

Nos. 18-3659, 19-1146

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

UNIVERSITY OF CHICAGO
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

**LOCAL 743, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**
Intervenor

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of the University of Chicago (“the University”) for review, and the cross-application of the National Labor

Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the University on December 4, 2018, and reported at 367 NLRB No. 41. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). Venue is proper because the University’s unfair labor practice occurred in Illinois. The petition and application are timely, as the Act provides no time limit for such filings. Local 743, International Brotherhood of Teamsters (“the Union”) intervened in support of the Board.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 13-RC-198365), and the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding for the limited purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d).

STATEMENT OF THE ISSUES

The University has admittedly refused to recognize or bargain with the union that its employees chose as their representative in a Board-supervised election.

The ultimate issue is whether substantial evidence supports the Board's finding that such refusal violated Section 8(a)(5) and (1) of the Act. 29 U.S.C. § 158(a)(5),

(1). That finding depends on the validity of the Board's certification of the Union as representative, which depends, in turn, on the following issue raised by the University on review:

Whether the Board abused its discretion by refusing to permit the University to introduce evidence proffered at a pre-election hearing regarding the alleged "temporary and/or casual" status of the employees in the unit.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The outcome of the present case is largely determined by the Board's legal analysis in *Trustees of Columbia University*, 364 NLRB No. 90, 2016 WL 4437684 (Aug. 23, 2016). The Board's decision in that case, which was preceded by a public invitation for briefing that resulted in extensive written argumentation in support of both sides, primarily addressed the question of whether students who perform services at their educational institutions are statutory "employees" within the meaning of the Act. 2016 WL 4437684, at *1 & nn.2-3. The Board's decision

in *Columbia University* was the culmination of several decades of caselaw addressing the rights of student workers.

Beginning in a series of cases in the 1970s containing minimal legal analysis, the Board concluded that various student workers, including graduate teaching and research assistants, were not statutory “employees” and were not entitled to engage in collective bargaining because they were “primarily students.” See *Columbia Univ.*, 2016 WL 4437684, at *2-3 (discussing overruled cases); e.g., *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974). The Board applied the same primary-status reasoning to deny collective-bargaining rights to medical interns and residents at teaching hospitals. *St. Clare’s Hosp.*, 229 NLRB 1000 (1977); *Cedars-Sinai Med. Ctr.*, 223 NLRB 251 (1976). The Board also applied such reasoning to deny the appropriateness of collective-bargaining units composed of students employed at educational institutions in non-academic positions. *S.F. Art Inst.*, 226 NLRB 1251, 1252 (1976) (rejecting separate unit of student janitors); *Saga Food Serv. of Cal., Inc.*, 212 NLRB 786, 787 n.9 (1974) (rejecting separate unit of student cafeteria workers).

The Board began to revisit that primary-status precedent in *Boston Medical Center Corp.*, 330 NLRB 152 (1999), which overruled *St. Clare’s Hospital* and *Cedars-Sinai Medical Center*, and rejected the notion that medical interns and residents are not statutory employees because they are “primarily students.” The

following year, in *New York University*, 332 NLRB 1205 (2000), the Board extended the reasoning of *Boston Medical Center* to find that certain university graduate assistants were statutory employees. However, the Board reversed *New York University* four years later in *Brown University*, 342 NLRB 483 (2004), to again state that graduate students employed at their universities are not statutory employees because they are “primarily” students, and because collective bargaining would unduly infringe on their educational relationships to their universities.

In *Columbia University*, as described in more detail further below, the Board thoroughly reexamined the issue, overruled *Brown University*, and reasserted the principle that common-law employees who also happen to be enrolled students are not excluded from the coverage of the Act. *Columbia Univ.*, 364 NLRB No. 90, slip op. at 1-22, 2016 WL 4437684, at *1-26. As relevant here, the Board also unambiguously rejected the argument that a bargaining unit composed of student employees is inappropriate because of the inherently short-term nature of student employment, explaining that such workers are not precluded from forming a unit appropriate for collective bargaining due to their finite tenure, and that a unit of similarly situated students does not consist of ineligible “temporary employees” within the meaning of Board law. 2016 WL 4437684, at *2, *14, *24-25.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Background; the University's Student Library Workers; the Union's Representation Petition

The University is a non-profit corporation that runs a private teaching and research university in Chicago, Illinois. (S.A. 2 n.3.)¹ The University operates several libraries on its campus, including the Joseph Regenstein Library, the Joe & Rika Mansueto Library, the Eckhart Library, the John Crerar Library, the D'Angelo Law Library, and the Social Services Administration Library. (S.A. 3.) Approximately 226 enrolled students work as library clerks at the University's various campus libraries. (S.A. 2.) The University's student library workers are paid an hourly wage. (S.A. 1.)

On May 8, 2017, the Union filed a petition with the Board seeking to represent a bargaining unit consisting of “[a]ll hourly paid student employees of the University of Chicago Libraries.” (S.A. 3, 195.) The University submitted a statement of position denying that the student library workers are statutory “employees” on the grounds that the Board’s decision in *Columbia University* “was wrongly decided and should be overturned,” and that the Board’s prior decision in *Brown University* “is the correct legal standard.” (S.A. 41.) The

¹ “A.” refers to the Appendix filed by the University. “S.A.” refers to the Separate Appendix filed by the University. “Br.” refers to the University’s opening brief.

University's statement of position further alleged that the student library workers are "temporary and/or casual employees" who do not manifest a sufficient interest in their terms of employment to warrant representation, citing *San Francisco Art Institute*, a case it asserted had been "wrongly overruled." (S.A. 41-42.)

B. The Pre-Election Hearing; the University's Offer of Proof

On May 17, 2017, a Hearing Officer conducted a pre-election hearing at which both the University and the Union were represented by counsel. (S.A. 62-69.) Pursuant to Section 102.66(c) of the Board's rules, 29 C.F.R. § 102.66(c), the University submitted a written offer of proof detailing the testimonial and documentary evidence that it proposed to introduce at the hearing. (S.A. 51-59.) The University's offer of proof began by reiterating its contention that *Columbia University* "was wrongly decided and should be overturned," and that it was prepared to introduce evidence showing that the student library workers are not statutory employees "[u]nder the Board's prior precedent in *Brown University*, which the University contends is the correct legal standard." (S.A. 52.)

