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## Confusion at the National Labor Relations Board: The Misapplication of Board Precedent to Resolve the Yale University Grade-Strike

Stephen L. Ukeiley

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# CONFUSION AT THE NATIONAL LABOR RELATIONS BOARD: THE MISAPPLICATION OF BOARD PRECEDENT TO RESOLVE THE YALE UNIVERSITY GRADE-STRIKE

*Stephen L. Ukeiley\**

[T]here is a pathetic irony in what my colleagues do today. The onset of organization of housestaff officers is among us. Fewer cases may come to this Agency, but as many will come to training hospitals. The one group so singularly involved in the [1974] congressional issues, both in terms of its immediate relationship with the delivery of medical services and in terms of its recognitional interests, is, today, by fiat, read out of the [National Labor Relations] Act. This decision is not grounded in the statute, the law, or reason.

Board Member Fanning<sup>1</sup>

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\* J.D. 1996, Hofstra University School of Law; B.A. 1993, Rutgers University. The author is the law clerk to the Honorable E. Thomas Boyle, United States Magistrate Judge for the Eastern District of New York. The views expressed herein are the result of independent research and are not related to any case or motion, pending or otherwise, before Magistrate Judge Boyle.

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## I. INTRODUCTION

For the past twenty years, the National Labor Relations Board (“NLRB,” “the Board” or “the Labor Board”) has precluded students employed by their universities in areas related and unrelated to their courses of study from employee status under the National Labor Relations Act<sup>2</sup> (“NLRA” or “the Act”). The rationale for this exclusionary policy is that the petitioners are either “primarily students” or that their employment is “merely incidental” to the students’ academic pursuits and career aspirations.<sup>3</sup>

It appears, however, following two decades of public debate and internal Board conflict that this federal labor policy is on the verge of becoming obsolete due to the efforts of the nearly 1100 graduate teaching assistants and part-time acting instructors at Yale University.<sup>4</sup> On November 18, 1996, NLRB General Counsel Fred Feinstein issued an Advice Memorandum wherein he ruled that the

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2. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1994)). The NLRA defines “employee” as follows:

The term “employee” shall include any employee . . . unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

*Id.* § 152(3).

3. See generally *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976); *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

4. See *Despite Threat, Yale Won’t Settle Labor Case*, BOSTON GLOBE, Nov. 20, 1996, at B7.

Board will file an unfair labor practice complaint against Yale University if the Ivy League institution refused to negotiate in good faith on the mandatory subjects of collective bargaining<sup>5</sup> with representatives of these graduate students.<sup>6</sup> The General Counsel based his ruling on three prior Labor Board decisions—*Leland Stanford Junior University*,<sup>7</sup> *Cedars-Sinai Medical Center*<sup>8</sup> and *St. Clare's Hospital & Health Center*<sup>9</sup> (collectively “the *Trifecta* decisions”).<sup>10</sup>

This article examines (1) the Yale decision and (2) whether Division I-A scholarship athletes should similarly be viewed as employees under the Act. Part II details the Yale controversy and the events leading up to the 1996 Yale grade-strike. In Parts III and IV, the author revisits the *Trifecta* decisions placing particular emphasis on Member Fanning’s dissent in *Cedars-Sinai Medical Center*.<sup>11</sup> Within these sections, the author further examines the NLRB’s misapplication of the *Trifecta* decisions and identifies the appropriate standard upon which the General Counsel should have based his decision.

Part V distinguishes Division I-A scholarship athletes<sup>12</sup> and their working relationship with the National Collegiate Athletic Association<sup>13</sup> (“NCAA”) and its member universities from those of the

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5. See PRIMER OF LABOR RELATIONS 59-62 (John J. Kenny & Linda G. Kahn eds., 24th ed. 1989). The mandatory subjects of collective bargaining include wages, hours, and working conditions. See *id.* at 59. Section 8(d) of the NLRA defines the duty to bargain in good faith as requiring representatives of the employer and the union “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .” 29 U.S.C. § 158(d).

6. See Telephone Interview with Jonathan Kreisberg, Regional Attorney for Region #34 of the National Labor Relations Board (Dec. 11, 1996) [hereinafter Kreisberg Telephone Interview]; *Despite Threat, Yale Won't Settle Labor Case*, *supra* note 4, at B7.

7. 214 N.L.R.B. 621 (1974).

8. 223 N.L.R.B. 251 (1976).

9. 229 N.L.R.B. 1000 (1977).

10. The term “*Trifecta*” was chosen so that the three cases could be grouped into a single category for the purposes of this article.

11. In addition to ruling that the Yale graduate students are employees under the Act, the NLRB is seeking a reversal of *Cedars-Sinai Medical Center*. See Kreisberg Telephone Interview, *supra* note 6.

12. This article specifically addresses the concerns and rights of scholarship athletes participating in the “revenue generating” or “big money” Division I-A college sports, i.e., football and men’s basketball. Restricting the scope in this manner does not necessarily reflect the author’s views towards the participants of other intercollegiate athletics. However, the “business aspect” of the revenue producing sports represents a significant element of the author’s argument and therefore the distinction is applied throughout the article.

13. The NCAA is a private, nonprofit organization that administers, regulates and enforces the rules regarding student-athletes’ involvement in intercollegiate athletics. See Lee

Yale graduate students. Within this section, the author concludes that scholarship athletes, unlike the Yale graduate students, are deserving of section 7 employee rights under the NLRA.<sup>14</sup>

## II. THE FACTS—THE YALE CONTROVERSY

Imagine yourself enrolled within a graduate degree program offered by one of the most revered academic institutions in the United States. In addition to studying for either a master's or Ph.D. degree, the opportunity to earn additional money is presented when the university asks you to teach an undergraduate course. You are on top of the world and, perhaps, the last thing on your mind is the impact that your decision is going to have on the national labor policy.

This is the situation that Robin Brown and approximately 1100 Yale graduate students encountered during the past two years.<sup>15</sup> Shortly after enrolling within the Comparative Literature graduate program, Ms. Brown joined the Graduate Employees and Students Organization ("GESO" or "the Organization").<sup>16</sup> The GESO, which purports to represent the more than 1100 graduate teaching

Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV., 206, 209 (1989). The NCAA offers five different types of memberships to academic institutions. See NATIONAL COLLEGIATE ATHLETIC ASS'N, 1996-1997 NCAA MANUAL §§ 3.01.1, 3.1.1 (1996) [hereinafter 1996-1997 NCAA MANUAL]. Section 3.1.1 provides that:

Membership is available to colleges, universities, athletics conferences or associations and other groups that are related to intercollegiate athletics; that have acceptable academic standards (as defined in 3.2.3.3), and that are located in the United States, its territories or possessions. Such institutions or organizations must accept and observe the principles set forth in the constitution and bylaws of the association.

*Id.* at § 3.1.1.

14. Section 7 defines the rights of employees under the Act. The provision states: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1994).

15. See Telephone Interview with Robin Brown, former Chairwoman of the Graduate Employees and Students Organization at Yale University (Dec. 6, 1996) [hereinafter Brown Telephone Interview]. Ms. Brown is a Yale Comparative Literature graduate student and was due to complete her studies during the 1997 spring semester. See *id.*

16. See Brown Telephone Interview, *supra* note 15.

assistants and part-time acting instructors within the University's humanities and social sciences departments,<sup>17</sup> has sought to be recognized by Yale University as the exclusive bargaining representative of the institution's graduate students since its inception during the mid-1980's.<sup>18</sup>

Ms. Brown became interested in the GESO after observing what she characterizes to be "administrative and organizational problems" at Yale University.<sup>19</sup> She was shocked to discover that limited funding is allocated for the University's teaching programs, which translates into modest wages, minimal benefits and inefficiently large classroom sections.<sup>20</sup> These issues, in addition to Yale's apparent indifference towards other University employees,<sup>21</sup> inspired Brown to seek an elected position within the Organization.<sup>22</sup> In 1994, she was elected chairwoman of the GESO.<sup>23</sup>

Although Yale University refuses to voluntarily recognize GESO as a labor organization, the GESO has made strides during the past decade by securing higher wages and health benefits for its members.<sup>24</sup> Unfortunately, these results have been obtained only after

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17. During a given semester, approximately 400 of the potential 1,100 graduate students have teaching responsibilities. *See id.* According to Ms. Brown, the majority of graduate students perform teaching duties between their third and fifth years of graduate study. *See id.*

18. *See id.* Once recognized, the University is obligated to negotiate in "good faith" with the Organization for the purpose of entering a written contract providing for the graduate students' wages, hours, and terms of working conditions. *See supra* note 4 and accompanying text.

19. *Id.*

20. *See id.* Ms. Brown stated that 15:1 is the ideal ratio of students per instructor. *See id.* She estimates that Yale's humanities and social sciences departments operate at a ratio closer to 20 students for each instructor. *See id.*

21. *See id.* Ms. Brown was referring to the members of Locals 34 and 35, who have been working without a university contract since 1995. *See id.*

22. *See id.* Another factor cited by Brown was the difficulty that most graduate students have in securing tenured-track positions after earning their Ph.D. degrees. *See id.* Brown stated, "You see organizations like ours existing all over the country because the way the market has simply changed . . . The way that people go through graduate school, what they do when they are there, and in some ways most importantly, what they don't do after they get out of there." *Id.*

23. *See id.* The chairperson serves a two-year term. *See id.* As chairwoman, Brown's primary responsibilities included keeping the GESO's 1,100 members apprised of the issues, attending meetings with administration and faculty members and holding press conferences. *See id.* Although Brown's tenure ended during the winter of 1996, she intended to remain an active member until graduation in the spring of 1997. *See id.*

24. *See generally* Aaron Bernstein, *Campus Unrest Over Pay, Not Politics*, *Bus. Wk.*, Apr. 10, 1995, at 6.

the commencement of work stoppages.<sup>25</sup> For example, in 1992, the University provided the graduate students with a twenty-eight percent wage increase following a GESO walkout.<sup>26</sup> In spite of this modest gain, the Organization has not achieved its primary objective, i.e., entering negotiations with Yale University for the purposes of consummating a collective bargaining agreement on behalf of its 1100 members.<sup>27</sup>

The number of unions seeking to represent graduate students at both private and public universities is on the rise.<sup>28</sup> To date, however, not one union comprised entirely of graduate students has been either voluntarily recognized or Board certified.<sup>29</sup>

25. *See id.*

26. *See id.*

27. *See* Brown Telephone Interview, *supra* note 15. The Yale graduate students seek additional compensation, lower health insurance costs, smaller-sized classes and expanded training programs. *See Despite Threat, Yale Won't Settle Labor Case, supra* note 4, at B7.

28. *See* Bernstein, *supra* note 24, at 6. Since the Act is applicable to only "private employers," students attending public institutions are bound by state employment laws.

Section 2 of the NLRA defines the breadth of the Act's protections.

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but *shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof*, or any person subject to the Railway Labor Act . . . as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2) (1994) (emphasis added).

29. *See* Brown Telephone Interview, *supra* note 15. The situation is different for students attending public universities and colleges where the number of recognized graduate student unions is continually rising. In April 1995, graduate student unions at seven public institutions were recognized as the exclusive collective bargaining representatives of their members. *See* Bernstein, *supra* note 24, at 6. By January 1996, this number increased to eleven. *See* George Judson, *Yale Student Strike Points To Decline in Tenured Jobs*, N.Y. TIMES, Jan. 17, 1996, at B6. Several of the recognized graduate student unions are located within the state of California. *See id.* However, the relationship between California's public universities and students has been tumultuous. In November 1996, graduate assistants at three of the University of California campuses were on strike. *See The Tenure Ground Shifts*, WASH. POST, Nov. 25, 1996, at A20.

In September 1996, California Administrative Law Judge ("ALJ") James W. Tamm, following 39 days of hearings, ruled that the graduate student instructors, readers, special readers, tutors and remedial tutors at the University of California at Los Angeles were employees under the state's Higher Education Employer-Employee Act ("HEERA"). *See* Regents of the University of California, Case No. SF-R-813-H, Sept. 13, 1996, at 2, 4, 122 (proposed decision) (a copy of the unpublished decision is on file with the *Hofstra Labor Law Journal*). The unique situation about California is that the HEERA provides for the recognition of student-employees. Section 3562(f)(subsection f) of HEERA provides:



### A. The Proposed GESO Bargaining Unit

The GESO seeks the recognition of a graduate student bargaining unit comprised of the nearly 1100 Yale teaching assistants (“TAs”) and part-time acting instructors (“AIs”) within the humanities and social sciences at Yale.<sup>30</sup> The TAs, who are assigned to assist members of the faculty, are responsible for reinforcing the principles and concepts introduced during the faculty member’s classroom lectures by leading weekly discussion sections.<sup>31</sup> The AIs, on the other hand, are assigned their own classes, and thus are afforded the additional experience of giving lectures within the large lecture halls.<sup>32</sup>

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“Employee” or “higher education employee” means any employee of the Regents of the University of California. However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

*Regents*, Case No. SF-R-813-H, at 5 (citing HEERA, CAL. GOV’T CODE, § 3562 (f) (West 1997)).

The ALJ rejected U.C.L.A.’s and the students’ arguments that the critical determination to be made was if the petitioners were primarily students or primarily employees. *See id.* at 63. Judge Tamm wrote, “The test is not whether they are more like students or employees, but rather a balancing of the value to educational objectives against the value of services rendered. My analysis, therefore, does not focus upon . . . whether student employees are more like students or more like employees.” *Id.*

Judge Tamm focused on the value of the services provided by the students. He concluded “that while there is value to the educational objectives received by all the student employees in the remaining disputed titles, the value received by the University is even greater. Thus, the educational objectives of student employees in these titles are subordinate to the services received by the University.” *Id.* at 92. Interestingly, Judge Tamm denied extending the protections of HEERA to U.C.L.A.’s graduate student researchers (“GSRs”) on the basis that the services they provide are related to, but not subordinate to, their educational objectives. *See id.* at 76-78.

The Regents of the University of California is appealing Judge Tamm’s ruling to the Public Employment Relations Board (“PERB”). PERB is the state equivalent to the National Labor Relations Board. At the time this article was drafted, a decision on the appeal had not been issued.

30. *See* Brown Telephone Interview, *supra* note 15.

31. *See id.* TA’s are also required to do the grading for the faculty instructor. *See id.*

32. *See id.* During the 1995 fall semester, Ms. Brown was a part-time acting instructor teaching an introductory class on European literary traditions. *See id.* She was fired in January 1996, for participating in the GESO’s grade-strike. *See infra* notes 50-52 and accompanying text.

The GESO asserts that the Yale graduate students are employees because they perform the bulk of “the front-line teaching.”<sup>33</sup> An intra-organization study during the early 1990s revealed that the TAs and AIs on average, excluding preparation time, performed approximately two-thirds of the overall classroom work at Yale University.<sup>34</sup>

The GESO acknowledges that it does not represent a “typical” labor group, but it assumes the position that University budget cuts have generated the need to recognize its members as employees.<sup>35</sup> According to Ms. Brown,

the organization’s success has everything to do with the way universities are being run in terms of who they rely on to do the teaching. It is the teaching assistants and adjuncts, who have their Ph. D. [degree] but cannot get a tenure-track job. The reason they can’t get tenure-track jobs is because the universities rely on them to do the teaching as opposed to hiring more full-time faculty.<sup>36</sup>

The difficulties in securing a full-time tenure-track faculty position immediately upon graduation are well-documented. For example, in 1993, fewer than fifty percent of graduating Ph.D. students in English obtained tenure-track positions that year.<sup>37</sup> This figure is

33. *Id.* The phrase “front-line teaching” refers to the combined total number of classroom hours. *See id.*

34. *See id.* National studies indicate that graduate students teach between 50% and 60% of undergraduate students. *See* Bernstein, *supra* note 24, at 6.

