

Nos. 15-1848 & 15-1999

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDEX FREIGHT, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 71

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1778

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

SUMMARY OF THE CASE

The Company has admittedly refused to recognize and bargain with the Union as the certified representative of the Company's city and road drivers, in order to obtain judicial review of the Board's determination that the drivers constitute an appropriate bargaining unit. The Company argues that the Board erred in failing to include its dockworkers in the unit.

Applying the analytical framework set forth in *Specialty Healthcare* to the stipulated facts here, the Board reasonably determined that the city and road drivers are an appropriate unit because they are readily identifiable as a group and share a distinct community of interest. Under well-settled law, it is not enough for a party challenging an appropriate unit to suggest an alternative appropriate unit. Pursuant to *Specialty Healthcare*, the Company's burden specifically was to prove that the dockworkers share such an overwhelming community of interest with the drivers that there is no basis for excluding them. The Company utterly failed to carry this burden. The Board accordingly certified a drivers-only unit.

Before this Court, the Company does not argue that it met its burden of proof. Rather, the Company for the first time launches a series of challenges to the *Specialty Healthcare* standard. Those challenges are not properly before the Court and, in any event, are without merit. The Board nevertheless agrees with the Company that an oral argument of 15 minutes per side may assist the Court.

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and

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 71**

Intervenor

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of FedEx Freight, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations

Board (“the Board”) to enforce, a Board Order issued against the Company on April 20, 2015, and reported at 362 NLRB No. 74. (A 197-99.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by refusing to bargain with the International Brotherhood of Teamsters, Local 71 (“the Union”) as the duly certified collective-bargaining representative of the road and city drivers at the Company’s Charlotte, North Carolina facility. (A 198.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. Although the unfair labor practice here occurred in Charlotte, North Carolina, this Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and venue is proper because the Company transacts business in Arkansas. (*See* Br. 1.) The Board’s Order is final with respect to all parties.

As the Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 10-RC-136185) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under

¹ Record references in this brief are to the Joint Appendix (“A”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair-labor-practice] order of the Board." 29 U.S.C. § 159(d). 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Company filed its petition for review on April 23, 2015, and the Board filed its cross-application for enforcement on May 13, 2015. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Union has intervened on the side of the Board in this proceeding.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board acted within its discretion in determining that the Company's city and road drivers constitute an appropriate unit for collective bargaining, and therefore found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the duly certified representative of those employees.

29 U.S.C. §§ 159(a), 159(b).

Specialty Healthcare & Rehab. Ctr. of Mobile, 357 NLRB No. 83 (2011), 2011 WL 3916077 (2011), *enforced sub nom. Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

Arlington Hotel Co. v. NLRB, 712 F.2d 333 (8th Cir. 1983).

STATEMENT OF THE CASE

In this unfair-labor-practice case, the Board found that the Company unlawfully refused to recognize and bargain with the Union as the representative of the road and city drivers at the Company's Charlotte, North Carolina terminal, after those employees chose the Union as their collective-bargaining representative in a Board-conducted representation election. The Company admittedly refused to recognize and bargain with the Union in order to seek court review of the Board's pre-election determination that the Charlotte drivers constitute an appropriate unit for collective bargaining, without the inclusion of the Company's dockworkers. The Board findings relevant to this representation issue and the subsequent refusal to bargain are summarized below.

I. THE REPRESENTATION PROCEEDING

A. Factual Background: the Company's Operations and Staff

The relevant facts are largely established by a detailed factual stipulation submitted by the parties. (A 37-41.) The Company carries freight by truck using a system of terminals in various states. (A 124; A 35, 37-38, 51, 65-66, 68.) The terminal involved in this case is located in Charlotte, North Carolina. (A 124; A

35, 37.) The Charlotte terminal consists of two buildings surrounded by a yard. (A 124; A 38, 51-52.) The main building contains administrative offices and a dock with numerous doors for loading and unloading freight. (A 124; A 38, 51-52.) The second building is a maintenance facility where the Company services its trucks and other equipment. (A 124; A 38, 51-52.) The yard is an open area where the Company moves and stores its vehicles and equipment as needed. (A 124; A 38, 51-52.)

The Company employs workers of various descriptions to keep its Charlotte operation running smoothly. (A 124; A 39, 52-53.) However, only three types of employees are at issue in this case: the city drivers, road drivers, and dockworkers. (A 124; A 38, 53.) There are 115 city drivers, 106 road drivers, and 186 dockworkers. (A 124; A 38, 40.) Most of the dockworkers (114) work part-time. (A 124; A 38, 40.)

1. The city and road drivers spend most of their working time driving trucks outside the Charlotte terminal

The Company uses its city drivers to transport freight locally, and its road drivers to transport freight over longer distances, outside the Charlotte area. (A 126-28; A 38-39, 90.) Given the nature of their work, the drivers spend most of their working time away from the Charlotte terminal and are supervised remotely by dispatchers. (A 126-27; A 39-40, 95.) The Company's supervisors rotate tasks

so that they occasionally supervise operations on the dock, and occasionally serve as dispatchers for the drivers. (A 129; A 39, 81-82, 104-08.)

