UNIVERSITY OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

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

Employer

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25,

Petitioner.

Case No. 1-RC-071163

PETITIONER’S OPPOSITION TO EMPLOYER’S EXCEPTIONS TO
REPORT ON CHALLENGED BALLOTS

The Petitioner, Teamsters Local Union No. 25 (“Union”), pursuant to Section 102.69 of the National Labor Relations Board’s Rules and Regulations, hereby files its Opposition to the Exceptions to the Report on Challenged Ballots filed by the Employer, Kinney System, Inc., d/b/a Central Parking System of Massachusetts (“Employer”).

The Board should adopt Administrative Law Judge Paul Bogas’ Report on Challenged Ballots. There is no factual or legal basis for overturning any of Administrative Law Judge Bogas’ (“ALJ”) conclusions to which the Employer takes exception. The ALJ drew reasonable inferences based upon the entire factual record as well as on his assessment of the witness testimony at the hearing.

The ALJ correctly found that five employees holding the job classification of “accounting specialist” should be excluded from the Unit and their ballots not counted because they are
“office clericals” who do not share an overwhelming community of interest with the other classifications included in the bargaining unit description, and that Mekdes Worku, classified as an “auditor,” is also ineligible to vote based upon the parties’ stipulation to exclude auditors from the Unit.

In addition, the ALJ properly held that fifteen individuals holding the job classification of “supervisor” should be excluded from the Unit and their ballots not counted because the parties’ stipulation and the Decision and Direction of Election specifically excluded employees holding the “supervisor” classification. Pursuant to the clear and unambiguous language of the Decision and Direction of Election, anyone holding the classification of “supervisor” was excluded from the Unit, as were any statutory supervisors under the Act. Critically, as noted by the ALJ, the Employer never objected to the statutory description following Region One’s issuance of the Decision and Direction of Election.

Moreover, at no time during the pre-election hearing did the Employer ever maintain that there was a select group of fifteen individuals who, although classified as “supervisors”, shared a community of interest with the petitioned-for employees and should be included in the Unit. The ALJ therefore properly ruled that the Employer’s attempt to make such an argument after the election, in the challenged ballot phase of the proceedings, was untimely.

The Board should therefore affirm Administrative Law Judge Bogas’ Report on Challenged Ballots in its entirety and dismiss the Employer’s Exceptions.
FACTS

On December 21, 2011, Robert Aiguier, Jr., Organizer for Teamsters Local 25, filed a representation petition seeking to represent the following unit of employees: “All Full & Part time cashiers, valets, dispatchers, custodians, attendants, shuttle drivers, supervisors, maintenance workers” employed by Central Parking System at forty-one lots in the Boston, Massachusetts area. (Petitioner Exhibit 2; Tr. 44). Aiguier included “supervisors” in his petition because a number of the authorization cards he received from employees listed “supervisor” as their classification or title. (Tr. 45). Upon receiving the authorization cards, but prior to petitioning the Board for an election, Aiguier spoke with many of the employees who listed their classification as “supervisor.” Based upon those discussions, Aiguier learned that the Employer did have a classification titled “supervisor,” but formed an opinion that those employees were not “supervisors” as defined in Section 2(11) of the National Labor Relations Act. (Tr. 45-47).

On January 6 and 9, 2012, a hearing on the Union’s representation petition was held at the offices of Region One of the National Labor Relations Board before Hearing Officer Alejandra Hung. (Board Exhibits 2 and 3; Tr. 25, 48). At the hearing, one of the issues was whether employees classified as “supervisors” should be included in the Unit. (Petitioner’s Exhibit 3; Tr. 29). The Union, represented by Steven Sullivan, Teamsters Local 25’s Director of Organizing, as well as by Organizer Aiguier, initially maintained that employees in the supervisor classification should be included in the Unit. The Employer argued that the “supervisors” were Section 2(11) supervisors and should be excluded from the Unit on that basis. (Board Exhibits 2 and 3; Tr. 29). The Union ultimately agreed to amend the petition to exclude those employees holding the “supervisor” classification, but would not stipulate to the Employer’s position that those individuals should be excluded from the Unit because they were
Section 2(11) supervisors. (Board Exhibits 2 and 3; Tr. 29). During the hearing, the parties also agreed that employees holding the classification of “accounting specialist” would be permitted to vote under challenge. (Board Exhibits 2 and 3).

