

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

WISMETTAC ASIAN FOODS, INC.,

Employer,

and

**FOOD, INDUSTRIAL & BEVERAGE
WAREHOUSE, DRIVERS AND CLERICAL
EMPLOYEES UNION LOCAL 630,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Case No. 21-RC-204759

Petitioner.

**WISMETTAC ASIAN FOODS, INC.'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S DECISION TO OVERRULE THE EMPLOYER'S
EXCEPTIONS AND OVERRULE THE UNION'S EXCEPTIONS,
ADOPT THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDATIONS
AND CERTIFICATION OF REPRESENTATIVE;
AND
REQUEST FOR REMAND TO THE REGION**

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WISMETTAC ASIAN FOODS, INC.

I. INTRODUCTION

Wismettac Asian Foods, Inc. (the “Employer”) submits this “Request for Review” of the Regional Director’s March 26, 2020 “Decision to Overrule the Employer’s Exceptions and Overrule the Union’s Exceptions, Adopt the Administrative Law Judge’s Recommendations and Certification of Representative” (the “RD Decision”), included herewith as RFR Exhibit 1, to the National Labor Relations Board (the “Board”) in Washington, DC.

The Administrative Law Judge (the “ALJ”) issued her “Decision and Report on Challenges and Objections” (the “ALJ Decision”) on August 30, 2019. The portions of which relevant to the instant case are attached as RFR Exhibit 2. It is the position of the Employer that the ALJ and the Regional Director improperly disallowed the votes of thirty-four (34) employees who engaged in “inventory control” and/or “labeling” work. The votes of employees performing such duties should be counted based upon the clear language of the “Stipulated Election Agreement” entered into by the parties, which includes such employees to be eligible voters, even though they also performed additional duties. The Regional Director erroneously considered only formal job titles when determining voter eligibility as opposed to considering job duties (irrespective of titles); and, the RD Decision is contrary to the clear and unambiguous language in the Stipulated Election Agreement.

II. GROUNDS FOR REVIEW

This Request for Review is submitted pursuant to Section 102.69(c)(2) of the Board’s Rules and Regulations; and, per direction of the Regional Director (RFR Exhibit 1, page 22), conforms to the requirements of Sections 102.67(e) and (i)(1), which states as follows:

(e) *Contents of request.* A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the Regional Director. (Emphasis added).

Section 102.67(d) of the Board's Rules and Regulations provides the grounds for which a request for review may be granted. As referenced above, paragraph (d)(2) of this section states the following criteria are grounds to grant review of the RD Decision under these circumstances:

(d)(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

In considering the above standards for review, in this case Section 102.67(d)(2) is applicable as the ALJ, and subsequently the Regional Director, made a "substantial factual error" by disallowing the votes of employees who perform inventory control and labeling work.

III. STATEMENT OF FACTS

A. Procedural History

The Employer will not repeat pages 1-3 of the RD Decision, which includes the Stipulated Election Agreement as well as the procedural history of the case.

B. Categories of Employees at Issue

There are three groups of employees at issue, the first being those "included" as eligible voters; the second being those who are defined as "others permitted to vote"; and the third being those voters whose job duties include neither of the aforementioned categories, but who perform inventory control and/or labeling work, which should make them eligible to vote. However, both

the ALJ Decision and the RD Decision exclude employees in all three categories who were performing inventory control and labeling work.

C. Testimony at the Hearing¹

To understand the Employer's position, it is important to review the testimony of Atsushi Fujimoto who testified (a) as to the job classifications/duties that contained inventory control and/or labeling work; and (b) as to each of the individual challenged voters and why they performed either inventory control and/or labeling work. Mr. Fujimoto's testimony is attached as RFR Exhibit 3 (Tr. 1096-1182) and RFR Exhibit 4 (Tr. 1191-1367).

Initially, Mr. Fujimoto testified that there were errors in the voter list, which he was not involved in the preparation of. Mr. Fujimoto testified as to his knowledge of what each of the classifications/duties involved as well as the duties of the individual employees. See RFR Exhibit 3, pages 34-35 (Tr. 1127:1-1128:23).

It has been the position of the Employer at the hearing and in the later briefing that Mr. Fujimoto's testimony as to the job duties of the employees should be considered controlling as opposed to the voter list, which Mr. Fujimoto conceded contained errors. Mr. Fujimoto's testimony along with backup documentation shows the duties performed by each of the challenged voters. The record is also clear, however, that despite references to multiple voter lists by the Regional Director and ALJ, the record is clear that there was only one voter list used for the second election on February 6, 2018. (See further discussion below).

