

No. 15-60812

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

DELEK REFINING, LIMITED,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**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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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board believes that oral argument is unnecessary because the Board's decision applies well-settled law to straightforward facts. If, however, the Court decides to hear oral argument, the Board requests that it be allowed to participate.

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Delek Refining, Limited (“Delek”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against Delek on November 13, 2015, and reported at 363 NLRB No. 41. The Board had jurisdiction over the unfair-labor-practice proceedings below under

Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. §§ 151, et seq. The Board’s Order is final under Section 10(e) of the Act, 29 U.S.C. § 160(e). The petition for review and cross-application for enforcement were timely as the Act places no time limit on either filing. The Court has jurisdiction pursuant to Section 10(e) of the Act, as the underlying unfair labor practices occurred in Texas.

The Board’s unfair-labor-practice Order is based, in part, on findings made in an underlying representation proceeding, *Delek Refining, Ltd.*, Board Case No. 16-RC-149865. (ROA. 792.)¹ Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before the Court therefore includes the record in that proceeding. Section 9(d) authorizes judicial review of the Board’s actions in a representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). 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 in the unfair-labor-practice case.

¹ “ROA” cites in this brief are to the three-volume administrative record on appeal. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to the supporting evidence. “Br.” cites are to Delek’s opening brief to the Court.

See Freund Baking Co., 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

STATEMENT OF THE ISSUE PRESENTED

The ultimate issue in this case is whether substantial evidence supports the Board's finding that Delek violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified bargaining representative of the unit employees. The contested issue before the Court is whether the Board acted within its discretion in determining that including the storeroom attendants in the existing bargaining unit resulted in an appropriate unit.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from Delek's admitted refusal to bargain with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (USW) Local 202 ("the Union"). In the underlying representation proceeding, Delek challenged inclusion of the storeroom attendants in the existing unit, arguing that they did not share a sufficient community of interest with unit employees.

(ROA. 709, 792.) Rejecting that argument, the Board found the unit appropriate.

(ROA. 709, 720.) After a self-determination election,² the Board issued a

² A self-determination election, or "*Armour-Globe* election[,] permits employees sharing a community of interests with an already represented unit of employees to

certification of representative, authorizing the Union to bargain for Delek's storeroom attendants as part of the existing production-and-maintenance unit. (ROA. 792 & n.2.) The Board then held (ROA. 793) that Delek's subsequent refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural history relevant to both the representation and the unfair-labor-practice proceedings are set forth below.

I. THE BOARD'S FINDINGS OF FACT

A. Background: Collective Bargaining at Delek's Tyler Refinery

Delek operates a petroleum refinery in Tyler, Texas ("the Refinery"). (ROA. 709.) Refinery employees extract crude oil from the ground and, using machinery and chemicals, refine the crude oil into usable fuel, such as gasoline, diesel, or propane. (ROA. 67-68.)

The Union has continuously represented a bargaining unit of refinery employees since 1951, when the Union was certified.³ (ROA. 709; ROA. 169.) That unit includes approximately 130 production employees and approximately 30

vote whether to join that unit." *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990).

³ La Gloria Oil and Gas Company, Delek's direct predecessor, owned the Refinery when the Union was initially certified. (ROA. 709; ROA. 169-70.)

maintenance employees, as well as certain hourly safety employees.⁴ (ROA. 708-09, 792 & n.2.) It is the only bargaining unit at the Refinery. (ROA. 709.)

From 1951 through approximately 1985, the bargaining unit included “warehousemen,” also known as storeroom attendants, warehouse technicians, or warehouse employees. (ROA. 710; ROA. 8, 14-16, 555-59.) At some point after 1985, Delek engaged an independent contractor to run its warehouse, and warehousemen were no longer Delek employees or included in the bargaining unit. (ROA. 710; ROA. 21, 158, 176, 560-62.) In late 2011, Delek stopped using an independent contractor to operate its warehouse, resumed direct control, and once again hired warehouse employees. (ROA. 710; ROA. 195-96.)

During negotiations for the current collective-bargaining agreement (effective February 1, 2015, through January 31, 2019), the Union proposed inclusion of those employees – storeroom attendants – in the bargaining unit.

⁴ The recognition clause for the current contract reads, in part:

Delek Refining Ltd. . . . recognizes the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local 202 . . . as the exclusive Bargaining Agent with respect to wages, hours and other terms and conditions of employment for all regular maintenance, production, and Operating Employees as well as Specific hourly Safety Employees . . . employed at the Company’s Tyler, Texas refinery excluding supervisory, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its Employees, and professional Employees.

(ROA. 486.)

(ROA. 709; ROA. 13, 23, 483.) Delek rejected that proposal. (ROA. 709; ROA. 23.)

B. The Refinery’s Administrative and Operational Structure

The Refinery is divided into nine departments: Administration, Capital Projects, Environmental, Maintenance, Operations, Planning and Economic, Safety/PSM, Technical Services, and Transportation.⁵ (ROA. 709.) Each department has its own line of supervision. (ROA. 709.) And six of the nine department heads – including those from Maintenance, Operations, and Administration – report directly to the Refinery’s Vice President and General Manager. (ROA. 198, 201.)

The existing bargaining unit includes employees from at least two departments. Production employees are grouped in the Operations Department. (ROA. 710; ROA. 65.) They are technically skilled workers who are responsible for controlling refinery processes through large computer boards and for monitoring the Refinery’s process equipment to ensure that it is functioning properly. (ROA. 713; ROA. 24, 29, 65-67.) Maintenance employees are grouped in the Maintenance Department. (ROA. 710; ROA. 64.) They are also technically

⁵ The underlying proceedings focused primarily on Delek’s maintenance employees, and to a lesser extent, its production/operations employees. (ROA. 713.) (“Production” and “Operating” employees are essentially the same.) (ROA. 30.) Additional represented job classifications were not discussed at length.

skilled and perform repair and maintenance work in the maintenance shop and throughout the Refinery. (ROA. 713; ROA. 24, 323.)