Following the representation hearing, Regional Director Rosemary Pye issued a Decision and Direction of Election on January 13, 2012, finding the following employees of the Employer to constitute an appropriate unit 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 various locations in the Boston, Massachusetts area, as listed in Attachment A, but excluding supervisors, project managers, auditors, all other employees, and guards and supervisors as defined in the Act. (Emphasis added) (Petitioner Exhibit 3)

During the ensuing election campaign, Organizer Aiguier deliberately limited his conversations with employees holding the “supervisor” classification because they were not eligible to vote in the election, but told some of them that perhaps the Union would petition for the employees in the “supervisor” classification at a later date. (Tr. 50). Aiguier testified that he told over twenty employees in the supervisor classification who asked about the election that they were not eligible to vote. He specifically recollected conversations with Francisco Palencia, Getachew Bedada, and Ven Vaiu Biene Aime. (Tr. 50-52).

Following the February 8, 2012 election, the tally of ballots revealed that 158 ballots had been cast in favor of Teamsters Local 25, while 139 had been cast for “No Union.” (Board Exhibit 1). There were thirty-seven challenged ballots. On March 12, 2012, Region One issued a Corrected Direction and Notice of Hearing on Challenged Ballots before an Administrative Law Judge beginning on March 19, 2012. (Board Exhibit 1). The Region directed that two of the challenged ballots, those of employees Soukayna Tandofe and Yahke Issack, would not be determined at the March 19 hearing, as those two employees had been terminated by the
Employer during the critical period and were the subject of pending unfair labor practice charges. (Board Exhibit 1).

On March 19 and 20, 2012, a hearing on the challenged ballots was held before Administrative Law Judge Paul Bogas. During the course of the hearing, the parties reached agreement to resolve ten of the ballot challenges.\(^1\) On May 15, 2012, the ALJ issued a Report on Challenged Ballots in which he approved the parties’ stipulation concerning ten of the ballot challenges; overruled the challenges to four additional employees and directed that their ballots be opened and counted\(^2\); sustained the challenge of the ballots of six employees classified as accounting specialists and ruled that their ballots not be opened and counted; sustained the challenge of the ballot of Mekdes Worku because she was classified as an auditor and directed that her ballot not be opened; and found that fifteen employees holding the classification of “supervisor” were ineligible to vote and therefore sustained the challenges to their ballots and ordered that their ballots not be opened and counted.

\(^1\) The parties agreed that the ballots of Andonet Bekele, Duc Duong, and Mohamed Farah were valid and should be counted, and that the ballots of Bechie Assefa, Getachan Bedada, Aboubacar Diakite, Abdi Jama Gurey, Christian Mutshipay, Abelhak Souabny, and Julio Villata would not be counted.

\(^2\) The ALJ ruled that the ballots of Michael Alazibh, Abourahman Jeilani, and Hector Gonzalez should be opened and counted. The three had been challenged by the Board because they were not on the Excelsior List, but the ALJ found that they were employed as full-time attendants during the relevant payroll period and were therefore eligible to vote. In addition, the ALJ overruled the Union’s challenge of the ballot of Warsame Abdullahi and directed that his ballot be opened and counted.
ARGUMENT

I. The ALJ’s Conclusion that Accounting Specialists Do Not Share a Community of Interest with the Other Employees in the Bargaining Unit is Supported by the Record and the Law.

Administrative Law Judge Paul Bogas correctly ruled that Accounting Specialists Eleni Shaba, Meryama Alioui, Zheng Wang, Sosina Abebe, and Ling Nerie do not share an overwhelming, or even substantial, community of interest with attendants, cashiers, valets, floor attendants, lead attendants, dispatchers, shuttle drivers or maintenance employees. They are more akin to office clerical employees.

There is nothing in Section 9(b) of the Act which requires that a unit for bargaining be the only appropriate unit, or the most appropriate unit. Bartlett Collins Co., 324 NLRB 484 (2001). A union is not required to seek the most comprehensive collection of employees unless “an appropriate unit compatible with that requested does not exist.” P. Ballantine & Sons, 141 NLRB 1103 (1963). “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).

Here, the Employer maintains that the smallest appropriate unit must include additional employees beyond those the Union petitioned to represent. In such a situation, as the ALJ correctly held, the Employer can only prevail on this argument if it “demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.” Northrop Grumman Shipbuilding, 357 NLRB No. 163, Slip. Op. at 2-3 (2011), quoting Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83, Slip. Op. at 12-13 (2011).³ In assessing whether a community of interest exists among

³ The Employer has objected to the ALJ’s citation to the Specialty Healthcare community of interest standard, specifically that there must be an “overwhelming” community of interest. Even assuming, arguendo, that
employees, the Board looks at a number of factors, including: “(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). The evidence establishes that the accounting specialists do not share an overwhelming or even a substantial community of interest with the rest of the bargaining unit classification petitioned for by the Union.

