

NATIONAL LABOR RELATIONS BOARD ISSUES

HEARING
BEFORE A
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COMMITTEE ON APPROPRIATIONS
UNITED STATES SENATE
ONE HUNDRED EIGHTH CONGRESS
SECOND SESSION

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SEPTEMBER 23, 2004—WASHINGTON, DC

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NATIONAL LABOR RELATIONS BOARD ISSUES

THURSDAY, SEPTEMBER 23, 2004

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN
SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 9:32 a.m., in room SD-192, Dirksen Senate Office Building, Hon. Arlen Specter (chairman) presiding.
Present: Senators Specter and Shelby.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good morning, ladies and gentlemen. The Appropriations Subcommittee on Labor, Health and Human Services, and Education will now proceed.

We have hearings this morning on issues relating to the National Labor Relations Board on the question of the status of university students, as to whether they constitute or qualify as employees under the Federal labor laws; and a question on the NLRB decertification policy as to unions following voluntary recognition agreements.

We have quite a number of witnesses and after these proceedings were scheduled the Prime Minister of Iraq was invited to address a joint session of Congress. That is something that I would like to attend, at least in part. So we would ask you to observe to the extent possible the tradition of the subcommittee on 5-minute opening statements, which will leave us the maximum amount of time for questions and answers.

STATEMENT OF HON. ROBERT J. BATTISTA, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD

Senator SPECTER. Our first witness is the Honorable Robert Battista, Chairman of the NLRB, appointed by President Bush for a 5-year term in 2002. Prior to this position he practiced employment and labor law with the Detroit law firm of Butzel Long. He has an undergraduate degree from Notre Dame and a law degree from the University of Michigan Law School.

Thank you for joining us, Mr. Chairman, and the floor is yours.

Mr. BATTISTA. Thank you, Chairman Specter and members of the subcommittee. I am Robert Battista, the Chairman of the NLRB, and I am pleased to appear before the subcommittee today as it considers National Labor Relations Board issues.

At the outset, I wish to note that the NLRB is charged with enforcing the law as it exists and to do so in a firm and evenhanded

manner. Accordingly, the Board carefully avoids any actions that could compromise its neutrality or otherwise cast doubt on its ability to act impartially as a quasi-judicial body.

Historically, members of the Board have refrained from policy debates regarding various issues, including proposed legislation. As to Board decisions that have issued, it is a longstanding tradition that the Board speaks through those decisions. Indeed, our reasoning in the *Brown University* case is set out in detail in the majority opinion and I would respectfully request that it be placed in the record.

As to pending matters, members of the Board should avoid commenting upon or discussing such matters. Neither should we apply the holdings of a decision we have reached to fact situations which could come before us. This tradition is consistent with and informed by the ABA Model Code of Judicial Conduct Canon 3, which specifically addresses prohibited ex parte communications and improper public commentary by judicial type officers.

It is in this context and with these constraints, then, that I turn to the question of whether graduate students are employees under the National Labor Relations Act. The issue is not a new one for the NLRB. The question was first addressed over 30 years ago in *Adelphi University*, where the Board held that graduate student assistants were primarily students and therefore should be excluded from a bargaining unit of regular faculty employees.

Two years later, the Board considered the issue again in *Leland Stanford, Jr., University*. The Board specifically held that graduate student assistants are not employees within the meaning of section 2(3) of the Act. In both cases, the Board considered the nature of the relationship of the graduate student assistants to the university. The Board found that the relationship to be primarily that of student and teaching institution rather than that of employee and employer.

The Board adhered to the *Leland Stanford* principle for over 25 years and that principle was never successfully challenged in court or in Congress. Notwithstanding this long history, the Board in 2000 changed this well-established principle in *NYU*. In that case the Board decided that graduate student assistants met the test of master-servant relationship with the university and accordingly found them to be statutory employees, with the right to organize into a union and to bargain with their employer.

In *Brown University* in 2004, the Board decided to return to the previously well-established precedent that graduate student assistants are not statutory employees. Two members of the Board dissented. I respect their well-considered views, albeit I disagree with them. In doing so, the Board considered the nature of the relationship between the graduate student assistants and the university, finding the relationship to be primarily academic rather than economic. The Board concluded that graduate student assistants are not employees within the meaning of the Act.

In finding a primary academic relationship, the Board noted the following factors: The individuals in question were students; they served as teaching assistant, research assistant, or proctors; and the receipt of a stipend and tuition remission depended upon continued enrollment as students; a student's stipend and tuition remission remained unchanged during times that the student did not

serve as a teaching assistant, research assistant, or proctor; that Brown treated funds for teaching assistants, research assistants, and proctors as financial aid; the principal time commitment of the student is focused on obtaining a degree; and that teaching and research are core elements of the Ph.D. degree which are fulfilled by serving as teaching assistant, research assistant, or proctor.

In reaching the conclusion that graduate students are not employees under the Act, the Board was guided in part by the admonition of the Supreme Court in *NLRB v. Yeshiva University* that: "The principles developed for use in an industrial setting cannot be imposed blindly on the academic world." The Board also was guided by the fundamental rule of statutory construction: A particular statutory provision must be considered in context with a view of the overall statutory scheme. Where the statute is explicit, the Board must follow the statute as it reads. However, where the statute is ambiguous, questions of statutory construction must be examined in the context of the overall purposes of the Act. The Supreme Court has found in *NLRB v. Bell Aerospace Company* that the question of employee status falls in the latter category.

PREPARED STATEMENT

In summary, in determining whether employees such as graduate assistants are employees within the meaning of the Act, the Board looks to the nature of the relationship between the individuals and the purported employer. If that relationship is fundamentally economic, the Board typically finds these individuals to be employees within the meaning of the Act. However, if the relationship is fundamentally non-economic, such as graduate student assistants who have a primarily educational or academic relationship with the university, employee status ordinarily will not be found.

Thank you for the opportunity to address the committee on this subject and I will entertain any questions that you have.

[The statement follows:]

PREPARED STATEMENT OF HON. ROBERT J. BATTISTA

Chairman Specter and Distinguished Members of the Subcommittee: I am pleased to appear before the Subcommittee today as it considers National Labor Relations Board issues. I am Chairman of the National Labor Relations Board, and also appearing with me today is Board Member Wilma Liebman. We have been invited to participate in today's hearing with respect to the question of whether graduate student assistants are "employees" within the meaning of the National Labor Relations Act (the Act).

At the outset, I wish to note that it is a long-standing tradition at the NLRB that members of the Board do not comment on the merits of pending or possible legislative proposals. As you know, the NLRB is charged with enforcing the law as it exists, and to do so firmly and evenhandedly. Accordingly, the Board carefully avoids any actions that could compromise its neutrality or otherwise cast doubt on its ability to act impartially as a quasi-judicial body. Historically, members of the Board have refrained from policy debates regarding pending or proposed legislation because such conduct may conflict with our obligation of neutral enforcement of extant law as passed by Congress.

As to Board decisions that have issued, it is a long-standing tradition that the Board speaks through those decisions. That is, the decisions speak for themselves. As to pending matters, members of the Board should avoid commenting upon or discussing such matters. This tradition is consistent with, and informed by the ABA Model Code of Judicial Conduct, Canon 3 of which specifically addresses prohibited ex-parte communications and improper public commentary by judicial-type officers.

It is in this context that I now turn to the subject of this portion of the hearing, the question of whether graduate student assistants are employees under the Act.

The issue is not a new one for to the NLRB. The question was first addressed over thirty years ago in *Adelphi University*, 195 NLRB 639 (1972). The Board held that graduate student assistants are primarily students and therefore should be excluded from a bargaining unit of regular faculty employees. Two years later, the Board considered the issue again in *Leland Stanford*, 214 NLRB 621 (1974). The Board specifically held that graduate student assistants are not employees within the meaning of Section 2(3) of the Act. In both cases, the Board considered the nature of the relationship of the graduate student assistants to the university. The Board found that relationship to be primarily that of student and teaching institution, rather than that of employee and employer. In reaching this conclusion regarding the research assistants in *Leland Stanford*, the Board noted the following factors:

1. the research assistants were graduate students enrolled in the Stanford physics department as Ph.D. candidates;
2. they were required to perform research to obtain their degree;
3. they received academic credit for their research work; and
4. while they received a stipend from Stanford, the amount was not dependent on the nature or intrinsic value of the services performed or the function of the recipient. Rather, the amount was determined by the goal of providing financial aid to the graduate students.

The Board adhered to the *Leland Stanford* principle for over 25 years, and that principle was never successfully challenged in court or in Congress. Notwithstanding this long history, the Board in 2000 changed this well-established principle. See *New York University*, 332 NLRB 1205 (2000). In that case, the Board decided that graduate student assistants meet the test of a master-servant relationship with the university, and that they are statutory employees with the right to organize into a union and to bargain with their employer.

In *Brown University*, 342 NLRB No. 42 (2004), the Board decided to return to the previously well-established precedent that graduate student assistants are not statutory employees.¹ In doing so, the Board considered the nature of the relationship between the graduate student assistants and the university. Finding that relationship to be primarily academic, rather than economic, the Board concluded that graduate student assistants are not employees within the meaning of the Act. In finding a primarily academic relationship, the Board noted the following factors:

1. the individuals in question are, in fact, students;
2. serving as a teaching assistant, research assistant, or proctor, and the receipt of a stipend and tuition remission, depends upon continued enrollment as a student;
3. a student's stipend and tuition remission remains unchanged during times the student does not serve as a teaching assistant, research assistant, or proctor;
4. Brown treats funds for teaching assistants, research assistants, and proctors as financial aid;
5. the principle time commitment of the student is focused on obtaining a degree; and
6. teaching and research are core elements of the Ph.D. degree, which are fulfilled by serving as a teaching assistant, research assistant, or proctor.

In reaching the conclusion that graduate student assistants are not employees under the Act, the Board was guided in part by the admonition of the Supreme Court in *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), that principles developed for use in the industrial setting cannot be “imposed blindly on the academic world.” The Board was also guided by a fundamental rule of statutory construction, i.e., a particular statutory provision must be considered in context and with a view of the overall statutory scheme. To be sure, where the statute is explicit, the Board must follow the statute as it reads. However, where the statute is ambiguous, questions of statutory construction must be examined in the context of the overall purpose of the Act. The Supreme Court has held that the issue of employee status falls in the latter category. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Brown*, we followed that principle and the 25 years of history.

In summary, in determining whether individuals such as graduate student assistants are employees within the meaning of the Act, the Board looks to the fundamental nature of the relationship between those individuals and their purported employer. If that relationship is fundamentally economic, the Board typically finds those individuals to be employees within the meaning of the Act. However, if that relationship is fundamentally non-economic—such as graduate student assistants who have a primarily educational or academic relationship with their university—employee status ordinarily will not be found.

¹Two Members of the Board dissented. I respect their well-considered views, albeit I disagree with them.

Thank you again for the opportunity to address this Subcommittee.

[NOTICE.—This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.]

BROWN UNIVERSITY AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AFL-CIO, PETITIONER. CASE 1-RC-21368

(July 13, 2004)

DECISION ON REVIEW AND ORDER

(By Chairman Battista and Members Liebman, Schaumber, Walsh, and Meisburg)

On November 16, 2001, the Regional Director for Region 1 issued a Decision and Direction of Election in which she applied *New York University*, 332 NLRB 1205 (2000) (*NYU*), to find that teaching assistants, research assistants, and proctors are employees within the meaning of Section 2(3) of the Act and constitute an appropriate unit for collective bargaining. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Brown University (Brown) filed a timely request for review, urging the Board, inter alia, to reconsider *NYU*. The Petitioner filed an opposition. On March 22, 2002, the Board granted the request for review. Brown and the Petitioner filed briefs on review. Amicus curiae briefs also were filed.¹

The case presents the issue of whether graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining under Section 2(3) of the Act. The Board in *NYU* concluded that graduate student assistants are employees under Section 2(3) of the Act and therefore are to be extended the right to engage in collective bargaining. That decision reversed more than 25 years of Board precedent.² That precedent was never successfully challenged in court or in Congress. In our decision today, we return to the Board's pre-*NYU* precedent that graduate student assistants are not statutory employees.

Until *NYU*, the Board's principle was that graduate student assistants are primarily students and not statutory employees. See *Leland Stanford*, supra. The Board concluded that graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school. Accordingly, the Board held that they were not employees within the intendment of the Act.

This longstanding approach towards graduate student assistants changed abruptly with *NYU*. The Board decided that graduate student assistants meet the test establishing a conventional master-servant relationship with a university,³ and that they are statutory employees who necessarily have "statutory rights to organize and bargain with their employer." 332 NLRB at 1209.⁴

After carefully considering the record herein, and the briefs of the parties and amici, and for the reasons detailed in this decision, we reconsider *NYU* and conclude

¹Amicus curiae briefs were filed by the following: Joint brief of the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Pennsylvania, University of Southern California, Washington University in St. Louis, and Yale University; National Right to Work Legal Defense Foundation; and Trustees of Boston University.

²See, e.g., *Leland Stanford Junior University*, 214 NLRB 621 (1974).

³"This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment." *NYU*, 332 NLRB at 1206, relying on *NLRB v. Town & Country Electric*, 516 U.S. 85, 90-91, 93-95 (1995).

⁴*NYU* was preceded by *Boston Medical Center*, 330 NLRB 152 (1999), a case involving the employee status of medical school graduates serving as interns, residents, and house staff at a teaching hospital. The Board in *Boston Medical Center* overruled *St. Clare's Hospital & Health Center*, 229 NLRB 1000 (1977), and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976). Applying the master-servant test, the Board found that these medical professionals were statutory employees and constituted an appropriate unit for collective bargaining. In our decision today, we express no opinion regarding the Board's decision in *Boston Medical Center*.

that the 25-year precedent was correct, and that *NYU* was wrongly decided and should be overruled.⁵

I. THE PETITION AND THE REGIONAL DIRECTOR'S FINDINGS

The Petitioner sought to represent a unit of approximately 450 graduate students employed as teaching assistants (TAs),⁶ research assistants (RAs) in certain social sciences and humanities departments,⁷ and proctors. The Petitioner, relying on *NYU*, supra, contended to the Regional Director that the petitioned-for TAs, RAs, and proctors are employees within the meaning of Section 2(3) and that they constitute an appropriate unit for collective bargaining.

Brown contended to the Regional Director that the petitioned-for individuals are not statutory employees because this case is factually distinguishable from *NYU*. Brown asserted that, unlike *NYU*, where only a few departments required students to serve as a TA or RA to receive a degree, most university departments at Brown require a student to serve as a TA or RA to obtain a degree. Brown contended that these degree requirements demonstrate that the petitioned-for students have only an educational relationship and not an employment relationship with Brown. Brown also argued that the TA, RA, and proctor awards constitute financial aid to students, emphasizing that students receive the same stipend, regardless of whether they "work" for those funds as a TA, RA, or proctor, or whether they receive funding for a fellowship, which does not require any work. Finally, Brown argued that even assuming the petitioned-for individuals are statutory employees, they are temporary employees who do not have sufficient interest in their ongoing employment to entitle them to collectively bargain.⁸

The Regional Director, applying *NYU*, rejected Brown's arguments. She also concluded that the petitioned-for unit was appropriate, and she directed an election.

The election was conducted on December 6, 2001, and the ballots were impounded pending the disposition of this request for review.

II. FACTS AND CONTENTIONS OF THE PARTIES

A. Overview of Brown and the Graduate Assistants

Brown is a private university located in Providence, Rhode Island. It was founded in 1764 and is one of the oldest colleges in the United States.⁹ The mission of Brown is to serve as a university in which the graduate and undergraduate schools operate as a single integrated facility. Brown has over 50 academic departments, approximately 37 of which offer graduate degrees.¹⁰ Brown employs approximately 550 regular faculty members, and has an unspecified number of short-term faculty appointments. Although student enrollment levels vary, over 1,300 are graduate students, 5,600 are undergraduate students, and 300 are medical students in various degree programs. Most graduate students seek Ph.D. degrees, with an estimated 1,132 seeking doctorates and 178 seeking master's degrees as of May 1, 2001.

Each semester many of these graduate students are awarded a teaching assistantship, research assistantship, or proctorship, and others receive a fellowship. At the time of the hearing, approximately 375 of these graduate students were TAs,

⁵ Brown's request for oral argument is denied as the record and the briefs adequately present the issues and positions of the parties and amici.

⁶ Included among the TAs are senior TAs, assistants, supplemental TAs, and teaching fellows. The union also seeks to represent the few medical students who are seeking a Ph.D. and serving as a TA.

⁷ The Petitioner did not seek to represent other RAs, who are largely in the life and physical sciences departments of the university. In its Brief on Review, however, the Petitioner for the first time takes the position that all RAs should be included in the unit. The Petitioner did not file a request for review of the Regional Director's finding, discussed infra, that the RAs in life and physical sciences should be excluded from the unit.

⁸ Further, Brown argued that there is no basis for treating groups of RAs differently for the purposes of collective bargaining. Thus, although Brown argues that none of the RAs are employees, it asserts that all RAs should be treated the same; either all are employees or all are not employees.

⁹ The University was originally named Rhode Island College. In 1804, the school was renamed Brown University to honor local merchant, Nicholas Brown.

¹⁰ At least 32 departments bestow doctorates, while 5 award masters degrees only.

220 served as RAs, 60 were proctors,¹¹ and an additional number received fellowships.¹²

Although varying somewhat among the departments, a teaching assistant generally is assigned to lead a small section of a large lecture course taught by a professor. Although functions of research assistants vary within departments, these graduate students, as the title implies, generally conduct research under a research grant received by a faculty member. Proctors perform a variety of duties for university departments or administrative offices. Their duties depend on the individual needs of the particular department or the university administrative office in which they work and, thus, include a wide variety of tasks. Unlike TAs and RAs, proctors generally do not perform teaching or research functions. Fellowships do not require any classroom or departmental assignments; those who receive dissertation fellowships are required to be working on their dissertation.

B. Educational Relationship Between Brown and the Graduate Student Assistants

Brown's charter describes the school's mission as "educating and preparing students to discharge the office of life with usefulness and reputation." To educate and prepare its students, Brown uses the university/college model, which "furnishes the advantages of both a small teaching college and a large research university," according to Brown's Bulletin of the University for the years 2001–2003. The Bulletin describes the Ph.D. degree as "primarily a research degree" and emphasizes that "[t]eaching is also an important part of most graduate programs." The testimony of nearly 20 department heads, and the contents of numerous departmental brochures and other Brown brochures, all point to graduate programs steeped in the education of graduate students through research and teaching.

In their pursuit of a Ph.D. degree, graduate students must complete coursework, be admitted to degree candidacy (usually following a qualifying examination), and complete a dissertation, all of which are subject to the oversight of faculty and the degree requirements of the department involved. In addition, most Ph.D. candidates must teach in order to obtain their degree. Although these TAs (as well as RAs and proctors) receive money from the Employer, that is also true of fellows who do not perform any services. Thus, the services are not related to the money received.

The faculty of each department is responsible for awarding TAs, RAs, or proctorships to its students. To receive an award, the individual usually must be enrolled as a student in that department.

TAs generally lead small groups of students enrolled in a large lecture class conducted by a faculty member in the graduate student's department. The duties and responsibilities vary with the department involved. In the sciences, TAs typically demonstrate experiments and the proper use of equipment, and answer questions. In the humanities and social sciences, TAs lead discussions of what was discussed in the lecture by the professor.¹³ All the TAs' duties are under the oversight of a faculty member from the graduate department involved.

During semesters when these students do not act as TAs, RAs, or proctors, they enroll in courses and work on dissertations. Even during those semesters when they are acting in one of these capacities, they nonetheless participate in taking courses and writing dissertations.

The content of the courses that the TAs teach, and the class size, time, length, and location are determined by the faculty members, departmental needs, and Brown's administration. Although undergraduate enrollment patterns play a role in the assignment of many TAs, faculty often attempt to accommodate the specific educational needs of graduate students whenever possible. In addition, TAs usually lead sections within their general academic area of interest. In the end, decisions over who, what, where, and when to assist faculty members as a TA generally are made by the faculty member and the respective department involved, in conjunction with the administration. These are precisely the individuals or bodies that control the academic life of the TA.

¹¹These figures are for a moment in time. During a given period, a much higher number will have served in one of these positions at some point during that period. Thus, as noted *infra*, the students in 21 of approximately 32 departments require teaching as a condition of getting a Ph.D. degree.

¹²Approximately 50 graduate students receive a dean's fellowship, and a university fellowship is offered to 60 candidates. Each department also has fellowships. The Employer asserts in its posthearing brief that there are at least 300 fellowships, although the record is not entirely clear as to the precise number overall.

¹³A few TAs in some departments do not lead sections or labs, but teach a course, although under the supervision of a faculty member. In addition, teaching fellows, who constitute less than 10 percent of all TAs, teach courses independently. The vast majority of TAs, however, typically lead sections or labs that are subsections of a large lecture.

Research assistantships are typically generated from external grants from outside Brown, i.e., Federal agencies, foundations, and corporate sponsors. A faculty member, referred to as the “principal investigator,” typically applies for the grant from the Government or private source, and funds are included for one or more RAs. The general process is for students to work with or “affiliate with” a faculty member, who then applies for funds and awards the student the RA. The students supported by the grant will work on one of the topics described in the grant. The faculty member who serves as a principal investigator most typically also serves as the advisor for that student’s dissertation. Although technically the principal investigator on the grant, the faculty member’s role is more akin to teacher, mentor, or advisor of students. Although the RAs in the social sciences and humanities perform research that is more tangential to their dissertation, the students still perform research functions in conjunction with the faculty member who is the principal investigator.

Proctors perform a variety of duties for university departments or administrative offices. The Regional Director cited a representative list of these duties, which include working in Brown’s museums or libraries, editing journals or revising brochures, working in the office of the dean, advising undergraduate students, and working in various university offices. Although a few perform research and at least one teaches a class in the Hispanic studies department, they generally do not perform research or teaching assistant duties.

C. Financial Support for Graduate Students

The vast majority of incoming and continuing graduate students receive financial support. In the preceding academic year, 85 percent of continuing students and 75 percent of incoming students received some financial support from Brown. Brown gives assurances to some students that additional support will be available in the future. Thus, at the discretion of each department and based on the availability of funds, some incoming students are told in their award letters that if they “maintain satisfactory progress toward the Ph.D., you will continue to receive some form of financial aid in your second through fourth years of graduate study at Brown, most probably as a teaching assistant or research assistant.” Brown’s ultimate goal is to support all graduate students for up to 5 years, typically with a fellowship in the first and fifth years, and TA or RA positions in the intervening years. As noted above, the financial support is not dependent on whether the student performs services as a TA, RA, or proctor.

Brown considers academic merit and financial need when offering various forms of support, although support is not necessarily issued to those with the greatest financial need.¹⁴ This support may include a fellowship, TA, RA, or proctorship, which may include a stipend for living expenses, payment of university health fee for oncampus health services, and tuition “remission” (payment of tuition). Priority is given to continuing students when awarding financial support.

The amount of funding for a fellowship, TA, RA, and proctorship generally is the same. The basic stipend for a fellowship, TA, RA, or proctorship is \$12,800, although some fellowships, RAs, and TAs are slightly more.¹⁵ Tuition remission and health fee payments generally are the same for TAs, RAs, proctors, and fellows, although the amount of tuition remission depends on the number of courses taken by a student.¹⁶

Brown treats funds for TA, RAs, proctors, and fellowships as financial aid and represents them as such in universitywide or departmental brochures. Graduate student assistants receive a portion of their stipend award twice a month, and the amount of stipend received is the same regardless of the number of hours spent performing services. The awards do not include any benefits, such as vacation and sick leave, retirement, or health insurance.

¹⁴The University requires all students to submit a Free Application for Federal Student Aid (FAFSA). Because proctorships usually are paid with Federal work-study funds, those students must financially qualify for this support. The University also provides Federal loans, such as the Federal Direct Student Loan Program.

¹⁵Students receiving the dean and dissertation fellowships receive \$14,500, while university fellowships receive \$13,300. Some departments, particularly in the sciences, offer RA stipends from \$13,200 to \$14,250. Some departments, mostly in sciences and social sciences, use senior TAs who receive \$13,300, while teaching fellows receive from \$14,300 to \$14,800. Our colleagues say that the graduate assistantships are “modest,” citing the \$12,800 stipend paid by Brown as an example. However, Brown may also provide these individuals with tuition remission worth \$26,000 per year, and in addition pays the University’s health fee on their behalf.

¹⁶As indicated above, TAs, RAs, and proctors participate in taking courses and are permitted to take a maximum of three courses during the semester that they serve. Fellows, however, are permitted to take a maximum of five courses with four courses being most typical.

D. Contentions of the Parties

1. Brown

In its Brief on Review, Brown argues that *New York University*, 332 NLRB 1205 (2000), was wrongly decided, contending that it reversed 25 years of precedent “without paying adequate attention to the Board’s role in making sensible policy decisions that effectuate the purposes of the Act.” Brown contends that the Board “did not adequately consider that the relationship between a research university and its graduate students is not fundamentally an *economic* one but an *educational* one.” Further, Brown contends that the support to students is part of a financial aid program that pays graduate students the same amount, regardless of work, and regardless of the value of those services if purchased on the open market (i.e., hiring a fully-vetted Ph.D.). Brown also emphasizes that “[c]ommon sense dictates that students who teach and perform research as part of their academic curriculum cannot properly be considered employees without entangling the . . . Act into the intricacies of graduate education.” Brown also incorporates arguments made in its request for review that, at a minimum, *NYU*, *supra*, is distinguishable from this case because of the extent that teaching and research are required for a graduate degree, and because the graduate assistants are temporary employees.

2. Petitioner

The Petitioner argues that the Regional Director correctly followed the Board’s decision in *NYU*, and that *NYU* must be upheld. The Petitioner contends that the petitioned-for employees clearly meet the statutory definition of “employee” because they meet the common law test. The Petitioner disputes Brown’s contention that TA and RA stipends, like fellowship stipends, are “financial aid.” The Petitioner argues that Brown’s contention that TAs or RAs lose their status as employees because the TAs and RAs are academically required to work is based on the false notion that there is no way to distinguish between a graduate student’s academic requirements and the “work appointments” of the TAs or RAs. Further, even assuming that these individuals usually are satisfying an academic requirement, this is not determinative of employee status.

With regard to the RAs in the life and physical sciences that the Regional Director excluded, the Petitioner now asserts that these individuals should be included in the unit because they provide a service to Brown and are compensated for such service in a manner consistent with a finding that they are employees within the meaning of the Act.

Finally, the Petitioner contends that the petitioned-for individuals are not temporary employees.

III. DISCUSSION AND ANALYSIS

A. Pre-NYU Board Decisions

In *Adelphi University*, 195 NLRB 639 (1972), the Board held that graduate student assistants are primarily students and should be excluded from a unit of regular faculty. In *Leland Stanford*, 214 NLRB 621 (1974), the Board went further. It held that graduate student assistants “are not employees within the meaning of Section 2(3) of the Act.” The common thread in both opinions is that these individuals are students, not employees. The Board found that the research assistants were not statutory employees because, like the graduate students in *Adelphi*, *supra*, they were “primarily students.” In support of this conclusion, the Board cited to the following: (1) the research assistants were graduate students enrolled in the Stanford physics department as Ph.D. candidates; (2) they were required to perform research to obtain their degree; (3) they received academic credit for their research work; and (4) while they received a stipend from Stanford, the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support. For over 25 years, the Board adhered to the *Leland Stanford* principle.

In each of these Board decisions, the Board’s view of graduate students enrolled at a college or university remained essentially the same. In *Adelphi University*, *supra*, the graduate student assistants were graduate students working towards their advanced academic degrees, and the Board noted that “their employment depends entirely on their status as such.” 195 NLRB at 640. Further, the Board emphasized that graduate student assistants “are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.” *Id.* The Board concluded that graduate student assistants were primarily students and contrasted them with research associates in *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971), because the re-

search associates “[were] not simultaneously a student but already had . . . [a] doctoral degree and, under the Center’s statutes, [were] eligible for tenure.” 195 NLRB at 640 fn. 8. As noted above, the rationale was similar in *Leland Stanford*, supra, in which the Board likewise contrasted the research assistants there to research associates, again emphasizing that research associates are not simultaneously students and concluding that “these research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University*.” 214 NLRB at 623.

In *St. Clare’s Hospital*, 229 NLRB 1000 (1977), and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), the Board reaffirmed its treatment of students “who perform services at their educational institutions which are directly related to their educational program” and stated that the Board “has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately.” *St. Clare’s Hospital*, 229 NLRB at 1002. The Board emphasized the rationale that they are “serving primarily as students and not primarily as employees . . . [and] the mutual interests of the students and the educational institution in the services being rendered are predominately academic rather than economic in nature.” *Id.* Although the Board later overruled *St. Clare’s Hospital* and *Cedars-Sinai* in *Boston Medical Center*, 330 NLRB 152 (1999), and asserted jurisdiction over the individuals there, those individuals were interns, residents, and fellows who had already completed and received their academic degrees. The Board in *Boston Medical* did not address the status of graduate assistants who have not received their academic degrees. In the instant case, the graduate assistants are seeking their academic degrees and, thus, are clearly students. We need not decide whether *Boston Medical* (where the opposite is true) was correctly decided.