Storeroom attendants are grouped in the Administration Department. (ROA. 710; ROA. 28, 201.) That department is further subdivided into Accounting, Information Technology, Security, Training, and Warehouse sub-departments. (ROA. 710; ROA. 28.) The Warehouse sub-department consists of four storeroom attendants working under the direction of one supervisor. (ROA. 710; ROA. 37-38, 118, 145-46.) Storeroom attendants are responsible for unloading deliveries to the warehouse, organizing inventory, interacting – either in-person or via radio – with refinery personnel who need parts from the warehouse, and delivering parts and supplies to areas throughout the Refinery. (ROA. 711; ROA. 24, 31-32, 250.) The warehouse inventory includes not only parts specific to the Refinery’s production process, but also supplies like bottled water, toilet paper, and office supplies. (ROA. 710; ROA. 31-32, 210, 299-300.)

A centralized Human Resources Department oversees labor-related issues at the Refinery. (ROA. 709-10; ROA. 11.) Under the direction of the Human Resources Director, the department is responsible for handling union issues (including negotiating and administering the collective-bargaining agreement), implementing and enforcing company policies, and administering employee compensation and benefits. (ROA. 709-10; ROA. 11.)

C. Storeroom Attendants' Interactions with Unit Employees

Storeroom attendants are in frequent contact with unit employees because they provide the supplies production and maintenance employees need to operate and repair the Refinery's production equipment. (ROA. 710-11; ROA. 251, 300, 323-26, 344-45, 384.) When a refinery employee needs a part or supply from the warehouse, she can request that item from the storeroom attendants by creating an electronic "pick ticket" through Delek's computer system (ROA. 711; ROA. 36, 257-58), via radio (ROA. 711; ROA. 251, 282-83, 311, 323-26, 387-88), or in person (ROA. 711; ROA. 86, 211-12, 283, 306-07, 311-12, 388-89). Then, storeroom attendants either deliver the part to the requester's worksite, or the requester picks it up from the warehouse. (ROA. 711; ROA. 308, 311-12.)

Although unit employees typically are not allowed inside the warehouse without a storeroom attendant, some unit employees (electrical and instrumentation technicians) retrieve specialized parts from the warehouse without assistance from storeroom attendants. (ROA. 711; ROA. 211-12.) Unit maintenance employees are in frequent contact with the storeroom attendants, interacting on the radio with them daily, sometimes multiple times per day. (ROA. 711; ROA. 323-26.)

When they are not delivering parts and supplies, storeroom attendants work in the Refinery's warehouse. (ROA. 710; ROA. 72-73, 292.) They must keep the warehouse inventory well organized through regular tracking and record-keeping,

and by conducting a full physical counting of the warehouse inventory annually. (ROA. 711-12; ROA. 44, 103-04.) That two-day process necessitates help from employees outside of the Warehouse Department, including unit members. (ROA. 712; ROA. 103-04, 135-36.)

The warehouse is in a building that sits between the administration building, which houses most of the Administration Department, and the Refinery. (ROA. 710; ROA. 143, 478-80.) The same building also houses the maintenance shop and offices for procurement and security. (ROA. 710; ROA. 32, 150-51.) Production employees, and at least some maintenance employees, spend a majority of their time working in the production areas of the Refinery. (ROA. 713; ROA. 65-66, 422.)

In September 2012, one storeroom attendant transferred into the unit when Delek hired him to fill a general maintenance position. (ROA. 713; ROA. 92-93, 336-343.)

D. Storeroom Attendants' and Unit Employees' Physical Work

Approximately 90% of storeroom attendants' work is physical – for example, organizing supplies, unloading trucks, delivering parts, and scanning and stocking materials. (ROA. 712; ROA. 255-56.) The remaining 10% of their duties involves paperwork, or the electronic equivalent, in the warehouse office. (ROA. 712; ROA. 24, 256, *see* 563-71 (company job descriptions).)

Storeroom attendants use forklifts to load, unload, and move heavy parts and supplies. (ROA. 711; ROA. 73-74, 88-89, 255, 275-76, 313, 385.) For certain items, maintenance employees assist the storeroom attendants in loading and unloading. (ROA. 711; ROA. 313-14, 351-52, 380-81.)

To perform the physical aspects of their job, storeroom attendants, like unit maintenance employees, must be trained to safely and properly use forklifts. (ROA. 713; ROA. 68, 73, 276-77, 339.) They, along with other refinery employees, also receive some fire-safety training (ROA. 713; ROA. 109-10) and attend quarterly safety meetings (ROA. 264). Production and maintenance employees also undergo additional, job-specific training that storeroom attendants do not attend. (ROA. 713; ROA. 69-71, 217-19.)

E. Storeroom Attendants' and Unit Employees' Earnings, Benefits, and Hours

Storeroom attendants are classified by Delek as professional, salaried, non-exempt employees. (ROA. 712; ROA. 41, 225-26.) Their annual salaries range from \$29,000 (approximately \$14.00 per hour) to \$39,000 (approximately \$19.00 per hour). (ROA. 712; ROA. 40, 563.) And they receive overtime if they work more than forty hours in a week. (ROA. 712; ROA. 145, 225-26, 503.) Unit employees, whom Delek classifies as "hourly," also earn overtime. Hourly rates for unit positions start at approximately \$24 per hour. (ROA. 712; ROA. 505.) Both storeroom attendants and unit employees must clock in and out as they start

and finish work, using different software programs to record their time.

(ROA. 712; ROA. 224-25.)

Storeroom attendants and unit employees are entitled to the same 401(k), medical, dental, vision, and welfare-type plans. (ROA. 712; ROA. 160.)

Storeroom attendants, like all non-unit employees, are entitled to two additional benefits. (ROA. 712; ROA. 40-41, 160-61.) They can receive a bonus based, in part, on overall company performance, and they are eligible for Delek's stock-appreciation-rights program. (ROA. 712; ROA. 41, 160-61.)

Delek's four storeroom attendants are split into two different Monday-Friday shifts. (ROA. 711; ROA. 62-63, 147, 305-06.) Two storeroom attendants work 7:00 a.m. to 4:00 p.m.; two work 10:00 a.m. to 7:00 p.m. (ROA. 711; ROA. 62-63, 305-06.) Maintenance employees also work Monday through Friday, typically from 7:00 a.m. to 3:30 p.m. (ROA. 711; ROA. 224, 427.) Storeroom attendants' schedules are staggered to ensure warehouse coverage during shift changes for production employees, who work twelve-hour shifts on a rotating schedule. (ROA. 713; ROA. 63-64, 148-49, 343.) During particularly busy times at the Refinery, storeroom attendants and maintenance employees also work twelve-hour shifts to ensure the warehouse is staffed, parts are available, and equipment is functioning properly. (ROA. 711; ROA. 144-45, 147-48, 156-57.)