Central Parking employs accounting specialists who are responsible for “completing accounting/financial transactions,” as well as tasks related to “cash management, ticket handling, accounts payable, accounts receivable, and/or payroll.” (Employer Exhibit 15). Accounting specialists must be able to “complete mathematical calculations with [a] high level of accuracy,” a requirement that is obviously central to the nature of an accounting position, and a skill which no other employee classification in the bargaining unit is required to possess. (Tr. 128). The degree of sophistication and professional nature of the position compared to that of attendants, valets, cashiers, shuttle drivers, dispatchers, and maintenance is supported by the fact that accounting specialists have a higher starting hourly wage than do any of the bargaining unit classifications, at approximately $15.00 per hour. 4 (Tr. 131-132).

Specialty Healthcare is not appropriate here, it is irrelevant since the ALJ also specifically held that the accounting specialists did not share a “substantial” community of interest with the other employees in the bargaining unit, let alone an “overwhelming” community of interest.

4 Ling Nerie currently earns $15.00 per hour, Meryama Alioui earns $15.37 per hour, Eleni Shaba is paid at a rate of $16.10 per hour, Sosina Abebe makes $17.00 per hour, and Zheng Wang is paid $17.69 per hour. (Petitioner Exhibit 32). Of the 411 employees listed in the Employer’s payroll document that are not classified as “supervisors,” only 5 employees earn more than $15.00 per hour- four maintenance employees (Jorge Fuentes, Ciro Genualdo, Saul Lemus, and Jorge Vazquez) and 1 attendant (Tilahun Tefera). (Petitioner Exhibit 32). F. Michael Mooney testified that accounting specialists have a higher starting wage than any of the bargaining unit classifications, and that wage rates increase depending on the length of time one has been with the Employer. (Tr. 125-126). This explains how the five non-supervisor employees are currently paid at a wage rate above the minimum accounting specialist starting rate of $15.00.
Accounting specialist Eleni Shaba, who has a finance and accounting degree from Northeastern University, testified that she handles accounts receivable, billing, invoices, and monthly statements, and that she enters cash receipts on a daily basis. (Tr. 140-142). She works in an office at the Employer’s Center Plaza location. The only other employees who work in the office with her are the Accounting Manager and the Garage Manager. (Tr. 141). She handles accounts receivables for the parking lot at the Center Plaza location, as well as the lots at 60 State Street, 28 State Street, 225 Franklin Street, Post Office Square, Central Plaza, Riverview, and Memorial Drive. (Tr. 142). The managers at each of these locations provide Shaba with the receipts, forms, and tickets to audit. (Tr. 143). Contrary to Mooney’s claim, Shaba testified that she has absolutely no interaction with cashiers, attendants, valets, dispatchers, shuttle drivers, or maintenance employees. (Tr. 143-144). Shaba only deals with managers. She testified that attendants do not bring her cash during the course of her workday. (Tr. 147). Shaba has never been asked by an attendant to deal with a customer, and the only time she interacts with a parking customer is if her manager is not present, in which case she deals with the customer directly rather than through an attendant or cashier. (Tr. 147-148). She therefore has no contact or interaction whatsoever with any of the bargaining unit classifications.\(^5\)

In addition, Shaba testified that as an accounting specialist, she has never parked cars, driven a vehicle, performed maintenance work, or fixed a ticket machine. Her only duties involve accounting. (Tr. 130, 144). No bargaining unit employees have ever assisted her in her accounting duties; she is the only employee at her location that performs this work. (Tr. 145). Thus, there is no interchange of work between the accounting specialists and the other

\(^5\) The Employer attempted to argue that some of the other classifications, such as shuttle drivers, do not interact with other bargaining unit classifications, but the difference is that the parties stipulated that shuttle drivers should be in the Unit. The only relevant issue is whether the accounting specialists interact with the other classifications.
bargaining unit classifications. In addition, no individuals hired as accounting specialists have later moved into a bargaining unit classification, and none of the employees in the bargaining classifications have moved into accounting.\(^6\) (Tr. 130-131).

The Board has found no community of interest between clerical employees and employees in a production unit. While the present case involves a slightly different factual scenario in that the individuals perform accounting services related to the income derived from the Employer’s parking garages and lots, the same analysis applies here. In *Esco Corporation*, 298 NLRB 837 (1990), the Board did not include clerical employees who worked in an office which adjoined the warehouse and who occasionally entered the warehouse to check on orders and inventory, since they spent most of their time in the office performing their respective duties while warehouse employees spent most of their time working in the warehouse and did not take orders or operate computers or other office equipment. *Id.* at 838. The Board excluded the clericals because they “perform separate functions from the warehouse employees, do not interchange or have substantial contact with them, and rarely enter the warehouse.” *Id.* at 841.

Similarly, in *Weldun International, Inc.*, 321 NLRB 733, 735 (1996), the Board found an estimating clerk who computed information on material costs and maintained files on production jobs to be an office clerical, since she had limited contact with production employees and spent the vast majority of her time in her office area. In *Cooper Hand Tools*, 328 NLRB 145 (1999), the Board found clerical employees who gathered production tickets and entered the ticket information into a computer in their office lacked a sufficient community of interest with production employees based upon limited interaction between the two groups of employees.

