UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF AMERICA, INC., Employer, and UNITED AUTO WORKERS, LOCAL 42, Petitioner.	Case No. 10-RC-162530

MOTION OF THE COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Coalition for a Democratic Workplace, the National Association of Manufacturers, and the National Federation of Independent Business, (collectively, the "Proposed *Amici")* respectfully move for leave to file the accompanying brief as *amici curiae*.

INTEREST OF *AMICI CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW"), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW has advocated for its members on several important legal questions, including the one implicated by this case: the standard used by the National Labor Relations Board ("Board") to determine appropriate bargaining units under the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169.[2]

[1] The *amici* certify that no counsel for a party authored this motion in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this motion; and no person other than the *amici,* their members or their counsel made a monetary contribution to its preparation or submission.

[2] A complete list of CDW's members is available at http://myprivateballot.com/membership/

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C. and in all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

Each of the Proposed *Amici* has been actively engaged in addressing the important legal and policy questions presented by the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which has great impact on the Proposed *Amici's* members. In *Specialty Healthcare*, a majority of the Board held that "in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional

employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Id*., slip op. at 1.

The legality of the standard announced in *Specialty Healthcare* was questioned from its inception and remains subject to considerable debate, even at the Board level. *See DPI Secuprint, Inc.,* 362 NLRB No. 172, slip op. at 9-19 (2015) (Johnson, dissent); *Macy's Inc.,* 361 NLRB No. 4, slip op. at 22-23 (2014) (Miscimarra, dissent); *Northrop Grumman Shipbuilding, Inc*., 357 NLRB No. 163, slip op. at 6-9 (2011) (Hayes, dissent); *Specialty Healthcare*, slip op. at 15-19 (Hayes, dissent).

Moreover, and notwithstanding the continuing questions regarding the legality and application of *Specialty Healthcare* generally, the Regional Director's Decision and Direction of Election ("Decision") in the instant case fails to comply with even the standard as set forth by the Board in *Specialty Healthcare*. His Decision certified a fractured unit of maintenance employees, and for that reason (as well as those applicable to *Specialty Healthcare* generally), undermines industrial peace and would frustrate the possibility of effective collective bargaining. Further, the Regional Director's Decision is plainly and unlawfully based on the extent of the Petitioner's organizing in violation of Section 9(c)(5) of the Act.

At a minimum, the Board should grant review to correct the errors in the Regional Director's Decision. Additionally, given the substantial impact this case will have on employers generally, particularly in the manufacturing industry, the Board should use it as an opportunity to re-examine the *Specialty Healthcare* standard. Job titles, departmental lines and the like simply are not a valid proxy for the Board's careful consideration of the proper grouping of workers for bargaining unit purposes, particularly in a highly integrated manufacturing process such as that at Volkswagen Group of America, Inc. The Proposed *Amici* have a strong interest in this case and

in demonstrating why the instant Decision and Direction of Election should be reversed, and why *Specialty Healthcare* itself should be overruled.

CONCLUSION

For the foregoing reasons, the Board should grant the Proposed *Amici* leave to file the accompanying *amicus* brief.

Dated: December 23, 2015

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CASES (cont'd) **PAGE**

STATUTES **PAGE**

OTHER AUTHORITIES

Amici Curiae the Coalition for a Democratic Workplace, the National Association of Manufacturers, and the National Federation of Independent Business, respectfully submit this brief in support of Volkswagen Group of America, Inc. ("VW").

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INTRODUCTION TO ARGUMENT

Each of the *amici* has been actively engaged in addressing the important legal and policy questions presented by the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which has had great impact on employers generally, including the employer members of each of the *amici*. In *Specialty Healthcare*, a majority of the Board held that "in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Id*. at 1.

The legality of the standard announced in *Specialty Healthcare* was questioned from its inception and remains subject to considerable debate, even at the Board level. *See DPI Secuprint, Inc.,* 362 NLRB No. 172, slip op. at 9-19 (2015) (Johnson, dissent); *Macy's Inc.,* 361 NLRB No. 4, slip op. at 22-23 (2014) (Miscimarra, dissent); *Northrop Grumman Shipbuilding, Inc*., 357 NLRB No. 163, slip op. at 6-9 (2011) (Hayes, dissent); *Specialty Healthcare*, slip op. at 15-19 (Hayes, dissent).

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At minimum, the Board should grant review to correct the errors in the Regional Director's Decision. Additionally, given the substantial impact this case will have on employers generally, particularly in the manufacturing industry, the Board should use it as an opportunity to re-examine the *Specialty Healthcare* standard. Job titles, departmental lines and the like simply are not a valid proxy for the Board's careful consideration of the proper grouping of workers for bargaining unit purposes, particularly in a highly integrated manufacturing process such as that at VW.

It is an empty claim for the Board to say that our national labor policy is to foster industrial peace through collective bargaining, and at the same time make that bargaining difficult and ineffective through the application of *Specialty Healthcare*. The Board should take the opportunity presented by this case not only to correct the flawed decision of the Regional Director, but in a broader sense to consider anew its *Specialty Healthcare* decision and, in particular, its application to manufacturing enterprises.

ARGUMENT

I. BOTH THE *SPECIALTY HEALTHCARE* STANDARD AND ITS APPLICATION IN THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION ARE CONTRARY TO SECTION 9(B) OF THE ACT.

In order to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act, Section 9(b) requires the Board "to decide *in each case*" whether a petitioned-for unit is "appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). Congress carefully chose this language to ensure that collective bargaining units would be formed in a manner that permits effective bargaining in light of the realities of the employer's business "in each case." Whenever the Board abandons its charge to consider "in each case" *all* of the factors necessary to protect the "rights guaranteed by" the Act, it does violence to the well-established meaning of Section 9(b), as illustrated by decades of Board precedent.

Unfortunately, in *Specialty Healthcare*, the Board cast aside decades of precedent and turned its back on the statutory command of Section 9(b). The rote application of *Specialty Healthcare*, without regard for its impact on the actual workplace and the actual flow of production, does violence to the "practice and procedure" of collective bargaining, and the "industrial peace" it is supposedly intended to foster. Nowhere is this more true than in the modern manufacturing process such as that involved here – the production of motor vehicles in a modern industrial setting requiring the integration of effort by hundreds of employees using different skills and abilities toward a common end.

