FedEx Freight Inc.,

Employer,

Case No. 6-RC-140779

-and-

International Brotherhood of
Teamsters, Local 175

Petitioner

PETITIONER'S POST HEARING BRIEF

Petitioner, Teamsters Local 175, by the undersigned, submits this brief to the National Labor Relations Board (NLRB). Because the NLRB has issued Decisions and Directions of Election in similar cases involving FedEx Freight and other Teamster Local Unions and because of the Stipulated Record, page 6, number 2, this brief will incorporate the brief filed by Teamsters Local 107 in the *FedEx Freight, Inc. and International Brotherhood of Teamsters Local 107,* Case 04-RC-133959 (*"Cinnaminson"*). (The brief is attached).

The Parkersburg facility has approximately 10 City Drivers, 11 Road Drivers, 1 Full Time Dockworker and 1 Part Time Dockworkers. As in the Cinnaminson case, the employees in the petitioned for unit possess vastly different skills and perform distinct job functions. Employer exhibit 2 is a list of all the Parkersburg employees, with the number of hours worked over a six month period ending October 31, 2014, broken down by on the dock, hostling, and driving. The listed City Drivers worked a total of 9252.72 hours during the period. Only 412.54 hours (4.5%) were spent on the dock. Additionally, City Drivers spent 320.71 (3.5%) hours spent on the Road. Thus the City Drivers spent 8519.47 (92%) performing P&D work, which is the City Driver's main function. The time on the dock, spent by the City Drivers, 4.5%, is not a significant portion

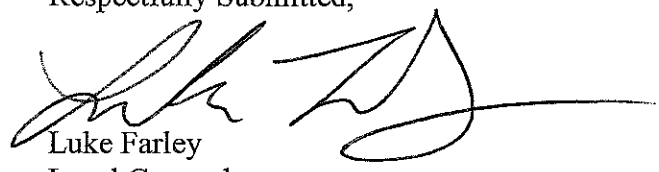
of their time. The data shows that overall the City Drivers, by classification, spend the overwhelming majority of their time performing their core responsibilities.

Road Drivers worked 9848.11 hours during the period. While Road Drivers may be required to work the dock at hub locations the information shows, during the six month period, only 183.62 (1.9%) were spent on the dock. This time on the dock would also be paid at the City Driver rate not the Dock Worker rate. (Stipulated Record 33). The time spent hostling, .42 hours and spent working in the City, 11.38 hours, is statistically so miniscule it is barely worth mentioning. Thus the Road Drivers 9652.69 hours (98.1%) on the Road performing their main function. Clearly the Road Drivers, much like the City Drivers, have little interaction with working on the Dock.

The Dock Workers spent all of their time performing Dock work. As stated in the Stipulated Record, Dock Workers are not responsible for the little hostiling work done at the Parkersburg facility. Although the one full time Dock Worker is a driver apprentice he recorded zero driving hours. The supplemental dock workers also had zero driving hours. Therefore, any interchange between the petitioned for unit and the Dock Workers is completely one-way. The Dock Workers never perform driving work and are legally forbidden from doing so.

In conclusion, the stipulated record concerning the Parkersburg facility provides no rationale for distinguishing Parkersburg from the Cinnaminson decision. For the reasons set forth in that decision, this brief and the brief submitted by Local 107, the Regional Director should conclude that a bargaining unit consisting of Road Drivers and City Drivers is appropriate and should direct an election in that unit.

Respectfully Submitted,



Luke Farley
Legal Counsel
Teamsters Local 175

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD
REGION 4

In the Matter of:	:	
FEDEX FREIGHT,	:	Case No. 04-RC-133959
Employer	:	
and	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 107, Petitioner	:	

PETITIONER'S POST-HEARING BRIEF

I. INTRODUCTION

The International Brotherhood of Teamsters, Local 107 ("Local 107" or "Union") initiated this matter on August 1, 2014 when it petitioned for a collective bargaining unit consisting of all City Drivers and Road Drivers at Fed-Ex Freight's ("Employer" or "Fed-Ex") facility at 800 Creek Road, Delanco, New Jersey ("Facility"), but excluding all Full-Time Dock Workers, Supplemental Dock Workers ("Dock Workers"),[1] and clerical, supervisory, and security staff at the Facility. The Employer does not contest the appropriateness of including City and Road Drivers in a single unit, nor does it contest the exclusion of the clerical, supervisory, and security staff from the unit. NT 10; 11. The Employer argues only that the smallest appropriate unit at the Facility must include all full-time and supplemental dock workers. NT 7.

[1] The phrases "Supplemental Dock Workers" and "Part-Time Dock Workers" refer to the same employees. NT 14. Of the fifty-six total Dock Workers, only five are classified as Full-Time. NT 77. Four of the Full-Time Dock Workers are trainees or "driver apprentices" in a driver training program conducted by Fed-Ex, and one is simply a dock-worker with full-time status. *Id.* Because Full-Time Dock Workers constitute such a small percentage of the total Dock Workers, the present brief refers to Supplemental Dock Workers simply as "Dock Workers." When it is necessary to refer to the five Full-Time Dock Workers, the brief will use the phrase "Full-Time Dock Workers."

The parties stipulated, *inter alia*, that Local 107 is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act; the Local claims to represent the employees in the unit described in its petition and the Employer declines to recognize the Local; there is no collective bargaining agreement covering any of the employees in the petitioned-for unit; there is no contract bar to this proceeding; and the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

II. STATEMENT OF FACTS

A. The Facility

The Employer, an Arkansas corporation, delivers freight on behalf of customers. The Facility, which acts as a hub for the Employer's delivery activities, consists of: (1) a main building containing a break room and offices; (2) an attached "dock" with 95 operational doors where freight is loaded onto or unloaded from tractor-trailer combinations; (3) an equipment repair shop where mechanics perform needed maintenance or repairs on Employer equipment, including tractors and trailers; and (4) a large "yard" on which tractors, trailers, and other equipment are kept as needed. NT 9-10. Fed-Ex employs at the Facility 25 Road Drivers, 76 City Drivers, 56 Dock Workers, and five Full-Time Dock Workers, four of whom participate in a driver training program offered by Fed-Ex.[2] NT 47.

