EXHIBIT A TO RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Case 13-CA-217957

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF CHICAGO,	)	
	)	
Employer,	)	
	)	
and	)	**Case No. 13-RC-198365**
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 743,	)	
	)	
	)	
Petitioner.	)	

THE UNIVERSITY OF CHICAGO'S EXPEDITED REQUEST FOR REVIEW AND MOTION TO STAY THE ELECTION AND/OR IMPOUND BALLOTS OR, IN THE ALTERNATIVE, FOR REMAND TO THE REGIONAL DIRECTOR

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I. INTRODUCTION

The University of Chicago seeks expedited review of the Regional Director's decisions to direct a hearing officer to reject the University of Chicago's Offer of Proof, which prevented the University from developing an evidentiary record on critical, statutory issues such as, *inter alia*, whether the students in the proposed unit are employees within the meaning of Section 2(3) of the Act and whether they are temporary or casual employees who are not entitled to engage in collective bargaining. The Regional Director's decisions are contrary to the guidance of the General Counsel and the Board rules that govern the circumstances under which an offer of proof may be rejected. The Regional Director compounded these erroneous decisions by directing the election to take place over a five day period beginning on June 2, 2017, the last day of the "reading period" set aside for students to study for final exams, and continuing through the first four days of the five-day final exams week at the University. The election is scheduled to take place during a critical time of the year when the students in the petitioned-for unit will be focused overwhelmingly on their studies rather than on an election. Moreover, many students leave campus, and the indeed the Chicago area, for the summer break as soon as they have finished their last exam or handed in their last paper. For some students, this will occur just a day or two into the voting period. Thus, the Regional Director has directed an election in a way that is likely to impede voters' exercise of their statutory right to vote.

Additionally, the Regional Director took a full week to issue the Decision and Direction of Election, despite the fact that he refused to take any evidence on the issues raised, and issued it just 6 business days prior to the election, with an intervening holiday week-end, making it extremely difficult for the University to obtain expedited review from the Board in advance of the scheduled election.

The Regional Director's rejection of the University's attempt to introduce evidence on

these critical issues which implicate the *entire* proposed bargaining unit merits granting expedited review and a stay/impoundment of the ballots. Furthermore, the Regional Director's decision to schedule an election on such short notice impedes the University's ability to seek expedited review from the Board prior to the election. Moreover, by directing that the election take place during final exams, the Regional Director has risked depriving a substantial segment of eligible voters (whose focus is elsewhere during this period) a real opportunity to participate in the election. All of these factors merit extraordinary relief to stay the election or, alternatively, to impound all ballots until the University can present its evidence and the Board can determine the issues raised.

For the reasons explained below, the Regional Director's decisions are contrary to notions of fairness and due process, contrary to the Board's rules and the General Counsel's guidance, and result in unfair prejudice to the University. The Board should immediately stay the Regional Director's decisions and direction of election, grant the request for review and, on the merits, reverse the Regional Director's decisions and dismiss the petition or remand with instructions to receive evidence consistent with the University's Offer of Proof.

II. REQUEST FOR REVIEW AND EXTRAORDINARY RELIEF

Pursuant to Section 102.65(c) and 102.67(c) of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. §§ 102.65, 102.67, the University seeks expedited review of the decisions of the Regional Director: (a) to reject the University's offer of proof and not to take evidence at the hearing on whether the proposed unit consists entirely students who are not "employees" as defined by Section 2(3) of the Act and whether there are compelling policy reasons why the Board should not assert jurisdiction in this matter; (b) to reject the University's offer of proof and not take evidence at hearing on whether, even if the proposed unit covered employees under the Act, those individuals are temporary and/or casual employees who are excluded by the unit description and not entitled to collectively bargain under the Act; and (c) to order an election

to be held on five days between June 2nd and 8th, 2017, just seven business days after the Decision and Direction of Election was issued, and during both the reading period prior to final exams and during final exams week at the University.

Pursuant to Section 102.67(j), the University further requests extraordinary relief to stay the election ordered by the Regional Director pending the Board's ruling on this Request for Review or, alternatively, to impound the ballots until the Board has considered the University's request. In the particular circumstances of this case, interim relief is necessary to effectuate the Board's role, comply with the Act's statutory requirements, enfranchise the optimal number of eligible voters, and prevent the unnecessary expenditure of resources by the Board and the parties if an election is held under these circumstances in the manner directed by the Regional Director.

