

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

**In the Matter of:**

**CVS ALBANY, LLC. d/b/a CVS,**

**Employer,**

**and**

**LOCAL 338, RWDSU/UFCW,**

**Petitioner.**

**Case No. 29-RC-155927**

**ANSWERING BRIEF IN OPPOSITION TO PETITIONER LOCAL 338,  
RWDSU/UFCW'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S  
DECISION AND DIRECTION TO COUNT TWO DETERMINATIVE CHALLENGED  
BALLOTS**

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the "Board"), the Employer, CVS Albany, LLC d/b/a CVS (the "Employer"), by and through its undersigned counsel, hereby files this Answering Brief in Opposition to Petitioner Local 338, RWDSU/UFCW's ("Union" or "Petitioner") Request for Review of the Regional Director's Decision and Decision to Count Two Determinative Challenged Ballots.<sup>1</sup>

In the instant Request for Review, the Union contends that the Regional Director erred in finding that the unit description contained in the Stipulated Election Agreement is facially ambiguous. In doing so, the Union ignores the fact that the Stipulated Election Agreement *is* facially ambiguous because the parties never defined the term "floater," and gave

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<sup>1</sup> The Board applies a three-part test to determine whether an individual whose ballot has been challenged should be included in a stipulated unit. Caesar's Tahoe, 337 NLRB 1096, 1097 (2002). First, if the applicable stipulated agreement is unambiguous, the Board will simply enforce the terms as to a challenged ballot. Id. If the terms of the agreement are ambiguous, the Board looks to the intent of the parties via the normal methods of contract interpretation, including examination of extrinsic evidence. Id. If the parties' intent remains unclear, the Board applies the standard community of interest test. Id.

no indication in the Stipulated Election Agreement that the three challenged voters were regarded as “floaters.”<sup>2</sup> Based upon the Stipulated Election Agreement’s lack of clarity in this regard, the Regional Director was able to discern three separate plausible readings of the unit description as it pertains to the eligibility of “floaters.” As a result, the Regional Director’s Decision demonstrates that the parties’ intent could not have been gleaned exclusively from the face of the Stipulated Election Agreement.

Next, the Regional Director properly determined that the Union presented insufficient extrinsic evidence, predicated primarily upon a few employees’ subjective beliefs as to the meaning of the term “floater,” to demonstrate that the parties reached a meeting of the minds over whether the three challenged voters should be included in the agreed-upon unit. Finally, the Union does not dispute that Debra Ellsmore or Debbie Henry-Aughton share a community of interest with the other employees listed in the unit description. As a result, the Regional Director correctly held that Ellsmore and Henry-Aughton’s ballots should be counted. Accordingly, the Union’s Request for Review should be denied.<sup>3</sup>

**I. STATEMENT OF THE CASE**

On July 14, 2015, Local 338, RWDSU/UFCW filed a petition for an election in the Employer’s Store 2812 (also referred to herein and during the hearing as the “Flatbush store”), in Brooklyn, New York. The parties signed a Stipulated Election Agreement (which was approved by the Brooklyn Region of the Board on July 23, 2015), agreeing to the following voting unit:

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<sup>2</sup> The three challenged voters were Debbie Henry-Aughton, Debra Ellsmore, and Kane Chow.

<sup>3</sup> As noted, the Union did not except to the Hearing Officer’s determination to overrule the challenge to Debbie Henry-Aughton’s ballot. Therefore, the Union has abandoned this challenge in the instant Request for Review. See e.g. Sorensen Lighted Controls, 286 NLRB 969, 987 (1987)(finding that union abandoned its challenge to a particular voter where union failed to brief issue); ACS Industries, 188 NLRB 383, 392 (1971).

All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift supervisor Bs and Photo Lab Supervisors, but excluding all floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, manager and supervisors as defined in the Act.

The election was conducted on August 7, 2015, with the following results: four votes for the Petitioner, three votes against the Petitioner, and three ballots challenged by the Petitioner. The basis for the Petitioner's three challenges was a claim that the three challenged employees were "floaters," who should be excluded from the voting unit. The Employer argued that the three challenged employees were not floaters. Rather, they were in the included classification "Clerk/Cashiers," and were eligible voters because they were regular part-time employees at the Flatbush store.

