definitional analysis employed by the current Board and Supreme Court decisions works as much against their conclusions as for them, providing more than enough impetus for one to embrace a return to the “primary purpose” test.

The first analytical step is to examine the educational process for the graduate students in question. The graduate students to whom this decision speaks most urgently routinely teach undergraduate classes, grade exams, oversee laboratories, and assist junior students with their studies. What the Board has come to call “services” are in actuality part and parcel to the graduate student educational process.

Naturally, the Board would disagree with this assertion, and attempted to head it off at the pass in its criticism of a key anti-unionization argument used in New York University:

[W]e disagree with the Employer’s argument that graduate assistant work is primarily educational. [New York University] attempts to highlight the educational nature of this work by claiming that graduate assistants perform this work to obtain their degrees, contrasting the house staff in Boston Medical Center who already had degrees and were merely receiving advanced training in their profession. We recognize that working as a graduate assistant may yield an educational benefit, such as learning to teach or research. But, surely the house staff work in Boston Medical Center affords an equal, if not greater, educational benefit, because that work, in part, provides training in furtherance of becoming certified in a medical specialty. Even in those circumstances, however, the Board determined that the fact that house staff “obtain educational benefits from their employment” is not inconsistent with employee status. . . . Nor is it inconsistent here.  

Unfortunately for our future college students, the Board is simply wrong in its stubborn de-emphasizing of the importance of the entirety of the graduate education process.

Putting graduate students in front of a classroom or asking them to grade papers is a vital step in their education; it is not an ancillary request of the school. Nor does it create an employer-employee relationship between a university and its students. In a Ph.D. program, learning to teach is as important as finding a research focus, growing mold in a petri dish, or

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90. See Adelphi Univ., 195 N.L.R.B. 639, 640-41 (1972) for a clear description of the typically academically-oriented activities in which graduate assistants take part.

defending a dissertation. 92

This can be proven just as readily as the Board satisfied itself with its definitions of “employee.” 93 That analysis worked from the assumption that the students are employees; one can just as readily look to another definition and find equally logical arguments for the opposite conclusion.

Were the Board to think the scenario through to its logical conclusion, it might have realized that a more pertinent definition for its analysis is that of a professor. The ultimate goal of many Ph.D. candidates is a professorship, and one can see the educational value of teaching assistant duties when the definition of professor is dissected. Take the Merriam-Webster Dictionary, which defines professor as follows:

Main Entry: PRO-FES-SOR
Pronunciation: pr&-'fe-s&r
Function: noun
Date: 14th century
1 : one that professes, avows, or declares
2 A : a faculty member of the highest academic rank at an institution of higher education B : a teacher at a university, college, or sometimes secondary school C : one that teaches or professes special knowledge of an art, sport, or occupation requiring skill. 94

That definition firmly establishes the academic aspirations of these Ph.D. candidates.

Instead of acknowledging that this definitional information runs counter to their own, the Board chose to turn a blind eye, thereby declaring graduate students employees. Decisions become easier when information to the contrary is ignored.

It is clear that the education required to perform these duties goes beyond that required to understand the subject matter; experience is necessary to successfully prepare for the challenges brought by a professorship. 95 The educational process provides that experience. Few

92. It is not difficult to conceive of the importance of a doctoral candidate focusing her research, developing her research skills, and learning to defend her ideas. All three experiences are intrinsic to an education, not a job. Were such activities on-the-job training as the Board seems to imply, then a candidate would be working towards a promotion, not a degree.


94. Merriam-Webster Online: The Language Center, available at http://www.merriam-webster.com (emphasis added). See also THE OXFORD ENGLISH DICTIONARY vol. 12, 574 (2d ed. 1989) (defining professor as “A public teacher or instructor of the highest rank in a specific faculty or branch of learning...the term Professor came eventually to be confined or endowed teaching offices, or to the highest class of these. . .”).

95. The same can be said for the lesser title of “instructor,” the definition of which
would argue that an education should end at the classroom door; this is especially true for graduate students pursuing advanced degrees. Such an educational process is not employment — the relationship is that of teacher-student, not employer-employee. The student learns from the teacher not only the advanced nuances of their field, but also the basic skills needed to teach those skills to others once they too become professors. Introducing core elements of graduate level education to a bargaining process would turn the entire educational system on its ear, hindering higher education in the process.

One can imagine the stress on the foundation of the educational system when graduate students can join together to eliminate a portion of their education, with legal sanction. While we would balk at the concept of a group of high school students refusing to take a final exam, the Board has done the equivalent for graduate level students. Our future college professors now have the power to forego basic instructions on how to teach. By allowing these graduate students the right to organize, the power to control the educational process is transferred from the university granting the degree to the student receiving it. This transfer would ignore the decades of knowledge and experience with higher education that professors and deans have, and consolidate much of the power over critical decisions into the hands of naïve and inexperienced recent college graduates.

This analysis rings most true for students hoping to attain professorships, but it need not be limited to such a scenario. It can be similarly applied to would-be chemists who expect to perform research experiments their entire lives and do the same at a university, or to a future astronomer who spends her nights gazing at the heavens through a telescope and plans to do the same after receiving her doctorate. These experiences are an important element of an education. Any money received as compensation is designed to be merely a token, intended to

follows:

Main Entry: IN-STRUC-TOR
Pronunciation: in-'str&k-t&r
Function: noun
Date: 15th century
: one that instructs : TEACHER; especially: a college teacher below professorial rank.


96. See generally, Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 253 (1976) (holding that interns, residents, and clinical fellows are engaged in graduate educational training and their status is therefore that of students and not employees).

97. For an example of the potential damage organized teaching assistants will bring, look at the University of Washington case, where teaching assistants refused to teach undergraduates or grade papers. See Ray Rivera, supra note 4, at B2.
assist the graduate student in her academic endeavors as any scholarship student receives living stipends. By saddling universities with further economic baggage\textsuperscript{98} and by empowering graduate students to control what they do and do not study, we deny the educational process the freedom it needs to function effectively. This is sound judicial thinking, but it is not wise judicial decision-making. Academia, and the world in general, will suffer the effects of this decision for years to come.

As a sympathizer to the labor movement, I wish to applaud the Board’s progressive stance in expanding the ranks of union membership. However, that they did so in this case by utilizing a very narrow world view, without an appreciation for the realities of the education received by graduate students, is most troubling. Such a haphazard application of the right to organize will serve as much to embarrass the labor movement in the twenty-first century as it will to empower it. We can only hope the Board has occasion to reflect further on its mistake and reverse its decision, embracing again the logical and well-considered “primary purpose” test. I am afraid, however, given the circuitous route the Board took to its current position, that this will not occur any time soon. Still, the decision is recent, and I hope that academic inquiry will continue and that the Board’s experience will illuminate the extent of its mistake, thereby prompting it to reconsider its decision.

\textsuperscript{98} See Cornell Univ., 183 N.L.R.B. 329 (1970). One can imagine the difficulty a school like the aforementioned DePauw would have were it to treat graduate students as employees, in addition to the administrative challenges it already faces.