The drivers are also subject to certain rules as a function of their driving responsibilities: they must have commercial drivers' licenses with double/triple hazardous materials and tank endorsements, at least one year of relevant experience,² and acceptable Motor Vehicle Reports. (A 126, 128; A 39, 58, 90, 92.) In addition, whenever the drivers are on their routes and thus potentially interacting with the public, they must wear company-issued uniforms. (A 129; A 40, 115.)

The drivers work a full-time schedule that is determined in part based on their preferences. (A 126, 128; A 40, 67, 99-100.) They select starting times in order of seniority, and the Company maintains separate city-driver and road-driver seniority lists to facilitate this process. (A 127-28; A 38, 40, 59, 67.) During the six-month period between March 1, 2014, and August 31, 2014, the city drivers

² In addition to providing work experience, an employee may meet this requirement by successfully completing the Company's dock-to-driver program. (A 130; A 38, 57-58.)

worked an average of 932 hours, and the road drivers worked an average of 1067 hours.³ (A 127-28; A 40, 99-100.)

The wage rate for drivers is based on their years of experience, with city drivers paid between \$20.63 and \$24.93 per hour and road drivers paid within the same range or between \$0.53 and \$0.62 per mile. (A 127-28; A 39-40, 87-88, 99.) Annually, the average earnings for city drivers is \$50,000, and the average for road drivers is \$70,000. (A 127-28; A 39, 87-88, 99.) The city and road drivers are all eligible for the same retirement and healthcare benefits and receive the same number of paid holidays each year. (A 129; A 39, 40, 88, 118.) In addition, all of the drivers are eligible to accrue the same amount of paid vacation time based on seniority. (A 129; A 40, 102.)

2. The dockworkers spend all of their working time handling freight inside the Charlotte terminal

In contrast to the drivers, who work primarily outside the Charlotte terminal, the dockworkers move freight within the terminal only. (A 128-29; A 40, 53-55.) Their work is directed towards loading freight onto outbound trailers, and unloading freight from inbound trailers. (A 128-29; A 38, 53-55.) Occasionally, dockworkers drive forklifts and other vehicles within the facility—for example, to

³ The Regional Director relied on timekeeping records from this six-month period (“the six-month period”) to determine how the three types of employees at issue spent their working time. (A 126 & n.5; A 39.)

move equipment from place to place (“hostling”)—but this internal driving does not require a commercial driver’s license or involve the tractors that the drivers use based on their commercial drivers’ licenses. (A 128-29; A 38, 53-55.)

There is no requirement of relevant experience for the dockworker position. (A 129; A 39.) Indeed, the only substantive requirement for employment as a dockworker is that the applicant must be at least 18 years of age. (A 129; A 39.) Similarly, there is no required uniform for the dockworkers. (A 129; A 40.) They are allowed to perform their work in street clothes. (A 129; A 40.)

The majority of the Company’s 186 dockworkers—114 of them—are part-time or supplemental employees. (A 124; A 39.) The Company does not give these employees an opportunity to select a schedule based on seniority. (A 129; A 38, 58.) Indeed, it does not maintain a list of them in order of seniority. (A 129; A 58.) Instead, the Company typically assigns the part-time or supplemental dockworkers to a shift when they are hired. (A 129; A 58.) During the six-month period, the part-time or supplemental dockworkers worked an average of 426 hours. (A 129; A 39.) Their hourly wages range between \$16.31 per hour and \$18.31 per hour, and their average annual salary is between \$25,000 and \$30,000. (A 129; A 39, 87, 99-100.)

About 72 dockworkers work a full-time schedule. (A 124; A 38.) The Company allows these employees to select their starting times in order of seniority,

and it maintains a seniority list of full-time dockworkers for this purpose. (A 129; A 38, 40.) During the six-month period, the full-time dockworkers worked an average of 872 hours. (A 129; A 38.) Their hourly wages start at \$20.13 per hour, but there is no evidence as to whether or how much their hourly wage may increase with years of experience. (A 129; A 39, 87-88, 99.) Likewise, the record does not contain data on their average annual earnings. (A 129.)

As a group, the part-time and full-time dockworkers worked an average of 613 hours during the six-month period. (A 129; A 39.) Like the drivers, they are all eligible for retirement and healthcare benefits. (A 129; A 39, 88.) Unlike the drivers, however, most of the dockworkers—that is, the part-time dockworkers—do not receive paid holidays and cannot accrue paid vacation time. (A 129; A 40, 101, 103, 114, 118.)

3. There is almost no interchange between the drivers and the dockworkers: the drivers, as a group, rarely perform dock work, and the dockworkers cannot perform driving work

The city and road drivers are fairly versatile in terms of their ability to perform work outside their designated functions. (A 126-28; A 38-39, 74, 78.) All of the drivers have the basic credentials to do either city or road driving for the Company. (A 127-28; A 39, 92.) Likewise, all of the drivers are capable of doing dock work, although they rarely elect to do such work, and the Company generally honors their preference in this regard. (A 126-28; A 38-39, 58-59, 74, 78.) During

the six-month period, city drivers as a group spent 9 percent of their time doing road driving and 5 percent of their time doing dock work including hostling; road drivers as a group spent 2 percent of their time doing city driving and less than 1 percent of their time doing dock work including hostling. (A 126-28; A 39.)

