Case Nos. 12-1027, 12-1174

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KINDRED NURSING CENTERS EAST, LLC
d/b/a KINDRED TRANSITIONAL CARE AND
REHABILITATION – MOBILE, f/k/a
SPECIALTY HEALTHCARE AND
REHABILITATION CENTER OF MOBILE,
Petitioner-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee,

&

UNITED STEEL PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION,
Intervenor.

On Appeal from the National Labor Relations Board

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER, URGING REVERSAL OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Robin S. Conrad
Jane E. Holman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce
of the United States of America

Charles I. Cohen
Jonathan C. Fritts
Alana F. Genderson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
Counsel for *Amicus Curiae*

Date Submitted: April 23, 2012

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America (the "Chamber") makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber has no parent corporation, and no publicly held corporation owns any portion of the Chamber.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No. The Chamber is not aware of any publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this appeal.

/s/ Alana F. Genderson
Alana F. Genderson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
Counsel for *Amicus Curiae*

Date Submitted: April 23, 2012

STATEMENT PURSUANT TO FRAP 29(a) & 29(c)

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to this dispute have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus curiae* the Chamber of Commerce of the United States of America and its members state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

TABLE OF CONTENTS

Page

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The *Specialty Healthcare* Standard Violates the Terms and Core Purpose of the Act. 5

A. The Board Must Exercise Its Authority in a Manner That Is Consistent with the Terms and Core Purpose of the Act. 5

B. The Board's New Standard Violates Section 9(c)(5) of the Act and Its Core Purpose of Promoting Labor Relations Stability. 8

II. Recent NLRB Decisions Demonstrate That *Specialty Healthcare* Does Not Merely "Clarify" Existing Law. 13

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Page(s)

CASES

Bay Med. Ctr., Inc. v. NLRB,
588 F.2d 1174 (6th Cir. 1978) 11

Beth Israel Hosp. & Geriatric Ctr. v. NLRB,
688 F.2d 697 (10th Cir. 1982) 12

Cont'l Web Press, Inc. v. NLRB,
742 F.2d 1087 (7th Cir. 1984) 12

DTG Operations, Inc.,
357 NLRB No. 175 (Dec. 30, 2011)..*passim*

EEOC v. Sundance Rehab. Corp.,
466 F.3d 490 (6th Cir. 2006) 1

Fibreboard Paper Prods. Corp. v. NLRB,
379 U.S. 203 (1964)..6

First Nat'l Maint. Corp. v. NLRB,
452 U.S. 666 (1981)..6

Hirsch v. CSX Transp., Inc.,
656 F.3d 359 (6th Cir. 2011) 1

Local 24, Int'l Bhd. of Teamsters v. Oliver,
358 U.S. 283 (1959)..6

NLRB v. Catherine McAuley Health Ctr.,
885 F.2d 341 (6th Cir. 1989) 4, 5, 6, 7

NLRB v. Guardian Armored Assets, LLC,
201 F. App'x 298 (6th Cir. 2006) 7

NLRB v. Pinkerton's, Inc.,
428 F.2d 479 (6th Cir. 1970) 7, 10

Northrop Grumman Shipbuilding, Inc.,
357 NLRB No. 163 (Dec. 30, 2011)...13

TABLE OF AUTHORITIES
(continued)

Page(s)

Odwalla, Inc.,
357 NLRB No. 132 (Dec. 9, 2011)....................13, 14

Pittsburgh Plate Glass Co. v. NLRB,
313 U.S. 146 (1941)....................7, 9, 10

Specialty Healthcare & Rehabilitation Center of Mobile (Specialty Healthcare),
357 NLRB No. 83 (Aug. 26, 2011)....................*passim*

Winnett v. Caterpillar Inc.,
553 F.3d 1000 (6th Cir. 2009)....................1

STATUTES

29 U.S.C. § 159(b)....................5

29 U.S.C. § 159(c)(5)....................4, 7

OTHER AUTHORITIES

Bread of Life, LLC, 07-RC-072022 (Mar. 21, 2012)....................13

Extendicare Homes, Inc., 18-RC-70382 (Jan. 24, 2012)....................13

First Aviation Services, Inc., 22-RC-61300 (Oct. 19, 2011)....................13

Grace Industries, LLC, 29-RC-12031, 29-RC-12043 (Dec. 8, 2011)....................13

Nestle Dreyer's Ice Cream, 31-RC-66625 (Dec. 28, 2011)....................13

Oliver C. Joseph, Inc., 14-RC-12830 (Sept. 7, 2011)....................13

Performance of Brentwood LP, 26-RC-63405 (Nov. 4, 2011)....................13

Prevost Car U.S., 03-RC-071843 (Mar. 15, 2012)....................13, 16

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing 300,000 direct members and having an underlying membership of over 3,000,000 businesses and professional organizations of every size and in every relevant economic sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community. *See, e.g.*, *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359 (6th Cir. 2011); *Winnett v. Caterpillar Inc.*, 553 F.3d 1000 (6th Cir. 2009); *EEOC v. Sundance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006).

The Chamber is filing this *amicus curiae* brief because the standard for bargaining unit determinations announced by the National Labor Relations Board (the "NLRB" or "Board") in this case will be problematic in all industries covered by the National Labor Relations Act (the "NLRA" or "Act"), not just the health care industry. Because the Chamber represents employers in every industry covered by the NLRA, the Chamber is uniquely qualified to articulate the business community's concerns with the Board's decision in this case.

SUMMARY OF ARGUMENT

Union representation in the private sector has been declining for decades. The standard announced by the Board in *Specialty Healthcare & Rehabilitation Center of Mobile* (*Specialty Healthcare*), 357 NLRB No. 83 (Aug. 26, 2011), facilitates union organizing by allowing a union to establish a foothold of representation among a small group of employees in a particular workplace. While this may be a desirable strategic outcome for the union, it does not serve the Act's primary policy objective: promoting industrial peace through effective collective bargaining.

The *Specialty Healthcare* standard affords a union wide latitude to organize employees in virtually any bargaining unit of its choice, with little or no regard for whether collective bargaining in that unit will be effective and ultimately lead to industrial peace. Under the *Specialty Healthcare* standard, the Board first determines whether the unit defined by the union is "appropriate" by analyzing whether the employees in the proposed unit share a "community of interest." *Id.* at *14.[1] If the unit is found to be appropriate, the burden shifts to the employer to

[1] The traditional "community of interest" factors include:

> [W]hether 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; have frequent contact with other employees; interchange with

prove that the unit inappropriately excludes other employees who share an "*overwhelming* community of interest" with the employees included in the unit. *Id.* at *16 (emphasis added). This standard requires proof that there is "no rational basis" for excluding the employees from the unit. *Id.* (citation omitted).

Although the *Specialty Healthcare* case arose in the nonacute health care industry, the Board intends this new standard to have broad application to all industries covered by the Act. The Board and its Regional Directors have already applied the new standard in cases that have no connection to the health care industry, including cases involving delivery drivers, shipyard employees, and employees at a rental car facility. Thus, the Chamber's concern with the *Specialty Healthcare* standard is not trepidation over the unknown. These published decisions confirm the true impact of the new standard and demonstrate that it is not, as the Board characterizes it, a mere effort to "clarify" existing law.

The *Specialty Healthcare* standard encourages piecemeal unionization, which could force employers to bargain with numerous "micro units" within a workforce even at a single location. Such piecemeal bargaining is inefficient and counter to the NLRA's goal of promoting industrial peace through collective

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> other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, 357 NLRB at *14 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

bargaining. Strikes and lockouts are protected by the Act as weapons of industrial warfare that create an incentive for the parties to resolve their disputes peacefully at the bargaining table. But the core objective of the Act is to avoid industrial warfare, and its destructive effect on commerce, by stabilizing labor relations through a meaningful and effective system of collective bargaining. The public will ultimately suffer if the *Specialty Healthcare* standard produces "micro units" that are incapable of stabilizing labor relations even at a single facility. If multiple bargaining units of employees are established at a single facility, each of which may be represented by a different union (unions that, in turn, are competing with each other for jurisdiction and membership), the potential for industrial warfare multiplies as well.

The Sixth Circuit has recognized that an NLRB bargaining unit determination must be reversed if it violates the spirit or letter of the NLRA. *See NLRB v. Catherine McAuley Health Ctr.*, 885 F.2d 341, 344 (6th Cir. 1989). The standard announced in *Specialty Healthcare* violates the Act because, as explained above, it leads to inefficient bargaining and industrial unrest. Furthermore, the standard violates Section 9(c)(5) of the Act, which prohibits "the extent to which the employees have organized" from being a controlling factor in unit determinations, 29 U.S.C. § 159(c)(5), and Section 9(b) of the Act, which requires the Board to define the unit that is appropriate "for purposes of collective

bargaining." 29 U.S.C. § 159(b). As these terms reflect, Congress did not intend the NLRB to merely rubber stamp the bargaining unit that the union believes to be appropriate and most susceptible to organizing. Instead, the statute imposes an obligation on the Board to determine that the unit, if organized, will be an appropriate and effective one for purposes of collective bargaining. No public interest is served in certifying bargaining units that are easy for unions to organize, but that will lead to industrial unrest once the collective bargaining process begins.

The Chamber urges the Court to reverse the standard announced in *Specialty Healthcare* because it conflicts with the terms of the Act and its fundamental purpose of promoting industrial peace through effective collective bargaining.