B. Return to the Pre-NYU Status of Graduate Student Assistants

The Supreme Court has recognized that principles developed for use in the industrial setting cannot be “imposed blindly on the academic world.” *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973). While graduate programs may differ somewhat in their details, the concerns raised in *NYU*, supra, and here forcefully illustrate the problem of attempting to force the student-university relationship into the traditional employer-employee framework. After carefully analyzing these issues, we have come to the conclusion that the Board’s 25-year pre-*NYU* principle of regarding graduate students as non-employees was sound and well reasoned. It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule *NYU* and return to the pre-*NYU* Board precedent.

Leland Stanford, supra, was wholly consistent with the overall purpose and aim of the Act. In Section 1 of the Act, Congress found that the strikes, industrial strife and unrest that preceded the Act were caused by the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership. . . .”¹⁷ To remove the burden on interstate commerce caused by this industrial unrest, Congress extended to and protected the right of employees, if they so choose, to organize and bargain collectively with their employer, encouraging the “friendly adjustment of industrial disputes arising out of differences as to wages, hours or other conditions. . . .” *Id.*¹⁸ The Act was premised on the view that there is a fundamental conflict between the interests of the employers and employees engaged in collective-bargaining under its auspices and that “[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest”[:]¹⁹

[T]he damage caused to the nation’s commerce by the inequality of bargaining power between employees and employers was one of the central problems addressed by the Act. A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the

¹⁷ Sec. 1, 29 U.S.C. § 151.

¹⁸ 1 Leg. Hist. 318 (NLRA 1935). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (a purpose of the Act is “to redress the perceived imbalance of economic power between labor and management.”); 1 Leg. Hist. 15 (NLRA 1935) (remarks of Sen. Wagner, 78 Cong.Rec. 3443 (Mar. 1, 1934)).

¹⁹ *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).

harm caused by labor disputes. *The vision of a fundamentally economic relationship between employers and employees is inescapable.*²⁰

The Board and the courts have looked to these Congressional policies for guidance in determining the outer limits of statutory employee status. Thus, the Supreme Court held, in *NLRB v. Bell Aerospace Co.*,²¹ that managerial employees, while not excluded from the definition of an employee in Section 2(3), nevertheless are not statutory employees. As the Court explained:

[T]he Wagner Act was designed to protect “laborers” and “workers,” not vice-presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true “managerial employees” would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.²²

This interpretation of Section 2(3) followed the fundamental rule that “a reviewing court should not confine itself to examining a particular statutory provision in isolation.”²³ We follow that principle here. We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board’s longstanding rule that it will not assert jurisdiction over relationships that are “primarily educational” is consistent with these principles.

We emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship. Even students who have finished their coursework and are writing their dissertation must be enrolled to receive these awards. Further, students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student. Also, as shown below, their service as a graduate student assistant is part and parcel of the core elements of the Ph.D. degree. Because they are first and foremost students, and their status as a graduate student assistant is contingent on their continued enrollment as students, we find that that they are primarily students.

We also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not “consideration for work.” It is financial aid to a student.

The evidence demonstrates that the relationship between Brown’s graduate student assistants and Brown is primarily educational. As indicated, the first prerequisite to becoming a graduate student assistant is being a student. Being a student, of course, is synonymous with learning, education, and academic pursuits. At Brown, most graduate students are pursuing a Ph.D. which, as described by the Brown’s University Bulletin, is primarily a research degree with teaching being an important component of most graduate programs. The educational core of the degree, research, and teaching, reflects the essence of what Brown offers to students: “the advantage of a small teaching college and large research university.” At least 21 of the 32 departments that offer Ph.D. degrees require teaching as a condition of getting that degree. Sixty-nine percent of all graduate students are enrolled in these departments. Thus, for a substantial majority of graduate students, teaching is so integral to their education that they will not get the degree until they satisfy that requirement.²⁴ Graduate student assistant positions are, therefore, directly related to the core elements of the Ph.D. degree and the educational reasons that students attend Brown. The relationship between being a graduate student assistant

²⁰ *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (emphasis added).

²¹ 416 U.S. 267 (1974).

²² *Id.* at 284.

²³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–133 (2000) (“The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme.”) (Citations and internal quotations omitted.) See also Sutherland, *Statutory Construction* (5th ed. 1994) § 46.05: “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.”

²⁴ This fact is relevant to our analysis, but it is not necessarily critical. That is, if the fact were to the contrary, we would not necessarily find employee status. Indeed, the fact was contra in *NYU* and employee status was found, but we have overruled that case.

and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational.

We recognize that a given graduate student may be a teacher, researcher, or proctor for only a portion of his or her tenure as a student. However, as described above, that task is an integral part of being a graduate student, and cannot be divorced from the other functions of being a graduate student.

Because the role of teaching assistant and research assistant is integral to the education of the graduate student, Brown's faculty oversees graduate student assistants in their role as a research or teaching assistant. Although the duties and responsibilities of graduate student assistants vary among departments and faculty, most perform under the direction and control of faculty members from their particular department. TAs generally do not teach independently, and even teaching fellows who have some greater responsibilities follow faculty-established courses. RAs performing research do so under grants applied for by faculty members, who often serve as the RA's dissertation adviser. In addition, these faculty members are often the same faculty that teach or advise the graduate assistant student in their coursework or dissertation preparation.

Besides the purely academic dimension to this relationship is the financial support provided to graduate student assistants because they are students. Attendance at Brown is quite expensive. Brown recognizes the need for financial support to meet the costs of a graduate education. This assistance, however, is provided only to students and only for the period during which they are enrolled as students. Further, the vast majority of students receive funding. Thus, in the last academic year, 85 percent of continuing students and 75 percent of incoming students received assistance from Brown. In addition, as noted above, the amounts received by graduate student assistants generally are the same or similar to the amounts received by students who receive funds for a fellowship, which do not require any assistance in teaching and research. Moreover, a significant segment of the funds received by both graduate student assistants and fellows is for full tuition. Further, the funds for students largely come from Brown's financial aid budget rather than its instructional budget.

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

Over 25 years ago, the Board in *St. Clare's Hospital*, supra, clearly and cogently explained the rationale for declining to extend collective-bargaining rights to students who perform services at their educational institutions, that are directly related to their educational program, i.e.,

The rationale . . . is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means 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 our judgment, are not readily adaptable to the collective bargaining process. It is for this reason that the Board has determined that the national labor policy does not require—and in fact precludes—the extension of collective-bargaining rights and obligations to situations such as the one now before us.

229 NLRB at 1002 (footnote omitted).

The Board explained, “[i]t is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship.” Thus, the student-teacher relationship is based on the “mutual interest in the advancement of the student's education,” while the employer-employee relationship is “largely predicated on the often conflicting interests” over economic issues. Because the collective-bargaining process is fundamentally an economic process, the Board concluded that subjecting educational decisions to such a process would be of “dubious value” because educational concerns are largely irrelevant to wages, hours, and working conditions. In short, the Board determined that collective bargaining is not particularly well suited to educational decisionmaking and that any change in emphasis from quality education to economic concerns will “prove detrimental to both labor and educational policies.”

The Board noted that “the educational process—particularly at the graduate and professional levels—is an intensely personal one.” The Board emphasized that the

process is personal, not only for the students, but also for faculty, who must educate students with a wide variety of backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. The Board observed that in many respects, collective treatment is “the very antithesis of personal individualized education.”

The Board also emphasized that collective bargaining is designed to promote equality of bargaining power, “another concept that is largely foreign to higher education.” The Board noted that while teachers and students have a mutual interest in the advancement of the student’s education, in an employment relationship such mutuality of goals “rarely exists.”

Finally, the Board concluded that collective bargaining would unduly infringe upon traditional academic freedoms. The list of freedoms detailed in *St. Clare’s Hospital*, 229 NLRB at 1003, includes not only the right to speak freely in the classroom, but many “fundamental matters” involving traditional academic decisions, including course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns. The Board opined that once academic freedoms become bargainable, “Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away.”²⁵

The concerns expressed by the Board in *St. Clare’s Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.²⁶

Based on all of the above-statutory and policy considerations, we concluded that the graduate student assistants are not employees within the meaning of Section 2(3) of the Act. Accordingly, we decline to extend collective bargaining rights to them, and we dismiss the petition.²⁷

²⁵In citing *St. Clare’s*, we do not necessarily register our agreement with all aspects of that case. That is, we do not hold that residents and interns are not employees for purposes of collective bargaining. Nor do we hold that the Act “precludes” residents and interns from employee status under Sec. 2(3). We simply say that, for many of the same policy considerations that underlie *St. Clare’s*, we have chosen not to treat graduate assistants as employees for purposes of collective bargaining.

²⁶Academic freedom includes the right of a university “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring). As our dissenting colleagues note, the Supreme Court found that these freedoms were not infringed by the EEOC’s efforts to subpoena tenure-related documents in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). In reaching this conclusion, the Court stressed that the application of Title VII to tenure decisions would not usurp the university’s authority to determine employment criteria for professors except by precluding the use of those proscribed by Title VII. The imposition of collective bargaining on the relationship between a university and its graduate student assistants, in contrast, would limit the university’s freedom to determine a wider range of matters. Because graduate student assistants are students, those limitations intrude on core academic freedoms in a manner simply not present in cases involving faculty employees.

²⁷Member Schaumber agrees with his colleagues that graduate student assistants are not statutory employees for the reasons stated above. He finds further support for this conclusion in the fact that graduate student assistants fit poorly within the common law definition of “employee,” which the Supreme Court has held is relevant to the question of whether an individual is an “employee” under the Act, although not controlling, *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (contrasting interpretation of term “employee” under other Federal laws, applying common law standards, with the “considerable deference” given to the Board’s construction of that term when administering the Act). Under the common law, an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment. *Id.* Here, graduate student assistants are not “hired” to serve as graduate teaching or research assistants. They are admitted to a graduate program that includes a requirement for service as a graduate student assistant. The teaching and research are not performed “for” the university, as such, but rather as an integral part of the student’s educational course of study. The financial arrangements for graduate student stipends further confirm the fundamentally educational nature of service as a TA or RA, as the stipends are based upon status—enrollment in a graduate program. They do not depend on the nature or value of the services provided, and, thus, are not a quid pro quo for services rendered. In disagreeing with this analysis, Member Schaumber believes that his dissenting colleagues

Our dissenting colleagues question our analysis of pre-*NYU* precedent. More specifically, they assert that the holding of *Leland Stanford*, 214 NLRB 621 (1974), is confined to research assistants and that research assistants are unlike graduate teaching assistants. The language of the Board in that case is directly contrary to this assertion. The Board said:

In sum, we believe these research assistants are like the graduate teaching and research assistants who we found were primarily students in Adelphi University, 195 NLRB 639, 640 (1972). We find, therefore, that the research assistants in the physics department are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act.

214 NLRB at 623 (emphasis added). Our colleagues' assertions, therefore, turn a blind eye to the Board's longstanding policy, discussed above, of declining to extend collective-bargaining rights to graduate students and holding that graduate students are not employees under Section 2(3) of the Act. See *Adelphi University*, supra; *Leland Stanford University*, supra; and *St. Clare's*, supra.²⁸

The broad applicability of this policy to graduate student assistants is clear from *St. Clare's*, in which the Board carefully delineated several categories of Board cases involving students, including those students who perform services at an educational institution where those services are directly related to the university's educational programs. Discussing this category of cases, and citing *Leland Stanford* and *Adelphi University*, the Board stated, "[i]n such cases, the Board has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately." *Id.* at 1002.²⁹ Until *NYU*, this had been the Board's unbroken policy towards the issue of collective-bargaining rights for graduate students. Although the Board may not have been presented the precise facts of *NYU* in earlier cases, the dissent chooses either to ignore or simply to disregard what had been Board law regarding this category of students for over 25 years. This Board law is also consistent with nearly one-half century of Board decisions holding that the disabled who are in primarily rehabilitative rather than an economic or industrial work relationships are not statutory employees and that it would not effectuate the policies of the Act to subject the rehabilitative program into which they have been admitted to collective bargaining.³⁰

Our colleagues argue that graduate student assistants are employees at common law. Even assuming arguendo that this is so, it does not follow that they are employees within the meaning of the Act. The issue of employee status under the Act turns on whether Congress intended to cover the individual in question. The issue is not to be decided purely on the basis of older common-law concepts. For example, a managerial employee may perform services for, and be under the control of, an employer. Indeed, the Supreme Court used the term "managerial employee" in *Bell Aerospace Co.*, 416 U.S. 267 (1974). And yet, the Court held that these persons were not statutory employees.

Similarly, our colleagues say that we never address the language of Section 2(3). In fact, we do. The difference is that our colleagues stop their analysis with the recitation of the statutory words "the term 'employee' shall include any employee." We go further than this tautology. We examine the underlying purposes of the Act.

Our colleagues rely on *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), and *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), to support their contention that the absence of an express exclusion in Section 2(3) for graduate student assistants mandates a finding that the assistants are statutory employees. As the foregoing discussion makes clear, that is simply not so. Further, neither of these cases supports the

focus too narrowly on the mechanics of the work performed by graduate student assistants without considering it in context with the controlling academic relationship of which it is an integral part. This parallels the dissent's application of the definition for "employee" set forth in Sec. 2(3) of the Act. Member Schaumber believes that the dissenters read the definition in isolation while the breadth of the term's application—its intended contours—can only be determined accurately by reading the definition in the context of the Act, see, e.g., Sec. 1 in which it appears.

²⁸Our colleagues say that, under *St. Clare's*, house staff were not employees for bargaining purposes but they could be employees for other statutory purposes. Our colleagues complain that, in the instant case, we are holding that graduate student assistants are not employees for any statutory purposes. In our view, that result flows from our interpretation of Sec. 2(3). Of course, *St. Clare's* is not now the law, and we decline to consider its holding here.

²⁹Although the dissent cites language from *Cedars-Sinai*, supra, to the effect that the Board has included students in some bargaining units and in a few instances, authorized elections in units composed solely of students, the Board clarified this general assertion in *St. Clare's* by making clear that this does not include the category of students who perform services at their university related to their educational programs.

³⁰*Sheltered Workshops of San Diego*, 126 NLRB 961(1960), *Goodwill of Tidewater*, 304 NLRB 767 (1991); and *Goodwill of Denver*, 304 NLRB 764 (1991).

dissent's position. In both *Town & Country* and *Sure-Tan*, the individuals found to be employees worked in fundamentally economic relationships. Moreover, and consistent with our approach, the Court in both cases examined the underlying purposes of the Act in determining whether paid union organizers and illegal aliens, respectively, were statutory employees. *Town & Country*, supra, 516 U.S. at 91; *Sure-Tan*, supra, 467 U.S. at 891–892. We have examined and rely upon those same statutory purposes in determining that Brown's graduate student assistants are not employees within the meaning of the Act.

Contrary to the dissent, our decision today is also consistent with the Board's recent decision in *Alexandria Clinic*, 339 NLRB No. 162 (2003), which considered whether a union satisfied Section 8(g)'s 10-day strike notice requirement when it issued a 10-day notice, but deliberately delayed the start of the strike for 4 hours after the time specified in the notice. Section 8(g) contains detailed requirements for strike notices at healthcare facilities, and the Board properly relied on those explicit statutory provisions in concluding that the notice in *Alexandria Clinic*, supra, was deficient. Section 2(3), by contrast, contains no detailed provisions for determining statutory employee status. That issue, therefore, must be examined in the context of the Act's overall purpose.

The dissent's further contention that we "fail to come to grips" with the statutory principles of Section 2(3) is nothing more than a disagreement with our interpretation and application of the statute. In reality, the *NYU* decision on which our colleagues rely was contrary to historic Board precedent. It was also contrary to Supreme Court and Circuit Court precedent, in that it read Section 2(3) out of the context in which it appears. We are unprepared to do so. As discussed above, the absence of "students" from the enumerated exclusions of Section 2(3) is not the end of the statutory inquiry. Rather, although Section 2(3) contains explicit exceptions for groups that must be excluded from the statutory definition of "employee," other groups also have been held to be excluded.

Moreover, even if graduate student assistants are statutory employees, a proposition with which we disagree, it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students. In this regard, the Board has the discretion to determine whether it would effectuate national labor policy to extend collective bargaining rights to such a category of employees. Indeed, the Board has previously exercised that discretion with respect to medical residents and interns. See *St. Clare's Hospital*, supra. Thus, assuming arguendo that the petitioned-for individuals are employees under Section 2(3), the Board is not compelled to include them in a bargaining unit if the Board determines it would not effectuate the purposes and policies of the Act to do so.

We also reject the dissent's contention that our policy is unsound because we "minimize the economic relationship between graduate student assistants and their universities." Contrary to the dissent, the "academic reality" for graduate student assistants has not changed, in relevant respects, since our decisions over 25 years ago. See, e.g., the description of graduate assistants in *Adelphi University*, 195 NLRB at 640. As the Board explained in *St. Clare's*, the conclusion that these graduate student assistants are primarily students "connotes nothing more than the simple fact that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic." 229 NLRB at 1003. That is the essence of the relationship between a university and graduate student assistants, and why we decline to accord collective bargaining rights to them.

Although the dissent theorizes how the changing financial and corporate structure of universities may have given rise to graduate student organizing, these theories do not contradict the following facts demonstrating that the relationship between Brown and its graduate student assistants is primarily academic: (1) the petitioned-for individuals are students; (2) working as a TA, RA, or proctor, and receipt of a stipend and tuition remission, depends on continued enrollment as a *student*; (3) the principal time commitment at Brown is focused on obtaining a degree, and, thus, being a *student*; and (4) serving as a TA, RA, or proctor, is part and parcel of the core elements of the Ph.D. degree, which are teaching and research. Although the structure of universities, like other institutions, may have changed, these facts illustrate that the basic relationship between graduate students and their university has not.

The dissent gives a few examples of collective-bargaining agreements in which there is assertedly no intrusion into the educational process. However, inasmuch as graduate student assistants are not statutory employees that is the end of the inquiry. Nevertheless, we will respond to our dissenting colleagues. Even if some unions have chosen not to intrude into academic prerogatives, that does not mean that other unions would be similarly abstemious. The certification sought by the Pe-

tioner here has no limitations. As discussed above, the broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process. In contrast to the broad power to bargain under Section 8(d) of the Act, all states have the authority to limit bargaining subjects for public academic employees, and at least some have exercised that authority.³¹

The dissent also faults us for acting in the absence of “empirical evidence,” and for allegedly engaging in policymaking reserved to Congress. Once again, inasmuch as graduate student assistants are not statutory employees, that is the end of our inquiry. It is our dissenting colleagues who are intruding on the domain of the Congress. In addition, as to the former point, 25 years of untroubled experience under pre-NYU standards seem to us a far more sound empirical basis for action than that offered by the studies our colleagues cite. And, as to the latter point, we note that Congress voiced no disapproval of the Board’s 25-year rule that graduate students are not employees. See *American Totalisator*, 243 NLRB 314 (1979), affd. 708 F.2d 46 (2d. Cir. 1983), cert. denied 464 U.S. 914 (1983) (“Congress is well aware of the Board’s historic stance of declining to assert jurisdiction over horseracing and dog-racing. . . . [a]bsent an indication from Congress that the Board’s refusal to assert jurisdiction is contrary to congressional mandate, we are not persuaded that we should exercise our discretion to reverse our prior holdings on this issue.”).

Finally, our colleagues suggest that we have concluded that “there [is] no room in the ivory tower for a sweatshop.” Although the phrase is a catchy one, it does nothing to further the analysis of this case. Our decision does not turn on whether our nation’s universities are ivory towers or sweatshops (although we do not believe that either has been shown). Rather, our decision turns on our fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act.

For the reasons we have outlined in this opinion, there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation’s excellent private educational system. Although under a variety of state laws, some states permit collective bargaining at public universities, we choose to interpret and apply a single federal law differently to the large numbers of private universities under our jurisdiction. Consistent with long standing Board precedent, and for the reasons set forth in this decision, we declare the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act.

ORDER

The Regional Director’s Decision and Direction of Election is reversed, and the petition is dismissed.

Dated, Washington, D.C., July 13, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Ronal Meisbrug, Member

³¹See, e.g., Cal. Gov’t Code Sec. 3562(q) (West 2004) (excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs), applied in *Regents of the University of California*, 23 PERC P 30025 (1998); see also *Central State University v. American Assn. of University Professors*, 526 U.S. 124 (1999) (per curiam) (Ohio statute exempting university professors’ instructional workload standards from collective bargaining does not violate equal protection); *University Education Association v. Regents of the University of Minnesota*, 353 N.W. 2d 534 (Minn. 1984) (criteria to determine promotion and tenure, review of faculty evaluations, and academic calendar, are matters of inherent management policy, which are not negotiable under labor relations statute); and *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 389 Mich. 96, 204 N.W. 2d 218 (1973) (scope of bargaining limited if subject matter falls clearly within the educational sphere).

NATIONAL LABOR RELATIONS BOARD

(SEAL)

(Members Liebman and Walsh, dissenting)

Collective bargaining by graduate student employees is increasingly a fact of American university life.¹ Graduate student unions have been recognized at campuses from coast to coast, from the State University of New York to the University of California. Overruling a recent, unanimous precedent, the majority now declares that graduate student employees at private universities are not employees protected by the National Labor Relations Act and have no right to form unions. The majority's reasons, at bottom, amount to the claim that graduate-student collective bargaining is simply incompatible with the nature and mission of the university. This revelation will surely come as a surprise on many campuses—not least at New York University, a first-rate institution where graduate students now work under a collective-bargaining agreement reached in the wake of the decision that is overruled here.²

Today's decision is woefully out of touch with contemporary academic reality. Based on an image of the university that was already outdated when the decisions the majority looks back to, *Leland Stanford*³ and *St. Clare's Hospital*,⁴ were issued in the 1970's, it shows a troubling lack of interest in empirical evidence. Even worse, perhaps, is the majority's approach to applying the Act. It disregards the plain language of the statute—which defines “employees” so broadly that graduate students who perform services for, and under the control of, their universities are easily covered—to make a policy decision that rightly belongs to Congress. The reasons offered by the majority for its decision do not stand up to scrutiny. But even if they did, it would not be for the Board to act upon them. The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions.

I.

We would adhere to the Board's decision in *NYU* and thus affirm the Regional Director's decision in this case.

In *NYU*, applying principles that had recently been articulated in *Boston Medical Center*,⁵ the Board held that the graduate assistants involved there were employees within the meaning of Section 2(3) of the Act, because they performed services under the control and direction of the university, for which they were compensated by the university. The Board found “no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students.” 332 NLRB at 1205. It was undisputed, the Board observed, that “graduate assistants are not within any category of workers that is excluded from the definition of ‘employee’ in Section 2(3).” *Id.* at 1206.

In turn, the Board rejected policy grounds as a basis for effectively creating a new exclusion. Rejecting claims that graduate assistants lacked a traditional economic relationship with the university, the Board pointed out that the relationship in fact paralleled that between faculty and university, which was amenable to collective

¹ See Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZAGA L. REV. 105, 106–107 (2004) (surveying history and status of graduate student unions); Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUCATION 187, 191–196 (2002) (same); Grant M. Hayden, “The University Works Because We Do”: *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233, 1236–1243 (2001) (same); Douglas Sorrelle Streit & Jennifer Allyson Hunkler, *Teaching or Learning: Are Teaching Assistants Students or Employees*, 24 JOURNAL OF COLLEGE & UNIVERSITY LAW 349, 358–370 (1997) (same). By one recent count, 23 American universities have recognized graduate student unions or faculty unions including graduate students, beginning in 1969 with the University of Wisconsin-Madison. See Coalition of Graduate Employee Unions, *Frequently Asked Questions about Graduate Employee Unions* at http://www.cgeu.org/FAQ_basics.html.

² *New York University*, 332 NLRB 1205 (2000) (*NYU*).

³ *Leland Stanford Junior University*, 214 NLRB 621 (1974).

⁴ *St. Clare's Hospital & Health Center*, 229 NLRB 1000 (1977).

⁵ *Boston Medical Center*, 330 NLRB 152 (1999). That decision concerned hospital interns, residents, and fellows (house staff) involved in medical training as well as in patient care. In upholding their right to engage in collective bargaining, despite their status as students, the Board overruled *St. Clare's Hospital*, supra. The Board's decision today explicitly notes that it “express[es] no opinion regarding” *Boston Medical Center*. We believe that *Boston Medical Center* was correctly decided.

bargaining. 332 NLRB at 1207–1208. The university’s assertion that extending collective-bargaining rights to graduate students would infringe on academic freedom was also rejected. Such concerns, the Board explained, were speculative. Citing 30 years of experience with bargaining units of faculty members, and the flexibility of collective bargaining as an institution, the Board concluded that the “parties can ‘confront any issues of academic freedom as they would any other issue in collective bargaining.’” *Id.*, quoting *Boston Medical Center*, *supra*, 330 NLRB at 164.

Here, the Regional Director correctly applied the Board’s decision in *NYU*. She concluded that the teaching assistants (TAs), research assistants (RAs), and proctors were statutory employees, because they performed services under the direction and control of Brown, and were compensated for those services by the university. With respect to the TAs, the Regional Director rejected, on both factual and legal grounds, Brown’s attempt to distinguish *NYU* on the basis that teaching was a degree requirement at Brown. Finally, she found that the TAs, RAs, and proctors were not, as Brown contended, merely temporary employees who could not be included in a bargaining unit. Accordingly, she directed a representation election, so that Brown’s graduate students could choose for themselves whether or not to be represented by a union.

We agree with the Regional Director’s decision in each of these respects.

II.

Insisting that it is simply restoring traditional precedent, the majority now overrules *NYU* and reverses the Regional Director’s decision. It concludes that because graduate assistants “are primarily students and have a primarily educational, not economic, relationship with their university,” they are not covered by the National Labor Relations Act and the Board cannot exercise jurisdiction over them. According to the majority, “[p]rinciples developed for use in the industrial setting cannot be ‘imposed blindly on the academic world.’”⁶

There are two chief flaws in the majority’s admonition. First, the majority fails to come to grips with the statutory principles that must govern this case. Second, it errs in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop.⁷ Before addressing those flaws, we question the majority’s account of Board precedent in this area.

A.

Seeking to avoid the consequences of overruling such a recent precedent, the majority contends that *Leland Stanford*, not *NYU*, correctly resolves the issue presented here. The majority argues, moreover, that *Leland Stanford* itself was consistent with a decision that came before it, *Adelphi University*.⁸ In fact, until today, the Board has never held that graduate teaching assistants (in contrast to certain research assistants and medical house staff) are not employees under the Act and therefore should not be allowed to form bargaining units of their own—or, indeed, enjoy any of the Act’s protections.

In *Adelphi University*, decided in 1972, the Board excluded graduate assistants from a bargaining unit of faculty members because they did not share a community of interest with the faculty, not because they were not statutory employees. 195 NLRB at 640. The Board pointed out, among other things, that “graduate assistants are guided, instructed, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.” *Id.* Nothing in the Board’s decision suggests that the graduate assistants could not have formed a bargaining unit of their own.

⁶The majority quotes from the Supreme Court’s decision in *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), in which the Court held that, given their role in university governance, the faculty members involved there were managerial employees, not covered by the Act. The Court made clear, however, that not all faculty members at every university would fall into the same category. 444 U.S. at 690 fn. 31. Following *Yeshiva*, the Board has continued to find faculty-member bargaining units appropriate. See, e.g., *Bradford College*, 261 NLRB 565 (1982).

⁷Graduate assistantships are modest, even at top schools. The Regional Director found that at Brown the “basic stipend for a fellowship, teaching assistantship, research assistantship, or proctorship is \$12,800 for the 2001–2002 academic year.” According to a 2003 report, the “average amount received by full-time, full-year graduate and first professional students with assistantships was \$9,800.” Susan P. Choi & Sonya Geis, “Student Financing of Graduate and First-Professional Education, 1999–2000,” National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education 22 (2003). It stands to reason that graduate student wages are low because, to quote Sec. 1 of the Act, the “inequality of bargaining power” between schools and graduate employees has the effect of “depressing wage rates.” 29 U.S.C. § 151.

⁸*Adelphi University*, 195 NLRB 639 (1972).

The *Leland Stanford* Board, as the majority acknowledges, “went further” in 1974. It concluded that because the research assistants (RAs) there were “primarily students” (citing *Adelphi University*), they were “not employees within the meaning of . . . the Act.” 214 NLRB at 623. How the conclusion followed from the premise was not explained. The rationale of *Leland Stanford*, moreover, turned on the particular nature of the research assistants’ work. The Board observed that:

[T]he relationship of the RA’s and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project’s needs.

Id. at 623. This narrow rationale is not inconsistent with *NYU*, where the Board actually applied *Leland Stanford* to exclude certain graduate assistants from the bargaining unit. 332 NLRB at 1209 fn. 10.

Finally, the majority cites *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), and *St. Clare’s Hospital*, supra, which involved medical interns, residents, and clinical fellows. The medical housestaff decisions, issued over the sharp dissents of then-Chairman Fanning, were correctly overruled in *Boston Medical Center*, supra, which the majority leaves in place.

Notably, in *St. Clare’s Hospital*, the Board made clear that while “housestaff are not ‘employees,’” the Board was *not* “renouncing entirely [its] jurisdiction over such individuals,” but rather was simply holding that they did not have “bargaining privileges” under the Act. 229 NLRB at 1003 (footnote omitted). The majority here does not seem to make this distinction—which would give graduate assistants at least some protections under the Act—and thus itself seems to depart from the precedent it invokes.

In sum, while the *NYU* Board did not write on a clean slate, it hardly abandoned a long line of carefully reasoned, uncontroversial decisions. And, as we will explain, much has changed in the academic world since the 1970’s.

B.