The dockworkers, by contrast, lack the qualifications to do city or road driving. (A 128; A 39, 57.) A dockworker can only hope to take up city or road driving once he or she has successfully shifted into one of the driver classifications through the Company's one-year, dock-to-driver program. (A 130; A 38, 57-58.) Not surprisingly, therefore, none of the dockworkers did any city or road driving during the six-month period. (A 128; A 39.)

B. Procedural History

The Union filed a petition with the Board seeking to represent the city and road drivers at the Charlotte terminal. (A 123; A 30.) Following a hearing, the Board's Regional Director issued a Decision and Direction of Election finding that the city and road drivers constitute an appropriate unit for collective bargaining and directing an election among those employees. (A 123-37.) The Regional Director applied the standard elucidated by the Board, and enforced by the Sixth Circuit, in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), 2011 WL 3916077, at *15-16 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). (A123, 125-

26, 130-33.) As required by *Specialty Healthcare*, the Regional Director first applied the traditional community-of-interest test to determine whether the petitioned-for unit is “appropriate.” (A 130-31.) The Regional Director determined that the city and road drivers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (A 130-31.)

The Regional Director then addressed the Company’s contention that the smallest appropriate unit must include the dockworkers at the Charlotte terminal. (A 131-33.) The Regional Director explained that *Specialty Healthcare* 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 131.) Applying that standard, the Regional Director found that the Company failed to show that the dockworkers share an overwhelming community of interest with the city and road drivers. (A 133.)

The Company filed, with the Board, a request for review of the Decision and Direction of Election, contending that the dockworkers must be included in the unit under the *Specialty Healthcare* test. (A 138-68.) On November 18, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) denied the request,

finding that the Company had raised no issues warranting review.⁴ (A 169-70.) In joining the denial of review, Member Johnson applied the traditional community-of-interest analysis, rather than the test set forth in *Specialty Healthcare*, and found that the Company's argument for a combined driver-dockworker unit failed under that analysis. (A 169 n.1.)

Following the denial of review, the Board conducted a secret-ballot election among the drivers in the petitioned-for unit. (A 198; A 173.) A majority of these employees voted for union representation. (A 198; A 173.) Accordingly, on December 12, 2014, the Board certified the Union as the exclusive collective-bargaining representative of the city and road drivers. (A 198; A 174.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

On December 19, 2014, the Union requested, by letter, that the Company recognize and bargain with the Union as the exclusive collective-bargaining representative of the city and road drivers. The Company refused. (A 198; A 175.) Thereafter, acting on an unfair-labor-practice charge filed by the Union, the Regional Director issued a complaint alleging that the Company's refusal to

⁴ The Company makes much of the fact (Br. 6 & n.3, 13) that the Board did not write its own decision in response to the Company's request for review. However, the Board was under no obligation to write a separate decision where it clearly saw no error in the Regional Director's analysis. *See* 29 C.F.R. § 102.67(d) (describing grounds on which Board will grant review).

recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A 197; A 176.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A 197; A 171-81.) In response, the Company admitted that it refused to recognize and bargain with the Union, but claimed that it had no duty to do so because the Board had erred in approving a drivers-only bargaining unit and certifying the Union. (A 184-86.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On April 20, 2015, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A 197-99.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (A 197.)

The Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union, and in any like or related manner

interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A 198.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post a remedial notice. (A 198-99.)

SUMMARY OF ARGUMENT

The Company admittedly refused to recognize and bargain with the Union in order to obtain judicial review of the Board's unit determination in the underlying representation proceeding. The Board certified a unit of city and road drivers after considering the Union's petition to represent those employees and the larger question whether they constitute an appropriate unit. Contrary to the Company's argument, the Board acted well within its discretion in finding the unit of city and road drivers appropriate.

Applying the analytical framework set forth in *Specialty Healthcare*, which incorporates the traditional community-of-interest analysis recognized in this Circuit, the Board first determined that the city and road drivers in the petitioned-for unit are readily identifiable as a group because they have the same general classification, job function, and skills, and are treated differently from other employees in nearly every operational and administrative sense. For similar reasons, the Board found that the drivers share a community of interest apart from

the interests of other employees: unlike the mostly part-time dockworkers, the city and road drivers spend most of their time driving trailers outside the Charlotte facility; they have unique training, licensure, and uniform requirements because of this distinct role; and they share a number of other terms and conditions of employment in common by virtue of their status as full-time employees involved in the same skilled work. Considering all of the relevant factors, the Board determined that the drivers constitute an appropriate unit for collective bargaining.

The Board also reasonably rejected the Company's claim that the bargaining unit is inappropriate unless it includes the dockworkers. As the Board found, the dockworkers share almost no attributes in common with the drivers, who perform a vastly different, skilled function. The record therefore amply supports the Board's finding that the Company failed to carry its burden of proving, pursuant to the standard clarified in *Specialty Healthcare*, that the dockworkers share an overwhelming community of interest with the drivers such that there is no legitimate basis to exclude them from the otherwise appropriate unit.

