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8 **UNITED STATES OF AMERICA**
9 **BEFORE THE NATIONAL LABOR RELATIONS BOARD**
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12 NESTLÉ DREYER'S ICE CREAM

13 Employer,

14 and
15

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

18 Petitioner.
19

Case No. 31-RC-066625

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL
501'S OPPOSITION TO REQUEST
FOR REVIEW OF THE REGIONAL
DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

20 **I. PRELIMINARY STATEMENT**
21

22 The Employer, Nestlé Dreyer's Ice Cream ("Nestlé" or "Employer"), is in the
23 business of producing ice cream and frozen dairy products. Nestlé has long operated a
24 food processing plant in Bakersfield, California located at 7301 District Boulevard,
25 Bakersfield, California known as the "Bakersfield Operations Center" or "BOC"). On
26 October 12, 2011, the International Union of Operating Engineers Local 501, AFLCIO
27 ("Local 501" or "Petitioner" or "Union"), filed a petition in Case 31 -RC-066625, seeking to
28 represent a unit composed solely and exclusively of maintenance employees at the

1 Bakersfield Operations Center.

2 On October 27 and 28, 2011, a hearing was held on the referenced petition. The only
3 issue presented was whether the petitioned-for unit is an appropriate unit in that it seeks to
4 include only full-time and regular part-time maintenance employees, and to exclude
5 production employees. There are approximately 113 maintenance employees and 578
6 production employees employed at the BOC.¹ The Petitioner only seeks to include these
7 maintenance employees.

8 In his Decision and Direction of Election, the Regional Director concluded that the
9 petitioned-for unit of maintenance employees was an appropriate unit. Now, however, as
10 argued in its Request for Review, the Employer asks that the Board not only to overturn the
11 Regional Director's Decision and Direction of Election, but also requests that this Board
12 reconsider and reject its recent decision in *Specialty Healthcare*.

13 Petitioner responds that the maintenance employees should be deemed an
14 appropriate separate unit because they are in their own department, are separately
15 supervised, are in different job classifications, have different skills, and perform totally
16 different job functions from production employees. Also, Petitioner believes this case does
17 not present an opportunity for the Board to revisit its *Specialty Healthcare* decision because
18 this case would have been resolved in favor of the Union regardless of whether or not
19 *Specialty Healthcare* is applied. Moreover, the Employer fails to offer any new substantive
20 reasons for rejecting the *Specialty Healthcare* decision that were not already raised by the
21 briefs or the dissent in that case.

22 I. ARGUMENT

23 A. THE UNION IS NOT REQUIRED TO SEEK THE MOST APPROPRIATE OR 24 MOST COMPREHENSIVE UNIT, BUT ONLY AN APPROPRIATE UNIT; THE 25 PETITIONED-FOR BARGAINING UNIT IS AN APPROPRIATE UNIT UNDER 26 TRADITIONAL COMMUNITY OF INTEREST PRINCIPLES

27 ¹There are three basic types of production employees who work on the production lines:
28 Ice Cream Makers I, Ice Cream Maker II, and Mix Maker. As to maintenance employees, there
are Entry Maintenance Mechanics, Maintenance Technicians, Maintenance Craft Workers,
Maintenance Group Leaders and Maintenance Control Technicians.

1 In unit determination questions, the Board first considers the Union's petition and
2 whether that unit is appropriate. *Boeing Co.*, 337 NLRB 152, 153 (2001); *P. J. Dick Contracting*,
3 290 NLRB 150, 151 (1988). It is well settled that the Board requires a union to seek not the
4 most appropriate or comprehensive unit, but only an appropriate unit. *Overnite Trans. Co.*,
5 322 NLRB NLRB 347 (1996). Indeed, "the Board generally attempts to select a unit that is
6 the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins*
7 *Co.*, 334 NLRB 484, 484 (2001). "In determining whether a sufficient separate community of
8 interest exists, the Board examines such factors as mutuality of interests in wages, hours,
9 and other working conditions; commonality of supervision; degree of skill and common
10 functions; frequency of contact and interchange with other employees; and functional
11 integration." *Capri Sun, Inc.* 330 NLRB 1124 (2000).

12 At the outset, the Regional Director focuses on the unit that has been requested in
13 the petition. Once the Regional Director determines that the maintenance employees
14 constitutes an appropriate bargaining unit, no further inquiry is required. See *Wheeling*
15 *Island Gaming, Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010) (Explaining that "the Board
16 looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's
17 inquiry ends."); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989) (The Board analyzes the community
18 of interest among the employees in the petitioned-for unit, and where such community of
19 interest is demonstrated, "[its] inquiry ends" even though there may be other units that
20 would be equally or even more appropriate).

