

Case No. 02-RC-143012

All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty, and Nevis facilities, but excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

Eligible to vote were all unit employees who:

- (1) hold an appointment or a training grant in a unit position in the fall semester 2016, or
- (2) are course assistants, graders, or readers who are on the casual payroll and who worked 15 hours per week or more in a unit position in the fall semester 2016, or
- (3) have held a unit position for either the fall, spring, or summer during the prior academic year.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	4256
Number of void ballots	3
Number of ballots cast for the Petitioner	1602
Number of votes cast against participating labor organization	623
Number of valid votes counted	2225
Number of challenged ballots	647
Number of valid votes counted plus challenged ballots	2872

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted has been cast for Petitioner.

be found to be employees under the Act. On March 31, 2015, the Board granted the Petitioner's request for review and remanded the case for hearing.

On October 30, 2015, following a hearing, the Regional Director issued another Order Dismissing the Petition, again relying on Brown University, *supra*.

On August 23, 2016, the Board issued a Decision on Review and Order in Columbia University, 364 NLRB No. 90 (2016), in which it reversed the holding of Brown University and found that students in the petitioned-for classifications are employees under the Act. The Board again remanded the case.

On October 31, 2016, the Region issued a Supplemental Decision and Direction of Election.

² All dates hereinafter are in 2016, unless otherwise indicated.

The Employer filed timely objections to conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director for Region 29³ caused an investigation to be conducted concerning the Employer's objections. On January 4, 2017, the Regional Director issued and served on the parties a Supplemental Decision on Objections and Notice of Hearing, in which she directed that a hearing be held regarding the Employer's objections.

A hearing was held before the undersigned on January 23, 24, and 25, 2017, in Brooklyn, New York. The Petitioner, the Employer, and a representative for the Regional Director of Region 2 appeared at this hearing. At the hearing, all parties were represented by counsel and afforded a full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues, and present oral argument. In addition, the Petitioner and the Employer filed post-hearing briefs.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Employer's objections.⁴

The Objections

General Principles

It is well-settled that the Board will not set aside a representation election lightly. See In re Safeway, Inc., 338 NLRB 525, 525-26 (2002). There is a "strong presumption that ballots

³ On December 19, this case was transferred from Region 2 to Region 29.

⁴ References to the transcript are identified as Tr. ___. References to the Board, Employer, Petitioner and Joint exhibits will be cited as Bd. Ex. ___, Er. Ex. ___, Pet. Ex. ___, Jt. Ex. ___ respectively.

cast under specific NLRB procedural safeguards reflect the true desires of the employees.” Id. at 525, quoting NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991). An objecting party has the burden of proving its allegations, and that burden is a heavy one. Id. See also Mastec North America, Inc., d/b/a Mastec Direct TV Employer, 356 NLRB 809 (2011), citing Kux Mfg. Co. v. NLRB, 890 F.2d 804, 806 (6th Cir. 1989).

When evaluating alleged objectionable conduct, the Board employs an objective test to determine “whether the conduct of a party to an election has the tendency to interfere with the employees’ freedom of choice.” Cambridge Tool & Mfg. Co., 316 NLRB 716, 716 (1995). The Board examines several factors, including:

1. the number of the incidents of misconduct;
2. the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
3. the number of employees in the bargaining unit subjected to the misconduct;
4. the proximity of the misconduct to the election date;
5. the degree of persistence of the misconduct in the minds of the bargaining unit employees;
6. the extent of dissemination of the misconduct among the bargaining unit employees;
7. the effect, if any, of misconduct by the opposing party in canceling out the effect of the original misconduct;
8. the closeness of the final vote; and
9. the degree to which the misconduct can be attributed to the union.

Avis Rent-a-Car System, 280 NLRB 580, 581 (1986).

In the present case, the Petitioner prevailed by over 900 votes. As noted above, this tally of ballots is a relevant factor to be considered when determining whether alleged objectionable conduct could have affected the results of an election. See Sanitation Salvage Corp., 359 NLRB 1129 (2013) (finding that the Board will not set aside an election if the number of employees

affected by objectionable conduct is insufficient to affect the outcome of the election); Hopkins Nursing Care Center, 309 NLBR 958, 959 fn. 8 (1992) (finding that the closeness of an election was due “great weight” when deciding whether conduct is objectionable).

Background

The election occurred at four polling sites. Objections Nos. 1 and 2 pertain to conduct at Earl Hall on the Employer’s Morningside Heights campus. The evidence offered in support of Objection No. 3 also occurred at Earl Hall. Voting took place at Earl Hall from 10 a.m. to 8 p.m. on both December 7 and December 8. Jt. Ex. 2. The majority of voters on the Excelsior list were scheduled to vote at this location. Jt. Ex. 5.

Objections Nos. 4, 5, and 6 involve conduct at the Columbia University Medical Center (“CUMC”) site on December 7. Voting took place at CUMC from 10 a.m. to 8 p.m. on both December 7 and December 8. Jt. Ex. 2.

There is no record evidence regarding conduct at either of the two additional sites, Lamont-Doherty and Nevis Laboratory.

Objection No. 1

In its first objection, the Employer alleges that voters who voted at the Earl Hall polling location were forced to pass known Union agents within 100 feet of the polling place during the final minutes before they cast their votes.

The Physical Layout of Earl Hall

To enter Earl Hall from the campus, one walks up an exterior flight of stairs, visible in Employer’s Exhibit 1. From those stairs, the front door enters into the second floor of the

building, visible in Employer's Exhibit 2. To the left of the door, 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. To the right of the door are stairs which lead up to the third floor polling place. These stairs are visible in Employer Exhibit 3. According to Hyacinth Blanchard, an assistant director of organizing for the International UAW, the stairs visible at the top of this picture lead to a small landing. There are seven additional stairs, not visible in the photograph, that lead to the third floor polling place.⁵ Tr. at 284-85. According to measurements taken by Idina Gorman, the Employer's Director of Labor Relations, the coffee table in front of the fireplace is approximately 25 feet from the base of the stairs leading to the third floor, and the base of those stairs is 40 feet from the front door of the polling place. Tr. at 181-83.

The Union Representatives' Presence at Earl Hall

The facts surrounding the Union representatives' conduct at Earl Hall during the election is largely uncontested. Assistant Director of Organizing Blanchard testified that she and Maida Rosenstein, the President of Local 2110, a UAW local that represents clerical and administrative staff employed by the Employer, visited Earl Hall several times on December 7 and 8. Tr. at 104, 117. Blanchard works in the Union's Detroit office. She came to New York on December 5 to train the Union's observers before the election. Tr. at 272-73.

Blanchard and Rosenstein were present before the polls opened and when the polls closed on both December 7 and 8. In addition, they went to Earl Hall about 30 minutes before observer shift changes, which occurred every two hours during the election. They met with incoming

⁵ Mirian Stincone, the Employer's assistant director for employee relations, also testified that there was a landing at the top of the photograph, but could not recall whether there were additional stairs. Tr. at 122-23.

observers in the seating area by the fireplace on the second floor. Blanchard and Rosenstein also met observers coming out of the election in the same area. Once those observers arrived, Blanchard, Rosenstein, and the observers left Earl Hall to debrief about the election elsewhere. Blanchard stated that they may have had to wait a few minutes past the end of the observers' shift to leave the building if there was a delay in people coming downstairs or so observers could use a restroom. Tr. at 290.