\(^6\) The ALJ correctly gave considerable weight to Shaba’s testimony and found her to be a “credible witness”, noting that she “testified in support of the Union’s position even though the Union was seeking to invalidate the ballot that she cast”. (Report on Challenged Ballots at 7, n.5).
Similarly, in *Cincinnati Bronze, Inc.*, 286 NLRB 39, 44 (1987), an employee who drafted purchase orders and expedited materials through the production process was an office clerical based upon the fact that he spent almost all of his time in his office and had limited contact with the production employees. See also: *Prather's, Inc.*, 227 NLRB 1229, 1230 (1977) (employees who processed invoice, shipping, and conservation data, as well as payroll records, were office clericals since they spent 95% of their time in an office area separate from the production employees and did not interact with them).

In the present case, the accounting specialists work in an office that is separate from the parking lot and garage where attendants, valets, cashiers, and maintenance employees work. The accounting specialists have no contact with any of these employees during the course of performing their work duties, and instead deal strictly with supervisory personnel. They possess special skills and perform tasks that are unrelated to any of the work performed by any of the petitioned-for bargaining unit employees, and never perform the work of any of these other classifications. There is no interchange of work, and the accounting specialists are paid a higher starting wage than any of the other employee classifications.

For all of these reasons, the accounting specialists do not share a community of interest with the bargaining unit employees. The ALJ therefore correctly ruled that the ballots of Eleni Shaba, Zheng Wang, Ling Nerie, Meryama Alioui, and Sosina Abebe should not be counted.

II. **The ALJ Correctly Held that Mekdes Worku's Ballot Should Not Be Counted Because She is an Auditor.**

The ALJ correctly held that Worku’s ballot should not be counted because the bargaining unit description as stated in the Decision and Direction of Election specifically excludes “auditors”. (Petitioner Exhibit 3). It is undisputed that the Employer’s payroll records classify Mekdes Worku as an “auditor”. (Petitioner Exhibit 32).
Moreover, the Employer’s payroll records list Worku as making $9.50 per hour, as compared to the accounting specialists, who all make a minimum of $15.00 per hour. This is further evidence that she is classified as an auditor and not, as the Employer claims, an accounting specialist. Based upon this evidence, the ALJ properly held that Worku’s ballot should not be counted.\(^7\)

III. **The ALJ Correctly Ruled that the Ballots of the Fifteen Employees Holding the Supervisor Classification Should Not Be Counted.**

The Administrative Law Judge properly held that the fifteen individuals classified by the Employer as “supervisors” were properly excluded from the Unit, and that their ballots should not be counted, because they were specifically excluded from the Unit by the parties’ stipulation and the Decision and Direction of Election. In addition, the ALJ correctly ruled that the Employer failed to timely raise the issue of whether the fifteen individuals were misclassified as supervisors and instead share a community of interest with the other bargaining unit employees and that, in any event, no such substantial community of interest exists.

A. **Employees Holding the Classification of Supervisor Were Specifically Excluded from the Unit.**

Administrative Law Judge Bogas properly concluded that fifteen employees holding the classification of “supervisor” were not eligible to vote based upon the stipulation of the parties and the Decision and Direction of Election issued by Regional Director Rosemary Pye. (Petitioner’s Exhibit 3). As a result, he correctly ordered that the ballots of Juan Rivas, Ben Ragmani, Jose Flores, Faud Ali, Osman Amin, Bezawit Abersa, Demelash Abersa, Hiruy Tasfaye, Felix Gonzalez, Romeo Gauvin, Joseph Arthur, Shane Smith, John Saunders, Francisco Palencia, and Yarde Alemu not be counted. There is no dispute that these employees were classified as

---

\(^7\) Even if the Board finds that Worku should be classified as an accounting specialist rather than an auditor, her ballot should not be counted for the same reasons as the other five employees in the accounting specialist classification.
"supervisors" by the Employer as of the relevant January 10, 2012 payroll date and on the date of the election. (Petitioner Exhibits 12, 13, 14, 32; Board Exhibit 1, Attachment A; Tr. 93-101).

