UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD

FIRST AVIATION-TETERBORO, INC.,	**Case No. 22-RC-61300**
Employer,	**Document Filed Electronically**
and	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 15	
Petitioner.	

FIRST AVIATION SERVICES, INC'S REQUEST FOR REVIEW

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PRELIMINARY STATEMENT

First Aviation Services, Inc. ("FAS" or "Employer") submits this Request For Review pursuant to Section 102.67(c) of the National Labor Relations Board Rules and Regulations. Compelling reasons exist for reconsideration of the September 13, 2011 Decision and Direction of Election ("Decision"), which determined, based upon purported application of the legal standard set forth in *Specialty Healthcare*, 357 NLRB No. 83, *slip op.*, 2011 WL 3916077 (2011), the petitioned-for unit limited to line service technicians and line service technician leads constitutes an appropriate unit.

FAS is a fixed base operator, and provides aviation services for general and corporate aviation at the Teterboro, New Jersey airport. FAS employs approximately 110 employees in the eight classifications at issue, who work together to provide aviation services to FAS' customers.

On July 18, 2011, International Association of Machinists & Aerospace Workers, AFL/CIO, District Lodge 15 ("Union"), filed a petition for representation pursuant to Section 9(c) of the National Labor Relations Act ("Act"), 29 U.S.C. § 159(c). In its Petition, the Union sought a bargaining unit limited to full-time and regular part-time line service technicians and line service technician leads ("line service employees") at FAS. A hearing in this matter commenced on July 29, 2011 and concluded on August 5, 2011. The parties subsequently submitted post hearing briefs.

At the hearing, FAS offered extensive testimonial, documentary and video evidence in support of its position that the smallest appropriate unit consists of all employees at FAS' Teterboro, New Jersey location in the following eight classifications: line service, customer service, security and transportation, aircraft cleaning, aircraft

maintenance, inventory, building services and vehicle maintenance, but excluding all office clerical employees, professional employees, supervisors and guards, as defined in the Act.

The Request for Review must be granted pursuant to Section 102.67(c)(1) and (2) of Board Rules because the Decision misinterprets and misapplies the legal standard set forth in *Specialty Healthcare* and other Board decisions for determining an appropriate bargaining unit under Section 9(a) of the Act.

In *Specialty Healthcare,* the Board held that the traditional community of interest test must be applied to determine whether a petitioned-for unit constitutes an appropriate unit. 2011 WL 3916077, at *14. Further, if consideration of traditional community of interest factors demonstrates that employees in the petitioned-for unit share a community of interest, the employer will have to make a heightened showing to demonstrate that the petitioned-for unit is nevertheless inappropriate because it excludes additional employees. *Id.* at *16. In essence, the employer will have to show that included and excluded employees share an overwhelming community of interest. *Id*.

In this matter, the Regional Director failed to follow the legal standard set forth in *Specialty Healthcare.* Specifically, the Regional Director failed to properly consider the traditional community of interest factors in determining that line service employees constitute an appropriate unit, and never determined that line service employees have a sufficiently distinct community of interest separate and apart from the other seven classifications at issue. Rather, the Regional Director based his Decision solely on consideration of several interests that line service employees share among themselves. Contrary to *Specialty Healthcare,* the Regional Director did not consider how the

interests of line service employees relate to and are distinguishable from the interests of employees in the seven excluded classifications.

Also, the Regional Director erroneously applied the "overwhelming community of interest" test, evaluated several community of interest factors under this heightened scrutiny, and concluded that additional employees should not be included in the unit because their interests do not "overlap almost completely" with the interests of line service employees. However, under *Specialty Healthcare*, the Regional Director should have never applied the heightened scrutiny of the overwhelming community of interest test without first properly considering all community of interest factors under the traditional standard.

Indeed, there was no need for the Regional Director to apply the overwhelming community of interest test in this matter. If the Regional Director had properly applied the traditional community of interest test, he would have necessarily determined that line service employees do not have a sufficiently distinct community of interest, and that employees in the seven additional classifications at issue must be included in the smallest appropriate unit because they share a substantial community of interest with line service employees.

The Regional Director's analysis under the overwhelming community of interest standard is also erroneous. The Regional Director did not explain why the Decision departs from the Board's long-held and well-established policy favoring plant-wide units, particularly where, as here, the employer's business is highly integrated. The Regional Director also failed to address two key community of interest factors, which are set forth in *Specialty Healthcare*--functional integration and common terms and conditions of

employment. The Regional Director failed to consider additional significant facts, misstated significant facts and failed to articulate why he accorded controlling weight to some employee interests, while failing to consider other critical interests.

When all community of interest factors are properly considered, it is clear that that all employees in the eight classifications share a sufficient community of interest under either the traditional or the overwhelming community of interest tests to be included in the smallest appropriate unit. All employees in the eight classifications are highly integrated, have substantial work-related and casual contact, significant permanent interchange, a substantially similar degree of skills and training, substantial job overlap, substantially the same terms and conditions of employment, and the same supervision.

The Regional Director's Decision clearly violates Section 9(c)(5) of the Act because it effectively accords controlling weight to the extent of union organization by failing to apply a robust community of interest analysis in determining that line service employees constitute an appropriate unit. Rather, the Decision is unduly deferential to the extent of organization, requiring only some evidence of common interests among line service employees. The Decision falls far short of what the Board and courts have deemed as sufficiently independent of the extent of union organization to pass muster under Section 9(c)(5).

In addition, it is respectfully submitted that pursuant to Section 102.67(c)(4) of Board Rules, the Board should reconsider use of the "overwhelming community of interest" test set forth in *Specialty Healthcare* because the test is unnecessary and lacks a reasonable basis in law as it is contrary to well-established Board precedent.

STATEMENT OF FACTS

FAS provides aviation services for general and corporate aviation at the Teterboro, New Jersey airport. (Tr. 26:2-3; 28:13-14). The services that FAS provides include: aircraft marshalling, fueling, lavatory pumping, maintenance, cleaning, snow removal and terminal service, as well as assistance to the aircraft crews with embarkation and disembarkation, transportation of the crew to hotels, and delivery to aircraft of catering, coffee, ice, newspapers and any other ordered items. (Tr. 26:16-27:3; 27:7-20; 41:25-42:4; 55:11-13; 652:16-19).

Many of the facilities at FAS are connected, and the remaining facilities are within close walking distance. (Employer Exhibit 1 (photograph of FAS' facilities)). FAS' main facility consists of three hangars (i.e., aircraft storage buildings) and a terminal, which are all interconnected. The terminal not only serves as an embarkation/disembarkation area for aircraft passengers, but also contains offices for FAS employees. (Tr. 31:3-32:21, 33:23-34:1). FAS' facilities also include a nearby fuel farm building, where aviation fuel is stored, and a vehicle maintenance facility. (Tr. 33:1-5; 33:13-14). The 22-acre ramp (i.e., aircraft parking area) adjoins the hangars and terminal structure, fuel farm and maintenance facility. (Tr. 33:15-17; 93:2).

FAS employs approximately 110 employees, who work in one of the following eight job classifications: line service, customer service, security and transportation, aircraft cleaning, aircraft maintenance, inventory, building services, and vehicle maintenance (hereinafter "all employees at issue" or "employees in the eight classifications"). (Tr. 28:4-8; 28:17-30:2).

While employees in the eight classifications have job duties for which they are responsible, the small, highly integrated nature of FAS' business requires that all employees at issue share numerous duties in providing services to the aircraft utilizing the FAS facilities. FAS' centralized management structure consists of CEO and president, William Thomas, and managers for each of the eight classifications at issue here, (Tr. 24:24-25:4; 35:3-13; 40:8-16; 46:22-47:3; 51:20-52:11; 56:9-13; 61:19-21; 63:17-22; 65:3-6). Further, since the employees work in three shifts during the week and weekends, employees in all of the classifications report to one night-shift manager or one weekend-shift manager. (Tr. 189:16-190:8; 216:23-217:1). Mr. Thomas conducts joint meetings with all managers on a weekly basis. (Tr. 190:25-191:12).

