

**NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-NINE
BEFORE HEARING OFFICER RACHEL ZWEIGHAFT**

In the Matter of:	:	
	:	
THE TRUSTEES OF COLUMBIA :	:	
IN THE CITY OF NEW YORK	:	
	:	
Employer,	:	
	:	
and	:	Case No. 2-RC-143012
	:	
GRADUATE WORKERS OF	:	
COLUMBIA-GWC, UAW	:	
	:	
Petitioner.	:	FEBRUARY 1, 2017
	:	

**PETITIONER'S POST HEARING BRIEF
IN OPPOSITION TO EMPLOYER'S OBJECTIONS**

I. INTRODUCTION

This petition was filed December 17, 2014, seeking a unit of student employees of Columbia University. More than a year and one-half later, the Board directed an election in the petitioned-for unit. *The Trustees of Columbia University in the City of New York*, 364 N.L.R.B. No. 90. The Board remanded the case to the Regional Director for Region Two to establish a voting eligibility formula. Sl. op. at 21-22. More than three more months passed before the eligibility issue was resolved, and the election was finally conducted on December 7 and 8, 2016.

The result of the election was decisive. The tally of ballots shows 1,602 votes in favor of the Union and only 623 against, a margin of more than 2½ to 1 in favor of the Union. There were also 647 challenged ballots which, given the definitive vote in favor of the Union, were not determinative. Of significance in light of the strained argument made by the Employer in its

objections, these voters were challenged because their names did not appear on the eligibility list prepared by the Employer.

The Employer filed objections, and the case was transferred to Region 29. A hearing was held before Hearing Officer Rachel Zweighaft on January 23, 24 and 25, 2017. As discussed in detail below with respect to the individual objections, there is nothing to warrant setting aside the election. Indeed, the Employer seems to recognize that, in light of the one-sided vote, its objections fall far short of establishing grounds to set aside the election. The Employer thus claims that the 647 challenged voters who it left off of the eligibility list were in fact eligible to vote and should be considered “no” votes so that the election can be regarded as close. That is, the Employer contends that it created a grossly inaccurate *Excelsior* list that disenfranchised hundreds of anti-union voters. This contention is absurd on its face.

II. LEGAL PRINCIPLES GOVERNING OBJECTIONS

As the Employer acknowledges, the legal principles governing objections to an election are set forth in the *Cambridge Tool & Mfg. Co.*, 316 N.L.R.B. 716 (1995) (cited by the Employer in its Objections in section 7). “The test, an objective one, is whether the conduct ... has the tendency to interfere with the employees’ freedom of choice. In making its determination as to whether the conduct has the tendency to interfere with employees’ freedom of choice, the Board will consider, inter alia, the closeness of the election.” 316 N.L.R.B. at 716. The Board has repeatedly emphasized the significance of the margin of victory. “The Board gives great weight to the closeness of the election in deciding whether conduct is objectionable.” *Hopkins Nursing Center*, 309 N.L.R.B. 958 at 959 n. 8 (1992). This principle has been applied consistently through changes in the composition of the Board. *Sanitation Salvage Corp.*, 359 N.L.R.B. 1129 (2013); *NYES Corp.*, 343 N.L.R.B. 791 (2004); *Phillips Chrysler Plymouth, Inc.*, 304 N.L.R.B.

16 (1991); *Metz Metallurgical Corp.*, 270 N.L.R.B. 889 (1984). The party objecting to the results of the election has the burden to establish that the conduct complained of could have had a sufficient impact so as to change the result. *Sanitation Salvage*, supra. In this case, there was no conduct that could have impacted the Union's overwhelming victory. Indeed, the Employer failed to meet its burden to establish that any improper conduct occurred.

III. THE SPECIFIC OBJECTIONS

1. Objection 1

The election was conducted at four locations. The largest number of employees voted at Earl Hall, on the main Columbia campus. In the first objection, the Employer alleges that voters were forced to pass "known Union agents within 100 feet of the polling place during the final minutes before they cast their vote."