21 Thus, the sole issue to be determined is whether or not the unit requested by the
22 Petitioner is an appropriate one. On this issue, the Regional Director correctly concluded
23 that the maintenance employees were readily identifiable as a separate unit due to a variety
24 of common factors, and, therefore, constituted an appropriate unit. As summarized below,
25 the Regional Director's findings were supported by a number of critical facts establishing
26 that the maintenance employees were functionally separate and distinct from production
27 employees and, thus, were properly deemed an appropriate unit.

28 First and foremost, the maintenance workers performed skilled maintenance work

1 that is separate and distinct from the production work performed by production
2 employees. This skilled maintenance work involves the repair equipment, troubleshooting
3 mechanical problems, fine-tuning equipment, and performing preventative maintenance.
4 In fact, the Regional Director found that approximately 90% of maintenance employees'
5 work time is spent performing skilled maintenance work. (DD&E pg. 7). To highlight this
6 core distinction, the Regional Director observed:

7 Maintenance employees share common functions. The maintenance employees
8 are primarily in charge of maintaining the Employer's machinery, and the
9 production employees are primarily in charge of producing the ice cream.
10 Maintenance employees also share common skills, which are quite different from
11 the skills of the production employees, who are significantly less skilled.
12 (DD&E pg. 18)

13 In practice, maintenance employees are specifically assigned to handle repair tasks
14 that require their specialized skill sets and experience. Although production employees
15 will typically observe maintenance workers performing repairs and sometimes assist in
16 spotting problems relating to the particular machinery they are assigned to operate, the
17 actual work of performing major repairs is performed exclusively by maintenance
18 workers.² For obvious reasons, the Employer does not want production employees fixing
19 complicated equipment without having the requisite knowledge of experience. (DD&E pg.
20 7)

21 The evidence shows that maintenance employees were ever assigned to perform
22 production work performed by production employees due to staffing shortages or
23 otherwise. On this issue, the Employer's Maintenance Supervisor confirmed that it would
24 be inefficient and wasteful for maintenance workers to perform lesser skilled production
25 work. As the Regional Director noted, the maintenance workers, at most, will only rarely
26 engage in non-maintenance tasks after finishing repairs (e.g., taking few seconds to clean
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28 ²The Regional Director noted that, except for the so-called Pilot Program on production
line 16 (which was implemented only recently in October 23, 2011), no production employees
are currently performing any duties historically performed by maintenance employees.

1 and/or remove trash parts, etc.)³

2 Maintenance employees have significant technical knowledge in the areas of
3 mechanics, electronics, and computers, including programmable computer logic. This need
4 for technical knowledge is a consequence to their specialized job functions. This contrasts
5 with, production employees who lack the specialized technical knowledge to perform
6 complex repairs except when they are minor or routine. Although production employees
7 sometimes perform "minor" and "routine" repair of their own equipment, the Regional
8 Director correctly confirmed that "this overlap in functions is *merely incidental* to the work
9 regularly performed by maintenance employees, and not involving a high degree of skill."
10 (DD&E pg. 18) (Italics added.)

11 The critical distinctions between maintenance and production employees are
12 reflected in their minimum qualifications for employment. The minimum qualifications to
13 be hired as a maintenance employee are far more stringent in regard to technical
14 knowledge than the minimum qualification for production jobs. For example, as set forth
15 in the "Maintenance I" job description, applicants: (1) must be able to read and follow blue
16 prints drawings and schematics; (2) must have a minimum of 2 years experience in trouble
17 shooting pneumatics, hydraulics, electrical and mechanical in a manufacturing facility; (3)
18 must additionally possess 1 year experience with Computerized Maintenance Management
19 Systems; and (4) must have 5-7 years of industrial high speed manufacturing maintenance
20 experience. (Company Exhibit 8). By contrast, none of the production classifications
21 require such extensive technical knowledge to be considered for a job. (Company Exhibits
22 5-7). Thus, the minimum requirements of the lowest level maintenance job classification
23 shows that there is no substantial overlap with production job classifications.