A. <u>Job Duties</u>

1. <u>Line Service</u>

FAS has approximately 34 line service employees, including four lead line service technicians.[1] (Tr. 51:14-19; 684:23-25). Line service employees are typically responsible for marshalling aircraft (i.e., giving pilots directions on how to come in and depart). However, when they are busy with other tasks or cannot see the aircraft because it is far down the ramp, security and transportation employees will marshal the aircraft. (Tr. 673:20-674:4). Line service employees are also responsible for placing chocks under the wheels of the aircraft after it is parked, and placing a carpet for aircraft passengers to walk onto at disembarkation. (Tr. 53:22-54:6). They may also take orders from the

[1] The parties stipulated and the Regional Director found that line service lead employees are nonsupervisory employees, who should be included in any unit found appropriate. Decision, pg. 4 fn. 7. FAS also contends that lead employees in the remaining classifications are also nonsupervisory employees, who should be included in the smallest appropriate unit. During the hearing, the Hearing Officer offered the Union an opportunity to present evidence establishing that any of the leads are supervisory employees. The Union responded that it did not have such evidence. (Tr. 686:2-22).

arriving aircraft crew for services which may include pumping of the plane's lavatory, fuel, and delivery of food, ice, coffee, newspapers and any other items the crew may request for their flight. (Tr. 36:21-23; 87:21-89:3; Tr. 555:6-556:4). Customer service employees also take service orders. (Tr. 87:21-89:3; Tr. 555:17-21). When orders are placed with customer service employees, those orders are relayed by customer service employees to line service employees either in person, via radio, telephone or a tube. (Tr. 489:18-490:5). Concierge Barbara Sureyka testified that she interacts with line service employees 45 minutes out of every hour. (Tr. 664:9-10).

Line service employees also perform various services when the aircraft is on the ground. They work very closely on a daily basis with customer service employees to coordinate the delivery of all ordered services to the aircraft, and are generally responsible for picking up the orders at the terminal building and delivering the ordered items to the aircraft in a cart or a tug. (Tr. 38:22-25; 54:9-10; 55:21-22). For example, the video admitted into evidence included footage of a customer service employee making coffee for a line service employee to deliver to the aircraft, at the same time and in the same location the line service employee was putting that coffee into a canister, and checking that dishes were ready to be delivered. (Tr. 639:12-14; 643:17-21; Employer Exhibit 5 (July 12, 2011 at 8:41:26 AM)).

The line service employees are responsible for pumping the contents of the aircraft lavatory. (Tr. 54:6-8). They are also responsible for fueling aircraft while it is on the ramp by using a fuel truck that they drive between the ramp and the fuel farm. (Tr. 43:13-17, 54:12; 55:8-9). They also de-fuel the aircraft while it is on the ramp. (Tr. 60:23-61:7). In doing so, they must interact regularly with other classifications,

particularly customer service. As noted, *supra*, when a customer places an order for services such as lavatory pumping or fueling, customer service employees communicate that order to line service employees in person or with a radio, telephone or a tube.

Line service employees also tow aircraft in and out of the hangars for cleaning and maintenance services using a tug, which is connected by a towing bar to the nose of the aircraft. (Tr. 48:2-9). As there is limited space in the hangars, the line service employees must coordinate with the aircraft cleaning employees and aircraft maintenance employees regarding when to tow the aircraft into the hangar, where in the hangar to park it, and when to return it to the ramp. (Tr. 50:9-11; 50:15-21; 54:11; 55:19-21; 498:5-14). The video evidence includes footage of a line service employee towing an aircraft into hangar 1 as the aircraft maintenance mechanics open the hangar door. (Tr. 636:17-24; Employer Exhibit 6 (December 16, 2010 at 12:11:50 AM)). Aircraft maintenance employees can also drive the tug. (Tr. 49:10-14). During the movement of the aircraft, usually two employees must function as wing walkers, who walk on the sides of the aircraft wings to ensure that the aircraft does not get damaged. (Tr. 48:12-16). All classifications, including line service, function as wing walkers.[2] (Tr. 55:14-16). Further, it is FAS' policy that all classifications may function as wing walkers. (Tr. 48:20-49:1; 481:4-9; 588:2-7).

In addition to towing aircraft, when the auxiliary power unit inside the aircraft which provides power to start the main engines needs maintenance, line service employees tow it to aircraft maintenance. (Tr. 450:18-451:1; 496:20-25). Line service

[2] One Union witness testified that his ***preference*** when towing aircraft is to have other line service employees perform the wing walker function. (Tr. 459:10-21). However, the record is clear that any classification of employees can and does perform this function. Indeed, that is the policy of the employer. These facts were ***not*** denied by any Union witness.

employees also work with aircraft maintenance employees to power-up aircraft using a ground power unit. Line service employees tow the ground power unit, hook it up to the aircraft, and aircraft maintenance employees then operate it. (Tr. 449:13-450:7; 497:4-9).

Line service employees are also responsible for snow removal from the ramp and from aircraft, and ice removal from the aircraft. Line service employees work in teams with aircraft maintenance, vehicle maintenance, building services, aircraft cleaning, and security and transportation to remove snow from the ramp. (Tr. 93:2-19; 94:9-13; 544:4-20; 585:3-586:7). In doing so, they work with other classifications, particularly customer service. Specifically, when a customer places an order for services, customer service employees must relay those orders to line service employees either in person or with a radio, telephone or a tube. (Tr. 489:18-490:5).

Both line service and aircraft maintenance employees operate plows for removing snow from the ramp; in addition, all classifications use shovels and snow blowers for snow removal from the ramp. (Tr. 94:2-4; 94:8-17). Line service employees also remove snow from aircraft wings using brooms and rubberized squeegees. (Tr. 94:18-95:5). The record evidence demonstrates that this duty is also performed by the aircraft maintenance and aircraft cleaning employees, who utilize the same equipment as line service employees for this part of snow removal operations. (Tr. 95:3-8; 586:16-22; 664:24-665:5).

Line service employees also work with and assist security and transportation employees in unloading and loading passenger luggage. (Tr. 54:10-11). Line service employees assist security and transportation employees in the transport of luggage using

a large luggage cart pulled by a tug. (Tr. 45:24-25; 85:24-86:2; 86:10-22; 202:2-6; 483:11-21).

Security and transportation employees also wheel the luggage, utilizing the same handcarts. (Tr. 43:11-12). The video evidence included footage of a security and transportation employee driving to the terminal area with a passenger, a line service employee meeting them and then working with the security and transportation employee to load the passenger's luggage into the cart to be driven to the ramp where the passenger's aircraft is parked. (Tr. 632:24-25; 633:12-634:10; Employer Exhibit 7 (August 29, 2010 at 5:22:56 PM)). The video evidence also included footage of line service employees working with security and transportation employees to remove luggage from an aircraft and load it onto a bus. (Tr. 651:18-20; 652:16-19; Employer Exhibit 4 (August 3, 2011 at 11:56:50 AM).

During the first shift, Monday through Friday, security and transportation employees drive a Company vehicle to transport pilots to their hotels. (Tr. 589:21-24). Customer service employee Travis Northern testified that during the second shift Monday through Friday, line service employees provide this service 50% of the time, utilizing the same Company vehicles as the security and transportation employees.[3] (Tr. 55: 11-13; 95:23-96:25; 454:18-20; 575:4; 689:11-590:5). During the weekend shift, the line service and customer service employees interchangeably provide this service. (Tr. 690:9-

[3] Although a Union witness, who is a line service employee, testified that line service employees transport pilots to hotels on occasion during the third and weekend shifts, he admitted that he has not worked on the third shift in the preceding six months and did not have personal knowledge of how often the line service employees perform this service. (Tr. 483:22-484:11). However, Travis Northern testified without contradiction that he was at the facility frequently during the first, second and third shifts, and on weekends, and repeatedly witnessed line service employees providing this service. The Union did not call a witness to rebut Northern's testimony.

10). During the third and weekend shift, line service employees are always the ones who provide this service. (Tr. 690:11-17).

Line service employees also coordinate with security and transportation and customer service employees to implement DCA Access, which is a program of the federal government that allows an airplane to fly from an authorized approved gateway airport, including Teterboro Airport, directly into Washington National Airport. (Tr. 90:6-9). As a certified participant in this program, FAS is required to segregate any aircraft, pilots and passengers flying to Washington National Airport from the rest of the population. (90:16-91:4). Line service employees are involved in moving the aircraft to the west ramp at FAS, parking it, and isolating it. (Tr. 91:11-17). Customer service employees identify the passengers who are arriving for that aircraft and the security and transportation employees transport the passengers to the west ramp, where they embark. (Tr. 92:5-11). This is clearly an integrated function.

2. Customer Service

FAS has approximately 13 customer service employees, including two leads and two customer service agents who function as concierges. (Tr. 116:14-16360:15-18; 498:18-20; 687:25-688:3; *see also* Exhibit P-3). The customer service employees are the intermediaries between FAS' customers and the other seven classifications that provide services to those customers.