In its opening brief, the Company does not even attempt to show that the factual findings underlying the Board's determinations were unsupported by record evidence. Instead, the Company, for the first time, has raised challenges to the validity of the *Specialty Healthcare* standard. Because the Company never raised those challenges before the Board, the Court lacks jurisdiction to consider them. In

any event, the Company's challenges have largely been considered and rejected in prior cases and are otherwise unpersuasive.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE CITY AND ROAD DRIVERS CONSTITUTE AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING, AND THEREFORE FOUND THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO RECOGNIZE AND 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 representatives of [its] employees” 29 U.S.C. § 158(a)(5).⁵ Here, the Company has admittedly refused to bargain with the Union in order to obtain judicial review of the Board-certified bargaining unit. The Company argues that the certified unit is inappropriate because it includes drivers but not dockworkers.

There is no dispute that if the Board properly certified the drivers-only bargaining unit involved here, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the elected representative of that unit. Accordingly, the sole issue before the Court is whether the Board acted within its broad discretion in making its unit determination. *See Mayflower Contract Servs.*,

⁵ An employer who violates Section 8(a)(5) also violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Inc. v. NLRB, 982 F.2d 1221, 1226 (8th Cir. 1993) (noting the Board’s “considerable discretion” and upholding its unit determination); *NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805, 807 (8th Cir. 1975) (noting the Board’s “broad discretion” and upholding its unit determination); *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1378 (8th Cir. 1975) (same).

A. Applicable Principles and Standard of Review

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.” 29 U.S.C § 159(b).

By its plain terms, Section 9(b) leaves the Board to determine whether a given grouping of employees is appropriate. Thus, the Act does not favor any particular unit composition or suggest how the Board should determine appropriateness. The Board’s designation of an appropriate unit accordingly “involves of necessity a large measure of informed discretion.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); accord *Stephens Produce*, 515 F.2d at 1378.

As the Supreme Court has observed, the Board does not exercise its discretion in this area “aimlessly.” *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). The starting point for the Board’s analysis is the unit for which the petition has been filed because, under Section 9(a) of the Act, “the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991); *see also Overnite Transp. Co.*, 325 NLRB 612, 614 (1998) (noting that the “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”). The Act allows the employees to “organize ‘a unit’ that is ‘appropriate’” *Am. Hosp. Ass’n*, 499 U.S. at 610. It need not be “*the* single most appropriate unit.” *Id.*

To determine whether the petitioned-for unit is an appropriate unit, the Board asks whether the employees in that unit “are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” and “share a community of interest.” *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83, 2011 WL 3916077, at *8, *12 (2011), *enforced sub nom. Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). In making its assessment regarding community of interest, the Board considers a number of relevant factors, including “company organization, physical distribution of employees, supervision, job functions, skills, wages, [and] working

conditions.” *Mayflower Contract Servs.*, 982 F.2d at 1226 (internal quotation marks and citation omitted). However, as this Court has emphasized, the Board’s “discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1218 (8th Cir. 1992).

In nearly every workplace, it is possible to conceive of more than one appropriate grouping of employees for purposes of collective bargaining, and the Board “may choose among several appropriate combinations of employees.” *Mayflower Contract Servs.*, 982 F.2d at 1226; *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). However, this Court has held that “[w]hen two or more units are appropriate, employee choice is a relevant factor.” *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1316 (8th Cir. 1981) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941)); *see also NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965) (the Board may “consider[] extent of organization as one factor, though not the controlling factor in its unit determination”). Consistent with this Court’s holding, the Board considers its inquiry at an end if it determines that the unit identified in the representation petition is “an appropriate unit.” *Specialty Healthcare*, 2011 WL 3916077, at *8; *see Metal Container*, 660 F.2d at 1316.

Where the Board has found that the petitioned-for unit is an appropriate unit, an objecting party can only overcome that finding by showing that the unit is “not appropriate.” *Metal Container Corp.*, 660 F.2d at 1313; *see also Arlington Hotel Co. v. NLRB*, 712 F.2d 333, 336 (8th Cir. 1983) (upholding Board’s unit certification where employer failed to show that the certified unit was “totally inappropriate”). In other words, it is not enough for the objecting party to merely suggest an alternative “more appropriate” unit. *Metal Container Corp.*, 660 F.2d at 1313. In *Specialty Healthcare*, the Board clarified that where the objecting party claims that the petitioned-for unit is inappropriate because it excludes certain employees, that party must show that the excluded employees share “an overwhelming community of interest” with those in the petitioned-for unit, such that there is no legitimate basis to exclude them. *Specialty Healthcare*, 2011 WL 3916077, at *13-15; *accord Kindred*, 727 F.3d at 562 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)).

The Board’s approach to unit determinations is not undermined by the fact that the Board has clarified its standard in this way. *See NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 495 n.4 (1985) (upholding the Board’s modified approach to determining whether close relatives of management should be excluded from bargaining unit). “[A]n agency’s day-to-day experience with problems is bound to lead to [such] adjustments.” *Id.* Accordingly, 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); accord *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 & n.11 (1984) (noting that a court “may not substitute its own construction” of the statute for the reasonable interpretation of the agency charged with administering the statute).

