

**Nos. 15-2585 & 15-2712**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

v.

**FEDEX FREIGHT, INC.**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE  
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**STATEMENT OF JURISDICTION**

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

May 19, 2015, and reported at 362 NLRB No. 91. (A 1-3.)<sup>1</sup> 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 701 (“the Union”) as the duly certified collective-bargaining representative of the road and city drivers at the Company’s Monmouth Junction, New Jersey facility. (A 2.)

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. 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 unfair labor practice occurred in Monmouth Junction, New Jersey. 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. 22-RC-134873) 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 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

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<sup>1</sup> 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.

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 Board filed its application for enforcement on June 29, 2015, and the Company filed its cross-petition for review on July 16, 2015. These filings were timely, as the Act places no time limit on the institution of proceedings to enforce or review Board orders.

#### **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.

#### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

There are no related cases or proceedings in this Circuit. However, the Board has certified bargaining units consisting of city and road drivers at other FedEx Freight locations, and the Company has challenged some of those certifications in court proceedings similar to this one. *See FedEx Freight, Inc. v.*

*NLRB*, Nos. 15-1848 & 15-1999 (8th Cir. appeal docketed April 23, 2015); *FedEx Freight, Inc. v. NLRB*, Nos. 15-2494 & 15-2732 (8th Cir. appeal docketed July 13, 2015).

## **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 Monmouth Junction, New Jersey 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 Monmouth Junction 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 51-55.) The Company carries freight by truck using a system of terminals in various states. (A 6; A 49, 51, 87, 101-02, 104, 128.) The terminal involved in this case is located in Monmouth Junction, New Jersey, and is

referred to as the South Brunswick terminal. (A 6; A 49, 51.) The terminal consists of one building surrounded by a yard. (A 6; A 52.) The building contains administrative offices and a dock with numerous doors for loading and unloading freight. (A 6; A 52, 76, 96-97.) The yard is an open area where the Company moves and stores its vehicles and equipment as needed. (A 6; A 52, 88.)

The Company employs workers of various descriptions to keep its South Brunswick operation running smoothly. (A 6; A 52, 53.) However, only three types of employees are at issue in this case: the city drivers, road drivers, and dockworkers. (A 5 & n.3, 6; A 51, 52, 54, 85, 89.) There are 81 city drivers, 33 road drivers, and 52 dockworkers. (A 6; A 52.) The drivers are full-time employees; most of the dockworkers (32) are part-time employees. (A 9-11; A 52, 62-66.)

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

The Company uses its city drivers to transport freight locally, and its road drivers to transport freight over longer distances, outside the Monmouth Junction area. (A 8-9; A 52, 125-26.) Given the nature of their work, the drivers spend most of their working time away from the South Brunswick terminal and are supervised remotely by dispatchers. (A 8-9, 11; A 53, 119, 131, 133.) The Company's supervisors rotate tasks so that they occasionally supervise operations

on the dock, and occasionally serve as dispatchers for the drivers. (A 11; A 53, 117, 119, 142-44.)

The drivers are 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,<sup>2</sup> and acceptable Motor Vehicle Reports. (A 8-9; A 53, 73, 75, 128, 170, 172.) They also must submit to random drug tests. (A 8, 9-10; A 154-55.) In addition, whenever the drivers are on their routes and thus potentially interacting with the public, they must wear company-issued uniforms. (A 11; A 54, 151-52.)

The drivers work a full-time schedule that is determined in part based on their preferences. (A 9-10; A 52, 53, 94-95, 103, 131-32.) 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 9-10; A 52, 53, 94-95, 103, 131-32.)

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 9-10; A 53, 123-24, 135.)

Annually, the average earnings for city drivers is \$50,000, and the average for road

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<sup>2</sup> In addition to providing work experience, an employee may meet this requirement by successfully completing the Company's dock-to-driver program. (A 11-12; A 52, 93-94.)

drivers is between \$60,000 and \$70,000. (A 9-10; A 53, 135-36.) 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 11; A 53-54, 124, 137, 154.) In addition, all of the drivers are eligible to accrue the same amount of paid vacation time based on seniority. (A 11; A 53, 137-39.)