The principle applied in *NYU*—and the one that should be followed here—is that the Board must give effect to the plain meaning of Section 2(3) of the Act and its broad definition of “employee,” which “reflects the common law agency doctrine of the conventional masterservant relationship.” *NYU*, 332 NLRB at 1205, citing *NLRB v. Town & Country Electric*, 516 U.S. 85, 93–95 (1995). See also *Seattle Opera v. NLRB*, 292 F.3d 757, 761–762 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (opera’s auxiliary choristers are statutory employees, applying common-law test). Section 2(3) provides in relevant part that the “term ‘employee’ shall include any employee” 29 U.S.C. § 152(3) (emphasis added). Congress specifically envisioned that professional employees—defined in Section 2(12) in terms that easily encompass graduate assistants—would be covered by the Act.

We do not understand the majority to hold that the graduate assistants in this case are *not* common-law employees, a position that only Member Schaumber reaches toward.⁹ Here, the Board’s “departure from the common law of agency” with respect to employee status is unreasonable. Compare *Town & Country Electric*, supra, 516 U.S. at 94 (upholding Board’s interpretation of term “employee” as “consistent with the common law”). See also *Seattle Opera*, 292 F.3d at 765 fn. 11 (Board’s hypothetical “neglect of the common law definition could have rendered its decision arbitrary and capricious”).

Nothing in Section 2(3) excludes statutory employees from the Act’s protections, on the basis that the employment relationship is not their “primary” relationship with their employer. In this respect, the majority’s approach bears a striking resemblance to the Board’s original “economic realities” test for employee status, which

⁹Member Schaumber asserts that “graduate student assistants fit poorly within the common law definition of ‘employee.’” He maintains that graduate assistants are “not ‘hired’ to serve” in that capacity, that their work is “not performed ‘for’ the university, as such,” and that their stipends “are not a quid pro quo for services rendered.” We disagree in each respect, as a factual matter. As the Regional Director found, graduate assistants carry out the work of the university, not their own projects, and they are compensated for it. There can be no doubt, of course, that Brown had the right to control the performance of the graduate assistants’ work for the university, a key test for employee status at common law. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) (“A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master”). Graduate students are clearly neither volunteers nor independent contractors.

Congress expressly rejected when it passed the Taft-Hartley Amendments in 1947. That test was based on economic and policy considerations, rather than on common-law principles, but it did not survive.¹⁰

Absent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees. As the *NYU* Board observed, there is no such exclusion for "students." 332 NLRB at 1206. Cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–892 (1984) (observing that the "breadth of [the Act's] definition is striking" and noting lack of express exemption for undocumented aliens). Here, the majority cites nothing in the text or structure of the Act, nothing in the Act's legislative history, and no other Federal statute that bears directly on the issues presented. It goes without saying that the Board's own policymaking is bounded by the limits Congress has set.

The Supreme Court's decision in *Yeshiva*, supra, is instructive on this point. There, the Court considered whether university faculty members at one institution were managerial employees and so excluded from coverage. It observed that it could not decide this case by weighing the probable benefits and burdens of faculty collective bargaining. That, after all, is a matter for Congress, not this Court. 444 U.S. at 690 fn. 29 (citation omitted). Other Federal courts have made similar observations in analogous cases, choosing to follow the plain language of the Act, rather than "attempting to 'second guess' Congress on a political and philosophical issue." *Cincinnati Assn. for the Blind v. NLRB*, 672 F.2d 567, 571 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982) (refusing to find exception to Section 2(3) of Act for disabled workers employed in sheltered workshops).¹¹ In a recent case where the Act's language was far less clear, our colleagues themselves have insisted that the statutory text alone dictated the outcome—indeed, they were content to "examine a particular statutory provision [Section 8(g) of the Act] in isolation" (to quote their words here).¹² The approach taken in this case stands in sharp contrast.

The majority never addresses the language of Section 2(3), which the Supreme Court has described as "broad." *Town & Country Electric*, 516 U.S. at 90 (citing dictionary definition of "employee" as including any "person who works for another in return for financial or other compensation"). Instead, it proceeds directly to consult "Congressional policies for guidance in determining the outer limits of statutory employee status." The majority cites the exclusion for managerial employees, which is not based on the Act's text. But in that example, as the Supreme Court explained, the "legislative history strongly suggests that there . . . were . . . employees . . . regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974). Graduate assistants simply do not fall into that category.

The Board's decision in *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), quoted by the majority, does not support its position here. That case involved the unpaid staff of a noncommercial radio station, who did not receive compensation or benefits of any kind, and whose work hours were "a matter within their discretion and desire." Id. at 1273. The Board found "no economic aspect to their relationship with the Employer, either actual or anticipated." Id. at 1275 (emphasis added). "Unpaid staff," the Board observed, "do not depend upon the Employer, even in part, for their livelihood or for the improvement of their economic standards." Id. at 1276. Rather, the Board explained, unpaid staff "work[ed] out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community." Id. at 1275.

The relationship between Brown and its graduate assistants is clearly different in nature. Teaching assistants, the Regional Director found, "perform services under the direction and control of Brown"—they teach undergraduates, just as faculty

¹⁰ See *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968) (discussing Congressional overruling of *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). As we will explain, we believe that the economic realities here do support finding statutory coverage in any case.

¹¹ See also *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 404 fn. 21 (5th Cir. 1983) (rejecting argument that Board lacked jurisdiction over sheltered workshop and disabled workers employed there). We believe that the Board's approach in this area—the Board chooses to exercise jurisdiction only where the relationship between disabled workers and their employer is "typically industrial," as opposed to "primarily rehabilitative"—is ripe for reconsideration, particularly in light of the evolution of Federal policy toward disabled workers. See *NYU*, 332 NLRB at 1207 (discussing disabled-worker cases). The issue is now pending before the Board in *Brevard Achievement Center, Inc.*, No. 12–RC–8515 (review granted Aug. 23, 2000).

¹² *Alexandria Clinic*, 339 NLRB No. 162, slip op. at 3 fn. 8 (2003).

members do¹³—and “are compensated for these services by Brown,” by way of a stipend, health fee, and tuition remission. As for research assistants in the social sciences and humanities (who were included in the bargaining unit), the Regional Director observed that they “have expectations placed upon them other than their academic achievement, in exchange for compensation.”¹⁴ The proctors, finally, are “performing services that are not integrated with an academic program,” such as working in university offices and museums. Notably, the Regional Director found that Brown withholds income taxes from the stipends of teaching assistants, research assistants, and proctors and requires them to prove their eligibility for employment under Federal immigration laws.

The majority is mistaken, then, when it insists that the graduate assistants here do not receive “consideration for work,” but merely financial aid. While it is true, as the majority observes, that “all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship,” that fact does not foreclose a meaningful economic relationship (as well as an educational relationship) between Brown and the graduate assistants. The Act requires merely the existence of such an economic relationship, not that it be the only or the primary relationship between a statutory employee and a statutory employer.¹⁵

C.

Even assuming that the Board were free to decide this case essentially on policy grounds, the majority’s approach, minimizing the economic relationship between graduate assistants and their universities, is unsound. It rests on fundamental misunderstandings of contemporary higher education, which reflect our colleagues’ unwillingness to take a close look at the academic world. Today, the academy is also a workplace for many graduate students, and disputes over work-related issues are common. As a result, the policies of the Act—increasing the bargaining power of employees, encouraging collective bargaining, and protecting freedom of association—apply in the university context, too. Not only is the majority mistaken in giving virtually no weight to the common-law employment status of graduate assistants, it also errs in failing to see that the larger aims of federal labor law are served by finding statutory coverage here. Indeed, the majority’s policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education—a subject far removed from the Board’s expertise.

American higher education was being transformed even as the Board’s “traditional” approach to graduate student unionization developed. Nearly a decade before the Board decided *St. Clare’s Hospital*, distinguished scholar and Columbia University administrator Jacques Barzun described changes that were tearing “apart the fabric of the former, single-minded” American university. He warned that “a big corporation has replaced the once self-centered company of scholars.”¹⁶ In deciding to exercise jurisdiction over private, non-profit universities more than 30 years ago (and reversing longstanding precedent in doing so), the Board recognized this development.¹⁷

After the 1980’s, financial resources from governments became more difficult for universities to obtain.¹⁸ “[A]s financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, over-worked part- or full-time adjunct lecturers and graduate students to meet instruc-

¹³The Regional Director found that the number of teaching assistantships, and the assignment of assistants to particular courses, is tied to undergraduate enrollment. She also found that Brown had “failed to demonstrate that most teaching assistantships at Brown are undertaken in order to fulfill a degree requirement.”

¹⁴The Regional Director found “insufficient evidence . . . upon which to conclude that as a general rule the RAs in the social sciences and humanities departments perform research as part of their studies in order to complete their dissertations,” in contrast to RA’s in the physical sciences, who were not included in the unit.

¹⁵ See, e.g., *Seattle Opera*, 292 F.3d at 762 (“[T]he person asserting employee status [under the Act] does have such status if (1) he works for a statutory employer in return for financial or other compensation . . . and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed”).

¹⁶Jacques Barzun, *The American University: How It Runs, Where It Is Going* 3 (1968).

¹⁷See *Cornell University*, 183 NLRB 329, 331–333 (1970), overruling *Trustees of Columbia University*, 97 NLRB 424 (1951).

¹⁸See, e.g., Clark Kerr, *Troubled Times for American Higher Education: The 1990s and Beyond* 3 (1994).

tional needs.”¹⁹ By December 2000, 23.3 percent of college instructors were graduate teaching assistants.²⁰

The reason for the widespread shift from tenured faculty to graduate teaching assistants and adjunct instructors is simple: cost savings. Graduate student teachers earn a fraction of the earnings of faculty members.²¹

Two perceptive scholars have recently described the context in which union organizing among graduate students has developed. Their description is worth quoting at length:

The post World War II expansion of universities is a well-documented phenomenon. Enrollments, resources, and activities increased and diversified. Universities were transformed into mega-complexes. But by the late 1980s and throughout the 1990s, the realization spread that expansion was not limitless. In response to heightened accountability demands, universities adopted management strategies that entailed belt-tightening and restructuring of the academic workplace [M]any universities replaced full-time tenure-track faculty lines with non-tenure-line and part-time appointments.

Expansion of doctoral degree production has continued nonetheless. . . . The discrepancy between ideals and realities prompt graduate students to consider unionization a viable solution to their concerns and an avenue to redress their sense of powerlessness.

Among the primary reasons for graduate student unionization is the lengthened time required to complete a degree, coupled with an increased reluctance on the part of students to live in what they perceive as academic ghettos. Many older graduate students desire to start families, need health care coverage and job security, and perceive the faculty with whom they work to be living in comparative luxury. . . . [D]ata show that the unionization of these individuals is driven fundamentally by economic realities.

Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUC. No. 2, 187 at 191, 196 (2002) (emphasis added; citations omitted).

Describing the same process, another scholar observes that the “increased dependence on graduate assistantships has created a group of workers who demand more economic benefits and workplace rights.”²² The question, then, is whether the collective efforts of these workers will be protected by federal labor law and channeled into the processes the law creates. Given the likelihood that graduate students will continue to pursue their economic interests through union organizing—even those who live the life of the mind must eat—there are powerful reasons to apply the Act and so encourage collective bargaining to avoid labor disputes, as Congress envisioned.²³ The prospect of continued labor unrest on campus, with or without federal regulation, is precisely what prompted the Board to assert jurisdiction over private non-profit universities in the first place, three decades ago.²⁴

¹⁹ COMMITTEE ON PROFESSIONAL EMPLOYMENT, MODERN LANGUAGE ASSOCIATION, FINAL REPORT 3 (1997) at http://www.mla.org/resources/documents/rep_employment/profemployment1 (examining higher education’s pedagogical and professional crisis and proposing ways to increase the effectiveness of higher education).

²⁰ *Reliance on Part-Time Faculty Members and How They Are Treated, Selected Disciplines*, CHRON. HIGHER EDUC., Dec. 1, 2000, available at <http://chronicle.com/prm/weekly/v47/i14/14a01301.htm>. See also Hutchens & Hutchens, supra, *Catching the Union Bug*, 39 GONZAGA L. REV. at 126 (“In an effort to contain costs, colleges and universities have increasingly relied on graduate students and nontenure-track instructors”). Illustrating this trend, the New York Times recently reported that graduate students “teach more than half of the core courses that all Columbia [University] students must take.” Karen W. Arenson, *Pushing for Union, Columbia Grad Students Are Set to Strike*, NEW YORK TIMES, p. A-11 (April 17, 2004).

²¹ Ana Marie Cox, *More Professors Said to Be Off Tenure Track, for Graduate Assistants*, CHRON. HIGHER EDUC. (July 6, 2001) available at <http://chronicle.com/prm/weekly/v47/i43/43a01201.htm>. See also *Stipends for Graduate Assistants*, 2001, CHRON. HIGHER EDUC., Sept. 28, 2002, available at <http://chronicle.com/stats/stipends/>.

²² Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 153, 154 (2000). See also Hutchens & Hutchens, supra, *Catching the Union Bug*, 39 GONZAGA L. REV. at 126 (“[T]he reality at many institutions likely belies a picture of students carefully mentored by faculty in their employment capacities, especially in the context of teaching assistants.”).

²³ See Sec. 1, 29 U.S.C. § 151.

²⁴ See *Cornell University*, supra, 183 NLRB at 333.

The majority ignores the developments that led to the rise of graduate student organizing or their implications for the issue decided today. Instead, it treats the Board's 1974 decision in *Leland Stanford*, together with the 1977 decision in *St. Clare's Hospital*, as the last word. Like other regulatory agencies, however, the Board is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday," but rather must "adapt [its] rules and practices to the Nation's needs in a volatile changing economy." *American Trucking Associations v. Atchison Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967).²⁵ The majority's failure to do so in this case is arbitrary.

III.

At the core of the majority's argument are the twin notions that (1) issues related to the terms and conditions of graduate student employment are "not readily adaptable to the collective-bargaining process," *St. Clare's Hospital*, 229 NLRB at 1002; and (2) imposing collective bargaining will harm "academic freedom" (as the majority defines it) and the quality of higher education. Neither notion is supported by empirical evidence of any kind. In fact, the evidence refutes them.

How can it be said that the terms and conditions of graduate-student employment are not adaptable to collective bargaining when collective bargaining over these precise issues is being conducted successfully in universities across the nation? New York University, ironically, is a case in point, but it is hardly alone. The recently-reached collective bargaining agreement there addresses such matters as stipends, pay periods, discipline and discharge, job posting, a grievance-and-arbitration procedure, and health insurance. It also contains a "management and academic rights" clause, which provides that:

Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.

Collective Bargaining Agreement between New York University and International Union, UAW, AFL-CIO and Local 2110, Technical Office and Professional Workers, UAW (Sept. 1, 2001-Aug. 31, 2005), Art. XXII.²⁶ The NYU agreement neatly illustrates the correctness of the NYU Board's view that the institution of collective bargaining is flexible enough to succeed in this context, as it has in so many others, from manufacturing to entertainment, health care to professional sports.

The NYU agreement cannot be dismissed as an anomaly. The amicus briefs to the Board submitted by the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and the American Association of University Professors (AAUP) inform us of many other, established collective bargaining relationships between graduate student unions and universities.²⁷ To be sure, most involve public universities, but there is nothing fundamentally different between collective bargaining in public-sector and private-sector universities.²⁸ The majority concedes that the subjects of graduate student collective bargaining "give the appearance of being terms and conditions of employment." Obviously, they *are* terms and conditions of employment, as found in a particular setting.

There remains the majority's claim that collective bargaining can only harm "academic freedom" and educational quality. Putting aside the issue of the Board's authority to serve as an expert guardian of these interests, the question is one of evidence. Here, too, the majority's claims are not simply unsupported, but are actually

²⁵The Board's recent failure to face contemporary economic realities threatens to become a recurring theme of its decisions. See *MV Transportation*, 337 NLRB 770, 776 (2002)(Member Liebman, dissenting) (criticizing Board's reversal of successor-bar doctrine, despite large increase in corporate mergers and acquisitions that destabilize workplaces).

²⁶The collective-bargaining agreement is posted on the University's Internet website at <http://www.nyu.edu/hr/>.

²⁷The AFL-CIO, for example, cites bargaining relationships at the University of California, the University of Florida, the University of South Florida, the University of Iowa, the University of Kansas, the University of Massachusetts, Michigan State University, the University of Michigan, Rutgers, the City University of New York, New York University, the State University of New York, the University of Oregon, Temple University, the University of Wisconsin, and Wayne State University. Brief of Amicus Curiae AFL-CIO in Support of Petitioner at 36 (May 20, 2002). See also Julius & Gumpert, *supra*, *Graduate Student Unionization*, 26 Review of Higher Education at 192-193 (Table 1: "The Status of Graduate Student Unions in U.S. Institutions").

²⁸The majority points out that "states have the authority to limit bargaining subjects for public academic employees." But under the Act, not every subject of interest to graduate assistants would be a mandatory subject of bargaining. The Board presumably would be free to take into account the nature of the academic enterprise in deciding which subjects are mandatory and which merely permissive. See fn. 32, *infra* (discussing statutory bargaining obligations).

contradicted. The majority emphasizes that collective bargaining is “predicated on the collective or group treatment of represented individuals,” while the “educational process” involves personal relationships between individual students and faculty members. The issue, if one is presented at all by this difference, is whether the two processes can coexist. Clearly, they can. The evidence is not just the ongoing collective-bargaining relationships between universities and graduate students already mentioned. It also includes studies ignored by the majority, which show that collective bargaining has not harmed mentoring relationships between faculty members and graduate students.²⁹ These conclusions are not surprising. Collective bargaining is typically conducted by representatives of the university and graduate students’ unions, not individual mentors and their students.

After a careful review, scholars Daniel Julius and Patricia Gumport, for example, concluded not only that “fears that [collective bargaining] will undermine mentoring relationships . . . appear to be foundationless,” but also that data “suggest that the clarification of roles and employment policies can enhance mentoring relationships.”³⁰ Scholar Gordon Hewitt reached a similar conclusion based on an analysis of the attitudes of almost 300 faculty members at five university campuses with at least four-year histories of graduate-student collective bargaining. Summarizing the results of his survey, Hewitt observes that:

It is clear . . . that faculty do not have a negative attitude toward graduate student collective bargaining. It is important to reiterate that the results show faculty feel graduate assistants are employees of the university, support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. *It is even more important to restate that, based on their experiences, collective bargaining does not inhibit their ability to advise, instruct, or mentor their graduate students.*

Hewitt, *supra*, 29 *Journal of Collective Negotiations in the Public Sector* at 164 (emphasis added). Amicus AAUP echoes these views in its brief to the Board. These findings should give the majority some pause, as should the obvious fact that whether or not the rights of graduate student employees are to be recognized under the Act, economic concerns have already intruded on academic relationships.

Finally, the majority invokes “academic freedom” as a basis for denying graduate student employees any rights under the Act. This rationale adds insult to injury. To begin, the majority defines “academic freedom” so broadly that it is necessarily incompatible with *any* constraint on the managerial prerogatives of university administrators. But academic freedom properly focuses on efforts to regulate the “content of the speech engaged in by the university or those affiliated with it.” *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990). On the majority’s view, private universities should not be subject to the Act at all. But, of course, they are—just as are newsgathering organizations, whose analogous claims of First Amendment immunity from the Act were rejected by the Supreme Court long ago.³¹

The *NYU* Board correctly explained that, the threat to academic freedom in this context—properly understood in terms of free speech in the university setting—was pure conjecture. 332 NLRB at 1208 fn. 9. We hasten to add that graduate students themselves have a stake in academic freedom, which they presumably will be reluctant to endanger in collective bargaining. As demonstrated in the amicus brief of the AAUP (a historical champion of academic freedom), collective bargaining and academic freedom are not incompatible; indeed, academic freedom for instructors can be strengthened through collective bargaining.³²

²⁹ See Julius & Gumport, *supra*, *Graduate Student Unionization*, 26 *Review of Higher Education* at 201–209; Hewitt, *supra*, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 *Journal of Collective Negotiations in the Public Sector* at 159–164.

³⁰ Julius & Gumport, *supra*, 26 *Review of Higher Education* at 201, 209.

³¹ *Associated Press v. NLRB*, 301 U.S. 103, 130–133 (1937).

³² The majority contends (1) that the “imposition of collective bargaining on the relationship between a university and its graduate students . . .” would limit the university’s [academic] freedom to determine a wide range of matters;” and (2) that “because graduate student assistants are students, those limitations intrude on core academic freedoms in a manner simply not present in cases involving faculty employees.” We disagree with both claims.

First, under Sec. 8(d) of the Act, collective bargaining would be limited to “wages, hours, and other terms and conditions of employment” for graduate student assistants. 29 U.S.C. § 158(d). And with respect to those mandatory subjects of bargaining, the “Act does not compel agreements between employers and employees,” just the “free opportunity for negotiation,” as the *NYU* Board correctly observed. 332 NLRB at 1208, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

Second, the basis for the majority’s distinction between faculty member bargaining and graduate-assistant bargaining escapes us. In our view, there is no harm to genuine academic free-

“[W]e declare the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act,” says the majority. But the majority has overstepped its authority, overlooked the economic realities of the academic world, and overruled NYU without ever coming to terms with the rationale for that decision. The result leaves graduate students outside the Act’s protection and without recourse to its mechanisms for resolving labor disputes. The developments that brought graduate students to the Board will not go away, but they will have to be addressed elsewhere, if the majority’s decision stands. That result does American universities no favors. We dissent.

Dated, Washington, D.C. July 13, 2004

NATIONAL LABOR RELATIONS BOARD

Wilma B. Liebman, Member

Dennis P. Walsh, Member

STATEMENT OF HON. WILMA B. LIEBMAN, MEMBER, NATIONAL LABOR RELATIONS BOARD

Senator SPECTER. Thank you very much, Mr. Battista.

We now turn to a member of the NLRB, Ms. Wilma Liebman, serving her second term, appointed by President Clinton and confirmed for a term which expired in the year 2002, subsequently reappointed by President Bush. Prior to her appointment to the NLRB, she served in the Federal Mediation and Conciliation Service, as counsel to the Bricklayers and Allied Craftman, and the International Brotherhood of Teamsters. A Philadelphia native, she has a bachelor’s from Barnard and a law degree from George Washington University.

Thank you for joining us, Ms. Liebman, and we look forward to your testimony.

Ms. LIEBMAN. Mr. Chairman, thank you for the chance to testify today about the Board’s recent decision involving university graduate student assistants, the *Brown University* case. Along with my Board colleague Dennis Walsh, I dissented from that decision, which overruled an earlier unanimous decision in which I also participated involving New York University.

Our dissent explains in detail why we thought that the Brown graduate students met the definition of employee reflected in the National Labor Relations Act. The Supreme Court has told us that the definition is very broad and that we must be guided by common law principles.

The question then is whether certain graduate students work for their universities in return for some type of compensation. With respect to the teaching assistants, research assistants, and proctors at Brown, the answer is yes. They teach classes, they do research, and perform services in university offices. In return, they receive stipends, health benefits, and tuition remission.

In the majority’s view, the graduate student assistants were primarily students and had a primarily educational, not economic, re-

dom in either case. But under the majority’s view, faculty-member bargaining would interfere with the prerogatives of university management at least as much as graduate-student bargaining would. It is surely the subjects of bargaining that matter, not the identity of the bargaining party. In that respect, the similarities between graduate assistants and faculty members (in contrast to clerical or maintenance staff members, for example) is clear.

lationship with their university. But this standard, the dissent argued, is not based on the language of the Act, on the legislative history, on the Supreme Court's decisions, or on common law principles. Rather, it is based on the majority's view that the academic world and the economic world are sharply separated.

But this is an outdated view. To quote the scholar Jacques Barzun, "A big corporation has replaced the once self-centered company of scholars." American universities are workplaces for many people, including many graduate students. Indeed, studies show that over the last few decades universities have become more and more dependent on the work of graduate students. At many schools, teaching assistants have replaced tenure track faculty. Statistics show that by December 2000 nearly one-quarter of college instructors were graduate teaching assistants.

To be blunt, graduate students are cheaper. Yet these students have the same problems and concerns that other workers do: their wages, their health care benefits, their workloads—all the things that labor unions negotiate with employers.

The majority said that the issues that concern graduate student workers are not suitable for collective bargaining, but graduate student unions and universities can bargain successfully. They do so at public universities and they did so at NYU following the Board's decision involving that school.

The majority also argued that collective bargaining is a threat to educational quality and academic freedom. But it cited no empirical evidence that the *NYU* decision had created problems, and studies show that collective bargaining does not interfere with the mentoring relationships between faculty members and graduate students.

Academic freedom in turn does not mean giving university administrators an unlimited managerial prerogative. As the Supreme Court has explained, academic freedom is a form of free speech. Collective bargaining does not interfere with free speech in a university setting.

The result of the Board's decision, if it stands, is that graduate student workers at private universities have no right to organize labor unions or bargain collectively. In fact, they can be punished for trying. Of course, this does not mean that the issues which drive graduate students to organize will go away. It simply means that labor disputes involving graduate students will not be governed by the Federal statute that was designed to stabilize labor relations.

PREPARED STATEMENT

Finally, viewing the *Brown* decision in a broader context, the Board's recent trend has been not only to interpret the statute's protections narrowly, but also to limit the coverage of the Labor Act itself. Fewer workers now enjoy fewer rights. As the statute's circle of protection diminishes, so too does its relevance in the American workplace.

I thank you and would be happy to answer any questions.
[The statement follows:]

PREPARED STATEMENT OF WILMA B. LIEBMAN

Mr. Chairman and Members of the Subcommittee: My name is Wilma Liebman, and I have been a member of the National Labor Relations Board (NLRB) since 1997, when I was first appointed by President Clinton. I was reappointed by President Bush in 2002. Before joining the Board, I held senior positions at the Federal Mediation and Conciliation Service (FMCS). I have also served as an attorney for two labor unions, the Bricklayers and Allied Craftsmen and the International Brotherhood of Teamsters. I began my legal career as a staff attorney for the NLRB. With my colleague Dennis Walsh, I am now one of two Democratic members on the five-member Board.

Thank you for the opportunity to testify today about the Board's recent decision in the *Brown University* case.¹ The issue in *Brown* was whether certain graduate students—who also worked for the university as teaching assistants, research assistants, and proctors—were employees protected by the National Labor Relations Act. In my view, they clearly were. But a three-member majority of the Board held they were not and overruled an earlier decision to the contrary, *New York University (NYU)*, which issued in 2000.² My colleagues cited no empirical evidence that *NYU* had created problems.

I had been in the majority in the *NYU* case, but in *Brown*, I dissented, along with Member Walsh. Our dissent explains our reasoning in detail, and I would ask that it be made part of the hearing record. With your permission, I will highlight the dissent's arguments.

The National Labor Relations Act is nearly 70 years old, but it still plays a vital role in the American workplace, by allowing workers to join together (if they choose) to improve their working conditions. Although the Act was written at a time when manufacturing dominated our economy, the statute has been applied successfully to a wide range of industries, from health care to professional sports to the media.

The *Brown* case raises important issues about collective bargaining in private-sector higher education. The Board's role in this debate is to interpret and apply the Act. We are guided by the language of the statute, by the legislative history, by the decisions of the Supreme Court, and (within these limits) by our views of sound labor relations policy. Questions of statutory coverage are fundamental, because they determine which workers are protected by the Act—and which are not. As I will explain, the Act defines covered employees very broadly, subject to a few specific exclusions. Broad statutory coverage, consistent with the intent of Congress, is critical to the effectiveness of the law.

Focusing on policy, the Board majority in *Brown* concluded that collective bargaining by graduate student assistants is incompatible with the nature and mission of universities. I strongly disagree. But the majority's first mistake was in focusing too quickly on policy. As Member Walsh and I argued in our dissent, the starting point should have been the statute. By that, I mean asking how the National Labor Relations Act defines employees and then deciding whether graduate student assistants meet that definition, whether or not the answer seems like good policy or bad policy.

Graduate student assistants do meet the statutory definition of an employee. Section 2(3) of the Act simply says that “the term ‘employee’ shall include any employee.” As you can see, the Act's definition is circular. But the Supreme Court has made clear that when a federal statute defines “employee” this way, the definition must be understood by looking to the common law. The judge-made common law has developed a test for deciding whether a worker is an employee (or instead falls into some other category, like a volunteer or an independent contractor). In its *Town & Country Electric* decision,³ the Supreme Court held that the common-law definition of employee applies under the National Labor Relations Act.

The common-law definition, in turn, says that a person is an employee if he works for another in return for financial or other compensation. Many graduate student assistants, including the graduate students in the *Brown* case, meet this definition. They perform work, such as teaching classes, doing research, or providing services in university offices. And they receive compensation, such as stipends, health benefits, and tuition remission for performing that work. Because the Act incorporates

¹ *Brown University*, 342 NLRB No. 42 (July 13, 2004).

² *New York University*, 332 NLRB 1205 (2000). The *Brown* decision also leaves in question the employee status of hospital residents and interns. *NYU* was based on the reasoning of the Board's decision in *Boston Medical Center*, 330 NLRB 152 (1999), which held that residents and interns were statutory employees. In *Brown*, the majority took no position on whether *Boston Medical Center* was correctly decided. Member Walsh and I believe that it was. The Board will likely confront this issue soon.

³ *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

the common-law definition of employee, graduate students are protected by the Act if they meet that definition, even if they are also students. That is the basic position of the dissent in *Brown*.

