

Nos. 14-2222, 14-2339

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NESTLÉ-DREYER'S ICE CREAM COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 501, AFL-CIO**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**CORRECTED BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

Dreyer's has requested oral argument. The Board agrees that oral argument would be of assistance to the Court. If argument is held, the Board requests that the parties each be given 20 minutes.

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**CORRECTED BRIEF FOR
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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Nestle Dreyer’s Ice Cream Company (“Dreyer’s”) to review a Decision and Order of the National Labor Relations Board issued on November 5, 2014, and reported at 361 NLRB No. 95. (A. 437-39.)¹ The Board found that Dreyer’s unlawfully refused to bargain with Local 501, International Union of Operating Engineers (“the Union”), which the Board certified as the bargaining representative of a unit of Dreyer’s employees. (*Id.*) The Board has cross-applied for enforcement of its Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(e) & (f). The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because Dreyer’s operates a facility in Maryland. Dreyer’s filed its petition for review on November 7, 2014, the Board filed its cross-application on December 5, 2014. Both were timely; the Act places no time limitations on such filings.

The Board’s unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 31-RC-66625), in which

¹ “A.” references are to the joint appendix. References before a semicolon are to the Board’s findings; those following are to the supporting evidence. Dreyer’s opening brief is referred to as “D-Br.” Amici’s three briefs are referred to as: “C-Br.” (Chamber of Commerce, et al.); “R-Br.” (Retail Litigation Center); and NAM-Br. (National Association of Manufacturers).

Dreyer's contested the Board's certification of the Union as the employees' collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair labor practice case. *See, e.g., Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).²

² *Contra NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996). *Lundy's* holding that the Board lacks the authority to resume processing the representation case rests on inapposite cases dealing not with Section 9(d)'s limitations on judicial control over representation cases but with Section 10(e)'s limitations on the Board's authority to revisit unfair labor practice issues once they have been considered by a reviewing court. *See Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent fraud or mistake, the Board is not entitled to have a court's enforcement order vacated so the Board can enter a new remedial order that, in retrospect, it decides is more appropriate); *W.L. Miller Co. v. NLRB*, 988 F.2d 834, 835-38 (8th Cir. 1993) (once a court enforces the Board's order in an unfair labor practice proceeding, the Board lacks authority to reopen the proceeding to award additional relief); *George Banta Co. v. NLRB*, 686 F.2d 10, 16-17 (D.C. Cir. 1982) (rejecting employer's argument that the Board lacked jurisdiction to adjudicate charges of post-strike unfair labor practices while a case against the same employer concerning pre-strike unfair labor practices was

ISSUE STATEMENT

The issue before the Court is whether the Board acted within its discretion in determining that a unit of Dreyer's maintenance employees constitutes an appropriate unit for collective bargaining. If so, then the Board properly found that Dreyer's unlawfully refused to bargain with the Union following its victory in the representation election.

STATEMENT OF THE CASE

On May 18, 2012, a three-member panel of the Board (Chairman Pearce and Members Hayes and Griffin) found that Dreyer's violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1), by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit. *See Nestle-Dreyer's Grand Ice Cream, Inc.*, 358 NLRB No. 45 ("the 2012 Decision and Order"). (A. 428.) Dreyer's petitioned this Court for review of that order and the Board sought enforcement (4th Cir. Nos. 12-1684 & 12-1783). On January 13, 2014, the Court placed the case in abeyance "pending the Supreme Court's

pending in court); *Serv. Emps. Local 250 v. NLRB*, 640 F.2d 1042, 1044-45 (9th Cir. 1981) (the Board lacks jurisdiction to adjudicate a union's unfair labor practice claim when an earlier court decision implicitly rejected that claim). Should the Court disagree with the Board's unit determination, the Board asks that the case be remanded for further processing consistent with the Court's opinion. *See NLRB v. Local 347*, 417 U.S. 1, 8 (1974) (holding appeals court should have remanded question of remedy to the Board rather than deciding the issue).

decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013).”

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointment of Member Griffin. On July 29, 2014, this Court, granting the Board’s motion, vacated the 2012 Decision and Order, and remanded the case to the Board for further consideration in light of the Supreme Court’s decision in *Noel Canning*. (A.431-36.) On November 5, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order (361 NLRB No. 95) now before the Court, which again finds that Dreyer’s violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit. (A.437-39.) Dreyer’s does not dispute that it refused to bargain with the Union. However, Dreyer’s contests the Board’s certification of a unit made up exclusively of maintenance workers. If the Court upholds the Board’s certification of the Union, the Order is entitled to enforcement.

I. The Board's Findings of Fact

A. Background: Dreyer's Operations

Dreyer's manufactures ice cream products at its Bakersfield Operations Center (BOC) in California. (A.404; 12, 14.) The Board certified a unit of 113 permanent maintenance employees who work at the BOC. (A.437.) Maintenance workers have significant technical knowledge in mechanics, electronics, and computers, and their primary responsibility is to keep the BOC's equipment running. (A.409; 88, 192, 267-68, 280-81.) This includes the equipment used by production employees to make the ice cream, as well as the HVAC system, the boilers, the alarm and fire systems, the lighting, and the plumbing. (A.48, 86, 287, 300.) Maintenance workers also resurface the parking lots and paint walls. (*Id.*)

As relevant here, Dreyer's categorizes its employees as either maintenance workers or production workers. Both groups of employees work three shifts, with BOC operations continuing 24 hours a day, 7 days per week. (A.404; 26-27.) The bulk of the manufacturing work is done on the BOC's 26 production lines. (A.404; 36.) In addition, the BOC includes a dry warehouse, a distribution center, a research and development center, and several maintenance shops. (A.404-05; 20, 48, 53-54, 85.)

B. Production Workers Make Ice-Cream Products

BOC employs 578 permanent production workers. (A.404; 26-27.) These employees work as ice cream maker I, ice cream maker II, mix makers, warehouse specialists, and palletizing specialists. (A.405; 42, 53, 154-55.) The primary responsibility of the production employees is to manufacture ice cream products. (A.409; 280-81.)

Production employees in the pre-manufacturing section order ingredients for ice cream and mix the ingredients according to computer-generated recipes. (A.404, 406; 22-23, 30, 43, 108-10, 114.) They use a computer to send the mix to a storage tank and then on to the production lines, where other production employees operate the machinery that manufactures and packages products. (A.406; 43, 109, 112.) The packaged ice cream goes by conveyer belt to the palletizing area, where other production employees stack it on pallets to be moved to cold storage in preparation for distribution. (A.404; 40, 289-90.)

Most production employees work on a specific product line. (A.404; 43, 86.) Every third shift, these employees take apart all the machines on their line and clean, sanitize, and reassemble them. (A.407; 209.) Maintenance workers stand by to make any necessary repairs. (*Id.*)

Production employees may attempt to make minor repairs to the equipment when problems arise, but most equipment problems are beyond their skill set.

(A.407; 232, 267-68, 281.) Dreyer's does not want production employees making complicated repairs because they lack the requisite expertise. (A.407; 238.)

C. Maintenance Workers Keep the Equipment Running

Dreyer's maintenance employees work as entry maintenance mechanics, maintenance technicians, craftworkers, process technicians, group leaders, and control technicians. (A.406; 153, 203.) As noted above, the primary responsibility of maintenance employees is to keep the equipment running. (A.409; 280-81.)

