UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WISMETTAC ASIAN FOODS, INC.	Case No.	21-CA-207463 21-CA-208128
and		21-CA-209337 21-CA-213978
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 630		21-CA-219153
and		
ROLANDO LOPEZ, an Individual	Case No.	21-CA-212285
and		
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 630	Case No.	21-RC-204759

WISMETTAC ASIAN FOODS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

On August 30, 2019, Administrative Law Judge Eleanor Laws (the "ALJ") issued her DECISION AND REPORT ON CHALLENGES AND OBJECTIONS (the "Decision" or "ALJD") in Cases 21–CA–207463, 21–CA–208128, 21–CA–209337, 21–CA–213978, 21–CA–212285, and 21–CA–219153. Set out below is Wismettac Asian Foods, Inc.'s Brief in support of its Exceptions[1] to that Decision, both as they relate to the unfair labor practice portion of the case (the "ULP–Case") as well as the issues involving the representation election (the "R–Case".)[2]

A. The Parties

At trial, Scott A. Wilson of the Law Offices of Scott A. Wilson served as counsel for Wismettac Asian Foods, Inc. (the "Respondent")[3]; the General Counsel was represented by attorneys Elvira T. Pereda and Thomas Rimbach (the "GC"); and the International Brotherhood of Teamsters, Local 630 and Rolando Lopez (the "Union" or "Charging Party"), were represented by Renée Q. Sánchez of Hayes, Ortega & Sánchez, LLP.

II. STATEMENT OF ISSUES

1. Whether the GC established violations of Sections 8(a)(1) and 8(a)(3) of the Act as it relates to Respondent's personnel actions involving Alberto Rodriguez, Ruben Munoz, Pedro Hernandez, Fanor Zamora, and Jeremiah Zermeno.

2. Whether the GC established that Respondent violated Section 8(a)(1) of the Act as it relates to employee communications during the R–Case campaign in August and September 2017.

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[1] "Exceptions" shall refer to Respondent's EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE filed simultaneously herewith.

[2] For the purposes of this Brief and Respondent's Exceptions, citations to witnesses testifying shall be referenced by the transcript page number and line(s.) Citations to the transcript shall be referred to as "Tr.". All exhibits referenced shall be noted by the Party that introduced it. Respondent's exhibits shall be referred to as "R Exh."; the General Counsel's exhibits shall be referred to as "GC Exh."; and the Union's exhibits shall be referred to as "U Exh.".

[3] The term "Respondent", as it relates to Wismettac Asian Foods, Inc., shall be used interchangeably for both the R–Case and the ULP–Case.

3. Whether the GC established that Respondent violated Section 8(a)(1) of the Act during March 2018 when it supplied employees with information as to revocation of union authorization cards.

4. Whether the GC established that Respondent violated Section 8(a)(1) of the Act by issuing a written warning to employee Rolando Lopez.

5. Whether the challenged ballots (excluding Alberto Rodriguez) should be counted.

6. Whether Union election objections 1-5 and 7-11 justify the holding of a new election.

7. Whether Respondent election objections 1-3 and 5-7 justify the holding of a new election.

8. Whether the R–Case should be remanded to the ALJ for reconsideration in light of the testimony of Isidro Garcia, which Respondent has asked to be stricken and the ALJ's refusal to consider the "inventory control" work performed by employees.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

A. The ALJ Found That Respondent's Discipline Of Rolando Lopez Was A Violation Of The Act.

Respondent issued a warning notice to Mr. Lopez based on what it considered to be insubordinate conduct. The ALJ found that Mr. Lopez's conduct was protected as concerted activity. (GC Exh. 1(ae), paragraph 7, ALJD 32:15-20.)

1. Testimony Regarding The Conduct Of Rolando Lopez

i. Testimony Of Susan Sands

Susan Sands testified about a meeting she attended with Mr. Lopez and as to his sarcastic and threatening manner. (Tr. 610-626.) Ms. Sands testified that she worked at Respondent's Santa Fe Springs facility and that she had been there for a year in the position of Assistant Operations Manager. (Tr. 610:9-20.) She explained her job duties included ensuring Respondent, which just

began being publicly traded in September 2017, was in compliance with the Sarbanes-Oxley Act of 2002 also known as "J-SOX standards," her duties included training departments to make sure they followed the proper protocols. (Tr. 610:21-25, 611:1-12.)

Ms. Sands testified that the meeting began with Mr. Matheu speaking in English, she opined that in her interactions with non-English speaking employees she personally would usually meet with them after a general meeting and help them work through material using a translator. (Tr. 614:12-23.) Ms. Sands recalled that about two to three minutes into Mr. Matheu's speech an employee aggressively spoke up towards Mr. Matheu, however Ms. Sands clarified that, although the employee appeared visibly upset, she did not know what was said since he had spoken in Spanish. (Tr. 614-615.) Ms. Sands also testified that other supervisors were at the meeting, including Mr. Romero and Mr. Vasquez. (Tr. 615- 616.) Going back to the employee who spoke at the meeting, Ms. Sands recalled that for most of the meeting the employee stood with an aggressive stance, including having his arms crossed in front and slightly leaning back with his feet shoulder widths apart. Ms. Sands described that the employee spoke in a hostile way and that his tone was loud during the few minutes he spoke to Mr. Matheu. (Tr. 616:2-24.) She also recalled that he made comments and gestures throughout the meeting to the drivers standing around him, including nudging them to agree or disagree with what was being said. (Tr. 616-617.) Ms. Sands testified that after the employee finished speaking Mr. Matheu responded in Spanish. (Tr. 617:15-25, 618:1-5.)

Ms. Sands testified her statement in R Exh. 3 stated Mr. Lopez's tone was "aggressive, sarcastic and hostile", defining the word sarcastic as "to be demeaning," and that she had inferred that based upon his manner of speaking and his body language during the meeting, which included him rolling his eyes, smacking his lips and making comments while the speakers were speaking. (Tr. 626:6-25, 627:1-7.)

ii. Testimony Of Frank Matheu

Mr. Matheu testified that he was present in the courtroom the day before and witnessed the testimony of Susan Sands and that he recalled holding a safety meeting on or about December 4, 2017 in which the same Ms. Sands briefly spoke. (Tr. 878:14-25.) Mr. Matheu explained that he began to hold the weekly communication meetings with drivers and warehouse workers in order to improve the communication between supervisors and employees and to keep employees generally apprised of what was going. (Tr. 879:1-8.)

At the weekly safety meeting on December 4, 2017, Mr. Matheu recalled that Ms. Sands was present to retrain drivers on how to complete their paperwork. (Tr. 879:9-25, 880:1-2.) He testified that as he was speaking about the daily safety report Mr. Rolando Lopez spoke up about weight issues with another employee's truck. (Tr. 880:3-16.) Mr. Matheu recalled that Mr. Lopez's tone of voice as he spoke was angry and aggressive and that he accused Respondent for never caring whether the trucks were overweight. (Tr. 880:17-22.) Mr. Matheu then explained that although the point was valid, it should be saved for a one-on-one conversation. (Tr. 880:23-25, 881:1-5.) Mr. Matheu testified that Mr. Lopez was ultimately disciplined for his outburst during the meeting with a verbal warning. (Tr. 881:6-10.)

2. Legal Argument

The conduct of Mr. Lopez was not concerted activity. And, while the Act protects concerted activity, it does not protect insubordinate/disruptive conduct of the type engaged in by Mr. Lopez. Respondent didn't dispute the points Mr. Lopez was making, they simply asked him not to disrupt the meeting, which he clearly did in a threatening manner. Respondent concedes that concerted activities, which involves employees complaining about wages, hours and working conditions is protected conduct. However, concerted activities can also cross a line where they become insubordinate and disruptive and are not protected. In the present case, Mr. Lopez "crossed

the line". He disrupted the meeting even the he was told his issue would be addressed at the conclusion of the meeting. He was aggressive and sarcastic. The warning notice issued to him was justified. The ALJ Decision should be reversed. The conduct of Mr. Lopez was not protected concerted activity. *See* Quicken Loans, Inc. 367 NLRB No. 112.

B. The ALJ Found That Respondent Violated The Act When It Provided Employees Information About Revocation Of Their Authorization Cards.

The ALJ found that a meeting at which Respondent provided employees with information as to the revocation of union authorization cards was a violation of the Act. (ALJD 46: 28-38.) An explanation of this meeting was offered by Respondent's witness Gustavo Flores.

1. Testimony Of Gustavo Flores

Mr. Flores testified that he provided employees with GC Exh. 21, as to means of revoking their authorization cards. (Tr. 1048:24-25, 1049:1-4.) He recalled the meetings took place over a period of three days beginning in March 2018, with certain meetings designated for Spanish and English speakers. (Tr. 1049:5-15.) During the first meeting, Mr. Flores recalled that Mr. Matheu and the new female HR representative were present, however he could not recall her name. (Tr. 1049:16-25.). Mr. Flores recalled that he conducted all the meetings over the next couple days however Mr. Matheu was not in attendance and the HR employee only attended a few of the meeting for introduction purposes. (Tr. 1050:1-12.)

During each meeting, Mr. Flores recalled saying the same thing: that employees had been asking how they could revoke their authorization cards and/or retrieve them from the Union, he then advised them of their right to not support the Union. (Tr. 1050:13-25, 1052:1-4.) GC Exh. 21 was the document he read during the meeting, but that he always made sure to explain that the employees were not required or obligated to act on the information and that the meeting was being held because company management felt it was important that the information be "made available"

to them. (Tr. 1052:5-14.) Mr. Flores testified that after each meeting an information form was placed at the end of the table and employees were told they could take the form if they wanted; Mr. Flores stated that at no time was the form ever distributed directly. (Tr. 1051:15-24.)