III. PROCEDURAL HISTORY

On May 7, 2017, International Brotherhood of Teamsters Local 743 ("Petitioner" or "Union") filed an RC-petition with the following proposed unit description:

> **Included:** All part-time hourly-paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regeinstien [sic] Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library and the Social Services Administration Library.
>
> **Excluded:** All employees represented by other labor organizations and covered by other collective bargaining agreements, temporary employees, professional employees, supervisory and managerial employees as defined by the National Labor Relations Act.

There are approximately 225 students in the proposed unit who, while enrolled as students at the University of Chicago, work part-time within the University Library System.

On May 16, 2017, the University stated its position with respect to the propriety of the proposed unit description in its Statement of Position (Form NLRB-505) as required by Section 102.63(b)(1) of the Board's Rules and Regulations. (Exhibit 1.) In its Statement of Position, the

University asserted that: (1) the 225 students in the proposed unit are not employees as defined by Section 2(3) of the Act because their relationship with the University is primarily educational, and that the Board should reconsider and overturn its decision in *Columbia University,* 364 NLRB No. 90 (August 23, 2016) and return to the correct legal standard announced in *Brown University,* 342 NLRB 483 (2004); (2) there are compelling policy reasons why the Board should not assert jurisdiction in this matter; (3) even if the proposed unit consists of employees as defined by the Act, they are temporary and/or casual employees who are excluded from the unit description and/or not permitted to collectively bargain under the Act; and (4) if an election is ordered notwithstanding these arguments, the election should not occur until after the Fall 2017 quarter has begun and students hired for that quarter are on the payroll.

At the hearing on May 17, 2017, the Hearing Officer, Christina Mols, requested that the University make an offer of proof on these issues. The University did so in writing. (Exhibit 2.) After consultation with the Regional Director, Hearing Officer Mols ruled that "because the evidence proposed as well as the testimony all deal with established [] law the Region is declining to take evidence on it at this time." (Exhibit 3, Tr. at 9:9-16.) Hearing Officer Mols did not assert, as the Regional Director claims in the Decision and Direction of Election, that the University's offer of proof would be "insufficient to sustain" its contentions that the students are not employees under the Act or, in the alternative, that they are temporary or casual employees. (See generally, *id.)*

On May 24, 2017, the Regional Director issued a Decision and Direction of Election ("DDE"). In the DDE the Regional Director suggested for the first time that the University's Offer of Proof was rejected because it was "insufficient to sustain the Employer's contention that: 1) the petitioned-for employees are not 'employees' under Section 2(3) of the Act; 2) a certified

collective-bargaining representative would interfere with the predominantly educational nature of the relationship between the petitioned-for employees and the Employer; and 3) the petitioned-for unit consists of temporary and/or casual employees." (DDE at p. 2.) The Regional Director ordered an election to be held on June 2, 5, 6, 7 and 8, 2017.

IV. FACTS THE UNIVERSITY WAS PREPARED TO PROVE AT THE HEARING

As set forth in the Offer of Proof, the University was prepared to present evidence that the proposed unit consists of individuals who are not employees as defined by the Act and who, even if they are employees, are temporary and/or casual employees who are specifically excluded from the proposed bargaining unit and/or are not entitled to collectively bargain under the Act. The following facts were described in the University's Offer of Proof, and the University was prepared to introduce evidence to establish these facts at the hearing:

A. University Policies Regarding Student Employment

The University was prepared to present a witness who would have testified that the sole reason these students attend the University is to obtain a degree within the allotted timeframe. (*See* Exhibit 2, University of Chicago's Offer of Proof ("OOP") at p. 3.)[1] The University makes clear in its Student Manual that "additional employment is secondary to their student status." (*Id.*, at p. 4-5.) While various departments and units across campus provide students with meaningful work opportunities to advance their academic and professional goals and assist them in funding their education expenses, these interests must be balanced against the central purpose of student enrollment—that is, the timely completion of degree requirements. (*Id.*, at p. 3.) Thus, the University has created student-specific positions throughout the institution and promulgated

[1] The original Offer of Proof submitted to the Hearing Officer inadvertently did not contain page numbers. For purposes of this Request for Review and ease of reference, the University has added page numbers to the Offer of Proof, but has not changed any other aspect of the Offer of Proof submitted at the hearing.

certain guidelines and policies applicable to enrolled students who also work at the University. (*Id.*, at p. 3-4.)

