

Bradley J. Bannon  
Burton Craige  
Narendra K. Ghosh  
Jonathan R. Harkavy  
Michael G. Okun  
Henry N. Patterson, Jr.  
Paul E. Smith

*Of Counsel:*  
Nahomi Harkavy

Patterson | Harkavy  
LLP

NARENDRA K. GHOSH

nghosh@pathlaw.com

ATTORNEYS AT LAW

Raleigh • Chapel Hill • Greensboro

December 21, 2016

**Via E-Filing**

Claude T. Harrell, Jr.  
Regional Director, Region 10  
National Labor Relations Board  
233 Peachtree Street N.E.  
Suite 1000  
Atlanta, GA 30303-1531

**Re: Duke University, Case No. 10-RC-187957  
Petitioner's Supplemental Brief on Election Mechanics**

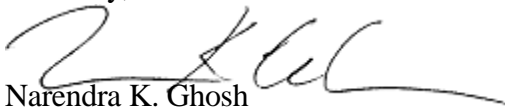
Dear Regional Director Harrell:

Please find enclosed Petitioner's Supplemental Brief on Election Mechanics.

On December 7, 2016, the last day of the hearing, the parties engaged in further oral argument concerning election mechanics. Based on the comments of the Hearing Officer that day, (Tr. p. 1205), we understood that the Region would consider supplemental briefing on election mechanics at the same time as the post-hearing brief. We have submitted the enclosed brief accordingly.

However, if we misunderstood, and the Region does not wish to consider further briefing on election mechanics, please disregard the enclosed brief.

Sincerely,

  
Narendra K. Ghosh

cc: Peter D. Conrad (via email)  
Paul Salvatore (via email)  
Steven Porzio (via email)  
Zachary D. Fasman (via email)

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

In the matter of:	)	
	)	
	)	
DUKE UNIVERSITY,	)	
Employer,	)	
	)	Case No. 10-RC-187957
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION CLC/CTW,	)	
Petitioner.	)	
	)	

**PETITIONER’S SUPPLEMENTAL BRIEF**  
**ON ELECTION MECHANICS**

Petitioner requests that the petitioned-for election be held by mail. Given Duke’s inability to produce information regarding employees’ work schedules and locations, and given employees’ scattered workplaces and schedules, a mail ballot election is not only preferable, but required. The Union is willing to provide the Region printed mailing labels for each voter.

**I. A Mail Ballot Is The Only Appropriate Voting Mechanism.**

Regional Directors have “discretion in determining the arrangements for an election, including the location of the election and whether it should be conducted by manual balloting or mail ballot.” *San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998). Mail balloting must be considered in any “circumstance[] that would tend to make it difficult for eligible employees to vote in a manual election,” and where voting by mail “would enhance the opportunities for all to vote.” *Id.* A mail ballot may be directed even when manual balloting “might be possible, but would be impracticable, or not easily done.” *Id.* at 1145 n.6 (emphasis added).

The Casehandling Manual instructs Regional Directors to consider first whether employees “work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules.” *Id.* at Sec. 11301.2. If any of these situations exist, Regional Directors then consider (1) “the desire of all the parties;” (2) “the likely ability of voters to read and understand mail ballots and the availability of addresses for employees;” and (3) the “efficient use of the Agency’s financial resources.” *Id.*; see also *Gps Terminal Servs., Inc.*, 326 NLRB 839 (1998).

Under governing legal standards in place for nearly 20 years, a mail ballot election is plainly required.

**A. The Petitioned-For Workers Are Scattered Geographically.**

Duke’s graduate student workers are geographically dispersed. Even if all work occurred in Duke’s designated buildings, workers would be spread across approximately 90 work sites on six different campuses, including one campus located 180 miles from the rest. But these “official” workspaces are often not where work is performed. Students based in North Carolina are encouraged to live up to 20 miles from campus. Most categories of workers can spend a large portion of working time off campus. Services performed by teaching assistants or non-laboratory research assistants can often be performed remotely. Even laboratory-based research assistants can at times conduct their work away from campus.

