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

DPI SECUPRINT, INC.

Employer

and Case-3-RC-12019

GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
LOCAL 503-M

Petitioner

BRIEF OF THE GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS AS *AMICUS CURIAE*

The Graphic Communications Conference of the International Brotherhood of Teamsters ("GCC/IBT"), as *amicus curiae*, submits this brief addressing the proper analysis for determining an appropriate unit in representation cases within the printing industry. Petitioner Graphic Communications Conference/International Brotherhood of Teamsters, Local 503-M is an affiliated Local of the GCC/IBT. The GCC/IBT is a labor organization that represents workers in the printing, publishing, newspaper and graphic communications industries throughout the United States and Canada. The GCC/IBT represents more than 45,000 workers in all craft and skill areas in the printing and publishing industry, including pre-press, shipping, and bindery employees and the operators of various types of printing presses. The GCC/IBT urges the Board to continue to apply the traditional community of interest analysis to determine whether petitioned-for units within the printing industry are appropriate under the National Labor Relations Act ("NLRA" or "Act"). In so doing, the Board should affirm the Acting Regional

Director's Decision finding that the petitioned-for unit, which excludes offset press employees, is an appropriate unit under Section 9(b) of the Act, 29 U.S.C. 159(b), and reject the Employer's assertion that "press employees cannot be separated from other lithographic employees." Additionally, the Board should apply the standard articulated in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), when reviewing a challenge to a petitioned-for unit as under inclusive, as the Employer has challenged here. It is clear from the record that the Employer has not satisfied its burden to show that the press employees must be included in the bargaining unit. Therefore, the Board should reject the Employer's specious arguments and affirm the Acting Regional Director's determination that the petitioned-for unit constitutes an appropriate unit under Section 9(b) of the Act.

I. FACTS

The employer in this case, Secuprint, Inc., d/b/a DPI ("DPI" or Employer") operates a commercial printing business in Rochester, New York. (TR[1] 12). DPI employs approximately 20 hourly employees in five different departments: Press, Pre-Press, Digital, Bindery and Shipping. (TR 11). The Graphic Communications Conference of the International Brotherhood of Teamsters, Local 503-M ("Union") seeks to represent certain employees of DPI, and pursuant to Section 9(b) of the Act filed a petition with the National Labor Relations Board ("NLRB" or "Board") seeking certification of a unit comprising all full-time and regular part-time hourly employees in the Employer's pre-press, digital press, offset bindery and shipping and receiving departments. Pursuant to Section 9(c) of the Act, a representation hearing was held on April 20, 2011. Subsequently, the Union and the Employer submitted post hearing briefs addressing the

[1] All references to "TR" refer to the transcript of the April 20, 2011 Representation Hearing before John N. Sullivan, Hearing Officer.

composition of the appropriate unit in this case. The Employer asserted, as it does on review, that the petitioned-for unit is not appropriate because it excludes employees in the press department. The Union argued, as it does here, that the employees in the petitioned-for unit share a community of interest and therefore the petitioned-for unit is appropriate under Section 9(b) of the Act. After consideration of the entire record and the arguments of the parties, on May 20, 2011, the Acting Regional Director issued his Decision and Direction of Election ("Decision"), concluding that "[t]he petitioned-for employees – the pre-press, digital press, digital and offset bindery and shipping/receiving employees – share a sufficient community of interest to constitute an appropriate unit." (Decision at 20). The Acting Regional Director further held that there was insufficient evidence "demonstrating that the offset pressmen share such an overwhelming community of interest with the petitioned-for employees that they must be included in the unit." (Decision at 26).

Thereafter, the Employer requested a review of the Acting Regional Director's Decision and Direction of Election claiming that the Acting Regional Director misapplied Board precedent and that under the Employer's interpretation of relevant precedent the smallest appropriate unit is an overall unit of all hourly employees at the Employer's facility. As explained more fully below, the Employer's argument on review is without merit and the Acting Regional Director's Decision must be affirmed.

II. THE ACTING REGIONAL DIRECTOR'S DECISION FINDING THE PETITIONED-FOR UNIT APPROPRIATE FULLY COMPORTS WITH THE PROPER APPLICATION OF *AGI KLEARFOLD* AND RELATED BOARD PRECEDENT, AND MUST BE AFFIRMED.