A. *Specialty Healthcare* And The Regional Director's Application Of It Are Contrary To The Well-Established Purpose and Understanding Of Section 9(b) And Decades Of Manufacturing Industry Cases.

For over half a century, the Board faithfully followed its statutory obligation under Section 9(b) to make unit determinations "in each case." As the Supreme Court said, the words "shall decide in each case" in Section 9(b) mean that "whenever there is a disagreement about

the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB,* 499 U.S. 606, 611 (1991). Until its decision in *Specialty Healthcare*, the Board had developed a body of unit determination precedent that reflected a careful balancing of the competing interests of employees, employers, and unions, with a goal of approving units "in each case" that allowed individual employers to efficiently conduct their respective businesses while protecting the ability to engage in meaningful collective bargaining where chosen by the employees.

Historically, the Board weighed carefully the potential consequences of approving a bargaining unit that covered only a portion of a particular facility or workforce, whether a plant, warehouse, retail store, restaurant or other establishment. The Board was particularly mindful of the potential disruption that multiple smaller units could have on business operations, stable labor relations, and effective, realistic collective bargaining. For example, the Board has long acknowledged that it "does not favor organization by department or classification" in manufacturing settings. *Airco, Inc*., 273 NLRB 348, 349 (1984) (cited with approval in *International Bedding Co*., 356 NLRB No. 168 (2011)).

Indeed, for a time following passage of the Taft-Hartley amendments to the Act, the Board held the view that employees in certain industries could *never* be separated into different bargaining units. While the Board ultimately abandoned the notion that whole industries were automatically foreclosed to craft or departmental units, it never (until *Specialty Healthcare*) strayed from the notion that most manufacturing operations are highly integrated and that evidence of such integration must be given *substantial* weight in the community-of-interest

analysis. *See, e.g., Alcan Aluminum Corp*., 178 NLRB 362 (1969) (rejecting petition for maintenance-only bargaining unit in large aluminum plant and holding that the only appropriate unit was one consisting of all production and maintenance employees in the plant).

The Board's manufacturing precedent is typical of the care it used to take in deciding questions of unit appropriateness. In those cases, the Board was consistently clear that it would not make a unit determination without considering the realities of the particular business setting and how a given unit might affect the employer's operations, so that neither bargaining rights nor industrial peace and stability were undermined.

Hence, in *Kalamazoo Paper Box Corp.* the Board articulated its charge as follows:

> As we view our obligation under the [Act], it is the mandate of Congress that this Board shall decide in each case . . . the unit appropriate for the purpose of collective bargaining. In performing this function, the Board must maintain the two-fold objective of insuring to employees their *rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability* . . . . At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, *efficient and stable collective bargaining is undermined rather than fostered.*

136 NLRB 134, 137 (1962) (emphases added) (internal citations and quotation marks omitted). Applying these principles in *Kalamazoo Paper Box,* the Board rejected an attempt to sever truck drivers from an existing production and maintenance bargaining unit at a manufacturer. In doing so, it articulated the problem with relying only on job classifications as the basis for unit determinations, explaining:

> In these circumstances, permitting severance of truck drivers as a separate unit based upon a traditional title . . . would result in creating a fictional mold within which the parties would be

> required to force their bargaining relationship. Such a determination could only *create a state of chaos* rather than foster stable collective bargaining, and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b).

Id. at 139-40 (emphasis added). The "chaos" the Board sought to avoid is not theoretical or speculative; rather, it represents the real, negative consequences that flow from a proliferation of units that can carve up an employer's workplace.

The proper determination of a bargaining unit requires a functional approach, looking beyond the groupings of title, department and the like, to how the requested bargaining unit might affect the operation of the employer's business. For decades the Board stressed that its traditional community-of-interest analysis must be viewed through the lens of the employer's business and whether both industrial stability and effective collective bargaining are functionally served by the unit deemed "appropriate."

For example, in *International Paper Co.*, 96 NLRB 295 (1951), the Board refused to assign welders to a particular craft unit. In doing so, the Board explained: "We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *Id.* at 298, n.7.

The Board also has acknowledged that this principle must be applied in a variety of business settings, always taking into consideration the circumstances and context in which collective bargaining would take place:

> The Board must hold fast to the objectives of the [Act] using an empirical approach to adjust its decisions to the evolving realities of industrial progress and the reflection of that change in organizations of employees. To be effective for that purpose, each unit determination *must have a direct relevancy to the*

> *circumstances within which collective bargaining is to take place.* While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination, *will vary from industry to industry and from plant to plant.* We are therefore convinced that collective-bargaining units must be based upon all the relevant evidence in each individual case.

American Cyanamid Co., 131 NLRB 909, 911 (1961) (emphases added).

In the decades since *American Cyanamid, Kalamazoo Paper Box,* and *International Paper* were decided, the Board continued—until *Specialty Healthcare*—to take care to avoid units that would undermine the functional integration of the employer's manufacturing operations. *See, e.g., Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Avon Products, Inc.*, 250 NLRB 1479, 1482 (1979) (reversing regional director's decision that failed to account for employer's "highly integrated process").

But the Board in *Specialty Healthcare* (and the Regional Director here) abandoned this well-developed and long-standing body of precedent. Inexplicably and without warrant, the *Specialty Healthcare* rule eliminates consideration "in each case" of the "circumstances within which collective bargaining is to take place." Instead, under *Specialty Healthcare*, the Board has adopted an "employees readily identifiable as a group" framework that slavishly pays heed to job titles, departments, or classifications without regard to how bargaining in such a unit would occur in the context of the daily practicalities of operating the business.

The *Specialty Healthcare* rule thus permits multiple smaller bargaining units drawn along discrete groupings such as job title, department or similar lines, instead of larger units reflecting the reality of the employer's functional integration and the resulting community of interests shared by its employees. As a consequence, the employer's resulting bargaining obligations may

be diffused among different employee groups that bear little or no relation to the way in which the employer's business actually operates and functions.

