

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Harvard Graduate Students Union-UAW,
Petitioner

-and-

President and Fellows of Harvard College,
Employer

Case No. 01-RC-186442

PETITIONER'S OPPOSITION
TO EMPLOYER'S REQUEST FOR REVIEW

Shelley B. Kroll, Esquire
Jasper Groner, Esquire
Segal Roitman, LLP
111 Devonshire Street, 5th Floor
Boston, MA 02109
(617) 603-1425
skroll@segalroitman.com

Thomas W. Meiklejohn, Esquire
Livingston, Adler, Pulda, Meiklejohn &
Clifford
557 Prospect Avenue
Hartford, CT 06105
(860) 233-9821
LAPM.org

August 11, 2017

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY 3

III. THE REGIONAL DIRECTOR CORRECTLY APPLIED BOARD PRECEDENT IN FINDING THAT THE EMPLOYER FAILED TO SUBSTANTIALLY COMPLY WITH ITS EXCELSIOR LIST OBLIGATIONS..... 7

 A. The Regional Director Considered and Properly Weighed All of the *Woodman’s* Factors 7

 1. The Employer Omitted a Significant and Determinative Percentage of Eligible Voters from its Excelsior List 7

 2. The Regional Director Found Harvard’s Explanation for its Omissions Legally Insufficient 8

 B. *Woodman’s* Did Not Compel the Regional Director to Consider Evidence of Actual Prejudice 12

IV. THE EMPLOYER’S PROPOSED CHANGE IN BOARD LAW IS UNWARRANTED, UNWORKABLE, AND THREATENS TO UNDERMINE THE PURPOSES SERVED BY THE *EXCELSIOR* RULE 15

 A. Harvard Has Not Provided Compelling Reasons for Reconsideration of the Board’s Excelsior Rule Policy 15

 B. Harvard Wrongly Claims that the Board Already Entertains Evidence of “Actual Prejudice” in Case of Insufficient Compliance with the Excelsior Rule 17

 C. Technological Advances Do Not Provide Reason to Overturn Board Precedent 18

 D. The Employer’s Proposed Change Would Undermine the Purposes Served by the Excelsior Rule and Indefinitely Delay the Finality of Board Elections 22

 E. Harvard is Proposing to “Spawn An Administrative Monstrosity” Because of Its Own Special Circumstances 24

V. THE REGIONAL DIRECTOR DID NOT ERR IN HIS DETERMINATION OF CHALLENGES 26

 A. Categories of Voters Intentionally Omitted from the Employer’s Voting List: GSD TAs, OEB Research Assistants, and Museum Interns 26

 B. The Eligibility Formula Established by the Regional Director 28

VI. CONCLUSION..... 29

Table of Authorities

Cases

Alcohol and Drug Dependency Services Inc., 326 NLRB 519 (1998) 18

Arbors at New Castle, 347 NLRB 544 (2006)..... 27

Avon Products, 262 NLRB 46 (1982)..... 9

Bon Appetit Management Co., 334 NLRB 1042 (2001)..... 18

EDM of Texas, 245 NLRB 934 (1979) 8, 11

Excelsior Underwear, 156 NLRB 1236 (1966)..... passim

Excelsior, 156 NLRB at 1240..... 23

Fantasia Fresh Juice, 335 NLRB 754 (2001) 7

In Re Ridgewood, 357 NLRB 2247 (2012)..... 18

Laidlaw Waste Systems, Inc., 321 NLRB 760 (1994)..... 18

LeMaster Steel Erectors, 271 NLRB 1391 (1984) 17, 18

Mod Interiors, Inc., 324 NLRB 164 (1997)..... passim

Murphy Bonded Warehouse, 180 NLRB 463 (1969) 21, 22

North Macon Health Care Facility, 315 NLRB 359 (1994) 13, 18

Pacific Gamble Robinson, 180 NLRB 532 (1970) 8

Ponce Television Corp., 192 NLRB 115 (1971)..... 12

Purple Communications, Inc., 361 NLRB No. 126 (2014) 21

RHCG Safety Corp., 365 NLRB No. 88 (2017) passim

Seafood Wholesalers, Ltc., 354 NLRB 381 (2009) 9

Singer Co., 175 NLRB 211 (1969)..... 18

Sonfarrel, Inc., 188 NLRB 969 (1971)..... passim

<i>Sweetener Supply Co.</i> , 349 NLRB 1122 (2007)	27
<i>Texas Christian Univ.</i> , 220 NLRB 396 (1975)	8, 12
<i>The Trustees of Columbia University</i> , 364 NLRB No. 90 (2016)	3, 4, 5, 8
<i>Thrifty Auto Parts</i> , 295 NLRB 1118 (1988)	8, 9, 14, 22
<i>Tractor Co.</i> , 359 NLRB No. 603 (2013)	8
<i>Trustees of Columbia University</i> , 350 NLRB 574 (2007)	3, 13
<i>West Coast Meat Packing, Co.</i> , 195 NLRB 37 (1972)	12
<i>Willett Motor Coach Co.</i> , 227 NLRB 882 (1977)	12
<i>Women in Counseling & Assistance</i> , 312 NLRB 589 (1993).....	17
<i>Woodman’s Food Mkts., Inc.</i> , 332 NLRB 503 (2000).....	passim

Statutes

20 U.S.C. §1232g.....	5
-----------------------	---

Rules

29 C.F.R. §102.67	1, 2, 11, 26
-------------------------	--------------

I. INTRODUCTION

The Employer, the President and Fellows of Harvard College (“Harvard” or “Employer”), is the oldest institution of higher education in the country and widely considered preeminent among its peers. Harvard’s lofty academic status, however, does not mean that the Board’s longstanding and well-tested policies do not apply in an election petitioned for by its student employees or that its failure to substantially comply with the *Excelsior* list rule is reason to overhaul Board precedent and adopt a new rule to accommodate its special status. Although the Employer contends that the Regional Director did not give proper credence to the special circumstances of Harvard’s operations, in reality the arguments presented in its Request for Review (“RFR”) are not unique nor do they demonstrate legal or factual errors on the part of the Regional Director.

Harvard and the Petitioner (“Union”) entered into a stipulated election agreement in which they agreed upon a unit of student employees performing instructional and research work, extended the time limit for the Employer to turn over the *Excelsior* list from two to ten days, and defined the criteria for a list of “look back” voters subject to Board challenge. Much of what Harvard complains of in its RFR reflects an effort to disavow the consequences of these agreed-upon undertakings.

Even if Harvard was not seeking special treatment under long-established Board standards, its RFR would be without merit because it does not satisfy the standards for Board review. Pursuant to 29 C.F.R. §102.67(d), a request for review is to be granted only for “compelling reasons” and upon limited grounds. Harvard bases its request on two of these grounds: (1) that in finding that the Employer failed to substantially comply with its obligations under *Excelsior Underwear*, 156 NLRB 1236 (1966) (“*Excelsior*”), the Regional Director

departed from precedent; and (2) that compelling reasons exist for the Board to reconsider the governing case law regarding voter list compliance and to adopt Harvard's proposed new rule. RFR at 1. Curiously, although Harvard takes issue with the Regional Director's ruling on challenges, it fails to list among the grounds for its RFR the standard for reviewing such determinations, i.e., that a decision "on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party." 29 C.F.R. §102.67(d)(2).¹ The Employer's RFR satisfies none of these grounds.

