BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE NEIMAN MARCUS GROUP, INC., d/b/a
BERGDORF GOODMAN

Employer, Case No.: 2-RC-076954

and

LOCAL 1102, RETAIL, WHOLESALE DEPARTMENT
STORE UNION

Petitioner.

ANSWERING BRIEF TO THE *AMICUS CURIAE* BRIEFS FILED BY THE EMPLOYER ASSOCIATIONS

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STATEMENT OF POSITION

This Answering Brief is submitted by the petitioner, Local 1102 Retail Wholesale Department Store Union, United Food and Commercial Workers ("Local 1102" or "Petitioner"), in response to the *amicus curiae* briefs and in support of the Regional Director's ("RD") Decision and Direction of Election. The following organizations submitted *amicus* briefs: the Coalition For a Democratic Workplace, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, National Council of Chain Restaurants, International Foodservice Distributors Association and the International Council of Shopping Centers; the Retail Industry Leaders Association and Retail Litigation Center; the Chamber of Commerce of the United States of America and HR Policy Association (collectively referred to herein as "Employers").

Clearly, the Employers and the Neiman Marcus Group, Inc., d/b/a Bergdorf Goodman (the "Company"), are now asking the Board to abrogate its year-old decision in Specialty Healthcare, 357 NLRB No. 83 (2011) and to instead utilize a cookie-cutter approach to unit determinations which fails to account for how an employer has chosen to arrange employee departments within its own business.[1]

In opposing the RD's Decision and Direction of Election, the Employers proffer an entirely speculative and self-serving parade of horribles which they claim will sink the retail industry if the unit determination stands and the ballots cast by dozens of the Company's sales employees in New York City are opened for counting. This speculative position flies in the face

[1] That Specialty Healthcare Decision and Order is now before the Sixth Circuit Court of Appeals in a review/enforcement proceeding (Docket Nos. 12-1027 / 12-1174), which resulted from unfair labor practices charges based upon the employer's refusal to bargain with the certified union.The lack of direct court review of representation decisions by the Board requires that a test of certification be by non-compliance with the employer's bargaining obligations processed through unfair labor practice charges.

of basic common sense, is directly inapposite to recent Board law, and is contrary to both the intent and text of the National Labor Relations Act and rational labor relations policy.

Instead, the facts here overwhelmingly support the RD's determination that Local 1102's petitioned-for bargaining unit was indeed "an" appropriate unit within the Company. Accordingly, no basis exists for the Board to upset the RD's determination in its review of this case.

Less than one year ago this Board reaffirmed that all that is required under the law is that the unit sought be "an" appropriate unit, not necessarily the "best" or most "convenient" unit as the Employers and Company suggest. The Employers' untenable position is that although the Company created, organized and maintained a certain operational structure in order to segment and operate its store, that structure should now be accorded no weight here because it is not the "presumptive" unit in Department Stores. Now, when that Company-created unit seeks union representation, the Company and Employers contend that the unit is incorrect, even though it was the Company that established and maintained the framework which created "an" appropriate unit. In reality, the Company and the Employers cannot avoid the fact that there are multiple appropriate units within their store, any of which might constitute an appropriate unit, even if not necessarily the most optimal unit. Instead, they really argue that only the "most" or "optimal" appropriate unit, from their view, can be subject to union organizing.[2]

As articulated below, the Board should, on this Review, reject the unfounded positions of

[2] There is no question that unions and employers frequently voluntarily agree upon bargaining in what are multiple appropriate units in the context of retail store operations and in other industries. There are tens of thousands of collective bargaining relationships built upon voluntary recognition of a bargaining unit, which unit may or may not be a unit that the Board would couch as "appropriate" in litigation. Most bargaining relationships in this country are established by voluntary recognition and not Board conducted elections. Those voluntary bargaining relationships are protected by the Board should there be a refusal to bargain. Likewise concepts of "Contract" or "Recognition" Bar, which address access into the Board's representation process, only require that "an" appropriate unit be involved in order that it be protected. The Board has never required, as the Employers seem to suggest here,

the Employers and the Company and direct the employee ballots which have already been cast in a Board-conducted election to be opened. To do so would be in line with common sense, respect Board precedent, and guarantee that the affected employees are able to exercise their most elemental rights guaranteed by the National Labor Relations Act.

POINT I

BACKGROUND

A. THE UNIT

Local 1102 seeks to represent a readily-identifiable group of employees in a bargaining unit comprised of "full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department, employed in the Employer's retail store located at 754 Fifth Avenue, New York, NY, and excluding all other employees, office clerical employees, guards and supervisors as defined in the Act."

The Company on the other hand, asserted that the smallest appropriate unit was a store-wide group encompassing all employees, or, alternatively, a somewhat smaller unit of *all* salespeople;[3] and the *Amicus* Employers now join that position. The Company would also exclude visual employees, loss prevention employees, the alterations department, restaurant workers, carpenters, housekeepers, guards, painters and supervisors.

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that only the "most" appropriate unit be worthy of protection.