Most maintenance employees are assigned to a specific business unit, where they provide support to various production lines. (A.404-05; 35, 37, 43, 103.) Others work in the utilities group, traveling throughout the BOC to perform maintenance on electrical, heating, and ventilation systems. (A.405; 86.) Finally, some maintenance employees work in one of the maintenance shops, such as the machine shop, which fabricates parts for the production line. (A.405; 48, 53-54.)

Preventative maintenance work must be done on all machines, and a computer system determines when. (A.406; 49.) When a maintenance worker begins his shift, he consults with a mechanic from the prior shift to determine which tasks still need to be completed. (*Id.*) Once a week, the first shift on each production line starts late while a maintenance worker does preventative maintenance on that line's machines. (A.407; 240.) The production workers watch to better understand the equipment. (A.407; 240-42.)

Maintenance workers also respond to calls from production workers who have identified problems with the factory's equipment. (A.407; 233, 236, 281.) For example, the production workers in pre-manufacturing will call a maintenance worker if the computer that generates the ice cream recipes malfunctions. (A.406; 203, 259.) The production workers will call a maintenance worker if there is a line jam that the production worker cannot resolve. (A.407; 233, 236, 238.) And if the conveyer belts stop working in the palletizing area, the production workers will contact maintenance to repair the equipment. (A.407; 291.)

In these circumstances, the maintenance employees generally must obtain permission from a maintenance supervisor before beginning the repair. (A.406; 76-77.) Then the maintenance employee works to identify the cause of the problem, with input from the production employee. (A.408; 245, 281-82.) For example, the production worker may explain the problem and any routine attempts he made to resolve it. (A.281-82.) But the maintenance worker diagnoses the problem and makes the necessary repairs. (A.407; 280-82.)

Maintenance employees spend about 90% of their time performing skilled maintenance work. (A.408; 213-14, 268, 282.) The overwhelming majority of repairs are performed by maintenance workers, as production workers lack the appropriate skills. (A.408-09; 267-68.)

D. Production and Maintenance Employees Work in Different Departments, Do Different Work, and Have Different Supervisors, Skills, and Pay rates

The BOC is organized into “leadership teams,” each of which has a manager who reports directly to the plant manager. (A.405; 29.) Dreyer’s put all maintenance employees on the technical operations team and all production employees on either the pre-manufacturing team or the manufacturing team. (A.405; 34.)

Because they are on different teams, maintenance and production employees have separate supervision. (A.405; 76.) Under Dreyer’s management structure, the only common supervisor of maintenance and production employees is the plant manager. (A.405; 106.) Accordingly, maintenance and production employees are evaluated by different supervisors. (A.412; 177.)

Dreyer’s requires maintenance employees to have significant technical knowledge of mechanics, electronics, and computers. (A.409; 88, 192.) To be hired, maintenance employees must have 2 years experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing equipment; 1 year experience in computerized maintenance management; and 5 to 7 years experience in industrial high speed maintenance. (A.409; 263-64.) All maintenance employees must pass a written test assessing their skills in these areas. (A.409; 270.) In addition, Dreyer’s requires that some maintenance employees be certified

by the Refrigerating Engineers & Technicians Association (RETA), which involves a series of classes and a test. (A.409; 173.)

Dreyer's does not require its production employees to have such expertise. (A.409; 88-89.) Because they are less skilled, Dreyer's does not permit production employees to operate the equipment in the machine shop. (A.409; 89.) Some, such as the mix makers, are required to have a pasteurization license. (A.409 n.8; 174-75.) No maintenance employee is required to have that license. (A.409; 174.)

Dreyer's pays production employees \$15 to \$22 per hour. (A.409; 82.) Because maintenance employees have greater skills, Dreyer's pays them between \$20 and \$30 per hour. (A.409; 81-83, 88, 156, 265.)

Dreyer's requires maintenance employees to work 10-hour shifts, while it assigns production employees to 8-hour shifts. (A.411; 77-78.) This impacts overtime, holiday, and sick pay. Production employees accrue overtime after working 8 hours, maintenance employees after 10. (A.412; 147-48.) Dreyer's gives both maintenance and production employees 5 sick days per year, but pays maintenance employees for 10 hours per sick day while production workers receive 8 hours per sick day. (*Id.*) The same applies to holiday pay: maintenance employees receive 10 hours of pay while production workers receive only 8. (A.412; 151.) In addition, maintenance employees are paid during their meal break, while production employees are not. (A.411; 77-78.)

Dreyer's requires maintenance employees to provide their own tools. The average tool set costs about \$5,000. (A.420 n.22; 283.) To help offset the cost, Dreyer's gives maintenance employees a tool allowance. (A.411; 79-80.) Production employees receive no such allowance; Dreyer's provides them with the tools they need to make minor adjustments to machinery. (A.411; 80, 101-02, 216.) Dreyer's provides many maintenance workers, but no production employees, with phones to communicate with each other during the work day. (A.411; 77.)

Dreyer's maintains a formal job bidding system for production employees, but not for maintenance workers. (A.412; 167-68.) Dreyer's maintains separate seniority lists for maintenance and production employees, which are used for shift selection and vacation. (A.411; 92.) Maintenance employees wear distinct shirts that distinguish them from production workers. (A.411; 43-47, 82-83.)

Every year, the BOC shuts down for 2 to 4 weeks to clean and make improvements to the facility. (A.410; 217-18.) Dreyer's requires all maintenance employees to work during the shutdown. (A.410; 218.) Only a few production employees – those who volunteer and are chosen – work during the shutdown. (A.410; 218-19.)

E. Production and Maintenance Workers Both Use the BOC's Common Areas, and Dreyer's Employment Policies Apply Equally to Both

Production and maintenance employees share common parking lots, time clocks, break and lunch rooms, and lockers. (A.411; 121.) They wear the same pants and safety equipment. (A.411; 43-47, 82-83.)

The terms of Dreyer's employee handbook – which include EEO, harassment, and other policies – apply to both production and maintenance employees. (A.412; 146.) All employees receive the same benefits, such as health insurance and paid leave. (A.409, 412; 150-51, 156.) All receive annual performance evaluations. (A.412; 177.) One production and one maintenance employee each attend daily operational review meetings, at which management and the two employees discuss any breakdowns that still need to be addressed. (A.408; 210-11.)

F. Just Before the Hearing, Dreyer's Restarted its Failed Cross-Training Program

In October 2009, Dreyer's began a Pilot Line project to train some production workers on basic maintenance to keep the lines going, reduce waste, and let maintenance employees focus on more complicated work. (A.410; 62-70, 72-73.) After 18 months, Dreyer's ended the pilot because it "hadn't gained sustainable results." (A.410; 69-70, 217.) The week the hearing was held in this

case, Dreyer's re-started the project. (A.410; 69.) Dreyer's did not present any evidence about the pilot project's progress since its reintroduction.

II. The Board Proceedings

A. The Representation Proceeding

The Union filed a petition with the Board seeking a representation election among all permanent maintenance employees at the BOC. (A.1.) Following a hearing, the Regional Director (RD) issued a Decision and Direction of Election finding that the maintenance employees constitute an appropriate unit for collective bargaining and directing an election. (A.402-25.) The RD applied the standard elucidated by the Board, and enforced by the Sixth Circuit, in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15-16 (2011) ("*Specialty*"), enforced sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Kindred*"). (A.414-15.) As required by *Specialty*, the RD first applied the traditional community-of-interest test to determine whether the petitioned-for unit is "appropriate." (A.416-20.) The RD determined that the maintenance workers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (A.417.)