II. THE REPRESENTATION PROCEEDING

In April 2015, the Union filed a petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to include the storeroom attendants in the existing production-and-maintenance unit at the Refinery. (ROA. 708-09; ROA. 456.) Delek challenged the petitioned-for unit as inappropriate. (ROA. 709.) It argued that the storeroom attendants had historically not been included in the unit and did not share a community of interest with the unit employees. (ROA. 709.)

On May 15, 2015, after a hearing, the Board's Regional Director issued a Decision and Direction of Election (DDE) finding that the storeroom attendants share a community of interest with the existing unit, and that the petitioned-for unit is appropriate. (ROA. 719-20.) Delek requested review of the Regional Director's Decision, which the Board (Members Hirozawa, Johnson, and McFerran) denied. (ROA. 754.) Following a June 12, 2015 self-determination election, the Board issued a certification of representative on June 22, 2015, authorizing the Union to bargain for the storeroom attendants as part of the existing unit. (ROA. 792; ROA. 756-58.)

III. THE UNFAIR-LABOR-PRACTICE PROCEEDING

By letter dated August 7, 2015, the Union requested that Delek meet to negotiate a collective-bargaining agreement. (ROA. 793.) Since August 11, 2015, Delek has admittedly refused to do so. (ROA. 793.) Pursuant to a charge filed by

the Union, the Board's General Counsel issued a complaint alleging that Delek's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and subsequently moved the Board for summary judgment. (ROA. 792.) Delek opposed the General Counsel's motion, reasserting its contention that the storeroom attendants do not share a community of interest with the unit employees currently represented by the Union.

(ROA. 792.)

IV. THE BOARD'S CONCLUSIONS OF LAW

On November 13, 2015, the Board (Chairman Pearce; Members Hirozawa and McFerran) issued a Decision and Order, finding that Delek had violated Section 8(a)(5) and (1) as alleged. (ROA. 792-94.) In its decision, the Board noted that all representation issues raised by Delek were, or could have been, litigated in the prior representation proceeding. (ROA. 792.) To remedy Delek's unfair labor practice, the Board's Order requires Delek to cease and desist from failing and refusing to recognize and bargain with the Union or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (ROA. 793.) Affirmatively, the Board's Order requires Delek to bargain with the Union upon request and, if an understanding is reached, to embody the understanding in a signed agreement. (ROA. 793.) The Order also requires Delek to post a remedial notice. (ROA. 793-94.)

SUMMARY OF THE ARGUMENT

The Board's finding that Delek violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union is supported by substantial record evidence.

Delek admits its refusal to bargain and fails to meet its burden to show that including storeroom attendants in the existing unit is clearly inappropriate.

Under well-settled law, the Board has broad discretion in determining the appropriateness of a unit for collective-bargaining purposes. The Board acted well within that broad discretion in finding a unit including storeroom attendants and production and maintenance employees appropriate under its well-established community-of-interest test. Like unit members, storeroom attendants primarily perform physical work. And their physical duties, along with some clerical duties, are integrated with production-and-maintenance processes at the Refinery. Because of the functional integration of their job duties and the geographic proximity of their worksites, storeroom attendants are in frequent contact with unit employees. In addition, the two groups have many similar terms and conditions of employment, including those related to earnings, benefits, and hours. Indeed, the Board has often included warehouse positions in production-and-maintenance units.

The factors favoring inclusion of the storeroom attendants in the existing unit far outweigh those disfavoring a community-of-interest finding. In particular,

the Board acted well within its discretion in affording the parties' history of collective bargaining little weight because Delek used contract labor for 26 of the approximately 30 years the workers in its warehouse were unrepresented.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DELEK VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), when it refuses to recognize and bargain with the duly certified representative of its employees. *See Texas Pipe Line Co. v. NLRB*, 296 F.2d 208, 209 (5th Cir. 1961). Here, Delek admittedly refused to recognize and bargain with the Union, but argues that the certification of the Union to represent storeroom attendants as part of the production-and-maintenance unit was improper because, in its opinion, the storeroom attendants do not share a community of interest with the unit employees. Accordingly, the question before the Court is whether the Board properly rejected that argument and certified the Union.

As shown below, the Board acted within its broad discretion in finding the expanded unit appropriate based on several community-of-interest factors. Delek's refusal to bargain thus violates the Act.

A. The Board Has Broad Discretion To Determine Whether a Petitioned-for Unit Is Appropriate

Section 9(b) of the Act, 29 U.S.C. § 159(b), empowers the Board to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” *See Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610-11 (1991). In determining an appropriate unit under Section 9(b), the Board first examines the petitioned-for unit, and if that unit is appropriate, then the inquiry ends. *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001); *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000) (stating that the Board “may simply look at the Union’s proposed unit and, if it is an appropriate unit, accept that unit determination without any further inquiry”).

To be deemed appropriate, the petitioned-for unit need not 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) (emphasis in original), *enforced*, 190 F.2d 576 (7th Cir. 1951); *accord Am. Hosp. Ass’n*, 499 U.S. at 610 (stating that “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit” and citing cases); *NLRB v. Purnell’s Pride, Inc.*, 609 F.2d 1153, 1155 (5th Cir. 1980) (“It is the duty of the Board to select ‘an’ appropriate unit; it need not delimit the

most appropriate unit.” (citing *NLRB v. J.M. Wood Mfg. Co.*, 466 F.2d 201, 202 (5th Cir. 1972)). It follows that employees of a given employer may be grouped in more than one way for purposes of collective bargaining. *Overnite Transp. Co.*, 322 NLRB 723, 723 (1996); *accord Country Ford Trucks*, 229 F.3d at 1189 (“It is well established that more than one appropriate bargaining unit logically can be defined in any particular factual setting.” (alteration, citation, and internal quotation marks omitted)).

