

**Nos. 16-1089, 16-1115**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**RHINO NORTHWEST, LLC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**INTERNATIONAL ALLIANCE OF THEATRICAL  
STAGE EMPLOYEES, LOCAL 15**

**Intervenor**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RHINO NORTHWEST, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1089, 16-1115
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-160205
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL ALLIANCE OF	)	
THEATRICAL STAGE EMPLOYEES,	)	
LOCAL 15	)	
	)	
Intervenor	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties, Intervenors, Amici**

Rhino Northwest, LLC (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. International Alliance of Theatrical Stage Employees, Local 15 (“the Union”) was the charging party before the Board and is the intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in Case 19-CA-160205. There were no amici before the Board, and there are none in this Court.

**B. Rulings Under Review**

This case involves the Company's petition to review and the Board's cross-application to enforce a Decision and Order the Board issued on December 17, 2015, reported at 363 NLRB No. 72.

**C. Related Cases**

The ruling under review has not previously been before this Court or any other court, except to the extent that the Company initially petitioned for review in the Fifth Circuit (No. 16-60003); following the Board's Motion to Dismiss for Improper Venue, the Fifth Circuit transferred the petition to this Court on March 4, 2016. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC  
this 24th day of October, 2016

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Rhino Northwest, LLC (“the Company”) to review, and the cross-application of the National Labor Relations

Board to enforce, a Board Decision and Order (363 NLRB No. 72) issued against the Company on December 17, 2015. (A. 519-21.)<sup>1</sup> International Alliance of Theatrical Stage Employees, Local 15 (“the Union”) has intervened on the Board’s side.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. The Company’s petition and the Board’s cross-application were timely; the Act imposes no limit on the time for filing actions to review or enforce Board orders. The Board’s Order is final, and the Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) (29 U.S.C. § 160(e)), which allows the Board to cross-apply for enforcement.

Because the Board’s Order is based in part on findings made in the underlying representation proceeding, the record in that proceeding (Case No. 19–RC–152947) is also before the Court under Section 9(d) of the Act (29 U.S.C. § 159(d)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Section 9(d) does not give the Court general authority over the representation proceeding.

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<sup>1</sup> “A.” references are to the deferred appendix. “Br.” references are to the Company’s opening proof brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

Rather, it authorizes review of the Board's actions in that proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice Order in whole or in part. 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. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

### **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are reproduced in the Addendum to this brief.

### **STATEMENT OF THE ISSUE**

Whether the Board acted within its discretion in determining that the Company's riggers constitute an appropriate unit for collective bargaining. If so, then the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act.

### **STATEMENT OF THE CASE**

In this test-of-certification case, the Company, which operates an event-staffing business, has refused to bargain in order to seek review of the Board's unit determination in the underlying representation case and argues that the unit of riggers certified by the Board is not an appropriate unit because it does not include

all event employees.<sup>2</sup> This is the first case presented for this Court’s review involving the Board’s application of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 943-47 (2011), enforced sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which clarified the Board’s analysis in unit determination cases like this one, when an employer contends that the petitioned-for bargaining unit is inappropriate because it excludes certain employees. The Board in *Specialty*, in clarifying the “overwhelming community of interest” standard at the second step of its analysis, expressly relied upon and adopted the reasoning of this Court’s opinion in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). See *Specialty*, 357 NLRB at 944-47. The Board’s findings of fact and conclusions and Order in this case are summarized below.

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<sup>2</sup> Specifically, the Company has contended that the unit must include its audio, audio/visual, camera, construction, deckhand, forklift, lighting, loading, production assistant, stagehand, video, wardrobe, climber/scaffers, rope access supervisor, and rope access technician employees. (A. 460, 462; A. 22, 367-68.) Those employees, together with the riggers, appear to comprise all company employees who work at company events. The Company has referred to that collective grouping of workers as a “wall-to-wall” unit. (See A. 22-23, 139, 359, 361-62, Br. 28 n.6.)

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; the Company's Operations**

The Company provides labor staffing services for concerts and other events at venues throughout the State of Washington, and occasionally in Oregon and Montana. These events may last for one day or longer. (A. 460-61; A. 27-29, 32, 56, 73, 93, 364-66.) Typically, the Company staffs three or more "calls" on each event, including a load-in call (setting up the event), a show call (the event or performance itself), and a load-out call (breaking down the event). The Company's schedulers offer employees work on particular calls, which employees voluntarily accept or decline. (A. 463-65; A. 30-31, 55, 73, 81, 84, 129-30, 170, 210, 228-31, 333-34.)

### **B. The Riggers' Job Function and Employment Conditions**

The Company employs approximately 66 riggers, whose function at company events is to temporarily suspend objects such as lighting trusses and video walls overhead during load-in calls and then return those objects to the ground during load-out calls. (A. 462-65; A. 37-39, 148, 150, 263-64, 299-300, 305, 312-13, 386-403.) At the start of each such call, the riggers have their own separate meeting to discuss their work plan. Rigging Manager Tyler Alexander leads these meetings. The rigging manager also directs the riggers' work during the call. (A. 462-63; A. 85-86, 145-48, 153, 163-64, 198, 206, 223-25, 232-33,

269-70, 299, 305, 342-44, 456-57.) If Alexander cannot be present on a given call, the Company designates a head rigger, who fills those roles for the call. (A. 462-63; A. 86, 144-45, 147-48, 164, 299, 342-43.) Riggers use special equipment and tools to perform their work, including climbing harnesses, fall arrest lanyards, ropes, chains, shackles, wire ropes, motors, motor controls, and laser plumb bobs.<sup>3</sup> (A. 462-63; A. 37-38, 140-44, 146, 262-63, 305-06, 315.)

For the load in, the rigging manager or head rigger marks the floor to show where each motor should hang from the “grid”—a network of structural beams near the ceiling—in order to suspend the trusses and other objects in the air. After the riggers conclude their pre-call meeting, those designated as high riggers ascend to the grid via elevator, stairs, ladder, and/or catwalk. The high riggers, wearing climbing harnesses and fall arrest lanyards, walk across the grid’s beams to position themselves above the marks on the floor, and then lower ropes toward the ground. The down riggers, who remain on the floor, grab the ropes and secure each one to a chain and a wire rope, which the high riggers raise to the grid by pulling the ropes back up. (A. 462-65; A. 37-40, 86, 135, 142, 233, 262-64, 298-302.)

