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National Labor Relations Board Columbia University Graduate Student Unionization Decision: Analysis and Implications for Administrators

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Abstract

All employees want to be treated fairly by their managers and employers. If workers observe that they are not getting a fair compensation and treatment for their knowledge and outcomes, then they will naturally think of unionizing. This is equally true of those who work in the government sector, private industries and educational institutions. For educational institutions, one question has been to determine if teaching and research assistants can be considered employees. The NLRB ruling in the Columbia University case demonstrates that teaching and research assistants at educational institutions are employees and should have the ability to unionize. As such, this article focuses on how private universities can deal with this new legal and practical reality. This article provides an overview of federal labor relations law as well as recommendations for university administrators on how to avoid unions; and how to deal with collective bargaining in the context of the Columbia University decision.

Keywords

NLRB, National Labor Relations Board, Unions, Unionization, Collective Bargaining, Teaching / Research Assistants, Employees, Columbia University

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1. Introduction

The National Labor Relations Board (NLRB) enunciated an important and potentially far-reaching ruling on August 23, 2016 holding that graduate students who assist in teaching and research at private universities are considered to be "employees" under federal labor law and thus are entitled to form, join, and be represented by unions in collective bargaining. This article is an examination of this seminal labor law decision by the NLRB.

This article first provides a general overview of federal labor relations law, focusing on the principal labor law statute in the U.S., the National Labor Relations Act (NLRA). Further, readers will receive a brief history and discussion of NLRB precedents involving students as potential employees. The authors provide an examination of the significant NLRB decision in the *Columbia University* case. The facts of the case will be first succinctly discussed; then the majority opinion and rationales will be presented. Next, the limitations of the decision will be stated; and finally the minority opinion and rationales therefor will be presented. The authors then will discuss the implications of the decision for universities and university administrators. Finally, the authors will provide recommendations for university administrators consisting on how to avoid unions. These will include general employment recommendations as well as specific labor relations suggestions; and the authors will offer advice

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on how to deal with collective bargaining in the context of the *Columbia University* decision. To conclude the article, a summary and discussion questions will be presented since the article can be used in the form of a case study for educational and management training purposes. The questions will stimulate discussion, debate, and analysis of this important educational and legal topic.

Since this article and the NLRB decision deal with students who are teaching and research assistants it is first necessary to define these key terms. Hayden (2001) concisely accomplishes this task in the context of graduate students who are the main, but not sole, "players" in this unfolding educational and legal "drama":

Graduate assistants are graduate students who work for their universities as they pursue advanced degrees. They fall into two primary categories: teaching assistants and research assistants. Typically, the teaching assistants have full responsibility for teaching introductory classes or leading small discussion sections for larger lecture classes taught by professors in their department. Research assistants aid professors in their departments with field and laboratory research. Both types of graduate positions are usually half-time, up to 20 hours per week, though the actual number of hours spent teaching and researching varies tremendously (p. 1236).

The next section to the article provides a brief overview of federal labor relations law in the United States.

2. Legal Overview and Precedents

The most important law in the United States dealing with labor relations is the 1935 statute, the National Labor Relations Act (NLRA), also called the Wagner Act (20 U.S.C. Sections 121-169; Cavico and Mujtaba, 2014; Cavico, Mujtaba, and Rosenberg, 2015). The law establishes the rights of employees in the private sector to join, form, and assist labor organizations, to bargain collectively with employers, and to engage in concerted activities to protect those rights. The NLRA also imposes an affirmative duty on employers to negotiate, bargain, and deal in good faith with unions as the elected representatives of the employees (20 U.S.C. Sections 121-169; Cavico and Mujtaba, 2014; Cavico, Mujtaba, and Rosenberg, 2015). The NLRA, moreover, created the National Labor Relations Board (NLRB), which is a federal administrative agency comprised of five members appointed by the President and approved by the Senate, but no more than three members can be of the same political party (20 U.S.C. Sections 121-169; Cavico and Mujtaba, 2014; Cavico, Mujtaba, and Rosenberg, 2015). The NLRB certifies appropriate collective bargaining units, oversees union elections, prevents employers as well as unions from engaging in unfair labor practices, and interprets and enforces federal labor laws (20 U.S.C. Sections 121-169; Cavico and Mujtaba, 2014; Cavico, Mujtaba, and Rosenberg, 2015). The decisions of the NLRB can be appealed to, and are enforceable by, the courts (Cavico, Mujtaba, and Rosenberg, 2015; Cavico and Mujtaba, 2014). The NLRB is charged with the difficult task of balancing the legitimate and often conflicting interests of employers and employees to effectuate a national labor policy of allowing workers to organize, equality of power between employers and employees, good faith collective bargaining, and peaceful settlement of labor disputes (*NLRB v. Truck Drivers*, 1957).

Section 7 of the National Labor Relations Act (NLRA 20 U.S.C. Section 7) grants employees the rights to form or join together to form a union or to assist unions, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid and protection (Cheesman, 2016; Cavico and Mujtaba, 2014). The NLRA Act in Section 8 also defines a number of employer practices which the statute regards as illegal "unfair labor practices," to wit: 1) interfering with the rights of employees to form, join, or assist unions or to engage in concerted activities for their mutual aid or protection; 2) an employer dominating a union or other labor organization or contributing to its financial support; 3) discriminating in the hiring of employees or in other aspects of employment because of their union affiliation or support; 4) discrimination against employees for filing charges under the NLRA or giving testimony under the Act; and refusing to bargain collectively with the duly designated representative of the employees, i.e. the union (NLRA 20 U.S.C. Section 7; Clarkson, Miller, Cross, 2012; Twomey, 2007). The NLRA in Section 8 (c) gives to employers a "free speech" right. That is, employers can express any views, arguments, or opinions, which will not be deemed unfair labor practices, so long as the speech contains no threats of reprisal or force or promise of benefit (NLRA 20 U.S.C. Section 8 (c); Twomey, 2007). For example, "an employer is free to state only what the employer reasonably believes will be the likely economic consequences of unionization that are outside the employer's control (Twomey, 2016, p, 103).

