

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

In the Matter of:)
)
GRADUATE EMPLOYEES OF)
NORTHEASTERN UNIVERSITY – UAW,)
)
 Petitioner,) Case No. 01-RC-311566
)
 and)
)
NORTHEASTERN UNIVERSITY,)
)
 Employer.)

POST-HEARING BRIEF OF NORTHEASTERN UNIVERSITY

Robert A. Fisher
rfisher@seyfarth.com
SEYFARTH SHAW LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
Telephone: (617) 946-4800
Facsimile: (617) 946-4801

John P. Phillips
jphillips@seyfarth.com
SEYFARTH SHAW LLP
700 Milam Street, Suite 1400
Houston, TX 77002
Telephone: (713) 225-2300
Facsimile: (713) 225-2340

COUNSEL FOR NORTHEASTERN
UNIVERSITY

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INTRODUCTION

The petitioned-for unit is not appropriate. Petitioner Graduate Employees of Northeastern University-UAW (“the Union”) seeks to mash together individuals whose only connection is that they are enrolled in some graduate degree program at Northeastern University (“Northeastern” or “the University”). The petitioned-for unit includes, for example, PhD students who are on so-called Stipended Graduate Assistantships or SGAs, PhD students who are on fellowships,¹ graduate students hired to serve as yoga instructors, graduate students hired to provide translation services, and graduate students who have work study awards as part of their financial aid package. (*See* Bd. Ex. 3; Pet. Ex. 33(b).²) While PhD students on SGAs perform a research or teaching assistantship as part of their graduate degree program,³ PhD students on fellowships have no such requirement.

Further, other graduate students in the proposed unit perform research or instructional services simply because they applied for and met the qualifications for some posted position on campus. Unlike students on SGAs, their positions are not part of their degree programs and are ad hoc. In fact, graduate students performing some hourly work relating to research or instruction are treated the same as undergraduate students performing similar tasks on an hourly basis. Yet the Union’s petition excludes undergraduate students altogether and excludes students employed

¹ After the hearing, but a few days before post-hearing briefs were due, the Union disclaimed interest in including students on fellowships in the unit.

² Citations to the transcript are identified as “Tr. ____.” Citations to the Board exhibits are identified as “Bd. Ex. ____.” Citations to the Union’s exhibits are identified as “Pet. Ex. ____.” Citations to Northeastern’s exhibits are identified as “NU Ex. ____.”

³ Northeastern disputes that graduate students on SGAs, nearly all of whom are PhD students, are employees within the meaning of the Act and submits that the Board’s decision in *Columbia University*, 364 NLRB No. 90 (2016) was wrongly decided. The Region barred Northeastern from litigating this issue and barred the University from presenting evidence that even under *Columbia*, graduate students on SGAs are not employees within the meaning of the Act.

on an hourly basis to perform a number of non-research or non-teaching related tasks, such as checking students into residence halls. In short, the Union's proposed unit is arbitrary and not based on any logical division in Northeastern's organization. As fully described below, there is no community of interest among the students in the petitioned-for unit.

Further, the Region should reject the Union's attempt to include students at three different campuses (Boston, Burlington, and Nahant). The Board has long presumed that separate locations should be separate units. The Union comes nowhere close to rebutting this presumption.

FACTS

A. General Overview of Northeastern University.

Northeastern is a private, non-profit university with its main campus located in Boston, Massachusetts. (Bd. Ex. 2; Tr. 68, 72.) The Boston campus is located at 360 Huntington Avenue, and runs for about a mile between the Prudential Center and the Museum of Fine Arts in the city of Boston. (Tr. 71-72, 103.)

In addition to its Boston campus, Northeastern has 14 campus locations across the United States, Canada, and the United Kingdom.⁴ (Tr. 72.) The University maintains a campus in Burlington, Massachusetts, which is about 28 miles north of the Boston campus. (Tr. 96; NU Ex. 6; NU Ex. 7; NU Ex. 8; NU Ex. 9.) The Burlington location houses Northeastern's Innovation Campus, which includes start-up and early venture companies. (Tr. 97.) The Burlington campus also houses training facilities relating to pharmaceutical work, and it has workshop facilities where outside organizations have laboratories. (Tr. 98.) The Burlington campus contains the Kostas Center for Homeland Security, which, due to its nature, has specific homeland security

⁴ Northeastern has locations in Arlington, Virginia; Boston, Massachusetts; Burlington, Massachusetts; Charlotte, North Carolina; London, United Kingdom; Miami, Florida; Nahant, Massachusetts; Oakland, California; Portland, Maine; San Francisco, California; San Jose, California; Seattle, Washington; Toronto, Canada; and Vancouver, Canada.

requirements for students or other visitors to enter the building. (Tr. 100, 101.) Any graduate students with research assistantships in laboratories located in Burlington conduct their research at Burlington in those laboratories. (Tr. 101.) They do not conduct their research at any other Northeastern campus, including Boston.

Northeastern also maintains a campus in Nahant, Massachusetts, which is located about 20 miles away from the Boston campus. (Tr. 101.) It houses the Marine Sciences Department, which includes the Coastal Sustainability Institute. (Tr. 101.) Any PhD student conducting a research assistantship in the marine sciences field conducts their research in Nahant. (Tr. 102.)

Students can park for free at the Burlington and Nahant campuses. (Tr. 133.) However, students must pay for parking at the Boston campus. (Tr. 132.)

There are approximately 20,000 graduate students enrolled at Northeastern across its 15 campuses. (Tr. 72.) Those graduate students are pursuing a number of graduate degrees, including Master's degrees, professional doctorate degrees (such as a law degree), and research doctorate degrees ("PhD"). (Tr. 72, 73.)

Northeastern has 10 academic colleges. (Tr. 68.) Of those 10 academic colleges, six colleges offer PhD programs: the Bouvé College of Health Sciences; the College of Arts, Media, and Design; the College of Engineering; the College of Science; the College of Social Science and Humanities; and the Khoury College of Computer Science. (Tr. 73.) There is also a PhD program in the Provost's Office, which is multidisciplinary. (Tr. 74.) In total, Northeastern offers 36 PhD programs, in which approximately 1,700 PhD students are enrolled. (Tr. 74.)

B. Northeastern's Commitment to Experiential Learning.

Northeastern is committed to experiential learning at all levels of its degree offerings, from undergraduate students to PhD students. (Tr. 68.) Experiential learning is fundamental at Northeastern and "is in its DNA." (Tr. 68.) Experiential learning provides students with diverse

experiences that reinforce their academic learning and promote creativity, experience, and reflection. (Tr. 69.) To further its commitment to experiential learning, Northeastern focuses on providing students integrated, real world experiences in students' academic programs. (Tr. 68.) For example, Northeastern offers a co-op program to undergraduate and Master's students that permits them to spend six months at outside partner organizations in which they gain real world experience. (Tr. 69.)

In the context of PhD students, Northeastern offers challenging assignments with partner organizations in industry, government, academia, and the nonprofit sector as part of their educational program. (NU Ex. 18; Tr. 70.) PhD students can, for example, study and conduct research at an outside partner to apply their research in a real-world setting. (Tr. 80, 81.) Such an opportunity teaches the PhD student how to apply his or her research and translate it into a real-world example. (Tr. 81.) In doing so, students can earn a Graduate Certificate in Experiential PhD Leadership. (Tr. 81, 82; NU Ex. 15). When earning the experiential leadership certificate, the PhD student is exposed to experiences outside of the university setting designed to challenge the student to address complex problems, equip the student with cultural agility, creativity, and professional skills, and enrich the student's research and fields of expertise. (NU Ex. 15.) The program is complementary to and aligned with the student's dissertation research, and is designed to deepen and further the student's learning. (Tr. 82.)

Northeastern's commitment to experiential learning for PhD students includes its commitment to providing PhD students with teaching and research opportunities to permit them to become world-class researchers and instructors. (Tr. 78.) To that end, Northeastern provides a teaching certificate to ensure that PhD students learn to teach, practice teaching, and are prepared to teach after they earn their degree. (Tr. 78.) PhD students serving on teaching assistantships can complete the required practicum and earn the graduate teaching certificate. (Tr. 78.) Northeastern

also includes teaching requirements in PhD student's course curriculum. For example, the Khoury College of Computer Science has a teaching requirement in its course curriculum. (Tr. 245, 246, 247; NU Ex. 10; NU Ex. 11.)

C. Earning a PhD Degree.

PhD students earn a research doctorate degree by meeting certain milestones associated with their degree program and by completing and defending a dissertation. (*See, e.g.*, NU Ex. 10.) A dissertation is a body of knowledge that demonstrates that a PhD has been able to sufficiently advance the boundaries of knowledge and has completed novel research that can be cited in the future in the larger scientific and academic community. (Tr. 78, 79.)

To earn a PhD, students must complete the applicable course curriculum for their respective PhD program. Typically, this includes taking academic classes in the first two years of their enrollment, passing a qualifying examination, conducting original research on their dissertation topic and working with a faculty member in a research group to conduct their research, preparing a dissertation, and defending that dissertation. (Tr. 198, 199.) It typically takes a student four to six years to earn the degree. (Tr. 75.)

PhD students are evaluated at least annually based on their academic progress. They must remain in good academic standing and must make progress on their dissertation to continue in the PhD program. (Tr. 91, 203.) The PhD student's evaluation includes how well the particular student performs in classes, the progress the student is making with his or her research and whether he or she is meeting research milestones, and whether the student is meeting any objectives, such as publication objectives. (Tr. 91, 92.) The evaluation includes consideration of the student's service on a teaching assistantship or research assistantship, if applicable. (Tr. 206, 207, 215.)

D. Financial Aid Options for PhD Students at Northeastern.

There are several different ways that PhD students finance their studies.⁵ Some students pay their own way and do not receive any financial assistance. (Tr. 79.) Other students receive financial aid. Northeastern makes financial aid decisions when it admits PhD students to the school, even though the University has not established exactly where the funding will come from for any particular student's financial aid package. (Tr. 75, 86.) Once a student is admitted to a PhD program, Northeastern sends that student an admissions letter. (Tr. 86; NU Ex. 1; NU Ex. 2.)

Students' financial aid packages are guaranteed for five years (provided the student remains in good academic standing), regardless of where the funding ultimately comes from. (Tr. 75, 76.) Thus, if Northeastern were to cease receiving any particular external grant, the University will nevertheless continue to honor the financial aid commitment it made to each student. (Tr. 75, 76.) In other words, a student's actual receipt of the committed funding is not contingent upon Northeastern's receipt of any particular funding source.