My colleagues in the majority, of course, took a different position. In their view, the graduate student assistants at Brown were “primarily students” and they had “a primarily educational, not economic, relationship with their university.” As a result, the majority said, the graduate students were not employees under the Act. The short answer to the majority’s argument is that there is no basis for this test. It is not based on the language of the Act, or on the Act’s legislative history, or on the Supreme Court’s decisions, or on common-law principles.

What the majority’s position is based on, it seems to me, is its view of policy. For the reasons I have explained, I do not believe that the Board is free to create an exclusion from statutory coverage, where Congress did not.⁴ That exclusion means the graduate student assistants have no rights at all under the National Labor Relations Act. They have no right to form unions and no right to engage in collective bargaining. In fact, they can be punished by universities for even trying to take those steps. That is a very harsh result.

Let me turn now to the policy issues raised by the *Brown* case. As I suggested before, I do believe that Congress intended the Board to help make federal labor relations policy, based on the Board’s expertise in that area. In this case, however, the Board exceeded its policy-making authority. But putting that issue aside, I also think that the majority’s position is wrong purely as a matter of policy. It reflects an outdated view of how universities work.

The majority saw a sharp separation between the academic world and the economic world. As Member Walsh and I pointed out in our dissent, that separation does not really exist. To quote the scholar Jacques Barzun, “a big corporation has replaced the once self-centered company of scholars.”⁵ Universities are workplaces for many people, including many graduate students. Those students have the same problems and concerns that other workers do. They may have families to support. They are concerned about their wages, their health-care benefits, their workloads—about all the things that labor unions negotiate with employers.

Our colleagues at the Board, unfortunately, were blind to the dramatic changes that have occurred in higher education. In their view, everything is the same as it was thirty years ago. But over the last few decades, studies show, American universities have become more and more dependent on the work of graduate students. At many universities, graduate student teaching assistants have replaced tenure-track faculty members. The *Brown* dissent cited statistics showing that by December 2000, nearly one quarter of college instructors were graduate teaching assistants. To be blunt, graduate students are cheaper—and, of course, they will stay cheaper if they cannot unionize.

There is nothing new about collective bargaining in a university setting. The Board first exercised jurisdiction over private universities in 1970, in the *Cornell University* decision.⁶ University professors, for example, are covered by the Act, except where their role in university governance makes them “managerial” employees. Finally, both faculty and graduate student unions are common at public universities, which lie outside of the Board’s jurisdiction.

The question, then, is why graduate students should not be permitted to organize unions, if they wish. The *Brown* majority gave two basic reasons: (1) that the work-related issues that concern graduate students are not suitable for collective bargaining; and (2) that collective bargaining would threaten academic freedom and the quality of higher education. Neither reason strikes me as persuasive.

First, graduate student unions and universities can and do bargain successfully over terms and conditions of employment. They certainly do so at public universities. And, in the wake of Board’s 2000 decision involving New York University, they did so at NYU, where a four-year collective bargaining agreement was reached in September 2001.

As for the supposed threat to academic freedom and educational quality, it seems dubious, to say the least. The *Brown* majority emphasized the importance of personal relationships between faculty members and graduate students. The dissent, however, cited studies showing that collective bargaining has not harmed mentoring relationships. The majority pointed to no contrary evidence.

⁴Very recently, the Board did essentially the same thing, by excluding disabled workers in rehabilitative settings from the coverage of the Act, even where they, too, met the common-law definition of employees. Member Walsh and I also dissented in that case, *Brevard Achievement Center*, 342 NLRB No. 101 (Sept. 10, 2004).

⁵Jacques Barzun, *The American University: How It Runs, Where It Is Going* 3 (1968).

⁶*Cornell University*, 183 NLRB 329 (1970).

Nor does collective bargaining threaten academic freedom, properly understood. Academic freedom does not mean the unlimited managerial prerogative of university administrators. Rather, as the Supreme Court has explained, academic freedom means freedom from attempts to regulate the “content of the speech engaged in by the university or those affiliated with it.”⁷ Collective bargaining is not a restriction on free speech in the university setting. If university professors can engage in collective bargaining without endangering academic freedom, then surely graduate student assistants can, too. Notably, the collective bargaining agreement at New York University contains a “management and academic rights” clause, making clear that the University has sole discretion to decide “who is taught, what is taught, how it is taught and who does the teaching.”

In our dissent, Member Walsh and I said that “[c]ollective bargaining by graduate student employees is increasingly a fact of American university life.” If it stands, the Board’s decision in *Brown* likely will cut that development short, at least at private universities. That result is unfortunate. The issues that drive graduate students to organize unions will not go away. For many decades, the National Labor Relations Act has been an effective tool for channeling labor disputes into peaceful collective bargaining. Under *Brown*, the Act cannot serve the purpose that Congress intended.

The *Brown* decision, finally, should be understood in its larger context. The Board’s recent trend has been not only to interpret the Act’s protections narrowly, but also to limit the coverage of the Act itself. Fewer workers now enjoy fewer rights. Graduate student assistants and disabled workers in rehabilitation programs are the latest examples. Growing numbers of contingent workers are also at risk, if the Board classifies them as independent contractors (a statutory exclusion). As the Act’s circle of protection diminishes, so does its relevance in the American workplace.

I would be happy to answer your questions.

REVERSAL OF PRECEDENT

Senator SPECTER. Thank you very much, Ms. Liebman.

It is an unusual situation to have a ruling by the NLRB in the year 2000 which overturns 25 years of NLRB decisions that graduate assistants are not employees and then to have only 4 years later a shift on that. What were the factors, Ms. Liebman? You were a member of the Board which reversed 25 years of experience. What were the factors that led you to that change of legal interpretation?

Ms. LIEBMAN. Well, first of all, the *NYU* decision followed another decision involving *Boston Medical Center*, in which the Board reversed older precedent and decided that interns and residents were employees under the National Labor Relations Board.

Senator SPECTER. How long before the year 2000 was that decision?

Ms. LIEBMAN. I think that was the year before, 1999.

Senator SPECTER. Okay, so you have a longstanding law. The concerns which are present turn on legal interpretation and to have a three to two decision along party lines in the year 2004 raises an obvious issue as to whether there is a political consideration as opposed to a legal consideration. When you have a decision in the year 2000 or 1999 overturning longstanding precedents, the first question arises, which I put to you, Ms. Liebman, and to you, Mr. Battista, will be the same question as to reversal: But what factors led to a reversal when you are dealing with a question of law, not a question of policy or a question of anything to do with the political arena, not public policy but law? We like to think there is some objectivity and certainty as to the legal conclusions.

⁷ *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990).

Ms. LIEBMAN. Mr. Chairman, the *Boston Medical* decision in 1999 and the *NYU* decision which followed it were based on the majority's view that the law, correctly interpreted, allowed for the graduate student assistants or the interns and residents to be treated as statutory employees because they met the common law—

Senator SPECTER. Well, had anything changed when you considered the *Brown* case from the decision before which had held to the contrary?

Ms. LIEBMAN. From the *Brown* decision?

Senator SPECTER. Well, had anything changed from the 1999 or 2000 decision which reversed longstanding law? Had anything changed in the interim to warrant that kind of change in legal interpretation?

Ms. LIEBMAN. The composition of the Board changed.

Senator SPECTER. Well, that is not necessarily a very good reason. If there had been an evolving factual situation or underlying public policy considerations changing—

Ms. LIEBMAN. Certainly from the perspective of the dissent nothing had changed, and nothing was argued by the majority in *Brown* to show that there was empirical evidence—

Senator SPECTER. I am not on *Brown* right now. I am on the decision in the year 2000 and 1999.

Ms. LIEBMAN. Well, things had changed in universities. Certainly universities had become more and more dependent on the use of teaching assistants for teaching classes, as I indicated in the statement.

Senator SPECTER. But had the relationship between the teaching assistants and the universities changed from the time the assistants were determined not to be employees until—a unanimous decision in the year 2000 reversed that policy.

Ms. LIEBMAN. That is right. The earlier decision was really based on a policy decision that they were primarily students engaged in an educational relationship rather than an economic relationship. So in essence the majority in 1999 and 2000 decided to part with that policy rationale and look strictly at the language of the statute, which in our view demanded the result that they be treated as statutory employees and common law employees.

Senator SPECTER. Mr. Battista, what changed from the decision in the year 2000 to the *Brown* decision except for a change in the composition of the Board?

Mr. BATTISTA. Senator, let me preface my remarks by saying that I believe the law should have some predictability and that practitioners and people who are governed by the law should have a feel for what the law is and it really should not change unless there are changed circumstances or we are as a Board firmly convinced that the underlying decision that we are looking at should be reversed, that it was wrongly decided.

When *NYU* was decided, it was decided by three members of the Board: Chairman Truesdale, members Liebman and Hurtgen. With regard to the other two Board seats—one position was vacant and one member of the Board did not participate. So when member Liebman says it is a unanimous decision, it was, but it was not a decision of the full Board. That was a factor we looked at.

Two, we thought——

Senator SPECTER. It was not a decision of the full Board? How many members were there?

Mr. BATTISTA. There were only three of the five. One position was vacant and one member did not participate.

Senator SPECTER. But it was unanimous?

Mr. BATTISTA. It was unanimous.

Senator SPECTER. That is as many votes as you had when you overturned it?

Mr. BATTISTA. That is correct.

As a majority, we looked at *NYU* and thought it was wrongly decided. At least I can speak for myself: I thought it was wrongly decided.

Senator SPECTER. Well, you thought it was wrongly decided. What weight did you give to precedent, to *stare decisis*?

Mr. BATTISTA. I gave a great deal of emphasis to the fact that there had been 25 years of Board precedent that had stood the test of time, both as far as the courts and the Congress were concerned, and I thought that decision was correct. I viewed our action as re-establishing a long established precedent.

Senator SPECTER. Well, now you are talking about the precedent up to the 2000 decision.

Mr. BATTISTA. That is correct.

Senator SPECTER. My question to you was different than that. My question to you was what weight did you give to the precedent or *stare decisis* on the decision which you overturned?

Mr. BATTISTA. I gave little weight to it because, frankly, it was a decision of rather short duration and, frankly, a decision that I thought, personally speaking, was erroneous. I gave a lot of weight to the 25 years that had been the previous precedent and to the fact that the common law test for master-servant cannot be decided in a vacuum. I think that the Supreme Court had told us in *Town and Country* that when we interpret terms like “employee” we are given great deference and we have to do so in looking at the objectives of the Act. Quite frankly, the objectives of the Act in my view were that the Act governs primarily economic relationships and not primarily academic relationships, and I personally viewed this as a primarily academic relationship and not covered by the Act.

Senator SPECTER. Mr. Battista, when the University of Pennsylvania students voted on February 26 and 27 of the year 2003 on this issue, their ballots were not counted because of the consideration of the *Brown University* case. But why were not at least the ballots counted so there would be a determination as to what had occurred at the election, even if the law was possibly to or likely to be changed?

Mr. BATTISTA. Senator, we followed our standard procedure when a request for review is filed—in other words, the regional director came down with a decision in *Pennsylvania* finding that, in accordance with *NYU*, the graduate student assistants were employees. That was appealed by the University of Pennsylvania. There was a request for review filed.

That request for review was granted by the Board. Once that request for review was granted, the standard procedure for the Board is to conduct the election and impound the ballots pending action

on the request for review, final action on the request for review. That was held in abeyance until *Brown* was decided and then the *Pennsylvania* case, along with a number of other cases, were then remanded back to regional directors for action in accordance with the *Brown* decision.

Senator SPECTER. Well, did you review the *University of Pennsylvania* decision or did you just follow your change in legal interpretation on the *Brown* case?

Mr. BATTISTA. What we did is remanded it back for the regional director to make a decision in accordance with *Brown*.

Senator SPECTER. Well, that was after, that was after the *Brown* decision.

Mr. BATTISTA. That is correct.

Senator SPECTER. The concern I have, Mr. Battista, is that you have a year and a half delay, from February 2003 until July 2004, and you have the *University of Pennsylvania* election occurring under existing law where the students are employees. Why not follow the existing law? If you are going to reverse it later, sufficient unto the day when you reverse it?

Mr. BATTISTA. Well, because one of the two parties, in this case the University of Pennsylvania, had filed a request for review, and the normal Board procedure in all cases is to try to expedite that request for review and action on it.

Senator SPECTER. Well, did you expedite it?

Mr. BATTISTA. We attempted. We made a decision on it and we granted the review, and I think that took place before my appointment to the Board. Then that issue was held in abeyance until the issue was decided—

Senator SPECTER. Well, is it customary when you grant requests for a review to have it pending for a year and a half before the review is made?

Mr. BATTISTA. It is not unusual where you have got a very significant case, and this obviously was a significant case. These issues were significant issues.

We would like to dispose of the cases much more quickly than a year and a half, but that is not always possible.

Senator SPECTER. Are you underfunded, Mr. Battista?

Mr. BATTISTA. I think, Senator, that we can always use more money, but the fact of the matter is I think that the President's budget is just fine.

Senator SPECTER. I take that to be a no.

Mr. BATTISTA. I think that that is correct. We could always use more.

Senator SPECTER. Well, this subcommittee funds the NLRB. There was an effort made to cut the funding by 30 percent back in 1996 and this subcommittee took the lead in seeing to it that that was not done and that there have been additions to the funding.

But I am not happy to see a year and a half's delay. I think there ought to be a much prompter decision, especially when it is not the initial decision; it is a decision for reconsideration. Even if you have another case pending, it seems to me that there is no great harm in counting the ballots where the failure to count the ballots has an overtone of secrecy or suppression.

The concerns I have, I think about Justice Roberts' decision in the case in the mid-30s on the Supreme Court where there was a reversal and he made a famous statement about: "This decision is like a railroad ticket, good for this day only." Where there is a reversal on law and it comes down along the lines of the appointees, it obviously raises concerns.

I would urge you to try to work it out on the Board to find a way, as Chief Justice Warren did in the segregation case, where there are hotly contested issues and a lot of views. You are not under that kind of scrutiny, to see if you cannot find some way to accommodate and have decisions which at least do not appear to be partisan.

Mr. BATTISTA. Let me just respond if I could briefly to that, Senator.

Senator SPECTER. Sure.

Mr. BATTISTA. With respect to the various cases that come before us, I do not decide them on a partisan basis. I decide them on what I believe is a correct statement of the law. There was a case earlier in my term, *San Manuel Casino*. That was a case on whether or not the jurisdiction of the Board should extend over to commercial Indian casinos on tribal lands. I sided with member Liebman and member Walsh on that because I believed that that was a correct decision. That was one Republican and two Democrats.

Similarly, with *Management Training* I sided with member Liebman to form a majority to sustain that principle. So that happens frequently.

It is not unusual, though, when you get three or four major cases—and we have only had about five or six, I think—that sometimes voting will fall along party lines. But it is not a partisan thing. It is really that that is the shared view of the majority.

Senator SPECTER. Party lines but not partisan, okay.

Ms. Liebman, in light of your statement that the only thing that changed was the composition of the Board, do you want to disagree with Mr. Battista's last answer?

Ms. LIEBMAN. No. I should say I do not believe that I said the only thing that changed was the composition of the Board. Certainly the only thing that changed between 2000 and 2004 was the composition of the Board.

But between the earlier precedent and 1999–2000 obviously the workplace has changed enormously, our economy has changed enormously. While we have great respect for stare decisis, an administrative agency is supposed to be attuned to changes in the economy, changes in the workplace, and there will sometimes be reversals of precedent based on changing conditions. I think it is our obligation to respond to changing conditions.

Nonetheless, the NLRB is a political body and there are likely to be changes of precedent, changes of view, as the composition of the Board changes. That unfortunately may be the political reality. Thank you.

Senator SPECTER. Well, okay. Those two answers suggest an appropriate degree of collegiality on your Board.

Mr. BATTISTA. There is, Senator, thank you.

Senator SPECTER. That is good to hear. We could use a little more of it in the Senate.

Mr. BATTISTA. Thank you.

STATEMENT OF CHRISTINA COLLINS, GRADUATE STUDENT AND Ph.D. CANDIDATE, UNIVERSITY OF PENNSYLVANIA, AND POLITICAL DIRECTOR, GRADUATE EMPLOYEES TOGETHER-UNIVERSITY OF PENNSYLVANIA

Senator SPECTER. Thank you very much.

We turn to our second panel: Mr. John Langel and Ms. Christina Collins. Ms. Collins is a sixth year graduate student at the University of Pennsylvania, working on a joint Ph.D. in history and education and a certificate in urban studies. She has been a research and teaching assistant at both the Graduate School of Education and the History Department for 5 years, one of the founding members of the Graduate Employees Together-University of Pennsylvania, and currently serves as its political director. Thank you for joining us, Ms. Collins, and the floor is yours.

Ms. COLLINS. Thank you, Senator Specter, and good morning. My name is Tina Collins. I am a sixth year doctoral candidate at Penn. During my first 5 years at Penn, as you mentioned, I was employed as a research and as a teaching assistant, working in both the Graduate School of Education and the History Department. I have taught both undergraduate and graduate students at Penn.

I am also a member of GET-UP, the Graduate Employees Together-University of Pennsylvania, which is a union organizing campaign which seeks to represent about 1,000 teaching and research assistants at the university. We are affiliated with the American Federation of Teachers.

I appreciate the opportunity to discuss the recent NLRB decision with you today which overturned the rights of graduate employees at private universities to bargain with their employers. The *NYU* decision in 2000 led a group of us at Penn to begin meeting about what could be done at our school and we looked to 3 decades of collective bargaining by grad employees at some of the most prestigious public universities in the country as a model for what we might accomplish at Penn.

Grad teachers and researchers at the Universities of Wisconsin, Michigan, California, and a number of other schools have been recognized and gained the right to bargain contracts with their administrations. These are premier research centers, which have not suffered any ill effects as a result of grad unionization.

Today, though, I want to talk about what grad assistants do, which I believe will make it obvious that we are indeed employees of our universities. My own first year of teaching in the history department I think provides a good illustration of these duties. I was assigned a class in Latin American history, even though I had never taken a graduate course in that field. I was not given training, office space, a phone line, or a computer.

Each week I spent approximately 20 hours working for the university. I met with the professor and another teaching assistant before the course began and then for about an hour a week to discuss the readings and the assignments. Like any other university instructor, I also prepared lesson plans and led my own weekly discussion sections.

Additionally, I held weekly office hours for students. These were usually held in coffee shops or other public spaces because most

teaching assistants do not get offices. I was also available to students by e-mail and by phone, including during evenings and on weekends. Students routinely asked me for academic advice and sent me drafts of papers to review. In addition, I was responsible for grading my students' exams and for calculating their final grades. In addition to these duties as an instructor, I was also taking four graduate classes of my own.

What I have just outlined is not unusual for teaching assistants throughout Penn. And for performance of these duties, most teaching and research assistants in the Graduate School of Arts and Sciences currently receive an annual salary of \$15,750. However, many other graduate employees at the university make less. Compensation is therefore a very significant issue to our members, especially nontraditional students who may have family responsibilities, as well as international students, who are legally barred from seeking other employment options.

According to a recent survey of our members, their average annual rent is more than half of their stipends. A majority also said that the funds that they receive are not sufficient to cover their living expenses.

Health insurance is another major concern. While some departments began paying health insurance premiums for graduate employees soon after our union campaign began, many are still expected to pay the premium out of their stipends. The premium has increased every year that I have been at Penn, most recently this year by 10 percent. One recent Ph.D. recipient had to make the choice in his last year of study of whether to add his wife or his infant son to the health insurance plan because their family could not afford to do both. We should not have to make this choice at an institution as wealthy as Penn.

These growing inequities in compensation and in benefits have led us to seek a collective voice for dealing with the university, which is the largest private sector employer in Philadelphia. Our goal is simple: a contract with the university that both serves the interests of our members and improves the quality of education at Penn.

I believe the NLRB decision represents a significant misinterpretation of the law. Graduate teaching and research assistants in the private sector, like the more than 40,000 graduate employees who participate in collective bargaining at public universities, are clearly employees who provide valuable services. Without our work, institutions like Penn would need to hire other employees to do our jobs.

We find the argument that we have no right to form a union unacceptable in a democratic country. Our work is essential to Penn and we are proud of the high quality research and instruction we deliver, even under sometimes difficult conditions.

PREPARED STATEMENT

I thank you for examining the impact of this decision on graduate employees and I hope that you will consider legislation that explicitly protects our basic right as graduate employees to form unions at private colleges and universities. Doing so will send a

strong message that the work of grad assistants is an essential part of higher education in America.

I welcome any questions you may have about my testimony.
[The statement follows:]

PREPARED STATEMENT OF CHRISTINA COLLINS

Good morning Chairman Specter, Ranking Member Harkin and members of the subcommittee.

My name is Tina Collins, and I am a sixth-year doctoral candidate pursuing a joint Ph.D. in history and education at the University of Pennsylvania (Penn). During my first five years at Penn, I was employed by the university as a research and teaching assistant, working in both the Graduate School of Education and the History Department, and teaching undergraduate and graduate students. I am also a member of Graduate Employees Together-University of Pennsylvania (GET-UP/AFT), a union organizing campaign seeking to represent nearly 1,000 graduate-level teaching and research assistants employed at Penn. GET-UP is an affiliate of the American Federation of Teachers (AFT).

I appreciate the opportunity to discuss the National Labor Relations Board's (NLRB) July decision in *Brown University*, 342 NLRB No. 42 (2004) (*Brown*). This overruled recent NLRB precedent and stripped graduate employees at private universities of protection under the National Labor Relations Act (NLRA). The board stated in *Brown* that graduate teaching and research assistants are not "employees" under the act, and therefore have no right to form a union and bargain collectively. Previously, the board ruled in *New York University*, 332 NLRB No. 1205 (2000) (*NYU*) that graduate assistants in private universities were employees and constitute an appropriate unit for collective bargaining.

My fellow graduate assistants and I were encouraged by the earlier *NYU* decision given the many similarities between our experiences and the circumstances facing the employees at NYU. The decision led a group of us to begin meeting to talk about what could be done about the many issues affecting our ability to perform our duties as graduate assistants at the university. We quickly confirmed that organizing graduate employees at universities is not unique or radical. We looked to the three decades of collective-bargaining experiences of graduate employees at some of the most prestigious public universities in the United States as a model for what we might accomplish. Graduate teachers and researchers at the University of Wisconsin at Madison, the University of Michigan, the University of California system, Michigan State University and the University of Illinois at Urbana-Champaign have fought for and won union recognition and the right to bargain contracts with their respective administrations.

The Teaching Assistants' Association (TAA/AFT) has been negotiating with the University of Wisconsin at Madison since 1969 over a wide range of issues including compensation and benefits packages, grievance procedures, and job training. The university has suffered no ill effects as a result of graduate unionization. In fact, today the school is nationally recognized as one of the country's premier research institutions. Its own Web site points out that the university is known for its "world-class, cutting-edge research."

Rather than offer my analysis on the legal complexities of this recent *Brown* decision, I would instead like to talk about what graduate assistants do as Penn employees and demonstrate the integral role we play as part of our institutions' instructional workforce. I am convinced these experiences would lead a reasonable person to recognize our status as employees who have the right to form unions that represent our interests in the workplace.

My own first year of teaching in the History Department provides a few typical examples of the extensive and essential work graduate employees provide at Penn. I was told I would be teaching a class in Latin American history, even though I had never taken a graduate course in that field, because two teaching assistants were needed and no one else was available; the other teaching assistant was working on a degree in European intellectual history. I was not given training, office space, a phone line or a computer. Consequently, I, like any other teacher at the university, had to prepare to teach my class, developing my teaching strategies and establishing a schedule not only for my students but also for myself. Each week, I spent approximately 20 hours working for the university. I met with the professor and the other teaching assistant before the course began and then for about an hour a week to discuss the readings for the class, the assignments and to ensure that our grading criteria were consistent. I attended the professor's lectures twice a week, taking notes and helping with the audio/visual material she used in her presentations. I

completed all the readings for the class, as well as reviewing other background materials and multi-media sources, including several films. I prepared lesson plans for my two classes, which included about 30 students and met once a week; during lessons I led discussion of the material, answered students' questions and assisted them in refining arguments in their written assignments.

I also held weekly office hours for students. Because teaching assistants at Penn do not have offices, these meetings usually were held in coffee shops or other public spaces. I was also available to students by e-mail and phone, during the week and on evenings and weekends (especially before big papers were due). I was expected to pay all of my own expenses for Internet access at home because the university had discontinued its off-campus access system the previous year. Students asked me for advice on completing coursework and sent me drafts of papers for comments on style and content, as well as turning to me for more general support regarding adjustment to life at the university. Over the course of the semester, I was responsible for grading three essay papers from each student on a wide variety of topics. I also was responsible for grading both a midterm exam and a final exam, each of which included short-answer as well as essay questions. I was also responsible for calculating and submitting students' final grades at the end of the semester. In addition to my duties for this class, I was completing my own academic work for four graduate classes, giving presentations at several conferences around the country and working on a journal article with two colleagues.

What I have just outlined is not unusual. In addition to teaching their own classes, graduate employees at Penn lead small group discussions and lab classes that complement the larger lecture classes typically taught by faculty. This semester, 87 percent of the teaching hours in large lecture classes in the History Department will be conducted by graduate employees. In the English Department, where large lecture classes are not the norm, graduate-level teachers will teach 40 percent of the introductory level seminars this semester. The tendency to rely heavily on graduate assistants to work with students in smaller groups, while also teaching their own classes, is increasing throughout the School of Arts and Sciences.

Former Penn President Judith Rodin recognized the valuable work performed by graduate assistants when she established the Penn Prize for Excellence in Teaching by Graduate Students. The prize seeks to recognize "excellence in teaching by graduate students across the university who, through their dedication to teaching have had a profound impact on undergraduate education at Penn." Yet, for all of these contributions and this high praise, most teaching and research assistants in the Graduate School of Arts and Sciences this year will receive a standard stipend of \$15,750. In addition, hundreds of graduate employees in schools such as Education, Social Work and Design typically receive much less than \$15,750. Even more troubling, more experienced teaching assistants at Penn actually now receive less for doing the same work as newer employees.

Compensation is a significant issue to our members, especially those non-traditional students with family responsibilities or international students with few other employment options. For the past several months, GET-UP has been surveying graduate employees from across Penn regarding their current quality of life and issues they would like to see addressed in a future contract. What we have learned from our colleagues is instructive. The average monthly rent for those surveyed is \$671, which amounts to an average of \$8,052 per year. So, the average cost of rent alone is more than half of the standard annual stipend in the School of Arts and Sciences. Overall, 56 percent of those surveyed said that the funds they receive from the university are not sufficient to cover their day-to-day living expenses.

Health insurance is also a major concern for our members. Although the departments that make up the School of Arts and Sciences began paying health insurance premiums for their graduate employees soon after our union campaign began, most graduate employees in the Schools of Design, Social Work and Education are still expected to pay the premium out of their stipends. The premium has increased every year I've been at Penn. For 2004-05, the annual rate is \$2,072, a 10 percent increase from last year. For graduate employees with two dependents, the premium cost jumps to \$8,207—and has the potential to price someone out of graduate school. One recent Ph.D. recipient had to make the choice in his last year of study between adding his wife or their infant son to the health insurance plan, because he could not afford to pay for both. Ultimately, his wife went without healthcare until he graduated and took a job in the private sector. This is a choice we should not be confronted with at an institution as wealthy as Penn. Even if graduate employees with children are able to pay these high premiums, the only primary care provider fully covered under the plan is the student health clinic, which does not have a pediatrician on staff.

There are also high co-pays, deductibles and prescription costs that often put care out of reach for graduate students, and can even affect treatment. One of my colleagues recently met with a doctor who suggested a test to better determine a course of action for his ailment. However, my colleague couldn't afford the \$100 out-of-pocket expense. The doctor then just went ahead with a treatment, unsure of whether it would be effective.

For many graduate employees—especially those of limited means or those with families—growing inequities in compensation and benefits packages may limit their ability to pursue graduate studies.

It was these types of examples that led us to eventually reach agreement on the need to establish a formalized vehicle to represent our interests and needs before the administration at Penn. Armed with the new status afforded to us by the NYU decision, we decided to form GET-UP in Fall of 2000. Our goal was simple: We sought the right to bargain a contract with the university that would serve the interests of our members and improve both working and learning conditions at Penn. We affiliated with the AFT later that academic year, and have been working ever since to gain recognition.

Throughout this period, we have faithfully followed the rules set forth under the NLRA as interpreted by the NLRB. Unfortunately, Penn failed to display that same level of commitment—In 2001, a substantial majority of graduate employees signed authorization cards asking Penn to recognize GET-UP as their union and begin bargaining; Penn refused this request. After another year of waiting, our case was finally heard; the regional labor relations board ruled in our favor and called for an election to be held in February 2003. According to a survey performed by the Daily Pennsylvanian, we won that election 62 percent to 38 percent, despite an intense anti-union campaign by the university. However, our votes were never counted because the university continued to reject our right to unionize. Despite four years of hard work by GET-UP members—who struggled to balance their academic, employment and personal responsibilities with their efforts to gain a voice at work—the NLRB overruled the previous NYU decision, ruling that graduate teaching and research assistants are not employees eligible to form unions under the NLRA. Our petition for recognition was subsequently dismissed in August 2004.

I believe that the most recent NLRB decision represents a significant misinterpretation of the NLRA. Graduate teaching and research assistants in the private sector, like the more than 40,000 graduate employees who participate in collective bargaining at public universities, are clearly employees providing valuable services at our institutions in exchange for compensation. Without our work, institutions like Penn would need to hire other employees to do fill these jobs.