As described in the University's Offer of Proof, students are not permitted to work more than 20 hours per week total in University positions absent explicit permission from their Dean of Students (DOS). (*Id.*, at p. 4.) The applicable DOS typically does not give permission for a student to work more than 20 hours a week unless the student articulates a good reason and assures the DOS that exceeding 20 hours per week of work will advance their academic goals without interfering with the student's progress towards their degree. (*Id.*, at p. 4.) Most often, the University's witnesses would have testified, students requesting an exception to the 20 hour per week limitation do so in order to take on another position at the University that is more closely aligned with their academic pursuits, such as a research position or teaching assistantship. (*Id.*, at p. 5.)

The University does not permit students who are on a leave of absence from their studies to work in student positions. (*Id.*, at p. 4.) If permitted, the University would have introduced testimony at the hearing that these policies and practices are intended to ensure that students focus primarily on their studies, and to discourage students from taking leave from their studies in order to work. (*Id.*, at p. 4.)

B. The Student Library Positions At Issue

As explained in the University's Offer of Proof, and as its witnesses would have testified, all students in the proposed bargaining unit members are hired on a quarter to quarter[2] basis and serve in part-time hourly-paid positions at the Library that are specifically reserved only for students who are actively enrolled at the University. (*See, e.g., id.*, at p. 4 *see also* Ex. 1, Statement

[2] The University operates its academic calendar based on quarters, not semesters.

of Position at Attachments B and C, Voter Lists including Job Classifications.) There is an entirely separate job classification for staff library employees, into which students are not hired or classified. Staff employees in that job classification are represented by Petitioner in a separate bargaining unit that encompasses all hourly-paid clerical employees working at University facilities, including the Library. (OOP at 4.) Approximately 30% of the students in the petitioned-for unit are on the federal work study program, a form of financial aid for students in which the government subsidizes part of the pay they receive for working in the Library. (*Id.* at p. 4.)

Because each student in the petitioned-for unit holds a student-specific Library position, the students' tenure in these positions is inherently tied to enrollment at the University. (*Id.*, at p. 6.) Moreover, students frequently come and go from their positions with the Library at their leisure and discretion. This movement in and out of student library positions occurs for a variety of reasons, including but not limited to academic breaks, other work opportunities at the University or study abroad programs. (*Id.*, at p. 5-6.) The mean duration of for students in their current position at the Library is approximately 9 months (i.e., approximately one academic year). (*Id.*, at p. 6.) Approximately 86% of the students in library positions have been in their current position for one academic year or less. (*Id.*, at p. 6 & 7.) 94% have been in their current position for two years or less. Virtually all (97%) have been in their current position for three years or less. (*Id.*, at p. 7.) When the students graduate or leave the University, they are not permitted to remain in their student library position beyond a one-quarter, transitional grace period. (*Id.*, at p. 7.)

The Library designs students' schedules to accommodate their academic commitments. (*Id.*, at p. 5, 6.) Upon hire and at the beginning of each quarter, Library supervisors ask students to tell them how many hours they want to work and when they are available to work. (*Id.*, at p. 5.) The Library is flexible with the students, adjusting schedules and hours to defer to their class

schedules. (*Id.*, at p. 5.) Students who work in the Library are permitted virtually unlimited time off to study and focus on their academic pursuits. (*Id.*, at p. 5.) If a student has an upcoming exam or a paper deadline and notifies their supervisor, the supervisor will adjust the student's work schedule accordingly. (OOP at p. 5.) Students typically request time off or reduce their hours significantly during final exams and the "reading period" leading up to final exams. (*Id.*, at p. 5.) Students tend not to work during academic breaks, such as winter break, and do not need supervisor approval to take several weeks of time off during academic break periods. (*Id.*, at p. 5.)

The University also would have presented a witness to testify that, while there are students who have petitioned for exceptions to the 20 hour maximum per week of work rule described above, the purpose of such petitions is to take on another position at the University outside of the Library, and there are no students who work more than 20 hours per week in the Library during the academic year. (*Id.*, at p. 4-5.)

Finally, the University would have demonstrated that students in Library positions also enjoy more leniency than staff employees when it comes to work rules. (*Id.*, at p. 5.) For instance, the University typically forgives students who violate attendance rules due to academic demands. (*Id.*, at p. 5.) Rather than disciplining a student for missing work without permission, the University attempts to resolve the problem and accommodate the student's academic needs, often in conjunction with the student's academic advisor. (*Id.*, at p. 5-6.) Students who work in the library are typically not subject to formal performance evaluations, and even when such evaluations occur, they are not evaluated as rigorously as staff employees. (*Id.*, at p. 6.)

