UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA IN THE CITY OF NEW YORK	:	
Employer,	:	
and	:	Case No. 2-RC-143012
GRADUATE WORKERS OF COLUMBIA-GWC, UAW	:	
Petitioner.	:	March 27, 2017

PETITIONER'S ANSWERING BRIEF TO COLUMBIA'S EXCEPTIONS

Thomas W. Meiklejohn
Nicole M. Rothgeb
Livingston, Adler, Pulda, Meiklejohn & Kelly, PC
557 Prospect Avenue
Hartford, CT 06105-5922
(860) 570-4628
twmeiklejohn@lapm.org
nmrothgeb@lapm.org

TABLE OF CONTENTS

I. Introduction 1

II. Legal Principles Governing Objections 2

III. Objection 1 – Union Representatives in The Sitting Area at Earl Hall 4

IV. Objection 2 – Cameras at Earl Hall 11

V. Objection 3 – Voter Identification 13

VI. Objection 5 – Closed Door 17

VII. Objection 6 – Challenged Ballot Envelopes 19

VIII. Conclusion 20

I. INTRODUCTION

This petition, filed December 17, 2014, involves a unit of student employees of Columbia University ("Columbia" or "the Employer"). The election, which was conducted two years after the petition was filed, resulted in an overwhelming vote in favor of representation by Graduate Workers of Columbia - GWC, UAW ("the Union" or "the Petitioner"). The tally of ballots shows 1,602 votes for the Union and only 623 against, a margin of more than 2½ to 1 in favor of the Union.

The Employer filed timely objections, which were heard by Hearing Officer Rachel Zweighaft on January 23, 24 and 25, 2017. On March 6, 2017, Hearing Officer Zweighaft issued a thorough and comprehensive Report and Recommendation on Objections, recommending that the Employer's Objections be overruled in their entirety. She concluded that no objectionable conduct had occurred and that, even if some objectionable conduct had occurred, it could not possibly have called into question the overwhelming majority support enjoyed by the Union. On March 17, the Employer filed exceptions with respect to five of six objections.

The Employer's arguments fail to undercut the Hearing Officer's conclusions that no objectionable conduct occurred or to raise the slightest doubt about the validity of the results of the election. The Board should overrule these exceptions forthwith and certify the Union that these employees have sought for years to establish.

II. LEGAL PRINCIPLES GOVERNING OBJECTIONS

As the Hearing Officer stated, citing Safeway, Inc., 338 N.L.R.B. 525 at 525-26,

the Board will not set aside the results of a representation election lightly (RRO at 3 [1]). There is a strong presumption in favor of the validity of an election conducted by the Board (RRO at 3-4, citing NLRB v. Hood Manufacturing Co., 941 F.2d 325 at 328 (5th Cir. 1991)), and a party seeking to disturb the results of an election must meet a heavy burden (RRO at 4, citing several cases). The Employer did not except to the Hearing Officer's citation to or reliance on these well-established principles. The Employer similarly does not dispute the overall legal standard applied by the Hearing Officer or the factors that she relied upon as relevant to a determination as to whether to set aside the election (RRO 4).

The Hearing Officer also relied upon the principle that the margin of victory in a Board election is an important factor in deciding whether to set aside an election (RRO at 4-5). The Board has repeatedly emphasized the significance of this factor. "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).

Evidently recognizing the significance of this factor, Columbia has tried various ways to minimize the Union's decisive margin of victory. In its original exceptions, the

---

[1] References to the record shall be designated as follows:
Hearing Officer's Report and Recommendation on Objections .... RRO (followed by page number)
Columbia's Exceptions to the Hearing Officer's Report and
Recommendation..Except. (followed by Exception number)
Brief in Support of Columbia's Exception to the Hearing Officer's Report and
Recommendation.. Er. Br. (followed by page number)
Transcript .... Tr. (followed by page number)

