UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

In the Matter of:

Wismettac Asian Foods, Inc., **Case No. 21-RC-204759**

Employer,

and

International Brotherhood of Teamsters, Local 630,

Petitioner.

PETITIONER'S STATEMENT IN OPPOSITION TO WISMETTAC ASIAN FOODS, INC.'S REQUEST FOR REVIEW

Renée Sánchez, Esq.
HAYES, ORTEGA & SÁNCHEZ
513 S. Myrtle Ave., Suite B
Monrovia, CA 91016
Telephone: 629-297-6900
Email: rqs@sdlaborlaw.com

Attorneys for Petitioner, Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees Union, Local 630, International Brotherhood of Teamsters

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[1] Respondent erringly referred to this employee as "Stephanie."

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I. INTRODUCTION.

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, International Brotherhood of Teamsters, Local 630 ("Union" or "Petitioner") hereby opposes Wismettac Asian Foods, Inc.'s ("Employer" or "Respondent") "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" ("Request for Review"). As discussed herein, no compelling reason exists to support a Request for Review and the Employer has failed to satisfy its burden mandated by the National Labor Relations Board (NLRB) Rules and Regulations and Statements of Procedure, § 102.67(c)-(d).

In her decision (ALJD), the ALJ correctly found, with regard to the challenged ballots, that: (1) there was no meeting of the minds regarding the meaning of "inventory control employees" in the stipulated election agreement; (2) that the only "labelers" were Beatriz Gonzales and Jose Erazo; (3) that employees categorized as GPO Distribution Coordinators, GPO Central Purchase Clerks, and Central Purchase Clerks do not share a community of interest with the Unit employees; and (4) the remaining disputed employees in various broad categories were also intentionally misclassified in an effort to stack the vote and do not share any community of interest with the bargaining unit, and were, thus, properly excluded from the unit. The Regional Director affirmed these findings in its Decision to Overrule the Employer's Exceptions and Overrule the Union's Exceptions, Adopt the Administrative Law Judge's

Recommendations and Certification of Representative ("Regional Director's Decision"). (Employer's Request For Review, Exhibit 1: (Regional Director's Decision).[2]

At the underlying trial, six witnesses testified for the Union. Of these, eight were current employees of Respondent when they testified and seven were former employees, directly or through a staffing agency. Many were long term employees, some with decades of experience and service to the Company. At least one current employee, Isidro Garcia, worked as the Assistant Warehouse Manager of the Warehouse/Driver unit for close to a decade and had intimate knowledge of the facility and petitioned-for bargaining unit. The Employer here relies on a single interested witness: Atsushi Fujimoto, and failed to call even a single employee-witness at trial to support its unconvincing and desperate argument.

II. STANDARD OF REVIEW.

In order for the Board to grant a Request for Review of a Region's decision, the Employer must set forth compelling reasons for such review. NLRB Rules and Regulations § 102.67(c). Section 102.67(c) provides that such request will only be granted if:

(1) A substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;

(2) 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.

(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

[2] The Employer's Request For Review will be cited herein as "RFR," and any exhibits thereto as "RFR, Exh." with a citation to the exhibit number; e.g. "RFR, Exh. 1").

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

The aforementioned standard sets a high threshold that the Employer has not met. Based on the Employer's submission, it appears that it relies solely upon the second ground for its Request for Review. Contrary to the Employer's assertions, the Regional Director, affirming the Administrative Law Judge (ALJ), has not made any clearly erroneous decisions on substantial factual issues.[3]

III. BACKGROUND.

On August 21, 2017, the International Brotherhood of Teamsters, Local 630 ("Union" or "Petitioner"), filed for an election. The Union and Employer (the "Parties") thereafter entered into a Stipulated Election Agreement that included driver and warehouse employees. (Union Exhibit 1 (ALJD), pgs. 47:50-65).[4] It also included temporary employees (U. Exh. 2 (Testimony of Carlos Quinonez), at Tr. 1614-1615),[5] and allowed 13 employees in four classifications to vote "subject to challenge:" GPO Distribution Coordinator, GPO Central Purchase Clerk, Central Purchase Clerk, and Logistics Office Clerk. (Exhibit 1 (ALJD) 8:10; U. Exhs. 16-18; U. Exh. 2

[3] While the Employer does not seem to rely upon the first ground set forth in Section 102.67(c), the Union nevertheless additionally asserts neither the Regional Director nor ALJ have departed from officially reported Board precedent.

