

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

.....
In the matter of: .

GENERAL ELECTRIC COMPANY .

Employer, .

Case No. 14-RC-073765

and .

IUE-CWA, THE INDUSTRIAL DIVISION OF .
THE COMMUNICATIONS WORKERS OF .
AMERICA, AFL-CIO CLC, .

Petitioner. .
.....

**GENERAL ELECTRIC'S REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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Pursuant to Section 102.67(a) of the National Labor Relations Board's Rules and Regulations, General Electric Company, the Employer, submits this request for review of the Regional Director's Decision and Direction of Election ("D.D.E.") in this matter. As discussed in further detail below, the Regional Director's creation of a fractured, gerrymandered bargaining unit at the Employer's West Burlington location deviates from established Board precedent. In reaching the conclusion that the plant's bargaining unit should contain only seven out of ten Plant departments, the Regional Director relied on an erroneous legal standard and inaccurate factual conclusions. Instead, when one examines the applicable precedent, most recently articulated in Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011), and the evidence, the only appropriate bargaining unit is one that includes all hourly employees in all of the Plant's departments, including the three expressly excluded by the Regional Director -- Engineering, Service, and Technology.

THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Union petitioned-for the following unit:

[M]ost of the employees in the following departments: Materials, Fabrication, Assembly, Quality, Facilities, EHS (Environmental Health and Safety), and Lean. Within these departments, Petitioner [sought] to exclude the Materials Buyers as lacking a community of interest; Quality Admin and EHS Manufacturing Entry employees as office clerical employees; and the Manufacturing Leaders in Materials, Fabrication, and Assembly as supervisors. Petitioner also seeks to exclude all employees in the Service, Engineering, and Technology departments because those employees are not production or maintenance employees and do not share a community of interest with production and maintenance employees

(D.D.E. at 2.)

The Employer contends “that the only appropriate unit must include all hourly employees employed in all of the aforementioned departments and that the Manufacturing Leaders should be included in the unit because they are not supervisors.” (D.D.E. at 2.)

Following three days of hearing on these issues, the Regional Director concluded the following constituted a unit appropriate for the purpose collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed in the Assembly, EHS, Fabrication, Facilities, Lean, Material, and Quality departments, employed by the Employer at its West Burlington, Iowa facility, excluding Engineering, Technology and Service department employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(D.D.E. at 45-46.)

THE BASIS ON WHICH REVIEW IS SOUGHT

The Employer is filing this Request for Review on the basis that:

(1) The Regional Director’s decision raises a substantial issue of law and policy because it departs from officially reported National Labor Relations Board precedent; and

(2) The Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Employer, a party to the proceeding.

SUMMARY OF THE EMPLOYER'S POSITION

The Regional Director's D.D.E. must be set aside, because he blatantly misapplied the standard set forth in the Board's recent decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 N.L.R.B. No. 83 (2011). Indeed, the Regional Director's determination here is an unwarranted extension of the Board's *Specialty Healthcare* standard because it does not conform to the Board's requirement that the Union must "demonstrate" that the employees in the petitioned-for unit are "readily identifiable as a group" and "that they share a community of interest" before shifting the burden to the employer and applying the "overwhelming community of interest" to the proposed larger group. *Specialty Healthcare*, 357 N.L.R.B. No. 83 sl. op. at 11 n. 25 (2011); *Blue Man Vegas, LLC v. N.L.R.B.*, 529 F.3d 417 (D.C. Cir. 2008).

In this case, neither the petitioned-for unit nor the Regional Director's recommended unit is presumptively appropriate, because neither is an employer unit, a craft unit, a plant unit or a subdivision thereof. Furthermore, neither the petitioned-for unit nor the recommended unit is a readily identifiable group that shares a community of interest. Rather, the seven departments thrown together by the Regional Director have nothing more in common, and in fact in many instances have less in common, than the ten departments that make up the Plant as a whole. As such, the Regional Director wrongfully shifted the burden on the employer to prove that an "overwhelming community of interest" existed between the petitioned-for unit and any excluded employees, because the union never demonstrated that the employees in the

petitioned-for unit were a readily identifiable group that shares a community of interest.

Additionally, the Regional Director's D.D.E. must be set aside because he also ignored prior Board precedent holding that he must take into account whether the smallest appropriate unit must contain additional employees. The included and excluded employees here share such an overwhelming community of interest that there is no legitimate basis upon which to exclude the excluded employees from the bargaining unit. *United Rentals, Inc.*, 341 N.L.R.B. 540 (2004). Both the petitioned-for unit and the recommended unit would result in unit proliferation and labor-relations chaos. The interests of the included employees are "insufficiently distinct" from those of other employees so as to warrant the establishment of a separate unit. *Id.*; *Wheeling Island Gaming*, 355 N.L.R.B. No. 127 sl. op at 1, n.2 (2010); *Seaboard Marine*, 327 N.L.R.B. 556 (1999). As such, the Regional Director's unit determination must be set aside, and the Employer's requested Plant-wide unit must be recognized as the only appropriate unit in these circumstances.

FACTS

I. The Employer's West Burlington Plant And Its Organizational Structure.

The Employer produces custom designed and built low voltage switchgears for customers such as large hospitals and stadiums at its West Burlington, Iowa plant. (D.D.E. at 3; R. 29.) The production facility consists of a single building, which houses all 250 employees involved in the production process. (D.D.E. at 3-4; R. 32.) A single plant manager, Chad Ebeling, leads ten separate Plant departments -- the Employee

Health & Safety Department, the Quality Department, the Materials Department, the Assembly Department, the Fabrication Department, the Engineering Department, the Facilities Department, the Service Department, the LEAN Department, and the Technology Department. (D.D.E at 3-4; Er. Ex. 2.) Each department is coordinated by a single, distinct manager or leader. (D.D.E at 3; Er. Ex. 2.)

II. All Hourly Employees Share Common Supervision And Terms And Conditions Of Employment, But All Departments Are Separately Supervised On A Day-To-Day Basis.

The Plant Manager is the only common supervisor for all the hourly employees. (D.D.E. at 3; Er. Ex. 2.) As the Plant Manager, Mr. Ebeling is the sole supervisor responsible for all personnel decisions involving all the hourly employees at the West Burlington facility, including, but not limited to, establishing wages and benefits, establishing work rules, establishing the staffing levels, approving overtime, hiring employees, firing employees, authorizing transfers between departments, and issuing disciplinary actions. (R. 25-28, 150, 165; D.D.E. at 3.) The Plant Manager alone sets the vacation policy for the Plant. (R. 27.) The Plant Manger sets the wage rates at the Plant and all hourly employees at the Plant have the same entry-level pay -- \$13 an hour. (R. 25-28, 287.) The Plant Manager approves the employee handbook, which is applicable to all hourly employees at the Plant. (D.D.E. at 3, 12; R. 26-27.) The Plant Manager also establishes disciplinary rules and grievance procedure to address problems that arise at the Plant, which are equally applicable to hourly employees in all ten departments. (R. 287-288.)

