

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

COLONIAL PARKING, INC.

and

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 27

CASE No. 04-RC-187843

**UNION'S STATEMENT IN OPPOSITION
TO REQUEST FOR REVIEW**

United Food and Commercial Workers, Local 27 ("the Union") submits this Statement in Opposition to the Request for Review filed by Colonial Parking, Inc. ("the Employer").

FACTUAL BACKGROUND

On December 1, 2016, the Regional Director directed a mail-ballot election be conducted between December 6 and December 27, 2016. Two employees, Lot Auditor Neil Blanchette and Skilled Maintenance Employee Paul York, voted subject to challenge. The mail-ballot election resulted in 10 votes for the Union and 9 votes against. The Employer did not file objections to the conduct of the election or to conduct affecting the results of the election.

On January 24, 2017, the parties participated in a hearing on the two challenged ballots. Hearing Officer Robert Gleason issued a report recommending to the Regional Director that Lot Auditor Blanchette and Skilled Maintenance Employee York be excluded from the bargaining unit and that their ballots not be opened and counted. On April 28, 2017, the Regional Director adopted the Hearing Officer's recommendation that the challenges to the ballots be sustained and issued a Certification of Representative. The Union adopts the recitation of facts in the Hearing Officer's Report, as adopted by the Regional Director. Hearing Officer's Report ("HOR") at 1–

11; Regional Director’s Decision on Exceptions to the Hearing Officer’s Report (“RD Decision”) at 3–4.

On May 16, 2017, the Employer filed a Revised Request for Review of the Regional Director’s Decision and Direction of Election and the Regional Director’s Decision on Exceptions to the Hearing Officer’s Report.

REASONS TO DENY REVIEW

I. The Company Forfeited Its Right to Challenge the Conduct of the Mail Ballot Election Because It Failed to File Timely Objections.

The Employer argues—for the first time—that the mail-ballot election was tainted by irregularities. Under the Board’s Rules and Regulations, allegations about “the conduct of the election or . . . conduct affecting the result of the election” must be raised by filing objections within seven days of the tally of ballots. 29 C.F.R. § 102.69(a). An objection to the conduct of the mail election and any claim that voters were disenfranchised should have been raised as objections immediately after the election. Because the Employer failed to assert timely objections, it is precluded from raising these issues in this request for review before the Board. *Superior Protection Inc.*, 341 NLRB 267, 267 (2004), *reconsideration denied by* 341 NLRB 614 (2004), *enf’d by* 401 F.3d 282 (5th Cir. 2005), *cert. denied* 546 U.S. 874 (2005); *Center for Social Change, Inc.*, 358 NLRB 161, 162 (2012) (*Noel Canning* Board). The Board should deny the Employer’s request for review on this ground.

II. The Regional Director Correctly Weighed the Evidence and Adhered to Well-Established Board Precedent in Determining that the Lot Auditor and the Skilled Maintenance Employee Should Be Excluded from the Stipulated Unit.

A. The Parties' Stipulated Unit Is Controlling Because It Does Not Violate Any Statutory Provision or Establish Board Policy.

The Employer argues that the Regional Director erred by not requiring the Union to make a *prima facie* showing that the stipulated bargaining unit is a readily identifiable group that shares a community of interest. However, the Employer's previous counsel did not raise this argument at the pre-election hearing, before the Hearing Officer, nor in the Employer's post-hearing brief. Rather, the parties expressly agreed to the unit and, as the Hearing Officer noted, "The Employer d[id] not appear to deny that the agreed-upon unit employees share a community of interest." HOR at 12 n.6. That the Employer's current counsel was not present at the pre-election hearing does not permit litigation of the stipulated unit at this stage.

The Board will not consider community-of-interest arguments regarding the appropriateness of a stipulated unit unless it violates "statutory provisions or established Board policies." *Goucher College*, 364 NLRB No. 71 (2016), slip op. at 1–2. The Board's analysis in stipulated-unit cases is "not intended to afford *de novo* review of the unit." *Tiffin Enterprise, Inc.*, 258 NLRB 160, 162 (1981). Further, "a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a nonstipulated-unit case on a 'community of interest' basis is not a violation of Board policy such as would justify overriding the stipulation." *Goucher College*, 364 NLRB No. 71, at 3 (Miscimarra, concurring) (quoting *White Cloud Prods., Inc.*, 214 NLRB 516, 517 (1974)). "Were the Board 'to review [the parties'] stipulation *de novo*, and make [its] own findings, [it] would be undercutting the very agreement which served as the basis for conducting the election." *Id.* (Miscimarra, concurring) (alterations

in original) (quoting *Tribune Co.*, 190 NLRB 398, 398 (1971)). Nothing in *Specialty Healthcare* changes this well-established Board law.