[3] As was adduced at the hearing, the Company actually has bargaining relationships with units of other distinct subgroups of employees in the store, *e.g.,* housekeeping employees and alterations employees. The record does not reflect whether the restaurant employees are organized and if so, into what union. Those other distinct bargaining relationships are mature ones with collective bargaining agreements between the Company and the other labor organizations (Teamsters and UNITE HERE). If the Company's logic in this case is extended to its preexisting relationships with those other unions representing those bargaining units, the Company seems to be arguing that those distinct unit subgroups must be abandoned in favor of a single store-wide unit. That has not taken place. Because there exist units other than a store-wide unit within its New York store, the Company is faced with the undeniable and currently-in-practice reality that there are multiple appropriate units in its store which can be individually organized and bargained. The women's shoe departments involved in this case simply represents one more such appropriate unit, similar to housekeeping and alterations.

The RD's Decision and Direction of Election dated May 4, 2012, sets forth the basic facts involved in this case, with which facts Local 1102 largely concurs. Those facts are summarized as follows.

B. STORE OPERATIONS

The Company is a luxury retailer on Fifth Avenue in New York City, with corporate offices based in Dallas, Texas. In New York there is a woman's store located at 754 Fifth Avenue and the men's store located at 745 Fifth Avenue; in total there 372 sales associates between these locations. Other employees at these stores include selling assistants and non-selling "support associates." Unlike support associates who work in whichever department their supervisor directs (but in the woman's store only), sales associates are assigned to a particular department on a permanent basis. The petitioned-for unit contains 35 sales associate employees in the "Salon Shoes" area on the 2nd floor and 11 employees in the "Contemporary Footwear" section on the 5th floor.

Management sets sales goals separately for each department. While prior experience is not a technical requirement, it is expected that employees know the products that they will be selling. Thus, as a practical matter, only experienced sales associates are hired in the women's shoe department. Non-shoe sales department associates are paid on a "salary plus commission" basis; however, sales associates in women's shoes are compensated via a "draw against commission" policy (which commission rate is substantially higher than for employees in other departments, *i.e.* 3% against 9% or 10% respectively). There is a distinct Shoe Department Managerial / Supervisory staff (and HR personnel) responsible for the women's Shoe Department operations.

Management evaluates employees relative to a baseline established by the department in

which they work, and shoe sales employees are tracked for quarterly sales including sales "outside of home base." Evidence demonstrated that shoe salon associates consistently make approximately 98% of their sales in their home base department; as a courtesy to customers, an employee may ring-up sales of merchandise from another department on an as-needed basis. There was no evidence that shoe sales associates were subject to discipline or reprimand for not selling from their own department – this is for good reason because shoe sales employees do not have adequate knowledge of merchandise stock, nor have they been trained with respect to merchandise details out of their own department. Inter-department cross training does not exist and other store employees are not called to "fill in" in the women's shoe department. Furthermore, sales made by shoe employees in other departments would be subject to a lower commission than those received from sales in the shoe departments, and accordingly there is no incentive for shoe sales employees to rove to other departments for sale. As noted, the Salon employees earn 9% commission and the Contemporary Shoe employees earn 10%, with both earning on a "draw against commission" basis and not "salary plus commission" basis as sales employees in the rest of the store. These shoe department commissions are the highest in the store.

A sales associate from dresses, jewelry, cosmetics, or lingerie has little to no knowledge of the stock in merchandise in shoes and *vice versa* – so unless the merchandise was simply being sold from the floor (or simply rung-up for the customer's convenience), the Company established a structure which was designed to effectively provide first-class service to a Bergdorf customer who pays top-dollar for a shopping experience with a knowledgeable sales staff. As one employee testified, shoes are difficult to sell and the proper size fit is extremely important because potential injuries from improper shoe fittings, such as bunions, knee and back problems,

can occur. Consistent with that concept, there was no evidence presented that non-shoe department employees ever sold shoes. In sum, women's shoes saleswomen rarely leave the department to sell other products.

Evidence also revealed that in the past 12 years there have only been four employees who transferred into women's shoes from other departments, and no evidence was presented about any shoe department employees being transferred out of the shoe department. New hires overwhelmingly have prior experience selling shoes.[4] Tellingly, and contrary to the Company's position in this case, is the fact that it is not really expected that a customer be sold shoes by anyone other than a shoe department sales associate, as evidenced by customer surveys and "mystery" shopper evaluations which do not include comments about the women's shoe department.

The Company holds separate department-specific early morning meetings in addition to general store meetings. But if the shoe department meeting conflicts with the general meeting, the sales associates in women's shoes are required to attend the women's shoe departmental meeting only. Storewide meetings concern general topics including new policies and merchandising strategies; but sales associates not scheduled to work are not required to attend any meetings.

In sum, a cornucopia of evidence considered by the Regional Director established that the sales associates in the respective women's shoes departments are isolated from other sales employees insofar as they rarely make sales outside the department, are paid based upon a different and more lucrative commission structure, and receive very few lateral salesperson

[4] Only one of fifteen "new" hires in the past three years had no prior shoe experience. The other qualifications or retail experience of that one employee was not evidenced nor was his or her ultimate success in the shoe department.

transfers from within the Company.

POINT II

THE DECISION AND DIRECTION OF ELECTION

Regional Director Fernbach applied the appropriate standard as set forth in Specialty Healthcare and noted that the Board reiterated that employees "may seek to organize 'a unit' that is 'appropriate,'" but not necessarily the single most appropriate unit. Specialty Healthcare, *supra* at *13 (quoting American Hospital Ass'n v. NLRB, 499 U.S. 606, 610 (1991)); Overnite Transportation Co., 322 NLRB 723, 723 (1996)("It is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining."); J.C. Penney Co., 196 NLRB 708, 709 (1972) (recognizing that though a larger unit could be an appropriate unit, that did not render the petitioned-for unit inappropriate). [Decision and Direction, p. 15].