Blanchard testified specifically about two visits to Earl Hall on December 7. She and Rosenstein met with observers in the second floor seating area at Earl Hall at 9:30 a.m. Tr. at 282. Blanchard and Rosenstein then went upstairs to the polling place for the pre-election conference before the polls opened at 10 a.m. During this conference, a Board Agent designated the third floor auditorium and the third floor foyer as the no-electioneering zone. The Board Agent specifically stated that he could not control any area he could not see, including the second floor of and outside Earl Hall. Tr. at 283-84. Once the conference was over, Blanchard and Rosenstein left the building. Tr. at 286.

Blanchard and Rosenstein returned to Earl Hall at 11:30 a.m. They met with the observers arriving for the 12 noon to 2 p.m. shift on the second floor of Earl Hall. Blanchard sat to the right of the fireplace and Rosenstein sat across from the fireplace with her back to the stairs. Blanchard and Rosenstein then met the observers who finished the 10 a.m. to noon shift, and left the building with them. Tr. at 288-89. Blanchard and Rosenstein repeated this same pattern of visits to Earl Hall in two hour intervals throughout the polling on December 7 and 8.⁶ Tr. at 289.

⁶ Blanchard testified that she may have gone to Earl Hall without Rosenstein on one occasion. Tr. at 297.

Blanchard testified that the amount of voter traffic varied during their visits to Earl Hall. Tr. at 304. There were times when the line of people waiting to vote extended onto the stairs between the second and third floor, and at other times there was no line at all. Tr. at 291-92, 303-04. Blanchard specifically testified that neither she nor any of the other Union representatives spoke to voters who were waiting to vote. Tr. at 292.

The testimony of the Employer's witnesses is consistent with Blanchard's testimony. The Employer's witnesses identified only Rosenstein, whom they know in her capacity as the President of Local 2110, as being in Earl Hall during the election. They did not identify Blanchard, who came from Detroit for the election. Mirian Stincone, the Employer's Assistant Director of Employee Relations, served as an observer for the Employer from 10 a.m. to 12 p.m. on December 7 and 8. Tr. at 92. Stincone testified that she saw Rosenstein in the polling place before the polling began on both December 7 and 8. Tr. at 105, 107, 118. On December 7, Stincone also saw Rosenstein in the second floor seating area at 12 p.m., after Stincone's observer shift. Tr. at 105. As Stincone came down the stairs from the polling place and left Earl Hall, she saw Rosenstein standing in the area near the coffee table talking with a small group of approximately three to ten people. Stincone did not recognize any of the other individuals, but noticed that they were wearing Union buttons. She could not hear anything Rosenstein or the others were saying. Tr. at 106. Stincone testified that she observed Rosenstein and the others there for about one to two minutes as she left the building. Tr. at 108. There were voters waiting to vote on line on the stairs between the second floor and the third floor of Earl Hall, but Stincone was not sure how far down the stairs the line reached. Tr. at 125-26. Stincone did not see Rosenstein talking to voters waiting to vote. Tr. at 126. She did not see Rosenstein after the polls opened on December 8. Tr. at 108.

Idina Gorman, the Employer's Director of Labor Relations, served as an observer in Earl Hall on December 7 from 12 p.m. to 4 p.m. Tr. at 177. Gorman arrived at Earl Hall around 11:45 a.m. She was early for her shift, so she waited on the second floor by the front door of the building. During this time, she saw Rosenstein sitting near the fireplace, talking with three or four people. Tr. at 187-88. Gorman could not hear their conversation. Tr. at 217. According to Gorman, Rosenstein was wearing a pro-union sticker. Tr. at 188.

After her shift ended at 4 p.m., Gorman came down to the second floor from the polling place. She saw Rosenstein in the sitting area near the fireplace with five or six people. Gorman went down to the first floor to use the restroom and to make a phone call. She returned to the second floor at approximately 4:10 p.m. Rosenstein and the other individuals were still present. Gorman then left the building. Tr. at 188-90. Gorman observed Rosenstein only for the time it took her to walk through the second floor at 4 p.m. and at 4:10 p.m. Tr. at 217-18. Gorman did not recognize any of the individuals with Rosenstein except for Theresa Smith, a shop steward for Local 2110, whose name does not appear on the Excelsior list. Jt. Ex. 5.

Ana Keilson, a graduate student at Columbia who served on the Union's organizing committee,⁷ testified that there were many students involved in the organizing campaign who did not know Rosenstein because students organized other students. Tr. at 360. Although the Employer inquired into Rosenstein's social media use, there is no evidence in the record regarding her social media following by unit voters. Keilson also testified that Rosenstein spoke to students about organizing, but again, there is no evidence regarding how many voters would know her in this capacity. Tr. at 361.

⁷ Keilson was not eligible to vote in the election because she is not teaching this year. Tr. at 349.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding the Union agents' presence in Earl Hall during the election, each witness testified in a straightforward, honest, and clear manner. I note this testimony is un rebutted. I generally credit the foregoing testimony regarding the Union agents' presence in Earl Hall.

Discussion

The Employer alleges that the mere presence of the Union agents on the second floor of Earl Hall at various times throughout the election is objectionable. The evidence does not support such a finding.

The Board has found that the mere presence of a union representative in the vicinity of the polls during an election, absent evidence of coercion or other objectionable conduct, does not warrant setting aside an election. See C & G Heating and Air Conditioning Inc., 356 NLRB 1054, 1055 (2011) (holding that the presence of union agents near a polling place is not sufficient to set aside an election absent evidence of coercion or other objectionable conduct); see also Aaron Medical Transportation Inc., 22-RC-070888, 2013 WL 3090117 at *1 fn. 3 (NLRB, Jun. 19, 2013) (in which the Board stated, “we find that the mere presence of union agents [near the polls during an election], without more, does not constitute objectionable conduct sufficient to overturn the election.”).

The record evidence here shows that Union agents remained on the second floor of Earl Hall in a seating area for approximately thirty minutes every two hours throughout the election. The Union agents remained beyond the no electioneering area at all times. There is no evidence that the Union agents spoke to voters or campaigned during this time. Moreover, the record does

not show the extent to which voters recognized the Union agents or were aware of their presence in Earl Hall during the election. Keilson, who served on the Union's organizing committee, testified without rebuttal that many voters would not necessarily know Rosenstein. While the Employer alluded to Rosenstein's social media presence and public speaking, the Employer offered no evidence regarding whether voters in this election would recognize her from her social media use or appearances. In fact, the Employer's witnesses recognized Rosenstein from her work as the president of a local that already represents other employees of the Employer, a capacity that would not necessarily be known to unit voters in this election. Blanchard does not work in New York and arrived in New York only a couple of days before the election to train observers. There is no evidence that anyone recognized Blanchard as a Union agent. While the Union agents sat in an area on the left side of the room, voters 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.

The Employer relies on Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981 (D.C. Cir. 2001). In that case, the election was held in a classroom in a church. Two union agents sat in a car parked within twenty feet from the church's door, within the no electioneering zone set by the Board Agent, during the election. The union agents motioned, gestured, and honked at employees as they entered the church to vote. The employer filed objections alleging, inter alia, that the union agents had engaged in objectionable conduct by remaining in the no electioneering zone and communicating with employees during the election. The Regional Director dismissed the objection, finding that the union agents had not engaged in impermissible electioneering. The Board affirmed that decision.