Collective bargaining simply means the employees through their elected union representative and the employer will engage in a process to negotiate the terms and conditions of employment (Clarkson, Miller, Cross, 2012). The group of employees that the union is seeking to represent is called a bargaining unit; it must be defined and determined by the NLRB to be an "appropriate" one for collective bargaining purposes, meaning in essence that the members of the unit have a commonality of interests regarding the terms and

conditions of employment, particularly concerning the physical location of the work and the work requirements of the work to be performed (Cheesman, 2016; Cavico and Mujtaba, 2014; Twomey, 2007). Once a bargaining unit has been ascertained at least 30% of the members of that unit must sign a consent card indicating that they wish to be represented by a union. Then, assuming there is the requisite consent but the employer contests the union the NLRB will conduct and supervise an election; and if the union receives a majority vote of the employees (more than 50%) the Board will certify the union as the bargaining representative of the employees in the unit (Cheesman, 2016; Twomey, 2007).

It is essential to point out that to be protected by the NLRA, a person must be an "employee" as defined by the statute (NLRA, 20 U.S.C. Section 152 (3)). The major problem is that the statute does not precisely define the key term "employee," though, among other categories, the Act does exclude supervisors and independent contractors, as well as employees of federal, state, and local government (NLRA, 20 U.S.C. Section 152 (3)). Faculty members who exercise managerial and supervisory functions are deemed to be supervisors and thus excluded from the NLRA (Hayden, 2001). The NLRA does not mention students generally, or student assistants in particular, or for that matter even private university employees. The Act applies to an "employee." Consequently, the National Labor Relations Board (NLRB) and ultimately the courts must decide this critical question.

Pursuant to the common law, an "employee" is a person who is employed to render service of any type and who remains under the considerable control of another in performing these services (Cavico, Mujtaba, and Rosenberg, 2015; Cavico and Mujtaba, 2014). Other key "employee" questions are: Is the worker engaged in a distinct and independent occupation (that is, an independent contractor as opposed to an employee)? Is the work typically done under supervision or independently by a specialist? How much skill is involved in the work (with more skills tending toward independent contractor status? Does the employer provide the workplace, materials, and/or the tools for performing the job (indicating employee status)? Does the employer provide benefits (indicating employee status)? Is the person employed on a temporary or permanent basis (with the latter indicating employee status)? Is the person employed for a longer period of time (indicating employee status)? How is the person doing the work paid (with regular payments indicating employee status as opposed to a one-time payment)? What is the intent of the parties, as evidenced by their words – oral and written – and conduct (Cavico, Rosenberg, and Mujtaba, 2015; Cavico and Mujtaba, 2014)? The NLRB and ultimately the courts must apply, weigh, and balance these criteria in making "employee" determinations.

Accordingly, in order to be protected by federal labor law one must be an "employee," and this critical issue is at the crux of the Columbia University situation. Before explicating the Columbia University case the authors must briefly discuss NLRB precedents. There are two student-as-employee NLRB cases previously decided by the Board which can serve as precedents for the Columbia University case. One involved graduate assistants at Brown University and thus emerges as a direct, on-point precedent.

2.1. The 2000 New York University Decision

In 2000, the issue of whether graduate assistants at a private university first arose before the NLRB in a case involving graduate teaching assistants at New York University (Leatherman, 2000; Tejada, 2000). The Board, following the decision of a Regional Director, held that the graduate assistants who were instructors were employees, pursuant to the NLRA and thus could unionize. The Board disagreed with the university which argued that the role of the students as students superseded their work duties as instructors (Leatherman, 2000; Tejada, 2000). The Board explained that the relationship the students had with the university was "indistinguishable" from the traditional employer-employee relationship (Tejada, 2000, p. A2).

2.2. The 2004 Brown University Decision

The 2004 *Brown University* decision dealt with the question of whether graduate assistants at the university were employees protected by the NLRA who could unionize. The essential characteristic of the employer-employee relationship is the power and right to control the daily details of the employee's work (Cavico, Mujtaba, and Rosenberg, 2015; Cavico and Mujtaba, 2014). The employer must at all times control or have the right to control the physical conduct of the employee in the performance of his or her duties (Cavico, Mujtaba, and Rosenberg, 2015; Cavico and Mujtaba, 2014). The U.S. Supreme Court has stated that the employment relationship exists when an employee "performs services for another, under the other's control, or right to control, and in return for payment" (*NLRB v. Town and Company Electric*, 1995, pp. 90-91, 93-95). The NLRB applied the preceding Supreme Court definition when ruling in 2004 that graduate teaching assistants and research assistants at Brown University were not employees but students, who were admitted into the university as students and not hired as employees, and thus they could not constitute an appropriate unit for collective bargaining purposes (*Brown University and International Union*, 2004). The NLRB found in the *Brown* decision that the employees were primarily students, their roles were connected to their education, their supervisors were school faculty, and their

wages were equivalent to the financial support provided to others who were not working those exact jobs (*Brown University and International Union*, 2004). Consequently, the NLRB decided that the graduate students were students first and foremost and employees merely second; and thus they were not "employees" able to unionize pursuant to the NLRA (*Brown University and International Union,* 2004).

The 2004 *Brown University and International* decision by the NLRB, therefore, was a major legal pronouncement at the time, overruling the prior Board decision in *New York University* (2000). The Board clearly maintained and explained that graduate student assistants at Brown University were not employees protected by the NLRA because they were primarily students who mainly have an educational relationship with the university and not an economic one; and consequently to treat the students as employees would undermine their educational relationship with the university (*Brown University and International Union*, 2004).