Like line service employees, customer service employees take service orders from the aircraft crew. Customers may call such orders in to customer service before landing or a pilot may place a service order at the customer service desk after landing. (Tr. 87:21-89:3; Tr. 555:17-21).

Customer service employees work very closely with other classifications to ensure that aircraft are fully serviced. For example, since line service is primarily responsible for delivering catering and other ordered items to the aircraft, customer service must advise line service employees when such items have been prepared, or, in the case of catering, delivered to coolers in the central area. (Tr. 36:13-15; 39:4).

Customer service employees also must coordinate with aircraft maintenance to make certain that all ordered maintenance work is performed. (Tr. 39:18-20). These employees coordinate with building services employees to ensure that all facilities are properly maintained. (Tr. 39:20-23).

As noted, *supra*, customer service employees also drive the same Company vehicles as line service and security and transportation employees to transport pilots to hotels.

The job duties of the concierges include meeting airplanes on the ramp to greet the crew and determine if they need any services. (Tr. 350:21-351:7; 356:3-8). They also make coffee and bag ice for the crew. On occasion, the concierge or another customer service employee brings the services to the aircraft. (Tr. 661:19-23). A concierge, Barbara Surdyka, testified at the hearing that she uses one of FAS' carts to drive the services out to the ramp. (Tr. 662:4-13). The line service employees use the same carts to deliver services. (Tr. 38:22-25).

3. Security and Transportation

FAS has approximately 17 security and transportation employees and leads. (Tr. 688:5). Their job duties include serving at the entrance gate that leads to the FAS facilities, where they check driver's licenses, determine the "tail number" of the

passengers' aircraft, and transmit this information to the security and transportation employees who serve at FAS' front entrance. (Tr. 41:16-24, 42:5-11, 42:16-19, 42:20-23). They also check the identification of employees who are entering the airport. They receive on-the-job training required by Port Authority of New York and New Jersey regarding the kind of identification required to enter the airport. (Tr. 105:21-106:6).

Security and transportation employees greet customers as they arrive in their vehicles in the courtyard in front of the terminal. (Tr. 42:20-23; 44:10-25). However, customer service employees greet the customers in the courtyard if the security and transportation employees are busy. (Tr. 42:23-24). Security and transportation employees unload luggage from the customers' vehicles and drive the customers and their luggage in shuttle buses to the aircraft on the ramp. They also transport the luggage in a handcart. (Tr. 41:25-42:4; 43:3-12; 43:21-25; 86:25-87:7). Further, they load luggage onto aircraft and unload luggage from aircraft. (Tr. 43:21-25). When there is a large amount of luggage, line service employees work with security and transportation employees to load or unload the luggage and sometimes transport the luggage to or from the aircraft using a large luggage cart pulled by a tug. (Tr. 85:24-86:2; 86:10-22; 151:21-152:7; 483:11-21).

As noted, *supra*, security and transportation employees also transport pilots to hotels in Company vehicles, a service also provided on a regular basis by line service employees.

4. Aircraft Cleaning

FAS has approximately 12 aircraft cleaning employees and leads. (Tr. 688:6). Their duties include cleaning the interior and exterior of aircraft. They clean the aircraft

pursuant to cleaning orders submitted by other employees, usually customer service. (Tr. 50:24-51:3; see also Exhibit P-7). They perform their cleaning duties while the aircraft is in one of the three hangars or on the ramp. (Tr. 47:8-17).

Aircraft cleaning employees must coordinate with line service employees, who tow aircraft into the hangars. The aircraft cleaning employees may also need to coordinate with aircraft maintenance employees because they often clean the aircraft while it is undergoing maintenance. (Tr. 50:4-7). These employees may also act as wing walkers. (Tr. 48:20-23).

5. Aircraft Maintenance

FAS has approximately 22 aircraft maintenance employees, including 3 plant clerical employees. (Tr. 348:18-21; 688:7-8). Except for clerical employees, aircraft maintenance employees are responsible for repairing and maintaining aircraft, including monitoring and changing avionics equipment, changing engines, and repairing drawers and lockers within the aircraft. (Tr. 57:15-18; see also Exhibits P-8 and P-9). They primarily perform their duties in the hangars, but will do some maintenance work on the ramp, where line service employees work. (Tr. 57:21-24).

Typically, a customer service agent notifies them when an aircraft needs maintenance. (Tr. 60:20-21). The aircraft maintenance employees then coordinate with the line service employees to either work on the aircraft on the ramp or have it towed into the hangar. (Tr. 60:12-15; 60:21-22). Sometimes they must coordinate with line service employees to have the airplane de-fueled before it is brought into the hangar. (Tr. 60:23-61:7). These employees may also act as wing walkers. (Tr. 48:20-24).

Aircraft maintenance employees also coordinate with customer service and building service employees to ensure the hangars are maintained. (Tr. 60:16-19).

The 3 plant clerical employees are responsible for typing handwritten maintenance work orders into FAS' electronic database and maintaining records of maintenance work. (Tr. 236:6-11; 348:16-25). [4]

6. Inventory

FAS employs 3 inventory employees. (Tr. 688:8). They are responsible for obtaining and storing parts for airplanes. (Tr. 63:10-12). They interact on a daily basis with aircraft maintenance employees regarding the aircraft parts, and coordinate with line service employees when a large part must be transported in or out of the facility. (Tr. 63:4-9).

7. Building Services

FAS employs approximately 6 building services employees. (Tr. 688:9). Their job duties are to maintain FAS' facilities in a clean and safe condition. (Tr. 64:2-4). The building services employees respond to cleaning requests from all other employees. (Tr. 64:19-23). They perform their duties in the same work areas as the employees in the classifications at issue herein.

Building services employees also act as wing walkers. (Tr. 48:20-49:1).

[4] The 3 aircraft maintenance clerical employees must be included in the same unit as other aircraft maintenance employees because they are "plant clericals." The Board has traditionally distinguished between office clerical and plant clerical employees in decisions concerning unit determination, finding that plant clerical employees should be included in the same unit as the maintenance employees whose functions they support. To determine whether an employee is a plant clerical, the Board examines whether that employee's "principal functions and duties relate to the production process, as distinguished from general office operations." *In re Desert Palace, Inc.*, 337 NLRB 1096, 1097-99 (2002). In this case, all of the aircraft maintenance clericals' functions are directed toward supporting the aircraft maintenance employees in carrying out their maintenance duties. The aircraft maintenance clericals do not engage in general office operations. Therefore, they are plant clericals.

Building services also employs a shipping and receiving clerk, who checks in the inventory that is shipped to FAS. (Tr. 59:8-17; 82:8-13).

8. Vehicle Maintenance

FAS has one vehicle maintenance employee. (Tr. 693:20-21). This individual is responsible for performing maintenance and repairs on FAS' vehicles, including the automotive vehicles, tow tugs, golf carts and the GPU used by line service, customer service, aircraft maintenance, aircraft cleaning, and security and transportation employees. (Tr. 65:21-24). The vehicle maintenance employee interacts with employees from all other classifications who have vehicles that require maintenance or repairs. Those employees contact and deliver the vehicles to the vehicle maintenance employee, who generally works in the vehicle maintenance building next to the fuel farm that is utilized by line service employees. He also picks up the vehicles himself and delivers them to the vehicle maintenance building. (Tr. 55:23-25; 65:18-66:16).

B. Transfers Between Classifications

In addition to the identical duties being performed by employees in different classifications, which are discussed above, FAS has transferred numerous employees from one classification to another:

- Chris Sciabica transferred from line service to aircraft maintenance;
- Mary Arango transferred from aircraft cleaning to aircraft maintenance as a clerk;
- Camilo Figueroa transferred from aircraft cleaning to customer service;
- Nick Kida transferred from building services to line service;
- Alfredo Avila transferred from line service to building services;

- Natalia Carmona transferred from customer services where she was an agent to aircraft maintenance where she is a lead clerk;
- Mary Biro temporarily transferred during her pregnancy from line service to aircraft maintenance as a clerk;
- Frank Smith was promoted from line service to night manager;
- Maria Altomare transferred from aircraft maintenance where she was a clerk to accounting;
- Josephine Crea transferred from aircraft maintenance where she was a clerk to human resources;
- Justin Moore transferred from line service to aircraft maintenance; and
- John Paul Germinario transferred from security and transportation to aircraft maintenance.

(Tr. 219:16-222:19). This is undisputed evidence.

