

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

Case 1-RC-71163

Employer,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 25,

Petitioner.

**EMPLOYER'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S REPORT ON CHALLENGED BALLOTS**

Comes now the Employer, Kinney System, Inc., d/b/a Central Parking System of Massachusetts ("Employer" or "Central Parking"), pursuant to Section 102.69 of the Board's Rules and Regulations, as amended, files the following Exceptions to the Report on Challenged Ballots issued by Administrative Law Judge Paul A. Bogas on May 15, 2012, and states as follows:

I. The employer excepts to the ALJ's findings that *Aigier [sic] 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.* (ALJD, p. 3, lines 7-9)

II. The Employer excepts to the ALJ's findings that *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. (ALJD, p. 4, lines 12-15)

III. The Employer excepts to the ALJ's unnecessary and unwarranted dicta¹ that *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.* . (ALJD, p. 4, lines 39-40)

IV. The Employer excepts to the ALJ's conclusions that *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.* (ALJD, p. 6, lines 21-23)

V. The Employer excepts to the ALJ's findings and conclusions that *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 contend 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 the employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.* (ALJD, p. 6, lines 29-33)

¹ The Employer wants to make it clear that it is not excepting to an ALJ's "credibility determination" (under *Standard Dry Wall Products*, 91 NLRB 544 (1950)), as no such determination was actually made, requested or even warranted. The ALJ's slighting reference to credibility of the witness was uncalled for and unwarranted. "When Petitioner's Representative was permitted to testify (over the Employer's strenuous objection) about the Petitioner's "intent" during the pre-election hearing, the Employer's counsel subsequently testified about what was actually said (with references to the transcript in Bd. Exhs. 2 and 3) during that hearing among himself, Petitioner's Representative and the Hearing Officer. The Employer's counsel's testimony was very brief, was never contradicted and was not even subject to cross-examination on the particular point at issue. Moreover the ALJ was expressly made aware that Hearing Officer Hung had entered the hearing room in this case at the beginning of this testimony (TR 219). Thus, the ALJ should have either [1] sought the clarifying testimony of Hearing Officer Hung (who was present and available) or [2] established an adverse inference (from her failure to testify) in favor of counsel's already brief and corroborated testimony under *International Automated Machines*, 285 NLRB 1122 (1987). The ALJ need not, or should not, have hinted at a credibility dispute that was non-existent.

VI. The Employer excepts to the ALJ's conclusions 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-on operation of the parking facilities and vehicles, and in providing services directly to customers.* (ALJD, p. 6, lines 42-47)

VII. The Employer excepts to the ALJ's findings that the evidence indicates *that employees in the petitioned-for positions share none of those responsibilities and are not responsible for similar tasks.* (ALJD, p. 7, lines 12-13)

VIII. The Employer excepts to the ALJ's findings that *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.* (ALJD, p. 7, lines 13-17)

IX. The Employer excepts to the ALJ's findings that *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.* (ALJD, p. 7, lines 17-19)

X. The Employer excepts to the ALJ's findings that *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.” (ALJD, p. 7, lines 27-29)

XI. The Employer excepts to the ALJ’s conclusions 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.* (ALJD, p. 8, lines 17-20)

XII. The Employer excepts to the ALJ’s findings that *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.* (ALJD, p. 8, lines 28-30)

XIII. The Employer excepts to the ALJ’s conclusions 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.* (ALJD, p. 9, lines 18-24)

XIV. The Employer excepts to the ALJ’s findings that *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.* (ALJD, p. 9, lines 28-30)

XV. The Employer excepts to the ALJ's conclusions that *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.* (ALJD, p. 9, lines 30-32)

XVI. The Employer excepts to the ALJ's conclusion 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.* (ALJD, p. 9, lines 40-42)

XVII. The Employer excepts to the ALJ's findings that *fifteen of the challenged ballots were submitted by individuals who were employed by the Employer in its "supervisor" job classification.* (ALJD, p. 10, lines 26-27)

XVIII. The Employer excepts to the ALJ's conclusion that *the 15 at-issue employees were all classified by the Employer as supervisors.* (ALJD, p. 10, lines 39-41)

XIX. The Employer excepts to the ALJ's findings that *the Employer [did not] 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.* (ALJD, p. 10, lines 45-50)

XX. The Employer excepts to the ALJ's findings 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. (ALJD, p. 11, lines 20-23)

XXI. The Employer excepts to the ALJ's findings that *the Union made clear at the pre-election hearing that it was not petitioning to represent any of those individuals who the Employer 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. (ALJD, p. 11, lines 23-27)*

XXII. The Employer excepts to the ALJ's findings that *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 supervisors and "supervisors as defined in the Act."* (ALJD, p. 11, lines 27-30)

XXIII. The Employer excepts to the ALJ's conclusions that *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. (ALJD, p. 11, lines 30-32)*