Likewise, “[a] reviewing court may not displace the Board’s choice between two fairly conflicting views” as to what constitutes the appropriate unit in a particular case, “even though the court would justifiably have made a different choice had the matters been before it de novo.” *Metal Container Corp.*, 660 F.2d at 1313; accord *Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 271 (8th Cir. 1984). Review of the Board’s unit certification “is limited to a determination of whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support.” *Metal Container Corp.*, 660 F.2d at 1313 (citing *NLRB v. Target Stores, Inc.*, 547 F.2d 421, 423 (8th Cir. 1977)). Thus, the Board’s certification of an appropriate bargaining unit, “if not final, is rarely to be disturbed.” *South Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs, AFL-CIO*, 425 U.S. 800, 805 (1976) (internal quotation marks and citation

omitted); accord *Arlington Hotel Co.*, 712 F.2d 335-36; *Stephens Produce*, 515 F.2d at 1378.

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

The Board reasonably applied its longstanding, judicially approved community-of-interest test to the stipulated facts here to find that the petitioned-for unit of city and road drivers is an appropriate unit for collective bargaining. In addressing the Company's claim that its dockworkers should be included in the unit, the Board applied the standard it clarified in *Specialty Healthcare*, and which the Sixth Circuit recently approved. The Board found, under that clarified, court-approved standard, that the Company had failed to show that the dockworkers shared such an overwhelming community of interest with the drivers that their exclusion would render the unit inappropriate. Significantly, the Company does not challenge the Board's factual determination that the drivers share a community of interest, or its finding that the Company failed to demonstrate an overwhelming community of interest between the dockworkers and the drivers.

1. The Board properly applied the traditional community-of-interest factors to find that a unit of city and road drivers is an appropriate unit

The record evidence fully supports the Board's finding (A 130-31) that the city and road drivers "share a distinct community of interest," making them an

appropriate bargaining unit. (A 131.) The drivers do not make up a “department” unto themselves, but the Company has marked them off from other employees by “treat[ing] . . . them differently in almost every operational and administrative sense.” (A 131.) Thus, the Company “tracks the drivers’ work separately from that of the [d]ockworkers” and similarly keeps their seniority lists separate from any dockworker seniority list.⁶ (A 131.) The Company also imposes on the drivers a requirement to wear uniforms that make them visibly distinguishable from the dockworkers in nearly all circumstances. And, of course, the drivers perform “the same unique function”—driving freight outside the facility—which carries with it unique licensure requirements. Based on these undisputed facts, the Board had little difficulty concluding that the city and road drivers “are readily identifiable as a group.” (A 131.)

The Board reasonably determined, “for similar reasons,” that the city and road drivers share a community of interest apart from any commonality they share with other employees. (A 131.) As the Board explained, the city and road drivers are “engaged in virtually the same task” of “moving freight from place to place,” and they perform “the bulk of this work away from the [t]erminal,” while the dockworkers can only move freight within the terminal. In addition, the drivers are

⁶ As noted above, p. 8, there is no seniority list for the majority of dockworkers, who work part-time.

“distinctly qualified and skilled” because they are subject to experience and licensure requirements that do not apply to the dockworkers. (A 131.) In further contrast to the dockworkers, most of whom are part-time employees, the drivers work full-time and enjoy the compensation, benefits, and seniority-based work allocation extended to full-time employees. (A 131.) Thus, the stipulated evidence amply supports the Board’s determination that the drivers share a “distinct community of interest” based on their common job functions, skills, wages, benefits, and working conditions. *See Mayflower Contract Servs.*, 982 F.2d at 1226; *Home Depot USA*, 331 NLRB 1289, 1290 (2000) (finding that unit of drivers shared a community of interest based, in part, on common requirement of commercial drivers’ license and adequate driving record).

2. The Company has not shown that the dockworkers share an overwhelming community of interest with the city and road drivers

It is well settled, as discussed above, that the Act requires only *an* appropriate unit. *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991); *accord Arlington Hotel Co. v. NLRB*, 712 F.2d 333, 336 (8th Cir. 1983) (finding that unit certified by Board was “an appropriate unit and that is all that is required”). And 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.” 2011 WL 3916077, at *15.

As the D.C. Circuit held in rejecting an employer’s challenge to the Board’s unit determination, the fact 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, LLC v. NLRB*, 529 F.3d 417, 421 (2008).

Consistent with these principles, the Board applied the standard clarified in *Specialty Healthcare*, that an employer seeking to expand a petitioned-for unit composed of a readily identifiable group that shares a community of interest must demonstrate that the employees it seeks to add “share an overwhelming community of interest with those in the petitioned for unit.” *Specialty Healthcare*, 2011 WL 3916077, at *15. In approving this clarified 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. *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 562-63 (6th Cir. 2013) (approving the Board’s *Specialty Healthcare* standard).⁷

⁷ 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

Applying *Specialty Healthcare*, the Board here reasonably found that the Company failed to carry its burden of proving that the dockworkers and drivers share such an “overwhelming community of interest” that the exclusion of the dockworkers would render the unit inappropriate. In so finding, the Board reiterated the numerous distinctions between the drivers and dockworkers already noted in its analysis of whether the drivers are a “readily identifiable group” having a “distinct community of interest.”

In particular, however, the Board relied on the “disparity in hours, wages, and benefits” between the drivers and dockworkers. (A 131.) As the Board found, “[a]ll of the [r]oad and [c]ity [d]rivers are full-time employees earning between \$50,000 and \$70,000 per year.” (A 131.) As full-time employees, “they are also entitled to paid holidays and paid vacations.” (A 131.) The dockworkers, by contrast, are mostly (58 percent) “part-time employees earning between \$25,000 to

“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 that 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”).

