Final Brief Oral Argument Not Yet Scheduled

Nos. 15-2442 & 15-4106

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTELLATION BRANDS, U.S. OPERATIONS, INC.,
d/b/a WOODBRIDGE WINERY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

TEAMSTERS LOCAL UNION 601

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

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery ("Constellation") to review a Decision

and Order of the National Labor Relations Board issued on July 29, 2015, and reported at 362 NLRB No. 151. (SA 1-3.)[1] The Board found that Constellation unlawfully refused to bargain with Cannery, Warehousemen, Food Processors, Drivers and Helpers, Local Union No. 601, International Brotherhood of Teamsters ("the Union"), which the Board certified as the bargaining representative of a unit of Constellation's employees. (SA 2.) The Board has cross-applied for enforcement of its Order, which is final with respect to both parties under Section 10(e) and (f) of the National Labor Relations Act, as amended. 29 U.S.C. § 160(e) & (f). The Union has intervened on the Board's behalf.

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act because Constellation transacts business within this Circuit. Constellation filed its petition for review on July 31, 2015, and the Board filed its cross-application on December 11, 2015. Both were timely; the Act places no time limitations on such filings.

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[1] "A." references are to the Joint Appendix, and "SA" references are to the Special Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "C-Br." refers to Constellation's opening brief; "A-Br." refers to the brief of Amicus Curiae Coalition for a Democratic Workplace, et al.

The Board's unfair-labor-practice Order is based in part on findings made in an underlying representation proceeding (Board Case No. 32-RC-135779), in which Constellation contested the Board's certification of the Union as the unit employees' collective-bargaining representative. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record in that proceeding is part of the record before this Court. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) does not give the Court general authority over the representation proceeding, but authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to "enforce[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board." The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair labor practice case. *See, e.g.*, *Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999).

ISSUE STATEMENT

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

STATEMENT OF THE CASE

The Board found that Constellation violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to recognize and bargain with the Union. Constellation took those actions in order to challenge the Union's certification, following a representation election, as the exclusive collective-bargaining representative of the employees in Constellation's outside cellar department. Constellation claims that unit is inappropriate because it does not include other employees at its Acampo winery. The Board's findings in the representation and unfair labor practice proceedings, as well as the Decision and Order under review, are summarized below.

I. The Board's Findings of Fact

A. Introduction: Constellation's Operations

Constellation is a New York corporation engaged in winemaking. This case involves its Acampo, California winery, which spans 257 acres and includes several buildings, some of which are located a quarter-mile apart. (SA 5, 16-18.) In addition to 100 managers and administrators, the winery employs about 200 production and maintenance employees, who are divided into the following departments: outside cellar, barrel, bottling, warehouse, and facility maintenance.[2] (SA 6-9, 12-15; A. 559, 598.) The Board certified a unit consisting of the 46

[2] The parties stipulated that the winery's technical services and winemaking departments should be excluded from the unit. (SA 9.)

employees in the outside cellar department. In so doing, it rejected Constellation's claim that the unit must also include the approximately 23 barrel department employees (comprised of 18 "barrel" employees, 4-6 "cellar services" employees, and one "recycler" employee).[3] (SA 1-2, 7.)

These two departments—outside cellar and barrel—play distinct roles in the process of turning grapes into wine. (SA 16-18, 30-31, 44 & n.20.) Outside cellar employees primarily work outside. During the "crush," they offload grapes upon their arrival, moving them to presses where juice is made, building lines to distribute the juice into extremely large (up to 650,000 gallon) steel tanks, and then mixing in additives to turn the juice into wine per the winemaker's instructions. On other occasions, when the wine-making process begins with wine that has been shipped to the winery, outside cellar employees build lines and use hoses to offload the product by tanker, move it to steel tanks, and blend in additives. (SA 16-17; A. 29, 42-43.)

Once the outside cellar employees have completed their role in the winemaking process, either the barrel or bottling department takes over. If control goes to the barrel department, those employees come to the outside cellar department to transfer the wine using hoses marked "barrel." Outside cellar

[3] In this brief, the term "barrel department employees" refers collectively to the barrel and cellar services employees in that department, while "outside cellar employees" refers to employees in the outside cellar department.

employees do not assist in this process and are explicitly forbidden from touching "barrel" lines. (SA 17; A. 129-30, 210.) The wine then goes to a barrel department area that is located behind closed doors; at that point, outside cellar employees have no further involvement in processing the wine. (SA 17; A. 103-04, 130, 136, 210.) If the wine goes from the outside cellar department to the bottling department, outside cellar employees are responsible for delivering the wine to tanks. Bottling department employees then use bottle-return tanks to move the wine to their department. (SA 17-18.)

B. The Outside Cellar Employees Constitute All the Employees in a Separate Department; They Have Common Supervision, Job Classifications, Functions, Duties, Shifts, and Wage Ranges; and They Are Eligible for the Same Benefits and Subject to the Same Company-Wide Policies

The 46 outside cellar employees constitute all the workers in Constellation's outside cellar department. (SA 32, 44 n.20; A. 78-79, 89-90.) They report directly to shift supervisors in that department, who in turn report to the barrel master (the second-level supervisor) who oversees the outside cellar department. Those supervisors have no responsibility for employees in other departments, and other departments' supervisors have no responsibility for outside cellar employees. (SA 7, 30-31, 33, 35, 42, 44 n.20; A. 78-79, 86-90, 172, 209.) Outside cellar employees receive annual evaluations, which can affect their income, from their departmental supervisors. (SA 30; A. 172, 193-94, 222, 403, 548-56.) They must

call in absences to their direct supervisor. If that supervisor is unavailable, they contact a foreman in their department. (SA 30; A. 172-75, 327, 402-03.)

All outside cellar employees work in one of the department's four job classifications: cellar operator I (the entry level position), cellar operator II, senior cellar operator, and cellar foremen. All entry-level outside cellar department positions require a high school diploma or GED, and up to two years' work experience. (SA 12; A. 563-93.) In order to move to a higher classification in the outside cellar department, the employee must be certified by his departmental shift supervisor. Employees in higher classifications within the outside cellar department help train the department's lower-level employees. (SA 12; A. 90, 115-19.)

Outside cellar employees have common duties and a distinct role in the wine-making process. As noted, they typically work outside, unloading grapes or juice from trucks, moving wine in and out of very large tanks, adding ingredients to the tanks, and cleaning and sterilizing their equipment. (SA 12-13, 44 n.20; A. 29, 42-43.) In performing those functions, they all use lines, hoses, pumps, presses, hoppers, centrifuges, rotovacs, and filtration units. (SA 12; A. 113, 118, 214-17.) They also use the same chemicals and wine-additives, pursuant to the same protocols. (SA 12; A. 456.) The outside cellar department is assigned its

own forklifts and golf carts, which are labeled by department. (SA 29; A. 108-10, 118, 129-30.)

All outside cellar employees are assigned to work one of three shifts: the day shift (7:00 a.m. – 3:30 p.m.), swing shift (3:00 – 11:30 p.m.), or graveyard shift (11:00 p.m. – 7:30 a.m.). If an outside cellar employee calls in sick, another employee from his department will replace him. Although they work in pairs, they are never paired with employees from outside their department. (SA 12-13, 23; A. 125-27.)

Outside cellar employees begin each shift at "Taco Bell," a building in the center of the winery, with a group exercise routine that is not used in other departments. They receive their work orders inside Taco Bell; employees of other departments typically receive their work orders elsewhere. (SA 12-13, 19, 21; A. 100, 124-26, 136, 213.) Weekly departmental safety meetings do not include employees from outside their department. (SA 19; A. 197-99.)

Outside cellar employees have common wage ranges, holidays, benefits, and other terms and conditions of employment. (SA 26, 33, 44 n.20.) All outside cellar employee wages are set within the same Constellation "H-Band" compensation. (SA 26; A. 700, 859-60.) Outside cellar employees are required to park in the areas assigned to their department; employees of other departments are assigned to park elsewhere. (SA 22-23; A. 96-97, 123, 447-53.) Outside cellar

employees are subject to the same general company policies and rules and wear the same safety attire. (SA 25-26, 29; A. 634, 702-07, 742.)