Section 9(b) of the Act states:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

29 U.S.C. § 159(b). In determining an appropriate unit under Section 9(b) the Board first examines the petitioned-for unit employees. *In re Boeing Co.*, 337 NLRB 152, 153 (2001). "If that unit is appropriate, then the inquiry into the appropriate unit ends." *Id.* It is well established that in undertaking its statutory responsibility to determine an appropriate unit, the Board's "focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985). The Board's community of interest analysis considers numerous factors, including the degree of functional integration, degree of employee skills and common functions, training required, contact and interchangeability among employees, common supervisors and work locations, and the wages, hours and working conditions of the employees. *Ore-Ida Foods*, 313 NLRB 1016 (1994); *Bartlett Collins Co.*, 334 NLRB 484 (2001)("In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest 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).

In the instant case, the Acting Regional Director properly undertook the community of interest analysis and concluded that the employees in the petitioned for unit "share a sufficient community of interest to constitute an appropriate unit." (Decision at 20). Specifically, the

Acting Regional Director found that the there is a "relatively high degree of functional integration" and contact between employees which supported finding the petitioned for unit appropriate. (Decision at 21-23). He also found that the common supervision, and similar wages, hours and working conditions merited finding the petitioned for unit appropriate. (Decision at 21-23).

The Employer in this case argues that the Acting Regional Director's decision runs counter to the Board's decision in *AGI Klearfold LLC*, 350 NLRB 538 (2007), and must be overruled. This argument is without merit.

The petitioner in *AGI Klearfold* sought certification of a unit comprising all press department employees at the employer's consumer packaging business in Illinois. *Id.* The Regional Director found that the press employees constituted an appropriate "craft department" unit and concluded that the petitioned for unit was appropriate under the Act. *Id.* at 541, fn 7. The employer filed a timely request for review asserting that "the petitioned-for unit does not constitute a craft or departmental unit, and that the unit should include all production and maintenance employees in the lithographic process, or at a minimum, must include the pre-press department employees." *Id*. In its decision, the Board rejected the Regional Director's reliance on finding that the petitioned-for unit was a "craft department" unit and reversed the Regional Director's determination that the petitioned-for unit was appropriate. *Id.* at 541, fn. 7. Instead, the Board applied the longstanding community-of-interest analysis to the unit determination and conferred "appropriate weight" to the Board precedent "that the 'traditional lithographic' unit in the printing industry is a combined unit of press and pre-press employees." *Id.* at 540. In accordance with applicable precedent, the Board also rejected the employer's contention "that a production and maintenance grouping is the only appropriate bargaining unit" and concluded that

"[u]nder the facts involved here, a 'traditional' unit consisting of press and pre-press employees is appropriate for collective-bargaining purposes." *Id.* at 541.

The Employer's reliance on *AGI Klearfold* is misplaced as the facts of the present case are clearly distinguishable. The present case is distinguishable in several important ways. First, the petitioned for unit at issue in the present case is a unit of all hourly employees in the Employer's pre-press, digital press, offset bindery and shipping and receiving departments, not a stand-alone unit of press employees. In contrast, the petitioner in *AGI Klearfold* sought certification of a unit of only press department employees. Given that the community of interest analysis begins with an examination of the petitioned-for unit, the analysis needed in the present case is necessarily different than the analysis used in *AGI Klearfold*. That the Board in *AGI Klearfold* found that a press employee unit is not appropriate under the Act, should have little bearing on whether the employees in the petitioned-for unit in the present case share a community of interest.

Additionally, the shared community of interest between the press and the pre-press department employees in *AGI Klearfold* is far different than what exists in the case at bar. Specifically, in *AGI Klearfold*, the press department employees had regular contact with the pre-press employees because the press employees would routinely enter the pre-press work area to search for a "job bag" or missing plate. *Id.* at 540. When a problem arose, a press employee may enter the pre-press room to help solve the problem, and may "go as far as to make plates, if necessary." *Id.*. Pre-press employees will also enter the press room to observe the plates on the press if a problem with the printing plates arose during production. *Id*. at 539. Furthermore, in *AGI Klearfold* the relationship between the press and pre-press employees was such that "the pressmen alone do not constitute an appropriate unit, as they comprise but a segment of the

lithographic production employees employed by the Employer." *Id*. at 540 (internal quotation omitted).

In contrast, in the present case there is no evidence of the contact between the press department employees and other employees at the Employer's facility, let alone evidence that the press and pre-press department employees regularly come into each other's work areas as in *AGI Klearfold*. The evidence in this case clearly demonstrates that the press department employees are more highly skilled than the employees in all other departments. All pressmen at DPI have at least five years of experience (TR 48) and no one but press employees work on the presses (TR 54). Meanwhile, there is clear evidence that employees within the pre-press, digital press, digital and offset bindery, and shipping and receiving may perform work in any of these departments, excluding press, as needed. (TR 21).