On August 19, 2015, the Regional Director issued a Report on Objections and Challenges and Notice of Hearing, overruling the Petitioner's election objections, and scheduling a hearing regarding the three outcome-determinative challenged ballots. The Board issued a Decision and Order adopting the Regional Director's findings and recommendations as set forth in the Report on Objections and Challenges.

A challenges hearing was held on September 3 and 10, 2015, and the Hearing Officer issued his Report on September 30, 2015. In his Report, the Hearing Officer first considered whether there was a meeting of the minds between the parties as to who is a floater. Finding that there was no meeting of the minds, the Hearing Officer then considered whether the three challenged employees were regular part-time employees who were eligible to vote. The Hearing Officer overruled the challenges to Ellsmore and Henry-Aughton. The Hearing Officer did, however, sustain the challenge to employee Kane Chow.

On October 21, 2015, the Employer filed timely exceptions to the Hearing Officer's determination to sustain the challenge to Kane Chow. That same day, the Union filed exceptions to the Hearing Officer's determination to sustain the challenge to Debra Ellsmore.<sup>4</sup> The parties subsequently filed answering briefs.

On November 18, 2015, the Regional Director issued a Decision and Direction to Count Two Determinative Challenged Ballots ("Decision") which affirmed the Hearing Officer's findings. The parties each timely filed a Request for Review with the Board.

## **II. APPLICABLE LEGAL FRAMEWORK AND THE REGIONAL DIRECTOR'S DECISION**

The Regional Director, in concert with Hearing Officer, held the Stipulated Election Agreement was facially ambiguous because the exclusion of "floaters" was subject to three plausible interpretations. Specifically, the Regional Director explained:

- (1) [t]he exclusion could reasonably be interpreted to apply only to employees in the floater job classification, i.e., pharmacist-floaters. Under this view, the disputed employees would not be excluded inasmuch as their job classification is clerk/cashier;
- (2) [t]he term floater could reasonably be read more expansively to refer to a general understanding of floater, i.e. employees who move from store to store, without regard to the regularity of their employment at the Flatbush Avenue store. Under this view, the three disputed employees, whose home stores are other than the Flatbush Avenue store, would be excluded from the unit...; and
- (3) [t]he exclusion of floaters [could be] meant to apply only to employees who move from store to store who are not regular full-time or part-time retail employees at the Flatbush Avenue store. In support of this view, I note that the stipulated unit includes *all* regular part-time retail employees, including clerk/cashiers, and two of the three disputed employees have been found to be regular, part-time retail employees at the Flatbush Avenue store.

(Decision, at 3-4).

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<sup>4</sup>

See footnote 3.

The Regional Director then proceeded to find there was “insufficient extrinsic evidence to discern the parties’ intent” regarding the term “floaters.” (Decision, at 6). In support of this finding, the Regional Director concluded that the record evidence did not “conclusively establish that the Employer regularly used the term floaters to refer to retail employees who worked at different stores or that the employees knew that the term was used by the Employer in that way.” (Decision, at 5-6). Additionally, the Regional Director found the term “floater” has different meanings in different contexts, and because it is “not a legal term or word of art, reference to a technical meaning for clarification is unavailable.” (Decision, at 6). Accordingly, the Regional Director proceeded to the third step of the Caesar’s Tahoe analysis and correctly determined that Debra Ellsmore shared a community of interest with the other unit employees (a portion of the Regional Director’s Decision the Union does not challenge in this Request for Review). (Decision, at 6-7).<sup>5</sup>

As detailed below, the Regional Director and Hearing Officer correctly overruled the challenges to Ellsmore and Henry-Aughton’s ballots.

## ARGUMENT

### POINT I

#### THE REGIONAL DIRECTOR CORRECTLY HELD THE STIPULATED ELECTION AGREEMENT IS AMBIGUOUS

In the present case, the Union asserts the Regional Director erred in determining that the Stipulated Election Agreement was facially ambiguous. The Union is incorrect because the parties never clearly defined which employees would qualify as floaters. As discussed below, each of the Union’s contentions contained in its Request for Review is without merit.

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<sup>5</sup> The Regional Director noted the Union did not file exceptions to the Hearing Officer’s finding that Henry-Aughton shares a community of interest with the other unit employees. As to Kane Chow, the Employer has separately filed a Request for Review of the Regional Director’s determination sustaining the challenge to his ballot.