24 The actual job duties of maintenance employees are substantially different as well.
25 For example, the Maintenance I job classification provides that maintenance employees are
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28 ³ This fact is highly instructive in that it distinguishes cases upon which the Employer heavily relies. See e.g., *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (Rejecting union's petition to represent subgroup of maintenance employee, in part, because these maintenance employees regularly performed production work); *TDK Ferrites Corp*, 342 NLRB 1006, 1008 (2004) (Maintenance employees performed production work on a regular basis)

1 required to perform:

- 2 • Repair of mechanical equipment including pumps, gear reducers, seals, bearings, hydraulic/pneumatic systems, blowers, and conveyors
- 3 • Repair of electrical equipment including motors, electrical distribution center, motor control centers, variable speed drives, transformers, and all
- 4 electrical controls
- 5 • Attention to Detail: Strives to understand details, balances analysis and action appropriately
- 6 • Analyze and solve electrical and mechanical problems for processing, packaging, and auxiliary equipment, and assist manufacturing personnel on process related problems
- 7 • Perform established Preventative Maintenance and identify new PM activities, as needed Continuous process improvement implementation and
- 8 origination.

9 By contrast, the job descriptions of the Ice Cream Makers I, Ice Cream Makers II, and
10 Mix Makers do not contain job duties that overlap with those of the Maintenance I worker.

11 Rather, the amount of “mechanical work” expected of production employees is minimal.

12 For example, Ice Cream Maker II is required to “troubleshoot ice cream freezer operations”
13 and “conduct basic trouble shooting of the pasturized storage and delivery system.”

14 Indeed, there is no requirement that a production employee actually repair equipment or
15 solve mechanical problems. Thus, the job duties of even the lowest level maintenance job
16 classification shows that there is no substantial overlap with production job classifications.

17 Importantly, there is no common supervision between maintenance and production
18 employees. Maintenance workers are segregated into separate departments that are
19 separately supervised. Maintenance employees are assigned to various “Leadership
20 Teams” that are supervised by a designated team leader from the maintenance department.

21 The maintenance supervisors have the necessary skill and training that allows them to
22 effectively prioritize the work of their subordinates. In practice, maintenance employees
23 receive their work assignments from first-line supervisors. Also, when called upon by a
24 production supervisor, a maintenance employee must first request authorization from his
25 or her immediate maintenance supervisor before taking on requested maintenance tasks.

26 Maintenance employees are paid more than production employees. Maintenance
27 employees earn wages ranging from \$20.00 to \$30.00 per hour, whereas production
28 employees receive wages of \$15.00 to \$22.00 per hour. The greater amount of pay received
by maintenance employees is consistent with their greater skills.

1 There are various employment practices relating solely to maintenance employees.
2 For example, maintenance employees work different schedules than production
3 employees. Maintenance employees routinely work ten hour shifts (known as a "4-10"
4 schedules) whereas production employees uniformly work eight hours shifts (known as a
5 "5-8" schedules). Also, maintenance employees receive a paid 30 minute lunch break,
6 production employees must take their lunch break unpaid. Significantly, maintenance
7 and production employees are placed on separate seniority lists.

8 Maintenance department employees are required to furnish their own tools. In
9 some cases, these tools can cost hundreds if not thousands of dollars. Because maintenance
10 employees are responsible for their own tools, the Employer pays them an annual tool
11 allowance which is not paid to any other employee. In contrast, the production employees
12 are never required to provide tools.

13 Finally, each and every year, the closes down its BOC facility and ceases production,
14 usually around the Christmas holidays, for a period of two weeks to a month. During this
15 shutdown, all maintenance department employees are required to work. Conversely,
16 production employees are not required to work except for a handful of employees –
17 between six and twelve – who are specially selected by the employer to perform to assist
18 with activities such as re-bricking and cleaning. See, *Capri Sun, Inc.* 330 NLRB 1124, 1125
19 (2000) (finding no significant interchange where production employees voluntarily
20 performed routine and unskilled maintenance).

21 In light of the foregoing considerations, Petitioner believes the Regional Director
22 properly concluded that the maintenance employees should be in a separate unit. The
23 Board has consistently found separate bargaining units comprised solely of maintenance
24 employees (and excluding production employees) to constitute an appropriate bargaining
25 unit – well before the passage of the *Specialty Healthcare* case. See, *American Cyanamid Co.*,
26 131 NLRB 909 (1961); *Ore-Ida Foods*, 313 NLRB 10 16, 1017 (1994); *Capri Sun, Inc.* 330 NLRB
27 1124 (2000).