[4] The Union's Exhibits will hereafter be cited as "U. Exh." and thereafter with the exhibit number, identifier if appropriate, and page/line number if one so exists, e.g., "U. Exh. 1 (ALDJ), at 10:15."

[5] Citations to the record will include last name (Quinonez) and Transcript page number, e.g. "U. Exh. 2 (Quinonez), at Tr. pg. 1614."

(Quinonez), at Tr. 1615, 1620, 1623, 1629). The Stipulated Election Agreement specifically *excluded* office-clerical employees and *all other* employees.

An election was held on September 19, 2017, which the Union won handily, with 75 votes cast for the Union, 21 against, 2 void ballots, and 31 challenged ballots. Respondent refused to sign the tally of ballots. (U. Exh. 1 (ALJD), at 8:40). The results were ultimately set aside due to alleged misconduct on the part of a Board Agent and a second election was conducted on February 6, 2018, which the Union also won. The challenged-ballot votes were determinative this time, with 76 votes for the Union, 46 votes against, and 53 challenged ballots. (U. Exh. 1 (ALJD), at 24:35). The Parties each filed objections to the second election.

A consolidated hearing addressing the unfair labor practice issues and representation matters, including addressing Petitioner's objections, Respondent's objections, and for resolution of challenged ballots, was held over thirteen (13) days between October 2, 2018, and January 22, 2019. The ALJ issued her Decision on August 30, 2019.

The ALJ found and recommended that each of Respondent's objections were overruled. (U. Exh. 1 (ALJD) at 95:35; see generally pgs. 88-89). Respondent failed to except to the ALJ's findings regarding its overruled objections as well as the Union's sustained objections, thus, pursuant to Sections 102.46(D)(ii) and 102.46(f), Respondent's exceptions must be disregarded, have been waived for those matters and may, thus, not be here urged.

While the ALJ sustained seven (7) Union objections, as discussed *infra*, sustained Union Objection 4 is relevant to the instant matter, as it is regarding Respondent's intentional and bad faith efforts to misclassify and stack employees in challenged-ballot positions when they clearly were office-clerical employees. (U. Exh. 1 (ALJD), at 95:35, 89:40-95:5).

IV. THE EMPLOYER'S FACILITY.

Wismettac's facility is comprised of a two-story front office which houses the corporate headquarters and branch offices ("Headquarters"), management and clerical staff, including upper management, administrative assistants, human resources, customer service, sales staff, and other clerical and management employees working at the Headquarters. (U. Exh. 3: (Garcia), at Tr. 63:19, 22; 65:10; (U. Exh. 4 (Minch), at 953:2; U. Exh. 5). A reception area is located at the front which leads to locked doors to the first and second main front office. (U. Exh. 3 (Garcia) at Tr. 97:12-25; 98:2, 7-14).

The facility's departments are physically separated (U. Exh. 5). The branch offices are located on the first floor of the front offices. (U. Exh. 4 (Minch), at Tr. 954:19; U. Exh. 5). Neither Drivers nor Warehouse workers have any office space in the front offices, nor do they spend time in that area. (U. Exh. 3 (Garcia), at Tr. 65:17-21). Adjacent to the first-floor front office is a kitchen and break room, bathrooms, and a very long hall which leads to the warehouse. The kitchen area and long hallway separate the front offices and Headquarters from the warehouse and delivery dock, which are located in the back of the facility and have their own entrance where drivers and warehouse workers routinely enter the facility. (U. Exh. 3 (Garcia), at Tr. 63:3-8; U. Exh. 5 (L. Lopez), at 1464:23; 1465:5;1467:3, 20; 1468:25-1469:5, 13; 1469:19-1470:4; U. Exh. 6 (Katayama), at 1515:1; U. Exh. 7 (R. Lopez), at 1559:3-7, 20). The long hallway that separates the front office from the warehouse and dock area is approximately 150 feet long with a chain-link fence that separates the hallway and office area from the warehouse. (U. Exh. 8 (Fujimoto), at Tr. 1287:6-22).

In contrast, challenged-ballot voter employees who work in the front offices enter through the front doors and park in the front part of the parking lot. (U. Exh. 3 (Garcia), at Tr.

64:10). Employees use key cards, or badges, to access various parts of the facility. (U. Exh. 3 (Garcia), Tr. 96:14). Whereas front office employees are able to access the main front offices, upstairs, and the warehouse entrance with their badges, warehouse workers and drivers cannot access the front of the facility with their badges. (U. Exh. 3 (Garcia), Tr. 97:2-9).