Next, the high riggers secure the chains to the grid’s beams using the wire rope and shackles. They adjust the chains’ positions as needed so that they hang

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<sup>3</sup> A laser plumb bob is a tool with a self-leveling laser that, when placed on the ground, points straight up to the ceiling. (A. 140-41.)

down and hit their marks on the floor. If this cannot be accomplished by hanging a chain directly from a beam, a down rigger prepares a wire-rope bridle that the high rigger attaches to two beams, creating the requisite point between beams where the high rigger secures the chain. After the high riggers finish securing all chains, they check to ensure that all of their attachments are sound and proper before returning to the floor. (A. 462-65; A. 37-38, 143, 263-64, 299-304.)

Meanwhile, on the floor, the down riggers attach the motors to the chains. Then, at the appropriate time, they operate the motor controls, causing the motors to climb up the chains. The motors lift the lighting trusses, video walls, and other objects into the air, where they remain suspended during the show. The high riggers, after returning to the floor, may assist the down riggers in completing their tasks. (A. 462-65; A. 37, 183, 187, 189, 264, 302, 304, 309, 310.)

On load-out calls, riggers' work is essentially the same as during the load in, but performed in reverse. They lower the suspended objects to the floor using the motors, detach the motors from the chains, remove the shackles and wire rope from the grid, and lower the chains to the floor. (A. 463; A. 42, 59, 305.) Riggers generally do not work during show calls. (A. 463-65; A. 57-58, 304.)

Riggers' wages range from approximately \$20 to \$40 per hour. (A. 462, 464; A. 174, 219-20, 242.) They are paid for a minimum of four hours on each call. Once riggers complete their rigging tasks on a given call, however, they are

permitted to leave, and generally do so. (A. 464; A. 67, 150-52, 155, 159, 193-94, 200, 305, 319-20.)

To become a rigger, employees must complete the Company's fall-protection training as well as its rigging training. Rigging Manager Alexander coordinates the rigging training, which lasts three days and includes a classroom component, practical component, and test. (A. 462; A. 71, 95-98, 133-34, 138, 224-25, 232, 260-61, 283-84, 313-15, 338, 456-57.) The rigging manager may, in his discretion, exempt an employee who has prior rigging experience from the rigging training, based on his evaluation of the employee's skills. (A. 462; A. 92, 224-25, 232.)

### **C. The Other Event Employees' Job Functions and Employment Conditions**

All of the Company's event employees other than the riggers attend a safety meeting at the start of each call that is led by a show supervisor and a crew chief. (A. 462-63; A. 52-53, 147, 163, 198, 298-99.) Those two individuals also direct the non-riggers' work during the call; they do not, however, direct the riggers. (A. 462-63; A. 52-53, 153-54, 205-06, 233-34, 268-69, 342-43.) Similarly, the rigging manager generally does not direct the non-riggers. (A. 462-63; A. 145-48, 233, 268-69, 343-45.)

During the load in, non-rigger employees perform functions that are distinct from the riggers' function. The forklift operators and loaders move items off of the

trucks and onto the docks. (A. 463; A. 31-32, 243-44.) Stagehands wheel those items to the floor and begin to unpack them. (A. 463; A. 152, 184, 246, 248, 269, 274.) The lighting employees build the trusses and affix the lights to them. (A. 463; A. 34, 182, 184, 189, 236, 244-45.) Audio employees, camera employees, and video operators set up the sound equipment, cameras, and video equipment, respectively. (A. 463; A. 34-35, 182, 235-37, 239-40, 251-52.) The carpenters assemble the stage equipment and set pieces. (A. 463; A. 35, 238, 253.) Wardrobe employees maintain any garments for the event, while production assistants complete and collect paperwork. (A. 463; A. 36, 246-47, 252-53.) Climbers/scaffers erect scaffolding. (A. 463; A. 90-91, 160-61, 239, 289, 334-36, 343.) Rope access supervisors and rope access technicians rappel into hard-to-reach areas to complete tasks such as hanging banners. (A. 463; A. 71-72, 79, 91, 161-62, 221, 331, 344-45.)

During the load out, the non-riggers perform essentially the same work as during the load in, except that they are breaking the items down, disassembling and packing them, and moving them back onto the trucks. (A. 463; A. 42, 59.) Unlike the riggers, some of the other event employees are scheduled to work during show calls. (A. 463-64; A. 40-41, 57, 241.) During such calls, deckhands are responsible for moving items on and off the stage, and spotlight operators and truss

spot operators work with the lighting. (A. 463; A. 40-42, 80, 91, 161, 241, 249-50.)

In contrast with the riggers, other event employees generally do not use chains, shackles, wire ropes, motors, motor controls, or laser plumb bobs to perform their jobs. Nor do they use climbing harnesses, fall arrest lanyards, or rope—except for climbers/scaffers, rope access employees, and truss spot operators. (A. 463; A. 98-99, 143-44, 150, 160-61, 181, 200, 221-22, 244, 263, 277, 289, 305-06, 315, 337, 339-41.)

Non-riggers' wages range from approximately \$11 to \$20 per hour. (A. 462, 464; A. 83, 94, 218-20, 235-38, 240-41, 243-46, 248-49, 251-52, 257-58, 261, 313-14, 444-50.) They are paid for a minimum of four hours on each call, but, unlike the riggers, they are not permitted to leave early after completing certain pre-defined work. (A. 464; A. 67, 153-54, 159, 162.) For events at the Gorge Amphitheater, non-rigger employees receive \$5 less gas reimbursement than riggers, and sleep in a separate campground from them. (A. 464; A. 254-55, 270, 317-18, 320-21, 385.)

The Company offers trainings focused on specific, non-rigger job functions, such as forklift training and video training, some of which are mandatory for employees who want to work in those positions. Riggers are not required to take such trainings. Similarly, non-riggers do not take the Company's rigging training,

unless they are seeking to become riggers. Nor do non-riggers take fall-protection training, with the exception of climbers/scaffers, rope access employees, truss spot operators, and spotlight operators. (A. 462; A. 48-49, 70-72, 102, 199, 222, 232, 265, 290, 337.)