The Full-Time Dock Workers are listed on the Employer's payroll as Dock Workers, and Fed-Ex's records show that 100% of their work consisted of "dock work," which is loading and unloading freight on the dock, and "hostling," which is moving equipment around the Facility's

[2] The precise number of various categories of employees varied slightly during Facility Manager Charles Long's ("Manager Long") testimony at the August 13, 2014 Board hearing. There was testimony that there are five Full-Time Dock Workers—four of whom are driver apprentices, one of whom is a dock worker with full-time status. NT 77. There was also testimony that there were only four Full-Time Dock Workers. *See* NT 47. This brief assumes that there are five total Full-Time Dock Workers, four of whom are in Fed-ex's driver training program and one of whom is simply a dock worker with full-time status.

yard (hostling is described in more detail below). NT 7-8; Employer Exhibit 3. Fed-Ex's records showed that they spent no work time doing driving work of the kind performed by Road and City Drivers. Employer Exhibit 3.

Full-Time Dock Workers in Fed-Ex's training program only become Drivers if they complete the program and acquire the needed commercial driver's license (CDL), and if the Employer has a driving position available. NT 15-16. The Employer's training program consists of five weeks of instruction that must be completed within a calendar year. *Id.* The Full-Time Dock Worker/trainee then takes a CDL test, and the Employer will offer the employee a job as a Driver if one becomes available. *Id.* Even an employee who completes the program and acquires a CDL might wait as long as a year before receiving a job as a Driver. *Id.* Throughout this process all of the Full-Time Dock Worker's logged work time with Fed-Ex is spent doing ordinary dock work, and none is spent performing driving duties of the kind performed by Road and City Drivers. *See* Employer Exhibit 3.

A total of 12 supervisors manage the facility. Manager Charles Long ("Long") is charged with overseeing the entire operation. One supervisory level below him are two Operations Managers, and below the Operations Managers are nine Operations Supervisors ("Supervisors"). NT 10.

The Employer categorizes its employees[3] into Dock Workers, Road Drivers, and City Drivers. *E.g.*, NT 11; See Petitioner Exhibits 1, 2, and 3; Employer Exhibit 3. In job descriptions provided on its website, Fed-Ex lists Road Driver, City Driver, and Supplemental Dock Worker separately. Petitioner Exhibits 1-3. In its electronic payroll system, Kronos, through which

[3] Manager Long conceded at the August 13, 2014 Board hearing that there are three "departments" at the Facility—City Drivers, Road Drivers, and Dock Workers. NT 56. On re-direct examination, Counsel for Fed-Ex argued that the Employer had three "classifications" rather than "departments." NT 71. Whatever the semantics, it is clear that the Employer distinguishes among these three types of work and these three categories of worker for virtually every administrative purpose.

employees log their hours with the Employer and "swipe in and out" of work, the Employer distinguishes between City Drivers and Dock Workers.[4] *See* NT 18. Put differently, the Kronos system "knows" whether an employee is a City Driver, a Dock Worker, or a Road Driver. *See id.* In its records of time worked, the Employer distinguishes between Road hours, City hours, and Dock hours, and categorizes individuals as "Road," "City," "Dock," and "Supplemental Dock." *See* Employer Exhibit 3. As explored in more detail below, Road and City Drivers receive higher pay and greater benefits than Dock Workers. They work more hours and have more control over their work schedules. Unlike Dock Workers, they are required to have certain skills, experience, and certifications. Also unlike Dock Workers, they are required to wear uniforms and are subjected to greater scrutiny for misbehavior such as drug use. That the Employer draws lines between Road Drivers, City Drivers, and Dock Workers, and uses this categorization for myriad if not all administrative purposes, is beyond dispute.

B. Overview of Facility Operations

Using a tractor—a powerful short truck—Road Drivers haul freight in trailers from "turn-point locations" to "Service Centers" and vice versa. Petitioner Exhibit 1. They handle the "middle legs" of the delivery process, moving freight among Fed-Ex facilities. *See id.* Using the exact same type of tractor-trailer combination, City Drivers handle the "end legs" of the delivery process, either picking up freight from a customer and bringing it to a Service Center or vice versa. NT 48; Petitioner Exhibit 2.

Unlike Road and City Drivers, Dock Workers do not drive tractors and in fact do not haul freight at all. Rather, they "[t]ransport freight across [the] dock area to [and] from trailers for

[4] Road Drivers are not required to swipe in using Kronos unless they are doing city driving or dock work. NT 22. Kronos is used to log hours, and Road Drivers are only paid by the hour when doing such work. For their ordinary driving they are paid by the mile. When they do perform non-road driving tasks and therefore swipe in, they are paid at the same rate as City Drivers, which is substantially higher than the rate earned by Dock Workers. NT 46.

loading to trailers." Petitioner Exhibit 3. Put differently, they load and unload trailers, which the Drivers[5] then haul using tractors.

As part of this process, Dock Workers sometimes "hostle," or move trailers and equipment around the Facility's yard. NT 12. Hostling does not necessitate the use of a tractor nor any other vehicle requiring a CDL. NT 13. However, a tractor can be used to hostle. *Id.* Employer Exhibit 1 is entitled "ELIGIBLE FOR: Hostling." This is rather misleading. Long indicated that an employee holding a CDL—meaning all current Drivers and no current Dock Workers—may hostle using a tractor without any special training or certification. *Id.* There is also apparently some "extra education" that employees can receive regarding how to use equipment that is specific to hostling, a category that would not include tractors. NT 12-13. The list contained in Employer Exhibit 1 apparently shows the employees who have completed this "extra education." But *all* Drivers are "eligible for hostling," because they all have a CDL, which is all that is needed to use a tractor to hostle. NT 13. Meanwhile, *only* the Dock Workers on the list in Employer Exhibit 1 can hostle, a group consisting of nine Dock Workers and two Full-Time Dock Workers, because these individuals do not have CDLs and must use the hostling-specific equipment. *See* NT 12-13.

With the possible exception of two Dock Workers who sometimes perform duties at customers' worksites, Dock Workers spend all of their time at the Facility in the area of the yard surrounding the dock.[6] NT 53. Drivers, in contrast, "perform the bulk of their work away from the terminal." *Id.*

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[5] In the present brief, the term "Drivers" refers to all City and Road Drivers.

[6] Manager Long testified that two Dock Workers may occasionally do dock work away from the terminal, but it is uncontested that the overwhelming majority of Dock Workers perform <u>all</u> of their work at the terminal and that even these two anomalous Dock Workers perform the bulk of their work at the terminal. NT 53.