Moreover, PhD students work at locations away from Duke’s campuses. They can work outside North Carolina or outside the country. Even students who generally work near a campus can be required take extended trips for academic conferences, research, or courses that take place in the field. Laboratory-based research assistants may be temporarily assigned to laboratories at

institutions other than Duke. If such students are away from campus on the dates of a manual election, they will lack even the opportunity to vote.

The scope of dispersion only increases if eligibility is appropriately extended to individuals not currently working but expected to work in the future. A student's temporary lack of service obligations makes it possible for them to conduct long-term research in the field or at other universities. For example, students in the Romance Studies department are entitled to receive funding one year without providing any teaching service; many use that year doing research, "often abroad," for the student's dissertation. (Er. Ex. 38, p. 2.) Such students are unable to vote in a manual election, even though they have a clear expectation of future employment. Even if such students remain in North Carolina, they might rarely come to campus as they are focusing on their research and dissertation.

Duke's workers are highly geographically dispersed. If a manual ballot is held, many workers will lack any opportunity to cast a vote; the voting mechanism will, by design, disenfranchise the entire class of workers.

#### **B. The Petitioned-For Workers Have Scattered Work Schedules.**

Duke's graduate student workers are also scattered by their work schedules. The existence of staggered work schedules is, by itself, a sufficient basis to direct a mail ballot election. *See Allied Waste Servs. of N. Am., LLC*, 20-RC-133841, 2014 WL 4734601, \*1 n.1 (NLRB 2014) ("[The Regional Director's] primary consideration was the scattered status of the voting employees due to their staggered work schedules. This was entirely appropriate; *all other pertinent considerations are secondary.*") (emphasis added). The Board has repeatedly stated that mail balloting is appropriate where a large proportion of employees would be forced to "adjust their work schedules or their off-hour commitments to travel" to the polls. *Nouveau*

*Elevator Indust.*, 326 NLRB 470, 471 (1998); *see also GPS Terminal Servs.*, *supra* (affirming a mail ballot election where a manual election would require “significant alterations of work schedules of a substantial proportion of employees”).

It is undisputed that all eligible voters are not on campus on any given day of the week. Duke, the proponent of manual ballot, has not produced the schedule for a single petitioned-for voter. Its Statement of Position instead lists “varies” for the schedule of every single voter. This description is plainly appropriate. Instructional workers and humanities research assistants may rarely come to campus, instead working remotely on their own schedule. Instructional workers are not required to have office hours at a common period or location. Professors may not even require teaching assistants to attend classes of courses for which they teach or assist.

Even if it is assumed, contrary to the evidence, that all instructional graduate assistants are required to be on campus during the times of assigned courses, Duke’s schedule of courses demonstrates that the dates, times, length and frequency of classes defy any commonality. Duke offers classes from 8 a.m. to 9:30 p.m., from 60 minutes in length to several hours, for one or more days a week. Laboratory-based graduate students also have variable schedules, as they can have great leeway to determine their own hours so long as their work gets done. As Dr. Nicchitta stated: “Research does not fit a 5-day, 9 to 5 [schedule].” (Tr. p. 600.)

Students work schedules are widely staggered. Duke has failed to show that a single student will be required to work at any given location on any given day. A mail ballot is the only means of holding an election without purposefully disenfranchising any group of employees.

**C. A Manual Ballot Requires an Inefficient Use of Limited Board Resources.**

Regional Directors are also to consider “the efficient use of Board resources” in deciding whether to allow a mail ballot. *See* Casehandling Manual Sec. 11301.2; *GPS Terminal Servs.*,

*Inc., supra*. Duke proposes simultaneous voting over two days at five different locations for approximately 14 hours each day – 7 a.m. to 9 p.m.<sup>1</sup>

As discussed in Section III, *infra*, this proposal still provides insufficient voting opportunities. Nevertheless, it represents a tremendous drain on the Region’s resources. Four of the proposed locations are more than 75 miles from the Subregional office. The fifth is more than 250 miles away. The cost to the Region would be far greater than other cases where the Board approved a determination that a manual ballot would be an inefficient use of resources. For example, in *Masiongale Elec.-Mech., Inc.*, 326 NLRB 493 (1998), the Board approved a finding of inefficiency where there were multiple work sites spread across 70 miles and “Board agents would be required to travel a significant number of miles and possibly conduct the election on more than 1 day.” In *United Maint. Co.*, 13-RC-106926, 2013 WL 4855389, (NLRB 2013), the Board approved a Regional Director’s finding of inefficiency where a manual election would require multiple voting sessions at three locations with at least two translators at each location.

