United States of America
Before the National Labor Relations Board

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

and

Case No. 02-RC-143012

GRADUATE WORKERS OF COLUMBIA–GWC, UAW,
Petitioner.

AMICUS CURIAE BRIEF OF ELLEN DANNIN, ATTORNEY[1]

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Interests of the *Amicus Curiae*

Ellen Dannin has been a member of the law faculties of Penn State, Dickinson School of Law (where she was the Fanny Weiss Distinguished Faculty Scholar), Wayne State University, and California Western School of Law. She has also been a National Labor Relations Attorney in Region 7 of the National Labor Relations Board. She has written numerous articles and books on labor issues and has been an Amicus Curiae in cases related to National Labor Relations Act issues.

Who Is an Employee Protected Under the NLRA – Who is an Employer Under the NLRA - *The Case of Columbia University*

No issue is more basic to labor and employment laws than defining who is an employee, who is an employer, and what rights and obligations are associated with each. role. Each of those roles and their effects provide useful insights into workplace power relationships. Indeed, it is surprising how durable these master and servant relationships have remained over thousands of years.

Examples of these relationships may be found in the Bible, which, for example, contains many laws that govern how workers are to be treated by their masters. For example, Exodus 20: 8-10 limits the time workers may toil to six days in a week, and, on the seventh day of the week, the master and the master's entire household are to do no work.

Deuteronomy 24:14-15 forbids a master's mistreatment and oppressing a hired servant. In addition, a master must pay each worker each day before sundown. Failing to do so is a sin. Deuteronomy 22:8 includes occupational health and safety laws. For example, a parapet – a low

protective wall – must be built around a roof so the workers are not injured from a fall. Deuteronomy 24:19 sets out a number of welfare laws. For example, some part of the harvest must be left for the foreigner, the fatherless, and the widow.

Indeed, there are many legal definitions as to who is an employee or employer, because each law's definition is tailored to ensure that the purposes of each workplace law are promoted.[2] The importance of the definition of employee to the success of workplace legislation is often not well understood or appreciated. For example, among the recommendations of the 1994 Dunlop Commission was, "Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship."

In fact, a single definition of employee would clearly be problematic.

Who is an Employee Under the National Labor Relations Act?

Most workplace laws are primarily based on the definitions of who is an employer and who is an employee. For the Columbia University NLRA case what matters is whether the parties fit the NLRA's definition of who are employers and employees.

> § 2(2). The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . .[(29 U.S.C § 152(2)]
>
> § 2(3). The term "employee" shall include any employee, and shall not be

[2] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, PREFACE, FACT FINDING REPORT ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1994). http://www.dol.gov/_sec/media/reports/dunlop/preface.htm

The problem created by that rule is that a unitary definition would defeat the various purposes of diverse statutes such as the NLRA, workers compensation laws, OSHA, wage payment laws, and the Fair Labor Standards Act, to name just a few.

limited to the employees of a particular employer . . .. [(29 U.S.C § 152(3)]

In addition, jurisdiction under the National Labor Relations Act also requires that a case involve a certain dollar amount and that an employer operate in interstate commerce.

Are Columbia University's Graduate Students Employees According to the National Labor Relations Act's Definitions?

The issue raised in *Columbia University* (*Graduate Workers of Columbia-GWC, UAW*), 02-RC-143012 2015) is whether Columbia's graduate students who perform work for their university, as part of their education, are employees, as opposed to solely being students. Columbia University's graduate students perform various forms of work for their academic institution. Doing that work could blur understanding of the purposes and effects of working students' work roles and legal statuses under the NLRA.

Understanding the interrelationship among students' educational performance and needs and work performance requires more than mere labeling. It requires understanding the details as to how various forms of education and work operate, within an educational context, and accounting for how those inputs and outputs function.

For example, at some colleges, such as Berea College, all students are required to perform work for their school, and the students' collective work has both a financial and educational component. "Berea College charges no tuition; every admitted student is provided the equivalent of a four-year, full-tuition scholarship (currently worth $83,600; $20,900 per year)."[3] This structure was created in large part because Berea educates students from Appalachia, and most of

[3] https://en.wikipedia.org/wiki/Berea_College

those students could not afford to pay college tuition.

Another example of a work-study model is Deep Springs College. “Deep Springs is founded on three principles, commonly called the ‘three pillars’: academics, labor, and self-government.” Deep Springs maintains a cattle herd and an alfalfa hay farming operation”[4] In addition to their studies, Deep Springs students work a minimum of 20 hours a week either on its ranch or its farm, which are attached to the college, or in positions related to the college and community. Position titles have historically included cook, irrigator, butcher, groundskeeper, cowboy, "office cowboy," dairy, and feedman. That structure also creates some blurring as to the roles of students and workers.

