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Comments from the National Center for the Study of Collective Bargaining in Higher Education and the Professions in Response to Proposed NLRB Rule Concerning Graduate Assistants and Other Student Employees

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NATIONAL CENTER
for the Study of Collective Bargaining in Higher Education and the Professions
HUNTER
The City University of New York

NLRB Docket No. 2019-0002

Proposed Rule FR 2019-20510

Jurisdiction—Nonemployee Status of University and College Students Working in Connection with Their Studies, 28 CFR Part 103

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I. Introduction

The National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, City University of New York (hereinafter "National Center") submits these comments in response to the notice of proposed rulemaking (NPRM) originally published in the Federal Register at 84 FR 49691 by the National Labor Relations Board (NLRB) on September 23, 2019, and corrected on October 17, 2019, concerning the employee status of university and college student employees under the National Labor Relations Act (NLRA).

The National Center is a labor-management research center with a primary focus on collective bargaining and unionization in higher education and the professions. It was formed by the City University of New York in 1972 following the NLRB's 1970 decision in *Cornell University*, 183 NLRB 329 (1970) to begin asserting jurisdiction over private non-profit institutions of higher education and after passage of state public sector collective bargaining laws applicable to institutions of higher education.

Our Board of Advisors is composed of administrators, union representatives, and scholars. The Board includes administrators from private and public institutions of higher education that have collective bargaining relationships with unions representing faculty and graduate assistants. It also includes representatives from national unions, and various regional unions, that represent faculty, graduate, and undergraduate employee bargaining units.

Since 1973, we have held national and regional labor-management conferences during which administrators, labor representatives, scholars, and government officials have exchanged experiences, discussed current topics, and presented new research. Speakers at our conferences have included officials from the NLRB, the Federal Mediation and Conciliation Services, and from state labor relations agencies.

In addition to data collection, the National Center publishes the peer-reviewed *Journal of Collective Bargaining in the Academy*, as well as research articles for other scholarly journals, and we function as a clearinghouse and forum for research and ideas by other scholars concerning labor relations, collective bargaining, labor history, and labor law issues.

Due to the singular nature of the higher education industry, the National Center closely follows developments in the areas of unionization and collective bargaining under the NLRA as well as public sector collective bargaining laws. There is commonality of legal and collective bargaining issues applicable to all college and university campuses regardless of whether they happen to be public or private institutions.

Throughout our history, we have collected and analyzed data concerning unionization and collective bargaining in higher education. In 2012, we published a *Directory of U.S. Faculty Contracts and Bargaining Agents in Institutions of Higher Education* with data concerning scope of unionization of graduate student employees. We found that there were 64,424 graduate assistant employees represented in collective bargaining units at that time. Based on our continuing research, we find that today there are approximately 68,442 graduate and undergraduate student employees who are covered by 42 collective bargaining agreements at public and private institutions with an additional 12,570 in new bargaining units without a first contract.

In 2017, then NLRB Chairman Philip A. Miscimarra and then Board member Mark G. Pearce made a joint keynote address at our annual national conference. During their joint address, Chairman Miscimarra and Board member Pearce discussed the unanimous decision in *Northwestern University*, 362 NLRB No. 167 (2015) where the NLRB declined jurisdiction over a representation case involving NCAA scholarship football players.

Collective bargaining concerning graduate assistants has been a frequent topic of labor-management panels at our national conferences. At our 2017 national conference, there was a discussion titled Graduate Student Employees: Collective Bargaining After the NLRB's Columbia University Decision. The panel included attorney Joseph W. Ambash, who represented the employer in *Brown University*, 342 NLRB 483 (2004), college administrator and scholar Daniel J. Julius, union representative Julie Kushner, former NLRB Chairman Wilma Liebman, with Wall Street Journal reporter Melissa Korn moderating.

At our 2019 national conference, we had a panel discussion with administrators and labor representatives from Tufts University and Brandeis University describing the substance of their negotiations leading to first contracts for graduate assistant units at those two private institutions. At other national conferences, we have had panel discussions about graduate assistant unionization at American University, the State University of New York, the University of Connecticut, and other private and public institutions. Written materials and podcasts from the national labor-management panels on graduate assistant unionization are available on the National Center's website.

II. The National Center's Comments Concerning the NPRM

As a labor-management research center, we take no position concerning the substance of the proposed rule. The purpose of these comments is to provide the NLRB with relevant information, data, and empirical evidence to help inform the agency's decision-making pursuant to 5 U.S.C. § 553(c), and its ultimate regulatory determination whether graduate assistants and other student employees are statutory employees under Section 2(3) of the NLRA. *See*, Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37-2 Admin. L. Rev. 163, 176 (Spring 1985) ("Even if the Board is statutorily barred by Section 4(a) from hiring economic analysis experts—a quirk of Taft-Hartley history—rule proposals may well trigger empirical, economic studies that are attuned to the needs of the Board's policy-making agenda.") (footnote omitted)

The information provided in these comments falls into four categories:

- The definitions, data, and analysis concerning graduate assistants by the United State Department of Labor Bureau of Labor Statistics and the United States Department of Education's National Center for Education Statistics. They demonstrate that the NLRB's proposed rule would exclude from NLRA coverage over 81,000 graduate assistants working in occupations at private institutions that other federal government agencies treat as distinct from the classification of graduate student.