35. *See* Brown Telephone Interview, *supra* note 15. The average TA at Yale University earns approximately \$9,800 per year, while full-time faculty members average \$90,000. *See* Judson, *supra* note 29, at B6.

36. Brown Telephone Interview, *supra* note 15; *see also* *The Tenure Ground Shifts*, *supra* note 29, at A20 (“Universities . . . see the advantage in hiring younger and cheaper part-timers and have done so to a point that strains the [teaching] profession’s self-image as a career with an upward ladder.”). Patricia Greenfield, Director of Labor Relations and Research Center at the University of Massachusetts, commented that “[w]ith cutbacks at universities nationwide, there has been increasing dependence on graduate student employees . . . The students are under much more pressure and the working conditions have deteriorated. Meanwhile, they are in a much stronger position strategically to flex some muscle.” Alice Dembner, *Union Drive Erupts at Yale, Graduate Students Could Be Expelled*, BOSTON GLOBE, Jan. 10, 1996, at 17.

37. *See* Judson, *supra* note 29, at B6 (citing Modern Language Association study). Fewer than 20% of the graduates obtained non-tenure track positions in 1993. *See id.*

not surprising considering that nearly forty percent of all faculty members within the United States are part-time employees.<sup>38</sup>

### *B. Yale's Position—Graduate Students Are Apprentices*

Similar to most private institutions, Yale University contends that the graduate students are “primarily students,” as opposed to employees, serving their apprenticeships for future careers within academia.<sup>39</sup> Although taxable income, Yale further asserts that the financial compensation it provides the graduate students is equivalent to a stipend which enables the students to perform research.<sup>40</sup> Alternatively, Yale argues that if the graduate students are found to be employees under section 152(3) of the NLRA, the 1996 grade-strike was not protected activity because it was not a complete work stoppage.<sup>41</sup>

The graduate students’ concerns have not gone unnoticed. Yale University recently addressed some of the issues concerning the teaching program by creating a joint student-faculty committee charged with expanding graduate students involvement in the decision-making process.<sup>42</sup> Yale University President Richard C. Levin

38. See *Strike at Yale*, WASH. POST, Jan. 22, 1996, at A18 (“The imbalance between Ph.D. recipients and tenured jobs is getting seriously out of whack again, as it did in the 1970s . . . .”); Judson, *supra* note 29, at B6.

39. See Brown Telephone Interview, *supra* note 15; see also *Strike at Yale*, *supra* note 38, at A18 (asserting that the University views the graduate student teaching program as “part of the profession’s apprenticeship, which, as in other professions, the professorate may design as it likes”).

40. See Telephone Interview with Jonathan Kreisberg, Regional Attorney for Region #34 of the National Labor Relations Board (Dec. 11, 1996) [hereinafter Kreisberg Telephone Interview].

41. See *id.* For a discussion of the NLRB’s decision concerning the grade-strike, see *infra* Part II.D.

The University argues that the undergraduate students are the innocent victims of the graduate students’ work stoppages. See Gerald Renner, *Demonstrators Take to the Street: Police Arrest 138 Who Support a Graduate Student Union at Yale*, HARTFORD COURANT, Jan. 11, 1996, at A3; see also Dembner, *supra* note 36, at 17 (quoting Yale University spokesperson Thomas Conroy, “organizing doesn’t immunize students if they don’t fulfill their obligations. Yale has an obligation to its undergraduate students”).

Although sympathetic to the undergraduate students, Ms. Brown responded that they are not at issue because non-parties are always impacted by a work stoppage. See Brown Telephone Interview, *supra* note 15. She added that, “The issue is the responsibility Yale has to its teaching programs and teachers . . . . Instructors are not going to be particularly effective teachers if you have thirty people in the classroom and that is something Yale has control of.” *Id.*

42. See Gerald Renner, *Yale Graduate Students File Complaint with Labor Board*, HARTFORD COURANT, Jan. 12, 1996, at A12.

stated, “[g]raduate students have some legitimate concerns, and we’re prepared to address them through reasoned conversation—which is different from their idea of negotiation for a written, binding agreement.”<sup>43</sup>

### C. *The 1996 Yale Grade-Strike*

In December 1995, the GESO expressed its disdain for the University’s treatment of its members by commencing a grade-strike in which approximately 250 of the graduate students<sup>44</sup> refused to submit their final grades for the fall 1995 semester.<sup>45</sup> A bitter dispute between the University and the graduate students ensued over the course of the strike.<sup>46</sup> The GESO contends that during the five week strike, the University acted unlawfully by threatening and mistreating the striking students and that its conduct constituted “intimidation and coercion [in violation of] the NLRA.”<sup>47</sup>

1. Three Forms of Discipline Threatened
  - a. Negative Letters of Recommendation

Some members of the Yale faculty threatened to include within the striking students’ letters of recommendation a section detailing the students’ union activities and the faculty member’s opinion that the graduate student is irresponsible and incapable of effectively managing a classroom.<sup>48</sup> This attempt to divide the GESO membership and streamline their enthusiasm produced mixed results. Some, but not all, of the graduate students opted to break rank immediately after the disbursement of the faculty’s ultimatum and submitted their outstanding grades.<sup>49</sup> Commenting on the delicacy of the situation, Ms. Brown stated, “[t]o be threatened by a faculty person who is your advisor and/or someone who may potentially be writing you a letter of recommendation in the future is virtually the scariest thing that can happen [to a graduate student] because you are so

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43. Judson, *supra* note 29, at B6.

44. This figure represents approximately one-half of the TAs and AIs that taught during the 1995 fall semester. See Brown Telephone Interview, *supra* note 15.

45. *See id.*

46. *See id.* The strike ended on January 14, 1996. *See id.*

47. *Id.*

48. *See id.*

49. *See id.*

dependent on those people for your chances on the job market.”<sup>50</sup> However, this tactic was not enough to end the grade strike as the work stoppage continued.

#### b. Relieved of Upcoming Teaching Duties

In addition to the negative letters of recommendations, Yale mailed notices warning the graduate students that if their grades were not submitted by January 10, 1996, they risked having their teaching assignments for the spring semester revoked.<sup>51</sup> In mid-January 1996, the University carried through with its promise by relieving several of the graduate students, including Ms. Brown, of their spring teaching duties.<sup>52</sup> The University considered the grade-strike to be a “serious dereliction of responsibilities” on the part of GESO membership.<sup>53</sup> Some of the discharged graduate students secured alternative teaching assignments for the semester, however, a majority of these positions were conditioned on the graduate students’ acceptance of less compensation and increased faculty supervision.<sup>54</sup>

#### c. Isolating GESO Officers

Yale’s final attempt to pressure the graduate students was more drastic as the University initiated disciplinarian hearings against three elected GESO officials: Diana Paton, Buju Dasgputa and

50. *Id.* Ms. Brown continues to work with her faculty advisor, who has been outspoken in his views against the graduate students, on her dissertation. She added, however, that their relationship has suffered and it “has not [entirely] healed.” *Id.*

51. *See id.*

52. *See id.*; *see also* Dembner, *supra* note 36, at 17 (discussing the effects caused by a disciplinary hearing to be held against three Yale graduate students). By this time, a majority of the graduate students had submitted their grades. *See* Brown Telephone Interview, *supra* note 15. Ms. Brown stated that while initially it was “disappointing” that some students did not carry through with the organization’s plans, there was no lasting backlash because they recognized that the organization could not withstand the types of action and pressure Yale was levying against them. *See id.* She added that some of the students had financial problems and were dependent upon the university’s teaching stipend to pay their tuition. *See id.* Others believed that continuing with the strike would jeopardize the completion of their dissertation. *See id.*; *see also supra* notes 48-50 and accompanying text.

53. Dembner, *supra* note 36, at 17; *see also* Brown Telephone Interview, *supra* note 15.

54. For example, Ms. Brown was demoted from her position as a part-time acting instructor to teaching assistant. *See* Brown Telephone Interview, *supra* note 15. In addition to denying her the opportunity of conducting large lecture hall-type classes, her salary was decreased to commensurate with the teaching assistant’s pay scale. *See id.*

Cynthia Young.<sup>55</sup> The University charged the students with misconduct and required them to appear before a University disciplinary committee comprised of deans, professors and students.<sup>56</sup> This committee had the authority to impose sanctions ranging from expulsion to the placement of a disciplinary letter within the students' files.<sup>57</sup>

Although each graduate student who had not submitted her grades by mid-January 1996<sup>58</sup> was subject to disciplinary procedures,<sup>59</sup> Yale took action only against the three elected GESO officials.<sup>60</sup> Two of the graduate students, Diana Paton<sup>61</sup> and Buju Dasgputa,<sup>62</sup> are not citizens of the United States, and they would have been facing deportation had they been expelled.<sup>63</sup>

The GESO considered Yale's message to be clear—do not become an active member in the union.<sup>64</sup> In response to what the organization characterized as discriminatory acts based upon the citizenry of its members, the graduate students, in a show of symbolic unity, rallied on the first scheduled day of disciplinary hear-

55. *See id.*; *see also* Renner, *supra* note 42, at A12.

56. *See* Telephone Interview with Robin Brown, former Chairwoman of the Graduate Employees and Student Organization at Yale University (Dec. 6, 1996) [hereinafter Brown Telephone Interview]; *see also* Renner, *supra* note 42, at A12.

57. *See* Brown Telephone Interview, *supra* note 56; *see also* Renner, *supra* note 42, at A12.

58. According to press reports, the graduate students were required to submit their grades by no later than January 2, 1996. *See* Dembner, *supra* note 36, at 17. However, Ms. Brown was under the impression that the university had extended the deadline until January 10, 1996. *See* Brown Telephone Interview, *supra* note 56.

59. According to Yale University, 27 of the graduate students failed to submit their fall semester grades by the January deadline. *See* Dembner, *supra* note 36, at 17.

60. *See* Brown Telephone Interview, *supra* note 56; *see also* Dembner, *supra* note 36, at 17. Diana Paton, Buju Dasgputa, Cynthia Young and the 24 remaining graduate students who refused to submit their grades were additionally charged with "harassment, disruption of the University and defying orders." Dembner, *supra* note 36, at 17.

61. Ms. Paton, a British subject, is a graduate student in the history department. *See* Renner, *supra* note 42, at A12.

62. Ms. Dasgputa is from India and is a teaching assistant in the psychology department. *See* Brown Telephone Interview, *supra* note 56.

63. *See id.*; *see also* Renner, *supra* note 42, at A12. Cynthia Young is enrolled in Yale's American Studies graduate program. *See* Dembner, *supra* note 36, at 17.

The disciplinary committee placed a disciplinary letter within Diana Paton's file and removed her teaching privileges for the 1996 spring semester. *See* Renner, *supra* note 42, at A12. Apparently, similar punishments were imposed upon Ms. Young and Ms. Dasgputa, however, at the time of publication, this was not confirmed.

64. *See* Brown Telephone Interview, *supra* note 56.

ings by staging a civil disobedience protest.<sup>65</sup> The demonstration, which lasted approximately one hour and was witnessed by an estimated 500 spectators, resulted in the arrest of more than 130 graduate students.<sup>66</sup> Those arrested were charged with creating a public disturbance and blocking a public roadway.<sup>67</sup>

Any momentum gained from the protest was short-lived as the number of strikers steadily declined. Realizing that Yale was not going to yield to their demands, the GESO made one final attempt to secure the right to collectively bargain. On January 11, 1996, the Organization filed an unfair labor practice charge at the NLRB regional office located in Hartford, Connecticut.<sup>68</sup> Although uncertain whether the National Labor Relations Act was applicable because of their status as graduate students, the GESO leaders nonetheless alleged in the charge that Yale committed unfair labor practices when it threatened and, in some instances, implemented disciplinary action against the striking students because the strike was protected activity under the Act.<sup>69</sup>

Three days after filing the charge, the grade-strike officially ended and all outstanding grades were submitted to the University.<sup>70</sup> As an organization, there was relief that the strike was finally over and the members would soon be returning to their normal routines. The GESO leaders soon learned, however, that the strike had a far greater effect than they had anticipated. Describing the tone and mood of the Organization's members as they awaited the Labor Board's decision, Ms. Brown commented,

Any time you go out on strike and do not get what you initially set out to get, it is very difficult. After the strike was broken, it took us a while to get back on our feet [but] we're there now and we're going forward as we always planned to. But it's true, it does take a while to recover from something like that especially when

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65. See *id.*

66. See *Graduate Students of the World, Unite*, U.S. NEWS & WORLD REP., Jan. 22, 1996, at 12; see also Renner, *supra* note 42, at A12.

67. A public disturbance charge is a misdemeanor in Connecticut and carries an accompanying fine of \$88. See Renner, *supra* note 41, at A3. Other than the arrests, the demonstration was peaceful. See *id.*; see also *Graduate Students of the World, Unite*, *supra* note 66, at 12.

68. See Brown Telephone Interview, *supra* note 56; see also Renner, *supra* note 42, at A12.

69. See Brown Telephone Interview, *supra* note 56.

70. See *id.*

you are in an environment where the kinds of threats people endured to stay on strike and then not getting what you initially went out on strike for is difficult. It's very, very difficult.<sup>71</sup>

#### D. *The General Counsel's Advice Memorandum*

On November 19, 1996, approximately ten months after the GESO had filed its unfair labor practice charge against Yale University, NLRB General Counsel Fred Feinstein issued his decision.<sup>72</sup> Within the General Counsel's Advice Memorandum, he ruled that (1) the Yale graduate teaching students are employees under the Act and (2) the grade-strike was protected "concerted activity."<sup>73</sup> The memorandum, although not binding, further provides that if Yale refuses to collectively bargain with the GESO, then the Labor Board will file an unfair labor practice complaint against the institution.<sup>74</sup> Jonathan Kreisberg, Regional Board

71. *Id.*

72. The General Counsel is the chief prosecutor of the NLRB. Section 3(d) of the Act describes the General Counsel's duties and responsibilities.

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

29 U.S.C. § 153(d) (1994).

73. Telephone Interview with Jonathan Kreisberg, Regional Attorney for Region #34 of the National Labor Relations Board (Dec. 11, 1996) [hereinafter Kreisberg Telephone Interview]. The General Counsel considered the grade-strike to be protected activity because the students had engaged in a complete work stoppage. *See id.* For a strike to be lawful, the striking employees may not choose what work they will or will not complete, i.e., it is all or nothing. *See id.* Thus, the General Counsel concluded that the graduate students' actions represented a complete stoppage because they failed to perform their final responsibilities. The general counsel reasoned that the grade-strike "was a complete cessation of work, and therefore, it was a protected work stoppage." *Id.*

Yale unsuccessfully argued that the grade-strike constituted a "partial withholding of services" since the graduate students had performed all other teaching responsibilities throughout the semester. *Id.*

Distinguishing between a complete and partial work stoppage is beyond the scope of this article. For a discussion on this topic, see Craig Becker, "Better Than a Strike": Protected New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 369-70 (1994).

74. *See* Kreisberg Telephone Interview, *supra* note 73; *see also* NLRB Statements of Procedures, 29 C.F.R. § 101.8 (1996). Section 101.8 provides that, "In certain types of cases,



Attorney for Region Thirty-Four stated, “an intent to file a complaint indicates that the Labor Board’s General Counsel felt Yale acted illegally when it threatened teaching assistants for participating in the strike.”<sup>75</sup>

Mr. Kreisberg added that the NLRB’s ruling is based upon the *Trifecta* decisions, i.e., *Cedars-Sinai Medical Center*,<sup>76</sup> *Leland Stanford Junior University*<sup>77</sup> and *St. Clare’s Hospital & Health Center*.<sup>78</sup> It is the Board’s position that these decisions are distinguishable from the Yale situation such that “the facts of Yale would show that the graduate teaching assistants . . . are employees.”<sup>79</sup>

The significance of the General Counsel’s decision cannot be overstated as fewer than five percent of all unfair labor practices filed with the NLRB are referred to him for an Advice Memorandum

involving novel and complex issues, the Regional Director, at the discretion of the General Counsel, must submit the case for advice from the General Counsel before issuing a complaint.” 29 C.F.R. § 101.8.