2.3. The 2014 Northwestern University Decision

The issue of students as employees arose again in 2014 but then in the context of college football players at Northwestern University who wanted to unionize (Cavico, Mujtaba, and Rosenberg, 2015). Although the Regional Director of the NLRB decided that the university football players were employees who could unionize due to their manifold and extensive sports work and responsibilities and their control by their university "employer" (Cavico, Mujtaba, and Rosenberg, 2015), the full Board unanimously declined to take jurisdiction of the case (National Labor Relations Board, Office of Public Affairs, 2015). Yet it is important to note that the Board did not definitely determine that the players were "employees" pursuant to the NLRA; rather, the Board "merely" exercised its discretion not to assert jurisdiction in this case; and consequently dismissed the representation petition filed by the players and their union (National Labor Relations Board, Office of Public Affairs, 2015). Also important to note is that the decision was narrowly focused to apply only to the players in this Northwestern University circumstance and case and their desired union; and thus the decision "…does not preclude reconsideration of this issue in the future" (National Labor Relations Board, Office of Public Affairs, 2015).

3. Columbia University Case Facts

Students at Columbia University and the New School of New York who were teaching and research assistants commenced this case in 2014 by filing petitions with the National Labor Relations Board to join the United Auto Workers (UAW) union. They claimed that they were statutory employees within the meaning of the National Labor Relations Act. The UAW was seeking to represent both graduate and undergraduate teaching assistants as well as graduate research assistants (*The Trustees of Columbia University in the City of New York*, 2016). The categories of students petitioning for employee status encompassed teaching assistants, both graduate and undergraduate, graduate research assistants, as well as Teaching Fellows, Preceptors, and Readers/Graders (*The Trustees of Columbia University in the City of New York*, 2016). The university oversees and directs all these activities for which the students receive compensation. Furthermore, receipt of a full financial reward is conditioned upon the successful performance of their teaching, research, or other activities. Students also may get student aid but this tuition aid is conditioned on the teaching and research and other work they do during a semester. Moreover, the stipend portion of their financial aid is usually treated a part of the university's payroll and consequently is subject to W-2 reporting for employees as well as I-9 employment verification for immigration purposes (*The Trustees of Columbia University in the City of New York*, 2016). Teaching assistants teach courses and thus act like a traditional faculty member (*The Trustees of Columbia University in the City of New York*, 2016). Research assistants work on defined tasks set by the faculty, which are typically in conjunction with the research assistants' doctoral dissertations. They receive grants for this research work; and the university also receives substantial income from grants since the research assistants are helping the university achieve its research goals (*The Trustees of Columbia University in the City of New York*, 2016). The work of the teaching and research assistants as well as the other petitioners advances their own educational interests as well as the university's interests.

The Columbia University case was first heard by a Regional Director of the NLRB, who followed the *Brown University* precedent and thus ruled that the graduate and undergraduate assistants at Columbia were not employees covered by the NLRA, thereby rejecting their petitions for unionization (*The Trustees of Columbia University in the City of New York*, 2016).

3.1. Graduate Students and Unions

The Columbia graduate students and their union and other supporters stated that they provide essential work-like services to the university and thus they should be considered as "employees" since in these teaching and research aspects of their education they are serving their employers as

employees (Trottman and Korn, 2016). They also contended that their status as employees and potential unionization would gain them greater pay and more control over the conditions of their teaching and research work at universities (Matthews, 2016). The amount of money they receive as stipends as well as the timeliness of the payments were stated as issues of prime concern (Scheiber, 2016). They are also very concerned about the availability, quality, and cost of their health care (Scheiber, 2016). Health care is a particularly important concern for teaching and research assistants if they have children (Douglas-Gabriel, 2016). To bolster their case that they are truly employees, graduate assistants can point to Internal Revenue Service policy that construes the compensation of graduate students who teach and/or do research to be wages. As such, when the students receive payment for their work it is not taxed on a 1042-S form used for scholarships but rather on the typical W-2 form which of course is used for employment income; and thus the IRS considers student assistant compensation to be taxable salary (Wikipedia, 2016; Hayden, 2001). Hayden (2001) further explains why the compensation accorded to the students is truly "salary" to employees:

The method of payment – a salary – makes the relationship between graduate assistants and universities look like one of employment. Several universities fighting graduate assistant organizations have attempted to characterize their salary as a 'stipend', a form of financial aid. However, 'stipend' is merely a 'buzzword' used to bolster the universities' position. Monies for graduate assistant salaries often come out of the general fund of the university. Payments to graduate assistants are made through regular university personnel payment channels, and graduate students often receive the same paycheck as other state employees…. Graduate assistant salaries cannot be characterized as a form of financial aid for a number of reasons. First, graduate assistants are not awarded on the basis of need. Second, characterizing graduate assistant salaries are mere 'aid' ignores the necessity of the services they provide to the university. Finally, universities themselves often do not consider the salaries as financial aid (2001, pp. 1251-52).

