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

COLUMBIA UNIVERSITY

Employer

And **Case No. 02-RC-143012**

GRADUATE WORKERS OF COLUMBIA-GWC, UAW

Petitioner

ORDER DISMISSING PETITION

On December 17, 2014, Graduate Workers of Columbia-GWC, UAW (the Petitioner) filed the petition seeking to represent the following unit of employees:

> 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): All Graduate Research Assistants (including those compensated through Training Grants) and All 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.

On January 12, 2015, I issued an Order to Show Cause as to whether the instant petition should be dismissed based on the Board's decision in, *Brown University,* 342 NLRB 483 (2004)(wherein the Board held that graduate student assistants are not employees within the meaning of Section 2(3) of the Act).

On January 20, 2015, the Petitioner responded to the Order to Show Cause. Primarily, the Petitioner raised policy considerations for overturning *Brown.* The Petitioner contends that the factual distinction here is that the Columbia graduate

students teach in exchange for income that is not offered as part of a financial aid package connected to their admission as students. The Petitioner also argued that I should order a hearing in light of the Board's recent Notice and Invitation to file briefs in *Northwestern University*, Case No. 13-RC-121359 regarding whether the Board should adhere to, modify or overrule the test of employees status applied in *Brown*. (A copy of the Petitioner's response to the Order to Show Cause is attached hereto as Exhibit A).

On January 27, 2015, the Employer submitted a reply to the Petitioner's response. The Employer argued, among other things, that *Brown* remains controlling precedent which I am obligated to follow. The Employer argues that the Board's remand in other cases involving students is not controlling because here, the petitioned-for unit is not factually distinguishable from the broad holding in *Brown* that graduate students are not employees as a matter of law. Finally, the Employer submits that the Board's invitation in *Northwestern* does not provide a basis for ordering a hearing in this case. (A copy of the Employer's response to the Order to Show Cause is attached hereto as Exhibit B).

After carefully considering the parties' submissions and the arguments made therein, I conclude, that a hearing is not warranted in this matter, and that the Petition should be administratively dismissed.

Although I recognize that the Petitioner is seeking to have the Board reconsider *Brown*, it is improper for me to ignore Board precedent. While the Petitioner's argument that the Board has remanded similar cases suggests that the Board would likely remand the instant case, I am, nonetheless, constrained by current Board precedent. In the event that the Board agrees with the Petitioner, development of an efficient and complete record would be facilitated by a remand from the Board setting forth the factors and evidence that they wish to be considered. As the Employer noted, reconsideration of current law is a decision for the Board.

Accordingly, I am administratively dismissing this petition on the basis that it seeks an election among graduate students who are not "employees" within the meaning Section 2(3) of the Act pursuant to *Brown*, for the reasons stated therein.

THEREFORE, based on the foregoing reasons, further proceedings on the petition are not warranted, and

IT HEREBY IS ORDERED that the Notice of Hearing issued herein be revoked and that the petition be dismissed.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National

Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on **February 20, 2015** at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[1] A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at New York, New York, February 6, 2015

Karen P. Fernbach

Karen P. Fernbach, Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

[1] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

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

COLUMBIA UNIVERSITY

Employer

And Case No. 02-RC-143012

GRADUATE WORKERS OF
COLUMBIA-GWC, UAW

Petitioner January 20, 2015

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION

Graduate Workers of Columbia-GWC, UAW ("the Petitioner") filed this petition on December 17, 2014, claiming to represent a unit of student employees employed by Columbia University ("the Employer"). This unit includes employees who provide instructional services and employees who work as research assistants. These employees are enrolled as students at Columbia and are paid to perform services that generate income for the University.

On January 12, 2015, the Regional Director issued an Order to Show Cause why this petition should not be administratively dismissed. The Order asks whether the petition should be dismissed on the authority of Brown University, 342 N.L.R.B. 483 (2004), without a hearing, on the ground that the petition seeks a unit of graduate student assistants who are not employees covered by the Act. Specifically, the Regional Director ordered:

> that the Petitioner provide written cause as to why this petition should not be dismissed based on the decision in *Brown University, supra.* The Petitioner should identify facts that it intends to present during a hearing

that support its position and would distinguish this case from *Brown University, supra.*

This memorandum is submitted in response to that order.