28 *Ore-Ida Foods*, supra, provides a *virtually identical* case in which the Board concluded
that a maintenance-only unit was an appropriate unit in a food processing plant. There, as

1 here, the employer contended that the maintenance employees were not a homogeneous
2 group separate and distinct from its production employees. *Id.* at 1019. The relevant factors
3 considered by the Board were: (1) that maintenance employees were required to have
4 different skills; (2) that maintenance employees primarily performed skilled maintenance
5 work; (3) that maintenance employees were grouped in their own departmental system; (4)
6 that maintenance employees were separately supervised; and (5) that maintenance
7 employees received higher wages than production employees. *Id.* at 1019-1020. The Board
8 disregarded certain minor commonalities between maintenance employees and production
9 employees, such as the fact that they were subject to the same terms and conditions of
10 employment, the fact that there were some transfers, and the fact that the production
11 employees routinely assisted maintenance employees with minor tasks. *Id.*

12 The *Ore-Ida Foods* case is factually on point. The same exact critical factors which
13 rendered the maintenance employees an appropriate unit in *Ore-Ida Foods* are present here.
14 The employees, here, are required to have greater skills than production employees,
15 exclusively perform maintenance work with little assistance from production, are subjected
16 to common supervision by maintenance supervisors, are placed in their own maintenance
17 department, and receive greater pay than production employees. As concluded by the
18 Board in *Ore-Ida Foods*, these minor commonalities between maintenance and production
19 employees did not justify deeming the instant petitioned-for maintenance unit as an
20 inappropriate bargaining unit (e.g., similar terms and conditions of employment, some
21 inter-departmental transfers, and mutual assistance).

22 Likewise, *Capri Sun, Inc.* squares almost perfectly with our case. There, the Board
23 found a separate unit of maintenance employees to constitute an appropriate bargaining
24 unit within a food processing plant despite the employer's contention that production
25 employees had to be included. That Board's decision was based upon the following factors:
26 (1) that there was separate supervision for the maintenance department; (2) that the
27 maintenance employees were more skilled than the production employees; (3) that
28 maintenance department employees received a substantially higher rate of pay than
production employees; (4) that the minimal qualifications for hiring maintenance

1 employees were higher than those required for hiring production employees; (5) that
2 maintenance employees were required to provide their own tools; (6) that maintenance
3 employees were subject to different schedules than production employees; (7) that the
4 absence of meaningful production work performed by maintenance employees or vice
5 versa; and (8) that during the employer's shut down for the Christmas holidays only some
6 production employees performed routine and relatively unskilled maintenance tasks. *Id.* at
7 1124-1127

8 Thus, the relevant controlling factors considered in *Capri Sun* are equally present in
9 this case. Moreover, our case provides an even stronger case than *Capri Sun* for accepting a
10 maintenance-only unit because the *Capri Sun* case involved various notable commonalities
11 between the production and maintenance employees. In *Capri Sun*, the Board was
12 confronted with the fact that a number of production employees were transferred to the
13 maintenance department and that a number of production employees performed some
14 routine preventative maintenance on weekends. *Id.* at 1125. The Board disregarded these
15 factors on the basis that they were insubstantial and did not reflect any meaningful overlap
16 or interchange of duties. *Id.* The Board also rejected the fact that production employees
17 interacted with and assisted maintenance employees. *Id.* at 1126. As in the case at bar, the
18 production employees in the *Capri Sun* case simply did not have the specialized skill and
19 knowledge to competently perform the basic job functions of maintenance employees.

20 For its part, the Employer relies on various cases involving failed efforts by unions
21 to represent certain "fractured" maintenance units. See e.g., *Peterson/Purina, Inc.*, 240 NLRB
22 1051 (1979) (Board rejected petitioned-for unit incorporating only a fractured subgroup of
23 employer's unskilled maintenance employees); *Chromalloy Photographic*, 234 NLRB 1046
24 (1978) (Board rejected appropriateness of employer's maintenance and repair employees
25 where petitioned-for unit excluded other maintenance employees who performed the same
26 basic functions). The Employer also cites several factually inapposite cases where
27 production employees seamlessly took over job duties of maintenance employees. See e.g.,
28 *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (Rejecting union's petition to represent subgroup
maintenance employees where maintenance employees regularly performed production

1 work); *TDK Ferrites Corp*, 342 NLRB 1006, 1008 (2004) (Maintenance employees performed
2 production work on a regular basis).