The RD then addressed Dreyer's contention that the smallest appropriate unit must include the production employees. (A.420.) The RD explained that

Specialty requires an employer to demonstrate that the excluded employees share an “overwhelming community of interest” with the employees in the petitioned-for unit, such that there is no legitimate basis upon which to exclude them. (A.415.) Applying the overwhelming community-of-interest test here, the RD found that Dreyer’s failed to show that the production workers share an overwhelming community of interest with the maintenance workers. (A.420-22.)

Dreyer’s requested review of the RD’s decision, again contending that the permanent production employees must be included in the unit. On December 28, 2011, the Board (Chairman Pearce and Members Becker and Hayes) denied the request, finding Dreyer’s had raised no substantial issues warranting review. (A.426.) Member Hayes, who dissented from the Board’s *Specialty* decision, refused to rely on that case but nonetheless agreed that “a unit of maintenance employees is an appropriate unit” because those employees share a community of interest and are “sufficiently distinct” from the production employees. (*Id.*)

The Board conducted a secret ballot election, and the maintenance workers voted for union representation. On January 13, 2012, the Board certified the Union as the exclusive collective-bargaining representative of the maintenance workers.

B. The Unfair Labor Practice Proceeding

Following certification, Dreyer’s refused to comply with the Union’s bargaining demand to contest the validity of the election. The Union filed an

unfair labor practice charge (A.427), and the Board's Acting General Counsel issued a complaint alleging that Dreyer's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) & (1). The Acting General Counsel subsequently filed a motion for summary judgment. Dreyer's opposed, claiming that production workers must be included in the unit.

III. The Board's Conclusions and Order

The Board (Chairman Pearce and Members Hirozawa and Johnson) granted the General Counsel's motion for summary judgment, finding that Dreyer's violated the Act by failing and refusing to bargain with the Union. (A. 437.) The Board found that all representation issues raised by Dreyer's in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (*Id.*)

The Board's Order requires Dreyer's to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 438.) Affirmatively, the Order directs Dreyer's to bargain with the Union as the representative of its maintenance employees. (*Id.*) The Order further requires Dreyer's to post a remedial notice and, if appropriate, distribute it electronically. (*Id.*)

SUMMARY OF ARGUMENT

Dreyer's maintenance workers chose union representation. Dreyer's has admittedly refused to bargain, claiming it has no obligation to do so because the unit should not have been certified by the Board. Specifically, Dreyer's contends the unit must include the production employees. But the Board reasonably applied the well-accepted community-of-interest test to determine that the maintenance workers constitute *an* appropriate unit for collective bargaining.

After making that finding, the Board found that Dreyer's failed to meet its burden of showing that the production workers share an overwhelming community of interest with the maintenance workers, such that they must be included in order to make an appropriate unit. The Board's application of that heightened standard, recently clarified in *Specialty* and approved by the Sixth Circuit in *Kindred*, comports with the Board's prior jurisprudence in this area of law. The standard represents a reasonably defensible construction of the Act, which gives the Board broad discretion to make unit determinations.

Dreyer's objects to the *Specialty* test, raising the same arguments rejected by the Sixth Circuit in *Kindred*. For example, Dreyer's contends incorrectly that the Board has attempted to hide its announcement of a wholly new standard. As the Sixth Circuit explained, the Board did not create a new test, but further elucidated its longstanding test, which focuses on similarities and differences between groups

of employees. Dreyer's argues, using terminology different from the Board's, that the differences between the maintenance and production workers are "insignificant." But this contention is at odds with the substantial record evidence showing that the maintenance and production workers have distinct job functions, skills, supervision, hours, pay, and experience. Dreyer's does not contend that it met its burden of showing the production employees have an overwhelming community of interest with the maintenance employees.

Additionally, Dreyer's erroneously argues that the *Specialty* standard gives improper controlling weight to the extent of unionization. But it is not improper for the Board to first examine the proposed unit, as long as the Board properly scrutinizes that unit using the multifactor community-of-interest test, as it did here. Nor did the Board infringe on the rights of employees to refrain from engaging in union activity, as Dreyer's contends. The production workers retain their statutory rights under the Act whether or not their colleagues unionize.

And Dreyer's and amici's speculative argument regarding the size of units that will be certified under the Board's standard should be rejected. The size of the unit is irrelevant so long as the Board certifies a unit that is appropriate under Section 9 of the Act.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT A UNIT OF MAINTENANCE EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING AND THEREFORE PROPERLY FOUND THAT DREYER’S VIOLATED THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative of [its] employees.” 29 U.S.C. § 158(a)(5).³ Dreyer’s does not dispute (D-Br. 28) that it refused to bargain with the Union. Rather, it objects to the standard that the Board applied in certifying a unit of maintenance workers, and contends that the production employees should have been included in the unit. Because the Board’s standard is reasonable and its findings fully supported by the record evidence, Dreyer’s refusal to bargain violated the Act. *See Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 533 (4th Cir. 1999) (“*Sandvik*”) (enforcing order where “Board did not exceed its discretion in determining the appropriate bargaining unit”).

³ An employer who violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [their organizational] rights.” 29 U.S.C. § 158(a)(1); *see Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 747 n.4 (4th Cir. 1998).

A. This Court Gives Considerable Deference to the Board’s Finding of an Appropriate Unit

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen “by the majority of the employees in a unit appropriate for” collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *Id.* § 159(b). Construing that section, the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed.” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quote marks and citation omitted); accord *Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992). Indeed, this Court has repeatedly stated that “the Board is possessed of the widest possible discretion in determining the appropriate unit.” *E.g., Sandvik*, 194 F.3d at 534; *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978).

Section 9(b), however, does not tell the Board how to decide whether a particular grouping of employees is appropriate. Accordingly, the Board’s selection of an appropriate unit “involves of necessity a large measure of informed discretion.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947).

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees share a “community of interests.” *Specialty*, 2011 WL 3916077, at *12; *accord Sandvik*, 194 F.3d at 535 (“[T]o test a bargaining unit’s appropriateness, the NLRB has historically relied on the ‘community of interest’ test.”). This analysis considers such factors as similarity in skills, interests, duties, and working conditions, degree of interchange and contact among employees, the employer’s organizational and supervisory structure, and bargaining history. *Sandvik*, 194 F.3d at 535. Additionally, the Board is permitted to “consider[] extent of organization as one factor, though not the controlling factor in its unit determination.” *NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965); *accord Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002).

The Board’s decision must be upheld as long as it approves *an* appropriate bargaining unit. The Board has long recognized that there is nothing in the Act’s language requiring “that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be ‘appropriate.’” *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). The Supreme Court agreed, stating that “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *Am. Hosp. Ass’n*, 499 U.S. 606, 410 (1991). The focus of the Board’s determination remains

the unit for which the petition has been filed because, under Section 9(a) of the Act (29 U.S.C. § 159(a)), “the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n. v. NLRB*, 499 U.S. at 610. As the Board has explained, “[a] union’s petition, which must according to the statutory scheme and the Board’s Rules and Regulations be for a particular unit, necessarily drives the Board’s unit determination.” *Overnite Transp. Co.*, 325 NLRB 612, 614 (1998).