The Plant Manager also issues safety policies for the Plant that apply to all employees, regardless of department. (R. 27, 29.) Similarly, the Plant Manager also mandates specific safety equipment and protection for all hourly employees at the Plant. (*Id.*) For example, the Plant Manager has decided that no employees could wear shorts in the production area, regardless of their originating department. (*Id.*) Similarly, he has required that all hourly employees must wear steel-toed boots and safety glasses when they are on the production floor. (*Id.*) Primarily office-based employees, such as the EHS Specialists, Engineering Designers, Assembly Techs, Controls Specialists, LEAN R&D Specialists, Buyers, Manufacturing Entry, do not have to wear the safety gear when they work in their enclosed offices, but they do need to do so when making one of their frequent trips to the production floor. (R. 194-196.)

Additionally, all hourly employees are part of a unified, non-department specific plant-wide seniority system, which is utilized to make certain personnel decisions such as the order of layoffs. (R. 278; Er. Ex. 7.) Employees also have bumping rights back to other parts of the Plant that they previously worked in, so an employee who no longer works on the production floor, but instead works in the Service, Engineering, EHS, LEAN, or Technology Departments, could bump an existing Assembly Department employee off the production floor in the event of a lay off. (R. 280-281.) The Plant's Human Resources Manager tracks all employees' job trail from the beginning of their employment at the West Burlington Plant, so as to facilitate seniority-based bumping when necessary. (R. 281.)

The Plant's Human Resource Department monitors all employees' attendance in all Departments. (D.D.E. at 12; R. 289.) All hourly employees must record their time on a time clock, by punching in and out of work. (R. 121.) The Engineering, EHS, LEAN, Facilities, Quality, Technology, and Materials, and Assembly Department employees all work from 7:00 a.m. until 3:10 p.m. (R. 122.) The Fabrication Department employees work from 7:00 a.m. until 3:00 p.m. (R. 122.) The Service Department works different schedules based on customer needs, given that the Service Department is the primary interface with the Plant's customers. (R. 122.) If any employee reaches a 3% average for absences or tardies, the Human Resources Department automatically generates a corrective action notice, to warn the employee about her unacceptable attendance record. (D.D.E. at 12; R. 289-290.)

Although a separate manager or lead employee coordinates each department, those managers and leaders do not make decisions on employment-related issues. (D.D.E. at 3-4; R. 25-28) None of the department managers have authority to establish labor relations or other personnel policies. (R. 28.) Instead, the Department managers or leaders are responsible for assigning work on a day-to-day basis and for giving employees direction throughout the day. (R. 225.)

III. The Company's Production Process At West Burlington Is Functionally Integrated, With All Ten Departments Playing An Equally Important Role.

Every order the Company receives from a customer is unique. (R. 30.) Because every order is unique, all of the hourly employees in the ten Plant departments play an important role together in the Plant's functionally integrated production process that

results in creation of the customer's product. (R. 30-32.) Accordingly, all department managers, including managers from the Service, Technology and Engineering Departments, meet three times a week to establish production goals and resolve production issues. (R. 74.)

When a customer requests a new order, the production process begins with the Service Department employees. (R. 30-32, 69-71.) The Service Department employees work with customers to understand their needs. (R. 30-32, 69-71.) Once the product is made, in addition to receiving and processing orders from customers, the Service Department employees produce the instruction manuals necessary for the customers to properly operate the finished products. (R. 70.)

Once the Service Department employees understand the product the customer needs, they work with the Engineering Department employees to construct the plans for production and a bill of materials needed to manufacture the order. (R. 34-35, 44-45.) Simultaneously, the Technology Department employees create plans to ensure that the products meet all appropriate standards for heat and UL. (R. 34-35.) The Engineering Department employees share information with the Technology Department employees as necessary. (R. 34-35.)

After the Engineering Department employees produce the bill of materials, the bill is sent to the Materials Department employees, who purchase the necessary items. (R. 50-51.) At times, however, even before receiving a new order from the Engineering Department employees, the Materials Department employees interface with employees in each of the other departments to ensure that they have enough raw materials to make

the products. (R. 50-51.) The Materials Department employees coordinate materials for all of the departments as needed throughout the production process, and thus, the Materials Department employees are in constant communication with the other departments. (R. 54-55.)

Also, once the Engineering Department employees complete the plans for production of the order, the Engineering Department employees send the plans for assembly to the Fabrication Department employees, who will make the parts needed to meet the plans created by the Engineering Department employees. (R. 30.) Once the Fabrication Department employees create the parts, the employees of the Materials Department deliver the parts to the Assembly Department employees for production. (D.D.E. at 7-8.)

Throughout this process, there is frequent communication between the Engineering and Technology Department employees on one hand with the employees of the Fabrication Department or the Assembly Department on the other hand. The Engineering and Technology Department employees actually “deal[] with the floor daily in some aspect, whether it be an Engineer, Electrical, or Mechanical.” (R. 50-51, 59, 62, 65.) The employees of the Engineering and the Technology Departments also physically work together with the Assembly Department employees, often on the shop floor, to resolve “issues with assembly as they are put together” or to address “changes to new assemblies.” (R. 35.) In fact, the “primary job” of the Engineering and Technology Department employees is to support the Assembly and Fabrication Department employees, “so when an issue comes up with a design on the shop floor,

and it is a technology drawing, they will go out and resolve it. (R. 64, 66, 71.) Both the Engineering Department employees and the Technology Department employees play “a very important role in [the Plant’s] fabrication process and assembly process.” (R. 64, 66, 71.) In sum, the Engineering and Technology Department employees are part of the Fabrication Department and Assembly Department production process all the way through. (R. 378.)

At the end of the process, the Quality Department employees test the product created by the Assembly Department employees, and coordinate with the Service, Engineering, and Fabrication employees to address any outstanding quality-related issues. (R. 44.) There are five quality inspectors throughout the plant, who reside in either the Fabrication Department or the Assembly Department. (R. 45.) If the quality inspectors find a problem with an assembled product, then they work with the Engineering and Technology Departments employees to resolve the problem before the product is shipped to customers. (R. 46.)

Although not directly involved in the construction of the product, the Employee Health and Safety (“EHS”) Department employees coordinate the safety procedures for all of the departments, including developing new procedures and protocols for handling the products designed by the Engineering and Technology Department employees, constructed by the Fabrication Department employees, and assembled by the Assembly Department employees. (R. 40-41.) The Manufacturing Entry person in the EHS Department also coordinates the Plant-wide healthy food and exercise program that applies to all departments. (R. 41.)