On January 13, 2012, Regional Director Pye issued a Decision and Direction of Election finding, based upon the stipulations of the parties, that the following employees constituted an appropriate unit:

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 various locations in the Boston, Massachusetts area, as listed in Attachment A, but excluding supervisors, project managers, auditors, all other employees, and guards and supervisors as defined in the Act. (Petitioner Exhibit 3, at 2) (Emphasis added)

In her Decision and Direction of Election, Ms. Pye noted that there were no issues litigated at the hearing, then added:

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 supervisory 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. (Petitioner Exhibit 3 at 2, n.4) (Emphasis added)

Thus, it is clear that the Decision and Direction of Election clearly distinguished between employees holding the classification of "supervisor", and the separate category of "supervisors as defined in the Act". Pursuant to the clear and unambiguous language of the Decision and Direction of Election, anyone holding the classification of "supervisor" was excluded from the Unit, as were any statutory supervisors under the Act. The Employer should be bound to the stipulations it entered into with the Union and by the terms of the Decision and Direction of Election:

The Board has held that even in the absence of a Norris Thermador list of those employees eligible to vote in the election, as herein, when parties stipulate to the unit in which an election is to be held, they must be held to their agreement, as any other party is held to the agreement . . . In stipulated cases, where the
language of the stipulation is clear and unambiguous, the scope of the stipulation will be relied on, unless such language is contrary to the Act or established Board policy, and the parties' subjective intent, if at odds with the stipulation language, will not be given recognition." St. Peter's Manor, Inc., 261 NLRB 1161 (1982), 1982 NLRB LEXIS 78 at [**8].

"When parties stipulate the unit in which an election is to be held they 'must be held to their agreements, as any other party is held to an agreement.'" Graham Ford, Inc., 224 NLRB 927 (1976), 1976 NLRB LEXIS 638 at [**5]. The language here is clear and unambiguous and not contrary to the Act or established Board Policy. The parties' stipulations and the Decision and Direction of Election should therefore be enforced.

Administrative Law Judge Bogas properly rejected the Employer's ridiculous argument that the use of the term "supervisors" was the result of a typographical error, since the Regional Director specifically noted in her Decision that the Employer believed those in the supervisor classification were also statutory supervisors, that the Union would not agree to such a stipulation, and that, in any event, the Union agreed to exclude the supervisor classification from the Unit. (Petitioner Exhibit 3, at 2, n. 4).

If, as the Employer claims, the Unit description contained a typographical error and the parties did not agree to exclude employees in the supervisor classification, but only Section 2(11) supervisors, then Mr. Moss, an experienced labor attorney of thirty-seven years (Tr. 218), surely would have notified Region One of the alleged discrepancy, filed a Request for Review of the Decision and Direction of Election, or filed a Motion for Reconsideration. He did none of these things. (Tr. 223-224). The Employer therefore cannot now argue that the language in the Decision and Direction of Election, which clearly spelled out that employees in the supervisor classification were excluded from the Unit, was incorrect or contained a typographical error.
when it never advanced this argument at the time the Decision and Direction of Election was issued.

Despite the Employer’s attempts to cloud the issue, it is clear that the parties and Region One agreed that those employees holding the classification of “supervisor” were to be excluded from voting in the election. While the Decision and Direction of Election is clear and unambiguous and there is no reason to review the transcript of the January 6 and 9, 2012 representation hearing, it nonetheless supports the Regional Director’s ruling in her Decision and Direction of Election.

The Union initially petitioned for a unit that included those employees holding the classification of “supervisor.” (Petitioner Exhibit 2). The Union’s initial reasoning for petitioning for this group of employees was that a number of employees had signed union authorization cards and listed their classification or job title as “supervisor.” (Tr. 45). Further investigation by the Union revealed that the Employer did have such a classification and, based upon Organizer Robert Aiguier’s conversations with employees in the supervisor classification, those individuals were not, in the Union’s opinion, Section 2(11) supervisors. (Tr. 45-47).

After the Union filed its representation petition seeking a unit that included “supervisors”, a hearing was held at the offices of Region One before Alejandra Hung on January 6 and 9, 2012. During the first day of hearing, the Union ultimately amended its original petition to exclude the classification of supervisors. (Board Exhibit 2, at 8-9). At the close of the first day of hearing, after the Union had agreed to amend the petition to remove the supervisor classification, Attorney Moss stated that “there are approximately 66 individuals employed as supervisors, and we intend to make an offer of proof as to their authority, establishing that they are appropriately excluded from the unit under Section 2(11) of the Act.” (Board Exhibit 2, at
12). The Union’s Director of Organizing, Steven Sullivan, replied that “I would argue that we have sub - -petitioned for the supervisors so we don’t need to get into who they are and what they do.” (Board Exhibit 2, at 12-13). At that point, Hearing Officer Hung stated: “Let the record reflect that the amended petition does not include the *job classification* of supervisor.” (Board Exhibit 2, at 13) (Emphasis added). Hearing Officer then added, “let the record reflect that the issue of supervisors will not be litigated at this proceeding, but that the Employer’s counsel, Mr. Moss, is certainly entitled to an offer of proof.” (Board Exhibit 2, at 13). Thus, as of the close of the first day of hearing, it is obvious that the Union had removed the classification of “supervisor” from the petition, that the Employer nonetheless wanted a ruling as to whether those employees in the classification of “supervisor” were Section 2(11) supervisors under the Act, and that the Board had determined that litigating that issue was not necessary since the Union was no longer petitioning for the classification of supervisors.

