UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

HUNTINGTON INGALLS INCORPORATED

and Case 5-CA-81306

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

RESPONDENT'S OPPOSITION TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO BOARD'S NOTICE TO SHOW CAUSE

Huntington Ingalls Incorporated, pursuant to Section 102.24(b) of the Board's Rules and Regulations and Statements of Standard Procedures, Series 8, as amended, states as follows for its Opposition to Counsel for the Acting General Counsel's Motion for Summary Judgment and its Response to the Board's Notice to Show Cause ("Opposition Brief") in this matter:

Although the Motion filed by Counsel for the Acting General Counsel contains what appears to be a factual summary regarding Case 5-RC-16292, the underlying representation proceeding in this matter (the "R-Case"), the Motion does not contain a section labeled as a statement of purportedly undisputed material facts. Nor does the Motion set forth any specific material factual assertions. Accordingly and in the interest of caution, the Company disputes and expressly denies any statement in Counsel for the Acting General Counsel's Motion that purports to be an alleged undisputed material fact besides those allegations that the Company admitted in its Amended Answer.

BACKGROUND FACTS AND PROCEDURAL HISTORY

I. Factual Background

Huntington Ingalls Incorporated ("HII" or the "Company"), a Virginia corporation, is a wholly owned subsidiary of Huntington Ingalls Industries, Inc. ("HII, Inc."), a Delaware

corporation headquartered in Newport News, VA. HII operates a shipyard and dry dock facility located in Newport News. The Company's principal business at this facility is the construction, repair and overhaul of nuclear-powered aircraft carriers and submarines for the United States Navy. The shipyard formerly was owned by Northrop Grumman Corporation ("NGC"), a Delaware corporation headquartered in Los Angeles, California. NGC operated the shipyard under the name Northrop Grumman Shipbuilding, Inc. ("NGSB"). Effective March 31, 2011, NGC spun off its shipbuilding businesses into a new corporation, HII, Inc., which became the parent entity of NGSB. NGSB subsequently was renamed HII. Upon completion of the spin-off, HII, Inc. became an independent, publicly-owned company and -- through HII -- the owner of NGC's shipbuilding businesses, including the Newport News shipyard.[1]

II. Procedural History

On March 3, 2009, the International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"), filed a petition with Region 5 of the Board seeking to represent all full-time and regular part-time Radiological Control Technicians ("RCTs") working in Department E85 at the Company's Newport News shipyard. A hearing on the petition took place on March 17 and 18, 2009. Both parties filed post-hearing briefs.

On April 2, 2009, the Board ordered the record re-opened to develop further evidence of the community of interest among the technical employees at the Newport News shipyard and to determine whether the Union's petitioned-for unit constituted a craft unit. A supplemental hearing took place from April 14-16, 2009. Both parties again filed briefs. In its brief, the Company argued that the Union's requested unit was just a fraction of the nearly 2,400 technical employees working as part of the shipyard's highly integrated nuclear ship construction and

[1] For the sake of clarity, all pre-March 2011 references to the employer in the underlying R-Case shall be to HII or the Company.

overhaul business. In making this argument, the Company relied on longstanding Board precedent disfavoring segmentation of technical employees within an employer's facility and argued that the Union failed to establish that the RCTs were an appropriate separate unit.

On May 29, 2009, the Regional Director issued a Decision and Direction of Election. He concluded that the RCT-only unit sought by the Union, combined with a small number of laboratory and calibrations technicians in the same department, was appropriate for bargaining, and directed an election. In doing so, the Regional Director excluded over 2,000 other technical employees employed at the shipyard. The election took place on June 25, 2009 in a unit of approximately 220 employees, and the ballots were impounded pending full Board review of the Regional Director's decision on the unit issues. The Board granted the Company's request for review on July 30, 2009, and both parties submitted briefs on review.