This Court has recognized that, “[i]n many cases, there is no ‘right unit’ and the Board is faced with alternative appropriate units.” *Corrie Corp. of Charleston v. NLRB*, 375 F.2d 149, 154 (4th Cir. 1967); *see also Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 618 (4th Cir. 2002) (“[T]here may be more than one ‘appropriate’ bargaining unit.”); *Arcadian Shores*, 580 F.2d at 119 (stating it is “well established that there may be more than one appropriate bargaining unit within the confines of a single employment unit and that the Board is free to select any one of these appropriate units as the bargaining unit”). It is within the Board’s discretion to select among different potential groupings of employees in determining an appropriate unit. *See Fair Oaks Anesthesia Assocs., P.C. v. NLRB*, 975 F.2d 1068, 1071 (4th Cir. 1992).

Therefore, an employer challenging the Board’s unit determination “has the burden to prove that the bargaining unit selected is ‘utterly inappropriate.’” *Sandvik*, 194 F.3d at 534 (citation omitted). “[A] unit would be truly inappropriate

if, for example, there were no legitimate basis upon which to exclude certain employees from it.” *Kindred*, 727 F.3d at 562 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)); accord *Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees “share an overwhelming community of interest” with the petitioned-for employees, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421. Accord *Kindred*, 727 F.3d at 562.

The Board’s interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). See *NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board’s reasonable interpretation of the Act. Indeed, the Court must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted). Accordingly, this Court will not disturb the Board’s reading of the Act if it is “reasonably defensible.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). Further, the Board’s findings of fact are “conclusive” if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e);

see Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951); *accord Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 326 (4th Cir. 2008).

B. The Board Reasonably Determined that a Unit Limited to Maintenance Employees Constitutes an Appropriate Unit for Collective Bargaining

The Board reasonably applied its longstanding, judicially approved community-of-interest test here to find that the petitioned-for unit of maintenance employees is appropriate for collective bargaining. Additionally, applying the standard it clarified in *Specialty*, and which the Sixth Circuit recently approved, when an employer asserts that additional employees should be included in the unit, the Board found that Dreyer’s failed to show that the production employees shared an overwhelming community of interest with the maintenance employees such that the unit would be inappropriate if they were excluded.

1. The Board properly applied the traditional community-of-interest factors to find that a unit of maintenance employees is an appropriate unit

The record evidence fully supports the Board’s finding (A.417) that the proposed unit of maintenance employees is an appropriate unit because the “maintenance employees are readily identifiable as a separate group” (A.416) and share a community of interest based on the Board’s traditional inquiry (A.417-20). Indeed, neither Dreyer’s nor amici even suggests otherwise.

The Board found (A.416) that maintenance employees are highly skilled and share “technical knowledge in areas of mechanics, electronics, and computers.” (A.416, 409; 270.) They all pass the same test before they are hired. (A.409, 416; 270.) All are subject to the unique requirement that they provide their own tools, a significant investment. (A.411, 420 & n.22; 79-80.)

All maintenance workers are on the technical operations team, and they are supervised by maintenance managers. (A.405, 418; 263-64, 280-81.) Their primary duties are to keep the BOC’s equipment operating properly. (A.418; 263-64, 280-81.) They spend 90 percent of their time doing skilled maintenance work. (A.408, 419.) Significantly, they share work assignments, wage rates, work hours, and uniforms. (A.405, 409, 411, 418; 43-47, 76-78, 81-83, 264-65.) Maintenance employees are required to work throughout the year, even during the annual shut down when other employees are off. (A.410; 217-19.) Thus, applying the traditional community-of-interest factors, the Board had little difficulty concluding that “this distinct group shares a community of interest” and is therefore an appropriate unit for collective bargaining. (A.420.)

2. The Board acted within its discretion in applying the overwhelming community of interest test to determine that the production employees do not have to be included in the maintenance employees’ unit

It is well-settled, as discussed above, that the Act requires only *an* appropriate unit. *American Hosp. Ass’n*, 499 U.S. at 610. As the Board stated in

Specialty, “it cannot be that the mere fact that [the petitioned-for unit of employees] also share a community of interest with additional employees [thereby] renders the smaller unit inappropriate.” *Specialty*, 2011 WL 3916077, at *15. Because a unit need only be *an* appropriate unit, it “follows inescapably” that simply demonstrating that another unit would also be appropriate “is not sufficient to demonstrate that the proposed unit is inappropriate.” *Specialty*, 2011 WL 3916077, at *15. As the D.C. Circuit held in enforcing a Board order where the employer challenged the Board’s unit determination, that “excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit.” *Blue Man Vegas*, 529 F.3d at 421.

Here, the Board applied the standard, clarified in *Specialty*, and approved by the Sixth Circuit, for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest under the traditional standard. Under that standard, an employer seeking to expand the unit must demonstrate that employees in the larger unit “share an overwhelming community of interest with those in the petitioned for unit.” *Specialty*, 2011 WL 3916077, at *15. In approving that standard, the Sixth Circuit agreed with the Board that, although different language has been used over

the years, the Board has consistently required a heightened showing from a party arguing for the inclusion of additional employees in a unit that shares a community of interest.⁴ *Kindred*, 727 F.3d at 562-63.

The Sixth Circuit found that the overwhelming community of interest standard “is not new” to unit determinations. *Kindred*, 727 F.3d at 561. The Board has applied it many times over the years. *See, e.g., Academy LLC*, 27-RC-8320, Decision and Direction of Election, at 12 (2004) (rejecting petitioned-for unit because additional employees “share an overwhelming community of interest” with the petitioned-for unit), available at www.nlr.gov/case/27-RC-008320; *Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1050 (2003) (rejecting argument that additional employees “shared such an overwhelming community of interests with”

⁴ *See, e.g., Wheeling Island Gaming, Inc.*, 355 NLRB No. 127, 2010 WL 3406423, at *1 n.2 (2010) (including additional employees because interests of petitioned-for unit were not “sufficiently distinct”); *United Rentals, Inc.*, 341 NLRB 540, 541-42 (2004) (employer presented “overwhelming” evidence that employees had “significant overlapping duties and interchange” and a “substantial community of interest”); *Engineered Storage Prods.*, 334 NLRB 1063, 1063 (2001) (larger group and petitioned-for group did “not share such a strong community of interest that their inclusion in the unit is required”); *Lawson Mardon, U.S.A.*, 332 NLRB 1282, 1282 (2000) (finding “such a substantial community of interest exists” between the two groups “so as to require their inclusion in the same unit”); *JC Penney Co.*, 328 NLRB 766, 766 (1999) (stating telemarketing employees “share such a strong community of interest with the employees in the unit found appropriate that their inclusion is required”); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (employer had not proven “such a community of interest or degree of integration between the truck drivers and the mechanics as would render the requested truck driver unit inappropriate”).

the petitioned-for unit); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (including concierges in the unit because they “share an overwhelming community of interest with the employees whom the Petitioner seeks to represent”).⁵

Moreover, prior to *Kindred*, the D.C. Circuit had also approved the test in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008). There, a union petitioned to represent a unit of stage crew members, but the employer wanted to add the musical instrument technicians (MITs). The Board found that the stage crew members constituted an appropriate unit and that the MITs did not share an overwhelming community of interest with the stage crew. *Id.* at 423. The court recognized that an employer must demonstrate that an otherwise appropriate unit is “truly inappropriate,” which it can do by showing that “there is no legitimate basis on which to exclude certain employees from it” because the excluded employees

⁵ See also, e.g., *Thomas Motors of Ill., Inc.*, 13-RC-021965, Decision and Direction of Election, at 5 (2010) (party challenging petitioned-for unit “must demonstrate that unit is inappropriate because it constitutes an arbitrary grouping of employees...or excludes employees who share an overwhelming community of interests or have no separate identity from employees in the petitioned-for unit”), available at www.nlr.gov/case/13-RC-021965; *Stanley Assocs.*, 01-RC-022171, Decision and Direction of Election, at 14 (2008) (finding “quality assurance employees do not share such an overwhelming community of interest with the petitioned-for employees as to mandate their inclusion in the unit”), available at www.nlr.gov/case/01-RC-022171; *Breuners Home Furnishings Corp.*, 32-RC-4603, Decision and Direction of Election, at 9 (1999) (stating “receptionists do not share such an overwhelming community of interest with the warehouse employees to be required to be included in the petitioned-for unit”), available at www.nlr.gov/case/32-RC-004603.