1. Fujimoto Testimony Regarding Job Classifications

Mr. Fujimoto's testimony regarding the following specific job classifications is as follows:

¹ For the purposes of this Request for Review, citations to witness testimony shall be referenced by the transcript page and line number(s) and shall be preceded by the notation "Tr."

The **Central Purchase Clerk** job description is attached as RFR Exhibit 5(a) [Hearing R Exh. 19] and testified to at Tr. 1130-1134 (RFR Exhibit 3, pages 37-38);

The **GPO Central Purchase Clerk** job description is attached as RFR Exhibit 5(b) [Hearing R Exh. 21] and testified to at Tr. 1138-1140 (RFR Exhibit 3, pages 45-46);

The **GPO Distribution Clerk** job description is attached as RFR Exhibit 5(c) [Hearing R Exh. 22] and testified to at Tr. 1140-1141 (RFR Exhibit 3, pages 47-48);

The **GPO Distribution Coordinator** job description is attached as RFR Exhibit 5(d) [Hearing R Exh. 23] and testified to at Tr. 1142-1143 (RFR Exhibit 3, pages 49-50);

The **Logistics Office Clerk** job description is attached as RFR Exhibit 5(e) [Hearing R Exh. 24] and testified to at Tr. 1144 (RFR Exhibit 3, page 51);

The **Warehouse Clerk** job description is attached as RFR Exhibit 5(f) [Hearing R Exh. 25] and testified to at Tr. 1145 (RFR Exhibit 3, page 52);

The **Warehouse Worker Lead** job description is attached as RFR Exhibit 5(g) [Hearing R Exh. 26] and testified to at Tr. 1146-1147 (RFR Exhibit 3, pages 53-54);

The **Warehouse Worker** job description is attached as RFR Exhibit 5(h) [Hearing R Exh. 27] and testified to at Tr. 1147-1148 (RFR Exhibit 3, pages 54-55);

The **Driver (CDL)** job description is attached as RFR Exhibit 5(i) [Hearing R Exh. 28] and testified to at Tr. 1148 (RFR Exhibit 3, page 55);

The **Driver (Non-CDL)** job description is attached as RFR Exhibit 5(j) [Hearing R Exh. 29] and testified to at Tr. 1149 (RFR Exhibit 3, page 56);

The **Assistant Buyer** job description is attached as RFR Exhibit 5(k) [Hearing R Exh. 30] and testified to at Tr. 1150-1152 (RFR Exhibit 3, pages 57-59);

The **Export Office Clerk** job description is attached as RFR Exhibit 5(l) [Hearing R Exh. 31] and testified to at Tr. 1154-1156 (RFR Exhibit 3, pages 61-63);

The **GPO Shipping & Receiving Clerk** job description is attached as RFR Exhibit 5(m) [Hearing R Exh. 32] and testified to at Tr. 1157-1159 (RFR Exhibit 3, pages 64-66);

The **GPO Coordinator** job description is attached as RFR Exhibit 5(n) [Hearing R Exh. 33] and testified to at Tr. 1159-1160 (RFR Exhibit 3, pages 66-67);

The **Sales Assistant (ICD)** job description is attached as RFR Exhibit 5(o) [Hearing R Exh. 34] and testified to at Tr. 1160-1161 (RFR Exhibit 3, pages 67-68);

The **Export Sales Assistant** job description is attached as RFR Exhibit 5(p) [Hearing R Exh. 35] and testified to at Tr. 1162-1163 (RFR Exhibit 3, pages 69-70);

The **[GPO] Export Clerk** job description is attached as RFR Exhibit 5(q) [Hearing R Exh. 36] and testified to at Tr. 1165-1167 (RFR Exhibit 3, pages 71-74);

The **GPO Import Clerk** job description is attached as RFR Exhibit 5(r) [Hearing R Exh. 37] and testified to at Tr. 1170 (RFR Exhibit 3, page 77);

The **Purchasing Clerk** job description is attached as RFR Exhibit 5(s) [Hearing R Exh. 38] and testified to at Tr. 1172-1173 (RFR Exhibit 3, pages 79-80);

The **Food Safety Coordinator** job description is attached as RFR Exhibit 5(t) [Hearing R Exh. 39] and testified to at Tr. 1174-1177 (RFR Exhibit 3, pages 81-84);

The **National Account Administrative Assistant** job description is attached as RFR Exhibit 5(u) [Hearing R Exh. 40] and testified to at Tr. 1177-1178 (RFR Exhibit 3, pages 84-85).

