UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE NEW SCHOOL
Employer

and Case 02-RC-143009

STUDENT EMPLOYEES AT THE
NEW SCHOOL-SENS/UAW
Petitioner

ORDER

Petitioner's Request for Review of the Regional Director's Supplemental Decision and Order Dismissing Petition is granted as it raises substantial issues warranting review.

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Member Miscimarra, dissenting:

In this case, the Regional Director has twice dismissed the representation petition filed by Student Employees at the New School, SENS/UAW, which seeks to represent "[a]ll student employees who provide teaching, instructionally-related or research services, including Teaching Assistants (Course Assistants, Teaching Assistants, Teaching Fellows, and Tutors), and Research Assistants (Research Assistants and Research Associates), and Student Assistants 3 at the Parsons School[.]"

Initially, the Regional Director dismissed the representation petition without a hearing, based on the Board's decision in *Brown University*, 342 NLRB 483 (2004) (holding that the University's relationship with petitioned-for teaching and research assistants and proctors was "primarily educational" and they were not employees under the Act). On March 13, 2015, the Board issued an order granting review, reinstating the petition, and remanding the case to the Regional Director for a hearing and issuance of a decision. *The New School*, Case 02-RC-143009 (March 13, 2015). In the Board's Order, former Member Johnson and I indicated that the petition was properly dismissed based on "existing law," citing *Brown University*, and we noted that the Board was not deciding "whether or not existing law should be overruled."[1]

After conducting a hearing following our remand, the Regional Director dismissed the petition a second time. She concluded, based on the factual record, that the Petitioner seeks an election among

[1] More recently, in *Northwestern University*, 362 NLRB No. 167 (2015), where the Board declined to assert jurisdiction over certain football program student-athletes, the Board stated that the participation of student-athletes in what was traditionally regarded as an extracurricular activity "materially sets them apart" from the types of students evaluated in *Brown University*, and other Board cases involving students. Id., slip op. at 4. In *Northwestern*, however, the Board expressed no opinion as to whether *Brown University* and other precedents involving students were correctly decided or whether they might be relevant to assessing whether scholarship football players were statutory employees. 362 NLRB No. 167, slip op. at 4 fn. 12.

graduate students who are not "employees" within the meaning of Section 2(3) of the Act under *Brown University*, and that the facts did not warrant finding the instant case distinguishable from *Brown University*. The Employer also argued that the Board should not direct an election in the petitioned-for unit on the basis that the graduate student assistants are "casual" or "temporary" employees, but the Regional Director found it unnecessary to reach or resolve these issues.

I would deny the Petitioner's request for review because the Regional Director's supplemental decision, based on the fully developed evidentiary record, does not warrant a grant of review under the Board's Rules and Regulations ("R&R"). See R&R Sec. 102.67(c) (reciting the grounds for seeking review). No party argues that the Regional Director's detailed supplemental decision departed from existing law, that her decision on a substantial factual issue was "clearly erroneous," or that she committed "prejudicial error" in any of her rulings or in the conduct of the hearing. Id. The sole basis relied upon by the Petitioner is its desire to have the Board overrule *Brown University*. Although R&R Sec. 102.67(c)(4) permits review based on "compelling reasons for reconsideration of an important Board rule or policy," I do not believe such reasons exist here for three reasons. First, this case may not even turn on the applicability of *Brown University* to the extent that individuals encompassed by the petition are "casual" or "temporary" employees, and I believe the Regional Director should be directed to address this issue consistent with the Board's earlier order remanding this case to the Regional Director. Second, the prevailing view for more than 40 years has been that graduate student assistants are not statutory employees, except for a brief four-year period when *New York University* was controlling law. See *The Leland Stanford Junior University*, 214 NLRB 621 (1974) (graduate student research assistants are not statutory employees); *New York University*, 332 NLRB 1205 (2000) (graduate student assistants are statutory employees); *Brown University*, 342 NLRB 483 (2004) (graduate student teaching assistants, research assistants, and proctors are not statutory employees). Third, the Regional Director's detailed supplemental decision—in which she analyzed the extensive record evidence—establishes that the functions performed and benefits received by graduate student assistants at The New School are closely related to the education of the student assistants and to the School's academic mission. For example, the Regional Director's decision notes record evidence indicating that the benefits afforded to various student assistants (e.g., Teaching Fellows) exceed the "market value" of their services, but The New School "does not wish to replace Teaching Fellows with part-time faculty members because of the financial aid function of the graduate student positions." For these reasons, I believe the Regional Director's supplemental decision, and her careful analysis of the record created as the result of our prior Order, warrant a decision not to grant review.

Accordingly, I respectfully dissent.

PHILIP A. MISCIMARRA, MEMBER

Dated, Washington, D.C., October 21, 2015.