Outside cellar employees have little contact or interchange with employees from the barrel department or any other department. They are not assigned to work in any other department, and employees in other departments are not assigned to work in the outside cellar department. (SA 13, 19; A. 104, 125-27, 129-30, 191, 214-17, 222.) Outside cellar employees have been told by their direct supervisors to "stay away" from other departments, and it is common knowledge that company policy precludes employees from mingling with other departments. (SA 21; A. 157-59.) Outside cellar employees have limited, occasional contact with other employees during annual or one-time interdepartmental trainings on matters such as operating forklifts; and during optional events such as committee meetings, holiday gatherings, and other company celebrations. (SA 23-24; A. 264, 301.)

C. The Barrel Department Employees Report to Different Supervisors, Have Different Roles in the Wine-Making Process, and Do Not Have Regular Contact or Interchange with Outside Cellar Department Employees

The approximately 23 barrel and cellar services employees are housed together in the barrel department. They report to front-line barrel department supervisors who give them yearly evaluations. The barrel department also has distinct second-line supervision through its own cellar master. Barrel employees must call in absences to (and request vacation from) their direct supervisor in the

barrel department. (SA 7, 13, 30; A. 78-79, 84-90, 100.) They receive training from their own department. (A. 110, 114-16, 192, 559-60.)

Barrel employees, unlike outside cellar employees, do not work night shifts. Also, barrel employees' hours on day and swing shifts differ slightly from those of outside cellar employees. (SA 27; A. 349-51.) In contrast to outside cellar employees, barrel employees start their shifts and receive orders in the barrel warehouse. (SA 13; A. 100, 126.)

Although barrel and outside cellar employees have similar general job descriptions and wage ranges (SA 9-10, 13, 26; A. 563-93), they typically work in separate locations performing distinct roles in the wine-making process. Barrel employees perform the exclusive function of barreling age-specific wine. In so doing, they primarily work with 58-gallon wooden barrels in the indoor barrel area. (SA 13; A. 29, 42-43, 53-54, 66, 104.) Outside cellar employees do not touch wine product or equipment, such as lines and hoses, when it is under the control of barrel employees, and they do not enter the barrel building to work. (SA 13, 16-17; A. 104, 130-40.)[4]

The approximately six cellar services employees, who are supervised by the barrel department, also have a distinct function. They are essentially the winery's "house cleaning" staff. (A. 78, 98-103.) They spend most of the day outside on

[4] The one recycler employee, who is also within the barrel department, is responsible for recycling throughout the facility. (SA 13.)

man lifts, power washing and prepping tanks. They also perform certain functions not typically handled by other employees, such as pressure washing the winery's tank farms, and sanitizing hoppers prior to the crush. They also clean and move wine daily, and fill and clean tanks if they spill over, and support the winery in any outdoor activity. Unlike outside cellar employees, cellar services employees start each day in the cellar break room, where they receive instructions from barrel department supervisors. (SA 13-14; A. 98-103.)

There is limited contact between outside cellar employees and barrel department employees. (SA 19-23; A. 100-01, 104, 123, 126, 136, 157-59.) They begin their shifts, take their breaks, park their cars, and work in different locations, and company policy bars them from mingling. (SA 19, 21-22; A. 100, 123, 126, 157-59.) Even when outside cellar employees work outdoors on tanks adjacent to the barrel area, they do not interact with barrel employees, who typically work inside the barrel building. (SA 19; A. 104, 130-40.) Interdepartmental contact typically involves annual or once-per-career training events, voluntary committee work, or company holiday activities. (SA 23; *see* p. 9.)

There is little interchange between outside cellar and barrel department employees. (SA 24-25.) From mid-2013 through the fall of 2014, there were no transfers between those two groups. (SA 24; A. 192-93.) Older instances were few and far between and have not been repeated. In 2005, for example, when

Constellation downsized the barrel department, the four affected employees transferred to the outside cellar department, and returned to their original department in 2009 when work picked up again. (SA 24-25; A. 284-85.) Likewise, there is little or no short-term interchange between the outside cellar and barrel departments. In 2009 or 2010, a single outside cellar employee stirred barrels for half a day, and in about 2013, he performed inventory in the barrel warehouse for 10-15 days. There are no other recent instances of such interchange. (SA 24-25 & nn.5, 7; A. 207, 218-21.)

D. All Employees Are Eligible for the Same Benefits, Subject to the Same Company-Wide Policies, Wear Similar Safety Attire, and Are Evaluated Under the Same General Criteria

All winery employees are subject to the same employee handbook. They wear the same or similar safety attire. (SA 25; A. 634.) They are evaluated by their respective department supervisors under the same general criteria, which may be applied to account for differences in work done in various departments. (SA 30-31; A. 170, 548-56.) They have common training on matters like forklift operation. (SA 23; A. 59, 151-56, 162-65.) All employees have the same holidays and are eligible for the same benefits. (SA 26; A. 242-47, 707.)

II. The Board Proceedings

A. The Representation Case

On September 2, 2014, the Union filed a petition with the Board seeking a representation election among all outside cellar employees at Constellation's Acampo winery. (SA 1-2, 5, 45.) Following a hearing, the Regional Director issued a Decision and Direction of Election finding that the petitioned-for employees constitute an appropriate unit for collective bargaining, and directing an election. (SA 6, 45.) The Regional Director applied the standard clarified 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) ("*Specialty*"), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) ("*Kindred*"). (SA 31-32.) As required by *Specialty*, the Regional Director first applied the traditional community-of-interest test to determine whether the petitioned-for unit is "appropriate." (SA 31-34.) The Regional Director determined that the outside cellar workers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (*Id*.)

The Regional Director then addressed Constellation's contention that the smallest appropriate unit must include a wall-to-wall unit of all Acampo winery employees, or alternatively all outside cellar, barrel, and cellar services

employees.[5] (SA 34-44 & n.20.) The Regional Director explained that *Specialty* requires an employer to demonstrate that the excluded employees share an "overwhelming community of interest" with the employees in the petitioned-for unit, such that there is no legitimate basis upon which to exclude them. (SA 31-35.) Applying that test, the Regional Director found that Constellation failed to show the other winery employees share an overwhelming community of interest with the outside cellar department employees. (SA 35-44 & n.20.)

Constellation requested review of the Regional Director's decision, again contending that the unit must include all Acampo winery employees, or alternatively all outside cellar, barrel, and cellar services employees. On February 26, 2015, the Board (Chairmen Pearce and Members Hirozawa and McFerran) denied the request, finding Constellation had raised no substantial issues warranting review. (SA 4.)

Thereafter, the Board conducted a secret-ballot election, and the outside cellar department employees voted for union representation. The Board certified the Union as the exclusive collective-bargaining representative of those employees.

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[5] In its opening brief, Constellation no longer argues for a wall-to-wall unit. It has therefore waived any such claim. *See Thomas v. Roach*, 165 F.3d 137, 145 (2d Cir. 1999) (claims not raised in opening brief are waived); *Dunkin' Donuts Mid–Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (enforcing rule that "argument portion of an appellant's opening brief 'must contain' the 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies'" (quoting Fed.R.App.P. 28(a)(9)(A))).

B. The Unfair Labor Practice Case

Following certification, Constellation contested the validity of the election by refusing to comply with the Union's bargaining demand. The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint alleging that Constellation's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The General Counsel subsequently filed a motion for summary judgment. Constellation opposed, again claiming that all winery employees, or at least all outside cellar, barrel and cellar services employees at the winery, must be included in the unit. (SA 1.)

III. The Board's Conclusions and Order

On July 29, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued a Decision and Order (362 NLRB No. 151) granting the General Counsel's motion for summary judgment and finding that Constellation violated the Act by refusing to bargain with the Union. (SA 2.) The Board found that all representation issues raised by Constellation in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding. (SA 1.)

The Board's Order requires Constellation to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by

Section 7 of the Act, 29 U.S.C. § 157. (SA 2.) Affirmatively, the Order directs Constellation, on request, to bargain with the Union as the representative of its outside cellar department employees. (*Id*.) The Order further requires Constellation to post a remedial notice. (*Id*.)

SUMMARY OF ARGUMENT

The employees in Constellation's outside cellar department chose union representation in a Board-conducted, secret-ballot election. Constellation has admittedly refused to bargain, claiming it has no obligation to do so because the unit must also include the barrel department employees at its Acampo winery. In rejecting those claims, the Board reasonably applied the well-accepted community-of-interest test to determine that the outside cellar department workers constitute *an* appropriate unit for collective bargaining.