Similarly, the employees of the Facilities Department are not involved in the production process. (D.D.E. at 10; R. 42-43.)

Finally, the LEAN Department is a cross function team that analyzes all Plant processes and constructs methods of improving each of the other departments' processes and the employees are not involved in the production process. (R. 37.) Members of the LEAN Department originally work in every other Plant department, including Technology, Service, and Engineering. (R. 38.)

IV. There Is Significant Interaction And Interchange Between The Engineering, Service, and Technology Departments And The Other Plant Departments.

As was illustrated by the Employer's "GE West Burlington Functional Working Chart" (Er. Ex. 3), employees in every support department, including Engineering, Service, and Technology, have frequent interchange and contact with Assembly employees. (R. 50-51, 64-66, 78-80; Er. Ex. 3.) Similarly, employees in the support departments, including Engineering and Technology, have frequent interchange and contact with Fabrication employees. (*Id.*) The Engineering and Technology Departments are in daily, routine contact with the Fabrication Department and Assembly Department employees to assist in the production process. (R. 50-51, 58-59, 62, 64-66.) As issues arise during the production process, Technology and Engineering Department hourly employees are on the production floor once a day to coordinate with Materials and Assembly Department hourly employees. (R. 31, 50-51, 58-59, 62, 64-66.) In fact, during the product construction process, there is "constant

communication going back and forth between Engineering, Materials, [and] Assembly.” (R. 31.)

Additionally, there are Manufacturing Entry employees in EHS, Fabrication, Assembly, and Engineering. (R. 55; Er. Ex. 3.) These employees “could be shifted around any one of those area[s] ... at any given time.” (R. 55.) There are no minimum qualifications necessary to become an entry level Manufacturing Entry employee at the Plant. (R. 122.) Based on customer demand, Technology, Engineering, and Service Department employees assist in Assembly or Fabrication as needed. (R. 81-82.) Various Technology, Engineering, and Service Department employees regularly fill in on shifts in other Plant departments, because Technology, Engineering, and Service Department employees used to work in other Plant departments. (R. 81-82.) In fact, the lead designer in the Technology Department worked as a painter in the Assembly Department 27 times in 2011 (for a total of more than 90 hours) and continues to work in the Assembly Department in 2012. (R. 285; Er. Ex. 8.) The same Technology Department employee meets face to face at least once a week with a Fabrication Department employee to resolve production issues. (R. 374.) Furthermore, one Engineering Department employee worked in the Assembly department on three occasions for eight hours each. (R. 258; Er. Ex. 6.)

Also, as the Regional Director noted, one Technology Department employee testified that she “goes to the plant floor frequently.” (D.D.E. at 19.) Additionally four of the Service Department employees frequently fill in on the weekends and during the week in the Fabrication and Assembly Departments, as evidenced by the numerous

time-keeping e-mails reflecting this work. (R. 258; Er. Ex. 6.) In fact, in some weeks, certain Service Department employees spend more time on the production floor than they do in the Service Department, and each of the four Service Department employees filled in the Fabrication and Assembly Departments for a minimum of 40 hours in the last year. (R. 258; Er. Ex. 6 at 7/1/11 E-mail from P. Mueller to M. Hockett). Furthermore, a Fabrication Department employee testified that he meets with the Engineering Department employees on a daily basis. (R. 362; D.D.E. at 19.)

Given their distinct tasks, however, there is not similar significant interaction regarding work processes between the employees of Assembly and Fabrication Departments, both of whom are included in the recommended unit. (R. 77.) For example, the Fabrication employees do not deliver product directly to the Assembly team, but rather the Materials Department employees work with both the Assembly and the Fabrication Department employees to shuffle materials as needed. (R. 78-79.) It is rare for Fabrication and Assembly Department employees to interact even in the employee cafeteria, as there are separate cafeterias for each of those departments. (R. 122-123.) In sum, the Fabrication and Assembly Department employees, who would comprise far more than 50% of the recommended unit, have virtually no interchange or contact with each other. (*Id.*)

V. The Skills And Training Vary Across The Plant.

There is no unique, basic skill or training required for entry- level employees at the Plant. (R. 122.) While there are no unique skills or training needed for any Plant

entry-level jobs, as discussed in detail above, the specific jobs Plant employees engage in vary from department to department. (R. 122.)

With regard to the tools used to complete jobs at the Plant, twelve different types of Plant hourly employees use computers as their primary tool -- Mechanical Support in the Assembly Department, Electrical Support in the Assembly Department, Mechanical Support in the Fabrication Department, Buyers in the Materials Department, all employees in the Engineering Department, all employees in the Service Department, Senior Designers in the Technology Department, and Manufacturing Leaders in the Materials, Assembly, and Fabrication Departments. (R. 51, 112-113.) Even certain Fabrication Department and Assembly Department employees use computers on a daily basis as well. (R. 59, 61.) All departments, including Service, Technology, and Engineering, use two computer programs to build the customer's products -- My Workplace (to view and build drawings for products) and MASH (to view products and production processes). (R. 67.)

Other employees use hand tools as their primary work tool -- LEAN R&D Specialists in the LEAN Department, Facilities Support in the Facilities Department, Controls Specialists in the Facilities Department, Assembly Techs in the Assembly Department, Manufacturing Entry in the Assembly Department, and Calibration/Braker in the Assembly Department. (R. 59, 113-114.) Only employees in the Fabrication Department and the LEAN R&D Specialists operate machines and run equipment as their primary work tools (as opposed to using hand tools or computers as their primary work tool). (R. 60, 115.)

ARGUMENT

I. The Regional Director's Unit Determination Departs From Existing Board Precedent As Announced In *Specialty Healthcare*.

The Regional Director's unit determination is an unwarranted extension of the Board's *Specialty Healthcare* standard. Indeed, the Regional Director's D.D.E. does not conform to the Board's requirement, articulated in *Specialty Healthcare*, that the Union must "demonstrate" that the employees in the petitioned-for unit are "readily identifiable as a group" and "that they share a community of interest" *before shifting the burden* to the employer and applying the "overwhelming community of interest" to the proposed larger group. *Specialty Healthcare*, 357 N.L.R.B. No. 83 sl. op. at 11 n. 25 (2011); *Blue Man Vegas, LLC v. N.L.R.B.*, 529 F.3d 417 (D.C. Cir. 2008). The Board left no question in its *Specialty Healthcare* decision that the Regional Director always must first answer the question of whether *the Union's* petitioned-for "unit is an appropriate unit." Slip op. at 8. Instead of following this requirement, the Regional Director here erroneously applied the standard set forth in *Specialty Healthcare* to presume that a slight variation on the union-proposed unit was appropriate without making the predicate two findings required, even though, as explained further below, neither the proposed unit nor the recommended unit was presumptively appropriate. (D.D.E. at 14-15.)