V. THE MANIPULATED VOTER LISTS.

The Company initially provided a list of employees with its Position Statement. (U. Exh. 10). Thereafter, and prior to the first election, it issued FOUR additional voter lists. (U. Exh. 2 (Quinonez), at TR 1630:25-1631:2; U. Exh. 11; U. Exh. 2 (Quinonez), at TR 1650:17-1652:18; U. Exh. 12. On September 7, 2017, the Company served an initial list and then an "Amended Voter List," which listed *excluded* employees and was otherwise confusing and failed to include all required information. (U. Exh. 2 (Quinonez), at 1636:19; U. Exh. 11; U. Exh. 12). On September 12, 2017, the Employer submitted a "Second Amended Voter List," and then on that same day, a "Third Amended Voter List." (U. Exh. 2 (Quinonez), at TR 1637:1; 1637:18; U. Exh. 11; U. Exh. 12). The lists included *excluded* employees, invalid employees, those with hire dates beyond the agreed-upon payroll period, and notably included five additional employees whose job titles had been changed in order to allow them to vote. (U. Exh. 2 (Quinonez), at TR 1637:25-1638:11; U. Exh. 11; U. Exh. 12). For example, the five (5) added employees were: Kumiko Estrada, Fumi Meza, Miwa Sassone, Hideki Takegahara, and Karen Yamamoto. (U. Exh. 2 (Quinonez), at 1638:2-11; U. Exh. 11, at part (c)). Estrada, Meza, and Yamamoto were listed with job titles of "Export Office Clerk;" Sassone as a "GPO Assistant Buyer;" and Takegahara as a "GPO Distribution Coordinator." (U. Exh. 11, at part (c), 10).

With each amendment, the list became more confusing, remained problematic, and grew in size, with more names improperly added to the "challenged" voter category. (U. Exh. 2 (Quinonez), at TR 1638:2, 1641:13-1652:1; U. Exh. 11; U. Exh. 12).

On December 20, 2017, Respondent issued a *fifth* Voter List. (U. Exh. 13; (U. Exh. 2 (Quinonez), at TR 1661:23; 1662:23). The list continued to be faulty and outrageously included dozens more alleged challenged employees despite that the Employer *had not hired* new employees. (U. Exh. 2 (Quinonez), at TR 1663:5; 1669:3; U. Exh. 13).

Indeed, the record reflects that Respondent had rather *laid off* and/or terminated employees.[6] The list reflected employees whose job titles were intentionally changed for the sole purpose of allowing them to vote in the second election, a brazen attempt by the Employer to affect the outcome of the vote.

But Respondent did not stop there. Instead, it shockingly issued a *sixth* Voter List on January 31, 2018. (RFR, Exhibit 7).[7] And with it there were now 30 additional employees included on the 6th Voter List, despite that the Company had not hired any new employees. (U. Exh. 2 (Quinonez), at TR. 1663:18; 1669:3). Instead, they were existing office clerical employees whose job titles had been modified to stack challenged-ballot voter categories. (U. Exh. 2 (Quinonez), at TR 1663:5-24; 1665:3-1666:3; 1666:18-1667:9; U. Exh. 16).

[6] *See*, General Counsel Exhibits 1(q), 1(t), 1(w), 1(z), 1(cc), 1(ll), 1(oo) and 1(rr).

[7] The Employer's Index of Exhibits in its Request for Review intentionally attempts to mislead the Board by titling its *Sixth* Amended Voter List as "Second Election Voter List."

VI. ARGUMENT.

A. The Regional Director and ALJ Applied Existing Board Precedent; the *Caesars Tahoe* and Community of Interest Analyses Were Proper.

1. *Caesars Tahoe*.

The Regional Director, in upholding the ALJD, clearly applied existing Board precedent in determining that the Parties failed to have a meeting of the minds with regard to "inventory control" and "labeler" employees.