In applying Specialty Healthcare, where the Board reverted to the traditional community of interest test, the RD noted that the test examines 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.

[Decision and Direction, p.15].

Concluding that the petitioned-for unit was an appropriate unit, the RD properly found that the employees on the 2nd and 5th floor shoe departments "clearly" share a community of interest. They occupy the same job classification and sell the same product which requires a distinct skill set from other sales employees; have been given distinct training and possess

experience in fitting customers for shoes and have no training in selling products other than shoes; have significantly different salary structures and higher commission rates than employees in other departments; and are separately supervised.

We submit that even if the rule as applied in Specialty Healthcare did not exist or was inapplicable to the facts at bar, which is not the case, sufficient facts were presented which would have required the RD to conclude that the sought-after unit was nevertheless "an" appropriate unit.[5] The Regional Director did indeed make this further finding and noted that "though an overall unit including all the Employer's sales associates in [sic] might constitute an appropriate unit, it does not necessarily follow that the petitioned for unit is inappropriate." [Decision, p. 24].

POINT III

THE REGIONAL DIRECTOR'S DECISION IS CONSISTENT WITH THE ACT

The Act provides and requires that the Board decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. As noted, there is no requirement that the Board only approve the "most" efficient bargaining unit or the one that is most convenient to the employer. In enforcing a Board order where the Employer contested the unit determination which excluded some employees that could also have been included, the D.C. Circuit Court noted approvingly that there may be more than one appropriate unit. Blue Man Vegas, LLC v NLRB, 529 F.3d 417, 421 (D.C.

[5]The objecting parties cite to footnote 29 in the Specialty Healthcare decision to support their position that only storewide units in department stores represent the unit appropriate for an election, and that anything else is an improper expansion of Specialty Healthcare. We submit, however, that such reliance is overstated, since Specialty Healthcare simply provides that the Board be less doctrinaire in determining what is an appropriate unit, and instead, follow the mandate outlined in Section 9(b) of the Act, which is to determine an appropriate unit in a particular

Cir. 2008). Likewise, as the Board stated in its Brief to the Sixth Circuit in the Specialty Healthcare case, which arguments are conceptually comparable to the facts here, "the employer is the party who has control over nearly all of the community-of-interest factors that the Board assesses. In fact, the community-of-interest test focuses almost exclusively on how the employer has chosen to structure its workplace.[6][NLRB Brief, p. 38]. The Board's brief goes on to explain, "this is significant not only because the facts at issue (supervision, skills, wage rates) are established by the employer, but also because 'the lines across which' the facts are compared are made by employer choices as well, including lines between job classifications, departments, functions and facilities." [NLRB Brief at p.38]. "Of course, the Board's role is not to tell unions what units they can propose; rather its role is to determine whether a proposed unit is appropriate." [NLRB Brief, p.39, n. 10, citing 29 U.S.C. § 159(b); American Hosp. Ass'n v. NLRB, 499 U.S. 606, 610 (1991)].

It should be noted that some or all of the *amici* in this case also submitted *amicus* briefs to the Sixth Circuit in Specialty Healthcare, and raised to that Court virtually all of the same arguments that they present to the Board in this case.[7] We believe the Board, in its response to, and in its affirmative moving application for enforcement, more than sufficiently addressed each of those issues and to the extent applicable in this case, we respectfully refer the Board to its own arguments and positions that it presented to the Sixth Circuit Court of Appeals, which petitioner in this case believes are positions well-founded in the law and in labor relations policy.

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factual setting by applying traditional community of interest standards.

[6] References to the "Board's Brief" in Specialty Healthcare refers to the NLRB Brief dated June, 2012, filed in Kindred Nursing Centers East, LLC d/b/a Kindred Transitional Care and Rehabilitation - Mobile f/k/a Specialty Healthcare and Rehabilitation of Mobile v. National Labor Relations Board, Docket 12-1027 and 12-1174.

[7] Indeed, in the Chamber's Brief in this case, reference to the Company seems to be modeled as if the Company here was a "Respondent" in an unfair labor practice case or in court litigation. Obviously, there is no "Respondent" involved in this representation case, only a "petitioner" and an "employer," and such reference must have been inadvertent. [*See*Brief, p. 20].

POINT IV

THE BOARD IS ENTITLED TO CLARIFY BARGAINING UNIT PRINCIPLES IN ADJUDICATION

In an *amicus* brief, the Employers contend that the Board abused its discretion in Specialty Healthcare by using adjudication instead of rulemaking to promulgate a new, generally applicable standard for determining appropriate bargaining units.[8] As demonstrated below, this contention is plainly meritless.