Employer argued that the election would have been closer if the challenged ballots were added to the "no" votes.[2] The problem for the Employer in making this argument is that these voters were challenged because their names did not appear on the eligibility list. That list, of course, was prepared by the Employer. Thus, the Employer, in preparing the list, had determined that they were not eligible. The Employer did not come forward with evidence that it left hundreds of eligible voters off the list. The Employer has apparently recognized this flaw in its argument. The Employer now argues that allegedly objectionable conduct somehow affected employees who did not vote. This argument fares no better. All of the Employer's objections relate to events at the polling places on the day of the election. Thus, the Employer is now arguing that the Petitioner's overwhelming victory should be disregarded because employees might have been affected by conduct that they did not witness because they did not show up at the polls. That the Employer would even proffer such an argument reveals its desperation to generate yet more delay in this case.[3]

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

---

[2] Even if all the challenged ballots had been "no" votes, the Union still would have prevailed by hundreds of votes. Since these votes were challenged because the Employer left their names off the eligibility list, it is likely that the Petitioner's margin of victory would increase if those ballots were counted.

[3] The Employer also challenges the Hearing Officer's arithmetic, contending that she imposed a burden to show that the allegedly objectionable conduct could have affected more than 900 votes (Er. Br. at 3). The Employer argues that, because the Union prevailed by 979 votes, the results of the election would have been different had 490 voters switched their votes (Ibid). The Employer claims that the Hearing Officer imposed a burden of demonstrating that twice that number of voters were influenced by the allegedly objectionable conduct. This argument is a complete straw man. The Hearing Officer never stated that 900 voters would have had to change their minds for the results to have been different. She noted that the Union prevailed by more than 900 votes, stating that overwhelming margin in this election as a factor to be evaluated (RRO 4. 36, 39). However, as the Employer is now arguing that the Board should consider the votes of challenged voters and non-voters, it would in fact have required 979 such voters, all voting against the Union, to affect the results of the election.

impacted the Union's overwhelming victory. Indeed, the Employer failed to meet its burden to establish that <u>any</u> improper conduct occurred.

III. OBJECTION 1 – UNION REPRESENTATIVES IN THE SITTING AREA AT EARL HALL

The election was conducted at four locations. The largest number of employees voted in the auditorium 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." This objection concerned voting at Earl Hall.

The polls were open at Earl Hall from 10:00 a.m. to 8:00 p.m. on both days of the election, December 7 and 8, 2016 (RRO 5).[4] 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 a second landing, make another 90 degree turn, and then climb 7 more stairs to reach the foyer in front of the auditorium (RRO 5-6). The doors to the auditorium were kept open during the polling periods, so that this hall on the third floor 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 hallway immediately outside the auditorium, together with the auditorium itself, as the "no electioneering" zone (Tr. 283-84; RRO 7).

---

[4] Except where otherwise indicated, citations to the finding of the Hearing Officer are to findings that were not excepted to by the Employer.

The Board set up four check-in tables in the auditorium, and each party had four observers, one for each table (Tr. 36, 109). The parties were permitted to relieve their observers at two-hour intervals (RRO 6). 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 then waited for 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 in the lobby 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 lobby 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 (RRO 6-7).

The area of the lobby where the union representatives met their observers is clearly set up for relaxation or socialization. The Hearing Officer described this area:

> To the left of the door [leading from outdoors into the lobby of the building], there are nine seats around a coffee table in front of a fireplace in the middle of the left wall of the room (three seats to the right, three seats to the left, and three seats facing the fireplace). In addition, there is a larger table behind the chairs facing the fireplace.

(RRO 6). The Employer did not except to this description. Idina Gorman, the Employer's Director of Labor Relations, testified that she measured the hallway on the second floor. According to her measurements, the coffee table in front of the fireplace

is approximately 25 feet from the base of the stairs leading to the third floor. The distance from the base of those stairs to the front door of the polling place, up the stairs and around the turns in the stairwell is, according to her measurements, an additional 40 feet (RRO 6). Thus, according to Gorman, the distance from the table in the sitting area on the second floor to the entrance to the polling place in the auditorium on the third floor is 65 feet.