Although City Drivers "can…technically work the dock," they do so very infrequently. NT 16; 47. *See* Employer Exhibit 3. Of the roughly 76 City Drivers at the Facility, only eighteen did *any* "non-driving work"—meaning dock work and hostling—between February 1, 2014 and July 31, 2014. Employer Exhibit 3. Three of these did not do any dock work but did hostle. *Id.* Of the eighteen City Drivers who performed any non-driving work, ten performed under five hours total of such work (usually out of roughly 1,000 or more total hours worked); only six performed more than ten hours of such work. *Id.* Acknowledging the obvious, Long agreed with Local 107's counsel that City Drivers "hardly ever do dock work." NT 47.

While it was more common for Road Drivers to engage in non-driving work, of the 26 total Road Drivers, only two logged more non-driving hours than road driving hours.[7] Four Road Drivers performed no non-driving work. Another six performed less than fifteen non-driving hours, and another eight performed at least four times more driving work than non-driving work, and often much more. The average Road Driver spent 123.17 hours performing non-driving work and 704.69 hours performing driving work during the seven-month period documented in Employer Exhibit 3.[8] In sum, Road Drivers as a group spent the overwhelming majority of their time driving.[9]

To the extent Drivers did perform non-driving work, it was because they specifically requested it. Long admitted that management would not order a Road or City Driver to work the dock unless there was a "dire need." NT 31. In fact, the official bid sheet given by the Employer

[7] One of these two anomalous employees was Cesareo Felices, whom Fed-Ex disingenuously held up as a typical example of a Road Driver at the August 13, 2014 Board hearing.

[8] These figures were calculated by totaling the non-driving hours for Road Drivers in Employer Exhibit 3 and dividing that sum by the number of Road Drivers, then doing the same for driving hours. *See* Employer Exhibit 3.

[9] One duty specific to Drivers is "dropping and hooking," in which drivers unhook their trailers from their tractors. NT 70. Dock Workers do not drop and hook, and time spent dropping and hooking is considered driving time. *See id.* Manager Long did not know if Employer Exhibit 3 included drop and hook time in the city and road hours totals. NT 71. It is worth noting that if drop and hook hours are not included, the discrepancy between driving hours logged and dock work hours logged among Drivers is even greater than it appears from Employer Exhibit 3, as the total driving time is actually larger.

to Road and City Drivers to bid for routes and start times contains a section where the Driver can indicate willingness to work the dock. *See* Employer Exhibit 2. Again and again during his testimony, Long stated that Drivers need only work the dock "if they want to."[10] NT 14; 24; 25; 29; 31; 32; 66-67; 69. In sum, Road and City Drivers engage in dock work only if they want to, and only a minority subset of Drivers ever do so.[11] Of this minority subset, only an even smaller subset perform more than a negligible amount of non-driving work. *See* Employer Exhibit 3.

Although Drivers occasionally perform some non-driving work, Dock Workers never do the work of Drivers. *See* Employer Exhibit 3; NT 50. This is true for the five Full-Time Dock Workers as well, none of whom perform any driving work. Employer Exhibit 3. In fact, Dock Workers are *legally forbidden* from performing the work of the Drivers because that work requires a Commercial Driver's License. The Employer's own job descriptions reflect this obvious state of affairs. City and Road Drivers "pick up and deliver" trailers and freight and perform all the tasks inherent in this primary job function. They "[m]ay be required to perform the job duties of a road [city] driver *or a dock employee where operationally necessary*." Petitioner Exhibit 1-2. Dock Workers, meanwhile, "[t]ransport freight across [the] dock area," but nowhere among their listed job duties are Road or City Driving tasks. *See* Petitioner Exhibit 3.

Thus, there is a clear division of tasks among different categories of employees. Road Drivers haul freight between Fed-Ex facilities. City Drivers do the same thing except between the Fed-Ex facility and customers. Dock Workers ensure that the freight is loaded onto the appropriate trailer for the Drivers to transport. Fed-Ex deliberately set up this system and

[10] Though Long repeated several times that he could "technically" order Drivers to work the dock, he admitted when pressed that he issues such an order "very little" and testified that the Employer not only accepts but solicits Driver preferences as to dock work and that those preferences are respected. *E.g.*, NT 69.

[11] Of the 101 total Drivers at the facility according to Employer Exhibit 3, only 40 performed any non-driving work whatsoever during the time period documented.

acknowledges the divisions in every salient administrative way. The twelve supervisors, including the nine lowest-level supervisors, oversee and coordinate this operation. Although Long strained to testify that the supervisors are not formally tasked with managing a specific category of employee, he acknowledged that the employees perceive such a specialization among the supervisors, *see* NT 62-63, and that, in practice, each supervisor tends to supervise one specific job classification, NT 39. In addition, supervisors are in different locations depending on if they are supervising Drivers or Dock Workers. *See* NT 63-64. When supervising Dock Workers, the supervisors are "roaming on the dock," but when they are supervising Drivers they are in an office in the main building. *Id.*

C. Pay, Benefits, Hours, and Other Features of the Various Categories of Employment

i. Qualifications for Employment

Fed-Ex requires virtually identical qualifications for Road and City Drivers. *Compare* Petitioner Exhibit 1 *and* Petitioner Exhibit 2. Most significantly, both categories are required to (1) possess a class A CDL with double/triple, hazardous materials, and tank endorsements; (2) have a minimum of one year of driving experience in the last three years or, alternatively, have completed the Fed-Ex Freight Driver Development Course; (3) possess an acceptable Motor Vehicle Record; and (4) meet all requirements imposed by the Department of Transportation on commercial drivers. *Id.*

In stark contrast to Drivers, Dock Workers are not required to have any type of CDL. *See* Petition Exhibit 3. While Fed-Ex *prefers* that Dock Workers have a high school diploma or an equivalent degree and that they have prior experience in handling freight, it does not *require* such qualifications. *See id.* In fact, aside from very basic physical and temperamental qualities, the only qualification a Fed-Ex Dock Worker must possess is attainment of the age of 18. *See id.*

ii. Pay, Benefits, and Hours

Road and City Drivers are empowered to bid for specific start times for their runs. NT 53. Road Drivers also bid for specific driving routes. NT 53-54. It is not clear from Long's testimony whether City Drivers also bid for routes. *See id.* The Employer awards bids to Road and City Drivers using seniority lists that it keeps for each category of Driver. NT 16-17. In contrast, the Employer does not permit Dock Workers to bid for work and keeps no seniority list for Dock Workers. NT 16; 54. Instead, the Employer simply assigns Dock Workers hours according to its needs. NT 54.