The University's offer of proof further purported to show that even if the student library workers are statutory employees they are "temporary and/or casual employees" who lack a sufficient interest in their terms of employment to warrant representation, again citing *San Francisco Art Institute*, which it characterized as "wrongly overruled in *Columbia University*." (S.A. 52.) The University proffered

the following evidence regarding its secondary claim that the student library workers cannot form an appropriate unit because they are “temporary or casual” employees:

(11) As noted above, students must be actively enrolled at the University of Chicago in order to be eligible to hold student library position[s]. As such, their tenure is inherently temporary because (putting aside the brief post-graduation grace period), student employment ends when students graduate or leave the University for other reasons. . . .

(12) Students are hired into student [l]ibrary positions temporarily, on a quarter by quarter basis, and most of the students remain in that position for one academic year or less. As noted above, the mean duration of employment of the students in the proposed unit is 9 months. The median duration of employment is 7 months. No less than 80% of students in the proposed unit have been in their current position for one year or less. And 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. If these students graduate or leave the University, they will not be permitted to remain in their student library position[s]. In other words, virtually all of the members of the proposed unit are short-term, temporary and/or casual employees. . . .

(S.A. 57 (footnote omitted).)

After considering the University’s arguments and the evidence described in the offer of proof, the Regional Director declined to allow the University to introduce the proffered evidence, citing established Board law. (S.A. 64.) The parties then continued the pre-election hearing, addressing the logistical details of the election and related issues. (S.A.64-69.)

C. The Regional Director’s Decision and Direction of Election; the Board’s Denial of the University’s Request for Review

On May 24, 2017, the Regional Director issued a Decision and Direction of Election finding that the petitioned-for unit of student library workers is appropriate under Board law, affirming that the University had failed to proffer sufficient evidence to sustain its contrary position, and scheduling an election.

(S.A. 1-7.) The following day, May 25, the University filed an expedited request for review with the Board, which challenged that ruling and asked the Board to stay the election, impound the ballots, or remand the case to the Regional Director.

(S.A. 8-75.) The University’s primary argument to the Board was that “*Columbia University* was wrongly decided and should be overruled for a variety of legal reasons and public policy considerations.” (S.A. 22.) According to the University, the Regional Director erred by declining to accept evidence which would have shown that the student library workers are not statutory employees pursuant to *Brown University*, the “correct standard” for assessing the employee status of student workers. (S.A. 24.) The University also argued that it should have been permitted to present its proffered evidence regarding the “temporary and/or casual” status of the student library workers. (S.A. 28-29.) In support of that argument, the University claimed that the Board in *Columbia University* had incorrectly “overrule[d] in part” *San Francisco Art Institute* but had not “overturn[ed] the

proposition . . . that it would not advance the interests of the Act to permit temporary and/or casual employees to collectively bargain.” (S.A. 28-29.)

On June 1, 2017, the Board (Members Pearce and McFerran; Chairman Miscimarra, dissenting) denied the University’s request for review. (S.A. 76.) The Board found, in agreement with the Regional Director, that the University’s offer of proof failed to present any grounds for concluding that the student library workers are not common-law employees or that they should be deemed ineligible for representation as temporary or casual employees. (S.A. 76 n.1.)

D. The Student Library Workers Vote in Favor of Union Representation; the Union Is Certified as Representative

The Board conducted a secret-ballot election among the student library workers on June 2 and June 5-8, 2017, in which a majority voted in favor of representation by the Union. (A. 2.) The University filed numerous objections to the conduct of the election and an accompanying offer of proof. (S.A. 78-81, 141-52.) The Regional Director issued an initial decision overruling the University’s election objections and certifying the Union (S.A. 82-87), and the University filed a request for review with the Board. (S.A. 88-157.)²

On December 15, 2017, the Board (Chairman Miscimarra and Member Emanuel; Member Pearce, dissenting) granted the University’s request for review

² The University does not contest the conduct of the election in its brief to the Court, and its post-election objections to the Board are not at issue on review.

in part and remanded the case to the Regional Director to hear evidence regarding one of the University's election objections. (S.A. 158-59.) On March 19, 2018, following a two-day evidentiary hearing, the Regional Director issued a supplemental decision on remand and overruled the University's remaining election objection while certifying the Union as exclusive representative of a unit comprising "[a]ll hourly paid student employees of the University of Chicago Libraries." (A. 2.) The University filed a request for review with the Board. (S.A. 167-187.) On May 21, 2018, the Board (Members Pearce, Kaplan, and Emanuel) denied the University's request for review as raising no substantial issues warranting review. (S.A. 188-89.)

E. The University Refuses To Bargain; the Board's General Counsel Issues an Unfair-Labor-Practice Complaint

On March 27, 2018, the Union requested that the University recognize and bargain with it as the exclusive representative of the student library workers, and the University refused to do so. (A. 2.) On June 15, 2018, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the University violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), and subsequently filed a motion for summary judgment with the Board. (A. 1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On December 4, 2018, the Board (Chairman Ring, Members Kaplan and Emanuel) granted the General Counsel's motion for summary judgment and found

that the University violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the Union. (A. 1-2.) The Board found that all representation issues raised by the University were or could have been litigated in the underlying representation proceeding, and rejected the University's argument that special circumstances warranted reconsideration of those issues in the unfair-labor-practice proceeding. (A. 1 & n.1.)

The Board's Order requires the University to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (A. 2-3.) Affirmatively, the Board's Order requires the University to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, and to post a remedial notice. (A. 3.)

SUMMARY OF ARGUMENT

When Congress enacted the National Labor Relations Act more than eighty years ago, it codified an expansive policy judgment that collective-bargaining rights are the surest mechanism for preventing labor unrest, and that federal law should protect the rights of workers in this country to exercise "full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. In a major decision three years ago, the Board overruled its existing precedent and held that student workers in common-law

employment relationships with their educational institutions are statutory employees notwithstanding the fact that they are also students. *Trs. of Columbia Univ.*, 364 NLRB No. 90, slip op. at 1-13, 2016 WL 4437684, at *1-14 (Aug. 23, 2016).