The Union representatives did not talk to employees waiting in line to vote, and they did not enter the no-electioneering zone established by the Board Agent (RRO 8).

The presence of these Union representatives, 65 feet from and out of sight of the polling area, was not objectionable conduct and would not be grounds for setting aside the election, even if the election had been 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). The Hearing Officer's findings establish that, under this test, no objectionable conduct occurred. The "conduct" at issue occurred, according to the Employer's witnesses, 65 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 and was separated from the sitting area by 27 stairs with two right angle turns. While Union representatives were involved, they did not engage in any "electioneering." Indeed, they did not talk to any voters other than

their observers. Finally, they were well outside the no-electioneering area and did not contravene any instructions of the board agents.

The Employer, in its exceptions, does not seriously dispute any of these findings. The Employer does except to this finding by the Hearing Officer's: "[v]oters had to turn right immediately to go up the stairs to the polling place. Although voters had to pass through the same room, they could walk up the stairs without walking directly past the union agents." (Except. Nos. 7, 8). This finding is consistent with all of the evidence and with other findings of fact that the Employer does not dispute. The Employer cites no evidence either in the Exceptions or in its Brief to contradict these findings. The Employer also does not except to the Hearing Officer's findings, based upon the Employer's exhibits, that a person entering the doors to the building would turn right to climb the stairs to the voting area and would turn left to get to the sitting area (RRO 6). These findings establish that voters would turn away from the sitting area to get to the polling place. Thus, the Hearing Officer's finding that voters entering the polling area would turn in the opposite direction from the sitting area and therefore would not pass the Union representatives is supported by substantial evidence. Indeed, it is uncontradicted.

The Employer excepts to additional findings made by the Hearing Officer that confirm how unobtrusive the Union representatives were. The Employer seems to be particularly disturbed by the finding that voters entering the building would not have recognized Rosenstein if they happened to glance in her direction.[5] This finding is not necessary to the Hearing Officer's conclusion that the Union representatives did not

[5] The Employer does not dispute the finding that Blanchard, who works in the UAW's Detroit office and came to New York for the election, would not have been recognized by the voters (RRO 6).

engage in objectionable conduct. Under the Boston Insulate Wire criteria, the presence of the Union representatives in the sitting area would not have been objectionable even if they were recognizable to the voters. In any event, the Hearing Officer's finding that Rosenstein was not widely known to voters is supported by undisputed testimony. Rosenstein is the president of the local union that represents support staff at Columbia (RRO 6). As such, she would rarely if ever have dealings with students. Ana Keilson, a bargaining unit employee who was involved in the organizing campaign from its commencement in 2014, testified that student employees organized other student employees. Rosenstein supported the campaign but played a limited role and was not known to even many of the members of the organizing committee (Tr. 360). Thus, the Hearing Officer's finding is supported by the record.

The Employer also disputes the Hearing Officer's observation that the presence of employer representatives near the polls is more intimidating than the presence of union representatives. While this observation is accurate, it is also not necessary to the Hearing Officer's conclusions. Under the applicable precedent relied upon by the Hearing Officer, the mere presence of a representative of either party in the sitting area of the lobby of Earl Hall would not be objectionable. In Boston Insulated Wire, supra, 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.

The Board has reached the same conclusion in cases involving similar conduct by employer representation. In Lowe's HIW, Inc., 349 N.L.R.B. 478 (2007), an employer representative stood in the immediate vicinity of the polls and encouraged employees to be ready to vote quickly so that they could return to work. In J.P Mascaro & Sons, 345 N.L.R.B.. 637 (2005), the employer's president stationed himself between 30 and 54 feet from the entrance to the polls, comparable to the distance from the sitting area in Earl Hall to the doorway to the building. He spoke with some voters and shook their hands as they approached the building. The Board did not find this conduct to be objectionable under the Boston Insulated Wire standards. See also Long's Drug Stores, 347 N.L.R.B. 500 (2006), in which the Board upheld an election where the employer ordered lead employees to maintain control of employees in the vicinity of the polling area. The conduct of the Union representatives at Earl Hall, who did not talk to voters, was much less obtrusive than the conduct of the employer representative in these three cases.