Mr. Flores testified that he was the only person who made the presentation at the series of meetings and that there was no sign in sheet or documentation kept of the employees who chose to take the form. (Tr. 1051:25, 1052:1-7.)

2. Respondent's Actions Did Not Violate The Act

There is nothing in Mr. Flores' testimony indicating that in any way whatsoever, employees were coerced, threatened, pressured, etc. to revoke authorization cards. And, with regard to the GC witnesses who testified about this incident, they offered no testimony in contradiction of Mr. Flores' description of these events.

Board case law is clear that making this information available to the employees is completely lawful. *See* Ernst Home Centers, Inc. 308 NLRB 848 (1992).

The fact that Respondent provided actual documents to the employees is de minimis as it merely has the same impact as providing the information. To the extent Board law is to the contrary, it should be overruled.

C. The ALJ Found That Respondent Violated The Act By Demoting Ruben Munoz.

The ALJ found that the demotion Ruben Munoz violated Section 8(a)(3) of the Act. (ALJD 36:29-31.) Respondent had justifiable reasons for demoting Mr. Munoz. Respondent concedes that Mr. Munoz was in fact an open union supporter as were many other employees.

1. Testimony Of Frank Matheu

Mr. Matheu explained that Mr. Munoz was demoted because Mr. Munoz did not have the character for a lead position, however he was not terminated because Mr. Matheu didn't feel he had crossed the line into violence or threats which would otherwise warrant a termination. (Tr.

859:25, 860:1-10.) After the termination Mr. Matheu testified Mr. Munoz continued to work as a warehouse worker on the day shift. (Tr. 860:11-14.)

2. Respondent Did Not Unlawfully Demote Ruben Munoz

Respondent had a lawful basis for demoting Mr. Munoz. This was supported by employee complaints as established by GC Exhs. 57-59 and 61-62.

Respondent's demotion of Mr. Munoz was entirely legitimate, there was no link to his union activities. And, as Mr. Matheu testified, Mr. Munoz was not terminated, he was simply demoted to a different position. The GC has also attempted to argue that because Mr. Munoz did not receive safety training, that was somehow a concession that his demotion was not justified. As correctly noted by Mr. Matheu, Mr. Munoz knew how to operate the vehicles and his actions were intentional, which would not be corrected by safety training. Consequently, his demotion was justified and the Decision of the ALJ should be reversed as it relates to the demotion of Mr. Munoz.

D. The ALJ Found That Respondent Violated The Act As It Relates To Former Randstad Employees Pedro Hernandez, Fanor Zamora And Jeremiah Zermeno.

The ALJ found that former employee Pedro Hernandez was unlawfully terminated on or about October 31, 2017 (ALJD 37) and, subsequently, that Respondent failed to re-hire Mr. Hernandez as well as Fanor Zamora and Jeremiah Zermeno after they had been laid off. (ALJD 45.) The allegations regarding these three employees all arose from the termination of the contract between the temporary agency Randstad and Respondent.

1. Testimony Of Frank Matheu

Regarding the Randstad agency, Mr. Matheu testified that he was familiar with the agency and that they provided temporary workers to the facility. (Tr. 861:22-25, 862:1-5.) He also recalled that as of September 2017 there were other agencies providing employees to the facility including Spectra, Horizon and Aerotek. (Tr. 862:6-15.) Mr. Matheu recalled being informed by Atsushi

Fujimoto in HR that Randstad had canceled their contract with Respondent. (Tr. 862:16-25, 863:1.) Mr. Matheu explained that Mr. Fujimoto was responsible for recruiting and employee-employer relations nationwide and that he informed Mr. Matheu that because Randstad had pulled their contract for all of the Randstad employees with Respondent nationwide, they would need to be dismissed. (Tr. 863:2-12.)

In regard to the Randstad day shift employees, Mr. Matheu testified that a decision was made to let them go immediately while retaining the night shift employees for as long as possible. He stated that night shift employees had a different set of specialized skills than the day shift employees. Consequently, it was easier to replace a day shift employee rather than a night shift one. (Tr. 865:14-25, 866:1-24.) Mr. Matheu recalled that the day shift Randstad employees were dismissed effective immediately after the meeting informing them that the Randstad contract had been terminated. Although he could not recall the exact date. (Tr. 866:25, 867:1-6.)

Mr. Matheu recalled that Respondent held a meeting with all Randstad employees in attendance where he explained the situation and stated that Respondent had no control over the situation as a result of the terminated contract; and that day shift employees were dismissed immediately but night shift employees could stay on for another month. (Tr. 867:7-15.) He remembered that all 15 Randstad employees at the facility attended the meeting and that he recalled employee Jeremiah Zermeno angrily spoke up three minutes into the meeting saying, "If I would've known, I would've taken a fucking job that I was offered at $18.00 an hour". (Tr. 867:16-25, 868:1-25, 869:1-8.)

Mr. Matheu testified that after the meeting he asked to speak with Randstad employee Pedro Hernandez who worked the night shift. (Tr. 869:9-19.) Mr. Matheu told Mr. Hernandez that it was his last day and that his temporary assignment was ending as a result of accusations from

employee Walter Vargas that he was creating a hostile work environment and not helping other employees. (Tr. 871:19-24.)

Going back to the Randstad meeting, Mr. Matheu recalled that Fanor Zamora along with several other employees spoke up during the meeting and asked if they could go to another agency in order to return to work, to which Mr. Matheu explained he couldn't tell him to apply but that they could go if they wanted. (Tr. 871:25, 872:1-25.) After the meeting Mr. Matheu recalled Mr. Zamora asked the same question to again and that he again answered by telling Mr. Zamora he could apply if he wanted. (Tr. 873:1-5.) Mr. Matheu testified that temporary employees could be converted to full-time employees however there was no set rule dictating a conversation had to take place within 60 days. (Tr. 873:6-25, 874:1-8.) Mr. Matheu testified that he never met with Mr. Fujimoto to ask what should be said to the Randstad employees and that Mr. Fujimoto otherwise did not give him any instructions on what to say. (Tr. 874:9-19.) Mr. Matheu testified he was not familiar with the methods used by Mr. Fujimoto to either hire or convert temporary employees to full-time. (Tr. 874:20-25, 875:1-5.)

Mr. Matheu testified additionally on cross with GC/ Ms. Pereda, that he had heard the term "rolling" employees from one staff agency to another and that the term referred to when a temporary agency employee changed to another agency but kept the same work assignment. (Tr. 926:13-18.) He explained that the decision to rollover was made by the employee and that Respondent was not involved. (Tr. 926:19-25, 927:1-10.) Mr. Matheu testified that he was familiar with an employee named Harumi Tomimura and that she began as a Randstad employee during the daytime shift before being directly hired. (Tr. 927:11-25, 928:1-7.) However, he did not know whether Respondent paid any sort of fee when Ms. Tomimura rolled over. (Tr. 928:8-14.) And, Ms. Tomimura had a special skill set making it necessary to hire her.

Regarding employee Fanor Zamora, Mr. Matheu testified Mr. Zamora was a Randstad employee who had applied directly with Respondent but who had never been directly hired. Mr. Matheu however was unsure whether Pedro Hernandez had also applied directly before being terminated. (Tr. 936:23-25, 937:1-10.) Regarding Jeremiah Zermeno, Mr. Matheu testified that Mr. Zermeno was a Randstad employee assigned to Respondent, but he couldn't recall any conversation he knew of in which Mr. Zermeno was testified to be on track to convert to a permanent employee, however Mr. Matheu recalled that Mr. Zermeno made a negative comment during the termination meeting but that Mr. Matheu did not report it. (Tr. 937:11-25.)

For the reasons stated above, the ALJ Decision should be reversed as it relates to Pedro Hernandez, Fanor Zamora and Jeremiah Zermeno.

E. The ALJ's Findings Regarding The Link Between Respondent's Actions And The Union Activity Of The Alleged Discriminatees.

The ALJ found that Respondent discriminated against Rolando Lopez, Ruben Munoz, Pedro Hernandez, Fanor Zamora, Jeremiah Zermeno, and Alberto Rodriguez (see below) because of their union activities. (ALJD 32, 35-36, 39:35-40, 45:15-20.) The Employer will concede that as it relates to Alberto Rodriguez, he was an open and active union supporter without question.

When reviewing the evidence however, as it relates to Mr. Munoz, Mr. Hernandez, Mr. Zermeno, and Mr. Zamora, while there is testimony that they were union activists, they appear to be no more active than numerous other employees against whom no disciplinary action was taken.

Carlos Quinonez, the lead union organizer, testified that he distributed t-shirts and buttons to the warehouse employees and drivers. (Tr. 37:21-40:15.) 28 of the 32 drivers accepted the buttons and 70 t-shirts were distributed to employees after they signed an authorization card. He also identified a committee of union employees. (Tr. 38:4-39:7.) There was no testimony offered at the hearing by Mr. Quinonez or any other GC/Union witness, that the Company was ever

informed of the identities of the employees on the committee. Mr. Quinonez further stated that certain days were designated to wear the t-shirts and that "most" warehouse workers wore them. (Tr. 55:11-25.) Specifically stating that "a whole lot" of the employees wore some sort of union designated button/t-shirt. (Tr. 56:11-19.)

Additionally, there was testimony about a meeting sometime in October 2017 outside the loading dock, which presumably had to do with the Union. The initial testimony about the meeting was from Luis Lopez. (Tr 115-118:13.) Mr. Lopez claimed that although supervisors were not present at the meeting, they were observing. According to Mr. Lopez there were 20 to 30 employees who attended the meeting. (Tr. 115:3-25.)