The Board's decision was appealed, and the Circuit Court remanded the case for a hearing to determine if the presence of union officials was objectionable, even absent evidence of electioneering. The court noted that "the Board has stated that a party's mere presence may be sufficient to justify setting aside an election," *Id.* at 992, relying on two Board cases, Performance Measurement Co., 148 NLRB 1657 (1964) and Electric Hose & Rubber Co., 262 NLRB 186 (1982), both of which addressed the continued presence of employer agents at the polls during an election.⁸

The Board has distinguished the presence of employer agents from the presence of union agents at a polling site, finding that the mere presence of union agents is not necessarily coercive.⁹ In Longwood Security Services, 364 NLRB No. 50 (2016), the Board noted that there "is no indication that the [circuit court in Nathan Katz] was presented with, or considered, an argument that Electric Hose and Performance Measurements were distinguishable on the basis that those cases involved *employer* agents rather than union agents." *Id.*, slip op. at 3 (emphasis in the original). In fact, consistent with Board precedent, the Administrative Law Judge who heard Nathan Katz on remand from the Circuit Court dismissed the employer's objection, finding that "the Board, support by the Courts, has consistently found that the mere presence of union representatives at or near the polling place, absent evidence of coercion or other objectionable

⁸ In Performance Measurement, the employer's president remained within two to six feet of the door to the polling place and even entered the polling place during the election. Performance Measurement, 148 NLRB at 1659. The Board held that "continued presence of the [e]mployer's president at a location where employees were required to pass in order to enter the polling place" interfered with employees' free choice in the election. *Id.* In Electric Hose, a supervisor was "stationed" within ten to fifteen feet of the polling area. Absent a showing of any legitimate business reason for the supervisor to be there, the Board found that his presence conveyed to employees the impression that they were being watched and was objectionable. Electric Hose, 262 NLRB at 216.

⁹ The Board has also found that the presence of an employer representative at the polls is not necessarily sufficient to set aside an election. See Lowe's HIW, Inc., 349 NLRB 478 (2007) (in which the Board declined to set aside an election where an alleged agent of the employer stood outside the polling place and told employees to have their votes ready); J.P. Mascaro & Sons, 345 NLRB 637 (2005) (in which the Board declined to set aside an election where the employer's president remained in front of the employer's facility during the election). The conduct of the Union agents in this case was even less intrusive given that the Union agents did not speak to voters and were not necessarily known to voters.

conduct, (such as electioneering) is insufficient to warrant setting aside an election.” In Re Nathan Katz Realty, LLC, 29-CA-23280, 2002 WL 1883790 (NLRB Div. of Judges, Aug. 12, 2002) (citations omitted). There is no evidence that the Union agents in the present case engaged in coercive or otherwise objectionable conduct in or around Earl Hall during the election.

In the instant case, the Union agents remained beyond the no electioneering zone set by the Board Agent, which was limited to the third floor where the polling place was located. In contrast to the union agents’ boisterous conduct in Nathan Katz, there is no evidence in this case that the Union agents behaved in any manner to call attention to themselves. The Employer’s witnesses could not hear the Union agents’ conversations from the stairs, walking through the lobby, or standing by the front door. While the Employer points out that the vast majority of the voters were scheduled to vote at Earl Hall, there is no evidence regarding how many voters walked through the Earl Hall lobby while Rosenstein was present. Finally, unlike the union agents in Nathan Katz, the Employer has not demonstrated that either Rosenstein or Blanchard was known or recognizable to voters. See C & G Heating and Air Conditioning Inc., 356 NLRB at 1054, supra, (in which the Board declined to set aside an election when a union agent remained near the polls, but absent “evidence that any employee entering [the polling place] to vote saw the union representative and recognized him as a union representative.”).

The Employer asserts that the “union agents surrounded the only entrance to the polls,” but, as discussed, the evidence demonstrates otherwise. The Union agents did not approach the entrance to the polling place during the election. Instead, they remained on a different floor and did not interfere with any voters waiting to vote. The Employer further argues that the Union agents violated the rule set forth in Milchem, 170 NLRB 362 (1968), which prohibits parties

from engaging in prolonged conversations with voters in the final minutes before they vote. The credible evidence established that the union agents did not speak to any voter waiting to vote.

For the reasons discussed above, I recommend overruling the Employer's first objection.

Objection No. 2

In its second objection, the Employer alleges that Union supporters were engaged in surveillance and created an impression of surveillance during the election.

Freyman's Video

Director of Labor Relations Idina Gorman testified that when she arrived at Earl Hall on December 7 at 11:45 a.m., she saw two people, a blond woman and a man, setting up a tripod with a camera directly in front of Earl Hall at the bottom of the exterior stairs shown in Employer Exhibit 1. She also saw these individuals handing out pro-union stickers. Tr. at 184. Gorman observed these individuals for about ten to fifteen seconds. Tr. at 186. Gorman could not identify either the man or the woman. Tr. at 208.

Graduate student Ana Keilson arrived at Earl Hall at approximately 12:15 p.m. on December 7. Keilson passed out stickers in front of Earl Hall, but did not enter the building. Tr. at 349-51. Around this time, she saw Falyn Freyman, who was working with Columbia Student News. Jt. Ex. 3. Freyman had a tripod set up at the bottom of the exterior stairs to Earl Hall, on the left of the building, by the handicapped sign visible in Employer's Exhibit 1. Tr. at 350-51. After a few minutes, Freyman asked to interview Keilson and Keilson agreed. Tr. at 352-53. A portion of that interview is included on a video entered into evidence as Joint Exhibit 3.

This video is two minutes long. It contains footage of Union supporters on campus, and interviews with several students (including Keilson), including both students who did and did not support the Union. The video includes footage of people entering Earl Hall, presumably during the election, as well as a few seconds of video taken from the second floor of Earl Hall showing people walking up the stairs leading to the polling place. There is no testimony about Freyman filming inside Earl Hall. There is also footage taken at times other than during the election. The narrator, who appears on camera about halfway through the video for a few seconds, identifies herself at the end by saying, "For Columbia Student News, I am Falyn Freyman." Jt. Ex. 3.

Cai's Video

Tina Cai, a graduate student at Columbia's School of International and Public Affairs, Tr. at 328, also recorded video at Earl Hall during the election for a class she was taking in Tools and Craft of Multiplatform Story Telling. Cai decided to complete her final project for that class with a piece about the union drive, for which she received a grade. Tr. at 330, 338. She did not coordinate her efforts with the Union in any way. Tr. at 331.

Cai and a fellow student arrived at Earl Hall at about 2 p.m. on December 7. Cai went to the third floor and voted while her colleague set up a tripod on the table behind the chairs in the seating area on the second floor visible in Employer's Exhibit 2. Cai then returned to the second floor. She mounted her iphone on the tripod at a height about eye level for the average person, and took video of voters walking up and down the stairs visible in Employer's Exhibit 3. She also interviewed four or five voters after they had voted. Tr. at 330, 341, 345-46. Cai took about thirty minutes of video in total, Tr. at 341, and then edited her footage into a two minute video that she submitted for her final project. Tr. at 338.

Joint Exhibit 6 includes three videos taken by Cai.¹⁰ The first video, labeled B Roll, is about 5:30 minutes long and includes footage of people walking up and down the stairs leading from the second floor to the third floor of Earl Hall. A couple of individuals look in the direction of Cai's iphone, but most people seem not to notice the iphone at all. None of the voters appear concerned by the iphone. Approximately 5 minutes into the video, a Board Agent from Region 2 is visible coming down the stairs from the third floor, walking through the second floor, and heading down to the first floor of Earl Hall. The Board Agent is visible for approximately 22 seconds. He does not look at the iphone during this time.