These smaller, multiple units disrupt both the efficient operation of the business and effective collective bargaining. More time must be spent bargaining contracts and more resources deployed to keep the artificially separated groups of employees functioning efficiently. Moreover, employer flexibility and employee advancement are compromised as separate bargaining units isolate employees in different seniority systems and job classifications, and the opportunities to move to other jobs within the employer are blocked by separate bidding systems and seniority rights, thus impeding not only employee advancement but employer business flexibility.

These negative consequences also cause the odd result of empowering a union based on which portion of the employer's business it happens to represent, while disenfranchising employees in other parts of the operation. Normally dependent on the solidarity of its membership, the strength of the union under *Specialty Healthcare* will now largely depend on whether it controls a unit consisting of "employees [] identifiable as a group" in the portion most crucial to the operation of the employer's business.

The instant case provides a stark example. If the directed bargaining unit of operationally crucial of maintenance workers calls for a boycott or work stoppage, VW would find itself at the mercy of a fractured unit constituting of but a fraction of its overall complement of employees. Many if not most employees involved in the integrated VW manufacturing process will have no say whatsoever in the matter, even though it could result in a work stoppage by default for them.

B. *Specialty Healthcare* And The Regional Director's Application Of It Are Inconsistent With The Contemporaneous Legislative History Of The Act.

The legislative history of Section 9(b) reinforces that the Board must make unit determinations based on all the circumstances before it. Section 9(b) is based on Section 2(4) of the Railway Labor Act of 1934 ("RLA"), which provides that employees "shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act." *Compare* S. 2926 *and* S. 1958, at 30 (Comm. Print 1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act of 1935,* at 1355 (1949) ("*1935 Legislative History*").

This RLA provision differs from what became Section 9(b) in one critical respect: the RLA does *not* contain language mandating a decision by the National Mediation Board ("NMB") as to the appropriate unit "in each case." Congress explained this fundamental difference in its comparison of Senate Bill 2926 (the original Senate bill proposing the Act) to Senate Bill 1958 (what ultimately was enacted as the Act): "The same necessity for unit determinations is embraced in the definition of majority rule in the [RLA] as set out above, although in that industry the nature of the department or craft alinement [sic] is so clearly defined as to require no express elaboration." *Id., reprinted in 1935 Legislative History* 1356.

By comparison, Congress recognized that the virtually limitless range of employers and areas of commerce falling under the jurisdiction of the Act are broader than, and different from, the railroad (and now airline) industry covered under the RLA. Unlike the RLA, the Act covers multiple types of businesses, employing individuals with varied skill sets, in enterprises ranging in size from but a few employees to hundreds of thousands of employees, doing business in but a

single location to having hundreds or thousands of locations around the country (and the world), all following multiple lines of ownership, organization and business purpose.

By requiring unit determinations "in each case" under Section 9(b), Congress recognized that unlike the RLA, the Act must be applied to allow for effective collective bargaining in myriad businesses, business settings, and functional organizations. Thus, Congress directed the Board to make unit determinations not on the basis of a simplistic formula, but based on the factors making up an appropriate unit "in each case."

The Board's role in bargaining unit determinations was part of a larger debate over the wisdom of majority elections. This "majority rule" debate naturally led to a discussion of why the Board needed to decide in what *unit* the majority would be determined:

> The major problem connected with the majority rule is not the rule itself, but its application. *The important question is to what unit the majority rule applies.* . . . Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. . . . The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, *by breaking off into small groups, could make it impossible for the employer to run his plant.*

Hearings on S. 1958 Before the S. Comm. On Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to the Board), *reprinted in 1935 Legislative History* 1458 (emphases added).

By deferring to the union's requested unit and erecting a barrier so that alternative units proposed by employers cannot seriously be considered, the *Specialty Healthcare* rule effectively excludes the employer from the process and reduces to the point of nonexistence the Board's responsibility to balance the various competing interests of employees, employers, and unions. *Specialty Healthcare's* single-minded focus on the union's proposed unit is contrary to the intent of Congress and implicates the very concerns raised by then-Chairman Biddle at the very outset of the Act.

II. BOTH THE *SPECIALTY HEALTHCARE* STANDARD AND THE REGIONAL DIRECTOR'S APPLICATION OF IT VIOLATE SECTION 9(C)(5) OF THE ACT.

Section 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5), provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." This provision "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995) (citing *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978)). Thus, the Act specifically prohibits what *Specialty Healthcare* establishes as a rule, *i.e.*, Board "determined" bargaining units that in all but the rarest of cases track identically the unit requested by petitioning union. The Board should grant review to reexamine this fundamental flaw in the *Specialty Healthcare* standard and to overturn the Regional Director's troubling application of that standard in this case.

A. The Legislative History Of The Taft-Hartley Act Demonstrates That *Specialty Healthcare* Violates Section 9(c)(5).

The legislative history of the Taft-Hartley Act again demonstrates that the Board in *Specialty Healthcare* strayed well beyond its statutory charge. The mandate in Section 9(c)(5) of

the Act that the extent of organizing "shall not be controlling" was not expressly described in the original Wagner Act. Congress nevertheless was concerned at the time with the scope of the Board's ability to determine unit appropriateness based upon the extent of organizing. *See Hearings on S. 1958 Before the S. Comm. On Educ. & Lab.*, 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to the Board), *reprinted in 1935 Legislative History* 1458, *supra* at p. 11. The Senate's final report prior to the Wagner Act's passage similarly reflects Congress' desire that the Board avoid overreliance on the extent of organization in unit determinations:

> Section 9(b) empowers the [Board] to decide whether the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. *And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind*.

S. Rep. No. 74-573 (1935) (emphasis added).

Early Board decisions disregarded this clear guidance. The Board issued a line of precedent that condoned reliance on the extent of organizing as a basis for determining unit appropriateness, *see, e.g., Botany Worsted Mills*, 27 NLRB 687 (1940) (unit of trappers and sorters, a single department in employer's plant, deemed appropriate), and even expressly acknowledged extent of organization as a principal factor for bargaining unit determinations in *Garden State Hosiery Co*., 74 NLRB 318 (1947). In a vigorous dissent, Member Reynolds commented that:

> [N]o minority group – either pro-union or anti-union – may be permitted to manipulate the boundaries of the appropriate [unit or group] for the sole purpose of constructing another [unit or group] wherein it comprises a majority. Obviously indulgence in such tactics – commonly referred to in political science as

> 'gerrymandering' – makes a mockery of the principle of majority rule.