A unit is appropriate if its employees share a “community of interest.” *NLRB v. DMR Corp.*, 795 F.2d 472, 475 (5th Cir. 1986); *accord NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The oft-cited community-of-interest factors include: “[1] similarity in the scale and manner of determining earnings; [2] similarity in employment benefits, hours of work and other terms and conditions of employment; [3] similarity in the kind of work performed; [4] similarity in the qualifications, skills and training of employees; [5] frequency of contact or interchange among employees; [6] geographic proximity; [7] continuity or integration of production processes; [8] common supervision and determination of labor-relations policy; [9] relationship to the administrative organization of the employer; [10] history of collective bargaining; [11] desires of the affected employees; and [12] extent of union organization.” *DMR Corp.*, 795 F.2d at 475

(citations omitted). The community-of-interest test entails a fact-intensive analysis. *Id.*; *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 240 (D.C. Cir. 2003). Thus, “the Board must consider the entire factual situation, and its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *Elec. Data Sys. Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991) (alteration, citation, and internal quotation marks omitted); *accord RC Aluminum*, 326 F.3d at 240 (stating that in community-of-interest analysis, “no particular factor controls”).

The Board has wide discretion in determining appropriateness of a bargaining unit. *NLRB v. Schill Steel Prods., Inc.*, 340 F.2d 568, 574 (5th Cir. 1965); *see also Packard Motor Car Co.*, 330 U.S. 485, 491 (1947) (“The issue as to what unit is appropriate for bargaining . . . involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed.”). Judicial review accordingly is narrow – “limited to determining whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support.” *NLRB v. J. C. Penney Co.*, 559 F.2d 373, 375 (5th Cir. 1977) (citing *Packard Motor Car Co.*, 330 U.S. at 491-92); *see Cont’l Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1089 (7th Cir. 1984) (stating that reviewing court’s role is limited to ensuring “that the Board apply with reasonable

consistency whatever standard it adopts to guide the exercise of its delegated power”).

An employer who challenges the Board’s determination that a particular unit is appropriate has an “uphill fight” because it bears the burden of proving that the Board has abused its discretion. *Schill Steel*, 340 F.2d at 574 (citation omitted); *NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1372 (11th Cir. 2012). In doing so, “[a] showing that some other unit would be appropriate is insufficient;” “the employer must establish that the designated unit is clearly not appropriate.” *J. C. Penney Co.*, 559 F.2d at 375; *accord Blue Man Vegas*, 529 F.3d at 421.

B. The Board’s Finding that the Storeroom Attendants Share a Community of Interest with Unit Employees Is Within Its Broad Discretion and Supported by Substantial Evidence

The Board acted within its broad discretion in finding (ROA. 720), pursuant to its well-established community-of-interest test, that the petitioned-for unit is appropriate. Indeed, the Board regularly has included employees who perform similar physical and clerical tasks in production-and-maintenance units like the existing unit at the Refinery. *See, e.g., Brown & Root, Inc.*, 314 NLRB 19, 24 (1994) (warehouse clerk, who “gives out materials and industrial gases to craft persons . . . , physically unloads the cylinders of gases and other incoming materials as well as bags and loads the cylinders and other items being sent out of the warehouse to field locations,” included in construction-and-maintenance unit);

Sohio Nat. Res. Co., 237 NLRB 1261, 1262-63 (1978) (warehouse employees, who “receiv[e] goods and materials, bin[] and inventory[] supplies while in the warehouse, and dispatch[] goods and materials to all areas of the site as needed,” included in uranium mine’s production-and-maintenance unit); *Astronautics Corp. of Am.*, 210 NLRB 652, 652-53 (1974) (stockroom employees, tasked with “receiving, in-plant distributions, storing, and record-keeping of material shipped to the [e]mployer . . . also assembl[ing] parts from ‘kit sheets’ and plac[ing] them into a kit or container for use by the production employees,” included in production-and-maintenance unit); *Pub. Serv. Co. of New Mexico*, 145 NLRB 1265, 1266-67 (1964) (warehouse employees, who “perform physical work in close conjunction with other production and maintenance employees,” could be included in existing production-and-maintenance unit).

As discussed below, community-of-interest factors supporting inclusion of the storeroom attendants in the unit predominate. Moreover, substantial record evidence supports the Board’s factual findings on each of the relevant factors. *See Purnell’s Pride*, 609 F.2d at 1156 (stating that “a finding of community of interest, such that the proposed unit is appropriate, is equivalent to a finding that the aggregate of the evidence under all the relevant factors preponderates in favor of the proponent”). Thus, Delek has not shown, as it must to prevail under the Court’s deferential standard of review, that the Board abused its discretion by

approving a unit that is clearly not appropriate. *See J. C. Penney Co.*, 559 F.2d at 375.

1. Storeroom attendants, like unit employees, primarily engage in physical work, and their work is functionally integrated with unit work

Reliable indicia of common interests among employees include similarity of their work duties and the functional integration of those duties in production processes. Like unit employees, storeroom attendants perform mostly physical work, and that work is functionally integrated with unit-employee work. Their few clerical duties, moreover, support the Refinery's production process.

More specifically, the Board acted well within its discretion in finding (ROA. 716-17) that the type of work performed by the storeroom attendants is "of a similar overall nature" to that of unit employees, particularly maintenance employees, in that it involves physical, hands-on tasks as opposed to sedentary office work. Storeroom attendants unload, organize, and deliver refinery parts and supplies. Thus, they spend 80-90% of their days engaged in physical work (ROA. 716; ROA. 255-56, 354) – essentially, "everything that [they] do has a physical aspect to it" (ROA. 255). Similarly, unit employees' work is mostly physical, and both storeroom attendants and unit maintenance employees use forklifts – the operation of which necessitates specific training and certification –

to move larger parts and supplies.⁶ (ROA. 716; ROA. 73-74, 88-89, 255, 275-76, 313, 385.) Indeed, maintenance employees assist storeroom employees with this task when deliveries are particularly heavy. (ROA. 718; ROA. 314, 380-81, 384-86.)

That maintenance employees also perform different physical tasks than storeroom attendants, as Delek points out (Br. 26), does not undercut the Board's finding (ROA. 716) that the majority of both groups' jobs are physical in nature. That similarity is significant. Physical tasks may be dirty or involve hazardous chemicals, and performing them requires physical stamina and skills (*e.g.*, driving forklifts). (ROA. 86-87, 279-80.) Due to their overall physical nature, both storeroom-attendant and unit-maintenance jobs are materially different from sedentary "office clerical" jobs performed at a desk. *See Pub. Serv. Co. of New Mexico*, 145 NLRB at 1267 (finding that including warehousemen in existing production-and-maintenance unit would constitute "an appropriate unit" in part because "warehousemen appear to be the only unrepresented employees whose duties are physical in nature").