**2. The dockworkers spend all of their working time handling freight inside the South Brunswick terminal**

In contrast to the drivers, who work primarily outside the South Brunswick terminal, the dockworkers move freight within the terminal only. (A 10; A 53.) Their work is directed towards loading freight onto outbound trailers, and unloading freight from inbound trailers. (A 10; A 52, 89-90, 96-97, 133.) Occasionally, dockworkers drive forklifts and other vehicles within the facility—for example, to 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 8, 10; A 52, 90-91, 147.)

There is no requirement of relevant experience for the dockworker position. (A 10; A 77, 174.) Indeed, the only substantive requirement for employment as a dockworker is that the applicant must be at least 18 years of age. (A 10; A 77, 174.) Similarly, there is no required uniform for the dockworkers. (A 11; A 54, 152.) They are allowed to perform their work in street clothes. (A 11-12; A 54,

151-52.) And they are not subject to random drug testing like the drivers. (A 10; A 154.)

Of the Company's 52 dockworkers, 32 are part-time employees. (A 6, 10-11; A 52.) These part-time dockworkers do not have an opportunity to select a schedule based on seniority. (A 11; A 52, 132.) Indeed, the Company does not maintain a list of them in order of seniority. (A 11; A 52, 94.) Instead, the Company typically assigns them to a shift when they are hired. (A 11; A 132.) They work on average 25 hours per week, their hourly wages range between \$16.31 per hour and \$18.31 per hour, and their average annual earnings are between \$25,000 and \$30,000. (A 10-11; A 53-54, 123, 135-36.)

About 20 dockworkers are classified as full-time employees and work an average of 35 hours per week. (A 11; A 52, 64.) 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 11; A 52.) The full-time dockworkers earn \$20.13 per hour, resulting in average annual earnings of about \$37,000. (A 11; A 64, 123.)

Like all employees, dockworkers are eligible for retirement and healthcare benefits. (A 11; A 53, 124.) 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 11; A 53-54, 137-39, 154.)

**3. There is almost no interchange between the drivers and the dockworkers: the drivers, as a group, infrequently 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 8-9; A 52-53, 134.) All of the drivers have the basic credentials to do either city or road driving for the Company. (A 8-9; A 53, 126, 128.) Nevertheless, they spend the vast majority of their time working within their assigned driving classifications. (A 8-9; A 62-65.) Likewise, all of the drivers are capable of doing dock work, but the Company generally does not impose such work on drivers, and only a few drivers have the time and inclination to regularly volunteer for dock work. (A 8-9; A 52, 108-10, 145, 147.) During the six-month period between February 1, 2014 and July 31, 2014,<sup>3</sup> 12 of the Company's 114 drivers performed 57 percent of all the dock work done by drivers. (A 13; A 62-65.) And, overall, dock work made up only a small fraction of the drivers' working time during the six-month period: the city drivers spent 3.5 percent of their time on dock work, while the road drivers spent 10 percent of their time on dock work; and the drivers in both classifications spent less than 1 percent of their time hostling. (A 8-9; A 62-65.)

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<sup>3</sup> 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 8 & n.8; A 25, 39-40.)

The dockworkers, by contrast, lack the qualifications to do city or road driving. (A 10; A 53, 94, 128, 134.) 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 11-12; A 53, 93-94.) Not surprisingly, therefore, none of the dockworkers did any city or road driving during the six-month period. (A 10; A 53, 64-66.)

### **B. Procedural History**

The Union filed a petition with the Board seeking to represent the city and road drivers at the South Brunswick terminal. (A 5; A 43.) 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 5-18.) 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). (A 5, 7, 12-15.) 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 12-13.) 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 12-13.)

The Regional Director then addressed the Company's contention that the smallest appropriate unit must include the dockworkers at the South Brunswick terminal.<sup>4</sup> (A 13-15.) 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 13.) 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 13-15.)

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 175-205.) On October 29, 2014, the Board (Chairman Pearce and Members Johnson and Schiffer) denied the request, finding

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<sup>4</sup> Although the Regional Director initially stated that the Company only sought to include full-time dockworkers in the unit, he subsequently interpreted the Company's position more broadly, to encompass possible inclusion of all the dockworkers. (A 5 n.4, 13-15.) The Company later clarified that its "position at all times has been that any unit found appropriate must include, at a minimum, all full-time and part-time dockworkers employed at South Brunswick." (A 179.)

that the Company had raised no issues warranting review.<sup>5</sup> (A 4.) 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 4 n.1.)