In a footnote, the Employer concedes that "the mere presence of a union representative in the vicinity of the polls" is not grounds to set aside the election." (Er. Br. at 16, fn. 15). The Employer then cites the holding of courts of appeals that they will find the presence of a party's representatives near the polls to be ground to set aside the election "**only** ... where a party's agents surround the only entrance to the polls." (Ibid) (emphasis added). There is no evidence that the Union's representatives "surrounded" the entrance to the polls. On the contrary, they were seated inconspicuously off to the side.

The cases cited by the Employer do not support its argument. 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. The Board concluded, "without any explanation for a supervisor to be 'stationed outside the voting area, it can only be concluded in observing the even[sic] was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched." 262 N.L.R.B. at 216, quoted in Er. Br. at 13. Blanchard and Rosenstein were sitting unobtrusively much farther from the polling area. Blanchard has supplied a legitimate explanation for their presence. They were not "watching" voters and did not convey the impression that they were doing so. In Performance Measurement Co., 148 N.L.R.B. 1657, 1659 (1964), the employer's president was continuously stationed within two feet of the door leading directly to the room where the vote took place. Blanchard and Rosenstein were located in an inconspicuous area and had no interactions with voters. The fact that the Employer relies upon these easily distinguishable cases demonstrates the lack of any basis for this objection.

The Employer places its principal reliance on Nathan Katz Realty LLC v. NLRB, 251 F.3d 981 (D.C. Cir. 2001). Even a superficial reading of that case reveals that it is consistent with the Hearing Officer's recommendation to overrule this objection. In Nathan Katz, the employer alleged that union agents entered a no-electioneering zone established by the board agent conducting the election. The regional director overruled

this objection without conducting a hearing, holding that this allegation, even if true, would not warrant setting aside the election. The Court of Appeals explained its reason for rejecting the Regional Director's decision:

> [A]ccording to Katz's election objection, which the Regional Director assumed to be true, the Board Agent established a no-electioneering zone. No such zone existed in *Performance Measurements*. The Director did not explain why the Union agents' "continued presence" in a no-electioneering zone by the entrance to the site of the election (where employees had to pass) is different from standing outside the room in which employees actually vote. Standing in either place could "interfere with the employees' freedom of choice"--particularly if the Board Agent enacted a no-electioneering zone, presumably to prevent the parties from interfering with that freedom.

251 F.3d at 993. The critical factor to the Court was thus that the union agents had entered the designated no-electioneering zone. The Board has distinguished Nathan Katz in later cases involving both employer and union agents on the basis that they did not enter the no-electioneering area. J.P. Mascaro & Sons, supra; U-Haul of Nevada, 341 N.L.R.B. 195 (2004). Blanchard and Rosenstein were not even within sight of the no electioneering zone. Thus, Nathan Katz provides no support for the Employer's argument.

The Board should adopt the Hearing Officer's recommendation that this objection be overruled.

IV. OBJECTION 2 – CAMERAS AT EARL HALL

The Hearing Officer found that two individuals filmed voters in the vicinity of Earl Hall on December 7 during the election. One of these was Falyn Freyman, a student journalist working for Columbia Student News (RRO 14). The second was Tina Cai, a graduate student working on a project for a class in Tools and Craft of Multiplatform Story Telling (RRO 15). Each of them filmed voters arriving and leaving Earl Hall,

Freyman from outside the building and Cai using her iPhone mounted on the table in the lobby of building. Each of them conducted interviews with students who voiced support for the Union and with students who voiced opposition to the Union (RRO 15-16). The Hearing Officer reviewed the videos prepared by these two students and concluded, "[M]ost people seem not to notice the iPhone at all. None of the voters appear concerned by the iPhone" (RRO 16). At one point, a board agent can be seen descending the stairs from the polling area. The Hearing Officer concluded, "He does not look at the iPhone during this time." (RRO 16).