As the Regional Director's Direction of Election makes clear, the parties stipulated that the following employees constitute an appropriate bargaining unit:

All full-time and regular part-time Attendants, Lot Attendants, Valet Attendants, Cashiers, Customer Service Employees, Floaters, and Maintenance Associates employed by the Employer [at 13 locations in Wilmington, Delaware], excluding all office clerical employees, administrative and bookkeeping employees, managerial employees, guards and supervisors as defined by the Act.

Board Ex. 1. The Employer points to no statutory provision or Board policy that suggests this unit violates the Act. The Employer's only argument is that the employees within the stipulated unit do not share a community of interest.¹ That is an argument that the Employer should have litigated before the election. It is not entitled now to appear through new counsel to bring a collateral attack on the unit to which it stipulated. *Goucher College*, 364 NLRB No. 71, at 3 (Miscimarra, concurring); *White Cloud Prods., Inc.*, 214 NLRB at 517.

B. The Lot Auditor and the Skilled Maintenance Employee Do Not Share a Sufficient Community of Interest with the Stipulated Bargaining Unit.

The Employer contends that the Regional Director's decision misstates the record and misapplies the applicable Board precedent in excluding Lot Auditor Blanchette and Skilled Maintenance Employee York from the stipulated unit. To the contrary, the Regional Director properly weighed the record evidence and concluded that Blanchette and York: (1) perform different functions; (2) travel outside of the unit each day; (3) have limited contact with employees in the stipulated unit; (4) do not interchange with employees in the stipulated unit;

¹ To support this argument, the Employer relies on cases in which the parties did not stipulate to a bargaining unit, but rather the Board determined an appropriate unit after a pre-election hearing. See *Wheeling Island Gaming*, 355 NLRB 637, 637 (2010); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 446 (3d Cir. 2016); *Constellation Brands v. NLRB*, 842 F.3d 784, 788 (2d Cir. 2016).

(5) are separately supervised by Areas Managers; and (6) receive higher wages than employees in the stipulated unit. RD Decision at 5. This is a conclusion dictated by generations of Board decisions that employees who are “separately located and supervised and have little, if any, contact with unit employees in the performance of day-to-day duties, . . . do not have sufficient community of interest with the unit employees to require their inclusion in the unit.” *Federal Electric Corp.*, 191 NLRB 859, 861 (1971). In light of the clear evidence in support of Regional Director’s decision, the Board should deny the Employer’s request for review.

1. The Lot Auditor and the Skilled Maintenance Employee perform different functions than the employees in the stipulated bargaining unit.

The Regional Director correctly concluded that Blanchette and York perform different functions than the employees in the bargaining unit. RD Decision at 5. The Board has approved units of select jobs classifications where the unit employees’ “functions are entirely distinct from the functions of [other employees].” *DTG Operations*, 357 NLRB 2122, 2126–27 (2011). In fact, a unit is appropriate even where “the Employer’s facility is functionally integrated, . . . [but] each classification has a separate role in the process.” 357 NLRB at 2128; *see also Overnite Transportation*, 322 NLRB 723, 726 (1996) (excluding mechanics because they “have specialized skills and training to repair and maintain the Employer’s . . . equipment, are separately supervised, do not regularly interchange with drivers and dock employees, work different hours, and are the only employees on call.”).

Here, the different job functions of Blanchette and York preclude any claim that they share an overwhelming community of interest with the bargaining unit employees. Blanchette and York perform specialized job duties that the employees in the stipulated unit do not perform. For example, unlike Blanchette, bargaining unit employees do not carry barcode scanners to check parking permits or regularly place wheel-lock boots on improperly parked vehicles. Post-

Election Hearing Transcript (“Tr.”) at 144, 127. Unlike York, bargaining unit employees—including Maintenance Associates—do not pick up trash from other parking facilities, clear leaves or snow, or build replacement gates for the parking facilities. Tr. at 137, 146. Bargaining unit employees do not drive Company vehicles. Tr. at 146. Unlike the bargaining unit employees, Blanchette and York testified that they rarely interact with customers or provide any direct service to them. Tr. at 18, 60.