ARGUMENT

I. The *Specialty Healthcare* Standard Violates the Terms and Core Purpose of the Act.

A. The Board Must Exercise Its Authority in a Manner That Is Consistent with the Terms and Core Purpose of the Act.

This Court has recognized that the NLRB has "[w]ide, though not unbridled," discretion to determine the scope of an appropriate bargaining unit under the Act. *See Catherine McAuley Health Ctr.*, 885 F.2d at 344. The Board's discretion in making unit determinations "is not without constraints, and if the Board's bargaining unit determination 'oversteps the law,' it must be reversed." *Id.* (citing *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S.

157 (1971)). The Board "oversteps the law" if its bargaining unit determination does not "effectuate the Act's policy of efficient collective bargaining." *Id.*

The NLRA protects the right to organize in order to promote industrial peace. The logic of the Act is that work stoppages and other interruptions to commerce can be avoided through a federally regulated system of collective bargaining. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) ("The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife."); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) ("A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.") (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

This core objective of the Act can be satisfied only if the bargaining units certified by the Board are capable of supporting stable and effective collective bargaining relationships. From the earliest days of the Act, the Supreme Court has recognized that, while the wishes of the employees are one factor that the Board

may consider in determining the scope of an appropriate bargaining unit, the Board must ultimately consider "the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining." *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941). The importance of this consideration has been recognized by the Board and this Court for decades:

> Because the scope of the unit is basic to and permeates the whole of the collective bargaining relationship, each unit determination, in order to further effective expression of the statutory purpose, must have a direct relevancy to the circumstances within which collective bargaining is to take place.

NLRB v. Pinkerton's, Inc., 428 F.2d 479, 482 (6th Cir. 1970) (quoting *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962)).

In 1947, Congress added Section 9(c)(5) to the Act to reinforce that the Board is prohibited from making bargaining unit determinations with a singular focus on the desires of the petitioning employees or labor organization. Therefore, Section 9(c)(5) provides that "[i]n determining whether a unit is appropriate for [collective bargaining purposes] the extent to which the employees have organized shall *not* be controlling." 29 U.S.C. § 159(c)(5) (emphasis added). *See, e.g.*, *NLRB v. Guardian Armored Assets, LLC*, 201 F. App'x 298, 303 (6th Cir. 2006) ("[T]he fact that the employees self-identify in single-location units is not the only factor to be considered."). Bargaining unit determinations that violate this clear statutory mandate "must be reversed." *See Catherine McAuley Health Ctr.*, 885

F.2d at 344.

B. The Board's New Standard Violates Section 9(c)(5) of the Act and Its Core Purpose of Promoting Labor Relations Stability.

The *Specialty Healthcare* standard cannot be reconciled with the purpose of the Act or the requirements of Section 9(c)(5) because it effectively makes the extent of a union's organizing effort the controlling factor in bargaining unit determinations. The standard allows a union to define the bargaining unit of its choice so long as the union can identify even a single traditional "community of interest" factor to justify the partitioning of included and excluded employees. The burden then shifts to the employer (or other party challenging the petitioned-for unit) to prove that the excluded employees share an "*overwhelming* community of interest" with the employees in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at *16 (emphasis added). Thus, the *Specialty Healthcare* standard places a minimal burden on the petitioning union to justify the bargaining unit it desires, but places a very heavy burden on any party that seeks to challenge that unit. As Member Hayes has observed in a subsequent case:

> As long as a union does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification, department, or function, i.e., a so-called fractured unit, it will be impossible for a party to prove that an overwhelming community of interest exists with excluded employees.

DTG Operations, Inc., 357 NLRB No. 175, at *11 (Dec. 30, 2011) (Member Hayes, dissenting) (footnote omitted).

Importantly, the *Specialty Healthcare* standard does not require the Board to undertake an analysis of "the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining." *Pittsburgh Plate Glass*, 313 U.S. at 156. The Board asserts that the fact that a proposed unit is small "is not alone a relevant consideration," and cites *Pittsburgh Plate Glass* for the proposition that "[a] cohesive unit – one relatively free of conflict of interest – serves the Act's purpose of effective collective bargaining." *Specialty Healthcare*, 357 NLRB at *15 (citing *Pittsburgh Plate Glass*, 313 U.S. at 165). Yet, *Pittsburgh Plate Glass* in no way supports the sort of "micro unit" organizing that the Board now seeks to promote.

Pittsburgh Plate Glass involved the Board's certification of a division wide bargaining unit that covered approximately 6,500 production and maintenance employees who worked in six different plants located in five different states (Pennsylvania, Ohio, West Virginia, Oklahoma, and Missouri). *See Pittsburgh Plate Glass*, 313 U.S. at 149-50. The Supreme Court upheld the Board's certification of this division wide bargaining unit, rather than a separate bargaining unit limited to one plant in Crystal City, Missouri. Even though the Crystal City plant was a "separate industrial unit" with a "substantial degree of local

autonomy," the Court held that the Board was justified in finding that a separate Crystal City bargaining unit "would frustrate division-wide effort at labor adjustments." *Id.* at 164. The Court further held that the statutory standards guiding the Board's discretion to certify the division wide unit included "the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining." *Id.* at 165.

The practical policy judgments that informed the Board's decision in *Pittsburgh Plate Glass* are entirely absent from the Board's decision in *Specialty Healthcare*. In stark contrast to the division wide unit in *Pittsburgh Plate Glass*, the *Specialty Healthcare* standard allows employees even at a single facility to be organized separately according to their particular job classification, function, or department. Forcing employers to bargain separately with employees in each job classification, function, or department within a single facility creates "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." *Pinkerton's*, 428 F.2d at 482 (6th Cir. 1970) (quoting *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962)).

As this Court held in *Pinkerton's*, an "employer is entitled to a reasonably adequate protection from the results of piecemeal unionization." *Id.* at 485. That case reversed the NLRB's certification of a smaller bargaining unit comprised of

31 employees in a certain geographic area, instead of a larger district wide unit of 480 employees that reflected the realities of the employer's business. In defending its decision to certify the smaller unit, the Board offered the same rationale as it now does in *Specialty Healthcare*: the employees in the smaller unit "comprise a cohesive grouping with interests, separate and apart from employees in other areas." *Id.* at 484. This Court found that the Board's rationale was not sufficient because "the real objective of the Act is to achieve stable collective bargaining." *Id.*

The *Specialty Healthcare* standard is a recipe for piecemeal unionization. *See Specialty Healthcare*, 357 NLRB at *27 (Member Hayes, dissenting) ("this test obviously encourages unions to engage in incremental organizing in the smallest units possible"). Piecemeal unionization will impose unnecessary costs on the business community and burden the economy with repetitious bargaining, more frequent strikes and slowdowns, and jurisdictional disputes between the various unions that may represent the separately organized groups of employees.

The Board majority in *Specialty Healthcare* rejected these concerns as "abstract specters that do not comport with our experience in labor relations in the health care industry or more generally." *Specialty Healthcare*, 357 NLRB at *19. Congress, however, did not view these to be "abstract specters." These very concerns were the reason Congress directed the Board to guard against unit

proliferation in the health care industry. *See Bay Med. Ctr., Inc. v. NLRB*, 588 F.2d 1174, 1176 (6th Cir. 1978) ("Undue unit proliferation must not be permitted to create wage 'leapfrogging' and 'whipsawing.'" (quoting 120 Cong. Rec. S. 6940-41 (May 2, 1974) (remarks of Sen. Taft))); *see also Beth Israel Hosp. & Geriatric Ctr. v. NLRB*, 688 F.2d 697, 700 (10th Cir. 1982) ("Congress directed the NLRB to justify more rigorously its bargaining unit determination in the health care field because it feared frequent strikes that would close hospitals and increases in the cost of medical care through wage 'leapfrogging' and 'whipsawing' if hospital employees were represented by many different unions.").

These same concerns exist in the other industries covered by the NLRA, as the Seventh Circuit has observed:

> It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers.

Cont'l Web Press, Inc. v. NLRB, 742 F.2d 1087, 1090 (7th Cir. 1984).

In sum, the *Specialty Healthcare* standard is in direct conflict with the terms and central purpose of the Act, clear legislative intent, and well-established jurisprudence concerning the limits of the Board's discretion in determining the scope of an appropriate unit under the Act.

II. Recent NLRB Decisions Demonstrate That *Specialty Healthcare* Does Not Merely "Clarify" Existing Law.

The Board cannot rationalize the *Specialty Healthcare* standard as a modest effort to "clarify" existing law. *Specialty Healthcare*, 357 NLRB at *1. Subsequent Board and Regional Director decisions confirm that *Specialty Healthcare*, in addition to reversing precedent in the nonacute health care industry, dramatically changes the standard for bargaining unit determinations in all other industries regulated by the Act.