In his Decision and Direction of Second Election ("DDSE"), the Regional Director carefully considered each of the Employer's exceptions to the Hearing Officer's rulings and, in all but one respect, affirmed the Hearing Officer's comprehensive and well supported findings and recommendations.² Harvard's largely ignores the factual basis for the Regional Director findings and simply repeats in its RFR the same arguments that both he and the Hearing Officer found to be contrary to the weight of the evidence. As for the Regional Director's alleged departure from *Woodman's Food Mkts., Inc.*, 332 NLRB 503 (2000) ("Woodman's"), and other cases addressing substantial compliance with the *Excelsior* rule, it is Harvard that misconstrues the governing law and continues to rely on cases that either pre-date *Woodman's* or are otherwise inapplicable in circumstances where, as here, an employer has omitted the names of a substantial and determinative number of voters.

¹ A claim of error under 29 C.F.R. §102.67 (d)(2) requires a party to include in its RFR "a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of the argument. Such request may not raise any issue or allege any facts not timely presented to the Regional Director." With respect to the Employer's claim that the Regional Director "improperly assessed the status of challenged voters", its RFR fails to document, in this prescribed manner, how his findings were "clearly erroneous on the record."

² The Regional Director sustained the Employer's exception to the Hearing Officer's modified look back formula, finding that while a "look back" eligibility formula is appropriate for graduate assistants, the formula contained in the stipulated election agreement should be adhered to since "[w]ell established Board principles call for enforcing stipulated election agreements provisions that are not inconsistent with any statutory provision of established Board policy and where the intent is unambiguous." DDSE at 8.

Although the Employer half-heartedly argues that the Regional Director erred as a matter of law in not permitting Harvard to subpoena and present evidence on the actual prejudice to the election caused by its omission of 533 eligible voters, there can be little doubt that his ruling was squarely based on some 50 years of consistent Board precedent. Conceding as much, the Employer now proposes that the Board abandon this precedent and adopt a rule that would allow Harvard and other employers who fail to substantially comply with *Excelsior* requirements a separate hearing in which to prove, on the basis of union communication with voters, that their insufficient list did not prejudice the election. Although Harvard claims its proposed policy is justified by decades of changes in the technology of communications, at each and every stage of these changes the Board has refused to consider such evidence because to do so would inevitably “spawn an administrative monstrosity.” See *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971) (“Sonfarrel”); *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997); *Trustees of Columbia University*, 350 NLRB 574, 575 (2007); *RHCG Safety Corp.*, 365 NLRB No. 88, slip. op. at 6 (June 2017). The Employer’s “new” policy is no different.

For these reasons, discussed more fully below, the Employer’s RFR should be denied as it raises no substantial issues warranting review.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

As Harvard acknowledges, and the hearing record reflects, for more than a year and a half prior to the Union filing its election petition, the Employer was aware of the Union’s organizing campaign among student employees. As a result, Harvard began to work with administrators in its various schools to identify those students likely to be included in a petitioned-for unit. On September 9, 2016, shortly after the Board issued its decision in *The Trustees of Columbia University*, 364 NLRB No. 90 (2016), Employer and Union representatives

met to discuss the next steps in the organizing process. At that meeting, the Petitioner informed Harvard that it was seeking a unit similar in scope to the *Columbia* unit which included student employees compensated to perform both instructional and research work at all of its subdivisions and schools. In the aftermath of this meeting, a team of administrators, led by Meredith Quinn, the Chief of Staff in the Office of the Provost, was tasked with compiling a list of eligible voters. RFR at 3-4; Hearing Officer's Report at 59.

Aware of the distinction between student employees who provide services to Harvard in exchange for compensation, and those who receive financial assistance without any required services, Quinn and her team directed "point people" in the various schools to designate the former eligible student employees. The Employer's PeopleSoft payroll system identifies student employees paid to provide instructional services or to work as hourly research assistants. However, the system does not distinguish between research assistants in the lab sciences who are assigned to a permanent lab, and receiving compensation for their research work, and those students who receive a financial stipend while they rotate through faculty labs to decide upon their permanent placement. To identify the science research assistants to be included in the unit, Quinn's asked school administrators to indicate at what point in their programs the students moved from the rotation phase of their education to an assigned lab. *Id.*

On October 18, 2016, the Union filed its petition, Bd. Ex. 3, and on October 21, 2016, the parties' Stipulated Election Agreement was approved by the Regional Director. Bd. Ex. 4.³ The agreed-upon bargaining unit was similar in scope to the *Columbia* unit, including graduate and undergraduate students providing instructional services under a variety of different titles and

³ The following abbreviations are used throughout: Bd. Ex. (Board Exhibit); Jt. Ex. (Joint Exhibit); Pet. Ex. (Petitioner's Exhibit); Tr. (Hearing Transcript); DDSE (Regional Director's Decision and Direction of Second Election); RFR (Employer's Request for Review).

graduate students employed as research assistants. The unit covered student employees fitting this description in all of Harvard's schools.

Mindful of the Board's holding in *Columbia* that the intermittent nature of graduate student employment warrants modification of its traditional eligibility date formula, the parties designated a category of "look back" voters whose votes would be subject to Board challenge. They were defined as "doctoral students who have been employed in the bargaining unit for at least one semester during the past academic year and who are not currently in their Dissertation Completion Year (or final year of their program)." Bd. Ex. 4.

From the parties' September 9 meeting to the time the Union filed its petition, Harvard had nearly six weeks to compile its voting list. Although pursuant to the Board's election rules, the Employer's lists of eligible and challenged voters should have been due within two business days of the Regional Director's determination of the Petitioner's showing of interest, Harvard was given ten days to furnish its lists which were not made available until November 1, 2016.⁴ Because of information missing from Harvard's initial lists, supplemental lists were issued to the Board and Petitioner on November 4, which was nearly two months after the parties' September 9 meeting. The voting list included 3556 eligible employees and the challenged voter list included 386 individuals. Hearing Officer's Report at 61.

Soon after receiving Harvard's voting list, the Union reached out to the Employer to inquire into the reasons for the omission of certain voters it believed were eligible. In what little

⁴ During this extended time period, Harvard requested a subpoena from the Board so that, in its view, it could lawfully release the names of student employees in accordance with its obligations under the Family Educational Rights and Privacy Act, ("FERPA"), 20 U.S.C. §1232g. Student employees on Harvard's voting lists were then notified of their right to object to the disclosure of their contact information. Tr. 1070-71.

time it had prior to the election, the Union made a good faith effort to bring to Harvard's attention the unlisted but eligible voters it could quickly identify. Pet. Ex. 30-36.⁵

The election was held on November 16 and 17 but because of the large number of challenged ballots, the count was delayed until December 22, 2016. The tally of ballots cast was 1272 ballots for representation, 1456 against representation, and a determinative number of 314 challenged ballots.