The Employer excepts to the factual finding that most voters and the board agent did not notice Cai's iPhone and to her finding that those voters who did notice the iPhone showed no concern (Except. 20, 21). The Employer points to no segment of the video or other evidence that would contradict this finding. The Employer includes with its exceptions four still shots from Cai's videos (attached to the Employer's Exceptions and labeled Joint Exhibit 6(c)). Those stills confirm that the individuals appearing in those stills are paying no attention to the iPhone and appear unaware of its existence. In short, the evidence provided by the Employer actually confirms the conclusion reached by Hearing Officer after viewing the entire video: no one pays attention to a young person taking pictures on an iPhone.

The Employer concedes that the Union was not responsible for this videotaping. Columbia argues, instead, that the election should be set aside under the standard for third party misconduct, citing Westwood Horizons Hotel, 270 N.L.R.B. 802 (1984) and Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 359 (6th Cir. 1983). As stated in Westwood, the Board will set aside an election on the basis of the conduct of a non-party only 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. The suggestion that videotaping by a student journalist and by a student working on a class project would create an "atmosphere of fear" is laughable. Both Westwood and Kitchen Fresh involved threats of severe physical harm directed to voters. Any suggestion that the presence of these cameras is comparable to widespread threats to physically beat employees is surpassingly absurd.[6]

It is astounding that Columbia University would ask the NLRB to patrol its campus to prevent its students from filming an event of great interest to the University community for academic or journalistic purposes. Columbia has claimed to be concerned about protecting and preserving academic freedom and First Amendment rights on campus. It is the height of cynicism and hypocrisy for Columbia to argue that the federal government should censor class projects and news reporting by its students. Clearly Columbia is not concerned about protecting the rights of its students. In its quest to defeat the Union, it is prepared to trample the First Amendment rights and academic endeavors of its own students.

V. OBJECTION 3 – VOTER IDENTIFICATION

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 agreed that the Regional Director would require identification (RRO 19). On December 6, the Assistant Regional Director advised the parties by email that

[6] The Employer argues that the video footage was taken by "individuals sympathetic to the Union." (Er. Br. at 45). There is not the slightest evidence that Cai was a supporter of the Union. While one of the Employer witnesses claims to have seen Feyman wearing a Union sticker, the news report she produced (Jt. Ex. 3), includes interviews with both supporters and opponents of the Union and quotes from a University statement in opposition to the Union.

identification would not be necessary because such a requirement had not been spelled out in the Supplemental Decision or in the Notice of Election (RRO 19). Therefore, voters had not been officially advised of the ID requirement. The board agents conducting the election at different times and in different locations followed inconsistent procedures in deciding whether observers could ask to see voters' identification (RRO 20). The Employer's observers testified that several voters had similar names, and it was easier to tell them apart if they presented identification (RRO 20-21). One voter appeared at the polls to vote and found that his name had already been checked off (Jt. Ex. 1).

As the Hearing Officer found, 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 not an abuse of discretion for the Regional Director not to require ID where the voters had not been informed in any official Board document of such a requirement.

The Employer argues that the Regional Director's handling of the ID issue was inconsistent with the Casehandling Manual. The Hearing Officer correctly concluded that the Casehandling Manual advises regional directors to "consider" requiring ID in

complex elections but does not mandate the use of photo ID (RRO 22-23). The Employer excepts to her finding that, "This Casehandling Manual section does not ... override the Regional Director's discretion by requiring use of identification in large or complex elections." (RRO 23; Except. No. 32). In addition to the fact that, as the Hearing Officer found, the words of the Manual do not require the use of ID, her finding is also supported by the statute and the Rules and Regulations. The Board has delegated the supervision of elections to the regional directors. Rules and Regulations, sec. 102.69(a). This delegation is explicitly authorized by section 3(b) of the Act, and cannot be overruled by the Casehandling Manual, which was prepared by the General Counsel for the "guidance" of agency personnel and has been neither reviewed nor approved by the Board. *Casehandling Manual, Purpose of the Manual.* Columbia cannot seize upon the Manual to argue that the Board should rescind its delegation of authority and usurp the discretion of the Regional Director.