Since the *Specialty Healthcare* decision issued in August 2011, the Board has considered the meaning of the new standard in eleven cases, three of which involved published Board decisions.[2] Of these, the Board only found one

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[2] The following NLRB decisions discuss the *Specialty Healthcare* overwhelming community of interest standard: *DTG Operations, Inc.*, 357 NLRB No. 175 (Dec. 30, 2011), *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (Dec. 30, 2011), and *Odwalla, Inc.*, 357 NLRB No. 132 (Dec. 9, 2011). The NLRB has denied review of the following Regional Director unit determination decisions under *Specialty Healthcare* as they raised "no substantial issues warranting review," with Member Hayes dissenting for the reasons expressed in his *Specialty Healthcare* dissent: *Prevost Car U.S.*, 03-RC-071843 (Mar. 15, 2012), *Extendicare Homes, Inc.*, 18-RC-70382 (Jan. 24, 2012), and *First Aviation Services, Inc.*, 22-RC-61300 (Oct. 19, 2011). The NLRB also denied review in *Bread of Life, LLC*, 07-RC-072022 (Mar. 21, 2012), *Nestle Dreyer's Ice Cream*, 31-RC-66625 (Dec. 28, 2011), and *Oliver C. Joseph, Inc.*, 14-RC-12830 (Sept. 7, 2011), with Member Hayes agreeing that the units were appropriate without relying on the overwhelming community of interest standard announced in *Specialty Healthcare*. The NLRB remanded *Performance of Brentwood LP*, 26-RC-63405 (Nov. 4, 2011), for further consideration of issues including whether certain employees were appropriately excluded from a unit under *Specialty Healthcare*. On November 8, 2011, the NLRB rescinded its order in *Performance*

employer to have met its burden of proving an "overwhelming community of interest." *See Odwalla, Inc.*, 357 NLRB No. 132 (Dec. 9, 2011). And in that case, the same result could have been reached under existing Board precedent. *See id.* at *7.

In other cases, the Board has reversed the decisions of its Regional Directors under the *Specialty Healthcare* standard. For instance, in *DTG Operations, Inc.*, 357 NLRB No. 175 (Dec. 30, 2011), the Board reversed the Regional Director's determination that the smallest appropriate unit at an airport rental car facility was a "wall-to-wall" unit consisting of all 109 hourly employees at the facility. The Regional Director rejected the union's proposed unit, which was limited to 31 rental service agents ("RSAs") and lead rental service agents ("LRSAs"), because the Regional Director found that these employees shared an "overwhelming community of interest" with the other hourly employees at the facility "based on the functional integration of the Employer's operations." *Id.* at *29. Even though the Board agreed that the facility was "functionally integrated, with all employees working toward renting vehicles to customers," the Board determined that it was appropriate to carve out a separate unit by job classification because "each

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of Brentwood LP after the employer filed a motion to withdraw request for review. Finally, the NLRB remanded *Grace Industries, LLC*, 29-RC-12031, 29-RC-12043 (Dec. 8, 2011), for further consideration in light of *Specialty Healthcare*, and then more recently granted review of the Regional Director's second supplemental decision on February 8, 2012.

classification has a separate role in the process." *Id.* at *9. In doing so, the Board rejected the Regional Director's reliance on prior precedent in the same industry and the Regional Director's finding that there was an "extensive amount of interchange" between the RSAs, LRSAs, and other classifications of employees at the facility. *Id.* at *29.[3] Member Hayes dissented from the Board's reversal of the Regional Director's decision, noting that it highlights the impossibility of meeting the "overwhelming community of interest" standard as long as the union "does not make the mistake of petitioning for a unit that consists of only part of a group of

[3] The Regional Director's finding of an "extensive amount of interchange between classifications of employees" – the "most significant factor" in the analysis – was based on the following record evidence:

> In fact, the record establishes that there is evidence of actual temporary interchange between each classification and at least one other classification, except for the two bus drivers. The RSAs actually have such interchange on a daily basis with the lot agents, return agents, and staff assistants. Specifically, the day shift RSAs cover the breaks of the lot agents and return agents on a daily basis. During the evening and night shifts, RSAs perform all of the duties of the lot and return agents because there are no scheduled lot and return agents. Additionally, the staff assistants are regularly called upon to work at the rental sales counters whenever customer demands warrant calling them to assist.
> With regard to interchange of other classifications of employees, the record establishes that one exit gate booth agent, one assistant mechanic, and one return agent possess CDLs and fill in as bus drivers to cover vacations and absences. Finally, during periods of high demand, mechanics and assistant mechanics perform service agent functions, and staff assistants help shuttle vehicles around the lot when necessary.

DTG Operations, Inc., 357 NLRB at *29.

employees in a particular classification, department, or function." *Id.* at *11 (Member Hayes, dissenting).

Other Regional Directors have simply refused to follow prior Board precedent as a result of the new *Specialty Healthcare* standard. In *Prevost Car U.S.*, 03-RC-071843, slip op. (Feb. 17, 2012), a case involving employees who manufacture transit buses, the Regional Director dismissed the significance of analogous precedent supporting a broader bargaining unit because those cases were of "questionable precedential value after *Specialty Healthcare*." *Id.* slip op. at 29. The Regional Director noted that the employer in those cases "was not required to demonstrate that an overwhelming community of interest existed between the petitioned for employees and the other groups, as an employer arguing for a broader unit must under *Specialty Healthcare*, supra." *Id.* slip op. at 31. On March 15, 2012, the Board, over the dissent of Member Hayes, denied the employer's request for review of the Regional Director's decision, finding that it raised "no substantial issues warranting review" and noting that the employer did not sustain its burden of proof under the *Specialty Healthcare* standard.

Thus, it is apparent that the Board and its Regional Directors do, in fact, view the *Specialty Healthcare* standard to be a significant change in the law – a decision that calls into question the "precedential value" of its prior case law, even outside the health care industry. As such, the Court should not take at face value

the Board's attempt to rationalize the decision as a mere effort to "clarify" existing law. It is, as Member Hayes predicted, a decision that "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." *Specialty Healthcare*, 357 NLRB at *21.

CONCLUSION

For all of the foregoing reasons, the Chamber urges the Court to grant the petition for review and deny the Board's cross-application for enforcement.

Respectfully submitted,

/s/ Alana F. Genderson
Charles I. Cohen
Jonathan C. Fritts
Alana F. Genderson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
Counsel for *Amicus Curiae*

Robin S. Conrad
Jane E. Holman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce
of the United States of America

Date Submitted: April 23, 2012

CERTIFICATE OF COMPLIANCE

The foregoing amicus curiae brief uses 14-point proportionately spaced Times New Roman font and contains 3,449 words excluding the corporate disclosure statement, table of contents, table of authorities, and signatures and certificates of counsel, and thus complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Word) used to prepare this brief.

/s/ Alana F. Genderson

Robin S. Conrad
Jane E. Holman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce
of the United States of America

Charles I. Cohen
Jonathan C. Fritts
Alana F. Genderson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
Counsel for *Amicus Curiae*

Date Submitted: April 23, 2012

CERTIFICATE OF SERVICE

I certify, pursuant to Fed. R. App. P. 25 and Sixth Circuit Rule 25, that on April 23, 2012, the foregoing *amicus curiae* brief was timely filed and served by filing a copy of the document by email to the Clerk, who will file the document through the Court's electronic docketing system.

Robin S. Conrad
Jane E. Holman
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Chamber of Commerce
of the United States of America

/s/ Alana F. Genderson
Charles I. Cohen
Jonathan C. Fritts
Alana F. Genderson
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000
Counsel for *Amicus Curiae*

Date Submitted: April 23, 2012

UNPUBLISHED DECISION ADDENDUM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BREAD OF LIFE, LLC
Employer

and

Case 7-RC-072022

LOCAL 70, BAKERY, CONFECTIONARY,
TOBACCO WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, AFL-CIO, CLC
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

BRIAN E. HAYES,	MEMBER
RICHARD F. GRIFFIN, JR.,	MEMBER
TERENCE F. FLYNN,	MEMBER

Dated, Washington, D.C., March 21, 2012.

[1] In denying review, we find that the petitioned-for employees share a community of interest that is distinct from that of the employees excluded by the Acting Regional Director under *NLRB v. Carson Cable TV,* 795 F.2d 879, 884 (9th Cir. 1986). We do not reach the question of whether the Board's test in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), applies.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXTENDICARE HOMES, INC. D/B/A
TEXAS TERRACE CARE CENTER
Employer

and

Case 18-RC-70382

SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) HEALTHCARE MINNESOTA
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

Member Hayes, dissenting:

I would grant review for the reasons expressed in my dissent in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., January 24, 2012.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRST AVIATION SERVICES, INC.
Employer

and Case 22-RC-61300

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 15
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.

MARK GASTON PEARCE, CHAIRMAN

CRAIG BECKER, MEMBER

MEMBER HAYES, dissenting:

For the reasons stated in my dissenting opinion in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), I would grant the Employer's Request for Review.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., October 19, 2011.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GRACE INDUSTRIES, LLC
Employer

and

Cases 29-RC-12031
29-RC-12043

HIGHWAY ROAD AND STREET CONSTRUCTION
LABORERS, LOCAL 1010, LABORERS INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO
Petitioner/Intervenor

and

UNITED PLANT AND PRODUCTION WORKERS
LOCAL 175, INTERNATIONAL UNION OF JOURNEYMEN
AND ALLIED TRADES
Petitioner/Intervenor

ORDER

Petitioner/Intervenor United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades' Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial factual issues.[1] The case is remanded to the Regional Director for further consideration in light of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

MARK GASTON PEARCE, CHAIRMAN

CRAIG BECKER, MEMBER

MEMBER HAYES, concurring:

Although I dissented in *Specialty Healthcare*, I agree that under either the majority or dissenting view in that case a remand is necessary for further consideration and explanation of why the asphalt workers bargaining unit sought by Petitioner/Intervenor United Plant and Production Workers, Local 175, International Union of Journeymen and Allied Trades is not appropriate.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., December 8, 2011.