Following the submission of briefs, the Board took no action on the case for over two years. In August of 2011, however, the Board issued a Decision on Review and Order in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 356 NLRB No. 83, 2011 NLRB LEXIS 489 * (August 26, 2011), *appeal pending sub nom* ("*Specialty Healthcare*") in which the Board dramatically altered the generally applicable standard for determining whether a petitioned-for unit is appropriate for purposes of collective bargaining. In *Specialty Healthcare*, the Board ruled that where a union seeks representation of a "readily identifiable" group of employees that share a community of interest, the burden is affirmatively on the employer seeking a larger unit to "demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Specialty Healthcare* at *2. The Board took pains to note that its decision was "not intended to disturb any rules applicable only in specific industries" besides rules applicable to non-acute health care facilities. *Id.* at *56.

On December 30, 2011, the Board issued its Decision on Review and Order in the R-Case. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, 2011 NLRB LEXIS 784 * (December 30, 2011)("*Northrop Grumman*"). Despite its promise not to extend *Specialty Healthcare* beyond the health care industry, the *Northrop Grumman* Board applied *Specialty Healthcare* and held that the Company failed to establish that the technical employees excluded from the unit found appropriate by the Regional Director shared an overwhelming community of interest with the RCTs. In doing so, the *Northrop Grumman* Board swept aside decades of precedent holding that when technical employees work in similar jobs and have similar working conditions and benefits, the only appropriate unit is a group including all of the employer's technical employees. Nevertheless, the Board concluded that the Company had not been prejudiced by its decision to apply *Specialty Healthcare*, even though that decision was issued long after the close of the record in the R-Case.

On February 9, 2012, the Board announced a revised tally of ballots in the R-Case, indicating that the Union had prevailed. On February 24, 2012, the Regional Director issued a Certification of Representative certifying the Union as bargaining agent of the RCT unit in which the election took place. The Union requested to bargain with the Company by letter dated April 14, 2012. The Company responded in writing on May 8, 2012, declining the Union's invitation to bargain on the grounds that the unit certified by the Board was inappropriate. The Union filed the charge in the instant case on May 18, 2012 and the Regional Director for Region Five issued a Complaint on May 31, 2012. The Company filed an Answer on June 12, 2012 and an Amended Answer on June 28, 2012.

ARGUMENT

I. The Board and General Counsel Are Without Statutory Authority to Act in This Case

A. The Board as Presently Constituted Lacks a Quorum Necessary to Act

As a threshold matter, the Board cannot rule on Counsel for the Acting General Counsel's Motion because it presently lacks the quorum required to conduct business. The President derives his authority to appoint members to the Board through the Appointments Clause of the Constitution, which bestows on the President the power to appoint "Officers of the United States" with the "Advice and Consent of the Senate." Const. Art. II, § 2, Cl 2. The Constitution narrowly circumscribes the President's ability to make appointments when Congress is not in session. The Recess Appointments Clause provides that the President may fill executive officer vacancies that "may happen during the Recess of the Senate, by granting Commission which shall expire at the End of their next Session." Const. Art. II, § 2, Cl 3.

Thus, the President has no authority to appoint Board members under the Recess Appointments Clause unless the Senate actually is in recess. In this case, the President purported to "recess" appoint Members Block, Griffin and Flynn (who has since resigned his seat) on January 4, 2012. However, the Senate was still in session on that date. The Congressional Record indicates that the Senate, by unanimous consent, had voted to remain in continuous session for the period December 20, 2011 through January 23, 2012 and that it never adjourned for longer than three days during this period.[2] The Senate conducted a pro forma session on

[2] This is significant because the executive branch has long acknowledged that an adjournment of three days does not constitute a recess. Moreover, Article I, Section 5 of the Constitution prohibits either House of Congress from adjourning for more than three days without consent of the other, and the House of Representatives never gave its consent to a Senate adjournment longer than three days during the period relevant to the Board appointments in question.

January 3, 2012 and adjourned until January 6, 2012. The Senate then reconvened on January 6, 2012. While these may have been pro forma sessions, the Congress -- not the President -- is empowered with the authority to set its own rules for conducting business, *see* U.S. Constitution, Art. 1, § 5, Cl 2, and its definitions of its own actions are controlling. Thus, the Senate was not in recess on January 4, 2012 and the President had no authority under the Constitution to re-characterize a Congressional action merely because he disagreed with the Senate's interpretation of rules that it alone may set and enforce.