Road Drivers are paid by the mile. NT 46. Pay per mile ranges from 53 to 62 cents depending on how many years the driver has been with the Employer. NT 46; 57. A Road Driver hits the top of the pay scale after three years with the Employer. NT 57. Long estimated that the average Road Driver earned between $60,000 and $70,000 annually. *Id.* City Drivers are paid by the hour and make between $20.63 and $24.93 per hour. *Id.* Like Road Drivers, City Drivers' rate of pay is determined by years of service and they reach the top rate after three years. NT 58. Long estimated that the average City Driver earned upwards of $50,000 per year. NT 58-59.

Dock Workers are paid by the hour at a rate of between $16.31 and $18.31 per hour. While a Dock Worker's pay rate is determined by how long they have been with the Employer, it only takes a year for them to reach the top pay rate, three times faster than Drivers. NT 45. In addition, Dock Workers work much less than Drivers, averaging 25 hours per week versus City Drivers' 43-hour average work week. NT 57-58. Long estimated that in a good year, the average Dock Worker earned between $25,000 and $30,000. NT 58.

When City Drivers engage in non-driving work—a rare event, as described above—they are not paid a Dock Worker rate but rather retain their ordinary City Driver rate, which is substantially higher than the Dock Worker rate (at the top of the scale, City Drivers make $24.93

per hour versus Dock Workers' $18.31 per hour). NT 58. And when Road Drivers perform non-driving tasks, including dock work, they are paid by the hour at the much higher City Driver rate. NT 46. The four Full-Time Dock Workers are paid by the hour at a rate of $20.13, which though higher than a supplemental Dock Worker's rate is still lower than the lowest hourly rate earned by City Drivers. NT 45.

Ultimately, these figures translate to the average Driver earning twice as much annually as the average Dock Worker. *See* NT 57-59. In several cases the discrepancy is even greater than that. *Id.*

In terms of time off, Drivers receive 2-4 weeks of vacation time per year, depending on years of service. NT 60. They also receive seven paid holidays per year. NT 76. They receive four or five days of personal time per year on top of that, which can be used for illnesses, emergencies, and the like. NT 60. City and Road Drivers are treated identically when it comes to leave time. Dock Workers, in contrast, receive only the four or five days of personal time per year. NT 59-61. They receive no vacation time and no paid holidays. *Id.* While Long's testimony is somewhat unclear on this point, he did indicate that the five Full-Time Dock Workers receive vacation leave, though he never specified how much or under what conditions. *See* NT 61. The Full-Time Dock Workers do receive seven paid holidays per year. NT 76.

The Employer requires all Drivers to wear a specific uniform while on the job. NT 73. Dock Workers, meanwhile, are permitted to wear whatever they choose while at work, including street clothes. *Id.*

Finally, while the Employer randomly drug tests its Road and City Drivers, it does not randomly drug test any Dock Workers, including the five Full-Time Dock Workers. NT 76-77.

III. ARGUMENT

A. Summary

Controlling Board precedent establishes a two-step process for determining the appropriateness of a bargaining unit proposed by a union when an employer argues that the smallest appropriate bargaining unit must contain additional employees. *See Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, 12-13 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Macy's, Inc.*, 361 NLRB No. 4, 7 (2014). First, employees in the union-proposed unit (the "petitioned-for unit") must "share a community of interest" under "the traditional criteria." *E.g., Specialty Healthcare*, 357 NLRB at 12. If the unit meets this requirement, the burden shifts to the employer to show that the additional employees it seeks to include in the unit "share an overwhelming community of interest" with those in the petitioned-for unit such that the "traditional community of interest factors" between the two groups of employees "overlap almost completely" and there is "no legitimate basis" for excluding the additional employees. *Macy's, Inc.*, 361 NLRB at 7.

Because longstanding Board precedent holds that a unit composed solely of all of the truck drivers at a facility is appropriate, *see, e.g., Rinker Materials*, 294 NLRB 738, 739 (1989); *Memphis Furniture Mfg.*, 259 NLRB 401 (1981), *Salvation Army*, 225 NLRB 406, 407 (1976), and because the employees in the unit proposed by Teamsters Local 107 have nearly identical skills and training, job functions, work locations, and benefits, the employees in the petitioned-for unit plainly share a community of interest under the traditional criteria and therefore easily meet the first step of the *Specialty Healthcare* framework. Fed-Ex therefore has the burden of demonstrating an "overwhelming community of interest" between the Drivers and the Dock Workers. Fed-Ex cannot meet this burden because the "traditional community of interest factors"

do not come close to "overlap[ping] almost completely," and Fed-Ex itself draws a clear line between City and Road Drivers on the one hand and Dock Workers on the other. *See Macy's* 361 NLRB at 7; 9; *Bergdorf Goodman* 361 NLRB No. 11, 3 (2014). Drivers and Dock Workers are organized into separate departments, have very distinct skills and training, perform different types of work, and receive greatly disparate pay and benefits, all of which point to a lack of community of interest. Because the Drivers in the petitioned-for unit share a community of interest and there is plainly a legitimate basis for creating a unit consisting of all truck drivers but excluding Dock Workers, the petitioned-for unit must be upheld.

B. Analysis

On August 26, 2011, the Board issued its decision in *Specialty Healthcare*, wherein it held that "for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees...the employer must show that the excluded employees share an 'overwhelming community of interest' with the petitioned-for employees." 357 NLRB at 14. More fully, the Board stated,

> when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

Id. at 12. Moreover, "[i]f the petitioned-for unit satisfies that standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an 'overwhelming community of interest' with the petitioned-for employees, such that there 'is no legitimate basis upon which to exclude certain employees from' the larger unit because the traditional community-of-interest factors 'overlap almost completely.'" *Odwalla, Inc.*, 357

NLRB No. 132, 4 (2011) (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421, 422 (D.C. Cir. 2008).