Assuming *arguendo* some procedural irregularity with respect to this issue, it would 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 Hearing Officer correctly found that 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 Employer argues that the Hearing Officer set the burden of proof too high in this regard, but it offers no serious argument that the results of the election do not represent the will of the voters.

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, a 6% differential. The Court of Appeals emphasized the importance of the fact that "the election was close." 188 F.3d at 639. In addition, 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 even 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.[7]

---

[7] The Employer also argues that the Hearing Officer erred by refusing to admit certain hearsay reports collected by Union agents. The Employer argues that "hearsay 'may be admitted ... in the discretion of the hearing officer.'" (Er. Br. at 35). Thus, the Employer acknowledges that this evidentiary issue is to be decided by the Hearing Officer in the exercise of her discretion. It follows that the ruling should not be disturbed merely because a party is unhappy with it. In any event, even if the excluded exhibit were to be considered, it shows nothing more than that some Union observers agreed with the Employer's observers that it would have been helpful to require ID.

Accordingly, the Board should adopt the Hearing Officer's recommendation to overrule the objection.

VI. OBJECTION 5 – CLOSED DOOR

This objection concerns voting at the Hammer Building, on Columbia's Medical School campus ("CUMC"). This is the only issue on which there was disputed testimony requiring a credibility determination.

The polling place in the Hammer Building has a glass wall which was covered with paper during the election. There was a double door to the polling room, with one door propped open while the polls were open. A sign on the wall outside identified the room as the polling place (RRO 32).

The Employer presented the testimony of one of its observers, Carrie Ann Marlin, who testified that, during the 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 (RRO 32-33). Marlin claimed that the door remained closed for about 10 minutes (RRO 33). Seth Prins, the Union's observer during this time frame, 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 (RRO 33). 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, voicing her agreement that the door should be opened. The Board Agent then walked

over to the door, opened it, and propped it open (RRO 33-34; Tr. 236). The door was closed for no more than three minutes (RRO 34).

The Hearing Officer credited Prins' version of events (RRO 34). The Employer argues that this credibility determination should be disturbed because, according to the Employer, it was not based upon demeanor. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence shows that they are incorrect. Stretch-Tex Co., 118 N.L.R.B. 1359, 1361 (1957). The Employer offers no argument to meet this standard, merely contending that Marlin was a better witness. The Hearing Officer correctly observed that Marlin's testimony was vague, while Prins' was direct and straightforward. Indeed, Marlin was a singularly evasive witness, repeatedly responding that she did not recall or, "I don't know" when asked about the details of this issue (Tr. 69, 70, 71). She contradicted herself as to whether one or two board agents were present when the door closed (Tr. 68, 69). She signed an affidavit prepared for her by counsel stating that she swore that is was true without being administered an oath (Tr. 73). Clearly, there is more than adequate evidence on the record to support the Hearing Officer's credibility finding. Accordingly, she properly concluded that the door was closed accidentally and that it was reopened after about 3 minutes.

In any event, there is no claim that the door was locked, so any voter who arrived at the polling place while the door was closed could have entered the polling place to vote. There is no evidence that any voter was deprived of the right to cast a ballot during the brief period when the door was closed. Accordingly, the Board should adopt the Hearing Officer's recommendation to overrule this objection.

VII. OBJECTION 6 –CHALLENGED BALLOT ENVELOPES

Objection 6 seeks to overturn the results of the election because the Board Agent at the Hammer Building ran out of challenged ballot envelopes. The Hearing Officer based all of her findings with respect to this objection on the testimony of the Employer's witnesses. Despite that, the Employer disputes those factual findings.