- The half-century of history and legal precedent concerning collective bargaining by graduate assistants and other student employees under state constitutions and collective bargaining laws in 14 states. The history includes collective bargaining

relationships established at the City University of New York (CUNY) and the University of Wisconsin-Madison in 1969, at the University of Oregon in 1970, and at Rutgers University in the early 1970s.

- Data maintained by the National Center concerning bargaining units, which demonstrate that there are currently 68,442 graduate assistants and other student employees covered under current collective bargaining agreements and an additional 12,507 graduate and undergraduate assistants in new bargaining units but without a first contract.

- The terms of 42 current collective bargaining agreements at institutions of higher education involving graduate and undergraduate student employees. The most common provisions are wages, grievance-arbitration, management rights, non-discrimination, terms of appointment, and union security. Many contracts also include no-strike, academic freedom, and retirement provisions.

Although we decline to take a position concerning the merits of the proposed rule, we encourage the agency to hold public hearings to grant scholars, administrators, faculty, and student employees the opportunity to testify concerning their research and experiences relevant to the legal and policy arguments examined in decisions such as *Columbia University*, 364 NLRB No. 90 (2016), *Brown University*, *supra*, *New York University*, 332 NLRB 1205 (2000), and earlier decisions.

A hearing would demonstrate that the NPRM is not a mere procedural substitution for amicus briefs in adjudicated cases and that the agency desires a truly comprehensive record before issuing a final rule concerning the employee status of graduate assistants and others in the higher education industry. To the extent appropriate, the National Center is willing to utilize its wide national labor-management network to help the NLRB identify knowledgeable witnesses who can provide probative and relevant information related to the proposed rule, and to answer any questions that Board members might have.

A. The Status of Graduate Assistants Defined by Other Federal Agencies

In evaluating the proposed rule, the NLRB should examine the definitions, data, and analysis of the United States Department of Labor's Bureau of Labor Statistics (BLS) concerning the employee status of graduate assistants in higher education. BLS recognizes that graduate assistants have an economic relationship at the public and private institutions that make up the higher education industry. In fact, BLS defines the position of graduate assistant as an occupation, and it draws an explicit definitional dichotomy between that occupation and the status of a graduate student.

BLS has classified the position of a graduate assistant in higher education as an occupation since at least 1982. The 2018 Standard Occupational Classification System (SOCS) places graduate assistants into three distinct occupational categories: Graduate Assistants (Teaching); Graduate Assistants (Research) and Graduate Assistants (Other).

BLS describes the work done by graduate teaching assistants in higher education as "performing teaching or teaching-related duties, such as teaching lower level courses, developing teaching materials, preparing and giving examinations, and grading examinations" and understands that graduate assistants must be enrolled in a graduate student school program. In contrast, BLS does not define "graduate student" as an occupation but rather as a "student who holds a bachelor's degree or above and is taking courses at the post baccalaureate level. These students may or may not be enrolled in graduate programs."

Consistent with its definitional categories, BLS defines the compensation received by graduate assistants as wages for work performed. Figure 1 is the May 2017 BLS table outlining some of its findings concerning the wages of graduate teaching assistants.

Figure 1: BLS Occupational Employment and Wages, May 2017
25-1191 Graduate Teaching Assistants

Percentile	10%	25%	50% (Median)	75%	90%
Annual Wage (2)	$17,970	$20,180	$32,460	$45,860	$58,450

A second federal agency, the United States Department of Education's National Center for Education Statistics (NCES), applies the BLS definitions when it collects and analyzes data for its Integrated Postsecondary Education Data System (IPEDS). IPEDS employs the BLS glossary concerning the entire higher education industry, including private and public sector institutions.

B. The Proposed Rule Would Exclude Over 81,000 Graduate Assistants

In considering the proposed rule, the NLRB should consider the large number of employees who would be excluded from NLRA coverage under a final rule.

Data from IPEDs demonstrates that adoption of the rule would result in 81,390 graduate assistants at over 500 private institutions being excluded from NLRA coverage and would constitute the largest *per se* exclusion of workers since the Labor-Management Relations Act of 1947 (Taft-Hartley Act). Whether the NLRB has the legal authority following Taft-Hartley to issue a rule excluding specific occupations is outside the purview of these comments.

According to IPEDs, there were a total of 377,750 graduate assistants at 1,013 private and public institutions of higher education in the Fall 2017. Slightly over 50% (518) are private institutions with a cumulative total of 81,390 graduate assistants. The remaining schools (494)

are public institutions, with a cumulative total of 296,360 graduate assistants. These figures do not include undergraduates employed on campuses across the country.

C. The Importance of Experience and Empirical Evidence in Rulemaking

Oliver Wendell Holmes, Jr., in his seminal book titled *The Common Law*, set forth a famous dictum fully relevant to the NLRB's rulemaking concerning the status of student workers in higher education: "The life of the law has not been logic: it has been experience." Indeed, experience was the foundation for the enactment of the NLRA and United States labor policy of encouraging the practice and procedure of collective bargaining. 29 U.S.C. § 151.