The present case involves the application of *Columbia University* to the University's student library workers, whom the Board found to be common-law employees constituting an appropriate unit for collective bargaining. The student library workers subsequently voted in a Board-supervised election to be represented by the Union. In the proceedings below, the University vigorously contested the Board's decision in *Columbia University*, and repeatedly sought to have the Board overrule that decision. The Board declined to do so. The University admits that it then refused to recognize or bargain with the Union as the student library workers' certified representative, which is unlawful pursuant to the Act, and the University's sole defense is its contention that the Union's underlying certification was invalid. On review, the University has narrowed its challenge to the Union's certification to the argument that the Board erroneously prevented it from introducing evidence at the pre-election hearing regarding the purported "temporary or casual" status of the student library workers.

Although not challenging on review the validity of the Board's decision in *Columbia University*, the University deliberately fails to engage with the Board's

reasoning in that case and misrepresents the law to the Court. In particular, the University implicitly relies on the flawed notion—rejected in *Columbia University*—that student workers are entitled to fewer rights than other common-law employees merely due to their separate educational relationship to their employing university. In addition, the University misconstrues Board law regarding so-called “temporary employees” and disregards the fact that such status is not evaluated in a vacuum but only in relation to the other employees in a given bargaining unit. In doing so, the University ignores *Columbia University*’s unambiguous holding that a unit comprising short-term student employees like those at issue here does *not* consist of “temporary employees” within the meaning of Board law. Instead, the University relies on a flawed reading of two student-worker cases that the Board expressly overruled in *Columbia University*.

Because the University’s offer of proof below was based on misconstructions of established Board law, and because the factual allegations made in the offer of proof would not have altered the Board’s analysis even if taken to be true, the Board acted well within its discretion in declining to admit the proffered evidence. Accordingly, the Board’s certification of the Union is valid, the University’s refusal to recognize or bargain with the Union violated the Act, and the Court should enforce the Board’s Order in full.

ARGUMENT**THE UNIVERSITY VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE OR BARGAIN WITH THE UNION**

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C.

§ 158(a)(5), (1), when it refuses to recognize or bargain with the duly certified bargaining representative of a unit of its employees. *Ruan Transp. Corp. v. NLRB*, 674 F.3d 672, 674-76 (7th Cir. 2012). The Board’s unfair-labor-practice findings are conclusive if supported by “substantial evidence” on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Here, the University has admittedly refused to recognize or bargain with the Union in order to contest the Board’s certification of the Union as the exclusive representative of the student library workers employed in the University’s campus libraries. Thus, if the Court upholds the Union’s certification, then substantial evidence necessarily supports the Board’s finding that the Company has violated the Act. *See Ruan Transp.*, 674 F.3d at 676.³

In contesting the Union’s certification, the University narrows its argument on review to the claim that it was prejudiced at the pre-election hearing by the

³ The operative facts underlying the Board’s unfair-labor-practice finding were never in dispute, and thus the traditional substantial-evidence standard of review is—contrary to the University (Br. 14)—largely inapposite here. Instead, the case turns, as detailed below, on whether the Board abused its discretion during the pre-election hearing in the underlying representation proceeding.

Board's refusal to permit it to present evidence that it proffered regarding the alleged "temporary or casual" status of the student library workers. (Br. 14-26.)

However, the Board's rules dictate that it exclude evidence insufficient to sustain the proffering party's position, and the University's offer of proof was insufficient because it relied on legal premises directly contrary to governing Board law—which the Board chose not to revisit in this case.

A. The Board Does Not Permit Parties at a Pre-Election Hearing To Introduce Evidence That Would Be Insufficient To Affect the Board's Analysis, and this Court Reviews the Board's Bargaining Unit Determinations and Evidentiary Rulings for an Abuse of Discretion

Section 9(a) of the Act provides for the selection of an exclusive bargaining representative by the majority of employees in "a unit appropriate for such purposes." 29 U.S.C. § 159(a). Section 9(b) vests in the Board the authority to determine "the unit appropriate for the purposes of collective bargaining," in order to assure employees "the fullest freedom in exercising the rights guaranteed by [the Act]." 29 U.S.C. § 159(b).⁴ Congress has entrusted the Board with a "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J.*

⁴ Pursuant to Section 3(b) of the Act, the Board has delegated its authority to determine the appropriateness of petitioned-for units to its regional directors, subject to discretionary Board review. 29 U.S.C. § 153(b); see *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 138-43 (1971).

Tower Co., 329 U.S. 324, 330 (1946). As such, this Court has recognized that “the Board’s authority to regulate elections is plenary.” *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 615 (7th Cir. 1983) (en banc). In particular, the Board’s pre-election determination that a petitioned-for bargaining unit is “appropriate” is discretionary and subject to review only for an abuse of discretion. *Id.* at 615 (citing *Lammert Indus. v. NLRB*, 578 F.2d 1223, 1225 (7th Cir. 1978)); *NLRB v. Aaron’s Office Furniture Co.*, 825 F.2d 1167, 1169 (7th Cir. 1987).

If the parties do not enter into a stipulated election agreement, the Board will hold “an appropriate hearing upon due notice.” 29 U.S.C. § 159(c). The sole purpose of the pre-election hearing is to determine whether a “question of representation” exists warranting a Board-supervised election, including whether the underlying representation petition “concern[s] a unit appropriate for the purpose of collective bargaining.” 29 C.F.R. § 102.64(a). Parties may only litigate issues at the pre-election hearing which are relevant to the existence of a question of representation. 29 C.F.R. § 102.66(a). The Board may solicit written offers of proof, but if the Board determines that the evidence described in the offer of proof is “insufficient to sustain the proponent’s position, the evidence *shall not* be received.” 29 C.F.R. § 102.66(c) (emphasis added). The Court reviews the Board’s refusal to permit a party to introduce evidence at a representation hearing for a “clear abuse of discretion.” *Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 298 (7th

Cir. 1983) (upholding evidentiary ruling at post-election objections hearing); *see also Roundy's, Inc. v. NLRB*, 674 F.3d 638, 648-49 (7th Cir. 2012) (applying same standard in context of evidentiary ruling at unfair-labor-practice hearing). The party alleging an abuse of discretion has the burden to demonstrate both legal error and prejudice. *Tuf-Flex Glass*, 715 F.2d at 297-98.