⁶ Operating heavy machinery like forklifts plainly requires skill and training beyond merely "carry[ing] things." (Br. 27 n.9.) And, despite Delek's argument that the two groups use forklifts in "fundamentally different" ways (Br. 27), substantial record evidence shows that both groups use them to load, unload, and transport refinery parts and supplies (ROA. 68, 73-74, 88-89, 255, 275-78, 284-85, 310, 313-15, 339, 346-47, 352-53, 378, 385-86, 399-400, 433-34).

The physical work that storeroom attendants perform is, moreover, functionally integrated with that of unit employees. (ROA. 718.) Storeroom attendants' role locating and delivering requested parts and supplies to unit employees is essential for the smooth functioning of both production and maintenance processes at the Refinery. As a unit maintenance employee testified, "[i]f a piece of equipment is down, that unit needs that piece of equipment to produce product, whatever product it might be producing; it could be anything. And to make that run smoothly and our job run in a timely, safe manner, that warehouse is needed." (ROA. 344-45.) In other words, ample evidence supports the Board's finding (ROA. 718) that "[m]aintenance employees require the assistance of storeroom attendants to perform their work," and the absence of storeroom attendants impedes maintenance employees' efficient job performance (ROA. 344-45).⁷ Likewise, unit employees assist storeroom attendants by, for example, loading or unloading particularly heavy deliveries (ROA. 718; ROA. 314, 380-81, 384-86), identifying parts and supplies (ROA. 348, 407), and

⁷ Although, as Delek points out (Br. 33), the Board was mistaken in stating (ROA. 711, 718) that maintenance employees sometimes must retrieve supplies from the warehouse when storeroom attendants are unavailable, Delek fails to explain how that undermines the Board's functional-integration finding. If maintenance employees never retrieve their own supplies, it would only buttress the Board's finding (ROA. 718) that unit employees depend on the storeroom attendants' assistance to perform the basic functions of their jobs. Moreover, the record is clear that at least some unit members (electrical and instrumentation technicians) are permitted access to the warehouse without a storeroom attendant escort. (ROA. 211-12.)

participating during annual physical inventory counts. (ROA. 718; ROA. 103-04, 135-36, 347-48, 360.)

Storeroom attendants' and unit employees' interaction in the Refinery's "tote yard," where chemicals used in refinery processes are stored in thousand-pound "totes," further illustrates the functional integration of their work.

(ROA. 78-79, 313-14.) Storeroom attendants organize and clean the tote yard, unit employees from "general maintenance go[] and get[the chemical totes], grab[] them, and take[] them to operations, so [unit production employees] can pump them all into the units." (ROA. 313.) Unit employees only have a large forklift, so storeroom attendants must use their smaller forklift to assist the production and maintenance employees in retrieving their chemical totes. (ROA. 277, 285.)

Conversely, maintenance employees, with the acquiescence of their supervisors, help organize the tote yard, a venue that is generally the responsibility of storeroom attendants, up to six times per month. (ROA. 313-14, 348-49, 351-52, 359-60, 377-80.)

Substantial evidence belies Delek's assertion (Br. 28) that "[t]here is simply nothing unique or legally more significant about the bargaining-unit departments' . . . reliance on continuity with the warehouse than the reliance by any other refinery department." As Delek asserts, storeroom attendants interact with non-unit employees and deliver supplies that are not directly related to production

processes, like bottled water and paper.⁸ (ROA. 31-32, 73, 299.) But those interactions necessarily take a backseat to the more urgent requests from the Refinery. (ROA. 372-73.) As a former storeroom attendant testified, if one employee requested parts to repair a leak at the Refinery and another requested bottled water, the latter would “have to wait for the water.” (ROA. 372.) Nor is there any merit to Delek’s related argument (Br. 32) that the Board’s functional-integration finding is flawed because non-unit employees may have assisted in the warehouse’s first “annual” inventory. Even if true, Delek fails to show how that additional assistance would undermine the clear evidence that unit employees assisted. (ROA. 103-04, 347-48.)

Moreover, even while making arguments to the contrary (Br. 28, 31-33), Delek actually concedes (Br. 30-31) the functional integration of the storeroom attendants’ and unit employees’ work. Specifically, it concedes (Br. 30) that when the Refinery must undergo “extraordinary maintenance work,” storeroom attendants stay past their regular hours to “support” the bargaining unit and to “ensure that supplies are available if needed” because “the Company has every incentive to repair and restart operations as quickly as it safely can.” (*See also*

⁸ Like storeroom attendants, unit maintenance employees also perform a variety of tasks not directly related to the production process, including “changing toilet seats” or addressing “funny smells in one of the[administrative] offices.” (ROA. 323, *see also* ROA. 421 (other examples).)

ROA. 718; ROA. 144-45, 156-58, 345.) Indeed, storeroom attendants also are asked to work twelve-hour shifts, along with unit employees, during “turnover” – a particularly busy time when the Refinery is temporarily shut down for overhaul and maintenance. (ROA. 144-45, 156-58.) Predictably, there is no similar evidence in the record suggesting that storeroom attendants must stay late to, for example, deliver water and paper to clerical employees.

As the Board acknowledged (ROA. 716), storeroom attendants also perform some non-physical, clerical work, particularly paperwork and computerized record-keeping related to the Refinery’s inventory. That clerical aspect of their position, however, is a limited part of their job. Only 5-10% of their daily work is spent on clerical work in the warehouse office.⁹ (ROA. 256, 354.) In fact, most of the Warehouse Department’s paperwork is handled by its supervisor. (ROA. 256, 288.)

Moreover, like storeroom attendants’ physical work, the type of clerical or non-physical work they perform is, as the Board found (ROA. 716-17), “more akin to plant clerical[]” work than to office clerical work. In determining whether employees are plant clericals, “[t]he test generally is whether the employees’ principal functions and duties relate to the production process, as distinguished

⁹ The warehouse office is a separate, air-conditioned room with computers. (ROA. 256.) Storeroom attendants spend the majority of their time in the warehouse, which is not air-conditioned, engaged in physical work. (ROA. 292.)

from general office operations,” which are incidental to production processes.