**A. The Union's Arguments That The Stipulated Election Agreement Is Clear and Unambiguous Lack Merit**

The Union argues that the unit description language is clear and unambiguous, essentially ignoring that the parties never clearly defined the term "floater" when preparing the Stipulated Election Agreement.<sup>6</sup> In fact, the only way that the language in question could be deemed clear and unambiguous is if the challenged voters' job classifications were actually explicitly defined as "floaters."<sup>7</sup> See Kroger Co., 342 NLRB 202, 209 (2004)(although parties unambiguously agreed that "office clerical employees" were to be excluded from the unit, it was ambiguous whether "failed claims" employees were considered part of that excluded classification). Thus, given that the Regional Director identified three possible interpretations of the Stipulated Election Agreement (including one reading that would deem the three challenged voters included in the unit and another reading that would find the same voters excluded), he correctly concluded that the unit description was facially ambiguous. As noted below, the Union rests exclusively upon conjecture in its attempt to persuade the Board to reach an opposite conclusion.

**1. The Placement of The Term "All Floaters" In The Unit Description Does Not Resolve The Ambiguity**

First, the Union asserts that the placement of the term "floaters" in the list of excluded classifications before references in the Stipulated Election Agreement to other excluded pharmacy employees demonstrates that the term could not possibly refer solely to pharmacy

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<sup>6</sup> The non-Board authority the Union cited on pages 8 and 9 of its Request for Review regarding whether an agreement is ambiguous is inapposite because in none of the cited cases did the factual circumstances arise in the context of negotiating a Stipulated Election Agreement, much less where the parties failed to define a term referenced in the Stipulated Election Agreement.

<sup>7</sup> While the term "floater" in the Stipulated Election Agreement is ambiguous, the term "Clerk/Cashier" is not. Accordingly, if a clerk/cashier like Ellsmore or Henry-Aughton satisfies the standard for being a regular part-time employee, which Ellsmore does, she is properly included in the unit. In that regard, it is noteworthy that Ellsmore testified that her job classification is Clerk/Cashier (Tr. 251), a classification that is explicitly *included* in the unit.

floaters. (Union's Request for Review, at 9-10). However, what the Union ignores is that even if the term is not limited to pharmacy floaters, it is far from clear that the exclusion applies to the employees in question here. That is precisely why the Regional Director noted that the separate reference to floaters could be construed as superfluous and "cast[] some doubt on the view that the parties intended to exclude only pharmacist-floaters." (Union's Request for Review, at 10 citing Decision, at 4-5)(emphasis added). However, the Regional Director's doubts were inconclusive in light of the fact that it is undisputed the Employer maintains only one floater classification, and only in a non-retail position.

The Regional Director thus properly followed Board precedent in this regard. See USF Reddaway, 349 NLRB 329, 330 (2007). There, the Board held:

The problem in this case is that the unit description in the stipulation does not match the actual classifications of the Employer. The Employer's classifications are mechanic/fueler, mechanic/floater, parts/mechanic, fuel/tire/trailer employee, and equipment washer/general helper. If the stipulation were read literally, the unit would exclude all of these employees, for no such job is included in the stipulation. A more reasonable reading would be that all of these classifications were meant to be included, i.e., that the parties used shorter job designations in the stipulation. Under this approach the parts/mechanic would be included in the unit, under the term 'all mechanics'. However, even this interpretation is not supported by unambiguous language in the unit description. **Thus, if the phrase 'all mechanics' was meant to include all mechanic positions, why does the unit description also separately list the trailer mechanic position? In these circumstances we find that the language of the stipulation is unclear as to the parties' intent concerning [the employee's] unit status.**

(Emphasis added).

The Union's argument also disregards that it was the *Union* that sought the exclusion of floaters, that the Employer knew that the only floaters it employed were "pharmacy floaters," also commonly referred to as just "floaters," and that it was a Board agent who made the decision as to where in the Stipulated Election Agreement to insert the job classification

“floater.” (Tr. 169). Thus, following USF Reddaway, the only thing clear about the unit description is that it is *facially ambiguous*.

## 2. It Is Immaterial That “All Floaters” Is Not Capitalized

Next, the Union speculates that the capitalized titles in the Stipulated Election Agreement “signifies that these are [the employees’] actual titles at CVS...,” while “the word, ‘floaters,’ is not capitalized, which signifies that it does not correspond to any specific title at CVS, but that it refers to the general understanding of that word.” (Union’s Request for Review, at 11). The Union faults the Regional Director’s finding that “‘the pharmaceutical titles set forth in the exclusions, i.e., pharmacists and pharmacy technician, are not capitalized either,’ without an explanation as to why that is significant.” (Union’s Request for Review, at 11 citing Decision, at 4). However, the significance is clear: the Regional Director could not discern from the face of the Stipulated Election Agreement itself whether the capitalization of any particular word had any discernable meaning.