We continue to organize graduate employees on campus and to highlight the necessity of advocating for our interests. However, our challenge has been increased by the recent NLRB decision.

GET-UP and its members find the argument that graduate employees have no right to or need for a union to be absolutely unfounded and unacceptable in a democratic country. Our work is essential to the university's mission, and we are proud of the high-quality research and teaching that our members perform, even under the often difficult conditions I've just described. We, and the other union organizing campaigns affected by the *Brown* decision, are committed to using our collective voice as employees to make our institutions better places in which to work and to learn.

On behalf of my graduate colleagues at Penn, I thank you for taking the time today to examine the impact of the recent NLRB decision on graduate employees. I hope that you and your colleagues in Congress will consider introducing and pushing legislation that explicitly protects the basic right of these employees to form unions at private colleges and universities under the protections of the NLRA. Doing so will send a strong message that graduate assistants are an essential part of undergraduate education programs not just at Penn but at other private colleges and universities across the nation.

I welcome any questions that members of the committee may have in regard to my testimony.

STATEMENT OF JOHN LANGEL, ESQ., BALLARD SPAHR ANDREWS & INGERSOLL, REPRESENTING THE UNIVERSITY OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Ms. Collins.

We turn now to Mr. John Langel, litigation department, Ballard Spahr, a prestigious law firm in Philadelphia. Before joining the firm, Mr. Langel served as law clerk for Judge Hewitt in the Fed-

eral court in Philadelphia. He is a member of the Philadelphia Bar Association Labor and Employment Committee, has a bachelor's from Marietta, and summa cum laude from Temple University.

Thank you for joining us, Mr. Langel, and we look forward to your testimony.

Mr. LANGEL. Thank you, Senator Specter. It is a pleasure to be here today representing the University of Pennsylvania.

As you have heard, for nearly three decades the National Labor Relations Board agreed with Penn's position that graduate students are not employees because teaching and research are integral parts of the education they receive. In 2000 the Board suddenly changed course and found certain graduate teaching and research assistants at NYU had the right to unionize. Interestingly, they did not find that all graduate students had the right to unionize. Then, this July in the *Brown* decision the Board returned to its long-held recognition that graduate students are just that, students, not employees.

I am here today to talk, not about the law of *Brown*, but rather to talk about graduate education at Penn, with which I became familiar representing Penn throughout the lengthy proceedings before the Board. Let us first review the benefits provided to Penn's graduate students. All graduate students at Penn, not just the select graduate group that the union had chosen to include in its petition, come to Penn with one goal in mind: to earn advanced degrees while acquiring the skills and expertise necessary for successful careers in their chosen fields. Often that is academic in nature.

Penn administers its diverse graduate programs with precisely that goal in mind. The programs deliver on that goal through a combination of formal instruction and applied learning. At the center of Penn's graduate educational programs are opportunities for students to gain hands-on experience in the most important functional areas of graduate level education, teaching and research.

The union seeks to distort the educational nature of those teaching and research experiences by contending that students who teach and research while simultaneously receiving generous financial aid that enables them to attend graduate school in the first place are Penn employees.

Let us look at the financial aid. It is significant and it bears no direct relationship to the services students perform as graduate assistants. Penn's graduate students receive multi-year funding packages, 4 to 5 years. They include: fully paid tuition, fully paid tuition at the University of Pennsylvania, and fees for each year of enrollment; a substantial stipend each year to cover living expenses, between \$15,000 and \$22,000; health insurance coverage.

The cost to Penn and the value to the students exceeds \$50,000 per student year. They are not cheaper labor. In fact, if the university were looking for cheaper labor they would find it in their adjunct professors, who are much less costly on a semester by semester basis.

The funding provided to its graduate degree students is and is intended to be educational financial aid at its core. Indeed, upon acceptance Ph.D. students are guaranteed this funding package for 4 or 5 years. Yet they serve as teaching or research assistants for as little as two semesters, and typically only during portions of 2

of those 4 or 5 years. During the rest of their time as students, when they receive the identical funding package, they devote their time exclusively to their course work and the beginning stages of their dissertations.

I will now turn to the academic focus of Penn's graduate programs. The nature of the services are likewise driven by an educational, not economic, engine. Students pursuing Ph.D. degrees overwhelmingly seek careers in academia. As part of its educational program and its mission to prepare the next generation of university educators, Penn requires its graduate students to conduct research and to teach. In fact, teaching and research are so much a part of graduate education at Penn that in many of its graduate programs serving as a teaching or a research assistant is a degree requirement, no different than taking certain courses. Like other aspects of their studies, graduate students teach and research and are reviewed by their instructors and their performance is made part of their academic record.

There is a fundamental nexus between teaching and the course work. So too that appears with their research. Indeed, most of the students, if not all the students, do research in the areas that wind up being their dissertations.

Clearly the services are pedagogical in nature. But beyond that, treating students as employees threatens academic freedom. Academic freedom is not just free speech. The erosion in the establishment of collective bargaining here would do an injustice to what the Supreme Court of the United States has recognized.

Imposing collective bargaining on Penn's relationship with its students would undermine Penn's ability to make each of these decisions. Penn would be forced to bargain over broad academic issues, including class size, time, length, location, as well as the graduate student's duties.

If you look at the proposed unit that GET-UP seeks to represent, you would see the anomaly that was created. They excluded all of the hard science research assistants and teaching assistants, saying that that which they did was academic in nature. If you examine the record, a 7-week record before the regional director in Philadelphia, you will see that all of the services are academic in nature that all of the graduate students provide.

PREPARED STATEMENT

One last item and that is: Under the Board's longstanding precedent, unrelated to students or whether students are employees, is the concept of temporary employees. Temporary employees are those who are there for a finite and short duration. The graduate students teach a semester, teach two semesters. They are there for a short, finite duration with no expectation of continued employment. Under the industrial model which GET-UP seeks to impose on the university model, they all are temporary employees.

Thank you for your time.
[The statement follows:]

PREPARED STATEMENT OF JOHN B. LANGE

Senator Specter, Members of the Committee. It is a pleasure to be here today to address this Subcommittee on an issue of such importance to the preservation of

academic freedom at our nation's great universities, like the University of Pennsylvania, which I have the honor to represent here today.

I am not here to present to you the legal history of these issues, but a little background is necessary. For nearly three decades, the National Labor Relations Board (the "Board") agreed with Penn's position that students are not statutory employees because teaching and research are integral parts of the education they receive. In October 2000, the Board departed from this precedent when it found certain graduate teaching and research assistants at New York University had the right to unionize. In doing so, the Board overruled such cases as *Adelphi University*, 195 N.L.R.B. 639 (1972), and *Leland Stanford Junior University*, 214 N.L.R.B. 621 (1974), where the Board underscored that the financial support received by graduate students is not compensation for services performed, but financial aid to help graduate students pursue their education.

Then, in July 2004, the Board overruled *NYU* in the *Brown University* decision and returned to its long-held recognition that graduate students are just that, students, not employees. *Brown University*, 342 N.L.R.B. No. 42 (2004). Rather than talk about why the *Brown* decision was the right decision, legally, I want to talk about graduate education at Penn, with which I became familiar representing Penn throughout the proceedings before the Board.

PENN'S GRADUATE STUDENT PROGRAMS

Penn is one of the country's premier research institutions. Research is what the faculty do; research is what the faculty work with the graduate students, and indeed increasingly the undergraduates, to teach them to do. Faculty members, students, research professionals, and lab technicians all collaborate to conduct this research, and all contribute to the success of Penn's research mission.

Beyond their first year of enrollment, many graduate students become increasingly involved in research activities. Students are encouraged early on in their degree program to meet professors, learn the professors' areas of expertise, and develop relationships with professors whose interests match their own. It is through these mentored relationships that graduate students learn the skills and methodologies that will distinguish them as gifted scholars and researchers.

At the same time, Penn does not operate solely as a center of research, and does not permit its faculty to focus solely on their individual research interests. Teaching is an equal component of Penn's mission. Students come to Penn to learn, and the duty of teaching them falls to the faculty. Accordingly, all faculty members are expected not only to teach, but to teach at an exemplary level.

Teaching graduate students at Penn is an interactive process. Students learn to teach under the guidance of faculty members. It is expected that, by the time they earn their degrees, Penn graduate students will have had first-hand experience in the major tasks performed by Penn faculty: conducting significant collaborative or independent research; writing grant proposals; authoring scholarly publications about their research; and teaching and mentoring Penn's other students. Penn expects its graduate students to perform all these functions as graduate students to prepare them for their own careers, as Penn recognizes that the vast majority of its graduate students go on to academic careers of their own.

BENEFITS PROVIDED TO PENN'S GRADUATE STUDENTS

All graduate students at Penn—not just the select group that the Union has chosen to include in its petition—come to Penn with one goal in mind: to earn advanced degrees while acquiring the skills and expertise necessary for successful careers in their chosen fields. Penn administers its diverse graduate programs with precisely that goal in mind. The programs deliver on that goal through a combination of formal instruction and applied learning. And at the center of Penn's graduate educational programs are opportunities for students to gain hands-on experience in the most important functional areas of graduate-level education—teaching and research.

The Union seeks to distort the educational nature of those teaching and research experiences by contending that students who teach and research, while simultaneously receiving generous financial aid that enables them to attend graduate school in the first place, are Penn employees.

Let's start with the financial aid. It is significant, and it bears no direct relation to the services students perform as graduate assistants. Penn's graduate students receive multi-year funding packages that include:

- Fully-paid tuition and fees for each year of enrollment;
- A substantial stipend each year to cover living expenses;
- Health insurance coverage.

The cost to Penn and the value to the students exceeds \$50,000 per student per year.

The funding Penn provides to its graduate degree students is and is intended to be educational financial aid at its core. Graduate education at Penn is expensive. Tuition alone for a full-time graduate student enrolled in classes is more than \$20,000 per year. Penn recognizes that Ph.D. students most often go on to academic careers in positions that do not pay well in the early years. Those students, therefore, will have limited resources with which to repay large student loan debt.

At the same time, Penn believes it is important for students to focus full-time on their studies while they are enrolled, in order to receive the maximum educational benefit and to enable them to earn their degrees as quickly as possible. Consequently, Penn offers full funding to these students so that they may be adequately supported to work full-time on their degrees without the distraction or time commitment of employment.

The funding students receive is tied to remaining in good academic standing and in making adequate progress towards their degree requirements. It is not tied to performing a certain number of hours each semester of teaching or research work.

Indeed, upon acceptance, Ph.D. students are guaranteed this funding package for four or five years, yet they serve as teaching or research assistants for as little as two semesters, and typically during only portions of two of those four or five years. During the rest of their time as students, when they receive the identical funding package, they devote their time exclusively to their coursework and the beginning stages of their dissertations.

Take, for example, a Ph.D. student in Humanities and Social Sciences. To entice the student to come to Penn, that student is offered a fellowship package, consisting of five years of guaranteed support, including fully-paid tuition, a generous stipend each year and health insurance. In the student's first year, she concentrates on her own coursework and does not teach. In her second year, she continues to take classes and begins to learn to teach. In her third year, she continues to teach while she finishes her classes and begins to focus on her dissertation. In years four and five, the student has no teaching responsibilities and concentrates entirely on researching and writing her dissertation. The student receives the same funding package throughout all five years without regard to any service she performs.

THE ACADEMIC FOCUS OF PENN'S GRADUATE PROGRAMS

The nature of the services are driven by an educational, not economic, engine. More importantly, the students' relationship with Penn is an academic one. It is driven by Penn's mission—to train the next generation of university faculty by preparing its graduate students for successful academic and professional careers.

Students pursuing Ph.D. degrees overwhelmingly seek careers in academia. Penn requires that students pursuing a Ph.D. complete 20 credit units of course work, a series of examinations, and a dissertation. The dissertation is the culmination of sustained research developed to answer an unexplored question within the student's field. Its purpose is to demonstrate that the student has proven ability to create new knowledge as a researcher after graduation. Most Ph.D. students begin to perform some form of research early in their programs and then progress to the point that their only activity is conducting research in furtherance of their dissertations.

All Penn's graduate degree programs are structured so that students learn from experienced faculty members how to conduct high level, advanced research within their fields, and to use that knowledge to contribute to the creation of new knowledge. Research assistantships provide students with hands-on experience in the procedural and practical aspects of research in their fields, all in furtherance of their professional development. Students then take that experience and incorporate it directly into their dissertations and research papers.

The academic positions Penn's Ph.D. students seek after graduation nearly always require the graduates to teach as a major part of their professional careers. To prepare those students properly for academic careers, the majority of Penn's graduate degree programs require a teaching component. The teaching activities in these programs train the students in both the pedagogical and administrative aspects of instruction at the university level. Moreover, even students who do not receive funding (the so-called "wages" for the "service"), still must take on these teaching responsibilities in order to obtain their degrees.

Penn requires its graduate students to conduct research and to teach for the simple reason that teaching and research is what the vast majority of them aspire to do. Teaching and research are so much a part and parcel of students' graduate education at Penn that, in many of its graduate programs, serving as a teaching or research assistant is a degree requirement no different than taking certain courses.

Indeed, graduate students often receive course credit for their teaching and research activities. Like other aspects of their studies, graduate students' teaching and research activities are reviewed by the students' instructor and made part of their academic record. And just like other aspects of their degree programs, poor teaching or research performance can jeopardize academic standing.

This fundamental nexus between the service a teaching assistant performs and the students' own academic program is enhanced and exemplified by the fact that, at Penn, graduate students teach only in classes within their discipline and, most often, ones that relate to their particular areas of specialization. So too in the research arena. Graduate students serving as research assistants are matched with faculty members whose research interests coincide with their own. In fact, in the vast majority of cases, the research Ph.D. students perform as research assistants is the very same research the students conduct for their dissertations.

TREATING STUDENTS AS EMPLOYEES THREATENS ACADEMIC FREEDOM

As the Board in *Brown* recognized, extending collective bargaining rights to graduate students risks transforming this fundamentally academic endeavor, as it would seriously intrude upon and infringe universities' basic academic freedoms. Academic freedom is not some lofty or theoretical concept. It lies at the core of Penn's mission, and lives and breathes throughout its graduate programs on a daily basis.

"The United States Supreme Court recognizes that a university enjoys four essential freedoms . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study."

Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957). Indeed, according to the Supreme Court, "[u]niversity faculties must have the widest range of discretion in making judgment as to the academic performance of students and their entitlement to promotion or graduation." *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978).

In direct contravention of the Supreme Court's admonition to allow universities to manage their own academic affairs, imposing collective bargaining on Penn's relationship with its graduate students would interfere with each of Penn's "essential freedoms." Penn would be required to bargain over terms and conditions of employment that, according to the Board, are mandatory subjects of bargaining, which would result in a direct conflict with the faculty's academic decisions concerning the course of studies for its graduate students.

Consider the following:

- Under the NLRA, procedures governing the discipline and discharge of unit employees are a mandatory subject of bargaining. *See Washoe Med. Ctr., Inc.*, 337 N.L.R.B. No. 32 (2001). Many of Penn's graduate programs do not permit graduate students to act as teaching or research assistants unless they remain a student in good academic standing. Thus, to allow Penn's graduate students to engage in collective bargaining over just cause discipline protection and a grievance and arbitration procedure—standard protections sought by unions in nearly all contract negotiations—would intrude upon Penn's fundamental right to determine for itself which students are entitled to remain in its academic programs.
- Standards of employee work performance also are a mandatory subject of bargaining. *Tenneco Chems., Inc.*, 249 N.L.R.B. 1176 (1980). Student performance as teaching and research assistants is used as a basis for evaluating the academic progress of graduate students. Allowing students to bargain over standards of "work" performance would result in a clear erosion of Penn's academic freedom to determine which students have met their program's academic requirements and standards and thus may remain students in good academic standing.
- An employer's decision to use supervisors to perform bargaining unit work is also a mandatory subject of bargaining. *Hampton House*, 317 N.L.R.B. 1005 (1995). At Penn, many departments choose to have faculty members teach labs or recitation sections rather than graduate students. Thus, Penn's academic freedom to structure and teach classes in the manner its faculty find most effective would be affected by graduate student collective bargaining.
- Assignment of work is also a mandatory subject of bargaining. *Engineered Control Sys.*, 274 N.L.R.B. 1308 (1985). At Penn, professors choose students to be their teaching, and especially research assistants, based upon a variety of factors, including the students' interest in the professors' academic discipline. Allowing students to bargain over how these selections are made would prevent

professors from working with students who most closely share their own academic interests.

These examples illustrate the concerns recognized by the Board in *Brown* that extension of collective bargaining rights to graduate students will intrude upon universities' academic freedom. The unions' arguments that such academic decision-making can be cordoned off from the collective bargaining process ignores the substantial autonomy granted Penn's graduate programs to shape and structure all aspects of their students' educational programs.

The Board in *Brown* found:

"Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown."

Brown, slip. op. at 8.

GET-UP'S PROPOSED UNIT DIVIDED PENN GRADUATE STUDENTS

Another myth I need to dispel is that unions seeking to organize graduate students, including GET-UP, seek to represent all graduate students. In fact, they seek to impose the "employee" model on only a limited portion of a diverse graduate student population. The bargaining unit GET-UP sought to represent at Penn was both divisive and illogical.

In short, what GET-UP proposed was a unit oddly divorced from its own purported concept that graduate students are employees because they engage in "work for pay." Consider the following:

- Students who receive a stipend and tuition and teach or research were included in GET-UP's proposed bargaining unit, but students who receive hourly pay and provide the same "service," even within the same departments, were excluded. We could never understand why.
- Professional students (that is law students and M.B.A. students) were excluded altogether, regardless of whether they teach or research.
- Wharton Business School Ph.D. teaching assistants were included, but Wharton M.B.A. teaching assistants, performing in the identical teaching in the very same class as the Ph.D. students, were excluded.

Before the Board's *Brown* decision, these illogical and inconsistent distinctions were being made all over the country. Consider the chaos as reflected in the following:

- A "natural science" research assistant working toward his dissertation while supported by an external grant at NYU is not a member of the bargaining unit, though if he went to Columbia or Tufts and were supported by that same grant, he would be a member of the bargaining units at those schools. Had he chosen Brown or Penn, however, he would not be eligible for union representation.
- A teaching assistant in the Business School at Columbia would be in Columbia's bargaining unit, but the same TA would not be in Penn's bargaining unit if pursuing an M.B.A. But, at the same time, the M.B.A. TA at Penn would be in the bargaining unit if he were pursuing a Ph.D.
- A student serving as a research assistant in Penn's Graduate School of Education would be included in the unit if pursuing an M.S.Ed., excluded if pursuing an Ed.D., and included if pursuing a Ph.D., notwithstanding that all three research assistantships carry the same responsibilities.
- A student teaching legal research and writing at Columbia would be a member of the bargaining unit, yet a student serving in the same role at Penn would not.
- A Penn Engineering student serving as a teaching assistant for one semester as part of his academic program (an Engineering Ph.D. academic requirement), would be in the bargaining unit for that one semester even though he has no expectation of being a TA for any more than one semester. Yet, the Penn M.B.A. student, serving as a teaching assistant for twice as long would be excluded from the unit. The same Engineering student grading papers the following semester would not be in the Penn bargaining unit, even though grading papers is a TA function. At NYU, Columbia or Tufts, however, his grading duties would place him in the bargaining unit.

The distinctions the unions sought to make between different groups of students performing the same teaching and research functions bear no rational relationship

to their claim of wanting to represent student “employees” and are impossibly divisive to the university communities.

GRADUATE STUDENTS ARE, AT MOST, TEMPORARY EMPLOYEES

GET-UP maintains that the service performed creates an employee model. Yet, even GET-UP recognizes that these services are performed for a brief and finite duration—only a portion of the five years. These facts highlight an additional reason—one that the Board does not mention in the *Brown* decision—that graduate students are not subject to unionization. Graduate students are, at most, temporary employees who have no right to unionize under the NLRA and the Board’s long-standing precedent.

The Board’s test for determining temporary employment status is simple, straightforward, and well-settled: whether the employee’s “prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.” *St. Thomas-St. John Cable TV*, 309 N.L.R.B. 712, 713 (1992). Under this test, even if one were to assume that graduate students are employees, they are, at most, temporary employees.

No Penn graduate student has any reasonable contemplation of continued “employment” beyond the duration of his or her studies. No Penn graduate student has any expectation whatsoever of a permanent position. All appointments are finite, for periods substantially less than the duration of the student’s studies. Indeed, many appointments last no more than a single academic semester.

GRADUATE STUDENTS ARE STUDENTS, NOT EMPLOYEES

In short, the attempt to place an employee label on Penn’s graduate students distorts the educational nature of graduate students’ teaching and research experiences. This effort to hammer the square economic employment relationship at the heart of collective bargaining into the round academic relationship between graduate student and university ignores what drives students to attend graduate school in the first place, and the totality of circumstances that shape their experience for the brief and finite time they are there.

Recognizing this, the Board in *Brown* found that graduate students were primarily students, not employees. The Board stated:

“It is clear to us that graduate students assistants . . . are primarily students and have a primarily educational, not economic, relationship with their university.”

Brown, slip. op. at 5. This finding is unquestionably the right one at Penn.

Senator SPECTER. Thank you, Mr. Langel.

I note that you are a graduate of the James E. Beasley School of Law at Temple. Worth noting for a moment that Mr. Beasley was a very distinguished Philadelphia lawyer who, regrettably, passed away a few days ago and made a great contribution to law and in endowing the Temple Law School, and a good friend of mine.

The process at Temple University, they do have graduate student unions. Do you think there is a challenge to academic freedom at Temple, Mr. Langel?

Mr. LANGEL. Senator, first let me tell you that I represented Temple University in the proceedings that resulted in there being a union at Temple University. At the hearing level, Temple University prevailed and we prevailed in light of the *Adelphi University* and the *Stanford University* cases.

With *NYU* that changed and the Pennsylvania Labor Relations Board, following the precedent of the *NYU* decision, reversed—

Senator SPECTER. Historically that is very interesting, Mr. Langel, but did it affect academic freedom?

Mr. LANGEL. Well, this is the second part of that, Senator, and that is there was an agreement with Temple University and the union that those items that are academic in nature—for example if a student uses their research that they do while they are a re-

search assistant in their dissertation, they cannot be in the union. Likewise, if they teach a course for which it is a program requirement or for which they get credit, they cannot be in the union.

So by agreement they took out all of the academic-related issues, and almost all Penn students would not be in a bargaining unit as defined with the *Temple University* agreement.

Senator SPECTER. Well, could the Penn program be structured as Temple was to preserve academic freedom in the same model?

Mr. LANGEL. We never got to that, Senator, because—

Senator SPECTER. Why not?

Mr. LANGEL. Because the union sought to take the academic component and put it in the matrix of a union. And almost all of Penn students use their research for their dissertation and almost all who teach are part of a program requirement. So there would be no employees by that definition. They would all be students.

Senator SPECTER. Ms. Collins, how was the decision made as to which graduate students were included and excluded from your bargaining unit?

Ms. COLLINS. We based it on the precedent that was available at the time, which was the *NYU* decision, and our unit exactly matched the Board's ruling of that, of that decision. So that was the basis for our decision.

Senator SPECTER. How many of the graduate assistants at the university are members of GET-UP?

Ms. COLLINS. We seek to represent about a 1,000 people that are currently teaching and research assistants. That number has varied between 800 and 1,000 people who would potentially be affected by this decision.

Senator SPECTER. Ms. Collins, could the Penn program be structured like the Temple program to preserve the issue of academic freedom under the structure described by Mr. Langel?

Ms. COLLINS. I certainly believe that academic freedom is maintained under grad unionization. As I have mentioned in my testimony, at universities like the University of Michigan, the University of Wisconsin-Madison, they have had unions for over 30 years at this point and are well respected for the independent professional academic scholarship that they produce.

So I think that the evidence of that experience is the best testimony really for our confidence that academic freedom would not be compromised by unions at private universities either.

Senator SPECTER. Well, that is a generalization, but how about the points Mr. Langel raised, which were in my question? Could you structure the Penn program like the Temple program to meet the considerations Mr. Langel raised?

Ms. COLLINS. In terms of the research that directly relates to dissertations?

Senator SPECTER. That is what he testified about.

Ms. COLLINS. And to teaching that relates to grad requirements? Basically, that was the reasoning in the original *NYU* decision for why they did not want hard science RAs included in that unit, because their research often does directly relate to their dissertation.

My experience at Penn, as I mentioned, in two different schools has not been that most people's research assignments directly relates to their dissertation when they are assigned as RAs, and

many of the teaching requirements that Mr. Langel mentioned have been instituted in the 5 years since the unionization campaign began, rather than having been longstanding Ph.D. requirements at the university. So our feeling would be that we would certainly want an agreement that preserves academic freedom, but an agreement that preserved it without sacrificing our members' right to make that decision themselves as to whether or not they wanted to be part of a union.

Senator SPECTER. Mr. Langel, you made a comment about unions distorting the process. I did not quite understand the thrust of that particular contention on your part.

Mr. LANGEL. I think what I was referring to is that in who they sought to represent and who they chose not to represent that they were distorting the relationship. If you look at the regional director's decision, she actually agrees with the university and says that there is very little difference between the hard sciences and the liberal arts and soft sciences, but she felt constrained by *NYU's* decision.

Most of the case went to the fact that research overlaps with dissertation and teaching is part of the training. In fact, Ms. Collins testified at the hearing and I recently reviewed her transcript of that testimony. She under the Temple model could not be in a union because she said that she used her research as part of her dissertation. That is really the crux of the matter. There is no difference between the hard sciences and the soft sciences and liberal arts and the hard sciences. It is all part of the academic relationship with the university.

Senator SPECTER. Ms. Collins, does it pose any problem on an ongoing basis for you to take this kind of a position with the university in your relationship with university officials or with professors you work with?

Ms. COLLINS. No, it has not. I have actually—you mean in terms of my own academic career so far has it posed any problem?

Senator SPECTER. Your day to day relationships, your career?

Ms. COLLINS. No. I have very collegial relationships with all of my professors. We talk about the union. Occasionally they ask me how the campaign is going. And they have been very happy with both my teaching and my research work. So I have had a very positive experience.

Senator SPECTER. Mr. Langel, is there any calculation as to how much more money it would cost the University of Pennsylvania if Ms. Collins' position were upheld?

Mr. LANGEL. I do not think it is a financial calculation, Senator. I think the university is competitive with all the other elite universities in giving its tuition and stipend. I really think it is much more a matter of undermining the academic freedom and the ability of the university to determine the academic relationship.

Senator SPECTER. So these are matters of "principle" with l-e and not a-l?

Mr. LANGEL. Absolutely.

Senator SPECTER. Okay. Well, it is a very fascinating issue which we had heard a lot about and wanted to explore. We have been careful not to intrude upon the judicial functions of the NLRB in trying to assess what the underlying issues are. Congress could leg-

islate in the field. We could make a definition as to where the academic interests begin and end and where the economic interests begin and end.

But I must tell you candidly that I think that unlikely in light of our great difficulties in passing appropriations bills and dealing with the 9/11 Commission report, wrestling with all of the other issues which we have. But this is an important issue and it is helpful to see the thoughtful approaches being undertaken on all sides by the members of the NLRB who testified here today in the spirit of collegiality and the concern which the subcommittee has for precedent and the issue of delay and the kind of considerations which are articulated by Ms. Collins and Mr. Langel.

So we thank you all very much.

We have a second issue to take up and that is the recognition bar doctrine, the NLRB policy on decertifying unions following voluntary recognition agreements. We are going to adjourn the hearing for 15 minutes because it is necessary for me to attend at least a portion of the joint session with the Prime Minister of Iraq. So we will reconvene at 10:40. Thank you.

Senator SPECTER. The Appropriations Subcommittee on Labor, Health, Human Services, and Education will now resume.

STATEMENT OF ARTHUR ROSENFELD, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Senator SPECTER. Our first witness on the panel on the NLRB policy on decertifying unions following voluntary recognition agreements is the distinguished General Counsel of the NLRB, Mr. Arthur Rosenfeld. Confirmed by the Senate on May 26, 2001, had served in senior staff positions in the Senate and the Department of Labor, a native of Allentown, bachelor's from Muhlenberg, master's from Lehigh, and a doctorate from the Villanova University School of Law.

Thank you for joining us, Mr. Rosenfeld, and we look forward to your testimony.

Mr. ROSENFELD. Thank you, Mr. Chairman. I will be exceedingly brief. I would ask that my statement be made a part of the record.

Senator SPECTER. Without objection, it will be made a part of the record.

RECOGNITION BAR

Mr. ROSENFELD. My purpose here today I believe is to lay out a foundation for a further discussion of the recognition bar doctrine. On June 7, 2004, the Board in a 3-2 decision granted review of an administrative dismissal by a regional director of an "RD petition," a decertification petition. The purpose of the grant of review as I understand it from the Board's order is to review the scope and application of the recognition bar doctrine.

In a nutshell, that is, since at least 1966, where there is a voluntary recognition of a union—where voluntary recognition of a union is validly granted—and I emphasize, "validly granted"—by an employer, the Board will not entertain or not consider for a reasonable period of time after that recognition is granted election petitions. In other words, they are barred by the grant of recognition.

I would contrast that just as an example to the “certification bar,” wherein after a union election the union is certified as the exclusive representative of the unit of employees, elections are barred in that circumstance also for 1 year, not for an “undefined reasonable period” of time but for 1 year.