Patricia Catapano, one of the Employer's observers at that location, testified that the Board agent ran out of envelopes at about 1:15 or 1:30 on December 7 (RRO 31; 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 were told to return later because they could not vote subject to challenge in the absence of challenged ballot envelopes (RRO 31; Tr. 41-42). Marlin, who replaced Catapano as the Employer's observer at 2:00 p.m., testified that a second Board Agent arrived with a fresh supply of challenged ballot envelopes at about 3:00 p.m. (RRO 31; Tr. 63). The Hearing Officer found that most or all of the voters who were turned away due to the lack of challenged envelopes returned to vote after the new envelopes arrived (RRO 36). The Employer excepts to this finding (Except. No. 51). The Hearing Officer's finding is supported by Marlin's testimony that, after the envelopes arrived, "Multiple people said … that they had come earlier, been told that they couldn't vote earlier, and had to return when there were envelopes available." (Tr. 63). Columbia cannot complain that the Hearing Officer based findings on the undisputed testimony of its own witness. The Employer's exception to this finding, like its other exceptions, is utterly baseless.

The Hearing Officer correctly concluded that 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. 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, the Board should adopt the Hearing Officer's recommendation to overrule this objection.

CONCLUSION

The Board should adopt the Hearing Officer's recommendations to overrule these objections and certify the Petitioner as the collective bargaining representative of the employees in the unit.

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

By: ______________________________

Thomas W. Meiklejohn
Nicole M. Rothgeb
Livingston, Adler, Pulda, Meiklejohn & Kelly, PC
557 Prospect Avenue
Hartford, CT 06105-5922
(860) 570-4628
twmeiklejohn@lapm.org
nmrothgeb@lapm.org

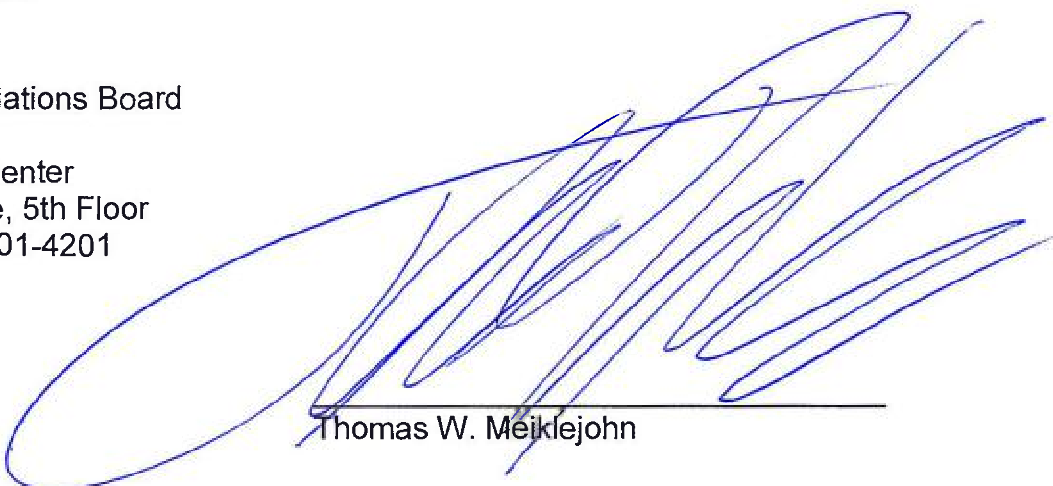
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petitioner's Answering Brief to Columbia's Exceptions was sent via email, on this 27th day of March, 2017, to the following:

Bernard M. Plum, Esq.
Yonatan Grossman-Boder
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
bplum@proskauer.com

Patricia Catapano, Esq.
Columbia University
Office of the General Counsel
412 Low Memorial Library
535 West 116th Street
New York, NY 10027

Rachel Zweighaft
National Labor Relations Board
Region 29
Two Metro Tech Center
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201-4201



Thomas W. Meiklejohn