Respondent does not dispute knowledge of the meeting, although it is certainly unclear as to which, if any, supervisors were actually observing. Anthony Vasquez testified stating that "pretty much every worker" was wearing a union t-shirt. (Tr. 649:19-650:16.) Mr. Vasquez also testified about the meeting in the Company parking lot. It is clear from Mr. Vasquez's testimony he was not purposefully "surveilling" the meeting. He was simply sitting in his office where he would normally observe the security cameras and observed a portion of the meeting where up to 20 employees were in attendance. Mr. Vasquez never determined exactly who the identities of the employees at the meeting were and he never specifically discussed it with upper management. (Tr. 652:15-656:21.)

As can be seen from above, there were at least 70 union t-shirts distributed; that is more than half of the warehouse employees. U Exh. 59 indicates there were 139 warehouse employees; the same list reflects there were 37 drivers, 28 of whom, according to Mr. Quinonez, wore union buttons. And, as Mr. Vasquez testified to, the drivers also wore union t-shirts prior to going on their routes and then buttons. Mr. Vasquez also testified that employees continued to wear the t-shirts even after the Randstad employees were laid off.

There are no facts to support the allegations of the GC and Union that Pedro Hernandez, Jeremiah Zermeno, Fanor Zamora and Ruben Munoz were singled out because they wore union t-shirts as opposed to 67 other employees. And, while they may have participated in the union committee, there is no evidence that Company management knew who was on the committee.

The same is true for Ruben Munoz. With the high level of union support there was, if the Company made personnel decisions based on employee's union support, they literally would not have had any employees remaining in their workforce. The GC and Union have not sustained their burden of proof as to the "union activities" of Pedro Hernandez, Jeremiah Zermeno, Fanor Zamora and Ruben Munoz.

The GC is obligated to show more than just conjecture and legal theory to support the claim that there was a link between personnel actions taken with regard to these four employees and their union activities. *See* American League of Baseball Clubs, 189 NLRB 5401 (1971). Suspicion is not sufficient. And, when determining whether union animus was the basis for an adverse employment action all relevant circumstances must be considered. *See* Tower Auto, 355 NLRB 1, 3 (2010). As previously noted, legitimate reasons were given as to all personnel actions taken as it related to these four employees.

For the reasons stated, there is not a sufficient link between the union activities of the four employees and Respondent's personnel decisions regarding them.

F. The ALJ Found That Respondent Unlawfully Discriminated Against Employee Alberto Rodriguez.

The ALJ found that Respondent unlawfully discriminated against employee Alberto Rodriguez by suspending and ultimately terminating him. (ALJD 41-42.) It is Respondent's position regarding Mr. Rodriguez that the "totality of the circumstances" must be looked at, and when all of the facts are considered cumulatively, his termination was justified, particularly as it

relates to the derogatory racial comments directed towards co-worker Marcus Mack. Frank Matheu testified that Mr. Rodriguez was suspended/terminated based upon his entire disciplinary record. (Tr. 878:10-13.) Essentially, the GC alleged virtually every action taken towards Mr. Rodriguez for a lengthy period of time were related to his union activities. However, as noted, Mr. Rodriguez was hardly the only employee at the facility supporting the Union. The idea that Respondent did nothing but concentrate on ways to discriminate against Mr. Rodriguez is baseless.

In considering the suspension/termination of Mr. Rodriguez, the ALJ should initially direct attention to R Exh. 2, which was is a document entitled "Mutual Agreement to Arbitrate Claims". Per the terms of that agreement, Mr. Rodriguez agreed that "all employment related claims shall be resolved by binding arbitration". The current litigation is a "employment related claim" initiated as a result of the Union filing unfair labor practice charges on behalf of Mr. Rodriguez, obviously with his full consent. Consequently, the matter should be submitted to arbitration.

The ALJ rejected Respondents argument that Mr. Rodriguez's claim should be subject to arbitration. (R Exh. 1, ALJD 39:20-25.) Regardless of previous Board case law obligating employees who had signed arbitration agreement to submit claims under the Act to arbitration, it is the position of Respondent that such case law is no longer valid in light of the U.S. Supreme Court decision in Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

Respondent was justified in the suspension and termination of Mr. Rodriguez. As can be seen from above, Mr. Rodriguez had a lengthy record of discipline. He had an extremely poor attitude (i.e. telling Mr. McCormick he had "better things to do" when Mr. McCormick asked him if he had filled out the necessary paperwork for one of his numerous absences.) The record shows a lengthy history of documented disciplinary issues as well as documentary emails supporting Company decisions regarding his misconduct. (GC Exhs. 12, 33-43, 52-53; R Exhs. 6-11.) The totality of Mr. Rodriguez's misconduct cannot be ignored simply because he was a "union

activist". No matter how much of an organizer he was on behalf of the Union, at some point Respondent is not obligated tolerate this type of misconduct.

In addition to his other misconduct, it is clear that Mr. Rodriguez had serious attendance problems, which also standing alone was a justification to terminate his employment. *See* Health Management, Inc., 326 NLRB 801 (1998); Cambridge Contracting, Inc., 259 NLRB 1374, 1381 (1982); and South Carolina Industries, Inc., 181 NLRB 1031 (1970).

Employers are not required to maintain the employment of employees with limited schedules and the GC has not offered any evidence of disparate treatment of similarly situated employees – i.e. numerous employees were union supporters and were not disciplined. *See* Starbucks Corp. dba Starbucks Coffee Co. & Local 660, Indus. Workers of the World, 2008 WL 5351366 (Dec. 19, 2008) (finding that Employer's argument that limited availability was a factor in termination was not pretext in the absence of evidence of disparate comparators.)

1. The Alberto Rodriguez' Incident With Marcus Mack

The ALJ describes the incident between Mr. Rodriguez and Mr. Mack (ALJD 19:40, 21:5-10), and while the ALJ largely dismissed the significance of this incident, there is no doubt that it occurred, and that Mr. Rodriguez directed music using the "n*****" word at Mr. Mack who is African American.

The ALJ completely disregards the testimony and documentary evidence of Laura Garza (Tr. 1078-1094) and Jinna Baik (Tr. 1395-1418) who testified that similar incidents of racial slurs had resulted in employees being terminated. The two terminations referred tby Ms. Garza and Ms. Baik were based strictly upon secondhand information as the people terminated in both instances were not interviewed. The ALJ justifies ignoring the Garza/Baik testimony on the grounds that in those cases the employees were terminated sooner after the incident than Mr. Rodriguez. The ALJ erroneously states that Mr. Rodriguez was only suspended after he served as an election observer

for the Union. (ALJD 44:0-5.) This is incorrect. Mr. Rodriguez was suspended on Friday, February 2, 2018 (ALJD 22:25-30) and the election was not until the following Tuesday, February 6, 2019. There is no evidence that Respondent had any prior knowledge of Mr. Rodriguez acting as the Union's observer at the election. Secondly, the rationale of the ALJ is flawed; if Mr. Rodriguez engaged in directing racial slurs towards Mr. Mack, he should be terminated even though Respondent did not act as quickly on his suspension/termination as it did in the others. And while Respondent concedes there was a delay, the suspension/termination was still justified, in this case the delay is nothing more than the equivalent of discovering after-acquired evidence, which would still justify the suspension/termination. *See* McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995).

2. Cumulative Evidence Regarding Alberto Rodriguez

When reviewing the actions taken against Mr. Rodriguez, not only is there the racial discrimination incident involving Mr. Mack, there were three other warnings on December 21, 2017, January 26, 2018 and January 31, 2018 (ALJD 16-22), all of which the ALJ completely dismisses as not being relevant. When all of the cumulative evidence is considered involving Mr. Rodriguez, his termination was justified.

G. The ALJ Found That Respondent Unlawfully Engaged In The Promises Of Benefits.

The ALJ found that Respondent unlawfully engaged in the promise of benefits to its employees prior to the election. (ALJD 28-30.) There was considerable testimony offered regarding communications from Respondent to the employees during the first election campaign, particularly those of management employee Frank Matheu along with labor consultant Gustavo Flores. It is the contention of Respondent that everything stated is protected under Section 8(c) of the Act as discussed below. Testimony regarding the communications was provided as follows:

1. Legal Argument

The allegations of improper campaign promises are without merit. A review of the totality of Mr. Matheu's comments and those of the employees called by the GC show nothing more than a typical back and forth in an election campaign and speech protected by Section 8(c), which states as follows:

> "[Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit."

See National Labor Relations Act 29 U.S.C. §§ 151-169.

There is no evidence that any threats were made. There are simply arguably "veiled" promises which are highly innocuous. The fact that the resources of the Board and the Respondent were utilized regarding these issues is somewhat inconceivable. In short, a considerable portion of the hearing involved litigating issues of campaign discourse in an election that the Region set aside the results of. This is protected speech and the allegations in the complaint regarding this issue should be dismissed. *See* Crowne Plaza Town Park Hotel, 341 NLRB 619 (2004); and Shopping Kart Food Markets, Inc., 228 NLRB 1311 (1977).

H. The ALJ's Continual Reference To Respondent's Use Of Labor Consultants As A Justification For Finding That Respondent Violated The Act.

The ALJ's Decision throughout is replete with Respondent's use of labor consultants. This is completely irrelevant as Respondent has a right to utilize whatever assistance it needs, as long as such persons do not violate the Act.

Mr. Matheu explained when he arrived at the Santa Fe Springs facility the labor consultants had already been retained. He also testified that Respondent's HR department based in Los

Angeles provided HR support for Respondent's sixteen branches throughout the United States and three in Canada. Mr. Matheu made it clear that Respondent needed assistance over and above HR.

The use of the consultants under these circumstances is completely understandable. Within six months, Respondent was faced with the advent of a mass employee demonstration inside its offices, two extremely contentious union organizing campaigns, two NLRB conducted representation elections, and the filing of twenty-two unfair labor practice charges between September 12, 2017 and August 6, 2018 (the filing and disposition of these charges are judicially noticed on the Board's website; only the current Complaint was issued in response to the aforementioned charges.) Respondent had every right to utilize labor consultants to supply whatever support/services it needed and there should be no inference drawn from the use of these consultants.