Undeterred, the Union then proceeds to contend that: (1) “[b]y agreeing to the lower-case form, both parties clearly meant that anyone who fits the description of the terms used, rather than the actual title, would be excluded;” and (2) [s]ince the Employer was the only party that knew of a classification entitled ‘Pharmacist Floater’ at the time the Agreement was signed, it had the onus to either include ‘Pharmacist-Floater’ in the category of ‘pharmacy employees,’ or, at the very least, capitalize the term, ‘floater.’” (Union’s Request for Review, at 11-12). Again, not only does the Union fail to cite to record evidence for this theory, the Union ignores: (1) that its argument is predicated upon extrinsic evidence (which is not to be considered to determine whether a stipulated election agreement is *facially ambiguous* or not); and (2) more

importantly, that the parties never clearly defined who constitutes a “floater.” Thus, the Board should disregard this meritless argument.

3. Whether There Are Limitations To The Phrase “All Floaters” Or Not Fails To Establish The Stipulated Election Agreement Is Clear and Unambiguous

In addition, the Union asserts the Regional Director erred by making an “unsolicited interpretation” that “the [Stipulated Election] Agreement can be read to mean that ‘all floaters’ is limited to those employees who are not ‘all regular part-time retail employees.’” (Union’s Request for Review, at 12-13). The Union misses the point of the Regional Director’s findings. The Regional Director *did not determine* that the Stipulated Election Agreement was facially ambiguous based solely on this possible reading of the unit description. Therefore, Four Seasons Solar Products Corporation, 332 NLRB 67, 70-71 (2000), relied upon by the Union, is inapposite. In that case, the Regional Director determined a collective bargaining agreement did not have contract bar quality on several grounds, including those the parties did not raise.<sup>8</sup> Thus, unlike here, the Regional Director’s ultimate conclusion rested on grounds the parties did not litigate.

By contrast, in this case, the Regional Director’s finding does not suggest that the aforementioned interpretation is the *only* interpretation of the Stipulated Election Agreement or that the Stipulated Election Agreement is ambiguous solely on that ground. Instead, the Regional Director, analyzing the record evidence, merely pointed out another plausible reading *in addition* to a reading supporting the inclusion of the employees within the unit and another reading suggesting that the same employees should be excluded. Hence, on the Stipulated Election Agreement’s face, it would not be possible to determine an employee’s eligibility if on the one

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<sup>8</sup> The Board subsequently reversed the Regional Director’s findings that the collective bargaining agreement did not serve as a bar to a representation petition and noted that it did not need to address the additional grounds reached by the Regional Director. Id.

hand, he or she was deemed a regular part-time employee but, on the other hand, was also found to be a floater because he or she was assigned to a different home store than Flatbush Avenue but also worked at more than one store. Because the parties never clearly defined the term “floater” in the Stipulated Election Agreement, it would be impossible to resolve the eligibility of an employee in this category without resorting to extrinsic evidence of the parties’ intent. Therefore, the Regional Director properly concluded that the Stipulated Election Agreement was facially ambiguous for this reason as well.

## POINT II

### THE EXTRINSIC EVIDENCE RELIED UPON BY THE UNION DOES NOT UNEQUIVOCALLY DEMONSTRATE THE PARTIES REACHED A MEETING OF THE MINDS TO EXCLUDE THE THREE CHALLENGED VOTERS AS FLOATERS

Given the facial ambiguity in the Stipulated Election Agreement with regard to the classification of floater, it was incumbent upon the Union to point to sufficient extrinsic evidence to support its argument that the parties clearly intended to exclude the three challenged voters because they were floaters.<sup>9</sup> The Regional Director explained that “[t]he express intent of

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<sup>9</sup> To this end, Kroger Co., 342 NLRB at 209, discussed supra, is particularly apt to the present case. There, as noted above, the parties agreed that “office clerical employees” were to be excluded from the unit. The hearing officer, whose decision the Board affirmed in pertinent part, noted that although the parties unambiguously excluded “office clerical employees” from the unit, it was ambiguous whether “failed claims” employees were considered part of that excluded classification. Id. The hearing officer noted “[t]he only extrinsic evidence of the parties’ intent is the fact that if all four ‘failed claims’ employees fall outside of the ‘office clerical’ category, the stipulation excludes none of the employees at the [work site] as ‘office clericals.’” Id. However, the hearing officer refused to hold that “the exclusion of a category of employees in a stipulated election agreement is evidence of the parties’ intent to exclude at least one employee from the bargaining unit, as being a member of that category.” Id.