In stipulated unit cases, "the Board's function is to ascertain the parties' intent with regard to the disputed employee[s] and then to determine whether such intent is inconsistent with any statutory provision or established Board policy." *White Cloud Prods., Inc.*, 214 NLRB 516 (1974), quoting *Tribune Company*, 190 NLRB 398 (1971). "The Board examines the intent on an objective basis, and denies recognition to any subjective intent at odds with the stipulation." *Viacom Cablevision*, 268 NLRB 633 (1984). Elections conducted pursuant to a stipulated election agreement are evaluated under the three-step test set forth in *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002). Moreover, pursuant to step two of the *Caesars Tahoe* analysis, the ALJ properly examined the extrinsic evidence which showed the Union and Respondent's intent in this regard and found that it was clear the Parties never reached a meeting of the minds. (U. Exh. 1, at 54:25; 54:35); *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002); *Associated Milk Producers, Inc. v. NLRB*, 193 F.3d 539 (D.C. Cir. 1999).

Here, the Parties clearly failed to have any meeting of the minds with regard to the inventory control and labeler positions and the Regional Director properly upheld the ALJ's *Caesars Tahoe* analysis. (U. Exh. 1 at 54:10-35). Whereas the parties agreed that four employee classifications, totaling 13 employees, were permitted to vote as challenged-ballot voters, Respondent absurdly argues that *any and all* clerical employees should be allowed to vote

regardless that they are specifically *excluded* from the unit as office clerical employees. This makes no sense, as the Regional Director and ALJ properly concluded the same. Importantly, the ALJ noted: "any such employee could be classified as office clericals, professional employees, supervisors, or managers, all of which are categories of employees *explicitly excluded* from the stipulated unit." (U. Exh. 1, at 54:20, emphasis supplied). The Regional Director properly concurred.

2. **The Legal Standard for Unit Determination.**

Section 9(b) of the Act has been interpreted to require the Board to determine whether the petitioned-for unit is "*an* appropriate unit." The petitioned-for unit need not be the only appropriate unit, or even the *most* appropriate unit. *Wheeling Island Gaming*, 355 NLRB 637, 637, fn. 2 (2010)(emphasis in original), citing *P.J. Dick Contracting*, 290 NLRB 150-151 (1988) and *Overnite Transportation Co.*, 322 NLRB 723 (1966); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

PCC Structurals, Inc., 365 NLRB No. 160 (2017) overturned *Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB 934 (2011)*(*Specialty Healthcare*), identifying what the majority Board called the "traditional community of interest" standard and overturning the "overwhelming community of interest" standard. Under *Specialty Healthcare*, if a union petitioned for an election for a particular group of employees and that group was deemed appropriate under the traditional standard, the Board would not find the petitioned-for unit inappropriate unless the employer proved that excluded employees it wished to add shared an "overwhelming" community of interest with the petitioned-for warehouse employees.

PCC Structurals, however, changed this standard and allows the Board to instead look to the traditional community of interest standard, but also permits the Board to evaluate the interests

of employees inside *and outside* of the petitioned-for unit, "without regard to whether these groups share an "overwhelming community of interest."" *PCC Structurals, Inc.*, 365 NLRB No. 160, 168 (2017).

The traditional community of interest standard, as articulated in *United Operations, Inc*., 338 NLRB 123 (2002), for determining whether a proposed bargaining unit constitutes an appropriate unit when the employer contends that the petitioned-for unit must include additional employees, requires the Board to determine: whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer's other employees; interchange with the other employees; have distinct terms and conditions of employment; and are separately supervised. *Id*; *PCC Structurals*, 365 NLRB No. 160, 168 (2017).

Even so, *PCC Structurals*, supra, further held the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit; and the Board may find that the exclusion of certain employees renders the petitioned-for unit an appropriate one even when the excluded employees do not share an "overwhelming" community of interest with employees in the petitioned-for unit. *Id.* And, in weighing the shared and distinct interests of petitioned-for and excluded employees: "The Board must determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'"[8] *Id*, citing *Constellation Brands US Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2nd Cir. 2016).

[8] Emphasis in original.

i. The Board Should Overturn *PCC Structurals, Inc.* and Reinstate the Standard Set Forth in *Specialty Healthcare*.

In *Specialty Healthcare*, the Board articulated a two-step burden-shifting test for determining whether the petitioned-for unit is an appropriate one. First it applied the traditional community of interest analysis, and, next, shifting the burden to the party that, even though the petitioned-for group shared a community of interest, nevertheless contended that additional employees should be included, to show that the employees it seeks to add to the unit share an overwhelming community of interest with the petitioned-for employees. *Specialty Healthcare*, 357 NLRB at 941-943, 945.