Id. at 326 (Reynolds, dissent). As a direct result of those Board decisions, Congress amended the Act in 1947 to codify the proscription against elevating the extent of organization as a factor in unit determinations. Hence, Section 9(c)(5) became law as part of the Taft-Hartley amendments. The House report on this provision confirms that Section 9(c)(5) was drafted in response to the Board's early reliance on the extent of organization:

> Section 9[(c)(5)] *strikes at the practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time*. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate. While the Board may take into consideration the extent to which employees have organized, *this evidence should have little weight*, and as section 9 [(c)(5)] provides, is not controlling.

1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 328 (1947) (House Report No. 245, April 11, 1947) (internal citations omitted) (emphases added). Senator Taft also noted that Section 9(c)(5): "overrules the 'extent-of-organization' theory sometimes used by the Board in determining appropriate units . . . [t]he extent-of-organization theory has been used *where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units*." 2 Leg. Hist. 1625 (Congressional Record, Senate, June 12, 1947) (emphasis added).

Thus, in addition to the plain language of Section 9(c)(5), the legislative history both of the Wagner Act and the Taft-Hartley amendments reflects Congress' intent that the extent of union organizing should be given little (if any) weight and should never control the outcome of a unit determination. As discussed below, the standard set forth in *Specialty Healthcare* disregards this congressional mandate and intent.

B. The Board Has Failed To Distinguish The Standard It Adopted In *Specialty Healthcare* From Its Rejected *Lundy* Test.

As was the case in *NLRB v. Lundy Packing Co., supra*, the "overwhelming community of interest" rule announced in *Specialty Healthcare* and applied by the Regional Director in this case represents a "classic" Section 9(c)(5) violation. *Lundy*, 68 F.3d at 1582. To be sure, the Board has attempted to rely upon the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), and argue that in *Lundy* it had used the correct test, but merely failed to consider whether the union's proposed unit was appropriate *before* applying the "overwhelming community of interest" test to the employer-proposed group.

That is, the Board maintains, unlike the test rejected in *Lundy*, the *Specialty Healthcare* test does not accord controlling weight to the extent of union organizing because it must be *preceded* by a threshold finding that the petitioned-for unit is "*prima facie* appropriate." *Id*. Only then will the employer be asked to demonstrate that there are other employees excluded from the voting group who have an "overwhelming community of interest" with those in the group.

But the flaw in the Board's *Lundy* decision had nothing to do with the *sequencing* of the Board's appropriate unit analysis. The *Lundy* Board never presumed that requested unit was appropriate without consideration of the other employees in the plant. Instead, it examined the traditional community of interest factors, but simply elevated one – the extent of organization – above the others. That was the source of the Fourth Circuit's objection and the reason the Board was reversed in *Lundy*.

The test promulgated by the *Lundy* Board *effectively* resulted in a presumption of appropriateness because of the immense burden it placed on the employer to alter the *unit proposed by the union*. The Board's requirement in *Specialty Healthcare* that the employer meet

an "overwhelming community of interest" standard as a separate step in the analysis does not address the concerns that led the Fourth Circuit to invalidate the Board's *Lundy* decision.

The "threshold analysis" called for in *Specialty Healthcare* appears to allow Regional Directors simply to rely on job titles, departmental lines and the like as a proxy for careful consideration of the proper division of work groups for bargaining purposes. This is deeply flawed and is inconsistent with the Act and long standing precedent that the Board claims it did not overrule in *Specialty Healthcare* or its progeny. Examining only whether the union's proposed voting group is "readily identifiable" and whether the members of that group share "*a* community of interest" among themselves enables virtually any collection of employees with the same job title to meet the standard. As Member Hayes noted in his *Specialty Healthcare* dissent:

> In a correct application of the traditional community of interest test, the Board 'never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests 'in common.' Our inquiry – though perhaps not articulated in every case – necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.'

Specialty Healthcare, slip op. at 19 (Hayes, dissent) (quoting *Newton-Wellesley Hospital*, 250 NLRB at 411-412 (1980) (emphasis added)).

By contrast, the *Newton-Wellesley* approach to unit analysis is designed to prevent the Board from deciding that a petitioned-for unit is "*prima facie* appropriate" by addressing, "solely and in isolation," the community of interest of *just that group of employees*. Instead, under *Newton-Wellesley*, the Board is required to assess whether the interests of the proposed group are "sufficiently distinct from those of other employees." Of course, it is impossible to make *that* determination *without examining the interests of other employees outside the proposed unit* and how they relate to the petitioned-for unit. The Board adhered to the *Newton-Wellesley* standard

for thirty years and, as recently as 2010, expressly reaffirmed the fact that it "never addresses" the interests of a petitioned-for group in isolation from the interests of other employees. *See Wheeling Island Gaming, Inc*., 355 NLRB 637 (2010).

But *Specialty Healthcare* appears to abandon this approach – despite the Board's claims to the contrary, *DPI Secuprint, Inc.,* 362 NLRB No. 172, slip op. at 3, n.7 (2015) – in favor of a half-measure contrived to all but guarantee that the union's unit will be found "*prima facie* appropriate." It calls for deciding the appropriateness of the union's chosen group in a vacuum, devoid of any consideration of the interests of "other employees." Thus, *Specialty Healthcare* contains no meaningful threshold test and the supposed "vast and crucial" differences between *Specialty Healthcare* and the Board's decision in *Lundy* simply do not exist.

The "threshold" step of the *Specialty Healthcare* test, which appears to require only that employees are part of an identifiable group, impermissibly accords controlling weight to the extent of organization. *No* unit is ever appropriate in which its members do not share a community of interest. And *every* group of employees working in the same job classification or department will virtually inevitably share a community of interest. So if the employees sought by the union are "readily identifiable as a group," they inevitably will meet the first step of the test.