75. *Despite Threat, Yale Won’t Settle Labor Case*, BOSTON GLOBE, Nov. 20, 1996, at B7.

Section 8 of the Act codifies unfair labor practices committed by employers and labor organizations or its agents. Section 8(a) provides, in pertinent part:

It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] . . . ;

(2) to dominate or interfere with the formation or administration of any labor organization . . . ;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section 9(a)] . . . .

29 U.S.C. § 158(a) (1994) (emphasis added).

76. 223 N.L.R.B. 251 (1976).

77. 214 N.L.R.B. 621 (1974).

78. 229 N.L.R.B. 1000 (1977).

79. Kreisberg Telephone Interview, *supra* note 73. Mr. Kreisberg refused to provide the author a copy of the memorandum, which is not otherwise available to the public, or to discuss the specifics of the situation since the case is still pending. *See id.* The General Counsel contends that *Cedar-Sinai* was wrongly decided more than twenty years ago and is seeking the reversal of that decision. *See id.* The NLRB does not intend to argue for the reversals of *Leland Stanford* or *St. Clare’s Hospital*. *See id.*

The author asserts that the General Counsel erroneously relied upon the *Trifecta* cases in this matter because the Yale graduate students fall under a different category of student-employee. *See infra* Part III.C.

dum.<sup>80</sup> Yale has the option of appealing the General Counsel's decision or settling the dispute. If the University chooses the latter, the NLRB will negotiate a settlement on behalf of the graduate students.<sup>81</sup> The Board welcomes this time-saving method whereby its objective is to make the charging party whole, i.e., financially restore the graduate students to where they would have been had Yale not committed the unfair labor practices.<sup>82</sup> The Labor Board will further demand that the discharged and demoted graduate students, who have not since graduated, be returned to their former teaching positions.<sup>83</sup>

A prominent factor for Yale to consider is that if it chooses to settle, the University would be required to acknowledge that the graduate students are employees under the Act. Moreover, the terms of the settlement would be prepared in a signed document and Yale would be required to post notices in conspicuous areas admitting that it committed unfair labor practices against the GESO membership.<sup>84</sup> A violation of the negotiated settlement agreement on the part of Yale could result in the revocation of the agreement and the Board's filing of an unfair labor practice complaint.<sup>85</sup>

Although the conditions of settlement are not particularly appealing from Yale's perspective, NLRB officials acknowledge that there is room for negotiation. Kreisberg stated, "[f]rom our

80. Kreisberg Telephone Interview, *supra* note 73. The Yale case was sent to the general counsel because "the novelty of the legal issues . . . not just on the employee's side but also on the legality of the strike—the grade strike—there were really two reasons why it was sent down. Both of those were novel issues." *Id.*

81. *Id.* Section 101.7 of the Code of Federal Regulations provides:

Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally pre-hearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent . . . .

29 C.F.R. § 101.7 (1996).

82. See PRIMER OF LABOR RELATIONS 34-35 (John J. Kenny & Linda G. Kahn eds., 24th ed. 1989). See generally 29 C.F.R. § 101.16.

83. See Kreisberg Telephone Interview, *supra* note 73.

84. See *id.*

85. See *id.* For a discussion on obtaining collective bargaining rights via unfair labor practice proceedings, see ARCHIBALD COX ET AL., LABOR LAW 318-19 (11th ed. 1991).

vantage point, we want to settle the case and try to get everything we would get if we were to litigate it and win, but we recognize that in order to get someone to settle, we must give them some incentive to settle.”<sup>86</sup>

In the interim, the graduate students may petition for a Board certification election after securing the signatures of at least thirty percent of the graduate students within the proposed bargaining unit.<sup>87</sup> If the GESO prevails in the election, then the Board would certify the Organization as the graduate student’s exclusive collective bargaining representative.<sup>88</sup> Prior to holding the election, however, a dispute will undoubtedly arise as to what comprises an appropriate bargaining unit. This issue will similarly have to be litigated.<sup>89</sup> The Board’s determination on an appropriate unit<sup>90</sup> will

86. Kreisberg Telephone Interview, *supra* note 73. At the time this article was drafted, Yale intended to appeal the case. If the parties “settle” the dispute, the NLRB’s efforts to reverse *Cedars-Sinai* will have to wait until the settlement agreement is violated or another unfair labor practice charge is filed by graduate students. *See id.*

When the Labor Board files an unfair labor practice complaint, the case is heard by an administrative law judge, an impartial judge selected from the NLRB’s Division of Judges. *See* 29 C.F.R. § 101.11 (1996). *See generally* 29 U.S.C. at § 153(d) (1994). The administrative law judge’s ruling is appealable to a three- or five-member panel Board which either adopts or rejects the decision. If the Board adopts the administrative law judge’s decision, then the decision is appealable to the federal court of appeals and then the Supreme Court, provided certiorari is granted. *See* 29 C.F.R. §§ 101.12, 101.14. It is evident that regardless of the outcome, “this is a very long-term process which is not . . . going to be settled overnight.” Kreisberg Telephone Interview, *supra* note 73.

87. *See* Kreisberg Telephone Interview, *supra* note 73; *see also* 29 C.F.R. § 102.61 (1996); PRIMER OF LABOR RELATIONS, *supra* note 82, at 4.

88. *See* 29 U.S.C. § 159 (1994). Section 9(a) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

*Id.* at § 159(a). For examples of Board certification cases, see *Brooks v. NLRB*, 348 U.S. 96 (1954), *Bartenders Ass’n*, 213 N.L.R.B. 651 (1974) and *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945).

89. Presumably, Yale will argue that the unit includes all of the graduate teaching assistants whereas the GESO may prefer to condense the unit to just the graduate students within the Humanities Department. *See* Kreisberg Telephone Interview, *supra* note 73. In January 1996, an unofficial survey of 766 graduate students within the humanities and social sciences departments revealed that 600 supported GESO as their exclusive collective bargaining representative. *See* George Judson, *Yale Student Strike Points to Decline in Tenured Jobs*, N.Y. TIMES, Jan. 17, 1996, at B6.

90. Congress delegated the authority of determining the appropriate bargaining unit to the NLRB. Section 9(b) of the Act provides, “The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this

have a significant impact on the outcome of the election because the larger the size of the unit, the less likely the organization is to become Board certified.<sup>91</sup>

There are many issues to resolve in this controversy. Yet Robin Brown and her colleagues are ecstatic about the results to date.<sup>92</sup> Reflecting on the GESO's experiences and accomplishments, Brown believes that she has an understanding of what it was like for unions to organize "back in the 20s and 30s for people who had no protections under the law whatsoever. Obviously, they did not shoot us, but they [Yale University] could do whatever they wanted to. There were no restrictions at all."<sup>93</sup>

### III. THE *TRIFECTA* DECISIONS REVISITED

The *Trifecta* decisions were a direct result of students, employed by their academic institutions in capacities related to their course of study, petitioning the NLRB to be recognized as employees under the Act. Even though the General Counsel placed too much emphasis on the *Trifecta* cases in resolving the Yale controversy,<sup>94</sup> a review of the Board's findings and conclusions in those cases provides the necessary background to examine the General Counsel's ruling.

#### A. Leland Stanford Junior University

The first of the *Trifecta* decisions, *Leland Stanford Junior University*<sup>95</sup> was decided in 1974.<sup>96</sup> In *Leland Stanford*, eighty-three research assistants ("RA's"), seeking Ph.D. degrees in physics, sought recognition as employees under the Act.<sup>97</sup>

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subchapter, the unit appropriate for the purposes of collective bargaining . . . ." 29 U.S.C. § 159(b) (1994); see also PRIMER OF LABOR RELATIONS, *supra* note 82, at 41-44.

91. The Board considers factors such as "[s]imilarity of duties, skills, wages, and working conditions" in determining an appropriate bargaining unit. PRIMER OF LABOR RELATIONS, *supra* note 82, at 44.

92. See Telephone Interview with Robin Brown, former Chairwoman of the Graduate Employees and Student Organization at Yale University (Dec. 6, 1996) [hereinafter Brown Telephone Interview].

93. *Id.*

94. See discussion *infra* Part IV.

95. 214 N.L.R.B. 621 (1974).

96. See *id.*

97. See *id.* In 1974, Leland Stanford Junior University, a private, non-profit academic institution of higher learning, had a student population of approximately 12,000 students. See *id.*

The curriculum mandated that each Ph.D. candidate complete a dissertation thesis and a variety of smaller research projects.<sup>98</sup> Upon satisfactory completion, the University applied the smaller projects, which were designed to prepare the students for their dissertation,<sup>99</sup> towards their degree total.<sup>100</sup>

The Board dismissed the graduate students' petition primarily based upon its conclusion that the research performed was for the individual advancement of the graduate students as opposed to the benefit of Leland Stanford Junior University<sup>101</sup> and, therefore, an employer-employee relationship did not exist.<sup>102</sup> The Board described the graduate student's research responsibilities as "part of the course of instruction, a part of the learning process" and "all steps lead to the thesis and are toward a goal of obtaining the Ph.D. Degree."<sup>103</sup>

98. *See id.* at 621-22. The students performed their research at five different locations throughout the university: the physics department, the McCulloch building, the high-energy physics laboratory, the microwave lab and the synchrotron radiation project. *See id.*

99. *See id.*

100. *See id.* at 622. Each Ph.D. candidate was also required to take an oral examination and complete three years of academic residence, of which only one year had to be performed at Leland Stanford. *See id.* at 622 n.4.

101. The Board distinguished the 83 research assistants from the University's research associates who had previously earned their Ph.D. degrees had become full-time University employees. *See id.* at 622-23.

102. *See id.* at 623. The Board stated:

Based on all the facts, we are persuaded that the relationship of the RA's and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs.

*Id.*

103. *Id.* at 621-22.

In *Adelphi University*, the Labor Board similarly excluded 125 graduate assistants (100 teaching assistants and 25 research assistants) from a bargaining unit comprised of University faculty, in part because the graduate assistants were primarily students working towards their master's or Ph.D. degrees, and their employment was based upon their enrollment in the institution's graduate program. *See* 195 N.L.R.B. 639, 640 (1972). Distinguishing the Adelphi graduate assistants from members of the faculty, the Board concluded, "[t]hey do not have faculty rank, . . . have no vote at faculty meetings, are not eligible for promotion or tenure, . . . have no standing before the University's grievance committee, and except for health insurance, do not participate in any of the fringe benefits available to faculty members." *Id.* at 640. The petitioners did not seek the certification of a separate bargaining unit comprised of the 125 graduate assistants. *See* discussion *infra* Part V.B.; *see also* College of Pharm. Sciences, 197 N.L.R.B. 959, 960 (1972) (excluding graduate teaching assistants

The nature of the compensation received by the graduate students was another factor. Each RA received a tax-free stipend, the amount of which was determined by the National Science Foundation Fellowship.<sup>104</sup> The quality of the RA's research or the number of hours spent working was not reflected in the stipend.<sup>105</sup> The Board also recognized that the RA's did not receive the fringe benefits that the University offered its non-student employees.<sup>106</sup>

## B. Cedars-Sinai Medical Center

Two years after *Leland Stanford* and the NLRA's Health Care Amendments of 1974,<sup>107</sup> the following issue was presented to the Board: Are medical interns, residents and clinical fellows ("the Housestaff") employees under section 2(3) of the Act such that they are entitled to be recognized as a separate bargaining unit? In *Cedars-Sinai*, the Board answered in the negative, and the decision became the landmark case for private universities that oppose the recognition of student unions.

### 1. The Housestaff

Cedars-Sinai Medical Center is an incorporated, private medical center located in Los Angeles, California.<sup>108</sup> In 1976, the nonprofit corporation operated two facilities in southern California, Cedars of Lebanon Hospital and Mount Sinai Hospital.<sup>109</sup> Both of these hospitals offered accredited internships and residencies in the areas of medicine, pediatrics, surgery, obstetrics and gynecology, pathology, psychiatry and radiology.<sup>110</sup>

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from a unit comprised of faculty members because teaching assistants are primarily students who lack a sufficient community of interest with members of the faculty).

104. See *Leland Stanford Junior Univ.*, 214 N.L.R.B. at 622.

105. See *id.*

106. The benefits received by University employees included health care insurance, sick leave, vacation time, schooling for children and retirement benefits. See *id.* The RA's were only provided with student health care insurance and they were eligible for student housing. See *id.*

107. The 1974 amendments are codified at 29 U.S.C. §§ 152(14), 158(d) (1994). Section 152(14) defines a "health care institution" as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person." *Id.* at § 152(14).

108. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 251 (1976).

109. See *id.*

110. See *id.* at 252.

The housestaff, which consisted of thirty-four interns,<sup>111</sup> eighty-six residents<sup>112</sup> and twenty-four clinical fellows,<sup>113</sup> received supervised medical training, practical patient care experience and were required to perform a variety of educational responsibilities including performing medical examinations, taking patient histories, assisting surgical procedures and preparing medical records.<sup>114</sup> The housestaff received an annual stipend in exchange for their services.<sup>115</sup> The economic value of the stipend was based on the number of years the individual housestaff member had successfully completed in the program.<sup>116</sup> Similar to *Leland Stanford*, the number of hours or the quality of service provided by the housestaff was not a factor.<sup>117</sup> In addition to the stipend, which was described as a scholarship within the *Essentials of Approved Residencies and Internships*<sup>118</sup> (“*Essentials*”), the housestaff also received several fringe benefits.<sup>119</sup>

## 2. The Housestaff Are Not Employees Under the Act

Denying the petition, the NLRB concluded that the housestaff are primarily students engaged in their graduate educational training.<sup>120</sup> The Board delineated the factors it had considered in ren-

111. An intern is defined as a graduate of medical school who is engaged in her first post-graduate medical training period within a hospital. *See id.* at 251.

112. A residency, which lasts from one to five years, is the second phase of post-graduate medical training. After completing the internship, the medical school graduate receives advanced training in a specialty area during the residency. *See id.* at 252.

113. Clinical fellowships comprise the third phase of post-graduate medical training. This educational program qualifies a medical school graduate “for certification in an identifiable subspecialty of medicine.” *Id.* at 251.

114. *See id.* at 252. The Housestaff received additional instruction and training by attending lectures and seminars. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*; *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 622 (1974).

118. The *Essentials*, a manual prepared by the Council on Medical Education and approved by the American Medical Association, provides the guidelines for operating a Housestaff program. *See Cedars-Sinai*, 214 N.L.R.B. at 252.