I. The Reinstatement Remedy Ordered For Pedro Hernandez, Jeremiah Zermeno, And Fanor Zamora Confers Full-Time Employee Status, Which Such Employees Are Not Entitled To.

The ALJ, in the remedial section of the Decision (ALJD 96:25-30, 39-47), orders the reinstatement of Pedro Hernandez, Jeremiah Zermeno, and Fanor Zamora. The record is not in dispute that all three were temporary employees, laid off after cancellation of the Randstad contract. They had not obtained full-time employee status. As testified to by Mr. Matheu, there was a process whereby temporary employees can be converted to full-time but there was no set rule as to when this would take place. (Tr. 873:6-25, 874:1-8.) There is no evidence establishing that these employees had in fact been promised definite conversion. Assuming the Board upholds the ALJ's Decision that their termination was unlawful, Respondent should only be ordered to reinstate them if they apply through a temporary agency and their status should remain as temporary employees.

IV. THE REPRESENTATION CASE

The primary issue regarding the R–Case is the challenged ballots. The ALJ addresses the challenged ballots in pages 46-87 of the Decision. (See detailed references below.) It is not in dispute that there were categories of employees permitted to vote, categories of employees who were at issue, and finally, other classifications of employees who might otherwise be deemed eligible based upon their particular job duties. (See further discussion below.)

A. The Scope Of Work Performed By Employees Who Are In The Categories That Are Permitted To Vote.

The parties entered into a Stipulated Election Agreement stating as follows:

> "Included: All full-time and regular part-time class A, B, and C drivers, warehouse clerks, inventory control employees, assemblers/selectors, labelers, forklift drivers, warehouse employees, and leads in all departments, including the shipping and receiving department, state department, international export department, dry department, and cooler freezer department, and employees in the job classifications described herein who are supplied by temporary agencies, employed by the Employer at its facility currently located at 13409 Orden Drive, Santa Fe Springs, California.
>
> Others permitted to vote: The parties have agreed that GPO Distribution Coordinators, GPO Central Purchase Clerks, central Purchase clerks, and Logistics Office Clerks may vote in the election but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election."

See R Exh. 17.

The Stipulation was entered into after lengthy discussions between the Union, the Respondent and the Region. Additionally, the original RC Petition filed by the Union described the unit as follows:

> "Included: All full-time and part-time regular drivers class A, B, C and Leads. All full-time and part time Warehouse workers and Leads in all departments (all shipping and receiving, All Export depts-State,

> International, dry, cooler, freezer, all forklift drivers, whse clerks, Inventory control, assemblers/selectors, labelers)
>
> Excluded: All other employees, office clericals, professional employees, guards, supervisors and all employment agency workers as defined in the Act."

See GC Exh. 1(a).

As to those employees permitted to vote, there were two phrases that were in dispute at the hearing, the term "inventory control employees" and "labelers". (See more detailed discussion below.) The ALJ took the position that this terminology was ambiguous and then, relying upon Caesars Tahoe, 337 NLRB 1096, 1097 (2002), ruled that if there is an ambiguity or "no meeting of the minds" the Board must then otherwise independently review the disputed classification and see if there is community of interest with other classifications that are not in dispute (ALJD 53-55.) Subsequently, after making an initial finding of ambiguity, the ALJ goes on to determine that the disputed job classifications have no community of interest with the undisputed job classifications and therefore employees working in those classifications are not entitled to vote.

It is Respondent's position however, that the entire analysis is based upon a false premise, i.e. that the terms "inventory control employees" and "labelers" were somehow ambiguous. If the Board determines that these phrases are not ambiguous, then there is no need to apply the community of interest standards, and persons who perform "inventory control" work and are "labelers" should be permitted to vote.

1. All Challenged Employees Who Handle Inventory Should Be Allowed To Vote.

As noted above, when the original RC Petition was filed, the term "Inventory control" was used and it was subsequently changed to "inventory control employees" in the Stipulated Election Agreement. Obviously the latter term would include more workers and by definition those workers who control inventory. The language is plain and unambiguous. Also, the original RC Petition

containing the term "Inventory control" was filed on August 21, 2017. *See* GC Exh. 1(a). The stipulation was entered into 9 days later with the term "inventory control employees". *See* August 30, 2017 Stipulated Election Agreement in GC Exh. 1(aj), pages 15-23. The parties had plenty of time to review the stipulation. In fact, there is one particular email that is very instructive as to this point. U Exh. 50 contains emails exchanged between the parties. In particular, there is an August 29, 2017 email (U Exh. 50, page 2) which states as follows:

> **From:** Hernandez, Juan D. [Juan.Hernandez@nlrb.gov]
> **Sent:** Tuesday, August 29, 2017 5:38 PM
> **To:** Renee Sanchez
> **Subject:** RE: WISMETTAC ASIAN FOODS, INC., 21-RC-204759
>
> Ms. Sanchez,
>
> I would like to talk to you tomorrow morning regarding some of the language in the stip, namely, the "included" language. I just have a few clarifying questions on departments and job classifications.
>
> Sincerely,
>
> J.D. Hernandez

As noted, the stipulation was entered into the following day on August 30, 2017 with the current language stating, "inventory control employees". It appears that the night before Ms. Sánchez and Mr. Hernandez spoke regarding the "included" classifications. Then, the following day, the final version of the stipulation included the expanded language.

2. Board Law Is Clear That When There Is Unambiguous Language In A Stipulated Election Agreement It Will Be Enforced.

Generally, the Board is bound to a stipulated election agreement unless the agreement violates applicable statutes or violates board policy. Otis Hospital, Inc., 219 NLRB 164, 89 LRRM 1545 (1975); NLRB v. Sonoma Vineyards, Inc., 727 F.2d 860, 865 (9th Cir. 1984); Butler Asphalt, LLC, 352 NLRB 189, 189-90 (2008) ("Where the parties' intent can be ascertained, the Board will give it effect unless it is 'inconsistent with any statutory provision or established Board policy.'").

Indeed, the "[t]he Board is prohibited…from applying the 'community of interest' standard to change a result mandated by an unambiguous pre-election stipulation which does not contravene the Act or settled Board policy." NLRB v. O'Daniel Trucking Co., 23 F.3d 1144, 1149 (7th Cir. 1994) (emphasis added) (technical refusal to bargain case; "Our cases make clear that once the parties stipulate to an appropriate bargaining unit, that unit is binding regardless of whether the 'community of interest' standard has been met.").

The ALJ found there was no "meeting of the minds" but there is no evidence to support this contention that at the time the Stipulation was entered into the parties did not agree as to the scope of this terminology. (ALJD 54:10-11.) The Union did not raise this issue until after the fact at the hearing. There was no evidence offered that these terms mean anything other than what they say. Consequently, applying the "community of interest standards" under these circumstances violates Board law. The Board only resorts to the community of interest doctrine if the objective intent of the stipulation is ambiguous. *See* Television Signal, 268 NLRB at 633; Genesis Health Ventures of West Virginia. L.P. (Ansted Center), 326 NLRB 1208, 1208 (1998) ("Only where the objective intent is unclear or the stipulation ambiguous does the Board consider community of interest principles to determine whether the disputed employee belongs in the unit.") (citing Lear Siegler, Inc., 287 N.L.R.B. 372 (1987)); Red Coats, Inc., 328 NLRB 205, 207 (1999) (holding, in a Section 8(a)(5) case involving employer's withdrawal of recognition based on claim of changed circumstances rendering single-location bargaining units inappropriate, that "where a unit has been agreed to by the parties, and is not prohibited by the statute, such a unit is appropriate under the Act, regardless of whether the Board would have certified such a unit ab initio").

The parties cannot later change a stipulated unit, nor can the Board, even if a different unit would be crafted with a community of interest analysis. *See* White Cloud Prods., Inc., 214 N.L.R.B. 516, 517 (1974) (explaining that even if a hearing officer found that "one of the parties

subjectively entertained an intent at odds with this stipulation, that intent cannot be given recognition. To do so would only undercut the very agreement which served as a basis for conducting the election."); Indeed, the Board in White Cloud explained:

> As also indicated above, we permit parties to stipulate to the appropriateness of the unit, and to various inclusions and exclusions, if the agreement does not violate any express statutory provisions or established Board policies. But a stipulated inclusion or exclusion which may not coincide with a determination which the Board would make in a non-stipulated unit case on a "community of interest" basis is not a violation of Board policy such as would justify overriding the stipulation. In Tribune Company, supra, we cited with approval this observation by the Courts of Appeals for the Second Circuit:
>
> In our view no established Board policy or goal of the Act is contravened by including [the employee.) We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to override the parties' intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit.

214 NLRB at 517 (quoting The Tribune Co., 190 NLRB 398 (1971)). Moreover, the Second Circuit Court of Appeals held in Tidewater Oil Co. v. NLRB, 358 F.2d 363, 365 (2d Cir. 1966), that "where the parties stipulate that the appropriate unit will include given jobs, the Board may not alter the unit, its function is limited to construing the agreement according to contract principles, and its discretion to fix the appropriate bargaining unit is gone." The court explained:

> We view community of interest as a doctrine useful in drawing the borders of an appropriate bargaining unit, a function well within the discretion of the Board. But we do not conclude that the doctrine remains as an established Board policy sufficient to override the parties' intent when the Board, in the interests of furthering consent elections, allows the parties to fix the unit. While the doctrine might permissibly be used to exclude an employee with no contacts at all in the unit, it is quite another matter for the Board to weigh White's contacts with Newburgh against those elsewhere, de novo, in order to exclude him. Compare J.J. Collins' Sons, supra. If community of interest is not a valid basis for expanding the unit by expanding job categories, as in Collins, it is no more a basis for contracting the unit by deciding what employees work 'at' the Newburgh plant.