2. Fujimoto Testimony Regarding Specific Employees

Mr. Fujimoto then testified about each of the remaining challenged voters, explaining their job duties and why they were eligible to vote based upon the Stipulated Election Agreement entered into by the parties. The testimony regarding each challenged voter is as follows:

Joseph Napoli (Tr. 1191-1195) (RFR Exhibit 4, pages 3-7);

John Kirby (Tr. 1195-1197) (RFR Exhibit 4, pages 7-9);

Wesley Chang (Tr.1200-1201) (RFR Exhibit 4, pages 12-13);

Thao Nguyen (Tr. 1202-1203) (RFR Exhibit 4, pages 14-15);

Kayoko Nishikawa (Tr. 1205-1207) (RFR Exhibit 4, pages 17-19);

Joshua Fulkerson (Tr. 1207) (RFR Exhibit 4, page 19);

Senllacett Guardado (Tr. 1208-1209) (RFR Exhibit 4, pages 20-21);

Kaori Juichiya (Tr. 1210-1211) (RFR Exhibit 4, pages 22-23);

Kaipo Eda (Tr. 1211-1212) (RFR Exhibit 4, pages 23-24);

Hwami Oh (Tr. 1212-1213) (RFR Exhibit 4, pages 24-25);

Rachel Lin (Tr. 1213-1214) (RFR Exhibit 4, pages 25-26);

Stephany Manjarrez (Tr. 1214-1215) (RFR Exhibit 4, pages 26-27);

Miwa Sassone (Tr. 1215-1216) (RFR Exhibit 4, pages 27-28);

Chizuko Sho (Tr. 1216-1219) (RFR Exhibit 4, pages 28-31);
Jenifer Tran (Tr. 1219-1221) (RFR Exhibit 4, pages 31-33);
Shun Man Yung (Tr. 1221-1222) (RFR Exhibit 4, pages 33-34);
Kazumi Kasai (Tr. 1223-1226) (RFR Exhibit 4, pages 35-38);
Yukihiko Amanuma (Tr. 1226-1228) (RFR Exhibit 4, pages 38-40);
Chiaki Mazlomi (Tr. 1228-1230) (RFR Exhibit 4, pages 40-42);
Brian Noltensmeier (Tr. 1230-1231) (RFR Exhibit 4, pages 42-43);
Ryan Prewitt (Tr. 1231-1233) (RFR Exhibit 4, pages 43-45);
John Salzer, Jr. (Tr. 1233-1234) (RFR Exhibit 4, pages 45-46);
Nobuyasu Yamamoto (Tr. 1234-1235) (RFR Exhibit 4, pages 46-47);
Hideki Takegahara (Tr. 1235-1238) (RFR Exhibit 4, pages 47-50);
Kumiko Estrada (Tr. 1238-1243) (RFR Exhibit 4, pages 50-55);
Cheryl Johnston (Tr. 1243-1244) (RFR Exhibit 4, pages 55-56);
Maho Kobayashi (Tr. 1244-1247) (RFR Exhibit 4, pages 56-59);
Sachie Liu (Tr. 1249-1251) (RFR Exhibit 4, pages 61-63);
Fumi Meza (Tr. 1252-1254) (RFR Exhibit 4, pages 64-66);
Kristie Mizobe (Tr. 1255-1256) (RFR Exhibit 4, pages 67-68);
Steffanie Mizobe (Tr. 1256-1258) (RFR Exhibit 4, pages 68-70);
Shuji Ohta (Tr. 1258-1261) (RFR Exhibit 4, pages 70-73);
Suguru Onaka (Tr. 1262-1266) (RFR Exhibit 4, pages 74-78);
Wakako Park (Tr. 1267-1270) (RFR Exhibit 4, pages 79-82);
Domingo Pliego (Tr. 1270-1273) (RFR Exhibit 4, pages 82-85);
Mamoru Tagai (Tr. 1273-1274) (RFR Exhibit 4, pages 85-86);
Keiko Takeda (Tr. 1274-1276) (RFR Exhibit 4, pages 86-88);
Stacey Umemoto (Tr. 1276-1277) (RFR Exhibit 4, pages 88-89);
Karen Yamamoto (Tr. 1278-1280) (RFR Exhibit 4, pages 90-92);
Chiaki Yamashita (Tr. 1280-1281) (RFR Exhibit 4, pages 92-93);

Yasuhiro Yamashita (Tr. 1282-1285) (RFR Exhibit 4, pages 94-97);

3. Testimony as to the Intent of the Parties

As noted above, 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. (Emphasis added).