At the beginning of the second day of hearing, Hearing Officer Hung asked for a stipulation that the Unit exclude “supervisors, project managers, and auditors.” (Board Exhibit 3, at 21). Mr. Moss then asked for a “slight modification. Excluding supervisors as defined in the Act; I would add that phrase.” Hearing Officer Hung then commented that “you’re talking about statutory supervisors,” and then reiterated the stipulation but this time named those as being excluded as “project managers, and auditors, and guards and supervisors as defined in the Act,” to which the parties then stipulated. (Board Exhibit 3, at 21-22).

The Employer argues that this somehow evidences that the parties did not intend to exclude both the supervisor classification and supervisors under the Act, but such a reading requires one to ignore the hearing transcript as a whole and take this passage out of context. First, as noted, Hearing Officer Hung commented that Mr. Moss, in seeking to tweak the unit
description language, was “talking about statutory supervisors,” as opposed to the supervisor classification, which the parties had already agreed, and Hearing Officer Hung had confirmed, would be excluded. Thus, the fact that she then restated the unit description to exclude only “supervisors as defined in the Act” and not “supervisors” is not dispositive, as it was clearly an unintentional omission.

Second, and most critically, it is clear that Mr. Moss sought to insert the phrase “supervisors as defined in the Act” not because he was maintaining that only those employees in the supervisor classification who were also statutory supervisors were to be excluded, but because he was seeking a ruling or stipulation that the employees in the statutory classification were supervisors as defined in the Act and therefore should also be excluded under the law, and not just based upon the agreement of the parties. This is further evidenced by the later exchange among Hearing Officer Hung, Ms. Moss, and Mr. Sullivan during the second day of hearing:

HEARING OFFICER HUNG: Mr. Moss, for the Employer, I know you have – want to state your position on the record as to the inclusion of the classification of supervisors in the original—as listed in the original petition.
MR. MOSS: Yes, thank you. The Employer’s position 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. They are either eligible to vote or not eligible to vote and it’s a disservice to them not to have it clearly understood what their status is.
We submit an offer of proof that if permitted to present evidence, the evidence would show that the approximately 55 supervisors regularly assign overtime, exercise independent judgment and discretion in directing the work of the valet attendants, attendants, floor attendants and cashiers. That they have the authority to issue written warnings on their own, to take further disciplinary action on their own, and/or to effectively recommend the issuance of written warnings and stronger discipline up to and including termination.
Their starting pay is approximately 2.50--$2.50 an hour higher than the people that they supervise.
There are seven locations at which supervisors work a shift at night when they are the only represent[ative] of management at those locations. There are other locations where a supervisor is the highest representative of management during the day shift.
Thank you. That’s our position.
HEARING OFFICER HUNG: Thank you.
Any response, Mr. Sullivan, for the Petitioner –
MR. SULLIVAN: Yeah
HEARING OFFICER HUNG: --as to whether that issue should be addressed—
MR. SULLIVAN: Yeah, that –
HEARING OFFICER HUNG: --at this hearing?
MR. SULLIVAN: -- that’s my point; *I don’t believe we need to discuss supervisors in this case. There will most likely be another RC case later with the supervisors, but I don’t think we need to bog down the record* –
HEARING OFFICER HUNG: Okay.
MR. SULLIVAN: -- about this at all.
HEARING OFFICER HUNG: Thank you, Mr. Sullivan. (Emphasis added)

Thus, it is clear that Mr. Moss was still attempting to litigate the issue of whether the employees in the supervisor classification were Section 2(11) supervisors because, as evidenced by Mr. Sullivan’s statement, the Union was not conceding that they were statutory supervisors and had indicated that it might seek to organize the supervisors separately at a later date. Therefore, it is obvious that Mr. Moss was seeking to have the supervisors’ Section 2(11) status decided at the hearing, so as to potentially derail a later election involving the supervisors.

There was no other reason to litigate this issue, as the Union had agreed to amend the petition to exclude the “supervisors.” Ms. Hung therefore determined that there was no need to determine whether those employees in the supervisor classification were Section 2(11) supervisors, since the Union was not seeking to represent those employees. The Employer had no right to present evidence, beyond an offer of proof, on the Section 2(11) status of a group of employees that the parties had already agreed would not be part of the petitioned-for unit.