Such a group also in all but the most unusual cases have been selected by the union based on the extent of its organization. Indeed, the Fourth Circuit observed in *Lundy* that the Board had "generally avoided § 9(c)(5) violations" by applying community-of-interest factors "*sufficiently independent* of the extent of union organization." *Lundy*, 68 F.3d at 1580 (emphasis added). The *Specialty Healthcare* test, however, nullifies any opportunity for an independent

community of interest analysis because it limits that analysis to the group of employees proposed by the union and whether they are "readily identifiable."

The extraordinarily low analytical hurdle of whether the proposed unit is "readily identifiable as a group" all but guarantees that the petitioned-for group will be found "prima facie" appropriate. Because at that point, the Board "*will find*" the unit to be appropriate unless the employer meets the extraordinarily high "overwhelming community of interest" standard for including other employees in the unit.

To meet its burden, the employer must show that the community of interest factors between the employees in the unit "overlap almost completely" with those of the employee outside of the unit. This is a nearly insurmountable burden given the fact that the Board already will have found that the union's proposed unit is "readily identifiable *as a group*." In this way, the supposed "threshold" step of the *Specialty Healthcare* analysis is in actuality the *only* step.

Ultimately, the *Specialty Healthcare* standard as it has been applied by the Board and the Regional Directors results in the same presumption of appropriateness invalidated in *Lundy*. It also clearly accords controlling weight to the extent of union organizing, an analysis Congress rejected when it amended the Act. As Member Hayes noted, the *Specialty Healthcare* test "cannot be reconciled with the traditional appropriate unit test identified in *Newton-Wellesley*, and provides no answer to the criticism of that test voiced by the Lundy court." *Specialty Healthcare*, slip op. at 19 (Hayes, dissent) (emphasis added). Its application in this case is equally offensive to the strictures of Section 9(c)(5), dismissive of the Congressional intent expressed both in the Wagner Act and Taft-Hartley Act amendments.

C. The Board's Reliance On The District Of Columbia Circuit's Decision In *Blue Man Vegas* Is Misplaced, Particularly In This Case.

The Board's reliance on *Blue Man Vegas, LLC v. NLRB*, *supra,* as support for its "overwhelming community of interest" standard is badly misplaced. The *Blue Man Vegas* case concerned a group of stage employees represented in a historically recognized bargaining unit that preexisted the Board proceeding. When the production group with which they were involved moved its operation to another location, the stage employees became employed by a different employer.

While their union arguably could have demanded recognition from the new employer under *NLRB v. Burns International Security Services, Inc*., 406 U.S. 271 (1972), it chose to seek a Board election to establish its continued majority status. The employer contested the union's petition and sought to add its musical instrument technicians to the stage employees' pre-existing, historically recognized bargaining unit.

The D.C. Circuit upheld the Board's refusal to alter the stage employees' historical unit. But in doing so, the Court did not adopt the "overwhelming community of interest test" as a rule of general applicability. It could not have inasmuch as the Board did not in its underlying ruling, and the Board's General Counsel could not therefore ask the Court to adopt such a standard on review. *NLRB v. Metro. Life Ins. Co*., 380 U.S. 438, 444 (1965) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action."). Indeed, the word "overwhelming" did not appear, *even once*, in the General Counsel's brief to the Court urging enforcement. *See* Brief of Respondent/Cross Petitioner, *Blue Man Vegas, LLC v. NLRB*, nos. 06-1328; 1341 (D.C. Cir. Jul. 30, 2007).

Instead, the Court based its ruling on a well-established line of cases recognizing that historical units are more likely to be found appropriate. *See, e.g., Armco, Inc. v. NLRB*, 832 F.2d

357, 363 (6th Cir. 1987) (when a unit has been in existence for a long period, "[t]his fact alone suggests the appropriateness of a separate bargaining unit"); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) ("In most cases, a historical unit will be found appropriate if the predecessor employer recognized it, *even if the unit would not be appropriate under Board standards if it were being organized for the first time.*") (emphasis added). Thus, much like in accretion cases where employees are added to an existing bargaining unit without an election, the burden on an employer attempting to disturb a historically recognized bargaining unit that pre-existed the representation case is undeniably higher than in initial unit determination cases where there is no union.

The D.C. Circuit's holding in *Blue Man Vegas* no more illuminates the correct standard in initial unit determination cases than does than the standard set forth in accretion cases. That is particularly so here. The unit approved by the Regional Director is not an "historical unit" at VW. Unlike the stage employees in *Blue Man Vegas*, the maintenance employees at VW had themselves never organized before this proceeding. Indeed, in the only previous representation election, the maintenance employees were part of an overall "wall to wall" production and maintenance unit. *Blue Man Vegas* offers no support for the Regional Director's ruling.

Even if *Blue Man Vegas* could be read to articulate a generally applicable unit determination standard, it is still distinguishable from the Board's *Specialty Healthcare* rationale, because the court in *Blue Man Vegas* would first require a unit determined under traditional Board standards. *See DPI Secuprint, Inc.,* slip op. at 11, n.7 (2015) (Johnson, dissent). For that reason, the D.C. Circuit distinguished its ruling from *Lundy* as follows:

> The Fourth Circuit there objected to the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit: 'By presuming the union-proposed unit proper unless there is 'an

> overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization.' . . . As long as the Board applies the overwhelming community-of-interest standard *only after the proposed unit has been shown to be prima facie appropriate*, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight.

Blue Man Vegas, 529 F.3d at 423 (quoting *Lundy Packing*, 68 F.3d at 1581) (citation omitted and emphasis added). Thus, on its face, *Blue Man Vegas* contemplates that the Board must first find a "*prima facie* appropriate unit" under its *traditional standards* before imposing any "overwhelming community of interest" standard.

In *Specialty Healthcare*, however, the Board seized on this passage, but in a way that does not fulfill the requirement that the Board *first* find a *"prima facie* appropriate unit" under its traditional standards. Instead, and as explained in detail above, the Board's "readily identifiable as a group" requirement introduces a *fait accompli* for determining a *prima facie* appropriate unit. That inquiry is not formulated, nor would it lead (except by coincidence), to the finding of a *prima facie* appropriate unit, because the criteria used effectively accords controlling weight to the "employees . . . identifiable as a group."