Duke’s proposal to use five locations, located up to 250 miles from the Region’s offices, for 28 hours each, amounts to a tremendously inefficient use of resources.

## **II. Duke Mischaracterizes the Applicable Legal Standard.**

Duke grossly misstated the appropriate standard for mail ballot elections when it claimed they are “disfavored” (Statement of Position) or permitted “only where a manual ballot election would be infeasible” (Tr. p. 1100). Such a claim conflicts with actual practice and law. The near-unanimity of the use of mail ballots in SEIU higher education academic elections refutes any contention that mail ballot elections are an infrequent exception.

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<sup>1</sup> Duke communicated a willingness to use five locations in an email subsequent to the hearing.

Duke's argument primarily relied on *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996). That case is simply outdated, as it relied on an outdated version of the Casehandling Manual that limited mail ballots to those occasions where a manual ballot was "infeasible." Since *Shepard*, the relevant provisions of the Casehandling Manual have been revised to dramatically expand the situations where mail ballots are permitted.

*Shepard* also predates the foundational case on mail ballots, *San Diego Gas & Electric*, 325 NLRB 1143 (1998), which announced a new standard to determine when mail ballots are permitted. Chairman Gould noted, in a subsequent partial concurrence/dissent: "The Board in *San Diego Gas and Electric*, 325 NLRB 1143 (1998), abandoned the 'infeasibility' standard set forth in the Casehandling Manual and provided guidelines in keeping with the Board's decision." *Diamond Walnut Growers, Inc.*, 326 NLRB 28, 30 (1998). The Manual now states: "The Board has also recognized ... that there are instances where circumstances ... where a manual election, *though possible*, is impractical or not easily done." CMH-2, Section 11301.2 (emphasis added). The infeasibility of manual ballot is no longer a predicate to directing a mail ballot.

This increased flexibility is illustrated by *Nouveau Elevator Industries, Inc.*, 326 NLRB 470 (1998), the second case offered by Duke in opposition to mail ballot. There, the Board sustained a Regional Director's direction of a manual ballot. Nonetheless, the Board agreed that a mail ballot would have been appropriate, even if a manual ballot was feasible under the circumstances, in part because "employees work at jobsites scattered throughout the New York City metropolitan area, including New Jersey, their hours of work are widely varied, and they spend most of their workday traveling to other sites." *Id.* at 471 (citations omitted).

### **III. Duke's Proposed Manual Ballot is Infeasible.**

Even under Duke's inaccurate legal standard, a mail ballot is required because a manual ballot is "infeasible." Duke knows almost nothing about its employees' schedules and locations, yet insists it can craft a massive, multi-day manual election that will somehow miraculously enfranchise workers in the petitioned-for unit. It has proposed that simultaneous voting be held for two days at five different locations for approximately 14 hours each day. Duke's proposal is inadequate in terms of date, location, and time. It would also result in rampant confusion.

First, Duke's proposal disenfranchises all voters who are not based near one of its campus. As discussed above, some workers in the petitioned-for unit perform their work at locations outside the state or the country. A manual ballot will guarantee that these workers lack even the possibility of voting. A subset of the students based near one of Duke's campuses will also be entirely disenfranchised, as they might be temporarily away from campus for required academic conferences, research trips, or courses that take place in the field. If such students are away from campus on the dates of a manual election, they too will lack even the opportunity to vote. Duke made no claim that the locations it proposes will allow workers based outside of North Carolina to vote. Instead, it simply noted that no election receives 100% participation. (Tr. p. 1141.) Be that as it may, there is no justification or precedent for creating an election mechanism which, by design, disenfranchises a predetermined population of eligible voters.

