

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NESTLÉ DREYER'S ICE CREAM,

Employer,

and

Case No. 31-RC-066625

Regional Director James J. McDermott

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

Petitioner.

**RESPONDENT NESTLÉ DREYER'S ICE CREAM'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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INTRODUCTION

Nestlé has long operated a plant in Bakersfield, California. Over that time, Nestlé has developed a highly integrated production process and constantly strives to increase the integration. So when the International Union of Operating Engineers, Local 501 sought to unionize a small fragment of the employees on the floor at the plant, Nestlé objected.

The Regional Director rejected Nestlé's objections and certified a unit for election in accordance with the Union's petitions. Yet in doing so, the Regional Director committed two reversible errors. He applied the "overwhelming-community-of-interest" test adopted in *Specialty Healthcare* despite the express disavowal in that case regarding its application to plants with prior organizing activity. And second, the Board clearly erred in determining that the production and maintenance employees at issue here did not share an overwhelming community of interest. In addition, beyond the errors of the Regional Director, the Board should reconsider its *Specialty Healthcare* decision. The Board's decision in that case was arbitrary and capricious, contrary to law, and in direct conflict with Supreme Court precedent. In addition, it violated common-law principles on case-by-case adjudication and departed from fifty years of precedent without even an acknowledgement, much less a reasoned decision.

For these reasons, set forth more fully below, Nestlé respectfully requests that the Board grant review of and reverse the Regional Director's Decision and Direction of Election.

FACTS AND PROCEDURAL HISTORY

1. The Parties And Their Prior Relationship

The employer, Nestlé-Dreyer's Ice Cream (the "Employer" or "Nestlé"), operates a production facility at 7301 District Boulevard, Bakersfield, California. (10)¹ Nestlé refers to this facility as the "BOC," which stands for Bakersfield Operations Center. (10) The Employer meets the jurisdictional standards of the Board. (7; Board Ex. 2, at 1-2)

The petitioning union, International Union of Operating Engineers Local 501, AFL-CIO (the "Union" or "Local 501"), is a labor organization within the meaning of the Act. (7; Board Ex. 2, at 1) It petitions for a unit consisting of a narrow subset of the hourly employees at the BOC, as follows:

Included: All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 7301 District Boulevard, Bakersfield, CA.

Excluded: All other employees, production employees, quality assurance employees, office and plant clerical employees, professional employees, persons employed by other employers, QA Receiving Coordinator, Microbiologist, Shipping Assistant, Input/Output Operator, Receiving Coordinator, Cycle Counter, Inventory Clerk, Accounting Specialist, Safety and Environment Technician H.R. Administrative Assistant, Maintenance Scheduler, guards and supervisors as defined in the Act, as amended.

(Board Ex. 2, at 2)

This is not the first time Local 501 has sought to represent employees at the BOC. In 1991 it filed a Petition jointly with Teamsters Local 87 in which it sought to represent all production and maintenance employees, described as follows:

All regular full-time and regular part-time production and maintenance employees employed by the employer at its Bakersfield, California facility.

¹ Supporting testimony from the hearing conducted on October 27 and 28, 2011 will be cited in this brief by reference to the page number of the transcript where that supporting testimony appears, as follows: "(page number)".

(Ex. 13b) It won a majority vote in that election. (See Ex. 14a-d (Stipulated Election Agreement); and Ex. 14e-f (Certification of Conduct of Election and Tally of Ballots)) However, the election was invalidated by the United States Court of Appeals for the Sixth Circuit, which concluded that in advance of the election the petitioning Unions improperly conferred benefits on the employees (in the form of free legal services relating to a lawsuit filed against Nestlé) that were sufficiently valuable to influence employees' votes. *Nestlé Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995). The Court concluded that the Unions' provision of free legal services smacked of purchasing votes because at campaign events staged shortly before the election, the Unions trumpeted a potential damages recovery in the amount of \$35,000—for each employee.² *Id.* The Court reversed the Board's finding that Nestlé committed an unfair labor practice by refusing to recognize the Unions after the election, and the case was remanded to Region 31 for further proceedings. Neither the Teamsters nor Local 501 pursued another election, until now.

2. **Description of the Employer's BOC Operations**

a. **The Products Made At The BOC**

At the BOC, Nestlé manufactures ice cream products mainly for sale to individual consumers. (12) These products fall into one of two types, or “segments”—“packaged” ice cream products such as 48-ounce containers sold in many grocery stores, and “snack” items

² The Teamsters had filed a lawsuit against Nestlé accusing it of organized criminal activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964. The federal district court granted Nestlé's motion to dismiss the complaint, but allowed the union to attempt to replead a proper claim. It filed an amended complaint that Nestlé again challenged with another motion to dismiss. This time, however, Nestlé also sought an award of sanctions against the union for filing a frivolous claim. The union agreed to dismissal of its amended complaint, with prejudice, in exchange for Nestlé withdrawing the request for sanctions. This procedural history is recounted in the opinion of the Sixth Circuit Court of Appeals. See 46 F.3d at 580.

generally consumed one at a time such as cones, bars and sandwiches. (12) Employer's Exhibit 1 depicts some of the "packaged" products made at the BOC on the top half of the exhibit, and some of the "snacks" products made at the BOC on the bottom half of the exhibit. (12-13)

b. The BOC Physical Site

The BOC is a large facility. The entire property site consists of about 47 acres. (14) The factory itself measures some 595,000 square feet, inclusive of the production area, office space, a Frozen Warehouse, a Dry Warehouse, a distribution center, and utilities. (14) Employer's Exhibit 2 is a blueprint-like site map of the BOC that includes various handwritten designations made by BOC Plant Manager, John Pritchard, during the course of his testimony as he described various portions of the facility and identified their locations on the map. (15-21)

Pritchard identified with the marking "A" on the site map the employee parking lot. (15; Emp. Ex. 2) The lot is located on the east side of the site, and used by the production and maintenance employees alike. (15) The "B" on the site map identifies the doorway used by all the factory employees to enter and exit the factory for work. (15; Emp. Ex. 2)

The designation "J" on the site map identifies the production area, and is highlighted on the original exhibit with a pink marker showing the boundaries of that area which encompasses the actual production lines. (18; Emp. Ex. 2) Products made on these production lines get moved by conveyors to the "palletizing" areas where they are organized, stacked and sealed onto pallets for shipping. The two palletizing areas are designated on the site map as "J-1" and "J-2." (18; Emp. Ex. 18) Pritchard also identified on the site map (with a "G") the entranceway that separates the production area from the employees' common areas (like locker rooms and the break room). (17)

c. Common Facilities Used By All Hourly Factory Employees

Both the hourly production employees and the hourly maintenance employees share common facilities. All factory employees use the employee parking lot (“A” on Emp. Ex. 2) and employee entrance (“B” on Emp. Ex. 2).³ All these hourly employees are entrusted with a security card that they use to swipe on an electronic reader to access the facility. (116-117) All record their work time for payroll purposes by use of the same time clocks located at “C” on Emp. Exhibit 2. (16; 44-45) All use the same (gender-specific) locker rooms to change into the required work clothes supplied by Nestlé. (“E” on Emp. Ex. 2; 16) All use one break room that contains vending machines and tables and seating to accommodate meals. (“D” on Emp. Ex. 2; 16, 120)

d. The Two Other Businesses On Site

The site houses two other Nestlé business organizations in addition to the ice cream products manufacturing business. (23) One is the “Regional Distribution Center,” or “RDC.” (23) It consists of the original frozen warehouse, designated with a “K” on the site map (Emp. Ex. 2), and a new frozen warehouse added in 2005, designated with an “L” on the site map. (19) The RDC is a warehouse and distribution function that gets products from the warehouse into Nestlé’s distribution system and ultimately to its customers. (23) The RDC operations and its personnel report into a business separate from the ice cream manufacturing business called “Nestlé Direct Store Delivery.” (23) As such, the profit and loss accounting for the RDC is rolled up into the business results and accounting of that distribution business, not Nestlé’s manufacturing business. (23) Yet, to be clear, a few of the 113 maintenance

³ The warehouse employees who work in the distribution center on the extreme west end of the site are permitted to use the west parking lot (shown as “M” on the site map), and the locker rooms and break room in the Distribution Center (shown as “N” on the site map). (20; Emp. Ex. 2)

employees in the petitioned-for unit work in the RDC, as do some of the hourly warehouse workers that are included in the total number of 578 that the Employer maintains should be added to the 113 maintenance employees in order to have an appropriate unit.

The second separate business on the Bakersfield site is the Research and Development Center. (24) This R&D Center operates in a distinct space that is connected to the ice cream factory building, and is staffed with scientists and support personnel who work to develop new ice cream products. (24) Its personnel do not work in the factory. (24) Like the RDC, this R&D Center reports into a different business organization than does the manufacturing operations. (24) However, unlike in the RDC, with very limited exceptions none of the 113 maintenance employees in the petitioned-for unit, and none of the 578 production employees the Employer seeks to have added for purposes of an appropriate unit, consistently work for or in the R&D Center. (83-84)

e. **Organization Of The Factory Operations And Management**

With minor exceptions, the BOC operations run 24 hours per day, utilizing three-shifts, seven days per week. (24-25)

The production operations are organized into three business units known as East Snacks, West Snacks, and “DAP” (which stands for Dibs and Packaged). (25) The East Business Unit consists of some 11 production lines (37) that produce mainly snack items like cones and sandwiches. (25) The West Business Unit consists of some eight production lines that manufacture other snack products such as bars with sticks and extruded sandwiches. (34; 25-26) The DAP Business Unit consists of some seven production lines that produce all the “packaged” products in 48-ounce containers, as well as the “Dibs” snack product and new shakes and smoothies products. (26; 34)

The management of the BOC is depicted on the organization chart in the record as Employer Exhibit 3 (with pages 3a-3l). The Leadership Team chart on Exhibit 3b shows the organization of the BOC. Eight functional areas and leaders report to the Plant Manager, John Pritchard. (Emp. Ex. 3b) These areas are Manufacturing, Technical Operations, Finance, Quality Systems, Environmental Health and Safety, Human Resources, Pre-Manufacturing, and “Nestlé Continuous Excellence” (known commonly in the facility as “NCE”).