Financial aid packages for PhD students are managed by the Office of the Provost, which provides overarching leadership for Northeastern's PhD programs across the colleges. (Tr. 67, 68.) The Provost's Office is responsible for all academic functions at the University, including undergraduate, graduate, and PhD levels. (Tr. 71.)

⁵ In addition to the scenarios described below, Northeastern has Industry PhD students. Industry PhD students are PhD students who are employed by a third party, such as a company or a nonprofit organization, which pays for the Industry PhD student to pursue and complete his or her PhD degree. (Tr. 92.) The third-party company or nonprofit pays the Industry PhD student's normal salary because the Industry PhD student is employed by the third party company. (Tr. 92, 93, 116, 252.) Industry PhD students do not receive stipends or health insurance from Northeastern. (Tr. 252.) Nor do they have research assistantship or teaching assistantship requirements. (Tr. 253.) As such, Industry PhD students are not Northeastern's employees under the Act or *Columbia University*, 364 NLRB No. 90 (2016). In any event, the Union has disclaimed any interest in representing Industry PhD students. (Tr. 254, 255, 486.) Thus, Northeastern does not address the Industry PhD students further.

One form of financial aid is known as a Stipended Graduate Assistantship or SGA. PhD students on SGAs receive the cost of their tuition, health insurance, and an annual stipend. (Tr. 75, 76, 85.) The stipend is divided into three parts (corresponding to semesters) and is paid out in installments during each semester. (Tr. 76, 77.) The amount of the stipend is set by the individual college responsible for the particular PhD program. (Tr. 85.)

PhD students on SGAs also have a service expectation in the form of either a research assistantship or a teaching assistantship. (Tr. 77.) PhD students with research assistantships are expected to spend up to 20 hours per week on the assistantship. (Tr. 77.) However, PhD students on SGAs do not record their hours. (Tr. 77, 78.) Each semester, Northeastern sends PhD students an assignment letter. (Tr. 89; NU Ex. 3; NU Ex. 4.) The assignment letter communicates that student's specific service expectation for the semester. (Tr. 89; NU Ex. 3; NU Ex. 4.)

Northeastern works to ensure that the research assistantships for PhD students on SGAs align with the students' dissertation research. (Tr. 200.) Thus, PhD students on SGAs spend their time in the lab conducting research that relates to and advances their dissertation topic. (Tr. 200, 201, 220, 221.)

Teaching assistantships are designed to teach students how to communicate complex ideas, regardless of whether they pursue careers in academia. (Tr. 78.) In some cases, the teaching assistantship is a requirement of the degree program. (NU Exs. 10, 11.) For example, in Khoury College, a student pursuing a PhD in Computer Science must teach at least three hours of classes and prepare an assignment or quiz. (Tr. 247-48.) In some instances, PhD students fulfill their teaching assistantship by serving as the Instructor of Record, meaning that they are listed in the course catalogue as teaching the course. (Tr. 95.)

Not all PhD students receive SGAs. (Tr. 79.) Some PhD students receive financial aid in the form of fellowships, which are essentially scholarships. (Tr. 79.) Students apply for

fellowships, and fellowships can be funded through both internal and external sources. (Tr. 79, 136, 138.) Some PhD students on fellowships may receive stipends directly from the fellowship donor, whereas other PhD students on fellowships receive the funds from Northeastern. (Tr. 138.) PhD students on fellowships receive tuition payment, funding for health insurance, and a stipend. (Tr. 80.) However, unlike PhD students on SGAs, PhD students on fellowships do not have any service requirements. (Tr. 79, 132.) Thus, PhD students on fellowships are not required to perform research or teaching assistantships. (Tr. 132, 201, 260.) Petitioner Exhibit 30 makes this clear. It states that “Fellowships are awards that do not require a . . . [service] commitment.” If a student with a fellowship is asked to perform service by their college, they will be appointed on an SGA. (Pet. Ex. 30.)

E. Undergraduate and Graduate Students Hired on an Ad Hoc Hourly Basis.

Like most universities, Northeastern offers student employment opportunities to its students, including undergraduate and graduate students. (Tr. 93, 151.) Students can perform a diverse set of tasks as hourly student employees, including jobs as varied as graders, yoga instructors, and resident hall proctors (who permit access to the resident halls). (Tr. 151, 152.) Hourly student employment jobs include work study jobs, meaning that the student’s work is part of their financial aid packages. (Tr. 152, 153.) Federal regulations apply to work study jobs, including that work study cannot exceed a semester, cannot displace full-time employees, and cannot be used for political work or, as an example, to build a church. (Tr. 155, 156.)

The Office of Student Employment, Graduate Assistantships, and Fellows (“SEGAF”)⁶ handles hourly student employment, including work study and non-work study positions. (Tr.

⁶ Northeastern notes that the court reporter in Volume 2 of the transcript incorrectly transcribed the acronym “SEGAF” as both “CGAF” and “CGAP.” (See, e.g., Tr. 148-151). It is clear from the record that both “CGAF” and “CGAP” are misnomers for “SEGAF.” (Tr. 148 (“A: I work at the Office of Student Employment, Graduate Assistantships and Fellowship. Q: Is that referred

148, 149.) SEGAF does not manage SGAs for PhD students.^{7, 8} (Tr. 149.) If a department needs a student worker, SEGAF works with an individual in that department, typically an administrator, to review, approve, and post open jobs to the University's student job board on Workday. (Tr. 152, 155, 190, 191.) The respective department submits a job requisition request to SEGAF, which reviews the request to ensure it is appropriate for student employment. (Tr. 157.) SEGAF reviews the appropriateness based on the description, level of pay requested, and how much time is required to be committed to the role. (Tr. 152.)

While the department may propose a rate of pay, SEGAF is responsible for setting the rate of pay for the job. (Tr. 153, 154.) It uses a series of levels to determine the appropriate pay range for the hourly position. (Pet. Ex. 32.) Unlike PhD students on SGAs, students who fill these hourly positions do not receive a tuition waiver, do not receive a stipend, and do not receive funding for health insurance. (Tr. 93, 94.) Rather, they are paid an hourly rate based on the number of hours they report. Students are required keep track of their time and record their hours in a timesheet each week. (Tr. 158, 159.) If students fail to timely enter their hours, SEGAF is responsible for following up with the students. (Tr. 159.)

to as CGAF? A: Referred to as CGAF.”)). To avoid unnecessary confusion for the reader of the record, Northeastern substitutes “SEGAF” for both “CGAF” and “CGAP” wherever they occur.

⁷ All SEGAF does with regard to PhD students on SGAs is process the stipend amount for payment to the student. (Tr. 149, 150.) Otherwise, SEGAF has no role with regard to PhD students: SEGAF does not handle PhD students' tuition, does not set PhD students' stipend amounts, does not play any role in providing research assistantships or teaching assistantships assignments, and does not evaluate PhD students' performance on research assistantships or teaching assistantships. (Tr. 149, 150.)

⁸ The court reporter mistakenly transcribed “SGA” as “CEGAF.” (Tr. 149.) It is clear based on the structure of the testimony that, at this point, the testimony is discussing graduate students on SGAs, given that the discussion turns immediately to assignment and performance of assistantships. (Tr. 150.) This becomes even clearer based on the first line of questioning in cross examination. (Tr. 160.)

Hourly student positions cannot extend beyond an academic year, and many are for a semester or less. (Tr. 156, 157, 208.) The student is not provided with any commitment for employment beyond the current assignment. (Tr. 57.) They are not guaranteed five years (or any amount or duration) of funding. (Tr. 93, 94.)

Once SEGAF approves the requisition, SEGAF posts the open position to the student job board. (Tr. 152, 154, 155.) Each hourly job is open to all Northeastern students to review and apply. (Tr. 154, 155.) To obtain an hourly job, students are required to complete Form I-9s to verify their authorization to work in the United States. (Tr. 150.) PhD students on SGAs are not required to complete Form I-9s. (Tr. 150.)

A student must meet the requirements of the position. However, there is no general requirement that a student's academic course of study be related to the subject matter of the position. For example, a political science student may apply (and has) for a yoga instruction position. (Tr. 155, 156, 194.) Nor does a student's performance in the hourly role impact their academic performance in their course of study. (Tr. 208, 215.)

After students apply, the department reviews the application and makes a decision on the successful applicant. (Tr. 155.) Once a job is filled, the posting is removed. (Tr. 189.) The successful student is not given an offer or assignment letter. (Tr. 156.)

Students are, on occasion, hired on an hourly basis to perform some research-related or instructional-related tasks. As Petitioner Exhibit 33 demonstrates, SEGAF classifies a wide range of positions as Research Assistants or Teaching Assistants. For example, Petitioner Exhibit 33(b) is a posting for a "Graduate Student Research Assistant." It does not require the student to be in any particular graduate program. In fact, the role does not involve research at all. The applicant must be able to provide translation services. (Pet. Ex. 33(b).) Similarly, Petitioner Exhibit 33(d) is an "RA" position requiring the student to collect news articles on mass murders. (Pet. Ex.

33(d.) The student must be able to use news archives and have an interest in mass killings. (*Id.*) Further, while some positions require the student to be in a particular department, such as criminal justice, some postings are generic. For example, Petitioner Exhibit 33(1) is a “TA” position, for which the student can be a graduate student in any humanities or social science field or have experience studying in such a field. (Pet. Ex. 33(1).)

Students may be hired to provide grading support for instructors. (Tr. 94, 95.) Although the Union’s petition only includes graduate students, undergraduate students also fill these roles. For example, Dr. Ahmed explained at the hearing that she uses undergraduate students rather than Master’s students as graders because they have recently taken the course, know the material, and are excited about it. (Tr. 244-45.) Unlike PhD students on an SGA—who may lead the class and provide lectures, develop the course materials, or teach a seminar or laboratory course—hourly undergraduate or Master’s teaching assistants typically perform none of those tasks, but instead make copies or grade assignments. (Tr. 95.) Nor are hourly undergraduate or Master’s teaching assistants the instructor of record for a course; unlike PhD students on SGAs, who may be an instructor of record. (Tr. 95.)

SEGAF handles complaints from hourly student employees. (Tr. 158.) These complaints range from personality conflicts with their supervisor, to availability issues, to pay issues. (Tr. 158.) SEGAF is also responsible for ensuring that students are keeping track of their hours, and SEGAF will follow up with students who forget to enter their hours to ensure the hours are entered so that SEGAF can process the payroll. (Tr. 159.)