The Employer also argues that Skilled Maintenance Employee York is, in fact, a Maintenance Associate. This is not the case. Although York’s job title contains the word “maintenance,” York’s job duties, wage rate, and supervision indicate that his position is something very different than that of the employees denominated “Maintenance Associate.” In fact, Vice President of Operations Hankins testified, regarding Employer’s Exhibit 12, that York is within the *separate classification* of “Lot Maintenance.” Tr. at 116.

The evidence shows that Blanchette and York perform distinct functions for the Employer that are not shared by the employees within the stipulated bargaining unit. Blanchette and York do not share a community of interest with the bargaining unit employees. See *DTG Operations*, 357 NLRB at 2126–27..

2. The Lot Auditor and the Skilled Maintenance Employee regularly travel outside of the stipulated bargaining unit.

The Regional Director correctly determined that Blanchette and York have insufficient contact with the employees in the stipulated bargaining unit because they regularly travel outside of the unit. RD Decision at 5. This conclusion is well-supported by Board precedent. *See, e.g., Banco Credito y Ahorro Ponceno*, 160 NLRB 1504, 1509 (1966) (although the excluded employees are based in the petitioned-for facility, “the work of both [excluded] employees

requires substantial travel throughout the island, [thus] we find that they do not share a sufficient community of interest with employees in San Juan, and we shall exclude them from the unit.”).

The bargaining unit employees report to and perform all their duties in an assigned parking facility within the stipulated bargaining unit. Tr. at 130. By contrast, the testimony and documentary evidence presented at hearing show that Blanchette and York spend the majority of their time traveling among the Employer’s parking facilities, including those outside of the stipulated unit. For example, the data supplied by the Employer in Employer’s Exhibit 1 and Blanchette’s testimony and relied upon by the Regional Director clearly support the conclusion that Blanchette spends less than ten percent of his time in bargaining unit parking facilities. RD Decision at 4; Employer’s Exhibit 1; Tr. at 13, 24, 33. Although the stipulated bargaining unit includes only thirteen parking facilities, Blanchett performs his duties in thirty-two of the Employer’s parking facilities. Employer’s Ex. 1 (showing the different parking facilities by number). Similarly, York travels among all the Employer’s parking facilities and is not stationed at a single place within the stipulated bargaining unit. In fact, Blanchette and York travel outside the unit to such an extent that employees in the stipulated unit testified that they rarely see Blanchette or York in the normal course of their duties. Tr. at 129 (Williams testifying that she sees Blanchette and York about once per month); 143–45 (Gordy testifying that she doesn’t see Blanchette or York).

The evidence shows that Blanchette and York regularly travel outside of the unit such that they do not share a community of interest with the bargaining unit employees.

3. The Lot Auditor and the Skilled Maintenance Employee do not interchange with employees in the stipulated bargaining unit.

The Regional Director correctly determined that Blanchette and York do not interchange with the employees in the stipulated bargaining unit. RD Decision at 5. The Board recognizes

that one-way interchange or interchange which is only “infrequent and incidental to their primary duties” is insufficient to establish an overwhelming community of interest. *DPI Secureprint*, 362 NLRB No. 172 (2015), slip op. at 6.

Blanchette and York do not fill in for or perform tasks typically performed by employees in the stipulated unit. Tr. at 49, 63, 68, 73–74. Conversely, unit employees do not and could not perform the work of Blanchette and York. Tr. at 127, 134, 146, 171–72. In fact, Blanchette and York each testified that no one fills in for them when they are gone for vacation. Tr. at 40, 65.

Further, York’s testimony at the hearing makes clear that the assistance he receives from Maintenance Associate Russell Marshall is infrequent and mostly limited to instances where York needs to move heavy or cumbersome items. Tr. at 53 (moving mattresses), Tr. at 66 (moving boxes). By contrast, there is no evidence of York filling in for or helping out employees within the stipulated bargaining unit.² Similarly, Blanchette does not perform the bargaining unit duties nor do bargaining unit employees assist with or perform Blanchette’s duties. The Employer points to one instance of permanent interchange when Blanchette transferred from Lot Attendant to Lot Auditor. This does not outweigh the overwhelming evidence that, in his current position, Blanchette does not interchange with the employees in the stipulated unit. Tr. at 128–30.