After making that finding, the Board found that Constellation failed to meet its burden of showing that the barrel department employees share an overwhelming community of interest with the outside cellar department employees, such that they must be included in order to make an appropriate unit. The Board's application of that standard, as clarified in *Specialty*, comports with the Board's prior jurisprudence. Indeed, two circuit courts recently approved the standard: the Sixth Circuit in *Kindred*, and the Eighth Circuit in *FedEx Freight, Inc. v. NLRB*, No. 15-1848, __ F.3d __, 2016 WL 859971, *4-8 (8th Cir. Mar. 7, 2016) ("*FedEx*").

Moreover, the standard is based on a reasonably defensible construction of the Act, which gives the Board broad discretion in making unit determinations.

Constellation objects to the *Specialty* test, raising many of the same arguments rejected by the Sixth Circuit in *Kindred* and the Eighth Circuit in *FedEx*. For example, Constellation contends incorrectly that the Board has attempted to hide its announcement of a wholly new standard. As the Sixth and Eighth Circuits explained, the Board did not create a new test, but further elucidated its longstanding test, which focuses on similarities and differences among groups of employees. Relying on terminology different from the Board's, Constellation also argues that the outside cellar employees and barrel department employees have "indistinguishable" interests. But this contention is at odds with the substantial record evidence showing that the outside cellar employees are housed in their own department, have distinct supervision and job functions, and have little contact and virtually no interchange with barrel department employees.

Additionally, Constellation erroneously argues that the *Specialty* standard improperly gives controlling weight to "the extent of unionization"—that is, the unit of employees the union campaigned and petitioned to represent. It is not improper for the Board to first examine the proposed unit, as long as the Board scrutinizes that unit using the multifactor community-of-interest test, as it did here. Nor did the Board infringe on the rights of employees to refrain from engaging in

union activity, as Constellation and Amici contend. The employees in other departments retain their statutory rights under the Act whether or not their colleagues unionize. Finally, Constellation's and Amici's speculation about the size of units that might be certified under the Board's standard should be rejected. Size is irrelevant so long as the Board certifies a unit that is appropriate under Section 9 of the Act.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE UNIT OF OUTSIDE CELLAR DEPARTMENT EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING, AND THAT THEREFORE CONSTELLATION VIOLATED THE ACT BY ADMITTEDLY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of [its] employees." 29 U.S.C. § 158(a)(5).[6] Constellation does not dispute (C-Br. 19) that it refused to bargain with the Union. Rather, it objects to the standard that the Board applied in certifying a unit of all employees in Constellation's outside cellar department, and contends that the barrel and cellar services employees in its barrel department must be also included in the unit. Because the Board's standard is reasonable and its findings are fully supported by the record evidence, Constellation violated the Act by refusing to bargain with the Union. *See HeartShare*, 108 F.3d at 470-72 (enforcing order where Board did not exceed its "broad discretion" in determining the appropriate bargaining unit).

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[6] An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their organizational] rights." 29 U.S.C. § 158(a)(1); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *NLRB v. HeartShare Human Servs.*, 108 F.3d 467, 470 (2d Cir. 1997).

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

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Construing that section, the Supreme Court has stated that the determination of an appropriate unit "lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed." *South Prairie Constr. Co. v. Operating Eng'rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quote marks and citation omitted); *accord NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 191 F.3d 316, 322 (2d Cir. 1999). Indeed, this Court has repeatedly stated that its review of the Board's determination of the appropriate bargaining unit is narrow and limited to determining whether the decision is "arbitrary and unreasonable," or lacking in evidentiary support. *NLRB v. Onyx Mgmt. Group, LLC*, 614 F. App'x 40, 41 (2d Cir. 2015) (citing *Staten Island. Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994)); *accord HeartShare*, 108 F.3d at 471; *Wheeler-Van Label Co. v. NLRB*, 408 F.2d 613, 616 (2d Cir. 1969).

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

In deciding whether a group of employees constitutes an appropriate unit for collective bargaining, the Board focuses its inquiry on whether the employees share a "community of interest." *Specialty*, 2011 WL 3916077, at *12. This analysis considers such factors as similarity in skills, interests, duties, and working conditions, degree of interchange and contact among employees, the employer's organizational and supervisory structure, and bargaining history. *HeartShare*, 108 F.3d at 471; *Coca-Cola Bottling Co*, 191 F.3d at 322. Moreover, not all of those factors need be explicitly assessed by the Board in a given case. Rather, "a strong showing on just a few of the factors may suffice to sustain the Board's decision, which is entitled to considerable deference on such matters." *HeartShare*, 108 F.3d at 472; *accord Coca-Cola Bottling Co.*, 191 F.3d at 322. Additionally, the Board is permitted to "consider[] extent of organization as one factor, though not the controlling factor in its unit determination." *NLRB v. Metro Life Ins. Co.*, 380 U.S. 438, 442 (1965); *accord MPC Restaurant Corp. v. NLRB*, 481 F.2d 75, 78 n.1 (2d Cir. 1973).

The Board's decision must be upheld as long as it approves *an* appropriate bargaining unit. The Board has long recognized that there is nothing in the Act's language requiring "that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate.'" *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950); *accord Staten Island Univ. Hosp.*, 24 F.3d at 455 (the Board is required to select only "*an* appropriate unit, not the *most* appropriate unit") (emphasis in original); *NLRB v. Hudson River Aggregates, Inc.*, 639 F. 2d 865, 871 (2d Cir. 1981). The Supreme Court has agreed, stating that "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *Am. Hosp. Ass'n*, 499 U.S. 606, 610 (1991). The focus of the Board's determination remains the unit for which the petition has been filed because, under Section 9(a) of the Act, "the initiative in selecting an appropriate unit resides with the employees." *Id.* As the Board has explained, "[a] union's petition, which must according to the statutory scheme and the Board's Rules and Regulations be for a particular unit, necessarily drives the Board's unit determination." *Overnite Transp. Co.*, 325 NLRB 612, 614 (1998).

This Court has recognized that, in many cases, the Board is faced with alternative appropriate units. *HeartShare*, 108 F.3d at 470-71; *Coca-Cola Bottling Co.*, 191 F.3d at 322; *Hudson River*, 639 F.2d at 871. Thus, the "choice among

appropriate units is within the discretion of the Board." *NLRB v. J.C. Penney, Co., Inc.*, 559 F.2d 373, 375 (5th Cir. 1977). Accordingly, an employer challenging the Board's unit determination must do more than establish that another unit would be appropriate, or even more appropriate; it must "show that the Board's unit is clearly inappropriate." *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (citation omitted); *accord FedEx*, 2016 WL 859971, *6; *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534 (4th Cir. 1999); *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991); *NLRB v. Carson Cable TV*, 795 F.2d 879, 887 (9th Cir. 1986). "[A] unit would be truly inappropriate if, for example, there were no legitimate basis upon which to exclude certain employees from it." *Kindred*, 727 F.3d at 562 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)); *accord Specialty*, 2011 WL 3916077, at *13-15 (2011). If the objecting party shows that excluded employees "share an overwhelming community of interest" with the petitioned-for employees, then there is no legitimate basis to exclude them. *Blue Man Vegas*, 529 F.3d at 421; *accord Kindred*, 727 F.3d at 562.

The Board's interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*. 467 U.S. 837, 843 (1984). *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts,

under *Chevron*, must defer to the Board's reasonable interpretation of the Act. Indeed, the Court must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted). Accordingly, the Court will not disturb the Board's reading of the Act if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *accord Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008); *Williams v. NLRB*, 105 F.3d 787, 790 (2d Cir. 1996). Further, the Board's findings of fact are "conclusive" if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Quinnipiac College*, 256 F.3d 68, 74 (2d Cir. 2001).

B. The Board Reasonably Determined that a Unit Limited to All Employees in Constellation's Outside Cellar Department Constitutes an Appropriate Unit for Collective Bargaining

The Board reasonably applied its longstanding, judicially approved, community-of-interest test here to find that the petitioned-for unit of outside cellar employees is appropriate for collective bargaining. Further, the Board—applying the standard clarified in *Specialty*, and approved in *Kindred* and *FedEx*, for when an employer claims additional employees must be included—found that Constellation failed to show that the barrel and cellar services employees shared an

overwhelming community of interest with the outside cellar employees such that the unit would be inappropriate if they were excluded.