No court has questioned the validity of *Specialty Healthcare*. Indeed, every Circuit Court that has reviewed the community of interest standard has found the *Specialty Healthcare* framework valid. *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2nd Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016). See also *Blue Man Vegas, LLC v. NLRB*, 529 F3d 417 (D.C. Cir. 2008). In *Rhino Northwest, LLC v. NLRB,* 867 F.3d 95 (D.C. Cir. 2017), the D.C. Circuit confirmed that *Specialty Healthcare* was "no departure from prior Board Decisions." *Id.* at 100-101.

In their *PCC Structurals* dissent, former NLRB Chairman Pearce and member McFerran noted that numerous Courts of Appeals have acknowledged that the "initiative in selecting an appropriate unit for bargaining resides with the employees." *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), citing *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016), quoting *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991). They filed a detailed and persuasive

dissenting opinion, correctly insisting that the *Specialty Healthcare* standard was appropriate and noting that reversing *Specialty Healthcare* would frustrate the Act and result in unnecessary litigation like in the instant case. In fact, former Chairman Pearce and member McFerran anticipated that *PCC Structurals* would allow employers to do exactly what Wismettac has done here: attempt to manipulate the unit.

PCC Structurals allows Employers to further thwart unionization by diluting the pool of union-supporting voters – the type of tactic attempts here with regard to the challenged ballot voters. The Board's *Specialty Healthcare* standard should be reinstated and the standard set forth in *PCC Structurals, Inc.* overruled.

ii. The Regional Director Properly Upheld the ALJ's Application of the Applicable Community of Interest Standard; the Petitioned-For Unit is Appropriate Under Either Standard and Shares a Community of Interest Sufficiently Distinct from Excluded and Challenged-Ballot Voters. Challenged-Ballot Voters Are Properly Excluded Under Either Standard.

Regardless of which standard is applied here, the outcome remains the same: the petitioned-for unit of Warehouse Workers and Drivers share a sufficiently distinct community of interest from those other employees excluded from the unit and challenged-ballot voters. Thus, using the traditional community of interest standard outlined in *PCC Structurals*, the petitioned-for unit is appropriate and distinct from a unit that includes *excluded* employees and/or those in the challenged-ballot categories.

Here, the Regional Director agreed with the ALJ that even the higher bar set by *PCC Structurals* was not met, and there is simply no degree of integration and/or interchange between the petitioned-for bargaining unit and the front-office employees/ "subject to challenge" voters.

iii. The Regional Director and ALJ Properly Applied the Community of Interest Standard.

Section 9(b) of the Act has been interpreted to require the Board to determine whether the petitioned-for unit is "*an* appropriate unit." The petitioned-for unit need not be the only appropriate unit, or even the *most* appropriate unit. *Wheeling Island Gaming*, 355 NLRB 637, 637, fn. 2 (2010)(emphasis in original), citing *P.J. Dick Contracting*, 290 NLRB 150-151 (1988) and *Overnight Transportation Co.*, 322 NLRB 723 (1966); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

Under *PCC Structurals*, once the Board determines that the employees in the petitioned-for unit share a community of interest, it then evaluates whether the interests of that group are "*sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *Id*., slip op at 7, quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn 2 (2010)(emphasis in original).

On September 9, 2019, the Board clarified *PCC Structurals* in *The Boeing Co.*, 368 NLRB No. 67, and provided a three-step process for determining an appropriate bargaining unit under the traditional community of interest test.

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved. *Id.*

Although *Boeing*, infra, was decided after the Decision issued in this case, it must be noted that under *any* standard, be it *Specialty Healthcare*, *PCC Structurals*, or *Boeing*, the petitioned-for unit remains appropriate and shares a community of interest sufficiently distinct from excluded and challenged ballot voters.

Here, there is simply no degree of integration between the petitioned-for bargaining unit and the "subject to challenge" and other challenged voters at issue, regardless of which standard is used. Each of the challenged voters in dispute works in the Wismettac front-office Headquarters, physically separated from drivers and warehouse workers, have distinct skills and training, perform distinct job functions and work, and are separately supervised. The petitioned-for unit employees share an internal and meaningful community of interest distinct from excluded employees.

As discussed herein, in the ALJD and Regional Director's Decision, the evidence overwhelmingly showed that there is simply no interchange of pre-challenged voters and/or the front-office clerical employees with the drivers and warehouse worker unit employees, who are physically separate from the challenged ballot voters, have distinct skills and training and perform distinct job functions and work, have little to no interchange, and are separately supervised. The challenged voter employees simply do not share a community of interest with the petitioned-for unit under any standard.

iv. The Regional Director Properly Upheld the ALJ's Finding that GPO Distribution Coordinators, GPO Central Purchase Clerks, and Central Purchase Clerks, Do Not Share a Community of Interest with Drivers and Warehouse Employees, and Thus, The Employees in Those Categories Were Ineligible to Vote.