119. *See id.* The fringe benefits included medical and dental care, vacation and paid holidays, uniforms, meals and malpractice insurance. The Housestaff were not eligible to join the medical center’s retirement plan. *See id.*

120. *See id.* at 253. The Board stated that since the Housestaff are primarily students, “their status is therefore that of students rather than employees.” *Id.* The meaning of this phrase triggered a continuing debate between Board members as they argued if the majority intended to rule that “student” and “employee” are “mutually exclusive” categories. *See id.* In other words, should a person be excluded from employee status merely because she is also

dering its decision: (1) the housestaff enrolled at Cedars-Sinai for the purpose of receiving medical training; (2) successful completion of the post-graduate program was a prerequisite for being licensed to practice medicine within the state of California; (3) the number of hours worked and the quality of performance did not effect the Housestaff's compensation; (4) the financial value of the stipend was not a determining factor in the housestaff's selection of Cedars-Sinai; (5) the anticipation that a majority of the housestaff would enter private practice after completing the program and (6) on average, the interns and residents remained in the program fewer than two years.<sup>121</sup> In other words, "[i]t is the educational relationship that exists between the housestaff and Cedars-Sinai (a teaching hospital) which leads us to conclude that the housestaff are students rather than employees, i.e., that the housestaff's relationship with Cedars-Sinai is an educational rather than an employment relationship."<sup>122</sup>

### 3. Member Fanning's Dissent

Initially, Member Fanning commented on the complex nature of the issue presented to the Board; a task made more difficult by Congress' vague definition of the term "employee."<sup>123</sup> Member Fanning stated, "The imprecision which necessarily accompanies the attempt to define an 'employee,' particularly in terms well suited to modern industrial relations, accounts for the deliberate

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a student? The majority in *Cedars-Sinai* denied the dissent's assertion that it took this position. The majority responded,

Our dissenting colleague has misconstrued the basis for our decision. We are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students. However, contrary to our dissenting colleague, we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act . . . . Thus, far from "exploiting semantic distinctions," our decision rests on the fundamental difference between an educational and an employment relationship.

*Id.*

121. *See id.* The Board commented that "[t]he programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice." *Id.*

122. *Id.*

123. *See Cedars-Sinai*, 223 N.L.R.B. at 254 (Member Fanning, dissenting).



refusal of the drafters . . . to define the term in any but a circular fashion, ‘An employee includes any employee.’”<sup>124</sup>

Member Fanning then voiced his concerns regarding the Board’s decision-making processes and its handling of the student-employee cases. Contrary to the majority, he viewed the Housestaff as employees under the Act because (1) they were compensated for their services provided to the Medical Center’s patients, (2) student and employee are not “mutually exclusive” categories and (3) the absence of a federal labor policy otherwise excluding students from the NLRA.<sup>125</sup> These factors are addressed in turn.

#### a. Medical Services in Exchange for Compensation

During the more than 100 hours they worked per week, the housestaff often found themselves providing patient care without a supervisor present.<sup>126</sup> In exchange for these services, the housestaff received a stipend, in which federal and state taxes were withheld.<sup>127</sup> Moreover, the Medical Center charged hospital fees to the patients who had been treated by the housestaff.<sup>128</sup>

According to Member Fanning, there was no question that the same set of circumstances removed from an academic environment would constitute an employment relationship.<sup>129</sup> Interestingly, the *Essentials* identified the housestaff program as an employment relationship,<sup>130</sup> where it stated that the “*Employment Agreements*” between the housestaff and the medical center “‘should specify at a

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124. *Id.*; see also *supra* note 2 for the definition of “employee” as provided for by § 152(3) of the NLRA.

125. See *Cedars-Sinai*, 223 N.L.R.B. at 254-57 (Member Fanning, dissenting).

126. See *id.* at 255. Member Fanning noted that while their duties were numerous, he believed that determining if the Housestaff were employees in accordance with the Act required a critical examination of the services provided; an issue not addressed with specificity by the majority. See *id.* For instance, Member Fanning took into consideration that housestaff officers were required on occasion to perform medical procedures including opening the chest wall of a patient, removing body organs and tissue, delivering babies and prescribing medication. See *id.*

127. See *id.*

128. See *id.*

129. See *id.* at 256. Member Fanning did not consider significant the fact that the hospitals viewed the primary purpose of housestaff programs as educational. See *id.* at 253; see also *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (holding that a worker’s perception of himself as a volunteer is not determinative in deciding employment status).

130. See *supra* note 117 and accompanying text.

minimum . . . *the salary*[,] . . . vacation periods . . . [and] hours of duty . . . .”<sup>131</sup>

b. Student and Employee Are Not “Mutually Exclusive”  
Categories

The majority reasoned that since the housestaff were primarily students, “their status is therefore that of students rather than of employees.”<sup>132</sup> Member Fanning focused his dissent on the phrase *primarily students* as he construed the majority’s ruling to mean that individuals are precluded from collective bargaining merely because they are students. On the other hand, Member Fanning took the position that “learning” should not preclude a student from employee status.<sup>133</sup> He wrote, “simply because an individual is ‘learning’ while performing this service cannot possibly be said to mark that individual as ‘primarily a student and, therefore, not an employee’ for purposes of our statute.”<sup>134</sup>

In response, the majority concurred that students and employees are not mutually exclusive groups.<sup>135</sup> The majority also denied their dissenting colleague’s implication that they had intended anything to the contrary by commenting that the student status of the individual housestaff members was just one of the factors that the Board had considered.<sup>136</sup> The majority explained,

Our dissenting colleague has misconstrued the basis for our decision. We are aware that the Board has included students in bar-

131. *Cedars-Sinai*, 223 N.L.R.B. at 256 (Member Fanning, dissenting). In fact, on January 13, 1975, the American Medical Association reported that it had approved the “Guidelines for Housestaff Contracts or Agreements.” The guidelines provided, in pertinent part:

The agreement should provide fair and equitable *conditions of employment* for all those *performing* the duties of interns residents and fellows . . . .

The *institution* and the individual members of the housestaff *must accept and recognize the right of the housestaff to determine the means by which the housestaff may organize its affairs*, and both parties should abide by that determination; provided that the *inherent right* of a member of the housestaff to contract and *negotiate freely with the institution*, individually or *collectively*, for *terms and conditions of employment* and training should not be denied or infringed. No contract should require or proscribe that members of the housestaff shall or shall not be members of an *association or union*.

*Id.*

132. *Id.* at 253.

133. *See id.* at 254-56.

134. *Id.* at 256.

135. *See id.* at 252-53.

136. *See id.*

gaining units and in a few instances, has authorized elections in units composed exclusively of students. However, contrary to our dissenting colleague, we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. . . . [F]ar from ‘exploiting semantic distinctions,’ our decision rests on the fundamental difference between an educational and an employment relationship.<sup>137</sup>

Thus, *Cedars-Sinai Medical Center* represents, in part, the proposition that students are not to be excluded employment status merely because they are students.

c. Federal Labor Policy Does Not Exclude Students from the  
 NLRA—*Macke Co. II*

Member Fanning cited the NLRA to illustrate that Congress did not intend to deny students of the rights and protections afforded under the NLRA. The term “employee,” as it is defined in section 2(3), “shall include any employee . . . unless [the Act] explicitly states otherwise . . . .”<sup>138</sup> Congress then listed the groups that are precluded from consideration: agricultural laborers; domestic servants; individuals employed by a parent or spouse; independent contractors and supervisors.<sup>139</sup> “‘Students’ are not among those exclusions.”<sup>140</sup>

Member Fanning also relied upon the *Macke Co. I and II*<sup>141</sup> decisions as setting Board precedent whereby bargaining rights were granted to a unit comprised exclusively of students.<sup>142</sup> On February 27, 1974, the Regional Director for Region Two<sup>143</sup> approved a bargaining unit comprised of ninety-nine part-time students and forty-

137. *Id.* at 253.

138. 29 U.S.C. § 152(3) (1994).

139. *See id.*; *see also Cedars-Sinai*, 223 N.L.R.B. at 254 (Member Fanning, dissenting). In addition, confidential and managerial employees have also been excluded from the Act’s protections for policy reasons. *See id.* (citing *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267 (1974)).

140. *Cedars-Sinai*, 223 N.L.R.B. at 254 (Member Fanning, dissenting).

141. *Macke Co. (II)* is not reported in the volumes of Board decisions but is referred to as Case 2-RC-16725. *See id.* at 254 n.5.

142. *See Cedars-Sinai*, 223 N.L.R.B. at 254 & n.5 (Member Fanning, dissenting).

143. The National Labor Relations Board is divided into 34 areas, or regions, geographically located throughout the United States. Region #2 is located in Manhattan, New York.

four nonstudents employed by a commercial employer contractually bound to provide food services at Fairfield University.<sup>144</sup>

In *Macke Co. I*, the Board, having decided that the students lacked a sufficient community of interest with the nonstudents, modified the Regional Director's decision by excluding the ninety-nine part-time students from the bargaining unit.<sup>145</sup> The Board reasoned that the part-time student employees, unlike the company's nonstudent employees, primarily worked evenings and weekends as well as fewer hours per week,<sup>146</sup> received lower wages<sup>147</sup> and were not given fringe benefits.<sup>148</sup> It therefore concluded that the students' "employment was incidental to their academic objectives" and distinguishable from the bargaining unit.<sup>149</sup>

However, the Board modified *Macke Co. I* by ruling that the part-time student employees comprised an appropriate bargaining unit separate and distinct from the nonstudent employees.<sup>150</sup> Recognizing the significance of its ruling, the NLRB subsequently delineated four distinct categories of student-employees, in addition to setting forth the criteria for each of the categories, in *St. Clare's Hospital & Health Center*.<sup>151</sup>

### C. St. Clare's Hospital & Health Center—Four Categories of Student-Employees

In *St. Clare's Hospital*, the petitioning medical interns and residents (the "Committee of Interns and Residents") sought to be recognized as employees under the Act.<sup>152</sup> Similar to *Cedars-Sinai*, the Board denied the petition finding that "when an individual is pro-

144. See *Macke Co. (I)*, 211 N.L.R.B. 90 (1974).

145. See *id.* at 90-91.

146. Thirty-five of the 44 nonstudent employees worked a minimum of 30 hours per week, while the nine remaining nonstudents worked on average between 20 to 25 hours weekly. See *id.* at 90. On the other hand, the student employees were scheduled to work between four and 16 hours weekly. See *id.*

147. The starting hourly wage for a part-time nonstudent employee was between \$2.10 and \$2.20. See *id.* Student employees received just \$1.85 per hour to start. See *id.*

148. See *id.* at 90 n.2 and accompanying text.

149. *Id.* at 91; see also *Barnard College*, 204 N.L.R.B. 1134 (1973); *Cornell Univ.*, 202 N.L.R.B. 290 (1973); *ITT Canteen Corp.*, 187 N.L.R.B. 1 (1970).

150. This was the *Macke II* decision, Case 2-RC-16725. See *Cedars-Sinai*, 223 N.L.R.B. at 254 n.5 (Member Fanning, dissenting).

151. 229 N.L.R.B. 1000 (1977) ("[T]he precise effect of the 1974 health care amendments on the status of housestaff apparently remains in a state of uncertainty . . .").

152. See *id.*

viding services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic."<sup>153</sup> Perhaps more important than the decision itself, the Board recognized the potential for confusion regarding its policy towards student employees and attempted to clarify its position by reviewing Board precedent.

The Board began the *St. Clare's Hospital* decision by accepting blame for the confusion.<sup>154</sup> The NLRB stated that

[m]uch of the blame for this misunderstanding can perhaps justifiably be laid at our feet for we may not have been as precise as we might have been in articulating our views. This may merely be reflective of the fact that we do not view *Cedars-Sinai* as a monumental decision, but, whatever the cause, it is apparent that *Cedars-Sinai* has been viewed by many as an aberration in national labor policy, or, if not an aberration, at least the initial step in a new direction. Nothing could be further from the truth.<sup>155</sup>

The Board further stated that the *Cedars-Sinai* decision was consistent with the national labor policy concerning student employees.<sup>156</sup>

The majority then undertook the painstaking task of detailing each of its four categories of student-employees.<sup>157</sup> The categories can systematically be divided into two distinct groups: (1) students employed by their academic institution and (2) students employed by a commercial employer. These subcategories are further divided according to the type of employment and how it relates to the student's academic programs, i.e., the students are employed in areas either *related to* or *unrelated to* their academic curriculum.<sup>158</sup>

The typical case involving student employees requires the Board to consider the placement of students into a bargaining unit which includes nonstudents.<sup>159</sup> Under these circumstances, the Board

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153. *Id.* at 1003.

154. *See id.* at 1000.

155. *Id.*

156. *See id.* The Board suggested that the mistaken impression that *Cedars-Sinai* was a case about the health care industry contributed to the overall confusion. *See id.* The NLRB, however, viewed *Cedars-Sinai* as a case primarily about students and, towards that end, it maintained that the decision was consistent with the prevailing labor policy. *See id.*

157. *See id.* at 1000-02.

158. *See id.*

159. *See id.* at 1001.

applies a “community of interest” test to determine whether the students’ interests in the employment are “sufficiently aligned” to those of the nonstudent employees such that inclusion within a single unit is appropriate.<sup>160</sup> If the Board concludes that the students lack a sufficient community of interest with the nonstudent employees, then, if petitioned, the Labor Board will determine if a separate unit comprised only of students would be more suitable.<sup>161</sup> This determination, although fact specific, generally depends upon the proposed unit’s interests in the working conditions and the “continuity of employment, regularity of work, the relationship of the work performed to the needs of the employer, and the substantiality of . . . [the] hours of work.”<sup>162</sup>

### 1. Category 1—Commercial Employer in Areas Unrelated to the Students’ Academic Curriculum

The NLRB generally considers Category 1 students to be employees under the Act because the importance of the student’s status is minimized when she is employed by a commercial employer in an area unrelated to her academic objectives.<sup>163</sup> The Board’s reasoning is that “the status of such individuals as students is sufficiently remote from their employment interests so that, in terms of employment responsibilities, they are ‘primarily employees’ rather than ‘primarily students’ . . . .”<sup>164</sup>

### 2. Category 2—Academic Institution Employs Students in Areas Unrelated to Their Course of Study

Prior to the Yale decision, students employed by their University in a capacity unrelated to their academic programs, e.g., student cafeteria workers and maintenance personnel, were generally precluded recognition from both combined and separate all-student

160. *See id.*

161. *See id.*

162. San Francisco Art Inst., 226 N.L.R.B. 1251, 1253 (1976) (Members Fanning and Jenkins, dissenting); *see also* St. Clare’s Hosp. & Health Ctr., 229 N.L.R.B. 1000, 1001 (1977).

163. *See St. Clare’s Hosp.*, 229 N.L.R.B. at 1001 (1977). Although it is far more common for Category 1 students to be considered employees than those of other categories, the student-status of Category 1 students is significant where the proposed unit also includes nonstudent employees. *See id.*

164. *Id. See, e.g.*, Saga Food Serv. of Cal., Inc., 212 N.L.R.B. 786, 787 (1974); Post Houses, Inc., 161 N.L.R.B. 1159, 1172-73 (1966); Giordano Lumber Co., Inc., 133 N.L.R.B. 205, 207 (1961).

bargaining units.<sup>165</sup> The Labor Board has cited three reasons for its position: (1) the employment is “merely incidental” to the students’ primary objective of receiving an education; (2) the student-employees typically ascertain the employment to supplement their income and (3) the employment is often of a transitory nature.<sup>166</sup>

In *San Francisco Art Institute*,<sup>167</sup> the petitioning labor organization sought to represent a unit comprised of twelve part-time student janitors, one full-time nonstudent janitor and one full-time and one part-time exhibitions department workers.<sup>168</sup> Alternatively, the organization sought the recognition of a separate bargaining unit comprised of the student janitors only.<sup>169</sup>

The NLRB denied both petitions.<sup>170</sup> The Board initially excluded the part-time student janitors from the unit because they lacked a “substantial community of interest” with the institute’s full-time employees and the employment was “incidental to their academic objectives.”<sup>171</sup> The Board then elaborated on the differences in the employees’ working conditions. For example, the part-time student employees were not provided an annual salary,<sup>172</sup> they received less financial compensation for their services, they worked fewer hours per week<sup>173</sup> and they had a higher turnover rate than the full-time employees.<sup>174</sup>

The Board then applied a similar analysis to the issue of a separate bargaining unit. It concluded that the part-time student janitors lacked sufficient interest in their employment to warrant representation in a separate, student only unit because of the brief nature of

165. *See St. Clare’s Hosp.*, 229 N.L.R.B. at 1001.

