JD–22–12
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KINNEY SYSTEM, INC.
d/b/a CENTRAL PARKING
SYSTEM OF MASSACHUSETTS,
Employer

and Case 01-RC-071163

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25,
Petitioner

Joseph F. Griffin, Esq.,
for the Regional Director.
Phillip J. Moss, Esq. (Fisher & Phillips LLP) of Portland, Maine, and James W. Walters, Esq. (Fischer & Phillips LLP) of Atlanta, Georgia, for the Employer.
Jonathan M. Conti, Esq. (Feinberg, Campbell & Zack, PC) of Boston, Massachusetts,
for the Petitioner.

REPORT ON CHALLENGED BALLOTS

PAUL BOGAS, Administrative Law Judge. The hearing in this case was held on March 19-20, 2012, in Boston, Massachusetts. The International Brotherhood of Teamsters, Local 25, (the Union or the Petitioner) filed a representation petition on December 21, 2011, in which it sought to represent certain employees of Kinney System, Inc., d/b/a Center Parking System of Massachusetts (the Employer or the Company). On January 13, 2012, the Regional Director for Region 1 of the National Labor Relations Board (the Board) issued a Decision and Direction of Election. The Regional Director found, based on a pre-election hearing, including the stipulations of the parties reached at the hearing, that the following employees constituted a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time attendants, cashiers, valets, floor attendants, lead attendants, dispatchers, shuttle drivers, and maintenance workers employed by the Employer at various locations in the Boston, Massachusetts area, as listed in Attachment A,[1] but excluding supervisors, project managers, auditors, all other employees, and guards and supervisors as defined in the Act.

The Regional Director also stated that the Union and the Employer had stipulated that an additional classification of employees – accounting specialists – would be permitted to vote under challenge.

On February 8, 2012, an election was conducted pursuant to the Decision and Direction. The tally of ballots showed the following:

Approximate number of eligible voters	361
Void ballots	1
Votes cast for the Petitioner	159
Votes cast against participating labor organization	138
Valid votes counted	297
Challenged ballots	37
Valid votes counted plus challenged ballots	334

The challenged ballots are sufficient in number to affect the results of the election.

The Regional Director issued a Direction of Hearing on Challenged Ballots on March 8, 2012, and a corrected version on March 12, 2012. Two of the challenged ballots, those of Yahke Issack and Soukayna Tandofte, were submitted by employees whose terminations are the subject of unfair labor practice charges. The Direction of Hearing on Challenged Ballots provides that the challenges to Issack's and Tandofte's ballots would not be determined in this hearing and that "If the Region determines there that there is reasonable cause to believe that the[] terminations violated the Act," the challenges to their ballots "will be resolved, if necessary, in an unfair labor practice proceeding."

I. Background Facts[2]

The Employer is a national corporation that operates parking lots and parking garages. The Union seeks to represent a bargaining unit of certain employees working at 44 of the Employer's locations in Boston, Massachusetts, and the surrounding area.

When the Union filed the initial petition on about December 21, 2011, it proposed a unit consisting of all full-time and part-time cashiers, valets, dispatchers, custodians, attendants, shuttle drivers, supervisors, and maintenance workers. Robert Aiguier, Jr., the organizer who

[1] Attachment A to the Regional Director's Decision and Direction of Election lists 44 locations of the Employer in Boston, Cambridge, Mattapan, Newton, and Quincy, Massachusetts.

[2] The Employer's unopposed motion to correct the transcript, dated April 6, 2012, is granted and received in evidence as Employer's Exhibit Number (E. Exh.) 32.

filed the petition, included the "supervisor" classification in the original petition because a number of employees had submitted union cards in which they identified their job classification as "supervisor" and because Aiguier believed, based on his conversations with employees and understanding of the company hierarchy, that the supervisors were not statutory supervisors under Section 2(11) who would be barred from participation in the unit.

On January 6 and 10, 2012, a pre-election hearing was held in Boston Massachusetts. The Employer was represented by Philip Moss, an attorney who also represented the Employer in the post-election hearing before me. The Union was represented by Steve Sullivan, the Union's director of organizing and government affairs – a non-attorney. Aiguier also made an appearance at the pre-election hearing, but did not actively participate. During the pre-election hearing the Employer took the position that approximately 55 supervisors should be excluded from the unit because they were supervisors for purposes of Section 2(11) of the Act. The Union amended its petition to remove the supervisor classification from the petitioned-for bargaining unit and the Hearing Officer informed the parties that "the amended petition does not include the job classification of supervisor." Nevertheless, the employer's representative sought to present evidence regarding the Section 2(11) supervisory status of approximately 55 individuals. The Union resisted the presentation of such evidence, stating that since the Union was no longer petitioning to represent the employees who the Employer classified as supervisors, there was no need to litigate the question of whether the supervisors had Section 2(11) status that barred them from participation in the unit. The Union's representative declined to stipulate that any of the persons who held the supervisor classification at the Employer had Section 2(11) status, and indicated that the Union might seek to represent those individuals in a future petition. The Hearing Officer precluded the Employer from presenting evidence on the issue of Section 2(11) status, explaining that "As the petition was amended to . . . exclude the job classification of supervisors, the issue of whether their inclusion is appropriate became a non-litigable issue for this hearing."