Both the Union and Employer filed timely objections to the election.⁶ Between February 22 - March 17, 2017, an eleven-day hearing was held before Hearing Officer Thomas Miller at which the parties presented their evidence on the outstanding challenges as well as on the Union's objection.

Both parties filed extensive post-hearing briefs. The Hearing Officer issued his decision on April 19, 2017, to which the Employer filed exceptions on May 3, 2017. The Regional Director issued his decision on July 7, 2017, substantially affirming the Hearing Officer's findings and recommendations with respect to the outstanding challenges and sustaining the Union's objection based on the omission of 533 eligible voters.⁷

⁵ In an effort to escape responsibility for the deficiencies of its voting list, Harvard lays blame on the Union for failing to "provide guidance" to "shape the list, despite "multiple opportunities." RFR at 12-13. Compiling an accurate list was, of course, Harvard's obligation, not the Union's. Nonetheless, like the Employer's many other unsupported assertions, it summons no evidence from the record to show that it sought the Union's input during the time in which it was gathering the information to compose its lists. Nor, prior to issuing its lists, did it discuss with the Union its decision to exclude challenged categories like the GSD TAs or the OEB G1 voters who, like other eligible science research assistants, had been assigned to labs. The single piece of evidence upon which Harvard bases its accusation is a November 10, 2016 email in which the Union was asked its opinion as to the eligibility of G1 and G2 students in the Division of Medical Sciences ("DMS"). Pet. Ex. 31a. At that time, the Union understood, based on Harvard's representations, was that these students had not yet received lab assignments. Tr. at 1094-95. It was not until after the election that Harvard reversed its stance and informed the Union that the DMS G1 and G2 students, who voted under challenge, were eligible voters because they were already assigned to labs. Tr. at 1096, 1141-45. To prove this point, Harvard produced their lab assignment forms which, in most cases, were dated months earlier. Pet. Ex. 37.

⁶ The Employer objected to the Board agent's ruling that a ballot marked against representation was void. The Hearing Officer sustained the Employer's objection to which the Union took no exception. The Regional Director affirmed the Hearing Officer's ruling. DDSE at 21.

⁷ The Regional Director sustained the Employer's exception to the Hearing Officer's modified look back formula and sustained challenges to three voters deemed eligible under that formula. DDSE at 8, 10, 15, 27; *Errata*.

On August 4, 2017, the Employer filed its Request for Review.

III. THE REGIONAL DIRECTOR CORRECTLY APPLIED BOARD PRECEDENT IN FINDING THAT THE EMPLOYER FAILED TO SUBSTANTIALLY COMPLY WITH ITS EXCELSIOR LIST OBLIGATIONS

A. The Regional Director Considered and Properly Weighed All of the Woodman's Factors

The parties agree that *Woodman's Food Mkts., Inc.*, 332 NLRB 503 (2000) sets the standard for evaluating whether an employer has complied with the *Excelsior* rule. In *Woodman's*, the Board departed from its previous approach of measuring compliance solely by the percentage of omissions from the eligibility list and adopted a multi-factor analysis which also considers “the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer’s reasons for omitting the names.” *Id.* at 503. See also *Fantasia Fresh Juice*, 335 NLRB 754, 763 (2001). The Board has affirmed its *Woodman's* approach as recently as June 2017 in *RHCG Safety Corp.*, 365 NLRB No. 88, slip op.at 6, n. 13 (June 7, 2017) (employer failed to substantially comply with *Excelsior* where it omitted 15 percent of the electorate, the omissions could have affected the outcome of the election, and it did not provide a legally sufficient reason for its omissions).

The Regional Director examined each of the three *Woodman's* factors and concluded that in all respects the Employer’s compliance fell short of the Board’s *Excelsior* rule standards

1. The Employer Omitted a Significant and Determinative Percentage of Eligible Voters from its Excelsior List

The Regional Director found that Harvard omitted 533 eligible voters from the *Excelsior* list. DDSE at 27; Errata ¶3. This constituted 11.91% of eligible student employees, a percentage considerably higher than the 6.8 percent rate of omissions in *Woodman's* itself.⁸ Of even greater

⁸ Even in the cases preceding *Woodman's*, in which the Board focused solely on the number of omissions, a 12 percent omissions rate was sufficient to establish a lack of substantial compliance. See, for instance, *Thrifty Auto*

importance post-*Woodman*'s is the fact that these omissions far exceeded the election's 184 ballot margin, a factor Harvard completely ignores.⁹

2. The Regional Director Found Harvard's Explanation for its Omissions Legally Insufficient

The Employer accuses the Regional Director of giving no consideration to its explanation for the omissions from its voter list. As evident in his decision, however, he did weigh Harvard's explanations but found that they were either inconsistent with the hearing record or legally insufficient.

Harvard apparently believes that because of its "special circumstances," it is entitled to a more relaxed version of the *Excelsior* list requirements, one which the Board does not apply to other large employers whose operations are also multi-faceted, complex and decentralized. The Regional Director comes under fire for not finding that Harvard "exceeded its duty of reasonable diligence," a standard the Board does not apply in evaluating substantial compliance.¹⁰ While claiming the steps it took to compile its voter list were "extraordinary," the deficiencies in its list were not caused by the impediments it cites, such as its allegedly unwieldy payroll system, time constraints, or the novelty of the *Columbia University* decision. Harvard had more time to prepare its list than do most employers and, aware of the shortcomings of PeopleSoft, knew supplementary measures would be necessary to identify eligible student employees. Where not

Parts, 295 NLRB 1118 (1988) (9.5% omission rate); *EDM of Texas*, 245 NLRB 934, n. 1 (1979) (10 percent); *Sonfarrel, Inc.*, 188 NLRB 969 (1971) (11 percent); *Pacific Gamble Robinson*, 180 NLRB 532 (1970) (11 percent).⁹ Not surprisingly, the Employer chooses to rely on pre-*Woodman*'s cases in which the Board does not consider the determinative nature of the employer's omission. See RFR, 23 n. 21. Even where Harvard cites to a more recent case, *Tractor Co.*, 359 NLRB No. 603 (2013), for the proposition that a 12% omissions rate is insufficient to prove non-compliance, it neglects to mention that in that case Board considered, "perhaps most importantly [that] the number of voters omitted from the list does not constitute a determinative number." Compare *Id.* at 603 with RFR at 22-23.