XXIV. The Employer excepts to the ALJ's findings and conclusions that *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 were properly omitted from the Excelsior list because they were within that excluded classification. (ALJD, p. 11, 32-36)*

XXV. The Employer excepts to the ALJ's conclusions that *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 petitioned-for employees, and therefore should have been included in the unit against the Union's wishes, the Employer failed to raise that argument in a timely manner.* (ALJD, p. 11, lines 38-42)

XXVI. The Employer excepts to the ALJ's findings and conclusions that *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 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.* (ALJD, p. 11, lines 42-46)

XXVII. The Employer excepts to the ALJ's findings that *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 insert members of the previously excluded class of individuals into the pool of eligible voters.* (ALJD, p. 11, lines 48-50)

XXVIII. The Employer excepts to the ALJ's conclusion that *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.* (ALJD, p. 12, lines 20-22)

XXIX. The Employer excepts to the ALJ's findings that *both the Union and the Hearing Officer made clear 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). (ALJD, p. 12, lines 24-26)

XXX. The Employer excepts to the ALJ's findings that *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 remotely suggested by the transcript of the pre-election hearing.* (ALJD, p. 12, lines 26-30)

XXXI. The Employer excepts to the ALJ's findings that *during the on-the-record discussions that occurred both before and after the oral stipulation, the Union representative and the Hearing Officer made clear that the Union was not petitioning to represent individuals in the supervisor classification, regardless of whether those individuals were Section 2(11) supervisors.* (ALJD, p. 12, lines 38-41)

XXXII. The Employer excepts to the ALJ's findings and conclusions that *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.* (ALJD, p. 12, lines 45-50)

XXXIII. The Employer excepts to the ALJ's conclusions that *to the extent 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. (ALJD, p. 13, lines 5-7)

XXXIV. The Employer excepts to the ALJ's conclusions that *the Regional Director's Decision expressly excluded both "supervisors" and "supervisors as defined by the Act" from the unit.* (ALJD, p. 13, lines 7-8)

XXXV. The Employer excepts to the ALJ's conclusion that *it is the Employer's argument on this point that is frivolous.* (ALJD, p. 13, lines 11-12)

XXXVI. The Employer excepts to the ALJ's conclusion that *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."* (ALJD, p. 13, lines 12-18)

XXXVII. The Employer excepts to the ALJ's conclusion 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.* (ALJD, p. 13, lines 18-20)

XXXVIII. The Employer excepts to the ALJ's conclusion that *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. (ALJD, p. 13, lines 30-32)

XXXIX. The Employer excepts to the ALJ's conclusion that *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. (ALJD, p. 13, lines 32-36)*

XL. The Employer excepts to the ALJ's finding that *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. (ALJD, p. 13, lines 37-39)*

XLI. The Employer excepts to the ALJ's finding and conclusion that *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." (ALJD, p. 13, lines 46-50)*

XLII. The Employer excepts to the ALJ's conclusion that *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." (ALJD, p 14, lines 6-9)*

XLIII. The Employer excepts to the ALJ's finding that *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.* (ALJD, p. 14, lines 14-16)

XLIV. The Employer excepts to the ALJ's conclusion that *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.* (ALJD, p. 14, lines 18-20)

XLV. The Employer excepts to the ALJ's finding and conclusion that *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.* (ALJD, p. 14, lines 22-26)

XLVI. The Employer excepts to the ALJ's finding and conclusion that *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.* (ALJD, p. 14, lines 48-50)

XLVII. The Employer excepts to the ALJ's conclusion 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. (ALJD, p. 15, lines 6-11)

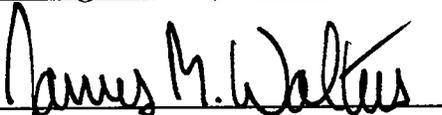
XLVIII. The Employer excepts to the ALJ's recommendation that the Board certify the results of the election in favor of the Union.

XLIX. The Employer excepts to the ALJ's refusal to consider its request that the challenges to the ballots of Sosina Abebe, Bezawit Abera, Demalash Abera, Fuad Ali, Meriyama Alioui, Osman Amin, Joseph Arthur, Andonet Bekele, Duc Doung, Mohamed Farah, Jose Flores, Romeo Gauvin, Felix Gonzalez, Ling Nerie, Ben Adam Ragmari, John Saunders, Eleni Shaba, Shane Smith, Hiruy Tasfaye, Zheng Wang and Mekdes Worku be overruled, and that their ballots be opened and counted.

Respectfully submitted,

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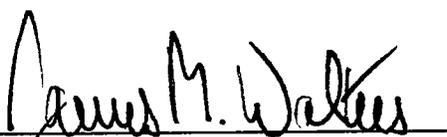
CERTIFICATE OF SERVICE

I certify that I have, this 12th day of June, 2012, served a copy of the foregoing EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S REPORT ON CHALLENGED BALLOTS and BRIEF IN SUPPORT, on the following individuals, via U.S.

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