First, it is an unwarranted stretch to argue that the Board in Specialty Healthcare adopted a *new* standard, rather than, as the Board majority explained, a clarification of existing unit determination principles. Specialty Healthcare, supra at pp. 1, 12;[9] *See, e.g.,* Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011), in which the Board continues to clarify the elements for unit determination. Prior to Specialty Healthcare, the Board had used the "overwhelming community of interest" formulation, *e.g.*, Laneco Construction Systems, 339 NLRB 1048, 1050 (2003); Lundy Packing Co., 314 NLRB 1042, 1043 (1992), and the D.C. Circuit had viewed the applicable Board case law as setting forth an "overwhelming community of interest" standard. Blue Man Vegas, 529 F.3d at 421. *See* Specialty Healthcare, supra, at p. 11.

Nor does Specialty Healthcare adopt a new standard for the reason that the Board imposed the burden of proof on the party arguing that the petitioned-for unit is inappropriate because the smallest appropriate unit contains additional employees. The Specialty Healthcare majority candidly acknowledged that prior Board decisions did not expressly address the burden of proof

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[8] Brief of *Amicus Curiae* The Coalition for a Democratic Workplace, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, National Council of Chain Restaurants, International Foodservice Distributors Association and International Council of Shopping Centers, pp. 18-26.

[9] Clearly, the Board's "expressed intent as to whether [Specialty Healthcare] clarifies existing law or substantively changes the law" is entitled to "great weight," First National Bank of Chicago v. Standard Bank and

issue but instead it cited numerous prior Board decisions that support allocating the burden of proof in this manner. Id. at p. 12 n. 28. Indeed, the courts of appeals have long understood the Board's case law to impose the burden of proof on the party seeking to expand a petitioned-for unit determined to be an appropriate unit. *See, e.g.*, Blue Man Vegas, 529 F.2d at 421 ("the employer's burden is to show the *prima facie* unit is 'truly inappropriate'"); Dunbar Armored, Inc. v. NLRB, 186 F.3d 844, 847 (7th Cir. 1999) ("it is not enough for the employer to suggest a more suitable unit; it must 'show that the Board's unit is clearly inappropriate'") (citation omitted); Sandvik Rock Tools, Inc. v. NLRB, 194 F.3d 531, 534 (4th Cir. 1999) ("[a]n employer challenging the Board's selection [of an appropriate unit] has the burden to prove that the bargaining unit is 'utterly inappropriate'") (citation omitted).

Second, even if the Board in *Specialty Healthcare* had adopted a new standard for unit determinations, Supreme Court precedent "make[s] plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). "Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion," id., the *amici* have failed to demonstrate how the Board abused its discretion by choosing to proceed by adjudication in this case.

The *amici* complain that the Board asked for *amicus* briefs on the question whether it should deem appropriate units of all employees performing the same job at a single facility as a general matter. [Brief, p. 23]. But nothing in law or logic compels the Board to refrain from soliciting *amicus* briefs to consider whether a decision should be limited to a particular industry or have broader applicability. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources

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Trust, 172 F.3d 472, 478 (7th Cir. 1999), particularly where, as here, "the new wording is not 'patently inconsistent'

Defense Council, 435 U.S. 519, 544 (1978) (a "very basic tenet of administrative law [is] that agencies should be able to fashion their own rules of procedure").

Similarly, the *amici* contend that the Specialty Healthcare decision "was designed to implement policy outside the narrow factual context presented by that case involving a skilled nursing facility …." [Brief, p. 24]. Assuming the truth of this contention, the Board is nevertheless free to make policy in adjudications: "Adjudicated cases may and do … serve as vehicles for the formulation of agency policies, which are applied and announced therein," and they "generally provide a guide to action that the agency may be expected to take in future cases." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969). If it were otherwise, countless Board decisions would be invalid since in all but a handful of instances the Board has formulated and implemented policies through adjudication instead of substantive rulemaking. In this case, the Company and other interested stakeholders (including the *amici*) have "a full opportunity to be heard" on their contention that the "overwhelming community of interest" standard is bad policy and/or should not be applied in the retail industry or to the particular retail department store at issue "before the Board makes its determination." Bell Aerospace Co., 416 U.S. at 295.

Finally, the fact that the Board has recently utilized rulemaking proceedings "on two other issues of widespread importance" [Brief, p. 25] does not even remotely suggest that the Board abused its discretion by utilizing adjudication in Specialty Healthcare or this case. "No language" in either the National Labor Relations Act or the Administrative Procedure Act "requires that the grant or exercise of [the rule-making] power was intended to exclude the Board's use of [adjudication]." Wyman Gordon Co., 394 U.S. at 771 (concurring opinion). Specialty Healthcare and this case are readily distinguishable from the Ninth Circuit decisions relied on by the *amici*,

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with prior interpretations." Id. at 479.

inter alia because the Board has not radically departed from its previous legal interpretations, fines or damages are not involved, and the *Specialty Healthcare* Board carefully explained to the public its clarification of existing unit determination principles. Pfaff v. U.S. Department of H.U.D., 88 F.3d 739, 748-49 (9th Cir. 1996); Ford Motor Co. v. F.T.C., 673 F.2d 1008, 1009-10 (9th Cir. 1981).

POINT V

DEPARTMENT STORE BARGAINING

The following history of pre-Specialty Healthcare cases reflects that the Board has long recognized that "an" appropriate unit can be something less than, and different from, all employees in the context of a department store. While some of these cases reflect units other than sales employees, the historical view of the Board is instructive. As shown below, the Board's standard from Specialty Healthcare is not new but simply reasserts previous policy.