Put another way, because *any* appropriate unit must contain employees who share a community of interest, what really governs the appropriate unit under *Specialty Healthcare* is the employees' status as "identifiable as a group," one almost certainly chosen by the union on the basis of the extent of organization. Upon what other basis would a readily identifiable group of employees be chosen? The union's extent of organization is then elevated to controlling status save only if an employer (or another petitioner) can show an "overwhelming community of interest" of non-included employees.[2]

[2] At the very minimum, the Board should require that a petitioner—who will have near-exclusive control of the evidence on this point—demonstrate that the "employees readily

Whatever may be the validity of the D.C. Circuit's formulation in *Blue Man Vegas* regarding when the "overwhelming community of interest" standard may be applied, *see Specialty Healthcare*, slip op. at 19, n.17 (Hayes, dissent) (concluding that *Blue Man Vegas* was wrongly decided), it is clear that the Court conditioned its ruling on the Board's having first made a proper finding of a *prima facie* appropriate unit under traditional Board standards. *See DPI Secuprint, Inc.,* 362 NLRB No. 172, slip op. at 11, n.7 (2015) (Johnson, dissent) (explaining that *Blue Man Vegas* stated that community of interest "factors include whether, in distinction from other employees, the employees in the proposes unit have 'different methods of compensation, hours of work, benefits, supervision, training, and skills; if their contact with other employees is infrequent, if their work functions are not integrated with those of other employees, and if they have historically been a part of the distinct bargaining unit'") (quoting *Blue Man Vegas*, 529 F.3d at 421 (2008)).

The test mandated by *Specialty Healthcare* is not formulated to, and except by coincidence will not result in, the finding of a truly *prima facie* appropriate unit. Instead, the *Specialty Healthcare* test produces a unit resulting from the extent of union organization. It is clear that is not what the D.C. Circuit was endorsing in *Blue Man Vegas*. A proper reading of that case instead confirms that the *Specialty Healthcare* test offends the requirements of Section 9(c)(5) and should be overruled.

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identifiable as a group" are constituted on the basis of factors other than the extent of union organization. Where this is the only basis for the petitioned-for unit, application of the *Specialty Healthcare* standard necessarily results in a violation of Section 9(c)(5).

III. THE REGIONAL DIRECTOR'S DECISION VIOLATES SECTIONS 9(B) AND 9(C)(5) OF THE ACT AND, FURTHER, ESTABLISHES A FRACTURED UNIT THAT CANNOT WITHSTAND BOARD REVIEW.

A. The Regional Director's Decision Applying *Specialty Healthcare* Fails To Consider The Realities of VW's Workplace, And Is Not Conducive To Industrial Peace Or Effective Collective Bargaining.

Even if the Board does not grant review for the purpose of re-examining its *Specialty Healthcare* standard (as it should), it must grant review for the purpose of rejecting the Regional Director's hopelessly flawed Decision. All of the concerns discussed above are presented by the Regional Director's Decision issued in the instant case. The factual record establishes that the VW facility is a highly integrated manufacturing operation in which all of the employees in the plant work in concert to produce a finished product.

The maintenance employees at issue are fully integrated into that process. They do not have their own, separate department. Instead, maintenance employees are assigned to, and work within, each of VW's individual production shops where they are almost totally embedded with the production employees in the shop. Production and maintenance employees work hand-in-hand on their particular phase of the manufacturing process.

In a case such as this one, traditional Board precedent required the Regional Director to conduct a thoughtful analysis of the company's operation and provide a reasoned explanation as to why anything besides a full production and maintenance unit would reflect the business realities of the workplace and uphold the Board's responsibilities under the Act. But the Regional Director here did no such thing, and the Decision does not include a meaningful discussion of the highly integrated nature of VW's overall production operation and each individual production shop. It also omits any evaluation of how his bargaining unit determination may impact the workplace.

Instead, the Regional Director automatically approved the proposed unit without any consideration of factors beyond job classification. But this simply does not provide a reasoned or legally supportable basis for the Regional Director's finding that those employees constitute an appropriate bargaining unit.

Member Johnson warned against organizing on this basis in *DPI Secuprint*:

> Daisy chaining a number of distinct job classifications together, *simply because they are distinct job classifications*, cannot logically create an organizational or departmental line in order to define a legitimate 'bargaining unit' any more than aggregating any group of distinct cells will then result, biologically, in a functioning 'organ.' If the employer itself never recognized such classifications as a separate department in its day-to-day operations, this should indicate that they are merely a selective collection of functionally disparate workers and not an appropriate unit for bargaining.

DPI Secuprint, Inc., slip op. at 11, n.6 (emphasis in original). Member Johnson also noted that automatic approval of proposed units based on job title or classification without consideration as to whether the group of employees are sufficiently distinct to warrant the establishment of a separate unit conflicts with precedent on which the *Specialty Healthcare* majority claimed to rely, including *Blue Man Vegas*. *See DPI Secuprint, Inc*., slip op. at 11, n.7. By disregarding the realities of VW's highly integrated operation, the Regional Director's determination in this case plainly "fails to relate to the factual situation with which the parties must deal," *Kalamazoo Paper Box Corp.,* 136 NLRB at 137. His rote application of *Specialty Healthcare* surrenders to the Union his obligation to decide "in each case" whether the petitioned-for unit is appropriate.

Member Hayes also noted the negative consequences of this type of bargaining unit determination in his *Northrop Grumman* dissent: "[T]his new standard will encourage petitioning for small, single classification and/or single department groups of employees . . . lead[ing] to the balkanization of an employer's unionized workforce, creating an environment of

constant negotiation and tension resulting from competing demands of the representatives of numerous micro-units." *Northrop Grumman*, slip op. at 9 (Hayes, dissent); *see also DPI Secuprint, Inc*., slip op. at 11 (Johnson, dissent) ("*Specialty Healthcare* fairly well guarantees the proliferation of fractured units that can only hobble a unionized employer's ability to manage production and to retain a necessary flexibility to respond to industry change.").