Caesars Tahoe, 337 NLRB 1096, 1098 (2002); *compare Hamilton Halter Co.*, 270 NLRB 331, 331-32 (1984) (listing examples of plant-clerical work, including processing customer orders, typing invoice slips, maintaining inventories, ordering supplies, collecting time cards, designing and labeling products, and loading and unloading trucks), *with Dunham’s Athleisure Corp.*, 311 NLRB 175, 176 (1993) (listing examples of office clerical work, including billing, payroll, telephone, and mail). Delek’s attempt (Br. 37) to analogize the storeroom attendants’ work to typical office clerical work is ineffective because it ignores the key characteristic of plant clerical work –integration with production processes. The storeroom attendants’ non-physical work – processing and filling pick tickets, answering radio requests for parts and supplies, and maintaining records of deliveries and inventory – is integrated with production in a way that office clerical tasks like billing, answering telephones, and delivering mail are not.

Finally, contrary to Delek’s suggestion (Br. 12 (citing ROA. 563, 566)), storeroom attendants’ “use of standard office software and computers,” including barcode scanners, does not undermine the Board’s analysis. It does not affect the fundamentally physical nature of the storeroom attendants’ job, the integration of their duties with those of unit employees, or the production-related nature of their clerical tasks. Storeroom attendants’ work will entail loading and unloading,

physically scanning and counting, and delivering parts and supplies, regardless of whether Delek uses an electronic method of inventory tracking. (ROA. 255-56, 275.)¹⁰ Their efficient performance of those tasks will still be integral to unit employees' efficient work performance, and their record-keeping (paper or electronic) will still relate directly to the production processes at the Refinery.

2. Storeroom attendants frequently interact with unit employees

Interaction and interchange between classifications of employees favor a finding that their grouping results in an appropriate unit. *Overnite Transp.*, 322 NLRB at 724; *see also NLRB v. Carson Cable TV*, 795 F.2d 879, 885 (9th Cir. 1986). Likewise, geographic proximity of worksites, which fosters interaction and interchange, weighs in favor of a community-of-interest finding. *See, e.g., Minneapolis-Honeywell Regulator Co.*, 115 NLRB 344, 346 (1956) (finding that plant clericals shared sufficient interests with existing production-and-maintenance unit, in part because they were “located in factory areas” with operating department and thus had “direct and continuing contact with operating personnel”); *Foster, Wheeler Corp.*, 94 NLRB 211, 211-12 (1951) (finding factory clerks, who

¹⁰ To the extent Delek references (Br. 12) the new Reliability Asset Management System technology, at least some duties associated with that system are not yet implemented. The barcode scanners, for example, are not fully functional. (ROA. 94-95, 274-75.) Moreover, “[a] unit determination must depend on the present duties of the employees, not on speculation as to future changes in work assignments.” *See Missouri Beef Packers, Inc.*, 197 NLRB 176, 180 (1972) (citing cases).

worked in various plant buildings rather than in main office building, shared community of interest with existing production-and-maintenance unit); *cf. J. C. Penney Co.*, 559 F.2d at 376 (noting geographic separation as factor supporting exclusion of clerical workers from unit of warehouse laborers).

The Board acted well within its discretion in finding (ROA. 717) that storeroom attendants' "regular contact . . . with the maintenance employees" weighs in favor of its community-of-interest finding. As discussed above, the integration of the two groups' jobs entails frequent interactions relating to requesting, locating, and delivering parts and supplies from the warehouse's inventory, as well as some inventory work and organizing large items. The two groups' geographic proximity, moreover, increases the potential for additional contact: the warehouse, where storeroom attendants spend 80-90% of their time, is located in the same building as the Maintenance Department. (ROA. 717; ROA. 32, 72-73, 150-51, 240, 262, 292, 429.)

Substantial evidence shows that the interactions between the storeroom attendants and the unit members are frequent and significant. A former storeroom attendant recalled that he interacted with unit employees up to 80% of his working time. (ROA. 353.) And other current and former storeroom and unit employees' accounts of their actual experiences on the job also indicate frequent conduct. For example, a current storeroom attendant testified, "I'm right there with [the

bargaining unit] every day. I'm rubbing elbows with them every day. We're down in the dirt every day together, working, to get our refinery running together.”

(ROA. 300.) And a general-maintenance unit employee testified, “[e]very day, I mean I'm calling [the storeroom attendants] on the radio for something.”

(ROA. 323.) Another unit member testified that electrical and instrumentation maintenance employees work “hand-in-hand” with the storeroom attendants.

(ROA. 384.) Unsurprisingly, in light of that ample evidence of interaction, Delek concedes that “maintenance employees communicate frequently with storeroom attendants.” (Br. 31 (quoting ROA. 718).)

Delek takes issue with the Board's finding that geographic proximity weighs in favor of finding a community of interest between storeroom attendants and unit employees, arguing (Br. 36) that because it restricts access to the warehouse, the warehouse is effectively isolated from the rest of the building where unit members work. But substantial record evidence shows that despite restricted access, storeroom attendants are in frequent contact with unit members in, or near, the warehouse. (ROA. 86, 211-12, 306-07, 311.) If anything, restricting access to the warehouse necessitates greater interaction because unit employees must engage storeroom attendants to request and receive the supplies necessary to perform their jobs. Moreover, the two groups work side-by-side in other areas of the Refinery, such as the tote yard and the filter area. (ROA. 277, 348-52.) And storeroom

attendants share a parking lot and lunchrooms with unit employees, providing additional opportunities for contact between the two groups. (ROA. 105-06, 280-82, 336, 401, 429-30, 437, 446); *see, e.g., Ambrosia Chocolate*, 202 NLRB 788, 789 (1973) (noting, in finding community of interest, that workers “share the same work breaks, lunch periods, locker room, lunchroom, and parking lot”); *cf. J. C. Penney Co.*, 559 F.2d at 376 (noting separate break room and lunchroom of employees excluded from bargaining unit).

Finally, there is evidence of interchange because one storeroom attendant became a unit maintenance employee. The Board reasonably found (ROA. 717) that single transfer significant, considering the small number of storeroom attendants (four) and the short period of time (three years) that the job has existed in its current form. *See Carson Cable TV*, 795 F.2d at 885 (“In a quite small bargaining unit of 14 employees, almost any level of interchange would have some significance.”).