See RFR Exhibit 6, pages 1-2 [Hearing GC Exh. 1(aj)].

As can be seen from the above, “inventory control employees” (lowercase) and “labelers” were in the “INCLUDED” category. That is, people performing such duties did not fall within the “Others permitted to vote” category. It is important to note that the above Stipulation does not only define job titles, it also defines the type of work performed.

A review of the voter list for the February 6, 2018 second election, attached as RFR Exhibit 7 [Hearing R Exh. 18], shows that there are no employees classified as labelers and three employees classified as “Inventory Controller”. Regarding the issue of inventory control, a job description entitled “Inventory Controller” was introduced [withdrawn Hearing R Exh. 20], but because Mr. Fujimoto erroneously stated that there were no inventory control employees, the exhibit was withdrawn. He further stated that there were other employees who handle inventory at

the Company, but do not have that specific title. See RFR Exhibit 3, page 48 (Tr. 1136:15-21).

The Stipulation was entered into after lengthy discussions between the Petitioner, the Employer and the Region. Additionally, the original RC Petition filed by the Petitioner 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. (Emphasis added).

See RFR Exhibit 8 [Hearing GC Exh. 1(a)].

As can be seen from above, the “Included” language changed from “Inventory control” in the original RC Petition to “inventory control employees” (lowercase) in the Stipulated Election Agreement. The uppercase “Inventory control” language in the RC Petition refers to the actual job classification. In the Stipulation, the group of employees eligible to vote expanded to any employee that handles inventory.

The ALJ and the Regional Director contend that this terminology is ambiguous and then, relying upon *Desert’s Palace, Inc. dba Caesar’s 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. See RFR Exhibit 1, page 5; and RFR Exhibit 2, pages 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 the disputed job classifications are not entitled

to vote. This same interpretation was adopted by the Regional Director.

It is the Employer'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. Instead, as noted, these classifications are contained in the "Included" category. The language is clear on its face that employees performing such duties should be permitted to vote.

(a) 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, RFR Exhibit 8, the original RC Petition containing the term "Inventory control" was filed on August 21, 2017. The Stipulation was entered into nine days later with the term "inventory control employees". See August 30, 2017 Stipulated Election Agreement in RFR Exhibit 6. 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. RFR Exhibit 9 [Hearing U Exh. 50] contains emails exchanged between the parties. In particular, there is an August 29, 2017 email (RFR Exhibit 9, 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.

IV. LEGAL ARGUMENT

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, “[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. See RFR Exhibit 2, page 54. The Petitioner 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 Corp.*, 268 NLRB 633 (1984); *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 NLRB 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 NLRB 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)).

Also, there is considerable reference by the ALJ and the Regional Director that the terms were “ambiguous”. However, the evidence shows that it was the Region and the Petitioning Union who drafted the Stipulation. Any ambiguity should be construed against the drafting parties. See Cal. Civ. Code § 1654. As discussed, there is a substantial amount of inventory control work performed by the disputed job classifications. The employees performing this work should be permitted to work.

A. Labelers

With regard to labeling, once again as noted, “labelers” is in the “Included” category. The Regional Director referenced testimony by Mr. Fujimoto that Karen Yamamoto (Official Job Title: Export Sales Assistant, International Export Division), Chiaki Yamashita (Official Job Title: GPO Export Clerk), Kumiko Estrada (Official Job Title: Export Office Clerk), Maho Kobayashi

(Official Job Title: Export Office Clerk) and Stephanie Mizobe (Official Job Title: GPO Export Clerk) were also involved in “labeling” of products. See RFR Exhibit 1, pages 15 and 17. The ALJ also determined that, “There is no evidence that any employee on the latest voter eligibility list appeared as a Labeler, or that any voter was challenged on that basis.” See RFR Exhibit 1, page 12 footnote 15. The only persons who during testimony were identified as performing duties as a labeler were Beatrice Gonzalez (voter list eligible employee no. 54, listed as a “Warehouse Worker”) and Jose Erazo (voter list eligible employee no. 51, listed as a “Warehouse Worker”). See RFR Exhibit 7, page 4; RFR Exhibit 10, pages 3-4 (Tr. 1510:13-1511:1); and RFR Exhibit 11, pages 3-4 (Tr. 1675:22-1676:1).