The evidence shows that Blanchette and York do not interchange with employees in the stipulated bargaining unit. They do not share an overwhelming community of interest with the bargaining unit. *See DPI Secureprint*, 362 NLRB No. 172 (2015), slip op. at 5.

² The Employer notes that York periodically works at the Company’s West Chester County Courthouse lot. However, this parking facility is not within the stipulated bargaining unit, Board Ex. 1, and York does not perform bargaining unit duties while he is stationed there, Tr. at 74 (York testifying that he only “hang[s] out” and “wait[s] until somebody gets there.”).

4. The Lot Auditor and the Skilled Maintenance Employee have distinct supervision.

The Regional Director correctly concluded that the Company's supervisory structure further supports that Blanchette and York do not share an overwhelming community of interest with the employees in the stipulated bargaining unit. RD Decision at 5. Testimony presented at the post-election hearing shows that Blanchette and York report to Area Managers, while the employees in the bargaining unit report to Facility Managers. Tr. at 26, 52; *see also* Tr. at 79 (Vice President of Operations Chris Hankins testifying: "There are maintenance associates, lot attendants, [lot] supervisors, cashiers, customer service folks who work at . . . the facility manager's supervision."). The lack of common day-to-day supervision precludes finding that employees share a community of interest. *See NV Energy*, 362 NLRB No. 5 (2015), slip op. at 4. Thus, the Regional Director correctly determined that that Blanchette and York do not share a community of interest with employees in the stipulated bargaining unit.

5. The Lot Auditor and the Skilled Maintenance Employee receive higher wages than employees in the stipulated bargaining unit.

The Regional Director correctly concluded that the higher wage rates paid to Blanchette and York distinguish them from the stipulated bargaining unit. RD Decision at 5 n.3. The evidence supports that the Lot Auditor and the Skilled Maintenance Employee are compensated at a higher rate that cannot be explained by seniority alone. The Board recognizes that different wage rates weighs against finding that employees share a community of interest. *See Shares, Inc.*, 343 NLRB 455, 457 (2004); *Scolari's Warehouse Markets*, 319 NLRB 153, 158 (1995).

Vice President of Operations Hankins testified that Blanchette is paid a "premium" as a Lot Auditor. Tr. at 107. As a result, Blanchette is paid \$11.75 per hour as a part-time employee in his fifth year of employment. Tr. at 47. This rate is higher than that paid to most of the bargaining unit employees, even those who have more seniority. *See, e.g.*, Tr. at 149. York is

similarly paid at a higher rate of \$15.90 per hour. Tr. at 51. This rate is \$3.00 per hour higher than anyone else in the bargaining unit, including the most-senior bargaining unit employee. Employer's Ex. 15; Tr. at 115.³

Thus, the evidence shows that Blanchette and York receive a different, higher wage rate—unexplained by seniority—than employees in the bargaining unit. They do not share a community of interest with the bargaining unit employees.

CONCLUSION

In sum, the Regional Director correctly determined that Lot Auditor Blanchette and Skilled Maintenance Employee York should be excluded from the stipulated unit because they do not share an overwhelming community of interest with the included employees. For the foregoing reasons, the Board should deny the request for review.

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Respectfully submitted,



Roseann R. Romano
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, DC 20005
Tel. (202) 223-2620
Fax (202) 296-9600
rromano@murphypllc.com

³ The Employer also argues that the wage disparity among workers within the stipulated unit undermines the Regional Director's community-of-interest finding. However, the wage disparity between the highest-paid and most-senior cashier, Tr. at 122–23, and other more junior employees is a result of seniority. Under Board precedent, this is not grounds to upset a community-of-interest finding. *Shayne Bros., Inc.*, 213 NLRB 113, 114 (1974) (“[S]eniority has never been a basis for exclusion from an appropriate unit.”).

CERTIFICATE OF SERVICE

I certify that the foregoing Opposition to the Employer's Request for Review by the Board was electronically filed on May 23, 2017, through the Board's website and will be sent by means allowed under the Board's Rules and Regulations to all parties and the Regional Director.

/s/ Roseann R. Romano
Roseann R. Romano
MURPHY ANDERSON PLLC
1401 K Street NW, Suite 300
Washington, D.C. 20005
Phone: (202) 223-2620
Fax: (202) 296-9600
Email: rromano@murphypllc.com