1. The Board properly applied the traditional community-of-interest factors to find an appropriate unit

The record evidence fully supports the Board's finding (SA 32-34; *see* pp. 6-7, above) that the proposed unit of all 46 outside cellar department employees is an appropriate unit because those employees "are readily identifiable as a separate group" and share a community of interest under the Board's traditional factors. It is plain that those employees are readily identifiable as a group. They constitute all the non-supervisory employees in the outside cellar department: operator 1, operator II, senior operator, and foreman. As such, the petitioned-for unit is coextensive with a departmental line drawn by Constellation.

As the Board further found (*see* pp. 6-7), the outside cellar employees share a community of interest. Thus, in addition to constituting all the workers in a separate department, they have common first-line supervision, as they are all directly supervised and evaluated by cellar department shift supervisors. They also have common second-level supervision through their cellar master, who oversees the outside cellar department.

Moreover, their work has a shared purpose and is functionally integrated because they all work outside, primarily moving wine to and from large steel tanks, and adding ingredients to the wine pursuant to winemakers' instructions. This

integration is exemplified by the fact that outside cellar employees work together in pairs, but are never assigned to work with employees in the barrel or any other department. In addition, outside cellar employees begin each shift at Taco Bell with a group exercise routine that is not used in other departments, and they alone receive their orders at that location. Outside cellar employees also regularly interchange jobs; for example, when an outside cellar employee calls in sick or goes on vacation, he will be replaced by another department employee. Further, each outside cellar employee must demonstrate competency in that department's lower-level job classifications before moving up to a higher classification within the department. They also help each other meet that goal, as senior outside cellar employees provide training to more junior ones. *See* pp. 7-8.

Further, outside cellar employees' contact with barrel department employees is generally limited to annual or once-a-career trainings, or optional activities such as such interdepartmental committees or company celebrations. Any other contact is largely incidental, as they are not assigned to work in other departments, and Constellation's outside cellar supervisors have directed outside cellar employees not to mingle with other employees. *See* pp. 8-9, 11.

Additionally, there were no permanent transfers into or out of the outside cellar department from mid-2013 through the fall of 2014, when the hearing in this case was held. The only other instance of a barrel-outside cellar transfer occurred

a decade ago and involved unusual circumstances that have not been repeated. Thus, in 2005, when Constellation downsized its barrel department, the four affected employees moved to the outside cellar department, then back to barrel when business picked up in 2009. (SA 25; A. 265, 284-85.) Moreover, the scant evidence of temporary interchange between the outside cellar and barrel departments was limited to one outside cellar employee working briefly in the barrel department several years ago. There is no evidence this incident was repeated. (SA 24-25; A. 207, 218-21; *see* p. 12, above.) Such limited interchange does not render a separate unit inappropriate. *See HeartShare*, 108 F.3d at 471 (lack of frequent contact and interchange with other employees may support separate unit), and cases cited at pp. 39-41.

Further, as to compensation, outside cellar employees are all paid on a similar basis, as they receive an hourly wage rate set within Constellation's H-compensation band. Additionally, they work common shifts, including a night shift that does not exist in the barrel department, receive the same benefits, are subject to the same employer policies, and are assigned to parking spaces within the lots designated for outside cellar employees. *See* pp. 8-10.

These considerations support the Board's finding that the outside cellar employees share a community of interest and therefore constitute an appropriate unit. *See, e.g.*, *HeartShare*, 108 F.3d at 471 (common work locations, supervision,

similarity in benefits, pay and job functions, common fit within employer's administrative structure, and limited contact and interchange with other employees may demonstrate that petitioned-for employees constitute an appropriate bargaining unit).

Constellation provides no grounds for overturning this well-supported finding. It does not dispute (C-Br. 25-28), for example, that outside cellar employees share common supervision, evaluation criteria, wages, benefits, job classifications, skills, and training requirements, and are subject to the same work rules and attire requirements. Nor does it deny (*see* C-Br. 25, 31-32) that those unit employees work together to perform the same tasks, during common shifts at common locations, on a distinct portion of the winemaking process. As shown, these considerations support the Board's finding that the outside cellar employees constitute an appropriate unit.

Constellation errs in contending (C-Br. 26, 28, 35-38) that it has no separate outside cellar department, and that there is no administrative line separating outside cellar employees from barrel and cellar services employees. As shown below, this claim is contrary to Constellation's daily operational realities, its official documents, and the testimony of its outside cellar employees, which establish the existence of the departmental lines found by the Board.

To begin, as a matter of operational reality, the outside cellar employees function as a different department. As discussed, outside cellar and barrel employees have separate immediate and intermediate supervision. Outside cellar employees also constitute a tightly integrated group that is distinct from the barrel employees. Thus, as the outside cellar employees testified without contradiction (*see* pp. 8-9; A. 125-27, 129-40, 191), they work together in pairs, but never with barrel employees. Indeed, outside cellar employees do not even enter the barrel building where barrel employees do most of their work. When an outside cellar employee calls in sick, he is replaced by another outside cellar employee, not a barrel department employee. Senior outside cellar employees train junior ones, but not barrel department employees. (A. 115-19.) As shown (pp. 5-12), the two groups have distinct roles in the winemaking process, and little interaction or interchange. Indeed, Constellation keeps the two groups separate, as outside cellar employees are instructed not to mingle with other employees (*see* p. 9; A. 157-59) or touch any line or equipment marked "barrel." (A. 130-40.) Consistent with these operational realities, Constellation frequently refers to its separate barrel and cellar departments in official documents, such as its "Security and Parking Procedures,"[7] training records,[8] system descriptions,[9] job postings,[10] and committee minutes.[11]

[7] Constellation states in this document that employees will park according to "the

It follows that Constellation errs in claiming (Br. 37-38) that the Board's decision contravenes precedent emphasizing the need to take "cognizance of the administrative set up of the employer" (citation omitted). Rather, as shown, the Board, consistent with that precedent, acknowledged the lines Constellation had drawn between its outside cellar department and barrel department employees. *See HeartShare*, 108 F.3d at 471 (common fit within employer's administrative and supervisory structure may demonstrate that petitioned-for employees constitute an appropriate bargaining unit), and cases cited at pp. 21, 27, 38, 48. Thus, Constellation gains no ground in citing cases where, in contrast, the petitioned-for unit was found inappropriate because it did not track any "administrative lines

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department [they] work in," lists "Barrel" and "Cellar" as departments, and directs "Cellar" department employees to park in lot B, and "Barrel" department employees to park in lot A. (A. 447-53.)

[8] Constellation keeps separate "Barrel Department Training Records." (A. 559-60.) Further, its "2014 Safety Training Matrix" lists the training that each "department" must provide, including "No. 7 Cellar" and "No. 8 Barrel," and provides separate training matrices for the outside cellar department (pp. 10-11) and the barrel department (pp. 12-13). (A. 772-73, 782-85.)

[9] For example, a manufacturing system excerpt designates the "Responsible Department" for certain work tasks, including "Cellar Operators" and "Barrel Department Operators." (A. 286, 765-71.)

[10] For example, a Constellation job posting from 2014 is for a "Cellar Operator I (Barrel Department)" position, reporting to barrel department supervisor Jeff Moeckly. (A. 763-64.)

[11] Constellation's "Safety Committee Minutes" from 2012 through 2014 contain numerous attendance sheets which separately list the "department" of each committee member, including Jeff Moeckly ("barrel" department) and Lynn Jobe ("cellar" department). (A. 794, 797, 808, 815.)

drawn by the Employer." *Neiman-Marcus Grp.*, Inc., 361 NLRB No. 11 (2014), 2014 WL 3724884, at *4; *see Odwalla, Inc.* 357 NLRB No. 132 (2011) (same).

In sum, the foregoing evidence supports the Board's finding that the 46 outside cellar employees are organized into, and function as, a separate department, and are therefore readily identifiable as a group for that additional reason. As those employees' interests are mostly identical, the Board, applying the traditional community-of-interest factors, had little difficulty concluding that this distinct group shares a community of interest and is therefore an appropriate unit for collective bargaining.