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[1] The Employer's motion to strike is denied because Local 175's Request for Review substantially complies with the Board's Rules and Regulations.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NESTLE DRYER'S ICE CREAM
Employer

and Case 31-RC-66625

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 501, AFL-CIO
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE,	Chairman
CRAIG BECKER,	Member
BRIAN E. HAYES,	Member

Dated, Washington, D.C., December 28, 2011.

[1] Member Hayes agrees that a unit of maintenance employees is an appropriate unit. However, he does not rely on *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), or the Regional Director's finding that production employees do not share such an overwhelming community of interest with maintenance employees so as to compel their inclusion in the unit. Instead, Member Hayes finds that, under the traditional community-of-interest test, the interests of the petitioned-for unit are sufficiently distinct from the production employees. See *Newton-Wellesley Hospital,* 250 NLRB 409, 411-412 (1980), cited in his dissent in *Specialty Healthcare*, supra.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OLIVER C. JOSEPH, INC.
Employer

and

Case 14-RC-12830

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review. The Regional Director decided this case before the Board issued its decision in *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011), clarifying the standard used in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain classifications of employees. Nevertheless, the Regional Director's analysis is consistent with *Specialty Healthcare* and we would deny review here whether or not *Specialty Healthcare* applies.[1]

MARK GASTON PEARCE, CHAIRMAN

CRAIG BECKER, MEMBER

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., September 7, 2011.

[1] Member Hayes agrees that a unit of journeymen, service technicians and lube and oil employees is an appropriate unit. However, he does not rely on the Regional Director's finding that the detail employees do not share such an overwhelming community of interest with those employees so as to compel their inclusion in the unit. Instead, Member Hayes finds that, under the traditional community of interest test, the interests of the unit are sufficiently distinct from the detail employees. In addition, Chairman Pearce and Member Hayes do not pass on the Regional Director's finding that the unit sought by the Petitioner is a craft unit from which the detail employees must be excluded.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PERFORMANCE OF BRENTWOOD LP
Employer

and Case 26-RC-63405

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues with regard to: (1) whether the Regional Director properly treated the Employer's new-car South location and its certified pre-owned (CPO) location as a single facility such that the petitioned-for unit was entitled to a presumption of appropriateness; (2) if the Employer's new-car South location and its CPO location are properly treated as a single facility, whether the Employer rebutted the presumption of appropriateness; (3) if the Employer's new-car South location and its CPO location are not properly treated a single facility, whether the petitioned-for unit is an appropriate unit in any event; and (4) whether the service advisors, get ready technicians, and detail technician are appropriately excluded from any unit found appropriate under the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).[1] The case is remanded to the Regional Director for further consideration of these issues consistent with this Order.

MARK GASTON PEARCE, CHAIRMAN

CRAIG BECKER, MEMBER

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., November 4, 2011.

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[1] Although Member Hayes disagrees with *Specialty Healthcare's* "overwhelming community of interest" standard, he acknowledges that *Specialty Healthcare* is extant law.

Member Becker would deny review of the Regional Director's exclusion of service advisors, get ready technicians, and detail technicians from the unit on the grounds that the Regional Director fully explained that the employees in the classifications included in the petitioned-for unit all perform skilled maintenance work on automobiles in contrast to employees in the excluded classifications and for that and other reasons share a community of interest distinct from that of the excluded employees.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

PREVOST CAR U.S.
d/b/a NOVA BUS

Employer

and **Case 03-RC-071843**

TEAMSTERS LOCAL 687,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Prevost Car U.S. d/b/a Nova Bus, hereinafter referred to as the Employer, is a Delaware corporation with a place of business at 260 Banker Road, Plattsburgh, New York, where it manufactures transit buses. During the past twelve months, the Employer purchased and received at its Plattsburgh, New York location goods and services valued in excess of $50,000 directly from points outside the

State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Teamsters Local 687, International Brotherhood of Teamsters, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

This proceeding presents issues of unit composition. The Petitioner seeks a unit of full-time assemblers. There are approximately 89 employees in the unit proposed by Petitioner.[1] The Employer contends that the only appropriate unit must also include, 8 material handlers, 7 maintenance mechanics, 6 inventory control technicians, 3 electrical technicians, 3 mechanical technicians, 10 quality monitors, 3 quality technicians and 4 technical trainers.[2] The Employer asserts that the employees in these classifications share an overwhelming community of interest with the assemblers, and it is therefore inappropriate to exclude them. There are approximately 44 employees in the additional classifications that the Employer would include, and approximately 133 employees in the unit proposed by the Employer. The Petitioner would proceed to an election if a unit

[1] The parties stipulated at the hearing that external trainers, the production clerk, temporary employees, guards and professional employees and supervisors as defined in the Act, should be excluded from the unit. The parties also stipulated that the production managers, the maintenance coordinator, the New York City production coordinator and the production group leaders are supervisors within the meaning of Section 2(11) of the Act.

[2] The numbers are approximate. The job titles are those that appear on the job descriptions in evidence.

larger than the petitioned-for unit is found appropriate. Based on the evidence adduced during the hearing and the relevant case law, [3] I conclude that the petitioned-for unit is appropriate. I also conclude that, under Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011), the Employer has not demonstrated that employees in the classifications in the broader unit it proposes share an overwhelming community of interest with the petitioned-for assemblers. Thus, I will direct an election in the petitioned-for unit.

FACTS

The Employer's Operation

The Employer, under contracts with public transportation authorities and private transit companies, assembles transit buses at its Plattsburgh, New York facility. Volvo is the Employer's parent company. The Plattsburgh facility opened in March 2009, and has been in full production since June 2009.

The facility covers approximately 14,000 square feet, most of which is the production area. There is a warehouse area at one end of the facility, separated from the production area by 30 or 40 feet.[4] There is a training lab, several conference rooms, an office area, locker rooms, a cafeteria that also serves as a break area,[5] a maintenance shop, a customer bay, offices for meeting with customers and a customer lounge.

The production area is organized into five "loops."[6] Within loops 1 through 4 are four or five work stations that are identified by number.[7] At each work station, different

[3] Both parties filed post-hearing briefs, which have been considered.
[4] The warehouse is part of the same facility that houses production.
[5] The locker rooms and the cafeteria are available to all employees.
[6] The diagram of the plant layout shows that the buses move along a path, or "loop," that is more linear than circular as they are assembled.
[7] In what is called either loop 5 or "final," there are seven work stations. Final testing and inspection is conducted at loop 5.

parts and systems are installed on the shell, or structure of the bus as it moves from station to station and loop to loop. At various points in the production process, operating systems are tested before the finished bus is road tested.

The plant manager is James Tooley. Two production managers, John Minukas and Jim Postlethwait, report to Tooley. Minukas is responsible for loops 1, 2 and 3; Postlethwait is responsible for loops 4 and 5. A production coordinator is responsible for each of the five loops. The coordinators report to either Minukas or Postlethwait. There are between two and four production group leaders in each loop. They report to the coordinators and are responsible for one or two (and in one case, three) work stations. The production group leaders are the assemblers' immediate supervisors. The number of assemblers in each loop varies, as does the number of assemblers assigned to any given work station.

Also reporting directly to plant manager Tooley are the manufacturing engineering manager, the logistics manager, the quality assurance manager and the human capitol director. The maintenance mechanics, maintenance technicians and the electrical technicians are in the line of supervision that culminates in the manufacturing engineering manager. The material handlers and inventory control technicians are under the ultimate supervision of the logistics manager, and the quality monitors and quality technicians are under the ultimate supervision of the quality assurance manager. The technical trainers are supervised by the human capital director.

Five of the maintenance mechanics perform their work within an assigned loop; the other two have plantwide responsibilities. Material handlers deliver parts from the warehouse area to the loops and work stations twice each day. Quality monitors,

mechanical technicians, and electrical technicians are assigned to one or more of the loops, and they perform their day-to-day work in the loops. Inventory control technicians are assigned to a loop (in one case, two loops). They perform their work in both the loops and the warehouse area, and have their desks in the loops. Technical trainers are assigned responsibility for a varying number of work stations within one or more loops. They have desks in the office area and smaller, desk-like work stations in the loops. Technical trainers spend about half of their time in the office area and the other half in the loops. Finally, the quality technicians have plantwide responsibility and are not assigned to particular loops. They also have space in the office area, and spend approximately half of their time in the office area and the other half in the loops.

Tooley testified that production is arranged so that support personnel can address maintenance and quality issues during the production process, instead of addressing them the end. Each work station is set up with the resources and skills needed to complete its job within a four-hour time frame. Assemblers are expected to complete their work within that time frame in order that the bus can move to the next work station. To the extent that they work directly on the buses, mechanical technicians, electrical technicians, maintenance mechanics, quality monitors, and quality technicians are also subject to this expectation. Inventory control technicians, material handlers and technical trainers are not strictly held to the same time frame, if at all.

There are times when the job is not completed at a particular work station within four hours. The bus nevertheless moves to the next station, and employees are, in that event, "chasing the bus" to the next work station, to complete the unfinished work and

make up for lost time on the next bus. Tooley described the Employer's operation as "low volume" manufacturing; typically, two new buses are finished each day.

