

**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.**

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

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## **I. INTRODUCTION**

Set out below is the reply of Wismettac Asian Foods, Inc. (the “Employer”) to “Petitioner’s Statement in Opposition to Wismettac Asian Foods, Inc.’s Request for Review” filed with the Board on May 26, 2020 (“Petitioner’s Opposition”). The Employer will not restate all of the arguments made in its May 11, 2020 “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”). It is important to note that the Petitioner has completely misstated the real issue as explained in the Employer’s Request for Review. The Employer has established the “clearly erroneous” standard, which should result in this matter being remanded to the Regional Director.

## **II. PETITIONER’S ARGUMENTS SHOULD BE REJECTED**

### **A. The Voter List**

The Petitioner constantly refers to “manipulated” voter lists and that multiple lists had been filed by the Employer. This is irrelevant. It is undisputed that the Sixth Amended Employer Voter List (RFR Exhibit 7 Second Election Voter List [Hearing R Exh. 18]) (the “Voter List”) was the only list used in the second election. Atsushi Fujimoto conceded that there were mistakes on the Voter List and offered testimony as to the duties of the employees at issue at the time of the election (see below).

### **B. Testimony of Atsushi Fujimoto**

Mr. Fujimoto’s testimony was un rebutted. There was no contrary evidence offered as to the “inventory control” duties of the employees he referenced.

**C. Labelers**

It is not in dispute that those employees referred to as labelers (Beatrice Gonzalez and Jose Erazo) were classified as “Warehouse Workers” on the Voter List, which is exactly the issue overlooked by the Administrative Law Judge (“ALJ”), the Regional Director, and now the Petitioner. That is, “labeler” was included in the Stipulated Election Agreement and people who performed labeling work were eligible to vote even though they had a different job title. The term “inventory control” is unambiguous on its face as with the labelers, and the fact that employees who performed inventory control had a different official job title does not preclude them from voting. Inventory control employees were allowed to vote.

**D. Community of Interest Standards**

As noted by the Employer, the community of interest standard is only applicable when the scope of the unit is in dispute<sup>1</sup>. In this case, the only categories of employees in dispute were the “others permitted to vote”. As noted, “inventory control employees” and “labelers” are part of the “included” category of employees. The argument of the ALJ, the Regional Director, and the Petitioner is based on a completely false premise, that the term “inventory control” is ambiguous. Consequently, evidence as to seating charts and office employee duties is equally irrelevant as long as these workers performed “inventory control” duties. The Unit was ambiguous as to inventory control and the language is plain on its face.

**E. Union (Petitioner) Election Objection No. 4**

This dealt with allegations of the Employer allegedly manipulating voter lists. That issue is completely irrelevant as to the status of the challenged ballots. If the Petitioner’s argument is

<sup>1</sup> See *Television Signal Corp.*, 268 NLRB 633 (1984); *Genesis Health Ventures of West Virginia. L.P. (Ansted Center)*, 326 NLRB 1208, 1208 (1998); *Lear Siegler, Inc.*, 287 NLRB 372 (1987); *Red Coats, Inc.*, 328 NLRB 205, 207 (1999); *White Cloud Prods., Inc.*, 214 NLRB 516, 517 (1974); *The Tribune Co.*, 190 NLRB 398 (1971); *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 365 (2d Cir. 1966); and *NLRB v. J. J. Collins’ Sons*, 332 F.2d 523 (7th Cir. 1964).

correct, then the ALJ and the Regional Director would not have even considered the challenged ballots as they would have been superseded by Union Election Objection No. 4. This contention should be disregarded all together.

**F. Shun Man Yung**

The case should be remanded to the Region and such categories are permitted to vote. Consequently, Shun Man Yung's vote should be counted as obviously Ms. Yung's status was an oversight by all parties involved. Under the Act, an employee's vote should not be so easily disregarded.

**G. Remand**

The ALJ and the Regional Director completely ignored the inventory control issue in their decisions. The case should be remanded to the Region to reconsider its decision that employees performing "inventory control" work are eligible to vote irrespective of their actual job classifications (i.e. the same as labelers). Failure to consider this evidence was a "substantial factual error".

**III.  
CONCLUSION**

For the reasons set forth herein, the Employer's Request for Review should be granted.

DATED: May 28, 2020

Respectfully submitted,



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## CERTIFICATE OF SERVICE

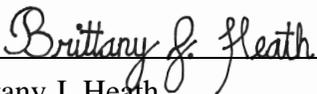
I, Brittany J. Heath, declare and state as follows:

1. I am at least 18 years of age 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 on May 28, 2020, a copy of **EMPLOYER'S REPLY TO PETITIONER'S STATEMENT IN OPPOSITION TO WISMETTAC ASIAN FOODS, INC.'S REQUEST FOR REVIEW** 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.
3. A copy of the same document described in item 2 above was served by email 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 28, 2020 in San Diego, California.

  
\_\_\_\_\_  
Brittany J. Heath  
Legal Assistant to Scott A. Wilson