The Hearing Officer orally proposed that the parties stipulate that the appropriate bargaining unit be defined as: "[A]ll full and part-time attendants, valets, floor attendants, lead attendants, cashiers, dispatchers, shuttle drivers, maintenance workers employed by the Employer at the [agreed upon locations], and excluding supervisors, project managers, and auditors." The employer's representative responded that the Employer would stipulate: "[w]ith a slight modification. 'Excluding supervisors as defined in the Act'; I would add that phrase." The Hearing Officer then asked if the parties would stipulate that the appropriate bargaining unit be defined as "all full and part-time attendants, valets, floor attendants, lead attendants, cashiers, dispatchers, shuttle drivers, maintenance workers employed by the Employer at the [agreed upon locations], and excluding project managers, and auditors, and guards and supervisors as defined in the Act." The Representatives for the Employer and the Union stated that they agreed to the stipulation.

Close to the end of the hearing, the Employer's representative again indicated that he wished to present evidence to show the Section 2(11) duties and responsibilities of supervisors. "The Employer's position," attorney Moss explained, "is that the supervisors numbering approximately 55 are appropriately excluded but that it is a mistake not to either stipulate to their authority or to take evidence regarding their authority because such a large group of employees should not be left in the dark as to their status." He then made an offer of proof that the

Employer, if permitted, would introduce evidence showing that approximately 55 individuals had the types of supervisory duties and authority set forth in Section 2(11) of the Act, received starting pay that was approximately $2.50 an hour higher than those they supervise, and at certain locations were the highest or only representatives of management. The Union responded that it was not necessary to hear evidence regarding the duties and responsibilities of supervisors because "[t]here will most likely be another [representation petition] later with the supervisors."

The record of the pre-election hearing contains no suggestion by the Employer that it had employees who were classified in its records as "supervisors," but who the Employer contended could cast valid ballots. The Employer did not produce, or seek to produce, any evidence that such employees existed. Nor did the Employer state any objection to the deletion of employees in the supervisor classification from the unit that the Union was petitioning to represent.[3]

At the pre-election hearing, the parties stipulated that a group of employees classified as accounting specialists would vote subject to challenge. The question of whether those individuals would participate in the bargaining unit was to be resolved after the election.

On January 13, 2012, after the pre-election hearing, the Regional Director issued a Decision and Direction of Election in which she expressly excluded both "supervisors" and "supervisors as defined in the Act" from the unit definition. The Decision stated that "based on the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining":

> All full-time and regular part-time attendants, cashiers, valets, floor attendants, lead attendants, dispatchers, shuttle drivers, and maintenance workers employed by the Employer at [the agreed upon locations], but excluding supervisors, project managers, auditors, all other employees, and guards and supervisors as defined in the Act.

In the Decision and Direction of Election of Election, the Regional Director also explained:

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[3] Attorney Moss testified that during off-the-record discussions with the Union, the Employer "made clear . . . the distinction between people who were coded as supervisors at the automated locations who we did not want to be disenfranchised and the approximately 55 supervisors who genuinely had and exercised the kinds of authority set forth in Section 2(11) of the Act." Based on the demeanor of the witness and the record as a whole this testimony struck me as self-serving and I am hesitant to credit it. Sullivan and Aiguier both gave contrary testimony that their understanding was that none of the employees who were classified as supervisors at the Employer would be part of this representation election. At any rate, whatever the Employer's attorney may have said off-the-record to a union representative, the transcript of the pre-election hearing makes perfectly clear that the Union was not petitioning to represent *any* of the persons classified as supervisors, regardless of their status under Section 2(11). Yet the Employer did not make any on-the-record contention that certain employees holding the classification of supervisor, but who were not Section 2(11) supervisors, should be added to the unit. When, after the pre-election hearing, the Regional Director issued the Determination and Direction of Election which excluded not only "supervisors as defined in the Act," but also the entire supervisor classification, the Employer did not request review or otherwise seek reconsideration of the decision.

At the hearing, the Employer took the position that approximately 55 individuals in a job classification entitled "supervisor" should be excluded from the unit as statutory supervisors and made an offer of proof concerning their supervisor status. The Petitioner did not stipulate to the status of these individuals as Section 2(11) supervisors but agreed, in any event, to exclude this classification from the bargaining unit.

The Regional Director's Decision and Direction of Election also noted that the accounting specialists would be permitted to vote under challenge.