**D. The Limited Functional Integration, Contact, and Interchange Between the Riggers and the Other Event Employees**

Since riggers generally do not work during show calls, they have virtually no functional integration or contact with other employees during such calls. (A. 463-65; A. 57-58, 304.) During load-in and load-out calls, such integration and contact is limited. The riggers and the other event employees work at the same time toward the same broad goal of setting up or breaking down a particular event. Nevertheless, they perform distinct functions in that process, and they work separately and independently of one another. (A. 462-65; A. 95-99, 148-52, 155, 165-66, 170, 182-89, 193-94, 269, 274, 276, 278-81, 293-96, 300, 308-09, 310-11, 319-20, 451, 454-55.)

For example, during a load in, non-rigger employees, including forklift operators, loaders, and stagehands, are responsible for moving certain items that the riggers will eventually need from the trucks to the floor. But the non-riggers perform that task without riggers' assistance or input. And, after those items are on the floor, the riggers simply grab them when they are ready to do so, and continue independently performing their unique rigging function. (A. 462-65; A.

32, 150, 269, 274, 294, 296, 306-07.) Similarly, non-riggers build and move the lighting trusses and the video walls without the riggers' involvement, and later, the riggers independently hoist those items into the air using the motors and chains that they, the riggers, alone have attached to the grid. (A. 462-65; A. 34, 182-84, 186-87, 189, 278-79, 295-96, 307-11.)

There is limited and infrequent interchange between the riggers and the other event employees. (A. 462, 464.) Riggers alone perform rigging duties, and they do not generally perform non-riggers' work. (A. 462, 464; A. 95-99, 129, 133-34, 148-50, 163, 165-66, 193-94, 269, 274, 276, 293-94, 319-20, 451, 454-55.)

Additionally, although a majority of riggers sometimes accept calls in non-rigger positions, they do so voluntarily, and when rigger positions are unavailable. (A. 464; A. 73, 74, 100-01, 115, 129-30, 133, 172-74, 197-98, 271-72, 289-94, 304, 326-34, A. 386-403, 423-38.) Non-riggers, in contrast, are not offered and cannot accept calls in rigger positions, as they are not qualified to perform rigging work. (A. 462, 464; A. 82, 94-100, 129, 133-34, 224-25, 232, 260, 294, 313-15, 325, 451, 454-55.)

## **II. THE PROCEDURAL HISTORY**

### **A. The Representation Proceeding**

The Union filed a petition with the Board seeking to represent a unit of the Company's riggers. (A. 460; A. 363-66.) In response, the Company asserted that

the petitioned-for unit was not appropriate because the riggers share an overwhelming community of interest with the Company's other event employees. (A. 460, 462; A. 22, 367-68.) Following a hearing, the Board's Regional Director issued a Decision and Direction of Election finding that the riggers constitute an appropriate unit and directing an election among those employees. (A. 460-69.) The Regional Director applied the standard elucidated by the Board, and enforced by the Sixth Circuit, in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 943-47 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). (A. 460-66.) As required by *Specialty*, the Regional Director first applied the traditional community-of-interest test to determine whether the petitioned-for unit is appropriate. The Regional Director determined that the riggers are readily identifiable as a group, share a community of interest, and therefore constitute an appropriate unit. (A. 461-62.)

The Regional Director then addressed the Company's contention that the smallest appropriate unit must include all event employees. (A. 461-65.) The Regional Director explained that, at this stage of the inquiry, *Specialty* requires an employer to demonstrate that the excluded employees share an "overwhelming community of interest" with the employees in the petitioned-for unit, such that there is no legitimate basis upon which to exclude them. (A. 461.) Applying that standard, the Regional Director found that the Company failed to show that the

excluded employees share an overwhelming community of interest with the riggers. (A. 462-65.)

The Company requested review of the Regional Director's decision, again contending that the unit must include its other event employees. (A. 475-88.) On November 30, 2015, the Board denied the request, finding the Company had raised no substantial issues warranting review. (A. 518.)

The Board conducted a mail-ballot election among the riggers in the petitioned-for unit. (A. 466, 470.) A majority of those employees voted for union representation. (A. 470.) Accordingly, on August 3, 2015, the Regional Director certified the Union as the exclusive collective-bargaining representative of the riggers. (A. 470.)

### **B. The Unfair-Labor-Practice Proceeding**

Following certification, the Company refused the Union's requests to bargain with it as the representative of unit employees. (A. 471-74, 490.) The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act. (A. 489, 491-97.) The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (A. 505-14, 519.) In response, the Company admitted that it refused to bargain with the Union, but claimed that it had no duty to do so because the Board had

improperly certified the Union as the representative of a riggers-only unit. (A. 490, 498-504, 519.)

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

On December 17, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (A. 519-21.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered and previously unavailable evidence, nor alleged the existence of any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. (A. 519.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A. 520-21.) Affirmatively, the Board's Order directs the Company, on request, to bargain with the Union and post a remedial notice. (A. 520-21.)

## SUMMARY OF ARGUMENT

The Board acted well within its broad discretion in determining that the petitioned-for unit of riggers is an appropriate unit for collective bargaining. Applying the analytic framework clarified in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 943-47 (2011), which encompasses the traditional community-of-interest analysis, the Board first reasonably determined that the riggers are readily identifiable as a group and share a community of interest, based on their unique work function, their common job classification and supervision, and their distinct training requirements, tools, and wage range. Indeed, the Company does not contest the Board's finding under this initial step of the *Specialty* analysis.

The Board also reasonably found, applying *Specialty's* second step, which incorporates this Court's teachings in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), that the Company failed to meet its burden of showing that its other event employees share such an overwhelming community of interest with the riggers that there is no legitimate basis to exclude them from the unit. As the Board found, the non-riggers are separately supervised, and the Company did not establish that they and the riggers share similar terms and conditions of employment. To the contrary, among other disparities, non-riggers receive substantially lower pay—most earn no better than three-quarters of the wage

earned by even the lowest-paid riggers—and they work longer hours because, unlike riggers, they cannot simply leave a call once they complete certain work. Further, the riggers and other event employees perform distinct job functions, and they work separately and independently of one another in setting up and breaking down events. Riggers only rarely and briefly assist with non-rigging duties, whereas non-riggers are not qualified to perform rigging work, and are forbidden from doing so. Accordingly, non-riggers also cannot and do not accept calls in rigger positions, and while riggers may choose to accept non-rigger calls, they do so purely on a voluntary basis, and only when rigger positions are not available. As a result, the Company failed to show more than limited functional integration, contact, and interchange between the two groups, as the Board found, which was insufficient to carry its burden of proof.