This is precisely the situation VW is now in, and the Regional Director has opened the door to a "balkanization" of the VW workforce that plainly is out of step with the policies of underlying the Act which are discussed above.

B. The Regional Director's Decision Is Also Contrary To The Board's Precedent Against Approving Fractured Units.

As described above, the bargaining unit certified by the Regional Director in this case is a truly fractured unit, gerrymandered by the Union based *solely* on the extent of its organization. The maintenance employees in the unit are not part of the same department. Instead, they are assigned to one of three different production shops in which they separately perform virtually all of their work. There is no centralized maintenance function, nor is there a managerial head of maintenance. Maintenance employees in each production shop are geographically separated from their counterparts in the other shops and do not work with them in any significant respect. Conversely, the maintenance employees in a given shop work hand-in-hand with the *production* employees in the shop to which they are assigned.

Under these circumstances, the petitioned-for unit is not "appropriate" under the Act, even under the *Specialty Healthcare* rule. Indeed, the Board in *Specialty Healthcare* regarded it as "highly significant" that "except in situations where there is a prior bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure the workplace." 357 NLRB No. 83, slip op. at 9, n.19; *see also The Neiman Marcus*

Group, Inc., 361 NLRB No. 11, slip op. at 3 (2014) (group consisting of women's shoes salespersons not "readily identifiable" in part because the unit "does not resemble any administrative or operational lines drawn by the Employer").

Here too, the petitioned-for unit is not drawn along any geographic, administrative, or operational line established by VW. The maintenance employees assigned to each shop are fully integrated with the production employees in their individual shop, and have very little if any community of interest – other than a job title – with maintenance employees in the two other shops. Thus, the petitioned-for unit is not "readily identifiable as a group" and does not share a sufficient community of interest. It is but an "arbitrary segment of what would be an appropriate unit." *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 5 (Dec. 9, 2011) (citing *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13).

The Regional Director sidestepped these facts and ignored VW's operational integration of the maintenance employees, instead finding them readily identifiable because they "share a unique function." Decision at 20. According to the Regional Director, "maintenance employees *share a job title* and perform distinct functions – they all perform preventative maintenance and repairs." *Id*. (emphasis added). This kind of rationale is *precisely* the problem with rigid application of *Specialty Healthcare* without regard to the Board's obligation to decide the unit in each case and applicable Board precedent that requires further analysis - it allows units based simply on the fact that the employees share the same job title or classification.

The Regional Director opined that the petitioned-for unit in this case is "distinct" from the unit rejected by the Board in *Neiman Marcus* primarily because: "Unlike the two groups of shoe sales employees [in *Neiman Marcus*], one of which contained all of the employees in a single department, while the other was only part of a larger department, all three of [VW's]

shops have both production and maintenance employees." Decision at 19. But on the facts of this case, what conceivable difference does that make? Certainly, not one that does anything to explain how the maintenance employees in this case are "readily identifiable as a group."

The Board found the women's shoe associates in *Neiman Marcus* to be an inappropriate unit because their combination did not track any organizational structure drawn by the employer. That is *exactly* the case here, and the Regional Director's "distinction" reads like "a post-hoc justification . . . so strained that it is difficult to track the actual rationale being applied." *DPI Secuprint, Inc*., slip op. at 10 (Johnson, dissent). The supposed "distinct way[]" in which this case differs from *Neiman Marcus* is, simply put, nonsense.

If the illogic of the Regional Director's "readily identifiable" finding is not reason enough to overturn his Decision, the procedural history of the case establishes beyond question that the unit is drawn based on one overriding factor – the extent of organization. The UAW tried, and failed, to organize the entire plant. It specifically agreed in Case No. 10-RM-121704 that the production and maintenance employees together comprised an appropriate unit.

Not until after the UAW lost that election did it adjust its focus to the maintenance employees. Even then, when the UAW continued its organizing attempts at the plant, it claimed to include both production and maintenance employees among its ranks. It is clear from the record the Union's intention is to organize the entire plant. Yet, the petition in this case is limited to a gerrymandered group that does not track VW's departmental lines and which plainly does not share a separate community of interest. If these facts do not establish that the petitioned-for unit is drawn primarily on the extent of the Union's organization, it is difficult to imagine a set of facts that would.

Ultimately, the fractured unit approved by the Regional Director here is not only contrary to Board law – it also clearly demonstrates that it is in reality based on the "extent to which the employees have organized," which is the "controlling" factor. The Regional Director's Decision represents a profound disregard of both the Board's disapproval of fractured units and the plain language and congressional intent of Section 9(c)(5) of the Act.

The Board should use this case as a vehicle to reconsider the *Specialty Healthcare* standard, particularly as it applies to a highly integrated manufacturing or other process, and should not allow the fractured unit sanctioned by the Regional Director, because it "does not resemble any administrative or operational lines drawn by the Employer." *The Neiman Marcus Group, Inc.*, slip op. at 3.

IV. THE BOARD CANNOT RECONCILE *SPECIALTY HEALTHCARE* WITH ITS LONGSTANDING SELF-DETERMINATION PRINCIPLES.

The infirmities of the *Specialty Healthcare* standard are additionally apparent when examined in conjunction with the Board's rules for including groups of employees within already existing bargaining units. The Board has long held that where an incumbent union seeks to add unrepresented employees to its existing unit, a self-determination, or *Armour-Globe* election, may be ordered. *See Armour & Co*., 40 NLRB 1333 (1942); *Globe Machine & Stamping Co*., 3 NLRB 294 (1937). Such an election is appropriate if the employees sought to be included both: (1) share a "community of interest" with the existing unit employees; and (2) "constitute an identifiable, distinct segment so as to constitute an appropriate voting group." *Warner-Lambert Co*., 298 NLRB 993, 995 (1990).

Specialty Healthcare is plainly inconsistent with these principles. Its rules allow a union to exclude from its targeted bargaining unit the same employees that the *Armor-Globe* rules would allow the union to add the unit through a subsequent, self-determination election. At first,

the excluded employees may not, under *Specialty Healthcare*, have a sufficiently "overwhelming" and "completely overlapping" community of interest with the group preselected by the union to be added to the union's petitioned-for unit. But later on, if and when the union decided to target the excluded employees, they could very well be found to have enough of a regular-old "community of interest" to be placed in the bargaining unit via *Armour-Globe*. Perversely, the Board "c[ould] selectively rely on differences when the union desires exclusion of employees – and on similarities when the union desires inclusion." *Lundy*, 68 F.3d at 1583.