To exemplify an overwhelming community of interest, the Board stated that a "fractured" unit would not be deemed appropriate:

> For example, employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured" unit. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit...If the proposed unit here consisted of only selected CNAs, it would likely be a fractured unit: the selected employees would share a community of interest but there would be "no rational basis" for including them but excluding other CNAs...In other words, no two employees' terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries. But the proposed unit of all CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit.

Specialty Healthcare, 357 NLRB at 13 (citations omitted). *See also Odwalla, Inc., supra* (unit excluding merchandisers deemed fractured, where their exclusion would not track any lines drawn by employer, such as classification, department or function, and would not follow lines of supervision nor methods of compensation).

In sum, "in cases in which a party contends that the smallest appropriate bargaining unit must include additional employees...beyond those in the petitioned for unit," "the Board must first assess" whether the "employees in the petitioned-for unit [are] readily identifiable as a group" and whether they "share a community of interest using the traditional criteria." *Bergdorf Goodman*, 361 NLRB at 3. "If the petitioned-for unit satisfies this standard, the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an *overwhelming* community of interest with the petitioned-for employees." *Id.* (internal quotations omitted) (emphasis added).

i. Step 1 of the Specialty Healthcare *analysis: The Unit is appropriate because the employees "are readily identifiable as a group" and share the same job*

classification, functions, work location, skills and training, and benefits, among other community of interest factors.

"In determining whether employees in a proposed unit share a community of interest, [a Board official] examines whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *Specialty Healthcare*, 357 NLRB at 9 (internal quotations omitted). Other traditional factors determining whether a community of interest exists are wages and compensation, benefits, and the amount of working time spent away from the employment situs. *Overnite Transportation Company*, 322 NLRB 723, 724 (1996). Particularly significant is whether the "boundaries of the petitioned-for unit…resemble any administrative or operational lines drawn by the Employer" or "tracks a dividing line drawn by the Employer." *Bergdorf Goodman*, 361 NLRB at 3; *Macy's, Inc.* 361 NLRB at 9. A "proposed unit need only be *an* appropriate unit" for the Board to sanction it "and need not be *the only* or *the most* appropriate unit." *Specialty Healthcare*, 357 NLRB at 10 (emphasis added).

On multiple occasions, the Board has found units consisting solely of all of the truck drivers at a facility to be appropriate, even when a larger unit that included other employees as well as truck drivers would also be appropriate. *E.g., Rinker Materials*, 294 NLRB at 739; *Memphis Furniture Mfg.*, 259 NLRB 401; *Salvation Army*, 225 NLRB at 407. A truck driver-only unit is appropriate, the Board has stated, because drivers "perform[] significantly different functions [and] possess[] different skills" from other employees, and because "drivers spend the greatest portion of their time outside the plants, whereas [other] employees are confined

primarily to the Employer's plant premises." *Rinker Materials*, 294 NLRB at 739. A unit consisting only of drivers may be appropriate even when there is common supervision of the drivers and the other employees. *See id.* at 739 FN 5.

Local 107 has petitioned for a bargaining unit that is indistinguishable from numerous past bargaining units approved by the Board—that is, a unit of all of the truck drivers at a facility. *See, e.g., Rinker Materials* 294 NLRB at 739; *Memphis Furniture Mfg.* 259 NLRB 401; *Salvation Army* 225 NLRB at 407. While the petitioned-for unit does consist of both City Drivers and Road Drivers, the only significant difference between these two classifications is which "leg" of the delivery process they drive. *See* NT 47-48. An examination of the traditional community of interest factors reveals strong overlap among all of the employees in the petitioned-for unit.

First, Fed-Ex requires all of the petitioned-for employees to have virtually identical "skills and training," which are distinct from all other Fed-Ex employees. *Specialty Healthcare*, 357 NLRB at 40. Specifically, all of the employees in the petitioned-for unit must possess a class A CDL with double/triple, hazardous materials, and tank endorsements and an acceptable Motor Vehicle Record. Petitioner Exhibit 1-2. Furthermore, they must meet all requirements imposed by the Department of Transportation on commercial drivers and have a minimum of one year of driving experience in the last three years or alternatively have completed the Fed-Ex Freight Driver Development Course. *Id.* These qualifications all serve to demonstrate that the petitioned-for employees are capable of driving a tractor-trailer combination. *All* employees in the petitioned-for unit, whether City or Road, possess this particular skill, which is at the heart of their job function.

Second, all of the employees in the petitioned-for unit perform a similar job function and do similar work that is distinct from the work performed by all other employees. This work consists of picking up and delivering freight between two locations using a tractor-trailer combination. Petitioner Exhibit 1-2. In short, hauling freight. *Id.* As Long indicated, the only distinction among the petitioned-for employees is that some tend to haul freight between customers and Fed-Ex facilities and others tend simply to haul freight between Fed-Ex facilities. *See* NT 47-48. But even this rather thin line is blurry, as City Drivers sometimes haul freight between Fed-Ex facilities just as Road Drivers do. *See id.*

Fed-Ex makes much of the fact that Drivers also occasionally perform non-driving work. However, this work "is clearly incidental to the primary function" of the petitioned-for employees, which the Employer itself acknowledges on its website is hauling freight. Petitioner Exhibit 1-2; *Macy's, Inc.*, 361 NLRB at 5 FN 25. The petitioned-for classifications of employees spend the overwhelming majority of their time hauling freight. *See* Employer Exhibit 3. No other employees perform this work. *See id.* Moreover, to the extent the petitioned-for employees do perform non-driving work, they do so voluntarily. NT 14; 24; 25; 29; 31; 32; 66-67; 69. The Board has found that when employees in a petitioned-for unit perform tasks normally done by those outside the unit, but only at the employees' own request, it does not militate against the appropriateness of the petitioned-for unit. *Ramada Inn West*, 225 NLRB 1279, 1279 FN 3; 1280 (1976). This is exactly the situation in the present case, where the Drivers only perform non-driving work if they want to. *E.g.,* NT 14. Therefore, the employees in the petitioned-for unit share a common, distinct job function.

Third, unlike other employees at the Facility, the employees in the petitioned-for unit perform the bulk of their work "away from the employment…situs," further demonstrating that

they share a distinct, readily identifiable community of interest. *Overnite Transportation Company*, 322 NLRB at 724 (internal quotations omitted); NT 53. Other employees, including Dock Workers, spend *all* of their time at the employment situs. NT 53.