The main entrance to Earl Hall is located on what the Employer identifies as the Second Floor. Voters arriving at Earl Hall would enter through the main doors on this floor and turn right to climb the stairs to the auditorium, where the polling area was located. To reach the auditorium, they would climb 3 stairs, cross a landing, make a 90 degree turn, climb another 17 stairs to second landing, make another 90 degree turn, and then climb 7 more stairs to reach the foyer in front of the auditorium. The doors to the auditorium were kept open during the polling periods, so that this hall was visible to the Board Agents conducting the election. Before opening of the polls, Board Agent Stephen Berger, who was in overall charge of voting at this location, designated this foyer right outside the auditorium, together with the auditorium itself, as the "no electioneering" zone.

The Board set up four check-in tables in the auditorium, and each party had four observers, one for each table. The parties were permitted to relieve their observers at two-hour

intervals. Hyacinth Blanchard, Assistant Director of Organizing for the UAW, testified that she and Maida Rosenstein, President of UAW Local 2110, met the observers in the downstairs foyer in advance of each shift change, and they met the departing observers after the shift change. When the polls opened at 10:00 a.m., Blanchard and Rosenstein left the building. They returned about ½ hour before each shift change, to make sure that the relief observers arrived and that they understood their role as observers. They met the arriving observers on the foyer on the same floor as the entry to the building. When time for the shift change arrived, the observers would go up the stairs to the polling area, while Blanchard and Rosenstein remained in the downstairs foyer until the relieved observers came down the stairs. They then left the building with the observers to discuss whether any problems had occurred during the preceding two-hour shift. They returned to the lobby of Earl Hall in advance of the next shift change.

The Union representatives met the observers in an area of the lobby that is clearly set up for relaxation or socialization. There is a fireplace in the wall with nine chairs set up in a square around the fireplace, three chairs on a side. To get to this waiting area, someone entering through the main doors to the building would turn left, the opposite direction from a voter going to the polls. The waiting area is approximately 25 feet from the foot of the stairwell. People entering and leaving Earl Hall to and from other parts of the building passed between the stairs and the sitting area.

The testimony of the Employer's witnesses is consistent with Blanchard's explanation for their presence in the sitting area at Earl Hall. Two of the Employer's observers testified that they saw Rosenstein in the sitting area around shift changes, when they were arriving for or leaving after their turns observing. Idina Gorman, the Employer's Director of Labor Relations who served as an observer on December 7 from noon until 4:00 p.m., testified that, either before or

after her shift, she saw Rosenstein and a Local 2110 steward, Theresa Smith, in the sitting area. Smith's presence in the sitting area can be explained by the fact that she served as a Union observer on the 7th from noon until 4:00 p.m. Gorman also claimed to have seen Rosenstein still sitting in the sitting area at 4:10 p.m. Blanchard testified that it was possible that they remained in the building for ten minutes after the observer shift change if someone had needed to use the rest room.

Employees waiting to vote waited in the second floor foyer or lined up along one wall of the stairway. Blanchard testified that the Union representatives did not talk to voters waiting in line or intercept people entering the building. Neither of the Employer witnesses claimed to have seen the Union representatives talking to voters.

The presence of these Union representatives, 75 feet from and out of sight of the polling area, is not grounds for setting aside an election, even if the election were close. In deciding whether there has been objectionable electioneering, the Board considers four factors:

1. Whether the conduct occurred within or near the polling place;
2. The nature and extent of alleged electioneering;
3. Whether the electioneering was conducted by a representative of a party; and
4. Whether the conduct occurred within the designated "no electioneering" area or contrary to instructions of a Board Agent.

Boston Insulated Wire and Cable Co., 259 N.L.R.B. 1118 (1982); *American Medical Response* ("AMR"), 339 N.L.R.B. 23, n. 1 (2003). In *Boston Insulated Wire*, a union representative outside the building where the election took place peered through glass-paneled doors to look at voters waiting in line inside the building. He spoke with and handed literature to employees entering the building. In *AMR*, the Union distributed flyers to employees 50 to 80 feet from the polling area. In both cases, the Board overruled objections based upon this conduct and upheld the election.

In the instant case, the alleged “conduct” occurred, according to the Employer’s witnesses, more than 75 feet from the polling area. The polling area was not within sight of the waiting area where the Union representatives met the off-duty observers, separated by a flight of 27 stairs with two right angle turns. While Union representatives were involved, they did not engage in electioneering. Finally, they were well outside the no electioneering area and did not contravene any instructions of the board agents.

