TESTIMONY
BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE
ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS jointly with the SUBCOMMITTEE ON HIGHER EDUCATION AND WORKFORCE TRAINING

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Joint Hearing on "Expanding the Power of Big Labor: The NLRB's Growing Intrusion into Higher Education."

My name is Christian Sweeney and I serve as the Deputy Director of the Organizing Department of the AFL-CIO. I am grateful for the opportunity to address this hearing because, while I have assisted workers from many different industries in organizing unions, my own roots in the labor movement are in higher education. I helped to organize a union at my own university, the University of California, Berkeley when I was working as a teaching assistant and an instructor while I pursued a Ph.D. in history. When I arrived at Berkeley in the late 1990's, TAs were making about $12,000 a year. Many of us faced heavy workloads – teaching classes, grading papers, running labs -- and lacked an effective means to address this issue. Many TAs had serious concerns about gaps in coverage in the university's health insurance system. Family healthcare was impossible to afford for many student employees with children. At the same time, the overwhelming majority of us were incredibly grateful to be studying and working at such a fine institution. Our problem wasn't with issues that we faced as students. The quality of the faculty, labs, and library were all excellent. And we were sensitive to the university's budget challenges. We just wanted a way to sit down and have a serious conversation about the issues we faced as university employees with the people who established our terms and conditions of employment. Over the course of several years, we built majority support for our union and

eventually won eight union representation elections on each of the University of California campuses. During the first contract negotiations, I served as the President of our newly constituted local union. When we sat down to bargain, we based many of our contract proposals on best practices that existed within the university system itself, but were not universally implemented. Ultimately, we reached an agreement with the university that addressed many of the concerns we had about our rights as employees, increased wages, and guaranteed healthcare for the first time.

The conditions that I faced as a teaching assistant were not unique to the University of California. Today, over 100,000 people are employed as teaching assistants and thousands more as research assistants at public and private universities across the United States. TAs make up about 20% of the instructional workforce in higher education, and many rely on this employment as they pursue advanced degrees in their fields of academic study.[1] Faced with low pay for teaching, many work additional jobs and rely on loans to make ends meet. In my years as an organizer assisting workers on campuses throughout the country, I have heard remarkable stories about the conditions these workers face. One TA at a private university here in Washington told me about how he severely injured his knee but could not afford the university's health insurance or the surgery to repair it. On another campus, I heard complaints from a graduate student employee of sexual harassment that she dared not raise for fear of reprisals. She would have preferred to deal with the problem through a quick union grievance procedure rather than pursue slower, more public legal remedies. Research assistants face very real workplace issues in labs. Researchers regularly deal with carcinogens, radioactive materials, and extreme fire hazards. In the last few years, for example, fire claimed the life of a researcher at UCLA.[2]

[1] *Brown University*, 342 NLRB 483 (2004).
[2] http://latimesblogs.latimes.com/lanow/2012/09/ucla-professor-arraigned-on-charges-in-fatal-2008-lab-fire.html .

The notion that the NLRB or "Big Labor" is somehow pushing its way in the academia is misguided. In fact, the opposite is true. Workers in academia are reaching out to unions in large numbers. There was a wave of clerical workers and service and maintenance workers who organized on campuses in the 1970's and 1980's. Today, we are seeing sustained interest in organizing on the part of college and university teachers and researchers. In the twelve years that I have been an elected leader, and subsequently a union staff person, I have worked on twelve union representation elections that resulted in over 20,000 employees obtaining representation in colleges and universities. Every single one of those 12 organizing campaigns was started because workers in those institutions reached out to the union for help in organizing. Workers ultimately voted for collective bargaining in eleven of the twelve elections. I am a good organizer, but I am not that good. The reason for this outcome is that thousands of workers in higher education have very real workplace concerns that they want to address through the democratic process of collective bargaining.

In considering who has initiated organizing on college and university campuses and whether real workplace concerns are moving employees there to organize, it is worth bearing in mind that this is a well-informed workforce with considerable access to information. The faculty and graduate assistants who have organized and considered their employment conditions, made a considered and informed decision to engage in collective bargaining.