Id. at 366 (emphasis added) (citing NLRB v. J. J. Collins' Sons, 332 F.2d 523 (7th Cir. 1964)).

As discussed below, in the disputed job classifications, there is a substantial amount of inventory control work and employees performing this work should be permitted to work. The same stands true for "labelers", which was performed by a number of the individual challenged voters. (See further discussion below.)

B. The Disputed Job Classifications

There are two issues with the disputed job classifications: (1) those classifications listed in the Stipulation; and (2) other classifications not listed in the Stipulation but involve inventory control work/labelling.

1. Employees Working In The Disputed Classifications Referenced In The Stipulation Should Be Allowed To Vote As This Work Involves "Inventory Control Work".

The testimony Respondent offered as part of its R–Case came primarily from Atsushi Fujimoto. Mr. Fujimoto testified part of his job duties included understanding job positions in order to assist managers who wanted to advertise for new employees, he explained how he would work with managers to craft a job description, occasionally screen applicants and communicate with agencies. (Tr. 1124:22-25, 1125:1-13.) Mr. Fujimoto stated that he spent a lot of time out on the first-floor warehouse of the facility talking to employees and observing their work, and that as a recruiter it was his job to make sure the employees he brought on were doing well in the positions they were chosen for. (Tr. 1125:14-25, 1126:1-8.) Mr. Fujimoto affirmed that he had worked for Respondent for 11 to 12 years and that he'd always done recruiting and employee relations which included advising supervisors on what to do regarding employee complaints. (Tr. 1126:9-18.)

Mr. Fujimoto stated that prior to testifying he reviewed employee personnel files, job descriptions and the voter list contained in R Exh. 18. (Tr. 1126:19-25, 1127:1-4.) He explained that when he received the voter list there were errors effective on the day of the election such as

incorrect job titles. (Tr. 1127:5-18.) Mr. Fujimoto affirmed that he was aware there was an election at the end of 2017 however, he wasn't sure of the date. (Tr. 1127:19-25, 1128:1-2.) Looking at R Exh. 18, Mr. Fujimoto explained that the date listed in the corner of the voter list was January 31, 2018, however he had no input into the preparation of the document, and no one consulted with him before it was created. (Tr. 1128:3-23.) Mr. Fujimoto couldn't recall the exact date he first received the list. (Tr. 1128:24-25, 1129:1-2.)

Mr. Fujimoto's testimony reflected that the "Others permitted to vote" categories should in fact be permitted; additionally he addressed the "inventory" issue by reviewing other job classifications held by the challenged employees that perform inventory work; and finally he went through each challenged employee and explained how they fit within the aforementioned categories, thus making them eligible. Mr. Fujimoto's testimony is not based upon the voter list. Instead, his testimony is based upon his knowledge of what jobs the employees were actually performing on the date of the February 6, 2018 election. As noted, Mr. Fujimoto conceded that there were errors in the voter lists.

i. Testimony Regarding Job Descriptions

Looking at the job descriptions listed in R Exh. 17 page 1, Mr. Fujimoto testified he reviewed those positions marked "Included" and "Other permitted to vote" prior to testifying and that he was confident he could testify about the job descriptions and duties. (Tr. 1129:3-25, 1130:1-13.) Mr. Fujimoto then offered testimony about each of the job classifications identified within the Stipulation. Such job classifications include: Central Purchase Clerk, Inventory Controller, GPO Central Purchase Clerk, GPO Distribution Clerk, GPO Distribution Coordinator, and Logistics Office Clerk. He subsequently offered testimony about other job classifications that included eligible voters. (See discussion below.)

(a) Central Purchase Clerk

Looking over R Exh. 19, Mr. Fujimoto testified that he was familiar with the position of Central Purchase Clerk and that those employees worked on the first-floor office, interacted with warehouse employees and participated in inventory control. (Tr. 1130:14-25, 1131:1-8.) He explained that the position actually worked for the headquarters for global procurement operations. (Tr. 1131:9-13.) Mr. Fujimoto explained that Respondent did not do any manufacturing and only procured goods from different manufacturers to be sold, the department which handled that process was global procurement operations "GPO". (Tr. 1131:14-22.)

Moving to the essential job function listed under the position of Central Purchase Clerk, Mr. Fujimoto explained that the Clerk would look at the inventory of all the branch offices; he explained that the job duties were so broad because the national headquarters for Respondent were stationed in the Santa Fe Springs facility. (Tr. 1131:23-25, 1132:1-9.) Going down the essential job description duties which stated "confirm purchase quantity" Mr. Fujimoto explained that each branch would request the amount of product to purchase in volume and that the Central Purchase Clerk was responsible for ensuring inventory personnel purchase the right inventory amount to meet the facility's orders. (Tr. 1132:10-25, 1133:1-10.)

Moving to another point labeled "adjusting quantity for each branch office" Mr. Fujimoto explained that Clerks had the ability to make a judgement call to purchase more inventory than requested by facilities in order to take advantage of wholesale pricing. (Tr. 1133:11-17.) He recalled that the Clerks were also responsible for ensuring that inventory was available to all facilities regardless of increased demand by a single facility at a time. (Tr. 1133:18-25, 1134:1-7.) Mr. Fujimoto testified that Central Purchase Clerks interacted with employees in the warehouse in order to ensure the correct amount of inventory arrived and was shipped to various facilities. (Tr. 1134:8-13.) He testified that the last line of the Clerk job description required spending time in the

warehouse because Clerks were expected to go out on the warehouse floors to check inventory levels for the branch. (Tr. 1134:14-23.)

The job description of Central Purchase Clerk, specifically as it relates to inventory control, in "Job Purpose" refers to "adjust[ing] inventory overages and shortages"; and, with regard to "Essential Job Functions" refers to "check[ing] inventory level for each branch office" and "adjust[ing] inventory overages and shortages for each branch office…" (R Exh. 19.) This is clearly an inventory control position.

(b) Inventory Controller

Reviewing R Exh. 20, Mr. Fujimoto testified that it was the job description for the position of Inventory Controller and that he was familiar with the position. (Tr. 1136:1-14.) At the time of the election Mr. Fujimoto testified that there were no Inventory Controller employees, however there were other employees with the title in their name. (Tr. 1136:15-22.)

This is very significant because "Inventory Controller" (emphasis on the capitalization) was not listed , instead the term "inventory control employees" (emphasis on the lower-case letters) was included within the Stipulation. Obviously, the parties intended a broader category of employees.

(c) GPO Central Purchase Clerk

Reviewing R Exh. 21, Mr. Fujimoto testified it was the same position as a Central Purchase Clerk he previously explained in regard to R Exh. 19, the only difference being that this position stated global procurement operations, he also testified that the position was located in the first-floor offices and required interaction with warehouse employees in regard to inventory levels. (Tr. 1138:1-25.)

Continuing with the position in R Exh. 21, Mr. Fujimoto explained that the interaction between the Clerks and Warehouse Workers required that office employees walk 150-300 feet into the warehouse area through either the back entrance or break room. (Tr. 1139:14-25, 1140:1-5.)

The "Job Purpose" in this job description (R Exh. 21) once again states, the job is to "adjust inventory overages and shortages and ensure that all products are distributed to each branch offices." And, "Essential Job Functions" include "check[ing] inventory level for each branch office" as well as "adjust[ing] inventory overages and shortages for each branch office." Once again, this is an inventory-based job classification.

(d) GPO Distribution Clerk

Reviewing R Exh. 22, Mr. Fujimoto explained that the job description in the exhibit referred to the position of GPO Distribution Clerk, and that the position included physically looking at the incoming shipping containers received at the facility along with the shipping list to ensure the order received was undamaged and matched the original order. (Tr. 1140:6-16.) He recalled that the employees in the position sat in the warehouse offices near the receiving area and interacted with warehouse employees every day while physically unpacking orders and checking inventory. (Tr. 1140:17-25, 1141:1-13.)

In the job description (R Exh. 22.) for this position the "Job Purpose" states the job "…is responsible to maintain the merchandise flow for the Company." Obviously this is maintaining inventory. As to the "Essential Job Functions", each of these definition involve inventory control, including "determine inventory level." Once again, this job is essential to inventory control.

(e) GPO Distribution Coordinator

After reviewing R Exh. 23, Mr. Fujimoto testified it was the job description for a Distribution Coordinator, a position which was similar to the Distribution Clerks except it required more experience. (Tr. 1142:19-25, 1143:1-4.) He recalled that the position sat in the warehouse

offices near the receiving area and required interaction with warehouse employees in order to unload shipping containers, control inventory and move products throughout the warehouse. (Tr. 1143:5-17.)

A detailed review of R Exh. 23 shows the "Job Purpose" includes "monitoring outgoing and incoming products." And, all "Essential Job Functions" directly relate to inventory control work, including "addressing any problems with inventory control."

(f) Logistics Office Clerk

Reviewing R Exh. 24, Mr. Fujimoto explained it was a job description for a Logistics Office Clerk position, he explained that the position was located in the warehouse offices and involved providing administrative support for the warehouse office operations and staff. (Tr. 1144:3-8.) Mr. Fujimoto testified that the position interacted with warehouse employees on a daily basis including collecting paper on a daily basis from drivers. (Tr. 1144:3-18.)

The ALJ permitted this classification of employees to vote. (ALJD 60:5-25.)

ii. The Board Should Permit Employees Who Perform Inventory Control Work In Classifications Included In The Stipulation To Vote.