The second video is labeled Interview 1. It is a thirty second interview with a voter who states he voted against union representation. Two individuals are visible in the background, one of whom seems to look toward the iphone. The third video, labeled Interview 2, is a one minute interview with a voter who voted for union representation. Approximately ten individuals are visible in the background, one or two of whom appear to look toward the iphone. Jt. Ex. 6.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding Freyman and Cai recording video during the election, each witness testified in a straightforward, honest, and clear manner. I note the testimony is un rebutted. I generally credit the foregoing testimony regarding these two individuals recording video in and around Earl Hall during the election.

¹⁰ The two minute video Cai submitted as her class project is not included in the record.

Discussion

The Employer alleges that the recording of video by Freyman and Cai constituted objectionable conduct. This allegation must be evaluated under the standard for third-party conduct as there is no evidence that any agent of the union recorded any video during the election. Third-party conduct may serve as a basis on which to set aside an election, but only if that conduct is “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” Westwood Horizons Hotel, 270 NLRB 802, 803 (1984); see also Phoenix Mechanical, 303 NLRB 888 (1991); PPG Industries, Inc., 350 NLRB 225 (2007).

There is no evidence that the conduct of either Freyman or Cai created an atmosphere of fear and reprisal which would require setting aside this election. Cai videotaped for about 30 minutes in total. Her footage shows voters walking up and down the stairs in Earl Hall. Only a handful of voters appear to notice Cai’s iphone and none appear upset by it. In addition, a few voters agreed to be interviewed after they had voted. Similarly, there is no evidence that voters were concerned or upset by Freyman’s recording during the election or during any interviews she conducted. There is no record evidence to demonstrate that there was a general atmosphere of fear and reprisal or that employees might have felt surveilled.

The Board has found videotaping by third-parties not objectionable. In Millard Processing Services, Inc., 304 NLRB 770 (1991), an assistant director for a cable news organization used a video camera and a tripod to record video of employees during a shift change on the day before an election while union agents were handing out leaflets. The director videotaped the plant involved, the employee parking lot, cars driving on the street as well as entering and exiting the parking lot, and employees entering and exiting the plant. He asked a few employees for interviews, which the employees refused. A couple of employees asked why

the director was filming and he identified himself as being with a cable news station. Applying the third-party conduct standard to the videotaping, the Board found that the taping could not “reasonably be expected to have had” the result of creating a general atmosphere of fear and reprisal rendering employees’ free choice impossible. There is no evidence suggesting that the videotaping in the present case was more coercive.

The instant case is easily distinguished from those cases in which third-party conduct has been found objectionable, including cases involving threats and violence. See Westwood Horizons Hotel, 270 NLRB 802 (1984) (in which the Board set aside an election following third-party threats of bodily harm accompanied by other misconduct, including forcing an employee to vote); Q.B. Rebuilders, 312 NLRB 1141 (1993) (in which the Board set aside an election after an employee threatened to report other employees to the Immigration and Naturalization Service if they did not vote against the union); Al Long, Inc., 173 NLRB 447 (1969) (in which the Board set an election aside following extensive property damage, anonymous telephone threats to employees, a bomb threat, and unruly conduct on a picket line before the election). Neither Freyman nor Cai’s conduct rises to such a level which would create an atmosphere of fear and reprisal that would render a free election impossible.

The Employer argues that in addition to the conduct of Freyman and Cai, it was objectionable for the Board Agent visible in Cai’s video not to stop her from recording. As stated above, there is no evidence that the Board Agent in the video was aware of this conduct. Thus, the evidence does not support the Employer’s assertion of the “Board Agent’s knowing disregard of surveillance inside Earl Hall.”

Accordingly, I recommend overruling the Employer’s second objection.

Objection No. 3

In its third objection, the Employer alleges that on December 6, 2016, the day before the election, the Regional Office engaged in objectionable conduct when it decided not to require voter identification at the polls.

The facts regarding this objection are not contested. The Employer and the Petitioner stipulated that during a conference call with the parties and representatives of Region 2 held on November 21, the parties agreed that the Region would require that voters show identification issued either by either a government agency or by Columbia. On December 6, Nicholas Lewis, the Assistant to the Regional Director for Region 2, sent an email to the parties stating: "This is to confirm that presentation of voter ID will not be a requirement in order for an individual to vote. As the presentation of identification was not included in either the Supplemental Decision or Notice of Election, the RD has concluded it cannot be made a requirement." Jt. Ex. 1. Although not specified in the parties' exhibit, the Employer notes in its brief that the Region stated that use of identification could be encouraged, but not required. The Petitioner and the Employer further stipulated that one challenged ballot was impounded during the vote count because a person with the same name had already been checked off as having voted at another polling place. Jt. Ex. 1.¹¹ In addition, the parties stipulated that the ballots of voters who were challenged because they voted at the wrong location were opened and counted with the exception of one. Jt. Ex. 4.

¹¹ At the hearing, Region 2 agreed with the stipulation only as it related to the December 6 email from Lewis. Region 2 did not take a position regarding the parties' November 21 agreement or the impounded ballot.

The use of voter identification during the election was inconsistent.¹² Assistant Director of Employee Relations Stincone testified that on December 7, a Board Agent at the election advised her that she could ask for identification, but that it was not required, and that lack of identification would not prohibit anyone from voting. Tr. at 109, 111. Accordingly, Stincone asked voters for identification, which she said facilitated the process and made sure it was as accurate as possible because there were voters with complex last names and voters with identical names on the Excelsior list. Tr. at 112.

When Stincone reported for her observer shift on December 8, another Board Agent told her that asking for voter identification was prohibited. Tr. at 112. Stincone testified that as a result, she had to ask some voters to repeat their names multiple times in order to verify their identity. She stated that some voters were cooperative and others less so, but ultimately everyone complied. Tr. at 113. She did not challenge any voters for lack of identification or turn any voters away because their names were already checked off. Tr. at 114, 127.

Director of Labor Relations Gorman also testified that there was a change of practice regarding the use of identification during the election. Before Gorman reported for her shift at 12 noon on December 7, Dan Driscoll, the Employer's Associate Vice-President of Labor Relations and Client Services, told her that she could request identification from voters, which she did. Tr. at 192. According to Gorman, voter identification made the process smoother because there were many voters with the same name and she could use voters' identification to make sure she was checking employees off the Excelsior list correctly. Tr. at 192. At 3:30 p.m. on December 7, Gorman was advised by a Board Agent that she could no longer request voter

¹² Carrie Ann Marlin, who served as an observer for the Employer at the Columbia University Medical Center site, testified that she asked voters for identification during her shift. She did not testify to any problems regarding the use of identification. Tr. at 60-61. There is no evidence regarding the use of identification at the Lamont-Doherty or Nevis Laboratory sites.

identification during the election. Tr. at 194. Gorman testified that “a couple hundred” voters voted at her table between 12 noon and 4 p.m. on December 7, but that it was “very quiet” between 3:30 and 4 p.m., and that there were less than fifty voters at her table during that time. Tr. at 194, 213.