166. *See id.*

167. 226 N.L.R.B. 1251 (1976).

168. *See id.* The San Francisco Art Institute is a nonprofit, educational institution which offers undergraduate and graduate programs in the fine arts. *See id.*

169. *See id.*

170. *See id.* at 1251-52.

171. *Id.* at 1251 & n.3 (citing *Saga Food Servs. of Cal., Inc.*, 212 N.L.R.B. 786 (1974); *Barnard College*, 204 N.L.R.B. 1134 (1973); *Cornell Univ.*, 202 N.L.R.B. 290 (1973); *Scope Assocs.*, 172 N.L.R.B. 1789 (1968)).

172. *See San Francisco Art Inst.*, 226 N.L.R.B. at 1251. Part-time employees at the San Francisco Art Institute were paid either by monthly salary, hourly wage or scholarship. *See id.* Of the 12 part-time student janitors, six were paid a hourly wage, four were on scholarship and two were enrolled in the work-study program. *See id.*

173. The student janitors worked on average 15 fewer hours than their full-time colleagues. *See id.*

174. *See id.*

**FIGURE 1**  
**THE N.L.R.B.'S FOUR CATEGORIES OF**  
**STUDENT-EMPLOYEES**

COMMERCIAL EMPLOYER	UNIVERSITY AS THE EMPLOYER
<p><u>Category 1:</u> Students employed in capacity <i>unrelated</i> to course of study</p> <p><u>Saga Food Service of California, Inc.</u> 212 N.L.R.B. 786 (1974) <u>Hearst Corp., San Antonio Light Division</u> 212 N.L.R.B. 324 (1976)</p>	<p><u>Category 2:</u> Students employed in capacity <i>unrelated</i> to course of study</p> <p><u>Yale Graduate Students</u> (1996) <u>San Francisco Art Institute,</u> 226 N.L.R.B. 1251 (1976) <u>Division I-A Scholarship Athletes</u></p>
<p><u>Category 3:</u> Students employed in capacity <i>related</i> to course of study</p> <p><u>Pawaiting Hospital Association</u> 222 N.L.R.B. 672 (1976) <u>Highview, Inc.</u> 223 N.L.R.B. 646 (1976)</p>	<p><u>Category 4:</u> Students employed in capacity <i>related</i> to course of study</p> <p><u>St. Clare's Hospital &amp; Health Center</u> 229 N.L.R.B. 1000 (1977) <u>Cedars-Sinai Medical Center</u> 223 N.L.R.B. 251 (1976) <u>Leland-Stanford Junior University</u> 214 N.L.R.B. 621 (1974)</p>

Source: St. Clare's Hospital & Health Center, 229 N.L.R.B. 1000-03 (1977)

the student janitors' employment,<sup>175</sup> the form of compensation provided to some of the student janitors<sup>176</sup> and the *fact*<sup>177</sup> that the stu-

175. *See id.* at 1252. The record revealed that no student janitor had ever obtained a position as a full-time janitor at the Art Institute following graduation. *See id.* at 1251. The Board was unpersuaded when the evidence revealed that one of the then-student janitors intended to remain employed in the Institute's maintenance department after graduation. *See id.* at 1252 n.5.

176. Presumably, the NLRB was referring to the four student janitors who received tuition scholarships and the two students enrolled in a work-study program. *See id.* at 1251.

177. The Board offered no support for its assertion that students are "in fact" more concerned about their studies than part-time employment. This oversight fails to consider the economical plights of those students who are unable to attend an institution of higher learning without additional funding. *See Telephone Interview with Robin Brown, former Chairwoman of the Graduate Employees and Students Organization at Yale University (Dec. 6, 1996) [hereinafter Brown Telephone Interview].*



dents were more concerned about their studies than part-time employment.<sup>178</sup>

Within the dissenting opinion, Members Fanning and Jenkins criticized the majority's ruling that the transitory nature of the employment<sup>179</sup> and the part-time students' interests, or lack thereof, in their working conditions justified the denial of collective bargaining rights.<sup>180</sup> The dissenters further asserted that the part-time janitors had a sufficient interest in the employment to find appropriate a separate unit because their "employment [was] continuous over long periods of time, [was] performed regularly on an established schedule, and [it] involve[d] a substantial number of hours of work each week throughout the year."<sup>181</sup>

### 3. Category 3—Commercial Employer in Areas Related to the Students' Academic Curriculum

Students employed by commercial employers in areas related to their course of study are generally excluded from units comprised of full-time nonstudent employees.<sup>182</sup> The Board considers the commercial employer to be "a surrogate for the educational institution, and thus, unlike the nonstudent employees, the students' interest in their employment is primarily educational in nature."<sup>183</sup> The Board also finds that the students have a diminished interest in the accompanying wages, hours and working conditions due to their long-term career objectives within the field.<sup>184</sup>

### 4. Category 4—Academic Institution Employs Students in Areas Related to Their Course of Study

The NLRB has also excluded students employed by their institution in areas related to their academic curriculum from the right to

178. See *San Francisco Art Inst.*, 226 N.L.R.B. at 1252.

179. See *id.* at 1253-54 (citing *Hearst Corp.*, *San Antonio Light Division*, 221 N.L.R.B. 324 (1975), *Sandy's Stores, Inc.*, 163 N.L.R.B. 728 (1967) and *Delight Bakery, Inc.*, 145 N.L.R.B. 893 (1964), which discuss the right of student employees to engage in collective bargaining where the employment is temporary and apparently terminates upon graduation).

180. *San Francisco Art Inst.*, 226 N.L.R.B. at 1253-54 (Members Fanning and Jenkins, dissenting).

181. *Id.* at 1254.

182. See *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1001 (1977).

183. *Id.*; see also *Highview, Inc.*, 223 N.L.R.B. 646 (1976); *Pawaiting Hosp. Ass'n.*, 222 N.L.R.B. 672 (1976).

184. See *St. Clare's Hosp.*, 229 N.L.R.B. at 1001-02.

organize.<sup>185</sup> The Board maintains that since the students' services are directly related to their education, they are "primarily students."<sup>186</sup> The Board expressed its position as follows:

[T]he student-teacher relationship is not at all analogous to the employee-employer relationship. The former is predicated upon a mutual interest in the advancement of the student's education and is thus academic in nature. The latter is largely predicated upon conflicting interests of the employer to minimize costs and the employees to maximize wages, and is thus economic in nature.<sup>187</sup>

The Board further commented that collective bargaining is an economic process atypical of the University-student relationship.<sup>188</sup>

The Labor Board also expressed its concern with the effect that permitting students to engage in collective bargaining would have on the academic curriculum.<sup>189</sup> In particular, it cautioned that the ensuing negotiations would include topics that have traditionally been determined by the institution, such as the length of classes, program advancement, exam and grading methods and course materials.<sup>190</sup> Although the Board's concern is without merit since it may exclude academic issues from the mandatory subjects of collective bargaining,<sup>191</sup> the Board reasoned that it did not "think that such a relationship should be regulated through collective bargaining."<sup>192</sup>

185. *See id.* at 1002.

186. *See id.*

187. *Id.*

188. *See id.*

189. *See id.* The Board asserted that the student-teacher relationship is inherently unequal and diametrically opposite to the "equality of bargaining power." *Id.*

190. *See id.* at 1003.

191. Employees are entitled to exercise their section 7 rights regarding the wages, hours and working conditions of their employment. *See* Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are an Employer's Dream Come True*, 6 SETON HALL J. SPORTS L. 167, 216 (1996); *see also* discussion *supra* note 5. However, the Board may preclude negotiations on any issue falling within the "educational sphere," e.g., the selection of courses and study materials, since these issues are unrelated to the students' employment. *See* Ukeiley, *supra*, at 215. Robin Brown stated that the Yale graduate program is distinct from the GESO members' teaching positions and excluding related academics from the realm of negotiable topics would "be reasonable." Brown Telephone Interview, *supra* note 177. For an example of a state court excluding academic issues from the mandatory subjects of collective bargaining, *see* Regents of University of Michigan v. Michigan Employment Relations Commission, 204 N.W.2d 218, 224 (Mich. 1973).

192. *St. Clare's Hosp.*, 229 N.L.R.B. at 1003. The majority added that finding the "housestaff [to be] 'primarily students' rather than 'employees' connotes nothing more than

#### IV. THE NLRB'S MISAPPLICATION OF THE *TRIFECTA* DECISIONS

According to Jane Clark Schnabel, the Assistant General Counsel for the Regional Advice Branch of the NLRB, the Board considers the Yale students to be Category 2 student-employees<sup>193</sup> since they are employed by Yale University in areas unrelated to their graduate programs.<sup>194</sup> Ms. Schnabel stated that the NLRB "is putting back the *Cedars-Sinai* decision. It is time for the Board to

the simple fact that when an individual is providing services at the educational institution itself as part . . . of his or her educational development the individual's interest in rendering such services is more academic than economic." *Id.*

Although the Board reiterated that it did not exclude the housestaff on the basis of their status as students, Chairman Fanning and Member Jenkins were not convinced. Member Jenkins wrote within his concurring opinion that while he agreed with the decision, the majority's misunderstanding is demonstrated by its "seeming willingness to regard any employees who also engage in structured studies as *per se* being somehow and in some respects disqualified from union representation." *Id.* at 1005. In addition, Chairman Fanning similarly expressed his displeasure by writing another dissenting opinion wherein he emphasized the absence of a federal labor policy excluding students from the protections of the Act. *See id.* at 1008 & n.51 (Chairman Fanning, dissenting). Chairman Fanning wrote:

Clearly, today's effort is an attempt to confuse. If it were not, the majority would be willing to answer, straightforwardly, the question: are you holding housestaff officers to fall outside the definition of "employee" found in Sec. 2(3) of the Act? . . . [P]lainly, no doubletalk like that evinced by the entire majority . . . can disturb the marked and meaningful jurisdictional distinction between holding individuals outside the ambit of Sec. 2(3) and holding them within it but not entitled, as a matter of "national policy," to vote in a representation election. There is a point where the "failure to be precise" becomes an embarrassment. And writing decisions to limit one's embarrassment is not an enviable example of jurisprudence.

*Id.* at 1009 n.57.

193. *See* discussion *supra* Part III.C.2.

194. *See* Telephone Interview with Jane Clark Schnabel, the Assistant General Counsel for the Regional Advice Branch of the National Labor Relations Board (Dec. 9, 1996) [hereinafter Schnabel Telephone Interview]; Telephone Interview with Jonathan Kreisberg, Regional Attorney for Region #34 of the National Labor Relations Board (Dec. 11, 1996) [hereinafter Kreisberg Telephone Interview]. Describing the secondary nature of the graduate students' teaching responsibilities in comparison to their academic pursuits, Robin Brown stated,

We are getting an education at the same time. We are also students but our jobs as teachers are not related to that. They aren't related to our degree program necessarily although we try to teach in our department [but that is] because it is more useful to us. Yale employs the graduate students by a need basis.

Brown Telephone Interview, *supra* note 177. The author disagrees with this assessment since the majority of GESO members will obtain teaching positions following graduation. *See id.* Therefore, their primary course of study is *teaching* in a general sense as opposed to teaching within a specific discipline.

reconsider whether students who work in capacities *unrelated* to their studies are employees under the Act.”<sup>195</sup>

Ms. Schnabel’s statement illustrates that the General Counsel erred when he based his Advice Memorandum on the *Trifecta* decisions because the petitioning students in each of those cases were employed by their institution in capacities *related* to their academic programs. In *Cedars-Sinai Medical Center*, the Board found that the housestaff’s responsibilities were “an integral part of a physician’s educational training.”<sup>196</sup> The following year in *St. Clare’s Hospital & Health Center*, the NLRB identified the *Trifecta* decisions when describing the Category 4 cases— students “perform[ing] services at their educational institutions which are directly *related* to their educational program.”<sup>197</sup>

The Board is apprehensive about cross-category analyses such as the one performed by the General Counsel in the *Yale* decision. In *St. Clare’s Hospital & Health Center*, the Board criticized then-Chairman Fanning<sup>198</sup> for citing *Macke Co. II* within the dissent of *Cedars-Sinai Medical Center*.<sup>199</sup> The majority argued that *Macke Co. II* was inapposite because the petitioning students were classified under a different category of student-employee than the students in *Cedars-Sinai Medical Center* and *St. Clare’s Hospital & Health Center*.<sup>200</sup>

Commentators have similarly criticized the Labor Board for its handling of student-employee cases. For example, Professor Martin

195. Schnabel Telephone Interview, *supra* note 194.

196. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 252 (1976).

197. *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977) (emphasis added); see *supra* Figure 1; see also discussion *supra* Part III.C.4.

198. After *Cedars-Sinai Medical Center* (1976) and before *St. Clare’s Hospital & Health Center* (1977), Member Fanning assumed the responsibilities of the Chairman of the Labor Board.

199. *St. Clare’s Hosp.*, 229 N.L.R.B. at 1001 n.13.

200. See *id.* *Macke II* involved a commercial employer (as opposed to an academic institution) and students who were working in areas unrelated to their course of study. See *id.* The majority noted that in *Macke II*, the parties had stipulated that an exclusive group of student employees would be appropriate provided the students were found to be employees under the Act. See *id.*

The majority’s criticism of then-Chairman Fanning provides an example of the NLRB’s inconsistent policy towards applying Board precedent. The author contends that in *St. Clare’s Hospital & Health Center*, the Board appropriately recognized *Macke II* and *Cedars-Sinai Medical Center* as being distinguishable based on the nature of the employment described in those cases. See *id.*

Malin attributes the inconsistency to the subjectivity of the standards being applied by the Board.<sup>201</sup> He wrote that

[t]he Board's insistence upon employing subjective criteria has resulted in conflicting positions before various circuits. The NLRB has indicated to one court of appeals [2nd Circuit] that the Board's decision that student employees are not entitled to the protection of the N.L.R.A. was based on considerations of national labor policy, while arguing to another court of appeals [D.C. Circuit] that the decision was a finding of fact.<sup>202</sup>

Assuming that Ms. Schnabel is accurate and the Yale graduate students are Category 2 employees, then the General Counsel should have applied the standards for evaluating student petitions as set forth in another Category 2 decision, such as *San Francisco Art Institute*. In other words, instead of stating the reasons why the Category 2 Yale graduate students are distinguishable from the Category 4 housestaff in *Cedars-Sinai Medical Center* and *St. Clare's Hospital & Health Center* or the research assistants in the *Leland-Stanford Junior University*, the Board should have compared them to the student janitors at the San Francisco Art Institute.<sup>203</sup>

Undoubtedly, a policy argument could be made that the Yale graduate students are entitled to improved working conditions and additional compensation.<sup>204</sup> However, the law, i.e., Board prece-

201. See Martin H. Malin, *Student Employees and Collective Bargaining*, 69 Ky. L.J. 1, 24 (1980); see also Stephen L. Sepinuck, *Hospital Residents and Interns: Inconsistent Treatment Under Federal Law*, 29 St. Louis U. L.J. 665, 681 (1985) (“[L]ittle seems to be gained by the Board’s approach of forcing a group of students into one of the four categories and then blindly applying the appropriate rule”).