The factors enumerated above, which the University was denied the ability to prove up at the hearing, go to both the issue of whether these students are statutory employees, as well as the University's contention that, if these students are determined to be employees at all, their

employment is temporary or casual at best.

C. The University's Reading Period For Final Exams, The Final Exams Period And Graduation (Convocation) Activities

As explained in the Offer of Proof, the first scheduled date of the election, June 2, 2017, is during the "Reading Period" for Spring 2017 Quarter. (*Id.*, at p. 8.) The Reading Period is a designated period at the end of each quarter after classes end but before final exams. (*Id.*, at p. 8.) The Reading Period is intended to give students the opportunity to study and prepare for final exams without interruption. (*Id.*, at p. 8.) Students at the University are focused on their studies during this two-day period. (*Id.*, at p. 8.) Student library workers typically request time off and/or scale back their hours significantly during the reading period and finals week because they are preparing for finals. (*Id.*, at p. 8.)

Final exams take place from June 5 through June 9, leading up to the University's graduation ceremony (called convocation), which will take place on June 10, 2017. Students are entirely focused on their studies during this period. (*See id.* at pp. 8.) Further, most students leave campus as soon as their last final is complete. (*Id.*, at p. 8.) The University is on a quarter system and its academic year ends later than the academic year at many peer institutions. Because students at the University are competing with students from peer institutions (that get out earlier in the year) for summer opportunities, University students are often eager to leave campus for their summer endeavors as soon as they have completed their coursework for the quarter. (*See id.*, at p. 8.) In other words, there will be few students on campus by June 9, 2017, and graduation occurs on June 10. (*Id.*, at p. 8.)

During the summer, the Libraries are staffed with far fewer student workers and have fewer patrons than during the academic year. (*Id.*, at p. 8.) Approximately 50% of the students who work in the Libraries do not continue to work there over the summer. (*Id.*, at p. 8.)

The University offered the foregoing facts in order to demonstrate why an election during the "Reading Period" and final exams week is inappropriate and does not advance the interests of the Act.

V. STANDARD ON REQUEST FOR REVIEW

The Board will grant a request for review upon one or more of the following grounds:

> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

Section 102.67(d).

The Board should grant review here because (1) there are compelling reasons for reconsideration of the Board's decision in *Columbia University,* 364 NLRB No. 90 (2016), due to important public policy considerations; (2) the Regional Director's decision on substantial factual issues (*i.e.*, whether the petitioned-for students are employees at all, or temporary employees excluded from the proposed unit) is clearly erroneous and results in prejudicial error to the University; (3) the Regional Director's decision to reject the University's Offer of Proof resulted in prejudicial error to the University; and (4) the direction of an election on June 2, 5, 6, 7 and 8, 2017 results in prejudicial error not only to the University but is prejudicial to the students who are eligible to vote in the election since it will, as a practical matter, disenfranchise a significant number of voters.

VI. ARGUMENT

A. *Columbia University* Was Wrongly Decided And Should Be Overruled

As a threshold matter, the University contends that the Board's decision in *Columbia University* was wrongly decided and should be overruled for a variety of legal reasons and public policy considerations. Indeed, while the University provides work opportunities to enrolled students in order to assist with their education-related expenses and advance their academic and professional goals, it recognizes that students' focus on their studies and their substantial investment in obtaining a degree from the University is paramount. Thus, the University has implemented policies intended to further the University's primary mission, *i.e.*, to facilitate students' academic development and the completion of their degree in a timely fashion. As now Chairman Phillip Miscimarra noted in his dissent in *Columbia University*, the Board's decision in that case disregards the importance of timely degree completion, as well as the fact that "full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make." He went on to note that "[m]any variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not; (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of undergraduate students do not complete degree requirements within four years after they commence college; and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education."

Recognizing the important policy consideration of facilitating students' degree completion of their degree in a timely and efficient manner, the University has implemented policies specifically aimed to ensure that students who work are able to complete their degree on time and

fully reap the benefit of the enormous financial and personal investment students and their families make in a University of Chicago education. For instance, it has created student-specific positions across campus that are designed to *complement* a student's studies, with deference to their academic commitments. The University imposes strict maximum hour caps on student work, with exceptions only being granted for good reason and in order to advance students' academic goals. It prohibits students on a leave of absence from working in student positions to discourage students from taking time off their studies in order to work. The University's Office of Student Employment works closely with departments and units across campus that utilize student workers to ensure that the necessary flexibility exists in student positions so that their academic commitments always take precedent over any work responsibilities. All of these policies demonstrate the University's commitment to ensure students complete their degree on time.