C. <u>Wages, Hours and Other Terms and Conditions of Employment</u>

1. <u>Wages</u>

All employees in the eight classifications are hourly and all receive overtime pay after 40 hours of work. (Tr. 76:4-21). The starting salaries for each classification are ultimately approved by the Company's CEO. (Tr. 143:18-144:6). All employees are eligible to receive salary increases in December of each year based on their annual performance rating. A specific percent salary increase is assigned to each performance score by Mr. Thomas and FAS' chief operating officer and then applied to calculate the salary increases for all employees at issue, regardless of their classification. (Tr. 79:20-25; 80:1-81:5).

The performance review process is the same for all at-issue employees. Every year, each employee is provided with a self-evaluation form to complete and return to FAS' Human Resources Manager, who then distributes them to the employees' respective managers. (Tr. 77:17-79:-2; 210:24-25). The managers then evaluate their subordinates and assign performance ratings. (Tr. 79:3-16).

All employees in the eight classifications work 37 ½ to 40 hours/week. The employees who work 37 ½ hours are paid for 40 hours/week. (Tr. 76:4-21).

2. Hours

FAS operates on three shifts—6:00 A.M. to 2:30 P.M., 2 P.M to 10:30 P.M and 10:00 P.M to 6:30 A.M. (Tr.66:23-25; 369:10-13). The shifts are the same Monday through Sunday. (Tr. 369:14-17). Most employees work according to this shift schedule, except for aircraft cleaning employees, who do not work the weekend shifts; a vehicle maintenance employee who only works the day shift; concierges who work the first and second shifts; aircraft maintenance employees who during the weekends, work four ten-hour shifts; and one line service lead who works an overlap shift on Sundays. (Tr. 67:3-13; 130:10-14; 360:17-361:4; 369:16-19). Further, all employees are required to utilize a time clock. (Tr. 67:20-23). There are approximately five time clocks throughout the premises, and employees can use any time clock, regardless of classification. (Tr.67:24-68:18).

3. Employment Policies

All of the hourly employees at issue are subject to the same employment policies, which are set by the CEO. (Tr. 257:23-25; *see also* Exhibit P-1 (FAS Policies and Procedures Guidelines)). All employees receive the same benefits. (Tr. 77:8-16). For

example, vacation and holiday policies at FAS are determined by the CEO and are the same for all at-issue employees. (Tr. 75:7-76:3; 215:2-4).

The hiring process for all classifications is also identical. Typically, a job opening is first posted internally for approximately two weeks, and anyone who has been employed with the Company for at least six months may apply for it. (Tr. 71:15-21; 211:21-22). If there are no internal candidates who meet the requirements of the posted position, FAS recruits external candidates. (Tr. 211:22-212:1). All candidates are required to complete applications, which are reviewed by Human Resources. The best qualified candidates are referred to the appropriate managers. (Tr. 72:1-5; 72:23-73:8; 212:2-3). The head of Human Resources and the managers then interview the candidates and make a hiring recommendation to the CEO, Mr. William Thomas, who has the ultimate authority to approve a hire. (Tr. 73:8-15; 212:3-8).

Prior to hire, all of the employees at issue here are subject to the same background checks and the same drug testing. (Tr. Tr. 345:24-346:5; 352:17-24). Certain classifications of employees are also subject to the FAA random drug testing requirements, including aircraft maintenance, line service, aircraft cleaning, and security and transportation. (Tr. 84:22-24).

FAS utilizes the same hiring criteria for all employees in the eight classifications, excluding aircraft maintenance, requiring that the employees speak fluent English, and possess high school diplomas or equivalents, a personable attitude and the ability to lift luggage. (Tr. 35:14-36:5, 40:20-41:14; 47:4-7; 52:12-23; 56:14-17; 56:20-57:1; 62:5-7; 63:23-64:1; 65:7-16). Aircraft maintenance employees are additionally required by the FAA to have Airframe and Powerplant licenses. (Tr. 56:17-22; 213:21-23)

All employees at issue wear uniforms that are supplied by FAS. The uniforms for all classifications, except customer service, bear the FAS Company logo. (Tr. 73:16-18; 193:17-21; 361:22-362:19). Also, all classifications are issued identification cards that state, "First Aviation Services" and their names, and display their photos. (Tr. 219:8-15).

4. FAS' Facilities

All employees in the eight classifications have access to all of FAS' employee facilities. FAS has two men's and two women's locker rooms, which all at-issue employees, of the appropriate gender, may use. (Tr. 69:8-22). There are two employee lunch rooms, which all at-issue employees may use. (Tr. 71:7-14; 556:11-19). There is a common coffee room and two vending areas accessible to all at-issue employees. (Tr. 74:22-25). There is a common parking lot area where all employees are permitted to park. (Tr. 74:11-19).

5. Training and Licenses

FAS also provides training to numerous classifications. Such training is conducted both on the job and in more formal sessions, generally conducted in FAS' training room. (Tr. 215:5-19; 231:24-232:9). Employees from every classification have access to the training room, and some employees take training courses in functions that are pertinent to other classifications. (Tr. 215:15-19). For example, a Union witness, line service employee James Soojian testified at the hearing in this matter that he has taken training in customer service functions. (Tr. 477:11-13; 505:19-22).

Some training courses are taught to employees in all eight classifications, including equal employment opportunity and sexual harassment, and fire extinguisher

training. (Tr. 542:19-543:12; 583:7-9; 583:22-24; 674:5-14). Also, the Port Authority of New York and New Jersey requires any employee who drives a vehicle on airport property to have a "D" license.[5] (Tr. 52:24-53:13; 217:12-14). Employees in numerous classifications, including line service, hold D2 licenses. (Tr. 549:9-10).

There are also training courses that are required for specific classifications. There are safety training courses based on safety guidelines published by NATA association, which are tailored to line service, aircraft maintenance and customer service classifications, and which those classifications are required to take. (Tr. 163:7-14; 168:10-25).

In short, the record evidence establishes a strong community of interest among all of the employees engaged in providing integrated aircraft services to the customers of FAS. The record does not establish a separate and distinct community of interest among only the line service employees.

[5] The record establishes that only line service employees hold the D1 license; but, importantly, not all line service employees hold such a license. The difference in licenses has no impact at all on what vehicle may be operated, but rather, only on ***where*** the vehicle may be operated. (Tr. 480:7-17).

ARGUMENT

POINT I

COMPELLING REASONS SET FORTH HEREIN DEMONSTRATE THAT THIS REQUEST FOR REVIEW SHOULD BE GRANTED

Compelling reasons set forth herein demonstrate that the Board should grant this Request for Review pursuant to Section 102.67(c), which states:

> (c) The Board will grant a request for review only where compelling reasons exist thereof. Accordingly, a request for review may be granted only upon one or more of the following grounds:
> (1) That substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent.
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> * * *
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

This Request for Review must be granted based upon the grounds set forth in Section 102.67(c)(1), (2) and (4). The Regional Director's Decision, which determined the petitioned-for unit limited to line employees constitutes an appropriate unit, raises a substantial question of law and policy by misinterpreting and misapplying the legal standard set forth in *Specialty Healthcare*, 357 NLRB No. 83, *slip op*., 2011 WL 3916077 (2011), and effectively according controlling weight to the extent of union organization in violation of Section 9(c)(5) of the Act. Also, the Regional Director's determination of two substantial factual issues is clearly erroneous. The Regional Director improperly determined that line service employees do not share marshalling duties, and wrongly categorized some duties of line service employees as primary and

other duties as non-primary. Further, it is respectfully submitted that the Board should reconsider use of the "overwhelming community of interest" test set forth in *Specialty Healthcare* because it is unnecessary and lacks a reasonable basis in law.

POINT II

THE DECISION MISINTERPRETS AND MISAPPLIES THE LEGAL STANDARD THAT THE BOARD SET FORTH IN *SPECIALTY HEALTHCARE*

A. The Decision Misinterprets and Misapplies the Legal Standard Set Forth in *Specialty Healthcare* by Failing to Properly Consider Traditional Community of Interest Factors in Determining that Line Service Employees Constitute An Appropriate Unit

The Regional Director's Decision in this matter misinterprets and misapplies the legal standard that the Board set forth in *Specialty Healthcare* for determining an appropriate unit under Section 9(a) of the Act. 2011 WL 3916077, at *14, *16.

In *Specialty Healthcare,* the Board held that the traditional community of interest test must be applied first to determine whether a petitioned-for unit constitutes an appropriate unit. *Id*. at *14. Further, if consideration of traditional community of interest factors demonstrates that employees in the petitioned-for unit share a community of interest, the employer will have to make a heightened showing to demonstrate that the petitioned-for unit is nevertheless inappropriate because it excludes additional employees. *Id.* at *16. In essence, the employer will have to show that included and excluded employees share an overwhelming community of interest. *Id*.