The purpose of the recognition bar—and again I emphasize I am speaking of a valid recognition, based on valid indication of employees’ majority sentiment—the purpose is to allow the new bargaining representative sufficient time to bargain without looking over its shoulder, without a demand for immediate results in bargaining. It removes an incentive for an employer to delay bargaining in hopes of undermining union strength. It minimizes the possibility of raiding during that bargaining period by another union. It recognizes that majority support for that union, for that exclusive representative, may fluctuate over a period of time, but the employer is free of concern that, after putting much effort into collective bargaining and getting close to reaching an agreement, that the union could be ousted by the employees prior to the agreement being reached and all that effort wasted.

On June 14, the Board invited amicus briefing on the recognition bar issue. These cases arise in representation settings, usually decertification petitions, occasionally a rival union situation. These cases are not within the core aegis of the general counsel. The authority for “R case” matters runs from the Board to the regional directors, whereas the delegation for unfair labor practice matters runs from the general counsel to the regional directors.

Nonetheless, because we in the general counsel’s office have experience in investigating and prosecuting unfair labor practices arising out of elections and voluntary recognition and also have general responsibility for supervision of the regional office staff, which is where R case petitions and elections are processed, we filed a brief.

The brief of the general counsel is on the NLRB’s website. We did not include it with the testimony, for which I apologize.

Senator SPECTER. Summarize what your brief said?

Mr. ROSENFELD. Let me summarize this way about a recognition bar and what my brief says. What we propose in the brief is that the Board allow, as a limited exception to the recognition bar, because we believe the recognition bar is very important, the holding of an election in situations where support—either for representation by another union or for no union representation—is expressed in writing by at least 50 percent of the bargaining unit employees. Further, such support must be expressed either at the time the employees receive formal written notice of the employer’s recognition of the union or no later than 21 days thereafter; and that a decertification petition in the usual form must be filed no later than 30 days after the formal notice of recognition.

PREPARED STATEMENT

The rationale for the proposed 50 percent threshold is that any showing of less than 50 percent opposition to the newly recognized union would not support an inference that a majority of employees did not actually support the union at the time of recognition, and moreover because there has already been a showing of majority

support that has not been challenged in an unfair labor practice proceeding, reliance on the usual showing of interest for an election petition, which is 30 percent, would be insufficient to justify an exception to the recognition bar.

I could go on, but I think at this point, Senator, I would just respond to whatever questions you might have.

[The statement follows:]

PREPARED STATEMENT OF ARTHUR F. ROSENFELD

Mr. Chairman and Members of the Committee: I am Arthur Rosenfeld, General Counsel of the National Labor Relations Board. I have been invited to appear before this Committee to discuss the Board's "recognition bar doctrine" and its recent decision to review that rule.

The doctrine was first announced by the Board in 1966 in a case called *Keller Plastics*.¹ Stated simply, the Board will not conduct an election to displace or replace a union within a "reasonable" period of time following the employer's voluntary extension of recognition to that union as exclusive representative of the employees in a bargaining unit, where that extension of recognition was premised on a showing of majority support.

Thus, whether an election petition is filed by a group of employees seeking to decertify a union as bargaining agent or by a rival union seeking to replace the new incumbent, the Board will dismiss that petition and will not proceed to an election if the petition is filed within a reasonable interval after recognition was extended—again, assuming the union has demonstrated majority support at the time of recognition.

The Board is now considering whether to preserve, abolish, or modify the recognition bar doctrine. It announced this intention to reconsider on June 7, in a single published order that encompassed three separate cases, brought by employees of the Dana and Metaldyne corporations.² These employees are seeking elections to decertify the unions following voluntary recognition by their respective employers. Those voluntary recognitions were extended pursuant to so-called "card check agreements" that the respective employers had entered into with the union.

In each case the employee followed standard NLRB procedure and filed a "decertification" petition with the appropriate Regional Office of the Board. Each petition apparently met the Board's threshold test—namely, that it was supported by at least 30 percent of the employees in the bargaining unit. In each case, the Regional Director, following Board precedent, dismissed the petition on the ground that it was barred for a reasonable period of time by the employer's voluntary recognition of the union pursuant to the card-check agreement.

The Board's grant of review signals its view that these cases raise substantial issues as to whether, and under what conditions, an employer's voluntary recognition of a union should bar a decertification petition. On June 14, the Board invited the parties and interested amici to file briefs addressing the issues raised in these cases.

As General Counsel I am responsible for the investigation and prosecution of unfair labor practice cases and also for the general supervision of the Regional Offices. Although the recognition bar doctrine is a representation case matter, not an unfair labor practice matter, I decided to file an amicus brief in this matter. I did so because the Office of the General Counsel has considerable experience in the day to day processing of representation cases, arising both from the General Counsel's responsibility for overall supervision of the Agency's Regional Offices and from his or her statutory prosecutorial authority with respect to the unfair labor practice cases that sometimes accompany union elections and voluntary recognitions. A copy of my brief is available online at: <http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/NLRBGC.pdf>.

I took the position in my amicus brief that the voluntary recognition bar should be retained as an important and effective means of promoting voluntary recognition and furthering the purposes and policies of the NLRA, but that an exception to that bar is warranted in certain circumstances.

As the brief explains, both Board-conducted elections and voluntary recognition are accepted ways of establishing a legally valid collective bargaining relationship. Of course, a Board-conducted election—when held under well-established procedures

¹ *Keller Plastics Eastern*, 157 NLRB 583 (1966).

² *Dana Corp. and Metaldyne Corp.*, 341 NLRB No. 150 (2004).

in an environment that is free from coercion—is the most reliable way of determining whether a majority of bargaining unit employees desire exclusive representation by a particular union.

A card check procedure is a less reliable, but nevertheless legitimate, way to demonstrate that a majority of employees support a particular union. Because of its practical advantages, the Board and the courts have sanctioned voluntary recognition based on a card check since the earliest days of the NLRA.

I agree that the voluntary recognition bar should be retained, albeit with certain modifications. As I indicated in the brief, the voluntary recognition bar effectuates the purposes of the NLRA in several ways. As with the similar bar that is imposed after the Board has certified a union pursuant to a Board-conducted election, the voluntary recognition bar, among other things, gives a union time to negotiate an agreement without undue time pressure and removes incentives for an employer to delay or undermine bargaining in hopes of ousting the union.

However, the brief goes on to argue that an exception to the recognition bar is warranted in certain circumstances because of the inherently less reliable nature of authorization cards, as compared to a Board-conducted election, as an indicator of employee choice. As the Supreme Court has pointed out, a Board election is a “solemn” occasion, conducted under “safeguards to voluntary choice,” including the “privacy and independence of the voting booth.”³ Given the lesser safeguards associated with the use of authorization cards, it is appropriate, and I believe important, that greater vigilance be exercised in deciding whether circumstances warrant barring challenges to employees’ expressions of support for a union based on cards.

Thus, I proposed in my amicus brief that the Board allow, as a limited exception to the recognition bar, the holding of an election in situations where support, either for representation by another union or for no union representation, is expressed in writing by at least 50 percent of the bargaining unit employees. Further, such support must be expressed either at the time the employees receive formal, written notice of the employer’s recognition of the union, or no later than 21 days thereafter; and a decertification petition in the usual form must be filed no later than 30 days after that formal notice of recognition.

As explained in the brief, the rationale for the proposed 50-percent threshold is that “Any showing of less than 50 percent opposition would not support an inference that a majority of employees likely did not actually support the union [at the time of recognition].” And, “[b]ecause there has already been a showing of majority that has not been challenged in an unfair labor practice proceeding, reliance on the usual showing of interest’ for an [election] petition (30 percent) would be insufficient to justify an exception to the recognition bar.”

Finally, the brief explains the rationale for the proposed 21 and 30-day cutoffs, as follows:

“The Board should therefore require that the showing of interest be obtained as soon as reasonably possible after recognition. A more extended period (such as 30 or 60 days) could allow time for active undermining of a union’s valid majority support, essentially continuing the organizing campaign and contributing to the very instability [that an election] bar is meant to prevent.”

* * * * *

“The General Counsel recommends allowing 30 days from formal notice of recognition for employees to file the petition with the regional office, as employees [who seek to oust a union] are often [legally] unrepresented and may be unfamiliar with Board procedures. In order to avoid litigation over when those periods (i.e., 21 days and 30 days) begin, the Board should require that they begin when the employer and/or the union give formal written notice to the unit employees of the voluntary recognition.”

As noted above, our amicus brief is available on the NLRB’s website at: <http://www.nlr.gov/nlr/about/foia/DanaMetaldyne/NLRBGC.pdf>.

All of this can be boiled down to a simple principle: if there’s a legitimate issue of whether a union had majority support at the time an employer recognized it, the best way to untangle the knot is to have a Board-conducted election.

Again, the idea is to balance two competing goals: on one hand the right of a nascent union to enjoy the benefits of exclusive representative status free of challenge, for a reasonable period; and on the other, the need to guarantee employee free choice by deterring the entrenchment of a union that does not truly enjoy uncoerced majority support. This balance is best struck by a test that provides that when half

³*Brooks v. NLRB*, 348 U.S. 96, 99–100 (1954).

or more of unit employees promptly indicate their dissatisfaction with a voluntary recognition, that recognition should not act as a bar to an election.

In view of the Board's expressed desire to look very carefully into the appropriateness of continuing the voluntary recognition bar in its current form, my office will be alert to cases that may raise this important issue. Indeed, shortly after filing my amicus brief with the Board, I directed our Regional Offices to submit, to our Division of Advice in Washington, unfair labor practice cases involving card check and neutrality agreements, so that they may receive legal review and coordination before any dispositive prosecutorial decisions are made. A copy is available online at: http://www.nlr.gov/nlr/shared_files/ommemo/ommemo/om04_76.pdf

It is essential that the legal theories and arguments advanced in these cases be consistent and uniform. To date, no new cases involving the recognition bar have been submitted.

Again, I thank you for this opportunity to provide my testimony on this important issue.

Senator SPECTER. There are two methods for union certification. One is the election procedure and a second is by signatures of employees in a majority that they wish to be represented by the union. Is that correct, Mr. Rosenfeld?

Mr. ROSENFELD. Yes. There is voluntary recognition, which does not necessarily have to be through a card check. It could be through a private agreement to have an election conducted by a neutral party. There are a variety of ways, but contrast that to the formal NLRB election process.

Senator SPECTER. But the card check is a procedure generally used to ascertain whether there is a majority of the employees who want the union?

Mr. ROSENFELD. Very often, yes, sir.

Senator SPECTER. And that is the essential provision contained in S. 1925?

Mr. ROSENFELD. I have not reviewed that piece of legislation.

Senator SPECTER. At the present time, you can have the so-called card check if it is a matter where the employer voluntarily agrees to it, correct?

Mr. ROSENFELD. Yes, sir.

Senator SPECTER. Are the considerations which you have outlined to bear on revising that so that there would not be a card check certification with the agreement of the employer?

Mr. ROSENFELD. No, sir. We support the concept of voluntary recognition. We offer a proposal for a limited exception, which I just read.

Senator SPECTER. A limited exception?

Mr. ROSENFELD. To the recognition bar, just to the recognition bar. We support voluntary agreements.

Senator SPECTER. Well, are you saying that there is an exception to supporting voluntary agreements?

Mr. ROSENFELD. No. There is an exception to being barred from entertaining for an election petition. In other words, the Board will not entertain an election petition during a reasonable period of time after voluntary recognition has been—

Senator SPECTER. Reasonable period of time? What is the 1 year requirement?

Mr. ROSENFELD. 1 year is for certification after an election, a flat 1-year bar, that the Board will not entertain.

Senator SPECTER. A 1-year bar?

Mr. ROSENFELD. Yes.

Senator SPECTER. And there is a bar for a reasonable period of time—

Mr. ROSENFELD. For the voluntary recognition situation.

Senator SPECTER. All right. Now, consideration is being given by the NLRB to an exception to that rule?

Mr. ROSENFELD. Yes, sir.

Senator SPECTER. And what are the range of exceptions possible?

Mr. ROSENFELD. Well, the Board asked for amicus briefs. I believe they received, in addition to briefs of the parties, about 20 other briefs. I have not read those, but they probably range from doing away with completely, as a policy matter, the bar itself, to not changing the law at all.

Senator SPECTER. Okay. And so far as you are concerned, your brief took the position of a limited exception to the bar?

Mr. ROSENFELD. Yes, sir.

Senator SPECTER. Where there is indication on another card check or some other means that a majority of the employees do not want the union?

Mr. ROSENFELD. Yes, sir, within the very limited period after recognition has been granted.

Senator SPECTER. How limited is the period?

Mr. ROSENFELD. Twenty-one days after formal written notice of recognition.

Senator SPECTER. And if action is not taken within the 21 days, then you cannot decertify?

Mr. ROSENFELD. Right, exactly.

Senator SPECTER. Okay. It is an arcane field, but you are well prepared for it because you have been educated in all those great Pennsylvania institutions, Mr. Rosenfeld.

Mr. ROSENFELD. Thank you, Mr. Chairman.

Senator SPECTER. It is good to see a fellow Pennsylvanian doing so well in this tough town.

Thank you. If you would stand by in the event some question arises where we need some expertise, I would appreciate it.

**STATEMENT OF NANCY SCHIFFER, ASSOCIATE GENERAL COUNSEL,
AFL-CIO**

Senator SPECTER. We now turn to our second panel, Ms. Nancy Schiffer and Mr. William Messenger. Ms. Schiffer is the Associate General Counsel of the AFL-CIO. Before that she was Deputy General Counsel to the United Auto Workers. She has a bachelor's degree from Michigan State and a doctorate from the University of Michigan Law School. Thank you for joining us, Ms. Schiffer, and we look forward to your testimony.

Ms. SCHIFFER. Thank you very much, Mr. Chairman. Thank you for this opportunity to address this very important issue of voluntary recognition and the recognition bar doctrine, which are so critical to workers' freedoms under the National Labor Relations Act. I have submitted written testimony and I would request that that be made part of the record here, and I am not going to go through that testimony.

Senator SPECTER. Without objection, it will be made a part of the formal record.

Ms. SCHIFFER. Thank you.

I would like to add one thing, if I may, to your introduction. I am also a proud member of United Auto Workers Local 1981.

I would like to tell you why continuation of the recognition doctrine matters to workers and why the radical change that is currently under consideration will harm the very policies that the National Labor Relations Act is supposed to support and defend. I would like to begin with a hypothetical. Suppose all the employer's workers come into the owner's office and say that they want to form a union, and the employer honors their choice. Or suppose the employer agrees ahead of time that if the workers demonstrate that a majority of them support forming a union then it will honor their choice.

Workers have the right to choose union representation, so why is it a bad thing when the employer respects that right and honors their choice? And how does this become an abdication of the Board's authority, as is urged in this case? Should not the Board in fact applaud the employer's willingness to recognize the union that its employees have selected pursuant to their Federally protected right to do so? And why should workers be forced through the Board's certification election process in order for their choice to be respected?

In fact, the Board does recognize and applaud voluntary recognition, as we have just heard. For many years after passage of the Wager Act, voluntary recognition was primarily used as a vehicle, it was the primary vehicle for forming a union. The Act specifically allows it. It has been repeatedly validated by the Board and courts as legitimate and well accepted, and so too has this corollary, the recognition bar doctrine. It has been consistently applied by the Board for 40 years.

So what has happened to suddenly compel a radical change that is being now contemplated that would discard this 40-year recognition bar doctrine? I submit the answer is: Nothing. So why this challenge to the recognition bar doctrine? I think the answer to that is found in the arguments used to make the challenge, and that is that voluntary recognition is illegitimate and so that the workers' choice it allows should not be honored.

Changing the recognition bar doctrine is really a means to attack all voluntary recognition, the recognition process itself, and it surely does that, because such a change as is being contemplated here would discourage the use of the voluntary recognition process, because what is the point if the Board certification process can be required anyway?

So this attack attempts to achieve through adjudication a result that Congress has expressly rejected, and it serves to remove a means to workers' representation that the Act specifically permits. The proposed change would allow 30 percent of the workforce to overturn the expressed will of the majority. So this minority of workers could undo the majority support for the union and it would allow the minority to control, stall, and delay the collective bargaining process.

Even the position articulated in the amicus brief filed by the general counsel, with its time limits and the 50 percent threshold, serves to seriously undermine the entire recognition process. An

employer is not going to agree to voluntary recognition if decertification is permitted, can be permitted immediately thereafter.

The recognition process inherently requires a snapshot of the level of interest of the workforce in forming a union and it is a process that must have finality in order to achieve the stability necessary to foster collective bargaining.

I would like to just note that this is not the only attack on voluntary recognition. This past July the NLRB's general counsel issued a memo to its regional office that lists various issues connected with voluntary recognition agreements which the regions are directed to submit to the office. It is mentioned in Mr. Rosenfeld's testimony.

Also, earlier this month and again just this week the general counsel has announced that complaints will issue against other voluntary recognition agreements. So that the current status of voluntary recognition is frighteningly like living in Florida this past summer and contemplating Bonnie and Charles and Francis and Ivan and Jean. You do not know what the impact is going to be, but meanwhile nobody is building new homes and nobody is planning a trip to Disney World.

PREPARED STATEMENT

The point is that this series of attacks and this consideration of reversal of a 40-year-old recognition bar doctrine really undermines the entire recognition, voluntary recognition process.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF NANCY SCHIFFER

Thank you for inviting me to testify before the Subcommittee today. My name is Nancy Schiffer, I am an Associate General Counsel of the AFL-CIO.

The notice of today's hearing states that it will examine the recognition bar doctrine of the National Labor Relations Act.

This is an extremely important and timely issue for discussion before this Subcommittee. It is an issue that is critical to workers' freedoms under the National Labor Relations Act which, in turn, vitally affect the quality of life of workers and the living standards of their families.

Let me start with the NLRA itself—what it does and what it doesn't do; then explain how voluntary recognition works for workers; and finally, detail the harmful impact on workers' rights under the Act if the recognition bar policy were to be radically changed or eliminated, as proposed.

The National Labor Relations Act (NLRA) states that its purpose is to encourage worker self-organization for representation in collective bargaining with employers. According to the National Labor Relations Act, it is "the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . ."

For workers, collective bargaining provides economic advantages. Union workers earn 27 percent more than non-union workers. They are 53 percent more likely to have medical insurance through their job. And they are nearly four times as likely to have a guaranteed pension, according to the U.S. Department of Labor, Bureau of Labor Statistics. The advantages for women and workers of color are even more dramatic. Unionized women workers make 33 percent more than their non-unionized counterparts; the differences for African Americans is 35 percent and, for Latinos, 51 percent.

Even workers who are not unionized benefit from having strong unions in their communities and states. States with a strong union presence have higher wages—for all workers—than those with a weak union presence. And, because union jobs provide more benefits than non-union jobs, they alleviate the burden on public

health care and other social services which are increasingly relied on by the working poor who lack union contracts and, accordingly, employer-provided benefits.

The NLRA has historically protected the rights of workers to organize and bargain with their employers for fair wages and decent benefits. But today, U.S. workers have lost these rights. The Act which is supposed to protect them has degenerated into a law which protects employer interests at the expense of workers' rights. The Act has become a tool of the "union-free" interests and their consultants, to the detriment of working families and their communities. When good union jobs are lost, all workers face depressed wages and lose their health care benefits and guaranteed retirement benefits. Their families and communities all suffer.

The National Labor Relations Act provides two avenues for workers to form a union. One starts with the filing a petition supported by thirty percent of the workers, includes a Board-conducted election, then Board certification and, eventually, an enforceable bargaining order. This process can take months and years.

If the NLRB election process were applied to a political election, then:

- You could not qualify for the ballot unless you first persuaded 30 percent of all eligible voters to sign a petition supporting you.
- You would not know the names and addresses of eligible voters until just a few weeks before the election. And the list would be drafted and provided by your opponent, the incumbent.
- The incumbent would be allowed to hold as many campaign rallies as he wants and could even compel voters to attend them, under penalty of termination. The voters themselves would be restricted from discussing the campaign except in non-work areas and during non-work times. You would be barred as a trespasser from entering the district. Instead, you would have to stand at the edge of the district, outside the community, waving signs or shouting about your qualification as voters come and go.
- The incumbent would control the election, its timing and its location. He would also control the economic livelihoods of the voters. And he could use that control to influence voters' choice. He could even fire voters from their jobs if he thinks they support you. Of course, this is illegal, but enforcement will take months and years. Nothing would happen until long after the election.
- If the incumbent lost, he could prevent you from taking office for months and years, simply by filing appeals, even if he loses every appeal.

This analogy demonstrates how flawed the election certification process is. So do the NLRB's own statistics: the number of workers who are retaliated against because they try to form a union has grown by leaps and bounds. In 1969, the number of such workers was just over 6,000. By the 1990's, more than 20,000 workers each year were victims of unlawful discrimination.

Research shows that at least one worker is illegally fired because of union activity in one-fourth of the organizing campaigns attempted. Over 90 percent of employers force employees to attend mandatory, closed-door meetings against the union and 78 percent force their workers to attend one-on-one meetings with their supervisors about the union. In over half of all organizing campaigns, the employer threatens to close the workplace if the union wins the election. Over half of organizing campaigns that involve undocumented workers include threats to call immigration officials.

These startling statistics of rampant interference with workers' rights during organizing campaigns demonstrate the harsh fact that that the NLRA process actually rewards employer violations. The Act's remedies have no deterrent impact and are applied too late to protect workers' free choice. This is precisely what Human Rights Watch concluded and reported in 2000 in "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards," p. 9. The bottom line is that workers are being robbed of their right to a fair and free choice about forming a union because the NLRB does not protect workers during organizing campaigns.

This interference is not cured simply because the NLRA representation process includes a secret ballot election conducted by an NLRB agent. A secret ballot election does not and cannot provide workers with a fair and free choice when they have already endured weeks and months of threats by their employer of the dire consequences of a vote in favor of forming a union. A company's threat to lay off workers or close the facility if the union is selected cannot be cured by the secrecy of a polling booth. Insistence by a company that it will never negotiate with a union, no matter how workers vote, cannot be mitigated by a secret vote. An NLRB-conducted election does not allow a worker, convinced by their employer's illegal threats that selecting a union will cause grave personal and financial loss, to freely exercise their right to vote.

The grim reality is that the Board's certification process forces workers through a confrontational, divisive war that can last for months and years. The inclusion, in that process, of a secret ballot election procedure cannot erase the fears and cannot produce a fair opportunity for workers to choose whether or not to form a union. It is a process that not only fails to protect workers' right to a fair and free choice regarding union representation, but also poisons the resulting bargaining process.

But this certification process is not the only method of union recognition provided for in the NLRA.

Since the passage of the Act, the Board and courts have recognized that employees may demonstrate majority support for a union by means other than a Board election. Employees may designate their majority support by signing cards authorizing the union to represent them and the employer may voluntarily recognize unions based on this demonstration of majority support. Such a process has been validated by the U.S. Supreme Court. *Gissell Packing Co. v. NLRB*, 395 U.S. 575 (1969) and *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956). It works in many Canadian provinces and it is required for public sector workers in Illinois, New York and California.

The value of voluntary recognition and the legitimacy of card check to establish majority support have been repeatedly affirmed by the Board and are consistent with the express language of the Act itself. Section 9(a) specifically refers to the union representative as "designated or selected" by a majority of the workers and does not specify, require or prioritize any particular method. Moreover, in passing the Taft-Hartley amendments in 1947 Congress rejected provisions that would have eliminated voluntary recognition.

So what does this have to do with the recognition bar doctrine? How does the recognition bar doctrine affect workers' rights to organize and bargain?

The answer is that, through a challenge to the recognition bar doctrine, the continued viability of voluntary recognition is at risk. On June 7, 2004, the Board granted review in cases involving voluntary recognition agreements and the recognition bar doctrine. The facts of these cases are straightforward. Worker majorities at two automotive parts supplier plants authorized the union to represent them, their majority status was verified by a neutral third party, the employers acceded to their workers' choice by granting recognition pursuant to a recognition agreement with the union, and the union and employers commenced collective bargaining negotiations. Shortly thereafter, NLRB decertification petitions were filed seeking elections to determine the union's continuing majority status. The petitions were dismissed by the NLRB Regional Offices in which they were filed on the basis of the recognition bar doctrine.

The NLRB recognition bar doctrine provides that a newly recognized union representative will be accorded a reasonable period of time, following voluntary recognition, to engage in collective bargaining for a contract, free of challenges to its majority status. This policy promotes industrial peace and stability, honors the expressed wishes of a majority of the workers, and encourages good faith collective bargaining between the parties. It is consistent with similar bars when recognition is granted pursuant to a Board certification or as a result of a settlement agreement.

The dismissals were appealed and review was granted by a divided Board.

Dozens of briefs were filed in this case, including an amicus brief by the NLRB's General Counsel. In his brief, the General Counsel acknowledged that voluntary recognition through a card check process is a "long-established," "legitimate," and "well-accepted" method of establishing majority support. Moreover, according to the General Counsel, voluntary recognition furthers harmony and stability of labor-management relations and promotes "the Act's fundamental policy of promoting employees' choice regarding bargaining representation."—Brief, p. 3, 4, and 5.

A necessary corollary of voluntary recognition is the recognition bar doctrine. Recognition bar has been the Board's policy since 1966 and has been repeatedly endorsed by the Board and courts since that time. By insulating the newly recognized union from a decertification election process, the recognition bar doctrine protects the new bargaining relationship from disruption in order to allow it to mature and succeed. It fosters stability in labor management relations and promotes industrial peace by permitting the parties an unfettered opportunity for negotiation of an initial contract. The predictability and certainty it provides encourage the parties to bargain in good faith and to work conscientiously toward agreement by eliminating the pressure on unions of having to produce results immediately and by discouraging employers from delaying in hopes that the union's strength will erode. Recognition bar also respects the majority's authorization of collective bargaining by allowing bargaining to bear fruit for employees. The protection is not indefinite, but only for a reasonable period of time, between about six months and one year. It is this policy—and these goals—that the Board is now considering. To undo the rec-

ognition bar doctrine is to so seriously undermine voluntary recognition that it becomes meaningless and irrelevant.

The AFL-CIO is not the only organization with this view. General Motors, Daimler/Chrysler, Ford, Delphi, Lear, Liz Claiborne, Levi, Kaiser Permanente, and other employers filed briefs in support of the continuation of the recognition bar doctrine. These are well-established, solid companies that provide quality jobs for workers here, in our local communities.

The brief filed by our nation's three largest auto manufacturers states that they have each experienced, in varying degrees, disruptions and distractions during the course of contentious organizing campaigns, and that such campaigns have had an impact on their over-all labor-management relationship. They express their belief that the recognition bar doctrine is essential for the maintenance of industrial peace and stability following voluntary recognition. They assert their view that "voluntary recognition [i]s their established and valid right" and that each "would experience a significant impact if voluntary recognition were significantly undermined." They point out that, without recognition bar, "the continued viability of voluntary recognition is threatened." Brief, p 8. Other employers have voiced similar sentiments in briefs filed in support of continuing the recognition bar doctrine.

The approaches being advocated against the recognition bar doctrine are to either eliminate it altogether or to create a window period that would allow the filing of a decertification petition after voluntary recognition has been extended, regardless of the status of the parties' collective bargaining negotiations. Such a petition, by a mere thirty percent of the workforce, would require the Board to set aside the expressed will of a majority of the workers in favor of a request by only one third of the workers. A minority of the workforce would be able to force all workers into the ordeal described above that is the NLRB's representation process. Collective bargaining would be effectively suspended; instead of developing a positive relationship at the bargaining table, the union and employer would be squaring off for a time-consuming, divisive campaign that disrupts the workplace and creates tensions and hostilities that are not easily reversed.

What is the argument for eliminating the recognition bar doctrine? It is being challenged on the basis of an underlying belief that voluntary recognition is somehow inherently coercive and not entitled to the full protection accorded recognitions resulting from either Board certifications or settlement agreements. Not only are these arguments just plain wrong, but they are also inconsistent with forty years of NLRB and court precedent. As described above, voluntary recognition has been repeatedly validated by the Board and courts since the Act's inception; it has been endorsed by Congress and it is embodied in the statutory language of the Act.

Voluntary recognition serves the interests of employers, employees and unions. It is typically far more expeditious than obtaining Board certification, so it more readily effectuates employee choice; it minimizes the duration of workplace campaigning so as to enhance productivity and customer service; and it creates positive labor-management relationships.

Voluntary recognition is an NLRB regulated process, contrary to the assertions of those who oppose it. It is subject to NLRB oversight and enforcement. Collusion and coercion in the process of voluntary recognition is strictly prohibited. The Act safeguards employee free choice by ensuring the existence of majority support and outlawing abuse in the collection of evidence of majority support. Board procedures are already in place to make sure the process is fair and that employee choice is honored.

In many ways, voluntary recognition incorporates even more worker protections than the certification process. First of all, over half of the entire workforce must support the union in order for the employer to lawfully recognize the union as their representative. In a Board certification process, however, workers achieve representation when only a majority of those voting select unionization. Second, voluntary recognition avoids the delays inherent in the certification process, delays that deny employees the benefits of their election for months and years. Finally, voluntary recognition fosters positive bargaining relationships, while the certification process produces adversarial, combative relationships which are hostile to good faith collective bargaining.

What is currently being urged on the Board is a radical departure from long-standing, well-established precedent. It would severely undermine voluntary recognition, to the detriment of workers, unions and employers. The change being sought serves no legitimate purpose, but rather, is at odds with the stated policies of the Act, which are to promote industrial peace, encourage collective bargaining, and protect employees' free choice regarding representation. Instead, it will do great harm.