II. The Union Campaign

The Decision and Notice of Election was issued on January 13, 2012. Between that time, and when the election took place on February 8, 2012, the Union campaigned among employees who it believed were encompassed by the unit description in the Regional Director's Decision. The Union did not campaign for the votes of any of the individuals who the Employer classified as supervisors. Sullivan told the Union's organizers that the supervisors were not part of the plan for the upcoming election and that the organizers were "to leave them alone." One of those organizers, Aiguier, informed approximately 20 individuals who were classified as supervisors that they would not be part of the February election. Aiguier identified Getachan Bedada, Francisco Palencia, and Ben Adam Ragmari, as three of the supervisors to whom he made such statements. Those three individuals cast ballots that are being challenged in this proceeding. John Saunders, an individual who was classified in the Employer's records as a supervisor, but who the Employer now claims was eligible to vote, testified that during the period leading up to the election he never heard anything or saw anything from the Union.

The Employer provided the Union with the Excelsior List on approximately January 20, 2012. F. Michael Mooney, the employer's regional human resources manager, prepared the list. He testified that there were difficulties in gathering the information and that he inadvertently failed to include the names of some individuals. The Union agrees that the Excelsior list prepared by the Employer is not completely accurate, and that some eligible voters were not included, but the two sides disagree in most instances about what the inaccuracies are.

III. Parties' Agreements to Resolve Ten Challenges

At the hearing before me, the Union and the Employer entered into oral agreements to resolve ten of the ballot challenges, and the representative of the Regional Director did not object. Specifically, the parties agreed that the challenged ballots of Andonet Bekele, Duc Duong, and Mohamed Farah were valid and would be opened and counted. The parties also agreed that the ballots of Bechie Assefa, Getachan Bedada, Aboubacar Diakite, Abdi Jama Gurey, Christian Mutshipay, Abelhak Souabny and Julio Villata would not be counted. I accept those voluntary resolutions of the parties.

IV. Accounting Specialists and Auditor: Sosina Abebe, Meryama Alioui, Ling Nerie, Eleni Shaba, Zheng Wang, and Mekdes Worku

The Board challenged the ballots of six employees pursuant to the parties' pre-election stipulation that employees in the accounting specialist classification would vote subject to challenge. Those six employees are Sosina Abebe, Meryama Alioui, Ling Nerie,[4] Eleni Shaba, Zheng Wang, and Mekdes Worku. The Board also challenged Worku's ballot on the basis that she was not included on the Excelsior list. Accounting specialists work at approximately 4 of the 44 locations involved in the instant petition. The Employer contends that challenges to the ballots of the accounting specialists should be overruled because those employees share a substantial community of interest with employees in the petitioned-for positions. The Union did not petition to represent the accounting specialists and opposes their inclusion in the bargaining unit. It argues that the accounting specialists are essentially office clerical employees and do not share a community of interest with the attendants, cashiers, valets, floor attendants, lead attendants, dispatchers, shuttle drivers, and maintenance workers who it has petitioned to represent.

"The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co.*, 334 NLRB 484 (2001). Even if a *more* appropriate unit in this case would include accounting specialists, the Employer cannot force their inclusion in the unit as long as the smaller unit excluding them is still an appropriate one that encompasses the employees that the Union petitioned to represent. Id.; see also *American Hospital Assn.*, 499 U.S. 606, 610 (1991) ("the initiative in selecting an appropriate unit resides with the employees" who "may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit") (emphasis in original); *Northrop Grumman Shipbuilding*, 357 NLRB No.163, Slip Op. at 2-3 (2011) (petitioner is not required to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit). Where, as here, an employer has not contended that some of the classifications in the petitioned-for unit do not share a community of interest, but rather contends that the smallest appropriate unit must include employees in addition to the those the union has petitioned to represent, the employer can prevail only if it "'demonstrates that employees in the larger unit share an *overwhelming* community of interest with those in the petitioned-for unit.'" *Northrop Grumman*, supra, Slip Op. at 3 (emphasis added), quoting *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 No. 83, Slip Op. at 12-13 (2011). In assessing the community of interest between various employees, "the Board examines such factors as: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours, and other working conditions; and (6) shared supervision." *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004).

Based on my review of the record evidence, I conclude that the evidence does not show that the accounting specialists share a substantial community of interest, much less an *overwhelming* community of interest, with any of the employees in the petitioned-for unit. The record shows that the accounting specialists work in office settings performing accounting and clerical duties. Employees in the petitioned-for positions, on the other hand, work in non-office settings such as garages, parking lots, or other external locations, and are engaged in the hands-

[4] A challenge to Nerie's ballot was also filed by the Union.

on operation of the parking facilities and vehicles, and in providing services directly to customers. I credit the testimony of Eleni Shaba,[5] one of accounting specialists whose ballot is being challenged. She testified that she works in an office and that the only other individuals who share that office are managers. Consistent with that testimony, the Employer's regional human resources manager, Mooney, stated that accounting specialists work in offices and that the only individuals they share those offices with are managers. Shaba testified that she has responsibility for accounts receivable, billing, invoices, monthly statements, and cash receipts. The evidence indicates that employees in the petitioned-for positions share none of those responsibilities and are not responsible for similar tasks. In performing her job, Shaba interacts with the Employer's managers, but has no interaction with employees in the petitioned-for positions of attendant, valet, cashier, dispatcher, shuttle driver and maintenance employee. She is not called upon to park cars, drive a shuttle, perform maintenance, or fix ticket dispensing machines – tasks that are performed by employees in the petitioned-for positions. She does not interact with parking customers unless her manager is not present and then only regarding matters that would usually be brought to the manager.