F. Expected Graduation.

PhD students typically earn their doctoral degree within four to six years. (Tr. 75.) Master’s students typically earn their degree within one to two years. (Tr. 102, 103.) Each year some students finish their studies and earn their respective degrees. This spring, in May 2023,

about 140 PhD students with SGAs and about 489 hourly-paid graduate student employees within the petitioned-for unit are expected to graduate. (Tr. 102, 233.)

ARGUMENT

I. The Union Failed to Respond to All Issues Raised in Northeastern’s Statement of Position and Thus Waived Its Right to Challenge Those Issues.

The Region erred in concluding that the Union was not barred from litigating some issues. Under the Board’s Rules and Regulations, “[f]ollowing timely filing and service of an employer’s Statement of Position, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the employer’s Statement of Position.” 29 C.F.R. § 102.63(b)(1)(ii). The petitioner must respond to each issue raised in the employer’s Statement of Position.⁹ *Id.*; *see also* NLRB Form-4812 (“A petitioner must file a Responsive Statement of Position in response to each party’s Statement of Position addressing each issue in each Statement of Position(s).”).

Here, the Union failed to meet its requirement to respond to each issue raised in Northeastern’s timely-filed Statement of Position. Northeastern raised the following issues:

- Graduate students on SGAs are not employees within § 2(3) of the Act and must be excluded because the primary relationship between these students and Northeastern is educational, and thus, to the extent that *Columbia University*, 364 NLRB No. 90 (2016) holds otherwise, it is wrongly decided.

⁹ The Board adopted the Responsive Statement of Position requirement to promote greater efficiency. As the Board explained when it published its final election rules, “[b]y requiring the petitioner to respond to the issues the employer (and other non-petitioning parties) have placed in dispute before the hearing, all parties and the Board itself will have earlier notice of what issues will require litigation at the hearing, should one prove necessary.” 84 FR 69524. The Board also found that “the responsive Statement of Position will also help Agency personnel make hearings more efficient,” by “narrow[ing] the issues and [the Board’s] investigation prior to the hearing, rather than at the start of the hearing.” *Id.* Another stated purpose of the Responsive Statement of Position is to “enable parties to identify circumstances where they are ‘talking past each other,’ clarify the terminology at issue, and identify or even eliminate any related disputes.” *Id.* Such benefits, of course, only accrue when the Responsive Statement of Position is actually responsive to the issues raised in the Statement of Position. Thus, the Board requires that the Union respond to each issue raised in the Statement of Position. 29 C.F.R. §§ 102.63(b)(1)(ii), 102.66(b).

- Graduate students on SGAs are not employees within § 2(3) of the Act even under *Columbia* and thus must be excluded because those students perform research assistantships and/or teaching assistantships in order to satisfy one or more academic degree requirements.
- Graduate students whose stipends are funded by third parties and/or who perform research services for such third parties do not perform services for Northeastern and thus are not employees of Northeastern under *Columbia* or § 2(3) of the Act, and must be excluded.
- Graduate students compensated on an hourly basis do not share a community of interest with graduate students on SGAs and must be excluded.
- Graduate students whose stipends are funded by third parties and/or who perform research services for such third parties do not share a community of interest with graduate students on SGAs, and must be excluded.
- Graduate students performing instructional or research services at campuses other than the Boston campus should be excluded because they do not share a community of interest with graduate students on SGAs at the Boston campus.
- Non-PhD graduate students must be excluded because many will graduate as early as May 2023 and thus their tenure is set to end on a date certain.
- Graduate students compensated on an hourly basis must be excluded because they are given assignments on an ad hoc basis and there is no reasonable expectation of future assignments.
- FERPA prohibits Northeastern from disclosing educational records and student personally identifiable information, other than directory information. Thus, Northeastern is unable to provide certain information, such as work locations, shifts, job classifications, and contact information beyond city, state, and county.

(Bd. Ex. 3.)

Despite Northeastern timely raising these issues in its Statement of Position, the Union did not respond to each issue. Instead, the Union only provided the following responses:

- The petitioned-for unit is appropriate because the issues regarding employee status and scope of the unit are governed by *Columbia*.
- The employees in the petitioned-for unit are eligible to vote because the issues are governed by *Columbia*.
- FERPA does not prevent Northeastern from complying with the Act and the Board's Rules and Regulations.

(Bd. Ex. 4.)

Thus, other than citing to *Columbia University*, the Union submitted what is essentially a general denial. This is insufficient under the plain—and mandatory—language of the rule, and it flies in the face of the spirit behind the rule. If a party could merely deny the issues raised in the Statement of Position without addressing each issue, the entire reason for requiring the Responsive Statement of Position in the first place would be vitiated.¹⁰ Here, the Union failed to respond to each issue raised in Northeastern’s Statement of Position. Accordingly, the Union is precluded from litigating the issues to which it failed to respond. *See Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016).

The Union’s citations to *Columbia* do not save it from preclusion. Northeastern raised many more issues than those addressed by the Board in *Columbia*. First, the Union did not respond to the issues raised by Northeastern relating to the employment status of certain graduate students. In *Columbia*, the Board considered whether graduate student assistants at Columbia University were employees within the meaning of § 2(3). The Board adopted the common law employment relationship test to determine whether graduate student assistants are employees under the Act. *Columbia*, 364 NLRB No. 90, slip op. at 2, 13 (2016). The Board then applied the common law test to the specific facts of Columbia University and determined that Columbia University’s graduate student assistants were employees under the Act. *Id.*, slip op. at 13-18.

Here, Northeastern raised issues beyond what was presented in *Columbia*. For example, *Columbia* did not address the issue raised by Northeastern that graduate students on SGAs who are performing research that directly correlates to their own dissertation topic and does not

¹⁰ If an employer generally denied the appropriateness of the unit in its Statement of Position, the Board would find preclusion. *See, e.g., Ikea Distribution Services, Inc.*, 370 NLRB No. 109, slip op. at 1 (2021).

benefit Northeastern are not employees under the common law test set forth in *Columbia*. Rather, *Columbia* held that Columbia University's graduate student assistants whose research benefited both the specific student and the university were employees. *Id.*, slip op. at 17-18. Nor did *Columbia* address the issue raised by Northeastern that graduate students funded by third parties and who perform research or other services for those third parties are not employees under the common law test.¹¹ Indeed, the practical impact of the Union's failure to respond to each issue raised by Northeastern became clear as the hearing progressed. During the hearing, the Union disclaimed its intent to include Industry PhD students in the proposed unit. (Tr. 486.) This was an issue raised in Northeastern's Statement of Position and could have been resolved pre-hearing. But by providing only a general denial, the Union prevented the Region from determining whether this was in fact a real issue to be litigated before the hearing.

Second, the Union failed to respond to all of the issues raised by Northeastern relating to the appropriate scope of the bargaining unit. Again, the Union simply cited to *Columbia*. But that decision did not address the many issues raised by Northeastern relating to the appropriate scope of the unit. In *Columbia* the Board applied the community of interest factors set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), to the specific facts of Columbia University's graduate student assistants. *Columbia*, 364 NLRB No. 90, slip op. at 18-19. The Board found that while there were dissimilarities between the students, they all worked in similar settings (labs and classrooms) and performed similar functions supporting the university's teaching and research goals. *Id.*

¹¹ If anything—and as explained later in this brief—the Board recognized that students whose stipends are not tied to completing research for the university are not employees under the Act. *Columbia*, 364 NLRB No. 90, slip op. at 17 (2016) (“It is theoretically possible that funders may wish to further a student’s education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder’s own particular research goals.”).

Northeastern raised additional issues beyond those considered in *Columbia* and based on the specific facts present at Northeastern. For example, Northeastern explained that graduate students who do not receive an SGA and who do not receive a full tuition stipend, but instead are given assignments on an ad hoc basis and compensated on an hourly basis, do not share a community of interest with graduate students on SGAs. (Bd. Ex. 3.) The Union failed to respond to those issues. (Bd. Ex. 4.)

The Union also failed to respond to the issues raised by Northeastern relating to the students who will graduate as early as May and the students who are given assignments on an ad hoc basis. (Bd. Ex. 3.) Instead, the Union merely gave a blanket citation to *Columbia*, (Bd. Ex. 4), but the *Columbia* Board did not address those issues. In *Columbia*, the Board held that graduate student assistants who averaged only two semesters of assignments were eligible to vote, and emphasized this holding was “within the context of this unit.” *Columbia*, 364 NLRB No. 90, slip op. at 20. Here, many Northeastern graduate students will graduate in less than three months, and many other students only perform assignments on an ad hoc basis. (Bd. Ex. 3; *see also* Tr. 208 (ad hoc hourly assignments may be less than a semester); Tr. 375 (union witness testified to taking a hourly role between semesters, over winter break).) The issues raised by Northeastern in its Statement of Position are not the same as those raised by *Columbia*, but the Union failed to respond to the actual issues raised by Northeastern.

II. PhD Students on SGAs and Fellowships Are Not Employees Under the Act Because Their Relationship with Northeastern Is Academic.

Northeastern acknowledges that the Region prohibited it from litigating whether *Columbia* was wrongly decided and whether even under *Columbia*, PhD students on SGAs who perform research or instructional services are not employees under the Act. Northeastern submits that it should have been permitted to put on evidence on these issues, and that the Regional Director erred

in this respect. Notwithstanding this error, what is in the record demonstrates that Northeastern's PhD students are not employees under the Act because the relationship is an academic one, not an employment relationship. This is true whether or not the Region applies *Columbia*.

A. Northeastern's PhD Students on SGAs Are Not Employees Under the Act; To the Extent *Columbia* Holds Otherwise, It Is Wrongly Decided.

1. *Columbia* unjustifiably departed from settled Board precedent.

Columbia represents an unjustified departure from settled precedent recognizing the unique nature and relationships in higher education. Both the Supreme Court and the Board have long recognized that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world.” *NLRB v. Yeshiva Univ.*, 444 U.S 672, 681 (1980) (universities do “not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world.”) (quoting *Adelphi Univ.*, 195 NLRB 639, 648 (1972)). Thus, the Board's long-standing precedent found that graduate student assistants were not employees under the Act.