After making this erroneous assumption, the Regional Director then wrongfully shifted the burden to the employer to prove that an "overwhelming community of interest" existed between the proposed unit and any excluded employees. Without so

much as analyzing whether the Union met its burden as described by the Board in *Specialty Healthcare*, slip op. at 8, the Regional Director stated: “The Employer, in contending that a larger unit is the only appropriate unit, has the heightened burden of proving that the remaining employees share such an overwhelming community of interest with the petitioned-for unit as to require their inclusion.” (D.D.E. at 15.) This inappropriate shift of the burden to the Employer to prove that “an overwhelming community of interest” existed between the petitioned-for unit and any excluded employees before finding that the petitioned-for unit was readily identifiable as a group and shared a community of interest, effectively accorded controlling weight to the extent of union organization, ignoring the Union’s clear obligations in the first instance. *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1993); see also *Specialty Healthcare*, 357 N.L.R.B. No. 83 sl. op. at 11 n. 25 quoting *Blue Man Vegas LLC*, 529 F.3d at 422-23 (the overwhelming community-of-interest standard should be examined “only after the proposed unit has been shown to be *prima facie* appropriate”).

If the Regional Director instead had examined the question of whether the Union met its burden first, as required by existing Board precedent, he would have discovered that the petitioned-for unit, in fact, does not meet that test. Indeed, the Regional Director admitted inasmuch by his ultimate refusal to recognize the Union’s petitioned-for unit.¹ Yet, the Regional Director’s compromise, recommended unit does not meet

¹ The standard set forth in *Specialty Healthcare* only applies once the petitioned-for unit is found to be an appropriate unit. The Regional Director here concluded that the petitioned-for unit was not an appropriate unit, and thus, the *Specialty Healthcare* standard arguably should not even apply at all in this case.

this initial burden either. Rather, only the unit proposed by the Employer is an appropriate unit under the Board's precedent, as explained in *Specialty Healthcare*.

A. Neither The Petitioned-For Unit Nor The Recommended Unit Is Presumptively Appropriate.

Section 9(b) of the Act identifies those units that are presumptively appropriate bargaining units: "the employer unit, craft unit, plant unit, or subdivision thereof." The Board presumes that "a community of interest inherently exists among such employees" organized in one of these types of units. *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 136 (1962). Yet in this case, the Regional Director ignored that neither the petitioned-for unit nor the recommended unit fits into one of these presumptively appropriate bargaining unit types. (D.D.E. at 15.) Neither the cherry-picked petitioned-for unit nor the recommended unit are an employer unit or a plant unit. They are also not comprised of employees belonging to a single type of craft, such as painters or boilermakers, so as to constitute a craft unit. Additionally, neither the petitioned-for unit nor the recommended unit is a recognized subdivision of the Plant. At best, the petitioned-for unit and the recommended unit are a conglomeration of disparate departments, and "the Board does not favor organization by department or classification." *Airco, Inc.*, 273 N.L.R.B. 348, 349 (1984). Therefore, neither the petitioned-for unit nor the recommended unit is presumptively appropriate.

B. The Employees In The Recommended Unit Are Neither Readily Identifiable As A Group Nor Do They Share A Community Of Interest.

After determining that the petitioned-for and recommended units are not presumptively appropriate, the Regional Director should have considered two

additional questions (1) are the employees readily identifiable as a group? and (2) do the employees share a sufficient community of interest? A deficiency in either is fatal to finding that such a unit is appropriate. *Specialty Healthcare, supra*, sl. op. at 8, 10, 11, n. 25, 12. *A fortiori*, both deficiencies taken together mandate that the recommended unit must be found inappropriate. Such is the result demanded by the facts here.

As discussed in detail above, neither the petitioned-for unit, which excluded certain members of the Materials, EHS, and Quality Departments, as well as the entire Technology, Engineering, and Service Departments, nor the recommended unit, which excludes the Technology, Engineering, and Service Departments, is a readily identifiable group. Indeed, the employees cross-classification and department lines, report to different supervisors, work in different parts of the building, and ultimately engage in different tasks in the production process. There is simply nothing that easily binds the employees in either the petitioned-for or recommended units together. For an outsider looking at an organizational map of the Plant, there is nothing that would suggest that these random conglomerations of employees belong to a unified group.

Turning to the community of interest question, to determine whether employees share a sufficient community of interest to constitute an appropriate unit, the Board looks to the following factors:

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

Specialty Healthcare, supra, slip op. at 9. Indeed, “except in situations where there is prior bargaining history,” which there is not here:

the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace. As the Board has recognized. “We have always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination.” *International Paper Co.*, 96 N.L.R.B. 295, 298 fn. 7 (1951).

Specialty Healthcare, supra, slip op. at 9 n 19. As demonstrated below, a review of these well accepted factors plainly demonstrates that both the petitioned-for unit and the recommended unit are inappropriate under this clear precedent.

1. The Employees In The Recommended Unit² Are Not Organized Into A Separate Department.

The Regional Director conveniently ignored this factor in his D.D.E. As discussed in detail above, the recommended unit includes employees from seven -- and only these seven -- distinct departments. There is no overall classification, department, or other subdivision that contains these seven -- and only these seven -- departments.

2. The Employees In The Recommended Unit Do Not Have Distinct Skills And Training.

Instead of looking at the appropriate factor identified in *Specialty Healthcare*, slip op. at 9, *i.e.*, do the employees in the recommended unit have the “distinct skills and

² Because the petitioned-for unit only sought, for inexplicable reasons, subsections of several departments, as well as several departments in their entirety, the reasons why the recommended unit (which admittedly covers more employees than the petitioned-for unit) does not share a community of interest apply with at least equal force to the petitioned-for unit.

training?," the Regional Director looked at the actual job functions of certain employees within the three (3) departments he sought to exclude. (D.D.E. at 18.) He never examined the required skills and training of any employees and he similarly never examined whether the employees in the recommended unit share "distinct skills and training."

If the Regional Director had examined the appropriate question of whether the employees in the recommended unit have certain skills and training, he would have discovered that the basic skills and training for all hourly, entry-level employees at the Plant are the same. There are no distinct qualifications for hourly, entry-level employees in the recommended unit. (R. 122.) This is not a workforce like the hospital employees considered in *Specialty Healthcare*, where "other employees are barred from performing key [recommended bargaining unit employee] tasks" because they lack a certain degree or certification. Slip op. at 10.

Yet the Regional Director never even examined the skills and training factor, let alone whether the skills and training of the recommended unit are distinct from the excluded employees (which they are not). If he had looked at this question, he would have concluded that all employees in the Plant share this community of interest factor -- it is not, as required under *Specialty Healthcare*, distinct amongst the employees in the seven departments in the recommended unit.