202. Malin, *supra* note 201, at 24-25 (internal citations omitted). Professor Malin suggests that the only justification for excluding student employees from collective bargaining is if the Board finds that they are “interested primarily in their studies.” *Id.* at 32; see also Martin H. Malin, *Implementing The Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101, 111 (1985) (comparing the influences of the National Labor Relations Act to the Illinois Educational Labor Relations Act, which determines the exclusion of student employees by an objective analysis of the employment relationships); Sepinuck, *supra* note 201, at 681 (arguing that the Board’s use of the four distinct student categories has resulted in “overgeneralization”).

203. It should go without saying that the different categories are distinguishable from one another. Presumably, this is the reason for creating the categories in the first place.

204. See, e.g., *The Tenure Ground Shifts*, WASH. POST, Nov. 25, 1996, at A20 (“Universities . . . see the advantage in hiring younger and cheaper part-timers and have done so to a point that strains the profession’s self-image as a career with an upward ladder.”); Ukeiley, *supra* note 191, at 169-75.

dent for Category 2 cases, does not extend this policy argument to include employee status under the NLRA.

In *San Francisco Art Institute*, the Board based its denial of the student janitors' petition for recognition as a separate bargaining unit on three factors: (1) the students were "primarily students" concerned more about their studies than the employment; (2) the form of compensation provided to some of the students within the proposed unit, i.e., scholarships and work-study and (3) the brief or transitory nature of the students' employment.<sup>205</sup> Applying this criteria, the author asserts that the Yale graduate students *are not* employees under the Act because, similar to the student janitors in *San Francisco Art Institute*, they are primarily concerned with completing their degree requirements so as to advance their careers.<sup>206</sup>

Robin Brown stated that a significant percentage of GESO members accepted teaching responsibilities merely because they needed the money to pay for tuition and living expenses.<sup>207</sup> It is also generally understood that obtaining a full-time tenure track faculty position at a university or college requires a Ph.D. degree. Thus, on appeal the ALJ, the Labor Board and eventually the federal courts<sup>208</sup> should conclude that the Yale graduate students are students primarily concerned with completing their dissertation and supplementing their incomes, and therefore, similar to the students in *San Francisco Art Institute*, they are not entitled to coverage under the Act.<sup>209</sup>

## V. SCHOLARSHIP ATHLETES AND THE NATIONAL LABOR RELATIONS ACT

Division I-A scholarship athletes, on the other hand, another Category 2 student group since academic institutions do not offer degrees in either basketball or football, should be considered employees under the Act.<sup>210</sup> The Board has already ruled that

205. See *San Francisco Art Inst.*, 226 N.L.R.B. 1251, 1252 (1976); see also discussion *supra* notes 167-81 and accompanying text.

206. See *San Francisco Art Inst.*, 226 N.L.R.B. at 1252 (concluding that the students had a "very tenuous secondary interest . . . in their part-time employment").

207. See Brown Telephone Interview, *supra* note 177 (describing their teaching assignments as jobs "needed to survive").

208. See discussion *supra* note 86 and accompanying text.

209. See *San Francisco Art Inst.*, 226 N.L.R.B. at 1251-52.

210. In a previous article, the author recommended that the Board create a fifth category designed to examine the employment status of scholarship athletes because their "college

learning does not preclude employee status.<sup>211</sup> Thus, even though scholarship athletes are required to remain in good academic standing throughout their collegiate careers,<sup>212</sup> the fact that they are students should have no bearing on the Labor Board's decision.<sup>213</sup>

#### A. *Scholarship Athletes Are Not "Primarily Students"*

Similar to the Yale graduate students, a majority of scholarship athletes do not enter the professional ranks immediately after leaving school.<sup>214</sup> However, scholarship athletes are distinguishable

experiences" are dissimilar from all other student groups. Ukeiley, *supra* note 191, 197-98. I maintain there is a need for a separate scholarship athlete category, however, the analyses within this article have been restricted to the application of the existing classifications. Of the four student-employee categories, scholarship athletes are most compatible with category 2, i.e., students employed by their university in an area unrelated to their academic pursuits.

Describing scholarship athletes, C. William Byrne, University of Nebraska athletics director, stated, "To give them a chance to be like normal students—I am all for that." Jim Naughton, *NCAA Panel Seeks to Allow Athletes to Borrow Against Future Earnings*, CHRON. HIGHER EDUC., Aug. 2, 1996, at A29; see also Drake Witham, *An End to Athletics Dorms*, CHRON. HIGHER EDUC., Oct. 13, 1995, at A39 (commenting on athletics dormitories, a University of Florida football player stated, "[w]e could relate to each other because we had the same hours, the same problems").

211. See *St. Clare's Hosp.*, 229 N.L.R.B. at 1000-01, 1004-05; *San Francisco Art Inst.*, 226 N.L.R.B. at 1251-52.

212. NATIONAL COLLEGIATE ATHLETIC ASS'N, 1996-1997 NCAA MANUAL (1996) 12 [hereinafter NCAA MANUAL] § 14.01. Section 14.01.2 provides:

To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be enrolled in at least a minimum full-time program of studies, be in good academic standing and maintain satisfactory progress toward a baccalaureate or equivalent degree. A waiver of the minimum full-time enrollment requirement may be granted for a student enrolled in the final term of the baccalaureate program (see 14.1.6.2.1.3). Also, a student may represent the institution while enrolled as a graduate or professional student or while enrolled and seeking a second baccalaureate degree at the same institution.

*Id.* at § 14.01.2.

213. See *St. Clare's Hosp.*, 229 N.L.R.B. at 1000-01, 1004-05; *San Francisco Art Inst.*, 226 N.L.R.B. at 1251-52.

Robin Brown interpreted the General Counsel's Advice Memorandum as stating that "you can be a student and an employee at the same time. The two are not mutually exclusive. Just because you happen to be a graduate student doesn't mean you should not have the same [collective bargaining] rights as any other teacher in the country . . ." Brown Telephone Interview, *supra* note 177.

214. In 1993, approximately 70% of the graduating English Ph.D.s found employment in academia that year. See George Judson, *Yale Student Strike Points to Decline in Tenured Jobs*, N.Y. TIMES, Jan. 17, 1996, at B6. Less than 50% of those graduates obtained tenure-track positions. See *id.*

Student-athletes reach the professional ranks with even less frequency. See Lawrence DeBrock et al., *The Economics of Persistence: Graduation Rates of Athletes As Labor Market Choice*, 31 J. HUM. RESOURCES 513, 518-20 (1996) (concluding that basketball presents a

from the graduate students in that the vast majority of them never become professional athletes.<sup>215</sup> Although the distinction is of no particular importance to the Board's analysis, it does suggest that there may be some validity to Yale's argument that the graduate students are "apprentices."<sup>216</sup>

### 1. The NCAA Is a Business

NCAA coaches are under extreme pressure to win games and generate revenue for their institutions.<sup>217</sup> Describing the pressure to establish a winning athletics program, Dennis A. Farrell, commissioner of the Big West Conference, stated that "coaches recruit athletes from two-year colleges whether or not they are academically prepared, and often have them cram in their eligibility requirements through last-minute summer or correspondence courses."<sup>218</sup>

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greater opportunity for individual economic success than football). DeBrock's research indicates that most college football, basketball and baseball players never get the opportunity to try out for a professional team, and of those who do, only two percent sign professional contracts. *See id.* at 518.

215. *See id.* at 518-20. Focusing on Division I-A Football, DeBrock calculated that only 3,196 of the 31,565 student-athletes (10.1%) who played Division I-A college football during a recent ten-year period went on to play in the National Football League. *See id.* at 519; *see also* Ivan Maisel, *Restrictions Eased: NCAA 'Listens,' OKs Part-Time Jobs for Athletes*, *NEWSDAY*, Jan. 14, 1997, at A63 (quoting Bridget Niland, chairwoman of the 28-member NCAA Student-Athlete Advisory Committee, "Athletic experience can't be equated with real work experience . . . . The majority of student athletes do not go on to earn a living as athletes.").

Although a much smaller sample was studied, a recent Division I-A men's college basketball poll conducted by the author offered somewhat different results. *See* 1996-1997 NCAA MEN'S BASKETBALL DIVISION I-A COLLEGE HEAD COACHES POLL [hereinafter COLLEGE HEAD COACHES POLL]; *see also* discussion *infra* notes 232-39 and accompanying text. In the authors poll, six head coaches indicated that on average, 45% of their basketball players played "some form" of professional basketball after leaving their academic institutions. *See* COLLEGE HEAD COACHES POLL, *supra*. This percentage combines all of the coaches' players who have played professionally either in the National Basketball Association, the Continental Basketball Association or in foreign leagues. *See* COLLEGE HEAD COACHES POLL, *supra*. The 45% figure is an estimate as one coach responded that "about [33%] try to play—primarily in Europe." COLLEGE HEAD COACHES POLL, *supra* (emphasis added).

216. *See* Judson, *supra* note 214, at B6; *see also* discussion *supra* Part II.B.

217. *See* Ukeiley, *supra* note 191, at 173, 179-84 (explaining that despite NCAA bylaws which stipulate that student-athletes are an integral part of the student body, "[c]ritics . . . argue many college athletes are in school for the sole purpose of playing sports and generating revenue").

218. Debra E. Blum, *Upholding Standards: NCAA Rejects Effort to Ease Eligibility Rules; Changes in Governance Approach*, *CHRON. HIGHER EDUC.*, Jan. 19, 1996, at A31. During the 1996 NCAA Annual Convention, member institutions approved a measure that reduced to



This is just one illustration of the manner in which the NCAA and its member institutions operate the business aspects of their athletics programs. The emphasis placed on financial prosperity was recently reinforced when the NCAA membership voted to restructure the NCAA's governing system.<sup>219</sup> The new system, which mandates the creation of a Management Executive Council ("Council") comprised of sixteen college presidents who will serve as the NCAA Division I-A chief governing body, dramatically decreases the input of individual NCAA members.<sup>220</sup> It will be the responsibility of the Council to recommend proposed legislation to the NCAA's fifteen member Board of Directors which will then either approve or deny the proposal.<sup>221</sup> NCAA Executive Director, Cedric W. Dempsey commented that the plan "give[s] the institutions with the *best known and richest* sports programs the biggest say in rule making."<sup>222</sup>

Corporate involvement, especially that of television, has also contributed to the "big business" mentality of intercollegiate athletics. One hundred and ninety one million of the NCAA's 1996-1997 \$254 million budget is provided for by the Central Broadcasting

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nine the number of academic credits that a student-athlete transferring from a two-year institution may earn during the summer prior to transferring to a four-year university. *See id.* Compare DeBrock et al., *supra* note 214, at 514 ("The impression that student-athletes in the revenue sports are predominantly 'athletes' and bear little resemblance to 'students' is a commonly held belief"), with Jim Naughton, *Lou Holtz Quits as Notre Dame Coach*, CHRON. HIGHER EDUC., Nov. 29, 1996, at A44 (suggesting that Coach Holtz resigned due to Notre Dame's "rigorous admissions standards" which inhibited his recruiting).

219. *See* Blum, *supra* note 218, at A32.

220. *See id.*

221. *See id.* This approach was intended to "streamline decision making" and shorten the process for effectuating NCAA legislative change. *See id.* The previous governance system utilized a democratic "town-meeting approach" where the member institutions voted on the legislative proposals. *See id.* A negative aspect of the NCAA's new system of governance is that 31 people have the authority to create all future NCAA legislation. Section 5.3.2.2.1 of NCAA Manual provides:

Any change in a Division I bylaw shall be subject to initial approval at a meeting of the Division I Management Council by a majority vote of those present and voting. At its next regular meeting after the period for membership review and comment . . . the Management Council shall consider the reactions and suggestions received and take action on the proposed change. If the proposed change receives a majority vote of those Management Council members present and voting, it shall be forwarded to the Board of Directors for consideration and possible adoption.

1996-1997 NCAA MANUAL, *supra* note 211, § 5.3.2.2.1.

222. Blum, *supra* note 218, at A32 (emphasis added).

System,<sup>223</sup> which bought the exclusive television rights to the NCAA Division I-A Men's Basketball Final Four through the year 2002.<sup>224</sup> Corporate sponsorships have also dramatically increased during the past decade. In 1985, Gillette became the first corporate sponsor of the NCAA.<sup>225</sup> "Today, there are [forty-five] official NCAA licensees, including Nike, which lavishes \$40 million a year on its college partners."<sup>226</sup> Unfortunately, financial prosperity often comes at the expense of academics and the student-athletes. For example, when questioned about the rigors of playing in the Final Four, former University of North Carolina men's basketball player Dante Calabria stated:

Going to the Final Four really hurts you in the spring semester in school. It's tough because you're always backing yourself into a hole. Last week, we missed three days of school. The week before we missed two . . . I'm at about a 2.8 grade average right now. I'm pretty happy. But when you get to the Final Four, you get so far behind it's tough to catch up.<sup>227</sup>

Former NCAA Executive Director Walter Byers, who argued for and promoted "the idealism of amateur sports" during his tenure, but now supports paying college athletes in exchange for playing,<sup>228</sup> has recently criticized the NCAA and its member institutions for

223. Steve Wilstein, *NCAA Riches Stop Short of Athletes: Despite Reform Talk, Members Stand Firm Against Pay for Play*, HERALD & NEWS, Dec. 25, 1996, at C1. The \$254 million budget does not include the estimated hundreds of millions of dollars generated by individual sponsorships, television and radio contracts, donations and ticket sales. *See id.*

224. *See* Steve Zipay, *CBS Pays \$1.725B for NCAA Tourney*, NEWSDAY, Dec. 7, 1994, at 72.

225. *See* Wilstein, *supra* note 223, at C1.

226. Wilstein, *supra* note 223, at C1.

227. Phil Mushnick, *Out of Town, Out to Lunch: Mike & Mad Dog Should Drop Road Act*, N.Y. POST, Apr. 28, 1995, at 107; *see also* Phil Mushnick, *Rutgers Shocker! (No Film at Eleven)*, N.Y. POST, Dec. 9, 1996, at 66 (noting that the University of Kansas men's basketball team was on the road for 19 straight days from November 21, 1996 through December 8, 1996).

228. *See* NCAA MANUAL, *supra* note 212, § 2.9. This section, entitled, *The Principle of Amateurism*, provides:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation *should be motivated primarily by education* and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from *the exploitation by professional and commercial enterprises*.

*Id.* (emphasis added).

exploiting student-athletes.<sup>229</sup> Mr. Byers, contends that congressional and judicial intervention are necessary to reform intercollegiate athletics.<sup>230</sup> He wrote, “[t]he rewards of success have become so huge that the beneficiaries—the colleges and their staffs—simply will not deny themselves even part of current or future spoils . . . I believe the record now clearly shows the major hope for reform lies *outside* the collegiate structure.”<sup>231</sup>

The results of the author’s 1996-1997 Division I-A Men’s College Basketball Poll<sup>232</sup> further suggests that matters other than educa-

229. See Drake Witham & Douglas Lederman, *Walter Byers’s About-Face: In a New Book, Former NCAA Director Now Says College Athletes Should Be Paid*, CHRON. HIGHER EDUC., Sept. 15, 1995, at A39. Addressing the 1997 NCAA Convention delegation, current executive director Cedric Dempsey stated, “I am not convinced that we fully recognize and respond to the real world of today’s student-athlete . . . [a]nd it is not fair to today’s student-athletes for us to cling to a vision of intercollegiate athletics as it existed when we were in school.” Wilstein, *supra* note 223, at C1.