The Employer has a problem-solving process to address recurring problems or problems that cannot be easily solved. A team is assembled to address the problem. According to Tooley, 30 or 35 such teams have been assembled since production began in 2009. The composition of the team depends on the nature of the problem. The record reveals that assemblers have been part of problem solving teams, but Tooley was unable to quantify how many of these teams included assemblers.

Assemblers

Eighty-nine assemblers perform the assembly of the various component parts of a bus. As noted above, assemblers work in the production area or loops, and are directly supervised by production group leaders.

According to the assembler job description, the Employer requires experience in mechanical, electrical and pneumatic assembly processes, along with manual dexterity, good problem solving skills, and the ability to read detailed plans. The Employer requires that assemblers possess a high school diploma or the equivalent.

Assembly is done primarily by hand, but assemblers use such tools as drills, manual or electric torque wrenches, mallets, hammers and saws. The work of the assembler varies from loop to loop and from one work station to another, because a different stage of the assembly process occurs at each work station. Upon hire, assemblers receive classroom instruction from trainers, and thereafter trainers coach assemblers on how to perform their current jobs better, or how to perform a new job if they change work stations.

Assemblers' starting wage is $16.63 per hour. The wage and salary scale reflects that assemblers receive a wage increase to $17.09 per hour after a six-month probation period. All employee classifications are subject to a 120-day probationary period. The six-month probation period for assemblers that is referred to on the wage and salary scale does not mean that there is a shorter probation period for assemblers. Rather, six months represents the period of time within which the Employer expects assemblers to acquire skills and abilities that will justify the higher wage. There is no evidence in the record that any assembler has been denied the increase after six months.[8]

The same medical, dental, vision, and disability benefits, and the same 401(k) plan and flexible spending accounts are available to all employees. The same personnel policies apply to assemblers as apply to all other employees at the Plattsburgh facility.

There is a second shift at the facility consisting of a group leader and seven assemblers (six of whom are temporary employees and, as such, are excluded by the parties' stipulation). Assemblers on the day shift have the same work hours, (7:00 a.m. to 3:30 p.m.), lunch period and breaks as all other employees at the Plattsburgh facility.

There are two paid 15-minute breaks during the day shift and a half-hour unpaid lunch. A bell rings at the beginning and the end of the lunch period and at the beginning and the end of each break. Assemblers swipe their badges to record their time in and out at the beginning and the end of the day, and their time out for lunch and back in again. They are not expected to swipe out for breaks. When swiping in, assemblers also enter a numerical code on a keypad, to indicate the specific bus that they are going to work on. Tooley testified that it was his belief that material handlers and maintenance mechanics

[8] After six months, all assemblers receive the same wage.

are the only additional classifications who swipe in and out.[9] Assemblers do not have desks, personal computers or company-issued cell phones.[10] Three days each week, group leaders hold 30-minute operational development (OD) meetings at the beginning of the shift. The purpose of these meetings is to discuss production issues and ways of solving problems or improving production. OD meetings are generally attended by assemblers and their group leaders.[11]

Human capital business partner Tracy Fasking testified that assemblers have been hired through an employment agency. She explained that there was a period of time when extra manpower was needed, and a number of assemblers were hired through the agency. Since then, the Employer has filled permanent assembler positions from the temporary employees who had gained experience in the job. There is no evidence in the record that employees in any other classification have been hired in this manner. All job openings, except openings for assembler, are posted and employees may apply on line at Volvo's internet site. A selection committee, including the direct supervisor of the vacant position, makes the hiring decision.

Some assemblers have permanently transferred to other classifications. In the two and one-half years that the Employer has been assembling buses, one assembler has transferred to a mechanical technician position, two became electrical technicians and two became technical trainers. In 2010, assembler Justin Reandeau became a quality monitor, but requested and received a transfer back to assembly after approximately five

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[9] The other six classifications at issue use a self-reporting, on-line time and attendance system called CATS. They submit their time and attendance weekly to their supervisors for review. The record does not reveal what CATS stands for.

[10] As discussed below, some of the other classifications at issue are provided some or all such equipment.

[11] Assembler Ricardo Hernandez testified that a quality monitor has attended an OD meeting, and assembler Andre Duquesnay testified that the plant manager's secretary attends OD meetings in Loop 1.

months. Assemblers Curtis Puopore and Trent Trombley have transferred to quality monitor positions on a temporary basis, and have received wage adjustments for time worked as quality monitors. Assemblers and all other employee classifications at the Plattsburgh facility are evaluated twice each year, using an evaluation instrument developed by Volvo. The same instrument is used for all classifications. Assemblers are evaluated by their production group leaders.[12] Overall ratings of 1 through 5 are given, with 5 being the highest rating one can receive. Fasking testified that the consequence of a poor rating would depend upon previous evaluations and any prior disciplinary history. A performance improvement plan may result from a poor evaluation. There are no monetary incentives or awards for assemblers who receive excellent evaluations.

Material Handlers

The eight material handlers unload, stock, load and move material within the plant, with the priority of supporting the production line. A high school degree or equivalent is required for the job.

Material handlers, like assemblers and maintenance mechanics, are hourly employees.[13] They swipe in and out, as do assemblers and maintenance technicians, but unlike assemblers, they do not enter a bus code. Material handlers' wage rate is $16.25 per hour. Their compensation is not tied to productivity or performance, and all material handlers receive the same wage rate. Unlike assemblers, they do not receive a wage increase after six months. Fasking testified that this is because the material handler position requires less skill than does the assembler position.

[12] In cases of temporary transfer, like Puopore's and Trombley's, their production group leader would still be responsible for their evaluations, but may seek input from one of the quality assurance group leaders, who directly supervise quality monitors.

[13] The employees in the other six classifications at issue are salaried.

Part of the material handlers' work is delivering bus components to the various loops and work stations. Most of their work, however, is performed in the warehouse area. Deliveries to the work stations are generally twice each day, as a bus moves from one work station to the next every four hours. Loop 1 production coordinator Richard Houghton testified that material handlers are in his loop for approximately 5 percent of the day. Assemblers may help material handlers unload parts from their delivery carts, and may converse with a material handler if, for example, a part is missing. Material handlers do not perform assembly work. There is no evidence in the record that assemblers have temporarily transferred to material handler positions, or vice versa.

Material handlers report to and are evaluated by the material control coordinator. The production coordinators may be asked to provide input for the evaluation of material handlers.

Material handlers, like assemblers, are not issued company cell phones. With the exception of trainers, employees in each of the other classifications at issue do have company cellular telephones. The reason for issuing cell phones is that employees in those classifications have plantwide responsibility, or move around the plant, and the cell phones may be used to locate them quickly. Material handlers do not attend the assemblers' OD meetings.

Maintenance Mechanics

The seven maintenance mechanics (MMs)[14] repair and maintain machinery and equipment, perform welding tasks, and operate a variety of metalworking tools (for e.g.

[14] Throughout the record, "maintenance mechanic" and "maintenance technician" are used interchangeably. Herein, "maintenance mechanic" or "MM" will be used.

grinders and drill presses). They troubleshoot equipment problems and perform preventive maintenance.

A high school diploma and three to five years of mechanical, electrical, welding and machining experience, and basic computer skills are listed as requirements in the job description for MM.

MMs are hourly employees, as are assemblers and material handlers. Like the assemblers and material handlers, they swipe in and out. Unlike the assemblers, however, they do not enter a code for the bus they are going to work on when they swipe in. MMs all earn the same wage, $19.91 per hour. Unlike the assemblers, there is no wage increase after a probation period, Fasking testified, because MMs are expected to have the required skills and abilities for the job when they are hired.

MMs report to and are evaluated by the maintenance coordinator. As is the case with material handlers, MMs' compensation is not affected by their productivity or performance.

Five of the MMs are assigned to a loop; the other two work throughout the plant, maintaining cranes, inspecting tanks and fire extinguishers, clearing snow, and performing general plant maintenance.

MMs support the assembly process, but they do not perform assembly work. Tooley testified that in the loop process, MMs work on the structure of the bus, making necessary modifications if things do not fit together as they should. Where a stud is missing or in the wrong place, or if a bracket is mis-located, or bent, the MM may be called upon to fix it. MMs may also grind a part down to fit properly.

Tooley testified that these activities occur multiple times each day, and that they lead to interactions between assemblers and MMs. However, there is no dispute that where an assembler needs the assistance of a MM -- or an electrical technician or a mechanical technician -- the usual procedure is to go to the group leader, who calls for the mechanic or the technician. There are times when assemblers "skip the chain." For example, assembler Ricardo Hernandez testified that if he needed a part cut to fit properly and the MM was nearby, he would go directly to the mechanic. Andre Duquesnay, an assembler in loop 1, testified that there have been such problems with the studs on the incoming structures that a MM comes to his work station every day to correct them. If it were an intermittent problem, Duquesnay testified, he would go to his group leader.[15]

The Employer has a detailed procedure for what is called "hot work," which typically involves welding. Steps are taken to ensure that there are no combustibles in the area where the hot work is to take place, and that no components will be damaged. A MM does the welding and completes the checklist on a "hot work permit." Afterward, someone, most commonly an assembler, stands fire watch for an hour and then signs off on the hot work permit.