¹⁰ In claiming the Board has "long held" that an employer need only exercise a "reasonable amount of diligence", meeting voter list requirements, the Employer relies solely on *Texas Christian Univ.*, 220 NLRB 396, 398 (1975). Harvard misrepresents the holding of that pre-*Woodman*'s decision. In its decision, the Board attributes the phrase Harvard seizes upon—a "reasonable amount of diligence"—to the Hearing Officer's analysis. Only because the Board found substantial compliance, did it focus on whether the employer "acted in good faith." *Id.* at 398.

intentional, Harvard's large number of omissions were attributable to the same types of inadvertent but avoidable human errors the Board has regarded as legally insufficient to excuse noncompliance by other employers. See *Woodman's*, supra at 505 (unintentional payroll errors insufficient justification for determinative omissions); *Mod Interiors*, (election set aside due to incorrect addresses even though the employer had supplied the most recent payroll information in its possession and corrected the inaccuracies eight days prior to the election); *Avon Products*, 262 NLRB 46 (1982) (even though employer omissions resulted from Board error, and not any shortcoming on the Employer's part, channels of communication were compromised and election set aside).

Harvard insists that all of its 533 omissions - whether inadvertent or intentional - resulted from good faith efforts to compile the eligibility list and therefore the employer should not be punished by having the election set aside. The purpose of the *Excelsior* rule, however, is not to reward or punish employers. It is a means to safeguard the right of employees to make a free, uncoerced and informed choice about representation. When an employer does not substantially comply with the rule's requirements, even in the absence of bad faith, the rights of employees to a fair election take precedence. See *RHCG Safety Corp.*, supra at 6 ("The voter-list rule, like the predecessor *Excelsior* list rule, 'is not intended to test employer good faith'; nor is employer bad faith a precondition to finding substantial noncompliance with the list requirements.); (internal citations omitted); *Seafood Wholesalers, Ltc.*, 354 NLRB 381, 389 (2009) ("Precedent establishes that evidence of a good faith attempt to provide correct information with regard to the *Excelsior* list is immaterial insofar as the information is erroneous."); *Thrifty Auto Parts*, 295 NLRB 1118 (1989) ("The question of whether the omissions were the result of bad faith or mere

inadvertence does not influence the calculation of whether compliance has been substantial or not.”)

Based squarely upon Board precedent, as well as the evidentiary record, the Regional Director properly found Harvard’s specific explanations for its omission of groups of eligible voters legally insufficient.

a. Retroactive Appointments

The Employer argues it was impossible to identify the 175 eligible student employees who had been retroactively appointed to bargaining unit positions at the time of the election because they were not yet included in the PeopleSoft payroll system. RFR at 16-17. However, the Regional Director found from the documentary and testimonial evidence that Harvard was aware that retroactive appointments occurred but made no efforts, during the weeks it had to prepare the voting list, to take any steps to locate eligible voters in such positions . DDSE at 25.

b. Research Assistants in the Division of Medical Sciences

Harvard claims its omission of 120 first and second year (G1 and G2) research assistants in the Division of Medical Sciences (“DMS”) was excusable because it resulted from “reasonable” error. RFR at 18-19. Due to a “miscommunication” with school administrators, Harvard believed these students were not assigned to labs until their third year of study. Tr. at 1251. While Harvard’s error in leaving these student employees off the list may have been inadvertent, that does not atone for the adverse consequences to the election process caused by their omission. See cases cited *supra* at pp. 8-9.

c. Resolution of Challenges

The Employer also faults the Regional Director for classifying challenged voters, whose eligibility was agreed upon prior to the December 22 vote count, as omissions. According to

Harvard, its agreement to count their votes was a good faith compromise made in order to reduce the number of challenges before ballots were counted. RFR at 21. Because the discussions over challenges were off the record, Harvard argues there was no way it could have reserved its right to later contest eligibility. RFR at 20.

As the Regional Director properly found, however, the record does not reflect Harvard's post hoc rationale. Instead, in its pre-hearing Statement of Position, Harvard declared, in unequivocal terms, that the ballots of these challenged voters were counted because both parties agreed they "were eligible" to vote. DSSE at 26.

The fact that Harvard acknowledged the eligibility of these voters short of litigation does not change the adverse effect of their omission. See *EDM of Texas*, 245 NLRB 934 (1979) (employer's omissions, including the names of six voters whose challenges were consensually resolved following the election, while not deliberate nonetheless deprived the union of a full opportunity to communicate with eligible voters prior to the election).

d. Deliberate Omissions

Finally, Harvard argues that the Regional Director departed from precedent in counting as omissions challenged voters deliberately left off the list because the Employer decided "in good faith" they were ineligible. These two groups consisted of the teaching assistants in the Graduate School of Design (GSD TAs) and first year research assistants in the Department of Organismic and Evolutionary Biology (OEB). With respect to the OEB challenges, the Regional Director found, which Harvard does not cite as error, that no exception was taken to their inclusion in the omissions count. DDSE at 24. That issue therefore is not properly before the Board. 29 C.F.R. §102.67(e).

In any event, the Employer fails to identify any “precedent” in which the Board holds that an employer should not be held responsible for omitting voters wrongly regarded as ineligible. Cf., *Willett Motor Coach Co.*, 227 NLRB 882, 895 (1977) (employer’s failure to substantially comply with *Excelsior* based, in part, on its failure to include employees on voter list “whose status might be doubtful” or to discuss their non-inclusion with the union); *Ponce Television Corp.*, 192 NLRB 115, 116 (1971) (no substantial compliance where employer willfully omitted voters it deemed ineligible and thereby “arrogated to itself the Board’s powers with regards to eligibility determinations.”). The cases relied upon by Harvard are, as the Regional Director noted, inapposite.¹¹

B. Woodman’s Did Not Compel the Regional Director to Consider Evidence of Actual Prejudice

The Employer boldly asserts that, “*Woodman’s* directs that prejudice to the election is a relevant consideration in analyzing *Excelsior* list deficiencies,” RFR at 23, but that the Regional Director nonetheless refused, like the Hearing Officer before him, to allow Harvard to subpoena and introduce evidence intended to prove that its 533 omissions did not actually prejudice the election process. The evidence Harvard sought to obtain by subpoena was virtually all of the Union’s pre-election communications with voters, even those pertaining to the Union’s authorization cards and showing of interest. When the Union’s petition to revoke was granted, the Employer unsuccessfully sought to enter into the record an offer of proof intended to show that the Union was able to communicate with voters despite an insufficient eligibility list.

¹¹ As authority for the position that a “good faith” but wrong decision to leave voters off the *Excelsior* list is sufficient legal justification for their omission, Harvard cites *West Coast Meat Packing, Co.*, 195 NLRB 37 (1972) (substantial compliance found despite 22% incorrect addresses and 4% omissions) and *Texas Christian University*, 220 NLRB 396, 398 (1975) (same result where list deficiencies consisted of 3% omissions and 18% incorrect addresses). In both of these pre-*Woodman’s* cases the Board’s focus was on the number of omissions and address errors. Good faith was a factor considered by the Board in these and other pre-*Woodman’s* cases only when the number of omissions was relatively low. In those situations, the presence of bad faith by itself precluded a finding of substantial compliance. *Woodman’s Food Markets*, 332 NLRB at n. 9. See DDSE at n. 45.