As demonstrated below, the University has failed to meet that burden here, because the Board applied governing precedent to affirm the Regional Director's conclusion that none of the proffered evidence was sufficient to establish that the petitioned-for unit was inappropriate, and because admitting the evidence would not have altered the Board's analysis.

B. Students in Common-Law Employment Relationships Are Statutory Employees with Collective-Bargaining Rights, and the Board Has Rejected the Primary-Status Reasoning Relied Upon by the University

The University has disclaimed any challenge on review to the Board's decision in *Columbia University*. (Br. 2 n.2.) Nonetheless, the University's arguments to the Court regarding the purported inability of its student library workers to form an appropriate bargaining unit rely in large part on a now-overruled conceptual framework which held that student workers are "primarily" students and therefore should be denied rights under the Act. The University repeatedly invokes the inherent attributes of student workers as grounds for denying the library workers here the right to form a unit appropriate for collective

bargaining. (Br. 7-9, 15 n.6, 21-22.) The University also renews the flawed assertion that student workers are not entitled to bargain because they are “concerned primarily with their studies rather than with their part-time employment.” (Br. 17-19 (quoting *S.F. Art Inst.*, 226 NLRB 1251, 1252 (1976), *overruled by name, Columbia Univ.*, 364 NLRB No. 90, slip op. at 20 n.130, 2016 WL 4437684, at *24 n.130)). Given that the University has failed to challenge the Board’s decision in *Columbia University*, the Court should reject the University’s implicit attempts to revive the overruled notion that student workers lack collective-bargaining rights because of their dual status as students or because of the inherently finite duration of student employment. As the below examination of the Board’s decision in *Columbia University* shows, the premises of the University’s brief to the Court—as well as its offer of proof to the Board and the overruled Board cases it relies on—are directly contrary to governing law.

Section 7 of the Act grants “employees” the right “to bargain collectively through representatives of their own choosing,” 29 U.S.C. § 157, and Section 2(3) defines the term “employee” to include “any employee” subject to a list of enumerated exceptions, 29 U.S.C. § 152(3). The breadth of the term “employee” in Section 2(3) is “striking,” and the task of defining that broad term is one that “has been assigned primarily to the agency created by Congress to administer the Act.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (quoting *NLRB v. Hearst*

Publ'ns, Inc., 322 U.S. 111, 130 (1944)). The Board's construction of the term "employee" is entitled to "considerable deference," and courts will uphold "any interpretation that is reasonably defensible." *Sure-Tan*, 467 U.S. at 891; *see NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90, 94 (1995) (reiterating that the Board, in particular, possesses "a degree of legal leeway" when interpreting the statutory term "employee").

In *Columbia University*, the Board overruled its earlier decision in *Brown University*, 342 NLRB 483 (2004), and concluded that students employed by their educational institutions are statutory employees under Section 2(3) of the Act. *Columbia Univ.*, 364 NLRB No. 90, slip op. at 1-13, 2016 WL 4437684, at *1-14. The Board specifically rejected the contention in *Brown University* that student workers are not employees because they are "primarily students and have a primarily educational, not economic, relationship with their university." *Columbia Univ.*, 2016 WL 4437684, at *1 (quoting *Brown Univ.*, 342 NLRB at 487). Instead, the Board observed that a given worker "may be both a student *and* an employee; a university may be both the student's educator *and* employer." 2016 WL 4437684, at *8. The Board also explained at length why granting collective-bargaining rights to students would not "improperly intrude into the educational process," and the Board found that such proposition in *Brown University* was unsupported "by legal authority, by empirical evidence, or by the Board's actual

experience.” 2016 WL 4437684, at *2, *8-14. The Board concluded that “student [workers] who have a common-law employment relationship with their university are statutory employees under the Act,” and that there is “no compelling reason—in theory or in practice—to conclude that collective bargaining by student [workers] cannot be viable.” 2016 WL 4437684, at *2, *14.

As the Board explained in *Columbia University*, it is well established that when interpreting the broad definition of the term “employee” in Section 2(3), the Board may consult the common law of agency and the “ordinary dictionary definition” of the term. 364 NLRB No. 90, slip op. at 4-5, 2016 WL 4437684, at *5-6 (quoting *Town & Country Elec.*, 516 U.S. at 90). For example, in *Town & Country Electric*, the Supreme Court affirmed the Board’s conclusion that paid union organizers are statutory employees notwithstanding the fact that they have a dual status and may be said to serve “two masters,” in part because that conclusion is consistent with the common law of agency. 516 U.S. at 92-96. The Court also affirmed the Board’s reasoning that such workers fall within the broad language of the Act and the “ordinary dictionary definition” of an “employee” as any person “who works for another in return for financial or other compensation.” *Id.* at 90.

The Board further observed in *Columbia University* that none of the enumerated exceptions which Congress included in Section 2(3) references students or private university employees of any sort, that the Act in general makes

no reference to students, and that the absence of a statutory exclusion for such workers “is itself strong evidence of statutory coverage.” 364 NLRB No. 90, slip op. at 4 & n.35, 2016 WL 4437684, at *5 & n.35. The Board’s reading of the statutory text is consistent with precedent. For example, in *Sure-Tan* the Supreme Court held that the definition of “employee” in Section 2(3) “squarely applies to ‘any employee,’” and that because undocumented workers “are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition.” 467 U.S. at 891-92; *see also NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177-90 (1981) (observing that the Act defines “employee” to include “any employee” with only a few enumerated exceptions, and rejecting argument that there is an implied exception for workers with access to confidential information); *Seattle Opera v. NLRB*, 292 F.3d 757, 761-765 (D.C. Cir. 2002) (affirming “employee” status of irregularly employed on-call choristers who met “plain meaning” of the term and were “not specifically excluded from coverage by one of [the Act’s] enumerated exceptions”); *cf. State Bank of India v. NLRB*, 808 F.2d 526, 530-34 (7th Cir. 1986) (applying same reasoning to analogous definition of “employer” in Section 2(2) of the Act).