The hourly “production” employees who would be included in the Unit as proposed by the Employer work within either the Manufacturing, Pre-Manufacturing or RDC segments of the business. (31-32; 20) The management structure in the Manufacturing function is depicted on Employer Exhibit 3d which shows a Manager for each of the production Business Units (West, East and DAP), and a 3rd shift manager, all four of whom oversee supervisors and report to Neha Shah, the Manufacturing Manager. (31) The management structure in the Pre-Manufacturing segment is depicted on Employer Exhibit 3j. Pre-Manufacturing is responsible for ordering materials and ingredients, receiving and storing those ingredients in the Dry Warehouse, planning production, and mixing the ingredients that get pumped to the production lines to produce the products. (28) The RDC is led by a Manager and other salaried personnel who report to her. (Emp. Ex. 3l)

There are some 578 hourly production employees in the Manufacturing, Pre-Manufacturing, and RDC groups. (31-32; 20; Board Ex. 2, Stipulation p.3, ¶ 9.b.) In Manufacturing, these production employees mainly hold one of two jobs—Ice Cream Maker I, or Ice Cream Maker II. (40) The Employer’s job description for the ICM I job is admitted as Employer Exhibit 5, and its job description for the ICM II job is admitted as Employer Exhibit 6. Each accurately describes the actual job of an ICM I or II. (250-251) An ICM I typically would

perform tasks such as packing final product, moving supplies to and around the production line, and operating the wrapper equipment. (110) The ICM II is more of a line operator that understands, operates and sometimes fixes the various pieces of equipment on the production line, such as a freezer, a filler, a cartoner and a wrapper. (110-111) Each “ICM I” and “ICM II” production employee is assigned to a particular production Business Unit (East, West or DAP), a particular production line within that Unit, and a particular shift. (40)

In Pre-Manufacturing, some of the hourly production workers hold a job called “Mix Maker.” (40-41)⁴ The job description for the Mix Maker job is admitted as Employer Exhibit 7. That description accurately describes the actual job of a Mix Maker. (254) The Mix Maker uses a recipe for a certain product to mix a batch of ingredients which then gets pumped to the production lines. (112)

The petitioned-for unit of hourly maintenance employees consists of some 113 persons. As a matter of organizational structure, these maintenance jobs are housed in the “Technical Operations” function, depicted on Employer Exhibit 3e. The Maintenance Manager, Roy Beyeler, manages six supervisors in Technical Operations. (Emp. Ex. 3e) Nearly all of the hourly maintenance employees at issue are supervised by these six supervisors within Beyeler’s management, but on a routine basis the maintenance mechanics may receive direction from a production supervisor. (54-55) Indeed, only one maintenance supervisor covers the entire second shift. (58) During some hours no maintenance supervisor is on site, and during those times a production supervisor acts as the shift manager over all hourly employees, including maintenance employees. (93)

⁴ The other hourly production employees in Pre-Manufacturing are warehouse-type employees who move materials as needed.

3. The Hourly Maintenance Employees

The hourly maintenance employees hold various types of jobs. The largest subgroup of these, approximately 56, are “line mechanics.” (200) Each of these line mechanics is assigned to one of the three production Business Units (East, West or DAP), and spends his work time within that Business Unit performing repairs and preventive maintenance on the production line equipment there. (41; 284) These line mechanics hold either a “Maintenance I” or “Maintenance II” job title, depending on their level of skills and experience. (141-142) The Employer’s job description for the Maintenance I job is admitted as Employer Exhibit 8.⁵ (258-259) Employer Exhibit 8 accurately describes the actual job of a maintenance employee at this level of Maintenance I. (258-259)

Just as the line mechanics work on and around the production lines in the production Business Units in the Manufacturing department, the maintenance employees known as “Process Technicians” support the mixing operations and equipment in the Pre-Manufacturing department. (201, 284) There are approximately 12 Process Technicians. (200)

Furthermore, some 16 or so maintenance employees hold positions as “Palletizing Mechanics.” (201) Just as the line mechanics work out on the production floor within an assigned Business Unit, the Palletizing Mechanics work within either of the two palletizing areas adjacent to the area of the production lines (designated as J-1 and J-2 on Emp. Ex. 2), performing repairs and preventive maintenance on the palletizing equipment. (285; 287-288)

Additionally, there are approximately 16 “Utilities” maintenance employees. (200) These persons support the factory’s boiler and ammonia system use for refrigeration. (46)

⁵ Human Resources Manager Norma McFaddin testified that in preparation for the hearing she did not locate a current job description for the Maintenance II position. (142)

Moreover, a handful of maintenance employees in the petitioned-for unit are so-called “shop” mechanics. (46) These work in either the machine shop, where they fabricate parts for the production or palletizing equipment, or in one of the smaller shops that support each of the three production Business Units and basically perform repairs on broken equipment used in the particular Business Unit. (46; 51-52)

The petitioned-for unit also includes four maintenance employees known as “Controls Technicians” (200) who are responsible for maintaining the computer software programs responsible for the programmable logic that runs equipment in the factory. (189-190)

Finally, there are two Maintenance-Facilities technicians (200) responsible for taking care of the building, alarm system, and grounds. (285) These two employees will do projects such as painting, plumbing, resurfacing the parking lot and the like. (285)

Nearly 50% of the 113 maintenance employees in the petitioned-for unit previously held production jobs in the BOC before transitioning into a maintenance job. (153-154) Some utilized Nestlé’s tuition reimbursement benefit to underwrite the cost of taking classes at one of the local colleges that made them better qualified for maintenance openings when those arose. (154) On the flip side, maintenance employees are also free to transition and move into production jobs, and this has happened as well. (193; 173)

4. **Overlap In Wage Rates For Production And Maintenance Employees**

While it is generally true that most maintenance employees are paid at a higher hourly wage than most production employees, the wages of the two groups overlap. (150-151) This overlapping wage structure is depicted on the Employer’s 2011 wage chart, admitted as Employer Exhibit 10. (151) HR Manager McFaddin explained in her testimony that the maintenance employees are paid at various wage “levels” ranging from Level 5 for entry-level mechanics, to Level 8 for the lead mechanics. (150; Emp. Ex. 10) The wage rate for ICM IIs

(and various other production employees like those in the palletizing and warehouse areas) (i.e., \$19.72/hr.) is the same as the wage rate for the entry level mechanic (Maintenance I). The Mix Maker production employees are paid at an even higher wage rate (up to \$22.30/hr.). (150; Emp. Ex. 10)

In addition to the overlap in the wage scales applicable to production and maintenance employees, the payroll process, procedures and timing are identical for these hourly employees. All are required to document their starting and ending work times by “punching” on either of the two time clocks located in the main employee entrance hallway (designated as “C” on Employer Exhibit 2). (16, 44) The Employer pays all these employees the same way – paychecks are mailed to each employee every other Friday. (180)

Furthermore, the Employer evaluates each hourly employee’s job performance on the same, annual basis. (174-175)

5. **Employee Benefits Common To Production And Maintenance Employees**

Nestlé provides the hourly employees at the BOC a wide range of employee benefits. All of the following benefits are available equally to the production and maintenance employees alike, with identical eligibility requirements:

- Medical insurance benefits
- Dental insurance benefits
- Vision insurance benefits
- Flexible spending account
- Pension
- 401(k) retirement savings plan
- Education (tuition reimbursement) benefits
- Life Insurance

- Long-term disability pay
- Short-term disability pay
- Paid vacation
- Shift-differential pay
- Holiday pay⁶
- Approved Leaves of Absences
- Jury duty pay
- Funeral leave pay
- Perfect attendance bonus
- Baby Nutrition coupons
- Paid time off for child bonding
- Various pay premiums for things like report in pay and “cold” pay for work in the frozen warehouse

(148-149, 179-181; Emp. Ex. 9 (Employee Handbook))

6. **Key Employee Policies Common To Production And Maintenance Employees**

The Employer maintains a variety of personnel policies that apply equally to the hourly production and maintenance employees. Many of these policies are published in the Employer’s Employee Handbook, a copy of which is admitted as Employer Exhibit 9. (144)

These common policies include:

- An Equal Employment Opportunity policy
- An Anti-harassment policy
- A Controlled Substance (*i.e.*, drug and alcohol) policy

⁶ Because maintenance employees typically work a 10-hour shift, their holiday pay benefit is greater than that given to production employees, whose holiday pay benefit is calculated based on their typical 8-hour shift. (149)

- An Attendance policy
- A Corrective Action (disciplinary) policy
- Various Leaves of Absence policies
- Various payroll practices and policies
- A “Use of Company Property” policy

(Emp. Ex. 9) These policies apply equally to hourly production and maintenance employees.