Second, Duke's proposal is inadequate in terms of the days of voting. Duke cannot specify which two days of the week its election should be held. It was unable to state when a plurality, let alone a strong majority, of its students are on campus. It ignores the fact that some classes are offered only one day a week. Instead, it simply hopes that a fair number of the subset



of its workers who actually come to campus will happen to be present during whichever two days are arbitrarily selected for the election.

Third, Duke's proposal is inadequate in terms of the hours voting will be allowed. By Duke's admission, each worker's schedule "varies." Duke's ignores the fact that many workers can provide many services any time of the day or night. Duke cannot show that its proposed voting times and locations overlap with any worker's actual schedule.

Fourth, the proposed voting locations will necessarily create rampant voter confusion. Several lengthy polling sessions at multiple polling sites on multiple days amounts to a "massive undertaking and a situation ripe for confusion and problems." *Sutter Bay Hosp*, 357 NLRB No. 21 (2011); *see also Reynolds Wheels Int'l, supra*. When multiple voting locations are used, the employer must "provide separate lists for each such polling place." Casehandling Manual Section 11302.2(a). It is impossible to determine where individual student workers should vote. Duke plainly lacks the ability to create such lists because it has been unable to produce comprehensive information regarding employee work locations. Moreover, even those students who actually work on campus may spend much of their time in locations very different from where they are technically assigned to work. Humanities research assistants might do their research in libraries. Teaching assistants might meet with students in undergraduate facilities. Workers might be on campus because they are taking their own courses in different buildings, because they are meeting with their cohort, or because they are participating in activities unrelated to their studies or employment. Even if Duke were capable of making voter lists that assigned voting locations based on "worksites," many students undoubtedly will seek to vote at the wrong location if it more convenient at the date and time of the election.

Harvard's recent election debacle provides a cautionary example about the use of multiple manual voting locations. Unlike Duke, Harvard is divided physically and operationally into three discrete, compact campuses. Nevertheless, the manual election at Harvard appears disastrous, through no fault of the Region. Voting ended November 17, but the vote count is not to begin until December 22. *Historic Unionization Vote Count to Begin Dec. 22*, The Harvard Crimson, December 16, 2016, <http://www.thecrimson.com/article/2016/12/16/harvard-unionization-vote-set/>. One of the cited reasons for the confusion is students' practice of voting at locations other than the one assigned. Had a mail ballot election been directed at Harvard, the parties would have eliminated all such controversies.

By contrast, a mail ballot election will not disenfranchise a single voter, while ensuring that Harvard's mass confusion does not repeat itself. E-mail notice will educate and inform voters about the mail ballot and how to request a ballot if they do not receive one. Outreach by SEIU and Duke after the Regional Director's decision will only elevate the voters' level of awareness. All individuals scheduled to be away from campus, including overseas, will be able to request that a ballot be sent to a preferred address. Duke's claim that a mail ballot will somehow disenfranchise ballots is brazen doublespeak. A manual ballot will guarantee that entire classes of workers are disenfranchised; a mail ballot will provide all students the opportunity to vote.

#### **IV. Duke Has Sufficient Information on Workers' Mailing Addresses to Permit a Mail Ballot Election.**

Duke insists it is ignorant of worker mailing addresses. It offered affidavits from two administrators to impeach the validity of its database of worker contact information. These affidavits failed to support Duke's contentions and do not justify a manual ballot.

Duke plainly has access to students' mailing addresses. It requires all PhD students to update their address information every academic year. For international students, federal law requires that Duke have an updated mailing address "within 10 days of any move." (See [https://visaservices.duke.edu/category/address\\_change\\_instructions.php](https://visaservices.duke.edu/category/address_change_instructions.php).) Duke provides an online form for international students to update their addresses. (See [https://visaservices.duke.edu/forms\\_and\\_documents/AddressUpdateForm/index.php](https://visaservices.duke.edu/forms_and_documents/AddressUpdateForm/index.php)). Duke also provides its employees with W-2 tax forms that list current mailing addresses, even when the form itself is electronically.