During the NLRB's decisional oscillation over the decades concerning the employee status of graduate assistants performing work for compensation in higher education, it has ignored the deep and rich well of precedent and experience regarding unionization and collective bargaining at higher education institutions across the country. As part of the rulemaking process, the NLRB should consider the entire history, experience, and precedent concerning graduate assistants and other student employees in the higher education industry.

We discourage the NLRB from relying on hypotheses regarding the relationships of institutions with their student employees or the potential deleterious effects of unionization on educational decisions and academic freedom without testing those hypotheses against actual higher education experience over the past half-century. A fact-driven rulemaking process must include a meticulous examination of the negotiated terms in current collective bargaining agreements applicable to graduate and undergraduate student employees. The terms of the agreements, along with the experiences of administrators and labor representatives who have bargained and administered the contracts, should be the primary evidence relied upon to resolve the question of statutory employee status of student employees and the policy issues raised in the NPRM.

Consideration of the experiences with bargaining concerning graduate assistants and other student employees in the entire higher education industry is fully consistent with the statement in the NPRM that "rulemaking is preferable to adjudication with respect to the *industry-wide determination* whether students" who work on campuses are employees for purposes of collective bargaining (emphasis added). It is self-evident that an industry-wide determination cannot be made without an industry-wide factual and legal foundation. This is particularly true when IPEDs data establishes that close to 80% of the graduate assistants employed in the higher education industry work at public institutions.

D. 50 Years of Student Employee Unionization and Collective Bargaining

1. Historical Precedent

This year marks the first half-century of unionization and collective bargaining involving student employees in higher education in the United States.[1]

[1] In Canada, there is an equally rich history of experience with collective bargaining for graduate assistants dating back to 1974. Canada had 22 graduate assistant collective bargaining relationships as of 2003, and a national union

In 1969, the New York State Public Employment Relations Board certified a union to represent a bargaining unit at the City University of New York (CUNY) that included teaching assistants, research assistants, and research associates. *Board of Higher Education of the City of New York*, 2 PERB ¶ 3000, 1969 WL 189424 (NY PERB 1969). *See also*, Board *of Higher Education of the City of New York*, 2 PERB ¶ 3056, 1968 WL 179832 (NY PERB 1968). The bargaining unit was created when "(t)he utilization of the teacher assistant was just coming into practice at CUNY as a result of CUNY's newly instituted graduate (Ph.D.) programs." See, Bernard Mintz, *Living with Collective Bargaining: A Case Study of the City University of New York*, p. 52 (1979).

Union representation of CUNY graduate teaching and research assistants has continued until the present day in a bargaining unit that includes faculty and other professionals. Similarly, teaching assistants at Rutgers University have been continuously represented in a bargaining unit with faculty since the early 1970s. *See*, Paul G.E. Clemens, *Rutgers Since 1945: A History of the State University of New Jersey*, p. 65 (2015). The stable decades-long collective bargaining relationships at CUNY and Rutgers University involving graduate assistants and faculty in the same unit are directly relevant to the NPRM concerning the employee status of graduate assistants.

In the same year as the original CUNY certification, a collective bargaining relationship for teaching assistants only was established at the University of Wisconsin-Madison. Negotiations between the university and the Teachers' Assistants Association led to a written contract, signed on April 17, 1970, that set the terms of employment for approximately 1,900 teaching assistants. See, Nathan P. Feinsinger and Eleanore J. Roe, *The University of Wisconsin, Madison Campus - TAA Dispute of 1969-70: A Case Study*, 1971 Wis. L. Rev. 229 (1971); Arlen Christensen, *Collective Bargaining in a University: The University of Wisconsin and the Teaching Assistants Association*, 1971 Wis. L. Rev. 210 (1971).

The 1970 contract at the University of Wisconsin-Madison was the first collective bargaining agreement for graduate teaching assistants in the United States. The economic relationship between the university and the teaching assistants is revealed in the contract, which included traditional subjects of collective bargaining: seniority, discipline, health insurance, sick leave, evaluations, probation, workload, transfers, anti-discrimination, and a grievance procedure. The collective bargaining relationship at the University of Wisconsin-Madison ended 41 years later following enactment of the 2011 Wisconsin Act 10, also known as the Wisconsin Budget Repair Bill.

The earliest known certification of a union to represent student food service workers on campus was issued on April 28, 1970 by the Oregon Public Employe Relations Board for a bargaining unit at the University of Oregon. Two years later, a certification was issued by the same agency for a union to represent the following student employee unit:

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density rate of 41% among those employees. *See*, Deborah M. Zinni, Parbudyal Singh, and Anne F. MacLennan, *An Exploratory Study of Graduate Student Unions in Canada*, 60-1 Relations Industrielles/Industrial Relations (2005 Winter); Christine M. Wickens, *The Organizational Impact of University Labor Unions*, 56-5 Higher Education 545, 546 (Nov. 2008). While Canadian history and experience is not fully elaborated upon in these comments, the NLRB is encouraged during the rulemaking process to look to our northern neighbors for additional relevant empirical evidence.

> All part-time, unclassified student employes enrolled for eight (8) or more credit hours who are not represented by the Graduate Student Association and who are employed in the Food Service Section of Erb Memorial Union and the Food Service Section of the University Housing Department. See, Letter from Public Employe Relations Board Agent K. E. Brown, dated August 8, 1972.