Significantly, *Specialty Healthcare* did not alter the traditional community of interest test for determining whether a petitioned-for unit constitutes an appropriate unit, which focuses on the relationship between the interests of employees included in and excluded from the petitioned-for unit. *Id*. at *13-14. *Specialty Healthcare* reaffirmed

that to determine an appropriate unit, the analysis must focus on the following traditional community of interest factors:

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

Id. at *14 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

In this matter, the Regional Director misapplied this test by only considering the interests that line service employees share among themselves, and did not consider at all how those interests relate to and are distinct from the interests of FAS' other employees who are excluded from the petitioned-for unit. Accordingly, the Regional Director never determined that line service employees share a sufficiently distinct community of interest separate and apart from the other seven classifications at issue. *See* Decision, pgs. 24-25.

Rather than addressing line service employees' distinct skills and training and distinct terms and conditions of employment, as set forth in *Specialty Healthcare*, the Regional Director addressed numerous interests that are actually shared by not just line service employees, but also by employees in most or all other classifications at issue, but he did not acknowledge this point. The Regional Director based his decision on the following shared interests among line service employees: (1) they occupy the same job classification and perform the same duties; (2) they are the only employees required to complete training regarding de-icing aircraft, fueling aircraft, marshalling aircraft, towing aircraft and GPUs, and providing water and lavatory services; (3) they are expected to

obtain a D-1 license; (4) they wear a distinctive uniform with safety gear; (5) they report to the same department manager; (6) they are all hourly employees, eligible for overtime and receive the same benefits; and (7) they are subject to the same employee handbook and random drug testing. Decision, pgs. 24-25.

Of those interests, the following are actually shared by many or all other classifications: special driving license requirement, uniforms, management, hourly compensation, overtime eligibility, benefits, employee handbook and random drug testing.

The Regional Director also failed to consider numerous community of interest factors discussed in *Specialty Healthcare* that pertain to the relationship between line service employees and employees in the excluded classifications, including job overlap among all classifications, functional integration among all classifications, frequency of contact among all classifications and interchange.

The Decision is contrary to well-established Board precedent. It is clear from traditional community of interest criteria set forth in *Specialty Healthcare* that the Board "'never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. . . . [The Board's] inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct . . . to warrant the establishment of a separate unit.'" *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, *slip op*., 2010 WL 3406423, at *1 fn. 2 (*quoting Newton-Wellesley Hospital*, 250 NLRB 409, 411-12 (1980) (emphasis added)); *see also Specialty Healthcare,* 2011 WL 3916077, at *27 (Hayes, dissenting).

If employees in the proposed unit do not have a sufficiently distinct community of interest from excluded employees, then the Board will include in the unit those additional employees who share a sufficient community of interest with employees in the proposed unit. *See, e.g., Turner Industries Group, LLC,* 349 NLRB 428, 431 (2007) (finding "that the petitioned-for multicraft unit is not an appropriate unit for bargaining, and that the unit must also include the insulators, electricians and [Daily Support Team] employees" who share a community of interest, particularly substantially similar terms and conditions of employment); *Publix Super Markets, Inc*., 343 NLRB 1023, 1023 (2004) ("there was insufficient evidence to warrant finding that a separate fluid processing unit is appropriate apart from the other production and maintenance employees"); *Air California*, 170 NLRB 18, 21 (1968) (although union petitioned for separate units of ramp agents and maintenance employees, Board included them in the same unit because they share a community of interest); *Bradley Flying Services, Inc*., 131 NLRB 437, 439 (1961) (including "certified mechanic" and the "certified pilot" in petitioned-for unit of ground service, maintenance and automotive mechanic employees upon determining that they share a community of interest).

In *Specialty Healthcare*, the Board clearly considered all traditional community of interest criteria in determining that the petitioned-for-unit of certified nursing assistants ("CNAs") at a nursing home had a sufficiently distinct community of interest from other nonprofessional service and maintenance employees whom the employer sought to include in the unit. 2011 WL 3916077, at *14. The Board examined in detail how CNAs "are unlike all the other employees the Employer would include in the unit." *Id*. The Board determined that CNAs constituted an appropriate unit because (1) they wore

uniforms, unlike other employees, most of whom did not wear uniforms; (2) they had separate and distinct immediate and intermediate supervision; (3) their primary duty—hands-on care of facility residents— exposed them to unique risks, such as exposure to blood and bodily fluids, and physically straining tasks; (4) they had distinct certification and training requirements based on federal regulations; (5) they had distinct work hours, work areas and wage scale; (6) they had limited and unspecific interaction with other employees; (7) there was no evidence of significant functional interchange or overlapping job duties; and (8) there was only one transfer out of a CNA position. *Id*.

Although the Board in *Specialty Healthcare* clearly addressed whether the CNAs had a sufficiently distinct community of interest, the Regional Director failed to address this issue in this matter. In fact, if the Regional Director had properly considered the traditional community of interest factors, he would have necessarily determined that line service employees do not share a sufficiently distinct community of interest because they have far less distinct interests than the CNA's did in *Specialty Healthcare*. The Regional Director would have also necessarily determined that employees in the seven additional classifications at issue must be included in the smallest appropriate unit because they share a sufficient community of interest with line service employees.

The Regional Director's Decision does exactly what Board Member Hayes was concerned about in his dissent in *Specialty Healthcare*—it distorts Board precedent by "ending an appropriate unit analysis upon finding that the petitioned-for-unit employees share a community of interest among themselves." *Id*. at *27 (Hayes, dissenting).

B. The Regional Director Erroneously Applied the "Overwhelming Community of Interest" Test Set Forth in *Specialty Healthcare*

After the Regional Director determined that line service employees constitute an

appropriate unit, he reviewed several, but not all, community of interest factors under the heightened scrutiny of the "overwhelming community of interest" test, concluding that additional employees should not be added to the unit because their interests do not "overlap almost completely" with the interests of line service employees.[6] Decision, pg. 25-27.

Pursuant to the framework set fort in *Specialty Healthcare,* the Regional Director should have never applied the overwhelming community of interest test before considering all community of interest factors under the traditional standard. 2011 WL 3916077, at *16.

Indeed, there was no need for the Regional Director to apply the overwhelming community of interest test in this matter. If the Regional Director had properly applied the traditional community of interest test, he would have necessarily determined that line service employees do not have a sufficiently distinct community of interest, and that employees in the seven additional classifications at issue must be included in the smallest appropriate unit because they share a sufficient community of interest with line service employees.

Further, the Regional Director's analysis under the overwhelming community of interest test is erroneous for several reasons. First, the Regional Director failed to consider critical community of interest factors set forth in *Specialty Healthcare*, including functional integration, and common terms and conditions of employment.

[6] The Regional Director relied on the Venn diagram set forth by the Sixth Circuit Court of Appeals in *Blue Man Vegas, LLC v. NLRB,* 529 F.3d 417 (D.C. Cir. 2008) to illustrate its point that under the overwhelming community of interest test, the interests of two groups of employees should "overlap almost completely." *Id.* at , 422; *see also* Decision, pgs 23-24. However, the Venn diagram in *Blue Man* demonstrates that under the overwhelming community of interest test, an identity of interests is not required and some difference in interests is clearly permitted.

Functional integration is the most significant factor in this case because it is critical to understanding FAS' operating environment. Under well-established Board precedent, the bargaining unit determination must relate to parties' factual situation. *See, e.g., Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). However, the Regional Director did not even consider that FAS is a small, highly integrated employer, and all aspects of its operations revolve around a single goal—the provision of aviation services to its customers.

Further, functional integration is critically important to consider here because the Board's well-established presumption favors plant-wide bargaining units where, as here, the employer's operations are highly integrated. *See Mallinckrodt Chem. Works,* 162 N.L.R.B. 387, 399-400 (1966) (establishing that appropriateness of a plant-wide unit is largely controlled by employer's level of functional integration). However, in this matter, the Regional Director erroneously failed to explain why the Decision fails to follow this well-established presumption.