The ALJ and RD properly found that GPO Distribution Coordinators, GPO Central Purchase Clerks, and Central Purchase Clerks, do not share a community of interest with Drivers and Warehouse Employees. The record clearly showed that employees in these departments all work in the Headquarters and front offices and are administrative support and/or office clerical employees and otherwise do not share a community of interest with the driver and warehouse worker unit employees.

Indeed, the petitioned-for unit primarily consisted of drivers and warehouse workers who performed manual and physically laborious jobs, while the "subject to challenge" voters were clerical employees with "office jobs," who had different educational requirements, experience and skill requirements, and sometimes even different language requirements. The subject to challenge employees had a separate locked entrance to their work area. The drivers and warehouse workers were separately supervised. Each of the employees in this category were properly excluded from the petitioned-for unit.

B. Respondent Failed to Except to the ALJ's Finding That Union Objection Number Four Was Sustained and Thus Admits it Intentionally Changed the Job Titles of Multiple Office Clerical Employees in an Effort to Increase "No" Voters and in an Effort to Cause the Stipulated Challenged Ballot Votes to be Determinative.

It is well-settled the Board's Rules and Regulations sets forth the requirements with which exceptions must comply in order to merit consideration by the Board. *Howe K. Sipes Co.*, 319 NLRB 30 (1995). For example, Section 102.46 carefully imposes content restrictions and requirements on exceptions and briefs filed in support of a party's exceptions. Such supporting briefs "*must contain only matter that is included within the scope of the exceptions*" and must, among other things, "*clearly [present] the points of fact and law relied on*" (emphasis added). Section 102.46(1)(D)(ii)(2)(iii). Additionally, the Board's Rules and Regulations provide that "*any exception which fails to comply with the foregoing requirements may be disregarded*" and that "*[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived*." Sections 102.46(1)(D)(ii).

Accordingly, the Employer, as the excepting party, is required by the Board to properly lay out the basis on which the ALJ may have erred for a proper determination.

The ALJ sustained the Union's Objection Number 4, which stated:

> Prior to the election the Employer intentionally changed the job titles of multiple office clerical employees in an effort to increase "no" voters and in an effort to cause the stipulated challenged ballot votes to be determinative. This conduct reasonably tended to coerce or interfere with employees' free choice in the election.

The ALJ detailed the evidence supporting this objection in the ALJD regarding challenged ballots, including that the Union received 7 voters lists, which grew over time. (*Citing* U. Exh. 2 (Quinonez), at 1648-1649). The ALJ specifically and properly noted the numbers of employees on the eligible voter list grew between the first and second election, from 145 to 178. (*Citing* U. Exh. 2 (Quinonez), at Tr. 1663; U. Exhs. 12, 13, and 15).

Here, the Employer's request that the Board review the Regional Director's Decision upholding the ALJD should be altogether rejected as it contains matters outside the scope of the Employer's exceptions, and therefore does not conform to the Board's Rules and cannot be urged before the Board. Thus, the status of the following employees may not be urged before the Board: Kimiko Estrada; Maho Kobayashi; Sachie Liu; Fumi Meza; Kristie Mizobe; Steffanie Mizobe;[9] Shuji Ohta; Wakako Park; Keiko Takeda; Stacey Umemoto; Karen Yamamoto; Chiaki Yamashita; Yasuhiro (David) Yamashita. Respondent is precluded from any arguments regarding these employees and the analysis should stop here.

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[9] Respondent erringly referred to this employee as "Stephanie."

1. The ALJ Properly Found that the Following Employees Were Not Logistics Office Clerks and Were Otherwise Not Eligible to Vote: Kimiko Estrada; Maho Kobayashi; Sachie Liu; Fumi Meza; Kristie Mizobe; Steffanie Mizobe;[10] Shuji Ohta; Wakako Park; Keiko Takeda; Stacey Umemoto; Karen Yamamoto; Chiaki Yamashita; Yasuhiro (David) Yamashita.

While the Respondent failed to meet its procedural burden and thus may not now urge review of the Decisions regarding these employees, if the Board nevertheless chooses to do so, these employees were nevertheless found to be inappropriate for the unit and improperly classified in an effort to alter the outcome of the vote.