Gorman testified about three specific voters. One voter showed identification, but the name on the identification was not on the Excelsior list and so that individual voted under challenge. Tr. at 194. A second voter arrived after 3:30 p.m., when they were no longer checking identification. This voter’s name appeared on the Excelsior list twice with different addresses. Gorman testified that initially there was some confusion about which address was the correct one, but they were able to determine the correct address and check the voter’s name off the Excelsior list. Tr. at 214-16. A third incident occurred at another table (at Earl Hall, voters reported to specific tables depending on the first letter of their last names). Gorman could not specify if this incident occurred before or after 3:30 p.m. Tr. at 221. Gorman did not hear the entire conversation. She heard only that a voter presented his identification, but his name had already been checked off. Tr. at 219. Gorman did not hear how the incident was resolved. Tr. at 221. Gorman later testified that she did not know if this voter produced identification, Tr. at 221, even though she initially testified that the voter had shown identification. Tr. at 219.

The Employer also offered notes from conversations between Union agents and Union observers taken by Union agents after the observers’ shifts. Assistant Director of Organizing Blanchard interviewed observers Sayantani Mukherjee and Alex Rigas,¹³ who both stated that

¹³ The Employer offered only Blanchard’s notes from observer Sayantani Mukherjee as Employer Exhibit 6, although additional material appears on the page.

The Employer offered the full content of the two pages included as Employer’s Exhibit 4. On this exhibit, Blanchard interviewed only Rigas and another observer, Josephine Caputo. Blanchard testified that the exhibit accurately reflects her discussions with those two observers. This exhibit also includes notes from interviews with

there were no issues regarding identification during their shifts. Er. Exs. 4, 6. In addition, the parties entered an unmarked copy of the Excelsior list into evidence. This list includes voters' full names and addresses. It is organized by polling place location. A review of that list shows that there are multiple voters with common last names, such as Brown (including Zachary Brown and Zachary C. Brown listed at two different addresses), Chen, Liu, and Zhang. Jt. Ex. 5.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding the use of voter identification during the election, each witness testified in a straightforward, honest, and clear manner. I note that this testimony is un rebutted. I generally credit the foregoing testimony regarding the use of voter identification during the election.

Discussion

The Regional Director has broad discretion in setting the details for an election. See San Diego Gas & Electric, 325 NLRB 1143, 1144 (1998) ("The Board has delegated to the Regional Directors discretion in determining the arrangements for an election"). The Board's Casehandling Manual specifically states that in large or complex elections, absent agreement of the parties, "the Regional Director should consider whether to require identifying information in addition to self-identification by voters." Casehandling Manual (Part 2) Representation Proceedings, Sections 11312.4. This section cites three cases on which the Employer relies: Monfort, Inc., 318 NLRB 209 (1995); Newport News Shipbuilding & Dry Dock Co., 239 NLRB

observers Shewanna House and Theresa Smith, but there is no evidence regarding the accuracy of those notes. Accordingly, I do not rely on that part of the exhibit.

I rejected the Employer's offer of additional notes taken by Union representatives who did not testify to authenticate the notes. Moreover, those notes were not corroborated by testimony. See Delphi/Delco East Local 651 (General Motors Corporation), 331 NLRB 479, 481 (2000) (rejecting uncorroborated hearsay as unreliable).

82 (1978); and Avondale Industries v. NLRB, 180 F.3d 633 (5th Cir. 1999). This Casehandling Manual section does not, however, override the Regional Director's discretion by requiring use of identification in large or complex elections.

In this case, the Regional Director considered this issue in light of the parties' agreement and decided that voters could not be required to show identification, because such a requirement was not included in the Supplemental Decision or Notice of Election. Although the Regional Director did not prohibit the use of voter identification, the evidence demonstrates that there were periods during the election when such use was in fact prohibited by Board Agents. There is no evidence regarding the extent of this prohibition, how many voters produced identification at the polls, or how many did not.

The parties stipulated that one challenged ballot was impounded during the vote count because a person with the same name had already been checked off as having voted at another polling place. There is no evidence, however, that this incident was related to problems with identification or whether the employee showed identification at either polling place. In fact, it appears that the proper procedure was followed with regard to this ballot. I note that the parties also stipulated that the ballots of voters who were challenged because they voted at the wrong location were opened and counted with the exception of one.

Director of Labor Relations Gorman testified about three voters; one voter who showed identification, but whose name did not appear on the Excelsior list, a second voter whose name appeared on the list twice with different addresses, and a third voter who presented identification, but his name had already been checked off the list. These few examples do not demonstrate that there were widespread irregularities that could have affected the results of this election, which the Petitioner won by a large margin. Significantly, two of the examples given by Gorman

involved voters who showed identification. With regard to the one example involving a voter who did not show identification, Gorman conceded that they were able to determine the correct voter by using the address. Stincone also testified that she was able to verify the identity of voters without the use of identification.¹⁴

The Employer relies on Avondale Industries v. NLRB, 180 F.3d 633 (5th Cir. 1999), which involved a large election of approximately 3,500 voters. The employer in that case alleged that it was objectionable for the Board to refuse to employ routine voter identification beyond self-identification. The court noted, “[w]hen examining the voter identification procedures employed in a representation election, this court does not sit to determine ‘whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity.’” Avondale, 180 F.3d at 637, citing NLRB v. ARA Servs., Inc., 717 Fed. 57, 68 (3d Cir. 1983); see also Polymers, Inc., 174 NLRB 282, 282 (1969) (in which the Board found that “the failure to achieve absolute compliance with [election] rules does not necessarily require that a new election be ordered,” and that the Board must determine if “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.”). Significantly, the Excelsior list used in Avondale did not contain employees’ full names, but only employees’ last names, first initials, and addresses. The lack of employees’ full name on the list left the election in Avondale vulnerable to a greater degree of uncertainty, which was magnified by the fact that the employees wore badges containing only their first names. Finding that this created confusion, the court noted that an employee named Jane could present herself as “any voter on the [Excelsior] list with the first initial ‘J’ and could vote on no more sure proof of identity.” Avondale, 180 F.3d at 638. The

¹⁴ With regard to the Union’s notes from its debriefings with observers contained in Employer’s Exhibits 4 and 6, I rely on these notes only to bolster the credible testimony of the witnesses. See Dauman Pallet, Inc., 314 NLRB 185, 186 (1994).

court further noted that there were fourteen instances where an employee appeared to vote whose name had already been crossed off the list. Id. at 639. The court found that an analysis of the marked Excelsior list showed “suspicious voting involving hundreds of ballots.” Id. at 636. The union prevailed in the election by approximately 250 votes, a much closer margin than the margin enjoyed by the Petitioner in this case. The court found that the number of irregularities in Avondale could have affected the results of that election and accordingly concluded that the “NLRB’s failure to implement more extensive identification procedures for this large-scale representation election, combined with evidence of potential voter fraud, raises serious questions regarding the validity of the representation election conducted at Avondale.” Id. at 640-41 (emphasis added). Avondale does not, as the Employer contends, affirmatively require the use of voter identification.

There is no question that the use of voter identification facilitated the process by helping the observers to find voters on the Excelsior list, as illustrated in Newport News and Monfort, in which the Board endorsed, but did not require, the use of voter identification. See Monfort, Inc., 318 NLRB 209, supra (in which the Board sustained challenges to voters whose names had already been checked off where the parties followed the Board’s procedures, including checking voters’ identification); Newport News Shipbuilding & Dry Dock Co., 239 NLRB 82, supra (in which the Board found valid an election where there were discrepancies between the number of voters checked off on the Excelsior list and the actual ballots cast absent specific evidence relating to the discrepancies).