Indeed, the Board has routinely certified highly diverse, plant-wide units based solely upon their functional integration. *See, e.g., Abdow Corp.*, 271 N.L.R.B. 1269, 1270 (1984) (certifying a single unit of kitchen and bakery workers, warehousemen and drivers where "all aspects of the Employer's operation are functionally integrated, revolving around a single goal of preparation and delivery of the Employer's food products to the restaurants") (emphasis added); *Walker Boat Yard, Inc.*, 273 N.L.R.B. 309, 311 (1984) (rejecting proposed unit which did not include all boatyard employees because the boatyard was "a functionally integrated operation with a significant level of interdependence between employees") (emphasis added); *Barbara George Collection*,

273 NLRB 1239, 1240 (1984) (rejecting proposed unit limited to warehouse employees, and holding unit must also include order processing and merchandising employees because of "the highly integrated nature of the Employer's business") (emphasis added); *Avon Products*, 250 NLRB 1479, 1484-91 (1980) (rejecting proposed unit limited to production and maintenance employees because "Employer is engaged in a single highly integrated process"; therefore, appropriate unit had to include all employees from order processing, data processing, shipping, receiving, and various other departments) (emphasis added).

Second, the Regional Director's analysis of other community of interest factors omits key facts, makes several factual misrepresentations and fails to explain why he accorded controlling weight to some factors but failed to consider other factors. *See* Brief Point III, *infra*.

POINT III

UNDER THE TRADITIONAL COMMUNITY OF INTEREST TEST OR THE "OVERWHELMING COMMUNITY OF INTEREST TEST," THE SMALLEST APPROPRIATE UNIT MUST INCLUDE ALL CLASSIFICATIONS AT ISSUE

When all of the factual and legal errors in the Regional Director's Decision are addressed and each community of interest factor is properly considered, it is clear that line service employees do not have a sufficiently distinct community of interest separate and apart from employees in the other seven classifications that would warrant including them in a separate unit, and that all classifications at issue must be included in the smallest appropriate unit because they share a sufficiently substantial community of interest under either the traditional or overwhelming community of interest tests.

1. Functional Integration with Other Employees

The Board's analysis of functional integration focuses on the extent to which the key functions that support an employer's activities are coordinated across all classifications of employees. *See, e.g.*, *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004). In this matter, the Regional Director failed to consider overwhelming record evidence that FAS is a small business engaged in a highly integrated operation that has one focus-- the provision of aviation services--and the key activities that support FAS' operation are coordinated across all classifications at issue in such a way that all classifications regularly share, swap and overlap duties.

Specifically, while line service employees are typically responsible for marshalling an aircraft, when they are busy with other tasks or cannot see the aircraft because it is far down the ramp, the security and transportation employees marshal the aircraft instead.

Line service employees share responsibility with customer service employees for taking orders for fuel and other services, including lavatory pumping, aircraft maintenance, catering, coffee, ice, newspapers and anything else the customers need for their flights. Customers communicate such orders to both classifications, and both classifications are responsible for ensuring that services such as catering, coffee, ice and newspapers are delivered to the aircraft on the ramp. Typically, customer service employees notify line service when the ordered items are ready for delivery. Then, both classifications work together to assemble the complete order before it is delivered to the aircraft. While line service employees normally deliver the order, the record demonstrates that customer service employees will deliver items to aircraft when needed

on the same equipment that line service employees utilize. Further, when orders are placed with customer service, those orders are communicated to line service employees in person or with a radio, telephone or via a tube. Without such communication, line service employees simply could not perform these services.

Customer service employees must interact with aircraft cleaning and maintenance employees to ensure they have provided the services ordered from them. In this regard, as there is limited space in the hangars where aircraft cleaning and aircraft maintenance employees perform their duties, the two classifications must coordinate to clean and repair the same aircraft at the same time and at the same location. Aircraft maintenance employees must coordinate with inventory employees, who are responsible for ensuring that the proper parts are provided to the maintenance employees to perform the needed repairs.

Aircraft cleaning and aircraft maintenance employees must collaborate with line service employees, who tow aircraft in and out of the hangars. However, aircraft maintenance employees can also drive the same tow tug that line service employees drive to move aircraft. Aircraft cleaning and aircraft maintenance employees must tell line service employees when aircraft should be towed into the hangars, where in the hangar to park it, and when the aircraft is ready to be returned to the ramp. In almost all cases, aircraft cannot be towed without two wing walkers, a function which is performed by employees from all classifications. The purpose of the wing walkers is very important because it is to ensure that the aircraft is not damaged while being moved.

In addition to towing aircraft, line service employees also tow the aircraft auxiliary power unit to aircraft maintenance employees for repairs. Line service

employees also work with aircraft maintenance employees to power-up aircraft using a ground power unit. The line service employees tow the ground power unit, hook it up to the aircraft, and employees in the aircraft maintenance classification then operate the unit.

To remove snow from the ramp, line service employees work in teams with aircraft maintenance, vehicle maintenance, building services, aircraft cleaning, and security and transportation. During snow removal, line service and aircraft maintenance employees operate plows, and all classifications use shovels and snow blowers to remove snow from the ramp. Line service employees also remove snow from the aircraft wings utilizing brooms and rubberized squeegees; this duty is also performed by aircraft maintenance and aircraft cleaning employees, who use the same equipment.

Classifications interact and cooperate with building services to ensure the terminal and other facilities at FAS are properly maintained. All are responsible for notifying building services when an area requires maintenance.

Line service employees share numerous key functions with security and transportation employees. These two classifications work together to load and unload luggage onto and off aircraft, and in and out of vehicles in the terminal area. In addition, security and transportation employees, line service employees and customer service employees share responsibility for transporting pilots to hotels in FAS vehicles. During the first shift, Monday through Friday, security and transportation employees provide this service. During the second shift, Monday through Friday, line service employees and security and transportation employees each provide this service 50% of the time, utilizing the same Company vehicles. During the weekend shift, the line service and customer

service employees interchangeably provide this service. During the third shift, line service employees are always the ones who provide this service.

Line service employees also coordinate with security and transportation and customer service employees to implement the DCA Access program by segregating aircraft that will fly directly into Washington National Airport from the rest of the planes. This permits the customer service and security and transportation employees to route the crew of that aircraft directly to the segregated area, as required by the Program.

When any of FAS' vehicles need repair, employees from all classifications who drive FAS' vehicles must coordinate with the vehicle maintenance employee to get those vehicles fixed.

Due to the highly integrated nature of FAS' business, any employment action taken by FAS regarding duties, compensation, hours or any other term or condition of employment would almost inevitably affect all classifications of employees at issue, even if the action is taken with respect to only one classification. Accordingly, a bargaining unit limited to one classification would significantly impact all excluded employees and inevitably cause substantial disruption to FAS' business operations.

2. Frequency of Contact with Other Employees

Employees in all classifications have frequent work-related and casual contact with one another on a daily basis. *See Publix Supermarket*, 343 NLRB at 1025 (considering work-related and casual contact in analysis of this factor). In the Decision, the Regional Director only considered work-related contact in determining that line service employees have substantial contact with customer service, security and transportation, and aircraft maintenance employees. Decision, pg. 25. However, as

demonstrated in the discussion of functional integration, line service employees also have substantial work-related contact with all of the remaining classifications.

Additionally, all employees at issue have contact because they continuously work in close proximity to or share work space with other classifications. All of FAS' facilities are either interconnected or within close walking distance, and many employees, including line service, perform duties all over FAS' facilities, including on the ramp, where customer service, aircraft maintenance and aircraft service employees also work; in hangars, where aircraft maintenance and aircraft service employees also work; in the fuel farm, which is near the vehicle maintenance employee; in all luggage loading/unloading areas including the front gate and terminal, where the security and transportation employees work; and in the customer service/coffee room areas, where customer service employees work. In addition, based on the nature of their jobs, customer service and building services employees work throughout FAS' facilities, so they must continuously share work space with other classifications.

Further, all of FAS' employees have casual contact with one another in the following shared areas to which all have access: lunch room, shared parking lot and shared break/coffee room. Additional shared areas at FAS include the men's and women's locker rooms, which are restricted only by gender.

Accordingly, the overwhelming amount of contact among all classifications mandates that all classifications at issue must be included in the smallest appropriate unit. This is particularly true in light of the fact that the Board has traditionally accorded significant weight to this factor. *See, e.g., Bradley Flying Services, Inc*., 131 NLRB 437, 438-39 (1961) (finding that ground service, maintenance and automotive mechanic

employees did *not* have a distinct community of interest from certified mechanic and certified pilot at an aviation services company where the certified mechanic and certified pilot had frequent contact with the automotive mechanic, notwithstanding that the certified employees did not punch a time clock, or share skills, duties or supervision with the other classifications; consequently, all employees were included in the same unit).