Delek takes great pains (Br. 33-36) to argue that the storeroom attendant was hired into the maintenance job as any new employee would be, rather than “transferred” from his old position. Even if the record on that point is ambiguous (*see, e.g.,* ROA. 92-93, 141-42 (company’s understanding), ROA. 336-43 (employee’s understanding), ROA. 415-16 (union president’s understanding)), legally, the interchange represented by the lone transfer/hire serves to bolster the

Board's community-of-interest finding. Absence of interchange, however, would not undermine the Board's determination that this factor supports finding a community of interest, in light of the independent, copious evidence of frequent interactions, both job-related and casual, between storeroom attendants and unit employees.

3. Storeroom attendants and unit employees share similarities in earnings, benefits, and hours

Similarities in scale and manner of determining earnings among employees weigh in favor of a community-of-interest finding, *see United Rentals, Inc.*, 341 NLRB 540, 541 (2004), and minor differences in remuneration typically will not defeat such a finding, *see Minneapolis-Honeywell Regulator Co.*, 115 NLRB at 346 (stating that “differences in the mode of payment and remuneration . . . do not preclude [employees’] inclusion in production and maintenance units, where other factors . . . indicate that their interests are allied”); *Sohio*, 237 NLRB at 1262-63 (finding warehouse employees shared community of interest with production-and-maintenance unit even though they were salaried and unit employees were hourly). Like earnings, similarities in benefits and hours of work favor finding a community of interest. *See, e.g., Foster, Wheeler Corp.*, 94 NLRB at 213 (finding stockroom clerks shared community of interest with existing production-and-maintenance unit, in part because they “work the same hours as . . . production and maintenance employees”).

The Board acted well within its discretion in finding (ROA. 715) that similarities in the scale and manner of determining earnings favors a community-of-interest finding. Storeroom attendants are compensated similarly to unit members in one key respect. Although storeroom attendants are classified as salaried, non-exempt employees, and unit employees are designated as hourly, both earn overtime on an hourly basis for work over forty hours per week.

Although Delek highlights (Br. 15-16) the disparity in hourly rates between the two groups, the difference between the storeroom attendants and the lower-paid unit employees is no greater than the disparity in pay that already exists within the bargaining unit. (ROA. 505, 563.) At the time of the hearing, storeroom attendants earned between \$14.00 and \$19.00 per hour (approximately) (ROA. 563), and unit employees earned between \$24.00 and \$35.00 per hour (approximately) (ROA. 505).

The Board also acted well within its discretion in finding (ROA. 715-16) that similarities between storeroom attendants' and unit employees' fringe benefits and hours of work support finding that the two groups share a community of interest. As Delek's Director of Human Resources testified, "[t]he storeroom attendants are entitled to the same benefit package that all employees are entitled to. The level of benefits are the same in terms of the medical, dental, vision, and welfare-type plans . . . and the 401(k) is the same." (ROA. 160.) The only

differences in employment benefits are the storeroom attendants' eligibility for a bonus and a stock-appreciation rights program. But the majority of benefits – including those with daily significance to the employees, like healthcare coverage – are shared. *See, e.g., United Rentals, Inc.*, 341 NLRB at 541-42 (stating that employees who were entitled to similar benefits shared overwhelming community of interest despite differences in profit-sharing plans).

Not only do the storeroom attendants receive similar employment benefits as unit members, but their work hours either match (as in the case of two storeroom attendants and unit maintenance employees), or are designed and occasionally adjust to support, those of employees in the bargaining unit. (ROA. 715-16); *see also* discussion of functional integration above, at pp. 25-26.

4. The desires of the affected employees and the extent of organization favor including the storeroom-attendant position in the existing unit

“Naturally the wishes of employees are a factor in a Board conclusion upon a unit.” *Pittsburgh Plate Glass Co.*, 313 U.S. 146, 156 (1941); *see also* 29 U.S.C. § 159(b) (stating that unit determination should serve to “assure to employees the fullest freedom in exercising” their guaranteed rights); *DMR Corp.*, 795 F.2d at 475; *Art Metal Constr. Co.*, 75 NLRB 80, 82 (1947) (discussing importance of employee choice in determining appropriate unit). Here, the Union garnered sufficient support from the storeroom attendants to trigger an election,

and there was no evidence of other employees who might be affected by including the storeroom attendants in the unit. (ROA. 719.)

Similarly, the extent of organization, while not controlling, *see* 29 U.S.C. § 159(c)(5), nevertheless favors the storeroom attendants' inclusion in the existing unit, *see NLRB v. S. Metal Serv., Inc.*, 606 F.2d 512, 514 (5th Cir. 1979) (stating that "recognition of [union's] desire as a factor in the balancing process does not make it 'controlling' within the prohibition of the statute"). As the Board reasonably found (ROA. 719), the Union's desire to include the storeroom attendants in the existing production-and-maintenance unit weighs in favor of a community-of-interest finding.

5. The factors favoring community of interest predominate

The Board acted well within its broad discretion in determining (ROA. 720) that a unit including the storeroom attendants is appropriate because "the factors weighing in favor of a finding of community of interest have more weight than the factors weighing against such a finding." As detailed above, several community-of-interest factors support finding the unit including the storeroom attendants to be appropriate, some quite strongly. Although the Board also found (ROA. 714-15) that the storeroom attendants do not share similar qualifications, skills, and training; are in a separate administrative department from unit employees; and were historically excluded from the unit for three years, it reasonably concluded

that the significance of each of those factors was mitigated, and that the differences between storeroom attendants' and unit employees' interests were outweighed by, the multiple and significant similarities between the two groups.¹¹

In particular, while finding that bargaining history weighs against the storeroom attendants' inclusion in the existing unit, the Board reasonably tempered the weight of that factor. Delek "may only point to three years of history where it has employed warehouse *employees* who were not included in the bargaining unit." (ROA. 719 (emphasis added).) Indeed, the undisputed facts establish that in the original bargaining unit at the Refinery, and for approximately 34 years, storeroom attendants were included. Then, for approximately 26 years, Delek used independent contractors to run its warehouse. The workers in the warehouse during that time were not included in the unit of Delek employees. Approximately three years before the Board's decision, Delek stopped using an independent contractor to run its warehouse and once again directly hired employees to serve as storeroom attendants. Since then, those employees have been unrepresented.