As will be noted, while the Board in Bullock's Inc., d/b/a I. Magnin & Co., 119 NLRB 642 (1957), which is a case cited by the Employers, found inappropriate the petitioned-for unit of 23 shoe department employees working in 4 shoe departments in a retail department store employing about 1,000 people (365 salespeople) in 105 departments, it did so because it found that the evidence did not reflect substantive differences for shoe department employees to warrant a separate unit. That simply reflects the way that particular department store was operated. The facts in the Bullock case are clearly distinguishable from the case at bar when the actual record is considered and applied to the controlling legal standard (as opposed to the hypothetical conclusions drawn by the Employers). In fact, in the case at bar we emphasize that, for example, the different method of compensation is significant (but not the sole factor), as would be the employee skill set and shoe sales experience which sets the shoe sales department employees

apart from the rest of the sales workforce organized into other departments. In reality and for a number of reasons, there is virtually no interchange between employees of the shoe department and the rest of the store, and the Company itself holds the shoe department out as being separate from the rest of the store.[10]

An early Board case found shoe sales employees to be an appropriate unit and there is no reason why that group cannot continue to be "an" appropriate unit. In May Dept. Stores, 39 NLRB 471 (1942), Board found appropriate separate unit of shoe salesmen in a retail department store, and rejected the employer's proposed storewide unit. Similarly, the Supreme Court had no difficulty is sustaining a Board unit determination for only some employees in a department store despite the employer's protests to the contrary. May Dept. Stores Co. v. NLRB, 326 U.S. 376 (1945).

In Thalhimer Bros., 83 NLRB 664 (1949) the Board found appropriate the petitioned-for unit of all building service employees in a retail department store, comprising both unskilled workers (porters, elevator operators, maids, *etc*.) and skilled journeymen with at least 4 years of training in their crafts (carpenters, painters, *etc*.). The unit employees' duties were dissimilar in many respects but were directed to a common purpose which was distinct from that of the other employee groups. These workers formed a cohesive group that was sufficiently homogenous and identifiable to warrant their own unit.

Goldblatt Bros., Inc. (Central Display), 86 NLRB 914 (1949) presents a case where the Board found appropriate a unit of display installation employees (window trimmers, interior trimmers and table top display men) at all 15 retail department stores in the Chicago area, with

[10] The Employers and the Company continuously argue without factual basis that the concept of interchange is central to their method of doing business. However, when the actual evidence is considered, nothing could be further from the truth. For example, male shoe sales employees at the Company (of which there are many) would not

some employed in a Central Display Department, and others employed in display departments in certain individual stores despite the employer arguing for a chain-wide unit. Here, it was found that these employees were a homogenous group with their own community of interest.

In Allied Stores of Ohio, d/b/a A. Polsky Co., 90 NLRB 1868 (1950) the Board found appropriate a unit of restaurant employees within a retail department store, although the employer predictably argued for store wide unit. It was found that the restaurant employees were a distinctive and homogeneous employee group.

Franklin Simon & Co., Inc. and Kays-Newport, Inc., 94 NLRB 576 (1951) presented a joint employer case where the Board found appropriate petitioned-for unit of two full-time and one part-time shoe salesmen within a larger retail store.

In another case where less than the full store complement was found appropriate, the Board in May Dept. Stores Co., Kaufmann Div., 97 NLRB 1007 (1952), found appropriate the petitioned-for unit of beauty salon employees (hair stylists, beauticians, manicurists) working in two salons on separate floors of a retail department store. Interestingly, almost all other store employees were represented by 19 unions in various units. The Board found that the salon employees constituted a homogenous group and possessed sufficiently distinctive skills to warrant a separate unit, joining the 19 other unions already present within that store.

The Board in Foreman & Clark, Inc., 97 NLRB 1080 (1952), upon reconsideration of an earlier decision, found that tailor shop employees at 9 retail department stores in Southern California were a separate appropriate unit despite some "interchange" with other store employees, thus rejecting employer's contention that an overall unit of all employees was the appropriate unit.

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be expected to make sales or work in the women's lingerie department or in cosmetics, and do not do so.

In Montgomery Ward & Co., Inc., 100 NLRB 1351 (1952), the Board found appropriate petitioned-for unit of office clerical employees at a retail department store, rejecting contentions of the employer and intervening union that only a store wide unit was appropriate.

The Board likewise rejected a store wide unit in J.L. Hudson Co., 103 NLRB 1378 (1953). Three different departments (Carpet Workroom, Cabinet and Finishing Workroom, and Upholstery & Drapery Workroom) were separate appropriate units despite the employer arguing for a store wide unit.

Again rejecting a store wide unit in A. Harris & Co., 116 NLRB 1628 (1957), the Board found appropriate a separate unit of all warehouse employees of a retail department store. The Employer here had argued that its operations were so integrated as to require a unit extending to all its Dallas operations (a main retail store, a branch store, and 3 warehouses).

In Rich's, Inc., 147 NLRB 163 (1964), the Board found appropriate the petitioned-for unit of production employees (bakers, decorators, utility personnel) in the bakery on the sixth floor of the employer's main retail department store, excluding all other employees (although each of the employer's retail stores in the metro Atlanta area had retail bakeries).