MMs are responsible for tool calibration. There is a database that indicates when recalibration of tools is due. Assembler Randall Cumm testified that the only other instance in which a tool might need to be recalibrated would be if it were dropped or somehow damaged. In that instance, he would take the tool to his group leader.[16]

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[15] Duquesnay also testified that he would "skip the chain" and go directly to a MM or a technician if his group leader and production coordinator were unavailable.

[16] Tooley testified that assemblers do not calibrate tools.

MMs do not attend OD meetings. Employer cell phones are issued to MMs.[17] Tooley testified that when they are not engaged directly in maintenance tasks, MMs work on "development tasks," in an effort to improve the production process. There is no evidence that assemblers have filled in as MMs, or that MMs have filled in as assemblers.

Mechanical Technicians

Mechanical technicians (MTs) use software to develop tools and templates used in production, write and update "production documentation" and generally support the assembly process by troubleshooting when issues arise. MTs ordinarily spend more than half of their time, and as much as 80 percent, writing work documentation.[18] The three MTs report to the manufacturing engineering manager. Two of them support two loops each, and the third supports one loop.

According to the MT job description, a college degree in mechanical or electrical technology or in engineering and one to two years experience in manufacturing are required. In lieu of a college degree, the Employer considers "substantial relevant experience" and a willingness to obtain a degree within two years. The record reveals that for MT, and for other positions that nominally require a college degree, the Employer has not held strictly to the degree requirement.

MTs are salaried positions. For each salaried position at the Plattsburgh facility, there is a designated salary class (ranging from class 8 to class 20) and a minimum, medium and maximum salary within each class.[19] At hire, an employee's salary may be

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[17] As noted above, some of them do not have loop assignments and move about the plant more than MMs who do have loop assignments.

[18] As discussed below, the MT spends more of his time working directly on the buses when there are persistent or recurring assembly problems.

[19] On the chart, median salaries are also converted to an hourly wage, based on 40 hours. The salaried classifications at issue herein, like the hourly classifications, are non-exempt employees for the purposes of the Fair Labor Standards Act.

set at or above the minimum, but somewhere below the median, depending upon experience. A collaborative management decision is made in that regard. Unlike the hourly classifications, performance has an effect on the compensation of salaried employees from year to year. Fasking testified that, following a salaried employee's evaluation, a matrix is created. The evaluative rating (1 through 5), the employee's "saturation into the salary class,"[20] and the overall budget for the facility are all factored into the decision whether a salary increase will be given.

Salaries for MTs range from $40, 616.40 (the minimum in class 11) to $65,361.60 (the maximum in class 12). The median salaries for class 11 and 12 MTs convert to hourly rates of $24.41 and $26.19, respectively.

MTs write step-by-step instructions or modifications called DSTs for assemblers to follow.[21] Their work on the structure of the bus occurs most often when there are recurring problems, such as the dashboard components and the "five-seater" (the seat that goes across the rear of the bus). MTs, sometimes with the assistance of another support employee, have worked with the assemblers to make these components fit properly, sometimes using tools that assemblers use, such as wrenches. Dashboards often must be trimmed to fit correctly. In loop 5, where water testing is done, an MT may be called upon when a leak is discovered, to fix the leak.[22]

In the two and one-half years that the Employer has been assembling buses, one assembler has transferred to the MT position. The record does not reflect that employees in either classification regularly fill in for employees in the other.

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[20] The median salary is used as a reference point, and is deemed to be "100 percent." The percentage of the median salary the employee currently receives (90 percent, for example) represents the degree of saturation. (Since the median salary is 100 percent, it is possible to be more than 100 percent saturated).

[21] A DST is "the bridge between the original design and the engineer change that is taking place."

[22] In the absence of any problem, assemblers conduct the water tests without any assistance from a MT.

MTs each have a desk and a computer, located on the assembly floor. They are issued company cell phones. MTs do not attend the assemblers' OD meetings.

Electrical Technicians

The job of the electrical technician (ET) is similar to that of the MT, except that the ET's area of expertise is the electrical systems of the bus. ETs write assembly instructions and DSTs, troubleshoot electrical problems and "prove out" electrical systems (test and ensure that they are routed and working correctly). Two of the three ETs support two loops and the third supports one.

A college diploma in electrical technology or engineering and one to two years manufacturing experience are listed in the ET job description as requirements.[23] ETs report to the manufacturing engineering manager. ETs, like MTs, are hired into salary class 11 or 12.

Perhaps more so than in the other loops, the ET in loop 3 works directly with assemblers, because loop 3 is where the bus is "run up," i.e., the electrical systems are turned on for the first time. However, the ET troubleshoots the problem and the assemblers fix it. The ET does not do assembly work, and the assemblers do not perform electrical work.

The record reveals that two assemblers have progressed to the ET position in the two and one-half years that the Employer has been assembling buses. There is no evidence of any temporary transfers between these classifications.

[23] As noted above, however, the Employer will consider "substantial relevant experience" in lieu of a degree. Only one of the three ETs has a degree.

ETs have desks and computers, and are issued company cell phones. Assembler Ricardo Hernandez testified that the loop 2 ET attends OD meetings less than half the time. The evidence does not show that ETs regularly attend such meetings.

Inventory Control Technician

Inventory control technicians (ITs) count warehouse inventory, analyze and resolve discrepancies, take corrective action to avoid repeat discrepancies and perform audits on parts that are not delivered to the work stations daily by material handlers. ITs report to the Employer's logistics manager.

A college degree in administration, logistics management, supply management, or a related field, and three years of relevant experience is required for the IT position. On the salary scale, ITs are in class 10. Their minimum salary is $32,668.56, the median is $40,835.70 ($19.63 when converted to an hourly rate) and the maximum salary is $49,002.84.

There are six ITs. One is assigned to each of the first three loops and another is assigned to loops 4 and 5. The remaining two ITs do not have loop assignments. ITs have desks and computers on the shop floor, and have company cell phones. They work in close proximity to the assemblers, and there is contact between assemblers and ITs if, for example, a part is defective, or if parts could be staged in a different place to make the assemblers' job easier. There is no evidence that assemblers have filled in for ITs, and the record reveals only two occasions when IT Chris LeClair stepped in to help install engines when there was a shortage of assemblers.

There is no evidence that ITs regularly attend the OD meetings with assemblers. Assembler Ricardo Hernandez testified that an IT who has since left the Employer attended OD meetings at his work station "sporadically."

Quality Monitor

The ten quality monitors (QMs) monitor supplies to ensure that quality requirements are met, monitor employee activity to ensure that the requirements of the quality manual are met, perform inspections and tests, inform employees of performance criteria that affect quality, produce data and reports on quality, and address the needs of the production supervisors in regard to the quality of products and supplies. QMs are expected to have good knowledge of bus mechanics and electrical systems, the ability to read plans and understand specifications, and the ability to use tools or to learn how to use them.

A high school diploma is required for the position. A diploma or certificate in auto mechanics is preferred, and a candidate for the job must have or be willing to obtain a commercial driver's license.[24] Relevant experience in assembly methods and inspection is required.

Some QMs have previously worked in the assembler classification, and then progressed to the QM classification permanently. As noted above, assemblers Curtis Pourpore and Trent Trombley have temporarily transferred to the position, and one employee, Justin Reandeau, transferred back to assembly from QM at his own request.

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[24] Part of the QM job is to test drive finished buses.

QMs are in salary class 9 (minimum salary of $28,915.78, median salary $36,144.72.[25] QMs are directly supervised by one of the quality assurance group leaders. They in turn report to the quality assurance manager.

One QM is assigned to each of the first four loops and three to the final loop. The remaining three QMs do not have loop assignments. In the course of performing inspections and tests, QMs may have direct contact with assemblers, by way of pointing out to the assemblers problems or defects that they (the QMs) have noted. Assemblers have accompanied QMs on test drives, though not necessarily on every test drive.

QMs have desks on the shop floor, with computers. They are assigned company cell phones. The record reveals that QMs have attended some OD meetings with assemblers, but this appears to be infrequent and ad hoc.

Quality Technicians

Quality technicians (QTs) write inspection and test plans (ITPs),[26] contribute to assembly problem-solving and the creation of quality criteria documentation, deal with rejects and nonconformities, follow up with suppliers and participate in projects aimed at improving the manufacturing process.

QTs are required to possess a certificate in quality assurance or a college degree in mechanical or industrial technology, quality control or a related area. Five years of experience in quality assurance in a manufacturing environment, including one year of

[25] Expressed as an hourly wage, the QM's salary converts to $17.38 per hour.
[26] The ITPs are signed off by an assembler when a particular function or part of a job has been completed, and a quality monitor then signs off to indicate that the work is of acceptable quality.

experience in writing assembly line procedures is also required. In addition, QTs must have knowledge of the ISO 9000 standard[27] and knowledge of metrology.[28]

QTs may be hired into salary class 10 (same minimum, median and maximum salaries as inventory technicians) or salary class 11, where the minimum salary is $40,616.40 and the median salary $50,770.50.[29] QTs, like QMs, are in the line of supervision that culminates with the quality assurance manager.

QTs have desk space in the office area where they have computers. QTs spend about half of their time in the office area, following up with suppliers or performing other tasks. They are issued company cell phones. There are three QTs, none of whom are assigned to a specific loop.