“share an overwhelming community of interest” with the included employees. *Id.* at 421. Specifically, the court found that the employer failed to meet its burden because the MITs’ working conditions, including supervision, form of payment, and sign-in sheets, differed from the stage crew. *Id.* at 424.

In *Specialty*, the Board and the Sixth Circuit found *Blue Man Vegas* to be persuasive and consistent with Board law. *See Kindred*, 727 F.3d at 562-65;

Specialty, 2011 WL 3916077, at *16. As the Sixth Circuit summarized it:

“Because the overwhelming community-of-interest standard is based on some of the Board’s prior precedents, has been approved by the District of Columbia Circuit, and because the Board did cogently explain its reasons for adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty* [.]” *Kindred*, 727 F.3d at 563.

This Court, consistent with the Sixth and D.C. Circuits, has applied a similar standard, holding an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest. In *Sandvik Rock Tools v. NLRB*, a union petitioned to represent workers in an employer’s chemical products division. 194 F.3d at 533. Like here, the employer admitted those employees shared a community of interest, but it insisted that additional employees – the mineral tools division employees – ought to be included in the unit as well. This Court rejected that argument. Even if the two groups of employees shared a

community of interest, the Court recognized, “that alone is not enough to overcome the Board’s unit determination.” *Id.* at 537. The employer had to prove more: that the unit of employees certified by the Board – whom everyone agreed shared a community of interest – was “utterly inappropriate.” *Id.* at 534, 538.⁶

Here the Board properly applied the overwhelming community-of-interest standard to determine whether the maintenance employees constitute an appropriate unit without including the production employees. *See Sandvik*, 194 F.3d at 534 (“[T]he Board is possessed of the widest possible discretion in determining the appropriate unit.”).

3. Dreyer’s has not shown that the production workers share an overwhelming community of interest with the maintenance workers

The Board reasonably concluded that Dreyer’s failed to meet its burden of showing that the maintenance and production employees share such a strong community of interest that the exclusion of the additional employees renders the unit inappropriate. (A.420.) Before this Court, Dreyer’s attacks the standard but does not assert that production employees share an overwhelming community of

⁶ *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (“[I]t is not enough for the employer to suggest a more suitable unit; it must ‘show that the Board’s unit is clearly inappropriate.’”); *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991) (“An employer who challenges the Board’s determination has the burden of establishing that the designated unit is clearly not appropriate”).

interest with maintenance employees. Rather, it claims (D-Br. 62-64) that the differences between the two groups of employees are “insignificant,” and the Board downplayed the similarities, like common employment policies. Viewed in the most favorable light, these claims assert only that a unit consisting of maintenance and production employees would be a *more* appropriate unit. But this Court long ago held that “[i]t is the employer’s burden to convince us, not that another unit is more appropriate, but that the unit selected is utterly inappropriate.” *Arcadian Shores*, 580 F.2d at 120.

In any event, Dreyer’s claim that the differences are “insignificant” is wrong. As fully explained above on pages 10-12, maintenance and production employees work in different departments, do different work, and have different supervisors, skills, and pay rates. They have different functions: production workers manufacture the ice cream product; maintenance workers keep all of the BOC’s equipment running (not just the ice cream equipment). (A.409; 280-81.) Significantly, maintenance workers are considerably more skilled than production workers. Maintenance employees have considerable technical knowledge in mechanics, electronics, and computers. They have experience in troubleshooting pneumatics, hydraulics, and electrical and manufacturing; in computerized maintenance management; and in industrial high-speed maintenance. (A.409; 88, 192, 263-64, 267-68.) Production employees do not.

Dreyer's requires maintenance workers to provide their own tools, valued at about \$5,000, while production workers have no such requirement. (A.411, 420 n.22; 79-80, 283.) And Dreyer's provides maintenance workers with a tool subsidy to help offset these costs. The higher-paid maintenance employees work longer shifts (10 hours) than production employees (8 hours), which impacts overtime, holiday, and sick day pay.

Dreyer's makes much (D-Br. 25-26, 64) of its effort to institute some integration between the maintenance and production employees. But as the Board found (A.422), the claim that the workers are integrated is without foundation. Dreyer's launched its integration effort mere days before the hearing in this case, on just one of its 26 production lines. (A.67.) And Dreyer's abandoned an earlier effort at integration because the program "hadn't gained sustainable results." (A.410; 217.) As the RD found, "[b]y [Dreyer's] own admission, production employees currently lack the skills even to perform even the routine preventative maintenance that the [pilot program] seeks to implement." (A.422.)

Notwithstanding that maintenance and production workers share a parking lot, and some common employment policies, their limited interaction and the distinct differences in their community of interests warrants the Board's finding that a unit of maintenance employees is an appropriate unit.

C. Dreyer's Provides No Basis for Denying Enforcement of the Board's Order

In asserting that production employees must be included in the maintenance unit, Dreyer's raises a plethora of claims, variously arguing that the standard gives controlling weight to the extent of organization; constitutes an abuse of discretion; and will result in the undue proliferation of units. As the Sixth Circuit held in *Kindred*, 727 F.3d at 559, 563-64, and as explained below, these arguments have no merit.

1. The overwhelming-community-of-interest standard does not give controlling weight to extent of organizing

Dreyer's and amici argue (D-Br. 39-44; C-Br. 22-25; NAM-Br. 8-11; R-Br. 5-7) that the Board's overwhelming community-of-interest test improperly gives controlling weight to a union's extent of organization in the workplace. The Board in *Specialty*, and the Sixth Circuit in *Kindred*, properly rejected this contention. *See Kindred*, 727 F.3d at 563-64; *Specialty*, 2011 WL 3916077, at *13, *16 n.25.

Section 9(c)(5) of the Act provides that the Board, in making unit determinations, shall ensure that "the extent of organization shall not be controlling." 29 U.S.C. § 159(c)(5). The Supreme Court has construed this language to mean that "Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of extent of organization," but that Congress did not preclude the Board from considering organization "as

one factor” in making unit determinations. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965). In other words, as the Board noted in *Specialty*, “the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account petitioner’s preference), that the proposed unit is an appropriate unit.” 2011 WL 3916077, at *13. *Accord Kindred*, 727 F.3d at 564.

Procedurally, the Board processes unit determinations consistent with this twin admonition. It “examines the petitioned-for unit first,” and if that unit is appropriate under the traditional community-of-interest test, the Board’s *initial* inquiry “proceeds no further.” *Specialty*, 2011 WL 3916077, at *12; *see also Wheeling Island*, 355 NLRB No. 127, 2010 WL 3406423, *1 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the Board did just that and reasonably determined that the proposed unit of maintenance employees was “readily identifiable as a separate group of employees and that this distinct group shares a community of interest” and is therefore an appropriate unit. (A.416-20.)