2. The Board acted within its discretion in applying the overwhelming community-of-interest test to determine that the barrel and cellar services employees do not have to be included in the outside cellar employees' unit

It is well settled, as discussed above, that the Act requires only *an* appropriate unit. *Am. Hosp. Ass'n*, 499 U.S. at 610. As the Board stated in *Specialty*, "it cannot be that the mere fact that [the petitioned-for unit of employees] also share a community of interest with additional employees [thereby] renders the smaller unit inappropriate." 2011 WL 3916077, at *15. Because a unit need only be *an* appropriate unit, it "follows inescapably" that simply demonstrating that another unit would also be appropriate "is not sufficient to demonstrate that the proposed unit is inappropriate." *Id.*; *accord Hudson River*, 639 F.2d at 871; *Wheeler-Van Label Co.*, 408 F.2d at 617; *MPC Restaurant Corp.*

481 F.2d at 78. As the D.C. Circuit has held, 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*, 529 F.3d at 421.

Here, the Board applied the standard, clarified in *Specialty*, and approved by the Sixth and Eighth Circuits, for determining the showing that is required when an employer seeks to expand a unit composed of a readily identifiable group that shares a community of interest under the traditional test. Under that standard, an employer seeking to expand the unit must demonstrate that employees in the larger unit "share an overwhelming community of interest with those in the petitioned for unit." *Specialty*, 2011 WL 3916077, at *15. In approving that standard, the Sixth and Eighth Circuits 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.[12] *Kindred*, 727 F.3d at 562-63; *FedEx*, 2016 WL 859971, *5.

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[12] *See, e.g.*, *Wheeling Island Gaming, Inc.*, 355 NLRB 637, 637 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");

As the Sixth Circuit explained, the overwhelming community of interest standard "is not new" to unit determinations. *Kindred*, 727 F.3d at 561; *accord FedEx*, 2016 WL 859971, *5. The Board has consistently applied it. *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.nlrb.gov/case/27-RC-008320; *accord Laneco Constr. Sys., Inc.*, 339 NLRB 1048, 1050 (2003) (rejecting argument that additional employees "shared such an overwhelming community of interest[] 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").[13]

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) (evidence did not show "such a substantial community of interest exists" between the two groups "so as to require their inclusion in the same unit"); *J.C. Penney Co.*, 328 NLRB 766, 766 (1999) (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 failed to show "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").

[13] *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

Moreover, prior to *Kindred*, the D.C. Circuit had also approved the test in *Blue Man Vegas v. NLRB*, 529 F.3d 417, 419 (D.C. Cir. 2008). There, a union petitioned to represent a unit of stage crew members, but the employer wanted to add the musical instrument technicians. The Board found that the stage crew members constituted an appropriate unit and that the technicians did not share an overwhelming community of interest with the stage crew. *Id*. at 423. The court recognized that an employer must demonstrate that an otherwise appropriate unit is "truly inappropriate," which it can do by showing that "there is no legitimate basis on which to exclude certain employees" because they "share an overwhelming community of interest" with the included employees. *Id*. at 421. Specifically, the court found that the employer failed to meet its burden because the technicians' working conditions, including supervision, form of payment, and sign-in sheets, differed from those shared by the stage crew. *Id*. at 424.

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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.nlrb.gov/case/13-RC-021965; *Stanley Assocs*., 01-RC-022171, Decision and Direction of Election, at 14 (2008) ("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.nlrb.gov/case/01-RC-022171; *Breuners Home Furnishings Corp*., 32-RC-4603, Decision and Direction of Election, at 9 (1999) ("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.nlrb.gov/case/32-RC-004603.

In *Specialty*, the Board and the Sixth Circuit found *Blue Man Vegas* to be persuasive and consistent with Board law. *See Specialty*, 2011 WL 3916077, at *16; *Kindred*, 727 F.3d at 562-65. Accordingly, as the Sixth Circuit aptly stated: "Because the overwhelming community-of-interest standard is based on some of the Board's prior precedents, has been approved by the District of Columbia Circuit, and because the Board did cogently explain its reasons for adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty*[]." *Kindred*, 727 F.3d at 563; *accord FedEx*, 2016 WL 859971, *4-8 (affirming the standard because it is "not a material departure from precedent and is consistent with the [Act's] requirements").

Moreover, other courts, consistent with the Sixth, Eighth and D.C. Circuits, have applied a similar standard, holding an employer seeking a larger unit to a higher burden when the petitioned-for unit shares a community of interest. Thus, in *Electronic Data Systems Corporation v. NLRB*, for example, a union petitioned to represent the 42 workers in the employer's print shop. 938 F.2d 570, 571-72 (5th Cir. 1991). As Constellation did here, the employer insisted that additional employees ought to be included in the unit. The court rejected that argument, holding that even assuming the larger unit sought by the employer shared a community of interest and was, therefore, also "an appropriate unit," that alone did not meet the employer's burden of establishing "that the designated unit is clearly

not appropriate." *Id.* at 574.[14] *Cf. HeartShare*, 108 F.3d at 471-72 (that the larger unit urged by employer may also share a community of interest does not show that the smaller unit approved by Board was inappropriate).

3. Constellation has not shown that the barrel department employees share an overwhelming community of interest with the outside cellar employees

Consistent with the precedent discussed immediately above, the Board reasonably applied the overwhelming community-of-interest standard, and concluded that Constellation failed to meet its burden of showing that the outside cellar employees share such a strong community of interest with the barrel and cellar services employees that excluding the additional employees would render the petitioned-for unit inappropriate. (SA 34-44 & n.20.)

Constellation contends (C-Br. 23, 27, 40) that the Board arbitrarily broke up an outside cellar-barrel workforce with "indistinguishable" interests, and addressed the outside cellar employees in isolation without adequately comparing them to other employees. That contention, however, is belied by the Board's careful analysis of the two groups' similarities and differences (SA 34-44 & n.20; *see* pp.

[14] *See also Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) ("[I]t is not enough for the employer to suggest a more suitable unit; it must 'show that the Board's unit is clearly inappropriate.'"); *Sandvik Rock Tools, Inc. v. NLRB*, 194 F.3d 531, 534, 538 (4th Cir. 1999) (employer challenging a unit determination must show the unit certified by the Board is "utterly inappropriate"); *accord NLRB v. Carson Cable TV*, 795 F.2d 879, 887 (9th Cir. 1986).

25-28, above), and the record evidence (*see* pp. 5-12) showing important distinctions between them. Constellation argues (C-Br. 23-34) that the differences are insignificant, and complains that the Board downplayed the similarities, like common employment policies. Even if Constellation's claims were viewed in the light most favorable to it, they assert only that a unit consisting of all outside cellar, barrel, and cellar services employees might be a *more* appropriate unit. As this Court and its sister circuits have explained, because the Board is required to select only "*an* appropriate unit, not the *most* appropriate unit," *Staten Island Univ. Hosp.*, 24 F.3d at 455 (emphasis in original), the employer must show, not that another unit is more appropriate, but that the designated unit is "clearly not appropriate." *Elec. Data Sys.*, 938 F.2d at 573-74; *see also* cases cited at p. 23.

The Board carefully compared the outside cellar employees with barrel and cellar services employees (SA 9-31) and reasonably found (SA 34-44 & n.20) clear distinctions between the two groups. Thus, as shown (SA 44 n.20; *see* pp. 6-12, above), outside cellar employees work in a separate department,[15] have separate immediate and intermediate supervision, work in different locations, perform a distinct function in the winemaking process, and do not have significant regular contact or interchange with the barrel department employees. Taken together, those facts show that the petitioned-for employees do not share an overwhelming

[15] Constellation's claim (Br. 26, 35-38) that there is no separate outside cellar department fails for the reasons discussed above (pp. 28-30.)

community of interest with the barrel department employees. *See DTG Operations, Inc.*, 357 NLRB No. 175 (2011), 2011 WL 7052275, at *7-9 (finding no overwhelming community of interest where two groups of employees work separately from each other and perform distinct tasks); *cf. Neiman Marcus Group*, 361 NLRB No. 11 (2014), 2014 WL 3724884, at *4 (proposed unit inappropriate where, unlike here, it did not track any departmental line drawn by employer, and employees to be included lacked common supervision). Simply put, the significant differences noted by the Board refute Constellation's assertion (C-Br. 23) that the interests of the outside cellar employees and barrel department employees are "indistinguishable."