Also, the press department employees work seven days a week whereas all other employees work only five. Press department employee work hours are also protected in a way not experienced by the remaining hourly employees. For example, uncontroverted record testimony indicates that when work is slow, press department employees are permitted to stay at work while other employees may be sent home. (TR 63-65).

In *AGI Klearfold,* the Board found that its decision was controlled by the Board's decision in *Moore Business Forms, Inc.*, 216 NLRB 833, 834 (1975). In *Moore*, the Board found that the petitioned for unit of pressmen only was not appropriate under the Act. It then applied the traditional community of interest analysis to the petitioner's alternative unit consisting of press and pre-press employees and concluded that "in view of the degree of skills requested in the Employer's printing operations, … the lithographic production employees employed in [the Employer's] press and preliminary departments constitute a cohesive unit appropriate for the

purposes of collective bargaining." *Id.* at 834. The record in the current case does not support a similar finding. The facts present in *AGI Klearfold* and *Moore Business* are distinguishable from the current circumstances, thus the outcome of *AGI Klearfold* is not controlling on the present case as the Employer argues.

However, the Board in *AGI Klearfold* also examined the employer's assertion that the only appropriate unit in that case is an overall production and maintenance unit. Similarly, the Employer in this case seeks to have the Board find that the only appropriate unit is one that contains the petitioned-for unit plus the excluded offset press employees. This combination includes all hourly employees and constitutes a wall to wall unit, like that sought in *AGI Klearfold* and *Moore*. As in those cases, there is an "insufficient cohesiveness" between all of DPI's employees "so as to require" an overall production unit. Specifically, the press department employees have different skills and work experience from the employees in the petitioned for unit. Press department employees work seven days per week, whereas the employees in the petitioned for unit only work five. Additionally, there is no evidence that press employees regularly do work in any of the other departments but testimony does show that only pressmen work on the presses and no employee in the petitioned for unit ever works on the presses.

Therefore, the Board should affirm the Acting Regional Director's decision finding that the petitioned-for unit constitutes an appropriate unit for collective bargaining and rejecting the Employer's contention that only a wall-to-wall unit of hourly production employees is appropriate. The Board should find that the Acting Regional Director's analysis correctly emphasized the Board's traditional community of interest factors, as required under longstanding Board precedent. The Board should further find that in applying the community of interest test, the petitioned-for unit is prima facie appropriate because these employees indisputably share a

community of interest. The Employer failed to show that the workers excluded from the unit share an overwhelming community of interest with the employees in the petitioned-for unit so as to require that they be combined into one unit. Therefore, the Board should reject the Employer's argument for an overall unit of employees and affirm the Acting Regional Director's Decision finding the petitioned-for unit appropriate.

III. THE EMPLOYER'S ARGUMENT RELIES ON A FLAWED INTERPRETATION OF BOARD PRECEDENT THAT MUST BE REJECTED

The central claim of the Employer's appeal is that the Acting Regional Director improperly applied Board precedent when he found the petitioned-for unit of employees, which excludes press department employees, an appropriate unit under Section 9(b) of the Act. (Brief on Review Submitted on Behalf of Employer Secuprint Inc. at 15 (June 30, 2011)) ("Employer Brief"). Specifically, the Employer asserts that the Acting Regional Director misapplied the Board's holding in *AGI Klearfold,* and contends that a proper application of *AGI Klearfold* requires a finding that the only appropriate unit in this case is one that includes the petitioned-for employees and press department employees, all hourly production employees. (Employer Brief at 19). As demonstrated above, the Acting Regional Director properly and logically applied *AGI Klearfold* and related precedent in finding the petitioned-for unit appropriate. Additionally, the Employer's argument relies on a fundamental misapprehension of *AGI Klearfold* which violates the Act and is contrary to clear Board and Supreme Court precedent, and must be rejected.

A. Employer's Erroneous Interpretation of *AGI Klearfold*

As explained above, *AGI Klearfold* simply represents the customary and straightforward application of the Board's venerated community of interest analysis. Yet inexplicably, DPI argues on appeal that "*AGI Klearfold* stands for the proposition that press employees cannot be

separated from other lithographic employees who share a community of interest" and asserts that "it is well established that press employees should be included in a broader lithographic unit." (Employer Brief at 15). The Employer seeks to have the Board find that any printing industry unit other than the "traditional lithographic unit" comprising press and pre-press employees is not appropriate under the Act. Essentially, the Employer asserts that because *AGI Klearfold* found a traditional lithographic unit appropriate, it requires that press and pre-press employees always be combined in a unit for purposes of collective bargaining. As demonstrated below, this assertion is deeply flawed and must be rejected.