As Dreyer’s admits (D-Br. 40-41), “[b]y examining twelve separate factors bearing on the unit determination decision,” the Board’s traditional community-of-interest test “ensure[s] that the extent of organization would not be the controlling factor.” For the same reasons, the Sixth Circuit properly rejected the claim that the Board’s approach in *Specialty* gives controlling weight to the extent of organizing.

As the court explained, the Board does not, under that test, “assume” that the petitioned-for unit is appropriate, but “applie[s] the community of interest test” to determine whether the employees in the petitioned-for unit “share[] a community of interest and therefore constitute[] an appropriate unit—aside from the fact that the union had organized it.” *Kindred*, 727 F.3d at 564.

The Board’s thorough decision here makes clear that it considered a number of factors in making its decision, “none of which [were] singularly dispositive.” (A.417.) Rather, the Board found that the maintenance workers share a community of interest based on their wages, hours, supervision, and common skills and functions. (A.418-19.) It did not give controlling weight to the unit that was petitioned for; instead, the Board, separately and independently, identified a number of facts that, under the community-of-interest test, support its determination that the maintenance worker unit is appropriate. Simply put, Dreyer’s and amici failed to “show that the extent of organization was the *dominant* factor in the Board’s unit determination.” *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002).

Nor did the Board violate Section 9(c)(5) when it applied the overwhelming-community-of-interest test to determine whether other employees must be included in the unit. Because the Board had already found the maintenance employees to be a clearly identified group and to share a community of interest without giving

controlling weight to the petitioned-for unit, Section 9(c)(5) was satisfied. *See pp. 33-34 supra* (citing cases). Simply because the employer then has the opportunity to demonstrate that other employees share such an overwhelming community of interest that they should be included in the unit, does not mean that the Board allowed “the extent of organization . . . [to] be controlling.” 29 U.S.C. § 159(c)(5).

Accordingly, the Sixth Circuit rejected the claim, which Dreyer’s and amici repeat here, that the overwhelming community-of-interest test violates Section 9(c)(5). The Sixth Circuit found persuasive the D.C. Circuit’s analysis in *Blue Man Vegas*, 529 F.3d at 423, which the Board relied upon in *Specialty*, that “[a]s long as the Board applies the overwhelming community of interest standard *only after* the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union’s organization not be given controlling weight.” *Kindred*, 727 F.3d at 565 (internal cites and quotations omitted) (emphasis in original). The *Kindred* court thus explained that, in *Specialty*, the Board followed the *Blue Man Vegas* approach, and conducted its community-of-interest inquiry before requiring the employer to show that the other employees shared an overwhelming community of interest with the petitioned-for employees. *Id.* It follows, the Sixth Circuit concluded, that *Specialty* does not violate Section 9(c)(5). *Id.* Dreyer’s provides no grounds for departing from the persuasive reasoning of the Sixth and D.C. Circuits.

Despite Dreyer's repeated claims to the contrary (D-Br. 35-43, 56, 62-64), this Court's decision in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), does not prohibit the test the Board applied here. The *Lundy* Court's objection was that the Board had *presumed* the petitioned-for unit was appropriate rather than properly applying the traditional community-of-interest standard. *Id.* at 1581; *see Lundy Packing Co.*, 314 NLRB 1042, 1043-44 (1994). The Court characterized the presumption applied by the Board as "a novel legal standard" that could only be explained by an effort to give controlling weight to the extent of organizing. 68 F.3d at 1581-82. The Court specifically stated that a union's desire for a certain unit alone is not grounds for certification if a unit is "otherwise inappropriate." *Id.* at 1581. *See also Sandvik*, 194 F.3d at 538 (upholding Board's unit determination and noting the Board's decision in *Lundy* was unexplained departure from long history of prior precedent). Here, as shown, the Board applied no presumption of appropriateness. It did not rely solely on the Union's request for a certain unit, but examined the community-of-interest factors as well as Dreyer's claims that the unit was "otherwise inappropriate." This approach is consistent with *Lundy*.

In fact, to avoid the problem raised by *Lundy* in this and future cases, the Board in *Specialty* clearly stated that it must first determine whether the petitioned-for employees constitute a readily identifiable group who share a community of interest. 2011 WL 3916077, at *16 n.25, *17. This must be done *before* the Board

assesses whether the employer has met its burden of showing that additional employees share an overwhelming community of interest with employees in the proposed unit. In *Blue Man Vegas*, the D.C. Circuit agreed that the Board did not run afoul of *Lundy* under these circumstances: “As long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union’s organization not be given controlling weight.” 529 F.3d at 423. Likewise, the Sixth Circuit found the Board’s approach in *Specialty* does not “assume” the petitioned-for unit is appropriate, but applies the community-of-interest test, which considers several factors beyond the extent of organization. *Kindred*, 727 F.3d at 564.⁷

That is exactly what the Board did here, and what it will do “in each case” as required by Section 9(b) of the Act. Unlike *Lundy*, here the Board first expressly found that the maintenance workers share a community of interest under the traditional test. (A.416-19.) Only then did the Board apply the overwhelming-community-of-interest standard to determine whether additional employees ought to be included. (A.19-21.)

⁷ Thus, the Sixth Circuit fully considered the concern this Court identified in *Lundy* about avoiding presumptions, and did not “completely ignore” it, as Dreyer’s erroneously suggests (D-Br. 39).

And while Dreyer's and amici suggest that the Union has complete control over who ends up in the unit, in reality it is the employer 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." *Specialty*, 2011 WL 3916077, at *14 n.19; *see also Int'l Paper Co.*, 96 NLRB 295, 298 n.7 (1951) ("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees."). For this reason, amici are wrong when they claim (C-Br. 12-14; R-Br. 6, 14) that the Board's unit determinations under *Specialty* bear "no relation to the way in which the employer's business actually operates and functions." All of the relevant facts in this case – supervision, wage rates, skill requirements, job classifications, departments, functions, and uniforms – were determined by Dreyer's.⁸

⁸ Indeed, the Board's unit determinations under *Specialty* have continued to give weight to how the employer has organized its operations. *See, e.g., Nieman Marcus Group, Inc.*, 361 NLRB No. 11, *4 (2014) (rejecting petitioned-for unit of all women's shoe sales associates at retail store because, among other things, the petitioned-for unit did not track any administrative or operational lines drawn by the employer); *Macy's, Inc.*, 361 NLRB No. 4, *10-18 (2014), *petition for review pending*, No. 15-60022 (5th Cir. pet. filed Jan. 12, 2015) (finding appropriate petitioned-for unit of all employees in the employer's cosmetics and fragrances department because the unit was "coextensive with a departmental line that the [e]mployer has drawn" and the included employees otherwise shared a community of interest).

Moreover, the Supreme Court has long recognized that the choice of unit is not merely a union's choice but is the employees' as well. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941) (“Naturally the wishes of employees are a factor in a Board conclusion upon a unit.”). Employees are fully informed of the composition of the unit on the Notice of Election posted at least 3 days before voting and on the ballot itself. *See* 29 C.F.R. § 103.20. If employees have second thoughts about the unit that was petitioned-for and that the Board approved, the employees can reject representation in that unit.