Moreover, the Board emphasized in *Columbia University* that federal labor law was designed to encourage the practice of collective bargaining and to protect the “full freedom” of workers to express a choice for or against the selection of a

collective-bargaining representative. 364 NLRB No. 90, slip op. at 2, 6-7, 2016 WL 4437684, at *2, *7 (quoting 29 U.S.C. § 151). Permitting student workers to choose in a Board-supervised election whether or not they wish to engage in collective bargaining directly furthers the policies outlined in Section 1 of the Act, 2016 WL 4437684, at *7, which codifies the judgment of Congress that collective-bargaining rights are necessary to prevent labor unrest leading to obstructions in commerce and the diminution of wages, 29 U.S.C. § 151. *See State Bank of India*, 808 F.2d at 531-32. The Board's analysis regarding student workers is again reinforced by the Supreme Court's opinion in *Sure-Tan*, which recognized that "extending the coverage of the Act to [undocumented immigrant workers] is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process." 467 U.S. at 892. The Court explained that a two-tiered system which denied collective-bargaining rights to undocumented immigrant workers would threaten to "seriously depress wage scales and working conditions [for other employees]," thereby limiting the Act's overall effectiveness and its congressionally prescribed goals. *Id.* So too in the present case, creating an artificial exception to Section 2(3) for student workers performing work alongside non-student library employees already represented in collective bargaining would risk perpetuating a "subclass of workers" whose lack of federal rights could "imped[e] effective collective bargaining" for all. *Id.*

In sum, pursuant to governing Board precedent, the Act's broad definition of the term "employee" includes students who have a common-law employment relationship with their universities. There was never any dispute in the present case that the University's student library workers are common-law employees who receive compensation from the University and work under the University's control. Thus, the student library workers at issue here are statutory employees notwithstanding the fact that they are also enrolled students.

The University's contention that it would like to "reserve[] its right to challenge the validity of [*Columbia University*] later in the appropriate forum" (Br. 2 n.2) is inexplicable. The University lacks any reserved "right" to relitigate the employee status of its student library workers if the Court enforces the Board's Order, which is based on the Board's finding that the petitioned-for unit is appropriate and consists of statutory employees with collective-bargaining rights under Board law. Any subsequent refusal by the University to bargain with the Union as representative of that unit would be grounds for a finding of contempt. *See NLRB v. Warren Co.*, 350 U.S. 107, 111-12 (1955).

C. Student Employees Are Not Denied Collective-Bargaining Rights Due to the Inherently Temporary Nature of Their Employment

The University bases its challenge to the Union's certification on the claim that it proffered evidence showing that the student library workers are "temporary or casual" employees such that "a unit consisting entirely of such employees would

not be appropriate for collective bargaining . . . as a matter of law.” (Br. 17.) The legal premise of that argument is flawed and the University misconstrues the meaning of the term of art that it invokes.

1. Short-term employees do not lack collective-bargaining rights, and employment tenure is only relevant as part of a community-of-interest analysis relative to the bargaining unit as a whole

The Board uses the term “temporary employee” when it determines that particular employees with finite tenures should not be included in a larger bargaining unit because those employees lack a sufficient “community of interest” with the rest of the unit. *See NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (discussing community-of-interest standard). When considering the effect of an employee’s tenure on his or her inclusion in a given bargaining unit, the Board focuses, in particular, on the “nexus between [the] employee’s temporary tenure and the determination whether [he or she] shares a community of interest with the [rest of the] unit employees sufficient to qualify as an eligible voter.” *Marian Med. Ctr.*, 339 NLRB 127, 128 (2003). As the Board has explained, “the determination is not based on the nature of an employee’s tenure in a vacuum; rather, the nature of the alleged temporary employees’ employment must be considered relative to the interests of the unit as a whole.” *Columbia Univ.*, 364 NLRB No. 90, slip op. at 20, 2016 WL 4437684, at *24. In general, a so-called “temporary employee” is “likely” to have divergent interests from a broader

unit of *non*-temporary employees, *Marian Med. Ctr.*, 339 NLRB at 128, but such employees do not lack collective-bargaining rights and may even be included in the same bargaining unit as non-temporary employees if they share a sufficient community of interest. *See Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 536-37 (7th Cir. 2003) (recognizing that temporary staffing-agency employees can be included in a bargaining unit with permanent employees if they share a sufficient community of interest); *NLRB v. W. Temp. Servs., Inc.*, 821 F.2d 1258, 1267-69 (7th Cir. 1987) (affirming inclusion of temporary staffing-agency employees in bargaining unit due to shared community of interest with permanent employees).

It is thus well established, pursuant to decades of Board law in myriad contexts, that the appropriateness of a particular unit turns on “whether the proposed unit shares a community of interest, not whether the employer has a stable and permanent set of workers.” *Ralph Rogers & Co. v. NLRB*, 870 F.2d 379, 384-85 (7th Cir. 1989). Contrary to the University (Br. 19), the Board has held that it will not categorically deny collective-bargaining rights to statutory employees merely due to the limited duration of their employment—unequivocally stating that “the Act vests in such *employees*, rather than the Board, the decision whether they will benefit from collective bargaining.” *Kan. City Repertory Theatre, Inc.*, 356 NLRB 147, 147 (2010) (emphasis added). Indeed, many employment relationships involve employees with a limited tenure, and to

erroneously extend the definition of “temporary employee” to all such situations would be to misapply a narrow community-of-interest consideration and “to make what was intended to be a limited exception swallow the whole.” *Bos. Med. Ctr. Corp.*, 330 NLRB 152, 166 (1999). The Board has a long history of successfully overseeing collective bargaining in industries that feature short-term or intermittent employment practices, and of approving bargaining units composed entirely of short-term employees—for example, among seasonal workers,⁵ employees in the construction trades,⁶ employees in the entertainment industry,⁷ professional

⁵ *E.g.*, *Stokely Bros. & Co.*, 15 NLRB 872, 885-86 (1939) (directing election among unit of seasonal employees who generally worked between two and eight weeks per season at vegetable canning plant); *cf.* *Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257-59 (7th Cir. 2003) (affirming inclusion of seasonal workers in larger unit where workers possessed sufficient community of interest).

