

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUKE UNIVERSITY
Employer

and

Case 10-RC-187957

SERVICE EMPLOYEES
INTERNATIONAL UNION CLC/CTW
Petitioner

ORDER

The Petitioner's Request for Review¹ of the Acting Regional Director's acceptance of the Employer's offer of proof is denied as it raises no substantial issues warranting review.²

¹ As there are no longer special appeals to the Board in the representation case context (see 79 Fed. Reg. 74382), we shall treat the Petitioner's Special Appeal as a Request for Review. See Sec. 102.65(c) and 102.67(c) of the Board's Rules and Regulations.

² In denying review, we do not reach the issue of whether evidence described in the Employer's offer of proof is sufficient to sustain its position that the petitioned-for graduate students are distinguishable from the graduate students in *Columbia University*, 364 NLRB No. 90 (2016), as the hearing has already ended. Nonetheless, we emphasize that an offer of proof should demonstrate with specificity how the evidence described is distinguishable from facts in controlling precedent to justify the evidence being received. See Sec. 102.66(c) of the Board's Rules and Regulations.

Member Miscimarra concurs in the denial of Petitioner's Request for Review on the basis that the hearing's conclusion renders moot the question of whether the Employer's offer of proof was sufficient to permit the introduction of evidence for the purpose of disputing the employee status of the petitioned-for graduate students by distinguishing them from the student assistants found to be employees in *Columbia University*, supra. However, for the reasons explained at length in the dissenting views set forth in the Board's Election Rule, 79 Fed. Reg. 74308, 74430-74460 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson), Member Miscimarra believes it is inappropriate for the Board to treat offers of proof as a substitute for record evidence regarding any matter that is relevant in a representation case. *Id.* at 74446-74447 (observing that an offer of proof "describes evidence that is *not* part of the 'record,' which means the described matters—since they have been *excluded* from the record—cannot be the basis for any decision or appeal on the merits") (emphasis in original; footnote omitted). In addition to dissenting from the Election Rule, Member Miscimarra dissented from the Board's holding in *Columbia University*, supra, that the student assistants in that case were employees for purposes of the Act. He notes, however, that the Board does not presently have pending before it the merits of whether the petitioned-for graduate students are employees. Like his colleagues, Member Miscimarra does not reach or pass on this issue.

MARK GASTON PEARCE, CHAIRMAN

PHILIP A. MISCIMARRA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., January 4, 2017.