As an initial matter, the Employer seeks an overall unit of all hourly production employees. So, even assuming that the Board was to inconceivably overrule decades of precedent on this topic, it is not clear how applying a straight presumption that the "traditional lithographic unit" is appropriate furthers the Employer's goal in this case. What the Employer wants is a wall-to-wall unit of all hourly employees, not the traditional lithographic unit.

Thus, it appears that the Employer has constructed an innovative interpretation of *AGI Klearfold*, one where the Board has established a presumption that any petitioned-for unit that contains one set of these employees, either press employees or pre-press employees, must also include the other to be appropriate. The Board must reject this convoluted interpretation of this straightforward case. In fact, it is ironic that the Employer chose to rely on *AGI Klearfold* to support its claim of an established Board presumption that an appropriate unit generally requires press and pre-press employees be together. In *AGI Klearfold* the Board explicitly denied that it created or applied the presumption sought by the Employer in this case. Specifically, in Footnote 6 of its decision, the Board addressed the United States Court of Appeals for the Seventh Circuit decision in *Continental Web Press Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984).

350 NLRB at 340 FN 6. In this decision, the Court of Appeals denied enforcement of the Board's order finding that a unit of only press employees was appropriate. *Id*. In its opinion, the Court of Appeals concluded that the Board "apparently has reversed a long-established presumption in favor of combining pressmen and preparatory employees into a single unit of lithographic production workers. " 742 F.2d at 1092. In *AGI Klearfold*, the Board responded to court's conclusion stating

> In light of the many occasions on which the Board has found a combined press and pre-press unit to be appropriate, and the Board's use of the denotation 'traditional lithographic unit' to describe the press and pre-press grouping, we can understand the court's language and the use of the term 'presumption.' However, we respectfully suggest that the Board has not applied a 'presumption' in favor of [pressman and preparatory employees] units. Rather, as we do here, we give appropriate weight to the precedent and to the traditional nature of the press/pre-press unit.

350 NLRB at 540 FN 6. The Employer conveniently omits discussion of the Board's stated position in *AGI Klearfold* which clearly rejects application of any presumption and affirms its continued intent to apply the traditional community of interest analysis to unit determinations within the printing industry: "we will continue to utilize a community-of-interest analysis in determining whether the petitioned-for unit – whether it be press employees only, a combined unit of press and pre-press employees, or an overall production unit – is appropriate." *Id.* at 540. Consequently, its argument, unsupported by *AGI Klearfold* must be rejected and the Acting Regional Director's Decision affirmed.

Moreover, the Employer's novel interpretation of *AGI Klearfold* is simply not viable as it violates Section 9(b) of the Act, reverses longstanding Supreme Court precedent and is unsupported by the Board's analysis and rationale in numerous representation cases.

B. The Employer's Interpretation of AGI Klearfold Violates Section 9(b) of the Act.

Section 9(b) of the Act requires the Board to "decide in each case … the unit appropriate for purposes of collective bargaining," 29 U.S.C. § 159(b). Thus, the initial question in any Section 9(b) challenge is whether the petitioned-for unit is appropriate. *See In re Boeing Co.*, 337 NLRB at 153 ("The Board's procedure for determining an appropriate unit under Section 9(b) is to first examine the petitioned for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends."). In determining whether a unit is appropriate the Board considers whether the employees in the petitioned-for unit share a community of interest, because "[a] cohesive unit – one relatively free of conflicts of interest – serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." *Action Automotive, Inc.*, 469 U.S. 490, 494 (1984) (citations omitted). A variety of factors are relevant to that determination, including "a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills, differences in job functions …; infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137-138 (1962). The current community of interest standard applied to the petitioned-for unit permits thoughtful review of the appropriateness of the petitioned-for unit while assuring employees "the fullest freedom" in exercising their rights to organize and select a collective bargaining representative.

However, under the Employer's interpretation of *AGI Klearfold*, when the Board must determine whether a unit of employees in the printing industry is an appropriate unit under Section 9(b) of the Act its inquiry would not begin with an examination of the petitioned-for

unit. Instead, if the petitioned-for unit contains either press or pre-press employees the Employer's interpretation requires the Board begin with an examination of a combined unit of press and pre-press employees. If these employees share a community of interest, the unit would be deemed appropriate and the inquiry into the appropriateness of the petitioned-for unit ends. Section 9(b) of the Act requires that employees be given "the fullest freedom" in exercising their rights to organize and select a collective bargaining representative, yet this cannot possibly be assured when the appropriateness of the petitioned-for unit is not initially evaluated.