Further, in Buckley Southland Oil, 210 NLRB 1060, 1061 (1974), the Board held that the parties did not reach a meeting of the minds with respect to the eligibility of seasonal employees as set forth in a stipulated election agreement. The Board noted that prior to the election, the parties agreed that if a certain seasonal employee attempted to cast a vote, his ballot would be challenged and resolved in post-election proceedings. Thus, the Board ruled that “if the parties were under the same impression of the status of their agreement...there would have been no need to await ‘post election procedures’ to determine [the individual’s vote because he]... would have been, by agreement of the parties, excluded from voting.” Id.

Similarly, in the present case, the fact that the term “floaters” appeared in the list of excluded classifications *does not mean* that the parties intended that the three non-pharmacy employees the Union challenged are necessarily excluded “floaters.” See Kroger Co. Additionally, as noted supra, the Employer listed all three employees whom the

the parties concerning the definition of job classifications sought to be included or excluded in the stipulated unit may be determined by reference to the employer's regular use of the classifications in a manner known to its employees, industry practice, and the Board's established definitions of the classifications." (Decision, at 5 citing National Public Radio, Inc., 328 NLRB 75, fn. 2 (1999)).

Based on this standard, the Regional Director correctly held "[t]he record evidence herein does not conclusively establish that the Employer regularly used the term floaters to refer to retail employees who worked at different stores or that the employees knew that the term was used by the Employer in that way." (Decision, at 5-6). The Union contends that the Regional Director erred "in concluding that the record does not establish that the CVS employees understood the term floater to mean an employee who moves from store to store." (Union's Request for Review, at 13).

The Union's contention is without merit. First, as noted by the Regional Director, the evidence adduced at the hearing on this topic was far from uniformly conclusive:

In this regard, I note that the evidence includes testimony of: the Senior adviser of Human Resources explaining that management commonly referred to pharmacist-floaters as floaters; several employees who never heard managers use or define the term floater; an employee who heard reference only to a floater in the pharmacy; a former employee who heard a manager refer to floaters in about January 2015; and, another employee who heard a manager (from a store other than the Flatbush Avenue store) refer to floaters about four years ago.

(Decision, at 6).

Second, the Union gives too much weight or mischaracterizes the testimony of several current and former employees as to what *they* believed the term "floater" meant. For

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Union challenged on the pre-election Voter List. If there was a true meeting of the minds that these three individuals were excluded from the unit, the Employer would not have listed them on the Voter List which was filed and served two days after the Regional Director approved the Stipulated Election Agreement and the Union would not have to wait until the instant post-election procedures to determine their eligibility. See Buckley Southland Oil.

example, the Union quotes CVS's Senior Human Resources Advisor Ana Valentin as testifying that a floater is: "Someone who floats, right? Somebody who, you know, goes multiple places. They kind of float around, they're kind of here, there and everywhere I mean," as if that testimony somehow supported the Union's argument. (Union's Request for Review, at 3). But Ms. Valentin was describing the situation with respect to employees like the floaters in the pharmacy, who have no regularly assigned stores, and are assigned by a district scheduler wherever they are needed on a day-to-day basis to fill short term needs at pharmacies within the district. (Tr. 131-135). This description does not fit Ellsmore, who is not assigned "here, there, and everywhere." Rather she is assigned on a regular basis to five stores, four of which she has been assigned to on a regular basis for many years. (Tr. 245). And the description certainly does not apply to Henry-Aughton, who works three days at the Flatland store, and two days at the Flatbush store, week in and week out. (Tr. 179).

The fact is, the subjective beliefs of employees as to what the term "floater" means is of little consequence in this analysis and certainly does not establish what the employer's "regular use of the classification[] in a manner known to its employees [is]...." National Public Radio, 328 NLRB at 75, n. 2. The Union argues that "[t]he Regional Director appears to place a burden on the Union to prove that every witness recently heard from a CVS manager that a floater is a retail employee who moves from store to store." (Union Request for Review, at 15). The Union is, in some respects, correct because such clear extrinsic evidence would actually be instructive of the parties' intent. See National Public Radio, Inc. However, at best, the Union's evidence in support of this contention is limited to Ms. Valentin's testimony about pharmacy floaters and two stray remarks from store managers (one of whom was not even

a Flatbush Store manager). Such underwhelming extrinsic evidence is insufficient to support the Union's argument that the parties mutually agreed to exclude the voters in question.