In *Adelphi University*, the Board excluded graduate students serving as teaching and research assistants from a unit of full-time faculty members, holding that the graduate students were “primarily students” who were “working toward their own advanced academic degrees.” 195 NLRB at 640. Additionally, in *Leland Stanford Junior University*, the Board held that graduate research assistants were not employees within the meaning of Section 2(3) of the Act. 214 NLRB 621, 623 (1974). The Board found that the research assistants at issue there were not statutory employees because, like the graduate students in *Adelphi University*, they were “primarily students.” *Id.*

For over 25 years, the Board adhered to these principles, departing briefly from this established precedent in *New York University*. See *New York University*, 332 NLRB 1205 (2000)

(finding student assistants were employees under the Act). However, recognizing that the *NYU* decision was wrongly decided, the Board in *Brown University*, 342 NLRB 483 (2004), correctly shifted the focus back to the essential nature of the academic environment.

In *Brown*, the Board looked to the “underlying fundamental premise of the Act” which is “designed to cover economic relationships.” *Brown*, 342 NLRB at 488. The Board explained that its longstanding rule “not [to] assert jurisdiction over relationships that are ‘primarily educational’ is consistent with these principles.” *Id.* *Brown* therefore applied the primary purpose test to decide whether graduate students were employees. *Id.* In *Brown*, the Board recognized the “simple, undisputed fact” that each of the individuals in the petitioned-for unit first had to be enrolled at the university before they could be awarded the teaching assistantship, research assistantship, or proctorship roles at issue in that case. *Id.* The students serving in those roles spent “only a limited number of hours performing their duties,” as their principal time commitment was “focused on obtaining a degree and, thus, being a student.” *Id.* Their service as graduate student assistants was “part and parcel of the core elements of the Ph.D. degree.” *Id.* Because the student assistants were “first and foremost students, and their status as a graduate student assistant [was] contingent on their continued enrollment as students,” the Board found that they were primarily students.” *Id.*

The Board recognized that graduate student assistants teach and conduct research as part of their overall educational experience, and such duties are an integral part of being a graduate student that “cannot be divorced from the other functions of being a graduate student.” *Id.* at 489. Thus, *Brown* held that “in light of the status of graduate student assistants as students, the role of graduate student assistantships in graduate education, the graduate student assistants’ relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one.” *Id.* at 489.

In *Columbia*, the Board reversed *Brown*, holding that an employment relationship can exist under the Act between a college or university and its graduate students. 364 NLRB No. 90, slip op. at 1-2, 5-6. In overturning *Brown*, the Board stated that “[s]tatutory coverage [under the NLRA] is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.” *Id.*, slip op. at 2. Thus, an individual “may be both a student *and* an employee; a university may be both the student’s educator *and* employer.” *Id.*, slip op. at 7 (emphasis in original). The Board read the definition of “employee” in Section 2(3) of the Act in a “strikingly” broad manner; *id.*, slip op. at 4; and held that student assistants meet the common-law definition of employee that establishes that an employment “relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.” *Id.*, slip op. at 3 (quoting *NYU*, 332 NLRB at 1206). The *Columbia* decision rejected not only *Brown*, but also the decades-old line of precedent under *Leland Stanford* holding that research assistants are not employees under the Act.

2. Relevant decisions do not support imposing the Section 2(3) definition of “employee” on PhD students.

Section 2(3) of the Act provides that “[t]he term ‘employee’ shall include ‘any employee.’” 29 U.S.C. § 152(3). It does not further define the term, nor is “employee” defined elsewhere in the Act. As the Supreme Court and the Board recognize, the Act’s application cannot be determined by a simplistic application of the common law agency definition of “employee.” “In doubtful cases resort must still be had to economic and policy considerations to infuse § 2(3) with meaning.” *Allied Chem. & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971); *see also WBAI Pacifica Found.*, 328 NLRB 1273, 1275 (1999) (“At the heart of each of the Court’s decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act.”).

The Board and reviewing courts have thus held that individuals who could conceivably fall within the Act's definition of "employee" may nonetheless be denied collective bargaining rights where there are policy reasons for doing so. *See, e.g., NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974) (managerial employees are not covered by the Act, even though they are not specifically excluded under Section 2(3)); *Pittsburgh Plate Glass Co.*, 404 U.S. at 166 (excluding retirees from the Act's coverage); *Goodwill Industries of Tidewater, Inc.*, 304 NLRB 767, 768 (1991) (workers at a rehabilitative facility excluded from definition of "employee" because the employment relationship was not based on typical economic factors); *Northwestern University*, 362 NLRB 1350, 1352 (2015) (holding that "it would not promote stability in labor relations to assert jurisdiction" even if scholarship players were found to be statutory employees).

The Board has continuously emphasized the existence of a "fundamental economic relationship" in defining "employees" under the Act, which is missing in the relationship between a university and its graduate student assistants. As noted in *Brown*, graduate student status is synonymous with graduate student assistant status because student assistantship positions are often integral and inseparable parts of educational programs designed to develop graduate students into teachers and scholars. *Brown*, 342 NLRB at 489 ("The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked . . .").

The relationship between Northeastern and its PhD students on SGAs simply cannot be described as "fundamentally economic" in nature. The teaching and research performed by graduate students at Northeastern is an integral part of their academic studies. In most instances, graduate student assistants teach and conduct research as part of the program in which they are pursuing a degree. (Tr. 77, 200, 201, 221, 222.) Research assistantships and the research performed in connection with such assistantships are intended to align with a student's dissertation topic. Moreover, Northeastern's curriculum and entire approach to its educational

mission is designed to provide students with experiential learning opportunities. Accordingly, PhD students pursue research and teaching opportunities both at Northeastern and in the “real world.” (Tr. 68, 69, 80, 81.) These opportunities do not entail an employment relationship. To the contrary, PhD students are undergoing an educational process to become first-class researchers and to communicate complex ideas.

Additionally, *Columbia*’s reliance on the “direction” and right to control the work of graduate student assistants is misguided and ignores the realities of academia. Northeastern faculty members do not manage students as an employer would manage employees. Rather, PhD students participate in collaborative learning environments, the purpose of which is to further Northeastern’s goal of preparing graduate students to become first-rate researchers.

Unlike an underperforming employee, graduate students who underperform in their teaching duties are typically not pulled from the classroom. Rather, the student’s faculty advisor considers the student’s performance in the teaching assistantship as part of their larger review of the student’s academic progress. (Tr. 91, 92, 203, 206, 207, 215.)

As in *Leland Stanford* and *Brown*, the stipends received by Northeastern graduate students are not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient. *See, e.g., Leland Stanford, supra*, at 621-22. Instead, the goal is to provide students with financial support. *Id.* The fact that a PhD student’s deficient performance as a teacher or researcher is one factor to consider in evaluating the student’s overall academic progress further establishes that the relationship between PhD students and Northeastern is purely educational. Students do not receive their stipend for services rendered to Northeastern; they receive their stipend as financial support to assist them in meeting their educational requirements.

The teaching and research performed by PhD students are educational and, in many ways, indistinguishable from any other learning experiences PhD students encounter during their

studies. *Columbia* ignores the reality of this overwhelmingly educational relationship. For this reason and the reasons set forth above, *Columbia* was incorrectly decided. The previously well-settled law articulated in *Brown* and *Leland Stanford* should apply. As such, PhD students on SGAs who teach or conduct research are not employees under the Act.

B. PhD Students on Fellowships Are Not Employees Under *Columbia*.

Beyond the *Columbia* issue generally, another threshold issue arose during the hearing—the Union’s contention that students on fellowships are included in the unit.¹² After the close of the hearing, however, the Union notified Northeastern that it disclaimed interest in representing students on fellowships. Accordingly, Northeastern only addresses this issue briefly, to help demonstrate why the same reasoning that precludes students on fellowships from being employees under *Columbia* applies equally to students on SGAs.

In *Massachusetts Institute of Technology*, Case No. 01-RC-304042 (2023), the Region concluded that students on fellowships were not employees under the Act or *Columbia*. There, the evidence established that MIT finances some graduate education through fellowships, which are both internal (offered by MIT) or external (offered by, for example, a private company). *Id.* at 3-4. A fellowship recipient at MIT does not have any formal research obligations associated with its receipt of the fellowship. *Id.* at 4. Moreover, funding attaches to a particular student, not a particular project. *Id.* At 7.

On these facts, the Region held that graduate students on fellowships are not employees under the Act. *Id.* at 2, 10. The Region explained that, under *Columbia*, “the common law

¹² The Union’s petition does not include graduate students on fellowships. The petitioned-for unit is defined as including graduate students enrolled at Northeastern who provide research or instructional services. Moreover, because the petition does not mention students on fellowships and the Union did not attempt to amend its petition, the Union waived its right to assert that PhD students on fellowships are employees under the Act and within the petitioned-for unit. In any event, the Union has disclaimed interest in representing the students on fellowships.

definition of employment requires that the students perform work, directed by the university, in exchange for compensation.” *Id.* However, “the work performed [by graduate students on fellowships] is indistinguishable from academic work and the direction is indistinguishable from academic direction.” *Id.* Moreover, “the compensation received by the fellows is not directly tied to completing particular tasks, as directed; rather, it is tied to maintaining academic good standing.” *Id.* Students on fellows conduct thesis research to earn their degrees, but they do not do so “under the direct supervision of a faculty member who controls their funding and makes certain that their [research] aligns with the objectives in the contract on which they are supported.” *Id.* at 10-11. Thus, the Region concluded that “[t]he fact that fellows must meet no employment responsibilities or service requirements to receive or maintain their fellowship awards supports a finding of non-employee status.” *Id.* at 11.

This same analysis holds true for Northeastern’s graduate students on fellowships; they have no research or teaching obligations. (Tr. 79, 132, 201, 260.) The only research they conduct is directed toward their own dissertation and their own academic progression. This analysis also compels the conclusion that PhD students on SGAs are not employees under the Act. The Union argued at the hearing that students on fellowships who are doing research in a lab are indistinguishable from those on SGAs doing research in a lab. But that only demonstrates that students on SGAs are students, not employees.

C. PhD Students on SGAs Are Not Employees Under *Columbia*.

Even if *Columbia* were to apply, PhD students on SGAs are still not employees under the Act. In *Columbia*, the Board adopted the common-law of agency to determine whether a student is an “employee” under the Act. *Columbia*, 364 NLRB, slip op. at 5. Common-law employment requires that the employer have the right to control the employee’s work, and that the work is performed in exchange for compensation. *Id.*, slip op. at 17 (citing *Seattle Opera Assn.*, 331

NLRB 1072, 1073 (2000)). The Board in *Columbia* emphasized that the existence of some other relationship between Northeastern and PhDs students on SGAs was immaterial.