2. <u>Legal Precedent</u>

Since 1969, a large body of state law precedent has developed concerning the right of graduate assistants and other student employees to unionize and engage in collective bargaining at public institutions. This precedent, while not binding, is persuasive authority the NLRB should carefully review and address during the rulemaking process. See, *Boston Medical Center Corp*., 330 NLRB 152, 163 (1999) (where the Board cited public sector precedent in concluding that interns and residents are statutory employees under the NLRA).

The question of whether graduate assistants are employees for purposes of collective bargaining has been resolved as a matter of constitutional law in two States: Florida and Missouri.

In 1982, the District Court of Appeals of Florida ruled that graduate assistants working at the University of Florida and at the University of South Florida were employees protected by the Florida state constitution's public sector collective bargaining provision. See, Florida State Constitution, Article 1, Section 6; *United Faculty of Florida v. Board of Regents, State University System*, 417 So.2d 1055 (Dist. Ct. App, 1st Dist, 1982), *clarified*, 423 So.2d 429 (Dist. Ct. App, 1st Dist, 1982). In its decision, the Florida appellate court ruled that a 1981 amendment to the Florida Public Employees Relations Act to exclude graduate assistants was unconstitutional.

Earlier this year, the Missouri Court of Appeals, Western District, held that graduate assistants employed at the University of Missouri were employees and had the right to unionize under Missouri State Constitution, Article 1, Section 29, which states that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." *Coalition of Graduate Workers v Curators of University of Missouri*, __S.W.2d__, 2019 WL 3417154 (Mo. Ct. App. West. Dist. Jul. 30, 2019), *mot. for rehearing and/or transfer den*. (Aug. 27, 2019). In reaching its decision, the Missouri appellate court reasoned:

> Furthermore, the undisputed facts demonstrate that graduate workers are employees under its plain and ordinary meaning as found in the dictionary. "The word 'employee' is commonly defined as 'one employed by another, usually in a position below the executive level and usually for wages,' as well as 'any worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as such a worker.' "

> *Howard*, 332 S.W.3d at 780 (quoting Webster's Third New International Dictionary 743 (1993)). "To 'employ' means 'to provide a job that pays wages or a salary or with a means of earning a living.' " *Id.* (quoting Webster's Third New International Dictionary 743).
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> Graduate workers teach classes, lead discussions and lab sections, proctor and grade large lecture exams, prepare and grade lab exams, assist faculty with research and writing, and keep the library open and staffed. They perform this work for the University under the supervision of graduate faculty, administrative staff, or principal investigators. In return for this work, the University pays them a flat stipend or hourly wage. These payments are paid as earnings and taxed at the time of payment, and the federal government regards the payments as income for tax purposes. Moreover, the University repeatedly treats graduate workers as employees through its policy and practices. The University's rules and regulations classify graduate workers as employees with specific job titles. The University requires that "[a]ny assignment of responsibilities, such as teaching a course, must be associated with fair and reasonable compensation." It includes graduate workers in its workers' compensation coverage, providing that "[a]ll academic and non-academic employees of the University, both full-time and part-time, (including student employees) are extended coverage." And finally, it requires graduate workers to complete employee training on discrimination prevention and the Family Educational Rights and Privacy Act.

There is a plethora of additional state precedent finding that students who receive compensation for their work on campus are employees for purposes of collective bargaining. Most of the administrative decisions were issued by labor relations agencies that are members, along with the NLRB, of the Association of Labor Relations Agencies (ALRA):

> **Michigan:** *University of Michigan*, 1971 MERC Lab Op 270 (MERC 1971), *aff'd Regents of the University of Michigan v. Michigan Employment Relations Comm'n*, 204 N.W.2d 218 (Mich. 1973); *Michigan State University*, 1976 MERC Lab Op 73 (MERC 1976); *University of Michigan,* 1981 MERC Lab Op 777 (MERC 1981); *University of Michigan***,** 4 MPER ¶ 12127**,** 1981 WL 676354 (MERC 1981);
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> **Florida***: Board of Regents, State University System*, 3 FPER 304 (1977), *aff'd Board of Regents of Florida v. Public Employees Relations Comm'n*, 368 So.2d 641 (Fla. 1st DCA 1979), *cert. denied*, 379 So.2d 202 (Fla.1979);

California: *University of California*, 7 PERC ¶ 14066, 1983 WL 862610 (Cal. PERB 1983), *aff'd*, *Regents of the University of California v. Public Employment Relations Board*, 715 P.2d 590 (Cal. 1986)*; University of California (Berkeley)*, 13 PERC ¶ 20087, 1989 WL 1701181 (Cal. PERB 1989); *Regents of the University of California*, 22 PERC ¶ 29084, 1998 WL 35394392 (Cal. PERB 1998); *Trustees of the California State University*, 29 PERC ¶ 156, 2004 WL 6013229 (Cal. PERB 2004);