Finally, while the Company launches numerous attacks against the *Specialty* standard, most of those arguments are not properly before the Court because the Company did not raise them to the Board, and in any event, the arguments are meritless. Indeed, the Company fails to acknowledge the opinions of five circuits that have unanimously rejected similar or identical challenges. Perhaps most notably, those circuits have recognized that *Specialty* merely clarified established law, and thus—contrary to a fundamental premise of the Company’s claims—is not “new.” Further, the Company baldly mischaracterizes this Court’s opinion in

*Blue Man* in an attempt to avoid that binding precedent, which held, prior to *Specialty*, that the overwhelming community of interest standard is central to the analytic framework properly applied in unit determination cases like this one.

## ARGUMENT

### **THE BOARD ACTED WELL WITHIN ITS DISCRETION IN DETERMINING THAT THE RIGGERS CONSTITUTE AN APPROPRIATE UNIT, AND THEREFORE PROPERLY FOUND THAT THE COMPANY VIOLATED THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of [its] employees . . . .” 29 U.S.C. § 158(a)(5).<sup>4</sup> Here, the Company admits that it has refused to bargain with the Union. It argues that the Board-certified bargaining unit of riggers is inappropriate because it does not also include all event employees.

There is no dispute, however, that if the Board properly certified the riggers-only unit, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the elected representative of that unit. *See Pearson Educ., Inc. v. NLRB*, 373 F.3d 127, 130 (D.C. Cir. 2004) (if employer fails to establish basis for invalidating the Board’s certification of elected union, then

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<sup>4</sup> An employer who violates Section 8(a)(5) also violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . .” 29 U.S.C. § 158(a)(1); *see NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

employer's admitted refusal to bargain violates Section 8(a)(5) and (1)).

Accordingly, the sole issue before the Court is whether the Board acted within its broad discretion in making its unit determination. *See NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (recognizing the Board's "broad" discretion with respect to unit determinations); *RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 240 (D.C. Cir. 2003) ("the Board has wide latitude in determining an appropriate bargaining unit").

#### **A. Applicable Principles and Standard of Review**

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen "by the majority of the employees in a unit appropriate for" collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C § 159(b).

By its plain terms, Section 9(b) leaves the Board to determine whether a given grouping of employees is appropriate. *Action Auto.*, 469 U.S. at 494; *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). Moreover, because the Act does not favor any particular unit composition or suggest how the Board should determine appropriateness (*see Local 1325, Retail*

*Clerks Int'l Ass'n, AFL-CIO v. NLRB*, 414 F.2d 1194, 1199-1200 (D.C. Cir. 1969); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 563-64 (5th Cir. 2016)), the Board's designation of an appropriate unit "involves of necessity a large measure of informed discretion." *Country Ford Trucks*, 229 F.3d at 1189 (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)).

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

To determine whether the petitioned-for unit is an appropriate unit, the Board asks whether the employees in that unit "are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)" and "share a community of interest." *Specialty Healthcare &*

*Rehab. Ctr. of Mobile*, 357 NLRB 934, 945 (2011), *enforced sub nom. Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). In making its assessment regarding community of interest, the Board considers “[a] host of factors” (*RC Aluminum*, 326 F.3d at 240), such as “the employees’ wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.” *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 1457 (2016) (internal quotation marks omitted); *see also Specialty*, 357 NLRB at 942 (listing factors). There is “no hard and fast definition or an inclusive or exclusive listing of the factors to consider.” *Country Ford Trucks*, 229 F.3d at 1190 (internal quotation marks omitted). The Board instead “weigh[s] . . . all relevant factors on a case-by-case basis” (*id.* at 1190-91) (internal quotation marks omitted), and “no particular factor controls.” *RC Aluminum*, 326 F.3d at 240. Accordingly, the Board “is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *Macy’s*, 824 F.3d at 564 (internal quotation marks omitted).

“It is well established that more than one appropriate bargaining unit logically can be defined in any particular factual setting.” *Country Ford Trucks*, 229 F.3d at 1189 (internal quotation marks omitted); *accord Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). This Court “ha[s] long observed that

the Board need only select *an* appropriate unit, not *the most* appropriate unit.” *Dodge of Naperville*, 796 F.3d at 38 (emphasis in original) (internal quotation marks omitted); *accord RC Aluminum*, 326 F.3d at 240. Moreover, in making its selection, the Board may properly take into account the employees’ desire to organize and bargain in a specific grouping, and a union’s interest in representing them in that grouping. *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441-42 (1965) (the Board may consider the extent of employee organization as one factor in its unit determination); *Country Ford Trucks*, 229 F.3d at 1191 (same); *Local 1325, Retail Clerks*, 414 F.2d at 1199-1200 & n.6 (“simple logic” would “seem to imply” that, since extent of organization can be considered as a factor, it “will sometimes make the difference between whether a unit is appropriate or not”).

Consistent with these principles, the Board considers its inquiry at an end if it determines that the unit identified in the representation petition is “an appropriate unit.” *Specialty*, 357 NLRB at 941; *see Country Ford Trucks*, 229 F.3d at 1191 (“the [Board] may simply look at the [u]nion’s proposed unit and, if it is an appropriate unit, accept that unit determination without any further inquiry”); *Cleveland Const., Inc. v. NLRB*, 44 F.3d 1010, 1013 (D.C. Cir. 1995) (“Under NLRB law, the Board first looks to the unit sought by the union. If the unit is appropriate, the Board’s inquiry ends.”).

Where the Board has found that the petitioned-for unit is an appropriate unit, an objecting party can only overcome that finding by showing that the unit is “truly inappropriate.” *Blue Man*, 529 F.3d at 421; *accord Country Ford Trucks*, 229 F.3d at 1189; *Macy’s*, 824 F.3d at 563 (“An employer who challenges the Board’s determination has the burden of establishing that the designated unit is clearly not appropriate.”) (internal quotation marks omitted); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016) (employer has burden to show that Board-approved unit is “utterly inappropriate”) (internal quotation marks omitted). Merely establishing “[t]hat other potential unit determinations appear equally or more appropriate is insufficient to justify reversal.” *Country Ford Trucks*, 229 F.3d at 1191; *accord Blue Man*, 529 F.3d at 421 (“the employer must do more than show there is another appropriate unit”).

