UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

COLUMBIA UNIVERSITY **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

COLUMBIA UNIVERSITY'S MEMORANDUM IN REPLY TO PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION

Pursuant to the Order issued by the Regional Director on January 12, 2015 directing Petitioner Graduate Workers of Columbia-UAW (the "Union") to show cause as to why its December 17, 2014, representation petition should not be dismissed based on the Board's decision in *Brown University*, 342 NLRB 483 (2004), Columbia University submits this memorandum in reply to the Union's response and in support of dismissal of the petition.

Nothing in the Union's response changes the conclusion that the petition must be dismissed because it fails to raise a "question concerning representation" within the meaning of Section 9 of the National Labor Relations Act. Under *Brown University*, the graduate and undergraduate Teaching Assistants and Research Assistants that the Union seeks to represent are students, not employees, who have no right to engage in collective bargaining under the Act.[1] The dispositive effect of *Brown University* on the petition is confirmed by the Region's prior dismissal in 2004 of a representation petition concerning a substantially identical proposed unit of graduate assistants at Columbia – based entirely upon *Brown University*. (The prior proceeding is hereinafter referred to as "*Columbia I*.")

The Union's arguments against dismissal are meritless. To begin with, the Union devotes a large portion of its brief to various arguments for overturning *Brown University* – arguments that are indisputably misplaced given that *Brown University* remains controlling precedent which the Regional Director is obligated to follow; only the Board has the power to overturn *Brown University*. Further, the Union's contention that the Region should proceed to a hearing,

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[1] For convenience, we refer to the entire group of students included in the proposed unit as "graduate students" or "graduate assistants" even though there are a small number of undergraduates within that group.

notwithstanding *Brown University*, based on the Board's ruling in *New York University*, 356 NLRB No. 7 (2010) ("*NYU II*"), and the suggestion in other cases that it wants to reconsider *Brown University*, is wholly misguided. The Board's decision in *NYU II* does not contain any directive whatsoever to hold a hearing in *this* case. Similarly, none of the Board's actions in other cases cited by the Union remotely supports holding a hearing in the instant matter in the absence of a change in the controlling authority of *Brown University* or an express order from the Board to do so.

Finally, the Union's attempt to identify facts that would distinguish this case from *Brown University* is equally unavailing. The Union's offer of proof fails to identify any facts that would distinguish this case from *Brown University*; rather, it consists of misplaced legal argument and alleged facts that were present in *Brown University* and/or in *Columbia I* where the petition was nevertheless dismissed under *Brown University.*

I. THE PETITION MUST BE DISMISSED BECAUSE GRADUATE ASSISTANTS IN THE PROPOSED UNIT ARE NOT EMPLOYEES UNDER THE BOARD'S DECISION IN *BROWN UNIVERSITY.*

In *Brown University*, the Board expressly overruled *New York University*, 332 NLRB 1205 (2000) ("*NYU I*"), based on the "principle . . . that graduate student assistants are primarily students and not statutory employees," and that "graduate student assistants, who perform services at a university in connection with their studies, have a predominantly academic, rather than economic, relationship with their school." 342 NLRB at 483. In conclusion, the Board declared "the Federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act." *Id.* at 493. *Brown University* remains the law today and is a bar to the petition here.

The Union does not– and cannot – dispute this. Instead, the Union resorts to arguing that *Brown University* was wrongly decided and should be overturned. (Union Br. at 2) The Union offers the following tortuous path to that conclusion: *Brown University* "relied heavily upon" *St. Clare's Hospital*, 229 NLRB 1000 (1977), which in turn was overruled by another Board decision (*Boston Medical Center*, 330 NLRB 152 (2000) (which pre-dated *Brown University)*, which has since been "reaffirmed" by the Board in *St. Barnabas* Hospital, 355 NLRB No. 39 (2010), which somehow creates an "inconsistency in the Board precedent" with respect to the employee status of graduate assistants. (*Id.*) Without conceding the relevance or accuracy of the Union's discussion of these cases, it suffices to note that the so-called "inconsistency" the Union claims to have identified has no bearing whatsoever on whether, as the Order asks, there is any reason *not* to dismiss the petition based on *Brown University*. Absent from the Union's discussion of these cases is any contention that *Brown University* does not remain controlling law. As a result, the Union's arguments as to why *Brown University* should be overturned are misplaced and provide no basis for doing anything other than dismissing the petition.