Additionally, while the Board has clearly stated that a petitioner's desire as to the unit is always a relevant consideration, *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964)*; See also Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (reaffirming "polic[y] … of recognizing the desires of petitioners as being relevant consideration in the making a unit determinations) in many cases, like the present one, the appropriateness of the petitioned-for unit might never be evaluated. For example, if the Board were to apply the Employer's interpretation of *AGI Klearfold* to the present case, it would first look to see if the presumptive unit of press and pre-press employees was appropriate. Assuming the Board found that these employees shared a community of interest, the union would be required to demonstrate that exceptional circumstances require a deviation from this presumptive unit. Thus, instead of evaluating the appropriateness of the petitioned-for unit, the Board's inquiry would focus on whether the presumptive unit was inappropriate under the circumstances. Furthermore, the need to prove exceptional circumstances warranting an exception to the presumption that a unit including both press and pre-press employees is the only appropriate unit, may be so burdensome as to repeatedly prevent lithographic employees from organizing into units other than the "traditional lithographic unit." This is a clear restriction on the freedom of employees to select their

bargaining representative, in violation of Section 9(b), therefore, the Employer's specious interpretation must be rejected.

C. The Employer Manufactures a Presumption Unsupported by Supreme Court Precedent and Clear Board Precedent

The Employer's argument in this case and its flawed interpretation of the Board's decision in *AGI Klearfold* as requiring a press industry unit to contain both press and pre-press employees must also be rejected because it completely ignores the Board's longstanding precedent regarding unit determinations. Specifically, the Employer disregards the well-established principle that in undertaking its statutory responsibility to "decide in each case … the appropriate unit for purposes of collective bargaining," 29 U.S.C. § 159(b), the Board's "focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Auto., Inc.,* 469 U.S. 490, 494 (1985). The Employer's argument fails to recognize that since Section 9(b) of the Act requires examination in "each case" and contemplates that a "unit appropriate for the purposes of collective bargaining" may be "the employer unit, craft unit, plant unit or subdivision thereof," it follows logically that several different groupings of employees in a workplace may each share a sufficient community of interest to qualify as an appropriate unit. In fact, the Board has recognized that "there is nothing in the statue which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) enfd. 190 F.2d 576 (7th Cir. 1951) (emphasis in the original). Application of a presumption in favor of the "traditional lithographic unit" contradicts this approach as it would unnecessarily appoint this unit as the *only* appropriate unit in many circumstances, where other equally appropriate units may exist.

The Employer's interpretation of *AGI Klearfold* as applying a presumption in favor of the "traditional lithographic unit" would also make the Board's unit determinations unnecessarily rigid and inflexible. This 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). Furthermore, the Supreme Court has 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). The Supreme Court has further held that the 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).

The community of interest analysis consistently applied by the Board fully comports with this Supreme Court precedent as it requires a thorough, fact specific inquiry. In Section 9(b) of the Act, Congress specifically mandated that *in each* case before it, the Board must decide which bargaining unit is appropriate after giving due consideration to, and balancing, the sometimes competing interests of employers and employees. The current community of interest standard in use today correctly and appropriately enquires into the circumstances of each situation. As such, the Employer's attempt to supplant this analysis with a presumption that the only appropriate unit containing press or pre-press employees is a combined unit must be rejected.

In addition, were the Board to find that *AGI Klearfold* means what the Employer says it does – a petitioned-for unit in the printing industry other than the "traditional lithographic unit"

is not appropriate under the Act – the Board must overrule *AGI Klearfold*. As explained above, this interpretation of *AGI Klearfold* is incompatible with the mandate of Section 9(b) that the Board decide "in each case" the unit appropriate for collective bargaining.

Given the fact that the Board's community of interest analysis relies on the facts of any given case, it stands to reason that multiple combinations of employees within the printing industry may constitute an appropriate unit under the Act. Yet the Employer in this case ignores the many instances where in the Board's consideration of units in the printing industry, it has found several groupings of employees, including press-only units and overall production and maintenance units, in addition to the "traditional lithographic unit" appropriate for purposes of collective bargaining. *Sutherland Paper Co.,* 112 NLRB 622, 623-624 (1955) (press unit); *Journal-Times*, 209 NLRB 745 (1974) (unit of overall production and maintenance employees appropriate); *Continental Web*, 262 NLRB 1395, 1396 (1982) enf. denied 742 F.2d 1087 (7th Cir. 1984) (press-only unit).