Nor did the Board fail to weigh those important differences against the two groups' similarities, as Constellation wrongly claims (C-Br. 23, 28-32). Rather, the Board acknowledged (SA 7, 35, 44 n.20), for example, that both groups are commonly supervised at the highest level. As the Board explained (SA 30-31, 35), however, such common upper-level supervision is outweighed by the key differences shown here, particularly given the absence of evidence that high-level managers regularly interact with the employees at issue. *See HeartShare*, 108 F.3d at 471 (existence of "some centralized administration" at higher levels offset by independent direct supervision of unit); *Staten Island Univ. Hosp.*, 24 F.3d at 455 (centralized high-level supervision offset by close unit-specific supervision and

lack of regular contact between higher-level administrators and unit employees); *Neiman Marcus*, 2014 WL 3724884, at *4 (common upper-level management outweighed by distinct immediate supervision and other differences). Likewise, Constellation's claim (C-Br. 31, 33) that outside cellar and barrel employees sometimes work "in the same general area" carries little weight given that the two groups are not assigned to work together and perform different functions. Indeed, even when outside cellar employees work in an area adjacent to the barrel building (where barrel employees do most of their work), they do not enter that building to perform their functions. And, outside cellar employees are directed to steer clear of any lines or equipment marked as being used by the barrel department. Thus, contrary to Constellation's claim, the Board did not merely "tally the factors" favoring a separate outside cellar unit without explaining each factor's relative "weight or significance." (C-Br. 28-32.)

Constellation relies heavily on its claim (C-Br. 27, 34) that outside cellar and barrel department employees are "interchangeable" and have the same "opportunities for interaction and collaboration." As shown (pp. 9-12, 25-27, 37), however, the Board reasonably found (SA 19-25) little or no evidence of significant contact or interchange between the outside cellar employees and barrel

and cellar services employees.[16] *See HeartShare*, 108 F.3d at 471 (lack of frequent contact and interchange with other employees may support separate unit); *accord Coca-Cola Bottling Co.*, 191 F.3d at 322; *DTG Operations*, 2011 WL 7052275, at *8. Thus, cellar employees are not assigned to work in the barrel department, and other employees (including barrel and cellar services) are not assigned to work in the outside cellar department. Further, as noted, Constellation discourages cellar employees from mingling with the employees of other departments.

The Board also fully considered (SA 21-24) the possibility of some informal contact between outside cellar employees and barrel and cellar services employees, but found no record evidence as to the extent or frequency of such interactions. Thus, as the Board noted (SA 23), interdepartmental trainings are infrequent—occurring either annually or once in an employee's tenure—and the voluntary committees and holiday gatherings do not involve employees performing their main job functions.

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[16] For example, Constellation relies (C-Br. 35 n.8) on General Manager Schulz's testimony (A. 71, 100-04, 235, 372) that outside cellar and barrel employees work "hand in hand" to move wine from barrels to larger tanks, while outside cellar and cellar services employees "work side by side" to fill tanks and clean hoppers. However, that testimony failed to specify the extent and frequency of this alleged collaboration. (*See, e.g.*, A. 100-01, 103-05.) Moreover, it conflicts with other evidence (*see* pp. 8-9; A. 104, 125-27, 130-40, 157-59, 222.) that outside cellar employees are not assigned to work with barrel and cellar services employees, and are discouraged from interacting with other department's employees. In any event, a separate unit is not rendered inappropriate merely because its employees have some interaction with other employees.

Nor did the Board fail to adequately consider the evidence of permanent employee interchange as Constellation wrongly suggests (C-Br. 34). Rather, the Board fully addressed the issue and explained (SA 24-25) that there was no evidence of any transfer between the outside cellar and barrel departments in the 1.5-year period preceding the hearing. Nor does an unusual and decade-old occurrence, when four downsized barrel employees transferred to the outside cellar department in 2005, and then returned to barrel in 2009 when work picked up, establish significant interchange. (*See* SA 24; A. 284-85.) This is particularly so given the relatively large size of the 46-employee unit, and the absence of any recent transfers. Such infrequent interchange does not require including the employees in the petitioned-for unit. *HeartShare*, 108 F.3d at 471; *Coca-Cola Bottling Co.*, 191 F.3d at 322; *Staten Island Univ. Hosp.*, 24 F.3d at 455-46; *DTG Operations*, 2011 WL 7052275, at *8. Thus, the record does not support Constellation's claim that its outside cellar and barrel department employees are "interchangeable." (C-Br. 34.)

Constellation also gains no ground to the extent it claims (C-Br. 2, 25-26, 32) that the winery's functional integration—essentially that outside cellar and barrel employees share the same general function of turning grapes into wine—renders a separate unit of outside cellar employees inappropriate. Rather, the significance of such generalized integration is reduced by the limited amount of

contact and interchange between outside cellar and barrel employees. Likewise, the broad similarity in wine-making function is offset by the fact that outside cellar employees work in a separate department, report to a different supervisor, and perform distinct functions in distinct physical areas. *See, e.g., DTG Operations*, 2011 WL 7052275, at *9 (the significance of functional integration of all employees working towards company-wide goal of renting cars to customers was diminished by each classification having a separate role in the process, and only limited interaction).

Finally, the Board addressed (SA 44 & n.20) the other similarities between the two groups, namely, that they have common wages, similar job descriptions and training requirements, are subject to the same company policies and basic evaluation criteria, and receive the same benefits. As the Board explained (*id.*), however, the fact that two groups share some community-of-interest factors—and could therefore be combined into an appropriate unit—does not, by itself, render a separate unit inappropriate. *See HeartShare*, 108 F.3d at 471, and cases cited at pp. 22-23, 35. Rather, given the significant distinctions discussed by the Board, it reasonably found the similarities between the two groups failed to establish that they share an overwhelming community of interest.

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

In asserting that barrel department employees must be included in the outside cellar unit, Constellation raises a plethora of claims, variously arguing that the standard gives controlling weight to the extent of organization, constitutes an abuse of discretion, and will result in the undue proliferation of units. As the Sixth and Eighth Circuits held, and as explained below, those arguments have no merit. *Kindred*, 727 F.3d at 559, 563-65; *FedEx*, 2016 WL 859971, *5-8.

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

Constellation and Amici argue (C-Br. 41-43; A-Br. 19) that the Board's overwhelming community-of-interest test improperly gives controlling weight to a union's extent of organization in the workplace. The Board in *Specialty*, the Sixth Circuit in *Kindred*, and the Eighth Circuit in *FedEx*, properly rejected this contention. *See Specialty*, 2011 WL 3916077, at *13, *16 n.25; *Kindred*, 727 F.3d at 563-65; *FedEx*, 2016 WL 859971, *7-8.

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); *accord MPC Rest.*, 481 F.2d at 78 n.1. 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; *FedEx*, 2016 WL 859971, *7-8.

Procedurally, the Board processes unit determinations consistent with this twin admonition. It "examines the petitioned-for unit first," and if that unit is appropriate under the traditional community-of-interest test, the Board's *initial* inquiry "proceeds no further." *Specialty*, 2011 WL 3916077, at *12; *see also Wheeling Island*, 355 NLRB 637, 637 n.2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). Here, of course, the Board did just that. It reasonably determined that the proposed unit of outside cellar department employees is readily identifiable as a separate, distinct group of employees that shares a community of interest, and therefore constitutes an appropriate unit. (SA 32-34.)

By examining multiple factors bearing on the unit-determination decision, the Board's traditional community-of-interest test ensures that the extent of organization would not be the controlling factor. For this reason, the Sixth Circuit

properly rejected the claim that the Board's approach in *Specialty* gives controlling weight to the extent of organizing. As the court explained, the Board does not, under that test, "assume" that the petitioned-for unit is appropriate, but "applie[s] the community of interest test" to determine whether the employees in the petitioned-for unit "share[] a community of interest and therefore constitute[] an appropriate unit—aside from the fact that the union had organized it." *Kindred*, 727 F.3d at 564; *accord FedEx*, 2016 WL 859971, *7-8.