Loveman, Joseph and Loeb, Div. of City Stores Co., 147 NLRB 1129 (1964) is a case where the Board found appropriate the petitioned-for unit of alteration employees in 3 departments (ladies' alterations, men's and boy's alterations, and the drapery workroom) in the employer's Birmingham store; in doing so, it rejected the employer's contention that the unit must include all selling, non-selling and workroom employees at the store and nearby warehouse.

In Allied Stores of New York, d/b/a Stern's Paramus, 150 NLRB 799 (1965), the Board found appropriate separate petitioned-for units of selling, non-selling, and restaurant employees in a retail department store with 695 employees spread over 130 departments on 5 levels. The

rationale for finding this appropriate unit was that "the employees' skills, duties, interests, and conditions of employment in each group are sufficiently different from each other…." While noting that store wide units may be optimum in retail, the Board opined that they were not necessarily the only appropriate units, as was evidenced by the Board directing elections in "a variety of small units." In this case, the units as petitioned-for were sustained.

Arnold Constable Corp., 150 NLRB 788 (1965) was a companion case to Stern's Paramus, in which the Board found appropriate separate petitioned-for units of selling, office clerical, and restaurant employees in a retail department store. In this case, five unions already represented various non-selling employees; the employer argued that all unrepresented store employees must be included in the preexisting units. Again, despite the contrary arguments and the preexistence of five other bargaining units, the Board found that the newly petitioned-for units were appropriate units.

Lord & Taylor, 150 NLRB 812 (1965) was another companion case to Stern's Paramus, where the Board also found appropriate a unit of all non-selling employees not already represented by one of several unions in various units in a retail department store with 1800 employees. It rejected both the petitioned-for unit limited to non-selling merchandise handlers and the employer's proposed store wide unit.

Bamberger's Paramus, 151 NLRB 748 (1965) was a case where the Board found appropriate a petitioned-for unit of service employees (tire installer, brakemen, front-end men, stockmen, and seat cover men) in the Auto Center of a retail department store located in a separate building 175 yards from the main store building. The Board made this finding notwithstanding the petitioner's alternative proposal to include the Auto Center's salesmen and the employer's claim that only a store wide unit was appropriate. *Accord*, Montgomery Ward & Co.,

Inc., 150 NLRB 598 (1965).

Bonwit Teller, Inc., 159 NLRB 759 (1966) was a case where the Board found appropriate a unit of non-selling employees in retail department store, excluding office clerical employees and alterations employees as these groups have different interests from the other nonselling employees. However, since an intervening union (which claimed to represent a majority of all nonselling employees) and the employer argued that a storewide unit was appropriate, the Board directed a bifurcated election allowing for the possibility of either unit.

In RWDSU v. NLRB, 385 F.2d 301 (D.C. Cir. 1967), enfg. Saks & Co., 160 NLRB 682 (1966), the Court affirmed the Board's determination that a unit of all non-selling employees in a retail department store was appropriate. The Board had added 40 employees that the union sought to exclude, but rejected the employer's contention for a storewide unit. The Court approved of the "Stern's Trilogy" cases "in which the Board adopted a basically new approach to department store organization." And it rejected the employer's § 9(c)(5) argument, pointing out that the Board considered the extent of organization but that it wasn't a controlling factor inasmuch as the Board added 40 jobs to the unit.

J.C. Penney Co., Inc., 196 NLRB 708 (1972) was a case where the Board found appropriate the petitioned-for unit of service department employees in an auto center of a retail department store, but also included 3 gas island clerks that the employer sought to include. However, the Board rejected the employer's attempt to also include the auto center sales specialists. The service employees were "an identifiable and homogenous grouping, with a community of interest sufficiently distinct from the sales specialists" - who among other distinctions were "paid a draw against commission" - "to warrant separate representation." This is the same type of distinct “draw against commission” that the petitioned-for bargaining unit

employees in this case earn.

In Wickes Furniture, 231 NLRB 154 (1977), the Board, in overruling prior decisions involving the same employer and same factual situation, found appropriate the petitioned-for unit which was limited to sales employees in a retail furniture store in Rochester. Despite frequent contacts and interaction with some other store employees, the Board found the sales employees had a "sufficiently distinct community of interest apart from other store employees" given their separate immediate supervision, selling function, receiving commission for sales, and minimal contacts with warehouse employees.

Finally in Saks & Co. d/b/a Saks Fifth Ave., 247 NLRB 1047 (1980), in the context of unfair labor practices where the appropriate unit was disputed, the Board found appropriate a unit of 18 alteration employees in a retail department store. Citing the precedent from Stern's Paramus, the Board stated that the presumption that only an overall unit is appropriate is "no longer applicable to department stores."

As can be seen from this brief survey, applying traditional unit determination tests the Board has long recognized that something other than a store wide unit or store wide selling unit can be “an” appropriate unit.[11]

In light of the above, Regional Director Fernbach in this case did not break new ground,

[11] While the Union does not necessarily believe that the “optimal” unit in a department store is in fact a store-wide unit, it does note that this Company, in setting its own operations in the best manner it sees fit, created the very situation it and the Employer *amicus* now complain of. Essentially the Company argues it should be exempt from its own actions in creating a separate shoe department where there is no interchange amongst sales employees, they are separately managed (have a unique HR person), possess unique skills (such as ability to fit), have not been cross-trained into other departments, and is held out separately from the rest of the store as a department, and, of course, paid wages in a form significantly different than are other sales employees in the store. It was not the Union that created this structure and therefore it can hardly be argued that the unit as sustained by the RD was based upon the extent of organizing (which is still considered as a factor) but rather, the unit was determined appropriate because of the way the Company organized and operated its business. We can see in retrospect, that the Company would have preferred if it did in fact integrate the shoe department sales workforce into its store-wide sales team as it attempted to argue it did at the hearing. Having made the operational choices, the Company is bound by the result and the employees involved here should not be denied the right to organize and exercise rights under the Act in what

but rather simply applied the unit determination rules long established by the Board in department store cases. Thus, far from making some radical unit determination which will forever doom the retail industry, the Board is simply utilizing a standard of bargaining unit propriety which was ubiquitous for decades.