To the extent the Board is going to allow employees who perform "inventory control" work to have their ballots counted, employees in the positions of Central Purchase Clerk, GPO Central Purchase Clerk, GPO Distribution Clerk, GPO Distribution Coordinator, and Logistics Office Clerk should all be permitted to vote.

2. Other Classifications Not Listed In The Stipulation But Involve Inventory Control Work/Labelling

i. Testimony Regarding Job Descriptions

As noted, Mr. Fujimoto offered testimony about the job classifications specifically referenced in the Stipulation, as well as other testimony of employees who Respondent believes are eligible to vote because their job duties including inventory control and/or labelling, which

permit them to be eligible. Such job classifications are as follows: GPO Assistant Buyer, Export Office Clerk, Shipping & Receiving Clerk, GPO Coordinator, Sales Assistant (ICD), Export Sales Assistant, GPO Export Clerk, GPO Import Clerk, Purchasing Clerk, Food Safety Coordinator, and National Account Administrative Assistant. The ALJ rejected each one of these job classifications as being permitted to vote.

(a) GPO Assistant Buyer

Reviewing R Exh. 30, Mr. Fujimoto stated the exhibit was the job description for a GPO Assistant Buyer, he recalled that the position was located in the second-floor office with duties that included working with buyers and branch locations to make sure they were ordering the correct products to sell. (Tr. 1150:7-20.)

Reviewing R Exh. 30, Mr. Fujimoto stated the Assistant Buyer was involved in inventory control which involved working with the LA branch and manufacturers to track the sales of products. (Tr. 1151:13-20.) He explained the Assistant Buyers would work with warehouse personal whenever a shipping container was received to ensure they were receiving the correct products for inventory control purposes. (Tr. 1151:21-25, 1152:1-4.)

The job description of Assistant Buyer (R Exh. 30) specifically states the "Job Purpose" is to "keep track of all products coming into Company", which is inventory control work. The "Essential Job Functions" state they are to "maintain and track sales and inventory results."

(b) Export Office Clerk

Reviewing R Exh. 31, Mr. Fujimoto testified the exhibit was the job description for an Export Office Clerk, he explained the position's duties included being responsible for working with customers in South America and Mexico. (Tr. 1154:3-10, 1155:7-12.)

Mr. Fujimoto explained that the Export Office Clerks would work in the first-floor office and interact with warehouse employees for purposes of label making and inventory control functions. (Tr. 1155:7-25, 1156:1-2.)

The job description of Export Office Clerk (R Exh. 31) specifically states the "Essential Job Functions" include "labeling of products."

(c) Shipping & Receiving Clerk

Reviewing R Exh. 32, Mr. Fujimoto testified the exhibit was a job description for a Shipping/Receiving Clerk, he explained the job duties included both checking the merchandise within arriving containers in order to insure there was no discrepancy between invoice amounts and allocating merchandise to be distributed to other facilities. (Tr. 1157:21-25, 1158:1-5.) He recalled that the position sat in the back warehouse receiving area and interacted with Warehouse Workers to ensure incoming products got moved from shipping containers to the warehouse floor, Mr. Fujimoto testified that the employees would also perform inventory control functions by allocating inventory to different branch offices. (Tr. 1158:6-25, 1159:1-4.)

The job description of Shipping & Receiving Clerk (R Exh. 32) reports the inventory control aspect as testified to by Mr. Fujimoto under "Job Purpose" as "responsible for…maintaining foreign and domestic purchase orders" as well as "maintain[ing] the merchandise flow for the Company." The "Essential Job Functions" include "inspecting condition of items; comparing of items to purchase order and packing list" and "determin[ing] inventory level", all of which are inventory control work.

(d) GPO Coordinator

Reviewing R Exh. 33, Mr. Fujimoto testified the exhibit was a job description for a GPO Coordinator, he described the job duties included serving as the most experienced Central Clerk that worked with manufacturers and vendors in order to ensure they were buying the right amount

of merchandise for each location. (Tr. 1159:5-25, 1160:1-3.) He recalled that the position sat in the first-floor office space and interacted with warehouse employees to ensure the right amount of inventory was being received or shipped off. (Tr. 1160:4-12.)

The job description of GPO Coordinator (R Exh. 33) specifically states under the "Job Purpose" that the job is "responsible for monitoring outgoing and incoming products and ensure that all products are distributed to each branch office," which is inventory control work.

(e) Sales Assistant (ICD)

Reviewing R Exh. 34, Mr. Fujimoto testified the exhibit was a job description for an Institutional Customer Division "ICD" Sales Assistant, he explained the position duties included selling merchandise to Respondent's national chain to distribute products to grocery stores and restaurants. (Tr. 1160:21-25, 1161:1-4.) He testified the position was seated in the first floors offices and would interact with Warehouse Workers in order to ensure the large orders were accurate. (Tr. 1161:5-16.)

The job description of Sales Assistant (R Exh. 34) states an "Essential Job Function" is to "check inventory to determine availability of requested merchandise", which is once again inventory control work.

(f) Export Sales Assistant

Reviewing R Exh. 35, Mr. Fujimoto testified the exhibit was a job description for the position of Export Sales Assistant, he explained the position duties included working with the international export division to export food items to South America and Mexico. (Tr. 1162:6-12.) He testified that the position was seated in the first floors offices and interacted with warehouse employees for purposes of working with customers to ensure that merchandise was labeled properly in order to ship to South America and Mexico. (Tr. 1162:13-25, 1163:1-17.)

The job description of Export Sales Assistant (R Exh. 35) states "Essential Job Functions" include "respond[ing] to internal and external inquiries concerning shipments and/or issue resolutions." These are specifically inventory control duties.

(g) GPO Export Clerk

Reviewing R Exh. 36, Mr. Fujimoto testified the exhibit was a job description for the position of Export Clerk which was originally referenced as a GPO but was now known as PAD. (Tr. 1165:19-25, 1166:1-14.) He couldn't recall the exact date the name change took place or whether it was before the second union election however, he stated it was in 2018. (Tr. 1166:15-20.) Mr. Fujimoto explained the position sat in the first-floor office and interacted with warehouse employees, specifically PAD/GPO Warehouse Workers, for purposes of ensuring the warehouse had the inventory to ship back over to affiliate offices. (Tr. 1166:21-25, 1167:1-14.)

The job description of Export Clerk (R Exh. 36) specifically states the "Job Purpose" includes "arranging the custom clearance at the Los Angeles/Long Beach ports for all merchandise", which is inventory control. The "Essential Job Functions" include "recognizing potential problems with delivery schedules and expediting orders as needed" as well as "alert[ing] Shipping on all destination shipment with shipment details and any special instructions." These are both inventory control duties.

(h) GPO Import Clerk

Reviewing R Exh. 37, Mr. Fujimoto testified the exhibit was a job description for the position of a GPO Import Clerk with position duties that included making sure that shipping containers cleared customs at the ports of Long Beach and Los Angeles. (Tr. 1170:2-10.) He explained that the position sat in the first-floor office and interacted with warehouse employees for purposes of ensuring shipments arrived consistently for inventory control purposes. (Tr. 1170:11-23.)

The job description of a GPO Import Clerk (R Exh. 37) states the "Job Purpose" includes "arranging the custom clearance at the Los Angeles/ Long Beach ports for all merchandise." The job description also states an "Essential Job Function" is to "coordinate all deliveries and security arrangements from the port and airport to the facility" and "handle all post-entry amendments and internal audits of all imports that have been imported." These are inventory control duties.

(i) Purchasing Clerk

Reviewing R Exh. 38, Mr. Fujimoto testified the exhibit was a job description for the position of a Purchasing Clerk, he explained the position duties included purchasing merchandise for the LA facility separate from the central Purchasing Clerks who were responsible for buying for the whole branch. (Tr. 1172:8-25,1173:1-2.) He explained that the position sat in the first-floor office and interacted with warehouse employees for purposes of ensuring the merchandise that arrived was correct. (Tr. 1173:3-18.)

The job description of Purchasing Clerk (R Exh. 38) specifically states the "Job Purpose" includes "monitoring inventory". An "Essential Job Function" is to "process inventories for products and maintains inventory for all products at Branch location." This job is also responsible for "keeping inventory databases current" and "participates in annual/ quarterly inventory control".

(j) Food Safety Coordinator

Reviewing R Exh. 39, Mr. Fujimoto testified the exhibit was a job description for the position of Food Safety Coordinator, he explained the position duties included making sure the LA facility and all food safety matters were in compliance with government regulations. (Tr. 1174:17-25.) He testified that the position sat in the warehouse offices and interacted with both warehouse employees and Drivers, he also recalled the position was involved in inventory control. (Tr. 1175:1-9.)

Mr. Fujimoto could not confirm to whether the inventory files were maintained in paper form or electronically, however he could confirm that inventory control employees were required to utilize a computer. (Tr. 1176:18-25.) He explained the computers would be needed in order to input information into the Oracle ERP system, an online database that housed inventory, customer information and accounting information. (Tr. 1177:1-8.)

(k) National Account Administrative Assistant

Reviewing R Exh. 40, Mr. Fujimoto testified the exhibit was a job description for the position of an Administrative Assistant with duties that included working with the Institutional Customer Division on the grocery side selling food items to grocery stores like Vons, Ralphs, etc. (Tr. 1177:17-25, 1178:1-2.) He explained that the position sat in the first-floor office and interacted with warehouse employees to ensure that the inventory being sold was in stock and ready to ship. (Tr. 1178:3-23.)

The job description of Administrative Assistant (R Exh. 40) specifically states an "Essential Job Function" is to "process orders which includes but not limited to checking inventory, confirming shipping schedules with clients…", which is an inventory control duty.

ii. The Board Should Permit Employees Who Perform Inventory Control Work In Classifications Not Included In The Stipulation To Vote.