Permitting these students to collectively bargain will interfere with this paramount interest. As Chairman Miscimarra noted, "Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense." He also cautioned against allowing students to resort to the "economic weapons" protected by the NLRA, which have the risk of detracting "from the far more important goal of completing degree requirements in the allotted time ...." The University contends that allowing students to engage in collective bargaining, and to utilize all of the tools associated with it, has the potential to do just what established University's policies are intended to counteract and what Chairman Miscimarra warned against, *i.e.*, interfering with students' focus on their studies and timely completion of degree requirements. For these reasons, the University contends that there are compelling policy considerations that warrant reconsideration of the Board's policy as stated in *Columbia University*.

B. The Regional Director Made Substantial Factual Errors In His Decision

i. The Regional Director Erred In Determining the Students Are Employees

As noted above, the University contends that *Brown University* was wrongly overturned in *Columbia University* and sets forth the correct standard to determine whether the students in the petitioned-for units are "employees" under Section 2(3) of the Act. The *Brown University* Board held that students who also work for their University are not statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university." Applying that standard, there is no question that the Regional Director's decision that the University's Offer of Proof was insufficient to sustain its position that these students are not employees under the Act was clear error. As was clearly set forth in the Offer of Proof, the University's witnesses would have testified that these students are at the University for the sole purpose of seeking a degree. While students are permitted to supplement their income and gain practical skills by working in the University Library, they are only permitted to work in a student-specific position, limited to 20 hours per week absent special permission. Further, student positions are designed to be subordinate to and flexible around the students' academic commitments. Students typically do not work in the Library during academic breaks, and do not need to seek approval for time off during such periods. Students must leave their position at the Library if they graduate, take a leave of absence or otherwise leave active enrolled status at the University. Indeed, according to explicit written University policy, their work in the Library is secondary to their student status. In other words, under the correct standard set forth in *Brown University*, these students have a primarily academic relationship to the University and are not statutory employees. The Regional Director's decision otherwise is clear error.

ii. Assuming *Arguendo* That The Students Are Statutory Employees, The Regional Director Erred In Determining They Are Not Temporary Or Casual Employees Excluded From The Unit

The Regional Director further committed substantial factual error by rejecting the University's Offer of Proof to sustain its contention that, even if these students are statutory employees, they are, at best, temporary employees. There were a variety of factors set forth in the University's Offer of Proof, and which it would have established if permitted to present evidence at hearing, that demonstrate these students' relationship to the Library as temporary or casual in nature. Specifically: (a) students are hired on a quarter-to-quarter basis, not for an indefinite term; (b) students are limited to a maximum of 20 hours per week; (c) most students stay in the position for one academic year or less; (d) students have flexible schedules built around students' academic commitments, and students regularly take advantage of the opportunities to adjust their schedule to prioritize academics; (e) students frequently come and go from their positions with the library in order to pursue other opportunities such as a research position or study abroad program; (f) students are not required to come to work during academic break periods, the summer break, or when pursuing study abroad programs; (g) students are subject to lenient attendance standards; and (h) performance standards for students are equally lenient, and different from the regular performance review process for library staff employees. In short, if these students are statutory employees, their "employment" is temporary or casual at best and, as such, they are specifically excluded from the unit definition. The Regional Director's decision to disregard these proffered facts and not permit the University to introduce evidence to sustain them constituted substantial factual error.

C. The Regional Director's Stated Basis For Rejecting The University's Offer Of Proof Was Prejudicial Error

i. The Regional Director Erred In Denying The University The Right To Present Evidence To Show That The Students In The Proposed Unit Are Not Employees Under The Act

The Regional Director's decision to deny the University the opportunity to litigate the employee status issue, simply because, as the Hearing Officer relayed at the hearing, there is "established Board law" on the matter, was erroneous, prejudicial and does not comport with due process. Compounding this error, in the DDE issued one week after the hearing, the Regional Director contradicted himself, asserting that he rejected the Offer of Proof not because there is "established Board law," but rather, because the Offer was "insufficient" to sustain the University's contentions. Apart from the fact that this belated explanation contradicted what the Hearing Officer said at the hearing, it is inaccurate because, as described in detail in Section VI.B, above, there were ample facts set forth in the Offer of Proof to support the University's contentions.