The Board's analysis here makes clear that it considered a number of factors in making its decision, none of which were singularly dispositive. (SA 32-34, 44 & n.20; *see also* SA 9-31.) The Board thereby complied with Section 9(c)(5)'s command that a unit determination not be controlled by "the extent of organization." 29 U.SC. § 159(c)(5). Thus, in finding that the outside cellar workers share a community of interest, the Board properly relied on their common supervision, wages, shifts, skills, training, benefits, location, and functions within a separate department, and the fact they work closely together with regular interchange amongst themselves, but have little contact or interchange with employees outside their department. (SA 32-34, 44 & n.20.) The Board did not, therefore, give controlling weight to the unit that was petitioned for; instead, it separately and independently identified a number of factors that, under the community-of-interest test, support its determination that the outside cellar unit is

appropriate. Simply put, Constellation and Amici failed to "show that the extent of organization was the *dominant* factor in the Board's unit determination." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 620 (4th Cir. 2002) (emphasis in original).

Nor did the Board contravene Section 9(c)(5) of the Act 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 that the outside cellar employees constitute a clearly identified group that shares a community of interest, without giving controlling weight to the petitioned-for unit's scope, Section 9(c)(5) was satisfied. *See Kindred*, 727 F.3d at 564, and cases cited at pp. 43-45. And the Board does not allow the extent of organization to control the analysis simply by then giving the employer a chance to show that other employees share such an overwhelming community of interest that they must also be included in the unit.

As noted (pp. 44-45), the Sixth and Eighth Circuits rejected the claim, which Constellation and Amici repeat here (C-Br. 41-48; A-Br. 19), that the overwhelming community-of-interest test violates Section 9(c)(5). The Sixth Circuit, for example, found persuasive the D.C. Circuit's analysis in *Blue Man Vegas*, 529 F.3d at 423, which the Board relied upon in *Specialty*, that "[a]s long as the Board applies the overwhelming community of interest standard *only after* the proposed unit has been shown to be *prima facie* appropriate, the Board does not

run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight." *Kindred*, 727 F.3d at 565 (internal cites and quotation marks omitted) (emphasis in original). The *Kindred* court thus explained that, in *Specialty*, the Board followed the *Blue Man Vegas* approach, and conducted its community-of-interest inquiry before requiring the employer to show that the other employees share an overwhelming community of interest with the petitioned-for employees. *Id.* It follows, the Sixth Circuit concluded, that *Specialty* does not contravene Section 9(c)(5). *Id.* *Accord FedEx*, 2016 WL 859971, *7. Constellation provides no grounds for departing from the persuasive reasoning of the Sixth, Eighth and D.C. Circuits.

Contrary to Constellation's claim (C-Br. 42-45), *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), does not prohibit the test applied by the Board here. The *Lundy* court's objection was that the Board had *presumed* the petitioned-for unit was appropriate instead of analyzing the issue under the traditional community-of-interest standard. *Id*. at 1581; *see Lundy Packing Co*., 314 NLRB 1042, 1043-44 (1994). The court characterized the presumption 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 added that if the petitioned-for unit is "otherwise inappropriate," then a union's desire for a certain unit alone is not grounds for certification. *Id*. at 1581 (citation omitted).

In the instant case, the Board did not apply such a presumption, nor did it rely solely on the Union's request for a certain unit. Instead, the Board examined traditional community-of-interest factors, as well as Constellation's contention that the unit was otherwise inappropriate. Thus, the Board's analysis here is consistent with the Fourth Circuit's decision in *Lundy*, as the D.C. Circuit recognized in *Blue Man Vegas*, 529 F.3d at 423. Likewise, the Sixth and Eighth Circuits found that 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; *FedEx*, 2016 WL 859971, *7. That is exactly what the Board did here, and what it will do "in each case" as required by Section 9(b) of the Act.

And, while Constellation suggests (C-Br. 59) that the Union has complete control over who ends up in the unit, in reality it is the employer that controls nearly all of the community-of-interest factors that the Board assesses. In fact, the community-of-interest test "focuses almost exclusively on how the employer has chosen to structure its workplace." *Specialty*, 2011 WL 3916077, at *14 n.19; *see also Int'l Paper Co.*, 96 NLRB 295, 298 n.7 (1951) ("[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees."). For this reason, Constellation and Amici are wrong when they claim

(A-Br. 23) that the Board's unit determinations under *Specialty* bear no relation to the way in which the employer's business actually operates and functions, or that *Specialty* "invites unions to gerrymander" bargaining units (C-Br. 59). All of the relevant factors in this case—departmental and organizational lines, supervision, job classifications and functions, location, interchange and contact, skills and training, and other terms and condition of employment—are determined by Constellation.[17]

Moreover, the Supreme Court has long recognized that the choice of unit is not merely up to the union but to the employees as well. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941) ("Naturally the wishes of employees are a factor in a Board conclusion upon a unit."). Employees are fully informed of the composition of the unit on the Notice of Election posted at least 3 days before voting and on the ballot itself. *See* 29 C.F.R. § 102.67(k).[18] If employees have

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[17] Indeed, the Board's unit determinations under *Specialty* have continued to give weight to how the employer has organized its operations. *See, e.g.*, *Neiman Marcus*, 2014 WL 3724884, at *4 (rejecting petitioned-for unit of all women's shoe sales associates at retail store because, among other factors, the petitioned-for unit did not track any administrative or operational lines drawn by the employer).

[18] Various amendments to the Board's representation-case procedures became effective April 14, 2015. *See* 79 Fed. Reg. 74,308, 74,308 (Dec. 15, 2014). The rules in effect when the Board conducted the instant election in March 2015 may be found at the Board's website. *See* National Labor Relations Board, Rules and Regulations—Part 102, *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node1717/rules_and_regs_part_102.pdf

second thoughts about the petitioned-for unit, they can vote against representation in that unit.

Constellation speculates (C-Br. 40, 43, 47) that the overwhelming-community-of-interest standard will always result in the petitioned-for unit being approved. This is incorrect. *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.nlrb.gov/case/19-RC-076743, *review denied*, 2012 WL 2951834 (2012).[19] The Eighth Circuit, therefore, properly rejected the claim that *Specialty* "creates an impossible standard." *FedEx*, 2016 WL 859971, *8. Moreover, when the Board applied a similarly-heightened standard under a different name, it regularly granted requests to expand the unit where the employer showed more than that its alternative unit was also appropriate. *See Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976), and cases cited at pp. 32-33 & nn.12-13.

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[19] *See also Odwalla, Inc.*, 357 NLRB No. 132, 2011 WL 6147417, *1-2 (2011) (finding employer demonstrated that its merchandisers shared an overwhelming community of interest with the employees the union petitioned to represent); *Academy LLC*, 27-RC-8320, *supra* page 28 (rejecting petitioned-for unit because additional employees "share an overwhelming community of interest" with the petitioned-for unit).

2. The Board did not abuse its discretion by clarifying the appropriate standard

Constellation and Amici argue (C-Br. 39, 43, 49-53; A-Br. 7) that the Board in *Specialty* impermissibly adopted a "novel" and "new" rule that "radically" departs from precedent without any reasoned explanation. As the Sixth Circuit in *Kindred*, and the Eighth Circuit in *FedEx*, explained in rejecting those very arguments, they are factually and legally erroneous.

The Board in *Specialty* did not make the sweeping or "fundamental" changes claimed by Constellation (C-Br. 49). As explained (pp. 32-34), although various terms have been used, the Board has traditionally imposed a heavy burden on a party claiming that additional employees must be included in the petitioned-for unit. In *Specialty*, the Board concluded that the use of "slightly varying verbal formulations" to describe this heightened burden could be improved by unifying the terminology. 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 Board case law 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.

The *Kindred* court, recently joined by the Eighth Circuit in *FedEx*, also rejected the employer's claim, repeated by Constellation (C-Br. 39, 43, 49, 52), that the overwhelming-community-of-interest standard represents a "material change" in the law. *Kindred*, 727 F.3d at 561; *FedEx*, 2016 WL 859971, *5, 8. As the *Kindred* court observed, the Board had used this standard before, "so its adoption in *Specialty* [] is not new." *Kindred*, 727 F.3d at 561. The Sixth Circuit further explained that "[i]t is not an abuse of discretion for the Board to take an earlier precedent that applied a certain test and to clarify that the Board will adhere to that test going forward." *Id.* at 563.