3. These Employees In The Recommended Unit Neither Have Distinct Job Functions Nor Perform Distinct Work.

Again the Regional Director ignored the relevant inquiry under this factor -- do the employees in the recommended unit *share* "distinct job functions or perform distinct work"? *Specialty Healthcare*, slip op. at 9. Instead, the Regional Director looked at the "degree of skill and common functions" among the employees he ultimately excluded. (D.D.E. at 18.)

If the Regional Director had examined the appropriate question, he would have noticed that far from sharing distinct job functions or work, the specific job duties in the recommended unit differ vastly from department to department. There are no distinctly shared job functions amongst the employees in the departments in the recommended unit. Indeed, virtually none of the employees in any of the various departments in the recommended unit engage in the same job functions or work. For example, Fabrication Department employees, working closely with employees of the Technology and Engineering Departments, create parts with heavy machinery. On the other hand, EHS Department employees do not manufacture anything, but instead enforce policies regarding safe working practices and track safety information on computers. In similar contrast, Facilities Department employees also manufacture nothing, but instead monitor the plant's wastewater treatment system and maintain other physical portions of the Plant itself with hand tools. Quality Department employees do not create products on their own, but instead verify that product design from the Technology and Engineering Department employees is followed by other

employees in the production process. Assembly Department employees use hand tools to put together the final product that the Fabrication employees created. Materials Department employees order parts and supplies necessary for the Fabrication Department to create the projects designed by the Technology and Engineering Departments. LEAN Department employees review processes used by all the other departments to identify methods of improvement. Furthermore certain employees in every department, but not all, use computers to assist them in various ways with their work on a daily basis.

In sum, there essentially are no common job functions or work amongst the employees in the different departments in the recommended unit, and thus, it must be found that these employees do not have distinct job functions or work.

4. All Of The Plant's Hourly Employees, Including Those Excluded From the Recommended Unit, Are Functionally Integrated.

The Board traditionally includes all employees "integrally related to the production process." *Lundy Packing Co.*, 68 F.3d at 1582. In situations where production employees work together on a process, often on the production floor, have frequent contact, and "face no special academic requirements," those employees are functionally "integrated into the production process" and all should be included in the same bargaining unit. *Id.* Contrary to the Regional Director's conclusion, such an integrated process exists at this Plant and it incorporates all ten departments. Seeming to recognize this inescapable conclusion, the Regional Director's D.D.E. does not even address the production process itself, instead focusing again on terms and conditions of

employment (such as which employees have offices and which do not) and the tools of work (such as which employees use certain computer programs). In light of the overwhelming evidence on this factor, the Regional Director's refusal to consider the integrated process is inexplicable.³

Every order the Employer receives from a customer is unique. (R. 30.) Because every order is unique, all of the hourly employees in the Plant play an important role together in the Plant's functionally integrated production process that produces the customer's product. (R. 30-32.) Accordingly, all department managers, including managers from the Service, Technology and Engineering Departments, meet three times a week to establish production goals and resolve production issues. (R. 74.)

When a customer requests a new order, the production process begins with the Service Department. (R. 30-52, 69-71.) The Service Department employees work with the customer to understand its needs. (R. 30-32, 69-71.) Also, once the product is produced, the Service Department employees produce the instruction manuals necessary for the customers to properly operate the finished product. (R. 70.)

³ The Regional Director's conclusion that "the work performed by the seven included departments is functionally integrated as it is all related to the actual production of the switch gears and is not a part of the design and customer service operations" ignores the evidence that the Engineering and Technology Department employees are frequently involved with the production process after completing the initial design. (D.D.E. at 21.) Additionally, the suggestion that the Engineering and Technology Department employees engage in customer service is wholly unsupported by the record. Finally, the conclusion also ignores the involvement of the Service Department employees at the end of the process to prepare instruction manuals based on the finished product. (R. 70.)

Once the Service Department employees understand the customer's order, they then work with the Engineering Department employees to construct the plans for production and a bill of necessary materials. (R. 34-35, 44-45.) Simultaneously, the Technology Department employees create plans to ensure that the product meets all appropriate standards for heat and UL. (R. 34-35.) The Engineering Department employees share information with the Technology Department employees as necessary while constructing these plans. (R. 34-35.)

After the Engineering Department employees produce the bill of materials, the bill is sent to the Materials Department employees who purchases the necessary items. (R. 50-51.) At times, however, even before receiving a new order from the Engineering Department employees, the Materials Department employees interface with each of the other departments to make sure that all departments have enough raw materials on hand to make the products. (R. 50-51.)

Also, once the Engineering Department employees complete the plans for production of the order, the Engineering Department employees send the plans to the Fabrication Department employees, who construct the parts needed to meet the Engineering Department employees' plans. (R. 30.) Once the Fabrication Department employees produce the parts, the Materials Department employees bring the parts to the Assembly Department employees for production. (D.D.E. at 7-8.) The Materials Department employees are the interface between the Fabrication Department employees and the Assembly Department employees, who have no direct contact with

one another. The Quality Department employees then test the products before being sent to the customer.

Employees in the other departments within the recommended unit -- LEAN, EHS, and Facilities -- are not involved in the production process itself. Instead, these department employees support the production process by improving plant processes, ensure a safe working environment, and generally maintaining the Plant's equipment. Indeed, the Regional Director acknowledged that the EHS employees are responsible for maintaining general safe practices in the Plant - not for the production process itself. (D.D.E. at 20.) Yet, the Regional Director relied on the EHS employees' highly tangential connection to the production process in finding that that they are functionally integrated into the production process. Surely the Engineering, Service, and Technology Department employees, who play specific roles in the actual production process, are more functionally integrated than the EHS employees that the Regional Director pointed to in his decision.

As discussed by the Fourth Circuit in *Lundy Packing*, "when such [excluded] employees [are] engaged in tasks essential to the company's operation," to exclude such employees "based on such meager differences is, to say the least, problematic under the 'community of interest' standard." 68 F.3d at 1581. The evidence in this case leaves no doubt that all employees in all of the Plant departments -- and certainly the excluded employees in the Technology, Service, and Engineering Departments -- are functionally integrated into a single process to produce product. If anything, it is the employees in the included LEAN, EHS, and Facilities Departments that only have a

tangential role in the production process. Thus, the Regional Director's recommended unit inappropriately excludes from the bargaining unit employees in the Technology, Service, and Engineering Department employees who are integral to the production process, while including employees in the LEAN, EHS, and Facilities Departments that only have a tangential role in the production process.