3. Interchange with Other Employees

The Regional Director erroneously determined that 4 permanent transfers and 1 temporary transfer of employees between the line service classification and the other classifications at issue were minimal. Decision, pgs. 25-26. The Regional Director erroneously failed to consider the additional permanent transfer of Frank Smith from line service to night manager. However, this transfer should be considered because it strongly evidences the shared community of interest among all classifications. By virtue of his experience in line service, Frank Smith was able to take a permanent position as night manager in charge of all classifications at issue.

Also, the Regional Director relied on *Red Lobster*, 300 NLRB 908, 911 (1990), where the Board held that 11 permanent transfers in a combined work force of 185 employees appeared to be a small amount. However, *Red Lobster* is distinguishable from the instant matter because in that case, the employer sought to include 13 restaurants in a single bargaining unit and, therefore, had an elevated burden to overcome the presumptive appropriateness of a single-facility unit. *Id*. at 911-12. In this matter, FAS does not have to overcome a presumption of a different appropriate unit. Given that there are only 34 line service employees at FAS, 6 instances of interchange in this classification is significant.

Further, the Regional Director failed to address FAS' argument that in cases where there is less interchange, the Board focuses its analysis on the amount of functional integration. *See, e.g., Brand Precision Services*, 313 NLRB 657, 658 (1994) (finding operators at industrial cleaning services company did *not* have a separate and distinct community of interest from the laborers and leadmen where, although there was no evidence of temporary interchange and few instances of permanent interchange, there was significant functional integration).

4. Distinct Skills and Training

All employees have a similar degree of skills and training. FAS has the same hiring criteria for all at-issue employees, with one exception,[7] requiring only that they speak English, possess a high school education or equivalent, are personable and can lift luggage. Although there are training and certification requirements that apply to various classifications, these requirements are insufficient to distinguish any classification as having a sufficiently higher degree of skill to warrant a separate bargaining unit.

Although the Regional Director determined that line service employees are not sufficiently skilled to qualify as a craft unit, pg. 24 fn. 29, the Decision points out that line service employees have unique certification and training requirements, including NATA Safety First training and certifications in de-icing aircraft, fueling aircraft, marshalling aircraft, towing aircraft and GPUs, and providing water and lavatory services. The Decision also notes that line service employees are the only classification required to obtain a D-1 license.

[7] The only exception is aircraft maintenance employees, who are required by the FAA to have Airframe and Powerplant licenses.

However, those requirements do not establish that line service employees have a sufficiently distinct degree of skills from the other classifications to warrant their inclusion in a separate unit. *See Peterson/Puritan, Inc.*, 240 NLRB 1051, 1052 (1979) (finding line mechanics at company engaged in filling plastic and metal containers do not have a distinct community of interest from the production workers where even though they are required to undergo a 90-day training period and to attend intermittent training classes, the Board nevertheless deemed them as not highly skilled because they are not required to possess any previous experience or formal training). Significantly, the fact that at least five employees have been transferred to line service from different classifications and from line service to different classifications is strong evidence that line service employees do not have a disparate skill level. *See id.* at 1051 (finding it significant that a number of current line mechanics are former production line employees).

Further, uncontested record evidence demonstrates that line service employees are certainly not the only ones who receive training and certifications at FAS. Aircraft maintenance and customer service employees also have NATA safety training courses and certifications that are tailored to them.

Also, any employee who wishes to operate one of FAS' vehicles can take the training to obtain a D1 or D2 license. The difference in licenses has no impact at all on what vehicle may be operated, but rather, only on <u>where</u> the vehicle may be operated. While line service employees are the only classification expected to obtain a D-1 license, importantly, not all line service employees hold such a license. Uncontested record evidence establishes that employees in numerous classifications have a D-2 license. *See*

Air California, 170 NLRB at 20-21 (ramp agents did *not* have a distinct community of interest from maintenance mechanics even though maintenance mechanics were required to have an FAA license and ramp agents were not); *see also Brand Precision Services*, 313 NLRB at 658 (finding similarity in skills among operators, laborers and leadman even though operators were additionally required to have a commercial driver's license and pass the Department of Transportation physical).

Also offered to all classifications is also mandatory fire extinguisher and equal employment opportunity training, which is given to classes with mixed classifications in attendance. Also, there is at least one cross-classification course in customer service. A Union witness, line service employee James Soojian, testified at the hearing that he has taken a training course in customer service.

Accordingly, all employees should also be included in the smallest appropriate unit because they have substantially similar degree of skills and training.

5. Distinct Job Functions and Work, and Amount and Type of Job Overlap Among Classifications

The Regional Director's analysis of this factor contains significant factual errors and fails to consider the substantial overlap of duties among all classifications. The Regional Director considered the following duties that line service employees share: loading luggage, transporting pilots to their hotels, delivering catering and other ordered services to aircraft, acting as wing walkers and removing snow from the ramp. However, the Regional Director erroneously concluded that line service employees do not share their primary duties, which they perform due to training and certifications, including marshalling aircraft, fueling aircraft, towing aircraft, de-icing aircraft, providing water and lavatory services to aircraft and towing luggage carts and GPUs. Decision, pg. 25.

First, the Regional Director's analysis is erroneous because he incorrectly and without any supporting evidence distinguished line service employees' duties as primary and non-primary. In fact, all of the duties that Regional Director addressed are the primary duties of line service employees, and all of these duties are critically important to FAS' operations. Second, the Regional Director failed to consider that line service employees and customer service employees also share responsibility for taking customer orders. This duty is significant because it is vital to FAS' single goal—the provision of aviation services. Third, the Regional Director incorrectly stated that line service employees do not share marshalling duties. The uncontested record evidence establishes that line service employees do share marshalling duties with security and transportation employees, who marshal the planes when line service employees are busy with other tasks or cannot see the aircraft because it is far down the ramp. (Tr. 673:20-674:4). Further, in the Facts section of the Decision, the Regional Director even acknowledged that, "Security and Transportation Manager Raymond Gabel testified that security and transportation employees have done marshalling on several occasions . . .." Decision, pg. 20. Fourth, the Regional Director failed to address the substantial overlap of duties among all classifications.

6. Distinct Terms and Conditions of Employment

The Regional Director failed to properly address the common terms and conditions among all classifications at issue, and only considered a few common terms and conditions of employment that line service employees share among themselves. In fact, all at-issue employees have substantially the same wages, benefits, hours, workplace

policies, and access to FAS' facilities. Also, employees across multiple classifications share equipment on a regular basis.

All employees are compensated on an hourly basis for a 40 hour work week, and all are eligible for overtime pay if they work in excess of 40 hours per week. There are five time clocks throughout FAS' facilities, and employees can use any time clock, regardless of classification.

More significantly, however, FAS has a uniform system of awarding annual wage increases that applies to all classifications. All employees receive a performance score annually, and FAS' President and CEO along with FAS' chief financial officer assign a percentage wage increase to each performance score. That percentage is then applied across all classifications to determine employees' wage increases. The performance review process is identical for all at-issue employees.

In addition, all employees in the eight classifications have access to all of FAS' employee facilities, including the shared training room, lunch room, coffee/break room, vending areas, and lockers. There are also common parking lots accessible to all employees.

FAS' workplace policies apply to all employees at issue here. All employees receive the same benefits, including vacations and holidays. All employees are subject to the same hiring policies, including background checks and drug testing. All employees at issue wear uniforms that are supplied by FAS. Although the uniforms are tailored to each classification, all uniforms bear the FAS Company logo. Also, all employees are issued FAS identification cards.

Further, numerous classifications share equipment on a regular basis. *Brand Precision Services,* 313 NLRB at 658 (finding the record amply demonstrates similar terms and conditions of employment where, *inter alia,* leadmen and operators have operated the same vacuum, filter and water blasting equipment, as long as they were properly trained). At FAS, all employees with a D2 or D1 license share FAS' vehicles, including cars and golf carts. To remove snow from the ramp, the line service employees and aircraft mechanics both operate plows. Also, all classifications share shovels and snow blowers. To remove snow from the aircraft wings, line service, aircraft maintenance and aircraft cleaning employees all use brooms and rubberized squeegees.

This factor demonstrates that all employees share an overwhelming community of interest, and the Regional Director's failure to consider this factor is clearly erroneous.

7. Common Supervision

The Regional Director also failed to consider and give proper weight to key facts in the analysis of supervision. The Regional Director determined that "although all classifications on the second, third and weekend shifts report to a common manager during their shift, the line employees are, nonetheless, segregated into a separate department, and have a separate manager who participates in their hiring, completes their evaluations that may result in wage increases, and disciplines them." Decision, pg. 26.