230. See Witham & Lederman, *supra* note 229, at A39.

231. *Id.* Thomas K. Hearn, Jr., president of Wake Forest University, concurs with Mr. Byers that the NCAA needs to be reformed but disagrees with the former executive director’s call to pay student-athletes. See *id.* Mr. Hearn asserts that the NCAA is “compromised but not irredeemably corrupt” and that paying student-athletes would only compound the problems. *Id.*

232. The poll, which was conducted between December 1996 and January 1997, was distributed to the head coaches of the AP Top 25 Division I-A Men’s Basketball programs for the week of December 2, 1996. The questionnaire contained the following four (4) multiple choice questions:

1. According to “your” views regarding the definition of an employee, would you consider your scholarship athletes to be both students and employees of the university?
  - A. Yes
  - B. No
  - C. No Opinion
2. If the university’s graduate students are considered to be employees (thus permitting them to collectively bargain over their wages, hours, and working conditions), then should scholarship athletes also be considered employees?
  - A. Yes
  - B. No
  - C. No Opinion
3. Today, do you consider the educational experience of playing college basketball to be the primary purpose of Division I-A programs?
  - A. Yes
  - B. No                    other:
4. Approximately what percentage of your players go on to play some form of professional basketball after leaving your program?
  - A. Under 2%
  - B. Under 5%
  - C. Under 10%
  - D. Other                    please specify:

tion take precedent when it comes to intercollegiate athletics.<sup>233</sup> Although none of the six coaches who completed the poll considered their scholarship athletes to be employees,<sup>234</sup> three of them (50%) responded that “the educational experience of playing college basketball” *was not* the primary purpose of their basketball programs.<sup>235</sup> Although the coaches did not volunteer the “primary purposes” of their basketball programs, one coach wrote, “[t]o state basketball to be the primary purpose would be extreme. But it significantly adds to the total experience.”<sup>236</sup>

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COLLEGE HEAD COACHES POLL, *supra* note 215.

233. COLLEGE HEAD COACHES POLL, *supra* note 215; *see also* discussion *supra* note 232. Each of the following coaches received the poll accompanied with a self-addressed stamped envelope. During the week of December 2, 1996, the following universities (head coach) were listed in the AP Top 25 (*in order*):

1. *University of Kansas* (Roy Williams), 2. *Wake Forest University* (David Odom), 3. *University of Utah* (Rick Majerus), 4. *University of Cincinnati* (Bob Huggins), 5. *Villanova University* (Steve Lappas), 6. *University of Kentucky* (Rick Pitino), 7. *University of Michigan* (Steve Fisher), 8. *University of Indiana* (Bob Knight), 9. *Iowa State University* (Tim Floyd), 10. *Duke University* (Mike Krzyzewski), 11. *University of New Mexico* (Dave Bliss), 12. *Clemson University* (Rick Barnes), 13. *Fresno State University* (Jerry Tarkanian), 14. *University of North Carolina* (Dean Smith), 15. *University of Arizona* (Lute Olson), 16. *University of Minnesota* (Clem Haskins), 17. *University of California at Los Angeles* (Steve Lavin), 18. *University of Texas* (Tom Penders), 19. *Syracuse University* (Jim Boeheim), 20. *Boston College* (Jim O'Brien), 21. *Tulsa University* (Steve Robinson), 22. *University of Arkansas* (Nolan Richardson), 23. *Xavier (Ohio) University* (Skip Prosser), 24. *Stanford University* (Mike Montgomery), 25. *University of Virginia* (Jeff Jones).

*Polls*, NEWSDAY, Dec. 3, 1996, at A61.

234. A total of nine COLLEGE HEAD COACHES POLLS were returned. Six of the nine questionnaires were completed. Two of the three coaches who returned uncompleted polls communicated that due to the number of surveys they receive annually, it is their policy not to complete unsolicited questionnaires. No additional efforts were made to garner responses from the 19 non-participating coaches.

235. *See* COLLEGE HEAD COACHES POLL, *supra* note 215; *see also* discussion *supra* note 232. The results of the COLLEGE HEAD COACHES POLL are similar to those reflected in the author's 1995-1996 NCAA Division I-A Football head coaches poll. *See* Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer's Dream Come True*, 6 SETON HALL J. SPORTS L. 167, 179-80 (1996). Of the 13 head football coaches who responded to the 1995-1996 football coaches poll, four (30%) answered that providing an “educational experience” was not the primary objective of their football programs. *See id.* at 178 & nn.61-64.

236. COLLEGE HEAD COACHES POLL, *supra* note 215; *see also* discussion *supra* note 232.

## 2. Financial Considerations Lead to Corruption and NCAA Rules Violations

In 1995, the average Division I-A athletics program operated at a \$1.2 million profit.<sup>237</sup> This figure, which has nearly doubled during the past two years, was at \$660,000 per program in 1993.<sup>238</sup> Focusing on the most successful of the revenue producing programs, the results are even more astonishing. For example, eight different universities earned more than \$8 million when their football teams appeared in a 1996-1997 college bowl.<sup>239</sup> Six of those teams; Nebraska, Virginia Tech, Penn State, Texas, Florida State and Florida, participated as representatives of the bowl alliance<sup>240</sup> and the two remaining teams, Ohio State and Arizona State, played in the Rose Bowl.<sup>241</sup>

With millions of dollars pending on the outcome of each game, there is extreme pressure to "win at all costs," even where that

237. See Jim Naughton, *NCAA Releases Report on Program Revenues*, CHRON. HIGHER EDUC., Nov. 29, 1996, at A44. The NCAA included financial contributions from sources such as state funds and student fees within its report. See *id.* Interestingly, when these resources were excluded from the tabulations, "the average Division I-A athletics program operated at a \$237,000 deficit." *Id.* Division I-AA and I-AAA athletics programs on average operated at a loss. See *id.*

238. See *id.*

239. See *College Football Bowl Lineup*, USA TODAY, Dec. 10, 1996, at 10C. The average payoff per team for the 1996-1997 college bowl season was approximately \$2.8 million. See *id.* This figure does not include the Heritage Bowl which did not provide financial details. See *id.* Last year, the Heritage Bowl payoff was \$100,000 per participating institution. See Ukeiley, *supra* note 235, at 180 n.67. The average amount received for appearing in a 1995-1996 bowl was \$2.1 million. See *id.*

240. The Division I-A football programs agreed that the champions of the Atlantic Coast, Big East, Big 12, and Southeastern conferences in addition to two at-large teams would appear in the bowl alliance games. In 1996, the Orange, Fiesta and Sugar Bowls comprised the "Alliance Bowls." See *College Football Bowl Lineup*, *supra* note 239, at 10C.

241. See *id.* The Big 10 and the Pacific 10 conferences are contractually bound to send their respective champions to the Rose Bowl. See Elliott Almond, *Pac-10 Set to Remain Unallied*, L.A. TIMES, Jan. 10, 1996, at C1.

The payoff per team appearing in the remaining 14 bowl games ranged from \$150,000 to \$3 million. See *College Football Bowl Lineup*, *supra* note 239, at 10C. A breakdown of the revenue generated by each university per bowl illustrates the significance of being invited to a higher-ranked bowl: Sugar Bowl (\$8.736 million); Fiesta Bowl (\$8.486 million); Orange Bowl (\$8.486 million); Rose Bowl (\$8.25 million); Florida Citrus Bowl (\$3 million); Cotton Bowl (\$2 million); Gator Bowl (\$1.5 million); Outback Bowl (\$1.5 million); Holiday Bowl (\$1.4 million); Peach Bowl (\$1.3 million); Sun Bowl (\$1 million); Alamo Bowl (\$1 million); Independence Bowl (\$800,000); Liberty Bowl (\$800,000); Copper Bowl (\$750,000); Carquest Bowl (\$750,000); Aloha Bowl (\$750,000) and Las Vegas Bowl (\$150,000). See *id.* "It is noted that a conference's bylaws may require a university to share the earnings it receives from a bowl appearance with the other members of its league." Ukeiley, *supra* note 235, at 180 n.67.

requires breaking the rules.<sup>242</sup> In November 1996, the University of California at Los Angeles (“UCLA”) fired men’s basketball head coach Jim Harrick for attempting to “cover up” an NCAA rules violation by lying to the investigating officials and encouraging another official within the basketball program to do the same.<sup>243</sup> The infraction occurred at a recruiting dinner which was attended by more UCLA players than permitted by NCAA rules.<sup>244</sup> According to UCLA chancellor Charles E. Young, Coach Harrick was not fired because of the NCAA violation but rather his “actions that followed,” which included the falsification of expense-accounts and intentional misrepresentations of fact.<sup>245</sup> Ironically, in October 1996, the NCAA had cleared UCLA of any wrongdoing after Coach Harrick’s son had sold a Chevy Blazer, which was registered in the coach’s name, to the sister of a basketball recruit.<sup>246</sup>

Three months earlier, in July 1996, the NCAA placed the New Mexico State men’s basketball team on three years probation and decreased the University’s men’s basketball scholarships from thir-

242. See Roger G. Noll, *The Economics of Intercollegiate Sports*, in *RETHINKING COLLEGE ATHLETICS* 197, 197-98 (Judith Andre & David N. James eds., 1991) (describing the NCAA as a “cartel” whose members have no regard for moral integrity); see also John J. MacAloon, *Memory, Attention, and the Communities of Sport*, in *RETHINKING COLLEGE ATHLETICS* 223, 235-36 (suggesting that a lack of job security is the driving force behind college coaches’ exploitation of student-athletes).

243. See Jim Naughton, *UCLA Fires Basketball Coach over Recruiting Violation*, *CHRON. HIGHER EDUC.*, Nov. 15, 1996, at A51.

244. See *id.* Section 13.7.5.5.1 of the NCAA Manual provides that “[i]f several students host a prospect, the \$30 per day . . . entertainment money may be utilized to cover the actual and necessary expenses incurred by the prospect and all hosts. Only *one student host per prospect* may be provided a free meal if restaurant facilities are utilized.” 1996-1997 NCAA MANUAL, *supra* note 212, at § 13.7.5.5.1 (emphasis added).

245. Naughton, *supra* note 243, at A51. In response to the firing, Coach Harrick stated, “There are so many rules that are not even written in the book [NCAA Manual]. Oftentimes I mentioned to my compliance officer, ‘Show me that in the book.’ ‘Well,’ he’d say, ‘it’s not in the book.’ So to keep on top of it is virtually impossible. A coach is living his life on eggshells all the time. It cost me my life, my career, my reputation, everything, over what I thought was something so small.”

Wilstein, *supra* note 223, at C1. The coach’s deceitfulness and falsification of expenditures violated the NCAA’s code of ethical conduct. Section 10.1 states:

Unethical conduct by a prospective or enrolled student-athlete or a current or former institutional staff member may include, but is not limited to, the following:

- (a) Refusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual’s institution . . . .

1996-1997 NCAA MANUAL, *supra* note 212, at § 10.1.

246. See Naughton, *supra* note 243, at A51.

teen to eleven through the 1999 season after an investigation revealed academic fraud within the basketball program.<sup>247</sup> The NCAA imposed these penalties on the southwestern school because former New Mexico State assistant men's basketball coach Chris Nordquist had arranged for the mismanagement of academic credit for five junior-college transfer students.<sup>248</sup> "The violations included completing correspondence-course examinations for two students, writing at least seven English papers for a third and submitting one of those papers on behalf of a fourth."<sup>249</sup> In addition to receiving probation and the loss of two scholarships per year until 2001, the men's basketball team had its NCAA tournament record vacated for the 1990s and New Mexico State is precluded from recruiting junior college athletes through the 1999 season.<sup>250</sup> With all of these pressures to succeed on the court, it is not surprising that many commentators, including the former NCAA executive director, are calling for the revamping of Division I-A athletics.<sup>251</sup>

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247. See Jim Naughton, *New Mexico State U. Given 3-Year Probation*, CHRON. HIGHER EDUC., July 26, 1996, at A44.

248. See *id.*

249. *Id.*

250. See *id.* The seriousness of the infractions was reflected in the penalties imposed by the NCAA Committee on Infractions. New Mexico State University had previously recommended that the men's basketball team: (1) be precluded from post-season play during the 1995-1996 season; (2) disallowed television revenues for the 1995-1996 season and (3) be required to decrease off-campus recruiting through the completion of the 1997 academic year. See *id.*

The NCAA Manual provides:

It shall be the mission of the NCAA enforcement program to eliminate violations of NCAA rules and impose appropriate penalties should violations occur. The program is committed to fairness of procedures and the timely and equitable resolution of infraction cases. The achievement of these objectives is essential to the conduct of a viable and effective enforcement program. Further, an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors, and other institutions.

1996-1997 NCAA MANUAL, *supra* note 212, at § 19.01.1.

251. See Wilstein, *supra* note 223, at C1 ("Though athletes benefit from a 'free' education, the fact is they work in their sports to earn that money, risk injury in every game and practice, can lose their scholarships at the discretion of coaches, and too often don't even graduate"); see also Witham & Lederman, *supra* note 229, at A39. During the fall of 1995, 28 NCAA member institutions, including Division I, II and III programs, were on probation. See *28 Institutions on NCAA Probation*, CHRON. HIGHER EDUC., Oct. 27, 1995, at A42. Most notably among the Division I-A programs were Baylor University, Texas A&M University, the University of Nevada at Las Vegas, Auburn University, the University of Pittsburgh and the University of Washington. See *id.* The infractions which placed these programs on probation included cash payment to a player from a coach (Auburn), payments from boosters

### 3. Alarming Low Graduation Rates

The lack of emphasis placed on academics is reflected in the low graduation rates of Division I-A football and male basketball players.<sup>252</sup> Although scholarship athletes in general graduate with higher frequency (56%) than the rest of the student body (48%),<sup>253</sup> the results are dramatically different when comparing the overall student body to football and basketball players. Only forty-two percent of the football and thirty-two percent of the male basketball players who entered a Division I-A university in 1984 earned their degrees by 1989.<sup>254</sup>

According to Professor DeBrock, graduation percentages do not accurately reflect the academic success of an institution.<sup>255</sup> He therefore studied all of the following variables in his research: academic ranking of the institution; university average SAT score; ratio of applicants to accepted students and the number of football and men's and women's basketball championships earned by the university between 1980 and 1990.<sup>256</sup>

DeBrock tested his hypothesis by examining the Division I universities with the five overall highest and lowest student graduation rates.<sup>257</sup> He concluded that of these ten Division I institutions, all of

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to players (Texas A&M), payment of preparatory-school tuition for a recruit (Pittsburgh) and unauthorized contact with recruits (U. of Washington). *See id.*

252. This is the primary difference between scholarship athletes and the Yale graduate students. The graduate students are required to obtain a Ph.D. degree to be considered for a full-time tenured track position at an institution of higher learning. On the other hand, it is not a prerequisite for the select few who play professional sports to have earned their academic degrees. *See Ukeiley, supra* note 235, at 205-06; *see also* Wilstein, *supra* note 223, at C1 (commenting on the "early exodus to the pros of dozens of the best college basketball players and high school prospects").

253. *See* DeBrock et al., *The Economics of Persistence: Graduation Rates of Athletes As Labor Market Choice*, 31 J. HUM. RESOURCES 513, 514 (1996).

254. *See id.* at 514, 516-17, 526 (concluding that the majority of scholarship athletes drop out of school due to financial considerations and the availability, or lack thereof, of employment opportunities in professional athletics).

255. *See id.* at 514-15. DeBrock calculated graduation rates over a four-year period as opposed to the six-year period studied by the NCAA. *See id.* at 520-21.