The affidavits provided by Duke do not demonstrate any actual confusion regarding students' mailing addresses. Regina Nowicki de Guerra attested that Duke Graduate School's information databases contained a total of 3,300 addresses for the nearly 1,500 students deemed by Duke to be eligible to vote, for an average of about two addresses per voter. Duke claimed that a mail ballot was impossible because some students have as many as six addresses on file.

The number of addresses on file is the direct result of how Duke solicits and manages its database. At least once a year, Duke asks students to provide an address. Duke retains the address unless the student specifically asks to delete the former address. (Tr. p. 1112). It is unsurprising that graduate students might provide multiple addresses during their several years working for Duke. That fact does not mean that Duke cannot simply send mail to the mailing address most recently provided by the student.

Ms. de Guerra also claimed that Duke cannot determine which address is "preferred." This is in direct contradiction to multiple affidavits that affirmed students are required to designate their mailing address every year. Ms. de Guerra did not deny that Duke solicits students' updated mailing address.

The second affidavit, provided by Duke marketing strategist John Zhu, is similarly unpersuasive. His affidavit establishes, at most, that Duke primarily communicates with students about institutional matters via electronic mail. This claim is consistent with how Duke communicated with graduate student workers and adjuncts about the NLRB process. Duke's electronic communications have little bearing on whether a mail ballot can or should occur.

Duke knows where its workers live. But even if there were some confusion as to certain students' addresses, any mismanagement of voter contact information by Duke is not a compelling reason to require a manual election that will disenfranchise significant swaths of voters. The Region can ameliorate questions about validity of student addresses through several standard means: (1) mailing the election notice to all voters prior to mailing the ballot kit, which necessarily tests the validity of addresses and enables students to provide more appropriate addresses; (2) inviting voters to contact the Region with a new or different address at the earliest possibility, instead of advising voters to wait one week before requesting a ballot; (3) extending the voting period, if necessary, beyond the standard two weeks, to expand opportunity for students to request duplicate ballots or ballots sent to a more accurate address; (4) allowing the Union to provide its own list of voter addresses; and/or (5) mailing a ballot to all addresses on file and counting the first ballot received from the voter.

A mail ballot is the only method by which all employees will have the opportunity to vote. Duke plainly has employee mailing addresses on file. Every student will also be informed about the election through Duke's primary means of communication – electronic mail. If a student has moved without notifying Duke, the student will still be able to vote by contacting the Region with an up-to-date address.

**V. Mechanics of a Mail Ballot Election.**

Optimally, a mail ballot election here should involve ballots sent as soon as possible following the decision and direction of an election, with two weeks to return ballots, and votes counted the day after the voting period. The election need not conform to the academic calendar. To the degree that the Regional Director is concerned about voter enfranchisement and address accuracy, the Region may extend a voting period to a third week.

In no circumstances is a manual election appropriate.

Respectfully submitted, this the 21st day of December, 2016.

SERVICE EMPLOYEES INTERNATIONAL  
UNION CLC/CTW

By its attorneys,

/s/ Narendra K. Ghosh

Narendra K. Ghosh

Michael G. Okun

Paul E. Smith

PATTERSON HARKAVY LLP

100 Europa Dr., Suite 420

Chapel Hill, NC 27517

919.942.5200

/s/ Patrick N. Bryant

Patrick N. Bryant

PYLE ROME EHRENBERG PC

18 Tremont Street, Suite 500

Boston, MA 02108

(617) 367-7200

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was filed electronically via the National Labor Relations Board's e-filing service, and was served via e-mail to the following:

Peter Conrad  
[PConrad@proskauer.com](mailto:PConrad@proskauer.com)

Zachary D. Fasman  
[ZFasman@proskauer.com](mailto:ZFasman@proskauer.com)

Steven Porzio  
[sporzio@proskauer.com](mailto:sporzio@proskauer.com)

Paul Salvatore  
[PSalvatore@proskauer.com](mailto:PSalvatore@proskauer.com)

Dated: December 21, 2016.

/s/ Narendra K. Ghosh  
Narendra K. Ghosh  
[nghosh@pathlaw.com](mailto:nghosh@pathlaw.com)  
PATTERSON HARKAVY LLP  
100 Europa Dr., Suite 420  
Chapel Hill, NC 27517  
919.942.5200