In *Specialty*, the Board—expressly adopting the careful work of this Court in *Blue Man*—clarified that where the objecting party claims that the petitioned-for unit is inappropriate because it excludes certain employees, that party must show that the excluded employees share “an overwhelming community of interest” with those in the petitioned-for unit, such that there is no legitimate basis to exclude them. *Specialty*, 357 NLRB at 944-47 (adopting *Blue Man*, 529 F.3d 417). The Court in *Blue Man* not only endorsed this approach, but recognized its place within

the “consistent analytic framework” used by the Board and the courts in unit determination cases. 529 F.3d at 421.

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, 842-45 & n.11 (1984). *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 123-24 (1987).

Accordingly, where the plain terms of the statute do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board’s reasonable interpretation of the Act. 467 U.S. at 843-45 & n.11. 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, 399 (1996) (citation omitted).

Similarly, in reviewing the Board’s designation of an appropriate unit in a particular case, the Court “may not substitute its own judgment for a rationally supported position adopted by the Board.” *Country Ford Trucks*, 229 F.3d at 1189; *accord Local 627, Int’l Union of Operating Engineers, AFL-CIO v. NLRB*, 595 F.2d 844, 848 (D.C. Cir. 1979). Indeed, the Court must uphold the Board’s unit determination “unless it is arbitrary or not supported by substantial evidence in the record.” *Blue Man*, 529 F.3d at 420; *see also Country Ford Trucks*, 229 F.3d at 1186 (affirming Board because employer “fail[ed] to demonstrate that [the Board]

abused its discretion in making the unit determination”). Thus, the Board’s certification of an appropriate bargaining unit, “if not final, is rarely to be disturbed.” *S. Prairie Const. Co. v. Local No. 627, Int’l Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 805 (1976); *accord Action Auto.*, 469 U.S. at 496; *Country Ford Trucks*, 229 F.3d at 1189.

**B. The Board Reasonably Determined that a Unit Limited to Riggers Constitutes an Appropriate Unit**

The Board reasonably applied its longstanding, judicially approved community-of-interest test to the record here to find that the petitioned-for unit of riggers is an appropriate unit for collective bargaining. In addressing the Company’s claim that its other event employees should be included in the unit, the Board applied the framework it clarified in *Specialty*, which has now been approved by five circuit courts. *See NLRB v. FedEx Freight, Inc.*, \_\_\_ F.3d \_\_\_, 2016 WL 4191498, at \*4-9 (3d Cir. Aug. 9, 2016); *Macy’s, Inc. v. NLRB*, 824 F.3d 557, 564-70 (5th Cir. 2016); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 495-502 (4th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 522-27 (8th Cir. 2016), *reh’g & reh’g en banc denied* (May 26, 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 559-65 (6th Cir. 2013); *see also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (approving “overwhelming community of interest” standard later adopted by Board in *Specialty*). Here, the Board found, under that clarified, court-approved standard,

that the Company had failed to show that its other event employees shared such an overwhelming community of interest with the riggers that their exclusion would render the unit inappropriate.

**1. It is uncontested that the Board properly applied the traditional community-of-interest factors to find the unit of riggers appropriate**

As the Board noted, the first step of *Specialty's* clarified analysis examines whether the petitioned-for employees “are readily identifiable as a group and share a community of interest.” (A. 461.) *Specialty*, 357 NLRB at 945. In its opening brief, the Company expressly concedes that “[t]he Board correctly concluded that the riggers share a community of interest” (Br. 14), and it fails to argue that the riggers are not readily identifiable as a group, thereby waiving the issue. *See N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived); Fed. R. App. P. 28(a)(8)(A) (“appellant’s brief must contain . . . the argument, which must contain . . . appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).<sup>5</sup>

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<sup>5</sup> The Company’s passing remark that “[e]ven if riggers were the only employees who used motors . . . that distinction is not enough to make [them] an identifiable group” (Br. 21) is not sufficient to avoid waiver of the issue. *See New York Rehab. Care*, 506 F.3d at 1076 (“It is not enough merely to mention a possible argument in the most skeletal way”); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (arguments merely referenced in opening brief are waived, and cannot be argued in reply brief).

Moreover, the record evidence fully supports the Board's finding that, under the first step of *Specialty*, the unit of riggers "is appropriate for the purposes of collective bargaining." (A. 462.) As the Board found, the riggers "are readily identifiable as a group" based on their job classification as well as their "unique function"—namely, "using motors to temporarily suspend objects such as video screens, lighting trusses, audio speakers, and cabling for the sets overhead at [Company] events." (A. 462.) See *FedEx Freight*, 2016 WL 4191498, at \*10 (unit employees were "clearly identifiable" as a group in part because unit was "structured along the lines of classification, job function, and skills"); *Specialty*, 357 NLRB at 945 (the Board asks whether employees are readily identifiable as a group "based on job classifications . . . functions . . . or similar factors").

The Board also reasonably determined that the riggers "share a community of interest." (A. 462.) As the Board explained, the riggers are under "common supervision" by Rigging Manager Tyler Alexander, whom the parties stipulated is a statutory supervisor. (A. 462; A. 223.) Additionally, the riggers' work "has the shared purpose of going up into the grid to attach chains to hoist motors in the air." (A. 462.) See *FedEx Freight*, 2016 WL 4191498, at \*10 (petitioned-for employees were "engaged in virtually the same task" of "moving freight from place to place," supporting their community of interest); *Macy's*, 824 F.3d at 565 (petitioned-for employees' "unique function . . . of selling cosmetics and fragrances" supported

their community of interest). Furthermore, as distinct from other employees, riggers are required to attend “specific training, including fall protection training and 3-day rigger training provided by the [Company],” and they use “unique tools” to perform their jobs—including climbing harnesses, fall arrest lanyards, ropes, chains, shackles, wire ropes, motors, motor controls, and laser plumb bobs.<sup>6</sup> (A. 462.) (See pp. 6, 8, 10-11.) Moreover, riggers “have a significantly higher hourly wage rate range than [other] employees.” (A. 462.)

**2. The Company has not shown that its other event employees share an overwhelming community of interest with the riggers**

It is well settled, as discussed above, that the Act requires only *an* appropriate bargaining unit. See *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991), and cases cited at pp. 21-22. It therefore “follows inescapably” that simply demonstrating that another unit would also be appropriate “is not sufficient to demonstrate that the proposed unit is inappropriate.” *Specialty*, 357 NLRB at 943; accord *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). As this Court explained in *Blue Man*, the mere fact that “excluded employees share a community of interest with the included employees does not . . . mean there may be no legitimate basis upon which to exclude them; that follows apodictically from

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<sup>6</sup> In addition to the fall-protection and rigging training, riggers must obtain a certification from the Entertainment Technicians Certification Program, a national program administered by an independent organization, in order to perform rigging work for the Company at the Washington State Convention Center. (A. 137, 156, 242-43, 266-67.)

the proposition that there may be more than one appropriate bargaining unit.” 529 F.3d at 421.