In the present case, as in Avondale, the procedures employed were not optimal. The Region’s decision not to require identification was not communicated to the parties until the day before the election, leaving the parties little to no time to negotiate any alternative. Moreover,

the Region's directive was not uniformly followed by the Board Agents conducting the election. However, in contrast to the facts of Avondale, the record evidence here does not raise a reasonable doubt as to the validity of this election.

The Employer argues that a handful of incidents impugns the validity of this election. In its brief, the Employer argues that it was "likely if not certain" that eligible voters were prevented from casting a ballot, but the evidence does not support this claim. The Employer has presented evidence regarding only four voters, including a voter whom it seems appeared at more than one polling site; a voter whose name was already checked off the Excelsior list; a voter whose name did not appear on the Excelsior list; and a voter whose name appeared on the list twice and whose identity the Employer concedes was verified by using the voter's address. As the Board noted in Monfort, there must be an evidentiary basis on which to find that an election was not fairly and properly conducted. Monfort, 318 NLRB at 210 fn. 11. These few examples of alleged voting irregularities do not call the results of this election into question. See also Newport News, 239 NLRB at 85 (stating that the Board must keep in mind the "realities of the voting process" when evaluating discrepancies at elections). The Employer has not demonstrated that there is a reasonable doubt as to the validity of this election due to the voter identification issue.

For the reasons discussed above, I recommend overruling the Employer's third objection.

The following objections pertain to alleged conduct at the Columbia University Medical Center ("CUMC") site on December 7 between 11:45 a.m. and 4 p.m.

Objection No. 4

In its fourth objection, the Employer alleges that a Board Agent conducting the election at the CUMC site dismissed Tshaye Meaza, a non-supervisory employee, from serving as the Employer's observer in the presence of unit employees, thereby prejudicing voters.

Meaza, the Employer's Assistant Director for Financial Operations and Administration, testified that she was scheduled to serve as an observer for the Employer at the CUMC site on December 7 from 12 noon to 2 p.m. She arrived at approximately 11:45 a.m., approached the Board Agent conducting the election, and stated that she was there to observe. Tr. at 152-53. The Board Agent asked if Meaza was a manager. Meaza responded that she was not a manager and gave the Board Agent her title. According to Meaza, the Board Agent said that she did not like Meaza's answer and that it sounded like Meaza was a supervisor. Tr. at 153. The Board Agent then told the person who was serving as the Employer's observer until 12 noon to call someone, although Meaza did not know whom the observer called. Tr. at 153-54. Meaza stepped out of the room.

A few minutes later, Meaza saw Patricia Catapano, the Employer's Associate General Counsel, walk into the polling room and talk to the Board Agent. Meaza went back into the polling room. At that point, the Board Agent said to Catapano that Meaza was a director. Tr. at 154. Catapano asked Meaza if she supervised anyone and Meaza said no. Tr. at 155. The Board Agent then said that she did not want a problem and that she would rather have Catapano serve as an observer than Meaza. At that point, Catapano took her seat to serve as the Employer's observer and Meaza left the polling place. Tr. at 155. According to Meaza, there were

approximately two or three employees waiting to vote when the Board Agent spoke to Catapano about Meaza serving as an observer. Tr. at 160. Meaza stayed at the CUMC building for about half an hour in case she was called back to the polling place, and then left. Tr. at 156.

According to Catapano, it was Catapano, not Meaza, who was scheduled to observe from 12 noon to 2 p.m. on December 7, and that only one observer was scheduled per shift. Tr. at 37, 48. Catapano testified that due to some confusion, Meaza was scheduled to observe for the Employer at the same time. Tr. at 37. When Catapano arrived a few minutes before noon, the Board Agent, the Employer's observer from the previous shift, the Union's observer, and Meaza were present. There were also approximately four voters waiting to vote. Tr. at 30, 31, 45. According to Catapano, she heard Meaza telling the Board Agent that she was not a supervisor. The Board Agent asked if Catapano was a supervisor and Catapano replied no. The Board Agent then said she would rather have Catapano as an observer. Tr. at 48. Catapano then took her place as an observer. Tr. at 31. Catapano testified that the Employer's previous observer was present until Catapano arrived and the Employer did not have any gaps in the presence of its observers. Tr. at 36-37, 48.

Credibility

Turning to credibility, I generally credit the testimony of Meaza and Catapano that the Board Agent stated that she thought Meaza was a supervisor and that she would prefer to have Catapano serve as an observer. I note that Meaza and Catapano's testimony differs regarding the exact chronology of the conversation, but I do not find that these discrepancies render the testimony unreliable. Their testimony regarding the comments of the Board Agent is consistent and unrebutted.

Discussion

I make no finding regarding Meaza's supervisory status.¹⁵

The evidence demonstrates that the Board Agent stated that she would rather have one of two possible observers who presented themselves for the same shift, citing Meaza's potential supervisory status. The Board Agent's actions were consistent with Board law. See Browning-Ferris Industries of California, 327 NLRB 704 (1999) (if a party proposes to use an observer who is ineligible, the board agent should put the parties on notice that the use of an ineligible observer may result in the election being set aside and allow the election to proceed accordingly). According to their own testimony, both Meaza and Catapano readily complied with the Board Agent's direction. There is no evidence that the Board Agent actually prohibited Meaza from serving as an observer. In fact, Catapano testified that it was Catapano herself who was supposed to observe from 12 noon to 2 p.m. on December 7, and that Meaza was scheduled for the same time due to "confusion." Thus, the Employer was not deprived of the observer of its choice at any time.

The Employer argues that by prohibiting Meaza from serving as an observer, the Board Agent destroyed the neutrality necessary for a valid election. The Employer relies on cases in which the Board set aside elections where Board Agents prohibited individuals from serving as observers, and thereby deprived parties of having observers at all. For example, in Longwood Security Services, Inc., 364 NLRB No. 50 (2016), the Board set aside an election where a Board Agent refused to seat the union's observer while allowing the employer's observer to serve during the election, thus breaching the stipulated election agreement's provision that the parties be allowed an equal number of observers. Similarly, in Browning-Ferris Industries of California,

¹⁵ The Employer's counsel asked Meaza if anyone reported to her or if she supervised anyone and Meaza answered no. Tr. at 150. I do not rely on such conclusory testimony.

327 NLRB 704, supra, the Board set aside an election where “the Board agent allowed the election to proceed with two observers present for the Employer and no observers present for the union. This constituted a material breach of the [stipulated election] agreement such that the election must be set aside.” Id. at 704. By contrast, in this case, the Employer was never deprived of an observer at the polls. As stated above, Catapano testified that she was the Employer’s intended observer. The Employer would have had two observers present at the polls had both Catapano and Meaza stayed. There is no evidence that the Employer was in any way prejudiced by having Catapano observe during the shift at issue.

The Employer further relies on Athbro Precision Engineering Corp., 166 NLRB 966 (1967). In that case, a Board agent conducting a split session election was seen by an employee of the employer drinking beer with a union representative between the voting sessions. Setting aside the election, the Board found that this conduct “gave an appearance of irregularity to the conduct of the election, thus departing from the standards of integrity which the Board seeks to maintain.” Id. at 966. Here, to the contrary, there is no evidence that the Board Agent expressed any preference for or showed any favor to either party. Even if the Board Agent was mistaken about Meaza’s supervisory status, it was not objectionable for the Board Agent to alert a party to a potential issue and suggest a better course. Such conduct does not suggest favoritism by the Board Agent. See Browning-Ferris Industries of California, 327 NLRB 704, supra.