Consideration of the documentary evidence further supports the view that the accounting specialists are office clerical employees who do not share a substantial community of interest with employees in the petitioned-for positions. For example, the Employer's job description for the position states that the accounting specialists must have the ability "to complete mathematical calculations with a high level of accuracy" and that their duties include following "established policies and procedures to complete accounting/financial transactions with a high level of accuracy." Employer's Exhibit Number (E Exh.) 15. None of the job descriptions for the petitioned-for positions make any reference to those positions requiring the use of mathematical skills or the ability to complete calculations or "accounting/financial transactions." E Exhs. 16, 18, 19, 20, 22. The job description for the accounting specialist position also makes reference to other office clerical duties – noting that accounting specialists must have the ability to "maintain files" and to "bend, kneel, squat and or stretch in order to maintain document files." This clerical work is not part of the job descriptions for any of the petitioned-for positions. Indeed, the other classification with position requirements that most closely resemble those of the accounting specialist classification is that of "auditor" – a classification that the parties have expressly excluded from the unit. The position description for the auditor position, similar to that for the accounting specialist position, requires that the employee have mathematical skills and the ability to perform filing. E Exh. 17.

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[5] I found Shaba a very credible witness. She testified in a confident and certain matter regarding her experience working for the Employer as an accounting specialist. Her testimony was not meaningfully undermined by documentary evidence, cross-examination, or credible contrary testimony. I note, moreover, that she testified in support of the Union's position even though the Union was seeking to invalidate the ballot that she cast. Under those circumstances I consider it unlikely that her testimony was the product of bias in favor the Union's position. In addition, while my credibility determination regarding Shaba's testimony is made independently of the fact that she is a current employee, I nevertheless note that crediting her is consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). See also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006) and *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) (Table).

The evidence also showed that the accounting specialists have a different wage scale than employees in the petitioned-for positions. The accounting specialists' starting pay of $15 per hour is higher than that of any of the seven positions that the Union petitioned to represent. The Employer argues that the accounting specialists nevertheless share a commonality of pay and working conditions with employees in the petitioned-for classifications because they have the same fringe benefits, are subject to the same polices, and use the same time clock system. I considered that evidence, but also considered the evidence that those same fringe benefits are provided to high-level managers such as senior vice-presidents. Similarly, the policies referenced by the Employer apply not only to accounting specialists and the petitioned-for classifications, but to *all* employees – including auditors and other employees who are expressly excluded from the unit. Similarly, the record suggests that the time clock system is for all hourly employees, including employees who are expressly excluded from the unit. On balance, I conclude that the pay and benefits of the accounting specialists, in particular their higher pay range, is a factor that weighs lightly against finding a community of interest between the accounting specialists and employees in the petitioned-for classifications.

Accounting specialists apparently share some supervision with employees in at least one of the petitioned-for classifications – that of "cashier." Both the cashiers and the accounting specialists report to project managers and general managers, although the cashiers, unlike the accounting specialists, also report to supervisors. The credible evidence does not show that any of the other petitioned-for classifications also report to project managers and general managers, and the record shows that employees in the excluded "auditor" classification also report to the project manager. On balance, I find that the evidence regarding shared supervision weighs slightly in favor of finding a community of interest between the accounting specialist classification and the petitioned-for classification of cashier.

The evidence regarding the degree of interaction and interchange between employees in the accounting specialist classification and those in the petitioned-for classifications weighs heavily against finding the requisite community of interest. I credit Shaba's testimony that as an accounting specialist she does not interact at all with employees in the petitioned-for classifications. The evidence also showed that during the relevant pay period,[6] and for a period of 6 months prior to the hearing, no employee had moved from (or to) an accounting specialist position to (or from) an attendant, valet, or dispatcher position. Indeed, the record does not show that any employee had ever moved between the accounting specialist classification and any of the petitioned-for classifications.

The Employer did not call any accounting specialists as witnesses to contradict the testimony of Shaba regarding work in that classification. Nor did it call anyone who claimed to work directly with accounting specialists on a daily basis. The Employer did elicit testimony from Mooney, its regional human resources manager. Mooney's testimony was in some critical respects contrary to that of Shaba. For example, whereas Shaba testified that she never had work-related contact with attendants, Mooney testified that accounting specialists had work-related contact with attendants once or twice every hour. Shaba testified that she never had

[6] The parties stipulated that the relevant payroll period for purposes of determining eligibility to vote in the election ran from January 4 to January 10, 2012. Transcript at Page(s) (Tr.) 59.

contact with cashiers, but Mooney stated that accounting specialists had such contact. Shaba stated that she did not fix ticket dispensers and Mooney stated that accounting specialists fixed ticket dispensers. I found Shaba a particularly credible, reliable, and disinterested witness, see, supra, footnote 5, and consider her testimony on these points more reliable than that of Mooney. Mooney was not in my view a similarly disinterested or reliable witness. He seemed to strain at times to give testimony favorable to the Employer's position. In addition, Mooney did not testify that he worked directly with the accounting specialists or that he spent a significant amount of time observing them at work. In this connection, I note that there are over 350 eligible voters in this case but only about 6 accounting specialists, and those accounting specialists are present at only about four of the over 40 locations covered by the petition. Under these circumstances one would expect Mooney's opportunity to directly observe the accounting specialists to be rather limited, and nothing in the record calls that expectation into question.