The Union also argues that a hearing is necessary to create a factual record demonstrating the alleged flaws in certain of the premises in the *Brown University* decision regarding the conflict between an individual's status as a student versus an employee and the harms resulting from the imposition of collective bargaining with graduate student assistants. (Union Br. at 4) Putting aside the merits of the Union's claims, as the Union explicitly acknowledges, those contentions relate to the question of whether to overturn *Brown University*. It is for the Board to decide whether the "facts" that the Union seeks to establish warrant holding a hearing in order to reconsider *Brown University*. We respectfully submit that this is not a determination that may be made by a Regional Director.

II. AS *BROWN UNIVERSITY* REMAINS CONTROLLING LAW, THERE IS NO BASIS FOR HOLDING A HEARING IN THE ABSENCE OF AN ORDER FROM THE BOARD TO DO SO.

The Union next argues that the Regional Director should nevertheless hold a hearing based on prior indications from the Board that it wishes to reconsider *Brown University*. (Union Br. at 3-4) This argument is flawed for a number of reasons, beginning with its misguided reliance on *NYU II*.

First, nowhere in its call for an evidentiary hearing in *NYU II* did the Board suggest that such hearings were appropriate in *all* cases involving representation petitions that would otherwise be dismissed under *Brown University*. It would have been very simple for the Board to include such an instruction in its decision; however, it did not. In other words, there was no "signal" – overt or implicit – to Regional Offices generally to refrain from dismissing petitions under *Brown University* and to hold hearings instead. Rather, there was a specific directive to a single Regional Director in a single case.

Second, *NYU II* was issued on October 25, 2010. More than four years have elapsed and the Board has not issued any decision overturning or modifying *Brown University*. *Brown University* remains controlling precedent for the current petition and there is no reason to require a hearing now based on a statement made in a single decision over four years ago.

Third, there were two Board members in *NYU II* who expressed the view that *Brown University* should be reconsidered (one member dissented) and, of those two members, only one remains a member of the Board. Thus, to order a hearing here, in the absence of an explicit directive from the Board, the Regional Director would be relying on the views of one sitting Board member concerning *Brown University* that were expressed more than four years ago.

There is no basis for assuming that a panel of the *current* Board would want the Regional Director to hold a hearing on a petition that is plainly subject to dismissal under *Brown University*.

Fourth, the Union also reads far more into *Polytechnic Institute of New York University*, Case No. 29-RC-12054 ("*NYU Poly*") than the facts support. (Union Br. at 3) The Union asserts that the Regional Director for Region 29 ordered a hearing in that case "recogniz[ing] the significance of the Board's holding in *NYU II*," but in fact the Regional Director never issued a written explanation for his decision to conduct a hearing in that case, rendering the Union's assertion pure conjecture. Indeed, the Regional Director's decision to hold a hearing could have been based on other considerations having nothing to do with *NYU II* – for example, he might have concluded that the *NYU Poly* students were not comparable to the graduate students at issue in *Brown University*, given that a majority of the students in the proposed unit in *NYU Poly* were masters degree candidates who were hourly paid participants in that school's "Graduate Student Employment Program." In any event, whatever his reasoning may have been, the unexplained decision of one Regional Director from another Regional Office to hold a hearing rather than dismiss the petition based on *Brown University* does not provide a basis for disregarding controlling Board law here – especially where, as discussed below, *this* Region previously determined that *Brown University* required dismissal of a petition concerning the same graduate assistants at Columbia University in *Columbia I*.

The Union's reliance upon the Board's grants of review of the dismissal of the petitions in *NYU II* and *NYU Poly* suffers from the same infirmities discussed above with respect to the *NYU II* decision. The grants of review in those cases did not contain a directive or an endorsement of the notion that *all* Regional Directors should conduct evidentiary hearings in *all*

graduate student cases; the grants were issued more than two and a half years ago; and only one member of the issuing Board then is a member of the current Board. In other words, the desire expressed by some Board members in 2012 to reconsider *Brown University* based on the factual record developed in two specific cases at that time does not support holding a hearing now in a case involving entirely different parties.

Finally, the Union attempts to draw support from the Board's invitation for briefs on review in *Northwestern University*, Case No. 13-RC-121359, but *Northwestern* actually undermines the Union's position here. (Union Br. at 3) In that case, which involves a Decision and Direction of Election in a unit of college football players that is pending before the Board upon a request for review by Northwestern, the Board issued a Notice and Invitation to File briefs on April 24, 2014. The notice included a list of eight questions that the parties and *amici* were specifically invited to address. The second question on the list is:

> Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), may be applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case.