⁶ *Steiny & Co.*, 308 NLRB 1323, 1324-28 & n.12 (1992) (reaffirming Board’s longstanding eligibility formula for short-term and intermittent employment in the construction industry, and noting that the Board at that time had conducted more than 6000 elections among such employees over the preceding 30 years); *see, e.g.*, *Ralph Rogers & Co.*, 870 F.2d at 384-85 (affirming unit of construction workers).

⁷ *E.g.*, *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 565, 568 (D.C. Cir. 2016) (affirming unit of orchestra musicians who chose which concerts to participate in and worked for employer no more than 150 hours per year on one-year contracts); *Cavendish Record Mfg. Co.*, 124 NLRB 1161, 1164-65 (1959) (rejecting argument that unit of session musicians was inappropriate due to “casualness” of their employment); *Television Film Producers Ass’n*, 93 NLRB 929, 929-34 (1951) (directing election among screen actors and permitting any employee with two days of employment in preceding nine months to vote).

athletes,⁸ and limited-term faculty in higher education.⁹ The finite duration of an individual's employment, and the term "temporary employee," are inapposite where, as here, the entire bargaining unit consists of similarly situated employees.

2. A unit composed of short-term student employees like those at issue here does not consist of ineligible "temporary employees"

There is no special rule for short-term student employees, as the Board made clear in portions of *Columbia University* that the University inexplicably disregards in its brief to the Court. 364 NLRB No. 90, slip op. at 12 & n.92, 20-21, 2016 WL 4437684, at *2, *14 & n.92, *24-25. The Board explained there that student employees' inherently short tenure "does not suggest a divergence of interests that would frustrate collective bargaining," and that "notwithstanding the length of any individual [student's] tenure," most university employers will continuously employ groups of similarly situated employees that could benefit

⁸ *E.g., Major League Rodeo, Inc.*, 246 NLRB 743, 745-46 (1979) (directing election among professional athletes on fixed-term contracts); *see also Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 251, 260-61 (S.D.N.Y. 1995) (issuing injunction based on league's failure to bargain with union representing unit of professional baseball players employed on waivable or fixed-term contracts), *affirmed*, 67 F.3d 1054 (2d Cir. 1995).

⁹ *E.g., NLRB v. Wentworth Inst.*, 515 F.2d 550, 552, 556-58 (1st Cir. 1975) (affirming unit of higher-education faculty employed pursuant to renewable one-year contracts); *Manhattan Coll.*, 195 NLRB 65, 66 (1972) (directing election among faculty members on one-year contracts, including "terminal contract" faculty who had already been notified their contracts would not be renewed but retained an interest in their terms of employment while still employed).

from a stable collective-bargaining relationship. 2016 WL 4437684, at *25. As such, the Board expressly rejected the argument that a bargaining unit composed entirely of short-term student employees is inappropriate or inconsistent with Board law regarding “temporary” employees. 2016 WL 4437684, at *2, *24-25.

Given that decision and the foregoing well-established legal principles, the University’s assertion to the Court that student workers alleged to be “‘temporary or casual’ employees . . . cannot form a separate unit as a matter of law” (Br. 17) is legally erroneous and borderline sanctionable. The University even cites the portion of the Board’s decision in *Columbia University* addressing this issue (Br. 18-19)—a decision which the University claims not to contest—while ignoring the Board’s analysis and misrepresenting the law to the Court. The University purports to be relying on a generally applicable and “long-standing [Board] test for temporary and/or casual employment” (Br. 19), but the University relies on just two cases, both of which involved students. *See S.F. Art Inst.*, 226 NLRB 1251, 1251-52 (1976); *Saga Food Serv. of Cal., Inc.*, 212 NLRB 786, 787 n.9 (1974).

As an initial matter, the Board in *Columbia University* indicated in no uncertain terms that the cases relied on by the Company have been overruled and are no longer valid precedent. 364 NLRB No. 90, slip op. at 12, 20-21 & n.130, 2016 WL 4437684, at *14, *24-25 & n.130 (explaining in detail why student

employees' short tenure does not preclude collective bargaining or make them "temporary employees," and expressly overruling "cases like" *San Francisco Art Institute* to the extent they suggested otherwise); *see also Bos. Med. Ctr.*, 330 NLRB at 166 (explaining that medical interns and residents are *not* ineligible to bargain merely due to the temporary nature of their educational positions, and analogizing them to employees on fixed-term contracts). Moreover, neither *Saga Food Service* nor *San Francisco Art Institute* stood for an independent "principle" that "it would not advance the interests of the Act to permit temporary and/or casual employees to collectively bargain" (Br. 18-19). Rather, as the Board itself confirmed in later cases, both of those decisions hinged on the Board's now-overruled primary-status reasoning, and the mistaken rationale for denying the student workers bargaining rights in those cases was that their employment was "merely incidental to [their] primary interest of acquiring an education." *Univ. of W. L.A.*, 321 NLRB 61, 62 & n.4 (1996) (distinguishing *Saga Food Service* and *San Francisco Art Institute* based on student-related attributes of workers in those cases, and directing election among different student library clerks); *see N.Y. Univ.*, 332 NLRB 1205, 1217 n.39 (2000) (confirming that the Board denied collective-bargaining rights to the workers in *San Francisco Art Institute* because they were "primarily students"); *cf. Nw. Univ.*, 362 NLRB 1350, 1352-53 & nn.11-

12 (2015) (classifying *Saga Food Service* and *San Francisco Art Institute* as fundamentally involving the employee status of the student workers at issue).

Furthermore, the cases cited by the University would no longer be tenable even if they had not been expressly overruled. *Saga Food Service* mainly involved a community-of-interest inquiry regarding the inclusion of student cafeteria workers in a combined unit with permanent, non-student employees. 212 NLRB at 786-87. The Board addressed a proposed alternative unit solely comprising student workers in a two-sentence footnote, cursorily stating that a separate unit would not effectuate the policies of the Act in view of the students' employment tenure "and our conclusion that their primary concern is their studies." *Id.* at 787 n.9. The Board has now rejected that primary-status approach and held that common-law employees are not denied rights merely because they are students.