While there has been an upsurge in interest in organizing among university employees, collective bargaining in higher education is nothing new. The NLRB asserted jurisdiction over private, non-profit universities forty years ago in *Cornell University*, 183 NLRB 329 (1971). Soon thereafter the Board approved units of faculty members and it has continued to do so continuously since that time. See *New York University ("NYU")*, 332 NLRB 1205, 1208 (2000)

(citing cases). In 1999, the Board held that medical interns and residents were employees protected by the Act. *Boston Medical Center,* 330 NLRB 152 (1999). In so holding, the Board squarely rejected the argument that "granting employee status to employees who are also students would improperly permit intrusion by collective bargaining into areas of academic freedom." *NYU,* 332 NLRB at 1208. A year later, the Board unanimously applied its holding concerning interns and residents to graduate assistants at New York University. Collective bargaining by graduate assistants has an even longer history in the public sector, dating back to 1969 at the University of Wisconsin. *See Brown University*, 342 NLRB 483, 493 n. 1 (2004) (Members Liebman and Walsh dissenting). As Board Member Liebman and Walsh observed in 2004, "Collective bargaining by graduate student employees is increasingly a fact of American University life. Graduate student unions have been recognized at campuses from coast to coast, from the State University of New York to the University of California." Id. at 493.

A. Why Do Workers In Higher Education Want To Form And Join Unions?

University and college employees, especially teachers and researchers, want to form unions because they need to protect their interests as employees. There was time when getting a Ph.D. meant a secure future as a faculty member. In 1970, 68 percent of new Ph.D.'s found full-time tenure track jobs. By the 1980's that was down to 51 percent.[3] Looking at the issue from the perspective of the percentage of total instructional staff, in 1975, 55.4 percent of instructional staff was full-time tenure track and full-time non-tenure track. By 2009, that number had shrunk

[3] Joe Berry, *Reclaiming the Ivory Tower* (Monthly Review Press, 2005) at p. 5.

to 39.5 percent and a mere 24.4 percent of faculties were tenure track faculty, the faculty with the most institutional stability.[4]

As public funding for higher education has decreased, both public and private institutions have come to rely increasingly on teachers and researchers employed on a part-time and contingent basis who can be hired relatively inexpensively. While this trend is well-known in the humanities and social sciences, the sciences and engineering are also more heavily relying on contingent researchers. In the past, some new Ph.D.'s commonly worked as postdoctoral researchers for a year or two before landing a faculty position. Today, that has changed. It is now expected that almost all science and engineering Ph.D.'s will spend five or more years in low paying "post doc" positions.[5] In the last decade, thousands of postdoctoral researchers have organized unions in California, New Jersey, and Massachusetts.

B. Teaching and Research Assistants

Teaching and research assistants have been at the forefront of union organizing in higher education for some time. TA and RA unions have become increasingly common since they first began in the late 1960's. There is a new wave of organizing happening today, but many of our best public research universities -- Wisconsin, Michigan, Oregon, Washington, the UC schools -- have been organized for some time. The real intrusion into higher education by the NLRB came in 2004 when the Bush NLRB stripped the right to form a union under the federal law from TAs and RAs at private universities.

Despite the extended experience with collective bargaining in higher education, which is devoid of any evidence of interference with the mission of colleges and universities, in 2004, the

[4] http://www.aaup.org/NR/rdonlyres/7C3039DD-EF79-4E75-A20D-6F75BA01BE84/0/Trends.pdf , U.S. Department of Education, IPEDS Fall Staff Survey.
[5] http://the-scientist.com/2012/08/01/opinion-the-postdoc-challenge/ .

Board abruptly reversed course and denied graduate assistants the protections of the Act. *Brown University,* 342 NLRB 483 (2004). In dissent, Members Liebman and Walsh described the majority's "troubling lack of interest in empirical evidence." Id. at 493. By 2004, that empirical evidence consisted not only of a bargaining history at more than 20 universities, but studies demonstrating "that collective bargaining has not harmed mentoring relationships between faculty members and graduate students." Id. at 493 n. 1, 499. The Board currently has pending before it another case arising out of *NYU* in which it has been asked to return to the position it articulated in 2000 that individuals can be both students and employees covered by the Act. I believe this is a sound position.

In this regard, I would encourage those seeking to understand this issue to look at the experience in public universities. The work of teaching assistants and research assistants at public and private universities is virtually indistinguishable. Across the country, teaching assistants and research assistants teach stand-alone courses, grade papers and exams, lead discussion sections, conduct undergraduate science laboratory classes, and serve as front-line researchers in nearly every university research laboratory. Both public and private universities rely heavily on their work. At Columbia University, when TAs organized around 2000, more than half of the courses in the core curriculum were taught by TAs. Similarly, at the University of California, about 60 percent of classroom instruction is provided by TAs. It is worth noting that UC Berkeley has more top-ranked graduate programs than any other university. [6] Likewise, other universities with union TAs, like the Universities of Wisconsin and Michigan, have more than their share of the very best Ph.D. programs. But you need not rely solely on rankings of