QTs do not perform assembly work. In certain cases, QTs have worked side-by-side with assemblers and mechanical technicians (MTs). Primarily, this has been on five-seaters and dashboards, which have been persistent problems. Specifically, a QT has worked with an assembler and a MT in loop 1, where the five-seater is installed, and the components have not fit properly. In that instance, the QT, the MT and the assembler may spend anywhere from one to two and one half hours, making it fit. This could occur twice daily, as a bus moves from one work station to another every four hours.

Dashboard components that do not fit properly have also been a persistent problem. The record does not disclose the length of time this problem has persisted, or how often it occurs. However, the record reveals that if the components fit properly, an assembler would install them without the assistance of a QT or an MT.

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[27] ISO standards are standards published by the International Organization for Standardization. The 9000 series of standards is designed to assist manufacturers in meeting the quality expectations of their customers.
[28] The science of measurement.
[29] Expressed as an hourly wage, the median salary for a class 11 QT converts to $24.41 per hour.

QTs may become involved with an assembler and a MT in the water testing process that takes place in loop 5, (final), but only where problems, such as a leak, arise.[30]

There is no evidence of temporary transfers between the assembler and QT classifications. QTs do not attend OD meetings with the assemblers.

Technical Trainers

Only the four "internal" trainers are at issue as the parties stipulated that external trainers are excluded from the unit. Technical trainers provide basic classroom training for new hires. They also coach employees to ensure that work is done correctly, when there are engineering changes or when an employee changes work stations or moves from one loop to another. Technical trainers develop training courses and materials, and provide maintenance training and technical support to customers.

A college degree or vocational school diploma in electrical technology, electrodynamics, or the equivalent is required, though substantial relevant experience is considered in lieu of those credentials. Technical trainers are required to have a thorough knowledge of electrical and mechanical systems, assembly logic skills, and the ability to read plans and understand specifications. Unlike any of the other classifications at issue, the technical trainer must be able to travel, including travel outside the United States, for up to 30 percent of the time.

[30] Although all buses are water tested, and two buses are completed each day, the record does not reveal how frequently leaks occur, the number of assemblers involved in the water testing process, the amount of time water tests take in the ordinary case, or how much time assemblers would spend working with a QT and MT to repair leaks that may be discovered in the process.

Technical trainers, like quality technicians, may be in salary classes 10 or 11. They report to the human capital director. Like quality technicians, technical trainers have their desks and computers in the office area.

In some cases, assemblers have progressed to the technical trainer position. There is no evidence that assemblers have served temporarily as technical trainers. However, technical trainer Paul Zelinsky recently filled in for an assembler for three or four days, installing door headers because the assembler who normally performed that function was absent and no other assemblers with the needed skill were available. Technical trainer Jon Strack recently filled in for an absent assembler on one day. Both Zelinsky and Strack are former assemblers.

ANALYSIS

Section 9(b) of the Act provides that the Board "shall decide in each case whether…the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The Board has broad discretion in deciding whether a petitioned-for unit is "appropriate" under Section 9(b). It is well established that a certifiable unit need only be *an* appropriate unit, not the most appropriate unit. Morand Bros. Beverage, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); Overnite Transportation Co., 322 NLRB 723 (1996); Bartlett Collins Co., 334 NLRB 484 (2001). The Board does not compel a petitioner to seek the most appropriate or most comprehensive unit. Overnite Transportation, *supra*, citing Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964).

The Board's recent decision in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011), set forth the principles that apply where,

as here, an employer contends that the smallest appropriate bargaining unit must include employees or employee classifications beyond those in the petitioned-for unit. Under Specialty Healthcare, the Board first decides whether the petitioned-for unit is an appropriate bargaining unit, applying traditional community of interest principles.

In determining whether employees in a proposed unit share a community of interest, the Board examines:

> 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; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, *supra*, slip op. at 9 (quoting United Operations, Inc., 338 NLRB 123, 123 (2002)).

If the petitioned-for unit is appropriate under a community of interest analysis, the burden is then on the employer to demonstrate that the additional employees it seeks to include share an overwhelming community of interest with the petitioned-for employees, such that there is "no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." Id., slip op. at 11 – 13, and fn. 28 (quoting Blue Man Vegas, LLC v. NLRB, 529 F. 3d 417, 421, 422 (D.C. Cir. (2008)).

The Board has, since Specialty Healthcare, applied its analysis in that case to industries other than health care. See Odwalla, Inc., 357 NLRB No. 132 (December 9, 2011) (Board found that the petitioned-for units excluding merchandisers, was a

"fractured unit"; merchandisers shared an overwhelming community of interest with the included employees); DTG Operations, Inc., 357 NLRB No. 175 (December 30, 2011). (petitioned-for unit appropriate; employer failed to show that other employees it sought to include shared an overwhelming community of interest with the petitioned-for employees).

Assemblers, who by far comprise the largest employee classification at the Plattsburgh facility, have uniform wages and hours.[31] They are supervised separately from the other classifications at issue herein, and they are all directly supervised by group leaders who in turn report to loop production coordinators and ultimately to one of two production managers. The job requirements are the same for all assemblers. Specific tasks vary from loop to loop and from work station to work station, (as might be expected in any assembly-line operation), but assemblers all perform the same kind of work: assembly.

Unlike the other classifications, assemblers receive classroom training when they begin their employment, have a six-month probation period which they must pass to receive a raise from $16.63 to $17.09 per hour, and are (or have been) hired through an employment agency. The OD meetings are attended primarily by assemblers and their group leaders.

The assemblers are "readily identifiable as a group" and share a community of interest with one another, using the traditional criteria. Id., slip op. at 4. Apart from its contention that the unit must include other classifications, the Employer does not argue otherwise. I find that the petitioned-for unit is an appropriate unit.

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[31] Except for the one assembler on the second shift.

Given that the petitioned-for unit is an appropriate bargaining unit, the burden shifts to the Employer to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the assemblers. I find that the Employer has failed to sustain its burden.

Initially, I note that the Employer seeks what is in essence a "wall to wall" unit. As in DTG Operations, supra, the Employer argues that the smallest appropriate unit must include the assemblers and all eight of the additional classifications, because they all share an overwhelming community of interest with the assemblers. As discussed below, the record evidence does not establish an overwhelming community of interest among employees in all those classifications and the assemblers. The Employer does not seek an alternative unit consisting of, for example, assemblers and the two other hourly paid classifications, material handler and maintenance mechanic.

The record reveals that the Employer's Plattsburgh facility is organized along departmental lines. The petitioned-for unit tracks lines drawn by the Employer. Cf. Odwalla, *supra*, slip op. at 5.[32] Responsibility for production is divided between production managers Minukas (loops 1 – 3) and Postlethwait (loops 4 and 5). Based on the testimony at the hearing and the organizational chart that is in evidence, production coordinators, group leaders and assemblers are in a departmental line and, ultimately, under the supervision of either Minukas or Postlethwait. None of the other classifications the Employer seeks to include are in either of these lines. Departmentally, technical trainers are under human capital, inventory technicians and material handlers are under logistics, quality monitors and quality technicians are under quality assurance, and the

[32] The Board found that the unit petitioned for in Odwalla was a "fractured unit," in part because it did not track any lines drawn by the employer, such as department, function or classification.

remaining classifications (maintenance mechanics, mechanical technicians and electrical technicians) are under manufacturing engineering. Thus, none of the eight classifications the Employer would include are within the same department as the assemblers, and those eight classifications fall within four separate departments. Thus, the assemblers are organized into a department separate from the other employees that the Employer would include in any appropriate unit.

As noted above, the assemblers are also separately supervised. Their immediate supervisors are the group leaders, who the parties have stipulated are statutory supervisors. The group leaders do not supervise any of the other classifications at issue. Plant manager Tooley testified that he has instructed production coordinators and group leaders to provide input to "functional leader(s)" -- the supervisors of employees who support production, such as material handlers -- for their evaluations.[33] Tooley also testified that the production coordinators have authority to set priorities for the support personnel, because the bus needs to move within the four-hour time.[34] But this evidence does not establish common supervision with the assemblers.

In this regard, the Employer's reliance upon Buckhorn, Inc., 343 NLRB 201 (2004), is misplaced. In that case, a separate unit of maintenance employees was found inappropriate, in part because the employees in the petitioned-for unit were not commonly supervised. Five skilled maintenance employees reported to the maintenance supervisor, while 14 general maintenance employees reported to the production

[33] Beyond this general testimony, there is no evidence in the record as to the weight such input is given in the evaluations of support personnel by their own immediate supervisors. An exemplar of the "personal business plan" (evaluation form) is in evidence, but no completed evaluations were introduced.

[34] No employees in any of the eight classifications the Employer would include testified at the hearing.

supervisor. The assemblers herein are commonly supervised by their group leaders, production coordinators and ultimately one of the production managers.