5. Most Of The Included And Excluded Employees Have Frequent Contact.

While the Regional Director dismissed out of hand the numerous examples in the record of contact amongst virtually all of the hourly employees at the Plant, stating that "such contact does not negate [the excluded department's] separate identity from the production employees" (D.D.E. at 20), he also failed to acknowledge that the two largest groups in the recommended unit have virtually no contact. In fact, the uncontroverted evidence proves that the two largest employee groups in the recommended unit -- Fabrication and Assembly -- do not interact directly with each other at all. (R. 77, Er. Ex. 3.) These employees even have separate lunch rooms. (R. 122.) Furthermore, the precise groups excluded by the Regional Director -- Engineering and Technology -- actually facilitate any interaction between Fabrication and Assembly that does occur. (See Employer Exhibit 3.) Indeed, the community of interest between the Assembly and Fabrication Department employees is so lacking that the Fabrication Department employees requested that they no longer have meetings with Assembly Department employees because "what they were talking about to the Assembly folks did not pertain to the Fabrication employees." (R. 76.) Given the evidence that the majority of the

employees in the included unit (who work in the Assembly and Fabrication Departments) have virtually no contact or interchange with each other, the Regional Director's conclusion that the included employees have "frequent contact and interchange with each other" (D.D.E. at 20) is unsupported by the record. The Regional Director also generally relied upon evidence of what he characterized as common duties amongst employees included in the recommended unit (D.D.E. at 20), but ignored that there is little evidence of actual contact amongst any of the employees included in the recommended unit.

On the other hand, the record shows frequent interaction between employees in classifications in the recommended unit and those excluded from the recommended unit on a daily basis. As Sean Chapin, an employee from the Fabrication Department, which is in the recommended unit, credibly testified, "I deal with everybody except for the customer" and he testified that he meets with the Engineering Department employees daily. (R. 378.) This sentiment was echoed by Brenda Valeu, a senior designer in the Technology Department, who testified that some days she goes to the plant floor multiple times. (R. 336.) Additionally three of the Service Department employees frequently fill in on the weekends and during the week in the Fabrication and Assembly Departments, as evidenced by the numerous time-keeping e-mails reflecting this work. (Er. Ex. 6.) In fact, in some weeks, certain Service Department employees spend more time on the production floor than they do in the Service Department. (Er. Ex. 6 at 7/1/11 E-mail from P. Mueller to M. Hockett). Furthermore, in testimony also wholly ignored by the Regional Director, the Plant Manager testified

that employees from Engineering and Technology have frequent contact with employees in every other department, as it is only employees in the Engineering and Technology Departments who are involved in every stage of the production. The Engineering and the Technology Department employees also physically work together with the Assembly Department employees, often on the shop floor, to resolve “issues with assembly as they are put together” or to address “changes to new assemblies.” (R. 35.)

Thus, it must be concluded that the excluded employees have frequent contact with the included employees.

6. The Recommend Unit Employees Interchange With Excluded Employees.

The Regional Director also ignored the undisputed testimony regarding the frequency of interchange amongst all of the Plant’s departments. The evidence here leaves no question that “[a]lthough the employees in each [department] at this facility have a designated function, they all ‘pitch in’ and perform the functions of different classifications when necessary.” *United Rentals, Inc.*, 341 N.L.R.B. at 541; *see also Novato Disposal Services*, 328 N.L.R.B. 820 (1999) (finding petitioned-for single unit inappropriate due to permanent transfers).

Although the Regional Director detailed interchange amongst certain employees within the recommended unit departments, he selectively overlooked similar evidence regarding interchange between the excluded employees in the Service, Technology, and Engineering Departments and employees in the recommended unit. (D.D.E. at 20.) For

example, Engineering Department employees perform Assembly Department and Fabrication Department work as necessary to maintain production. (R. 286; Er. Ex 9). Similarly, Service and Technology Department employees regularly work in the Assembly Department. (R. 251, 282; Er. Exs. 6, 8.) Additionally, there are Manufacturing Entry employees in the EHS, Fabrication, Assembly, and Engineering Departments, who can “be shifted around any one of those area[s] ... at any given time.” (R. 55.) This type of interchange, which the Regional Director inexplicably ignored, further militates in favor of a finding that all of the Plant’s hourly employees share a community of interest such that all must be included in the unit.

7. The Employees In The Recommended Unit Do Not Have Distinct Terms And Conditions Of Employment.

Rather than examining the relevant question identified by the Board in *Specialty Healthcare*, slip op. at 9, the Regional Director instead considered the “mutuality of interest in wages, hours and other working conditions.” (D.D.E. at 14.) In doing so, the Regional Director ignored the fundamental question that the Board’s community of interest test requires him to answer -- do the employees in the recommended unit have distinct terms and conditions of employment? The fundamental answer to the appropriate question here is no, they do not. There are no distinct terms and conditions of employment for employees in the seven departments in the recommended unit. Thus, the seven departments in the recommended unit do not share a community of interest. See *United Rentals, Inc.*, 341 N.L.R.B. at 541 (finding that inappropriately excluded employees have common terms and conditions of employment because all

employees were subject to the same attendance policy, common labor relations policies, and benefits).

As the Regional Director recognized, all hourly employees at the Plant are subject to the same corporate policies, employee handbook, safety policies, and attendance policies. (D.D.E. at 16.) Additionally, all of the Plant's employees receive the same pension and insurance benefits. (*Id.*) All employees share virtually identical hours of work. (*Id.*) Assembly, Engineering, Materials, EHS, LEAN, Facilities, Quality and Technology Department employees all work from 7:00 a.m. to 3:10 p.m. Fabrication Department employees work from 7:00 a.m. to 3:00 p.m. Further all hourly employees utilize the same "grievance" procedure for internal complaints and concerns. (*Id.*) Perhaps most importantly, all hourly employees from all ten Departments are included in the Plant-wide seniority list, and in instances of job reductions, senior employees have bumping rights over less senior employees in different departments. (*Id.*) As a result, a senior hourly employee in the Engineering Department who previously worked in the Assembly Department has bumping rights over less senior employees in the Assembly Department and vice versa. (*Id.*)

Tellingly, the Regional Director himself identified virtually no distinct terms and conditions of employment shared by employees in the seven included departments. Instead, he focused on a few insignificant differences he found between the included and excluded employees, and seized upon them to prove a lack of common terms and conditions of employment amongst the ten departments. Yet, in doing so, the Regional Director ignored the question as identified by the Board in *Specialty Healthcare*, slip op.

at 9 -- do the employees in the unit “have distinct terms and conditions of employment”? When examining the correct question, instead of the question framed by the Regional Director, the only clear answer is no, because the included and excluded employees share virtually all terms and conditions of employment.

Turning to the few instances of different terms and conditions of employment amongst the excluded and included employees that the Regional Director highlighted, a close examination leaves no question that the Regional Director missed the mark. The Regional Director focused on the evidence that certain Engineering and Technology Department employees (but not Service Department employees) receive a slightly different wage scale and vacation multiplier. (D.D.E. at 16.)⁴ These slight differences in pay are minor, however, in light of the plethora of common benefits, benefits which include health insurance, vacation time, and sick leave received by all of the employees, both included and excluded.