For the reasons stated above, I recommend overruling the Employer’s fourth objection.

Objections Nos. 5 and 6

In its fifth objection, the Employer alleges that on December 7, between approximately 3:00 p.m. and 3:50 p.m., the Board Agent conducting the election closed the doors to the CUMC polling place. In its sixth objection, the Employer alleges that on December 7, the Board Agent conducting the election at the CUMC site turned away prospective voters because the Board Agent had run out of challenged ballot envelopes. Approximately 400 voters were scheduled to vote at the CUMC site. Jt. Ex. 5(B).

Challenged Ballot Envelopes

The Employer's Associate General Counsel Catapano testified that during her observer shift, between approximately 1:15 and 1:30 p.m., the Board Agent conducting the election ran out of challenged ballot envelopes. The Board Agent called the NLRB office and asked someone to bring more envelopes to that polling place. From that point until 2 p.m., when Catapano left the polling place, the Board Agent told any voters whose ballots were challenged that they had to come back later that day or the next day and advised them of the hours the polls would be open. Tr. at 32, 46, 49. Catapano estimated that approximately eight to ten people were turned away due to lack of challenged ballot envelopes during that time. Tr. at 32. These voters were all challenged because their names did not appear on the Excelsior list. Tr. at 41.

Carrie Ann Marlin, the Employer's Assistant Provost for Administration and Planning, relieved Catapano and served as the Employer's observer at CUMC from 2 p.m. to 3:50 p.m., when the following observer arrived for the Employer. Marlin testified that another Board Agent arrived with additional challenged ballot envelopes at approximately 3 p.m. Marlin could not recall if any voters were turned away due to lack of challenged ballot envelopes from 2 p.m. to 3 p.m. Tr. at 86-87.

Marlin testified that between 3 p.m. and 3:50 p.m., about seventy-five percent of the voters who came to the CUMC site voted subject to challenge. She stated that the “vast majority” of these voters stated that they had come to the polls previously and had to come back because there were no envelopes when they came initially. Tr. at 64. Marlin stated with certainty that more than five voters returned and estimated that it was more than ten. Tr. at 86.

Door to the Polling Place

The CUMC polling place had a glass wall which was covered with paper during the election to ensure privacy. Tr. at 40, 57. There was a double door to the polling room, one of which was open. Tr. at 40, 65. There was a voting place sign on the wall outside the polling place. Tr. at 41, 70. Meaza testified that she found the polling room because she saw the sign. Tr. at 158.

There was disagreement among the witnesses about whether there was something holding the door open. Catapano testified that the door was open by itself and that she did not recall anything holding it open. Tr. at 40-41. Seth Prins, a post-doctoral research fellow in sociomedical sciences at Columbia who served as the Petitioner’s observer at CUMC from 2 p.m. to 4 p.m. on December 7, testified that one of the doors was closed and one of the doors was held open by a garbage pail. Tr. at 235. He described the garbage pail as a large industrial garbage pail with a swing door on it. Tr. at 247. At one point, Employer observer Marlin stated she could not recall if there was something propping the door open or if the door was open by itself, Tr. at 69, but later testified that it was a heavy door and that “something was holding it open.” Tr. at 81.

Marlin testified that sometime after 3 p.m., there was a line of voters whose ballots were being challenged in the polling place. At this point, the Board Agent closed the door to the

polling place.¹⁶ Marlin testified that Prins asked why the door was closed and the Board Agent stated that she would open it once the line had cleared. Marlin said there was a short conversation between the Board Agent and both observers and that Marlin herself said that the polling place looked like a construction site because of the paper covering the glass wall. Tr. at 65-66, 73-74. The Board Agent processed the votes of those voters waiting on line, and once the line had “mostly” cleared, she opened the door to the polling room again. Marlin testified that the door was closed for approximately ten minutes. Tr. at 67. She did not know if the door had locked while it was closed, but stated that voters left through the same door once they had voted, so the door opened at various times during the ten minutes. Tr. at 83, 87-88.

Marlin was unable to recall many details pertaining to this objection. Marlin could not recall whether anyone had entered the polling place or whether the Board Agent who brought the additional challenged ballot envelopes at 3 p.m. was still present during the ten minutes when the door was closed. Tr. at 67, 69, 82. Marlin testified that she could see into the hall outside the polling place when the door was open, but did not recall if any voters were waiting in the hall when the Board Agent closed the door. Tr. at 82. She could not recall if anyone entered the room immediately when the Board Agent opened the door. Tr. at 84.

Prins testified to a different version of events. According to Prins, at one point during his shift on December 7, as voters exited the polling place, a voter bumped into the garbage pail holding the door opened, pushing the garbage pail out of the way, and the door closed. Tr. at 236. Prins asked the Board Agent, who was checking voters’ names off the Excelsior list, about opening the door. The Board Agent continued to check voters’ names off the list. Prins then asked if he could open the door and Marlin also said that the door should be opened. At that

¹⁶ None of the witnesses provided the exact time the door closed.

point, the Board Agent opened the door. According to Prins, the door was closed for approximately three minutes. Tr. at 237. Prins testified that he could see the door clearly from where he was sitting during the election and he saw the door swing closed. Tr. at 239, 241. Prins did not actually see someone bump the garbage pail, but explained that the only way the door could have closed is if someone had moved the garbage pail. Tr. at 241, 248. Prins saw the Board Agent reopen the door and resituate the garbage can to hold the door open. Tr. at 244. Prins stated that there were about twenty people in the polling place when the door closed. Tr. at 247. Prins did not recall if anyone entered to vote while the door was closed, but confirmed that voters exited through that door when they finished voting during that time. Tr. at 248.

Prins specifically testified that the Board Agent did not close the door, Tr. at 236, 239, and denied that the Board Agent said that she wanted to wait for the line to clear, as Marlin had testified. Tr. at 243.

Credibility

Turning to credibility, I generally credit the foregoing testimony regarding the lack of challenged ballot envelopes and that potential challenged voters were turned away as a result on December 7. I note that the testimony of the witnesses was straightforward, consistent, and un rebutted on this point.

With regard to the door, I generally credit the testimony of Prins over that of Catapano and Marlin. Prins testified in a straightforward manner and his testimony provided a much greater amount of detail and specificity than that of Catapano or Marlin regarding the door. As to whether the door was propped open by something, Prins's testimony was very clear on this point. By contrast, Catapano testified that she did not recall anything holding the door and Marlin's testimony was very vague, although she eventually conceded that something was

holding the door open. Prins's testimony was also very clear that he saw the door actually swing closed and that he saw the Board Agent reopen the door and replace the garbage pail in front of it. By contrast, Marlin's testimony regarding the time the door was closed was evasive and lacked specificity.

Discussion

In Objections Nos. 5 and 6, the Employer alleges that polling was suspended twice at the CUMC site on December 7; once due to lack of challenged ballot envelopes for a period of approximately an hour and 45 minutes, and once when the Board Agent allegedly closed the door to the polling place for approximately ten minutes. Suspension of polling during an election may serve as grounds to set aside an election if it can be shown that (1) the votes of those possibly excluded could have been determinative, (2) the record demonstrates that there were accompanying circumstances suggesting that the vote could have been affected by the suspension of polling, or (3) if it is impossible to determine whether the suspension could have determined the outcome. See Jobbers Meat Packing Co., 252 NLRB 41 (1980). For example, in Wolverine Dispatch, Inc., 321 NLRB 796 (1996), a Board Agent suspended voting for only a few minutes during an election. The Board set the election aside finding that it was possible that four voters were disenfranchised and that those four votes could have been determinative. Compare Celotex Corp., 266 NLRB 802, 803 (1983) (in which a Board Agent conducting an election arrived late which resulted in the polls opening late, but the Board declined to set the election aside absent evidence of possible voter disenfranchisement).