Moreover, although the students do receive compensation in the form of scholarships, stipends, and health insurance, the *Washington Post* (Douglas-Gabriel, 2016) reported that regardless of what this compensation is called, "…many say the coverage is limited and the pay is not enough for them to support themselves or their families." It is reported that "the median pay for a graduate teaching assistant is about $30,800 a year…, but wages vary widely by university and field of study" (Douglas-Gabriel, 2016, p. 2). Hayden (2001, p. 1258) similarly declares that the "lack of adequate compensation and benefits does not meant that graduate assistants are merely students, nor does it indicate that they are not employees; instead it simply means that they are undercompensated employees. Holding that a group lacks the right to bargain collectively because they are so grossly underpaid, and thus could not possibly be employees, is self-defeating. Graduate assistants organize in order to redress these deficiencies in their compensation and benefits; it is nonsensical to deny them the right to organize on these grounds." To illustrate, Douglas-Gabriel (2016, p. 2) quoted a teaching and research assistant who said that her work had indeed given her valuable classroom experience and a good educational experience, but considering how much time she spent in teaching and research, which time spent was more than she was supposed to do, and consequently as a result she ended up "being paid minimum wage or less. That's not enough to survive in D. C. Trying to make ends meet every month is virtually impossible." Another student said that "the vast majority of my colleagues are swimming in student debt" and thus are concerned about getting a good job to pay back the debt (Douglas-Gabriel, 2016, p. 2).

As a general criticism of universities the *Washington Post* (Douglas-Gabriel, 2016, p. 1) noted that many universities use lowly paid graduate teaching and research assistants, particularly doctoral students, as well as adjunct professors, to do the work of full-time professors, and consequently this "…model…has been widely criticized as exploitative." Moreover, the *New York Times* (Scheiber, 2016, p. A1) posited that the union effort by the teaching and research assistants "…reflects a growing view among more highly educated employees that they, too, are at the mercy of faceless organizations and are not being treated as professionals whose opinions are worthy of respect." Finally, it should be pointed out that certain faculty organizations, for example, the American Association of University Professors and the National Education Association, support the right of graduate students to form unions (Wikipedia, 2016). Currently, the only graduate employee union in the U.S. that is recognized by a university is the New York University's Graduate Student Organizing Committee, which is affiliated with the United Auto Workers (Wikipedia, 2016).

3.2. Columbia and Other Universities

Columbia and other universities have always contended that the relationship between graduate students and their universities is not the same as the one between an employer and employee. The relationship the students have with the university, schools, departments, and faculty is an educational one, and not an employer-employee one, Columbia insisted (Scheiber, 2016). Moreover, Columbia and other universities long have asserted that unionization and collective bargaining will create an adversarial relationship at

the schools; and consequently will intrude upon, interfere, and harm the educational relationship between graduate students and universities (Matthews, 2016; Scheiber, 2016).

As such, several universities, including Stanford, the Massachusetts Institute of Technology, and all the Ivy League schools submitted briefs to the NLRB saying that treating the students as employees and bringing them into the collective bargaining process would be disruptive to academic operations and potentially detrimental to students, especially if such core academic matters as who is selected to teach and/or do research, the workload, what is included in the curriculum, the size and length of classes, the nature and format of exams, and the amount of grading were included in the labor negotiations (Douglas-Gabriel, 2016; Scheiber, 2016). Attorney Joseph Ambash of Boston, who filed a brief on behalf of the schools, declared that the interference in the educational requirements of these schools would be disruptive and "dramatic" (Douglas-Gabriel, 2016).

4. NLRB Columbia University Decision

4.1. Majority Opinion and Rationales

The NLRB decision on August 23, 2016 in the case of The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW held that students, graduate and undergraduates, at Columbia university who acted as teaching and/or research assistants were "employees" under federal law, specifically the National Labor Relations Act, and thus the students could form and join and be represented by unions as well as being protected by the full scope of U.S. labor law. The decision specifically overruled the 2004 Brown decision. The Columbia decision was a 3-1 one (as the Democrats have a three member majority on the Board, who composed the majority opinion, with the one lone Republican member in the minority) as one Board seat was not filled at the time of the decision and has been vacant since 2015 (Scheiber, 2016). The majority on the Board, Chairman Pearce, and Members Hirozawa and McFerran, disagreed with the Brown University rationale that the students' primary relationship with the university is educational. Rather, the Board members said that they would treat the students as employees pursuant to the NLRA because of their work at the "direction" of the university; and the fact that there also is another relationship, that is, educational, with the university did not foreclose a finding of employment status (The Trustees of Columbia University in the City of New York, 2016, pp. 1-2). The Board explained that in reviewing Congressional policies "…we can discern no such policies that speak to whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or non-economic relationship" (The Trustees of Columbia University in the City of New York, 2016, p. 6). The Board further explained that by allowing the students to express a choice as to whether to engage in collective bargaining, as opposed to prohibiting it, would effectuate the policies of the NLRA (The Trustees of Columbia University in the City of New York, 2016, pp. 6-7). Finally the Board noted that "neither administrative experience nor empirical evidence supported the Brown University Board's determination that extending statutory protection to student assistants would be detrimental to the educational process…. The experience of student assistant collective bargaining at public universities provides no support for the fearful predictions of the Brown University Board (The Trustees of Columbia University in the City of New York, 2016, p. 8). The Board concluded its decision and opinion by saying: "Our conclusion is that affording student assistants the right to engage in collective bargaining will further the policies of the Act, without engendering any cognizable, countervailing harm to private higher education (The Trustees of Columbia University in the City of New York, 2016, p. 13).

4.2. Limitations of the Decision

Initially, it is important to note that the decision does not apply to graduate assistants at public universities as they are covered by state labor law and state regulatory agencies, for example, the Public Employees Regulatory Commission in Florida. The Washington Post (Douglas-Gabriel, 2016, p. 3) reported that today "there are more than 30 collective bargaining units representing more than 65,000 students across the country." However, most of these groups are at public universities (Douglas-Gabriel, 2016).