Overall, I conclude that consideration of the relevant factors and the record evidence shows that the accounting specialists do not share a substantial community of interest with employees in the petitioned for classifications, and certainly not the "overwhelming" community of interest that would permit the Employer to force the inclusion of that group of employees into the unit. Employees in the petitioned-for classification are non-office employees who work out in garages and parking lots or driving vehicles, whereas accounting specialists are office clerical workers who have substantial contact only with managers. See *Esco Corporation*, 298 NLRB 837, 841 (1990) (clerical workers who work in an office that adjoins a warehouse do not have a community of interest with the employees who work in the warehouse given, inter alia, that they perform separate functions from the warehouse employees and do not have interchange or substantial contact). The accounting specialists have different skills, duties, and working conditions than the employees in the petitioned-for classifications and have no meaningful contact or interchange with those employees. Therefore, the challenges to the ballots of Sosina Abebe, Meryama Alioui, Ling Nerie, Eleni Shaba, and Zheng Wang should be sustained. Their ballots should remain unopened and uncounted.

The situation is different with respect to Worku, although the challenge to her ballot should be sustained as well. I find that she is in the auditor classification, not the accounting specialist classification. The Employer's payroll records list Worku as an auditor and show that she receives an hourly pay rate of $9.50 per hour – well below the $15.00 starting hourly pay she would receive if she were, in fact, an accounting specialist. There was no evidence that Worku was classified as anything other than an auditor. The parties stipulated that auditors would not be part of the unit. I conclude that the challenge to Worku's ballot based on her absence from the Excelsior list should be sustained because she is an auditor and, therefore, was properly excluded from that list. Her ballot should not be opened or counted.

V. Ballots of Michael Alazibh, Abourahman Jeilani, and Hector Gonzalez

The Board challenged the ballots of Michael Alazibh, Abourahman Jeilani, and Hector Gonzalez because those individuals did not appear on the Excelsior list of eligible voters that was created by the Employer. The Union argues that the Employer should have included these three individuals on the list, and that their ballots should be counted, because the Employer's paycheck and payroll records demonstrate that they were employed as full-time attendants during

the relevant payroll period. Tr. 59 (relevant payroll period for purposes of determining eligibility ran from January 4 to January 10, 2012); Petitioner's Exhibit Number (P Exh.) 15, P Exh. 16 and P Exh. 32; see also Tr. 107 (parties stipulate that P. Exh. 32 shows the employees' code/classification during the relevant pay period). The Employer has not provided any reason, either at the hearing or in its brief, to justify the omission of these three attendants from the Excelsior list. There is no evidence contrary to the paycheck and payroll records relied on by the Union, or which suggests that these employees were not in bargaining unit positions during the relevant time period. I find that Alazibh, Jeilani, and H. Gonzalez were employed in bargaining unit positions during the relevant time period, that the Employer erroneously omitted them from the Excelsior list, and that they were eligible to vote.

The challenges to the ballots of Alazibh, Jeilani and H. Gonzalez should be overruled and their ballots should be opened and counted.

VI. Ballots of Employees Classified as Supervisors:
Bezawit Abera, Demelash Abera, Yarde Alemu,
Fuad Ali, Osman Amin, Joseph Arthur,
Jose Flores, Romeo Gauvin, Flex Gonzalez,
Francisco Palencia, Ben Adam Ragmari, Juan E. Rivas,
John Saunders, Shane Smith, and Hiruy Tasfaye

Fifteen of the challenged ballots were submitted by individuals who were employed by the Employer in its "supervisor" job classification.[7] Ten of those individuals were on the Employer's Excelsior list, and the Union challenged their ballots on the grounds that they were classified as supervisors. Those individuals are: Bezawit Abera, Demelash Abera, Fuad Ali, Osman Amin, Joseph Arthur, Jose Flores, Romeo Gauvin, Felix Gonzalez, Ben Adam Ragmari, and Hiruy Tasfaye. The Union argues that these challenges should be upheld because the supervisor classification was not included in the amended petition and was expressly excluded from the unit definition by the Decision and Direction of Election. Five of the at-issue individuals were not included on the Excelsior list and the Board agent challenged their ballots on the basis that they were not on the list. Those individuals are: Yarde Alemu, Francisco Palencia, Juan E. Rivas, John Saunders, and Shane Smith. The Union argues that the latter five