Fourth, the employees in the petitioned-for unit have similar terms and conditions of employment that are distinct from other employees. All of the employees in the petitioned-for unit receive 2 to 4 weeks of vacation time, with the precise amount of time being determined in the same way for all petitioned-for employees. *See* NT 60. Dock Workers, on the other hand, do not receive any vacation time. *See* NT 59. All of the employees in the petitioned-for unit are required to wear an identical uniform that other employees, including Dock Workers, are not required to wear. NT 73. It is difficult to imagine a more salient indication that certain employees constitute a "readily identifiable group" separate from other employees than a uniform that the identified employees must wear and that the others do not. Moreover, the employees in the petitioned-for unit are subject to heightened scrutiny by Fed-Ex in the form of random drug testing, a reflection of their distinct and arguably more responsible duties. NT 76-77. Employees in the petitioned-for unit are also allowed to bid for specific work start times, with the bidding priority determined according to seniority lists. NT 53-55. Finally, all of the employees in the petitioned-for unit are paid more than other non-supervisory employees. *See* NT 57-59. True, Road Drivers are paid by the mile while City Drivers are paid by the hour. *See id.* But the final take-home incomes of Road Drivers and City Drivers are far closer to one another than either is to the incomes of other non-supervisory employees, particularly Dock Workers. *See id.* Indicative of the reality that, though calculated differently, Road and City Drivers are compensated and valued similarly, is the fact that when Road Drivers perform hourly work such as City Driving and non-driving work, they are paid at a City Driver's rate. NT 46. In sum, the

employees in the petitioned-for unit receive similar pay and benefits that distinguish them from other employees and serve to identify them as a distinct group with a community of interest.

Though not decisive, recent Board decisions have emphasized the significance of "dividing line[s] drawn by the Employer" in assessing whether a community of interest exists among employees in a petitioned for unit. *See Macy's, Inc.* 361 NLRB at 9; *Bergdorf Goodman* 361 NLRB at 3. Here, the union-proposed unit "resemble[s]...administrative or operational lines drawn by the Employer," a strong indication of its appropriateness. *Bergdorf Goodman* 361 NLRB at 3. The unit consists of all of the employees in the two "Driver" classifications used by Fed-Ex. The Employer draws a line between the Driver categories on the one hand, and Dock Workers and other workers on the other, at nearly every administrative point. First, as already indicated, the Employer requires the petitioned-for employees to wear the same uniform but does not require Dock Workers to wear any uniform. NT 73-74. Also, the Employer requires the petitioned-for employees to have virtually identical qualifications, skills, and training that it does not require from other employees. *See* Petitioner Exhibit 1-3. The Employer grants the petitioned-for employees the same benefits in terms of time off and compensates them at the same rate when they perform hourly work, and it does not extend these same benefits and pay rate to other workers. NT 46; 59-61; 76. It subjects the petitioned-for employees to heightened scrutiny relative to other employees in the form of random drug screenings. NT 76-77. All Drivers are overseen by supervisors stationed in the same office, while supervisors managing Dock Workers are stationed in a separate location "roaming on the dock," further indicating that the Employer treats the petitioned-for employees as a distinct category separate from other types of worker.[12] NT 63.

[12] The present situation is easily distinguishable from the situation in *Bergdorf Goodman*, where the Board found the petitioned-for unit to be inappropriate because it did not constitute a readily identifiable group. 361 NLRB at 3

Just as was true in *Macy's, Inc.*, in the present matter "[a]lthough there are some differences among the petitioned-for employees…they are insignificant compared to the strong evidence of community of interest that they share." 361 NLRB at 8. "[M]inor differences in compensation among petitioned-for employees"—for instance, being paid by the mile as opposed to by the hour when the ultimate amount of compensation is nevertheless very similar—"do not render a petitioned-for unit inappropriate." *See id.* Nor do slight differences in the exact parameters of what is fundamentally similar work. *See id.* at 8-9. "In most…respects…the interests of the petitioned-for employees are identical." *Id.* at 9. This is sufficient to render them an appropriate unit. *See id.*

ii. Step 2 of the Specialty Healthcare *analysis: The Employer cannot meet its burden of showing that the Dock Workers share an "overwhelming community of interest" with the petitioned-for employees because they differ sharply from the petitioned-for employees on numerous community of interest factors.*

If a petitioned-for unit consists of "employees who are readily identifiable as a group, and the Board finds that the employees in the group share a community of interest after considering the traditional criteria," "the burden is on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an overwhelming community of interest with the petitioned-for employees, such that there is no legitimate basis upon which to exclude certain employees from the larger unit because the traditional community-of-interest factors overlap

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FN 4. There, the petitioned-for unit consisted of all of the employees in one department as well as a "carved-out" group of employees from a second department. *Id.* at 3. Employees from the two departments shared no common supervision other than the highest level of management at the employment facility, nor did they share any special skills and training. *Id.* at 3; 4 FN 5. Here, by contrast, there is no "carve out"; the proposed unit consists of all employees in the two Driver classifications. The Union simply proposed to undertake the long-accepted and entirely sensible task of organizing all of the truck drivers at a particular facility. *See, e.g., Rinker Materials* 294 NLRB at 739. Moreover, here, unlike in *Bergdorf Goodman*, the Road and City Drivers share common supervision and are supervised in a similar way that is distinct from the supervision of Dock Workers (Drivers are supervised from a single office, while Dock Workers are supervised from the dock). NT 63. Last, and most starkly, are the highly specific skills and training that unite the petitioned-for employees—the ability to operate a tractor-trailer. *See* Petitioner Exhibit 1-2. The employees in *Bergdorf Goodman* had no such distinctive skills and training, though the Board indicated that if they had that "might [have] serve[d] to justify" the petitioned-for unit. 361 NLRB at 4 FN 5.

almost completely." *E.g., Odwalla, Inc.*, 357 NLRB at 4 (internal quotations omitted). Unless the Employer carries this heavy burden, "the Board will find the petitioned-for unit to be an appropriate unit," even if the "employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate." *Specialty Healthcare*, 357 NLRB at 12.