Similarly, *San Francisco Art Institute* rejected a separate unit of student janitors on the grounds that "students are concerned primarily with their studies rather than with their part-time employment." 226 NLRB at 1252. The additional rationale in *San Francisco Art Institute*, that the students had a short tenure and the composition of the unit might change by the time of certification, *id.*, is plainly inconsistent with decades of Board precedent in other contexts involving short-term or intermittent employees. *See supra* pp. 26-28. For that reason, it was also specifically rejected by the Board in *Columbia University*. 364 NLRB No. 90, slip

op. at 12 & n.92, 2016 WL 4437684, at *14 & n.92. Indeed, the Board in *San Francisco Art Institute* responded to two dissenting Board members by further clarifying that it was only rejecting a separate unit of the student janitors because they “were students working *for* the educational institution they attended,” which brought “into sharp and special focus” their primary status as students. 226 NLRB at 1252 (emphasis added).¹⁰

The only other cases cited by the University (Br. 17) are simply inapposite, because they involved fact-specific determinations of whether certain short-term student workers should be excluded from larger units of permanent employees due to the lack of a sufficient community of interest. *See Evergreen Legal Servs.*, 246 NLRB 964, 967 (1979) (excluding two law student work-study participants from unit of approximately 200 employees due to lack of commonality in wages, benefits, pay structure, hours of work, or tenure of employment); *Shady Oaks*, 229 NLRB 54, 55 (1977) (excluding eleven high school students from unit of

¹⁰ The dissenting Board members had noted that short-term employees, including other student workers, were not categorically denied collective-bargaining rights under established law. *S.F. Art Inst.*, 226 NLRB at 1253 (Members Fanning and Jenkins, dissenting); *see, e.g., Hearst Corp., San Antonio Light Div.*, 221 NLRB 324, 324-25 & n.1 (1975) (including student clerks who worked less than twenty hours per week in unit with non-student employees, despite employer’s claim that their average tenure was less than nine months); *Six Flags over Ga., Inc.*, 215 NLRB 809, 809-10 (1974) (directing election among unit of college students employed as stagehands for several weeks at peak season, despite “heavy turnover” between seasons).

approximately forty-eight full-time and regular part-time employees due to their “substantially different wages and benefits,” divergent hours of work, and lack of continued employment expectations); *cf. B.J. Carney Co.*, 157 NLRB 1285, 1286-87 (1966) (resolving unit-clarification petition regarding whether students hired during summer vacation periods were encompassed by existing certification and parties’ collective-bargaining agreement).

In sum, the Board has unambiguously rejected the proposition that short-term or intermittent employees “cannot exercise the rights vested in employees by Section 9 of the Act,” *Kan. City Repertory Theatre*, 356 NLRB at 147, and clarified that there is no special exception for student employees, *Columbia Univ.*, 364 NLRB No. 90, slip op. at 21, 2016 WL 4437684, at *25. Pursuant to *Columbia University*, the student library workers here are not “temporary employees” within the meaning of Board law, and they are not precluded from forming an appropriate unit for collective bargaining. *See* 2016 WL 4437684, at *2, *25. The University has not cited any valid precedent to the contrary or called into question the decades of precedent summarized above, much less the Board’s directly apposite analysis in *Columbia University*. *Cf. NLRB v. Austin Developmental Ctr., Inc.*, 606 F.2d 785, 790-91 (7th Cir. 1979) (discussing “zone

of reasonableness” afforded to the Board even when it treats similar cases differently).¹¹

D. The Board Did Not Abuse Its Discretion by Refusing To Permit the University To Introduce Evidence Proffered at the Pre-Election Hearing

In light of the governing Board precedent discussed above, the University’s argument that the Regional Director, as affirmed by the Board, misapplied the Board’s rules by refusing to permit the University to introduce certain evidence at the pre-election hearing is plainly without merit. As noted previously, the sole purpose of the pre-election hearing is to determine whether an election is warranted, including whether the petitioned-for unit is “appropriate” for the purpose of collective bargaining. 29 C.F.R. § 102.64(a). The Board reasonably found that the University’s offer of proof was insufficient to show either that the student library workers at issue are not statutory employees or that they should be deemed ineligible to form an appropriate unit as “temporary or casual employees.” (S.A. 76 n.1.) The University has not met its burden to show that the Board abused

¹¹ Insofar as the Board rejected the argument that the employees here are ineligible “temporary employees” within the meaning of Board law, the University’s additional claim (Br. 6-7, 16, 19-20) that all of the student library workers were excluded from the formal unit description is without merit. Even assuming that some ambiguity in the unit description remained, it is plain that neither the petitioning Union nor the Board intended to exclude every single employee at issue. *Cf. NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 532-33 (7th Cir. 1986) (holding technical error in certified unit description insufficient to invalidate results of election or nullify obligation to bargain).

its discretion by reaching such conclusion and affirming the exclusion of the proffered evidence, both because the Board did not err in applying extant Board precedent, and because the University was not prejudiced.

Indeed, the University's argument that it should have been permitted to present the proffered evidence was based entirely on its misconstruction of Board law, as detailed above. The University did not argue to the Board that any specific employee should have been excluded from the unit, or that some subset of the employees lacked a community of interest with the unit as a whole. Nor did the University ever specifically explain why, in its view, the student library workers could not engage in meaningful bargaining. Rather, the University's argument rises or falls on its legal assertions that the entire unit is inappropriate due to the students' inherently finite tenure, and that student workers alleged to be "temporary or casual" employees . . . cannot form a separate unit *as a matter of law*." (Br. 17 (emphasis added).)

As described above, however, the Board specifically rejected those assertions in *Columbia University*. 364 NLRB No. 90, slip op. at 21, 2016 WL 4437684, at *2, *25. The Board explained that a unit of similarly situated short-term student employees can engage in meaningful collective bargaining despite the finite duration of any particular student's employment—particularly where, as here, the university employer "will continuously employ groups of [student

employees] across semesters,” such that “although the precise composition of these groups will differ from semester to semester, there will typically be some individual [student employees] who are carried over from one semester to another.” *Columbia Univ.*, 364 NLRB No. 90, slip op. at 21 & n.135, 2016 WL 4437684, at *25 & n.135.