Although the ALJ found that Logistics Office Clerks *did* share a community of interest with the petitioned-for unit, she also rightly held that there were only three employees who were eligible to vote in this category: Johnston, Onaka, and Tagai.

The remaining employees who voted in this category were improperly used to stack the vote and the ALJ sustained the Union's Objection number 4, as discussed *supra*. Citing 29 C.F.R. §§102.62(d), 102.67(l), and *Advanced Masonry Systems*, 366 NLRB No. 57 (2018), the ALJ correctly found that it was clear that these employees never even held this position. Indeed, Respondent blatantly stacked the list to affect the outcome of the election. (U. Exh. 1 (ALJD) 92:15; U. Exh. 2 (Quinonez), at Tr. 1648-1649, 1663; U. Exhs. 12, 13, 19, 15).

As the party challenging the employees' eligibility to vote, the Respondent bears the burden of proof. *Sweetner Supply Corp.*, 349 NLRB 1122, 1122 (2007). Respondent failed, however, to present sufficient reliable evidence to sustain its burden of proof regarding these thirteen challenged voters, not one of them testifying on behalf of the Employer. Instead, Respondent relied on the sole testimony of interested witness Atsushi Fujimoto. (See *Flexsteel Industries*, 316 NLRB 745, 785 (1995)(Failure to examine a favorable witness regarding factual

[10] Respondent erringly referred to this employee as "Stephanie."

issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

C. Respondent Failed to Except to the ALJ's Finding that Shun Man Yung Was Excluded From the Bargaining Unit and is Thus Precluded From Now Arguing Her Status.

The Regional Director properly found that Shun Man Yung's challenge was sustained. Despite that Respondent failed to file any Exception to the ALJ's finding regarding Shun Man Yung, it now urges the Board to give it a second bite at the apple. Pursuant to the aforementioned Sections, 102.46(1)(D)(ii)(2)(iii) and 102.46(1)(D)(ii), Respondent failed to meet its procedural duty and has thus waived its ability to now further urge it before the Board. The Board should decline to entertain its request.

Even so, Shun Man Yung worked as a GPO Central Purchase Clerk, a classification of employee that both the Regional Director and ALJ found to be properly excluded from the unit.

D. **The Stipulation Explicitly *Excluded* Office Clerical Employees and All Other Employees. The Regional Director Properly Upheld the ALJ's Finding that the Following Additional Office Clerical or "Other" Employees Were Also Ineligible to Vote: Domingo Pliego; Hideki Takegahara; Chiaki Mazlomi; Thao Nguyen; Rachel Lin; Miwa Sassone; Chizuko Sho; and Kasumi Kasai.**

While the Employer asks the Board review and include clearly excluded employees via its continued argument that employees <u>not</u> included in the stipulation be allowed to nevertheless vote, the Regional Director properly upheld the ALJD, noting the Stipulation was <u>not</u> ambiguous as to these employees who were not named in any category, applying *Viacom Cable*, 268 NLRB 633 (1984). The Board should find the same result.

1. Respondent's Citation to Request For Review Exhibit 9 (Union Hearing Exhibit 50) is a Failed Attempt to Evade the Required Community of Interest Analysis.

Respondent strenuously attempts to find an argument for the inclusion of a wall-to-wall unit that includes excluded office-clerical and other impermissible voters by twisting the facts and misconstruing the evidence. During the negotiation of the stipulated election agreement, Respondent insisted on including 13 additional employees in four classifications as "subject to challenge" voters: GPO Distribution Coordinator, GPO Central Purchase Clerk, Central Purchase Clerk, and Logistics Office Clerk. (U. Exh. 2 (Quinonez Test.), at Tr. 1615:11-23).

At the hearing, the Union offered Exhibits 50 and 51 together (attached as U. Exhs. 16, 17), to show it never intended for the allowance of anything **but** 13 additional "subject to challenge" employees who worked within one of the four classifications noted above, which were specifically identified by the Employer and relayed by the Board Agent (e.g., employee numbers 80, 104, 85, 89, 94, 112, 103, 107, 109, 81, 87, 99, and 100). (U. Exh. 2 (Quinonez Test.), at Tr. 1615:11-23; 1615:24-1616:2; U. Exh. 16-17; *confirmed* by U. Exh. 10, pgs. 4-9; (U. Exh. 2 (Quinonez Test.), at Tr. 1623: 13-19, 22).