The Regional Director also pointed to the evidence that the Engineering and Technology Department employees did not participate in a 2010 employee vote, in which other employees agreed to accept lower wages in lieu of a Plant-shutdown. (D.D.E. at 16.) In relying on this evidence, the Regional Director ignored evidence that the excluded Service Department employees did participate in the vote. (D.D.E. at 16.) Furthermore, the Regional Director also inappropriately relied on this evidence because

⁴ One must query whether the Regional Director’s reliance on this one unique issue means that he would even refuse to recognize a separate bargaining unit that included Service, Technology, and Engineering Department employees, because all employees in these three departments do not receive precisely the same wages.

there was no evidence that this unique situation would ever occur again under the same conditions and thus it is really not a distinct term and condition of employment.

Further grasping at straws, the Regional Director also highlighted the evidence that most of the excluded employees in the Service, Engineering, and Technology Department work in offices,⁵ and therefore, according to the D.D.E., they “are not required to wear safety shoes or glasses or adhere to dress restrictions.” (D.D.E. at 17.) In doing so, the Regional Director ignored the many employees that he included in the recommended unit primarily work in offices (*i.e.*, material technicians, mechanical and electrical supports, inspectors, the calibration/breaker specialist, and the R&D specialist). (R. 89 - 95.) As a result, these same included employees, while in their primary work locations, are not required to adhere to the same safety regulations regarding attire as the employees who primarily work on the plant floor that the Regional Director similarly included in the unit. (R. 195.) Moreover, the Regional Director wholly ignored the evidence that all Plant employees, regardless of their home Department, must wear safety goggles, steel-toed boots, and long pants on the Plant floor, and many of the excluded employees from Engineering, Technology, and Service are often on the Plant floor. Thus, the Regional Director’s identified variation among

⁵ Also, given the Regional Director’s focus on work location, he surprisingly ignored the evidence that employees in the recommended unit are further physically removed from the production areas than certain employees in the excluded departments. For example, the EHS Department employees’ work location is physically further away from the production area than the Engineering Department employees’ work location, which is purposefully close to the production areas so as to ensure interaction between the Engineering Department employees and Assembly Department employees. (R. 105; 108.)

the three excluded departments is in fact no variation at all. In any event, a fair examination of the record as a whole reveals that employees in the recommended unit do not have distinct terms and conditions of employment as compared to excluded employees.

8. The Employees In The Recommended Unit Are Not Separately Supervised.

With regard to the supervision factor in the community of interest test, the relevant inquiry identified by the Board in *Specialty Healthcare* is whether the employees in the unit are “separately supervised.” Slip op. at 9. The question is not, as the Regional Director set forth, whether the employees share “commonality of supervision.” (D.D.E. at 17.) Looking at the appropriate question, the employees in the recommended-unit are not collectively “separately supervised.” Each department is coordinated by a manager or leader who directs the department on a day-to-day basis regarding job functions. The same is true for the three excluded departments -- Technology, Service and Engineering. Therefore, there is no singular separate, distinct supervisor who oversees the seven departments included in the recommended unit. Rather, all ten separate supervisors oversee all of the individual Plant departments.

In fact, as acknowledged by the Regional Director, the “only common supervision among the hourly employees is the Employer’s Plant Manager.” (D.D.E. at 3, 17.)⁶ While the Regional Director concluded that excluded employees have

⁶ While the Regional Director pointed to the evidence that the day-to-day supervisors of the Service and Technology Departments do not report to the Plant Manager as support for his exclusion of these departments from the recommended unit (D.D.E. at 17), that

“sufficiently distinct supervision” (D.D.E. at 22), he cited to no evidence, let alone analyzed such evidence, to support such a conclusion. The reason for the lack of cited evidence in support of the Regional Director’s conclusion is clear – contrary to the Regional Director’s conclusion, the Plant Manager commonly supervises all employees in the ten departments. This factor clearly demonstrates that only a bargaining unit of all Plant employees share a community of interest, and the recommended unit is not “separately supervised.” See *Lundy Packing Co.*, 68 F.3d at 1580-81.

II. Even Assuming *Arguendo* That The Recommended Unit Is A Readily Identifiable Group (Which It Is Not) And That The Employees In The Recommended Unit Share A Community Of Interest (Which They Do Not), The Recommended Unit Is Nevertheless Inappropriate Because The Smallest Appropriate Unit Must Contain Additional Employees.

A. The Included And Excluded Employees Share Such An Overwhelming Community Of Interest That A Plant-Wide Unit Is The Only Appropriate Unit Here.

Although nothing in the Act requires the Board to identify the *only* appropriate unit or the *most* appropriate unit, in determining *an* appropriate unit, the Regional Director ignored that the Act does require that the bargaining unit composition assure all employees the fullest freedom in exercising the rights guaranteed by the Act. See *Overnite Transp. Co.*, 322 N.L.R.B. 723, 726 (1996); *Brand Precision Serv.*, 313 N.L.R.B. 657, 658 (1994); *Phoenix Resort Corp.*, 308 N.L.R.B. 826, 828 (1992). In defining an appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the Regional Director inexcusably ignored the Board’s long

argument is a red herring because there is no evidence that the managers of the day-to-day supervisors of the Service and Technology Departments affect the terms and conditions of employment of the hourly employees at the Plant.

established precedent that a plant-wide unit “is presumptively appropriate under the Act, and a community of interest inherently exists among such employees.” *Airco, Inc* 273 N.L.R.B. 348, 349 citing *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. at 136. Here the Regional Director recommended a bargaining unit that consists of an arbitrary portion of the Plant -- seven distinct departments that are no more connected than the three that are excluded. It is only when the ten departments are unified together that the bargaining unit represents employees that share a community of interest.

Setting aside this clear precedent that a Plant-wide unit presumptively shares a community of interest, the factual record here discussed in detail above leaves no question that all of the Plant’s hourly employees share an overwhelming community of interest. Perhaps the most telling of the community of interest factors is the degree of functional integration at the Plant. *Unelco Electronics Corp.*, 199 N.L.R.B. 1254, 1255 (1972) (fact that employees are part of highly integrated continuous flow of work favors including them in one unit); *North American Aviation, Inc.*, 162 N.L.R.B. 1267, 1271 (1967) (welders share community of interest with other employees in part because they “participate directly in the Employer’s highly integrated, continuous flow production process”); *Mallinckrodt Chemical Works, Uranium Div.*, 162 N.L.R.B. 387, 398-99 (1966) (plant mechanics share a community of interest with production line employees because their work is “intimately related to the production process itself”); *Lundy Packing Co.*, 68 F.3d at 1580 (quality control employees included in the unit because they “performed functions that were integral to the production process”). At this Plant, there simply is no production of a customer’s product without the direct involvement of

all the plant's hourly employees. That production process "absolutely" begins and ends with the involvement of employees from the Service, Engineering, and Technology Departments -- the three departments expressly excluded by the Regional Director's recommended unit. (R. 371.) Indeed, the production process comes to a halt without the ongoing involvement of the Service, Engineering and Technology Departments. (R. 339, 348.)