The cases cited by the Employer provide no support for this objection. In *Nathan Katz Realty*, the Employer alleged that the Union agents entered the “no electioneering” area designated by the board agent and violated his instructions. Blanchard and Rosenstein were never even within sight of the no electioneering zone. In *ITT Auto v. NLRB*, 188 F.3d 375 (1999), supervisors were stationed at the intersection of aisles through which voters were required to pass in order to vote, and one of the supervisors “overtly threatened” a voter. 188 F.3d at 387. In *Electric Hose and Rubber Co.*, 262 N.L.R.B. 186, 216 (1982), a supervisor was “stationed” within 10 to 15 feet of the entrance to the polling area “without explanation.” Blanchard and Rosenstein were sitting much farther from the polling area, and Blanchard has supplied a legitimate explanation for their presence. Finally, in *Performance Measurement Co.*, 148 N.L.R.B. 1657, 1659 (1964), the employer’s president was continuously located within a few feet of an area employees were forced to pass in order to reach the polls. Blanchard and Rosenstein were located in an unobtrusive area and had no interactions with voters.¹ These cases demonstrate the lack of any basis for this objection.

¹ *Milchem, Inc.*, cited by the Employer in its objections, stands for the proposition that “prolonged conversations between representatives of any party and voters waiting to cast ballots” is objectionable, regardless of the content of such conversations. These Union representatives did not engage in *any* conversations with voters in line, and certainly not “prolonged conversations.”

The conduct alleged in this objection is less intrusive than in several recent cases that the Board found not to be objectionable. The mere presence of agents of a party near a polling place is not objectionable, even if those agents talk to voters waiting in line, so long as they do not engage in electioneering. In *Lowe's HIW, Inc.*, 349 N.L.R.B. 478 (2007), a representative of the employer stood outside the building containing the polling place, held the door open for employees waiting in line to vote, and directed them to "have their votes ready" and to return to work after voting. In *Longs Drug Stores*, 347 N.L.R.B. 500 (2006), the employer directed lead employees to maintain control of employees in the vicinity of the polling area, directing them to stand in an orderly fashion and to return to work promptly after voting. In both cases, the Board held this conduct was not objectionable, despite the fact that employer representatives spoke to employees waiting to vote. In *J.P. Mascaro & Sons*, 345 N.L.R.B. 637 (2005), the owner of the employer waited outside the building where the election took place and said good morning to employees as they arrived to vote. He explained his presence by saying that he wanted to be in the area because "I was apprehensive and I wanted to be there to signify the importance of the day." Again, the Board found that the mere presence of the highest official of the employer was not objectionable because he did not engage in electioneering, had no direct view of the polling area, and did not enter the no-electioneering area designated by the Board Agent. Similarly, the Union officials in this case could not see the voting area, did not enter the no-electioneering area, and did not engage in any electioneering. Indeed, they had had no contact with the voters. Accordingly, Objection 1 should be overruled.

2. Objection 2

The Employer alleges that "identifiable Union supporters" set up a camera on a tripod outside Earl Hall while other Union supporters were handing out Union stickers. In support of

this objection, the Employer relied entirely upon testimony by Gorman that she saw a “blonde woman” wearing a Union sticker setting up a camera on a tripod. Gorman testified that the blonde woman, whom she could not otherwise identify, was assisted by a male whom she observed handing out pro-union stickers.² The Employer offered no evidence that either was an agent or representative of the Union.

Ana Isabel Keilson, a History Ph.D. candidate and Union supporter who was not an eligible voter, testified that she observed a woman with “dirty blonde hair” operating a camera outside of Earl Hall on December 7. The woman approached Keilson, identified herself as a student journalist, and asked to interview her. Keilson agreed to an interview. In the course of investigating this objection, the Union obtained a copy of a video from a student journalist, which was introduced as Joint Exhibit 3. Keilson identified the narrator of the video, who appears on it, as the blonde woman she saw outside of Earl Hall. Keilson appears on the video, explaining her support for the Union. The video also includes interviews with other Union supporters, a lengthy interview with a Union opponent, and excerpts from an anti-Union editorial written by the Provost of the University. It concludes with the narrator identifying herself, “For Columbia Student News, I’m Falyn Freyman.” In short, the video is a typical news report.