Before the Board, the University made no attempt to factually distinguish the student library workers here from the research and teaching assistants, including undergraduates, at issue in *Columbia University*. To the contrary, as noted, the University’s offer of proof to the Board was explicitly conditioned on its legal argument that *Columbia University* “was wrongly decided and should be overturned,” including the portions of *Columbia University* that “wrongly overruled” *San Francisco Art Institute*. (S.A. 52.) Accordingly, because the University has failed to call into question governing Board precedent, the University has necessarily failed to establish that the Board erred by rejecting the proffered evidence. *See NLRB v. Speedway Petroleum, Div. of Emro Mktg. Co.*, 768 F.2d 151, 159 (7th Cir. 1985).

Furthermore, even if the University’s offer of proof had not been premised on a disagreement with existing Board law, the factual allegations contained therein were insufficient to affect the Board’s analysis and the University was not prejudiced by the exclusion of the evidence. The University’s own offer of proof

alleges facts demonstrating that a unit of the student library workers is appropriate and conducive to collective bargaining under Board law. It is undisputed that the University regularly employs student library workers each academic quarter. The offer of proof conceded that a portion of the student library workers remain in their positions for more than one year, and that at least one prospective voter had been in his position for eight years. (S.A. 57.) Far from being “negligible” or “ad hoc,” *Columbia Univ.*, 364 NLRB No. 90, slip op. at 21, 2016 WL 4437684, at *25, the offer of proof alleged that the average tenure of the student library workers at the time of the pre-election hearing was nine months. (S.A. 57.) Moreover, the University made no claim that those students who *want* to continue in their positions from quarter-to-quarter are unable to do so or face obstacles in securing multi-year employment while enrolled as students. According to the offer of proof, student library workers may even remain in their positions for several months after graduating. (S.A. 56-57.)¹² In any other context, there would be little

¹² The University’s offer of proof to the Board based its claim that the student workers are “temporary and/or casual employees” on the specific allegations that student employment is “inherently temporary” and that most students in the bargaining unit had been employed for less than one year at the time of the pre-election hearing. (S.A. 57.) To the extent the University is now invoking other factual allegations as a basis for its “temporary” or “casual” argument (Br. 21), the Court should disregard those belated justifications. In any event, the University provides no argumentation and cites no precedent in support of the illogical notion that a common-law employee’s scheduling flexibility or lenient treatment would transform that employee into an ineligible “temporary” or “casual” employee, or would preclude meaningful bargaining. *Cf.*, *e.g.*, cases cited *supra* note 7.

dispute that a separate unit of such employees could be found appropriate—indeed, the Board regularly certifies units of employees with less stable and shorter-term employment relationships. *See supra* pp. 27-28; *e.g.*, *Hondo Drilling Co.*, 164 NLRB 416, 416-18 (1967) (directing election among oil-rig roughnecks where employer maintained continuous operations but average length of a given job was eighteen days and worker turnover was high, and setting eligibility formula to include currently employed workers and those with ten working days in preceding ninety days), *affirmed*, 428 F.2d 943 (5th Cir. 1970).

As a result, the University has not demonstrated the necessary prejudice to establish an abuse of discretion or to justify its request for a remand. *Roundy's*, 674 F.3d at 648-49; *NLRB v. Midwestern Personnel Servs., Inc.*, 508 F.3d 418, 427 (7th Cir. 2007). Permitting the University to introduce the proffered evidence at a new hearing would serve “no purpose.” *Speedway Petroleum*, 768 F.2d at 159. The Board has already considered the factual allegations contained in the University’s offer of proof, and the written arguments in the University’s request for review, and the Board has determined that such evidence would not affect its analysis regarding the appropriateness of the unit. *Cf. Alimi v. Ashcroft*, 391 F.3d 888, 890-91 (7th Cir. 2004) (finding lack of prejudice where judge “invited offers of proof and credited the proffers” in concluding that immigrant’s claims were insufficient to establish risk of persecution).

The University's duplicative claim that its due-process rights were violated (Br. 23-26) fails for the same reasons noted above, including the lack of prejudice. *Midwestern Personnel*, 508 F.3d at 427; *see Alimi*, 391 F.3d at 890 (describing duplicative due-process argument as "gratuitous"). The University does not challenge the validity of the Board's rules (Br. 16 n.7), and those rules require the exclusion of evidence that the Board determines, based on an offer of proof, would be insufficient to affect the Board's analysis regarding the existence of a question of representation warranting a secret-ballot election. 29 C.F.R. § 102.66(c); *see also* 29 C.F.R. § 102.66(a).¹³ Contrary to the University (Br. 24-25), this Court has recognized that an offer of proof "ensures that the record will be sufficiently detailed to permit appraisal by an appellate court of the scope and effect of the ruling, so that it can determine whether [there was] reversible error in excluding the evidence." *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 648 (7th Cir. 1982). Based on the contents of the offer of proof and Board law regarding the rights of student workers, the Board properly refused to permit the University to introduce evidence regarding its misguided assertion that the student library workers cannot form an appropriate unit as "temporary and/or casual" employees.

¹³ The General Counsel guidance memorandum cited by the University (Br. 3, 15) merely restates the Board's rules in pertinent part. In any event, the General Counsel's guidance documents are purely advisory and are not binding on the Board or the parties. *E.g.*, *Starlite Cutting*, 280 NLRB 1071, 1071 n.3 (1986).

CONCLUSION

For the foregoing reasons, the Board's certification of the Union was proper, and the University has admittedly violated Section 8(a)(5) and (1) the Act by refusing to recognize or bargain with the Union. The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
June 2019

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

UNIVERSITY OF CHICAGO)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	Nos. 18-3659 &
Respondent/Cross-Petitioner)	19-1146
)	
and)	
)	
LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS)	Board No.
Intervenor)	13-CA-217957
)	

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, D.C.
this 5th day of June, 2019