New York: *Board of Higher Education of the City of New York*, 2 PERB ¶ 3056, 1968 WL 179832 (N.Y. PERB 1968); *State of New York (State University of New York)*, 24 PERB ¶ 3035 (N.Y. PERB, 1991), 1991 WL 11750982, *conf'd*, *State of New York (State University of New York) v. New York State Public Employment Relations Board*, 586 N.Y.S.2d 662 (N.Y. App. Div. 1992);

Kansas: *University of Kansas*, PERB Case No. 75-UD-1-1992, 1994 WL 16779818 (KS PERB 1994);

Iowa: *State of Iowa (University of Iowa*), PERB Case No. 4959 (IA PERB 1994)*;*

Pennsylvania: *Temple University*, 32 PPER ¶ 32164, 2001 WL 36365345 (PLRB 2001); *University of Pittsburgh*, 50 PPER ¶ 60, 2019 WL 1424342 (PLRB 2019);

Massachusetts: *University of Massachusetts, Amherst*, CERB Case Nos. SCR-2241, CAS-01-3481, 2001 WL 36174277 (MA LRC 2001); *University of Massachusetts*, CERB Case No. SCR-01-2246, 2002 WL 34459889 (MA LRC 2002); *University of Massachusetts, Amherst*, CERB Case No. SCR-14-3687, 2015 WL 936511 (MA LRC 2015);

Washington*: University of Washington*, PERC Case No. 16288-E-02-2699, 2003 WL 23354434 (WA PERC 2003);

Minnesota: *University of Minnesota*, BMS Case No. 05-PCE-785, 2005 WL 6103187 (MN BMS 2005); Minn. Stat. §179A.03(14) (2005);

Montana: *Montana State University*, LSB Case No. 1020-2011, 2011 WL 3436818 (MT LSB 2011);

Oregon: *Oregon State University*, ERB Case No. UC-04-12, 2013 WL 485140 (OR ERB 2013).[2]

In contrast, the Ohio Legislature in 1984 statutorily excluded graduate assistants, interns and residents, and other students working as part-time public employees from the definition of public employee under that state's collective bargaining law. See, Ohio Rev. Code § 4117.01(11); *University Hospital, University of Cincinnati College of Medicine, v. State Employment Relations Board*, 587 N.E. 835 (Ohio, 1992).

3. Empirical Evidence from Collective Bargaining

Precedent over the past half-century has resulted in empirical evidence that the NLRB should consider when determining the relationship between higher education institutions and student employees: the terms of existing collective bargaining agreements at private and public institutions. The negotiated provisions are the clearest expression of the relationship between the institutions and the represented employees as well as the compromises inherent in collective bargaining in order to reach an agreement.

In Figure 2, we identify 42 public and private institutions with current contracts that cover an aggregate of over 68,000 graduate and/or undergraduate employees along with a link to each contract. Twenty of those contracts (10 from private institutions, 10 from public institutions) are also attached as exhibits to these comments. Agreements applicable to interns and residents working at higher education medical institutions are not included because the status of those employees under the NLRA does not appear to be at-issue under the NPRM. See, *Boston Medical Center Corp*., *supra*. We note, however, that the most recent bargaining unit of interns and residents in higher education was certified at Oregon Health & Science University on November 5, 2019.

Our research has found that there are an additional 12,507 graduate and undergraduate assistants in seven new collective bargaining units without first contracts, six at private institutions and one at a public institution: Georgetown University, Loyola University Chicago, University of Chicago, Harvard University, Columbia University, Brown University, and Illinois State University.

[2] The following is precedent from Canadian provisional labor relations boards concerning the employee status of teaching and research assistants: *York University*, OLRB Rep. Sept. 683 (ON LRB 1975); *Carleton University*, OLRB Rep. Feb. 179 (ON LRB 1978); *York University*, OLRB Rep. May 601 (ON LRB 1981); *Memorial University of Newfoundland*, LRBD No. 16 (LRB 2007); *University of Western Ontario*, OLRB Rep. Nov./Dec. 1151 (ON LRB 2007).

Figure 2: List of Institutions with Current Collective Bargaining Agreements with Links

State	Institution	Link to Collective Bargaining Agreement
CA	California State University	http://silo.hunter.cuny.edu/LoaUVKSu
CA	University of California	http://silo.hunter.cuny.edu/zjKpsphJ
CT	University of Connecticut	http://silo.hunter.cuny.edu/krjU6u8P
DC	American University ∗	http://silo.hunter.cuny.edu/nEcijcbc
FL	Florida A&M University	http://silo.hunter.cuny.edu/tjgjdPrA
FL	Florida State University	http://silo.hunter.cuny.edu/RclTeroo
FL	University of Florida	http://silo.hunter.cuny.edu/T7Bvtqig
FL	University of South Florida	http://silo.hunter.cuny.edu/A6tfcIWr
IA	University of Iowa	http://silo.hunter.cuny.edu/pM5v1zHm
IA	Grinnell College ∗ †	http://silo.hunter.cuny.edu/VAD7VE
IL	University of Illinois – Springfield	http://silo.hunter.cuny.edu/Ga9Sg7ye
IL	University of Illinois – Urbana – Champaign	http://silo.hunter.cuny.edu/rvlNdeeu
IL	Southern Illinois University – Carbondale	http://silo.hunter.cuny.edu/YNG85oh8
IL	University of Illinois – Chicago	http://silo.hunter.cuny.edu/aPj7dYFF
KS	University of Kansas – Lawrence	http://silo.hunter.cuny.edu/TljTn1FS
MA	University of Massachusetts – Amherst §	http://silo.hunter.cuny.edu/gsKDoL8h
MA	University of Massachusetts – Amherst †	http://silo.hunter.cuny.edu/KZHmAcmN
MA	University of Massachusetts –Boston	http://silo.hunter.cuny.edu/IaXLwei5
MA	University of Massachusetts – Lowell	http://silo.hunter.cuny.edu/8hpxxoju
MA	Brandeis University ∗	http://silo.hunter.cuny.edu/ELzltGa4