The Supreme Court has recently held that the Board has no authority to conduct business without a quorum of at least three validly appointed members. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Because Members Block and Griffin were not validly appointed under the Recess Appointments Clause, only two members of the Board -- Chairman Pierce and Member Hayes -- presently are properly seated. The Board therefore lacks the three-member quorum it is required to have in order to act. As such, its June 21, 2012 Order Transferring Proceeding to the Board and Notice to Show Cause was *ultra-vires* and improper. The Board should stay its decision on Counsel for the Acting General Counsel's Motion for Summary Judgment and should take no further action regarding this case until it has attained a valid quorum of three constitutionally appointed members.

B. The Acting General Counsel Lacks the Authority to Issue the Complaint in this Case

If the Board rejects the contention that it is powerless to act in this case, it should dismiss the Complaint. Regardless of the relative merits of the underlying charge, this proceeding should never have been brought because the Acting General Counsel lacks the authority to issue a Complaint in this matter. Section 3(d) of the National Labor Relations Act (the "Act") provides that: "[i]n the case of a vacancy in the office of the General Counsel the President is authorized

to designate the officer or employee who shall act as General Counsel during such vacancy." 29 U.S.C. § 153(d). But the statute expressly limits the President's appointment authority, prohibiting an interim designee from acting "for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate." *Id.* The President designated Lafe Solomon as the Acting General Counsel on June 21, 2010. He did not submit Mr. Solomon's nomination to Congress until January 5, 2011, well beyond the forty-day period prescribed in the Act. Thus, Mr. Solomon's ability to serve as Acting General Counsel lapsed on July 31, 2010, forty days after his interim appointment. Accordingly, he has no authority under the Act to continue to serve as Acting General Counsel, and the issuance of the Complaint in this case was *ultra-vires*. As such, to the extent the Board deems itself empowered to proceed, it must dismiss the Complaint with prejudice.[3]

II. The Application of the *Specialty Healthcare* Standard in This Case Was a Clear Abuse of the Board's Discretion

Assuming arguendo that the Acting General Counsel had the authority to issue the Complaint in this case, summary judgment is wholly inappropriate because the Board's decision

[3] If Counsel for the Acting General Counsel does not sidestep this contention altogether, *see Ctr. for Soc. Change, Inc.*, 358 NLRB No. 58 (2012), *appeal pending sub nom*, it may respond by arguing that Mr. Solomon's January 5, 2011 nomination to serve as General Counsel was proper under the Federal Vacancies Reform Act of 1998 ("FVRA"). The FVRA does provide generally that the President may fill a vacancy in an executive office with a temporary appointment and provides a longer time period than the Act for doing so. 5 U.S.C. § 3346(a). However, the statute also expressly exempts from its exclusivity provisions any other "statutory provision" that "authorizes the President . . . to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. § 3347. Section 3(d) of the Act undoubtedly meets this definition. Thus, the Act, not the FVRA, is the primary authority through which the President may designate an Acting General Counsel of the Board. And as the Supreme Court has observed, "it is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

in *Specialty Healthcare*, which the Board applied as controlling in the underlying R-Case, represents a marked departure from traditional unit placement standards. Its application in this case works a distinct prejudice against the Company and represents an abuse of the Board's discretion in myriad respects.

Section 9(b). First, the Board in *Specialty Healthcare* contravened its obligation under Section 9(b) of the Act to consider the right of employees to refrain from self-organization. That section of the Act compels the Board to "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 purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b). One of the core employee rights guaranteed under Section 7 of the Act is "the right to *refrain* from any and all such activities." 29 U.S.C. § 157 (emphasis added). Thus, in evaluating the appropriateness of a representation petition, the Board must avoid using any "one-size-fits-all" formulation and instead must reach a determination on a case-by-case basis. The Board must also consider in each case not just the right to self-organization and collective bargaining, but the right to refrain from doing so.