Thus, Administrative Law Judge Bogas logically held that the clear language of the Decision and Direction of Election, as well as the hearing transcript, confirmed that the parties intended to exclude all employees holding the “supervisor” classification, and not just Section 2(11) supervisors.
B. The Administrative Law Judge’s Rejection of the Employer’s Argument that the
Fifteen Employees Holding the Supervisor Classification Who Voted Were
Misclassified as Supervisors and Should Have Been Included in the Unit is Supported
by the Factual Record and the Law.

The Employer claims that the fifteen supervisors in question were “misclassified” as
supervisors because they do not “supervise” anyone, and that they instead share a community of
interest with the other employee classifications in the unit. The ALJ correctly rejected this
argument.

First, as previously noted, the pre-election hearing transcript reveals that Mr. Moss never
made reference to a subset of fifteen supervisors who were misclassified as “supervisors.” If the
Employer truly believed that the fifteen employees in question were misclassified as supervisors,
it could have raised this issue at the pre-election hearing. The Employer was not prevented from
introducing evidence or argument that certain individuals classified as “supervisors” were
misclassified and should be included in the bargaining unit. Indeed, during the second day of
hearing, Mr. Moss stipulated that the then-current count of employees in each proposed
classification consisted of “189 attendants, 3 valets, 0 floor attendants, 7 lead attendants, 70
cashiers, 2 dispatchers, 5 shuttle drivers, and 36 maintenance workers.” (Board Exhibit 3, at 23-
24). This would seemingly have been an opportune time for Mr. Moss to explain that there were
some individuals who were classified as supervisors but who were more akin to attendants or
other classifications in the Unit, but he never did so. Moreover, the Employer has yet to explain,
either during the Hearing, in its Post-Hearing Brief, or in its Brief to Support its Exceptions, why
it failed to do so.  

---

8 The Employer claims that the fact that Mr. Moss referenced, at the pre-election hearing, there being
“approximately 55 supervisors” somehow shows that the Employer did mention that there were fifteen misclassified
supervisors who shared a community of interest with the other employees in the bargaining unit. This is an absurd
argument, as the Employer never indicated during the pre-election hearing that there were allegedly two groups of
“supervisors,” one consisting of 55 employees who should be excluded, and the other made up of 15 “misclassified”
The ALJ correctly ruled that the Employer could not wait until after the election to identify the specific employees in the previously excluded classification of supervisor whose ballots it now wants counted, when it failed to do so at the pre-election hearing. An employer’s “challenges to pre-election rulings that employers are not eligible to vote” must “be made prior to the actual casting of ballots.” *Mercedes-Benz of San Diego*, 357 NLRB No. 67, 2011, Slip Op. at 2, quoting *NLRB v. A.J. Tower Co.*, 392 U.S. 324, 331 (1946).

In any event, even assuming, *arguendo*, that the Employer’s argument that these fifteen supervisors were misclassified as supervisors should even be considered, it was properly rejected by Administrative Law Judge Bogas. The Employer’s argument is based upon the claim that because the fifteen supervisors in question, for various reasons, allegedly do not “supervise” anyone, they are therefore not performing the same job duties and functions of the other employees classified as supervisors, and are instead performing duties more akin to attendants and valets. This argument was properly rejected by the ALJ because the Employer failed to introduce evidence to show that these fifteen employees were not still performing the functions of the supervisor classification.\(^9\)

---

\(^9\) In addition to claiming that some of the fifteen employees were working at lots that are now automated, and that there is no one there to “supervise”, the Employer also maintains that it did not reclassify some of the fifteen supervisors as attendants or some other non-supervisor classification because it did not want to reduce their pay rates. Such an explanation lacks credibility because the Employer simply could have kept these employees at their current pay rate but coded them in a classification other than “supervisor”. (Tr. 176-177). Similarly, the explanation that the Employer only kept supervisors Romeo Gauvin and Joseph Arthur in the supervisor classification because they had been working as “supervisors” at two automated lots, Memorial Drive and Riverview in Cambridge, previously run by another company, LAS Parking, and that the client requested or required that those employees continue to be classified as “supervisors” by Central Parking, is not a sufficient reason for including them in the Unit. The Company is ultimately responsible for the titles, classifications, and/or job codes its employees hold.
Critically, the "scope of the position," as stated in the supervisor job description, requires a supervisor to be "responsible for the daily routine supervision of field staff, handling of customer issues and the support of the Operations Manager." (Petitioner Exhibit 4). Thus, "supervising" vis-à-vis other employees, is not the only critical component of the supervisor classification. The Employer introduced no evidence to suggest that these fifteen employees were not still engaging in the "daily routine supervision of the facility" and/or supporting the Operations Manager. Indeed, as noted by the ALJ, the Employer's Regional Human Resources Manager, F. Michael Mooney admitted that these fifteen supervisors are still "kind of running the show." (Tr. 109, 169).