However, unlike the relationships at issue in *Columbia*, the SGA at Northeastern is intended to enable the student to achieve his or her academic goals and earn a PhD degree. The primary and overwhelming goal of research assistantships is for students who receive them to assist the students in pursuing their dissertation research and to develop the skills necessary to become excellent researchers. Their duties as research assistants are so intertwined with the research related to their studies as to be wholly indistinguishable, usually forming the basis of their theses or dissertations. (Tr. 77, 200, 201, 220, 221.) In fact, Northeastern does not distinguish in practice between time spent by a PhD student on an SGA conducting research associated with that student's research assistantship and time spent by that PhD student on an SGA conducting research associated with that student's dissertation topic. (Tr. 201, 202.) As Dr. Williams testified, there is no difference in the research conducted by a PhD student on an SGA in his lab versus a PhD student not on an SGA and without a service assignment. (Tr. 201, 202.) Moreover, PhD students must continue to make progress on their dissertation research in order to remain in good academic standing and in order to continue in the PhD program. (Tr. 203.)

Similarly, the primary goal of Northeastern's teaching assistantship is to further students' experiential learning and prepare students for their careers. (Tr. 78.) A PhD student with a teaching assistantship can earn a teaching certificate which demonstrates that the PhD student is an effective teacher. (Tr. 78.) And getting instruction on being an effective teacher is crucial, because, through the process of teaching, PhD students learn how to communicate complex ideas, which is what they will need to as an advanced researcher after they graduate, whether in academia, industry, or another organization. (Tr. 78.) Furthermore, there are PhD programs in

which students must satisfy a teaching requirement in order to graduate, regardless of the source of funding. (Tr. 247, 248.)

In *Columbia*, the Board focused on the faculty's "direction" of student research assistants' work. That is wholly lacking here. At Northeastern, students are encouraged to learn and appreciate the intellectual rigors of complex research projects and assignments. They are not "directed" in the same way that an employer directs or controls an employee's work. Rather, the goal of the relationships between faculty and students performing research assistant duties is to benefit students intellectually and strengthen their education.

Northeastern also places a high emphasis on experiential learning. Experiential PhD students conduct research and continue their learning outside of the university setting at a third-party company. Northeastern does not control what those students are doing, other than from an academic perspective in that Northeastern monitors their academic progress. (Tr. 108.) Although monitoring their academic progress can include a consideration of the research the PhD student is conducting at the third party, this only reinforces that the relationship is an academic relationship, not an employment relationship. (Tr. 108, 109.) Nor does the fact that the third-party company provides Northeastern with compensation as part of participating in the experiential PhD program convert the experiential PhD student's relationship into an employment relationship with Northeastern. To the contrary, the PhD student is pursuing an experiential learning certificate as part of that student's academic progression; the student is not under the control of Northeastern (beyond Northeastern ensuring that the student is meeting his or her academic requirements).

Thus, although the Region barred Northeastern from presenting evidence on this issue, the record evidence shows that the PhD students on SGAs in the petitioned-for unit are distinguishable from the graduate students at issue in *Columbia*. They are not students *and* employees. They are *students*. Indeed, the Union conceded at the hearing that any purported

employment relationship is “overlapping” with the educational relationship; it is not distinct. (Tr. 119). While the Union tried to claim that this is consistent with *Columbia*, the Board’s holding in that case is premised on the notion that a student’s service to Columbia was for the benefit of the university and distinct from the educational relationship.

The Region’s decision in *MIT*, Case No. 01-RC-304042 (2023), reinforces this conclusion. Just like the graduate student fellows at issue in *MIT*—and especially combined with Northeastern’s focus on experiential learning—the research and teaching that Northeastern’s PhD students on SGAs perform is indistinguishable from their academic work and from their dissertation research. Nor does any faculty member control any PhD students’ funding or stipend; Northeastern commits five years of funding to each graduate student regardless of the source of that funding. (Tr. 75, 86.) If any particular funding does not materialize or ceases to exist, Northeastern still continues the students’ funding. (Tr. 75, 86.) Thus, just like in *MIT*, “the work performed [by graduate students on SGAs] is indistinguishable from academic work and the direction is indistinguishable from academic direction.” *MIT*, Case No. 01-RC-304042, at 10.

Accordingly, the Region should find that PhD students on SGAs are not employees within the meaning of § 2(3) of the Act or under *Columbia*.

III. The Petitioned-For Unit Is Not Appropriate Under *American Steel*.

In *American Steel Construction, Inc.*, 372 NLRB No. 23 (2022), the Board returned to the standard set forth in *Specialty Healthcare*¹³ for evaluating whether a petitioned-for unit is appropriate. Under *American Steel*, the Union must establish that employees in the petitioned-for unit “(1) share[] an internal community of interest; (2) [are] readily identifiable as a group based on job classifications, departments, functions, work locations, skills, or similar factors; and (3)

¹³ *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).

[are] sufficiently distinct.” *American Steel*, 372 NLRB No. 23, slip op. at 17. Here, the Union cannot establish these requirements.

A. *Columbia Did Not Address the Issue of Whether Northeastern’s Student Employees Share a Community of Interest with Its PhD Students on SGAs.*

Because the facts are against it, the Union contends that the Board in *Columbia* held that a unit consisting of PhD and Master’s students is presumptively appropriate. This argument was rejected by the Region when it allowed the evidentiary hearing to proceed after Northeastern’s offer of proof. And for good reason. The Board in *Columbia* adopted no such presumption. In that case, the Board determined that the students shared a community of interest only after applying the community of interest factors from *Specialty Healthcare* and only “within the context of this unit.” *Columbia*, 364 NLRB No. 90, slip op. at 20.¹⁴

Further, the facts there are distinguishable from the facts here. The Board found that Master’s and PhDs students at Columbia performed similar duties under the guidance of a faculty member or academic department. *Id.*, slip op. at 14, 19. Further, most of the students at *Columbia* were “appointed on a semester-long basis and are paid in part through a tuition remission and in part via a bimonthly stipend.” *Id.* at 19. That is not true here. Rather, student employees are paid on an hourly basis and their length of employment varies. Indeed, it is often even less than a semester. (Tr. 208.) Union witness Daniel Braconnier testified that he took an hourly position between semesters to make some extra money during winter break. (Tr. 375.)

¹⁴ The Board in *Columbia* also affirmatively recognized that, even among Columbia University’s graduate student assistants, there were other potentially appropriate units: “[W]e find that—although there might potentially be other appropriate unit groupings among these student assistants—the petitioned-for classifications share a sufficient community of interest to form an appropriate unit.” *Columbia*, 364 NLRB No. 90, slip op. at 19 (emphasis in original); *see also Yale Univ.*, Case No. 01-RC-183014 (2017) (certifying nine different graduate student units).

Thus, *Columbia* did not answer the question of whether Northeastern’s student employees share a community of interest with Northeastern’s PhD students on SGAs. As such, the Union failed to meet its burden of establishing the appropriateness of the unit.¹⁵

B. Master’s Students Paid Hourly Do Not Share a Community of Interest With PhD Students on SGAs.

There is no community of interest between hourly-paid Master’s and other graduate students and PhD students on SGAs. When evaluating whether a community of interest exists, the Board examines:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

American Steel, 372 NLRB No. 23, slip op. at 2. In doing so, the Board requires that the petitioned-for unit be “homogenous”—the Board will reject a petitioned-for unit “where the petitioned-for employees represent a heterogeneous grouping of classifications with disparate interests.” *Id.*, slip op. at 3.

A heterogenous grouping can be found when the diversity of interests is greater than the common interests. *The Grand*, 197 NLRB 1105, 1106 (1972) (for a unit to be appropriate, elements of common interest must “supply a sufficient bond to overcome the diversity of interests among employees”). Factors can include mutuality of interests in wages, hours, and other working conditions, frequency of contact and interchange with other employees, and functional integration. *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007); *Yuengling Brewing*

¹⁵ In this respect, the Region’s requirement that Northeastern make an offer of proof on the appropriateness of the unit (as well as other issues) and then proceed with its case improperly shifted the burden from the Union to Northeastern.

Company of Tampa, Inc., 333 NLRB 892, 892 (2001). The determination that the skills, duties, and qualifications of an employee grouping are diverse supports a finding that a unit is inappropriate. *Tuskegee Institute*, 221 NLRB 944, 944 (1975). A heterogenous group also lacks common supervision, place of work, and performs generally unrelated work. *Hayes Aircraft Corp.*, 98 NLRB 362, 365 (1952) (establishing separate voting groups for carpenters and cabinet makers, and maintenance mechanics).

Here, the petitioned-for unit is heterogenous, not homogeneous. There is no community of interest between hourly paid Master's and other graduate students and PhD students on SGAs.

1. Hourly-paid students and PhD students on SGAs are organized differently.

There is a completely different organizational structure relating to hourly student employees and PhD students on SGAs. Student employment is administered and supported by SEGAF, which reviews and approves all postings, posts jobs to Workday, and manages the process. (Tr. 148, 149.) Student employees can get jobs either through work study, which cannot extend beyond a semester and which must comply with a host of other statutorily required conditions (all of which is managed by SEGAF), or non-work study jobs, which cannot extend beyond one academic year. (Tr. 156, 157.) Students may also be hired for less than a semester. (Tr. 208, 375.) (Braconnier testifying that he worked as an hourly employee between semesters, during winter break).

Student employees are hired on an ad hoc basis, paid hourly, and record their hours worked each week. (Tr. 155, 158, 159.) If a student employee fails to timely enter his or her hours, the student will not be paid and SEGAF is responsible for following up with the student. (Tr. 159.) Student employees are not evaluated in the same manner as PhD students on SGAs; rather,

unlike a PhD student, a student employee's performance in an hourly position has no impact on that student's academic performance. (Tr. 215.)

Moreover, student employees are not limited to PhD students or even graduate students; nor are student employees limited to research- or teaching-related roles. To the contrary, SEGAF treats all student employment the same, at both the graduate and undergraduate levels. All students can apply for hourly positions relating to a diverse set of tasks, from research support, to yoga instruction, to checking in students at the resident halls, and everywhere in between—all of which is managed in the same manner by SEGAF. (Tr. 148, 149, 151, 152.)