Following the denial of review, the Board conducted a secret-ballot election among the drivers in the petitioned-for unit. (A 2; A 209.) A majority of these employees voted for union representation. (A 2; A 209.) Accordingly, on November 12, 2014, the Board certified the Union as the exclusive collective-bargaining representative of the city and road drivers. (A 2; A 209.)

## **II. THE UNFAIR LABOR PRACTICE PROCEEDING**

On January 20, 2015, 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. (A 2; A 209.) The Company refused. (A 2; A 209.) Thereafter, acting on an unfair-labor-practice charge filed by the Union, the Regional Director issued a complaint alleging that the Company's

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<sup>5</sup> The Company makes much of the fact (Br. 12 & n.3, 20, 43) 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).

refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A 1; A 209-10.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A 1; A 207-15.) 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 217-20.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On May 19, 2015, the Board (Chairman Pearce and Members Johnson and McFerran) 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 1-3.) 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 1.)

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 2.) 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 2-3.)

### **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 full-time city and road drivers spend most of their time driving trailers outside the South Brunswick 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 makes almost no attempt to show that the factual findings underlying the Board's determinations were unsupported by record evidence. Instead, the Company, for the first time, raises 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).<sup>6</sup> Here, the Company has admittedly refused to bargain with the Union in order to obtain judicial review of the Board-certified bargaining unit. *See St. Margaret Mem’l Hosp. v. NLRB*, 991 F.2d 1146, 1151 & n.5 (3d Cir. 1993) (only avenue for court review of certification is through refusal-to-bargain proceeding); *NLRB v. Sun Drug Co.*, 359 F.2d 408, 410 (3d Cir. 1966) (same). The Company argues that the certified unit is inappropriate because it includes drivers but not dockworkers.

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<sup>6</sup> 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).

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. *See Presbyterian Univ. Hosp. v. NLRB*, 88 F.3d 1300, 1303, 1310 (3d Cir. 1996) (affirming Board finding of Section 8(a)(5) and (1) violation where employer challenges to unit certification failed). Accordingly, the sole issue before the Court is whether the Board acted within its broad discretion in making its unit determination. *See Westinghouse Elec. Corp. v. NLRB*, 236 F.2d 939, 942-43 (3d Cir. 1956) (upholding Board-certified unit and noting that “the Board must be permitted to exercise wide discretion” in determining bargaining unit); *accord Sun Drug*, 359 F.2d at 412; *NLRB v. Caswell-Massey Co.*, 247 F. App’x 381, 383 (3d Cir. 2007).

**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. *See Libbey-Owens-Ford Co. v. NLRB*, 495 F.2d 1195, 1199 (3d Cir. 1974) (recognizing “that the Board is granted broad powers under Section 9(b)”). 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 Libbey-Owens-Ford*, 495 F.2d at 1199.

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.*; *accord St. Margaret Mem. Hosp.*, 991 F.2d at 1152.

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 “generally looks to factors such as” similarity of wages, hours, benefits, other terms and conditions of employment, work performed, qualifications, skills, and training; frequency of contact or interchange among the employees; geographic proximity; participation in an integrated production process; common supervision; desires of the affected employees; and extent of union organization. *NLRB v. St. Francis Coll.*, 562 F.2d 246, 249 (3d Cir. 1977); *accord Caswell-Massey*, 247 F. App’x at 383. However, as this Court has emphasized, “the Board is free to consider a wide variety of factors, and the presence or absence of one or even several of them is not necessarily determinative of the case.” *Libbey-Owens-Ford*, 495 F.2d at 1200.

In nearly every workplace, it is possible to conceive of more than one appropriate grouping of employees for purposes of collective bargaining, and “[i]t has often been repeated that the [Board] need not select the most appropriate

unit—any unit that is an appropriate one will do, even if there are several better possible units.” *NLRB v. Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 153 n.12 (3d Cir. 1983); accord *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). However, “[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”); *NLRB v. Local 404, Int’l B’hd of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 205 F.2d 99, 103 (1st Cir. 1953) (the Board may properly “c[o]me to the conclusion that the single factor that would tip the scales [i]s the preference of the employees” (internal quotation marks and citation omitted)). Consistent with this principle, 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 clearly inappropriate. *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (citing cases); see *St. Margaret Mem. Hosp.*, 991 F.2d at 1152 (party

challenging Board unit determination has “heavy” burden to show that Board abused its discretion in selecting an appropriate unit). In other words, it is not enough for the objecting party to merely suggest an alternative “better possible unit[.]” *Cardox Div. of Chemetron*, 699 F.2d at 153 n.12. 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*, 529 F.3d at 421).