Thank you for the opportunity to address this committee.

STATEMENT OF WILLIAM L. MESSENGER, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

Senator SPECTER. Thank you very much, Ms. Schiffer.

We turn now to Mr. William Messenger, Staff Attorney for the National Right to Work Legal Defense Foundation. He had been on the staff of the Republican Senate Policy Committee and the Assistant Majority Leader's Office, Federal Election Commission, and the National Association of Manufacturers. He has a bachelor's degree from Ohio University and a law degree from George Washington.

Thank you for joining us, Mr. Messenger, and the floor is yours.

Mr. MESSENGER. Thank you, Mr. Chairman, for the opportunity to testify today on this important issue.

The recognition bar is a Board policy that prevents the NLRB from conducting secret ballot elections after an employer recognizes a particular union to be the representative of its employees. I submit that this policy should be abandoned as it deprives the Board and employees of the best means to determine whether or not an employer-recognized union actually has the support of a majority of employees.

Now, unions in this country are increasingly turning to employer recognition to satisfy their organizing objectives. Employer recognition is simply where an employer recognizes a particular union as the representative of its employees and the union accepts such recognition. Now, employer recognition over the past decade is frequently bestowed pursuant to a prearranged agreement between the employer and the union. These agreements are often called voluntary recognition agreements, neutrality agreements, or sometimes partnership agreements.

Now, while the terms of these agreements vary, the standard provision is that they require the employer to recognize the union, usually based upon authorization cards collected by the union. These agreements usually also have many other types of provisions, usually commitments by the employer to assist the union organizing drive against its employees, and commitments by the union to behave in an employer-friendly manner after being recognized.

But the most important and critical aspect of employer recognition is that it is a purely private process. It occurs entirely outside of NLRB supervision and outside of NLRB processes. In fact, the entire purpose of recognition or partnership agreements is to exclude the NLRB from the representational process. Again, employer recognition is simply a private agreement between an employer and a union purporting that a third party, employees, want the representation of that union.

Now, the National Labor Relations Act was enacted to protect the rights of that third party, of employees. And the most important of those rights is employee freedom of choice as to union representation. The Supreme Court has recognized there can be no greater infringement of employee rights than for an employer to recognize a union that does not actually enjoy majority support.

That brings us to the underlying issue with regard to the recognition bar: How does the NLRB determine if an employer-recognized union actually has the support of a majority of employees?

Or to be rephrased, through what procedural mechanism does the NLRB investigate whether the employer recognition was in fact valid?

I respectfully submit that the NLRB secret ballot elections are the best method for determining whether or not employees truly support an employer-recognized union or if in fact they do not support the union their employer recognized. In fact, Congress enacted the representational procedures of the National Labor Relations Act and gave employees a statutory right to request a decertification election after employer recognition for precisely that purpose.

The Board should not deprive itself of its primary tool for divining employee representational preferences. Yet that is exactly what it is doing with its recognition bar doctrine. The bar is in fact a policy of deliberate blindness. It is a license granting employers and unions complete control over the representational process and the right to shut the NLRB and employees out of that process.

PREPARED STATEMENT

Therefore, abolition of the recognition bar is needed so that the Board can resume its proper statutory duty of ensuring that an employer-recognized union actually has the support of a majority of employees and therefore protect employees' rights to choose to be represented by a representative of their choosing or no union at all.

Thank you, Mr. Chairman.

[The statement follows:]

PREPARED STATEMENT OF WILLIAM L. MESSENGER

Chairman Specter and Distinguished Senators: Thank you for the opportunity to comment on the National Labor Relation Board's ("NLRB" or "Board") current "recognition bar" policy in these important hearings.

My name is William L. Messenger. I am a Staff Attorney with the National Right to Work Legal Defense Foundation, in Springfield, Virginia. Since the Foundation was founded in 1968, it has provided free legal aid to workers who choose to stand apart from a labor union, to exercise the "right to refrain" that Congress granted them under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and that, more fundamentally, is guaranteed by the First Amendment's freedom of association.

I am counsel or co-counsel in several cases pending before the NLRB challenging the Board's "recognition bar" policy, which is the subject matter of this hearing. See *Metaldyne Precision Forming/UAW (St. Marys, PA)*, 341 N.L.R.B. No. 150 (2004); *UAW & Dana Corp. (Upper Sandusky, OH)*, 341 N.L.R.B. No. 150 (2004); *USWA & Cequent Towing Products (Goshen, IN)*, N.L.R.B. Case No. 25-RD-1447. I also represent individual employees in several cases challenging various forms of so-called "neutrality agreements."¹

INTRODUCTION

In 1966, with virtually no reasoning or analysis, the Board planted the seeds of what has become known as the "recognition bar" in *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. 583, 587 (1966). From this rudimentary ruling mushroomed an unfair and undemocratic recognition bar that blocks employees from exercising their statutory right to a decertification election (or otherwise changing representatives) once an employer unilaterally bestows voluntary recognition on a particular union.

Employees enjoy a statutory right to petition for a decertification election under § 9(c)(1)(A)(ii) of the National Labor Relations Act ("NLRA" or "Act"). By contrast,

¹ See *Patterson v. Heartland Industrial Partners, et. al.*, No. 5:03 CV 1596 (U.S. District Court, N.D. Ohio); *UAW & Dana Corp.* (Bristol, VA), Case Nos. 11-CB-3397, 11-CB-3398, 11-CB-3399; *UAW & Thomas Built Buses, Inc. (High Point, NC)*, Case Nos. 11-CB-3455-1, 11-CA-20338; *USWA & Heartland Industrial Partners (Cleveland, Ohio)*, Case No. 8-CE-84; *UAW (Detroit, MI)*, Case Nos. 7-CE-1786 & 7-CE-57; *USWA & Goodyear Tire & Rubber Co., (Asheboro, NC)*, Case Nos. 11-CA-20434 et. seq.; *USWA & Metaldyne Corp. (Cleveland, OH)*, Case No. 8-RD-1966.

the voluntary recognition bar—which frustrates employees’ right to a decertification election—is not a creature of statute. It is a discretionary Board policy which should be reevaluated when industrial conditions warrant.

The time has come for the Board to reassess entirely the underlying purpose of, and need for, a recognition bar. This is particularly true given the growth of so-called “voluntary recognition agreements.” In these agreements, unions and employers deliberately take advantage of the Board’s recognition bar rule to completely exclude the NLRB from the process in which employees choose (or reject) union representation. In a perverse way, the Board’s electoral machinery is being driven to obsolescence by its own recognition bar policy.

Exclusion of the NLRB from the representational process leaves employee rights in the abusive hands of employers and unions that are pursuing their own self-interests under these agreements. Unions are desperately seeking additional members and dues revenues. Employers are (naturally) pursuing their business interests, such as avoiding coercive union corporate campaigns or obtaining pre-negotiated “sweetheart deals” regarding future-organized employees’ terms and conditions of employment. Neither entity has any interest in protecting employee rights to freely choose or reject union representation (which is what the NLRB exists to protect).

Employee free choice should not, and under the text of the Act can not, be subject to the vagaries of self-interested unions and employers. Accordingly, abolition of the “voluntary recognition bar” is needed to reestablish the Board’s proper role in the representational process, and thereby protect employee rights to freely choose or reject union representation.

Thankfully, the NLRB is currently evaluating the propriety of the recognition bar in a series of important cases.² We hope that a prompt decision in these cases will result in the rescission of the recognition bar policy, thereby restoring to employees their right to a secret-ballot challenging the status of an employer-recognized union.

OVERVIEW OF BASIC CONCEPTS

Under current Board law, a union can become the exclusive representative of a group of employees in three ways: (1) be “certified” as the representative of employees pursuant to an NLRB-conducted secret-ballot election; (2) be “recognized” by an employer as the representative of its employees; or (3) through an NLRB “bargaining order” in which the Board orders an employer to recognize and bargain with a union as the remedy for its unfair labor practices. The third method, which is reserved for extraordinary situations, does not concern us here.

“Certification” occurs when a union obtains the majority of votes in a NLRB-conducted, secret-ballot election. The NLRB “certifies” that union is the exclusive representative of employees based upon the uncoerced support of a majority of employees. NLRB officials control and monitor the conduct of such elections to ensure their validity and protect employee free choice. See *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) (“In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees”).

“Recognition” is where an employer recognizes a particular union to be the exclusive representative of a group of its employees, and the union accepts such recognition. The NLRB is not involved in this process. Employer recognition is simply a private agreement between a union and an employer in which both purport that a majority of employees desire the union’s representation.

Employers frequently recognize unions pursuant to pre-arranged agreements between the entities. These agreements are often referred to as “neutrality agreements,” “partnership agreements,” or “voluntary recognition agreements.” While the terms of the agreements vary greatly, a standard provision is an obligation by the employer to recognize the union without a NLRB secret-ballot election. Other common provisions include employer commitments to assist union organizing campaigns against their employees, and union commitments to behave in an employer-friendly manner upon being recognized.

The National Labor Relations Act (“NLRA”) grants employees a statutory right to petition for a decertification election challenging the status of a recognized or certified union. Section 9(c)(1)(A)(ii) states that employees may file an election petition asserting that “the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative.” 29 U.S.C. § 159(c)(1)(A)(ii).

²See *Metaldyne Precision Forming/UAW (St. Marys, PA)*, 341 N.L.R.B. No. 150 (2004); *UAW & Dana Corp. (Upper Sandusky, OH)*, 341 N.L.R.B. No. 150 (2004); *USWA & Cequent Towing Products (Goshen, IN)*, N.L.R.B. Case No. 25–RD–1447.

The only statutory limitation on decertification elections is when, within the “preceding twelve month-period, a valid *election* shall have been held.” 29 U.S.C. § 159(e)(2) (emphasis added). Thus, employees may not petition for an election for one year after a union is certified in an NLRB election. However, there is no statutory restriction on an employee’s right to petition for an election after a union is merely recognized by their employer.

The “recognition bar” is an NLRB created policy that prevents employees from exercising their statutory right to petition for an election after employer recognition of a union. The bar precludes elections for “reasonable” period of time, which can include a year.³ The validity of this policy is the subject of this testimony.

ISSUE PRESENTED

How Does the NLRB Determine if an Employer-Recognized Union Actually Has the Uncoerced Support of a Majority of Employees?

In a narrow sense, the issue is the validity of the Board’s recognition bar policy. However, the overarching issue is: how should the NLRB determine if an employer-recognized union actually has the uncoerced support of a majority of employees? The proper, statutorily prescribed method for making this determination is an NLRB-conducted, secret-ballot election.

The NLRB was created by Congress to protect employee rights.⁴ The most important of these rights is an employee’s right to choose union representation, or refrain from union representation. 29 U.S.C. § 157. There could be “no clearer abridgement” of this right than for an employer to recognize a union that does not enjoy the actual, uncoerced support of a majority employees in the bargaining unit. *Ladies Garment Workers (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 737 (1961). The NLRB has a duty to ensure that an employer-recognized union actually enjoys the uncoerced support of a majority of employees.

However, employer recognition of a union occurs entirely outside of NLRB processes and supervision. Indeed, the primary purpose of employer/union “partnership agreements” is to exclude the NLRB from the representational process.⁵ Employer recognition is merely a private agreement between a union and an employer in which both entities purport that a majority of employees desire the representation of the union.

Employer recognition does not itself mean that the employer-recognized union actually enjoys uncoerced support of a majority employees. “The fact that an employer bargains with a union does not tell us whether the employees wish to be represented by the union.” *Baseball Club of Seattle, LP, Seattle Mariners*, 335 N.L.R.B. 563, 567 n.2 (2001) (Member Hurtgen, dissenting); see also *Ladies Garment Workers*, 366 U.S. 731 (employer negotiated with minority union based on erroneous “good faith” belief that union had majority support of employees).

The NLRB itself does not know whether or not employees actually support the union their employer designated to represent them, unless and until the Board takes some action to determine the representational preferences of employees. This fact is readily apparent from the facts of the three primary cases in which the NLRB is reviewing the validity of the recognition bar doctrine:

“*Metaldyne Precision Forming & UAW (St. Marys, PA)*, Case Nos. 6–RD–1518 and 6–RD–1519. Metaldyne and the UAW are parties to a secret “partnership agreement.” In December, 2003, Metaldyne declared the UAW to be the representative of its employees pursuant to that agreement. Within days after employer recognition, over 50 percent of employees signed a showing of interest against UAW representation and for a decertification election. The election petition was dismissed under the recognition bar policy.

³ See *MGM Grand Hotel Inc.*, 329 N.L.R.B. 464, 471–472 (1999) (election petition filed 356 days after employer recognition dismissed pursuant to recognition bar). However, as a practical matter, the actual bar to elections is three or more years due to common provisions in “neutrality agreements” that guarantee a collective bargaining agreement within a few months after recognition. This is discussed at greater length below.

⁴ See 29 U.S.C. §§ 153–54; *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (“By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers”); *Levitz Furniture Co. of the Pacific, Inc.*, 333 N.L.R.B. 717, 728 (2001) (employers only statutory interest in representational matters “is in ensuring that they do not violate Section 8(a)(2) by recognizing minority unions”).

⁵ Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Labor Law Journal, Summer/Fall 1996, p. 176 (AFL–CIO’s General Counsel writes that unions should “use strategic campaigns to secure recognition . . . outside the traditional representation processes”).

“*UAW & Dana Corp. (Upper Sandusky, OH)*, Case No. 8–RD–1976. Dana and the UAW are parties to a secret ‘partnership agreement.’ Pursuant to this agreement, Dana provided the UAW with personal information about employees, access to its facilities, and conducted a series of captive audience meetings in which Dana praised its ‘partner’ union. Dana then recognized the UAW as the representative of its employees. Approximately 33 days later, a decertification petition was filed, duly supported by 35 percent of employees. The election petition was dismissed under the recognition bar policy.

“*USWA & Cequent Towing Products (Goshen, IN)*, Case No. 25–RD–1447. Cequent and the USWA are parties to a secret ‘neutrality agreement.’ Pursuant to their agreement, Cequent and the union launched an organizing drive against Cequent’s employees in Goshen, IN. During the campaign (and before employer recognition), a majority of employees signed a petition stating that they did not want the USWA to be their representative, and wanted an NLRB election in the event that Cequent ever recognized the USWA. Despite this petition against USWA representation, Cequent recognized the USWA as the representative of its employees. An election petition was filed by employees within three days of employer recognition. The petition was dismissed under the recognition bar policy.”

In each of the above cases, it is at best unclear whether a majority of employees actually desires the representation of the employer-recognized union. Indeed, it is likely that the employees do not want that representation.

Most important, the NLRB does not know what the actual free choice of Metaldyne, Dana, and Cequent employees is with regard to union representation.⁶ The Board has a statutory duty to ensure that a union acting as the exclusive representative of employees enjoys the uncoerced support of a majority. The issue then is how—or through what procedural mechanism—does the NLRB determine if an uncoerced majority of employees actually desires the representation of an employer-recognized union?

ANALYSIS

There are three possible methods through which the NLRB could attempt to determine whether an uncoerced majority of employees support an employer-recognized union. First, the Board can simply defer to the decision of the employer and union. Second, the NLRB can rely on unfair labor practice proceedings challenging the employer’s recognition as unlawful under the NLRA. Third, the NLRB can conduct secret-ballot election to determine employees’ true representational preferences.

As discussed at greater length below, the first and second options are grossly insufficient to protect employee freedom of choice. Deference to the decision of the employer and union leaves employee rights in the abusive hands of these entities, each of which is pursuing its own self-interests. This is particularly true given the growth of “voluntary recognition agreements,” in which recognition is bestowed pursuant to pre-arranged deal between an employer and union.

Unfair labor practice proceedings are also inadequate, as those procedures were not designed to determine the representational desires of employees. Instead, unfair labor practice charges are designed to punish (and thereby prevent) violations of the NLRA. Moreover, conduct which itself does not amount to an unfair labor practice, but is offensive to employee free choice in an NLRB election because of the higher standards of conduct required in election proceedings, is inherent in any union “card check” campaign.

Only the third option—representational proceedings culminating in an election—accurately determines whether an employer-recognized union truly has the uncoerced support of employees. Indeed, Congress created the representational procedures of the NLRA for expressly this purpose. See 29 U.S.C. §§ 159–61; *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (“secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support”).

Unfortunately, the Board’s recognition bar policy precludes elections after employer recognition, thereby preventing employees and the NLRB from determining the actual representational preferences of employees. This was the doctrine’s affect in the *Metaldyne*, *Dana*, and *Cequent* cases discussed above, in which election peti-

⁶That the recognition bar precludes the NLRB from conducting elections in these cases, despite the fact that the NLRB does not know employees’ actual representational preferences at the time, is perhaps the doctrine’s greatest flaw. The recognition bar is effectively a policy of deliberate blindness by the NLRB regarding the existence of employee support for an employer-recognized union.

tions were dismissed in spite of manifest uncertainty as to what the free choice of employees may be with regard to union representation.

The Board should overrule and discard its current recognition bar policy. The bar serves only to prevent employees and the NLRB from determining whether an uncoerced majority of employees desire the representation of an employer-recognized union.

I. THE NLRB CANNOT DEFER TO THE SELF-INTERESTED CHOICE OF EMPLOYERS AND UNIONS WITH REGARD TO THE REPRESENTATIONAL PREFERENCES OF EMPLOYEES

1. *NLRB Cannot Assume That Employer Recognition of a Union Proves that An Uncoerced Majority of Employees Actually Supports Union Representation*

An employer voluntarily recognizing a union does not itself indicate that employees freely wish to be represented by that union. Voluntary recognition means only that an employer has selected a particular union to represent its employees without a Board-certified election. An employer could potentially voluntarily recognize a union that has majority employee support, does not have majority support, or whose employee support was obtained through coercion.⁷

The Board cannot blindly defer to employer and union determinations regarding employees' representational preferences.⁸ As the Supreme Court long ago recognized, deferring to even an employer's "good-faith" determination that a union has majority employee support "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Ladies Garment Workers*, 366 U.S. at 738–39 (emphasis added).⁹

Indeed, there is a long and tawdry history of cases in which employers recognized unions that did not enjoy the support of an uncoerced majority of employees.¹⁰ In many cases, the employer itself distorted employee free choice by pressuring employees to "vote" for a favored union by signing union authorization cards.

The Board's current policy of dismissing employee election petitions seeking to determine whether a union has the actual support of employees, because an employer

⁷ See *Ladies Garment Workers*, 366 U.S. 731 (employer negotiated with minority union based on erroneous good faith belief that union had majority support of employees); see also *Duane Reade, Inc.*, 338 N.L.R.B. No. 140 (2003), *enforced*, Case No. 03–1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer recognized union after unlawfully assisting the union by coercing employees to sign union authorization cards).

⁸ See *Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom"); see also *Levitz Furniture*, 333 N.L.R.B. 717 (employer determinations as to employee support or opposition to union representation disfavored); *Underground Service Alert Southern California*, 315 N.L.R.B. 958, 960–61 (1994) (same).

⁹ This lesson was recently reiterated in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003). There, the Board deferred to a contractual agreement between an employer and union stating that the union had majority employee support, without independently verifying the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in *Garment Workers*." *Id.* at 537.

¹⁰ The cases where an employer conspired with its favored union to secure "recognition" of that union are legion. See, e.g., *Duane Reade, Inc.*, 338 N.L.R.B. No. 140 (2003), *enforced*, Case No. 03–1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer unlawfully assisted UNITE and unlawfully granted recognition); *Fountain View Care Center*, 317 N.L.R.B. 1286 (1995), *enfd.*, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); *NLRB v. Windsor Castle Healthcare Facility*, 13 F.3d 619 (2nd Cir. 1994), *enforcing* 310 N.L.R.B. 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); *Kosher Plaza Super Market*, 313 N.L.R.B. 74, 84 (1993); *Brooklyn Hospital Center*, 309 N.L.R.B. 1163 (1992), *aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB*, 9 F.3d 218 (2nd Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); *Famous Casting Corp.*, 301 N.L.R.B. 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); *Systems Management, Inc.*, 292 N.L.R.B. 1075, 1097–98 (1989), *remanded on other grounds*, 901 F.2d 297 (3rd Cir. 1990); *Anaheim Town & Country Inn*, 282 N.L.R.B. 224 (1986) (employer actively participated in the union organizational drive from start to finish); *Meyer's Cafe & Konditorei*, 282 N.L.R.B. 1 (1986) (employer invited union it favored to attend hiring meeting with employees); *Denver Lamb Co.*, 269 N.L.R.B. 508 (1984); *Banner Tire Co.*, 260 N.L.R.B. 682, 685 (1982); *Price Crusher Food Warehouse*, 249 N.L.R.B. 433, 438–49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); *Vernitron Electrical Components*, 221 N.L.R.B. 464 (1975), *enfd.*, 548 F.2d 24 (1st Cir. 1977); *Pittsburgh Metal Lithographing Co., Inc.*, 158 N.L.R.B. 1126 (1966).

avers that the union it recognized had majority employee support (i.e. the recognition bar), repeats the folly identified in *Ladies Garment Workers*. The Board's failure to determine for itself whether the employer-recognized union actually has the uncoerced support of a majority of employees by conducting a secret ballot election places fundamental employee rights directly in "permissibly careless employer and union hands." *Id.*

Worse still, the Board abdicates its statutory duties by deferring to employer and union determinations as to the representational preferences of employees. Congress empowered the NLRB to administer the Act and decide representational matters. See 29 U.S.C. §§ 153–54, 159–161. The Board is thereby charged with protecting employee rights under § 7 of the Act, *see, e.g.*, 29 U.S.C. § 160, and with determining and ensuring that employees' representational wishes are realized under § 9 of the Act. See 29 U.S.C. § 159. The Board cannot delegate its duties to self-interested employers and unions.

2. *Employer Recognition Bestowed Upon a Union Pursuant to a "Voluntary Recognition Agreement" Counsels Heightened Board Scrutiny Regarding Whether an Employer Recognized Union Truly Enjoys the Uncoerced Support of a Majority of Employees*

Employer recognition of a union pursuant to a pre-arranged deal between the entities counsels even greater scrutiny from the NLRB than employer recognition made in the absence of such an arrangement (which is itself undependable). Employer recognition pursuant to a "voluntary recognition agreement" is not an "arm's length" determination that likely reflects the free choice of employees. Instead, it reflects only the intersection of the employer and union self-interests that led to the parties to make the agreement in the first place.

Unions are aggressively seeking voluntary recognition agreements to satisfy their self-interest in acquiring more dues paying employees to replenish their rapidly diminishing ranks.¹¹ Every new facility organized brings more members into the union, more money into union coffers through compulsory dues payments, and places more power in the hands of union officials.¹²

By seeking voluntary recognition agreements, unions are effectively organizing employers, not employees, by coercing or coaxing the employers to agree in advance which particular union is to represent employees. The employer and its anointed union then work together to organize employees from the "top down," irrespective of the employees' actual preference.¹³

Unions obtain voluntary recognition agreements from employers with a combination of the "stick" and the "carrot." The "stick" often includes "corporate campaigns"

¹¹The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9 percent of wage and salary workers were union members, down from 13.3 percent in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. <http://www.bls.gov/news.release/union2.nr0.htm> (January 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 percent in 1983, the first year for which comparable union data are available. For example, in 1982, the Steelworkers claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the UAW claimed 1.14 million members, by 2002, 700,000 members. As of today, only 8.2 percent of the private sector workforce is unionized, and the other 91.8 percent do not appear to be flocking to join. *IBM Corp.*, 341 N.L.R.B. No. 148, slip op. at 19 n.9 (2004). In *UFCW Local 951 (Meijer, Inc.)*, 329 N.L.R.B. 730 (1999), Texas A & M labor economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is employee resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that 2/3 of employees are not favorably disposed towards unions. (Hearing Transcript pp. 1382–83).

¹²In *United Food & Commercial Workers Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730, 732, 734–35 (1999), the UFCW unions and the Board majority relied upon the expert testimony of a labor economist, Professor Paula Voos. Prof. Voos has written that unions seek to organize for a whole host of reasons, including the desire of union leaders for political aggrandizement and power; the monetary self-interest of union leaders to keep and enhance their own jobs and wages; and the perceived "social idealism" and "ideological gains" brought about by union organizing. See Paula Voos, *Union Organizing Costs and Benefits*, 36 *Industrial and Labor Relations Review* 576, 577 (July 1983). Professor Voos also wrote that organizing is a profit-making venture for many unions. *Id.* at 577 & n.5. For example, she recognized that unions often organize larger units precisely because that is "where the money is!" *Id.* at 578 n.8.

¹³Organized labor's "top-down" organizing strategy is repulsive to central purposes of the NLRA, and creates the potential for severe abuse of employees' § 7 rights. See *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act was to limit top-down organizing campaigns"); *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 653 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns") (citations omitted).

against the employer,¹⁴ the use of secondary pressure,¹⁵ and enlisting the aid of state or local government to force private employers to sign voluntary recognition agreements with a favored union as a condition of doing business with the governmental entity.¹⁶

The “carrot” frequently includes pre-negotiating terms and conditions of employment favorable to the employer that will come into effect upon the union successfully organizing employees.¹⁷ In each of the three major recognition bar cases currently pending before the Board, the union agreed to “sweetheart” collective bargaining terms in exchange for employer assistance with organizing employees.

In *USWA and Cequent Towing Products (Goshen, IN)*, N.L.R.B. Case No. 25–RD–1447, the USWA agreed to a “Side Letter and Framework” agreement that limits the wages and benefits employees can attain after the USWA is recognized as their union representative.¹⁸ In *UAW and Dana Corp. (Upper Sandusky, OH)*, Case No. 8–RD–1976, the UAW signed a “partnership agreement” with Dana in which the union pre-negotiated several terms and conditions of employee’s employment in a manner favorable to the employer.¹⁹ Finally, in *Metaldyne Precision Forming and UAW (St. Marys, PA)*, Case Nos. 6–RD–1518 and 6–RD–1519, Metaldyne and the USWA entered into a “partnership agreement” in which the USWA sacrificed the right of employees to strike or engage in work actions to support bargaining demands.²⁰

A typical example of the “carrot” of favorable terms and conditions of employment unions are willing to offer employers in exchange for assistance with organizing is the “Agreement on Preconditions to a Card Check Procedure Between Freightliner LLC and the UAW.” This reprehensible agreement speaks for itself. A copy of it is attached to this testimony.

¹⁴It is well documented that these corporate campaigns include, inter alia, baseless lawsuits, unfavorable publicity to cast the employer in an evil light and pressure by so-called “community activists.” See Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Employee Relations Law Journal 21 (Spring 1999); *Symposium: Corporate Campaigns*, 17 Journal of Labor Research, No. 3 (Summer 1996); Herbert R. Northrup & Charles H. Steen, *Union ‘Corporate Campaigns’ as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J. L. & Pub. Pol’y 771 (1999).

¹⁵See, e.g., *Pittsburgh Fulton Renaissance Hotel*, Case No. 6–CE–46, at 5 (N.L.R.B. G.C. Feb. 7, 2002) (Division of Advice finds that provision of neutrality agreement that “does not permit the Employer to lease, contract or subcontract its operations . . . to any person unless that person agrees to neutrality, access, voluntary recognition, card-check, no-strike/no-lockout, etc. provisions of the neutrality agreement” violates § 8(e), but advises against issuing a complaint because it is time-barred under § 10(b)); *Int’l Union UAW*, Case No. 7–CE–1786 et al (case pending before General Counsel alleging that UAW has § 8(e) agreement with auto manufacturers to not do business with automobile parts suppliers that do not sign voluntary recognition agreements with UAW); *Heartland Industrial Partners (USWA)*, Case No. 8–CE–84 (case pending before General Counsel alleging that USWA has § 8(e) agreement with an investment company that requires the company to not do certain business with employers that will not sign the USWA neutrality agreement).

¹⁶See *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (San Francisco Airport Authority mandate that private concessionaires who wished to lease space at the airport had to first sign a neutrality agreement preempted); *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004) (California statute that forbids employers who receive state grants or funds from using such funds to advocate against or in favor of union organizing is preempted); *H.E.R.E. Local 57 v. Sage Hospitality Resources LLC*, 299 F. Supp. 2d 461 (W.D.Pa. 2003), *appeal pending*, Third Circuit Case No. 03–4168 (City of Pittsburgh pressured hotel operator to sign a neutrality and card check agreement as a condition of approving the public financing necessary to complete its project, even directing the hotel operator to contact specific HERE officials to negotiate this mandatory arrangement).

¹⁷See *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2nd Cir. 1966).

¹⁸See November 27, 2000, Side Letter and Framework for a Constructive Collective Bargaining Relationship Agreements between Heartland Industrial Partners, LLP (Cequent’s parent company) and the USWA, at Side Letter § 9(A–C).

¹⁹On September 3, 2004, the NLRB’s Office of General Counsel decided to issue unfair labor practice complaints against the UAW and Dana for violating §§ 8(a)(1), 8(a)(2), and 8(b)(1)(A) of the Act by entering into agreements regarding employees’ terms and conditions of employment in their “partnership agreement”. See *Dana Corp. (UAW)*, Case Nos. 7–CA–46965 et. seq., *Dana Corp. (UAW)*, Case Nos. 7–CA–47079 et. seq., and *Dana Corp. (UAW)*, Case Nos. 11–CA–20134 et. seq.