The Employer's argument in this case relies in large part on the fact that the Board gives "appropriate weight" to the "traditional lithographic unit" when evaluating an appropriate unit in the printing industry. However, the Employer ignores the fact that many of the cases leading to the establishment of the "traditional lithographic unit" involved attempts by employees to certify combined units of press and pre-press employees instead of an overall production unit requested by the employers. *See e.g. St. Louis Litho.,* 114 NLRB 24 (1955)(petitioned for unit of press and pre-press employees found appropriate, employers argument for a larger unit rejected); *Meyer Label Co.*, 232 NLRB 933, 934 (1977) (employer's argument for an overall production and maintenance unit rejected and the petitioned for unit of lithographic production employees affirmed). Also, though it is true that the Board has regularly found that a combined unit of press

and pre-press employees (the traditional lithographic unit) an appropriate unit for collective bargaining, it has never found it to be the *only* appropriate unit. That the Board has generally found that press and pre-press employees share a community of interest and therefore *may* be combined in an appropriate unit does not mean that these employees *must* be combined in one unit to be appropriate under the Act.

Also, while the Board has repeatedly found appropriate the traditional lithographic unit, it has never found a particular combination of employees within the printing industry per se inappropriate. This makes sense, because as discussed above, such a restriction would impede the employees' freedom to select their collective bargaining representative in violation of Section 9(b). Furthermore, as noted above, the Board has never endorsed application of a presumption and has specifically rejected the idea that it created a presumptively appropriate unit in the printing industry. See discussion of *AGI Klearfold,* 350 NLRB 538, 340, FN 6 *supra* at 6.

For all of the above reasons, the Board must reject the Employer's argument in this case that *AGI Klearfold* stands for the proposition that "press employees cannot be separated from other lithographic employees who share a community of interest" and asserts that "it is well established that press employees should be included in a broader lithographic unit." This contention violates the requirements of the Act and runs counter to the "main corpus of [the Board's] jurisprudence, which holds that the Board need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace." *Specialty Healthcare*, 357 NLRB No. 83, 2011 WL 3916077 at *10 (2011). Were the Board to accept the Employer's argument in this case it "would stand on its head the statutory concept of an appropriate unit." *Overnite Transportation*, 322 NLRB 723, 725 (1996).

IV. THE EMPLOYER HAS NOT MET ITS BURDEN UNDER APPLICABLE LAW DEMONSTRATING THAT THE PRESS DEPARTMENT EMPLOYEES MUST BE INCLUDED IN THE UNIT.

A. The Board's Recent Decision in *Specialty Healthcare and Rehabilitation Center of Mobile* is Applicable to Case

On August 26, 2011, the Board issued its decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, 2011 WL 3916077 (2011). This case reaffirmed and reiterated the Board's use of the community of interest analysis in unit determinations and clarified that when an otherwise appropriate unit is challenged as being not appropriate because it excludes certain employees, the challenging party must demonstrate that the excluded employees share an "overwhelming community of interest" with the employees in the petitioned-for unit requiring that they be combined in one larger unit. *Id.* Although this case involved the certification of a bargaining unit in the non-acute healthcare industry, the Board's holding is controlling on the present case. At its base, *Specialty Healthcare* involved a challenge to the Regional Director's finding that a petitioned-for bargaining unit of certified nursing assistants (CNAs) was appropriate under the Board's traditional community-of-interest analysis. However, the Board's decision is not limited to the non-acute healthcare setting and its primary holding is applicable to the Board's analysis of appropriate units across industries, including the printing industry, that involve similar circumstances.

In *Specialty Healthcare*, the employer asserted that a larger unit, encompassing the petitioned for unit, but also including previously excluded nonprofessional service and maintenance employees at its facility, was the only appropriate unit containing the CNAs. *Id.* The Board determined that "[b]ecause this case raises important issues concerning the Board's determination of appropriate bargaining units," it "invited parties and interested amici to file briefs addressing the issues. *Id.* at 1, *citing Specialty Healthcare and Rehabilitation Center of*

Mobile, 356 NLRB No. 56 (2010). In its order inviting briefs, the Board noted that "it has an obligation under the Act to continually evaluate whether its decisions and rules are serving their statutory purposes," and specifically stated that this obligation "extends as well to the procedures and standards for determining whether proposed units are appropriate in all industries—a critical and necessary prerequisite for resolving questions concerning representation." *Specialty Healthcare*, 356 NLRB No. 56, 2010 WL 5195445, 2 (2010). The Board also recognized that "[i]n most respects, the Board's standard for determining whether a proposed unit is an appropriate unit is uniform across industries. Industry-specific rules are the exception, not the norm." *Id* at 5. Accordingly, the Board sought briefs addressing issues specific to the non-acute healthcare setting, but also sought comments on general principles to guide the Board's determination of whether a proposed unit is appropriate. *Id*. at 2-5.