3 The Employer goes so far as to state that production and maintenance employees
4 “share an overwhelming community of interest” because “the employees work very closely
5 together, have only modest wage and skill differences, interchange frequently, receive the
6 same fringe benefits, and are subject to identical terms and conditions of employment.”
7 (Employer’s Pet. Pg. 56-57). The basic problem with the Employer’s argument is that proof
8 of these commonalities is do notE outweigh the fundamental distinctions between
9 maintenance employees and production employees in regard to placement within the
10 employer's organizational structure, job functions, skills, supervision, and pay.⁴

11 The law has long been quite clear in providing that the Petitioner is not required to
12 petition for the most appropriate unit, but only an appropriate unit. The evidence is clear
13 that maintenance employees are not so functionally integrated with productions that the
14 only appropriate unit is one that includes both of them. Accordingly, the Board should
15 find that, applying a traditional community of interest analysis, the Petitioner has made an
16 adequate showing that the maintenance employees are composed of a separately
17 identifiable group.

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19 **B. THE SPECIALTY HEALTHCARE CASE MERELY PROVIDES A CLEARER BASIS**
20 **FOR REJECTING THE EMPLOYER’S CONTENTION THAT A LARGER MIXED**
21 **BARGAINING UNIT IS THE ONLY APPROPRIATE UNIT**

22 The Board's recent decision in *Specialty Healthcare* sets forth the principles that apply
23 in cases where, as here, a party contends that the smallest appropriate bargaining unit must
24 include additional employees beyond those in the petitioned-for unit. The *Speciality*
25 *Healthcare* case sets forth certain heightened burdens that the Employer must meet in order
26 to overcome the Petitioner’s *prima facie* showing of a smaller appropriate unit. There, the
27 Board held:

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⁴At best, the commonalities pointed out by the Employer might go to show that a larger unit might well be appropriate. However, the burden that the Employer fails to meet is showing that a maintenance-only unit is inappropriate.

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[W]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. *Specialty Healthcare*, 357 NLRB No. 83, slip op. at pp. 54-55 (Aug. 26, 2011)

Clearly, the Employer cannot show that the maintenance and production employees share an “overwhelming community of interest” that would justify the rejection of a maintenance-only unit. As discussed above, the maintenance employees share a community of interest, and are readily identifiable as a separate group, because they are in their own department, are separately supervised, are in different job classifications, have different skills, and perform different job functions from production employees.

Once the Board determines that the petitioned-for unit is readily identifiable as a group (based on traditional community of interest factors such as job classifications, departments, functions, skills, pay and other similar factors) the burden shifts to the Employer to show that the maintenance employees shared an “overwhelming community of interest” with production employees. The heightened standard of proof cannot be met by merely pointing out minor miscellaneous commonalities between the petitioned-for class and a larger unit of employees. Rather, as the Board in *Specialty Healthcare* clarified, the burden is on the employer to show that the traditional community of interest factors “overlap almost completely.” *Id.* at 50.⁵ Here, given the substantial differences between maintenance and production employees (particularly in reference to maintenance employees’ placement within the employer's organizational structure, supervision, duties, skills, and pay), the Employer cannot show that the maintenance and production

⁵Quoting *Blue Man Vegas LLC v. NLRB*, 529 F.3d 417,422 (D.C. Cir. 2008)

1 employees share any genuine “overwhelming community of interest.”⁶ Despite the
2 Employer’s disagreement with the heightened standards of *Specialty Healthcare*, we believe
3 this decision is extant law and is, therefore, the standards set forth therein must be applied
4 to this case.

5
6 **C. THE SPECIALITY HEALTHCARE CASE IS NOT FACTUALLY
7 DISTINGUISHABLE ON THE BASIS OF ANY PAST BARGAINING HISTORY**

8 The Employer contends that *Specialty Healthcare* is distinguishable because there
9 existed some prior bargaining history involving production and maintenance employees.
10 However, the Employer principally relies on a bargaining relationship that was unlawfully
11 created. Specifically, in regard to the Teamsters’ 1989 contract, the mixed unit of
12 maintenance and production employees was rendered null and void *shortly after its creation*
13 because Employer had unlawfully recognized the Teamsters union as a minority union.
14 Each impacted maintenance employee was repaid all dues deducted from their wages. In
15 considering this isolated incident, the Regional Director expressed strong reservations
16 about the fact that the Employer failed to specify any time-frame during which the
17 Teamsters actually represented the maintenance employees.