In deciding *Specialty Healthcare*, the Board elevated the right to organize to a inappropriately lofty status and failed even to address employees' corresponding right not to organize. In its attempt to derive statutory support for its new "overwhelming community of interest" standard, the majority claimed that the "right to self-organization" is the "first and central right set forth in Section 7 of the Act" and noted that employees exercise their right to self-organization "not merely by petitioning to be represented, but by petitioning to be represented in a particular unit." *Specialty Healthcare* at **37, 37 n.18. But the Board did not account for how its new standard affects the equally important right of employees to refrain from

organization. In reality, the standard relieves unions of having to worry about whether a majority of individuals in a presumptively appropriate unit oppose unionization. Under *Specialty Healthcare*, a union can now confine its petition to those employees it knows already support its efforts. Those within the union's preferred unit who may not support unionization are therefore relegated to an afterthought. While it might be said that this result obtains in the practical sense from every unit determination proceeding, it nevertheless obtained under the old standards after the Board's careful analysis "in each case" of the relevant factors in each such proceeding. By announcing a generally applicable, hard-line test in *Specialty Healthcare*, the Board has reduced this part of the analysis to the point of non-existence.

The Board's new approach also risks disenfranchisement of the employees left out of the petitioned-for unit. Its responsibility under Section 9(b) extends to *all* employees who *could* be included in the unit, not just those named in the union's petition. By elevating the right to organize in a "particular unit" to such heights, the *Specialty Healthcare* Board took an inappropriately myopic view of its Section 9(b) obligation. As a result, it devised a standard that warps the Board's obligation under Section 9(b) and which will lead to the wholesale exclusion of employees from participation at all when, for all purposes that have any relevance to collective bargaining, they are indistinguishable from those "cherry picked" in a union petition.

While the Board's interpretation and application of the Act is owed deference, it does not have the authority to make such weighty policy decisions. When it picks and chooses among employees' various Section 7 rights and accords some more importance than others, the Board invades the province of Congress. Here, by failing even to address what impact its "overwhelming community of interest" standard may have on employees' Section 7 right not to organize and how its new standard might disenfranchise those employees left out of a union's

hand-picked unit, the *Specialty Healthcare* Board violated its mandate under Section 9(b) to make a unit determination in each case that upholds all of the rights guaranteed to employees under Section 7.

Section 9(c)(5). Second, the unit determination principles announced in *Specialty Healthcare* and applied in this case run afoul of the Act by once again imposing a standard that accords controlling weight to the extent of union organization in representation proceedings. Section 9(c)(5) of the Act states that: "the extent to which employees have organized *shall not be controlling*" in a determination whether a petitioned-for unit is appropriate for the purposes set forth in Section 9(b). 29 U.S.C.§ 159(c)(5)(emphasis added). Congress amended the Act to add Section 9(c)(5) in 1947 in response to the development of Board precedent that promoted reliance on the extent of organizing as a primary basis for unit determinations. *See, e.g., NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441 (1965)(Section 9(c)(5) was passed "to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization.").

In adopting its "overwhelming community of interest" standard, the *Specialty Healthcare* Board returned the state of the law to the pre-Taft Hartley Act precedent endorsing the use of the extent of organization as the principal factor in unit determinations. By holding that any "readily identifiable" group of employees with a community of interest can be considered appropriate, the Board has made it virtually impossible to demonstrate that any group besides the most obviously fragmented collection of employees is inappropriate for certification. Thus, in all but the most egregious cases, a union may comfortably petition for the group that represents the extent of its organization and the Board will approve that unit unless the employer can show an "overwhelming community of interest" between the petitioned-for group and other employees.

No matter how the Board attempts to characterize its new standard, this test unquestionably accords controlling weight to the extent of organization and effectively cedes to the union the Board's obligation to determine the appropriate unit in each case.[4]

The Board has been chastised by the courts before for attempting to impose such a standard in representation proceedings. *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995)("By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization."). Its attempt to do so again in *Specialty Healthcare* clearly runs afoul of the Congressional intent underlying passage of the Taft-Hartley amendments and conflicts with the language of Section 9(c)(5) itself.