For excluded employees to share an overwhelming community of interest with petitioned-for employees such that they must be included in a unit, there must be "an almost complete overlap of [community of interest] factors" between the two groups. *Macy's, Inc.*, 361 NLRB at 12 (internal quotations omitted). "[T]he fact that two groups share *some* community of interest factors does not, by itself, render a separate unit inappropriate." *Id.* at 11 (emphasis added). So even when petitioned-for and excluded employees receive some of the same benefits or use the same break room, if they differ on other community of interest factors the petitioned-for unit will stand. *See id.* In addition, when petitioned-for employees perform work done by excluded employees, but this work does not "involve[] a significant portion of the petitioned-for employees' time" and is "incidental to the petitioned-for employees'" primary function, the excluded employees need not be included in a unit with the petitioned-for employees. *Id.* at 10. Put differently, when so-called interchange is "infrequent, limited, and one-way" it is not necessary to include other employees in the petitioned-for unit. *Id.* Also, "the mere fact that…some (but not all) petitioned-for employees share similarities with some (but not all) other…employees, does not demonstrate the almost complete overlap of factors required to establish an overwhelming community of interest between" the petitioned-for employees and the other employees the Employer seeks to include. *Id.* at 12. In other words, if a union petitions for a unit consisting of a certain classification of employee, and the employer argues that *all* of an additional classification must be included in the unit, the fact that some subset of the two

classifications share some similarities will not render *all* of the employees in the two classifications a single inseparable unit. *Id.* In sum, controlling Board precedent places a very heavy burden on an Employer arguing that the smallest appropriate unit must include additional employees once it is established that the petitioned-for employees share a community of interest.

In the present case, Fed-Ex seeks to include *all* Dock Workers in the unit. NT 11. Far from "overlapping almost completely," the petitioned-for employees and the Dock Workers diverge on almost every traditional community of interest factor. The petitioned-for employees are paid roughly twice as much annually as Dock Workers, and often the discrepancy is even larger. *See* NT 57-59. They receive substantial vacation and holiday leave that is not available to Dock Workers. NT 59-61. They haul freight between locations while the Dock Workers simply load and unload freight and move equipment at the Facility; thus they have different job functions. Petitioner Exhibit 1-3. The petitioned-for employees spend the bulk of their time away from the Facility, while all except two of the Dock Workers spend all of their time at the Facility. NT 53. The petitioned-for employees have special and distinctive skills, training, and experience, including a CDL, that the Dock Workers do not have. NT 50; Petitioner Exhibit 1-3. The petitioned-for employees work significantly more hours than Dock Workers. NT 57-58. They are allowed to bid for start times and routes, while Dock Workers are simply assigned particular hours and work. NT 53-54. The petitioned-for employees are required to wear uniforms while the Dock Workers are not. NT 73-74. They are subjected to heightened scrutiny in the form of random drug testing to which the Dock Workers are not subjected. NT 76-77.

To say that there is a "legitimate" or "rational" basis for excluding Dock Workers from the petitioned-for unit, which is all Board precedent requires, is an extreme understatement. *Specialty Healthcare*, 357 NLRB at 13; *Odwalla, Inc.*, 357 NLRB at 4. Not only do the

community of interest factors not "overlap almost completely," they diverge at almost every significant point.

What precious few similarities do exist between the petitioned-for employees and the Dock Workers are either disputed or of a kind that have been dismissed by the Board in the past as insufficient to establish the required overwhelming community of interest. Long and Fed-Ex's counsel took great pains to establish that City and Road Drivers may work the dock and occasionally do so, presumably because they mean to argue that this one-way and incidental overlap in job responsibilities renders the petitioned-for employees and Dock Workers an inseparable unit. *E.g.,* NT 16-17. However, the Board recently rejected such an argument in *Macy's, Inc.* 361 NLRB at 10. There, all the employees at a facility participated in inventory work. *Id.* at 5 FN 25. The Board found that because the inventory work was "clearly incidental to the primary function" of the petitioned-for employees, and because the overlap in job duties between included and excluded employees was "infrequent, limited, and one-way," it was not necessary to include the excluded employees in the petitioned-for unit. *Id.* at 10.

Just as was the case in *Macy's,* in the present matter the "interchange" between the petitioned-for employees and the Dock Workers is completely one-way. While Drivers do occasionally perform non-driving work, Dock Workers *never* perform driving work and are actually legally forbidden from doing so. *See* NT 50. Moreover, Drivers perform non-driving work only to an "infrequent, limited" extent and the non-driving work is "clearly incidental to [their] primary function" of hauling freight using tractor-trailers. *See* Employer Exhibit 3; Petitioner Exhibit 1-2. As indicated above, many Drivers perform *no* non-driving work, including the overwhelming majority of City Drivers and a substantial subset of Road Drivers. NT 47; *See* Employer Exhibit 3. Of the Drivers that do perform non-driving work, many perform

only a negligible amount. *See* Employer Exhibit 3. The Employer's own job descriptions describe the primary function of Road and City Drivers as pick-up and delivery of freight. Petitioner Exhibit 1-2. Further evidencing the "limited" nature of the overlap, Drivers are rarely, if ever, *required* to perform non-driving work. NT 14; 24; 25; 29; 31; 32; 66-67; 69. The Board has indicated that such voluntary overlap in work tasks does not constitute the sort of interchange that militates against a unit's appropriateness. *See Ramada Inn West*, 225 NLRB at 1279 FN 3; 1280. The Employer not only accepts expressions as to Drivers' willingness to work the dock, they actively solicit them. *See* Employer Exhibit 2. A Driver's preference not to perform dock work is always, or almost always, respected. NT 14; 24; 25; 29; 31; 32; 66-67; 69. Here, as in *Macy's, Inc.*, the fact that there is some minor, totally one-way overlap in job duties between two groups of employees does not establish an overwhelming community of interest. 361 NLRB at 10.

The Employer also made much of the supervisory structure at the Facility. NT 39-40. Long testified that all nine supervisors have the power to discipline all employees at the Facility, whether Dock Worker, City Driver, or Road Driver. *Id.* This, the Employer's argument will presumably go, establishes common supervision, which in turn establishes an overwhelming community of interest. But the presence of common supervision at the Facility is belied, or at least called into question, by Long's own statements. When asked to identify "City supervisors," Long began to do so without hesitation. NT 62. He did the same thing for "Road supervisors" and "Dock supervisors." NT 62-63. While there are no formal distinctions, employees at the Facility "perceive" particular supervisors as managing specific, distinct categories of employee, Long explained. NT 63. This suggests that any common supervision is theoretical or technical, and that in practice Drivers and Dock Workers are supervised separately.