POINT VI

THE MERITLESS COMPLAINTS OF THE *AMICI*

The a*micus curiae* briefs in this case present arguments which fly in the face of basic common sense.

For example, the brief of the Chamber of Commerce and HR Policy Association ("Chamber's Brief") complains that "[i]n fact, if the rationale of the Regional Director is affirmed in this case, retail employers such as Bergdorf Goodman could end up having a multiplicity of separate bargaining units, including perhaps even a separate unit for employees in a men's luxury sportswear shoes or a women's sunglasses department." [Chamber's Brief, p.2]. The logical response to this suggestion is "so what." The Act does not dictate that there must be fixed or limited units in retail stores, but rather simply provides that employees have the opportunity to bargain collectively in an appropriate unit. If, however, an employer organizes itself in such a way which permits multiple bargaining units, as Bergdorf Goodman has done here, then yes, there can be such multiple units. It is, however, unadulterated speculation to conclude that even if there was the potential for multiple units, that a union would organize on that basis, or that a result would be multiple unions or multiple collective bargaining agreements.[12]

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is "an" appropriate unit.

[12]There can be no doubt that the *amici* in this case close their eyes to, for example, the construction industry, where there are many unions representing employees of a single employer, resulting in multiple (and sometimes conflicting) collective bargaining agreements. The entertainment industry is similarly organized. Somehow, employers in those industries function and have survived.

Moreover, there is no reason to conclude that in a contested unit determination case, the union would be able to initially demonstrate that a subset of a grouping is an appropriate unit. This *amicus* argues that the department store's presumptively store-wide unit should not be disturbed. That position if blindly applied, however, is inconsistent with employee rights to organize and fails to acknowledge that the law does permit the extent of organization to be a factor (but not a determinative factor), in the Board's unit determinations, thus protecting employees who are not interested in union representation.

In a similar fashion, the brief submitted by the Retail Industry Leaders Association and Retail Litigation Center ("Retail Industry Brief") blithely concludes that "if this unit is sustained, a cascade of similarly artificial units will fragment the retail workforce, sow discord among employees, limit employee opportunities for advancement and undermine the efficient and effective operation of retail stores." [Retail Industry Brief, p. 1]. The Retail Industry Brief continues with additional self-serving speculation by stating that "the introduction of multiple bargaining units in a single store (some of which would inevitably have more bargaining power than others) would set employees against each other, prompt competition for benefits and frequent strikes and stoppages, and lower morale of similarly-situated employees who could enjoy less favorable working conditions simply by virtue of the relative bargaining power of different units." [Retail Industry Brief p. 2]. This Brief then goes on to suggest that "[t]he decision creates a fantastical unit that has no relationship to the organizational structure of the employer...."[13] In the argument presented here the Employers suggest that the parade of horribles to be suffered it claims the unit determination here "...threatens to cause substantial damage, including to the vitality and operation of the retail industry." [Retail Industry Brief at p. 5]. Fantastically, this

[13] Indeed, it is the very organizational structure of the Company that sets the shoe department up as an

amicus suggests that "[a]n employer with three thousand retail locations, each with twenty unions, would be required to keep track of sixty thousand [union agreements]." [Retail Brief, p. 22].[14] This brief fancifully speculates that "[a] union may limit a proposed unit to labor-enthusiasts in 2nd floor designer men's socks, or 3rd floor televisions. Or, a union might simply try to organize the entire 3rd floor of a store, merely because that is where it enjoys its strongest support." [Retail Brief, p. 24]. While this *amicus* suggests that "arbitrary units that do not track the organization of the employer's business inherently exclude employees that are similarly situated to those within the unit" [Brief, p.25], they fail to acknowledge that the unit involved in this case, does in fact "track the organization of the employer's business."

The Brief for the Coalition for a Democratic Workplace, *et. al*, ("Coalition Brief") acknowledges the position that "...Section 9(b) commands that the Board 'shall decide in each case' whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining...." [Coalition Brief, p. 5]. It goes on to note that: "In sum, Congress recognized that while a 'one size fits all' approach to bargaining-unit determination might be acceptable in the more homogeneous business types covered by the RLA, such an approach would neither be possible nor desirable for the far broader range of employers and employees in the industries subject to the Act. For that reason, the Board was directed to make its determinations not on the basis of a simplistic formula, but to consider the factors making up an appropriate unit 'in each case.'" [Coalition Brief at p. 6]. This Brief then goes on to argue the position that Specialty Healthcare

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appropriate unit.

