**Transcript – “Inside the Hearings”**

*January 26th, 2017*

Reporter (Mark Harrison): Just hours ago, graduate students at Yale University filed for union representation elections in 10 departments, this coming a week after the National Labor Relations Board ruled that students working as research and teaching assistants at private universities will now have a federally backed right to unionize.[[1]](#footnote-1)

Student: So I am so excited that I get to be here to vote yes for my union. I’m doing this for the generations of graduate teachers that have come before me.[[2]](#footnote-2)

(*sounds of cheering*)

Alicia: Here are the basics. On August 23rd, the National Labor Relations Board ruled that Columbia University’s graduate students could be recognized as employees. The following Monday, Local 33 of Unite Here, a group that has long sought to gain a graduate student union at Yale, filed 10 separate petitions on behalf of teaching assistants  in departments to hold unionization elections. We now have that decision, and you may be trying to make sense of it. So what happened between August and today? In this episode, we’re going to try to tell you, at least from a legal perspective, what has been going on, who is making what arguments, and just what is micro-bargaining anyway? I’m Alicia, enjoy the show.

(*Music*)

Alicia: First we’ll just make a quick disclaimer. The Yale Graduate Student Assembly is the parent organization for this podcast, and the GSA has itself taken explicit positions on this issue. The GSA is neutral on the question of graduate student unionization in general, but opposes unionization via Local 33 and opposes Local 33’s current “micro-bargaining” approach. But this podcast episode isn’t meant to advance or defend the positions the GSA has taken or to convince you of how you should feel about the issues, and our producers as a whole—we have a range of positions, ourselves. Our purpose here is to respond to calls we’ve heard from many grad students for more information about what’s been happening and what the arguments are. This podcast is intended to be neutral across the board, not to advance the position of our parent organization. So, with that, let’s dive in.

(*Music*)

This is Patrick.

Patrick: Hi I’m Patrick

Alicia: Patrick came to us with the idea about doing an episode on the ongoing unionization efforts at Yale. So how did you get this idea?

Patrick: So, I started working on a paper exploring bargaining units at private universities and to that end, I filed a Freedom of Information Act Request with the NLRB on October 25th. The request was approved in late November, and we ended up with 192 pages of post-hearing briefs. It became obvious to me though that these legal proceedings were going to move way too fast for a paper, and I’d never have a chance to digest it all, so I reached out to Alicia to see if we could record a podcast instead.

Alicia: So what are we looking at today?

Patrick: Well, after Local 33 filed for elections, NLRB agents would see if the the employer and the union can reach an election agreement about the appropriate bargaining unit and who is eligible to vote in the election. If an agreement is not reached, which seems to have been the case at Yale, the NLRB regional director holds a hearing.

Over the course of September and October 2016, the NLRB office in Hartford held 17 days of hearings. On October 17th, Local 33 withdrew its petition for Comp Lit, meaning that there are now 9 petitions: East Asian Languages and Literatures, English, Geology and Geophysics, History, History of Art, Mathematics, Physics, Political Science, and Sociology. Now, we were not at these hearings, so what we’re going go over today is the written summaries of the arguments submitted by both Local 33 and the Yale administration to the NLRB regional director. These are called post-hearing briefs.

Alicia: Ok, you said 10 - or now 9 - separate petitions - what does that mean?

Patrick: Right, so, if you’ve been following the case at Yale, then you’ve probably heard that the legal debate in large part comes down to an idea called “micro-bargaining.” Basically, micro-bargaining involves having separate elections in each of the departments that filed petitions rather than one election for all graduate students as a whole.

Alicia: There’s been a lot of controversy over this approach. Graduate school dean, Lynn Cooley, in an email to the graduate student body dated October 12th, claimed that this approach “is insufficiently democratic – an attempt to place an important decision about graduate education for nearly 3,000 Yale students in the hands of about 300 who would be eligible to vote in one of these 10 proposed elections.”[[3]](#footnote-3)

Patrick: But filing via micro-units is an approach used in the past by Unite Here, Local 33’s parent union, in organizing hotel workers. Local 33 argues that filing in this way allows those departments where union support is strong to hold elections, and prevents “delaying tactics” that the university administration might pursue. According to a New Haven Register article, Kristin Martin who serves as legal counsel for Unite Here said, “By starting with a set of departments where the desire to form a union is overwhelmingly clear, we hope to avoid the unnecessary legal gamesmanship that typifies NLRB elections.”[[4]](#footnote-4)

Alicia: So, where did micro-bargaining come from? What is the legal precedent? What does it tell us about how to understand the issues relevant to determining the case at Yale?