[7] The Employer takes the position that while these 15 individuals were "coded" in its payroll records as supervisors, they were not "classified" as supervisors. Based on the record evidence I find, contrary to the Employer's contention, that the 15 at-issue employees were all classified by the Employer as supervisors. The record shows that the job classification listed for each of these individuals in the Employer's payroll records for the relevant pay period was, in fact, "FSUPV," which multiple witnesses testified stood for full-time supervisor. Tr. 93, 211-12. The Employer's human resources director affirmed that payroll records listing the "FSUPV" designation for particular employees, showed that those employees were classified as supervisors. Tr. 95 line 24 to Tr. 96 line 3; Tr. 98 lines 6 to 11. The Employer did not introduce payroll or personnel records or other documents identifying any of the 15 individuals as something other than supervisors during the relevant pay period. Nor did the Employer show that, prior to the election, it identified any of these 15 individuals to the Hearing Officer, the Regional Director, or the Board, as having been misclassified as supervisors in the Company's records. Given this, I find that the payroll records are sufficient to establish that the 15 employees at-issue were within the supervisor classification at the Employer, regardless of whether they were supervisors for purposes of Section 2(11) of the Act.

5 challenges should be upheld because the individuals were classified by the Employer as supervisors and therefore were properly omitted from the Excelsior list. The Union does not argue that any of these 15 individuals were supervisors for purposes of Section 2(11), but rather that individuals who the Employer classified as supervisors were excluded from the petition and the unit definition, regardless of whether they were Section 2(11) supervisors or not.
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The Employer argues that the challenges to all 15 of these ballots should be overruled. It makes essentially two, related, arguments. First it argues that the parties' stipulation at the pre-election hearing excluded only those supervisors who met the requirements of Section 2(11), and since none of the 15 employees were shown to be Section 2(11) supervisors their votes should be
15 counted. Second, it argues that some of the 15 employees who it classified as supervisors were not performing supervisory work, but rather work so similar to that of the petitioned-for employees as to bring them within the bargaining unit.

Based on my review of the transcript of the pre-election hearing and the Decision and
20 Direction of Election, I find that individuals who the Employer classified as supervisors were not part of the unit and were not entitled to vote, regardless of whether those individuals possessed any Section 2(11) attributes or performed work that is commonly associated with the supervisor classification in other workplaces. More specifically, the Union made clear at the pre-election hearing that it was not petitioning to represent any of those individuals who the Employer
25 classified as supervisors, and the Employer made no argument before the Hearing Officer or to the Regional Director that there were individuals in the company's supervisor classification who should be included in the unit. The Regional Director understood this and in the Decision and Direction of Election not only omitted the classification of supervisors from those mentioned as being part of the unit, but went a step further and expressly excluded from the unit both
30 supervisors and "supervisors as defined in the Act." The only reasonable reading of the Regional Director's Decision is that both Section 2(11) supervisors *and* any other persons who held the supervisor classification at the Employer were excluded from the unit. The Union has met its burden of substantiating the challenges to the ballots of these 15 employees by showing that they were employed in a classification that was expressly excluded from the unit and/or that they
35 were properly omitted from the Excelsior list because they were within that excluded classification. *Harold J. Becker Co.*, 343 NLRB 51, 52 (2004).

Assuming that, prior to the election, the Employer had a viable argument that certain persons classified as supervisors shared an "overwhelming community of interest" with the
40 petitioned-for employees, and therefore should have been included in the unit against the Union's wishes, *Northrop Grumman*, 357 NLRB No. 163, Slip Op. at 3, the Employer failed to raise that argument in a timely manner. The Employer had to bring that contention to the attention of the Hearing Officer at the pre-election proceeding. To the extent that the Employer believed that the Regional Director's decision to exclude the entire classification of supervisors
45 was not supported by the record of the pre-election hearing, or was otherwise erroneous, the Employer's recourse was to request review of the Decision and Direction of Election. The Decision itself informed the parties of the procedures for requesting such review, but the Employer did not do so. Once the election was held, and the Employer discovered that the tally of eligible votes counted was in favor of the Union, it was too late for the Employer to attempt
50 insert members of the previously excluded class of individuals into the pool of eligible voters. The Board made this clear in its recent decision in *Mercedes-Benz of San Diego*, 357 NLRB No.

5 67 (2011). In that case, a pre-election hearing was held and the acting regional director issued a decision and direction of election ruling that certain employees were in a classification that was ineligible to vote. After the election was held, the employer argued for the first time that those employees were eligible to vote because they had been reclassified. The Board rejected the employer's contention as untimely, and relied on precedent that an employer's "challenges to 10 preelection rulings that employees are not eligible to vote" must "'be made prior to the actual casting of ballots.'" 357 NLRB No. 67 (2011), Slip Op. at 2, quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 646 (1946). The Board noted that the employer " had multiple preelection opportunities to present evidence of the [the employees'] reclassification" but failed to do so. Similarly, in the instant case, the Employer's argument, raised for the first time post-election, 15 that certain individuals who the company's own records place in the excluded "supervisor" classification should be considered eligible voters is untimely and cannot be considered. The Employer could have raised that argument at the pre-election hearing or in a request for review of the Decision and Direction of Election, instead of waiting until after the election.