Thus, there already is a case with a full evidentiary record developed through a representation hearing, in which the Board specifically raised the possibility of modifying or overturning *Brown University* and solicited briefing on that question. The fact that the Board's determination in that case is pending weighs against holding a hearing here, at least until it can be determined whether *Northwestern University* will address *Brown University* in any way. In the meantime, it should be the Board's prerogative to decide if it wants to create an additional factual record in this case, at this time, for the purpose of reconsidering *Brown University*.

Indeed, consideration of the possible outcomes for *Northwestern University* identified by the Board underscores the inappropriateness of proceeding to hearing here. If in *Northwestern University* the Board ultimately "adheres to" *Brown University*, there would obviously be no need for an evidentiary hearing here because *Brown University* would remain the law and the petition would be dismissed. If, on the other hand, the Board were to "modify" *Brown University* in some way, it could turn out that the parties would need to know *how* it was modified in order to determine whether that modification had any impact here and, if so, how that would affect the evidence they should present to the Region. Otherwise, by proceeding before *Northwestern University* has been decided, the Region could wind up holding a lengthy hearing (the last representation case involving Columbia graduate students lasted 30 hearing dates over the course of seven months) which fails to generate a record on the particular question(s) that the Board deems relevant in its modification of *Brown University*. The same rationale may apply in the event that the Board were to overturn *Brown University* in its *Northwestern University* decision: the parties should have the benefit of knowing the basis for that decision with respect to the employee status of student football players, and whether that rationale affects the issues presented by the instant petition, before presenting evidence regarding the graduate student assistants covered by the petition here.

III. THE UNION HAS FAILED TO IDENTIFY FACTS THAT WOULD DISTINGUISH THIS CASE FROM *BROWN UNIVERSITY*.

The Union's offer of proof fails to show how this case would be factually distinguishable from *Brown University*. As an initial matter, the Union's utter silence regarding the Region's prior dismissal of a representation petition concerning a substantially identical proposed unit of graduate assistants at Columbia is telling. That petition in *Columbia I*, filed in 2001 (in Case No. 2-RC-22358) when *NYU I* was controlling, led to a hearing held at this Regional Office that

spanned 30 hearing days over the course of seven months. After the hearing concluded, the Regional Director issued a Decision and Direction of Election in February 2002 which found the following unit to be an appropriate bargaining unit:

> INCLUDED: All graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Law Associates, Preceptors, Instructors, Listening Assistants, Course Assistants, Readers and Graders), Graduate Research Assistants and Departmental Research Assistants employed by the Employer at its Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> EXCLUDED: All other employees, including Teaching Fellows and Research Assistants in the Law School, Instructors and Teaching Assistants in the Summer Session programs, Teaching Assistants, Course Assistants and Program Assistants in the School of International and Public Affairs, Departmental Research Assistants in the School of the Arts, Film Division, Service Fellows in the School of the Arts, and guards, and supervisors as defined by the Act.

An election was eventually held but the ballots were impounded pending the Board's review of the Decision and Direction of Election. Before the votes were counted, the Board issued its *Brown University* decision overturning *NYU I*. Only three days after issuing *Brown University*, the Board issued an order dated July 16, 2004 which remanded the Columbia case to the Regional Director "for further consideration consistent with *Brown University*." (A copy of the Board's July 16, 2004 Order is attached hereto as Exhibit 1.) On remand, as noted in her August 26, 2004 Order Further Amending the Decision and Direction of Election and Dismissing the Petition, the Regional Director stated that she had

> asked the Petitioner to submit an explanation for why the petition should not be dismissed, pursuant to *Brown University*, 243 [*sic*] NLRB No. 42 (2004). The Petitioner failed to submit anything in response to this request.

The Regional Director concluded:

> Inasmuch as the unit herein was comprised of graduate student assistants and consistent with *Brown University*, supra,
>
> IT HEREBY IS ORDERED that the petition in this matter be, and it hereby is, dismissed.

(A copy of the Regional Director's August 26, 2004 Order is attached hereto as Exhibit 2.)