(146-148)⁷

Another fundamental requirement of the Employer that applies to hourly maintenance and production employees alike is the obligation to work overtime hours when required by the Employer. Both groups of employees are required to work overtime hours (186), and employees in both groups do so on a regular basis. (182-183) Both groups of employees are subject to being called in to work hours other than their regularly scheduled hours, and this happens to both maintenance and production employees alike. (237-238)

Similarly, both maintenance and certain categories or types of production employees are scheduled and required to work during the BOC’s annual “shutdown” period. (294-295) Plus, the production employees who are not scheduled are permitted to (and some do) sign up to work, and those will work either with maintenance mechanics rebuilding and cleaning equipment, or with Facilities maintenance employees doing brick work, floor work or painting. (216)

⁷ The only policy that has some different application to maintenance employees is the hours of work policy (maintenance employees typically work 10 hours per day, 4 days per week compared to production employees who typically work 8 hours per day, 5 days per week). This would impact the number of paid “sick” leave hours and when daily overtime pay kicks in. (144-146)

Additionally, the Employer requires all the hourly production and maintenance employees to wear uniforms at work and to change into and out of these uniforms at the BOC. (42-43) Both groups of employees must wear the Employer-supplied uniform pants and shirt. These are the same, except that the color of the shirts worn by maintenance mechanics is a darker shade of blue than the shirts worn by production employees. (43) All production and maintenance employees alike are required to wear the following items while in the factory: safety shoes, hearing protection, hair net, beard guard, hard hat, and safety glasses. (17; 42-43)

7. **Maintenance And Production Employees Constantly Work Together**

The un rebutted and unquestioned evidence in the record is that the entire hourly workforce at the BOC works on a “team philosophy where the priority is . . . to make a quality product, safe, and get that product to our consumers” (299) Therefore, as a general proposition, the reality at the BOC is that hourly employees do not work exclusively in some tightly enclosed silo of narrowly-defined job duties that separate each from the other. Rather, each hourly employee is to do “whatever it takes to [make a quality product, safely]; everybody pitches in and helps.” (299) In fact, Maintenance Manager Beyeler testified without contradiction that he encourages the maintenance employees to perform work tasks outside of their typical maintenance job duties in order to pitch in to help the production team. (299) Beyeler cited as examples different instances in which maintenance employees pitch in to assist with repacking, or equipment recalibrations, or even just dumping a trash can. (211-212; 299)

But beyond this general team philosophy in which maintenance employees pitch in to help the production employees with tasks that are not traditional maintenance duties, there are a wide variety of specific ways in which the maintenance employees work together and in direct coordination with production employees at the BOC on a consistent and on-going basis.

a. **Line Mechanics Work With And Around The Production Employees (ICMs) Out On The Production Floor.**

There are numerous ways in which the 56 line mechanics work hand in hand with the ICMs. Each line mechanic is assigned to one of the three production Business Units, and spends the vast majority of his work time in and among the production lines and ICMs in that Business Unit. (41) The mechanics will interact and coordinate with the production employees in their assigned Business Unit throughout each work day, in a variety of circumstances, and all are directed to work together as a team. (209) Following are examples of such circumstances.

First, the line mechanics and ICMs work together on diagnosing and repairing the production equipment when problems arise. As the mechanics go about working on the preventive maintenance items on the lines in their Unit, problems inevitably arise with a jam, breakdown or other failure of the equipment. Typical kinds of breakdowns include temperature fluctuations with the freezer, pulsating ice cream flow, wrapper problems that prevent proper sealing of the wrap, and jams in the cartoner equipment. (222-223) An ICM, or Production Supervisor, will call for one of the mechanics assigned to that Unit to come to the problem and help diagnose and repair it. (204-205) As part of the mechanic's work repairing a breakdown, the Employer expects the mechanic to be communicating with and educating the ICM about the equipment, the problem and the fix. (57)

As mechanics complete repairs, the ICM stays close, assisting as needed, observing and learning, and ultimately documenting. (223) With input from the mechanic that worked on the repair, the ICM II will use the computer located near the line at issue to input data in a software system. This is done to document some details about the nature of the problem, the fix and any steps taken to prevent the problem in the future. (224) Employer Exhibit 16 is a printout of just a few pages from this database. (231) This Exhibit relates to certain production

lines identified at the top of the report, and covers the dates October 3, 2011 to October 25, 2011. (231; Emp. Ex. 16) The “Comment” column on the far right-hand side of this report indicates for many of the documented problems what the employees did to fix it, and sometimes who did that. Sometimes the record documents that a maintenance employee fixed the problem (e.g., “maint. adj. cartoner”), but other times it documents a stoppage problem that the production employee solved. (227)⁸

Second, in addition to work on specific breakdowns, the production employees and mechanics coordinate and share overlapping duties with respect to the fine-tuning of the production equipment that is used during a shift. (208) This includes tasks like ensuring that a piece of equipment is properly oriented, or “center-lined.” (208) Sometimes the ICMs can and do make the equipment adjustments necessary to “center-line” it, but other times they call on their line mechanic to do it. (208) The same is true with respect to calibrating the metal detector equipment and check weighers. (209) Sometimes the ICM can accomplish those mechanical adjustments, but other times they call and rely on their Business Unit’s line mechanics. (209)

Third, ICMs and line mechanics also work together, directly and actively, during line “changeovers.” (219) A “changeover” occurs when a different product is about to be made on a particular line and the nature or size of that product requires resizing and recalibrating aspects of the production line, as well as other changes. (219) Some lines have a changeover weekly, while other lines need one less frequently. (219) During a changeover, both production

⁸ The Employer provides to production employees a set of basic tools for their use in making some of these more routine repairs. (99-100; 214) Maintenance employees use their own tools, and Nestlé reimburses each up to a certain dollar amount for costs of tools. (149) The Maintenance Manager, who himself once worked as a maintenance mechanic at the BOC, testified that on average the maintenance employees’ tools cost between \$300 and \$500. (274)

and maintenance employees work together on the same line, implementing the needed changes, and communicating throughout the process to coordinate their activities. (220)

Fourth, the mechanics and ICMs work together closely during start-ups.

Although the line mechanics interact in their work duties with production employees in their respective Business Units throughout the work day, their interaction and coordination is particularly intense during the process of starting up the lines. (203) Beyeler testified that during start-up the production supervisors and ICMs alike will actively coordinate with the line mechanics as they identify any mechanical glitches in the start-up process. (203)

The whole idea of start-ups is that Production should not have to page Main[tenance], because Maintenance should already be out there on the line. . . . [T]he Maintenance Mechanics and the Production people pretty much have to be dialed in with each other about what is going on, if there are any issues.

(207)⁹ This is especially true during the so-called “pre-flight,” which is a dry-run for the line during the start-up process. (207) The mechanic and the ICMs overseeing a particular line’s start-up and pre-flight together inspect things like the seals formed by the wrapper and the gluing of the cartoner to ensure that all is working properly, and to tweak or repair anything that is not. (207-208)

Fifth, just as mechanics and ICMs work hand in hand during the start-up of a line, they similarly work together during a tear down. On third shift, production workers tear apart the equipment every night for thorough cleaning and sanitizing. (207) Maintenance is there to support the tear down and re-assembly process, particularly when the ICMs spot issues with worn or damaged parts. (207)

⁹ All of the testimony of the three Employer witnesses was unrebutted and uncontradicted as the Union did not present any witness testimony or exhibit.

Sixth, the line mechanics work directly with the ICMs on preventive maintenance (“PM”) days. (238) Each production line has a PM day, once per week. During the PM day, the ICM IIs work side-by-side with the mechanics to learn more about the equipment in a hands-on way. (239) In this regard, the ICM follows the mechanic, observes what the mechanic does and how he does it to perform the various preventive maintenance tasks, asks questions, and learns. (240) The Employer essentially doubles up on the staffing, and incurs the extra costs to do so, in order to build capability in its workforce generally, and specifically to make the ICMs’ skills more like a mechanic’s. (63-64)

It is important to note that in addition to providing the on-the-job learning opportunities, Nestlé invests in training that enhances the ICMs’ skills in performing tasks historically defined as maintenance tasks. The Maintenance Department Training Coordinator, Fred Cruz, extends to ICMs many of the mechanics’ training sessions. (221) This includes training on video jet equipment, metal detector check wear, and ice cream freezers. (221-222) By including production employees in this maintenance training, Nestlé helps broaden the overlap of skills between production and maintenance employees and this creates even more opportunity for sharing of a wider range of task and work activities perhaps historically viewed a “maintenance” duties.

The job descriptions created, maintained and used by the Employer related to the production jobs (ICM I, ICM II and Mix Maker) reflect the reality that these jobs require the incumbent to share responsibility for certain types of typical “maintenance” tasks and to work with the maintenance employees in a variety of ways. Beyeler identified numerous items listed on the ICM II job description (admitted as Employer Exhibit 6) that reflect duties that require the ICM II to work with maintenance employees. (241-250) Among other examples, Beyeler

explained that item 2.4.1.4 reflects that production and maintenance employees work together to perform a root cause analysis of an equipment breakdown. (243-244) This happens “every shift.” (244) Also, item 2.6 on the job description confirms that the production employee in the ICM II job is required to perform basic maintenance on the equipment. (249) Typically, it is the mechanics that teach the ICM IIs how to do this basic maintenance. (249) Beyeler similarly identified various of the duties specified on the ICM I job description (Emp. Ex. 5) that also require interaction between the production employee and the maintenance mechanics. (251-254) One example is item 2.9, which requires ICM Is to “Actively participate in NCE initiatives.” (251; Emp. Ex. 5) (NCE is discussed in section 8 below.)

The job description for the “Maintenance I” level job is admitted in the record as Employer Exhibit 8. (142) Although it spells out only six items as “Duties and Responsibilities,” one of these very specifically requires the mechanic to “assist manufacturing personnel on process related problems.” (Emp. Ex. 8, at 1) As discussed, line mechanics fulfill this duty during start-up, fine-tuning, addressing malfunctions, tear-down, changeovers, and more.

b. Process Technicians Work With The Mix Makers.