After consideration of arguments from a broad range of interested parties, the Board issued its decision in *Specialty Healthcare*. In its decision the Board explicitly states that its analysis involves "the general principles that guide the Board's determination of whether a proposed unit is appropriate" and the Board did not limit its conclusions in this regard to any specific industry. 2011 WL 3916077, 5. Additionally, *Specialty Healthcare* has recently been applied to several cases involving unit determinations outside of the healthcare setting. *See e.g. DTG Operations, Inc.*, 357 NLRB No. 175, 2011 WL 7052275, 1 (December 30, 2011)(Board applied *Specialty Healthcare* analysis to determination of appropriate unit of rental agent employees at an airport rental car facility); *Odwalla Inc.*, 357 NLRB No. 132, 2011 WL 6147417, 2 (December 11, 2009)(Board applied *Specialty Healthcare* to determination of appropriate unit of employees engaged in product sales and distribution and product storage repair); *Grace Industries, LLC*, 2011 WL 6122778, 1 (December 8, 2011) (remanded case to

Regional Director for consideration of appropriate unit of asphalt workers under *Specialty Healthcare*); *Performance of Brentwood*, 2011 WL 5288439, 1 (November 4, 2011)(remanded case to Regional Director for consideration of appropriate unit of car dealership employees under *Specialty Healthcare*); *Oliver C. Joseph, Inc.*, 2011 WL 3946951, 1 (September 7, 2011)(Board found that the Regional Director's decision regarding the appropriate unit of car dealership service department employees, which preceded *Specialty Healthcare*, nonetheless complied with the Board's analysis in that case.) Therefore, the fact that *Specialty Healthcare* involved employees in the healthcare industry, is irrelevant and does not preclude the Board from applying its analysis in *Specialty Healthcare* to the case at bar. Furthermore, the primary issue in in the current case, specifically the Employer's argument that a larger unit encompassing the petitioned-for unit plus excluded press employees is the only appropriate unit, is analogous to the employer's argument in *Specialty Healthcare*. Therefore, the Board's holding on this issue in *Specialty Healthcare* should be applied as controlling precedent in this case.

B. The Employer Has Failed to Demonstrate the Excluded Employees Share "Overwhelming Community of Interest" with the Employees in the Petitioned-For Unit as Required under *Specialty Healthcare*.

As noted above, the Board in *Specialty Healthcare* addressed two issues related to the determination of an appropriate unit, including the applicable standard to be applied to unit determinations specific to a nonacute health care facility. 2011 WL 3916077, 5. The Board, however, also examined the traditional principles of unit determination. The Board's description and application of these principles is consistent with the policies expressed in *AGI Klearfold* and related Board and Supreme Court precedent discussed above. *Id.* at 20 ("Our decision today adheres to well-established principles of bargaining-unit determination, reflected in the language of the Act and decades of Board and judicial precedent"); See *also discussion supra.* at 8.

Specifically, the Board noted that the "Supreme Court has recognized that Section 9(a) [of the Act] 'read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." *Id.* at 12, *quoting American Hospital Association*, 499 U.S. 606, 610 (1991). Accordingly, the Board observed that "[p]rocedurally, [it] examines the petitioned-for unit first. If that unit is an appropriate unit, the Board proceeds not further." *Id.*; *see also Wheeling Island Gaming Inc.*, 355 NLRB No. 127, slip op. at 1 fn. 2 (2010) ("the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board's inquiry ends."). The Board also recognized that "[i]n making the determination of whether the proposed unit is an appropriate unit, the Board's 'focus is on whether the employees share a community of interest,'" *Id.* at 14, *quoting NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985), which requires examination of

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., quoting United Operations, Inc., 338 NLRB 123, 123 (2002). Finally, the Board agreed with past cases and related judicial precedent finding that "it is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining." *Id., quoting Overnight Transportation*, 322 NLRB at 723.

After recounting and reaffirming these general principles, the Board in *Specialty Healthcare* then addressed "the question of how those principles apply when the employer contends that the smallest appropriate unit contains employees not included in the petitioned-for unit." *Id.* at 5. Regarding this broader question, the Board reiterated and clarified that

> when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (base on job classifications, departments, functions, work locations, skills, or similar factors), and the Board find 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.

Id. at 17. [emphasis added]. As explained in *Specialty Healthcare*, the Board and courts of appeals have repeatedly and "necessarily required a heightened showing to demonstrate that the proposed unit [found appropriate] is nevertheless inappropriate because it does not include additional employees." *Id.* at 16 and the cases cited therein. The Board favorably cited the District of Columbia Circuit Court decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008) which held "that the proponent of the larger unit must demonstrate that employees in the more encompassing unit share 'an overwhelming community of interest' such that there 'is no legitimate basis upon which to exclude certain employees from it.'" *Id.* at 16, *quoting* 529F.3d at 421.