In light of this history, the Union has the burden of identifying not only those facts that would distinguish this case from *Brown University*, but also those facts that would distinguish this case from *Columbia I*. It has not even attempted to do so. The Union does not contend that the proposed unit in the instant petition, filed December 17, 2014, is different from the unit found to be appropriate in the 2002 Decision and Direction of Election. To the contrary, it affirmatively represents that "[t]he unit sought in this petition follows the general outlines of the unit found to be appropriate by the Regional Director in [*Columbia I*]." (Letter from T. Meiklejohn to Regional Director Fernbach, dated December 24, 2014 at 2) Comparing the descriptions of the two units confirms that they are substantially the same:

> INCLUDED: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Law Associates, Preceptors, Instructors, Listening Assistants, Course Assistants, Readers and Graders): [*sic*] All Graduate Research Assistants (including those compensated through Training Grants) and Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
>
> EXCLUDED: All other employees, guards and supervisors as defined by the Act.[2]

If the petition to represent the 2002 proposed unit warranted dismissal under *Brown University*, in the absence of any claim by the Union that there is a material difference in the unit covered by

[2] The underscoring has been supplied to indicate text that the Union has added to the unit description from the 2002 Decision and Direction of Election – largely consisting of "catch-all" phrases that do not appear to alter the 2002 proposed unit in any material respect.

the instant petition, the same result must be reached with respect to the current proposed unit based on the Region's own prior ruling.

For this reason, the Union's offer of proof concerning Research Assistants involved in research projects for which the University receives substantial grant funding is irrelevant. (Union Br. at 4-5) Regardless of whether there was "evidence in *Brown University* that the student employees at issue in that case did work that generated comparable sums of income," the Decision and Direction of Election in *Columbia I* did specifically reference evidence regarding $300 million of "faculty research grants" (as of 2001) and it discussed the function performed by Graduate Research Assistants in connection with those projects. *Columbia University*, Case No. 2-RC-22358, Decision and Direction of Election at 17 (February 11, 2002). In other words, this evidence was part of the record in *Columbia I* and the Research Assistants were held to be included in the unit, but when the Regional Director subsequently ordered the union to show cause why the petition should not be dismissed based on *Brown University*, the Union did not attempt to make any distinction based on the Research Assistants (indeed, it offered no response to the Order Show Cause at all). If the involvement of Research Assistants in grant-funded research projects was not a basis for distinguishing *Brown University* at that time, there is no basis for a different result now.

Furthermore, the holding in *Brown University* that graduate assistants are not employees under the NLRA specifically encompassed Research Assistants in the social sciences and humanities supported by external grants. (The Regional Director's exclusion of Research Assistants in the science departments was not raised on review.) The Board noted that these Research Assistants, like the Research Assistants at Columbia, were performing work in support of the research funded by the grants. *Brown University*, 342 NLRB at 485. Thus the only

distinction between the Research Assistants in this case, and those addressed in *Brown University*, is the amount of the grant money received by the university in total, which plainly has nothing to do with the employee status of the Research Assistants.[3]

In addition, it is not *Brown University* by itself that stands in the way of the petition with respect to Research Assistants. Rather, the Board's earlier decision in *NYU*, 332 NLRB 1205 (2000) ("*NYU I*"), excluded from the bargaining unit research assistants in science departments who were funded by external grants. The Board held that because these students were not providing services to the university, they were not employees under the Act. In so holding, the Board relied on long-standing principles adopted in *Stanford*, 214 NLRB 621 (1974). It affirmed the Regional Director's express rejection of the same contention made by the Union here, i.e., that Research Assistants were employees because they provided services to the university by helping the university perform its obligations under research grants. 332 NLRB at 1220 n. 50. Thus, even if the Regional Director were to conclude that alleged facts pertaining to Research Assistants working on grant-funded projects in the instant matter somehow renders this case distinguishable from *Brown University*, the status of those graduate assistants would be controlled by *Stanford* and *NYU I* which were not impacted by *Brown University* and which would require the exclusion of similarly situated Research Assistants at Columbia as non-employees for the same reasons.

The Union's other efforts to distinguish *Brown University* are also groundless. The Union asserts that it will present evidence of how certain aspects of the teaching assignments for

[3] While the Union's brief seems to suggest that the *amount* of income generated from research grant funding is somehow relevant to this analysis (by referring to the absence of "*comparable* sums of income" in *Brown University*), it offers no explanation for that view and clearly it is wrong. The amount of grant funding, by itself, is unrelated to the role played by graduate students in the associated research projects and thus should have no bearing on the question of employee status.

"some" (the Union's word) graduate assistants at Columbia differ from what was "generally" (again, the Union's word) the nature and characteristics of the graduate assistants' teaching assignments in *Brown University*.[4] (Union Br. at 5) Even accepting this proffer at face value, however, these are not factual distinctions that would remove this case from *Brown University's* sweep. By definition, there were exceptions to what was "generally" the case in *Brown University*, yet the Board still held that as a matter of law graduate assistants are not employees under the Act. Here, the Union is merely offering to prove that "some" graduate assistants at Columbia are similar to the exceptions in *Brown University*, which would not serve to distinguish this case in any meaningful way from *Brown University*. Moreover, as previously noted, the Union does not even claim to be able to distinguish this case from *Columbia I* where *Brown University* was determined to be dispositive.