\$30,000 per year, who are ineligible for paid holidays or vacations.” (A 131-32.)

Moreover, during the six-month period considered in this case, “the average [d]ockworker accrued 39% fewer hours than the average driver.” (A 132.)

Ultimately, as the Board found, there are “few areas of commonality between the drivers and the dockworkers.” (A 133.) As the Board explained, the Company’s supervisors rotate positions periodically and accordingly may supervise either the dockworkers or the drivers. (A 129-30, 132.) In addition, the evidence shows that the drivers occasionally perform dock work, with about 10 drivers accounting for most of this work in the six-month period considered in this case. However, the undisputed evidence also shows that the dockworkers do not take on driving work—indeed, they generally lack the qualifications to do so—meaning that any interchange among the drivers and dockworkers is necessarily one-way: the drivers occasionally perform dock work, but the dockworkers never perform driving work. (A 129, 132; A 39-40.) On these facts, the Board properly concluded that the limited points of connection among the drivers and dockworkers “fall far short of establishing the overwhelming community of interest . . . that would be necessary to require the [d]ockworkers’ inclusion” in the bargaining unit already found appropriate. (A 133.)

C. The Company’s Challenges to *Specialty Healthcare* Are Not Properly Before the Court and, In Any Event, Lack Merit

In its opening brief, the Company argues, for the first time, that the Board committed various legal errors in determining, based on *Specialty Healthcare*, that the drivers constitute an appropriate bargaining unit. Specifically, the Company argues that *Specialty Healthcare* “watered down” the traditional community-of-interest test at the initial stage, and then left the proponent of a broader unit with a new burden—to prove that the employees it would include share an “overwhelming” community of interest with those in the unit—in violation of the Administrative Procedure Act and Section 9(c)(5) of the Act.

As shown below, the Company’s specific arguments against the *Specialty Healthcare* standard are jurisdictionally barred because the Company failed to raise those arguments before the Board. In any event, as further shown below, the Company’s arguments do not provide any basis for overturning the Board’s reasonable unit determination.

1. The Company failed to sufficiently present any *Specialty Healthcare* challenges to the Board

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). This provision is “a jurisdictional bar,

designed to allow the [Board] the first opportunity to consider objections and to ensure that reviewing courts receive the full benefit of the [Board's] expertise.” *Cast North Am. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 1000 (7th Cir. 2000); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) bars the courts from considering issues not raised before the Board); *W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (describing Section 10(e) as a “jurisdictional bar” in the face of which the court is “powerless . . . to consider arguments not made to the Board”).

Accordingly, to preserve an issue for appeal, a party must apprise the Board of that issue “sufficiently enough that the Board may consider [it] on the merits.” *Cast North Am.*, 207 F.3d at 1000; *accord NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350 (1953) (employer failed to give the Board “adequate notice that it intend[ed] to press the specific issue it now raises”). This Court further has recognized that “an objection made during the course of a representation proceeding must be reasserted in the subsequent unfair labor practice case in order to be preserved for review by this court.” *NLRB v. Mr. B. IGA, Inc.*, 677 F.2d 32, 34 (8th Cir. 1982).

Here, the Company failed to take any of these required steps to ensure that the Court would have jurisdiction to consider its challenges to the Board's *Specialty Healthcare* test. Indeed, in its request for Board review of the Regional

Director's unit determination, the Company presented an extensively developed argument that accepted the *Specialty Healthcare* standard and applied it to the stipulated facts of this case to argue that a unit of drivers, excluding the dockworkers, was inappropriate. It only cryptically suggested in a footnote that it had reservations about the test itself, summarily stating:

The Employer posits that *Specialty Healthcare* was decided erroneously, largely for the reasons cited in Member Hayes' dissent therein. However, on the assumption that [the] Board will not now revisit its decision there, the [Company] alternatively contends that the case at bar was decided incorrectly even under the rule of *Specialty Healthcare* and its progeny.

(A 146 n.2.) In doing so, the Company failed to identify, much less develop, any specific dispute with the *Specialty Healthcare* standard. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996) (basis for employer's objection must be evident if not explicit). Further, in the subsequent unfair-labor-practice proceeding, the Company did not state any challenge to the standard, choosing instead to elaborate on the factual arguments it had made under *Specialty Healthcare* in the representation proceeding. (A 184-86.)

Thus, far from giving the Board notice of the specific arguments against *Specialty Healthcare* now raised in this Court (Br. 17-35), the Company gave the Board no firm indication that it intended later to challenge *Specialty Healthcare* on court review. Moreover, in its opening brief, the Company does not suggest, let alone show, any "extraordinary circumstances" that would excuse its failure to

raise its contentions before the Board. *See* 29 U.S.C. § 160(e). Accordingly, the Company’s challenges to that standard are beyond the bounds of what this Court may properly consider. *See Singer Co. v. NLRB*, 429 F.2d 172, 180-82 (8th Cir. 1970) (employer’s general objection to the Board’s remedy was “too vague” to preserve the employer’s specific argument that the Board’s order was overbroad).⁸ In any event, the Company’s challenges would fail on the merits, as explained below.