Even if individual supervisors sometimes manage multiple categories of employee, it is clear that the actual supervision of Drivers and Dock Workers takes place separately. *See* NT 63-64. When overseeing Dock Workers, a supervisor "roam[s] on the dock," meaning the supervisor is located in the dock area; but a supervisor overseeing Drivers does so from an office inside the main building. *Id.* This is not "common supervision" for community of interest purposes. Dock supervision takes place in one location and is of a certain nature, while Driver supervision takes place in a different location and is of a different nature. Thus, despite Fed-Ex's strenuous efforts to demonstrate the contrary, it appears that there in fact is not common supervision between the petitioned-for employees and the Dock Workers. However, even assuming, purely for the sake of argument, that there were common supervision, this would be just one overlapping community of interest factor among the many divergent community of interest factors. "[T]he fact that two groups share *some* community of interest factors does not...render a separate unit inappropriate." *Macy's, Inc.*, 361 NLRB at 11. Even if Fed-Ex's contention were accurate, which it is not, Fed-Ex still would not have carried its burden of showing an "almost complete overlap" of community of interest factors between Dock Workers and the petitioned-for employees.

Fed-Ex also harped on the Full-Time Dock Workers and the Employer's program for training dock workers to drive tractor-trailers. NT 15. Full-Time Dock Workers, a group consisting of one outright dock worker and four participants in the driver training program, are treated somewhat differently from the far more numerous supplemental Dock Workers. In particular, they receive a higher hourly pay rate than supplemental Dock Workers, and, unlike supplemental Dock Workers, they receive vacation and holiday leave. NT 45; 61; 76 While Full-Time Dock Workers are treated differently from supplemental Dock Workers to a certain extent, they still do not come anywhere close to sharing an overwhelming community of interest with

the petitioned-for employees. All Full-Time Dock Workers perform exclusively non-driving work, just like supplemental Dock workers. *See* Employer Exhibit 3. Put differently, the Full-Time Dock Workers, including those in the training program, perform no driving work of the kind that is the primary job function of the petitioned-for employees. Moreover, while they are paid more than supplemental Dock Workers, Full-Time Dock Workers are still paid less than even the lowest paid City and Road Driver. NT 45. Full-Time Dock Workers also do not have a CDL. NT 50. They are not categorized with Drivers in Fed-Ex's payroll or record-keeping system. NT 18; Employer Exhibit 3. They spend all of their work time at the Facility, just as supplemental Dock Workers do. Employer Exhibit 3. In short, while they receive higher pay and more time off than supplemental Dock Workers, they are nevertheless very similar to supplemental Dock Workers in terms of their relation to Drivers. Like supplemental Dock Workers, Full-Time Dock Workers diverge from Drivers on almost every community of interest factor.

Moreover, even assuming, *arguendo*, that Full-Time Dock Workers did have significant similarities with the petitioned-for employees, the Employer argues that *all* Dock Workers, Full-Time and supplemental, must be included in a bargaining unit. NT 11. The Board recently found that "the mere fact that all petitioned-for employees share certain community of interest factors with some (but not all) other [] employees, or that some (but not all) petitioned-for employees share similarities with some (but not all) other [] employees, does not demonstrate the almost complete overlap of factors required to establish an overwhelming community of interest between all the petitioned-for employees and…the other [] employees." *Macy's, Inc.* 361 NLRB at 12. In other words, in a situation where petitioned-for employees are found to share a community of interest, and the employer seeks to include additional employees, the employer

cannot cherry-pick some subset of the additional employees that share more similarities with the petitioned-for employees and use these outliers to bring in all of the additional employees. *See id.* But again, the Full-Time Dock Workers, like the supplemental Dock Workers, share almost no community of interest factors with the petitioned-for employees, so this analysis is unnecessary. It is included here only to demonstrate that under *any* characterization of the facts, the Employer cannot carry its burden of showing an overwhelming community of interest between the Dock Workers and the petitioned-for employees.[13]

IV. Conclusion

The employees in the bargaining unit proposed by the Union are a readily identified group—all of the truck drivers in the Facility—who share a clear community of interest under the traditional criteria. Similar units have been approved by the Board for decades. The employees that Fed-Ex insists must be included in the unit are not truck drivers but dock workers who, among other things, are paid less, receive fewer benefits, perform different functions, work fewer hours, and lack specialized skills. There is plainly a legitimate and rational basis for excluding them from the petitioned-for unit. Therefore, under the controlling *Specialty Healthcare* framework, the petitioned-for unit is appropriate.

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[13] Finally, the Employer may argue that there is "permanent interchange" between the Dock Workers and the petitioned-for employees because several current drivers were Dock Workers at some point in the past. First, "evidence of permanent interchange is a less significant indicator of whether a community of interest exists" than is evidence of other shared factors. *See Macy's, Inc.*, 361 NLRB at 10. Second, there is little support in the record for the proposition that there has been meaningful permanent interchange between Dock Workers and the petitioned-for employees. The sole evidence is a series of hand-drawn asterisks on Employer Exhibit 3 that purports to show all of the individuals who went through the driver training program offered by the Employer. NT 37. There is no information as to when they completed the program or how they became Drivers, nor is there any information regarding whether or when they worked as Dock Workers. *See id.* As such, it is a rather thin reed on which to rest an "overwhelming community of interest" argument. Furthermore, while it may be true that some minority of Drivers were once Dock Workers, there is no evidence nor even a suggestion that any Dock Workers were formerly Drivers. Here, as in the case of some Drivers occasionally doing non-driving tasks, the so-called interchange is "infrequent, limited, and [completely] one-way." *Macy's, Inc.* 361 NLRB at 10. This is far from the almost total overlap of community of interest factors needed to render the Dock Workers and the petitioned-for employees inseparable.

Respectfully submitted,
MARKOWITZ & RICHMAN

By:_____

THOMAS H. KOHN, ESQUIRE
Attorney for Petitioner
123 South Broad Street, Suite 2020
Philadelphia, PA 19109
(215) 875-3129

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief and Attachments were sent by certified mail, this day of December 9, 2014 to:

Felix Wade
Ice Miller LLP
250 West Street
Suite 700
Columbus, OH 43215

Luke Farley