In addition, Mooney testified that these fifteen supervisors, whether they work at an automated lot or not, are still responsible for checking gates and "spitters" to ensure that the equipment is working properly; responsible for ensuring that "spitters" have an adequate number of tickets filed in the correct sequence; responsible for reporting to a manager the status of the ticket inventory; handle customer complaints; are required to be familiar with the facility's operations; and are responsible for taking care of malfunctioning equipment and/or leaving a note for a manager about the equipment. (Tr. 202-203). These are all responsibilities clearly spelled out in the supervisor classification job description (Petitioner Exhibit 4).

Furthermore, Mooney conceded that there are no job duties in the supervisor job description that are performed by attendants or valets at the non-automated facilities. (Tr. 208). Thus, these fifteen supervisors are still performing the essential and exclusive job duties of the supervisor classification and, therefore, should be excluded from the bargaining unit like the approximately fifty-five other employees in the "supervisor" classification.
C. The Union Will Be Unfairly Prejudiced if the Ballots of the Fifteen Employees Holding the Supervisor Classification Are Counted.

As previously noted, at no point during the pre-election hearing did the Employer ever identify those employees classified as supervisors whom it claims do not perform supervisory functions. (Board Exhibits 2 and 3). Mr. Moss did not request that the parties agree to a Norris Thermador list, and he admitted that he never identified the fifteen individuals it now claims are misclassified as supervisors. (Tr. 224). The Excelsior List provided by the Employer did not identify who these employees were, either, as there was no classification next to each employee’s name. (Petitioner’s Exhibit 5). The Union therefore had no knowledge about this alleged special subset of employees in the supervisor classification, and therefore campaigned with the understanding that no one in the “supervisor” classification was eligible to vote. For the Employer to now be able to pick and choose which of these seemingly excluded supervisors should be allowed to vote is patently unfair to the Union.

Both Steven Sullivan and Robert Aiguier testified that they campaigned prior to the election with the understanding that employees in the supervisor classification were not eligible to vote, per the agreement of the parties and the specific language of the Decision and Direction of Election. Sullivan testified that he told his organizers to “leave [the supervisors] alone and if there was a question, possibly, you know, form their own union later on. But I told them that these people are ineligible to vote and not to, you know, interact with them.” (Tr. 33). Aiguier testified that because they had “decided not to include the supervisors . . . I limited my conversations with the supervisors and I told them that if they were still interested after we had this election we could have a separate election for the supervisors.” (Tr. 50). Aiguier also recalled that he spoke with approximately twenty-three supervisors and advised them that they were not eligible to vote in the election. (Tr. 50-52, 68).
Moreover, as noted by Administrative Law Judge Bogas, John Saunders, one of the fifteen supervisors in question and the only one to testify at the hearing, stated that he had not seen or heard anything from the Union during the campaign, further evidence that the Union did not campaign for the votes of any individuals holding the supervisor classification. (Tr. 214).

The Union therefore acted in accordance with the mandate of the Decision and Direction of Election and the parties’ stipulation and did not actively campaign for the votes of the supervisors. Union organizers even told the supervisors who asked about the election that they were not eligible to vote. Allowing the Employer, which is responsible for classifying its own employees, to benefit from its incompetence (or downright deception), and to essentially handpick after the Decision and Direction of Election which of the employees in the supervisor classification are eligible to vote, without notice to the Union, put the Union at an extreme disadvantage in this election. While it is true that the Union currently has twenty-one more ballots cast for it than against it, the ballots of those employees whom the Union logically and rationally believed were not eligible to vote, and therefore expended little energy in wooing, should not be allowed to be the potential determining factor as to whether the Union is certified as the bargaining unit employees’ collective bargaining representative.

IV. **Conclusion**

For all of the foregoing reasons, and on the record as a whole, the Board should affirm Administrative Law Judge Paul Bogas’ findings in his Report on Challenged Ballots and dismiss the Employer’s Exceptions.
Dated this 18th day of June, 2012

Respectfully submitted,

Teamsters Local Union No. 25

By its Attorney

[Signature]

Jonathan M. Conti
Feinberg, Campbell & Zack, P.C.
177 Milk Street
Boston, MA 02109
(617) 338-1976
jmc@fczlaw.com

CERTIFICATE OF SERVICE

I, Jonathan M. Conti, hereby certify that I caused a copy of the foregoing to be sent via electronic mail, to Philip Moss, Esq. (pmoss@laborlawyers.com), James M. Walters, Esq. (jwalters@laborlawyers.com), and Joseph F. Griffin, Esq (Joseph.Griffin@nlrb.gov) and sent overnight mail to Regional Director Rosemary Pye, National Labor Relations Board, Thomas P. O’Neil Federal Building, 10 Causeway Street, Room 610, Boston, MA 02222-1072

Dated: June 18, 2012

[Signature]