MA	Tufts University ∗	http://silo.hunter.cuny.edu/xwyw5P5S
MI	Central Michigan University §	http://silo.hunter.cuny.edu/G38xPxP9
MI	University of Michigan	http://silo.hunter.cuny.edu/ZPHpIED5
MI	Michigan State University	http://silo.hunter.cuny.edu/lJ2kST49
MI	Wayne State University	http://silo.hunter.cuny.edu/C8K8boyK
MI	Western Michigan University	http://silo.hunter.cuny.edu/E7sSGis2
MT	Montana State University	http://silo.hunter.cuny.edu/1C5MKaok
NJ	Rutgers University ‡	http://silo.hunter.cuny.edu/ceo8i9dh
NY	City University of New York ‡ §	http://silo.hunter.cuny.edu/uzi8Qqfl
NY	CUNY Research Foundation, Graduate Center ∗ §	http://silo.hunter.cuny.edu/sWioIjKy
NY	CUNY Research Foundation, LaGuardia Community College ∗ §	http://silo.hunter.cuny.edu/YFck9p8S
NY	CUNY Research Foundation, New York City College of Technology ∗ §	http://silo.hunter.cuny.edu/5nXC9c7V
NY	State University of New York	http://silo.hunter.cuny.edu/C0PSIryT
NY	SUNY Research Foundation ∗ §	http://silo.hunter.cuny.edu/wUpf45Kx
NY	New York University ∗	http://silo.hunter.cuny.edu/2wFYbFZp
NY	The New School ∗ †	http://silo.hunter.cuny.edu/0eUm3ac9
OR	Oregon State University	http://silo.hunter.cuny.edu/ajoALBIt
OR	University of Oregon	http://silo.hunter.cuny.edu/gNii5m7w
OR	Portland State University	http://silo.hunter.cuny.edu/sRnXaZaM
PA	Temple University	http://silo.hunter.cuny.edu/K53qs12f
RI	University of Rhode Island	http://silo.hunter.cuny.edu/BKYkuJzZ

WA	University of Washington - Seattle	http://silo.hunter.cuny.edu/Br10Y9nA

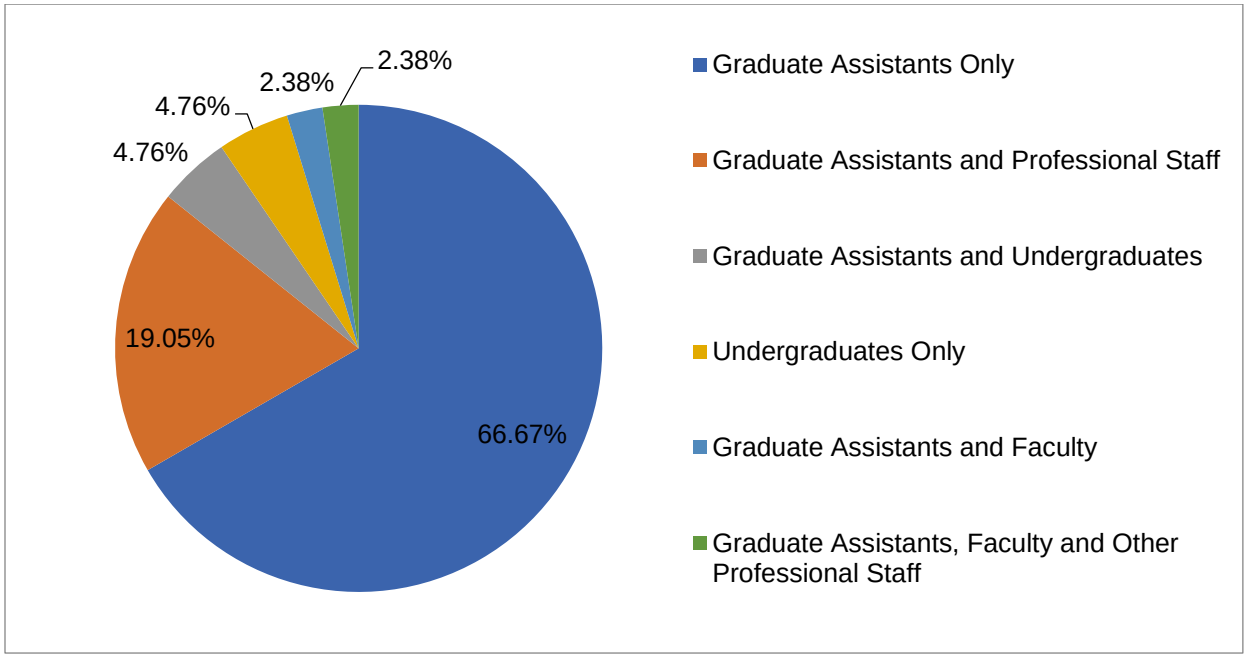
* Bargaining units at private sector institutions
† Bargaining units with undergraduate student employees
‡ Bargaining units with faculty and graduate assistants
§ Bargaining units with other professional and non-professional employees