Secondly, though, subject to any appeal and reversal, the graduate students can commence the process to form or join a union and be represented by a union for collective bargaining purposes. There still has to be a petition for and election of a union, a designation by the NLRB of an "appropriate bargaining unit," which issue can also be litigated before the Board and the courts, and the winning of the election by union (Cavico and Mujtaba, 2014). The "appropriate bargaining unit" determination may arise in the courts since the Board in the Columbia decision said that undergraduate students who take on teaching duties were included in the definition and decision as "employees" who could unionize too (National Labor Relations Board, *The Trustees of Columbia University in the City of New York,* 2016)

Moreover, even if there is union representation of the graduate and perhaps undergraduate student "employees"

labor law in the U.S. only requires that the employer and employees through their representative bargain in "good faith"; as such, there is no legal duty or requirement to formulate and enter into a collective bargaining agreement (Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). Although it is beyond the purposes of this article to fully explicate this duty to bargain in "good faith" some components thereof would be as follows: to take the negotiations seriously, agree to meet with the representatives of the union, avoid constantly shifting positions, avoid sending bargainers who have no authority to bargain, avoid unrealistic demands and "take-it-or-leave-it offers, and to be prepared to make some concessions and counteroffers (Cheeseman, 2016; Clarkson, Miller, and Cross, 2012). If the employer or the union refuses to bargain in good faith an unfair labor practice has been committed, thereby bringing sanctions from the NLRB. Yet if there is bargaining in good faith and nonetheless no collective bargaining agreement is obtained there is no labor law violation; but then, after any private or government mediation, the employees can engage in economic pressure by means of picketing and strikes against the employer but the employer can counter with a lock-out and termination of economic strikers (Cheeseman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

4.3. Dissenting Opinion and Rationales

The one dissenting opinion was by Board member Philip Miscimarra, the lone Republican member of the Board, who underscored that the prior Board in the 2004 *Brown University* decision was quite correct in holding that graduate student assistants are students and not employees. He echoed the rationale in the early decision that the relationship of the graduate assistants to the university is a "predominantly academic" one rather than an economic one (*The Trustees of Columbia University in the City of New York*, 2016, p. 25). He explained:

For students enrolled in a college or university, their instruction-related positions do not turn the academic institution they attend into something that can be fairly said to be a 'workplace.' For students, the least important consideration is whether they engage in collective bargaining regarding their service as research assistants, graduate assistants, preceptors, or fellows, which is an incidental aspect of their education…. Moreover, I believe collective bargaining is likely to detract from the far more important goal of completing degree requirements in the allotted time, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one another (*The Trustees of Columbia University in the City of New York*, 2016, p. 23).

Board member Miscimarra, echoing the concerns of the *Brown University* Board, also discussed in detail these potentially adverse "economic weapons," such as strikes, lock-outs, loss suspension, or delay of academic credit, suspension of tuition waivers, loss of tuition, discharge from the school, and the potential replacement of striking student assistants (*The Trustees of Columbia University in the City of New York*, 2016, pp. 29-30). Finally, he had a problem with the designation of a wide group of students as "employees" for collective bargaining purposes since "an assortment of student positions is involved here" (*The Trustees of Columbia University in the City of New York*, 2016, p. 22). He listed the following positons that are included in the bargaining unit: graduate and undergraduate teaching assistants, teaching assistants, teaching fellows, preceptors, course assistants, readers, graders, graduate research assistants, and department research assistants; and he further explained that "no distinctions are drawn based on subject, department, whether the student must already possess a bachelor's or master's degree, whether a particular position has other minimum qualifications, whether graduation is conditioned on successful performance in position, or whether different positions are differently remunerated" (*The Trustees of Columbia University in the City of New York*, 2016, p. 22). Member Miscimmara concluded that this "single, expansive, multi-faceted bargaining unit" would not be an appropriate and efficacious one for collective bargaining purposes (*The Trustees of Columbia University in the City of New York*, 2016, p. 22). It will "wreak havoc," he predicted, to engage in collective bargaining with such a bargaining unit and to have such "economic weapons" be wielded against the participants during the educational process (*The Trustees of Columbia University in the City of New York*, 2016, p. 33).

5. Implications for Universities

The *Wall Street Journal* (Trottman and Korn, 2016, p. A3) declared that the decision was a "sweeping" one that "paves the way for student unionization at campuses nationwide." The *Miami Herald* (Matthews, 2016, p. 13A) stated that the decision "potentially affects students at hundreds of private colleges and universities throughout the U.S." Trottman and Korn (2016, p. A3) also noted that "the victory for the Columbia University students could deliver tens of thousands of new members to the nation's beleaguered labor movement, which has seen its rank decline dramatically." As such, the *Wall Street Journal* reported that as a result of the Board decision the Service Employees International Union (SEIU) said that students at several universities are planning to take "immediate steps" to join the union, including students at Duke, Northwestern, Saint Louis University, and American University (Trottman and Korn, 2016, p. A3). Students at

Yale and Harvard have already voted to form unions (Douglas-Gabriel, 2016, p. 2). The Executive Director of the SEIU, Heather Conroy, was quoted in the *Washington Post* (Douglas-Gabriel, 2016, p. 2) as saying that the decision is an "incredible opportunity" for students to not only have the "ability to have a voice on important issues like their stipends and health care, but also academics and the broader campus community." As an example of the potential "broader campus community" concerns mention must be made of the UAW's (which union represents student worker in the University of California system) latest contract between graduate student employees and the UC system, which not only has provisions permitting graduate students to control class size, but also to provide financial opportunities for undocumented students as well as to furnish gender-neutral bathrooms for transgender students (Wikipedia, 2016).

Very soon after the NLRB ruling, Columbia University declared that the decision was an incorrect one and that the graduate teaching and research assistants were students and not employees. Columbia issued a firm statement saying it disagreed with the Board decision, explaining: "We believe the academic relationship students have with faculty members and departments as part of their studies is not the same as between employer and employee" (Trottman and Korn, 2016). The University also specifically pointed to the perceived academic harm the decision might cause, to wit: "First and foremost, students serving as research or teaching assistants come to Columbia to gain knowledge and expertise, and we believe there are legitimate concerns about the impact of involving a non-academic third party in this scholarly training" (Matthews, 2016, p. 13A).