Administrative Procedure Act. Finally, the Board violated the Administrative Procedure Act ("APA") by using *Specialty Healthcare* as a vehicle for creating a new, generally applicable standard for determining appropriate bargaining units that should have been set through a rulemaking process. The APA distinguishes between agency rulemaking and adjudication. It defines rulemaking as an "agency process for formulating, amending, or repealing a rule," 5 U.S.C.§ 551(5), and further defines "rule" broadly, to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C.§ 551(4). By contrast, the statute defines "adjudication" to describe the process for issuing an agency "order," which means the "whole or part of a final disposition . . . in a matter other than rule making . . ." 5 U.S.C.§ 554(a)(6). While the Board has discretion under

[4] The *Specialty Healthcare* standard has led to predictably one-sided results. Since the Board's decision in August 2011, Regional Directors have had the opportunity to apply the "overwhelming community of interest" test to union representation petitions in at least 35 cases similar to this case. Of those, the employer was found to have failed to meet its burden in 29 of the cases, an employer "failure" rate of approximately 83%.

the Act to choose between adjudication and rulemaking, its rulemaking provisions "may not be avoided by the process of making rules in the course of adjudicatory proceedings." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Numerous federal appellate courts have found abuses of discretion where a federal agency effected a change in generally applicable agency precedent through adjudication rather than rulemaking. *See, e.g., First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984).

The Board in *Specialty Healthcare* abused its discretion by creating a generally applicable unit determination standard. It then exacerbated its error by applying that test to the facts of the R-Case. The *Specialty Healthcare* majority raised the question whether to use the case as a vehicle for announcing a new unit determination standard on its own, without seeking input from either party. Its request for amicus briefing on the question, *see Specialty Healthcare and Rehab. Ctr. of Mobile*, 356 NLRB No. 56, 2010 NLRB LEXIS 514 * (December 22, 2010), signaled that the majority was intent on making a significant change to the law. In fact, Member Hayes noted in dissent that the majority's request: "clearly represents broad scale rulemaking, without the 'inconvenience' of complying with the various statutory requirements for rulemaking under the [APA], and without the scrutiny and broad-based review that such requirements are designed to insure." *Id.* at *16 (Member Hayes, dissenting).

The Board is well aware how to utilize the rulemaking process under the APA. In fact, the Board has just this past year used rulemaking for proposing and then passing substantial changes to the Board's representation election procedures. *See* Proposed Rule, Representation-Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011); Final Rule, Representation-Case Procedures, 76 Fed. Reg. 80,140 (Dec. 22, 2011). For whatever reason, the Board chose to avoid the rulemaking process in *Specialty Healthcare*. However, the standard announced in the

majority opinion is of equal importance to the election procedures the Board just passed through the rulemaking process. The Board clearly promulgated a generally applicable "rule" in deciding *Specialty Healthcare*, and it violated the APA and abused its discretion in the process.

II. The Board Violated the Company's Basic Right to Due Process By Imposing the *Specialty Healthcare* Standard After the Fact

Even if *Specialty Healthcare* represents a valid exercise of the Board's authority, its application in this case was grossly prejudicial to HII. The Board not only changed the rules in the middle of the game, but did so only after the Company's opportunity to play was completed. The R-Case record had been closed for over two years when the Board decided to apply its recently minted *Specialty Healthcare* standard against the Company. Despite claiming in *Specialty Healthcare* itself that the decision was not intended to disturb "rules applicable in specific industries," the Board proceeded to apply it to the Company in *Northrop Grumman*, turning decades of unit precedent applicable to technical employees on its ear. By failing even to offer the Company a chance to argue why the record in the R-Case meets this standard, let alone provide the Company an opportunity to submit additional evidence to try to overcome it, the Board violated HII's right to due process by retroactively imposing a legal standard in a manner that works manifest injustice against the Company.

Section (9)(c)(1) of the Act entitles the parties in a representation proceeding to "an appropriate pre-election hearing" where the Board has reasonable cause to believe that a question concerning representation exists. 29 U.S.C. 159(c)(1). Section 102.64(a) of the Board's Rules and Regulations directs the hearing officer to "inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under section 9(c) of the Act." The Board has acknowledged that an employer has a right under these rules to due process in a representation proceeding and to

present evidence relevant to the union's petition. *See North Manchester Foundry, Inc.,* 328 NLRB No. 50 (1999); *Angelica Healthcare Services Group, Inc.*, 315 NLRB 1320 (1995); *Barre-National, Inc.*, 316 NLRB 877 (1995).

Regarding changes to applicable Board standards, the Board has stated that it will apply an arguably new rule retroactively so long as this does not work a "manifest injustice." In determining whether retroactive application will cause manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *SNE Enters.*, 344 NLRB 673 (2005).