4. Composition of Student Employee Bargaining Units

In Figure 3, we analyze the 42 bargaining units with collective bargaining agreements based on unit composition categories: a) graduate assistants only; b) graduate assistants and faculty; c) graduate assistants, faculty, and other professional staff; d) graduate assistants and other professional staff; e) graduate and undergraduate assistants; and f) undergraduate student employees only.

As Figure 3 demonstrates, the most common bargaining unit composition is those with graduate assistants only, constituting 66.67% of the units. The second most common (19.05%) is units with graduate assistants and professional staff. The bargaining unit types that are the least common (2.38%) are combined units of graduate assistants and faculty, and units of graduate assistants, faculty, and professional staff. The combined units at the City University of New York and Rutgers University are two of the oldest of the bargaining units with current contracts. The longevity and stability of those units belie assertions that the unionization of graduate assistants will impair faculty-graduate student relations.

Figure 3: Student Employee Bargaining Unit Composition

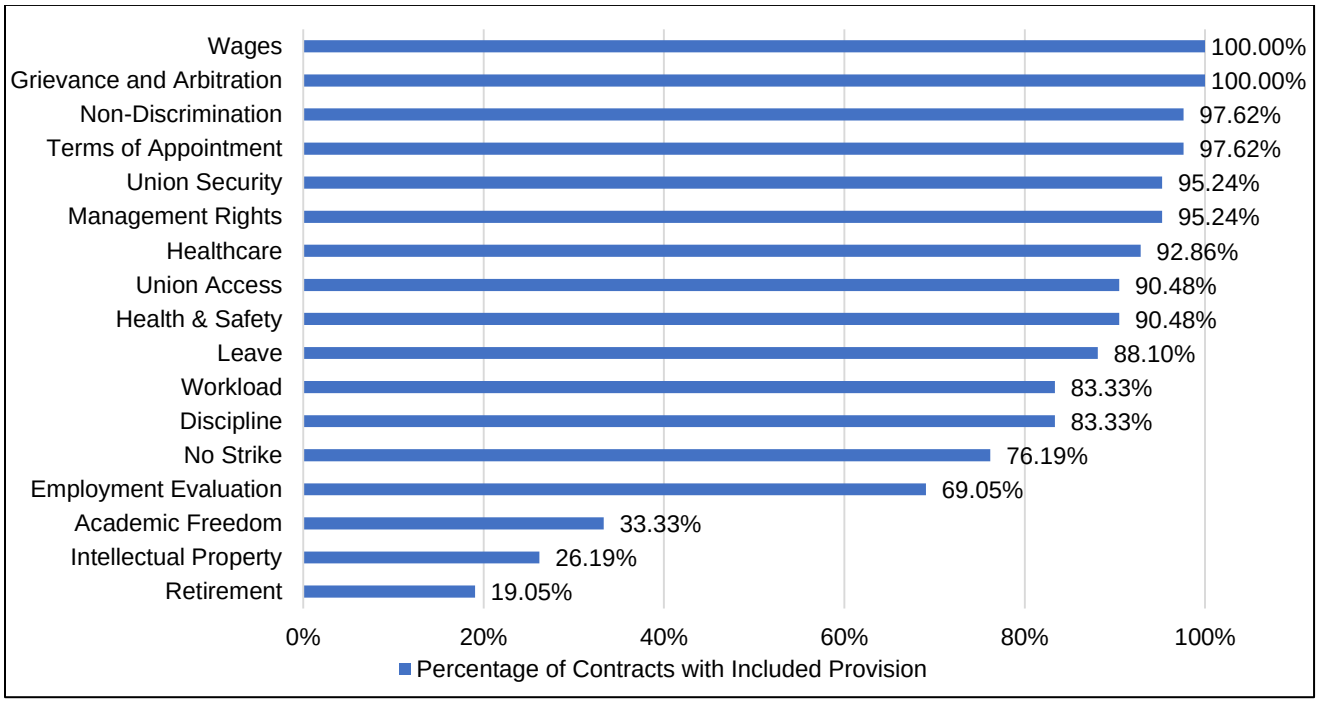


5. Common Provisions in Current Collective Bargaining Agreements

The NLRB has the unique opportunity during the rulemaking process to carefully review the negotiated provisions in the 42 current collective bargaining agreements in determining whether graduate assistants and other student employees are employees under Section 2(3) of the NLRA. These agreements constitute direct evidence concerning the actual terms and conditions of the at-issue employees and the nature of the relationship they have with institutions of higher education. Moreover, the contract articles address policy issues raised in the NPRM including managerial control over education policies and academic freedom.

Figure 4 is a chart displaying the frequency of 17 specific terms and conditions of employment in the 42 current agreements.