[14] The Chamber also suggests that the employer would be "...burdened with the cost of negotiating separately with different unions..." [Chamber Brief, p. 9]. The Act does not address this concern and indeed, the concern often expressed with respect to "proliferation" of bargaining units relates only to unit determinations in healthcare facilities. If Congress thought this was a legitimate issue, it would have commanded that inquiry be made

does not permit the Board make those determinations consistent with the Act. However, it can be easily seen that all of this argument is material only if a unit determination was made based upon the extent of union organizing. The Petitioner in this case has never suggested that its petitioned-for unit was based upon the extent of organization and there is no reason to conclude that it was.

The unit chosen here was based upon the Company's own organization of its facility, not the petitioner's organizing success. The insistence by Regional Director Fernbach in this case that the Company demonstrate why excluded employees should be added to a petitioned-for unit serves the underlying purpose of the Act and is totally consistent with the law. Simply said, the Company's own organization structure created "an" appropriate unit in a "readily identifiable group" and while a larger unit may also be appropriate, there is nothing wrong in permitting the employees in this identifiable group to effectuate their representation rights under the Act. Whether they will choose representation or not is another matter, as they will be permitted to vote as they desire. The appropriateness is substantiated by the fact that the Company could not present any meaningful contest of the facts that made this group readily identifiable. If it had, the unit might have been something different than what was petitioned-for. The readily identifiable group was created by the Company in its organizational and operational structure, not by the union in soliciting membership authorization cards.

The Chamber Brief and the Retail Industry Brief argue and warn at length of the horrors that might accompany hypothetical piecemeal organization in department stores. That concept is nothing new and was, in fact, how department stores became organized in the first place. [See, Section V, supra]. In Allied Stores of New York, Inc. d/b/a Stern's Paramus, 150 NLRB 799 (1965), the Board explained the unique nature of the retail department store industry:

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in unit determinations. It did not.

> Indeed, without resort to election procedures available under this Act, retail department store employers and unions in the Metropolitan New York area have voluntarily entered into collective-bargaining agreements covering less than all store employees. Thus employers and unions have recognized explicitly the diverse work and interests of the various employee groups. At Lord & Taylor, in New York City, separate unions bargain under separate contracts for these employees: warehouse, men's alteration department, women's alteration department, interior display department, decorators, and elevator and maintenance employees. At Saks Fifth Avenue, shoe sales employees are represented by a local of the Retail Clerks.[15] At Arnold Constable, the Petitioner represents the employees in a leased beauty salon and a local of the Retail Clerks Association represents nonselling employees classified as "cashier-wrappers, carriers, markers, parcel post clerks, runners, stock clerks, receiving clerks, checkers and packers..." Collective-bargaining agreements covering custodial, warehouse and craft units are common in the industry. Although the Employer has a collective-bargaining contract with the Petitioner covering almost all employees at its New York City store, other unions represent porters, freight elevator operators, passenger elevator operators, electricians, boiler operators, oilers, carpenters, plumbers, and certain mechanics. Even in retail department stores where unions currently represent store-wide units, organization rarely began on this basis. Unions won bargaining rights successively for small units of occupations groupings, Organization proceeded first in the nonselling groups and only later included the sales force. This pattern of organization demonstrates the understanding by unions and employers of the singular differences in duties and interests between selling and nonselling employees.... (N.28 - 'A similar organizing pattern developed at R.H. Macy & Co., and Namm's New York City stores and Loeser's Brooklyn store.')

The Board in Specialty Healthcare simply permitted units to be based upon traditional factors which are unique to a particular employer and returns the inquiry to the pattern developed some 45 years ago. In order to sustain "an" appropriate unit, the Board "...must first find that the petitioned-for employees are readily identifiable as a group and share a community of interest considering traditional factors. This must be done *before* assessing whether the employer has met

[15] In fact the union at Saks Fifth Avenue in this unit is the petitioner, Local 1102.

its burden of showing that additional employees share an overwhelming community of interest with the employees in the proposed unit." [NLRB Brief to the Sixth Circuit in Specialty Healthcare p. 46]. If the RD, when presented with a petition seeking a subgroup of employees, does not conclude that the distinctions for those employees are substantive and with merit, the petition will be dismissed. *See e.g.* Home Depot U.S.A., Inc., Case No. 20-RC-067144 (2011); Wheeling Island Gaming, Inc., 355 NLRB No. 127 (2010).[16]

It has long been the rule that "the Act does not compel representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit." Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (2011), citing Federal Electric Corp., 157 NLRB 1130, 1132 (1966).

What is involved in this case is the exact factual determination that the Act requires to be made and not application of what may be an artificial unit department store presumption, which presumption, in this case does, not reflect this Company's own store organization and operation. Specialty Healthcare simply returns the inquiry to where it was and should be.

The Board must not allow a "cookie-cutter" approach to bargaining unit determinations as suggested by the Employers and the Company. Such an approach would prevent employees, who have in fact been organized by *their own* employer into readily definable groups, from exercising the rights that collective bargaining brings. This is the precise logic being argued here by the Employers and the Company, and that logic, in light of the language and intent of the Act, must firmly be rejected.

[16] These cases were cited in the Chamber's Brief, pp. 5, 13.

CONCLUSION

In light of the foregoing, Regional Director Karen Fernbach's Decision and Direction of Election was correct and should be affirmed.

Dated: July 18, 2012

Respectfully Submitted

/s/ Richard M. Greenspan

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