Constellation nonetheless points (C-Br. 51) to a line of cases considering whether the interests of the petitioned-for unit were "sufficiently distinct" from those the employer sought to include. It claims (C-Br. 50-51) that the *Specialty* test radically "transformed" the "sufficiently distinct" test. But the standards are almost identical, and the Board cited a number of those cases in *Specialty*, 2011 WL 3916077, at *17 & n.26.[20]

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[20] *See, e.g.*, *Lodgian, Inc.*, 332 NLRB 1246, 1254-55 (2000) (most employees that employer sought to include did "not share such a substantial community of interest with the other employees," except the concierges, who "share[d] an overwhelming community of interest" and therefore had to be included in unit); *Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (employer argued that two groups had an

Constellation objects (C-Br. 50) to the Board's use of the word "clarify" in *Specialty*, where the Board explained that it was rearticulating the overwhelming-community-of-interest standard. But courts "give great weight to an agency's expressed intent as to whether a rule clarifies existing law or substantively changes the law." *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999). There, 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 is not 'patently inconsistent'" with prior interpretations. *Id.* at 479. The same is true here. The Board has made no policy change. It has always required only that the petitioned-for unit be appropriate, and it has always held a party seeking a broader unit to a heightened standard.

Constellation incorrectly claims (C-Br. 53-56) that the overwhelming community-of-interest standard was developed for, and should only be used in, accretion cases. The Board has used that exact language in prior unit determination cases. *See Kindred*, 727 F.3d at 561-63 (citing the Board's use of the standard in prior cases, and explaining that the Board's adoption of it in

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"overwhelming community of interest," and Board agreed that the groups did "not have sufficiently separate community of interests"). *See also Kindred*, 727 F.3d at 563 (noting the "sufficiently distinct community of interest" test was among the "slightly varying verbal formulations" the Board clarified by adopting the overwhelming-community-of-interest test).

Specialty was, therefore, "not new"); *Blue Man Vegas*, 529 F.3d at 423 (citing Regional Directors' use of the standard); *see also Laneco Constr. Sys.*, 339 NLRB 1048, 1050 (2003).

3. Constellation's and Amici's concerns about unit size and undue proliferation of units are irrelevant

Constellation and Amici argue that the *Specialty* standard will lead to the certification of smaller units.[21] (C-Br. 57-60, A-Br. 7, 22-23.) However, the Board has held that the size of a proposed unit is "not alone a relevant consideration, much less a sufficient ground" for finding an otherwise appropriate unit to be inappropriate. *Specialty*, 2011 WL 3916077, at *15. Indeed, a "cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining" and prevents "a minority group interest from being submerged in an overly large unit." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (citations omitted).[22]

Thus, this Court should not be detained by Constellation's (C-Br. 57-60) and Amici's (A-Br. 7, 23) speculation that enforcing the Board's unit determination

[21] Amici also argue (A-Br. 5, 22) that the *Specialty* standard will result in the formation of "micro-unions," a term they fail to define. Nor do they explain why the formation of such units would be inappropriate under any provision of the Act.

[22] Moreover, the courts have recognized why there is no statutory preference for a particular unit size, as "very large" and "small" units may present their own advantages and disadvantages. *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980).

will lead to smaller, multiple units that will "disrupt" and "destabilize" the wine-making and other industries. As discussed, the Board's finding here (SA 45) is that, based on the particular facts of this case, this particular departmental unit of outside cellar employees is an appropriate unit. *See NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1311 (5th Cir. 1973) ("a determination of a unit's appropriateness will invariably involve factual situations peculiar to the employer and unit at issue," which is why "the Board has been given great discretion in ruling on these matters").

Moreover, the Act does not prohibit multiple units at an employer; instead, it explicitly recognizes that a unit containing a "subdivision" of employees may be appropriate. 29 U.S.C. § 159(b). And, even if there were a rule against small units, which, as shown, there is not, the 46-person unit certified here is not small. Indeed, it is significantly larger than the 9-employee maintenance unit that the Court recently approved in *Onyx Management.*, 614 F. App'x at 41, and it is comparable to the 42-employee print-shop unit that the court approved in *Electronic Data Systems*, 938 F.2d at 472-74.[23] In any event, Constellation and Amici do not support their conjecture (*e.g.*, C-Br. 58, A-Br. 23) that applying

[23] As the Board noted in *Specialty*, the median unit size certified from 2001 to 2010 was 23 to 26 employees. 2011 WL 3916077, at *15 n.23 (citing *Proposed NLRB Rule*, 76 Fed. Reg. 36821 (June 22, 2011)); *see also Final NLRB Rule*, 79 Fed. Reg. 74308, 74391 n.391 (Dec. 15, 2014) (noting that the median unit size from 2011 to 2013 was 24 to 28 employees).

Specialty or approving the outside cellar unit will result in excessive administrative burdens, multiple, crippling work stoppages, or unproductive bargaining.[24] To the contrary, the Board has long approved multiple units at a single employer without the grave effects prophesied here. *See, e.g.*, *Teledyne Economic Dev. v. NLRB*, 108 F.3d 56, 57 (4th Cir. 1997) (enforcing Board's decision certifying two units at one employer); *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 647 (2d Cir. 1996) (enforcing Board order requiring employer to bargain over three different units); *Stern's Paramus*, 150 NLRB 799, 802-03, 806 (1965) (approving separate units of selling, non-selling, and restaurant employees at department store).

Constellation's (C-Br. 57) and Amici's related argument (A-Br. 23) that the Board's *Specialty* standard will lead to undue "proliferation" of units should also be rejected as irrelevant outside the healthcare industry. That phrase appears in the legislative history of the 1974 healthcare amendments to the Act, which admonished the Board to give "due consideration" "to preventing proliferation of bargaining units in the health care industry." S.Rep.No.766, 93rd Cong., 2d Sess. 5 (1974); H.R.Rep.No.1051, 93rd Cong., 2d Sess. 7 (1974) (footnote omitted). Moreover, even in the healthcare industry context, the Supreme Court unequivocally found that the "admonition" was not binding on the Board and does

[24] As shown (pp. 51-52), moreover, the Sixth Circuit in *Kindred* credited the Board's view in *Specialty* that its clarification of its unit-determination standard would help "employers order their operations with a view towards productive collective bargaining." 727 F.3d at 563.

not have "the force of law." *Am. Hosp. Ass'n*, 499 U.S. at 616-17 ("legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute"). Simply put, there is nothing in the Act suggesting that having two or more units at one facility constitutes "undue proliferation." *See Teledyne*, 108 F.3d at 57.

Nor is there any merit to Constellation's and Amici's argument (C-Br. 59; A-Br. 24) that the *Specialty* standard fails to guarantee employees the right to refrain from engaging in concerted activity. The barrel department employees and other winery employees have the right, as well as the opportunity, to organize or refrain from doing so, to vote for or against unionization, and to encourage their coworkers to do the same. And those workers' statutory rights remain firmly intact whether or not some of their colleagues unionize. *Cf. Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) (certification of unit of drivers, which excluded mechanics, protected the rights of both groups). The Board's *Specialty* standard therefore "assure[s] to employees," both inside and outside the unit, "the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. § 159(b).

CONCLUSION

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

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April 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTELLATION BRANDS, U.S. OPERATIONS, INC., d/b/a WOODBRIDGE WINERY	:
Petitioner/Cross-Respondent	: Nos. 15-2442 & 15-4106
v.	:
NATIONAL LABOR RELATIONS BOARD	: Board Case No. 32-CA-148431
Respondent/Cross-Petitioner	:
and	:
TEAMSTERS LOCAL UNION 601	:
Intervenor	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,354 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 12th day of April, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSTELLATION BRANDS, U.S. OPERATIONS, INC., d/b/a WOODBRIDGE WINERY	
Petitioner/Cross-Respondent	Nos. 15-2442 & 15-4106
v.	
NATIONAL LABOR RELATIONS BOARD	Board Case No. 32-CA-148431
Respondent/Cross-Petitioner	
and	
TEAMSTERS LOCAL UNION 601	
Intervenor	

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those 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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Dated at Washington, DC
this 12th day of April, 2016