2. *Specialty Healthcare* did not abandon or misapply the Board’s traditional community-of-interest analysis

Contrary to the Company’s claims (Br. 9, 13-16, 34), the Board’s *Specialty Healthcare* decision did not “effectively discard[]” or “water[] down” the traditional community-of-interest test by narrowly focusing the analysis on attributes that employees in the petitioned-for unit may share “in isolation” from other employees. As the Company acknowledges (Br. 14 n.4), the Board in

⁸ In requesting that the Court hear oral argument in this case (Br. ii), the Company states that the Board’s application of a “new and improper standard for determining the appropriate bargaining unit” makes this a “case of first impression” in this Circuit. Even assuming that the Company is correct in its assessment—which, as shown below, it is not—a party is not free to withhold so-called novel labor-law issues from the Board in order to raise them before a court in the first instance. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.”).

Specialty Healthcare, in fact, stated just the opposite—that its initial community-of-interest determination must be based on consideration of the employees’ “separate” and “distinct” attributes as compared to other employees. In so stating, moreover, the Board merely reaffirmed the traditional community-of-interest standard set forth in earlier cases. There is accordingly no basis for the Company’s claims that, as a result of the Board’s decision in *Specialty Healthcare*, the Board no longer applies the traditional community-of-interest test recognized in this Circuit.

Similarly, there is no basis for the Company’s claim (Br. 15-16) that, following the purported rule of *Specialty Healthcare*, the Board here considered only the “internal” community of interest that the drivers in the petitioned-for unit share among themselves. As shown above, in considering at the outset whether the drivers constituted an appropriate unit, the Board analyzed the various attributes that the drivers have in common, but also emphasized that many of those attributes also distinguished them from other employees. This allowed the Board to reasonably conclude (A 131) that the drivers “share a distinct community of interest,” consistent with the traditional community-of-interest standard as understood by this Court. *See Watonwan Mem. Hosp., Inc. v. NLRB*, 711 F.2d 848, 850 (8th Cir. 1983) (finding that substantial evidence supported Board’s

determination that a unit of technical employees shared a community of interest “separate and distinct from that of other employees”).

Tellingly, while the Company challenges the Board’s community-of-interest analysis, it provides no factual analysis of its own to prove its apparent point that the Board could have reached a different result under the traditional community-of-interest analysis. Specifically, the Company provides no factual support for its argument that the drivers lack a community of interest separate from the dockworkers. And the Company’s skeletal description of the drivers and dockworkers in its statement of facts (Br. 6-8) falls far short of supplying the necessary factual support.

Indeed, the Company’s factual recitation does not establish a single point of commonality between the drivers and the mostly part-time dockworkers, and instead shows (Br. 7-8) only that some of the dockworkers “may become eligible for a drivers’ position,” and some of the drivers perform dockwork. Accordingly, there is no comparison as the Company suggests between this case and *NLRB v. Cell Agricultural Mfg. Co.*, 41 F.3d 389 (8th Cir. 1994), in which the employer showed as a factual matter that the community-of-interest factors overwhelmingly favored its view of the appropriate unit. *Id.* at 397 (reversing Board unit determination based on “overwhelming evidence put forward by [employer]” establishing that Board-certified unit was “inappropriate”). Likewise, there is no

factual basis for the Company's separate suggestion (Br. 16-17) that a "preponderance of the relevant factors" would have weighed against the drivers-only unit certified by the Board.

3. The Board's overwhelming-community-of-interest standard is not a radical departure from precedent

There is similarly no merit to the Company's argument (Br. 17-26) that *Specialty Healthcare* imposes a new, heightened burden on employers who wish to challenge a petitioned-for bargaining unit. As noted above p. 25, 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. And as the Sixth Circuit recently found, the overwhelming community of interest standard "is not new" to unit determinations. *Kindred*, 727 F.3d at 561. The Board has applied an overwhelming community of interest standard to unit determinations 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" 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”).⁹

Indeed, even before the Sixth Circuit’s decision in *Kindred*, the D.C. Circuit had approved the test in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 419 (2008). As here, the employer in *Blue Man Vegas* sought a unit broader than the petitioned-for unit that the Board found appropriate. Addressing the employer’s arguments, the court affirmed the Board’s view 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 “share an overwhelming community of interest” with the included employees. *Id.* at 421.

⁹ 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 employee 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.

In *Specialty Healthcare*, the Board and the Sixth Circuit found *Blue Man Vegas* to be persuasive and consistent with Board law. See *Kindred*, 727 F.3d at 562-565; *Specialty Healthcare*, 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 Healthcare* [.]” *Kindred*, 727 F.3d at 563.