The Union also located a second student, Tina Cai, who filmed inside of Earl Hall. Cai testified that she created her video for a class project. She explained that she set up her iPhone on a small tripod on a table inside Earl Hall. Like Freyman, she filmed background video of employees entering and leaving the polling area and interviews with a Union supporter and a Union opponent (Jt. Ex. 6).

² The fact that a young male offered assistance to a blonde woman does not warrant the inference that they were acting pursuant to a pre-arranged plan.

In its objection, the Employer cited *Randall Warehouse of Arizona*, 347 N.L.R.B. 591 (2006) for the proposition that a Union photographing employees engaged in section 7 activity can be intimidating. Since the videotaping was clearly not done by the Union, the Employer has apparently abandoned this argument and now contends, citing *Westwood Horizons Hotel*, 270 N.L.R.B. 802 (1984), that the election should be set aside on the basis of third party misconduct. As stated in *Westwood*, the Board will set aside an election on the basis of the conduct of a non-party when that conduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” 270 N.L.R.B. at 803. *Westwood*, like most cases applying this standard, involved threats of severe physical harm. A view of the background video filmed by Cai reveals that no one was intimidated by the presence of an iPhone video camera. Many voters did not even notice the camera, and those who did showed little interest.³ Thus, the presence of cameras in and around Earl Hall in the hands of third parties is not grounds to set aside an election.⁴

Objection 3

In Objection 3, the Employer argues that the election should be set aside because the Regional Director reversed her earlier decision to require voters to produce identification. The parties stipulated that they had agreed that the Regional Director would require identification. On December 6, the Assistant Regional Director advised the parties by email that identification would not be necessary because that requirement had not been spelled out in the Supplemental Decision or in the Notice of Election. One voter appeared at the polls to vote and found that his

³ At one point, a Board Agent can be seen coming down the stairs from the polling area and passing the camera. He clearly did not even notice the camera.

⁴ Indeed, it would raise First Amendment issues if the Board were to attempt to prevent journalists or students outside the no electioneering zone from creating video reports of an election.

name had already been checked off (Jt. Ex. 1). The Employer's observers testified that several voters had similar names, and it was easier to tell them apart if they presented identification.

It is well established that the mechanics of an election are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.*, 357 N.L.R.B. 628 (2011); *San Diego Gas & Electric*, 325 N.L.R.B. 1143 (1998); *Monfort, Inc.*, 318 N.L.R.B. 209 (1995); *Manchester Knitted Fashions*, 108 N.L.R.B. 1366 (1954). The results of an election will not be disturbed based upon a regional director's exercise of that discretion, even where a regional director has had a change of mind regarding the mechanics of the election, absent evidence of abuse of that discretion that affected the results of the election. *Independent Rice Mill, Inc.*, 111 N.L.R.B. 536 (1955); *Augusta Cartage Co.*, 120 N.L.R.B. 73 (1958). It was reasonable for the Regional Director not to require ID where the voters had not been informed in any official document of such a requirement.

Assuming *arguendo* some procedural irregularity with respect to this issue, it does not warrant setting aside the election. "The presence of a procedural irregularity is not in itself sufficient to overturn an election. Nor is it sufficient for a party to show merely a 'possibility' that the election was unfair. Rather, the challenger must come forward with evidence of actual prejudice resulting from the challenged circumstances." *NLRB v. Bloomfield Health Care Ctr.*, 372 Fed. Appx. 118, 120 (2d Cir. 2010), quoting *NLRB v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994). Moreover, where both election observers check off the names of voters, there is a strong presumption of the validity of that vote. *Monfort, Inc.*, *supra*. "It is well settled that representation elections are not lightly set aside. The burden is on the objecting party to show by specific evidence that there has been prejudice to the election." *Affiliated Computer Services, Inc.*, 355 N.L.R.B. 899, 900 (2010).