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.” *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981); accord *Presbyterian Univ. Hosp. v. NLRB*, 88 F.3d 1300, 1303, 1306 (3d Cir. 1996); *Libbey-Owens-Ford*, 495 F.2d at 1203. “[I]nsofar as the Board’s unit determination depend[s] on facts,” the scope of review is “limited to whether there was substantial evidence to support the Board.” *Libbey-Owens-Ford*, 495 F.2d at 1200 n.4. Otherwise, the Court reviews only for abuse of the Board’s broad discretion to “designate an appropriate unit, not [necessarily] the most appropriate unit.” *Presbyterian Univ. Hosp.*, 88 F.3d at 1303, 1306 & n.7. 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 *Libbey-Owens-Ford*, 495 F.2d at 1199.

**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 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 that the city and road drivers "share a distinct community of interest," making them an appropriate bargaining unit. (A 13.) Preliminarily, as the Board found, the petitioned-for unit of drivers is a clearly identifiable group "structured along the lines of

classification, job function, and skills,” and therefore it “tracks a dividing line drawn by the [Company].” (A 12, quoting *Macy’s, Inc.*, 361 NLRB No. 4, 2014 WL 3613065, at \*12 (2014). To be sure, 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 12.) 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.<sup>7</sup> (A 12.) More visibly, the Company distinguishes the drivers from the dockworkers by requiring the drivers to wear uniforms when performing driving assignments, while “allow[ing the dockworkers] to perform their job duties in street clothes.” (A 12.) And, of course, the drivers are further set off from other employees simply by virtue of their “unique function”—driving freight outside the facility—which carries with it unique licensure requirements. (A 12.) Based on these undisputed facts, the Board had little difficulty concluding that the city and road drivers “are readily identifiable as a group.” (A 12.)

The Board reasonably determined, “for similar reasons,” that the city and road drivers share a community of interest apart from any commonality they share

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<sup>7</sup> As noted above, p. 8, there is no seniority list for the majority of dockworkers, who work part-time.

with other employees. (A 13.) 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. (A 13.) In addition, the drivers are “distinctly qualified and skilled” because they are subject to experience and licensure requirements that do not apply to the dockworkers. (A 13.) Because of their unique responsibilities, the drivers are subject to random drug testing. (A 13.) And in further contrast to the dockworkers, who are mostly part-time employees, the drivers work full-time and enjoy the compensation, benefits, and seniority-based work allocation extended to full-time employees. (A 13.) 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. (A 13.) *See NLRB v. Sun Drug Co.*, 359 F.2d 408, 413 (3d Cir. 1966) (upholding Board unit determination where employees in unit were “closely and distinctly related in location and function”); *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 Cardox Div. of Chemetron*, 699 F.3d at 153 n.12; *Caswell-Massey Co.*, 247 F. App'x at 383. 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).<sup>8</sup>

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. (A 14.) In so finding, the Board reiterated the numerous distinctions between the drivers and dockworkers already

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<sup>8</sup> 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 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”).

noted in its analysis of whether the drivers are a “readily identifiable group” having a “distinct community of interest.” (A 13.)

In particular, however, the Board relied on the fact that the drivers and dockworkers have “vastly different skills and perform distinct job functions.” (A 13.) The drivers are required to possess commercial driver’s licenses with various certifications and are subject to random drug-testing because of the nature of their work. (A 13.) By contrast, the dockworkers “do not require any specialized skills beyond the use of a forklift.” (A 13.) Further, “the nature of the work drivers principally perform . . . means that they spend the bulk of their time away from the [t]erminal,” while the dockworkers spend their time performing duties within the terminal. (A 13.) Finally, as the Board found, there is an obvious “disparity in wages” between the drivers and dockworkers. (A 13.) “All of the [r]oad and [c]ity [d]rivers are full-time employees earning between \$50,000 and \$70,000 per year.” (A 13.) Meanwhile, the dockworkers are mostly part-time employees who earn significantly less (\$25,000 to \$30,000 per year), and even the full-time dockworkers only average about \$37,000 per year. (A 13.)