In the present case, there is no evidence that the lack of challenged ballot envelopes or the closing of the door require setting this election aside. First, the evidence does not show that possibly disenfranchised voters could have affected the results of the election, in which the

Petitioner prevailed by more than 900 votes. With regard to the challenged ballot envelopes, the evidence shows that the Board Agent at the CUMC site told approximately ten voters whose names did not appear on the Excelsior list that they had to return later that day or the next day to vote. The evidence also shows that almost all, if not all, of those voters returned after 3 p.m. on December 7, when additional challenged ballots were delivered to the site.¹⁷ Even if none of the voters had returned, the Employer has not demonstrated that more than ten possible voters were affected by the lack of challenged ballot envelopes, a number far too small to affect the results of the election.

With regard to the closing of the door, the evidence does not demonstrate that this resulted in any disenfranchisement of voters. The credible evidence established that the door was closed for only three minutes when a voter inadvertently moved the garbage pail holding the door open. Even assuming the door was closed for ten minutes as Marlin testified, there is no evidence that any voters were dissuaded from voting by the fact that the door was closed. The record shows that there was a voting sign clearly visible outside the room. In fact, Meaza testified that she found the polling place because of that sign. There is no evidence that the door was locked or that voters could not enter the polling room. Moreover, even while the door was closed, Prins and Marlin both testified that voters opened the door as they left the room. Thus, the door would have been opened with some frequency as voters left. There is no evidence that any voters were affected by the fact that the door to the polling place was closed for a short period of time. Given the Petitioner's margin of victory in the tally of ballots, the Employer has not demonstrated that a determinative number of voters could have been disenfranchised.

¹⁷ I note that voters whose names appeared on the Excelsior list were able to vote throughout this period of the election.

Nor is there any evidence of “accompanying circumstances” suggesting that the vote could have been affected by the suspension of polling. Finally, given the Petitioner’s large margin of votes over the Employer, there is no plausible argument that it is impossible to know if the conduct could have affected the election. There is nothing in the record to suggest that hundreds of votes might have been affected, as would have been necessary to possibly affect the results. There are approximately 400 eligible voters on the Excelsior list for the CUMC location, so a vast majority of voters on the list would have to be disenfranchised to affect the results of the election. The Employer has not shown that this election should be set aside because the votes of those possibly excluded could have been determinative, there were accompanying circumstances suggesting that the vote could have been affected by the suspension of polling, or that it is impossible to determine whether the suspension could have determined the outcome as required under Jobbers Meat Packing Co., 252 NLRB 41, supra.

Arguing that the laboratory conditions of this election were destroyed by the suspension of the polling, the Employer relies on three cases which are distinguishable from the present case. In Whatcom Security Agency, 258 NLRB 985 (1981), the doors to the building containing the polling place were locked for fifty minutes during the election. Approximately fourteen eligible voters who were scheduled to vote did not do so. This number was sufficient to affect the results of the election where nine votes separated the union and the employer in the tally of ballots. Similarly in Garda World Security Corp., 356 NLRB 594 (2011), where a single vote separated the union from the employer in the tally of ballots, the Board Agent closed the polls early at the morning shift of a split shift election and told three voters to come back later. The Board set aside the election finding voters might have surmised that the polls were closed and not voted. In Kerona Plastics Extrusion Co., 196 NLRB 1120 (1972), the Board Agent closed

the polls twenty minutes early during the morning shift of a split shift election in the presence of employees waiting to vote. The Board set the election aside upon evidence of rumors circulating to employees that the Board Agent favored the employer, which affected the afternoon voting session. In each of these cases, there is evidence of irregularities that could potentially have affected the results. The Employer in this case has failed to present evidence of conduct that could possibly have affected the election results.

For the reasons above, I recommend overruling the Employer's fifth and sixth objections.

The Employer's Cumulative Effect Argument

The Employer also argues that the cumulative effect of the conduct alleged could have affected the results of the election and that this cumulative effect is sufficient to set the election aside. The cumulative effect of conduct may be relevant in an objections case, but the objecting party "still bears the burden of establishing that the cumulative conduct found to have occurred interfered with the free choice of employees to such a degree that it would materially affect the results of the election." SNE Enterprises Inc., 344 NLRB 673, 682 (2005) (Member Liebman dissenting on other grounds).

This standard is consistent with that of the cases cited by the Employer. In Certainfeed Corporation v. NLRB, 714 F.2d 1042 (11th Cir. 1983), the court sustained the Board's dismissal of three objections and remanded one objection on limited grounds. The Employer cites to a footnote in which the court noted "[w]e recognize our responsibility to assess the cumulative effect of these allegations on the validity of the proceedings." The court continued: "However, our finding that only objection 1 may have substantial merit disposes of any purported

cumulative impact of the four objections.” Certainteed Corporation, 714 F.2d at 1046 fn. 2. Thus, an objecting party must show that conduct materially affecting the results of an election occurred for the cumulative effect of that conduct to be considered.¹⁸

The Employer has failed to demonstrate that any alleged objectionable conduct occurred which could have affected the results of this election, in which the Petitioner prevailed by more than 900 votes.¹⁹ See Sanitation Salvage Corp., 359 NLRB 1129, supra (finding that the Board will not set aside an election if the number of employees affected by objectionable conduct is insufficient to affect the outcome of the election). Accordingly, I have recommended overruling the Employer’s objections in their entirety.

Recommendation

I have recommended overruling the Employer’s objections. Accordingly, I recommend that the Petitioner be certified as the exclusive bargaining representative for the following appropriate unit:

All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty, and Nevis facilities, but excluding all other employees, guards, and professional employees and supervisors as defined in the Act.

¹⁸ The other cases cited by the Employer confirm this principle. See Kitchen Fresh Inc. v. NLRB, 716 F.2d 351, 359 fn. 15 (6th Cir. 1983) (in which the court noted that evidence of a threat might be relevant in light of other objectionable conduct even if the threat alone were found not to be sufficient to overturn the election); Home Town Foods, Inc. v. NLRB, 416 F.2d 392, 399 (5th Cir. 1969) (in which the court noted that the cumulative facts of the case must be considered where eight objections had been substantiated by witness testimony).

¹⁹ In its brief, the Employer concedes that the number of the employees in the bargaining unit subjected to alleged misconduct and the closeness of the tally are relevant considerations. See Cedars-Sinai Med. Ctr., 342 NLRB 596, 597 (2004).

Right to File Exceptions

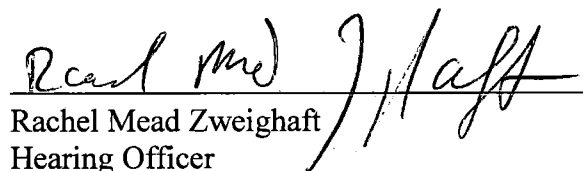
Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on March 20, 2017, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions

will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on this 6th day of March, 2017.


Rachel Mead Zweighaft
Hearing Officer
National Labor Relations Board, Region 29
Two MetroTech Center
Brooklyn, New York 11201