Consistent with these principles, the Board here applied the standard clarified in *Specialty*, that an employer seeking to expand a petitioned-for unit composed of a readily identifiable group that shares a community of interest must demonstrate that the employees it seeks to add “share an overwhelming community of interest with those in the petitioned for unit.” *Specialty*, 357 NLRB at 945-46. In approving this clarified standard, the Third, Fourth, Fifth, Sixth, and Eighth Circuits have agreed with the Board (*see* 357 NLRB at 944-46) 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. *See FedEx Freight*, 2016 WL 4191498, at \*7; *Nestle*, 821 F.3d at 496, 499-500; *Macy’s*, 824 F.3d at 567; *Kindred*, 727 F.3d at 561-63; *FedEx Freight*, 816 F.3d at 523-25.

Indeed, as noted, this Court in *Blue Man* recognized that the Board and the courts’ “consistent analytic framework” has included the question whether “the excluded employees share an overwhelming community of interest with the included employees.” 529 F.3d at 421. In *Specialty*, the Board expressly adopted this Court’s work and settled on the “overwhelming community of interest” formulation of the heightened standard (*Specialty*, 357 NLRB at 944)—in an effort

“to standardize the phrasing” of that aspect of the consistent analytic framework. *FedEx Freight*, 2016 WL 4191498, at \*7. As the Board noted here, the standard is satisfied only when the excluded and included employees’ traditional community-of-interest factors “overlap almost completely.” (A. 461) (citing *Specialty*, 357 NLRB at 944 (quoting *Blue Man*, 529 F.3d at 422); see also *Blue Man*, 529 F.3d at 425 (when excluded and included employees do not share a “nearly complete overlap” in community-of-interest factors, standard is not satisfied); accord *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017 (2011).

Applying *Specialty*, the Board reasonably found that the Company failed to carry its burden of proving that the riggers and the other event employees share such an “overwhelming community of interest” that the exclusion of the non-riggers would render the unit inappropriate. To begin, the Board found that the riggers and non-riggers are “separately supervised.” (A. 462-63.) Indeed, Rigging Manager Alexander almost exclusively directs riggers’ work, and he leads the riggers’ separate pre-call meetings, whereas the show supervisor and crew chief only direct non-riggers, and conduct distinct pre-call safety meetings, which riggers do not attend. (A. 463.) (*See* pp. 5, 8.) The Company’s claim that the show supervisor nonetheless supervises “riggers and non-riggers alike” rings hollow. (Br. 22.) The show supervisor ultimately approves the riggers’ timesheets, but that is the extent of his oversight—he does not, for example, assign tasks to the riggers,

nor does he direct or evaluate their work. (A. 153-54.) *See Macy's*, 361 NLRB No. 4, 2014 WL 3613065, at \*12 (July 22, 2014) (separate immediate supervision supported finding no overwhelming community of interest, notwithstanding shared second-level supervision by store manager, where record did not show extent of manager's day-to-day interactions with employees aside from her leading daily storewide meetings), *aff'd*, 824 F.3d 557 (5th Cir. 2016).

The Board also reasonably determined that the Company did not establish that the riggers and non-riggers share similar terms and conditions of employment. (A. 464.) That determination finds powerful support in the disparate wage ranges separating the two groups—\$20 to \$40 per hour for riggers, as compared to \$11 to \$20 per hour for other event employees. (A. 464.) (*See pp. 7, 10.*) *See Nestle*, 821 F.3d at 493-94, 497, 499 (wage ranges of \$20-\$30 per hour for unit employees versus \$15-\$22 per hour for excluded employees was a significant distinction). Furthermore, Director of Operations Karen Biggers conceded that employees in at least the vast majority of non-rigger positions tend to be paid closer to the bottom of their range (\$11 per hour) than to the top. (A. 218, 257-58.) Thus, most non-riggers earn at least five dollars less per hour than even the lowest paid riggers—at least twenty-five dollars less per hour than the highest paid riggers. *See FedEx Freight*, 2016 WL 4191498, at \*2, \*11 (where, compared to average unit employee, hourly wage of excluded employees was fifty cents less on average if

full-time and between \$2.32 and \$4.32 less if part-time, excluded employees earned “considerably less” and the “disparity in wages” supported lack of overwhelming community of interest).

Moreover, the non-riggers’ distinct employment terms at the Gorge Amphitheatre—where they are paid \$5 less gas reimbursement than the riggers, and sleep in a separate campground—further support the Board’s finding. (A. 464.) Additionally, whereas riggers are only scheduled to work during load-in and load-out calls, some other event employees are scheduled during show calls. (A. 463-64.) And, strikingly, while all employees are guaranteed four hours’ pay per call, only riggers are permitted to leave once they complete their work. (A. 464.) (See pp. 7-8, 10.) See *Overnite Transp. Co.*, 331 NLRB 662, 663 (2000) (fact that included classifications were “the only employees that can be sent home for lack of work” was a particularly significant distinction showing their “separate terms and conditions of employment”). As a result, riggers typically work only 2.5 to 3 hours per call, whereas non-riggers typically work the full 4 hours, often being reassigned to different tasks or areas after completing their initial assignments. (A. 153-54, 159, 162.)

Further, non-rigger employees have distinct job duties and only infrequent and limited interchange with the riggers, and the Company failed to show significant functional integration or contact between the two groups, as the Board

reasonably found. (A. 462-65.) As explained (pp. 5-12), the Company's other event employees "have different job duties" (A. 463) and "perform distinct tasks" (A. 462) than the petitioned-for riggers. Thus, it is the riggers "alone" (A. 464) who perform their "separate and distinct function" (A. 465)—namely, "using motors to safely suspend objects overhead before events and safely removing them with motors afterwards." (A. 463.) (*See* pp. 11-12.) Indeed, Chief Executive Officer Jeffrey Giek admitted that rigging "requires" specialized training, and that Company policy dictates that employees "never perform [rigging] tasks unless specifically trained and scheduled for them by [the Company]." (A. 95-98, 454.) *See Country Ford Trucks*, 229 F.3d at 1190-91 (rejecting employer's contention that unit should be expanded where excluded and included employees "perform[ed] different functions . . . and [were] required to have different skills"); *Nestle*, 821 F.3d at 496-97 (excluded and included employees "perform[ed] different . . . essential functions," and excluded employees "lack[ed] the appropriate skill" to perform work that was unit employees' primary function).