Ultimately, as the Board found, there are “few areas of commonality” between the drivers and the dockworkers. (A 14.) As the Board explained, the Company’s supervisors rotate positions periodically and accordingly may supervise either the dockworkers or the drivers. (A 13-14.) In addition, the

evidence shows that the drivers occasionally perform dock work, but such work is “largely concentrated among a few” of them and makes up only a fraction of the drivers’ duties overall. (A 13.) Moreover, 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 14.) 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 14.)

**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); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984) (application of the Section 10(e) bar is “mandatory, not discretionary”).

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”). In practical terms, this means that a party cannot, for example, parlay factual arguments raised before the Board into legal arguments before the court. *See NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 88 (3d Cir. 2002) (holding that because “[t]he tenor of [the employer’s] challenge before the Board raised a purely factual question,” a related legal challenge was jurisdictionally barred).

Here, the Company simply failed to take the steps necessary to ensure that this Court would have jurisdiction to consider its legal challenges to the *Specialty Healthcare* standard. 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. (A 175-206.) 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 183 n.4.) 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 217-20.)

Thus, far from giving the Board notice of the specific arguments against *Specialty Healthcare* now raised in this Court (Br. 18-43), 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 FES, a Div. of Thermo Power*, 301 F.3d at 88 (holding that court lacked jurisdiction to consider employer legal challenge where employer failed to make basis for challenge clear before the Board).<sup>9</sup> In any event, the Company’s challenges would fail on the merits, as explained below.

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<sup>9</sup> 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

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

Contrary to the Company’s claims (Br. 15, 20-22, 42), 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. 20 n.4), the Board in *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. 22) that, following the purported rule of *Specialty Healthcare*, the Board here considered only the

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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.”).

“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 that the drivers “share a distinct community of interest,” consistent with the traditional community-of-interest standard as understood by this Court. (A 13.) *See NLRB v. Caswell-Massey Co.*, 247 F. App’x 381, 383-84 (3d Cir. 2007) (affirming Board finding of an appropriate unit where community-of-interest analysis suggested numerous “distinctions” between employees in proposed unit and other employees).

Tellingly, while the Company challenges the Board’s community-of-interest analysis, it provides no factual analysis of its own to prove that the drivers lack a community of interest separate from the dockworkers. Instead, the Company merely points to the most general of similarities between the drivers and the dockworkers—that they are all paid by the hour, enjoy health and retirement benefits extended to all company employees, advance the overarching company goal of delivering freight, and have some common functions and working conditions, mainly by virtue of the fact that the drivers are capable of performing dock work. (Br. 26.)

But these basic similarities between the drivers and dockworkers pale in comparison to the much deeper similarities among the drivers that effectively distinguish them from the dockworkers: the city and road drivers have identical hourly wages, which are uniformly higher than the dockworkers' wages; their average annual earnings are about \$20,000 to \$40,000 higher than the average annual dockworker earnings; the drivers work a full-time schedule unlike the dockworkers; they select their schedules based on seniority, unlike the dockworkers; they are subject to the same experience, licensure, and random-drug-testing requirements, which do not apply to the dockworkers; they are eligible for unique benefits based on their status as full-time employees, including paid vacation time and paid holidays, which are not available to the part-time dockworkers; and, critically, they spend the bulk of their working time driving large commercial vehicles outside the South Brunswick facility, something the dockworkers undisputedly cannot do.<sup>10</sup> In these circumstances, contrary to the Company's claims (Br. 25 n.5, 26), the weight of the evidence plainly supports the Board's finding that the drivers have a sufficiently distinct community of interest to constitute an appropriate unit.

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<sup>10</sup> As the Company acknowledges (Br. 6-7), a dockworker cannot perform the work of a driver, which necessarily involves driving outside the facility. An individual dockworker can only hope to take on driving duties by graduating from the Company's dock-to-driver program, securing a commercial driver's license, and successfully transitioning into a driver position.