Thus, the Regional Director while recognizing the common supervision on the second, third and weekend shifts, and that FAS' President and CEO makes all key employment decisions for all classifications regarding hiring, compensation, benefits and termination of employment, apparently disregarded those facts, or felt they were completely outweighed by the fact that line service employees are in a separate

department. There simply is no precedent to disregard common supervision because separate departments are involved.

Accordingly, all community of interest factors when properly considered together, demonstrate that all employees in the eight classifications share an overwhelming community of interest.

POINT IV

THE DECISION CLEARLY VIOLATES SECTION 9(C)(5) OF THE ACT

The Regional Director failed to consider all traditional community of interest factors in determining that line service employees constitute an appropriate unit. Rather, the Regional Director only considered some interests that line service employees share among themselves. This unprecedented standard can be met by any union petitioning for a representation election because, as the Board noted in *Wheeling Island Gaming*, "[n]umerous groups of employees fairly can be said to possess employment conditions or interests 'in common.'" 2010 WL 3406423, 1 fn. 2. Under the Regional Director's analysis, the only obstacle between the unit which the union has focused its organizing efforts on and petitioned-for, and the Regional Director's determination that unit is appropriate, is the insignificant requirement that employees in that unit have some undetermined interests in common. Therefore, the Decision in reality accords controlling weight to the extent of union organization in violation of Section 9(c)(5) of the Act.

Section 9(c)(5) provides: "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." The term "extent to which the employees have organized" generally refers to the classifications of employees on whom the union has

focused its organizing efforts. *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1580 (4th Cir. 1995). Section 9(c)(5) not only precludes the Board from relying solely on the extent of organization in determining an appropriate unit, but also prohibits the Board from assigning this factor either exclusive or controlling weight. *Id*. While the Board may consider extent of organization as one factor, "it is clear that in passing this amendment Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization." *N. L. R. B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-42 (1965).

Significantly, courts have held that application of the community of interest test avoids violations of Section 9(c)(5) because this test is sufficiently independent of the extent of union organization. *See, e.g., Lundy Packing Co*., 68 F.3d at 1580. In *Lundy*, the Fourth Circuit held that the Board violated Section 9(c)(5) of the Act when, in determining an appropriate production and maintenance bargaining unit, it adopted a novel legal standard under which any proposed unit was presumed appropriate unless the employer could prove that excluded employees share an overwhelming community of interest with employees in the proposed unit. *Id*. at 1581. The Fourth Circuit held this standard violated Section 9(c)(5) because the Board effectively accorded controlling weight to the extent of union organization. *Id*. at 1581-82. That is what happened here and it is wrong.

The Board in *Specialty Healthcare* distinguished the standard set forth therein from the standard set forth in *Lundy* on grounds that the *Specialty Healthcare* standard requires the Board to initially determine whether the petitioned for unit is an appropriate unit based on traditional community of interest criteria and, therefore, does not accord

controlling weight to the extent of union organization. But, that is what the Regional Director did here and it is wrong.

Contrary to established precedent from the Board and courts, the Regional Director accorded controlling weight to the extent of union organization by only considering the line service employees' shared interests and omitting consideration of traditional community of interest factors. This was in error. The Regional Director's Decision is in clear violation of Section 9(c)(5) of the Act. The NLRA was intended to avoid labor strikes. This Decision does just the opposite. The Regional Director's Decision lacks logic and ignores reality. Simply put, if the Union is voted in, this Employer will not be able to operate under a traditional labor agreement without adversely impacting customer service and severely disadvantaging it with its competitors.

POINT V

THE "OVERWHELMING COMMUNITY OF INTEREST" TEST ARTICULATED IN *SPECIALTY HEALTHCARE* IS UNNECESSARY AND LACKS A REASONABLE BASIS IN LAW

The overwhelming community of interest test set forth in *Specialty Healthcare* is unnecessary because the threshold application of the traditional community of interest analysis, which *Specialty Healthcare* requires, is designed to determine which employees share a sufficient community of interest to be included in the smallest appropriate unit. *See, e.g*., *Publix Super Markets, supra*; *Air California*, *supra; Bradley Flying Services, Inc.*, *supra.* The Board has never required any additional test to determine an appropriate unit for the purpose of a representation election. Indeed, the additional "overwhelming community of interest" test does nothing more than cause confusion, as demonstrated by the Regional Director's Decision in this matter.

Further, *Specialty Healthcare* is the first case in which the Board determined that the overwhelming community of interest test must be applied after the traditional community of interest test has already been applied to determine whether additional employees should be included in an appropriate unit. This portion of the decision lacks a reasonable basis in law. The Board states in *Specialty Healthcare* that it has traditionally required application of a heightened community of interest test where an employer seeks to add employees to a unit determined to be an appropriate unit under the traditional community of interest test. *Id*. at *16. However, except for *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 420, 423 (D.C. Cir. 2008) and *N.L.R.B. v. Lundy Packing Co*., 68 F.3d 1577, 1580-82 (4th Cir. 1995), which are inapposite, none of the remaining cases on which *Specialty Healthcare* relies involve application of any test beyond the traditional community of interest test.

Blue Man is inapposite because it involved a very unique situation where the employer conceded the petitioned-for unit was appropriate, but sought to add additional employees to it anyway. 529 F.3d at 420, 423 ("RD first determined 'the record . . . established that the petitioned-for unit, which excludes MITs, is an appropriate unit for collective bargaining'; indeed, as he noted, 'the parties have never contended' otherwise.") (emphasis added). The Board applied an "overwhelming community of interest" test to determine if additional employees should be included in the unit. In affirming the Board's use of the "overwhelming community of interest" standard in *Blue Man*, the Sixth Circuit Court of Appeals looked to accretion cases for guidance because the situation clearly warranted a higher level of review than what the Board has

traditionally accorded to initial unit determinations that are at issue here. *See id*. at 422 and fn.*.

Also, *Lundy* is inapposite because in that case the Board presumed the petitioned-for unit was appropriate and then applied an "overwhelming community of interest" test to determine if additional employees should be included in the unit. The Fourth Circuit overruled the Board's use of this test on grounds that it violates Section 9(c)(5) of the Act. 68 F.3d at 1580-82. Therefore, the Board has traditionally required only the traditional community of interest test to determine whether additional employees should be included in an appropriate unit.

Courts require that the Board's decisions must have a "reasonable basis in law." *N.L.R.B. v. Action Automotive, Inc*., 469 U.S. 490, 496 (1985). Although the Board has wide discretion in reviewing the appropriateness of a unit determination, the Board may not proceed in an unreasonable or arbitrary manner. *N.L.R.B. v. Saint Francis College*, 562 F.2d 246, 252 (3d Cir. 1977). "If the Board has reached different conclusions in prior cases, 'it is essential that the 'reasons for the decisions in and distinctions among these cases' be set forth to dispel any appearance of arbitrariness.'" *Id*. (quoting *N.L.R.B. v. Saint Francis College*, 562 F.2d 246, 252 (3d Cir. 1977)).

In *Specialty Healthcare*, the Board did not set forth the reasons for its departure from prior precedent, which did not involve application of the overwhelming community of interest test under the circumstances at issue here. The Supreme Court, confronted with a similarly unexplained departure from Board policy, warned:

> It is hard to imagine a more violent breach of that requirement [of reasoned decisionmaking] than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced.

> The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably administrative law judges), and effective review by the courts.

Allentown Mack Sales & Service v. NLRB, 522 U.S. 359, 374 (1998).

Accordingly, the portion of Board's decision in *Specialty Healthcare*, which articulates the overwhelming community of interest test, is unreasonable and arbitrary.

CONCLUSION

In conclusion, compelling considerations require review and reconsideration of the Decision and Direction of Election in this matter. The overwhelming record evidence establishes that under proper application of the legal standards set forth in *Specialty Healthcare,* the smallest appropriate unit must consist of line service, customer service, security and transportation, aircraft cleaning, aircraft maintenance, inventory, building services and vehicle maintenance employees, but excluding all office clerical employees, professional employees, supervisors and guards, as defined in the Act.

Respectfully submitted,

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/s/Francis X. Dee
FRANCIS X. DEE
A Member of the Firm

DATED: September 27, 2011

CERTIFICATION OF SERVICE

I hereby certify that the within Request For Review has been served this date upon the Regional Director, National Labor Relations Board, Region 22, via electronic filing and upon William Rudis, Grand Lodge Representative, via electronic mail at wrudis@iamaw.org.

/s/Francis X. Dee
FRANCIS X. DEE
A Member of the Firm

DATED: September 27, 2011