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To answer that, we need to go back to 2011, to a case called Specialty Healthcare. And to walk us through that case, we’re going to turn to Matt, who did some research on this.

Matt: Ok, so in this case, the NLRB had to decide whether a specific group of employees could constitute a bargaining unit within a nursing home, even as the employer argued that a larger group would be more appropriate. In the process of making the decision, the Board laid out some explicit principles for deciding what an appropriate bargaining unit is. The procedure is a two step process. In the first step, the question is whether the petitioned-for unit represents what the NLRB refers to as “a community of interest.” Here, two big considerations are relevant. The first is that the petitioner’s desire concerning the unit is always a relevant, but not determinative consideration. Giving weight to employee preferences concerning the bargaining unit means that the proposed unit need only be an appropriate unit, not necessarily the most appropriate unit. The second important consideration is that in situations where there is no bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure the workplace. This means that Local 33 needs to show, according to how the administration has set up TF workplace conditions, that TFs within the individual departments petitioning for elections share a community of interest.

Alicia: So, what exactly is a community of interest?

Matt: Well, there’s a formal legal definition - a test - to determine that, and it has a bunch of different parts, but what’s most important for our case is really the question of how the word “department: is understood legally. The determination of whether department based divisions constitute appropriate bargaining units will rest on questions of how much of teaching training, supervision, qualifications, conditions and terms, you know how much of that kind of stuff, operate through and are determined by the department and how much of those same things operate through the graduate school as a whole. If basically nothing is specific or particular to the department in terms of TF workplace conditions, then department based units might be seen as a kind of arbitrary fractioning of the workforce. But if the department performs some important functions in training TFs, allocating positions, supervising performance, then there is a case for department based units as separate communities of interest.

This leads to the second step.  If the petitioned for unit represents a community of interest, but it isn’t the only possible community of interest, then the question becomes whether an alternative unit would overlap largely or completely with the same community of interest factors that constitute the petitioned for units. On one hand, the question is about the extent of overlap – how many shared factors do TFs inside and outside the petitioned for units have in common? How many diverge? But it is also about the significance of overlap – how significant are the factors that diverge between TFs in one department versus another?

Alicia: Right, so let’s turn to the briefs and see what both sides have to say. We’re going to focus on three of the most important factors that the NLRB will consider in making their decision. First, are the employees organized into discrete departments? Second, do the employees have unique skills and training? Finally, do the employees have distinct terms and conditions of employment?

Patrick: While we’re only going to cover these three key items during the podcast, we’re releasing the legal briefs themselves on our website at gsa.yale.edu, if you’d like to read more.

(*Music*)

Alicia: So getting to the first question, are the employees organized into departments? Local 33 is arguing that they are. They write that their proposed bargaining units fall along the dividing lines set by the administration itself. After all, they say, academic departments are involved in the day-to-day management of their employees. They distribute, hire, and supervise graduate student employees and even set the TF pay grade and assignment type. Furthermore, Local 33 is relying on legal precedent here - they argue that ever since 1951, the Board has emphasized that the most important consideration in determining unit appropriateness “is the manner in which the particular employer has organized his plant and utilizes the skills of his labor force.”[[5]](#footnote-5) Their argument is that Yale has organized its graduate teachers through academic departments, and therefore they constitute distinct communities of interest.

Patrick: Yale’s brief, on the other hand, argues that academic departments at Yale aren’t that rigid. They’re “permeable groups of faculty with common interests.”[[6]](#footnote-6) They point out that faculty members often have many departmental appointments (even across divisional lines). [[7]](#footnote-7) What’s more, they argue that in practice graduate students are even less confined to departmental lines. They’re appealing to a legal precedent here as well, since the Board has held in the past that decisions concerning appropriate bargaining units must always be informed by empirical knowledge about the particular industry and workplace in question. Furthermore, the university suggests that at Yale, Local 35—which is the university’s blue-collar union, also backed by Unite Here—actually opposed departmental units in a 1970 case, arguing at the time that “collective bargaining at the University since 1943 has established a pattern of university-wide bargaining units ...and that, therefore, only a campus-wide unit is appropriate.”[[8]](#footnote-8)

Alicia: Before we continue, we should take a minute to describe who Local 33 proposes would be included within each departmental bargaining unit. Here’s what Local 33’s petition for the political science department said, “Included: All graduate students who are regular full-time and part-time Teaching Fellows, Graders, Part-Time Acting Instructors, and Associates in Teaching in the Political Science department. Excluded: All other employees, managers, supervisors and guards.”[[9]](#footnote-9)

Now, this brings up an important clarification in how the unit would be defined. The union is arguing that all graduate students working as teaching fellows in the political science department should be included in the political science unit, regardless of where they are earning a degree. For instance, if you were a law student, but you were TFing for a course in political science, you would be included in the political science unit, but if you were a student earning a degree in political science who either wasn’t teaching that semester or was teaching in a different department, you would not be in the polisci unit.