The Board's *Specialty Healthcare* decision marks a substantial change in the procedures for determining unit appropriateness in representation proceedings. This is particularly the case with regard to proceedings involving technical employees. Whatever the burden of proof may be generally -- or whether it is appropriate even to allocate a burden of proof in a representation proceeding where the "burden" is actually on the Board to effectuate the purposes of the Act by insuring that the petitioned-for unit is appropriate for purposes of bargaining -- there is no doubt that the onus has always been on the union to establish that a subset of technical employees it seeks to represent have a sufficiently distinct community of interest apart from other technicals to warrant their inclusion in a separate unit. *See, e.g., TRW Carr Division*, 266 NLRB 326, n.3 (1983)("Showing that some technical employees perform their duties in another phase of the Employer's operation is not enough to establish affirmatively why the segmented group of technical employees should be represented separately")(emphasis added); *Bendix Corp.*, 150 NLRB 718, 720 (1964)("It is not enough for the Petitioner to show that it is willing to represent

all the electronic technicians at the plant; it must also establish affirmatively why they should be represented separately")(emphasis added).

Thus, to the extent *Specialty Healthcare* now represents the standard in representation cases involving technical units, the Board has not only changed, but completely reversed the relative burdens on the parties. The Company was given no opportunity to test this new standard. Every argument the Company has made, and the entirety of the evidence it presented at the hearing, was premised on the expectation that the traditional line of technical cases was the applicable standard and that the Union had the obligation to demonstrate why the RCTs were an appropriate separate unit. The Company even argued extensively in its briefs that the Union had failed to meet its "burden." By any reasonable interpretation, the Company clearly did not believe it had the burden of proof, and it presented its evidence at the R-Case hearings (and in its briefs) accordingly.

But the Board, in its Decision on Review and Order, casually breezed past this potentially thorny issue. It remarked that imposing *Specialty Healthcare* on the Company after the fact would not work a "manifest injustice" against the Company because: "there is no evidence that the Employer relied on any precedent relieving it of the burden of proof." *Northrop Grumman* at *12 n.8. The Board is mistaken at best, disingenuous at worst, in holding that the Company never "relied on any precedent relieving it of the burden of proof." It did, and the Board's retroactive application of *Specialty Healthcare* based on such an egregious misstatement of fact unquestionably has worked a manifest injustice against the Company.

Thus, the Company is not attempting to re-litigate matters decided in the R-Case. It was never given the chance to litigate them. The Board's retroactive application of *Specialty Healthcare* has irreparably prejudiced the Company in this case. The Board here should not

countenance its earlier failure to afford the Company its right to due process, and should deny summary judgment and dismiss the Complaint with prejudice.[5]

IV. Regardless of the Applicability of *Specialty Healthcare*, the Board Failed to Correctly Apply Traditional Unit Principles Applicable to Technical Employees

In its Decision on Review and Order, the majority attempted to sidestep the fact that it had shattered decades of precedent applicable to technical employees and prejudiced HII by doing so without giving the Company a chance to meet the new standard. The majority argued that, notwithstanding *Specialty Healthcare*, the Union's petitioned-for unit nevertheless was appropriate under the technical line of cases cited by the Company. *Northrop Grumman* at **16-26. This could not be further from the truth.

The Company presented an abundance of evidence during the R-Case hearings regarding the substantial community of interest between the RCT's and the shipyard's other technical employees. The evidence, summarized in the Company's post-hearing briefs, clearly demonstrates that the Union failed to establish that the RCT's have a community of interest so sufficiently distinct from the other technicals working in the shipyard that fragmentation of the RCT's into a separate unit would be appropriate. The Board's *Northrop Grumman* decision alternatively ignores or haphazardly re-characterizes the record evidence and disingenuously attempts to distinguish two cases that are virtually controlling and factually on point. The Board has twice rejected union efforts to organize separate groups of radiological control technicians just like the RCT's at issue here. *Westinghouse Electric Corp.*, 300 NLRB 834 (1990); *Westinghouse Electric Corp.*, 137 NLRB 332 (1962). The radiological employees in those cases performed functions and had job duties that were substantially similar to those performed by the

[5] At a minimum, the Board before ruling should reopen the R-Case record and allow the Company to attempt to meet the standard in *Specialty Healthcare*.