Dreyer's speculates (D-Br. 41) that the overwhelming-community-of-interest standard will always result in the petitioned-for unit being approved. This is false. *See Gen. Dynamics Land Sys.*, 19-RC-076743, Decision and Direction of Election, at 2 (May 31, 2012) (including employees union sought to exclude because they “share an overwhelming community of interest with the petitioned for unit”), available at <http://www.nlr.gov/case/19-RC-076743>, review denied, 2012 WL 2951834 (2012).⁹ And when the Board applied a similarly-heightened standard under a different name, the Board regularly granted requests to expand the

⁹ *See also Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417, *1-2 (2011) (finding employer demonstrated that its merchandisers shared an overwhelming community of interest with the employees the union petitioned to represent); *Academy LLC*, 27-RC-8320, *supra* page 27 (rejecting petitioned-for unit because additional employees “share an overwhelming community of interest” with the petitioned-for unit).

unit where the employer showed *more* than that its alternative unit was also appropriate. *E.g.*, *United Rentals*, 341 NLRB 540, 541 (2004); *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000); *J.C. Penney Co.*, 328 NLRB 766, 766 (1999); *Jewish Hosp. Ass’n*, 223 NLRB 614, 617 (1976); *Colorado Nat’l Bank of Denver*, 204 NLRB 243, 243 (1973).

2. The Board did not abuse its discretion or violate the Administrative Procedure Act by clarifying the appropriate standard

Dreyer’s argues (D-Br. 45, 58) that the Board in *Specialty* impermissibly adopted a rule of “broad-scale, general application that conflicts with prior precedents,” and that such changes in the law must be done through rulemaking. As the Sixth Circuit in *Kindred* explained in rejecting this very argument, Dreyer’s contention is wrong, both factually and legally.

The Board in *Specialty* did not make the sweeping changes Dreyer’s claims (D-Br. 36, 45-48, 58). As explained above (pp. 27-29), although various terms have been used, the Board has always imposed a heavy burden on a party claiming that additional employees must be included in the petitioned-for unit. In *Specialty*, the Board concluded that the use of “slightly varying verbal formulations” to describe this heightened burden could be improved by unifying terminology. *Kindred*, 727 F.3d at 563 (quoting *Specialty*, 2011 WL 3916077, at *17). To provide clarity, the Board adopted the careful work of the D.C. Circuit in *Blue Man*

Vegas, 529 F.3d at 421, which viewed the Board caselaw as articulating an “overwhelming community of interest” standard. *Id.* The *Kindred* court properly credited the Board’s concern that using varying formulations neither served the statutory purpose of “assur[ing] employees the fullest freedom in exercising the rights guaranteed by the Act,” nor “permit[ted] employers to order their operations with a view toward productive collective bargaining should employees chose to be represented.” 727 F.3d at 563.

The *Kindred* court also rejected the employer’s claim—which Dreyer’s effectively repeats here (D-Br. 36, 47-48)—that the overwhelming-community-of-interest standard represents a “material change” in the law. *Id.* at 561. As the *Kindred* court observed, the Board had used this standard before, “so its adoption in *Specialty* [] is not new.” *Id.* The Sixth Circuit further explained that “[i]t is not an abuse of discretion for the Board to take an earlier precedent that applied a certain test and to clarify that the Board will adhere to that test going forward.” *Id.* at 563.

Dreyer’s nonetheless points (D-Br. 50-51) in particular to a line of cases considering whether the interests of the petitioned-for unit were “sufficiently distinct” from those the employer sought to include. *Newton-Wellesley Hosp.*, 250 NLRB 409, 411 (1980). Dreyer’s claims (D-Br.50) that the *Specialty* test is a “dramatic change[]” from the “sufficiently distinct” test, and that the Board failed

to acknowledge these cases. But the standards are almost identical,¹⁰ and the Board cited a number of those cases in its decision. *Specialty*, 2011 WL 3916077, at *17 & n.26.

Dreyer's objects (D-Br. 46-47, 56-57) to the Board's use of the word "clarify" to describe its articulation of the overwhelming-community-of-interest standard. But courts "give great weight to an agency's expressed intent as to whether a rule clarifies existing law or substantively changes the law." *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999).¹¹

¹⁰ See, e.g., *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000) (most of employees employer sought to include did "not share such a substantial community of interest with the other employees," except the concierges, who "share[d] an overwhelming community of interest" and therefore had to be included in unit); *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (employer argued that two groups had "overwhelming community of interest" and Board agreed that groups did "not have sufficiently separate community of interests"). See also *Kindred*, 727 F.3d at 563 (noting the "sufficiently distinct community of interest" test was among the "slightly varying verbal formulations" the Board clarified by adopting the overwhelming-community-of-interest test).

¹¹ Dreyer's errs in suggesting (D-Br. 46-47) no deference is owed the Board's view that *Specialty* is a "clarification." Indeed, some of its cited cases (*id.*) even confirm that courts accept an agency's "reasonable" interpretation of its own precedent and the statutes entrusted to its care. See, e.g., *Pettibone Corp. v. United States*, 34 F.3d 536, 541 (7th Cir. 1994); *accord Detroit Edison Co. v. EPA*, 496 F.2d 244, 248 (6th Cir. 1974) ("[i]t is well settled that an agency's interpretation of its regulations is properly entitled to deference . . . unless it is plainly erroneous or inconsistent with the regulations.") Here, as shown, the Board provided a reasoned explanation for its view that *Specialty* clarified existing Board law. The other cited cases (D-Br. 46) are inapposite because they addressed a retroactive application of the U.S. Sentencing Guidelines (*United States v. Diaz*, 245 F.3d 294

The court there agreed with an agency that its amendments to an administrative regulation were mere clarifications because they did “not represent any major policy changes” and “because the new wording is not ‘patently inconsistent’” with prior interpretations. *Id.* at 479. The same is true here. The Board has made no policy change. It has always required only that the petitioned-for unit be appropriate, and it has always held a party seeking to expand that unit to a heightened standard. Dreyer’s incorrectly claims (D-Br. 55) that the overwhelming community-of-interest test was developed only for, and should only be used in, accretion cases. The Board has used that exact language in prior unit determination cases. *See Blue Man Vegas*, 529 F.3d at 423 (citing Regional Directors’ use of the standard); *Laneco Constr. Sys.*, 339 NLRB 1048, 1050 (2003). *See also Kindred*, 727 F.3d at 561-63 (citing the Board’s use of the standard in prior cases, and explaining that the Board’s adoption of it in *Specialty* was, therefore, “not new”).

Dreyer’s reliance (D-Br. 58-59) on two Ninth Circuit decisions¹² for the idea that any principle of general application that changes existing law must pass through formal rulemaking procedures is misplaced. Even if the Board had made a

(3d Cir. 2001)), or the question whether state law on inmate release fell under the *ex post facto* clause (*Smith v. Scott*, 223 F.3d 1191, 1193-94 (10th Cir. 2000)).

¹² *Ford Motor CO. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981), and *Pfaff v. U.S. HUD*, 88 F.3d 739, 748 (9th Cir. 1996).

policy change – which, as shown above, it did not – the Supreme Court had made clear that the Board is “not precluded from announcing new principles in an adjudicative proceeding.”¹³ And even under Ninth Circuit precedent, a “clarification” of an agency policy that amounts to “a minor adjustment, a fine tuning of doctrine” “does not require rulemaking unless it imposes severe hardship or circumvents existing rules.” *Cities of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984). Dreyer’s has made no such showing with respect to the Board’s clarification of its unit determination standard. And, as the Sixth Circuit observed in *Kindred*, “if the Board may announce a new principle in an adjudication, . . . it may chose to follow one of its already existing principles,” as it did in adopting the overwhelming-community-of-interest test in *Specialty*. 727 F.3d at 565.