PhD students on SGAs are organized in a completely different matter. (Tr. 212.) SEGAF is not responsible for supporting PhD students. Instead, the SGA process is managed out of the Provost's Office. (Tr. 67, 68.). PhD students on SGAs receive a funding commitment for five years with their admissions decision. (Tr. 86; NU Ex. 1). They are not required to keep track of their hours; they do not apply for positions on Workday; their performance on their research or teaching assistantship is part of their academic review and progression; and they are managed in a completely different matter. Thus, this factor does not support a community of interest.

2. Hourly-paid students and PhD students on SGAs have distinct skills and training.

Student employees hired through SEGAF and PhD students on SGAs have distinct skills and training. Students apply to open hourly positions through SEGAF, and there is no requirement that the position be connected in any way to the students' area of study. (Tr. 155, 156, 194.) Indeed, the types of positions available to students through SEGAF is incredibly diverse, ranging from graders, to yoga instructors, to resident hall proctors (permitting access to resident halls), and all manner in between. (Tr. 151, 152.)

Although the Union seeks to limit the petition to jobs involving instructional or research services, SEGAF broadly classifies jobs as teaching or research assistant positions. Even the postings selected by the Union demonstrate this: For example, Petitioner Exhibit 33(b), which is a posting for a “Graduate Student Research Assistant,” does not actually require research. Rather, it requires the applicant to be able to translate written and oral Haitian Creole, Chinese, Portuguese, and Spanish. (Pet. Ex. 33(b).)

For example, Union witness Chelsea Diaz testified that she was granted a work study job as part of her financial aid package as a law student.¹⁶ (Tr. 292-93.) However, her work had nothing to do with her ability to earn a law degree. (*Id.*) Nor does she receive any credit towards her degree through her performance of work study jobs. (Tr. 300). These were just jobs to earn extra money.

Moreover, not all hourly student employees have the same skills and training. Dr. Ahmed testified that she typically uses undergraduate students (hired hourly through SEGAF) as graders in her course rather than Master’s students. (Tr. 244.) In her view, the undergraduate students have a better understanding of the course and its materials.

PhD students on SGAs, on the other hand, have the distinct skills and training necessary to conduct research and teaching assistantships. Indeed, the whole purpose of Northeastern’s curriculum for PhD students is to provide them with the hands-on training and skills to perfect and hone their research and teaching skills. (Tr. 68, 69, 70, 78.) In contrast, the record testimony

¹⁶ The law school experience—in which students are pursuing a professional degree—is very different from the PhD experience or other graduate school experience. *See, e.g., Syracuse University*, 204 NLRB 641, 643 (1973) (noting that law faculty have different interests than other university faculty, including that law faculty are “oriented more closely to their chosen field than to the academic or university world, with intellectual interests more nearly aligned with those of their brethren in practice than with their academic colleagues of the faculty”). Thus, Ms. Diaz’s testimony of her experience as a part-time law student employee is not relevant or representative of PhD students’ or other graduate students’ experiences.

demonstrates that graduate and other hourly-paid student employees do not have the skills to teach and perform the advanced teaching assistant roles that come with a teaching assistantship. (Tr. 207, 223.)

Northeastern also provides PhD students with an orientation program that discusses, among other things, their research experience. (Tr. 90, 91.) Thus, the record evidence shows that student employed through SEGAF and PhD students on SGAs do not have the same skills and training.

3. Hourly-paid students and PhD students on SGAs have distinct job functions and perform distinct work.

Hourly-paid Master's students and PhD students on SGAs do not perform the same tasks. PhD students on teaching assistantships lead the class and provide lectures, develop the course materials, and teach a seminar or laboratory course. (Tr. 95, 202, 222.) PhD students on SGAs may also be the Instructor of Record, meaning that they are the only teacher of the course. (Tr. 95.)

Hourly-paid students are different. As a threshold issue, student employees perform a host of different tasks, depending on the specific job in question. A yoga instructor or a student translating Haitian Creole, for example, is not similar to a PhD student conducting advanced research in physics. Nor are such hourly positions similar to what was described by Union witness Max Von Hippel, who testified that he utilizes mathematical techniques and computation logic to identify vulnerabilities in computer protocols and then publishes those results in peer reviewed journals. (Tr. 450.)

To the extent a student is hired to assist with teaching, that student would almost always be asked to only grade assignments. (Tr. 95, 207, 223). Union witness Chelsea Diaz made clear that her role as a teaching assistant is different from that of a PhD student on an SGA. As the "teaching assistant" for a Constitutional Law course, she does not teach. She holds office hours

by appointment and she performs an optional review in which she presents a recycled PowerPoint presentation.¹⁷ (Tr. 295-96.)

Moreover, PhD students may have teaching requirements in their course curriculum. When they do so, the PhD student is expected to perform far more than merely grading assignments. (Tr. 247, 248; NU Ex. 10; NU Ex. 11.)

The Union's witnesses' testimony does not change these facts. To the contrary, their testimony was largely conclusory and not based on personal knowledge. For example, Union witness Lisa Oakley testified that she does not actually know whether or not certain individuals were PhD or Master's students. Instead, she merely Googled an individual's name in anticipation of testifying at the hearing. (Tr. 355.) Similarly, Union witness Marcella Heineke testified that she does not know which students have SGAs or teaching or research assistantships. (Tr. 428-430.) And she admitted that she has only been in laboratories on occasion and does not have knowledge about what students are actually doing in those labs. (Tr. 435-37.)

Thus, the record evidence shows that student employees and PhD students on SGAs perform distinct job functions and work.

4. Hourly-paid students and PhD students on SGAs are not functionally integrated.

Hourly-paid students and PhD students on SGAs are not functionally integrated because they perform different tasks. Of course, there is no functional integration between PhD students on SGAs and the vast majority of student employees who perform all sorts of different functions at the University (such as checking students into resident halls). And even when student employees have marginally research- or teaching-related positions, those positions are not

¹⁷ On redirect, Diaz attempted to claim that her review session is different than that of her predecessor because she provides three sessions. However, she admitted that her decision to offer multiple sessions was based on her experience as a student. (Tr. 307.)

functionally integrated with PhD students on SGAs. For example, Dr. Williams testified that in the very limited situations where the Physics Department would hire a Master's student in an hourly role, that student would be limited to grading. (Tr. 207.) And in the even more limited situation where a student employee may be asked to cover some portion of a PhD student's duties, the student employee would not cover all of the duties; at most, they may be asked to take on some grading assignments. (Tr. 209.)

The Union witnesses' testimony supports this. For example, Union witness Chelsea Diaz, a second year law student, testified that her financial aid package included work study. Accordingly, her two jobs have nothing to do with Ms. Diaz obtaining her law degree. (Tr. 292, 293, 297, 298.) No PhD student on an SGA performs similar work as part of that student's research or teaching assistantship.

Moreover, even when a Master's student may be in a research setting in a lab, the Master's student is not performing the same work as a PhD student on a research assistantship. Nor is the student functioning under the same operational framework. For example, Dr. Niedre testified about a Master's student in his lab who is not even an hourly-paid student employee, but instead is receiving course credit (and paying tuition) for the education the student is receiving in Dr. Niedre's lab. (Tr. 222.)

5. Hourly-paid students and PhD students on SGAs do not have frequent contact.

There is also no frequent contact between hourly-paid students and PhD students on SGAs. Again, as a threshold matter, there is no contact between the majority of hourly student positions and PhD students on SGAs. PhD students on SGAs do not, for example, have frequent contact with a Master's student who happens to teach yoga as an hourly position, except perhaps to take the yoga class. Nor is there frequent contact even between the hourly positions that contain some

type of research or instructional component. For example, Dr. Williams testified that the College of Science very rarely hires Master's or other graduate students on an hourly basis. (Tr. 207.) Dr. Ahmed testified that she does not even hire graduate students on an hourly basis; instead, she hires undergraduate students as they are closer to the course material and better suited for her needs. (Tr. 244.)

Union witness Marcella Heineke similarly testified that she had no interaction with Master's student employees (or any other student employees) during her teaching assistantships. (Tr. 393.) And of course, there is no contact between Union witness Chelsea Diaz and any PhD students on SGAs because Ms. Diaz is a law student and there are no PhD students in the law school.

The only evidence of contact between hourly graduate students and PhDs students was through the testimony of Lisa Oakley. According to Ms. Oakley, students would make presentations at weekly or bi-weekly meetings. However, she admitted that this was a process for students to get feedback on their research and was part of their academic progression. (Tr. 346-47.) It had nothing to do with any alleged employment. In short, there is no frequent contact, and, this factor weighs against a community of interest.

6. Hourly-paid students and PhD students on SGAs do not interchange.

There is also no interchange between hourly-paid Master's students and PhD students on SGAs. The vast majority of students performing hourly-paid student jobs have no interchange with PhD students on SGAs. For example, a PhD student on an SGA does not fill in for a Master's student teaching yoga. As another example, none of the Union's witnesses fill in for an hourly student employee translating Haitian Creole.

Moreover, even when a PhD student and a Master's student are performing some teaching-related duties within the same department, there is no interchange. At most, a Master's student could conceivably be hired on an ad hoc basis to cover grading, but even then the

Master's student would not be assuming all of the duties performed by a PhD student on an SGA.¹⁸ (Tr. 209, 210.)

7. Hourly-paid students and PhD students on SGAs have distinct terms and conditions.

The terms and conditions governing student employees and PhD students on SGA are distinct as well.

First, the rates and method of compensation are vastly different. Student employees are paid by the hour at the rate set by SEGAF. SEGAF determines the rate based on factors, such as the level of responsibility the role entails. (Tr. 153, 154.) Student employees are paid on a biweekly schedule. (Tr. 154.) Student employees also receive no additional benefits beyond an hourly rate. (Tr. 295.) In contrast, PhD students on SGAs receive tuition waivers, health insurance (including dental insurance), and annual stipends, which are paid out on a semi-monthly basis. (Tr. 75, 85, 159.)

Second, the length of student employees' employment is different from PhD students' SGA term. PhD students on SGAs are provided a five-year funding commitment at the time they are admitted to Northeastern. (Tr. 75, 86.) Hourly student employees, in contrast, apply for discrete ad hoc positions through Workday as those positions become available. Those positions are no more than one year (for non-work study positions) or one semester (for work study positions), and may even be for less than a semester. (Tr. 156, 157, 208, 375.) As Union witness Chelsea Diaz explained, she has no commitment to serve as a teaching assistant in the future.¹⁹

¹⁸ While Lisa Oakley tried to claim that she and Master's students performed the same tasks, she was not sure who was a Master's student versus a PhD student, except that she Googled names to prepare for the hearing. (Tr. 355.)