Likewise, riggers are "solely responsible" for fulfilling their unique rigging function (A. 463), and therefore "do not generally perform" non-rigging duties. (A. 464.) (*See* pp. 11-12.) Thus, riggers Matthew Klemisch, Heidi Gonzalez, and Kyle Daley consistently testified that riggers are "not . . . required" (A. 319-320) to perform non-rigging tasks, although they "might" (A. 165-66, 274) agree to do so

“as a personal favor” (A. 319)—such as when a non-rigger is “really struggling” (A. 274), or in an “unusual circumstance.” (A. 319.) The three riggers were unanimous that riggers perform non-rigging duties only “very rare[ly]” (A. 165-66), and for no more than five percent of their working time on any given call. (A. 150, 274-76, 319.)

As the Board specifically noted, riggers “do not have any responsibility for unloading or loading items.” (A. 463.) Indeed, as Matthew Klemisch vividly described:

[W]hen a concert’s loading out . . . there’s often pieces left to be disassembled at the end of the day. But the rigging is done. The motors have been put down. They’ve been packed in their boxes, and they’re ready to be loaded. The riggers leave. They go home. They don’t load them in the truck. They don’t even push them to the truck. They leave them in a nice neat pile, and they leave.

(A. 150.) During one particular load out, a tour representative asked Klemisch and the other riggers to move boxes to the truck, but they refused, “[b]ecause the rigging was done,” and “[t]he loading of the trucks is not the riggers’ job.” (A. 152, 193-94.)

The record also amply supports the Board’s determination that the riggers and other event employees work “separately” and “independently” of one another. (A. 462, 464-65). (*See* pp. 11-12.) As Heidi Gonzalez succinctly put it, “[e]veryone has their position and works,” so that the riggers and non-riggers work “[t]ogether, but independently.” (A. 294, 296.) Thus, when setting up a show,

each classification stays “in [their] department[] . . . doing [their] own individual jobs”—for example, “the [stage]hands work [as] a team to make sure that they get everything out, while [the riggers] work as a team . . . to get everything up in the air.” (A. 294-96.) With the limited exception of rope access employees, non-riggers “aren’t allowed up in the grid” during the load in. (A. 325.) And, as the high and down riggers “progress[] down the line” in hanging the chains and motors (A. 183-84), they work their way downstage—“away from the stagehands” (A. 170, 300)—in order to “get[] ahead of all the [employees] that are building [the trusses and other items] behind [them].” (A. 300.) Indeed, the riggers “try to work fast enough” so that they “stay ahead,” and thus, the riggers and non-riggers can “stay out of [each other’s] way” and “limit their interaction” as they each do their own distinct jobs. (A. 170, 183-84.)

Accordingly, because the riggers perform a “separate and distinct function” during load-in and load-out calls (A. 465), the Company did not carry its burden of showing that their work has an overwhelming degree of functional integration with the work of the excluded employees, as the Board reasonably found. (A. 464-65.) As the Board explained, although “both groups are broadly responsible for aspects of staging the [Company’s] events,” the relevant inquiry “is not whether all employees play some part in achieving one overall purpose,” but rather, “whether the employees in the classifications at issue have a separate role in the process.”

(A. 464.) *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151, 2013 WL 3365658, at \*9 (July 3, 2013); *DTG Operations, Inc.*, 357 NLRB 2122, 2128 (2011). As in *Guide Dogs*, the Company has failed to demonstrate that its riggers and non-riggers are “so functionally integrated as to blur the pronounced differences that exist between” the two groups. 2013 WL 3365658, at \*9. *See also Country Ford Trucks*, 229 F.3d at 1187, 1190-91 (upholding unit that included technicians and lubricators at one facility but excluded installers/fabricators and parts employee at second facility across street, where both groups of employees sometimes performed work on the same trucks).

Similarly, “the record does not establish that the [non-riggers] and the riggers regularly have any reason to interact with each other in performing their work, for example by discussing what needs to be loaded or unloaded or moved to the floor or discussing the work the riggers need to accomplish.” (A. 465.) To the contrary, such interaction “is extraordinarily limited.” (A. 155.) (*See also* A. 170, 183, 189, 280-81.) Thus, for reasons similar to those supporting the Board’s findings concerning unique job duties and limited functional integration, the Board reasonably determined that the Company failed to prove a significant degree of contact between the included and excluded employees. (A. 465.) *See Macy’s*, 2014 WL 3613065, at \*5, \*10, \*12 (record failed to show significant contact where

it indicated physical proximity and some contact between employee groups but did not establish the “extent of any . . . interactions” involved).

The Board acknowledged that the Company presented evidence showing that riggers and other event employees “in some instances” experience a higher degree of contact and functional integration when working together “on particular tasks, such as building and erecting tents at Chambers Bay and removing wind walls if wind speeds exceed approximately 30 miles per hour at the Gorge Amphitheatre.” (A. 465.) As the Board correctly determined, however, “the record does not establish that the two groups work together on such tasks with any significant degree of frequency or regularity.” (A. 465.) “Rather, it appears that riggers . . . only occasionally participate[] in the performance of [such] tasks.” (A. 465; A. 60-62, 105, 119-20, 127-28, 168-72, 180-81, 220, 233, 285, 316, 322-23, 404, 406-09.) Thus, the Board’s acknowledgment concerning those infrequent and irregular instances does not undermine its finding that the Company failed to carry its burden regarding the contact and functional integration between the two groups. *See Macy’s*, 2014 WL 3613065, at \*5, \*12 (where record did not establish frequency of activities involving contact between employee groups, employer did not show significant contact); *Oregon Shakespeare Festival Ass’n*, 19-RC-150979, 2015 WL 4980475, at \*1 n.1 (Aug. 20, 2015) (“Although there is some degree of

contact and functional integration between the two groups, the [e]mployer did not establish how frequently or regularly the contact occurs.”).