The Employer's evidence falls far short of establishing that the Regional Director abused her discretion in not requiring ID or that the failure to require ID could possibly have changed the result of the election. The case cited by the Employer, *Avondale Industries v. NLRB*, 180 F.3d 633 (5th Cir. 1999), illustrates just how far the Employer has fallen short of meeting its burden. In *Avondale*, the Union won the election by a margin of 250 out of 4,000 votes. The Court of Appeals emphasized the importance of the fact that "the election was close." 188 F.3d at 639. Moreover, the employer came forward with evidence of actual voting irregularities, including evidence that employees whose names were checked off on the voting list had not been on the premises at the time of the election. According to the Court of Appeals, the employer presented evidence of "potentially suspicious voting involving hundreds of ballots." 188 F.3d at 636. In the instant case, the election was not close and the Employer presented no evidence of voter fraud. There is no reasonable argument that the result would have been different had ID been required. This objection should be overruled.

Objection 4

The Employer alleges in objection 4 that a non-supervisory employee that it designated to serve as an observer was "ordered to leave by a Board Agent in front of voters in the polling place." This objection concerns voting at the Hammer Building on Columbia's Medical School campus. The employer presented the testimony of Tshaye Meaza, the observer who was allegedly "ordered to leave," and of Patricia Catapano, who took her place as an observer. Meaza testified that she was scheduled to serve as an observer in the Hammer Building on December 7 from noon until 2:00 p.m. (Tr. 152). When she arrived, the Board Agent asked her if she were a manager, and she replied that she was an assistant director (Tr. 153). The Board Agent turned to the Columbia observer who was covering the prior shift, and asked her to place a

call (Tr. 153-54). Meaza waited outside the voting area until Catapano arrived (Tr. 154). They both entered the polling area, where the Board Agent told Catapano, “I don’t want an issue. I’d rather have you being an observer than her.” (Tr. 155, 30).⁵ Catapona added that there were around 5 voters in the area when this conversation took place (Tr. 31). Catapano testified that the Employer had an observer at that location throughout the day and that, to her knowledge, the Employer was never left without an observer at any time during the election (Tr. 36-37).

The parties are entitled to equal numbers of observers. *Pacific Coast M.S. Industries Co., Ltd.*, 355 N.L.R.B. 1422, 1426 (2010). If a party designates an observer who may be not be qualified, the Board Agent should notify the party that use of an objectionable observer may result in the election being set aside, but should not prohibit an observer from serving. *Detroit East, Inc.*, 349 N.L.R.B. 935, 936 (2007); *Browning-Ferris Industries of California, Inc.*, 327 N.L.R.B. 704 (1999). The Board Agent at the Hammer Building did not preclude Meaza from serving, she merely indicated her preference for a different observer. The Employer relies upon cases in which a party was deprived of its right to an observer during an election. Catapano’s testimony establishes that the Employer was never denied an equal number of observers.⁶ Accordingly, this objection should be overruled.

Objection 5

Objection 5 alleges that, on December 7, the Board Agent at the Hammer Building closed the doors to the polling place, preventing employees from entering and voting. The Employer presented the testimony of one of its observers, Carrie Ann Marlin, who testified that, during the

⁵ Catapano testified that she arrived while Meaza was still in the room talking to the Board Agent.

⁶ The Employer argues that the Board Agent’s statement showed favoritism in favor of the Union and was overheard by voters. The Board Agent’s statement that she “preferred” Catapano as an observer would not suggest to any voter waiting in line that she favored the Union. In any event, the comment was heard, at most, by a “handful” of employees and could hardly have affected the result of the election.

2:00 p.m. to 4:00 p.m. shift, while there were a large number of employees waiting to cast challenged ballots, the Board Agent went to the door and closed it (Tr. 65). Marlin claimed that the door remained closed for about 10 minutes (Tr. 67). Seth Prins, the Union's observer during this time period, testified that the door closed, not by an action of the Board Agent, but because someone inadvertently disturbed the garbage pail that was propping the door open, allowing the door to swing closed (Tr. 235-36). The Board Agent was processing a voter when the door closed, and she did not immediately respond to the closing. Prins said to the Board Agent that he thought she should open the door. She did not immediately respond, so he asked, "Do you mind if I open the door?" Marlin chimed in at this point, indicating agreement that the door should be opened. The Board Agent then walked over to the door, opened it, and propped it open (Tr. 236). The door was closed for no more than three minutes (Tr. 236).