Here, Respondent intentionally misrepresents a single email on page two of Union Exhibit 16 (Union Hearing Exhibit 50), a ten-page email thread, citing it for the false proposition that the Union somehow agreed to include an onslaught of clerical workers as "Inventory Control" voters. It unquestionably did not. Indeed, at every turn the Union protested the Company's continued manipulation of the voter lists. A simple review of the transcript and of Union Exhibits11, 12, 15-20, shows otherwise. Request for Review Exhibit 9/Union Exhibit 16, clearly identify a mediated negotiation by the Board Agent between the Respondent and Petitioner regarding <u>which</u> employees, <u>by number</u>, the Parties would agree to allow to vote

"subject to challenge" and nothing more. (U. Exh. 16-17 (Union Hearing Exhibits 50-51); U. Exh. 2 (Quinonez Test.), at Tr. 1615:11-23; 1615:24-1616:2; 1630:19-22). The Board should altogether reject Respondent's bad faith misrepresentations.

E. Neither the ALJ Nor the Regional Director Made Erroneous Findings of Substantial Factual Issues.

Here, the Union's intent was always only to include drivers and warehouse employees, and that office clericals would be specifically excluded. Respondent, however, makes the contorted argument that the Parties intended to expand the number of "inventory control" and "labeler" voters. They did not. Inventory control employees and labelers are warehouse workers. [U. Exh. 2 (Quinonez), at Tr. 1635:13 – 1648; U. Exh. 11; 20; RFR. Exh. 7; U. Exh. 1 (ALJD) 70:5]. "Warehouse Worker" was described as the general catch-all description of employees that work in the warehouse including assemblers, receivers, forklift operators, stockers, and order selectors. (U. Exh. 21 (Hernandez) Tr. 483:13; U. Exh. 22 (Ho) 516:19; U. Exh. 23 (Linares) 533:21; U. Exh. 24; U. Exh. 25). It was undisputed at the hearing that "assembler" was synonymous with "warehouse worker." (U. Exh. 8 (Fujimoto) Tr. 1289:1-10). At all times, the Union's only intent was to include in the unit the three identified inventory control warehouse workers. *Id.*

Moreover, while Respondent desires to have poorly disguised office clerical employees' votes to be counted as "inventory control" and/or "labeler" voters, the record is clear that labelers are also warehouse employees, and that only two warehouse employees held this position. (U. Exh. 6 (Katayama) Tr. 1510; U. Exh. 2 (Quinonez) Tr. 1675:22-1676:1). Respondent makes this argument despite that the employees it wishes to include as "inventory control" and/or "labeler" voters have distinct job titles and job descriptions that *do not* fit the descriptive language of the stipulation. *Bell Convalescent Hospital*, 337 NLRB 191 (2001)(A classification will be deemed

to be excluded if it is not mentioned in the inclusions and there is an exclusion for "all other employees.")(See also *Los Angeles Water and Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003); *National Public Radio, Inc.*, 328 NLRB 75 (1999).

There was no mutual intent to expand the number of eligible inventory control or labeler warehouse employees and the Employer's Request for Review is not persuasive.

F. Respondent Improperly Claims Hwami Oh and Nobuyasu Yamamoto were Challenged Ballot Voters; These Employees are Admitted Supervisors.

The Respondent improperly identifies Hwami Oh and Nobuyasu Yamamoto as "challenged voters," negligently arguing that its witness Atsushi Fujimoto's testimony somehow supports this argument when, in fact, Mr. Fujimoto expressly admitted Hwami Oh was a supervisor of front office-clerical employees, and Nobuyasu Yamamoto was the GPO Distribution Manager, and supervisor, of front-office clerical employees. (RFR at pgs. 5-6; U. Exh. 8 (Fujimoto) at Tr. 1212:22, 25; 1235:8; 1298:7-13; 1301:13; 1305:4; 1307:5; 1311:10; 1315:22; 1323:15, 24; 1325:5, 11; 1326:16; 1351:11).

CONCLUSION

For the reasons set forth herein, the Respondent's Request For Review is without merit, and the Union should be certified as the exclusive representative of the bargaining unit employees.

Dated: May 26, 2020

Respectfully Submitted,

HAYES, ORTEGA, & SÁNCHEZ, LLP

BY: /s/
RENÉE SÁNCHEZ, ESQ.
Attorneys for Petitioner
International Brotherhood of Teamsters, Local 630