¹¹ The Board also reasonably found (ROA. 714-15) that evidence relevant to the "common supervision and determination of labor-relations policy" factor weighed neither for nor against a community-of-interest finding. Although the Maintenance, Production, and Administration Departments all have separate lines of supervision, Delek's Human Resources Department maintains centralized control over labor relations and other important terms and conditions of employment.

The Board's finding that only three years of bargaining history are relevant to its analysis is consistent with – if not dictated by – those undisputed facts. During the decades immediately preceding those three years, the storeroom attendants did not have the same employer as the unit employees because an independent contractor ran the warehouse. There is no evidence in the record describing the terms and conditions of employment under those independent contractors, but both the job and the interests of the workers who held it were necessarily distinct from the position in Delek's employ and the interests of the current storeroom attendants. Indeed, it is not clear on this record whether the workers in Delek's warehouse could have been included in an appropriate unit with Delek's production and maintenance employees. At the very least, they had a different employer – a very significant term of employment – from the unit employees, and they may have been independent contractors, excluded from the statutory definition of employee and ineligible for inclusion in any bargaining unit. *See* 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include . . . any employee having the status of an independent contractor.”).

In light of those circumstances, the Board's decision not to consider more than three years of bargaining history is anything but “arbitrary and contrary to the record evidence.” (Br. 22.) Delek ignores both the “factual context,” *Purnell's Pride*, 609 F.2d at 1158, and basic labor-law principles in insisting (Br. 23-24) that

its 30-year bargaining history with the existing unit is of “determinative significance” and sufficient standing alone to render the unit inappropriate and warrant setting aside the Board’s certification of the Union.¹² Not only has Delek failed to address the legal significance of its 26-year use of contract labor in its warehouse, but it has fundamentally misunderstood the community-of-interest analysis, under which no one factor is dispositive. *See Blue Man Vegas*, 529 F.3d at 421 (“[U]nit determinations must be made only after weighing all relevant factors on a case-by-case basis.” (quoting *Country Ford Trucks*, 229 F.3d at 1190-91)); *Purnell’s Pride*, 609 F.2d at 1156 (specifying that community-of-interest “factors have no independent significance”).¹³

The remaining two factors – “qualifications, skills, and training” and “relationship to the administrative organization of the employer” – also disfavor a

¹² The Board made no findings, nor does the record contain information, as to whether the Union consented to removing the position from the unit. (*See* ROA. 163.) As the Board found (ROA. 719), the Union has organized the storeroom employees, and Delek has not cited any authority for the proposition that the Union either could prospectively waive those employees’ right to seek union representation, or clearly and unmistakably did so. *Cf. Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (stating that waiver of a statutorily protected right “must be clear and unmistakable”).

¹³ Delek’s sole authority (Br. 23) for the presumptively dispositive weight it would accord this factor is inapposite. In *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 37 (D.C. Cir. 2015), an employer sought to justify its unilateral withdrawal of recognition from a union by asserting that a 20-year-old bargaining unit was rendered inappropriate when the employer closed its unionized shop and moved union mechanics to a non-union dealership.

community-of-interest finding, but do not weigh significantly in the analysis. For example, although production and maintenance employees are more skilled and require different on-the-job training than storeroom attendants, those differences are overshadowed by the similarly physical nature of both storeroom attendants' and unit employees' work, and by the functional integration of the groups' distinct duties in the production process. And storeroom attendants' classification as Administration Department employees is less significant considering that they are separated into a distinct Warehouse sub-department; perform plant-clerical, rather than office-clerical, work; are physically located in the same building with unit maintenance employees, separate from the building housing most Administration Department employees and sub-departments; and frequently interact with unit employees. *See Pub. Serv. Co. of New Mexico*, 145 NLRB at 1266-67 (finding that warehouse employees, grouped in "materials and supplies section" in employer's "office management department," could be included in existing production-and-maintenance unit because there was no evidence that they shared community-of-interest with employees in "office management department"; they were the only unrepresented employees performing physical work; and they worked in close conjunction with unit employees).

Plainly, the Board, in conducting its community-of-interest analysis, duly considered "the weight or significance, not the number, of factors relevant to [the]

particular case” and “weigh[ed] that evidence against all evidence to the contrary.” *Purnell’s Pride*, 609 F.2d at 1156 & n.2. The cases that Delek relies on to argue that the Board did not “fully articulate its reasoning and conclusions” (Br. 21, *see also* 18-21) are factually distinguishable. *See Purnell’s Pride*, 609 F.2d at 1160-62 (remanding case for further explanation because in Court’s view Board “rest[ed] the unit determination primarily on a ‘presumption’” and failed to “adequately explain [] the weight . . . assigned to each individual [community-of-interest] factor”); *Cont’l Web Press, Inc.*, 742 F.2d at 1092 (remanding case for further explanation because Court found that Board “reversed a long-established presumption” without sufficient explanation). More fundamentally, they do not support Delek’s suggestion (Br. 21) that a unit must be – or the Court should determine – *the most* appropriate, rather than *an* appropriate, unit. To the contrary, as noted above, pp. 16-17, it is well established that the Board need only find, as it did here, that the petitioned-for unit is appropriate. To overturn the Union’s certification, Delek bears the burden – which it has not met – to demonstrate that the unit including the storeroom attendants is “clearly not appropriate.” *J. C. Penney Co.*, 559 F.2d at 375; *see also Elec. Data Sys. Corp.*, 938 F.2d at 574 (“Although there is evidence to support each side’s contentions and the unit composition argued for by [petitioner] may have also been ‘an appropriate bargaining unit,’ we cannot say that the one approved by the NLRB was ‘clearly

not appropriate' based on the employee's 'community of interests.'" (citation omitted)).

In sum, the storeroom attendants share numerous community-of-interest factors with employees in the bargaining unit. Like unit employees, they perform physical work that is integrated with the Refinery's production process. They also frequently interact with unit employees and share similarities in the scale and manner of determining earnings, benefits, and hours of work. In light of those substantial shared interests, the Board acted well within its discretion in finding the petitioned-for unit appropriate, ordering a self-determination election for the four storeroom attendants based on their community-of-interest with the existing unit, and certifying the Union. Accordingly, Delek's admitted refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.

CONCLUSION

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

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National Labor Relations Board
April 2016

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

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Petitioner/Cross-Respondent	* No. 15-60812
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 16-CA-158842
	*
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth 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 27th day of April, 2016

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	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,125 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 27th day of April, 2016