The Employer fails to ever explain where or how *Woodman's* helps its cause. That is not surprising since for some fifty years the Board has steadfastly rejected efforts to prove that an employer's failure to substantially comply with *Excelsior* requirements caused no actual prejudice to the union's ability to communicate with eligible voters or their ability to be exposed to arguments for and against representation. In *Excelsior*, the Board provided a still powerful rationale for its refusal to consider such evidence of "actual prejudice." Acknowledging that labor organizations might have the means to "communicate with a substantial portion of the electorate," without a voter list, the Board maintained "what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters." *Excelsior*, 156 NLRB at 1241.

Over the past five decades, despite changes in the composition of the Board and changes in the technology of communications, the Board has not altered its view in this regard. See *RHCG Safety Corp.*, 365 NLRB at 5 (rejecting employer's contention that voter list shortcomings did not impede union's ability to communicate with eligible voters; Board does not look beyond the issue of substantial compliance and into the issue of whether employees were actually informed about election issues). Accord *Trustees of Columbia Univ.*, 350 NLRB 574, 575 (2007) (rejecting union's argument there was no "substantial compliance" with *Excelsior* because it was unable to reach employees notwithstanding that employer provided complete *Excelsior* list); *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997) ("[A] union's ability to communicate with employees by means other than the eligibility list does not influence the determination of whether the employer has substantially complied with its *Excelsior* duty."); *North Macon Health Care Facility*, 315 NLRB 359, 360 (1994) (fact that unions may gain access to some, or even most, employees is not a factor weighing against the requirement that

employers provide a list of the names and addresses of eligible voters.”); *Thrifty Auto Parts*, *supra* at 1118 (“Board has long held that the issues of a Union’s actual access to employees, or the extent to which employees are aware of election issues and arguments, are not litigable matters in applying the *Excelsior* rule”); *Sonfarrel, Inc.*, 188 NLRB 969, 969-70 (1971) (“We shall therefore presume, as the *Excelsior* case intended, that the Employer’s failure to supply a substantially complete eligibility list had a prejudicial effect upon the election, without inquiry into the question of whether the Union might have obtained some additional names and addresses of eligible employees prior to the election or whether the omitted employees might have garnered sufficient information about the issues to have made an intelligent choice.”)

Woodman’s is no exception. As evident by the Board’s subsequent decisions, in *Woodman’s* the Board did not open the door to consideration of whether a union’s channels of communication with voters had been actually prejudiced by a substantially flawed voter list. What changed in *Woodman’s* was the Board’s shift from focusing solely on the percentage of omissions to recognizing that *potential* prejudice to an election may be presumed when the number of omissions “equals or exceeds the number of additional votes needed by the union to prevail in the election.” 332 NLRB at 504. As the Board explained:

Obviously, the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union’s ability to communicate with a determinative number of voters. To ignore this circumstance, therefore, is not only inconsistent with the rule’s purpose but makes little sense. Accordingly, we overrule our prior cases to the extent they have done so and hold that whether the omission involve a determinative number of names must be considered in determining whether to set aside an election.

Id.

There can be no serious claim that the Regional Director failed to follow the Board's "directive in *Woodman's*" by refusing to permit Harvard to introduce evidence of "actual prejudice" consisting of the Union's communications with student employees.¹²

IV. THE EMPLOYER'S PROPOSED CHANGE IN BOARD LAW IS UNWARRANTED, UNWORKABLE, AND THREATENS TO UNDERMINE THE PURPOSES SERVED BY THE EXCELSIOR RULE

A. Harvard Has Not Provided Compelling Reasons for Reconsideration of the Board's Excelsior Rule Policy

Implicitly acknowledging that the Regional Director acted in accordance with longstanding Board precedent when he revoked its subpoena seeking the Union's communications with employees, and rejected its related offer of proof, Harvard now calls for overhauling that precedent. Until now, Harvard has argued that the Hearing Officer and Regional Director either broke with precedent or failed to recognize that its "special circumstances" warranted that an exception be made to the requirements of substantial compliance. When all else fails however, rather than allow the Board to count the challenged ballots of eligible voters and, if necessary, hold a second election, the Employer proposes an ill-conceived wide-ranging change in Board law that would not only put off a new election for its student employees but would delay the finality of elections in all workplaces.

Harvard seeks to introduce a new stage of post-election litigation in which an employer that has not substantially complied with the Board's voter list requirements would have an opportunity to prove that its omissions did not actually prejudice the election. This would be

¹² For the same reasons, the Regional Director did not err in affirming the Hearing Officer's revocation of Harvard's subpoena and rejection of its offer of proof. The information the Employer sought to obtain and introduce has no relevance to the Petitioner's objection. While Harvard suggests its request for all communications with voters might have led to background information and other admissible evidence, this speculative rationale amounts to no more than a fishing expedition.

accomplished through the production of evidence of the union’s communications with eligible voters, an undertaking the Board has consistently prohibited.

The Employer claims that its proposal is not intended to take aim at the *Excelsior* rule but is rather a necessary update, due to the technological revolution in workplace communications, which will better advance the “democratic choice” of employees in representation elections. RFR at 34. The import of Harvard’s proposed rule change is far different, however. Even within the confines of its Request for Review it is obvious that in opening the Board’s floodgates to evidence of union communications with voters, Harvard sees the potential for doing away with the rule itself which serves to “maximize the likelihood that *all* the voters will be exposed to the arguments for, as well as against, union representation.” *Excelsior Underwear*, 156 NLRB at 1241 (emphasis provided). Without any factual support, Harvard posits:

The reality is that in some elections in today’s world, the union’s ability to reach voters is not at all harmed by not having an employer-provided list of every voter’s name and address. The employer-provided contact information has become at most redundant, and possibly even irrelevant. In some elections, like this one, the union has the ability to easily reach the entire electorate through electronic means that do not rely on individual names and contact information provided by the employer.

RFR at 34. See also RFR at 33 (“With social media tools, there is no longer the need for employer-provided home and email addresses in order for a union to get its message out among the electorate.”)¹³

¹³ Although Harvard prides itself on the novelty of its proposal, when the Board first adopted the *Excelsior* rule, some employers argued that employee contact information should only be provided to unions “otherwise unable to reach the employees with [their] message.” *Id.* at 1244. The Board disagreed. “[E]ven assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.” *Id.* at 1245 (emphasis in original).

B. Harvard Wrongly Claims that the Board Already Entertains Evidence of “Actual Prejudice” in Case of Insufficient Compliance with the Excelsior Rule

Harvard attempts to minimize the scope of the change it seeks by arguing that the Board already considers “in a wide range of cases” whether voter list deficiencies cause actual prejudice to a union’s ability to communicate with voters. Nowhere in this “wide range” are there cases in which an employer has omitted the names of a large and determinative number of voters, as Harvard did here. The cases Harvard cites are concerned with missing or wrong addresses, incomplete names or election delays. While the Employer finds no logical reason to treat the omissions of eligible voters any differently, an employer’s failure to identify and list unit employees has always been held to a stricter standard by the Board. *Women in Counseling & Assistance*, 312 NLRB 589, 589 (1993).