20 I reject the Employer's contention that the parties' stipulation at the pre-election hearing shows that only Section 2(11) supervisors, not all persons classified by the Employer as supervisors, were excluded from the unit. First, even assuming for purposes of argument that the parties had stipulated that only the Section 2(11) supervisors would be expressly excluded from the unit, that would not change the fact that both the Union and the Hearing Officer made clear 25 that the petition did not cover persons classified by the Employer as supervisors, regardless of whether those individuals were supervisors for purposes of Section 2(11). Supervisors are not listed as one of the classifications included in the unit and the Employer made no pre-election contention to the Hearing Officer, the Regional Director, or the Board that some persons the Company classified as supervisors should be included in the unit. Such a contention is not 30 remotely suggested by the transcript of the pre-election hearing.[8]

It is true that at one point during the pre-election hearing the Hearing Officer orally proposed a stipulation, agreed to by the representatives of both parties, that the appropriate bargaining unit would be defined as "all full and part-time attendants, valets, floor attendants, 35 lead attendants, cashiers, dispatchers, shuttle drivers, maintenance workers employed by the Employer at the [agreed upon locations], and excluding project managers, and auditors, and guards and supervisors as defined in the Act." A narrow focus on this oral exchange does not fairly reflect what happened at the hearing. During the on-the-record discussions that occurred both before and after the oral stipulation, the Union representative and the Hearing Officer made 40 clear that the Union was not petitioning to represent individuals in the supervisor classification, regardless of whether those individuals were Section 2(11) supervisors.

[8] I am aware that, at the pre-election hearing, the Hearing Officer did not permit the Employer to present evidence that approximately 55 supervisors had Section 2(11) status. However, assuming the Employer had been able to show that 55 supervisors met the requirements of Section 2(11), that would still have left wholly open the question of whether other supervisors (who did not have Section 2(11) status and who the Union had not petitioned to represent) had to be included in the unit. The Hearing Officer did not prevent the Employer from introducing evidence, or argument, that certain persons classified as supervisors had to be included in the unit. The Employer simply did not seek to do so.

To the extent that there could have been any doubt that all persons classified as supervisors at the Employer were excluded from the unit, that doubt was erased by the Regional Director's Decision and Direction of Election. The Regional Director's Decision expressly excluded both "supervisors" and "supervisors as defined by the Act" from the unit. The Employer describes the mention of both groups as a "typographical error" by the Regional Director and asserts that arguments to the contrary are a "crass attempt" to capitalize on this error. Brief of Employer at Pages 13-14. To the contrary, it is the Employer's argument on this point that is frivolous. In the Decision and Direction of Election, the Regional Director not only expressly excluded both "supervisors" and "supervisors as defined by the Act," but also explained that the Union "did not stipulate to the status of these individuals as Section 2(11) supervisors but agreed, in any event, to exclude this classification from the bargaining unit." This makes clear that the Regional Director was well aware of the distinction between the meaning of "supervisors as defined by the Act" and persons merely classified at the Employer as "supervisors," and intentionally excluded both groups. Not only that, but the Regional Director's Decision also expressly excluded "all other employees" – an exclusion that would encompass individuals who, like the supervisors, were not expressly included in the bargaining unit. Cf. *Bell Convalescent Hospital,* 337 NLRB 191 (2001) (when the express language of a stipulated agreement fails to include a disputed classification, and the stipulation excludes "all other employees," the Board will find a clear intent to exclude that classification). If the Employer had an argument with the Regional Director's decision that all supervisors, not just Section 2(11) supervisors, were excluded from the unit then the Employer had to raise those matters by requesting review of the Decision and Direction of Election. Certainly it could not wait until after the election to identify employees in the previously excluded classification whose votes it now wants counted. See *Mercedes-Benz of San Diego*, supra.

The Employer's argument that some of the persons who it classified as supervisors were performing work so similar to that of the petitioned-for employees that they should be included in the unit was not made in a timely fashion and I do not reach it. If I had reached that question it is highly doubtful that, on this record, it would have been possible to find that the 15 at-issue supervisors shared an overwhelming community of interest with the petitioned-for employees that would justify their inclusion in the unit despite the fact that the Union was not seeking to represent them. Even according to the Employer, these individuals continued to receive enhanced pay based on being classified as supervisors and, with respect to most of them, the record does not show that they lacked any of the duties and responsibilities associated with the Employer's supervisor classification, much less that they lacked all of those duties. The Employer's primary argument to the contrary is that a group of individuals had been supervisors until the parking facilities where they worked became automated, at which time they retained their title and supervisory pay, and continued "kind of running the show," but no longer had any employees to supervise. Tr. 109, 169. Despite the reliance that the Employer places on this scenario it did not call a single supervisor to whom such events had occurred. Instead it relied on Mooney's rather imprecise testimony that three of the at-issue supervisors – Bezawit Abera, and Ragmari – had once been supervisors, but no longer supervised anyone. Even if one credits Mooney's testimony that these three individuals no longer had employees to supervise, that would not show that they were no longer classified as supervisors or receiving supervisory pay. Moreover, it would not show that they did not retain other supervisory duties when they remained to "kind of run[] the show." The Employer's position description for the supervisor classification states that supervisors are "responsible for the daily routine supervision of the

facility . . . includ[ing] the supervision of field staff, handling of customer issues and the support of the Operations Manager." P Exh. 4. Even if the Employer had timely shown that 3 or 4 of the 15 at-issue supervisors no longer supervised field staff, that would not mean that those employees did not engage in the "daily routine supervision of the *facility*" by "handling customer issues," "support[ing] the Operations Manager," and "running the show."