With regard to the original stated basis for rejecting the Offer of Proof, the fact that there is established precedent on what constitutes employee status is not a basis to reject a party's offer of proof under Board Rules. Rather, the Board's Rules and Regulations provide only that "[i]f the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received." Section 102.66(c). Here, the Regional Director belatedly made such a finding in his DDE, even though that is not what the Hearing Officer stated at the hearing.

Second, Rule 102.66(a) provides that *any* "party shall have the **right** to appear at any hearing in person ... to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation." (Emphasis added.) The Regional Director denied this

right to the University.

Third, the General Counsel issued guidance on representation cases after April 14, 2015, and that guidance specifically directs that "[i]ssues as to whether individuals are employees within the meaning of Section 2(3) of the Act *must be litigated* at the initial hearing." Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015, Memorandum GC 15-06, 2015 WL 1564882 (N.L.R.B.G.C. April 6, 2015) at pp. 16-17. The Regional Director's decision not to take evidence on this issue is inconsistent with Memorandum GC 15-06.

Finally, the Regional Director's erroneous decision is inconsistent with principles of fairness and due process and clearly prejudiced the University. By denying the University the right to offer evidence in support of its position, the Regional Director frustrated the University's ability to build a record to support its position that these students are not employees as elaborated upon above. This error has significant implications: if a court of appeals ultimately reviews the decision in this case, the court will need record evidence to evaluate the University's arguments that *Columbia University* applied the wrong standard and/or that the petitioned-for students in this unit are not statutory employees. The Regional Director's denial of due process to the University prevents it from developing that record, and that error is prejudicial to the University.

ii. The Region Also Erred In Denying The University The Right To Present Evidence To Show That The Students Are, At Best, Temporary Or Casual Employees

The Regional Director's late-stated reasoning for rejecting the Offer of Proof in the DDE, *i.e.*, that the University's Offer of Proof was "insufficient to support its contention" that the students, if deemed to be statutory employees, are temporary or casual employees, is erroneous because, as elaborated upon in detail in Section VI.B, above, the University offered a myriad of facts that demonstrate the temporary and casual nature of these employees. Here, the evidence the University sought to admit directly sustains and supports its alternative position that, if these

students are employees under the Act, the petitioned-for unit consists of temporary and/or causal employees. Again, the University has the right under Section 102.66(a) to "introduce into the record evidence of the significant facts that support the party's contentions," and the Regional Director denied that right to the University in this case. Thus, it was clearly erroneous to deny the University the right to introduce evidence to prove up the factors that demonstrate the temporary and/or casual nature of these students' relationship to the Library.

The Hearing Officer's stated basis for rejecting the Offer of Proof at the hearing *i.e.*, that *Columbia University* is settled law, provides no basis for the Regional Director's decision to prohibit the University from presenting evidence on the issue of the temporary or casual employee status of the students in the proposed unit. The University offered facts to show that the students' relationship to the Library is temporary and casual, regardless of whether or not *Columbia University* governs whether the students are employees. What is more, the Petitioner's own unit definition excludes "temporary employees," yet the University was not permitted to introduce evidence to demonstrate the students' status as temporary or casual employees.

Footnote 130 in the *Columbia University* decision states that "[t]o the extent that cases like *San Francisco Art Institute*, 226 NLRB 1251 (1976), suggest that the mere fact of being a student in short-term employment with one's school renders one's interests in the employment relationship too 'tenuous,' such cases are incompatible with our holding here today and are overruled."[3] However, the basis of the University's position that students who work in the Library are temporary employees is *not* that these students are temporary *merely* due to the fact that they are students with an inherently short-term relationship with their school. Rather, students who work in the Library are temporary employees for all of the factual reasons summarized above. These

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[3] The University contends that the Board's decision in *Columbia University* to overrule in part *San Francisco Art Institute* was incorrect.

facts render them temporary employees even if they were not also students. Furthermore, this footnote, standing alone, does not alter the Board's long-standing test for temporary and/or casual employment, nor does it overturn the proposition set forth in *San Francisco Art Institute* and *Saga Foods,* 212 NLRB 786 (1974), that it would not advance the interests of the Act to permit temporary and/or casual employees to collectively bargain. Consistent with these legal principles, University's Offer of Proof articulated a number of factors (which are enumerated above in Section VI.B), beyond the inherently short-term nature of the student-University relationship, which support its position that the petitioned-for students are temporary and/or causal employees who should not be permitted to collectively bargain. The University would have offered evidence to support these facts at the hearing, but was denied the opportunity to do so.