18 The other two examples are equally unavailing. With respect to a subsequent
19 organizing effort in 1991 by two unions – Teamsters and Local 501 – to represent a
20 production and maintenance unit, the United States Sixth Circuit Court of Appeals
21 invalidated the election on the grounds that the election had been unduly influenced by the
22 provision of free legal services. In the last example, which occurred sometime in 1999, the
23 United Food and Commercial Workers filed a petition to represent a production and
24 maintenance unit, but lost the election. The mere filing of a petition proves nothing.

25 In sum, each of the past instances in which unions have sought to represent a mixed

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27 ⁶Certainly, there is no basis for finding that there is an “overwhelming community of
28 interest” merely on account of the miscellaneous commonalities cited by the Employer, such
as the fact that all maintenance and production employees shared the same locker room areas,
time clocks, security cards, work rules, anti-harassment policies, overtime policies, hairnets
and beard guards, etc. Even so, the Employer cannot remotely show any complete overlap
in regard to the most important community of interest factors, including placement within the
employer's organizational structure, supervision, duties, skills, and pay.

1 production and maintenance unit has failed. As such, there is no real “bargaining history”
2 to speak of in regard to maintenance employees. The evidence shows that the maintenance
3 employees have historically been unrepresented. Notwithstanding the Employer’s
4 insistence that there existed some bargaining history that precludes the application of the
5 standards in *Specialty Healthcare*, the Employer has offered no evidence showing that there
6 was any real bargaining history. Not only does the Employer fail to identify the dates
7 during which its maintenance employees were allegedly represented in a mixed bargaining
8 unit, the Employer has offered no evidence reflecting that any union engaged in collective
9 bargaining on behalf of the maintenance employees. The Regional Director further
10 rejected the Employer’s argument on the grounds that “[b]argaining history determined by
11 the parties and not by the Board is not binding.” (DD&E pg. 20)⁷ In sum, Petitioner is fully
12 in accord with the Regional Director’s finding that the evidence presented by the Employer
13 on the subject of past bargaining history was, at best, “inconclusive” (DD&E pg. 20)

14
15 **D. THE BOARD NEED NOT REVISIT ITS DECISION IN *SPECIALTY***
16 ***HEALTHCARE***

17 The Employer raises no new legal argument that would justify a reconsideration of
18 the *Specialty Healthcare* decision. The Employer spends a substantial amount of time
19 arguing that the Board’s decision was disingenuous and ill-considered. However, the
20 Employer offers nothing new in terms of substantive argument. Each of the main points
21 raised by the Employer mirror those already considered in the litigation leading to the
22 *Specialty Healthcare* decision. For example, the Employer accuses the Board of overruling
23 past case law without explanation, failing to proceed via rule-making, violating 9(c)(5) of
24 the Act by making the extent of organization a dominant factor in determining
25 appropriateness of a unit, and otherwise endangering workplace democratic rights and the
26 stability of collective bargaining. The Board specifically considered and rejected each of

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⁷Assuming *arguendo* that this purported “bargaining history” renders the *Specialty Healthcare* case factually distinguishable, then the Board has no occasion to revisit the holding in *Specialty Healthcare*.

1 these basic contentions when they were previously raised in the dissent and briefs filed in
2 connection with the *Specialty Healthcare* decision. Indeed, the *Specialty Healthcare* decision
3 speaks for itself in addressing the Employer's "spilled milk" objections. There are simply
4 no new arguments or unique facts presented herein which might justify revisiting the
5 Board's holding in *Specialty Healthcare*.

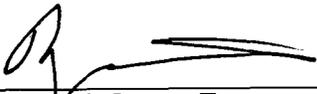
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7 **III. CONCLUSION**
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9 It is respectfully submitted that the Board must decline to grant the Request for
10 Review as the Employer has not shown any compelling reason for review, because it has
11 not demonstrated that the Regional Director's decision either departs from Board precedent
12 or is based on factual errors.

13
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15 Dated: December 21, 2011

Respectfully Submitted,
MYERS LAW GROUP

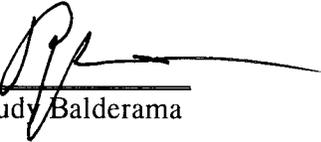
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18 By:



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Attorneys for Local 501

CERTIFICATE OF SERVICE

I certify that on December 21, 2011, I served a copy of this Opposition to Respondent's 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 Bernard J. Bobber at his registered address, bbobber@foley.com



Rudy Balderama