Here the employees in the petitioned-for unit comprising the hourly employees in the Employer's pre-press, digital press, offset bindery and shipping and receiving departments clearly share a community of interest. As in *Specialty Healthcare*, this point is not in dispute. In its Brief on Review, the Employer does not contend that the petitioned for unit is inappropriate because the employees included in the unit do not share a community of interest. To the contrary, the Employer affirms the Acting Regional Director's decision on this point, stating that the "Acting Regional Director cited specific evidence that showed the existence of a community of interest among employees in the petitioned-for unit," (Employer Brief at p. 15), noting that he "correctly found that the similarities among the employees in the petitioned-for

unit with respect to requisite skill sets and training weighed in favor of finding a community of interest." (Employer Brief at p. 11). Since there is no argument that the petitioned for unit is not appropriate, the question then becomes is this otherwise appropriate unit inappropriate because it excludes other employees that share with them an overwhelming community of interest. *Id.* at 16-17. The Employer bears the burden of demonstrating that the excluded press employees share an overwhelming community of interest such that they must be included in the unit. *Id.* The Employer has failed to satisfy this burden.

The Employer's Brief on Review is replete with assertions that press employees share a community of interest with the petitioned for unit and therefore must be included in the unit. However, even assuming the Employer's assertions regarding the shared community of interest were true, this would not be enough to warrant their inclusion in the petitioned for unit. As the Board has recognized "once the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate." *Id.* at 15. The Board further explained

> because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate. More must be shown.

Id.

In explaining when an "overwhelming community of interest" will be found the Board in *Specialty Healthcare* noted cases finding this standard met when the traditional community of interest factors "overlap almost completely," for the included and excluded employees and "there is no legitimate basis upon which to exclude certain employees from it," *Id.* at 16, quoting *Blue*

Man Vegas, LLC v. NLRB, 529 F.3d at 422. The Board also noted that "employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a 'fractured' unit. *Id.* at 18. A unit is fractured when a petitioner seeks representation in "'an arbitrary segment' of what would be an appropriate unit." *Id. quoting Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). Fractured units are "combinations of employees that are too narrow in scope or that have no rational basis." *Id. quoting Seaboard Marine*, 327 NLRB 556 (1999).

In the instant case, the Employer has failed to demonstrate that the offset press employees share an overwhelming community of interest with the petitioned-for unit. At best, the Employer has demonstrated that the press employees share *some* community of interest with the petitioned-for unit, however the shared community of interests is not so overwhelming that "neither [the press employees or the petitioned for employees] can be said to have any *separate* community of interest." *Blue Man* Vegas, 529 F.3d at 422 (emphasis added). Also, the petitioned-for unit is clearly not a fractured unit. As explained in the Acting Regional Director's Decision, "the record reveals that offset pressman are more highly skilled than any of the other employees, and it takes substantially longer to train a pressman who comes to the job without experience that it does to train other employees. The offset press department works seven days a week, where the other departments work five days. When work is slow, pressman are allowed to stay on the job, while employees in the bindery are sent home." (Decision at 23-24). Thus, there is clearly a rational basis for excluding the press employees from the petitioned for unit. Furthermore, pursuant to the test articulated in *Blue Man Vegas, LLC v. NLRB*, which has been endorsed by the Board in *Specialty Healthcare*, the community of interest factors of the offset press employees and the petitioned for unit employees clearly do not "overlap almost completely." The employees in the petitioned-for unit have different skill levels, training, and working hours

than the offset press employees. In addition, there is no functional integration between the employees in the petitioned-for unit and the pressmen because only pressmen operate the presses. Thus, it also cannot be said that there is no legitimate basis for excluding these employees from the petitioned for unit. The Acting Regional Director found that the "the offset press employees do not share such a close community of interest with the petitioned-for employees that they *must* be included in the unit." (Decision at 23.) Therefore, the Board should affirm the Acting Regional Director's decision, which fully comports with *Specialty Healthcare* and *AGI Klearfold*, that the petitioned for unit, which excludes the offset press employees, is appropriate and the Decision should be upheld.

V. CONCLUSION

The GCC/IBT urges the Board to adhere to its longstanding precedent in unit determination cases, recently reaffirmed and reiterated in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). Furthermore, for all of the reasons discussed above, GCC/IBT requests the Board affirm the Acting Regional Director's Decision and Direction of Election.

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Respectfully submitted,

By: /s/Peter J. Leff

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