Just as in Manufacturing where the ICMs work hand in hand with the line mechanics assigned to their respective Business Units, in Pre-manufacturing the Mix Makers work together with the 12 maintenance employees (called “Process Technicians”) who are assigned to the mixing area and its equipment. (257; 201) The job description for the Mix Maker is admitted in the record as Employer Exhibit 7. (141) Beyeler identified in his testimony that various of the job duties of the Mix Maker require that production employee to work with a maintenance employee. (255-258) For example, the Mix Maker must coordinate with the maintenance employees to perform the duties of “valve maintenance, pump

maintenance, pump rebuilds.” (255; Emp. Ex. 7, at 2) Beyeler explained that while the Mix Maker might do that maintenance work, he will rely on a maintenance employee to inspect and approve the work. (255) Additionally, the Mix Maker must “Troubleshoot mix batching, valves, pumps, and all out of spec mix.” (256; Emp. Ex. 7, at 2) This too requires the Mix Maker to coordinate with the maintenance employees to share some of these tasks and/or to inspect the Mix Maker’s maintenance-type work. (256)

One of the job duties listed on the job description specifically requires close coordination between the Mix Maker and the Process Technicians. It reads: “Work closely with the State Inspector and Process Tech. to complete monthly audits.” (Emp. Ex. 7, at 2; 257) This coordinated work effort requires about four to eight hours, each month. (257)

In sum, the maintenance employees in the Pre-manufacturing area have the responsibility to support the mix making process and to get the mix pumped to the production lines. (284) In that regard, they support and work with the Mix Makers in a way similar to how the line mechanics support and work with the ICMs in the Manufacturing area.

c. Palletizing Mechanics Directly Support The Production Employees.

The approximately 16 palletizing mechanics work in the palletizing areas that are a part of the production area and adjacent to the production lines. (285) These are identified as “J-1” and “J-2” on the site map. (Emp. Ex. 2; 18) Palletizing is simply the last step in the production process where the products are arranged on pallets in preparation for shipping. (18) The J-1 palletizing area supports the East Snacks and West Snacks production, and the J-2 area support the DAP production. (38-39) These mechanics work in these palletizing areas, keeping the conveyors and palletizing equipment running. (285)

d. The Other Maintenance Employees Have Specific Roles.

The line mechanics, process technicians and palletizing mechanics constitute nearly 75% of the maintenance group. The others have more unique and specialized roles that require them to support the activities of the production employees, but do not require them to engage and interact with production employees as frequently as do the majority of the maintenance employees. This more specialized group includes the Utilities employees who maintain the boilers and ammonia system in the plant, the couple of Facilities employees who maintain the building and grounds, the Controls Technicians who specialize in the programmable computer logic (programs) that helps run the production and other equipment in the plant, and the shop mechanics who repair and fabricate parts.

8. **Nestlé Continuous Excellence (“NCE”)—An Evolving Shift Of Maintenance Tasks To Production Employees**

Nestlé Continuous Excellence (“NCE”) is a worldwide company program that focuses on driving continuous improvement in the efficiency of the operational side of Nestlé’s business. (60) When BOC Plant Manager John Pritchard assumed his role some three and one-half years ago, NCE initiatives were already in place at the BOC. (60) NCE is such a major initiative at the BOC that it is defined as distinct function of the business, lead by a Manager (John Durre) dedicated to implementing NCE efforts. (Emp. Ex. 3b)

In late 2010, Pritchard led plant-wide “State of the Business” meetings in which he explained to hourly employees how NCE initiatives—like “Total Performance Management” (“TPM”)—would impact their daily work activities. (61) A copy of the PowerPoint presentation Pritchard showed to employees as part of his presentation is admitted as Employer Exhibit 4.

Pritchard explained in his testimony at the hearing that the graphics found on the slide located on the top half of the third-to-last page of Exhibit 4 depict how TPM would involve

a process of “redefining tasks and responsibilities.” (Emp. Ex. 4, third-to-last page; 62-64) With respect to production employees (i.e., “Operators”), TPM seeks to change the allocation of their time from time spent predominantly on “Operation” tasks such as running equipment, to a majority of their time instead spent on “Autonomous Maintenance” tasks. (*Id.*) Basically, Pritchard explained, this requires the production employees to take on more and more of the tasks historically performed by maintenance mechanics, such as inspecting, lubricating and cleaning machine parts. (64) As for the mechanics, the TPM graphic depicts Nestlé’s intent to have mechanics spend less of their time in the future on “Break down maintenance” tasks—those being shifted more and more to production employees—but more of their time than before on “Planned Maintenance” and “Training”—namely, training of the production employees on the less complicated maintenance tasks. (Emp. Ex. 4, third-to-last page)

This ongoing process in which production employees learn and assume more and more of the autonomous maintenance tasks historically performed by maintenance employees has already been initiated at the BOC. Production Line 16 has been designated as the pilot “Autonomous Maintenance” Line on which the production employees are being trained by mechanics to do the simple preventive maintenance and inspecting, lubricating and cleaning tasks historically performed by mechanics. (64-65) The pilot line was initially started two years ago but was delayed due to employee turnover. (67-68) But now that it has been reinitiated, Pritchard anticipates the pilot project to be complete by 2012. (67) At that point, the Employer intends to implement the autonomous maintenance model across the rest of the production lines. (67) In anticipation of ultimately converting the other lines to the “autonomous maintenance” model, the Employer required mechanics and production operators to work together extensively

to create a comprehensive set of “Standard Operation Procedures” defining all the operating procedures for some 27 lines of operation at the BOC. (65)

9. **History Of Defining The Appropriate Bargaining Unit At The BOC**

In several different circumstances, arising over the course of the last 23 years, the Board, the Employer and three different unions have defined the appropriate unit at this facility at issue as including both production and maintenance employees, together.

First, in 1988 Teamsters Local 87 sought to represent a unit of the Employer’s production and maintenance employees. The Employer recognized the Teamsters and entered into a labor contract that is admitted as Employer Exhibit 11. It confirms in its Article 1.1 that:

The Company recognizes the Union as the sole bargaining representative for all production, maintenance and materials team members at the plant but specifically excluding all office and plant clerical, security, team coordinators and other Supervisory Personnel as defined in the Act, resource specialists and information automation services.

(Emp. Ex. 11, Art. 1.1 at 1) Local 501 filed an unfair labor practice charge and “[t]o settle the charge, the Teamsters agreed to cease representing the employees.” 46 F.3d at 586. The “Board-approved settlement agreement ordered the Teamsters to stop representing the employees,” and to refund the collected dues to the employees. *Id.*¹⁰ But at no point throughout that process did the Teamsters, Local 501, the Employer or Board apparently doubt the reality that the appropriate unit consisted of both production and maintenance employees, together.

¹⁰ We note that it was the union, not the Employer, that was required to repay the dues because at the hearing in this matter on October 27, 2011, the Union’s attorney seemed to claim that the Employer was required to repay dues. The Union offered no support whatsoever for that claim, and it is contradicted by the federal appellate court’s opinion in the record as Emp. Ex. 15. Plus, when the Union’s counsel twice attempted to get an Employer witness to agree with his claim, the witness did not. (163-164) There is simply no evidence in the record to support the Union’s claim that the Employer was required by the Board or anyone to repay dues.

The same reality emerged in the next round of union involvement at the BOC in 1991 when Local 501 and the Teamsters jointly petitioned to represent a unit of production and maintenance employees, together. (Emp. Ex. 13b) As discussed above in Section 1, the unions won the election but the election was ultimately invalidated by the United States Court of Appeals for the Sixth Circuit due to the unions' wrongdoing. But with respect to the scope-of-the-unit issues, there is no indication in the record or anywhere else that Nestlé knows of that at any time from the filing of the joint petition in 1991, to the publication of the opinion of the Sixth Circuit in 1995, that Local 501, the Teamsters, the Employer, Region 31, the Board or even the Sixth Circuit Court of Appeals raised any doubts or concerns about the appropriate unit. All accepted without challenge that in this facility the appropriate unit is production and maintenance employees, together.

Yet a third labor union formed and acted on the same conclusion. In 1999, the United Food and Commercial Workers filed a petition seeking to represent a unit of production and maintenance workers, but the union lost the election. (161-62) As in 1988 and 1991, however, again in 1999 the union, the Employer, and the Board alike all realized that the appropriate unit in this plant consists of both production and maintenance employees.

10. **Procedural History**

On October 13, 2011, the Union filed a petition to unionize a portion of the Bakersfield workforce. Specifically, the Union sought to represent the maintenance employees and to exclude the production employees.

Nestlé objected to this attempted segregation of its workforce on the grounds that the production and maintenance employees shared a strong community of interest. At the representation hearing conducted on October 27 and 28, Nestlé introduced three witnesses who testified to the community of interest shared by the employees. Nestlé filed its post-hearing brief

on November 10, providing further support for its arguments that (1) the production and maintenance employees shared a strong community of interest such that a separate bargaining unit was not warranted; (2) the overwhelming-community-of-interest test adopted in *Specialty Healthcare* is invalid; and (3) the employees shared an overwhelming community of interest.

On November 23, the Regional Director issued his Decision and Direction of Election. He rejected Nestlé’s arguments, determined that the rule adopted in *Specialty Healthcare* applied, and ruled that the petitioned-for unit was therefore appropriate. The Regional Office has set January 4, 2012 as the election date for the maintenance employees.

ISSUES FOR REVIEW

Under the Board’s Rules, it shall grant requests for review of a regional director’s decision “where compelling reasons exist therefor.” 29 C.F.R. § 102.67(c). In this case, Nestlé respectfully requests that the Board grant review and reverse the Regional Director’s because:

1. The Regional Director’s Decision departs from Board precedent by applying *Specialty Healthcare* despite the presence of prior organizing and election activity at the Bakersfield plant.
2. Even if the Regional Director did not err by applying *Specialty Healthcare*, the Board should reevaluate its decision in that case.
3. Even if the Board reaffirms the vitality of the *Specialty Healthcare* rule, the Regional Director’s factual finding that there was no overwhelming community of interest was clearly erroneous.

ARGUMENT

1. THE REGIONAL DIRECTOR ERRED BY APPLYING THE “OVERWHELMING-COMMUNITY-OF-INTEREST” TEST TO THIS CASE DESPITE PRIOR ORGANIZING ACTIVITY AT THE BAKERSFIELD PLANT.