Furthermore, the Petitioner's own unit description specifically excludes "temporary employees." Yet, the University was denied the right to introduce evidence to establish how the students' relationship to the library is so temporary or casual in nature, such that they would not have a sufficient continuing interest in the terms and conditions of employment to permit collective bargaining.

Additionally, the University was denied the ability to distinguish the students covered by this petition from students in other cases such as in *University of West Los Angeles*, 321 NLRB 61 (1996). As explained in the University's Statement of Position and Offer of Proof, the students who work in the University Library system are totally distinguishable from the student library clerks in *University of West Los Angeles* and the Regional Director should have permitted the University to present evidence to advance that argument.

In short, the Regional Director's decision to deny the University the right to introduce evidence to demonstrate that the students in the petitioned-for unit are temporary and/or casual

employees excluded from the bargaining unit based on the Union's own unit description and under Board law, is plainly erroneous. This decision was also clearly prejudicial and implicates due process concerns in that the University cannot even begin to show or support its position that the petitioned-for unit falls into the category of temporary and/or casual employees. Accordingly, the Board should grant this request for review and reverse his decision.

D. The Timing Of The Election As Directed By The Region Constitutes Prejudicial Error

The Regional Director's late-issued decision to direct an election to take place on June 2, 5, 6, 7 and 8, 2017, in the midst of the Reading Period and final exams week, ignores the General Counsel's policy on scheduling elections and runs the high risk that many students who are eligible voters would be disenfranchised. Furthermore, the Regional Director's decision to delay issuing the Decision and Direction Election until May 24, 2017, one week after the hearing in which no evidence was permitted, and a mere 6 business days before the election with an intervening holiday weekend, denied the University its due process right to request expedited review from the Board by making it virtually impossible for the Board to decide this request prior to the election. If the Board agrees an election is proper for this unit (which it is not, for the reasons explained above), the Board nonetheless should reverse the Regional Director's decision on the timing of the election and instead direct the Region to schedule the election during an appropriate week in the Fall 2017 Quarter.

The General Counsel's Memorandum on Representation Case Procedure Changes Effective April 14, 2015, GC 15-06, sets forth general guidance on when regional directors should schedule elections:

> Where there is a choice, the regional director should avoid scheduling the election on dates on which all or part of the facility will be closed, on which past experience indicates that the rate of absenteeism will be high, or on days that many persons will be away from the facility on company business

> or on vacation. Days immediately preceding or following holidays should also be avoided if the rate of absenteeism is likely to be high.

The Regional Director's decision to set an election for June 2 and 5-8 directly contradicts these principles and is likely to disenfranchise a substantial number of voters.

As explained in the University's Statement of Position, the election period intrudes on the Reading Period, held on June 1 and June 2, 2017. There are no classes on these days, and the Reading Period is intended to provide students with an intensive period of time to prepare for upcoming final exams. Furthermore, the week of June 5, 2017 is the final exams period at the University when students will be focused entirely on their studies and finishing exams during this period. After students complete their exams, they typically leave campus immediately for their summer endeavors. This is particularly true here because the University is on a quarter system and its academic year ends later than many other Universities. As such, students are typically eager to leave town as soon as possible in order to begin summer internships, jobs or study abroad programs that their peers at other institutions have already commenced. For these reasons, students in the proposed bargaining unit would be less likely to vote during this period of time and, in any event, should not be distracted by voting responsibilities or campaigning during a time when their focus must be on academics. It is inappropriate and contrary to the Board's mandate to ensure optimal enfranchisement of eligible voters to direct an election to take place when students are studying for and/or taking their final exams, or when many of them are leaving town for the summer quarter. Holding an election when, in effect, most of the students in the proposed unit would be off-campus and unable to exercise their right to vote is inappropriate and contrary to the General Counsel's own guidance. This decision not only prejudices the University, but also prejudices students who may be part of any bargaining unit, if certified.

Based on historical recruiting patterns for student positions at the Library, the University's position is that the appropriate time for an election (if one is to be held at all) is the second or third week of November 2017. Fall Quarter 2017 begins on September 25, 2017. However, the student onboarding process for the fall quarter, which is the busiest season for student recruiting, takes approximately one month. As a result, the full complement of students who work in the Library will not be hired until the second week of November 2017. Having an election prior to that date would result in the disenfranchisement of many students who will be joining the unit in a matter of weeks, and who obviously have an interest in the outcome of the election.