¹⁹ While she testified that the professor for whom she does case research would like her to continue in that role, she has not resumed that work because she did not have the bandwidth. That

(Tr. 299.) Similarly, Union witness Lisa Oakley explained that while she had a funding commitment through graduation, a Master's student worked on an hourly basis in a lab for only one semester. (Tr. 343-44.)

Third, hourly student employees are subject to different requirements than PhD students on SGAs. Student employees are required to keep track of their hours and record their time worked. (Tr. 158, 159.) In contrast, PhD students on SGAs have no such requirement; they do not keep track of their time. PhD students on SGAs are paid their full stipend no matter how many or how few hours the PhD students spend on their research or teaching assistantships. (Tr. 77, 78.) Rather, their performance is evaluated by their overall academic progression. (Tr. 215.)

Fourth, hourly student employees' positions may be work study positions, which require SEGAF to ensure compliance with a host of government regulations. (Tr. 152, 153.) Such federal regulations include that work study cannot exceed a semester, cannot displace a full-time employee, and cannot be used for political work or, as an example, to build a church. (Tr. 152, 156.) There are no such requirements applicable to PhD students on SGAs.

Fifth, the required qualifications for hourly student employment versus PhD students on SGAs are also very different. Hourly student employees have no requirement that their academic course of study be related to the subject matter of the position to which they apply. For example, a yoga instructor could be a Master's student studying political science. (Tr. 155, 156.) Hourly student employees must only meet the requirements of the posted job, and their applications are reviewed by the department or person who submitted the "job requisition request" to SEGAF. (Tr. 152, 155.) PhD students, in contrast, are given SGAs through the admissions process and their research or teaching assistantship is tied to their academic program and progress. (Tr. 86.)

underscores how ad hoc hourly positions can be, Ms. Diaz decides for herself whether she has the time (or interest) in performing any work.

Union witness Lisa Oakley made clear how her role as a PhD student is different from that of a Master's student. She explained that as part of her research assistantship, she was able to publish a paper based on that research, which allowed her to earn her Master's degree while working towards her PhD. (Tr. 345-46.) In contrast, a Master's student in the lab was paid an hourly rate for one semester, and there is no evidence that his work in the lab had anything to do with his degree program. (Tr. 344.)

Sixth, the evaluation process for student employees and PhD students on SGAs is also very different. PhD students are evaluated based on their academic progress, including an evaluation of their service in a teaching or research assistantship, as applicable. (Tr. 215.) Student employees, on the other hand, are not evaluated based on their performance as an hourly employee, whether that be a teaching assistant, grader, or research assistant (or yoga instructor for that matter). (Tr. 208, 215.)

Seventh, the difference in duration of a PhD program and a Master's student means that they have different interests. While it typically takes a PhD student four to six years to earn the degree, a Master's student may complete the degree requirement within one to two years. (Tr. 75, 102, 103.) Thus, not only do Master's students work for only a semester or so at a time and on an ad hoc basis, they leave the University more frequently. The evidence demonstrates that in less than two months, fewer than 10% of the PhDs students will graduate. In contrast, almost half of the hourly paid Master's students are expected to graduate. (Tr. 102, 233; Bd. Ex. 3.) This projected turnover underscores that it is inappropriate to merge together in a single unit students on SGAs with those who have hourly jobs on ad hoc basis.

8. Hourly-paid students and PhD students on SGAs have different supervision structures.

The supervision structure is vastly different between student employees and PhD students

on SGAs. As explained above, PhD students are evaluated based on their academic progress, including an evaluation of their service in a teaching or research assistantship, as applicable. (Tr. 215.) Hourly student employees, however, are not evaluated at all based on their student employment. (Tr. 208, 215.) Thus, a PhD student must remain in good academic standing in order to continue their PhD program, and therefore their role in a assistantship contributes to their receiving a degree. (Tr. 203.) However, student employees' role as an hourly employee has no bearing on those students' academic progression.

Moreover, when issues arise, the process is much different. PhD students on SGAs manage any issues directly with their faculty advisor or the Provost's Office. In contrast, hourly student employees may raise issues with their department administrator or SEGAF. (Tr. 158-59.)

In short, hourly student employees hired through SEGAF do not share a community of interest with PhD students on SGAs. Accordingly, those students should be excluded.

C. The Petitioned-For Unit Is Not Comprised of a Readily Identifiable Group.

The petitioned-for unit is also inappropriate because it does not constitute a readily identifiable group based on job classifications, departments, functions, work locations, skills, or similar factors. *American Steel*, 372 NLRB No. 23, slip op. at 4. In cases decided under *Specialty Healthcare*, the Board determined whether a petitioned-for unit was "readily identifiable" based on the proposed unit's common function. *DPI Secuprint Inc.*, 362 NLRB 1407, 1410 (2015) (finding group readily identifiable where "[t]hey are all the hourly employees in the prepress, digital press, bindery, and shipping departments—in short, all the hourly employees who do not work on the offset presses."). Further, a petitioned-for unit will be inappropriate if it does not reflect the employer's administrative or operational lines. *The Neiman Marcus Group, Inc.*, 361 NLRB 50, 53 (2014) (finding petitioned-for unit inappropriate).

Here, the Union seeks all graduate students who perform research or instructional services. But this unit is an arbitrary one. All student employees hired through SEGAF are employed through the exact same process regardless of whether the specific duties associated with any particular job may tangentially relate to research or instruction. Thus, there is no difference between hourly paid Master's students assisting a professor with grading compared to hourly paid undergraduate students assisting a professor with grading. Yet the Union would not include undergraduate students who perform research or teaching assistant jobs, despite that they are hired the exact same way.

There is also no difference between hourly paid Master's students providing yoga instruction compared to hourly paid Master's students checking students into residence halls. All of these positions are filled and processed through the same procedures and the same office, and yet the Union has arbitrarily carved out research or instructional services—a distinction which, in and of itself, is not readily apparent among the class of student employees employed through SEGAF. For example, Workday, on which SEGAF posts all hourly student employment positions, classifies an "NU Spiritual Life Yoga Instructor" as being similar to a student reviewing medical literature, performing data analysis, and utilizing predictive modeling, computer simulation, and linear programming. (Pet. Ex. 33(c); Tr. 194, 195.)

Similarly, the Union's inclusion of hourly paid students with PhD students on SGAs with research assistantships or teaching assistantships is arbitrary. There are no similarities between a Master's students teaching yoga or providing translation services for an hourly rate as a part-time job and a PhD student developing and delivering lecture materials to students as part of their degree program. For example, Union witness Daniel Braconnier took a part-time hourly job during winter break providing music instruction to make some extra money between semesters.

(Tr. 375.) Mr. Braconnier's ad hoc part time job has no connection whatsoever with PhDs students on SGAs who perform research assistantships in order to become first-rate researchers and to develop a dissertation.

Put simply, the Union's proposed unit is a fractured one. It would carve out all hourly-paid undergraduate students performing instructional or research services, while including all hourly-paid graduate students performing the same functions. At the same time, the Union would group the hourly-paid graduate students with PhD students who are not paid hourly, but are instead provided tuition reimbursement, healthcare, and stipended assistance in order to earn their degree. The only connection between these two groups is that they are graduate students, but that has nothing to do with any supposed employment relationship. And of course, undergraduate student workers are students too. In short, the Union is attempting to draw an artificial line in Northeastern in a manner that the Board has consistently rejected. *See, e.g., Neiman Marcus*, 361 NLRB at 52. Thus, the proposed unit is not a readily identifiable group.

D. Students at the Burlington and Nahant Campuses Do Not Share a Community of Interest with PhD Students on SGAs at the Boston Campus.

PhD students or hourly-employed graduate students at the Boston campus have no frequency of contact or interchange with the PhD students at the Burlington and Nahant campuses. Students do not freely intermingle between the campuses for the purposes of performing research assistantships or teaching assistantships. The Boston campus spans a mile long, and can be found between the Prudential Center and the Museum of Fine Arts on Huntington Avenue in Boston. (Tr. 103.) The Burlington campus is 28 miles away from the Boston campus, and the Nahant campus 20 miles away from the Boston campus. (Tr. 101, 117.) Although there is a shuttle between the campuses, only Union witness Marcella Heineke testified to the subject—and she said she does not take the shuttle. (Tr. 412.) Furthermore, there are security restrictions in place for graduate students

to be able to work in certain buildings on the Burlington campus, due to the research done in part for Homeland Security. (Tr. 101.) These security restrictions are not present at the Boston campus.

The testimony of Union witness Braconnier, a PhD student in the department of Mechanical and Industrial Engineering, also supports a finding of minimal interchange between the Burlington and Boston campus. (Tr. 362.) Mr. Braconnier testified that he conducted his research in the DAPS lab, located in the Egan Research Building on the Boston campus. (Tr. 361, 362, 365.) Although the DAPS lab has satellite lab space on the Burlington campus, Mr. Braconnier testified that he would only go there for the specialized equipment, and it would only be as infrequent as “once a month if that.” (Tr. 365.) Moreover, Mr. Braconnier did not testify that he used the specialized equipment when performing a research assistantship as opposed to conducting research solely for his dissertation.

The testimony of Union witness Heineke, a PhD student in the Department of Marine and Environmental Science, also supports the lack of both contact and frequency of interchange between the Nahant and Boston campuses. (Tr. 390.) When Ms. Heineke was assigned to a teaching assistantship in her first year as a PhD student, there was no job requirement that she go to Nahant at all. (Tr. 431.) All of her teaching assistantship responsibilities were at Boston. The only time she spent in Nahant was either by personal choice, such as when she chose to hold her office hour virtually from there, on her own free time, such as when she helped a lab-mate with her dissertation work, or for academic reasons, such as meeting with her advisor. (Tr. 395, 431, 437.) None of these reasons were related to her teaching assistantship.