The Board has created a sizable body of law on the appropriateness of maintenance-only units in manufacturing plants. Under these precedents, the Board compares production and maintenance workers across a number of factors to determine whether the

maintenance workers are sufficiently distinct from the production workers to justify a separate bargaining unit. Despite recent changes in the law announced in *Specialty Healthcare* that could potentially apply to the manufacturing industry, the traditional standard still controls here in light of prior organizing and election activity at the Bakersfield plant. Under this longstanding standard, the maintenance employees do not maintain a sufficiently distinct community of interest to warrant a separate bargaining unit. By applying the “overwhelming-community-of-interest” test created in *Specialty Healthcare*, the Regional Director committed reversible error. Under the appropriate standard, the separate maintenance-only unit is inappropriate.

A. The Decision In *Specialty Healthcare*

The Specialty Healthcare and Rehabilitation Center of Mobile is a nursing home in Alabama. In 2009, a union filed a petition to represent the certified nursing assistants (CNAs) in the facility. The employer challenged the petition on the grounds that the smallest appropriate unit included both the CNAs and the remainder of the nonsupervisory, nonprofessional staff at the facility. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 2.

The regional director granted the union’s petition. In doing so, the director failed to address or apply the rule adopted in *Park Manor Care Center*, 305 NLRB 872 (1991), which at the time governed bargaining units in nonacute healthcare facilities. Because of this, the employer requested that the Board review the decision. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 1.

The Board granted the request but then proceeded to take a number of highly unusual steps. It issued a notice and invitation to file briefs to both the parties and the general public. It asked the parties to address eight questions, almost all of which went beyond the facts of the case. The questions covered interested parties’ collective experience with *Park Manor*, as well as whether the Board should find certain units appropriate outside the health care context. It

did all this despite the fact that the request for review was a simple, straightforward question. The Board's actions turned a simple case on the application of a longstanding precedent to particular facts into a vehicle for reshaping the law of appropriate bargaining units across all industries. *Id.*

The remainder of the story is well known. The Board overturned *Park Manor* as obsolete, determined that any proposed units with a community of interest are appropriate, and required any party challenging the appropriateness of a unit on these grounds to show that other employees share an "overwhelming community of interest" with the proposed unit. *Id.* at 4-13. On the latter point, the Board went out of its way to indicate that it was simply clarifying the law, rather than overruling prior decisions. *Id.* at 12.

B. The Regional Director Erred By Applying *Specialty Healthcare* To A Unit With Prior History

The Regional Director determined that the "overwhelming-community-of-interest" test was the correct standard for determining whether this particular maintenance-only unit was appropriate. After so concluding, the court determined that the production and maintenance workers do not share the requisite community of interest. (Op. at 14, 19.) But the Regional Director's decision contravenes the express language of *Specialty Healthcare* regarding its application in circumstances with prior bargaining history.

Specialty Healthcare explicitly disavowed application of the "overwhelming-community-of-interest" test in cases where prior bargaining history existed in the plant. There was no bargaining history in *Specialty Healthcare*, and the Board's opinion should be read to apply only in the absence of a bargaining history. See 357 NLRB No. 83, slip op. at 1 (stating one of its issues for review as "Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is

presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter.”); *id.* at 9 n.19 (“It is highly significant that, *except in situations where there is prior bargaining history*, the community-of-interest test focuses almost exclusively on how the employer has chosen to structure its workplace.”) (emphasis added and omitted). The Regional Director concluded that the prior history in this case is irrelevant because “[b]argaining history determined by the parties and not by the Board is not binding.” But the opinion considered only the 1988 bargaining and not the subsequent elections in 1991 and 1999. The omission of the 1991 history is especially galling, given that the election spawned four years of Board and court proceedings where no party ever questioned the appropriateness of the production-and-maintenance unit at issue. By ignoring this history, and instead applying the *Specialty Healthcare* test, the Regional Director committed prejudicial error.

C. The Regional Director Should Have Analyzed This Case Under The Traditional Community-Of-Interest Test. Under That Test, A Maintenance-Only Unit Is Inappropriate.

Because *Specialty Healthcare* does not apply to this case, the Regional Director should have reviewed the case under the traditional community-of-interest standard that the Board has used for more than fifty years. During that time, the Board has developed standards for determining when a maintenance-only bargaining unit is appropriate where another party (usually the employer or a rival union) contends that a production-and-maintenance unit is the smallest appropriate unit. Beginning with *American Cyanamid Co.*, 131 NLRB 909 (1961), the Board has compared and contrasted the maintenance employees in the proposed unit with the production employees claimed to be necessary members of the unit to determine whether the maintenance employees have a sufficiently distinct “community of interest” justifying a bargaining unit separate from the production employees. *Id.* at 910; *see also Buckhorn, Inc.*, 343 NLRB 201, 202 (2004) (“It is the Board’s longstanding policy, as set forth in *American*

Cyanamid . . . , to find petitioned-for separate maintenance department units appropriate where the facts of the case demonstrate the absence of a more comprehensive bargaining history and the petitioned-for maintenance employees have a community of interest separate and distinct from other employees.”). Units containing production and maintenance workers are presumptively appropriate. *Alpha Assocs.*, 344 NLRB 782, 784 (2005).

The Board has recognized that determinations under this standard are fact-intensive and determined on a case-by-case basis. Among the factors considered are “mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.” *Id.* No single factor is dispositive, and the weight to be given each factor “will vary from industry to industry and from plant to plant.” *Am. Cyanamid*, 131 NLRB at 911. If, after considering all these factors (and any other factors relevant to the particular workplace), the maintenance employees are not “a distinct and homogeneous group of employees with interests separate and apart from other employees,” *TDK Ferrites Corp.*, 342 NLRB 1006, 1008 (2004), the Board will not certify a maintenance-only unit.

Major distinctions between two groups of employees will justify multiple bargaining units, but modest differences between production and maintenance employees do not *ipso facto* warrant separate units. Instead, the Board must weigh the differences in the groups against the similarities. For example, the Board has held that separate supervision for maintenance employees and some variations in conditions of employment were “more than offset” by the similarities between the two groups. *Chromalloy Photographic Indus.*, 234 NLRB 1046, 1047 (1978). Likewise, the Board has held that differences in wages (\$4.25 per hour for maintenance employees vs. \$3.25-\$3.50 per hour for production workers) and uniform colors

create a “nominal community of interest” for maintenance employees that can be outweighed by the broader community of interest shared by all production and maintenance workers at the plant. *F&M Schaefer Brewing Co.*, 198 NLRB 323, 324-25 (1972).

In this case, whether the Board determines this issue on its own or remands to the Regional Director for further proceedings, the ultimate result should be the same: the factors used in the community-of-interest test point decisively to requiring a combined production-and-maintenance unit. Half of the current maintenance staff began as production employees. Most of the maintenance employees are an integrated part of the production process and spend a majority of their time working with and around production employees. The wage and skill differences between the employees are modest, such that there is significant overlap. The employees are all subject to the same terms and conditions of employment, receive the same benefits, and must follow the same rules in the same employee handbook. Whatever differences exist between the two groups, they are narrow and are outweighed by the considerable similarities among the production and maintenance employees in the BOC.

Large numbers of production employees have transferred into the maintenance department. Among the current maintenance staff, nearly fifty percent had previously been production employees. As more production employees join the maintenance ranks, it gives lie to the notion that maintenance employees possess such special and unique skills that would be compromised by forcing them to bargain with production employees. High levels of interchange between the groups suggest that whatever skills are possessed by the maintenance employees are gained through experience and on-the-job training, such that they are not particularly distinguishable from production employees. In the past, even lower levels of interchange than those seen in Bakersfield have been considered in denying a petitioned-for maintenance-only

unit. *See Chromalloy*, 234 NLRB at 1047 (thirty percent transfer rate); *Greater Bakersfield Mem'l Hosp.*, 226 NLRB 971, 974 (1976) (“[I]t is noteworthy that 5 of the 13 employees [38%] transferred into the [maintenance] department without any specialized trade or craft experience.”); *cf. Capri-Sun, Inc.*, 330 NLRB 1124, 1125-26 (2000) (finding separate maintenance unit appropriate in part because employer failed to demonstrate that prior transfers involved current employees); *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1020 (1994) (finding separate maintenance unit appropriate in part because employer set up apprenticeship program that served as “strong barrier” to production employees who sought to transfer into maintenance positions)

In addition, the production and maintenance employees work side-by-side on a daily—and in some cases, hourly—basis. The evidence in the record on the integration of the workplace consistently confirms that (1) the line mechanics work closely with the ICMs, (2) the process technicians work closely with the Mix Makers, and (3) the palletizers immediately take control of items at the back end of the production process. The Union has provided no evidence to counter the compelling accounts of a functionally integrated group of employees working side by side in the production process. Unlike *Capri Sun*, which had entire departments with no maintenance employees assigned to them, every Business Unit in the BOC was staffed by a dedicated team of maintenance employees. *See Capri-Sun*, 330 NLRB at 1124 (“No maintenance employees are assigned to Mr. Freeze Rather, maintenance employees are sent to Mr. Freeze from other departments as problems arise.”). Where “the maintenance employees work side-by-side with the production employees” and “maintenance employees’ duties are an integral part of the production process,” *TDK Ferrites*, 342 NLRB at 1008, it makes little sense to split the employees into multiple bargaining units. *See also Peterson/Puritan, Inc.*, 240 NLRB

1051, 1051 (1979) (“[A]lthough the mechanics perform essentially mechanical maintenance rather than production work, they maintain the production lines, and thus their duties are an integral part of the production process.”).