When closely examined, however, even the cases on which the Employer relies do not open the door to the type of evidence Harvard claims should be admitted. These cases either pre-date *Sonfarrel* or arise in exceptional circumstances in which the Board considered the possibility of *potential* prejudice to the election. RFR at 37. There is no examination of *actual* prejudice to union communications or allowance of the type of evidence Harvard subpoenaed.

Notwithstanding Harvard’s claim to the contrary, the Board does not commonly consider evidence of actual prejudice in cases turning on wrong or incorrect addresses. See *Mod Interiors, Inc.*, 324 NLRB 164, 164 (1997) (where employer provides incorrect addresses for a substantial number of voters, Board presumes employee “free and reasoned choice” has been impeded; union’s “ability to communicate with employees by means other than the eligibility list” is “irrelevant to the application of the *Excelsior* rule”).¹⁴ Similarly, in cases involving voter

¹⁴ The Employer relies on *LeMaster Steel Erectors*, 271 NLRB 1391 (1984), an unusual case in which an employer provided the permanent residential addresses of employees but not their temporary addresses, information not

list delays, the Board will only examine likely prejudice to the election when the Board is responsible for the delays. See *In Re Ridgewood*, 357 NLRB 2247, 2247 (2012) (“A showing of prejudice is required only when the employer timely files the list with the Regional Office . . . and the region fails to immediately make the list available to all parties as required by *Excelsior*, but does not make it available at least 10 days before the election.”) See also *Alcohol and Drug Dependency Services Inc.*, 326 NLRB 519, 520 n.8 (1998) (same).¹⁵ Nor will the Board examine prejudice when an employer fails to provide employees’ first names. *Laidlaw Waste Systems, Inc.*, 321 NLRB 760, 760 (1994) (failure to provide first names means no substantial compliance with *Excelsior* without regard to actual prejudice).¹⁶

Harvard’s proposal to dedicate a stage of post-election hearings to the consideration of evidence of union communications with voters is a radical departure from any of the Board’s *Excelsior* compliance case law and would open the Board’s floodgates to a host of thorny issues.

C. **Technological Advances Do Not Provide Reason to Overturn Board Precedent**

Harvard argues its proposed change in Board policy is justified by all the ways in which communications technology has advanced over the past fifty years, particularly with respect to email and social media. There is no disputing the efficacy of these technologies or the fact that for many emails has overtaken other forms of direct communication. That is precisely why the Board’s recent rulemaking process resulted in amending the Excelsior rule to require that employers furnish available personal email addresses and cell phone numbers. The Employer’s

specifically required by *Excelsior*. Because the employer timely provided residential addresses, and employees were at those addresses for ten days prior to the election, the Board held the union had “ample opportunity for personal contact.” *Id.* at 1391. There is no suggestion that the Board examined the union’s actual communications with voters.

¹⁵ The cases Harvard cites at 37, n. 30 either predate *Sonfarrel* or involve an error by the regional office, not the employer. The only exception is *Bon Appetit Management Co.*, 334 NLRB 1042 (2001), which involved the employer’s timely submission of a voter list missing first names which was corrected one day later.

¹⁶ *Singer Co.*, 175 NLRB 211 (1969), cited by Harvard, predated *Sonfarrel*, and was overruled in relevant part by *North Macon Health Care Facility*, 315 NLRB 359 (1994), *Laidlaw*’s immediate predecessor.

technology-based rationale for the policy change it seeks is actually a compelling justification for these amendments. In fact, in claiming that the ability of unions to communicate with voters via workplace email systems is reason for lowering the threshold of *Excelsior* list compliance, Harvard provides ammunition to those who pushed, albeit unsuccessfully, for the Board to add work email addresses to the contents of voter lists.

The Employer's observations about technological advances do not, however, provide compelling reason for changing the Board's policy when it comes to substantial compliance with its voter list rules. That may be why the Union could find no similar proposal by other employers who participated in the public comments and hearings preceding the Board's adoption of the 2015 election rules despite the fact that the impact of new technologies and the procedure for post-election objections were under consideration.

It is undoubtedly true that if a union is provided with an accurate list of eligible voters, and is given their personal email addresses by the employer, then communicating with employees about election issues by email will in many, but not all, circumstances serve as a quick and efficient means of establishing contact. But the usefulness of email in representation elections, like older forms of communication, still depends upon the employer providing accurate and complete contact information in a timely fashion. It still remains the case that the employer knows who its employees are maintains their personnel information. If the employer withholds information, including email addresses when available, then the union is forced to find less efficient and dependable ways to identify eligible voters and to inform them of the issues before they cast their ballots. Social media and web sites, which Harvard claims makes personal contact information unnecessary and outmoded, provide no alternative to a complete and

accurate list. While some voters may check a union's Facebook page or website, when available, others will not and a union has no effective way to track where the "hits" are coming from.

The Employer's talk of new technologies therefore really begs the question at stake in this case as well as in others in which employers have failed to substantially comply with the Board's voter list requirements. The Employer proposes in such circumstances to have the Board probe the Union's communications with voters to determine whether the election was actually compromised by the deficiencies of its list. This would impose upon the Board the Herculean task of determining whether the union with all the technology at its disposal was able to communicate not with some or even most voters, but with all voters.

Without an election list, the Board has explained, the union "has no method by which it can be certain of reaching *all* the employees with its arguments in favor of representation."

(emphasis added) *Excelsior*, 156 NLRB at 1240-1241 (emphasis added).

This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.

Id. at 1241 (emphasis in original).

Determining whether a union was able to communicate with all eligible voters would also require the Board to decide whether the means of communication that were available to the union are equivalent to the contact information the employer was obligated to provide. Under the Board's new rules, this includes full names, work locations, shifts, job classifications, residential addresses, and, when available, personal email addresses, home and personal cell

phone numbers. The Employer's suggestion that a union's access to work email addresses¹⁷ and its own Facebook pages or websites would serve as equivalent methods of contact, sufficient to demonstrate the absence of "actual prejudice," is at odds with what the Board, through its rulemaking process, has determined is necessary in today's world to level the playing field. In taking on the task of deciding whether an employer's noncompliance was prejudicial to the union's ability to communicate with voters, the Board would inevitably have to delve into the comparative effectiveness of such different modes of communication.