[6] In the latest National Research Council study, Berkeley had the highest number of top-ranked doctoral programs in the nation, based on a regression analysis involving 20 criteria from more than 5,000 programs at 212 institutions. http://grad.berkeley.edu/admissions/#1 (September 9, 2012).

graduate programs. Peer reviewed research has also demonstrated that an overwhelming majority of faculty believe that collective bargaining by TAs and RAs has a positive or neutral effect on mentor-mentee relationships.[7]

Concerns over the impact of collective bargaining on the educational mission of universities are not well founded. At NYU, the only private university ever to have had a contract for TAs and RAs, the union and the university reached an agreement to allay the administration's concerns about collective bargaining's intrusion into matters of academic judgment. Article XXII of the contract states, "[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University."[8]

C. Faculty and Issues Arising Under the National Labor Relations Act

In addition to the status of teaching and research assistants, the NLRB has also repeatedly considered two other issues related to the application of the Act to faculty.

First, in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court held that the implied exemption from NLRA coverage for so-called managerial employees applies as well to college faculty members to the extent that the faculty exercises managerial authority. The Court held that the exemption covered the faculty members at Yeshiva, because their authority over University academic policy was nearly absolute. In the thirty-plus years since *Yeshiva* was decided, the Board has decided numerous cases involving the managerial status of college faculty members, sometimes finding that the faculty members have sufficient authority to be excluded from NLRA coverage, sometimes finding that they do not. But I submit that as the

[7] "9 of 10 Professors Say Grad-Student Unions Don't Strain Advisor-Advisee Ties," *The Chronicle of Higher Education*, November 1999.
[8] http://www.2110uaw.org/gsoc/NYU_2110_contract.pdf .

Sixth Circuit stated in a case interpreting *Yeshiva*, "[T]he [managerial] exception must be narrowly construed to avoid conflict with the broad language of the Act, which covers 'any employee,' including professional employees." *Kendall Memorial School v. NLRB,* 866 F.2d 157, 160 (6th Cir. 1989). As the NLRB has noted, an overly broad application of the managerial exception can result in the exclusion of an entire class of professional employees from the coverage of the NLRA. *University of Great Falls,* 325 NLRB 83, 93 (1997), *aff'd,* 331 NLRB 1663 (2000), *reversed on other grounds,* 278 F.3d 1335 (D.C. Cir. 2002). This is consistent with the *Yeshiva* majority's assertion that "[w]e certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690.

Some critics have also expressed concern about the impact of faculty collective bargaining on academic freedom. This issue is perhaps best answered by the American Association of University Professors, which actively defends academic freedom.

> The basic purposes of the American Association of University Professors are to protect academic freedom, to establish and strengthen institutions of faculty governance, to provide fair procedures for resolving grievances, to promote the economic well-being of faculty and other academic professionals, and to advance the interests of higher education. Collective bargaining is an effective instrument for achieving these objectives.[9]

The D.C. Circuit has recently called upon the Board to more fully explain its analysis under *Yeshiva*. The Board is undertaking to do that in *Point Park University*, which is on remand from the D.C. Circuit, and has called for amicus briefs advising it on that matter.

Second, in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), the Supreme Court created an implied exemption from NLRA coverage for primary and secondary school teachers at religious schools in order to avoid a serious constitutional question under the First

[9] http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementcolbargaining.htm, (September 10, 2012).

Amendment. The Court did so on the grounds that teaching at that level would inevitably involve some degree of religious instruction, no matter what formal subject matter was being taught. The Board has extended *Catholic Bishop* to exempt certain college teachers. The District of Columbia Circuit Court of Appeals has questioned whether the Board's method of determining a college's religious nature unduly intrudes upon the college's right to freely exercise its religion. The Board has several cases pending in which it should be able to articulate an application of the *Catholic Bishop* consistent with the D.C. Circuit's understanding of *Catholic Bishop*.

D. Conclusion

In the last thirty years American higher education has changed, among the greatest of those changes has been the use of contingent instructional and research staff. No one should be surprised that the employees most impacted by those changes are coming together through the democratic process of collective bargaining to make their votes heard. Adjunct faculty, many of whom are paid as little as $1,500 for a teaching a semester-long course, and graduate student employees are an inexpensive way for many universities and colleges to close their budget gaps. All these workers are asking for is a method to have some small measure of say in their work lives. That is a right which we afford to almost every private sector employee and universities have not made the case for why they deserve a special exception. Collective bargaining is a democratic and rational process that allows management and workers to find common ground to make their workplaces better. By its very definition it is flexible and there is no reason why workers including teachers and researchers should be denied the right to participate in collective bargaining.