Further, not only is the work of the production and maintenance employees highly integrated, Nestlé is continually striving to integrate the workplace even further. Programs such as the tuition reimbursement program and the NCE program illustrate Nestlé’s commitment to (1) integrating the production process even further by allowing production employees to take on even more traditional maintenance tasks; and (2) increasing interchange among production and maintenance employees such that there is little gap between the two groups. As the Board has frequently noted, “the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 9 n.19. And Nestlé has chosen to encourage significant integration among the production and maintenance employees within the facility. The Board should respect that decision and allow Nestlé to continue its program of integrating the entire production and maintenance process.

Moreover, the terms, conditions, and benefits associated with employment at the BOC are almost identical for the production and maintenance employees. Aside from the technical differences that arise because of different shift lengths, the conditions are virtually identical. The employees receive identical benefits. They are subject to the same payroll and personnel policies. They are subject to mandatory overtime rules. They park in the same parking lot, enter through the same front door using the same type of security cards, punch the same time clock, eat lunch in the same lunchroom, take breaks in the same break room, and dress in the same changing rooms using the same employer-provided uniforms and protective

equipment. Each of these conditions of employment counsels against providing a separate bargaining unit for the maintenance employees. *See, e.g., Buckhorn*, 343 NLRB at 204 (“[I]n all significant respects, all maintenance employees and production employees share identical terms and conditions of employment, including work rules and policies, work schedules and vacations, lunch facilities, and fringe benefits.”).

Further, production supervisors routinely direct maintenance employees to do work on the production lines. Though maintenance employees have their own supervisors, the day-to-day reality of the production process of the BOC involves production supervisors and employees calling maintenance workers to inform them of serious breakdowns or jams on the lines and expecting quick turnarounds in order to resume production operations.¹¹ *See id.* at 203 (“Production employees seek out the assistance of maintenance employees when a mechanical problem arises.”). During the hours when no maintenance supervisor is present, a production supervisor is in charge of the maintenance workers.

On the facts of this case, no weight should be accorded to the fact that the maintenance employees supply their own tools. In past cases where the Board found tool ownership relevant, the values at issue were significantly higher. For example, in *Capri Sun*, two maintenance employees testified that their tools costs between \$9,000 and \$10,000. 330

¹¹ The Regional Director’s opinion stated that “whenever a production supervisor asks a maintenance mechanic to perform a task, the maintenance mechanic must first obtain permission from a maintenance supervisor, in part so the maintenance supervisor can prioritize the work of a maintenance mechanic.” (Op. at 5.) This is much too broad. The record contains several references indicating that production supervisors made specific requests to maintenance employees “almost every day” without direct input from maintenance supervisors. (55) While there was testimony that maintenance employees should confer with their supervisors before ignoring specific directives, nothing in the record suggests that maintenance employees needed some sort of permission to assist production supervisors.

NLRB at 1125.¹² The value of the tools is highly relevant because “[t]he higher skill level of the maintenance employees is reflected in the cost of [their] tools.” *Id.* Here, the lack of skill differential between the production and maintenance employees is reflected by the low cost of the maintenance employees’ tools. Uncontradicted evidence in the record indicates that the average employee spent \$300 to \$500 on tools.¹³ The purchase and possession of such relatively insignificant tools is not a factor warranting separate representation, especially where, as here, the Employer provides a cash tool allowance to defray those costs.

Likewise, the modest differences in wages cannot warrant a separate bargaining unit. This case is similar to *Buckhorn*, where the Board held that modest wage and skill differentials were insufficient to justify a maintenance-only unit:

Although certain maintenance employees are paid at a higher level than production employees, largely because of their skill level, there is some overlap in wages, just as there is overlap among employees in the exercise of their job skills. While these two factors might appear to favor separate units, we find that the modest discrepancy in wage rates and skill levels is relatively insignificant and is outweighed by all the other factors that clearly demonstrate the broad community of interest that the maintenance employees share with production employees.

¹² Adjusted for inflation, those tools would be worth \$11,858 to \$13,176 in 2011, according to the Consumer Price Index Inflation Calculator provided by the Bureau of Labor Statistics, *available at* http://www.bls.gov/data/inflation_calculator.htm (last visited November 8, 2011).

¹³ The Regional Director’s determination that “\$5,000 was . . . a fair estimate of the value of the maintenance employees’ tools,” (op. at 19 n.22) is clearly erroneous. The only evidence on the value of the tools came from maintenance manager Roy Beyeler. He testified that \$300 to \$500 was the average value spent on tools. (274) The only evidence relating to \$5,000 worth of tools was in response to a question on “the highest dollar value of tools that *any maintenance employee in your department* provides for work.” (280) In taking the value of the tools of a single outlier among 112 maintenance employees and turning it into the value for an average employee, the Regional Director clearly erred.

343 NLRB at 204. The overlap in wages discussed above sets this case apart from *Capri Sun*, where the maintenance workers were consistently paid more than the production workers. *Capri Sun*, 330 NLRB at 1124 n.1.

Further, the evidence of skill differential and distinctions in the terms and conditions of employment here is much less pronounced than it has been in other cases where the Board found a separate maintenance unit appropriate. For example, in *Capri Sun*, the Board relied on specific record evidence that maintenance employees were required to “demonstrate the ability to perform electrical wiring up to 480 volts and read and explain wiring diagrams.” *Id.* at 1124. Others in the proposed unit were required to demonstrate even more skills and have greater credentialing, including completion of at least nine specific electrical-engineering-type classes. *Id.* at 1124, n.4. Here, there is simply nothing in the record to indicate the kind of dramatic skill and credentialing differences found between the production and maintenance employees in *Capri Sun*. Likewise, the Board in *Capri Sun* relied on the facts that (1) “unlike the production employees, the maintenance employees’ lunch and breaks are not scheduled” and (2) “the maintenance employees, unlike production employees, are not subject to the layoff procedures.” *Id.* at 1125. No evidence in this case suggests either of these things are true at the BOC.

In short, as in *Buckhorn*, *Chromalloy*, *F & M Schaefer*, *Peterson/Puritan*, and *TDK Ferrites*, the differences between the production and maintenance employees in Nestlé’s Bakersfield plant are far outweighed by the similarities. Indeed, the differences here are almost identical to those in *Peterson/Puritan*:

The mechanics are paid a higher average wage than production line employees, wear a distinct uniform, and report to work one-half hour before each production shift begins. Also, the mechanics are

under the exclusive supervision of the line mechanics supervisor, who reports directly to the plant engineer.

240 NLRB at 1051. Yet despite these differences, the Board there concluded that a separate unit was inappropriate. *Id.*

So too here. Whatever differences there are between the production and maintenance employees, they are comparatively minor when reviewed against the considerable similarities and the integration of the production process at the BOC. In short, in light of the lengthy and meaningful list of similarities between the two groups of employees, no reasonable fact finder could conclude that the maintenance employees are “a distinct and homogeneous group of employees with interests separate and apart from other employees.” *TDK Ferrites*, 342 NLRB at 1008. As such, the unit certified by the Regional Director—applying the wrong standard—is inappropriate.

2. THE BOARD SHOULD RECONSIDER AND OVERRULE ITS DECISION IN *SPECIALTY HEALTHCARE* ADOPTING THE OVERWHELMING-COMMUNITY-OF-INTEREST TEST.

Specialty Healthcare was a dramatic, unwarranted, inadequately explained, and unreasonable decision overturning settled law that had been approved by the Supreme Court as effectuating Congressional intent. The Board’s new “overwhelming-community-of-interest” test, while appropriate for accretion cases, conflicts with Supreme Court precedents on the proper standard for determining an appropriate bargaining unit in the first instance. The decision overruled fifty years of precedent silently under the guise of “clarifying” the law. Finally, the decision created a rule so broad in scope that it violates basic norms of common-law jurisprudence, and on top of all that, it was arbitrary and capricious and contrary to law. For all these reasons, the Board should reconsider and overrule *Specialty Healthcare*.

A. *Specialty Healthcare* Is Inconsistent With Governing Supreme Court Precedent.

The Board claimed that its decision in *Specialty Healthcare* was about returning to its “traditional community-of-interest standards in this case and others like it.” *Id.* at 5. On one level, this is somewhat accurate. The Board overruled *Park Manor*, which had used a modified form of the community-of-interest test, and directed application of what it called the “traditional” test. But on another level, the Board’s claim fails the smell test. Instead of applying the “traditional” standard, the Board eradicated it and replaced it with the new “overwhelming-community-of-interest” test. As discussed further below, the Board’s new test bears little resemblance to the “traditional . . . standards” and amounts to a repudiation of 50 years of precedent.

Compounding the problems, the Board ignored the Supreme Court precedent indicating that its traditional test was a proper method of effectuating Congressional intent. The Supreme Court has recognized the Board’s longstanding practice of using case-by-case determinations under the community-of-interest test as a wise exercise of discretion: “The Board does not exercise [its] authority aimlessly; in defining bargaining units, its focus is on whether the employees share a ‘community of interest.’” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (citation omitted). Speaking of “community of interest” and not “overwhelming community of interest” is no accident; in passing the Act, Congress intended to create considerable flexibility in shaping bargaining units “to the particular case.” *Id.* The traditional community-of-interest test, as applied above, allowed the Board to do just that by balancing every factor relevant to a particular workplace. The Court recognized long ago that “the complexities of modern industrial organization *make difficult the use of inflexible rules as the test of an appropriate unit.*” *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 134 (1944) (emphasis added). Because of these difficulties, the Court has extolled the Board’s historical use of “a wide

variety of factors in case-to-case determination of the appropriate unit” as a reflection of Congressional intent. *Id.* To be sure, extent of organization has always been “among the factors” considered by the Board, but only as one factor among many. *Id.*

But no more. Thanks to *Specialty Healthcare*, the scope of the petitioned-for unit will be decisive in “all but the most exceptional circumstances.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 15 (Hayes, dissenting). The Board has shunted aside more than seventy years of case-by-case adjudication under the community-of-interest test and replaced it with an inflexible monolith. This new standard, by requiring employers to meet an effectively impossible burden, has no place in a system where the Board has been directed by the Court and Congress to maintain flexibility. *See id.* By adopting the new standard, the Board ignored longstanding Supreme Court’s approval and endorsement of the old standard.