Moreover, there is no common supervision or place of work across the Boston, Burlington and Nahant campuses. Supervision occurs on a granular level. For PhD students, they are immediately supervised by an academic advisor who has input into whether the student is

making academic progress and progress on their dissertation. (Tr. 206.) Although SEGAF handles oversight and operation of all student employment matters, the supervision of graduate (and undergraduate) students who obtain work through SEGAF is handled by the person or department who posted the job through SEGAF. (Tr. 149, 152, 155.) SEGAF does not handle complaints between these students and their supervisors. (Tr. 158.) Supervision may even be segregated within the same lab. Union witness Lisa Oakley testified that when she worked in a lab, there were multiple lab leaders, but she only worked with one leader. (Tr. 313.)

Thus, students on the Boston campus performing research or instructional duties do not share a community of interest with students on the Burlington or Nahant campuses.²⁰

IV. The Petitioned-For Multilocation Unit Including the Boston, Burlington, and Nahant Campuses Is Not an Appropriate Unit.

When a union petitions for a multilocation unit, the presumption in favor of a single facility unit does not apply. *Sleepy's Inc.*, 355 NLRB 132, 134 (2010). Instead the Board applies its traditional community-of-interest analysis. *Id.* “In determining whether a petitioned-for multi-facility unit is appropriate, the Board will consider the following factors: “employees’ skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history.” *Clarion Health Partners*, 344 NLRB 332, 334 (2005) (citing *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004)). Again, the Union bears the burden of proof in this regard, and it failed to meet its burden.

Here, there is no interchange between the three campuses. De minimis interchange does not suffice. *Sleepy's Inc.*, 355 NLRB at 134 (finding that an employee who worked at excluded

²⁰ Indeed, Union witness Chelsea Diaz has never been to the Burlington or Nahant campuses. (Tr. 302.)

store 52% of time was “frequent interchange” and “not de minimis”). Moreover, the Board is concerned with the functional interchange that occurs during working time. *Clarion Health Partners*, 344 NLRB at 334 (noting that employees did not clock in and out when rotating between separate locations). Thus, functional integration can only be supported by students moving regularly between the three campuses in their role as alleged employees, not in their role as students. As mentioned above, there is minimal integration between the campuses when students are performing research or instructional services.

There is little functional integration between the three campuses. The Burlington campus is defined by the unique character of the many buildings that make up its campus, and the specialized functions and spaces they offer. There is the Innovation Campus, which is focused on inspired research, where start-up companies, and early venture companies reside. (Tr. 97; NU Ex. 6.) There is Building V, which houses a combination of training facilities related to pharmaceutical work, workshop facilities, outside organizations’ laboratories, and a netted drone facility. (Tr. 98; NU Ex. 7.) There is also the Kostas Center for Homeland Security, which conducts security-related research. (Tr. 98; NU Ex. 8). And there is the stress laboratory, which is attached to the Kostas Center and the Venture Creation Center, where facilities for start-up companies are housed. (Tr. 99; NU Ex. 9.)

Similarly, the Nahant campus serves as the hub for research in the area of marine studies, and the Coastal Sustainability Institute, which is located at Nahant, is specialized to that purpose. (Tr. 101, 102). Each facility has different rules related to transportation. PhD students doing research assistantships at Burlington and Nahant can park for free. (Tr. 133, 413.) However, PhD students on SGAs cannot park for free at the Boston campus. (Tr. 133.)

The Union presented screenshots from Northeastern’s website showing that some faculty in Burlington have offices on the Boston campus too. Even if true, it has nothing to do with

students performing research or instructional services. There is no evidence that students perform such services at more than one campus.

It is not appropriate to lump the Boston, Burlington, and Nahant campuses together. The campuses do not share a community of interest. The unit should be limited to the Boston campus.

V. Graduate Students Who Are Expected to Graduate In May 2023 Are Not Eligible Voters.

The record evidence shows that approximately 140 PhD students with SGAs and approximately 489 hourly-paid graduate student employees will graduate in May 2023. (Tr. 102, 233.) Thus, there are about 629 individuals in the petitioned-for unit who have no expectation of continued graduate student employment after May 2023. Moreover, hourly-paid student employees are hired for no more than one academic year, and many are hired for either a semester or an even shorter time period. (Tr. 156-57, 208.) In fact, Union witness Daniel Braconnier testified that he took an hourly position between semesters to make some extra money during winter break. (Tr. 375.)

The Board has long held that when a temporary “employees’ tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created,” such employees do not qualify as eligible voters. *Marian Medical Center*, 339 NLRB 127, 128 (2003); *Hygenia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971) (students hired for summer with no expectancy of permanent employment excluded from the unit); *O’Hara Metal Products Co.*, 155 NLRB 236, 238 (1965) (college student hire for summer and another employee hired for a short-term job, both of which were expected to be discharged on a date certain, were excluded from the unit).

Here, the students who will graduate in May have a “reasonably ascertainable” finite date at which any employment with Northeastern will end. Accordingly, they do not share a community of interest with the petitioned-for unit, and they should be excluded.²¹

VI. There Should Be No Special Eligibility Formula, Or In the Alternative Any Eligibility Formula Must Include Factors Like Imminent Matriculation Or Increment of Employment.

The Board should not adopt a special eligibility formula in this case. While the Board did so in *Columbia*, the facts of this case warrant against such an approach here. In *Columbia*, the Board found that special eligibility formula was warranted because student assistants at Columbia tended “to work for a substantial portion of their academic career, but not necessarily in consecutive semesters.” *Columbia*, 364 NLRB, slip op. at 26. That rationale does not and could not apply to the petitioned-for unit here. A Master’s student who is hired as a research or teaching assistant is typically hired for a semester with no expectation of employment beyond that particular assignment. (Tr. 156, 157, 208.) It cannot be said that such students “work for a substantial portion of their academic career.” To the contrary, their employment is ad hoc. And given that Master’s students typically earn their degree in a year or two, a special eligibility formula going back to prior terms makes no sense. (Tr. 102, 103.)

Further, allowing PhDs students who are currently not on SGAs to vote in an election would violate the Act. For the reasons stated above, an PhD student who is on fellowship cannot be an employee since they have no service commitment. They should not be allowed to vote because they held an SGA in some prior academic year. Likewise, PhD student who have

²¹ The Board’s decision in *Columbia* that Columbia’s graduate students were not temporary employees is not controlling here. In *Columbia*, the Board found that Columbia’s graduate students typically served for more than one semester and typically carried over from semester to another. *Columbia*, 364 NLRB No. 90, slip op. at 21. The Board did not consider whether any such students were expected to graduate by a date certain and thus had no expectation of continued employment as a student employee.

exhausted their funding commitment are not employees, since such students no longer have any service commitment. Even assuming (without conceding) that PhD students on SGAs are employees, any PhD students who formerly had an SGA but no longer do are essentially former employees, and the Board generally does not permit former employees to vote in an election. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991) (“The Board has long held, however, that employees must be employed both during the payroll eligibility period and on the election date to be eligible to vote in an election. The date-certain test for determining voter eligibility fosters predictability and stability in the election process and simplifies the process of identifying eligible voters.”) (footnote omitted).

The Board has long recognized that only those individuals with a regular and continuing interest in employment should be permitted to vote in an election. *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1991) (a formula should not “permit[] individuals to vote who have no real continuing interest in the terms and conditions of employment” with the employer). Adopting a special eligibility formula here would violate that principle because it would allow individuals who have no expectation of future employment to vote. In fact, this Region and others have found it appropriate to apply a traditional eligibility formula in graduate student cases. *See, e.g., Yale University*, Case Nos. 01-RC-183014, 01-RC-183016, 01-RC-183022, 01-RC-183025, 01-RC-183031, 01-RC-183038, 01-RC-183039, 01-RC-183043, 01-RC-183050 (2017); *Washington University*, Case No. 14-RC-206299 (2017). In other instances, the parties agreed that the traditional approach was appropriate. *See, e.g., Boston College*, Case No. 01-RC-194148 (2017).

VII. FERPA Prevents Northeastern From Releasing the Information Included in the Voter List.

Northeastern understands the Region expects it to provide a copy of any Voter List to the Union. The Voter List includes the home address, home telephone number, cell phone number,

and personal email address for each student, to the extent known to Northeastern. This information is protected by the Family Educational Rights and Privacy Act (“FERPA”). FERPA generally protects all records relating to a student and includes records relating to any employment as a result of their status as a student. *See* 34 CFR § 99.3. The information required by the Voter List constitutes educational records under FERPA.

FERPA permits an educational institution such as Northeastern to disclose educational records in response to a valid subpoena. 34 CFR § 99.31(9). While the Region has issued a subpoena requesting production of the Voter List upon the direction of an election, it cannot compel the University to provide FERPA covered information to the Union. Regulations under FERPA make clear that even where a university may disclose the information, it may only do so “on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.” 34 CFR § 99.33(a). Further, in the context of a subpoena, the university must make reasonable effort to notify the students to give them a chance to object to the disclosure.

The Region’s subpoena effectively circumvents what FERPA is designed to prohibit—the disclosure of student records to third parties without their consent. While the Board has the power to subpoena information in connection with matters under investigation and has the power to require the production of a voter list, it should not be able to evade federal privacy laws by ordering one party to provide educational records under FERPA to another party. To be clear, Northeastern does not object to providing information that is not subject to FERPA or within an exception. It does, however, object to the Board using its subpoena power to force the production of private records to a third party.

CONCLUSION

For these reasons, the petitioned-for unit is not appropriate. Students on SGAs are not employees within the meaning of the Act. Regardless, they cannot be joined together with hourly student workers who happen to be graduate students. Finally, the Union has not met its burden to justify the Nahant, Boston and Burlington locations into a single unit.

Dated: March 28, 2023

Respectfully submitted,

NORTHEASTERN UNIVERSITY

By: s/ Robert A. Fisher
One of Its Attorneys

Robert A. Fisher
rfisher@seyfarth.com
SEYFARTH SHAW LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
Telephone: (617) 946-4800
Facsimile: (617) 946-4801

John P. Phillips
jphillips@seyfarth.com
SEYFARTH SHAW LLP
700 Milam Street, Suite 1400
Houston, TX 77002
Telephone: (713) 225-2300
Facsimile: (713) 225-2340

COUNSEL FOR NORTHEASTERN
UNIVERSITY

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of March, 2023, I have caused a true and correct copy of the Post-Hearing Brief of Northeastern University to be filed electronically via the National Labor Relations Board's electronic filing system and that a copy was served via email upon: Thomas Meiklejohn (twmeiklejohn@lapm.org), and Josh Gilbert (jgilbert@uaw.net).

s/ Robert A. Fisher

Robert A. Fisher