The ALJ’s assertion with regard to employees formally classified as “labelers” supports the contention of the Employer. “Labelers” were in the “Included” category, yet no one was identified specifically as a “labeler” on the voter list, as there is no separate job classification for this term. Other examples of job classifications referenced in the “Included” category that there are no separate job classifications for are “assemblers/selectors” and “forklift drivers”. As is the case with “labelers”, no one on the voter list is identified as “assembler/selector” or “forklift driver”, meaning that these terms are job duties, not job titles, that define eligible voters.

B. Erroneous Factual Determinations by the Regional Director

The Regional Director, upholding the ALJ Decision, indicates that there was no “meeting of the minds” regarding inventory control employees and states, “Specifically, she noted that the parties could have included these employees among the classifications eligible to vote but chose instead to subject them to challenge.” See RFR Exhibit 1, page 5.

This statement is factually erroneous; “inventory control employees” and “labelers” were in fact listed as classifications in the “Included” category of voters. That is, workers performing

inventory control and/or labeling duties were NOT placed in the “others permitted to vote” category. This is why the “meeting of the minds” “ambiguity” argument is fallacious as persons performing these duties are listed as eligible voters not in dispute or subject to challenge. In fact, as to “inventory control”, the language was modified in a way that more voters would be included.

Despite the assertion by the Regional Director that this contention is an “unsupported assertion”, as noted above, it is in fact asserted. See RFR Exhibits 6 and 8.

As is clear from above, the Stipulation regarding inventory control and labeling is not “ambiguous” as stated by the ALJ. Yet, the ALJ and the Regional Director simply ignored this issue and ruled that all of the voters performing inventory control and/or labeling duties were ineligible. Instead, the Regional Director focused on official job titles and ignored the clear language in the Stipulation that employees who performed miscellaneous job duties, including inventory control and/or labeling work, were eligible to vote irrespective of any formal job title. This is a “substantial factual error” which is grounds for a request for review under Section 102.67(d)(2) of the Board’s Rules and Regulations.

C. Status of Shun Man Yung

The Regional Director establishes that Ms. Yung’s status was inadvertently not addressed by the ALJ. See RFR Exhibit 1, page 8, footnote 10. It is the Employer’s contention that this person is a GPO Central Purchase Clerk, as testified to by Mr. Fujimoto. See RFR Exhibit 4, page 33 (Tr. 1222:1-12). And, as the parties did not take an exception to this, the Regional Director indicated that the challenge is upheld. If the Board directs that GPO Central Purchase Clerk employees should be permitted to vote due to their inventory control duties, then this vote should be counted. The fact that there was an oversight by all parties should not deny the person the right to vote.

V.
REQUESTED REMEDY

The Regional Director committed a “substantial factual error”. The Regional Director should be directed to count the remaining thirty-four (34) challenged ballots; or, in the alternative, the case should be remanded back to the Region to revise its decision and count the votes of those “inventory control employees” and “labelers”.

VI.
CONCLUSION

The Employer’s Request for Review should be granted for the grounds stated.

DATED: May 11, 2020

Respectfully submitted,



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WISMETTAC ASIAN FOODS, INC.

CERTIFICATE OF SERVICE

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

1. I am at least 18 years of age and not a party to this action. I am employed at the Law Offices of Scott A. Wilson, which is located in San Diego, California. My business address is 433 G Street, Suite 203, San Diego, California 92101-6972. My e-mail address is sawfrontoffice@pepperwilson.com.
2. I hereby certify that a copy of **WISMETTAC ASIAN FOODS, INC.'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION TO OVERRULE THE EMPLOYER'S EXCEPTIONS AND OVERRULE THE UNION'S EXCEPTIONS, ADOPT THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDATIONS AND CERTIFICATION OF REPRESENTATIVE; AND REQUEST FOR REMAND TO THE REGION** in Case No. 21-RC-204759 has been submitted by e-filing to the Executive Secretary of the National Labor Relations Board in Washington, D.C.; and to the Regional Director of Region 21 of the National Labor Relations Board on May 11, 2020.
3. A copy of the same document described in item 2 above was served on the interested parties in this action addressed as follows:

NAME OF INDIVIDUAL SERVED	ELECTRONIC SERVICE ADDRESS
William B. Cowen, Regional Director National Labor Relations Board, Region 21	<u>william.cowen@nlrb.gov</u>
Renée Q. Sánchez, Counsel for Petitioner International Brotherhood of Teamsters, Local 630	<u>rqs@sdlaborlaw.com</u>

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

EXECUTED on May 11, 2020 in San Diego, California.



Brittany J. Heath
Legal Assistant to Scott A. Wilson