There is accordingly no factual basis for the Company's suggestion (Br. 23-26) that a "preponderance of the relevant factors" would have weighed against the drivers-only unit certified by the Board. *See Libbey-Owens-Ford Co. v. NLRB*, 495 F.2d 1195, 1200 (3d Cir. 1974) (noting that absence of some factors in the Board's analysis would not necessarily preclude finding of community of interest). Thus, the Company's emphasis (Br. 23-25) on the preponderance standard discussed in *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980), is to no avail.<sup>11</sup>

### **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. 27-34) that *Specialty Healthcare* imposes a new, heightened burden on employers who wish to

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<sup>11</sup> *Purnell's Pride* involved the question of how to apply the community-of-interest analysis when the Board also considers it appropriate to apply a presumption in favor of a petitioned-for single-plant unit. 609 F.2d at 1160-61; *see also Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 574 n.3 (5th Cir. 1991) (noting the court's view in *Purnell's Pride* that the single-plant presumption only "confuse[s] the inquiry," but observing that "at least five other circuits recognize this rebuttable presumption as valid"). That question is not presented in this case. In any event, in addressing that question in *Purnell's Pride*, the Fifth Circuit did not endorse a one-step community-of-interest analysis as the Company suggests (Br. 23). The court simply held that the Board must explain whether the evidence preponderates in favor of the petitioned-for unit, rather than resting to a great extent on a presumption of unit appropriateness. *Purnell's Pride*, 609 F.2d at 1156, 1160-61. And the court confirmed settled law that once the Board has found an appropriate unit, it is the burden of the employer who challenges that unit to prove as a separate matter that "the designated unit is clearly not appropriate." *Id.* at 1155-56 (internal quotation marks and citation omitted).

challenge a petitioned-for bargaining unit. As noted above pp. 26-27, 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](http://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”).<sup>12</sup>

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<sup>12</sup> *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](http://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

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.

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

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with the petitioned-for employees as to mandate their inclusion in the unit"), available at [www.nlr.gov/case/01-RC-022171](http://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](http://www.nlr.gov/case/32-RC-004603).

adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty Healthcare* []." *Kindred*, 727 F.3d at 563.

**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 (Br. 34-36) 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 choose 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 (Br. 16, 28) 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. *See NLRB v. Sun Drug Co.*, 359 F.2d 408, 413 (3d Cir. 1966) (“Unless there is presented a prima facie case of misconduct, it would be disrespectful of the integrity of the administrative process to probe the mental processes of the Board, and we will accept its opinion as the true expression of the basis of its decision.” (internal quotation marks and citations omitted)).

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 36-43), 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); *see also NLRB v. St. Francis Coll.*, 562 F.2d 246, 249 (3d Cir. 1977) (recognizing the “desires of the affected employees” and “extent of union organization” as factors that the Board may take into account in making unit determinations); *Westinghouse Elec. Corp. v. NLRB*, 236 F.2d 939, 943 (3d Cir. 1956) (“The extent of organization may be a contributing factor in the determination of the unit so long as it is not the controlling factor.”). 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 12-13.)

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 12-13.) 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. *See Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 766 n.5 (3d Cir. 1997) (rejecting employer argument that Board gave controlling weight to extent of organization where the Board “articulated substantial reasons for its determination which were based on legitimate criteria,” dispelling “any appearance of arbitrariness or reliance on impermissible factors”).

In its opening brief (Br. 36-43), 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. 40-43), *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. 15, 27, 40) 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).<sup>13</sup> And when the Board applied a similarly-heightened standard under a

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<sup>13</sup> *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);

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).

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*Academy LLC*, 27-RC-8320, *supra* p. 37 (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.

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National Labor Relations Board

November 2015

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

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Petitioner/Cross-Respondent	*	Nos. 15-2585
	*	15-2712
v.	*	
	*	Board Case No.
FEDEX FREIGHT, INC.	*	22-CA-146653
	*	
Respondent/Cross-Petitioner	*	
	*	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,175 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, D.C.  
this 12th day of November 2015

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	*	

**COMBINED CERTIFICATIONS REGARDING  
BAR MEMBERSHIP, IDENTICAL COMPLIANCE  
OF BRIEFS, AND VIRUS CHECK**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Milakshmi V. Rajapakse certifies that she is a member in good standing of the bar of the District of Columbia Court of Appeals. She is not required to be a member of this Court's bar, as she is representing the federal government in this case.

Pursuant to Third Circuit L.A.R. 31.1(c), the Board certifies that the hard copies of the brief submitted to the Court and counsel are identical to the brief electronically filed on November 12, 2015. That brief, as indicated in the certificate of compliance attached thereto, contained 11,175 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. The Board certifies that it scanned the electronic copy of the brief for viruses using Symantec Endpoint Protection, version 12.1.2015.2015, and no virus was detected.

/s/ Milakshmi V. Rajapakse

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	*	

**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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