II. THE REGIONAL DIRECTOR SHOULD NOT DISMISS THIS PETITION BASED UPON BROWN

In Brown, the Board declared "Federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act." 342 N.L.R.B. at 493. That decision overruled the decision in New York University, 332 N.L.R.B. 1205 (2000) ("NYU I"), holding that graduate student assistants have the right to organize under the NLRA. In reaching its holding, the Board in Brown relied heavily upon St. Clare's Hospital, 229 N.L.R.B. 1000 (1977) for the proposition that "students 'who perform services at their educational institutions which are directly related to their educational program'" do not have the right to organize. 342 N.L.R.B. at 487, quoting St. Clare's at 1002. St. Clare's, however, was expressly overruled in Boston Medical Center, 330 N.L.R.B. 152 at 152 (2000). There, the Board held that medical interns, residents and fellows are "employees," despite the fact that they were also students at the institution that employed them, performing services related to their medical education. After the Brown decision, the Board reaffirmed the holding of Boston Medical. St. Barnabas Hospital, 355 N.L.R.B. No. 39 (2010). Thus, there exists an inconsistency in the Board precedent regarding whether employees are excluded from the coverage of the Act merely because they are also students at the institution that employs them.[1]

[1] The Board in Brown also made that claim that the decision in NYU I had "reversed more than 25 years of precedent." 342 N.L.R.B. at 483, citing Leland Stanford Junior University, 214 N.L.R.B. 621 (1974). In fact, the Board in Leland Stanford did **not** hold that graduate student assistants could not be employees if they provided services for their university in exchange for compensation Rather, the Board in Leland Stanford found that particular students were not employees on the facts of that case because they did not perform services that benefitted the university in exchange for compensation. The student employees in NYU I did perform services that benefitted the university.

The Board has made it clear that it wishes to address this inconsistency on the basis of a full evidentiary record. In 2010, the Acting Regional Director dismissed the petition in *NYU*, Case No. 2-RC-23481, without a hearing. The Board granted review of that decision, finding "compelling reasons for reconsideration of the decision in Brown University." New York University, 356 N.L.R.B. No. 7 (2010) ("NYU II"). The Board reinstated the petition, holding that the validity of Brown should be "considered based upon a full evidentiary record...." sl. op. at 2.

The following year, the UAW filed the petition in *Polytechnic Institute of New York University* (*"NYU Poly"*), Case No. 29-RC-12054. The petitioner sought a unit of student employees who fit the definition of graduate student assistants under Brown. The Regional Director for Region 29, recognizing the significance of the Board's holding in NYU II, conducted a hearing on the petition, rather than dismiss the case without a hearing on the authority of Brown. The Regional Director should do the same in this case.

Both *NYU II* and *NYU Poly* were ultimately dismissed by the respective regional directors on the basis of Brown after a full record had been made. The Board reaffirmed its intention to reconsider Brown by granting review of both decisions. In granting review, the Board explicitly stated that it wished to consider the validity of the decision in Brown. This past May, the Board invited briefs on review in Northeastern University, addressing, *inter alia,* whether the Board should "adhere to, modify or overrule the test of employees status" applied in Brown. Case No. 13-RC-121359, Order dated May 12, 2014.

Thus, on three occasions the Board has stated that it wishes to reconsider the holding of Brown. The Board has also held that it wishes to consider this question on the basis of a full record. The Regional Director recognized as much when he conducted the hearing in *NYU Poly*. Consistent with the most recent decisions of the Board, the Regional Director therefore should conduct a hearing to enable the Board to address this issue on the basis of a full record.

III. FACTS THAT DISTINGUISH THIS CASE FROM *BROWN*

Based upon the Board decisions cited above, the Petitioner intends to argue in this case that Brown should be overruled. This result is mandated by the fundamental policies of the Act. Brown is premised upon a perceived inconsistency between an individual's status as an employee and status as a student. Such a dichotomy cannot be justified in logic or in the policies of the Act. The Brown decision also relies upon speculation about harms that would result from collective bargaining that has no objective or empirical basis. Contrary to that speculation, the Petitioner intends to offer evidence of successful collective bargaining among graduate student employees. Brown is also inconsistent with the broad definition of employee contained in Section 2(3) of the Act and with Supreme Court and NLRB decisions broadly interpreting Section 2(3). Finally, as discussed above, the Board based the Brown decision on St. Clare's, a decision that has been overruled and that cannot be reconciled with the holdings of Boston Medical and St. Barnabas. Therefore, even if this case were on all fours with Brown, a hearing should be held.