Consistent with the Sixth and D.C. Circuits, this Court has only set aside the Board’s finding of an appropriate unit, in favor of a broader unit, where the proponent of the broader unit was able to show an overwhelming community of interest between those in the otherwise appropriate unit and those who would be added. See *Cell Agricultural Mfg. Co.*, 41 F.3d at 395-97. In *Cell Agricultural*, the union presented the employer with authorization cards showing that a majority of its assembly plant employees wished to be represented by the union. The employer refused to recognize and bargain with the union as the representative of the assembly plant employees, maintaining that they did not constitute an appropriate bargaining unit without inclusion of the employees in the employer’s

nearby rubber plant.¹⁰ The Court agreed with the employer, holding that “[t]he overwhelming evidence put forward by [the employer]” showed that the assembly plant employees were an “inappropriate bargaining unit.” *Id.* at 397. The Court specifically found, contrary to the Board, that nearly all of the community-of-interest factors favored a finding that the assembly plant employees shared a community of interest with the employer’s rubber plant employees, meaning that “the appropriate bargaining unit . . . must include both the assembly plant and the rubber plant” employees. *Id.*

Thus, the Board’s overwhelming-community-of-interest test is neither a radical departure from precedent as the Company claims, nor inconsistent with the law of this Circuit. *See also Arlington Hotel Co.*, 712 F.2d at 336 (rejecting employer’s effort to expand the certified bargaining unit, holding that “although the unit found by the Board is not the only possible unit, it is an appropriate unit[,] . . . that is all that is required,” and “the Hotel has not shown that the unit is totally inappropriate”).

¹⁰ Before a bankruptcy had forced reorganization of the employer’s business, the employer had a history of bargaining with a different union as the representative of a single unit of assembly and rubber plant employees. *Id.* at 392.

4. The Board did not violate the Administrative Procedure Act by clarifying the appropriate standard in the context of an adjudication

Relying on the erroneous premise that the Board established a new legal standard in *Specialty Healthcare*, the Company argues (A 18, 26-28) that the Board was obliged to introduce its “new” standard through rulemaking under the Administrative Procedure Act, rather than through adjudication of a specific dispute. As the Sixth Circuit in *Kindred* explained in rejecting this very argument, this contention is wrong, both factually and legally.

As explained above, *Specialty Healthcare* is not a new standard. 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 Healthcare*, 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 Healthcare*, 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.

As the *Kindred* court explained, moreover, “[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. Although the Company questions (A 19) whether the Board genuinely set about such a limited task in *Specialty Healthcare*, it offers no basis for disbelieving the Board’s clear statement that it intended only to clarify the analysis to be applied where a party challenges an otherwise appropriate unit and seeks a broader unit.

The courts ultimately “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). In *First National Bank of Chicago*, for example, the court 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 was 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.

Moreover, even if the Board made a policy change in *Specialty Healthcare*—which, as shown above, it did not—the Supreme Court has made clear that the Board is “not precluded from announcing new principles in an adjudicative proceeding.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). And, as the Sixth Circuit observed in *Kindred*, “if the Board may announce a new principle in an adjudication, . . . it may choose to follow one of its already existing principles,” as it did in adopting the overwhelming-community-of-interest test in *Specialty Healthcare*. 727 F.3d at 565.

5. The Board did not violate Section 9(c)(5) of the Act by its clarified standard

The Company’s remaining argument (A 28-35), that the Board’s overwhelming community-of-interest test improperly gives controlling weight to a union’s extent of organization in the workplace, also fails. Again, the Board in *Specialty Healthcare*, and the Sixth Circuit in *Kindred*, addressed this same contention and properly rejected it. *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 Wheeling Island*, 355 NLRB No. 127, 2010 WL 3406423, *1 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, the Board reasonably determined as an initial matter that the proposed unit of city and road drivers was readily identifiable as a separate group of employees and that this distinct group shares a community of interest, making it an appropriate unit for collective bargaining. (A 130-31.)

The Board based its decision not on any one factor, but on a detailed analysis of multiple factors: the drivers’ functions, skills, training, licensure requirements, working conditions, compensation, and benefits. (A 126-31.) Thus, the Board 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 drivers-only unit is an appropriate unit. In its opening brief (Br. 28-35), the Company fails to show how, despite this detailed, multi-factor analysis, “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 city and road drivers 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. As the Sixth Circuit observed in *Kindred*, “[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 quotation marks and citations omitted) (emphasis in original).

Despite the Company’s claims to the contrary (Br. 33-34), *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 Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 538 (4th Cir. 1999) (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 the Company’s claims that the unit was 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 Healthcare* 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. As shown above, 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.

In a final effort to rationalize its challenge to *Specialty Healthcare*, the Company claims (Br. 9, 30-32) that the overwhelming-community-of-interest standard places an “insurmountable” burden on the employer that will always result in the petitioned-for unit being approved. This is false. *See, e.g., 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).¹¹ And when the Board applied a similarly-heightened standard under a different name, the Board regularly granted requests to expand the unit where the employer showed *more* than that its alternative unit was also appropriate. *See, 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).

¹¹ *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* p. 34 (rejecting petitioned-for unit because additional employees “share an overwhelming community of interest” with the petitioned-for unit).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

/s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

/s/ Milakshmi V. Rajapakse
MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2949
(202) 273-1778

RICHARD F. GRIFFIN
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

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)	Board Case No.
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)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 71)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,455 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board’s brief, is identical to the hard copy of the Board’s brief filed with the Court and served on the petitioner/cross-respondent. Board counsel further certifies that the CD-ROM has been scanned for viruses

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According to that program, the CD-ROM is free of viruses.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, DC
this 14th day of September 2015

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, D.C.
this 14th day of September 2015