The Board in the *Columbia University* decision however, said that "there is no compelling reason – in theory or practice – to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education" (*The Trustees of Columbia University in the City of New York*, 2016, p. 12). The Board also tried to allay the fears of Columbia and other similarly situated universities by telling them that collective bargaining over topics of "core concern" to employees are "standard fare for collective bargaining"; and thus "(f) ulfilling one's obligation to bargain about job loss or staffing levels, or the effects thereof, has not proven unduly burdensome to countless other unionized workplaces" (*The Trustees of Columbia University in the City of New York*, 2016, p. 11).

Nevertheless, the decision certainly could be costly to universities in terms of money, time, and effort. The salaries of teaching and research assistants could be raised by means of collective bargaining and any concomitant economic pressure (Trottman and Korn, 2016). Moreover, the whole process of labor relations and collective bargaining will require legal counsel by specialized labor lawyers and administration, bargaining, and negotiation by specialized labor relations managers. Collective bargaining could also be "disruptive" to the educational process, especially since university administrators might be unaccustomed to labor relations bargaining (Trottman and Korn, 2016, p. A3). At worse, if there is an impasse in bargaining between the union and a university, economic pressure could ensue in the form of picketing and a strike and then engender a lock-out by the employer university, thereby harming labor peace and surely adversely affecting the education of all the students.

Columbia, of course, can always appeal the Board decision in the federal courts, perhaps ultimately asking the Supreme Court to review the decision. Absent an appeal or an unsuccessful appeal to the courts universities will not have to deal with union organizing campaigns by students who perform teaching and research work as they are now protected "employees." In the next section to the article the authors will provide certain recommendations to university administrators to help them deal with any unionization campaign and also, if the union is successful, how to negotiate with the union during the collective bargaining process.

6. Recommendations

Initially, the authors wish to stress that the NLRB in the Columbia University case made a "permissive" decision; that is, though finding that the graduate teaching and research assistants were "employees," the Board certainly did not mandate unionization; rather, the students at the university and other similarly situated students now will be allowed to unionize as employees covered by the NLRA. Accordingly, the authors also wish to remind the readers, particularly university administrators, of the old labor relations maxim: "Who makes unions? Bad management makes unions."

As per the aforementioned maxim the authors would like to review some basic management principles, first, as stated by the Father of Scientific Management, Frederick W. Taylor, to wit: Taylor encouraged managers to: "*Establish a fair level of performance* and pay for higher performance" (Cavico, Mujtaba, and Rosenberg, 2015); and "Workers should benefit from higher output" (Cavico, *et. al*., 2015). Without proper compensation, according to Taylor, employees might suffer from "natural soldiering*"* and "systematic soldiering" (Mujtaba 2014, p. 7). Mujtaba (2014) explains that "*natural soldiering*" is the natural instinct and tendency of players and workers to "take it easy" rather aiming to performing at the optimal level. Taylor blamed management for not designing the tasks properly and not offering proper incentives to motivate everyone toward excellent performance (Cavico, *et.*

al., 2015). Taylor thought that a manager should be able to inspire employees to stop "natural soldiering" (Cavico, *et. al*., 2015). Furthermore, "*systematic soldiering"* results from group pressures for employees to conform to output norms set by the work group (Cavico, *et. al*., 2015). If the employees are not pleased with the benefits of hard work, then they would all systematically be inclined to limit their performance to the minimum acceptable level as agreed upon by the work group. Taylor also believed that everyone was best or "*first class*" at some type of task (Cavico, *et. al*., 2015). There thus should be a match between a person's abilities and the person's job placement. Of course, today this concept is known as having a "job-fit" between a worker and his/her responsibilities. If in the context herein a graduate student enjoys the task for which he or she is responsible for, whether teaching or research or both, then he or she will likely be more productive doing it and will have the motivation to go the "extra-mile" in achieving it. Proper and fair compensation of employees can certainly be an important factor in the creation of "first class" student employees at the university. Similarly, Henri Fayol, an industrialist and management historian, who identified the original "five functions of management" as the planning, organizing, directing, coordinating, and controlling, would certainly agree that proper "rewards" can create a "sense of belonging" on the group and organization (Cavico, Mujtaba, and Rosenberg, 2015), thereby enhancing morale, solidarity, performance, productivity, revenues, and perhaps avoiding unionization by disgruntled student employees.

Modern research, moreover, shows that 7 out of 10 employees are likely to be dis-engaged in any large American organization, and 2 out of 10 might be trying to drive the organization into bankruptcy or "sink this boat" into the bottom of the ocean (Kelleher, Konselman, and Benowitz, 2013). Research has shown that about 70% of managers make their teams and departments worse due to ineffective management practices which cause employees to be non-engaged. Some companies and entrepreneurs tend to hire or promote the wrong candidates into management positions about 82% of time. These ineffective managers cost organizations wasted time, money, and it can lead to dissatisfied and disengaged employees (Mujtaba, 2014).

Satisfaction is about making employees successful so they can have commitment to the job instead of simply being compliant. Productive and satisfied employees are likely to be highly engaged in their workplace's current affair and future direction. Employee engagement can maximize value over time by reducing change resistance and increasing commitment. Employee engagement can increase satisfaction and productivity in the workplace, thereby creating a competitive advantage for the organization. Mujtaba (2014) as well as Kelleher *et al*., (2013) emphasize that e*ngagement* is about going "above and beyond" the "call of duty," providing the discretionary effort. Employee engagement is about:

- Capturing the employees "head and heart."
- Making the employee and the organization successful.
- Mutual commitment (between employees and their organization).
- Unlocking employee's potential to drive high performance.