As noted above, when all of the aforementioned job descriptions, whether specified by name in the Stipulation or the additional descriptions testified to by Mr. Fujimoto, all of them involved duties that would make employees holding these job classifications eligible voters.

C. Challenged Voters Who Perform Duties That Fit Within Either The Undisputed Or Disputed Job Categories.

1. Review Of Each Challenged Voter Not Accepted By The ALJ.

The ALJ Decision reflects that the ballots of John Kirby, Jose Rosas, Cheryl Johnston,

Suguru Onaka, Mamoru Tagai, Joseph Napoli, Emilio Gonzales, and Alberto Rodriguez[4] should be counted. (ALJD 87:35-40.) Set out below is a review of the eligibility of the remaining challenged voters whose eligibility was disallowed by the ALJ.

In reviewing each individual employees, it is important to note that Mr. Fujimoto (see above) testified that there were in fact errors on the voter list. Mr. Fujimoto was not responsible for preparing the list. Mr. Fujimoto's testimony as to each of the remaining challenged employees addresses the job duty they were actually performing at the time of the election. And, it is Respondent's contention that if they fall within any of the job descriptions as discussed herein, then they should be considered eligible voters, irrespective of how they were listed.

In many cases, as discussed below, Respondent and the ALJ are in agreement as to what the actual job duty of the person was at the time of the election. The question is whether or not, as noted above, employees with such job duties are eligible voters. Set out below is a discussion as to each of the remaining challenged ballot employees.

i. Discussion Of The Remaining Challenged Ballot Employees.

(a) Kumiko Estrada

The ALJ finds Kumiko Estrada's position to be an Export Office Clerk. (ALJD 57:10-23.) Respondent agrees with this determination and contends that Export Office Clerk is eligible to vote for the reasons stated above. Ms. Estrada should be independently allowed to vote as a result of being a "labeler". (R Exh. 31.)

(b) Maho Kobyashi

The ALJ finds Maho Kobyashi's position to be an Export Office Clerk. (ALJD 57: 25-33.) Respondent agrees with this determination and contends that Export Office Clerk is eligible to

[4] It is the position of Respondent for the reasons stated above that Mr. Rodriguez was lawfully terminated and his ballot should not be counted.

vote for the reasons stated above. Ms. Estrada should be independently allowed to vote as a result of being a "labeler". (R Exh. 31.)

(c) Sachie Liu

The ALJ finds Sachie Liu's position to be an ICD Sales Assistant. (ALJD 57: 35-41.) Respondent agrees with this determination and contends that ICD Sales Assistant is eligible to vote for the reasons stated above.

(d) Fumi Meza

The ALJ finds Fumi Meza's position to be a GPO Export Clerk. (ALJD 57:43-47, 58:1-2.) Respondent agrees with this determination and contends that Export Office Clerk is eligible to vote for the reasons stated above.

(e) Kristie Mizobe

The ALJ finds Kristie Mizobe's position to be an ICD Sales Assistant. (ALJD 58:4-10.) Respondent agrees with this determination and contends that ICD Sales Assistant is eligible to vote for the reasons stated above.

(f) Stephanie Mizobe

The ALJ finds Stephanie Mizobe's position to be an Export Office Clerk. (ALJD 58:12-19.) Respondent agrees with this determination and contends that Export Office Clerk is eligible to vote for the reasons stated above.

(g) Shuji Ohta

The ALJ finds Shuji Ohta's position to be a Purchasing Clerk. (ALJD 58:21-28.) Respondent agrees with this determination and contends that Purchasing Clerk is eligible to vote for the reasons stated above.

(h) Wakako Park

The ALJ finds Wakako Park's position to be an ICD Sales Assistant. (ALJD 58:30-36.) Respondent agrees with this determination and contends that ICD Sales Assistant is eligible to vote for the reasons stated above.

(i) Keiko Takeda

The ALJ finds Keiko Takeda's position to be a Purchasing Clerk. (ALJD 58:38-43.) Respondent agrees with this determination and contends that Purchasing Clerk is eligible to vote for the reasons stated above.

(j) Stacey Umemoto

The ALJ finds Stacey Umemoto's position to be a Purchasing Clerk. (ALJD 59:1-8.) Respondent agrees with this determination and contends that Purchasing Clerk is eligible to vote for the reasons stated above.

(k) Karen Yamamoto

The ALJ finds Karen Yamamoto's position to be an Export Sales Assistant. (ALJD 59:10-16.) Respondent agrees with this determination and contends that Export Sales Assistant is eligible to vote for the reasons stated above.

(l) Chiaki Yamashita

The ALJ finds Chiaki Yamashita's position to be an Export Sales Assistant. (ALJD 59:18-25.) Respondent agrees with this determination and contends that Export Sales Assistant is eligible to vote for the reasons stated above.

(m) Yasuhiro (David) Yamashita

The ALJ finds Y. Yamashita's position to be an ICD Administrative Assistant. (ALJD 59:27-34.) Respondent agrees with this determination and contends that ICD Administrative Assistant is eligible to vote for the reasons stated above.

(n) Domingo Pliego

The ALJ finds Domingo Pliego's position to be a Food Safety Coordinator. (ALJD 59:36-42.) Respondent agrees with this determination and contends that Food Safety Coordinator is eligible to vote for the reasons stated above.

(o) Hideki Takegahara

Reviewing R Exh. 64, Mr. Fujimoto identified the employee in the document as Hideki Takegahara, who was employed by Respondent since July 4, 2007, including at the time of the second election on February 6, 2018. (Tr. 1235:17-25, 1236:1-2.) Mr. Fujimoto asserted that Mr. Takegahara's position at the time of the election was that of "GPO Distribution Coordinator"; however, he admitted that R Exh. 64 indicated that the position change request form was never received when Mr. Takegahara changed positions in 2011, but he could not explain why. (Tr. 1236:3-25.) Reviewing R Exh.64, Mr. Fujimoto noted the document was in Japanese, but he could not otherwise translate it. (Tr. 1237:8-16.)

Mr. Fujimoto identified the employees named on page 1 of R Exh. 64, as Osamu Suzuki, Kazumi Kasai, and Hideki Takegahara; he clarified that in 2011 they worked for the LA branch, and later reported to what is known as GPO or PAD. (Tr. 1237:21-25, 1238:1-4.)

The ALJ finds Mr. Takegahara to be ineligible. (ALJD 62:1-34.) It is Respondent's position that this person should be permitted to vote. There was confusion regarding paperwork as to when there was a change in job. Mr. Fujimoto worked at the Company, was familiar with the positions, there is no contrary evidence that Mr. Takegahara was not a GPO Distribution Coordinator. Additionally, Mr. Fujimoto's testimony was not ambiguous as shown by the testimony exchange in the ALJ Decision. (ALJD 62:10-15.) Mr. Fujimoto clearly states at the time of the election Mr. Takegahara was a GPO Distribution Coordinator. Mr. Takegahara's vote should be counted.

(p) Chiaki Mazlomi

The ALJ finds Chiaki Mazlomi's position to be a GPO Coordinator. (ALJD 62:36-44, 72:32-34.) Respondent agrees with this determination and contends that GPO Coordinator is eligible to vote for the reasons stated above.

(q) Yukihiko Amanuma

The ALJ finds Yukihiko Amanuma's position to be GPO Distribution Coordinator. (ALJD 62:46-47, 63:1-7, fn.72.) Respondent agrees with this determination and contends that GPO Distribution Coordinator is eligible to vote for the reasons stated above.

(r) Brian Noltensmeier

The ALJ finds Brian Noltensmeier's position to be a GPO Distribution Coordinator. (ALJD 63:9-14.) Respondent agrees with this determination and contends that GPO Distribution Coordinator is eligible to vote for the reasons stated above.

(s) Ryan Prewitt

The ALJ finds Ryan Prewitt's position to be a GPO Distribution Coordinator. (ALJD 63:16-20.) Respondent agrees with this determination and contends that GPO Distribution Coordinator is eligible to vote for the reasons stated above.

(t) John Salzer

The ALJ finds John Salzer's position to be a GPO Distribution Coordinator. (ALJD 63:22-25.) Respondent agrees with this determination and contends that GPO Distribution Coordinator is eligible to vote for the reasons stated above.

(u) Thao Nguyen

The ALJ finds Thao Nguyen's position to be a Central Purchase Clerk. (ALJD 67:18-26.) Respondent agrees with this determination and contends that Central Purchase Clerk is eligible to vote for the reasons stated above.

(v) Kayoko Nishikawa

The ALJ finds Kayoko Nishikawa's position to be a Central Purchase Clerk. (ALJD 67:27-31.) Respondent agrees with this determination and contends that Central Purchase Clerk is eligible to vote for the reasons stated above.

(w) Wesley Chang

The ALJ finds Wesley Chang's position to be a Central Purchase Clerk. (ALJD 67:32-37.) Respondent agrees with this determination and contends that Central Purchase Clerk is eligible to vote for the reasons stated above.

(x) Rachel Lin

The ALJ finds Rachel Lin's position to be an Assistant Buyer. (ALJD 68:39-43.) Respondent agrees with this determination and contends that Assistant Buyer is eligible to vote for the reasons stated above.

(y) Miwa Sassone

The ALJ finds Miwa Sassone's position to be an Assistant Buyer. (ALJD 69:1-8.) Respondent agrees with this determination and contends that Assistant Buyer is eligible to vote for the reasons stated above.

(z) Chizuko Sho

Comparing R Exhs. 55 and 21, Mr. Fujimoto testified that employee Chizuko Sho was employed by Respondent as a production associate until her last day of employment on March 30, 2018. (Tr. 1216:17-25, 1217:1-7.)