Another thorny issue the Board would face is whether information about union communications sought by an employer to prove lack of prejudice, whether by document or witness subpoenas, would impermissibly interfere with and chill Section 7 protected activity.¹⁸ In its petition to revoke Harvard's subpoena, the Union argued that the Employer's efforts to obtain its communications with employees about the election, organizing issues, authorization cards, and other confidential matters intruded upon the employees' protected and concerted activities. Because the information had no relevance to the Union's objection under current Board law, neither the Hearing Officer nor Regional Director reached this issue. The Board has shown no receptivity in the past to allowing employers to evade *Excelsior* rule compliance by probing into union communications with voters. See *Murphy Bonded Warehouse*, 180 NLRB 463, 464 (1969) (refusing to allow employer to engage in "impermissible examination into the

¹⁷ The Employer cites *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) as proof that union may now "make its case to the electorate" by utilizing the employer's email system. The Board's decision does not, however, go so far as permitting non-employee union organizers access to workplace email systems. *Id.* at *14. Moreover, even when pro-union employees have work email addresses for some of their co-workers, few will likely feel comfortable making the union's case when the employer has the ability to monitor what they are saying.

¹⁸ Harvard assures the Board that at the hearing it is proposing, an employer would "be precluded from asking about a particular employee's views" about unionization. RFR at 39. That is of little comfort to employees whose communications have been subpoenaed or who are questioned about their contacts with the union.

number or identity of employees who have signed authorization cards” in an effort to show union was not prejudiced by *Excelsior* rule violation).¹⁹

It is to avoid being mired in just such an “administrative monstrosity,” *Mod Interiors*, 324 NLRB at 164, quoting *Sonfarrel, Inc.*, 188 NLRB 969, 970 (1971), that the Board has refused to measure the prejudice resulting from an employer’s noncompliance. Instead, the Board has treated the *Excelsior* rule as “essentially prophylactic, i.e., the potential harm from list omissions is deemed sufficiently great to warrant a strict rule that encourages conscientious efforts to comply.” *Thrifty Auto Parts, Inc.*, 295 NLRB 1118, 1118 (1989). For some fifty years, when an employer fails to provide a substantially complete eligibility list, the Board has presumed there is a prejudicial effect on the election “without inquiry into the question of whether the union may have obtained some additional names and addresses of eligible employees or whether omitted employees may have garnered sufficient information about the issues to make an intelligent choice.” *Id.*

D. The Employer’s Proposed Change Would Undermine the Purposes Served by the *Excelsior* Rule and Indefinitely Delay the Finality of Board Elections

Harvard proposes that when an “otherwise blameless” employer fails to substantially complied with the *Excelsior* rule, it should be entitled to rebut the Board’s presumption of prejudice to the election at a hearing in which it would attempt to establish the union’s organizing campaign suffered “no material prejudice.” RFR at 39. The Employer does not define what “modicum of noncompliance,” RFR at 39, would entitle employers to this rebuttable presumption, i.e., whether there is any number of omissions of eligible voters, wrong addresses, or withholding of available email addresses and/or cell phone numbers that may still be

¹⁹ The Board also pointed out in *Murphy Bonded Warehouse* that even if the employer could elicit testimony purporting to show that the union had the names and addresses of all eligible voters, the employer’s own list would be required because it “is the most reliable source of such information.” *Id.* at 464.

presumed to taint the election or whether the union's communications with voters will always be fair game to noncompliant employers.

While Harvard claims it is proposing a "simple" way to "realize the will" of the majority of voters, RFR at 39, in reality the layer of post-election litigation it seeks to add would indefinitely delay a new election in which all eligible employees could participate on equal terms. The Employer's proposed rebuttal hearing would be convened only after there is a finding of lack of substantial compliance, a decision that could be delayed for many months if Board review is sought and granted. Harvard assures the Board that wrongdoers who engage in other objectionable conduct or unfair labor practices would not be entitled to the rebuttable presumption it claims for itself. Yet, in this respect as well, a final determination of alleged unfair labor practices or other objectionable conduct could take months if not years to issue. Nor does Harvard account for the time that such a hearing would take and for the subsequent appeals to follow. What Harvard is proposing would seriously thwart the Board's efforts to conduct expeditious and determinative elections in which the will of *all* employees, not only a majority of those included on the employer's incomplete list, may be expressed and realized.

The Employer's "simple" change would also threaten to undermine the purposes that are served by the *Excelsior* rule. The rule was adopted to enable the Board to "conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint or coercion violative of the Act, but also free from elements that impede a free and reasoned choice." *Excelsior*, 156 NLRB at 1240.

Harvard's proposed rule would provide employers with a disincentive to use their best efforts to compose complete and accurate voter lists. This could occur even if they are otherwise

“blameless” but believe the petitioning union has other means of access to employees. Less scrupulous employers might simply be willing to take their chances that they could turn up sufficient evidence of union communications to excuse their noncompliance. When eligible employees are left off the voter list, they are not only deprived of the right to be fully informed about election issues but are discouraged from voting unless they are prepared to do so under challenge.

Furthermore, Harvard’s proposed change could chill employees in the exercise of their Section 7 right to free expression. In contested elections employees are often fearful of making their pro-union views known. Knowing that their employers could obtain and scrutinize what they regard as private communications with union representatives could well restrain their pre-election activities.

E. Harvard is Proposing to “Spawn An Administrative Monstrosity” Because of Its Own Special Circumstances

These are just some of the reasons why the Board has shut the door on considering evidence of union communications with voters when offered as a means of excusing an employer’s failure to substantially comply with *Excelsior* rule requirements. From *Sonfarrel* to the present, the Board has reiterated that, “to look beyond the question of substantial completeness of the lists . . . and into the further question of whether employees were actually ‘informed’ about the election issues despite their omission from the list, would spawn an administrative monstrosity.” *Sonfarrel*, 188 NLRB at 970; *RHCG Safety Corp.*, 365 NLRB No. 88 at slip. op. p. 6. (2017) (same).

Harvard’s “compelling reasons” for proposing such a fundamental, burdensome, and unwarranted change boil down to the special circumstances of university employment that

allegedly provided the Petitioner with “unfettered access” to all eligible voters.²⁰ The Employer vacillates between claiming the Union actually contacted *all* students, RFR at 24-26, or could have done so through Harvard’s student directory. RFR at n. 26.²¹ Neither of these inaccurate representations justify the scope of the change Harvard seeks.²²

Whether or not the Union could or did contact all of Harvard’s 22,000 students is irrelevant. The Union did not bear the burden of sifting through Harvard’s entire student body to determine which students were employed in unit positions in the fall of 2016 so that it could communicate directly with them about the election issues affecting their jobs. With all of the resources at its disposal, and all the information that it maintains, Harvard claims it could not accurately identify eligible voters and should not be faulted for the insufficiency of its voter list. Nonetheless, the Employer insists the Union could identify and communicate with each and every such voter and that Harvard should be permitted to prove this.