Patrick: In response to this, the administration argues that teaching fellows in a particular department aren’t even readily identifiable as a group. They write that, “Teaching Fellow appointments are short term in nature and subject to change semester-to-semester. Thus, the mix of Teaching Fellows with appointments in any particular department will change from one term to the next, and a student may teach in one department one semester and another department the next.”[[10]](#footnote-10)

To emphasize this point, the Yale brief actually has some data on the number of teaching fellows that were pursuing a PhD in one department, but teaching in another at the time the original 10 petitions were filed. According to Yale’s brief, there are 310 teaching fellows in the original

petitions, 64 of those (about 20%) are homed in a department that’s different from the one in

which they are teaching.[[11]](#footnote-11). In one department, East Asian Languages and Literatures, 24 of the 29 teaching fellows were homed somewhere else.

Alicia: But the union argues that even if students teach outside their own programs, the academic department as such still plays the defining role in shaping TF workplace conditions, doing so in ways that make those conditions specific to particular departments. Take for example the question of skills and knowledge required for teaching in a specific department. Here the union argues that regardless of your department of study, if you are teaching a course in political science, you would be required to have certain skills and background knowledge which would be held in common with the other teaching fellows for that course, and that’s something the department decides, not the administration. The union also argues that TFs receive primary training for their courses at the departmental level. The union suggests that TF’s tend to hold office hours in a shared department space, that they standardize grading with other TFs within the course, and that often share syllabuses, worksheets, and so on with those working in the same context. So, on the union’s account, there are a lot of critical components of graduate teaching work that are entirely dependent on the departmental situation rather than on any general feature of the graduate school as a whole.

Patrick: The universities response comes in two parts. First, they argue, “that all teaching fellows, regardless of department, have the same fundamental skills and qualifications for imparting knowledge” [[12]](#footnote-12). The chief differences lie in the [curricular content][[13]](#footnote-13). In many courses, Teaching Fellows have no specific prior expertise in the subject matter, learning the substantive material of the course as they go through it ahead of the students[[14]](#footnote-14).

Second, they argue that teaching fellows don’t really receive training from their departments as such, but rather, that their training happens at the Graduate School level from Yale’s Center for Teaching and Learning or from individual faculty members responsible for their particular course[[15]](#footnote-15). They expand upon this last point quite a bit. They argue that meetings to regulate grades or discuss teaching methods happen through the specific course, not the department; and that professors, not the department, decide what specific skills and background are necessary to teach the course.

Alicia: Let’s turn now the third key point — the debate about whether terms and conditions of employment for TFs are being set at the department level or across the graduate school as a whole. The union argues that this essentially happens within individual departments. For instance, they argue that job duties vary by department, even with the same job title. So they say in the brief that someone with the title of “grader” in the east asian languages and literatures department may not actually do grading, but instead typically meets with students as a tutor outside the classroom, whereas a grader in Math does do grading but doesn’t have structured one-on-one time with students. They support this claim by arguing that each Department that entered a petition has its own unique set of published Graduate Teacher policies, and that Yale’s only restriction on this departmental autonomy is that such policies must not conflict with an explicit rule in the Graduate School of Arts and Sciences Guide.

Moreover, the union argues that it’s the department that ultimately decides how teaching fellow resources are distributed. So while the Graduate School determines the number of TF resources to budget for each department, the department actually has the authority to decide which courses TF positions will be assigned to and what kind of positions they’ll actually be.

Patrick: The University, on the other hand, maintains that they apply a common set of terms and conditions to all teaching fellows, *independent of department*. Teaching fellows across the university fulfill similar roles in the courses they are assigned to[[16]](#footnote-16).  To quote, they “lead discussion sections, hold office hours, tutor students, attend lectures, prepare materials for class, and evaluate student work.” [[17]](#footnote-17)  Differences in duties that exist between teaching fellows are a function of course content rather than the department in which they are teaching.  Additionally, Yale centrally administers all teaching fellows through the Teaching Fellow Program, which the administration claims is solely responsible for teaching fellow resource allocation.  While the departments match students with teaching fellow positions, the final approval rests with the Teaching Fellow Program.  The administration also emphasizes that graduate student teachers receive similar stipends and student health benefits do not vary between departments[[18]](#footnote-18).

Alicia: So those are the basic points that the NLRB regional director would consider in determining the appropriate bargaining unit here at Yale.