RCT's here, and their level of functional integration with the employer's other technicals was similar to the level of integration between the RCT's and the other technicals working in the shipyard. The *Westinghouse* cases are directly on point with the evidence in the R-Case record and the Board's casual attempt to swat them aside so that it can assert that the Company failed to meet the "traditional" line of technical cases is unavailing.

The Board has repeatedly rejected efforts to fragment technical employees into departmental units, particularly in circumstances like those here where the functions of all the technical employees at the shipyard are so thoroughly integrated and interdependent and the functional integration is critical to safety of employees and the work site. *PECO Energy Co.*, 322 NLRB 1074 (1987); *TRW Carr Division*, 266 NLRB 326 (1983); *Bendix Corp.*, 150 NLRB 718 (1964); *Allis-Chalmers Manufacturing Company*, 117 NLRB 749 (1957). Thus, the departmental technical unit is the exception, not the rule. Having chosen -- however hypothetical the choice may have been -- to apply this precedent in the R-Case, the *Northrop Grumman* Board was at least bound to apply it correctly. It most certainly did not, and for all of the reasons described herein and asserted by the Company during the R-Case proceeding and in its briefs, the Board's conclusion that the RCT's were an appropriate separate unit of technical employees was clearly erroneous.

CONCLUSION

The Board presently is without authority to act because it does not have a quorum. As such, its issuance of the Notice to Show Cause was *ultra-vires* and improper. It must stay any ruling on Counsel for the Acting General Counsel's Motion for Summary Judgment until such time as it has attained a valid quorum of three properly appointed members.

If the Board deems itself empowered to act in this case, it should dismiss the Complaint with prejudice because the Acting General Counsel lacked the authority to issue it. Nevertheless, and to the extent the Board reaches the merits, it should deny Counsel for the Acting General Counsel's Motion for Summary Judgment. The Board's Decision on Review and Order in the R-Case is invalid and erroneous. The Board erred in failing to overturn the Regional Director's decision and abused its discretion in multiple respects by deciding and applying the standard announced in *Specialty Healthcare* in the underlying R-Case. Moreover, by changing the applicable standard after the fact and denying the Company an opportunity to meet it, the Board worked a manifest injustice against the Company.

Accordingly, the Company has not violated the Act by failing to bargain with the Union. For all of these reasons, to the extent the Board deems itself empowered to decide the issues raised in this case, Counsel for the Acting General Counsel's Motion should be denied and the Complaint in this matter should be dismissed with prejudice. In the alternative, a new hearing in the underlying R-Case should be ordered to allow the Company to prove that the technical employees at the Company's Newport News shipbuilding facility share an overwhelming community of interest with the RCT's in the petitioned-for unit.

Respectfully submitted,

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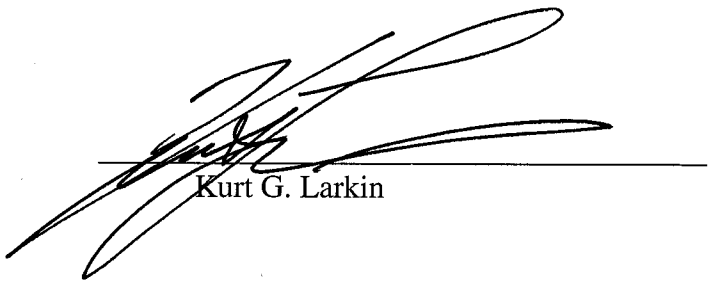
CERTIFICATE OF SERVICE

I certify that on the 10th day of July, 2012, I served a copy of the foregoing Opposition Brief by electronically filing it with the Board and by mailing an original and eight copies to the Executive Secretary of the Board, Mr. Lester A. Heltzer, at 1099 14th Street, NW, Washington, D.C. 20570-0001, via overnight delivery. I further certify that I will serve a copy of the Opposition Brief by Electronic Mail on Mr. Ramon A. Garcia, Grand Lodge Representative for the Int'l. Assoc. of Machinists and Aerospace Workers, AFL-CIO, the Charging Party, at: rgarcia@iamaw.org.



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