There is also insufficient extrinsic evidence to conclusively establish the parties' intent with respect to the other criteria identified in National Public Radio, Inc. Thus, the Regional Director correctly held "there is no specific Board definition of a 'floater...,' Board cases reveal different applications of the word 'floater...,'<sup>10</sup> [and because] the term 'floater' is not a legal term or word of art, reference to a technical meaning for clarification is unavailable." (Decision, at 6). Other than purely conclusory assertions, the Union does not dispute this finding. Accordingly, there is insufficient extrinsic evidence regarding these criteria to instruct as to what the parties intended regarding the eligibility of the three employees who cast the challenged ballots.

### POINT III

#### THE TERM FLOATERS HAS NO LEGAL SIGNIFICANCE IN THIS CONTEXT

Finally, the Union argues that the three voters in question fit the definition of floaters on the grounds that "there is no dispute that the three challenged voters have home stores other than Flatbush Avenue, and that they move back and forth among various CVS store locations."<sup>11</sup> (Union's Request for Review, at 16). Whether or not they qualify as floaters in

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<sup>10</sup> Thus, the way that other courts or the Board in non-election agreement contexts have defined the term "floater" provides no insight as to what the parties contemplated in the instant case. (See Decision, at 6, n. 7).

<sup>11</sup> The Union's argument runs counter to the "dual function" concept in which the Board has ruled that:

[W]here employees perform unit work and non-unit work, such an employee should be included in the unit when the 'employee [performs unit work] for sufficient periods of time to demonstrate he has a substantial interest in the unit's wages, hours and conditions of employment.' *Bredero Shaw*, 345 NLRB 782, 786 (2005) (quoting *Air Liquide Amer. Corp.*, 324 NLRB 661, 662 (1997)). 'The Board has found that dual-function employees have a substantial interest with unit employees even when they perform unit functions less than half the time. *Bredero Shaw*, 345 NLRB at 786 (citing *Wilson Engineering Co.*, 252 NLRB 333, 334 (1980)).

(Hearing Officer's Report, at 13).

accordance with the *Union's* definition of that term is not relevant to the analysis. Rather, because the Agreement is facially ambiguous, and there is a lack of clear extrinsic evidence demonstrating the parties' intent, in accordance with Caesar's Tahoe, the Board must proceed to evaluate whether the three employees share a community of interest with the other employees in the unit.<sup>12</sup> Critically, the Union does not challenge the Regional Director's findings with respect to whether any of the three employees share a community of interest with the other unit employees.

Here, regardless of how the Union has described each employee's work assignments at the particular stores, it does not dispute that each employee has performed unit work for a sufficient period of time such that they share a community of interest with the other employees described in the unit. The Union should not seek to disenfranchise these voters in violation of the salutary purposes of the Act.

### CONCLUSION

For the foregoing reasons, the Union's Request for Review should be denied and the Region should be directed to count the ballots of all three challenged voters.

Respectfully submitted,

JACKSON LEWIS P.C.  
666 Third Avenue  
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/s Michael R. Cooper

Michael R. Cooper  
Daniel D. Schudroff

Dated: January 8, 2016

ATTORNEYS FOR CVS ALBANY, LLC. d/b/a CVS

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<sup>12</sup> The Employer has separately challenged, through its own Request for Review, the Regional Director's finding that Kane Chow lacks a community of interest with other employees on the grounds that, in accordance with such a determination, he will be disenfranchised because he will be ineligible to vote no matter when or for which store a representation petition is filed.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 8, 2016, I caused a true and correct copy of the foregoing **ANSWERING BRIEF IN OPPOSITION TO PETITIONER LOCAL 338, RWDSU/UFCW'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION TO COUNT TWO DETERMINATIVE CHALLENGED BALLOTS** to be served on Local 338 RWDSU/UFCW's counsel of record, Jae W. Chun, and Regional Director, National Labor Relations Board, Region 29, James G. Paulson, via electronic mail, at the following addresses of record.

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/s Daniel Schudroff  
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