The University's request to hold the election in the fall is fully consistent with Board decisions (which recognize that higher education is a seasonal industry) will ensure optimal employee enfranchisement. *See, e.g.*, *Tusculum College*, 199 NLRB 28, 33 (1972) (moving date of election to the beginning of the fall semester to ensure that a representative complement of the petitioned-for faculty would have an opportunity to express their wishes); *The Trustees of Columbia Univ. in the City of N.Y. & Graduate Workers of Columbia-GWC, UAW*, 364 NLRB No. 90, n. 92 (Aug. 23, 2016) (*citing Tusculum College*); *Fordham University*, 193 NLRB 134, 140 (1971) ("At Fordham, as at most universities, the various schools are in session from September until June. While the University has a summer session, it is clear that many faculty members do not teach during the summer").

E. Extraordinary Relief Is Required In The Particular Circumstances Of This Case

Rule 102.67(j) specifically provides a party with the right to request extraordinary relief, including expedited consideration, a stay of an election, and/or the impounding of ballots, pending the Board's decision on review. The Board has generous discretion in this area, and grants extraordinary relief "upon a clear showing that it is necessary under the particular circumstances

of the case." Rule 102.67(j)(2). Under the particular circumstances of this case, especially given the uncertainty of the law on the employee status of students, the risk of disenfranchising a large proportion of student voters, and the Regional Director's delayed Decision and Direction of Election which came a mere 6 days prior to the election, the Board should grant extraordinary relief: the Board should stay the election and/or impound the ballots, pending the decision of the Board on review.

In this case, there are critical and unresolved statutory questions relating to whether the petitioned-for unit members are employees under the Act. It would not be in the interests of any party – Petitioner, the University, or the Board – to have an election when the question of whether the proposed bargaining unit is covered by the Act is left unresolved. Nor could an election fairly be held when the University's ability to advance its position on that question has been foreclosed by the decisions of the Regional Director. Similarly, the question of whether, if they are employees under the Act, the petitioned-for students are temporary and/or causal employees who are excluded from the proposed unit or not entitled to collectively bargain also remains unresolved. Holding an election under those circumstances would be a waste of resources and not in the interests of any party. Furthermore, the dates of the election as ordered by the Regional Director will disenfranchise a large proportion of the eligible voters, which does not advance the interests of the Act.

Without the extraordinary relief requested here, the University may be forced to challenge every ballot cast in the election in order to properly preserve its rights in a post-election phase. Such a challenge process for every voter would prolong the voting process and would be unnecessary if these statutory and unit-wide issues were resolved on a proper record and before an election.

VII. CONCLUSION

For all of the reasons set forth above, the University of Chicago requests that the Board accept the request for review, reverse the decisions of the Regional Director, and dismiss the petition; alternatively, the University requests that the Board reverse the decisions of the Regional Director and remand with instructions to permit the University to offer evidence consistent with its Offer of Proof regarding whether the petitioned-for students are employees under the Act and, if so, whether they are temporary and/or causal employees. In addition, the University requests extraordinary relief in the form of a stay of the election and/or impoundment of ballots pending the Board's decision on review.

Respectfully submitted,

s/ Jenny Goltz

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University of Chicago

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

UNIVERSITY OF CHICAGO,	)	
	)	
Employer,	)	
	)	
And	)	Case No. 13-RC-198365
	)	
LOCAL 743,	)	
	)	
Petitioner.	)	

CERTIFICATE OF SERVICE

I, Jenny Goltz, state under oath that I caused a copy of The University Of Chicago's Expedited Request For Review And Motion To Stay The Election And/Or Impound Ballots Or, In The Alternative, For Remand To The Regional Director to be e-filed with the National Labor Relations Board on May 25, 2017. Copies of this filing have been served on the following individuals by e-mail:

Peter Sung Ohr
Regional Director
National Labor Relations Board
Region 13
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Chicago, IL 60604

Catharine Schutzius
Vice President
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s/ Jenny Goltz
Jenny Goltz

Miller, Peggy

From: ExecSec@nlrb.gov <e-Service@service.nlrb.gov>
Sent: Thursday, May 25, 2017 3:50 PM
To: Miller, Peggy
Subject: RE: 13-RC-198365-Request for Review of DDE, 13-RC-198365-Unknown, 13-RC-198365-Unknown, 13-RC-198365-Unknown

Confirmation Number: 1000141894

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Date Submitted:	5/25/2017 4:46:08 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name:	University of Chicago
Case Number:	13-RC-198365
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