Some colleges, such as Antioch College and Northeastern University, require students to rotate between work terms / co-op terms and study terms as part of students’ education. Instead of being employed by their colleges, Northeastern and Antioch co-op students work off campus during their working terms.

This form of education fits with Antioch’s goal of expanding “students’ practical knowledge” and “new and better ways of living are discovered through intentional linkages between classroom and experiential learning. For more than 90 years, Cooperative Education (Co-op) has been the College's flagship experiential program and our signature means of ensuring that a rigorous liberal arts education gains traction in the world..”[5]

Northeastern University’s “co-op is not about getting a job, but rather it is an approach to intellectual and professional growth and career success that demands continual learning and

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[4] https://en.wikipedia.org/wiki/Deep_Springs_College

[5] http://www.antiochcollege.org/academics/co-op_program

integration. When they leave Northeastern, our students are prepared to apply both knowledge and skills to unfamiliar tasks and activities in new, authentic contexts and continue to learn in a work-based environment. Our model produces graduates who are critical thinkers, globally aware, confident, self-directed learners experienced in multiple organizations. They are young professionals fully prepared to engage in, contribute to and eventually become leaders in the global workforce."[6]

When Are Graduate Students Employees?

Section 2(3) of the NLRA takes an expansive view of the meaning of employee. The NLRA says that the term employee "*shall* include any employee, and shall not be limited to the employees of a particular employer." (Emphasis added). The cases of *Brown University* and *Columbia Universities* ultimately require deciding whether students have a protected right to engage in freedom of association with other employees, self-organization, collective bargaining, and acts of mutual aid or protection.[7]

Even for colleges and universities that do not have co-op, work-study, or similar programs, the status and quality of life for students who perform work within and outside their colleges may also experience educational benefits. Indeed, employees who are students outside institutions of higher education may often receive formal and informal training that can be useful in their future work, in their making contacts who can introduce them to potential future employers, and in receiving formal or informal training.

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[6] http://www.northeastern.edu/coop/about/

[7] NLRA §§ 1, 2(3), 7; 29 U.S.C. § 151, 152(3) & 157; *see also Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

The NLRA's protections apply to employees as a class. NLRA § 2(3) says "employee *shall* include *any* employee, and *shall not* be limited to the employees of a particular employer."[8] Indeed, Congress considered class-based protections as so necessary that those protections were reinforced in § 2(9).[9] There, Congress defined the term "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*.[10]

Despite the clarity with which Congress spoke on the issues of who is an employee and who, therefore, is protected by the NLRA. Courts and legislators and administrative conservative majorities have progressively narrowed the definition of employee. As a result of limiting and, thus, undermining important employee rights and protections,[11] Congress's intent as to the basic protections have been progressively undermined.

Creating Obstacles to Equality of Bargaining Power

Inequality of bargaining power is the result of two forces – employer power that grew out

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[8] § 2(3); 29 U.S.C. § 152(3).

[9] Ellen Dannin, *Not a Limited, Confined, or Private Matter: Who is an Employee under the National Labor Relations Act*, 59 LAB. L.J. 5 (2008).

[10] § 2(9); 29 U.S.C. § 152(9) (emphasis added).

[11] ELLEN DANNIN, TAKING BACK THE WORKERS' LAW - HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act* (American Constitution Society Legal Brief May 13, 2008). http://www.acslaw.org/node/6664; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

of employers' ability to become collective through the protections given to corporations and partnerships; by corporations' and partnerships' abilities to increase their power through joining trade associations; by court interpretations of laws that give corporations personhood and that have interpreted laws to weaken unions while softening their effects on corporations; and by employer-dominated unions.

Senator Robert Wagner, the driving force behind the enactment of the NLRA, made it clear that workers needed the collective power of unions if they were ever to have any degree of equality to bargain as an equal with employers. Unfortunately, the path to that equality has been, and continues to be, a difficult one for workers, given the far greater power employers can achieve through incorporation and partnership laws.

> Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed, this united strength will result in unalloyed good to the Nation. *But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today*. It is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.[12]

Congressman Patrick Joseph Boland (PA-11), a former carpenter and, by 1935, the House Majority Whip, observed that the inequality between employers and employees meant that workers had no more than theoretical freedom of contract and the country suffered from the evils

[12] NLRA Legislative History 15 (emphasis added).

that resulted from the present regime that was built on inequality of bargaining power. "Having permitted industry to unite through merger and consolidation into powerful corporate units, and having encouraged business to form trade associations covering entire industries" had created gross imbalance and left workers economically insecure.[13]

Judges Putting a Thumb on the Scales of Justice

Hearings on the enactment of the National Labor Relations Act described the failure of courts and judges to enforce antitrust laws which were enacted to prevent corporate concentrations of power, a problem that has plagued labor rights beyond the nineteenth century and continuing to this day.[14]

Chief Justice Taft described the value of unions in promoting a greater balance of power, while criticizing lower courts' failures to enforce the antitrust laws. Unions, he said, were essential if workers were to achieve some degree of equality with their employers.

However, Taft said, equality was increasingly threatened by economic concentration that was "fostering economic despotism." This dangerous situation had led to the enactment of the Sherman antitrust laws. However, those laws "withered under sustained assault in the courts. Whether it was due to the formidable battery of lawyers that the powerful could gather, or to the subconscious prejudices that judges carried over from their former associations, or to the fact that

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[13] NLRA Legislative History 2431.

[14] ELLEN DANNIN, TAKING BACK THE WORKERS' LAW - HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006); JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, (May 13, 2008) (American Constitution Society Issue Brief) http://www.acslaw.org/node/6664; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L.REV. 265 (1978).

the laws themselves were not in harmony with the technique of modern industry are matters of relatively little moment today. The important fact is that the laws failed. . . . Thus the heavy hand of the courts paralyzed the enforcement of the antitrust laws."[15]

Senator Wagner agreed that the courts had played a pernicious role with regard to using corporate power. He charged the courts with having "enunciated so broad an interpretation of commerce" that the result had "been to frustrate the attempts of wage earners to better their economic conditions by collective action."[16] As a result, the only way to secure meaningful rights in our economic system is to have the economic power to enforce them.

Arthur E. Suffern, economist and author on labor issues and inequality of bargaining power, contended that the rules of the game would never be fair, "if those with power and selfish interests at stake are allowed to make them. If Government has any justification in modern civilization it is to be found in its duty to protect the weak against the strong and to define and enforce standards which lift the level of human relations."[17] Arthur Suffern saw how an employer could make labor's rights ineffective by simply refusing to recognize and deal with his workers' representatives. For those who lacked funds to hold out without pay, the strike weapon was of little use. "The result is that labor's right to organize and bargain collectively is largely a fiction."[18]

Suffern urged comparing that weakness with the power employers had "through

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[15] NLRA Legislative History 2322-23.

[16] NLRA Legislative History 2339.

[17] NLRA Legislative History 315-16.

[18] NLRA Legislative History 316.

corporation organization, trade associations and now under code authorities are able to act as a unit in setting wage rates and establishing working conditions."

Rather than taking on the responsibilities that this power over others gave them, Suffern argued, "employers shirked their responsibilities of so managing the economic system as to make it serve its main purpose of providing the population with the best possible living. In an industrial society worthy of the name, owners and employers should be leaders and builders as well as profit takers. Is there any way of holding them to these responsibilities as long as they are free to refuse to deal with their employees on a basis which enables their employees to protect their economic right to employment at the best possible terms?"

In fact, even collective bargaining failed to benefit workers, because, then, as now, employers had been given veto power over this fundamental right As a result, workers and their representatives feared to aggressively press their members' claims.[19]

Richard W. Hogue, former director of workers' education for the Pennsylvania State Federation of Labor and Director of the Independent Legislative Bureau, argued that democracy and human rights cannot exist when there is "an owning and possessing and a dictating class in the main, and either a subservient or a protesting and a rebelling class."[20] Hogue observed that the American industrial system had such a narrow focus on profit that it was unable to pay attention to issues such as human rights. Under those conditions, he argued, democracy cannot exist."[21]

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[19] NLRA Legislative History 318.

[20] NLRA Legislative History 334-35.

[21] NLRA Legislative History 330.

Sources of Employee Power

Employee power lies, first, in the large number of people who are employees or who are not employers, compared with those who are the employers. Senator Wagner, conceded that the power of those numbers could be used to force real bargaining by the employer; however, to be effective, that bargaining must take place through employee representatives who were not subservient to the employer:

> No one would suggest that employers should not be allowed to employ outside lawyers, financial experts, or advisers. Secondly, only representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. Simple, common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.[22]

Wagner, however, made clear that more was needed to ensure that employees had democratic governance rather than merely having representatives who were independent of the employer. Instead, Wagner observed company unions that hired outside representatives but whose employers were still able to "exercise a compelling force over the collective activities of his workers." Those dominated unions lacked the building blocks of democracy. What, then, was needed to promote democratic unions was participatory unions.[23]

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[22] NLRA Legislative History 16.