The goal of employee engagement is to provide an environment where all employees can be "first class" associates or partners of management in serving their internal and external customers in a timely and quality manner. Highly engaged employees are 250% more likely to make recommendations for improving the organization (Kelleher *et al*., 2013). These engaged, "first-class" employees are likely to eliminate any group desires for "natural soldiering," "systematic soldiering," or thoughts of unionization as they would be much more open to discuss their challenges with the leadership and administration. Furthermore, Kelleher *et al*., (2013) conclude that:

- Highly engaged employees are 480% more committed to helping the organization succeed.
- Highly engaged employees are 380% more likely to recommend the organization to others.
- Employees with lower engagement are 4 times more likely to leave their jobs.
- Disengaged leaders and managers are *3 times* more likely to have disengaged employees.
- Bad leadership and bad management equal dissatisfaction and disengagement, which cost U.S. companies about $450 billion each year.
- Around *7 out of 10* workers in the U.S. are disengaged (52%) or actively disengaged (18%). These figures mean that about the 2 out of 10 employees who are "actively disengaged" might be constantly trying to damage the organization as they want it to be unsuccessful and even fail.

So, engaged employers, administrators, and managers should know who are their *paddlers* (30%), *passengers* (52%) and those *who are sinking* (18%) or driving organization into financial distress (Mujtaba, 2014; and Kelleher *et al*., 2013). Conversely, they must know who the engaged workers are. Overall, these engaged employees focus on purpose and values of the organization thereby creating a productive work atmosphere. The best way to have engaging employees is to

increase the level of trust in management by caring about and respecting the employees, managers role-modeling what they preach, and demonstrating competent leadership. Engaged employees can be *six times* more productive than those working for non-engaged organizations (Mujtaba, 2014 and Kelleher *et al*., 2013). The university, therefore, by achieving a workforce of respected, engaged, and satisfied student teaching and research assistants will help the university fulfill its goals of having an efficient, effective, productive, and non-union student-employee workforce.

6.1. Specific Recommendations on Avoiding Unionization

The authors would suggest that universities now abjure any adversarial stance and also move away from the traditional faculty-centered model of academic affairs. The goal is to achieve teamwork and cooperation in the workplace by giving student assistants, particularly graduate teaching and research assistants a greater voice in determining academic matters as well as a greater share of the benefits obtained from their teaching and research work. In the past student assistants, even graduate ones pursuing doctoral degrees, were in some cases treated merely as students and thus given little autonomy; and consequently they were expected to do what the faculty told them to do. University administrators as well as faculty must realize that the student assistants, particularly the graduate level ones, can provide a great deal to contribute to the university's mission and values by means of their knowledge and skills, hard work, creativity, as well as their ability to engage in self-directed work. University administrators and faculty must also realize that the student assistants in addition to their educational aims have a need for some security regarding their work at the university. They also want opportunities for self-development and improvement; and of course they want a fair wage and other equitable financial remunerations Nothing is going to be accomplished, except the production of "negative value," by over-working, under-paying, dictating to, and "stressing out" student workers.

The ultimate goal is to achieve a legal, ethical, and socially responsible workplace that can be successful and sustained over time. As such, the students, as students and student-employees, must be treated in a respectful, dignified, humane, fair, and equitable manner. The idea is to forge academic work teams and an academic partnership among the student assistants, the faculty, and the administration. As such, student assistants must be allowed to participate in decision-making at all levels and places where the faculty conducts business. The teaching and research roles of the student assistants, especially the graduate ones, should be designed to develop further knowledge and skills, for example, by course creation and delivery, and also to give the students more responsibility for the results of their teaching and research. There should be work teams composed of faculty and student assistants to discuss ways to develop and structure programs and to teach courses as well as to discuss recurring academic challenges, for example, academic dishonesty, misconduct, and plagiarism. There could be problem-solving teams that consist of faculty members, administration, and student assistants drawn from different departments that would meet regularly to discuss ways of improving the quality of programs, courses, teaching, and research. There also could be special-purpose teams to deal with special topics, for example, the use of technology in the classroom. Allowing the student workers to participate in decision-making as part of school work teams should cause the student workers to find their teaching and research work more stimulating and rewarding; and the propitious result should be greater production and also the production of a higher quality teaching service and research product.

Treating the student employees, as well as all employees of the university, in a legal, ethical, and socially responsible manner; and emphasizing a cooperative, empowering, teamwork, and true partnership approach to education will benefit the university and all its stakeholders, especially the students, and also may have the additional benefit for the university in avoiding unionization. Thus, the idea is not to take a hostile and adversarial "anti-union" approach to attempted unionization but to foster a successful and sustainable culture of cooperation, autonomy, and mutual respect. Some more traditional and conventional administrators and faculty may strenuously object to giving "mere" students any role or "voice" in any academic matters; yet such university personnel must be convinced that it is in their long-term self-interest, as well as for their universities and students, to treat student assistants as worthwhile partners deserving of dignity and respect and thereby to accord to them a true place and substantial role in the "business" of academia.

6.2. Recommendations on Collective Bargaining

If the students do agree to unionize, then obviously the university on legal and ethical grounds must respect the wishes of the students and engage in collective bargaining in a good faith manner. However, "simply requiring (a university) to bargain doesn't require the university to give away the store" (Leatherman, 2000, p. 2). First and foremost the university should insist on the typical "management rights" clause in any collective bargaining agreement. In the educational-employment context herein the clause should clearly state the rights of the university to define matters

plainly in the educational sphere, such as types of courses, course content, course assignments, class size, time, length, and location, nature and formatting of exams, grading policies, methods of instruction, qualifications of teaching and research assistants, evaluation of their performance, scheduling of teaching and other work, and the required progress of the student employees in obtaining their degrees. Such a clause perhaps could be called an "academic rights" clause for the university; ideally, it would set forth the boundaries of the relationship between the student employees and the university in a mutually acceptable manner.