As is the case with almost any manufacturing facility, particularly assembly-line operations, the Employer's operation is functionally integrated. Everyone works to the same end: producing a finished bus that meets customer specifications and standards of quality. Nevertheless, the assemblers and the other classifications have separate roles and distinct functions within the process. Assemblers are the only classification in which employees perform assembly tasks every day. To the extent that other classifications work together with assemblers to resolve persistent problems such as missing or misplaced studs, or nonconforming five-seaters or dashboards, there is arguably some overlap of functions. But the record evidence presents a situation quite different from that in United Rentals, 341 NLRB 540 (2004), cited by the Employer in its brief. In United Rentals, the employer, notwithstanding a nominal division of responsibilities, "relie(d) on everyone to 'pitch in' to do various types of jobs, despite their designated classification. Employees therefore perform(ed) the duties of different classifications every day." In addition, the fact that there is a level of functional integration is not dispositive and does not outweigh the other factors demonstrating that assemblers do not share an overwhelming community of interest with the other employees. See DTG Operations, Inc., 357 NLRB 175, slip op. at 6, 7 (December 30, 2011), (Board found the petitioned-for unit of rental service agents appropriate; although the employer's operation was functionally integrated, the Board noted that the rental service agents performed "distinct functions," and each classification had a separate role in the process).

Other factors distinguish the assemblers and the other classifications of employees the Employer seeks to include. The skills and training required for each of the classifications at issue varies considerably from classification to classification. With one exception -- material handler, the other entry-level position -- more is required in terms of education, skills and training than is required of the assembler at hire. After hire, more is required of assemblers than is required of material handlers. Assemblers are expected to acquire the skills and proficiencies to justify a wage increase after six months. There is no such probation period" or raise for material handlers, because the job is "less technical" than that of assembler.[35]

The degree of contact that assemblers have with the other classifications at issue varies considerably. Technical trainers, quality technicians and inventory control technicians are likely to have less contact with assemblers than are material handlers, mechanical technicians, electrical technicians or quality monitors.

The Employer argues in its brief that there is significant interchange among the assemblers and the other classifications at issue herein. But the record reveals few instances of temporary interchange: i.e., the temporary assignment of assemblers Poupore and Trombley to the quality monitor position, and the transfer of assembler Justin Reandeau to quality monitor and back to assembler. Given the size of the Employer's workforce and the number of assemblers in the proposed unit (89), the evidence does not establish temporary interchange that is regular or is so frequent as to compel a finding that only a larger unit is appropriate. See Hilander Foods, 348 NLRB 1200, 1203 (2006) (three instances of temporary transfer from among 150 employees over a three year

[35] There is also no probation period or wage increase for the other hourly position, maintenance mechanic. As the Employer's human capital business partner testified, the maintenance mechanics are expected to possess the requisite job skills when they are hired.

period was not significant interchange); Red Lobster, 300 NLRB 908, 911 (1990) (19 of 85 employees affected by temporary assignments during one year not considered significant).

The record reveals that several employees in various classifications started out as assemblers and progressed to their current positions. As the Employer points out in its brief, the Board has considered permanent transfers as a factor in the community of interest analysis. Buckhorn, Inc., *supra* at 203. However, permanent transfers are less significant as an indicator of community of interest than temporary interchange. Milwaukee City Center, LLC, 354 NLRB No. 77, slip op. at 3 (September 21, 2009), *citing* Bashas', Inc., 337 NLRB 710, 711, fn. 7 (2002); Red Lobster, *supra* at 908, 911. In any event, the permanent transfer of approximately five assemblers over a two and one-half year period is insignificant, given the large number of employees in the assembler classification.

Finally, although all employees share many of the same employment terms and conditions, (e.g., hours, benefits), the assemblers' working conditions differ from those of the other classifications in important respects. Technical trainers, inventory control technicians and material handlers do not perform their work within the constraints of the four-hour time frames. Assemblers are not issued company cell phones,[36] as are most of the salaried classifications, because assemblers do not have plantwide responsibilities. Moreover, assemblers do not have desks or computers, as do several of the other classifications. Like material handlers and maintenance mechanics, assemblers swipe a magnetic badge to record their time in and out, while the six salaried classifications record their time online and submit it to their supervisors at the end of the week.

[36] Nor are material handlers or trainers.

Most telling of all, assemblers' hourly wage is greater than that of only one other classification, the material handlers, by 84 cents per hour (after six months). The assemblers make less, in most cases significantly less, than employees in other classifications.

In Specialty Healthcare, slip op. at 13, the Board stressed its disapproval of "fractured units," i.e., "combinations of employees…that have no rational basis." The petitioned-for unit herein would be a "fractured unit" if there were no rational basis for excluding the classifications the Employer would include. But there is a rational basis here for finding the petitioned-for unit appropriate. The community-of-interest factors clearly do not "overlap almost completely." Id., slip op. at 11-13 and fn. 28. Petitioner has not proposed a "fractured" unit, or sought an "arbitrary segment of what would be an appropriate unit. To the contrary, a unit consisting only of assemblers, by far the largest group of employees, is rational. Assemblers perform their work under separate supervision. Only the assemblers regularly attend OD meetings with the production group leaders. Only the assemblers are hired through an employment agency, undergo classroom training upon hire, and only the assemblers must satisfactorily complete a unique six-month probation period in order to receive the full wage for the classification.

The Employer, in its brief, cites two cases in support of its argument for a broader unit: Avon Products, 250 NLRB 1479 (1980) and Lily-Tulip Division of Owens-Illinois, 181 NLRB 713 (1970). These cases are either distinguishable on their facts or are of questionable precedential value after Specialty Healthcare. There are similarities in the assembly-line nature of the Employer's operation and the employer's operation in Avon, where the Board found appropriate a unit broader than that petitioned for. But Avon does

not compel the same result in this case. In Avon, the Board found that a Regional Director had inappropriately excluded several classifications analogous to some of those that the Employer urges be included here. But with respect to the material handling department, the inventory control analysts, and the production department, the Board found that each of those groups shared common wages and working conditions with included employees, with whom they came into contact on a daily basis.[37] The assemblers herein have different wages than all of the other classifications, and do not have daily contact with all of the employees in those classifications.[38] The Board in Avon also noted that, unlike this case, the record there revealed a high degree of employee interchange:

> "Thus, many employees often move from one job classification to another pursuant to temporary transfers. Also, on a daily or hourly basis, employees may move from one classification to another under what is termed the "add rate" program."

250 NLRB at 482.

In Lily-Tulip Division of Owens-Illinois, *supra*, the Board dismissed a petition for a unit of machine attendants. While the Employer is correct that the Board relied upon the functionally integrated nature of the employer's operation, the machine attendants in Lily-Tulip also shared a greater community of interest with the production employees than do the assemblers herein with the classifications the Employer proposes to include. The petitioner in Lily-Tulip already represented the maintenance employees. Moreover, the petitioned-for machine attendants spent as much as 85 percent of their time

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[37] In Avon, the Board agreed with the Regional Director that several maintenance classifications should be included. Unlike the Petitioner herein, however, the union in Avon petitioned for those employees.

[38] Even where they do, such contact might be brief. For example, assemblers come into contact with material handlers twice each day, but the record reveals that material handlers spend only about five percent of their time in the loops.

making adjustments on machines and were part of a machine crew consisting of multiple job classifications. Machine attendants were hired and jointly supervised by a production foreman and the superintendent of the maintenance department. Vacancies for positions were filled based on seniority among all production employees and all production employees were required to have the same skills. Thus, unlike the instant case, the community-of-interest factors in Lily-Tulip did overlap to such an extent that a stand-alone unit of machine attendants was found inappropriate.

Notably, in both Avon and Lily-Tulip, the employer was not required to demonstrate that an overwhelming community of interest existed between the petitioned-for employees and the other groups, as an employer arguing for a broader unit must under Specialty Healthcare, supra.

The Employer has not carried its burden of demonstrating that the classifications of material handler, maintenance mechanic, quality monitor, quality technician, mechanical technician, electrical technician, inventory control technician and technical trainer share an "overwhelming community of interest" with the assemblers. As noted above, the Employer has not sought an alternative unit narrower than a "wall to wall" unit, such as a unit of assemblers, material handlers and maintenance mechanics. The petitioned-for unit is an appropriate unit. I shall therefore direct an election in the unit petitioned for.

CONCLUSION

I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time assemblers employed by the Employer at its

> 260 Banker Road, Plattsburgh, New York facility, excluding: material handlers, maintenance mechanics, inventory control technicians, electrical technicians, mechanical technicians, quality monitors, quality technicians, technical trainers, temporary employees, external trainers, production clerks, production managers, maintenance coordinators, the New York City production coordinator, group leaders, guards, and professional employees and supervisors as defined in the Act.

These are 89 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by:

TEAMSTERS LOCAL 687, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit

employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before

February 24, 2012. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website **www.nlrb.gov**,[39] by mail, by hand or courier delivery, or by facsimile transmission at (716) 551-4972. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received

[39] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the eligibility list, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT on **March 2, 2012**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,[40] but may not be filed by facsimile.

DATED at Buffalo, New York this 17th day of February, 2012.

/s/Rhonda P. Ley
RHONDA P. LEY, Regional Director
National Labor Relations Board, Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

[40] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PREVOST CAR U.S.
d/b/a NOVA BUS
Employer

and

Case 03-RC-071843

TEAMSTERS LOCAL 687,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
Petitioner

CORRECTED ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, CHAIRMAN

RICHARD F. GRIFFIN, JR., MEMBER

Member Hayes, dissenting:

I would grant review for the reasons expressed in my dissent in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., March 15, 2012.

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[1] In denying review, we find that the Employer has not sustained its burden of establishing that any of the disputed classifications, either individually or collectively, share an overwhelming community of interest with the petitioned-for employees such that their inclusion in the unit is required.

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