In reference to the discrepancy between Ms. Sho's listed job title of "Product Associate" on page 1 of R Exh. 55, and her final position as "GPO Central Purchase Clerk" in R Exh. 21, Mr. Fujimoto testified that the "manager request form," needed by HR to make any kind of change to an employee's position or personnel file, was never submitted to finalize Ms. Sho's change in job

title. (Tr. 1217:12-25, 1218:1-2.) Mr. Fujimoto then stated that they no longer had a "Product Development Division," and that as of February 6, 2018, Ms. Sho was working as a "GPO Central Purchase Clerk" in the department known either as "Product Allocation Division" or "GPO operation." (Tr. 1218:3-16.) CC/Ms. Sánchez asked to clarify, and Mr. Fujimoto testified, that R Exh. 55 did not refer to Ms. Sho as a "GPO Central Purchase Clerk." (Tr. 1218:17-25, 1219:1-2.)

The ALJ finds Chizuko Sho's position to be a Production Associate simply because paperwork for her change of position to GPO Central Purchase Clerk was not completed. (ALJD 69:10-19.) Once again, the person with the most knowledge of this is Mr. Fujimoto, who explained the situation and had personal knowledge of her job. The ALJ's decision should be reversed and Ms. Sho should be determined to be a GPO Central Purchase Clerk.

(aa) Joshua Fulkerson

The ALJ finds Joshua Fulkerson's position to be a GPO Central Purchase Clerk. (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(bb) Senllacett Gonzalez Guardado

The ALJ finds Senllacett Gonzalez Guardado's position to be a GPO Central Purchase Clerk. (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(cc) Kaori Juichiya

The ALJ finds Kaori Juichiya's position to be a GPO Central Purchase Clerk. (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(dd) Kaipo Eda

The ALJ finds Kaipo Eda's position to be a GPO Central Purchase Clerk. (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(ee) Stephany Manjarrez

The ALJ finds Stephany Manjarrez's position to be a GPO Central Purchase Clerk (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(ff) Jenifer Tran

The ALJ finds Jenifer Tran's position to be a GPO Central Purchase Clerk. (ALJD 69:21-22.) Respondent agrees with this determination and contends that GPO Central Purchase Clerk is eligible to vote for the reasons stated above.

(gg) Kazumi Kasai

After examining R Exh. 58, Mr. Fujimoto testified that Kazumi Kasai was employed by Respondent – first as a Lead Order Desk, then as a GPO Import Clerk and that she held the position of GPO Import Clerk during the second election on February 6, 2018. (Tr. 1223:2-17.) Mr. Fujimoto clarified that Ms. Kasai's position was never officially updated via request form, through there was a position change notice submitted in 2008; he vouched for her more updated job description as a GPO Import Clerk because he knew her personally. (Tr. 1223:18-25, 1224:1-9.)

Referring to page 1 of R Exh. 58, Mr. Fujimoto was unable to clarify to UC/Ms. Sánchez whether Ms. Kasai was at any point a salaried employee. (Tr. 1224:10-25, 1225:1-8.) In regard to the two other employees named in the document, Douglas Shin and Cristina Veron; Mr. Fujimoto stated that he did not know anything about Mr. Shin, but he did know that Ms. Veron was no longer

employed by Respondent. (Tr. 1225:9-14.) Mr. Fujimoto testified that Ms. Kasai was an hourly employee as of February 6, 2018. (Tr. 1225:21-25, 1226:1-3.)

The ALJ finds Kazumi Kasai ineligible to vote. (ALJD 72:19-30.) Once again, it is the position of Respondent that the best evidence of what job the employees were performing at the time of the election is the testimony of Mr. Fujimoto who found Ms. Kasai to be a GPO Import Clerk, which for the reasons stated above is an eligible position and the ALJ Decision should be reversed and Ms. Kasai's ballot should be counted.

D. The Testimony Of Former Employee Isidro Garcia Should Be Stricken.

Isidro Garcia, a former employee of Respondent, testified the first day of the hearing (Tr. 62-109) and offered U Exh. 1, a seating chart. He then went on to testify about the job duties of various employees who were noted on the seating chart. The ALJ gave considerable weight to Mr. Garcia's testimony. (ALJD 65:fn. 75). As to U Exh. 1, Mr. Garcia stated that he had been given the seating chart by an administrative assistant employee on approximately January 18, 2018. (Tr. 99:25, 100:1-5.) Mr. Garcia testified he had not requested the document but received it multiple times from the L.A. office in the regular course of business from the time he began working first as an Assistant Manager. (Tr. 100:6-13.) However, when the particular seating chart in question was sent out, Mr. Garcia clarified he was suspended, and the chart was sent to his still active work email prior to his return on February 5, 2018. (Tr. 100:14-24.)

On cross, Mr. Garcia testified that his knowledge of U Exh. 1 came from his time as assistant manager. (Tr. 100:25, 101:1-6.) Mr. Garcia also stated that the week before testifying, he had met once with the Union and their counsel to discuss and review U Exh. 1. (Tr. 101:9-18.) He also further testified his knowledge regarding the exhibit came from his time as an assistant manager. (Tr. 101:19-24.)

Mr. Garcia stated at the hearing that when he met with the Union, he did discuss U Exh. 1, however they did not ask for the seating chart; he had produced it on his own volition. (Tr. 105:13-21.) Mr. Garcia also again testified he had only met with the Union once, the week before testifying and at that meeting had brought the chart "just in case." (Tr.105:22-25, 106:1-4.)

Mr. Garcia stated that, at the present time and at the time of the meeting, he remained an employee of Wismettac. (Tr. 106:5-8.) Although he also admitted that he had not asked permission to give the document to the Union because he was no longer in the same management position. (Tr. 106:8-13.)

Mr. Garcia testified that he is aware that Respondent has an employee handbook, however as a manager he was not required to know most of the content and that "honestly" he had never read the material. (Tr. 107:3-12.) Mr. Garcia further stated that he had no knowledge about the employee section labeled "confidential information" which contained a prohibition on divulging information to outside parties about employees. (Tr. 107:18-22.)

Mr. Garcia's testimony largely became irrelevant after the testimony of Atsushi Fujimoto and the "inventory control" issues were addressed. However, it the position of Respondent that his testimony and the circumstances under which it was prepared are improper. First, U Exh. 1 is a document that was improperly obtained. Mr. Garcia testified he obtained this document during the course of his employment with the Company. If the Union wanted this document produced then it should have been subpoenaed through proper channels. Mr. Garcia's production of the document was a clear violation of Company policies. (R Exh. 83.) The Company's Employee Handbook states regarding confidential information as follows:

> "Employment with Wismettac may allow employees access to information about clients, customers and employees, as well as other information of proprietary or confidential nature. For purposes of this policy, confidential information includes client lists, client contact information, client files, employee files and rosters,

> computer records, financial and marketing data and information, as well as master documents and/or salary and payroll information. Any unauthorized disclosure or misappropriation of such information is strictly prohibited and may result in disciplinary action up to and including termination."

See R Exh. 83, pages 26-27.

A review of the seating chart clearly establishes that at a minimum it is a "roster". There is information about employees, i.e. employee phone numbers. This is clearly not a public document of the type that could be released.

Respondent represents to the ALJ/the parties, that after the hearing Mr. Garcia did not return to work, immediately requested a leave of absence and shortly thereafter resigned his employment. Consequently, an argument that he could have been disciplined for divulging this document is pointless as he never returned.

Additionally, it was improper for Counsel for the Union, Ms. Sánchez, to interview Mr. Garcia while he was employed about his activities as a manager. That is essentially the same as Respondent's counsel approaching an employee of the Union, such as Mr. Quinonez, and attempting to interview him about activities in his capacity as an employee of the Union. It is one thing to call Mr. Garcia to testify, it is entirely another matter for him to be interviewed about is tenure as a supervisory employee with knowledge of Company operations that was not public knowledge, without notice to the Company.

For these reasons, Mr. Garcia's testimony and U Exh. 1 should be stricken.

1. Remand To The ALJ

Respondent requests that the Board remand the R–Case portion of this case back to the ALJ to (a) reconsider her Decision in light of a future Board decision to strike the testimony of Isidro Garcia (see above); and (b) to reconsider her Decision as a result of her complete failure to

give any weight whatsoever to inventory control functions performed by employees (see argument above).

V. CONCLUSION

For the reasons stated, the findings that Respondent committed unfair labor practices should be reversed and the challenged ballots should be counted.

Dated: October 30, 2019

Respectfully Submitted By:

LAW OFFICES OF SCOTT A. WILSON

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CERTIFICATE OF SERVICE

I, Brittany J. Heath, declare and state as follows:

1. I am at least 18 years of age, not a party to this action. I am employed at the Law Offices of Scott A. Wilson, which is located in San Diego County, California. My business address is 433 G Street, Suite 203, San Diego, CA 92101. My e-mail address is sawfrontoffice@pepperwilson.com.

2. I hereby certify that on October 30, 2019, a copy of **WISMETTAC ASIAN FOODS, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** in Cases 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, 21-CA-212285, and 21-RC-204759 has been submitted by E-Filing to the National Labor Relations Board, Office of the Executive Secretary, in Washington DC.

3. On October 30, 2019, I served by e-mail, a copy of the document listed in item 2 on the parties as follows:

NAME OF PERSON SERVED	ELECTRONIC SERVICE ADDRESS
Elvira T. Pereda, Esq. Counsel for the General Counsel National Labor Relations Board, Region 21	elvira.pereda@nlrb.gov
Thomas Rimbach, Esq. Counsel for the General Counsel National Labor Relations Board, Region 21	thomas.rimbach@nlrb.gov
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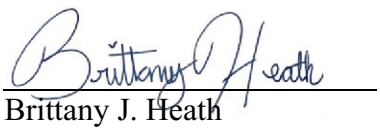
Rolando Lopez	cateoria@yahoo.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California on October 30, 2019.

By: 
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