However, as directed in the Order to Show Cause, we make an offer of proof as to the factual distinctions between this case and Brown. At a hearing, we will show that

the Employer receives nearly One Billion Dollars ($1,000,000,000.00) in annual income from research projects funded by government, foundations and businesses. This income, generally in the form of grants, is conditioned upon the University conducting particular research projects. Research assistants in the petitioned-for unit perform a substantial portion of the work necessary to fulfill the conditions of these grants and generate this income for the Employer. We will also show that much of the rest of the work to fulfill the conditions of these grants is performed by post-doctoral and other employees who are not enrolled students at Columbia, but who nevertheless provide similar services to the research assistants, working in the same locations under similar working conditions. There was no evidence in Brown that the student employees at issue in that case did work that generated comparable sums of income.

In Brown, the Board found that teaching assistants generally did not "teach independently" and that the classes that they worked in were generally related to their education. 342 N.L.R.B. at 489. We will present evidence of teaching assistants at Columbia who do teach independently and who teach classes that bear little or no relationship to their courses of study. We will offer evidence that some of the employees in the unit sought do not even receive grades for performing their teaching functions. While teaching for many of the employees in the unit sought is offered as part of a financial aid package, we will offer evidence of employees who teach in exchange for income that is not offered as part of a financial aid package connected to their admission as students.

We will also present evidence that the Employer regards the work performed by employees in the petitioned-for unit to be part of an "apprenticeship." It is, of course,

well established that apprentices are considered to be employees within the meaning of section 2(3) of the Act. E.g., Newport News Shipbuilding & Dry Dock Co., 57 N.L.R.B. 1053, 1058-59 (1944), General Motors Corp., 133 N.L.R.B. 1063, 1064-65 (1961); Chinatown Planning Council, Inc., 290 N.L.R.B. 1091, 1095 (1988), *enfd.*, 875 F.2d 395 (2d Cir. 1989).

Therefore, while we intend to argue that Brown should be overruled, we can also present evidence that this case is distinguishable on its facts in ways that are related to the holding in Brown. Accordingly, for all the reasons stated above, this petition should not be dismissed.[2]

RESPECTFULLY SUBMITTED

By: _____

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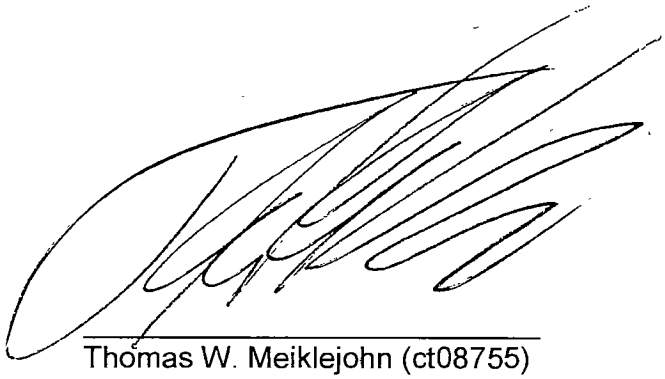
[2] The Petitioner is prepared to proceed to an election in any unit found appropriate by the Board.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served copies of the Petitioner's Response To Order To Show Cause on each of the following parties by electronic mail on January 20, 2015:

Edward Brill, Esq.
Proskauer Rose
Eleven Times Square
New York, NY 10036-8299

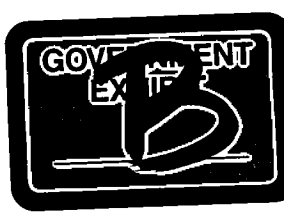


Thomas W. Meiklejohn (ct08755)

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:

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

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[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.

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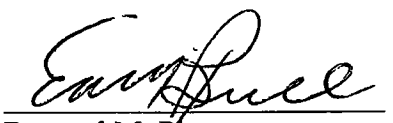
[4] Even the specific facts the Union alleges in its Brief do not differentiate this matter from *Brown University*. For example, the Regional Director's Decision and Direction of Election in *Brown University* found that some teaching assistants at Brown taught outside of their respective departments 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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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.

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:

By E-File
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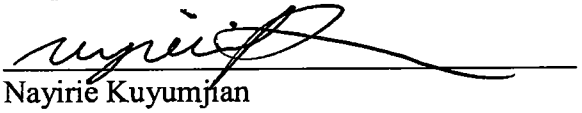
Respectfully submitted,



Dated: January 27, 2015

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