The testimony of Prins that the door was closed inadvertently and that it remained closed for at most three minutes should be credited. His testimony was direct and logical. Marlin's claim that the Board Agent deliberately closed the door is illogical. Moreover, Marlin was a remarkably evasive witness on cross examination, repeatedly answering that she did not recall or did not know to a wide array of questions. In any event, the witnesses for both sides testified that the voting location was well marked with signs. There is no claim that the door was locked, so if a voter arrived at the polling place while the door was closed, she could have entered the polling place to vote. There is no evidence that any voter was deprived of the right to cast a ballot. By contrast, in all of the cases cited by the Employer, voters were physically prevented from voting for an extended period of time. *Whatcom Security Agency*, 258 N.L.R.B. 985 (1981); *Kerona Plastics Extrusion Co.*, 196 N.L.R.B. 1120 (1972); *The Nyack Hospital*, 238 N.L.R.B. 257, 259 (1978). Therefore, this objection should be overruled.

Objection 6

Objection 6 seeks to overturn the results of the election because the Board Agent at the Hammer Building ran out of challenged ballot envelopes. In support of this objection, Catapano testified that the Board agent ran out of envelopes at about 1:15 or 1:30 on December 7 (Tr. 32). She testified that about 8 or 10 voters were turned away during this period because their names were not on the eligibility list, and they could not vote subject to challenge in the absence of challenged ballot envelopes (Tr. 41-42). Marlin testified that a second Board Agent arrived with a fresh supply of challenged ballot envelopes at about 3:00 p.m., and that several employees returned to vote who had been turned away previously (Tr. 63).

The shortage of challenged ballot envelopes could not possibly have affected the results of the election. No more than 10 voters were turned away, and most, if not all, returned later and cast their challenged ballots. Moreover, the voters who were turned away were challenged because the Employer did not include their names on the eligibility list. If the Employer's eligibility list was accurate, then these individuals were not eligible to vote, and their votes would not count regardless of whether they submitted challenged ballots. If, on the other hand, some of these voters should have been allowed to vote, they would not have been challenged had the Employer provided an accurate eligibility list. The Employer cannot object to the election on the basis of problems that it created by providing an incomplete eligibility list. Thus, this objection should be overruled.

CONCLUSION

Employees in the bargaining unit voted overwhelmingly in favor of representation by the Petitioner. The Employer therefore must meet an extremely heavy burden in order to justify setting aside the election. The Employer clearly did not meet its burden. Therefore, the

objections should be overruled and the Union should be certified as the collective bargaining representative of the employees in the bargaining unit.

ON BEHALF OF THE PETITIONER,
GRADUATE WORKERS OF COLUMBIA-GWC, UAW

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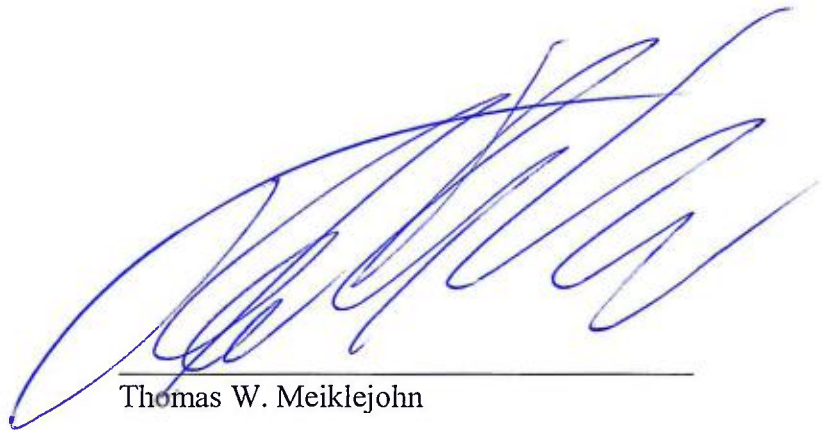
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of the Petitioner to the Hearing

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