Figure 4: Percentage of 17 Specific Terms and Conditions in 42 Current Contracts



The most common provisions (100%) address wages and grievance-arbitration procedures. The next most common provisions are non-discrimination, and terms of appointment clauses, which are found in 41 agreements (97.62%), followed by management rights and union security provisions contained in 40 agreements (95.24%).

The 40 management rights clauses are particularly relevant to NLRB deliberations during the rulemaking process. The NLRB should carefully review each of the management rights clauses due to concerns expressed in the NPRM that collective bargaining involving graduate assistants and other students will impair educational and academic decisions.

In particular, we refer the NLRB to the following sample provisions: Article 2 in the American University-SEIU contract, Article 8 in the Brandeis University-SEIU contract, Article

8 in the Tufts University-SEIU contract, Article XXII in the New York University-UAW contract, and Article X in the New School-UAW contract.

The following is the text from the American University-SEIU contract:

ARTICLE 2 - MANAGEMENT FUNCTIONS

> All management functions, rights, and prerogatives, written or unwritten, which have not been expressly modified or restricted by a specific provision of this Agreement, are retained and vested exclusively in Management and may be exercised by Management at its sole discretion. Such management functions, rights, and prerogatives include, but are not limited to, all rights and prerogatives granted by applicable law; the right to generally determine and effect American University's mission, programs, objectives, activities, resources, and priorities; to establish and administer procedures, rules and regulations, and direct and control American University operations; to alter, extend or discontinue existing equipment, facilities, and location of operations; to determine or modify the number, qualifications, scheduling, responsibilities and assignment of students and employees; to establish, maintain, modify or enforce standards of performance, conduct, order and safety; to evaluate, determine the content of evaluations, and determine the processes and criteria by which students' and employees' performance is evaluated; to establish and require students and employees to observe American University rules and regulations; to discipline or dismiss students and employees; to establish or modify the academic calendars, including holidays and holiday scheduling; to assign work locations; to schedule hours of work; to recruit, hire or transfer; to determine how and when and by whom instruction is delivered; to determine all matters relating to student and employee hiring, retention, and student admissions; to introduce new methods of instruction; to subcontract all or any portion of any operations; and to exercise sole authority on all decisions involving academic matters. Decisions regarding the recipients of financial aid and the terms of that aid, the work assignments provided, the work to be completed, and evaluation of the academic performance of the work assigned involve academic judgment and shall be made at the sole discretion of Management. Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of Management. Management, in not exercising any function hereby reserved to it in this Article 2, or in exercising any such function in a particular way, will not be deemed to have waived its right to exercise such function or preclude Management from

> exercising the same in some other way. No action taken by American University with respect to a management or academic right shall be subject to the grievance procedure or collateral suit unless the exercise thereof violates an express written provision of this Agreement.

Over 90% of the 42 agreements address health care benefits (39), health and safety (38), union access (38), and no-strike clauses are included in over three-quarters of the agreements (32). More than 80% of the contracts have provisions concerning employee leave (37), workload (35), and workplace discipline (35). Academic freedom is specifically addressed in over 30% of the agreements, and intellectual property is a negotiated topic in over a quarter of the contracts. Retirement is a subject in 19% of the contracts, underscoring the employee status of the at-issue graduate assistants.

With respect to the issue of academic freedom raised in the NPRM, we refer the NLRB to these sample provisions: Article 5 of the Brandeis University-SEIU contract, Article II of the Rutgers University-AAUP contract, and Article XIV of the University of Rhode Island-NEA contract. In addition, the City University of New York-PSC contract states: "CUNY and the PSC seek to maintain and encourage, in accordance with law, full freedom of inquiry, teaching, research and publication of results, the parties subscribe to Academic Freedom for faculty members. The principles of Academic Freedom are recognized as applicable to other members of the Instructional Staff, to the extent that their duties include teaching, research and publication of results, the selection of library or other educational materials or the formation of academic policy."

III. Conclusion

During the rule-making process, the NLRB has an opportunity to examine data, information, empirical evidence, experience, and precedent through public comments and hearings on the question of whether graduate assistants and other student employees are statutory employees under Section 2(3) of the NLRA.

In these public comments, we have presented data and information from primary sources that must be carefully examined and considered.

The first primary source of information comes from BLS and NCES that recognize the position of a graduate assistant is an occupation, distinct from the status of a graduate student. Data from those agencies are relevant to determining the employee status of graduate assistants, and showing how a final rule might have the deleterious effect of discouraging, rather than encouraging, collective bargaining.

The second primary source is the half-century of history, empirical evidence, and legal precedent from sister state agencies that has been largely overlooked in prior NLRB adjudicatory cases involving the issue. The evidence includes the substance of the 42 current collective bargaining agreements along with the unique expertise of those who have negotiated and administered the contracts.

As a labor-management research center, we encourage the NLRB to look beyond the arguments set forth in the NPRM, which are taken from prior majority and dissenting decisions, to facts, data, and experience concerning unionization of graduate assistants in the entire higher education industry. The failure to analyze the five decades of relevant collective bargaining history, precedent, and contracts, and to not directly solicit testimony from those who have negotiated and administered the contracts, will undermine the validity and legitimacy of any final rule.