²⁰Waiving employees’ right to strike is a massive concession at the expense of employees, as it destroys employee bargaining leverage to obtain favorable terms and conditions of employment. “The economic strike against the employer is the ultimate weapon in labor’s arsenal for achieving agreement upon its terms.” *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) see also *Pattern Makers League v. NLRB*, 473 U.S. 95, 129 (1985) (“The strike or the threat to strike is the workers’ most effective means of pressuring employers, and so lies at the center of the collective activity protected by the Act”) (emphasis added).

Employers have a wide variety of self-interested business reasons to enter into voluntary recognition agreements that have nothing to do with facilitating employee free choice. This primarily includes avoiding the “stick” of union pressure tactics, and/or obtaining the “carrot” of favorable future collective bargaining agreements, as discussed above. Other reasons for which employers have assisted union organizing drives include: (a) to cut off the organizing drive of a less favored union; (b) because of the existence of a favorable bargaining relationship with the union at another facility; or (c) as a bargaining chip during negotiations regarding other bargaining units.²¹

None of the union or employer motivations or arrangements for entering into voluntary recognition agreement center on ensuring employee free choice. Instead, unions and employers seek and enter into these agreements purely to satisfy their narrow self-interests. Accordingly, employer and union determinations regarding the representational choices of employees that are made pursuant to pre-arranged “partnership agreements” are entitled to no deference from the NLRB.

II. UNFAIR LABOR PRACTICE PROCEEDINGS ARE AN INADEQUATE SUBSTITUTE FOR SECRET-BALLOT ELECTIONS FOR DETERMINING THE REPRESENTATIONAL PREFERENCES OF EMPLOYEES

1. *Unfair Labor Practice Proceedings Are Not Designed to Determine the Representational Preferences of Employees*

Unfair labor practice procedures are inadequate to determine whether employees support or oppose union representation because that is simply not what the procedures were designed by Congress to accomplish. Sections 10 and 11 of the Act empower the Board to prevent and remedy violations of the Act. 29 U.S.C. § 160–61. Sections 3(d) and 10 of the Act assign the General Counsel with the responsibility of investigating unfair labor practice charges, issuing and prosecuting complaints, and seeking compliance with Board orders in Court. These sections were not designed to determine the representational wishes of employees. 29 U.S.C. § 153(d) and 160. By contrast, Congress specifically enacted § 9 of the Act to gauge whether employees support or oppose union representation. 29 U.S.C. § 159

Congress also solely empowered the Board to decide representational issues. *Id.* By contrast, unfair labor practice charges are filtered sparingly through the General Counsel’s discretionary prosecutorial lens. *See* 29 U.S.C. § 153(d); *NLRB v. UFCW*, 484 U.S. 112 (1987) (General Counsel has unreviewable discretion to issue or not issue unfair labor practice complaints). Allowing the General Counsel to resolve what are effectively representational issues—determining whether the union designated by an employer has the uncoerced support of a majority of employees—is contrary to the basic structure of the Act.

As a practical matter, an after-the-fact investigation of an unfair labor practice allegation does not affirmatively determine the representational desires of employees. It merely hunts for unfair labor practices. It is impossible for the General Counsel, after-the-fact, to divine the true wishes of employees by trying to piece together all the myriad events and circumstances that occurred in a “card check” drive.

2. *Conduct Offensive to Employee Free Choice in an NLRB Election, Which Does Not Itself Amount to An Unfair Labor Practice, is Inherent in “Card Check” Campaigns*

A higher standard for union and employer conduct is required in representational proceedings than in unfair labor practice proceedings. In secret-ballot elections, the Board provides a “laboratory” in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine employees’ uninhibited desires.²² A lower standard is utilized in unfair labor practice proceedings.

Conduct that does not rise to the level of an unfair labor practice can interfere with employee free choice in an NLRB election, and warrant overturning the results of that election. *See General Shoe*, 77 N.L.R.B. 124, 127 (1948). A union can become the exclusive bargaining representative of employees via employer recognition by engaging in conduct that would have precluded it from obtaining such status through a secret-ballot election, without committing an unfair labor practice. In fact, conduct objectionable in any secret-ballot election is inherent to union “card check” campaigns!

²¹ *See Price Crusher Food Warehouse*, 249 N.L.R.B. 433 (1980); *Brooklyn Hospital Center*, 309 N.L.R.B. 1163 (1992), *aff’d sub nom., Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB*, 9 F.3d 218 (2nd Cir. 1993); and *Kroger Co.*, 219 N.L.R.B. 388 (1975), respectively.

²² *See General Shoe*, 77 N.L.R.B. 124, 127 (1948); *see also NLRB v. Sanitary Laundry*, 441 F.2d 1368, 1369 (10th Cir. 1971); *Gissel Packing*, 395 U.S. 525, 601–602 (1969).

For example, in an NLRB-supervised secret ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters, at or near the polling place;²³ (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;²⁴ and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).²⁵

Yet, this conduct occurs in almost every “card check campaign.” When an employee signs (or refuses to sign) a union authorization card, he is not likely to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby “vote” for the union.²⁶ This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases the employee’s decision is not secret, as in an election, as the union clearly has a list of who has signed a card and who has not.²⁷

A very recent Board decision further demonstrates that conduct inherent to a card-check drive is objectionable and coercive if done during a secret-ballot election. In *Fessler & Bowman, Inc.*, 341 N.L.R.B. No. 122 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot—even absent a showing of tampering—because where “ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question.” (Slip. op. at 2).

In a card check campaign, union officials do much more than merely handle a sealed secret ballot as a matter of convenience to one or more of the employees. Union officials directly solicit employees to sign an authorization card (and thereby cast their “vote”), stand over them as they “vote,” know with certainty how each individual employee “voted,” and then physically collect, handle and tabulate these purported “votes.” This conduct is infinitely more intimidating and intrusive than the theoretical taint found to warrant a remedy in *Fessler & Bowman*.

Accordingly, even a card-check drive devoid of conduct that may constitute an unfair labor practice does not approach the “laboratory conditions” guaranteed in a Board-conducted election.²⁸ The superiority of Board supervised secret-ballot elections for protecting employee free choice is beyond dispute. It is therefore incongruous for the Board to apply the unyielding recognition bar to card check recognitions, because the lack of integrity inherent in such card checks would surely taint a Board election held under similar circumstances.

3. Secret Ballot Elections are a Faster and More Decisive Method to Determine Employee Representational Preferences Than Unfair Labor Practice Proceedings

Finally, representational proceedings are faster than unfair labor practice proceedings. See NLRB Case Handling Manual, ¶ 11000 “Agency Objective” (“The processing and resolution of petitions raising questions concerning representation, i.e.,

²³ See *Alliance Ware Inc.*, 92 N.L.R.B. 55 (1950) (electioneering activities at the polling place); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961) (same); *Bio-Medical Applications of P.R.*, 269 N.L.R.B. 827 (1984) (electioneering among the lines of employees waiting to vote); *Pepsi Bottling Co. of Petersburg*, 291 N.L.R.B. 578 (1988) (same).

²⁴ *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

²⁵ *Piggly-Wiggly*, 168 N.L.R.B. 792 (1967).

²⁶ The Board’s justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employees making a determination as to union representation in a card check drive. “The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.” *Milchem Inc.*, 170 N.L.R.B. 362, 362 (1968). Union soliciting and cajoling employees to sign authorization cards is incompatible with this rationale.

²⁷ An additional distinction is that in a secret-ballot election, once an employee has made the decision “yea or nay” by casting a ballot, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a “card check drive,” but often represents only the beginning of harassment for that employee. Eventually, many employees sign union authorization cards just to get the union organizers “off their back.”

²⁸ Of course, many card-check drives are also fraught with union coercion, intimidation and misrepresentations that could amount to an unfair labor practice charges. See *eg HCF Inc.*, 321 N.L.R.B. 1320 (1996) (union “not responsible” for threats to employee by authorization card solicitor that “the union would come and get her children and it would also slash her tires”); *Levi Strauss & Co.*, 172 N.L.R.B. 732, 733 (1968) (Board recognizes the serious problem of union misrepresentations about the purpose and effect of an authorization card).

RC, RM, and RD petitions, are to be accorded the highest priority”). This is particularly true in the context of employer recognition bestowed pursuant to a “partnership agreement,” as the “partners” are unlikely to file blocking charges against each other that delay an expeditious election.

Representational proceedings are also more decisive, as an election is a one-time occurrence that definitively decides the issue, one way or the other. By contrast, unfair labor practice proceedings generate multiple preliminary decisions as the charge proceeds from the General Counsel, to trial before an Administrative Law Judge, to the Board itself, and then to an appellate court. These proceedings are the equivalent to holding a “sword of Damocles” over a collective bargaining relationship for years.

Thus, representational proceedings are far superior to unfair labor practice proceedings for stabilizing (lawful) collective bargaining relationships, as they settle the issue of whether the employer-recognized union enjoys uncoerced majority support quickly and in “one fell swoop.” Ironically, effectuating the Act’s interest in the “stability of labor-management relations” is one of the primary arguments proponents of the recognition bar raise to justify its existence. In reality, by forcing employees to turn to drawn-out ULP proceedings to protect their representational rights, the recognition bar injures that interest. For all of the above stated reasons, unfair labor practice proceedings are an inadequate and wholly inappropriate substitute for secret-ballot elections for determining employees’ true representational preferences.

III. THE SUPERIORITY OF BOARD SUPERVISED SECRET-BALLOT ELECTIONS IS BEYOND DISPUTE

1. *Secret Ballot Elections are the Act’s Preferred Method for Determining the Representational Preferences of Employees*

Congress created the NLRA’s statutory representation procedures to determine whether employees support or oppose representation by a particular union. See 29 U.S.C. § 159. The Supreme Court has long recognized that Board supervised secret-ballot elections are the preferred method for gauging whether employees desire union representation.²⁹ The Board and the lower courts similarly “emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees’ support for unions.” *Levitz Furniture*, 333 N.L.R.B. at 723, citing *Gissel*, 395 U.S. at 602.³⁰

Even the AFL–CIO has recognized that NLRB supervised secret-ballot elections are superior to “card checks” in establishing the true choice of the uncoerced majority. With regard to an employer withdrawing recognition from a union (as opposed to bestowing recognition), the AFL–CIO argued to the Board that employee petitions and cards advocating decertification “are not sufficiently reliable indicia of the employees’ desires,” and that employees and employers should only be able to remove a union pursuant to a secret-ballot election. See Brief of the AFL–CIO to the NLRB in *Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc.*, Case Nos. 7–CA–36846, at 13 (May 18, 1998).³¹

Fully recognizing this principle, the Board has held that non-electoral evidence of employee support—even if untainted by unfair labor practices—is not as reliable in gauging employee support for a union as an election. In *Underground Service Alert Southern California*, 315 N.L.R.B. 958 (1994), a majority of employees voted for union representation in a decertification election. But, well before the election results were known, a solid majority of employees delivered a signed petition to their employer making clear that they did not support union representation. The employer withdrew recognition. Even though the investigation revealed no “impropriety, taint, factual insufficiency, or unfair labor practice of any type with respect to this employee petition,” *id.* at 959, the Board held that the employer violated the Act because the election results were a far superior indication of employee wishes. The employee petition was considered a “less-preferred indicator of employee sentiment,” particularly as compared to “the more formal and considered majority em-

²⁹ See *Linden Lumber Div., Sumner & Co. v. NLRB*, 419 U.S. 301, 304, 307 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) (“secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support”); *Brooks v. NLRB*, 348 U.S. 96 (1954) (“an election is a solemn and costly occasion, conducted under safeguards to voluntary choice”).

³⁰ See also *Underground Service Alert*, 315 N.L.R.B. 958, 960 (1994); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1078 (8th Cir. 1992).

³¹ Clearly, labor union officials are not advocating employer determinations based on cards or petitions because these officials sincerely believe that this method reflects employee sentiment more reliably than a Board supervised secret-ballot election. Rather, they advocate the “card check recognition” process solely to advance their self-serving interests.

ployee preference for union representation which was demonstrated by the preferred method—the Board-conducted secret-ballot election.” *Id.* at 961. The Board explained why:

“The election, typically . . . is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union. No one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters.”

Id. at 960, quoting *W. A. Krueger Co.*, 299 N.L.R.B. 914, 931 (1990) (Member Oviatt, concurring in part and dissenting in part).

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Accordingly, any aversion by union officials that they are attempting to save industrial democracy by eliminating the secret-ballot election should be greeted with the incredulity the proposition deserves.

2. *Employee Freedom of Choice is Paramount Under the NLRA, and Thereby Must be Given the Greatest Weight in Any Analysis*

Because NLRB-conducted secret-ballot elections are the best means to effectuate employee free choice as to union representation, it is imperative that the Board favor and encourage this option. After all, “employee free choice” must be granted the greatest weight in any analysis, as the fundamental and overriding principle of the Act is “voluntary unionism.” *Pattern Makers v. NLRB*, 473 U.S. 95, 104–07 (1985).³²

Any notion that the NLRA’s fundamental purpose is to increase the membership ranks of labor organizations is false. The Act exists to enable employees to freely choose union representation, or freely reject union representation. It does not favor one choice over the other.³³ As former NLRB Member Brame cogently stated: “unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions.” *MGM Grand Hotel*, 329 N.L.R.B. at 475 (Member Brame, dissenting).

Also, the policy of “encouraging the practice and procedure of collective bargaining,” stated in the preamble to the Act at 29 U.S.C. § 151, does not mean that the Act endorses favoritism towards unions or employees who support union representation over those who wish to refrain from union representation. Only where a majority of employees freely select union representation is there any policy interest in promoting collective bargaining or labor stability. Because collective bargaining is entirely predicated on the exercise of employee free choice enshrined in § 7 of the Act.³⁴ This is amply demonstrated by the undisputable fact that the NLRA does not favor “collective bargaining” between an employer and a union that lacks the uncoerced support of a majority of employees, but instead condemns it as a grievous offense against employee rights.³⁵

Since collective bargaining is predicated on employee free choice, the Act’s policy of promoting stable collective bargaining relationships favors secret-ballot elections.

³²See also *Rollins Transportation System*, 296 N.L.R.B. 793, 793 (1989) (emphasis added) (“The paramount concern . . . must be the employees’ right to select among two or more unions, or indeed to choose none”) (emphasis added); *In re MV Transportation*, 337 N.L.R.B. 770, 775 (2002) (“the fundamental statutory policy of employee free choice has paramount value, even in times of economic change”); *Bloom v. NLRB*, 153 F.3d 844, 849–50 (8th Cir. 1998) (“Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected”), vacated & remanded on other grounds sub nom. *OPEIU Local 12 v. Bloom*, 525 U.S. 1133 (1999).

³³Section 7 of the NLRA could not be more clear: “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 shall also have the right to refrain from any or all such activities.” (emphasis added). Similarly, § 8(a)(3) precludes “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” (emphasis added).

³⁴See *Levitz Furniture*, 333 N.L.R.B. at 731 (Member Hurtgen, concurring) (“our nation protects and encourages the practice and procedure of collective bargaining for those employees who have freely chosen to engage in it”); *In re MV Transportation*, 337 N.L.R.B. 770, 772 (2002) (“[preservation of the stability of bargaining relationships] is a matter of policy and operates with respect to those situations where employees have chosen a bargaining relationship”) (citations omitted, emphasis added).

³⁵See *Ladies Garment Workers*, 366 U.S. at 737; *Majestic Weaving*, 147 N.L.R.B. at 860–61.

Unless and until the NLRB holds an election to determine whether employees truly support or oppose union representation, the interest of “encouraging the practice and procedure of collective bargaining” cannot be attributed to any bargaining relationship, as the employer-recognized union may in fact lack majority employee support.³⁶

Accordingly, when employees petition for a decertification election after their employer selects a particular union as the representative of its employees, the Board should conduct a secret-ballot election to protect and facilitate the Act’s paramount interest in employee free choice. The recognition bar policy, which precludes the NLRB from conducting such elections, should be discarded.

IV. THE BOARD’S RECOGNITION BAR POLICY THREATENS TO RENDER THE NLRA’S REPRESENTATIONAL PROCEDURES IRRELEVANT AND UNUSABLE IN THE CURRENT AGE OF VOLUNTARY RECOGNITION AGREEMENTS

The recognition bar policy threatens the continued viability of the Board’s representation machinery. Unions and employers are taking advantage of the Board’s current recognition bar policy by entering into voluntary recognition agreements that render it virtually impossible for the NLRB to conduct secret-ballot elections. The NLRB must not permit self-interested employers and unions to render the representation procedures of § 9 unusable and irrelevant, and deny the Board its supervisory role in the union selection (or rejection) process.

Two common provisions of “partnership” or “neutrality” agreements operate to preclude the use of the Board’s procedures. First, virtually all these agreements require an employer to recognize the union without an NLRB election. This provision automatically waives both the employer’s and union’s right to request a Board-supervised election,³⁷ and blocks election petitions from employees under the recognition bar.

Second, many “partnership” agreements establish an arbitration procedure that guarantees a collective bargaining agreement in the event that the employer and union are unable to negotiate an agreement within a certain amount of time after employer recognition.³⁸ This provision effectively ensures that a contract will be signed before the recognition bar period expires. *See e.g., MGM Grand*, 329 N.L.R.B. 464 (1999) (recognition bar can last one year or more). Moreover, after this contract is signed, the Board created “contract bar” rules then apply to preclude an election for another three years.³⁹

Thus, under current Board policy, many “neutrality” or “partnership” agreements block election petitions for three or more years because (i) employer recognition triggers the recognition bar; (ii) an arbitration provision ensures that a collective bargaining agreement is signed before the voluntary recognition bar expires; (iii) the signing of the collective bargaining agreement triggers the “contract bar,” which bars petitions for approximately three years. Under this regime, it is impossible for any party (employee, union or employer) to obtain a secret-ballot election for over three years from the date of union recognition. Unless the Board changes its current policies, the Board’s representational machinery is unusable and irrelevant.

Many “neutrality” agreements also cut the Board out of other aspects of the union selection process. Many agreements allow the union to gerrymander the unit to include union supporters and exclude union opponents, thereby removing the Board from the unit determination process.

The Board is also often precluded from determining whether particular organizing conduct is lawful or not, as most voluntary recognition agreements forbid any post-selection disputes to be brought to the Board. The result is that important challenges and objections concerning the conduct of the “card check elections” (as some union officials euphemistically calls them) are not heard by the Board, no matter how coercive the conduct.

This leads to incongruous results like that demonstrated in *Service Employees International Union v. St. Vincent Medical Center*, 344 F.3d 977 (9th Cir. 2003).

³⁶It is for this reason that the interest in “encouraging . . . collective bargaining” cannot support the Board’s current voluntary recognition bar policy, as the bar prevents the Board from determining if the employer-selected union has majority employee support. Without such a determination, there is no interest in preserving the stability of a union/employer bargaining relationship that may be unlawful.

³⁷*See Central Parking*, 335 N.L.R.B. 390 (2001); *Verizon Information Systems*, 335 N.L.R.B. 558 (2001).

³⁸The neutrality and partnership agreements used in the Dana, Metaldyne, and Cequent cases all include such an arbitration provision.

³⁹*See Waste Management of Maryland*, 338 N.L.R.B. No. 155 (2003) (“contract bar” precludes election petitions during first three years of a collective bargaining agreement, save a 30-day window period near the end of the period).

There, a union lost an NLRB supervised secret-ballot election, but was nevertheless able to force an employer to “arbitrate” before a private arbitrator over purported objectionable election conduct. The purported “objections” of the SEIU union could have been—and clearly should have been—filed with the Board under its Rules and Regulations. Instead, the Board was cut out of post-election proceedings in a Board supervised election!

Such results show the insidious nature of many “voluntary recognition agreements.” In effect, private parties can now repeal, at their mutual discretion, all of the Board’s Rules and Regulations related to elections and post-election challenges and objections. The Board has no role in any of this, and, apparently, neither do the individual employees whose rights are at stake whenever a union is being selected.

The union strategy of eliminating the NLRB from its proper role in determining representational issues through use of voluntary recognition agreements is having its intended effect. The Board is increasingly cast aside and prevented from making labor law policy and overseeing private sector labor relations. The number of representation elections held by the NLRB in 2003 decreased to 2,333 from 2,723 in 2002, continuing a sharp decline in NLRB elections since 1996, when about 3,300 were conducted. See Daily Labor Reporter Online, *Union Representation Elections*, June 8, 2004. The number of eligible voters in representation elections fell to 148,903 in 2003 from 191,319 in 2002. (*Id.*)

The Board should not (and cannot) abdicate its statutory duties to the self-interested desires of unions and employers. Congress empowered the NLRB to administer the NLRA and decide representational matters. See 29 U.S.C. §§ 153–54, 159–161. The Board is thereby charged with the responsibility of protecting employee rights under § 7 of the Act, see, e.g., *Lechmere Inc. v. NLRB*, 502 U.S. 527, 532 (1992), and with administering § 9 of the Act. See 29 U.S.C. §§ 159.

“In election proceedings, it is the Board’s function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.”

General Shoe Corp., 77 N.L.R.B. at 127 (emphasis added). The NLRB must not sit passively on the sidelines and allow its representational processes to become irrelevant. See e.g., Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, *The Labor Lawyer* (Fall, 2000).

In short, the increased usage of “recognition agreements” permits employers and unions to strip employees of their § 7 rights and their statutory right to a decertification election, and erases the Board from the process of employees’ selecting (or rejecting) a union. These practices must be halted. The first step to doing so is for the Board to eliminate the recognition bar.

CONCLUSION

For the foregoing reasons, the Board should abandon its recognition bar rule.

Senator SPECTER. Thank you very much, Mr. Messenger.

Mr. Messenger, under current law employers are allowed to withdraw from establishing a bargaining relationship on the basis of evidence that the union has lost its majority status and no NLRB process is required. If an employer can withdraw recognition without an election being required, why should not the same process be allowed when workers want their union recognized?

Mr. MESSENGER. Well, I believe that after an employer recognizes the union, the exception—or the abolition of the recognition bar doctrine I believe would only apply to employee petitions. If an employer voluntarily recognized a union to be the representative of its employees, I believe that labor law would prevent that union from changing—that employer from later changing its mind and turning around and withdrawing that recognition.

However, employees were left out of that initial recognition process, in that employer recognition again is a purely private agreement between the employer and the union. So the issue is how do

employees challenge or have the NLRB determine whether or not the employer-recognized union is really their representative.

Senator SPECTER. Ms. Schiffer, when you referred to the 30 percent figure what did you have in mind on that?

Ms. SCHIFFER. Under the Board's policies, a decertification petition can be filed by an employee when it is supported by 30 percent of the workers in the bargaining unit. So that under this proposal to eliminate the recognition bar doctrine and allow a decertification petition to be filed, it can be filed when only 30 percent of the workers support it. So then that would trigger a Board election certification process under this proposal to abolish the recognition bar doctrine.

Senator SPECTER. Mr. Rosenfeld, if you could come back to the table, I have a question for you. The whole question of industrial stability is really the backbone of the National Labor Relations Act. There has been a longstanding practice where the Board will not entertain—can you hear me?

Mr. ROSENFELD. Yes.

Senator SPECTER. There has been a longstanding practice, as I say, for the industrial stability in a context where the Board has recognized that a petition to decertify a union voluntarily recognized will not be entertained until there has been a reasonable period for the parties to establish their relationship.

Why the necessity for the kind of proposal which you have articulated in your brief?

Mr. ROSENFELD. Because there is a balance in the application of the Act and the balance is between industrial stability and employee free choice. Employee free choice is guaranteed by section 7 of the Act. Some would argue that stability is a policy choice, and where that balance lies is for the Board to determine.

The difficulty with the recognition bar is, and I do not think anybody at this table would argue, that the gold standard of the NLRB is a secret ballot election. Now, I think, without asking for more money, Mr. Chairman, we could not conduct our day to day operations if there were not voluntary recognitions.

Senator SPECTER. So you are saying that the electoral process is not really—well, you articulate it as—the gold bar, not really indispensable to making a determination as to what the real wishes of the employees are?

Mr. ROSENFELD. It is not. I do not have numbers because, as was said before, the voluntary recognition scenario occurs very often outside the Board's processes. We do not know the numbers. But the truth of it is that voluntary recognition is a way that employee sentiments are furthered through collective bargaining, and there is absolutely nothing wrong with that.

Senator SPECTER. And there is a legitimate determination or an accurate determination of employees' sentiments in the voluntary procedures which you have described?

Mr. ROSENFELD. Right. But again, there is no argument that an election is a better process. A secret ballot election conducted by a government agent is the process. The solemnity of that process has been accepted in the whole body of law and Board decisions. Again, nobody would question that.

Senator SPECTER. What is your view, Mr. Rosenfeld? We had a hearing in Harrisburg on July 16 where we were taking up the provisions of S. 1925, which provides for a certification on cards as opposed to the election process. We heard a fair amount of testimony that the election process lent itself to a lot of maneuvering and a lot of coercive practices by employers against employees. We also heard testimony to the contrary. That is what a hearing is all about. We had a balanced hearing, as we have a balanced hearing today, to try to allow all sides to be explored.

What is your view of the contention that there are coercive practices in the electoral process which are very undesirable?

Mr. ROSENFELD. They exist. We file complaints on 8(a)(1)'s all the time. They exist on both sides, frankly. We get objections where there has been electioneering at an election site. But in the main, in a secret ballot election conducted by the Board, the overwhelming majority of those elections are conducted within the laboratory conditions that the Board insists upon. But yes, there are folks who cross the line. That is probably the reason for—

Senator SPECTER. People cross the line on both sides?

Mr. ROSENFELD. On both sides. That is the reason for the Act.

Senator SPECTER. Like offsides in a football game.

Ms. Schiffer, I am not saying there should be a change, but if there is a change how would you evaluate Mr. Rosenfeld's position? Would you say that that is a reasonable compromise, unreasonable, if there is to be any change at all?

Ms. SCHIFFER. I appreciate that the general counsel's brief recognizes that at least a minority of workers should not be allowed to interfere with when a majority of workers have indicated they want to be represented by a union. So I appreciate that at least his position does not reflect that a minority of workers should be able to control this process and stall collective bargaining at this point.

But even the way that he describes this exception will allow this bargaining process to be stalled, to be delayed, even after a majority of workers have decided they want to have a union and have collective bargaining. I mean, that is the point, to have collective bargaining, and this would interrupt that process.

When Mr. Rosenfeld talks about balancing stability with employee free choice, I think we have to keep in mind that in a voluntary recognition a majority of the workers have exercised their free choice and indicated they want to be represented by a union, and their rights need to be protected and they ought to be entitled to get the benefit of collective bargaining that they elected when they sought to form a union.

I also want to point out that there is Board supervision of this process. There are Board rules and procedures in place to make sure that it is an uncoerced majority. The union, the employer, and employees can challenge the process through the Board's unfair labor practice process if they think that it was not an uncoerced majority or that there are other defects in the grant of the recognition.

Senator SPECTER. Mr. Messenger, what is your sense as to Mr. Rosenfeld's contention that the NLRB simply does not have the facilities to have elections on many, many matters and has to rely upon these voluntary procedures?

Mr. MESSENGER. Well, with the recognition bar, seeking the abolition of the recognition bar will not affect the ability of an employer to recognize the union. The only issue really is through what procedures does the NLRB investigate the validity of that recognition if a sufficient number, if a group of employees challenge it as being illegitimate?

An employer can continue to recognize a union even if the recognition bar is abolished. The issue is, under current Board processes if employees disagree that the union their employer recognized actually has majority support, the only way they can challenge it is through unfair labor practice proceedings.

What we are advancing today is that the proper method to determine this issue is through representation proceedings because, after all, the issue is do a majority of employees actually support the employer-recognized union or not. And the representational procedures are designed to answer that question, not the unfair labor practice procedures.

So really I believe the issue is not card check versus secret ballot election. The real issue is unfair labor practice proceedings versus representational proceedings to determine the free choice of employees after employer recognition.

Senator SPECTER. Without intruding into the judicial functions of the NLRB, Mr. Rosenfeld—and we did not ask the NLRB members to stay. In fact, we separated these hearings so there would be a clearcut distinction between our inquiries as to the issue of the *Brown* decision, where we are exercising oversight on something which has already concluded, as opposed to something in the discretionary function.

Without intruding into the judicial functions, can you give us any insight as to how close the Board is to having some new rule on this area?

Mr. ROSENFELD. I have no idea. The dynamic of the Board at this point is of interest because when Congress adjourns, one of the members is a recess appointee and so that recess appointment lapses and the Board would then be four members.

Senator SPECTER. So what do you think, we should stay in session?

Mr. ROSENFELD. I think that is a great idea, Senator.

Senator SPECTER. You may find yourself as the sole dissenter on Capitol Hill to that proposition.

Mr. ROSENFELD. Please do not quote me on that.

Senator SPECTER. I will not quote you. It is in the record.

Mr. ROSENFELD. That is what I was afraid of.

Senator SPECTER. Mr. Rosenfeld, I would ask you to take a look at S. 1925 because it provides for certification on cards and that has an impact on a proposed change. What Congress will do on that nobody can predict. But when Congress is in the field, I think, and considering that kind of an issue, it is at least a factor which ought to be before the Board and ought to be on their radar screen. They can make a determination for themselves as to how much weight, if any, to give to it.

Well, thank you all very much for coming. This has been a very interesting hearing. The movement by the subcommittee into some of these areas is I think a very important oversight function. There

is general agreement that there is insufficient oversight by the Congress and it is educational to stop for a moment and deal with some of these arcane issues.

CONCLUSION OF HEARING

Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 11:27 a.m., Thursday, September 23, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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