Finally, despite Dreyer’s claim to the contrary (D-Br. 36, 58), the issue the Board decided in *Specialty* was squarely before it. A union there petitioned to represent a group of CNAs, but the employer argued that additional employees should be included in the unit. As the Sixth Circuit found, the Board properly summarized the law applying a heightened standard in such cases and clarified that it would apply prospectively the overwhelming-community-of-interest test when a party seeks to include additional employees into an already-deemed-appropriate

¹³ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

unit. *Kindred*, 727 F.3d at 561-63 (citing *Specialty*, 2011 WL 3916077, at *1, 15-17).

3. Amici’s and Dreyer’s concerns about unit size and undue proliferation of units are irrelevant

Amici argue that the *Specialty* standard will lead to the certification of smaller units.¹⁴ (See C-Br. 9-15, 18, 21; R-Br. 2, 15-18; NAM-Br. 9-10.)

However, the Board has held that the size of a proposed unit is “not alone a relevant consideration, much less a sufficient ground” for finding an otherwise appropriate unit to be inappropriate. *Specialty*, 2011 WL 3916077, at *15. Indeed, a “cohesive unit – one relatively free of conflicts of interest – serves the Act’s purpose of effective collective bargaining” as well as preventing “a minority group interest from being submerged in an overly large unit.” *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (citations omitted).

In arguing against “smaller” or “multiple” units, amici (R-Br. 2, 8, 16-17, 19-25; NAM-Br. 9-10, 16; C-Br. 9-10, 13, 21) seem to be urging that only facility-wide units are appropriate. But that has never been the law. *Teledyne Economic Development v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) (enforcing Board’s decision certifying two units at one employer); *Banknote Corp. of Am., Inc. v. NLRB*, 84

¹⁴ Amici Retail Litigation Center argues (R-Br. 17) that the *Specialty* standard will result in the formation of “micro-unions.” Amici fail to define “micro-union” or explain why the formation of such unions would be inappropriate under any provision of the Act.

F.3d 637, 647 (2d Cir. 1996) (enforcing Board order requiring employer to bargain over three different units). In fact, the Act explicitly recognizes that a unit containing a “subdivision” of employees may be appropriate.¹⁵ 29 U.S.C. § 159(b).¹⁶

Amici’s related argument (C-Br. 10; R-Br. 2, 16, 23) that the Board’s *Specialty* standard will lead to undue “proliferation” of units should also be rejected as irrelevant outside the healthcare industry. That phrase was found in the legislative history of the 1974 healthcare amendments to the Act, which

¹⁵ Even if there were a rule against small units, the units certified in this case and in *Specialty* are not small. The unit in this case includes 113 employees, and the unit certified in *Specialty* included 53. As the Board noted in *Specialty*, the median unit size certified from 2001 to 2010 was 23 to 26 employees. 2011 WL 3916077, at *15 n.23 (citing *Proposed NLRB Rule*, 76 Fed. Reg. 36821 (June 22, 2011)); see also *Final NLRB Rule*, 79 Fed. Reg. 74308, 74391 n.391 (Dec. 15, 2014) (noting that the median unit size from 2011 to 2013 was 24 to 28 employees). Likewise, the case that amici (R-Br. 14, 17; C-Br. 13, 15 & n.4) single out for mention involved a unit of 41 employees. See *Macy’s, Inc.*, 361 NLRB No. 4, * 1, 10-18 (2014).

¹⁶ Amici (R-Br. 19) relies on an “entire store” unit presumption in the retail industry to incorrectly suggest that *Specialty* and subsequent cases like *Macy’s* constitute a significant change in the law. Amici’s arguments about standards and presumptions for the retail industry are not at issue in this case and can be addressed in the challenge to *Macy’s* pending before the Fifth Circuit. In any event, Amici’s attacks are unfounded. As the Board explained in *Macy’s*, it has always permitted less than store-wide units based on traditional community of interest principles. 361 NLRB No. 4, *17-18, 20. Accordingly, in *Macy’s*, the Board applied those principles to find that the petitioned-for unit of all employees in *Macy’s* fragrance and cosmetics department was appropriate. *Id.* at *10-18. Thus, the approved unit neither ignored the employer’s business operations nor imposed an “arbitrary” unit (R-Br. 14, 17; C-Br. 13, 15 & n.4), but rather it tracked the structure of the employer’s own business operations.

admonished the Board to give “due consideration” “to preventing proliferation of bargaining units in the health care industry.” S.Rep.No.766, 93rd Cong., 2d Sess. 5 (1974); H.R.Rep.No.1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). However, even in the healthcare industry context, the Supreme Court unequivocally found that the “admonition” was not binding on the Board and does not have “the force of law.” *Amer. Hosp. Ass’n*, 499 U.S. at 616-17 (“legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute”). Simply put, there is nothing in the Act suggesting that two or more units at one facility constitutes “undue proliferation.” *See Teledyne*, 108 F.3d at 57.

Dreyer’s likewise misses the mark in claiming (D-Br. 52-54) that, prior to *Specialty*, the Board routinely required production and maintenance units even where a union sought to represent only maintenance employees. In fact, prior to *Specialty*, the Board had certified maintenance-only units in manufacturing plants where, as here, the maintenance employees were highly skilled, earned higher wages, and worked in a different department with different supervision from production employees. *See Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019 (1994), *enforced*, 66 F.3d 328 (7th Cir. 1995) (table) (certifying maintenance-only unit). The cases cited by Dreyer’s (D-Br. 52-54) acknowledged this “longstanding policy,” but found combined production and maintenance units were required

where, unlike here, those employees had common skills, wages, supervision, training, and duties. *Buckhorn, Inc.*, 343 NLRB 201, 202-04 & n.6 (2004) (most maintenance employees not highly skilled, often performed same tasks as, and had common supervision with, production employees); *accord Peterson/Puritan, Inc.*, 240 NLRB 1051, 1052 n.3 (1979) (maintenance employees not required to have special skills, training or prior experience, and work was limited to minor machine repairs); *TDK Ferrites Corp.*, 342 NLRB 1006, 1008-09 (2004) (production and maintenance employees had common duties, supervision and schedules); *F&M Schaefer Brewing Co.*, 198 NLRB 323, 324-25 (1972) (common supervision, duties, skills, training and testing requirements; maintenance employees often required to perform production work).

Nor is there merit to Dreyer's and amici's argument (D-Br. 44 n.9; C-Br. 18-21; R-Br. 9-10, 13, 16; NAM Br. 10) that the *Specialty* standard fails to guarantee employees the right to refrain from engaging in concerted activity. The maintenance workers had the right, as well as the opportunity, to vote for or against unionization, and to encourage their coworkers to do the same. And the statutory rights of the production workers remain firmly intact whether or not their colleagues unionize. *See Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (stating certification of unit of drivers, and excluding mechanics who did not wish to be included, protected the rights of both groups). The Board's

Specialty standard “assure[s] to employees,” both those inside and outside the unit, “the fullest freedom in exercising the rights guaranteed by th[e] Act.” 29 U.S.C. § 159(b).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Dreyer's petition for review and enforcing the Board's Order in full.

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April 2015

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. _____ **Caption:** _____

14-2339

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**UNITED STATES COURT OF APPEALS
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NESTLÉ-DREYER'S ICE CREAM COMPANY)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 14-2222, 14-2339
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	31-CA-74297
)	
and)	
)	
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this 6th day of April, 2015