Similarly, the Employer claims that some of the at-issue supervisors had been supervisors with predecessor employers and retained the supervisory classification and pay, but not the supervisory duties, when the Employer took over the facilities where they worked. However, the Employer did not call any supervisors who testified to having this experience. Certainly the Employer failed to show that such supervisors were no longer performing any of the core duties connected with the Employer's job description for the supervisor classification. The only supervisor who the Employer called was John T. Saunders and he did not testify that he had ever worked as a supervisor at an automated facility or with a predecessor employer.[9] On this record, the Employer's narrative about how the 15 at-issue employees came to be misleadingly classified as supervisors, while internally coherent, was not shown to be meaningfully tethered to reality.

For the reasons discussed above I find that the challenges to the ballots of Bezawit Abera, Demelash Abera, Yarde Alemu, Fuad Ali, Osman Amin, Joseph Arthur, Jose Flores, Romeo Gauvin, Felix Gonzalez, Francisco Palencia, Ben Adam Ragmari, Juan E. Rivas, John Saunders, Shane Smith, and Hiruy Tasfaye should be sustained. Their ballots should remain unopened and uncounted.

VII. The Ballot of Warsame Abdullahi,

The Union challenged the ballot of Warsame Abdullahi on the basis that he was a supervisor. At the hearing the Union contended that Abdullahi, unlike the 15 supervisors discussed above, was a supervisor for purposes of Section 2(11). Tr. 17. However, during the hearing the Union presented no evidence showing what Abdullahi's duties and responsibilities were or indicating that he met the requirements of Section 2(11). In addition, unlike the 15 supervisors discussed above, the record did not show that the Employer classified Abdullahi as a supervisor in its records. To the contrary, those records show that he was classified as an attendant. Thus the Union has failed to substantiate the challenge based on Abdullahi's supposed supervisory status.

The challenge to Abdullahi's ballot should be overruled, and his ballot should be opened and counted.

VIII. Conclusions

For the reasons discussed above, I conclude and recommend that the challenges to the ballots of the following employees be overruled and that their ballots be opened and counted:

[9] Moreover, Saunders testified that he had not seen or heard anything from the Union, thus providing some support for the Union's argument that it did not campaign with persons in the supervisor classification because they were excluded from the unit and were ineligible to vote.

Warsame Abdullahi, Michael Alazibh, Abourahman Jeilani, and Hector Gonzalez. I also conclude and recommend that the challenges to the ballots of the following employees be sustained and their ballots remain unopened and uncounted: Sosina Abebe, Bezawit Abera, Demelash Abera, Yarde Alemu, Fuad Ali, Meryama Alioui, Osman Amin,, Joseph Arthur, Jose Flores, Romeo Gauvin, Felix Gonzalez, Ling Nerie, Francisco Palencia, Ben Adam Ragmari, Juan E. Rivas, John Saunders, Eleni Shaba; Shane Smith, Hiruy Tasfaye, Zheng Wang, and Mekdes Worku

Based on the agreement of the parties, I recommend that the challenges be overruled with respect to the ballots of Andonet Bekele, Duc Duong, and Mohamed Farah. The ballots of those three individuals should be opened and counted. In addition, based on agreement of the parties, I recommend that the challenges be sustained with respect to the ballots of Bechie Assefa, Getachan Bedada, Aboubacar Diakite, Abdi Jama Gurey, Christian Mutshipay, Abelhak Souabny and Julio Villata. The ballots of those seven individuals should remain unopened and uncounted.

Accordingly, based on the forgoing, as the challenged ballots of the seven voters found eligible herein are insufficient to affect the results of the election, I recommend that the Board certify the results of the election in favor of the Union.[10]

Dated: Washington, D.C. May 15, 2012.

Paul Bogas
Administrative Law Judge

[10] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Report on Challenged Ballots, either party may file with the Board in Washington, D.C., an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by May 29, 2012. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy on the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Report.

I note that on April 30, 2012, a new Board rule went into effect regarding the procedures to be followed in representation cases. See 76 FR 80138 (2011). My understanding is that those new rules apply to cases filed on or after April 30, 2012, but not to cases, such as the instant one, that were already pending prior to April 30, 2012. This circumstance was not specifically addressed by the Board, but I conclude that it is appropriate to apply the former procedures to previously filed cases, rather than changing the applicable procedures in the middle of a pending proceeding.