The troubling implications of that outcome are illustrated in this case. The Regional Director certified a fragmented unit of maintenance employees over VW's objection that the smallest appropriate unit must include all production employees. The production employees excluded from the voting unit were found not to have an "overwhelming community of interest" with those in the unit.

But what would happen if the UAW returned to the Board later to request an *Armour-Globe* election of the production employees in one of the production shops? The employees would be a fragment of the Company's total compliment of production employees. But as long as the Union could show that the sought-after employees share a mere community of interest with the maintenance employees and would not cause a fractured unit (how could they, if separating the maintenance employees did not create one in the first place), the Board could allow the Union to merge production employees into a unit from which they were originally excluded. The Act cannot accommodate such clear inconsistency and employers should not be expected to play on the tilted field created by *Specialty Healthcare*, which allows just such piecemeal organizing.

The Board's failure to harmonize the *Specialty Healthcare* standard with its *Armour-Globe* principles creates a significant inconsistency in the law. At a minimum, the Board in this case must either reconcile these two lines of precedent or overrule *Specialty Healthcare* before it can consider affirming the Regional Director's decision.[3]

V. APPLYING *SPECIALTY HEALTHCARE* WILL HAVE A PARTICULARLY UNWARRANTED, ADVERSE IMPACT ON THE MANUFACTURING INDUSTRY AND ITS EMPLOYEES.

The adverse impact of the rule announced in *Specialty Healthcare* and its application in this and other cases raises serious issues for manufacturing employers and their employees and undermines decades of precedent. That precedent demonstrates the thoughtful, deliberate analysis employed by the Board in determining appropriate bargaining units in the manufacturing industry "in each case," as required by Section 9(b), and reflects the experience gained by the Board through decades of unit determinations in which the Board took into account the realities of manufacturing in all of its diverse forms, products, structures, sizes and locations. Importantly, none of the analyses utilized an "overwhelming community of interest" standard.

Now, as dramatically illustrated by the instant case, all of this is thrown into doubt by the *Specialty Healthcare* decision. *Specialty Healthcare* enables unions to organize by cherry-picking a bargaining unit composed of a small subset of employees with little regard for whether those employees constitute a practical bargaining unit. All they need be is a readily identifiable group of employees – perhaps, not even that, if the Regional Director's Decision is allowed to

[3] *Specialty Healthcare* does not address the implications of the Board's radical new 9(b) standard in relation to its longstanding self-determination principles. In fact, on the same day that the Board decided *Specialty Healthcare*, it issued a separate decision reaffirming the *Armour-Globe* principles. *See St. Vincent Charity Med. Ctr.*, 357 NLRB No. 79, slip op. (Aug. 26, 2011). Neither decision so much as mentions the other.

stand. As a result, unions will often organize by forming bargaining units based on the extent of their organization, creating a proliferation of units with no limiting feature other than that they all are identifiable groups.

The practice condoned by the Regional Director in this case, if allowed to stand, would encourage unions to repeat it in thousands of other manufacturing settings, resulting in a proliferation of separate bargaining units that could cripple a manufacturing employer with endless multiple negotiations, conflicting union demands and contract obligations, and burdensome administrative duties. Effective collective bargaining and industrial peace are undermined, not enhanced, in such a regime.

For example, in many manufacturing settings, employees perform tasks in a variety of different departments and settings in order to develop their skills and knowledge base. Production operations can involve a high degree of interchange among job classifications. In a situation where a business is faced with multiple units as contemplated under *Specialty Healthcare*, each perhaps represented by a different, competing union, union rules will prevent—or at a minimum greatly complicate—the ability to cross-train employees and meet customer and client expectations via flexible staffing, as employees generally may not and cannot perform work assigned to another unit. Employees would be limited to micro-units and the job duties assigned to that particular unit, thus reducing skill building, training, and job opportunities as cross-training, promotions, and transfers would be hindered by barriers created by multiple smaller bargaining units.

Employers would also lose operational flexibility as workers from one department might not be able to pick up shifts in another if different units represented the different departments. The impact on business productivity and competitiveness would be significant. Today's

economic environment is challenging enough for workers without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

Under *Specialty Healthcare*, in addition to multiple balkanized units, manufacturers will have to contend with multiple collective bargaining agreements (e.g., different agreements for maintenance employees; production employees – perhaps, in this case, segmented by shop; quality control employees; shipping and receiving employees; etc.), in which the unions may insist on different or conflicting work rules, pay scales, benefits, bargaining schedules, vacation and holidays, grievance processes and layoff and recall procedures. Juggling the administrative tasks associated with multiple bargaining agreements could overwhelm businesses to the point of paralysis.

Finally, multiple unions representing multiple bargaining units within a single manufacturing facility could lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages or other job actions, creating a situation where a union representing only a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families.

In sum, under *Specialty Healthcare*, the bargaining-unit proliferation and balkanization that Congress discouraged is now a reality that will unnecessarily and improperly impact the manufacturing industry to the detriment of both employers and employees, and the economic well-being of families and communities who depend on them. It is impossible to conceive that this is the labor peace that Congress intended to foster in passing the Act.

CONCLUSION

For the foregoing reasons, the Board should grant review, overrule *Specialty Healthcare* and return its representation case standard to that articulated in *Wheeling Island Gaming*. In the

absence of the foregoing, the Board should at a minimum overrule the Regional Director's Decision and Direction of Election, as it creates a fractured unit in this case and plainly violated the Act.

Dated: December 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of December, 2015, he caused the foregoing Motion of the Coalition for a Democratic Workplace, the National Association of Manufacturers, and the National Federation of Independent Business for Leave to File Brief as *Amici Curiae* to be filed using the National Labor Relations Board's E-Filing system. The foregoing motion was also served by e-mail upon the following counsel of record for the parties:

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