Ironically, in the section of the Board’s opinion overruling *Park Manor*, the Board recognized and even relied on this need for flexibility:

The Employer’s argument based on *Park Manor* thus runs counter to the Supreme Court’s observation that the “[w]ide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter.” *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (footnote omitted). Indeed, the Court has further observed, “[t]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). Thus, determination of whether a proposed unit is an appropriate unit requires “examination of the facts of each case” and cannot be based on “conclusory rationales.” *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980).

Specialty Healthcare, 357 NLRB No. 83, slip op. at 8. Perhaps this rationale justified overruling *Park Manor* in the acute care hospital context. But if so, it also precludes overruling the

traditional community-of-interest test, which unquestionably preserved more flexibility in determining appropriate units. If, as the Board itself recognizes, flexibility is compelled by the Court and Congress, it cannot justify its result in *Specialty Healthcare*.

B. *Specialty Healthcare* Represents A Departure From Historical Community-Of-Interest Jurisprudence Without Adequate Explanation.

Conflicting with the Supreme Court, while obviously serious, is just the first problem in *Specialty Healthcare*. More fundamental is the Board's failure to explain its decision. Where an agency, including the Board, repudiates its prior law, it needs to provide an explanation for doing so. *LeMoyné-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004) (Roberts, J.). Without an explanation, a court has no way to determine why the agency departed from its prior holding and, therefore, whether the agency exercised its discretion properly. *Id.* at 61.

We recognize that the Board in *Specialty Healthcare* adequately explained why it overturned *Park Manor* (though the dissent makes strong points on the merits for rejecting the Board's decision). But the Board did not adequately explain why it adopted the "overwhelming-community-of-interest" test and silently overruled over 50 years' of precedents. Though the Board claimed to be simply clarifying the law, its argument is belied by a comparison between the standard created in *Specialty Healthcare* and the standard used prior to the decision. If *Specialty Healthcare* is to apply in the production-and-maintenance context, the Board must have a reasoned explanation for neutering all its past cases. Courts are entitled—indeed, required—to test the adequacy of an agency's justification for changing its policy. Where the justification is found lacking, the decision must be rejected. *See, e.g., Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 211 (5th Cir. 2001). The purpose of the reasoned explanation requirement is "so that the reviewing court may understand the basis of the agency's action and so may judge

the consistency of that action with the agency's mandate." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (plurality opinion).

The Board fell all over itself claiming that the community-of-interest test it adopted in *Specialty Healthcare* was merely a clarification, rather than a substantive shift. It began by acknowledging that "different words have been used to describe" the employer's burden to show that a proposed unit is too small. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 11. It then proceeded to cherry-pick the few cases that used the term "overwhelming," ignoring the substantially larger number that provided a less demanding standard. *Id.* The sheer paucity of Board decisions using the "overwhelming" standard was so obvious that the Board was forced to cite *Lundy Packing Co.*, 314 NLRB 1042 (1994), in support of its argument. The problem with citing *Lundy*: the Fourth Circuit already eviscerated the "overwhelming" standard in that case:

The exclusion of quality control employees based on such meager differences is, to say the least, problematic under the "community of interest" standard, when such employees were engaged in tasks essential to the company's meat packing and processing operation.

The Board, however, adopted a novel legal standard which effectively accomplished the exclusion. Under this new standard, any union-proposed unit is presumed appropriate unless an "overwhelming community of interest" exists between the excluded employees and the union-proposed unit By presuming the union-proposed unit proper unless there is "an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. . . . Given the community of interest between the included and excluded employees here, it is impossible to escape the conclusion that the QA/LT's ballots were excluded in large part because the Petitioners do not seek to represent them.

NLRB v. Lundy Packing Co., 68 F.3d 1577, 1581 (4th Cir. 1995) (quotation omitted). Because of the lack of support elsewhere for the "overwhelming" standard, the Board had no choice but to rely on this discredited decision. Relying on *Lundy* and two other cases pulled from twenty

years of decisions, the Board concluded that its invocation of the overwhelming standard was a simple restatement of the law.

Comparing the dearth of support for the Board’s “clarified” standard with the mountains of support for the *real* traditional standard reveals conclusively that the Board “doth protest too much.” *Hamlet*, Act III, scene 2. Prior to *Specialty Healthcare*, the Board’s community-of-interest test involved a comparison between the petitioned-for employees and those outside the unit to determine whether the former group was “sufficiently distinct” to warrant separate bargaining. At no point under the traditional test did the Board look solely at the petitioned-for unit:

The Board’s inquiry into the issue of appropriate units, even in a non-health care industrial setting, never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests “in common.” Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

Newton-Wellesley Hosp., 250 NLRB 409, 411 (1980) (emphasis added); *Wheeling Island*, 355 NLRB No. 127 (2010), slip op. at 1 n.2 (citing *Newton-Wellesley* in rejection of dissenting member’s proposed “same job, same location” standard). This standard has been reaffirmed countless times by both Democratic and Republican Boards. *See, e.g., Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 n.2; *AGI Klearfold, LLC*, 350 NLRB 538, 541 (2007); *Publix Super Mkts., Inc.*, 343 NLRB 1023, 1024 (2004); *Home Depot USA, Inc.*, 331 NLRB 1289, 1291 (2000); *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999); *C&K Mkt., Inc.*, 319 NLRB 724, 726 (1995); *Transerv Sys., Inc.*, 311 NLRB 766, 767 (1993); *P.S. Elliott Servs., Inc.*, 300 NLRB 1161, 1162 (1990); *New England Tel. Co.*, 280 NLRB 162, 164 (1986); *Barbara*

George, Inc., 273 NLRB 1239, 1240 (1984); *Purnell's Pride, Inc.*, 265 NLRB 1190, 1190 (1982); *Print-O-Stat, Inc.*, 247 NLRB 272, 273 (1980); *Atl. Richfield Co.*, 231 NLRB 31, 32 (1977); *Norrwock Shoe*, 209 NLRB 843, 843 (1974); *Harrah's Club*, 187 NLRB 810, 812-13 (1971); *United Foods, Inc.*, 174 NLRB 91, 91 (1969). But *Specialty Healthcare* sanctioned—indeed, required—the precise inquiry that the Board supposedly “never addresses.” The Board now looks only at the petitioned-for unit to determine whether that unit shares a community of interest, irrespective of the interests shared across other employees. See *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 8 (“Procedurally, the Board examines the petitioned-for unit first. If that unit is an appropriate unit, the Board’s inquiry ends.”); *id.* at 9-10 (determining that CNAs are “an appropriate unit” without comparing terms of employment of other employees in facility).

The Board’s test is fundamentally inconsistent with the “sufficiently distinct” standard used without controversy for more than half a century. In looking exclusively at the petitioned-for unit and adopting the overwhelming-community-of-interest test, *Specialty Healthcare* does not apply the long tradition outlined above; it overrules every single case in that line. See *id.* at 18 (Hayes, dissenting) (“The majority purports to apply ‘traditional community-of-interest’ principles in making unit determinations for nonacute health care facilities. However, their definition of these principles is far from traditional and will have the intended dramatically different results in appropriate unit determinations for all industries.”). This was a dramatic change in the law that the Board failed to acknowledge, much less adequately explain. The Board’s claim that it was simply clarifying the law cannot be sustained.

Because *Specialty Healthcare* overruled a long line of cases, rather than simply clarifying those cases’ meaning, the Board was required to develop an adequate, reasoned

explanation for its decision. *LeMoyne-Owen Coll.*, 357 F.3d at 60; *Entergy Gulf States*, 253 F.3d at 211. But the Board did not even acknowledge the line of cases it overruled, let alone adequately explain their decision to overrule them. For this reason, *Specialty Healthcare* must be overruled, at least with respect to its broader holding applied outside the health-care context.

C. The Profound Change In Law Occasioned By *Specialty Healthcare* Violates Well-Settled Jurisprudential Standards And Is One That Could Only Properly Be Effectuated Through Notice And Comment Rulemaking.

Specialty Healthcare also violated jurisprudential norms by reaching out beyond the facts of the case and adopting a rule of general application. Had the Board wanted to proceed via adjudication to decide an issue, it was incumbent upon it to wait until it had a case in which the issue was necessary for decision. Otherwise, it was obligated to proceed via rulemaking.

The decision to proceed via rulemaking or adjudication rests with the Board in the first instance. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974). Still, there is a limit on the Board's discretion. *Id.* at 294. Promoting rules of broad-scale, general application must be done via rulemaking, where the strictures of the Administrative Procedure Act govern the process. *See Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (“[A]n agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application.”); *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 15 (Hayes, dissenting) (“[T]he majority is overstepping the bounds of its discretion in making sweeping changes to established law through this adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedures Act (APA) designed to safeguard the process by ensuring scrutiny and broad-based review.”). Promulgating such rules via adjudication is an abuse of discretion. *Pfaff v. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

Here, the Board exceeded the reasonable boundaries of the adjudicative process and abused its discretion. The Board took a case ostensibly about the presumptions regarding bargaining units in nonacute care hospitals and used it as a vehicle for rewriting the rules for bargaining units in all workplaces. In doing so, it overruled fifty years of precedent in another substantive area of law without an acknowledgement that it was doing so. The present case is a perfect example to show why the Board's actions were so inappropriate. The case law deciding whether production and maintenance workers should bargain in the same unit or different units has developed since the Board released *American Cyanamid*, 131 NLRB 909, in 1961. Since then, decisions in countless cases involving myriad fact patterns have helped to create a huge body of law in this area. Over time, both employers and unions have learned to rely on this body of law. This is the American common-law legal tradition. And yet the Board saw fit to attempt to eradicate the entire body in a separate case that had nothing to do with production and maintenance workers.