Finally, the Union's claim that it will present evidence that Columbia "regards" the teaching and research performed by graduate assistants as an "apprenticeship" (Union Br. at 5-6) also does not constitute a factual distinction from *Brown University* that warrants a hearing in this case. Indeed, the Union made exactly the same contention in *Columbia I*. (UAW Post-Hearing Brief in Support of its Petition for Representation, Case No. 2-RC-22358, dated November 16, 2001, at 3, 101) Supposed evidence about how the Employer regards the graduate assistants would not overcome the dispositive impact of *Columbia I* in the absence of any distinguishing facts concerning the actual characteristics of the teaching and research performed by the graduate students in question.

[4] Even the specific facts the Union alleges in its Brief do not differentiate this matter from *Brown University*. For example, the Regional Director's Decision and Direction of Election in *Brown University* found that some teaching assistants at Brown taught outside of their respective departments and some taught independently. *Brown University*, Case No. 1-RC-21368, Decision and Direction of Election at 5-6 (November 16, 2001). Thus, the Union's proffer of those facts here would not create any distinction from *Brown University*.

CONCLUSION

The petition should be dismissed and the Notice of Representation Hearing should be withdrawn.

Dated: January 27, 2015
New York, New York

PROSKAUER ROSE LLP

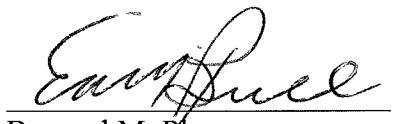

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EXHIBIT 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK
Employer

and Case 2-RC-22358

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,
AFL-CIO
Petitioner

ORDER

On March 22, 2002, the Board granted the Employer's Request for Review of the Regional Director's Decision and Direction of Election.

On July 13, 2004, the Board issued a decision in Brown University, 342 NLRB No. 42 (2004), which overruled New York University, 332 NLRB 1205 (2000), and found that graduate student assistants are not employees within the meaning of Section 2(3) of the Act. The Board remands this proceeding to the Regional Director for further consideration consistent with Brown University.

ROBERT J. BATTISTA, CHAIRMAN

PETER C. SCHAUMBER, MEMBER

RONALD MEISBURG, MEMBER

Dated, Washington, D.C., July 16, 2004.

EXHIBIT 2

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

Employer

and **Case No. 2-RC-22358**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO

Petitioner

Order Further Amending the Decision and Direction of Election and Dismissing the Petition

On February 11, 2002, a Decision and Direction of Election was issued in this matter. On February 13, 2002, an Order Amending the Decision and Direction of Election was also issued. The Employer timely submitted a Request for Review of the Decision and Direction of Election, which was granted by the Board on March 22, 2002.

On July 13, 2004, the Board issued a decision in Brown University, 342 NLRB No. 42 (2004), which overruled New York University, 332 NLRB 1205 (2002), and found that graduate student assistants are not employees within the meaning of Section 2(3) of the Act. Based on the Brown University decision, on July 16, 2004 the Board remanded this proceeding to the Regional Director for further consideration. Thereafter, the Region asked the Petitioner to submit an explanation for why the petition should not be dismissed, pursuant to Brown University, 243 NLRB No. 42 (2004). The Petitioner failed to submit anything in response to this request.

Inasmuch as the unit herein was comprised of graduate student assistants and consistent with Brown University, supra,

IT HEREBY IS ORDERED that the petition in this matter be, and it hereby is, dismissed.[1]

Dated at New York, New York,
August 26, 2004

Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

[1] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, D.C. 20570. This request must be received by the Board by **September 9, 2004**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

COLUMBIA UNIVERSITY **Employer** **and** **GRADUATE WORKERS OF COLUMBIA-GWC, UAW** **Petitioner**	**Case No. 02-RC-143012**

Date of Electronic Mailing: January 27, 2015

AFFIDAVIT OF SERVICE OF: Columbia University's Memorandum in Reply to Petitioner's Response to Order to Show Cause

I hereby certify that, on the 27th day of January 2015, I served the above-entitled document(s) by the methods indicated below, upon the following persons at the following addresses:

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Respectfully submitted,

Dated: January 27, 2015

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