256. *See id.* at 522. DeBrock also examined the universities' overall graduation rate, size of undergraduate enrollment, incoming football players' average grade point average and SAT score, the number of athletes drafted by the National Football League and the number of football players who actually played in the National Football League. *See id.*

257. *See id.* at 515. Duke, Notre Dame, Stanford, Bucknell and Virginia had the highest graduation rates, averaging 92%. *See id.* Nicholls State, Boise State, Alabama State, Northwestern State, and Texas Southern finished at the bottom with an overall student graduation rate of 16%. *See id.*



which offer football scholarships, only Nicholls State had a higher graduation rate for the members of its football and men's basketball teams in comparison to the overall student population.<sup>258</sup> However, the school's thirty-nine percent graduation rate for basketball players and twenty-nine percent rate for the football team were still considerably lower than the NCAA average.<sup>259</sup>

In November 1994, the NCAA conducted a similar study on data accumulated from the Top 25 Division I-A football programs for the week of November 26, 1994.<sup>260</sup> The NCAA's study revealed that fifty-seven percent of the players from the best college football programs, compared to sixty-five percent of those universities' undergraduate students, had earned their degrees within six years.<sup>261</sup> Moreover, the study revealed that the student body graduated at a higher rate than their football counterparts at sixteen of the twenty-five universities.<sup>262</sup>

The largest discrepancy occurred at Ohio State University, where twenty-nine percent of the football players graduated compared to

258. *See id.* DeBrock's research further indicated that success on the football field and the basketball court (men's) translated into lower graduation rates. *See id.* at 526.

259. *See id.* at 515. The overall student graduation rate at Nicholls State was 20%. *See id.*

The research also indicated that the female basketball players at these ten universities graduated at a rate higher than or equal to their male basketball counterparts. The same results occurred when comparing female basketball players to football players, except at the University of Notre Dame. *See id.* DeBrock suggests that the lack of a women's professional basketball league located in the United States attributed to the higher graduation rates for female basketball players. *See id.* at 519. With the addition of the American Basketball League, a professional women's league which began play during the winter of 1996, DeBrock's theory may be tested shortly. *See* W.H. Stickney Jr., *Two for the Show: Next Summer, WNBA Joins Ranks of Women's Pro Basketball*, HOUS. CHRON., Oct. 13, 1996, at 22.

260. Jillian Kasky, *Duke Beats the Top 25 Football Schools, But Check Caltech*, MONEY, Jan. 1995, at 20.

261. *See id.* The college programs studied were selected from the USA Today/CNN Top 25 Division I-A Football Poll. *See id.* The survey examined the graduation rates of students over a period of six years from between 1987 and 1994. *See id.*; *cf.* DeBrock et al., *supra* note 253, at 520-21 (computing graduation rates of students who had earned their degrees within four years).

262. *See* Kasky, *supra* note 260, at 20. The nine universities where members of the football team graduated at a higher rate than the general student population were (percentage of football graduates, overall student graduation rate): *Duke University* (96%, 95%); *Boston College* (95%, 87%); *Pennsylvania State University* (92%, 77%); *University of Oregon* (74%, 56%); *Colorado State University* (69%, 58%); *Mississippi State University* (55%, 50%); *University of Tennessee* (63%, 51%); *Brigham Young University* (69%, 51%) and *University of Utah* (54%, 42%). *See id.* But *see* discussion *supra* note 259 and accompanying text.

fifty-nine percent of the student body.<sup>263</sup> These graduation rates reinforce the notion that providing an education to students-athletes does not take precedent over intercollegiate athletics.<sup>264</sup>

### *B. Athletic Scholarship Is Sufficient Compensation*

An athletic scholarship generally provides the student-athlete with the cost of tuition, institutional fees, room and board, meals, books and medical expenses.<sup>265</sup> Although the NLRB had reservations about granting students who received scholarships or work-study credits the right to collectively bargain in *San Francisco Art Institute*, the Supreme Court subsequently mooted their position in *Tony & Susan Alamo Foundation v. Secretary of Labor*.<sup>266</sup>

In *Alamo Foundation*, the Court held that the Foundation's<sup>267</sup> associates who were provided food, clothing, shelter and medical benefits in lieu of a salary or a hourly wage were employees under the Fair Labor Standards Act.<sup>268</sup> The Court reasoned that since the Foundation was expected to provide these items in exchange for the associates' services, "[t]hese benefits were simply wages in another form . . . ." <sup>269</sup>

263. See Kasky, *supra* note 260, at 20.

264. See Derek Q. Johnson, Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 99-101, 105 (1985).

265. NATIONAL COLLEGIATE ATHLETICS ASS'N, 1996-1997 NCAA MANUAL §§ 15.2, 16.4 (1996) [hereinafter 1996-1997 NCAA MANUAL]. Although the value of the scholarship may not exceed the cost of the student-athlete's education, it is generally acknowledged that athletic grants fall approximately "\$2,000 to \$2,500 a year short of the cost of campus life." *Id.* at § 2.13; see also Steve Wilstein, *NCAA Riches Stop Short of Athletes: Despite Reform Talk, Members Stand Firm Against Pay for Play*, HERALD & NEWS, Dec. 25, 1996, at C1.

As a result, the NCAA has relaxed some of the financial restrictions placed on student-athletes' with the passage of Proposal 62. See Ivan Maisel, *Restrictions Eased: NCAA 'Listens,' OKs Part-time Jobs for Athletes*, NEWSDAY, Jan. 14, 1997, at A63. Proposal 62, which effectuates during the 1997-1998 academic year, was passed during the 1997 NCAA Convention by a vote of 169-150. See *id.* The new rule permits Division I scholarship athletes to work during the school year without counting the financial enumeration against the value of the scholarship. See *id.* Division I scholarship athletes may earn "up to the 'cost of attendance,' a formula that includes incidental expenses and money to go home." *Id.*

266. 471 U.S. 290 (1985).

267. The Tony and Susan Alamo Foundation is a nonprofit religious organization with offices in California, Arkansas, Tennessee and Arizona. See *id.* at 292 n.2.

268. See *id.* at 293, 306; see also Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994).

269. *Alamo Found.*, 471 U.S. at 293. Section 203(m) of the Fair Labor Standards Act provides, "'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other

Similar to the Foundation's associates, scholarship athletes *expect* to receive "a free education" in return for their services. Moreover, the manner in which this compensation is provided does not preclude them from the protections of the Act.<sup>270</sup>

In 1986, Congress contributed to the "employment relationship" when it revised section 117 of the Internal Revenue Code to provide that the recipients of scholarships must report the room and board portions as taxable income.<sup>271</sup> According to the House of Representatives' report,

The House bill limits the § 117 exclusion for scholarships or fellowship grants . . . (2) to the amount of the scholarship . . . required to be used, and in fact is used, for tuition and course-required fees, books, supplies and equipment ("course-related expenses"). Any other amount of a scholarship or fellowship grant received by a degree candidate (for example amounts for *room, board or incidental expenses*) is includable in gross income . . . .<sup>272</sup>

In addition to paying taxes, the employment relationship is further advanced when the university exercises its right to discharge a student-athlete. NCAA rules preclude member institutions from awarding athletic scholarships or financial aid grants for a period longer than one year, thus making the scholarship or employment contract, subject to annual review.<sup>273</sup> In other words, both the university and the student-athlete have the option of ending the "employment relationship" at the beginning of each academic year. Student-athletes who do not have their scholarships renewed or find that their financial aid was reduced, are often left without recourse since section 15.3.5.2 of the NCAA Manual expressly provides that the decision to renew or not renew is up to the *discretion* of the university.<sup>274</sup>

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facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees . . . ." 29 U.S.C. § 203(m).

270. See *Alamo Found.*, 471 U.S. at 293.

271. See Michael B. Tannenbaum, *Taxation of Qualified Scholarships, with a Focus on Athletic Scholarships*, SPORTS LAW. 1, 1-2 (Sports Laws. Ass'n), Nov./Dec. 1994, at 1.

272. *Id.* (quoting H.R. REP. NO. 841, 99th Cong., 2d Sess. 224) (emphasis added). See generally Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (amending I.R.C. § 117).

273. See 1996-1997 NCAA MANUAL, *supra* note 265, § 15.3.3.1.

274. See *id.* § 15.3.5.1.1 (emphasis added). Students who do not have their scholarship renewed have the right to request a review hearing. See *id.* Section 15.3.5.1.1 provides:

### C. *Transitory Nature of Employment Does Not Preclude Bargaining*

In *San Francisco Art Institute*, the Board denied the part-time student janitors' petition, in part, because of the brief and inconsistent nature of their employment.<sup>275</sup> The evidence adduced during the hearing revealed that the students were employed on a semester-by-semester basis, and the majority of them "work[ed] approximately twenty hours a week."<sup>276</sup>

However, in light of *Hearst Corp.*,<sup>277</sup> the brevity of the employment and the high turnover among students is inconsequential in the evaluation of the employment status of Division I-A scholarship athletes.<sup>278</sup> In *Hearst Corp.*, a Category 1 student employment case,<sup>279</sup> the Board included part-time student employees within a bargaining unit comprised of the newspaper publishing company's full- and part-time employees.<sup>280</sup> Even though contradictory testimony concerning the length of the students' employment, either eight months or three years, was elicited, the Board concluded that the student employees shared a sufficient community of interest with their colleagues such that the groups were indistinguishable.<sup>281</sup> Within a footnote, the Board commented, "[w]e find it unnecessary to resolve this conflict [regarding the length of employment] in the evidence as this factor is not controlling in our decision herein."<sup>282</sup>

The Labor Board's General Counsel apparently reached the same conclusion in the Yale case. According to Robin Brown, the

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If the institution decides not to renew or decides to reduce financial aid for the ensuing academic year, the institution shall inform the student-athlete in writing [on or before July 1 (§ 15.3.5.1)] that he or she, upon request, shall be provided a hearing before the institutional agency making the award. The institution shall have established reasonable procedures for promptly hearing such a request and shall not delegate the responsibility for conducting a nonrenewal hearing to the university's athletics department or its faculty athletics committee. The decision to renew or not renew the financial aid is left to the discretion of the institution, to be determined in accordance with its normal practices for students generally.

*Id.* (emphasis added).

275. See *San Francisco Art Inst.*, 226 N.L.R.B. 1251, 1251-52 (1976) (excluding 12 student janitors because the employment was incidental to obtaining an education).

276. *Id.* at 1251.

277. 221 N.L.R.B. 324 (1975).

278. See *id.*

279. See discussion *supra* Part III.C.1.

280. See *Hearst Corp.*, 221 N.L.R.B. at 325.

281. See *id.* at 324 n.1., 325.

282. *Id.* at 324 n.1.

Yale graduate students “are both teachers and students, [but] some semesters [we are] just students.”<sup>283</sup> Ms. Brown further revealed that the majority of graduate students only teach courses between their third and fifth years of the graduate program.<sup>284</sup> Both *Hearst Corp.* and the General Counsel’s Advice Memorandum demonstrate that transitory employment does not preclude students from obtaining employee status under the NLRA.

In any event, competing in Division I-A intercollegiate athletics is a year-round position that may last up to five or six years.<sup>285</sup> The NCAA Manual defines the length of each college “season”<sup>286</sup> and provides the maximum number of *supervised* hours that athletes may devote to their sport both in and out-of-season.<sup>287</sup> When considering preseason conditioning, practices and the actual games, each playing season may last as long as seven months.

For instance, the official preseason conditioning period for a Division I-A basketball program begins on the first day of classes during the fall semester.<sup>288</sup> On-court practices may commence on October 15th and the first scheduled contest with “outside competition” may be scheduled for either the third or fourth week of November.<sup>289</sup> The team’s game schedule, which may not contain more than 27 games, must be completed within 129 days from the date of the season opener, excluding the Championship game which takes place in April.<sup>290</sup>

This seven month schedule does not include the *unsupervised* hours that the student-athletes put forth both in- and out-of season

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283. Telephone Interview with Robin Brown, former Chairwoman of the Graduate Employees and Student Organization at Yale University (Dec. 6, 1996) [hereinafter Brown Telephone Interview].

284. *See id.*

285. *See* 1996-1997 NCAA MANUAL, *supra* note 265, at § 14.2. Although student-athletes may only compete in games for four seasons, the “student-athlete shall complete his or her seasons of participation within five calendar years.” *Id.* §§ 14.2, 14.2.1. A sixth year of eligibility will be granted if the student-athlete demonstrates a medical hardship. *See id.* § 14.2.5.

286. *See id.* § 17.1.1. The playing season is identified as the time between an athletics team’s first *recognized* practice session and its final practice session or date of competition, whichever occurs later. *See id.*

287. *See id.* §§ 17.1.5.1, 17.1.5.2. Student-athletes may compete in “countable athletically related activities” a maximum of 20 hours per week during the playing season and eight hours per week outside the playing season. *Id.* §§ 17.02.1.1, 17.1.5.1, 17.1.5.2.

288. *See id.* at Figure 17-2, § 17.3.3.1.

289. *See id.* §§ 17.5.2.1, 17.5.3(a).

290. *See id.* §§ 17.5.3(a).

preparing for their sport. Commenting on the number of hours he devotes to training, a football player at the University of Wisconsin stated,

The reason that an athlete receives a scholarship is for reimbursement for their time given to their university. Well, it was calculated here at Wisconsin that an athlete on scholarship earns \$1.35 an hour for the 20 hours a week of mandatory workouts. The last time I checked, the minimum wage was more than \$1.35 an hour. And that doesn't even count the amount of volunteer time athletes put into lifting and other activities that are necessary to be at a competitive physical level.<sup>291</sup>

When considering that the length of a intercollegiate athletics career is approximately equal, if not greater, to that of professional basketball and football players, who average four and one-half and four year-careers respectively,<sup>292</sup> there is yet an additional argument why scholarship athletes, dissimilar to the Yale graduate students, should be recognized as employees under the Act.<sup>293</sup>

## VI. CONCLUSION

The intent of this article was not to denounce the NLRB, which often finds itself in the difficult position of resolving issues of first impression between labor and management. But rather, this article focused on what the author perceives to be an inconsistency in Board policy concerning student employees.

While it is recognized that determining employee status is to be done on a case-by-case basis, the General Counsel ignored the criteria set forth in *St. Clare's Hospital & Health Center* when deciding the Yale controversy. According to NLRB Region #34 Regional Attorney Jonathan Kreisberg, the General Counsel based his decision on *Leland Stanford Junior University*, *Cedars-Sinai Medical Center* and *St. Clare's Hospital & Health Center*, which the author has referred to collectively as the *Trifecta* decisions.<sup>294</sup>

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291. Wilstein, *supra* note 265, at C1.

292. See DeBrock et al., *supra* note 253, at 520. The median career lengths of professional athletes were of longer duration; 7.9 years for NBA players and 6.4 years for NFL players. See *id.* at 520 n.12.

293. See *supra* note 252 and accompanying text.

294. See Telephone Interview with Jonathan Kreisberg, Regional Attorney for Region #34 of the National Labor Relations Board (Dec. 11, 1996) [hereinafter Kreisberg Telephone Interview]; see also discussion *supra* note 10.

However, the *Trifecta* decisions are not applicable to the Yale situation since they involved Category 4 students; students employed by their respective institution in a capacity *related* to their academic programs. By the Board's own admission, the Yale controversy is a Category 2 case; students employed by their institution but who work in capacities *unrelated* to their studies.<sup>295</sup> Accordingly, a Category 2 test or precedent should have been at the focal point of the General Counsel's memorandum. Even though the categories of student employees are not static, they would serve a more useful purpose if the standards were enforced on a consistent basis. If new categories need to be created so as to ensure that a particular group of students seeking recognition will be evaluated fairly, as I have previously suggested regarding scholarship athletes,<sup>296</sup> then the Board should establish additional categories on a need basis.

The crucial aspect is that the Labor Board, which was intended to promote harmony between labor and management, is doing a disservice when it randomly applies the rules. At minimum, the parties are entitled to know that the Board effectuates its policies and precedent in a consistent manner.

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295. See Kreisberg Telephone interview, *supra* note 294.

296. See Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes Are An Employer's Dream Come True*, 6 SETON HALL J. SPORTS L. 167, 222 (1996).