But as of Wednesday January 25th, we no longer have to wait in suspense because the NLRB regional director ruled in the union’s favor, deciding quote, “that Yale has failed to demonstrate that its teaching fellows are sufficiently distinct from the student assistants found to be statutory employees in Columbia University to warrant a different result” and “that the nine petitioned-for units are appropriate pursuant to the Board’s analysis in Specialty Healthcare…and I shall direct separate elections in those nine units.”[[19]](#footnote-19)

So now, what happens? Well, we vote - or rather, students teaching in the 9 units will vote, and it seems like this is all going to happen pretty fast. On the NLRB’s webpage they say that “elections are held on the earliest practicable date after a Director’s order or authorization.”[[20]](#footnote-20) So that can vary, but it looks like elections typically happen within a month after the decision comes out.

Within those 9 departments, who gets to vote? The decision specifies that “students who were employed during the payroll period ending immediately prior to issuance of the Decision” will be eligible, so it seems like if you are teaching this semester, you will be eligible to vote. Graders and TFs who come from professional schools or terminal masters degrees will also be eligible to vote, but their ballots will be challenged because their eligibility hasn’t been resolved, so whether they count or not looks like it will be decided after the election.

We should also note that Yale still has the ability to request a review of the Board’s decision within 14 days of it being released. In that case the review would be filed with the NLRB in Washington, and then its anyone’s guess what would happen since the composition of the board typically changes with each new presidential administration.

In other words, we don’t really know what’s going to happen, but this is what we understand the situation to be, so I guess we’ll see….

(*Music*)

Alicia: If you’re interested in going through the briefs on your own, we have made them available on our website. They are obviously a lot more comprehensive and precisely argued than the bullet points we brought up here, and no doubt we missed some things you might decide are important, or included things that you thought really weren’t important. But we hope these last 20 minutes have offered a little more insight into how this whole process has been working and what’s shaping the board’s decision.

So visit our page, check out the information, and feel free to send us an email to let us know your thoughts on this episode. Thanks for listening!

1. Labor This Week - Mark Harrison: Graduate Students at Columbia can Unionize: Labor Minute [www.youtube.com/watch?v=RzmXlR-IQU8](https://exit.sc/?url=https%3A%2F%2Fwww.youtube.com%2Fwatch%3Fv%3DRzmXlR-IQU8) [↑](#footnote-ref-1)
2. From November 30th Unity Rally [↑](#footnote-ref-2)
3. from YaleNews. “NLRB hearing on Local 33 election petitions concludes.” October 17, 2016. http://news.yale.edu/2016/10/17/nlrb-hearing-local-33-election-petitions-concludes [↑](#footnote-ref-3)
4. from Ed Stannard. “Yale grad students file petition seeking union certification.” New Haven Register. August 29 2016. <http://www.nhregister.com/general-news/20160829/yale-grad-students-file-petition-seeking-union-certification> [↑](#footnote-ref-4)
5. from Local 33’s post-hearing brief, quoting *International Paper Co*., 96 NLRB 295, 298 n. 7 (1951), p. 1. [↑](#footnote-ref-5)
6. From Yale’s post-hearing brief, p. 14. [↑](#footnote-ref-6)
7. From Yale’s post-hearing brief, p. 14. [↑](#footnote-ref-7)
8. Ibid., p. 11. [↑](#footnote-ref-8)
9. United States Government National Labor Relations Board RC Petition (Case number 01-RC-183038, date filed 8/29/16). [↑](#footnote-ref-9)
10. From Yale’s post-hearing brief, p. 50. [↑](#footnote-ref-10)
11. From Yale’s post-hearing brief, p. 36 [↑](#footnote-ref-11)
12. From Yale’s post-hearing brief, p. 31. [↑](#footnote-ref-12)
13. From Yale’s post-hearing brief, p. 31. Original text, “The chief differences lie in the subject

    matter.” [↑](#footnote-ref-13)
14. From Yale’s post-hearing brief, p. 32. [↑](#footnote-ref-14)
15. From Yale’s post-hearing brief, p. 56. [↑](#footnote-ref-15)
16. From Yale’s post-hearing brief, p. 29. [↑](#footnote-ref-16)
17. From Yale’s post-hearing brief, p. 29. [↑](#footnote-ref-17)
18. From Yale’s post-hearing brief, p. 29. [↑](#footnote-ref-18)
19. United States of America Before the National Labor Relations Board Region 01. “Decision and Direction of Election” released January 25th, 2017, p. 2. [↑](#footnote-ref-19)
20. https://www.nlrb.gov/what-we-do/conduct-elections [↑](#footnote-ref-20)