Further, neither party in *Specialty Healthcare* requested the type of broad-scale revisions the Board made. The Board's decision to do so *sua sponte* was another abuse of discretion—and demonstrates once again that its intent was to effect the kind of “underground” rulemaking that violates the APA. The Board would have been justified in highlighting the issue and assuming, without deciding, that the traditional standards still governed, but that is not what the Board chose to do. Instead, it issued what was essentially an advisory opinion that neither party requested.

While the Board is free to develop its law via adjudication, there are consequences for doing so. It must wait for a case with the proper facts and a party making the proper legal arguments before it can change the law in a certain area. The Board did not do that

in *Specialty Healthcare*, so it should be overturned as applied outside of the nonacute hospital context.

Finally, as discussed above, *Specialty Healthcare* should not be read to apply in this case, given its references to prior bargaining activity. There was no bargaining history in *Specialty Healthcare*, and the Board's opinion should be read to apply only in the absence of a bargaining history. See 357 NLRB No. 83, slip op. at 1 (stating one of its issues for review as “Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter.”); *id.* at 9 n.19 (“It is highly significant that, *except in situations where there is prior bargaining history*, the community-of-interest test focuses almost exclusively on how the employer has chosen to structure its workplace.”) (emphasis added and omitted). To the extent that the Board wants to apply the test in such cases, it again was obligated to wait until it decided a case with the appropriate facts or else proceed via rulemaking. By failing to do so, the Board's order cannot be enforced outside the context from which it came. As such, the Board should take this opportunity to reconsider the broader holding of *Specialty Healthcare*.

D. Even If Such A Profound Alteration Of The Law Could Properly Be Accomplished Through Adjudication Rather than Rulemaking, The New *Specialty Healthcare* Standard Is Both Arbitrary And Capricious And Contrary To Law, Insofar As It Has Both The Purpose And Effect Of Contravening The Express Command Of Section 9(c)(5) Of The Act.

It is axiomatic that Board action in direct conflict with the substance of its empowering statute is unlawful. *NLRB v. Ky. River Cmty. Care*, 532 U.S. 706, 721 (2001).

The “overwhelming-community-of-interest” standard was originally developed and applied in the context of so-called “accretions,” where it makes sense to require a very high standard of proof, given that accreted workers are thereby deprived of any voice in determining

whether to become part of a bargaining unit. It is both arbitrary and capricious and contrary to law, however, to apply the same standard in determining in the first instance the contours of the unit in which included employees will be given a voice.

This conclusion is only fortified when one considers that the inevitable consequence of this new rule will be the proliferation of micro-unions and atomization of representation in the workplace. The rule thus is both potentially destabilizing to labor relations and gives controlling weight to the extent of organization, both in contravention of the Act's express command. In accretion cases, a party seeks to force currently unrepresented employees into the bargaining unit without giving those employees a voice as to whether they want to join the unit. *Lundy Packing*, 68 F.3d at 1581. In such cases, the "overwhelming-community-of-interest" test makes sense. In order "to assure to employees the fullest freedom in exercising" their rights under the Act, employees should be denied a vote only when they are virtually identical to employees already in the bargaining unit, such that continuing to exclude them is irrational or arbitrary.

Requiring such a showing as a precondition for the disenfranchisement of employees is entirely rational. It makes no sense, however, to apply the same standard when what is being sought is the exact opposite—the enfranchisement of employees. Whereas there is a compelling justification for applying the very high bar before potentially forcing an employee to be represented by a union without a vote, there is no similar justification for allowing unions to pick and choose which employees they will exclude from that choice in virtually every case. The only effects of the application of the overwhelming-community-of-interest test to initial unit determinations is to encourage the fracturing of the workplace. Unions will petition to certify the units that they can organize, and these micro-unions will almost always be upheld as appropriate.

Judge Posner has eloquently explained the concern with unit proliferation from the perspective of employers, employees, and other interested parties:

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. . . . Apart from concern with the impact on the employer's operations, breaking up a work force into many small units creates a danger that some of them will be so small and powerless that it will be worth no one's while to organize them, in which event the members of these units will be left out of the collective bargaining process.

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

Further, dissenting members in these micro-unions will have no recourse. For example, take an employer with 100 employees at a facility. Rather than organize the entire group or substantial segments thereof, as the union might have had to under the traditional community-of-interest standard, now the union will be able to petition for unit composed of a three-member janitorial staff. If one janitor opposes the unit, he is nevertheless compelled to bargain collectively. If, on the other hand, the union must organize a larger unit, the janitor at least has a voice and an opportunity to persuade his coworkers not to certify the union. Allowing micro-union elections to take place under almost any circumstances will have the perverse result of denying workers their voice and their right to control their representation. The language of Taft-Hartley should not be so easily dismissed: "Employees . . . shall also have the right to refrain from any or all of such activities." 29 U.S.C. § 157; see *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 18 (Hayes, dissenting) ("Obviously, the paramount concern supporting a restrictive inclusion rule in accretion cases has no relevance to initial appropriate unit

determination cases, where any employee included in the unit found appropriate will have the opportunity to vote on the question concerning representation.”).

In addition, the “overwhelming” test gives controlling weight to the extent of organization in violation of section 9(c)(5) of the Act. That section provides: “In determining whether a unit is appropriate for [collective bargaining,] the extent to which the employees have organized shall not be controlling.” This language prevents the Board from making extent of organization the exclusive or dominant factor in determination whether a unit is appropriate. *Lundy Packing*, 68 F.3d at 1580.

In *Lundy Packing*, the Board relied on the exact same legal formulation that it used in *Specialty Healthcare*, finding that “the technicians do not share such an *overwhelming community of interest* with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners’ objections.” *Lundy Packing Co.*, 314 NLRB at 1043 (emphasis added). And just as in *Specialty Healthcare*, *Lundy Packing* provoked a sharp dissent from a Board member questioning both the wisdom and the pedigree of the test:

[T]he majority sustains the challenges to the QALTs’ ballots in large part because the Petitioners do not seek to represent them. The majority takes the position that the QALTs can be included, over the Petitioners’ objection, only when they have an “overwhelming” community of interest with the other unit employees. The only case cited for this proposition is *Penn Color*, 249 NLRB 1117 (1980) and that case does not set forth so stringent a test.

Id. at 1046 (Stephens, dissenting).

The Court of Appeals denied enforcement of the Board’s order in *Lundy Packing*, sharply rebuking the Board in the process. It noted that the excluded employees shared considerable similarities with the approved unit, which was “problematic under the ‘community of interest’ standard.” *Lundy Packing*, 68 F.3d at 1581. The court recognized that the Board

sidestepped this problem by “adopt[ing] a novel legal standard which effectively accomplished the exclusion.” *Id.* The court determined that the overwhelming community of interest standard “effectively accorded controlling weight to the extent of union organization . . . because ‘the union will propose the unit it has organized.’” *Id.* (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). As such, the court determined that the test “exhibits the indicia of a classic § 9(c)(5) violation.” *Id.*

The Board’s efforts to distinguish its test from the one rejected in *Lundy Packing* are unconvincing. It claimed that the *Lundy Packing* court did not deny enforcement “because the Board’s overwhelming-community-of-interest standard improperly gives controlling weight to the extent of organization.” *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 11 n.25. But that is precisely what the *Lundy Packing* court did. Further, the Board tries to have it both ways: it relies on *Lundy Packing* as historical precedent to justify using the overwhelming-community-of-interest test on one hand and attempts to distinguish the rejection of it on the other. Given that *Specialty Healthcare* adopted the precise test used in *Lundy Packing* (and even relied on the *Lundy Packing* formulation), its attempts to distinguish the denial of enforcement are absurd.

3. EVEN ASSUMING THE VALIDITY OF *SPECIALTY HEALTHCARE*, THE REGIONAL DIRECTOR CLEARLY ERRED BY CONCLUDING THAT THE PRODUCTION AND MAINTENANCE WORKERS DO NOT SHARE AN OVERWHELMING COMMUNITY OF INTEREST.

Even if the Board affirms the validity of *Specialty Healthcare* and applies it here, the Regional Director nevertheless clearly erred in its application of the standard to the facts of this case. The petitioned-for unit remains inappropriate because the production and maintenance employees share an overwhelming community of interest. As discussed above, the employees work very closely together, have only modest wage and skill differences, interchange frequently, receive the same fringe benefits, and are subject to identical terms and conditions of

employment. Further, the undisputed evidence in the record shows that Nestlé continues to further integrate the workforce through its “Nestlé Continuous Excellence” program. In light of the Board’s admonition that the community-of-interest test “focuses almost exclusively on how the employer has chosen to structure its workplace,” the Board should defer to Nestlé’s efforts in this regard. Finally, given the Board’s claim that the “overwhelming” standard was simply a restatement of existing law, it must show why the present case differs from *Buckhorn*, *Chromalloy*, *F & M Schaefer*, *Peterson/Puritan*, and *TDK Ferrites*, where the Board found separate maintenance units inappropriate despite facts nearly identical to the present case.

CONCLUSION

For the reasons set forth above, Nestlé respectfully requests that the Board grant review of and reverse the Regional Director’s Decision and Direction of Election.

Dated: December 7, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2011, I served a copy of this Request for Review of the Regional Director's Decision and Direction of Election pursuant to Section 102.114(i) of National Labor Relations Board Rules and Regulations by attaching a copy of the document and sending it via electronic mail to Adam Stern at his registered address, laboradam@aol.com.

/s/ Ryan N. Parsons
Ryan Parsons