Of course, as noted, and as emphasized in the minority decision in the *Columbia University* case, the duty to bargain collectively is only with a group of employees in an "appropriate bargaining" unit, and the dissenting Board member clearly believed that the expansive and varied unit of graduate and undergraduate students performing a wide variety of educational roles that was approved by the Board was not an "appropriate" one. Consequently, one can expect appeals to the courts as to the appropriateness of such a big and varied unit.

Legally, collective bargaining is limited to only those matters regarded as "mandatory" or compulsory subjects, such as wages, hours, and other terms and conditions of employment, and not subjects deemed as "permissive," which latter subjects the parties may negotiate and bargain over (Cheeseman, 2016). Mandatory subjects likely would include compensation for the teaching and research assistants, workload, stipends, pay periods, job postings, health insurance, housing subsides (especially for doctoral students), grievance and arbitration procedures, and discipline and discharge policies. Such topics would very likely be of prime importance to the student employees who would insist that they are mandatory bargaining subject matters. However, since this area of the law is a new one, the NLRB and ultimately the courts will likely be called upon to decide what subjects are mandatory ones for bargaining purposes. Close attention will be paid to labor law decisions in the public sector which might be precedents. Hayden (2001, p. 1262) provides an example based on a decision from the state of Michigan issued by the Michigan Employment Relations Committee (MERC), which governs public sector labor relations in the state. The MERC ruled that some of the terms and conditions of employment would not be subject to collective bargaining because they would interfere with the "autonomy" of the Regents of the state, who govern the public university system. The decision involved a state university ten-term teaching limit which the MERC ruled was not a mandatory subject of bargaining because it affected matters properly in the educational realm, such as encouraging students to finish their degrees and directly, and affecting the number of students who could be funded (Hayden, 2001, p. 1262). The objective of the university will be to maintain its academic freedom and autonomy while properly addressing the terms and conditions of employment for its student employees. Another goal would be to have a mutually respectful, amicable, and successful bargaining relationship with the student employees as represented by their union, culminating a fair and mutually beneficial collective bargaining agreement

The authors wish to provide one final recommendation, and a very strong one, and that is, for the affected universities to secure expert labor relations legal counsel as well as labor negotiators and likely mediators and arbitrators to ensure academic freedom and to properly fulfill their obligations under labor law. Such is now the "brave new world" of private university labor relations where the university is an employer of students as well as an educator thereof.

7. Conclusion

Today, based on the seminal NLRB ruling in the *Columbia University* case, university teaching and research assistants, especially at the graduate level, have much more than a "mere" working relationship with their universities. They are employees too, and thus can unionize, as now at least some student assistants have come to believe that they can obtain better employment terms and conditions by means of unionization and engaging in collective bargaining with their university employers. Private universities thus must deal with this new legal and practical employment-educational reality.

This article first provided a general overview of federal labor relations law as well as a brief history and discussion of NLRB precedents involving students as potential employees. The authors then examined the significant NLRB decision in the *Columbia University* case. The facts of the case were succinctly discussed; then the majority opinion and rationales therefor were presented; next the limitations of the decision were stated; and finally the minority opinion and rationales therefor were presented. The authors discussed the implications of the decision for universities and university administrators. Next, the authors provided recommendations for university administrators consisting on how to avoid unions; and how to deal with collective bargaining in the context of the *Columbia University* decision.

8. Questions for Discussion

1. Do you agree with the NLRB's decision on legal grounds that the university's graduate students are "employees" and not merely students? Why or why not? Or do you

agree with the dissenting opinion that the 2004 Brown University precedent should have been followed? Why or why not?

2. Should the university appeal to the courts? Why or why not? What do you think the university's chance of success is? Why?
3. Is the bargaining unit an appropriate one for collective bargaining purposes? Why or why not? Or do you agree with the dissenting opinion that the bargaining unit is too broad and diverse and thus unworkable for collective bargaining? Why or why not?
4. Based on this decision should the college football players and their union again petition the NLRB for status as "employees" who can unionize? Why or why not? What do you think the result will be? Why? What do you think the result *should* be? Why?
5. Is the decision a moral one pursuant to Utilitarian ethics? Why or why not? Who are the "stakeholders" or constituent-groups affected by the decision? How are they affected? Does the unionization cause more "pleasure" or "pain" for these groups? Does the decision produce the "greatest amount of good for the greatest number of people"? Why or why not?
6. Is the decision a moral one pursuant to Kantian ethics? Does it treat all stakeholders as worthwhile human beings deserving of dignity and respect? Why or why not?
7. Do you agree with the assertion in the *Washington Post* article that the university's "model" of using adjunct professors and graduate teaching and research assistants as opposed to full-time professors is an "exploitative" one? Why or why not?
8. Do you agree with the assertion in the *New York Times* article that the union effort by the teaching and research assistants "reflects a growing view among more highly educated employees that they, too, are at the mercy of faceless organizations and are not being treated as professionals whose opinions are worthy of respect"? Why or why not?
9. Do you agree with the statement made in the dissenting opinion that the Board decision allowing unionization will "wreak havoc" on the educational system? Why or why not?
10. What should an Ethically Egoistic university be doing in order to avoid unionization based on the NLRB decision (assuming it is upheld on any appeal)? Provide examples.
11. What can the university do to "engage" student teaching and research assistants? Provide examples.
12. What should a large private university be doing for its students, the local community, and society as a whole in order to be a "socially responsible" and "sustainable" organization? Provide examples.

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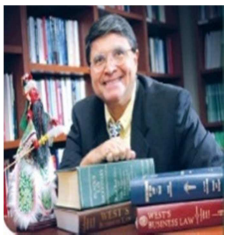
Biography



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