[23] NLRA Legislative History 16.

The bill Senator Wagner championed also spoke to the challenge of protecting employees who exercised their right to make common cause with one another. Wagner observed: "The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."[24]

Despite clear evidence that our recent Great Recession was caused by financial misdeeds, large employers and financiers continue to increase their size and power. At the same time, they have assaulted the sources of worker power by directly attacking unions and indirectly by shifting work abroad and lobbying for corporate subsidies in the forms of financial benefits, exemptions from legal obligations, and the creation of barriers for unions, among others. Employers have been largely successful in persuading many of us that allowing employees to have more collective power is dangerous.

Unions faced similar problems during the Great Depression, yet they and their allies were able, in the National Labor Relations Act, to craft a law that benefitted the nation as a whole. Part of that success was based on the articulation of ideas that made the case for worker collective organization.

Graduate Students' Work Is Similar to Work of the Skilled Trades

One of the greatest success stories – though not as widely known as it should be – is the structure of the skilled trades training, apprenticeships, and pay and benefits. That paid training

[24] NLRA Legislative History 1103.

includes on-the-job and classroom training.

The years of training required for the construction trades can equal or exceed the years of education required for a bachelor's degree. The lowest amount of training is two years for laborers. Electrician's training is five years or more and includes 900 hours of classroom work, including mathematics and 8000 hours of hands-on training. A carpenter's apprenticeship requires 4 years training with 640 hours of classroom instruction and 8000 hours of on-the-job training. That structure of paid on-the-job training and benefits is set out in collective bargaining agreements and in prevailing wage laws.

Construction work tends to be episodic. An employer may need an electrician or other employee only for a few days here and there as a job progresses. At the same time, the electricians want steady work and good pay and benefits. That is not possible when a job may only be available from time to time.

A common stereotype about construction workers is seeing workers wearing hard hats and leaning on their shovels. What is not so obvious is that those workers are not wasting time and money. The reality is that much of construction work is very dangerous work, with heavy equipment moving around and near workers. This means that if every worker is to go home each day, everyone needs to watch each others back.

Another issue is wait time. Construction work can be like making a layer cake. As each phase progresses, more or fewer workers are needed. When a phase of a job is completed, workers will report to the hiring hall for their next assignment.

In addition to the hiring hall, key to turning an episodic job into a good job is the creation of the union hiring hall and uniform union training. Contractors contact the hiring hall to send

out the number of construction workers needed. Once that job is done and the workers report back to the hiring hall for their next assignment, the workers do not need additional training. They are able to do productive work immediately, and they do not see the end of a job as putting the workers in desperate straits. Without these structures the cost and quality of construction work would suffer.

This is not just speculation.

A 1994 study by Hamid Azari-Rad, Anne Lucille Yeagle, and Peter Philips, *The Effect of the Repeal of Utah's Prevailing Wage Law on the Labor Market in Construction*[25] found that the quality and availability of skilled construction workers crashed when Utah's prevailing wage law was repealed. That work has continued in more recent work in Hamid Azari-Rad, Peter Philips, Mark J. Prus, *The Economics of Prevailing Wage Laws* (2005).[26] The decision to repeal a state's prevailing wage law demonstrates a lack of understanding as to the value and efficiency of highly trained workers.

Conclusion

Graduate students' working conditions include intellectual work and learning how to become a good teacher and researcher. In addition, they learn the values of collegiality.

The structure and process of graduate student training has strong similarities to construction industry apprenticeships. The work of both is often episodic, but apprenticeships provide free training and good benefits and pay. According to the Bureau of Labor Statistics,

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[25] Hamid Azari-Rad, Anne Lucille Yeagle, and Peter Philips, *The Effect of the Repeal of Utah's Prevailing Wage Law on the Labor Market in Construction*. (1994).

[26] That work has continued in Hamid Azari-Rad, Peter Philips, Mark J. Prus, *The Economics of Prevailing Wage Laws* (2005).

carpenters, for example, earn on average $40,820 a year, with wage rates varying depending on the type of carpenter work. The median pay for electricians is $51,110.[27]

The core question in this case is whether graduate students are employees as defined under the National Labor Relations Act. Section 2(3) of the NLRA states, “The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer.” The terms of employment in the construction trades provides a clear analogy in the case of Columbia University graduate students, and that analogy reveals the nature of the work they perform as being that of an employee.

[27] http://www.bls.gov/ooh/construction-and-extraction/carpenters.htm#tab-5