Because Harvard was not successful in convincing the Regional Director that its special circumstances warranted lowering the threshold for Excelsior compliance or creating an exception in its case, it has hastily concocted a proposed change in the law applicable to all elections in all kinds of workplaces. Harvard has not articulated any “compelling reasons” why such a wholesale change should be made other than the fact that it did not receive a passing grade in complying with the Board’s Excelsior requirements. Holding a second election, as the Regional Director has recommended, is certainly a more efficient and effective way to determine

²⁰ There are other bargaining units on Harvard’s campus and on the campuses of institutions of higher education across the country. Despite the fact that union organizers may have easier access to campuses than to other workplaces, only Harvard, and only in the case of its student employees, has that been reason to propose eviscerating the *Excelsior* rule.

²¹ Harvard suggests the Union could contact all voters because students’ contact information is provided in its directories. However, Harvard’s own website makes clear that students decide for themselves whether to provide contact information and select what it should be. https://harvard.service-now.com/ithelp?id=kb_article&sys_id=2192da9c0f7cbe802dfe5bd692050e29.

²² The Petitioner does not address the representations made in Harvard’s offer of proof as they are not part of the record in this case.

the will of the majority of Harvard's eligible employees than is remanding this case for a new hearing in which the Board will be mired in determining whether the Union was able to contact each and every eligible voter, when, and by what means.

V. **THE REGIONAL DIRECTOR DID NOT ERR IN HIS DETERMINATION OF CHALLENGES**

A. **Categories of Voters Intentionally Omitted from the Employer's Voting List: GSD TAs, OEB Research Assistants, and Museum Interns**

Harvard deliberately excluded teaching assistants in the Graduate School of Design (GSD), G1 research assistants in the Department of Organismic and Evolutionary Biology (OEB), and museum interns from its voting list because, in the Employer's view, they do not provide services within the scope of the unit. Voters holding these positions were challenged by the Board. Affirming the Hearing Officer's findings, the Regional Director overruled the challenges and found these student employees to be eligible voters.

Although requesting review of the Regional Director's determination, Harvard fails to identify any "substantial factual issue" on which his findings were "clearly erroneous on the record." 29 C.F.R. §102.67(d)(2). Instead, the Employer simply repeats the same general arguments advanced in its exceptions which amount to faulting the Hearing Officer (and now the Regional Director) for giving more weight to the "anecdotal" testimony of student employees in the disputed positions than to the testimony of its "decanal" witnesses who had little first-hand knowledge of the work the challenged voters performed. As the Regional Director properly found:

The Employer does not except to the hearing officer's findings of fact regarding TA duties; rather, it claims, that the hearing officer erred by crediting the 'anecdotal testimony' from TAs over un rebutted documentary evidence and senior administrative witnesses. . . . The Employer's exceptions do not support rejection of the hearing officer's recommendation. The hearing

officer correctly placed more weight on the first-hand experiences of actual TAs than on documents describing policy and witnesses lacking direct knowledge of the TAs' duties. I note that the Employer did not call any witnesses who were the TA's direct supervisors or any GSD course students.

DDSE at 13.

The Regional Director drew the same conclusion with respect to the eligibility of OEB

G1 researchers:

As the hearing officer properly concluded, the Employer's reliance on general testimony from a witness who admittedly lacked first-hand knowledge of individual first-year student activities is accorded less weight in the face of specific testimony from actual students, including a current first-year student. None of the student testimony was rebutted.

DDSE at 15.²³

As the party contesting voters' eligibility, the Employer shouldered the "burden of proving they were, in fact, ineligible to vote." *Sweetener Supply Co.*, 349 NLRB 1122, 1122 (2007) (although Board agent challenged the ballots, party seeking to establish the ineligibility of the voters bears the burden of proof); *Arbors at New Castle*, 347 NLRB 544, 548 n.11 (2006) (same). Instead of offering such evidence, Harvard assumed that the academic status of its "decanal" witnesses would carry the day, despite their lack of first-hand knowledge. The Regional Director correctly concluded that "the Employer failed to meet its burden." DDSE at 15.

The Employer has presented no grounds warranting review of the Regional Director's decision to overrule the challenges to the ballots cast by these voters.

²³ The Regional Director's determination that the two challenged museum interns were eligible to vote is similarly grounded in the record evidence which Harvard failed to rebut. DDSE at 15-17.

B. The Eligibility Formula Established by the Regional Director

The Regional Director properly found that there is a pattern of intermittent employment by student employees at Harvard. DDSE at 6-7. He found those challenged voters eligible who satisfied the parties' stipulated formula for inclusion in the "look back" list, a formula consistent with the factors the Board has applied for more than 50 years in industries where intermittent employment is common. DDSE, fn. 14. The Employer, however, argues that the precedent applicable to other industries is not suitable for Harvard because its students at progress in a "linear" fashion toward graduation. RFR at 42. While their academic studies may progress in a linear fashion, the Regional Director concluded that their employment does not follow the same pattern. He found that the record establishes that "students leave bargaining unit work and then return during later semesters, thereby creating a continuing interest in the bargain unit work." DDSE at 7. The Employer does not claim this finding is not supported by the record. Indeed, the testimony was undisputed that student employees frequently work for one or more semesters, leave bargaining unit work because they have obtained funding that does not require them to provide services, and then return to work in order to earn money to support themselves as they continue their studies. Tr. 65-67, 123, 133, 140-41, 243, 264. Accordingly, the Regional Director's findings are supported by undisputed evidence, and the Employer has failed to establish grounds for review on this issue.

VI. CONCLUSION

For the foregoing reasons, the Employer has not shown that compelling reasons exist for Board review of the Regional Director's Decision and Direction of Second Election. Petitioner therefore respectfully requests that the Board exercise its discretion to deny review.

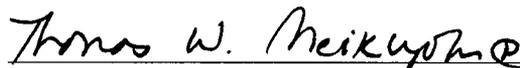
Respectfully submitted,

HARVARD GRADUATE STUDENTS
UNION-UAW,

By their attorneys,



Shelley B. Kroll, Esquire
Jasper Groner, Esquire
Segal Roitman, LLP
111 Devonshire Street, 5th Floor
Boston, MA 02109
(617) 603-1425
skroll@segalroitman.com



Thomas W. Meiklejohn, Esquire
Livingston, Adler, Pulda, Meiklejohn &
Clifford
557 Prospect Avenue
Hartford, CT 06105
(860) 233-9821
LAPM.org

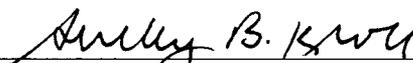
Dated: August 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2017, a true and accurate copy of the above document was served, by electronic mail, upon the following counsel for Employer and upon the Regional Director for Region One.

Nicholas DiGiovanni, Esquire
Joseph P. McConnell, Esquire
Damian M. DiGiovanni, Esquire
Morgan Brown & Joy, LLP
200 State Street, 11th Floor
Boston, MA 02109-2605
ndigiovanni@morganbrown.com
jmccConnell@morganbrown.com
ddigiovanni@morganbrown.com

John J. Walsh, Jr., Regional Director
Region 1, National Labor Relations Board
10 Causeway Street, No. 601
Boston, MA 02222
Jack.walsh@nlrb.gov



Shelley B. Kroll, Esquire