Recognizing that a community of interest exists between all employees participating in an integrated process, the Board disfavors separation of employees who are members of an integrated workforce into units based on job classification. *Huckleberry Youth Programs*, 326 N.L.R.B. 1272 (1998) (5 peer health educators included in unit of 35 program employees because they were functionally integrated with rest of workforce). The reason for this rule is simple. The objective of bargaining unit determinations is to determine a unit that has "a direct relevancy to the circumstances within which collective bargaining is to take place." *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. at 136. Further supporting the rule disfavoring department units in a completely functionally integrated and interdependent operation such as the Plant here, a work stoppage by the recommended unit would effectively cause employees in the excluded Departments to cease working as well. *See Threads-Inc.*, 191 N.L.R.B. 667 (1971) (finding departmental unit inappropriate because "[a] work stoppage in the wet process department would cause other departments to cease operating in a period ranging from a few hours to a few days depending upon the department and backlog of material there available").

B. The Union's Fragmented Bargaining Unit Would Lead To A Nonsensical Result.

The Board prohibits bargaining units that are “fractured” and contain “‘an arbitrary segment’ of what would be an appropriate unit.” *Specialty Healthcare*, slip op. at 13, quoting *Pratt & Whitney*, 327 N.L.R.B. 1213, 1217 (1999). The Board will not approve “combinations of employees that are too narrow in scope or that have no rational basis.” *Seaboard Marine*, 327 N.L.R.B. at 556. Here, given the significant interchange between employees included in the recommended unit and those excluded from the recommended unit, the composition of the recommended unit leads to a nonsensical situation where the excluded employees routinely perform bargaining unit work. Furthermore, in view of the frequent interchange among all ten departments detailed at length above, exclusion of the Engineering, Technology, and Service Departments from the bargaining unit may breed “friction between employees and chaos in labor relations,” since “some employees [are] under union rules as to wages, hours, seniority, grievance procedures, etc. when the employees working beside them in the same category [are] not.” *See, e.g., N.L.R.B. v. Purity Food Stores, Inc.*, 376 F.2d 497, 500-01 (1st Cir. 1967) (finding unit comprised of employees at only one store in the employer’s supermarket chain inappropriate where employees divided their normal work week between two stores and employees, in addition to working a normal work week in one store, sometimes worked overtime in another); *see also Judge & Dolph, Ltd.*, 333 N.L.R.B. 175, 183 (2001) (citing *Purity Food Stores* with approval and holding that “movement of personnel between locations is a ‘most reliable indicium of common

interests among employees [arising from] similarity of skills, duties, and working conditions inasmuch as employees would be working together for significant periods in the normal course of performing their duties). Indeed, given this frequent interaction, the duties of the excluded employees “are not so dissimilar from the duties of many other classifications to warrant separate representation.” *Seaboard Marine, Ltd.*, 327 N.L.R.B. at 556. Such friction and potential conflict must be avoided. Therefore, to effectuate this desirable labor relations policy, hourly employees in all ten Plant departments should be included in the bargaining unit.

C. It Is Erroneous To Shift The Burden To The Employer To Prove That An Overwhelming Community Of Interest Exists Between The Included And Excluded Employees.

The Regional Director’s decision requires the Employer to prove that the presumptively appropriate Plant-wide unit shares “an overwhelming community of interest.” Such burden shifting is inappropriate here. Instead, assuming *arguendo* that the employees in the recommended unit can somehow be found to possess employment conditions or interests “in common,” the Board must necessarily proceed to a further determination as to “whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” *Wheeling Island Gaming, Inc.*, slip op. at 1 n. 2 (emphasis included in original) quoting *Newton-Wellesley Hosp.*, 250 N.L.R.B. 409, 411-412 (1980). If the Regional Director had considered this question, he would have concluded that the employees in the petitioned-for unit and the recommended unit do “not share a sufficiently distinct community of interest from other employees to warrant a separate unit.” *Seaboard*

Marine, Ltd., 327 N.L.R.B. at 556. In fact, the only employees that share a sufficient community of interest is a Plant-wide unit of employees. See *Lundy Packing Co.*, 68 F.3d at 1581, quoting *Continental Web Press, Inc. v. N.L.R.B.*, 742 F.2d 1087, 1093 (7th Cir. 1984) (“the fact that []the union wanted a smaller unit . . . could not justify the Board’s certifying such a unit if it were otherwise inappropriate.”); see also Member Hayes’s dissent in *Specialty Healthcare*, sl. op at 18-19. Indeed, the interests of the included employees are “insufficiently distinct” from those of other employees so as to warrant the establishment of a separate unit. *Id.*; *Wheeling Island Gaming*, sl. op at 1 n.2; *Seaboard Marine*, 327 N.L.R.B. at 556.

CONCLUSION

Ignoring the Board’s clear precedent most recently articulated in *Specialty Healthcare*, the Regional Director erred by failing to determine first whether the petitioned-for or recommended bargaining unit is either presumptively appropriate or that employees in either of those units are readily identifiable or as a group share a community of interest. If the Regional Director had examined those questions, he would have concluded that neither the petitioned-for bargaining unit, nor the recommended bargaining unit is presumptively appropriate. Similarly, neither unit purports to represent a readily identifiable group or a group with a community of interest. Instead, the only appropriate unit in this case is a plant-wide unit. The presumptive appropriateness of a plant-wide unit, the integrated nature of the operation, and the substantial evidence of commonality, work contact, and interchange among all hourly employees plant-wide, on the one hand, contrasts sharply with the

many differences between employees in the selected departments contained within the recommended unit, particularly given the lack of distinct, separate supervision and the lack of work contact or interchange among many employees in the different included departments. At best, the Regional Director's recommended unit constitutes an artificial, heterogeneous grouping whose duties are divergent and unrelated. Such a unit cannot be justified in the face of the highly integrated operation of the Plant. Therefore, the Regional Director's recommended unit must be rejected and a Plant-wide unit must be found to be the only appropriate unit in these circumstances.

Respectfully submitted,

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ATTORNEYS FOR GENERAL ELECTRIC
COMPANY

Dated: April 2, 2012

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this motion to be served upon the following individuals via overnight delivery and e-mail on this 2nd day of April, 2012:

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_____/s/ John J. Toner_____

John J. Toner