Additionally, as noted, the Board properly found that the Company failed to show “significant interchange” between the riggers and other event employees. (A. 462, 464.) As explained (pp. 11-12, 33-35), such interchange does not occur within a call, when other employees leave the rigging to the riggers, and the riggers only rarely and briefly assist in non-rigging tasks. (A. 464.) Moreover, while “the majority of riggers have voluntarily accepted [calls in] non-rigger positions when rigger work is not available,” non-riggers, conversely, are not offered and cannot accept calls in rigging positions, because they are not qualified to perform rigging work. (A. 462, 464.) (*See* pp. 8, 12, 33.) Thus, riggers’ one-way acceptance of non-rigger calls “does not establish interchange between the riggers and other employees.” (A. 464.) *See FedEx Freight*, 816 F.3d at 527 (upholding drivers-only unit that excluded dockworkers, holding that “[a]lthough the drivers . . . perform about one third of the dock work, the more important fact is that dock workers cannot and do not perform driving work”); *DPI Secuprint, Inc.*, 362 NLRB No. 172, 2015 WL 5001021, at \*6 (Aug. 20, 2015) (“one-way ‘interchange’ is not sufficient to establish an overwhelming community of interest”).

And, as the Board further found, the significance of such “interchange” is moreover diminished “because it occurs largely as a matter of employee

convenience, i.e., it is voluntary.” (A. 464.) *See Overnite Transp. Co.*, 331 NLRB 662, 663 (2000) (petitioned-for employees’ practice of working extra shifts in excluded positions not significant, in part because it was mostly voluntary); *Capri Sun, Inc.*, 330 NLRB 1124, 1125 (2000) (interchange was not significant, in part because it was voluntary); *Red Lobster*, 300 NLRB 908, 911 (1990) (interchange carries reduced significance when voluntary or done as a matter of employee convenience). Furthermore, as the Board additionally found, riggers voluntarily accept non-rigger calls only “when rigger work is not available” (A. 464)—thus, their work on such calls is “secondary in nature” to their core role as riggers, further reducing its significance. *See Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1414-15 (1978) (skilled operators’ assignments to perform unskilled laborer work “when there [was] no work for them as operators” did not render operators-only unit inappropriate, in part because such assignments were “secondary in nature” to their “primary function” as operators, and were made “basically to give them something to do”).

The Company repeatedly misstates the record evidence concerning the extent to which riggers accept non-rigging calls. (Br. 4, 10, 22.) It claims, for example, that “riggers testified that their non-rigging work occupied over 20 percent of their respective time, up to 50 percent” (Br. 10), that one rigger “estimated . . . he spent 50% of his time doing non-rigging work” (Br. 22), and that

most riggers “do non-rigging work . . . more than half their total work time.” (Br. 22.) These assertions lack record support, and the purported rigger testimony simply does not exist. Indeed, the Company provides almost no record citations to back up these claims; it cites nothing more than an exhibit that merely lists the positions in which riggers have worked (but that does not show how often they have worked in those positions), statements made by Company counsel during the hearing’s closing arguments, and the testimony of Show Supervisor Eric Drda, who is not a rigger. *See* (Br. 4, 22) (no record citation provided), (Br. 10) (citing (A. 127-28, 360, 390-403.).

Moreover, Mr. Drda’s testimony does not support the Company’s assertions. He testified that at least 50 percent of the events on which he works include riggers doing non-rigging work (A. 127-28)—an entirely different proposition than the 50-percent claim asserted by the Company. Mr. Drda added that on the U.S. Open Chambers Bay Golf Course project, riggers may spend 35 or 45 percent of their time doing non-rigging tasks (A. 128)—but Chambers Bay, a job spanning more than two months where employees consistently worked eight-to-ten-hour shifts, was an unusual project. (A. 465; A. 60-62, 105, 127-28, 168-72, 180-81, 220, 233, 404, 406-09.) Indeed, Drda himself described the Chambers Bay project as “one of those job sites where [riggers are] really outside of the boundaries,” and as a type of job that the Company does only “every so often.” (A. 127.)

Additionally, while the Company does not cite it, Mr. Drda also testified regarding purported seasonal fluctuation in how frequently riggers accept non-rigger calls. (A. 133.) He stated that in the summertime “there’s a lot of shows going on,” and consequently, “[a]ll the riggers are being utilized as riggers,” whereas in other seasons, “when there’s not as many shows happening,” more than 50 percent of the riggers’ calls are in non-rigger positions. (A. 133.) Not only does the Company fail to cite this testimony, the testimony taken at face value does not speak to the overall percentage of riggers’ Company calls in which they work in non-rigger positions—particularly because riggers’ total number of Company calls during and surrounding peak season may be substantially higher than their total number of Company calls during less busy times of year, especially given that riggers typically work for several different event-staging/entertainment companies, and sometimes also work outside of the industry. (A. 136, 172, 178-79, 259-60, 313.) Over a two-year period, riggers Kyle Daley, Heidi Gonzalez, and Kyle Bove worked just 17 percent, 12 percent, and 5 percent of their Company calls in non-rigger positions, respectively; thus, they worked 83 percent, 88 percent, and 95 percent of their Company calls as riggers. (A. 207-08, A. 386-89, 408-09, 423-38.)<sup>7</sup> Additionally, as the Company rightly concedes (Br. 10-11, 22), about 21

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<sup>7</sup> For Kyle Bove, the above calculations disregard calls that he worked on the Chambers Bay (“USGA”) project; however, even if those calls were included, he still worked 93% of Company calls in rigger positions. (A. 408-09.) Similar

percent of riggers work exclusively as riggers—that is to say, on 100 percent of their Company calls. (A. 74, 209-12, 386-403.)

In any event, even setting aside the lack of record support for the Company's claims, and the one-way and voluntary nature of the riggers' acceptance of non-rigger calls, the simple fact that employees in a petitioned-for unit sometimes work in non-unit positions or otherwise perform non-unit work does not render the unit inappropriate. *See FedEx Freight*, 816 F.3d at 520, 527 (upholding petitioned-for unit of drivers excluding dockworkers where forty-one out of forty-three drivers performed dock work, and 34 percent of all dock work was completed by drivers); *DTG Operations, Inc.*, 357 NLRB 2122, 2122-23, 2125, 2127 (2011) (approving petitioned-for unit of rental-car service agents notwithstanding that those employees regularly covered duties of excluded lot-agent and return-agent positions during break times and on overnight shift, when lot and return agents did not work); *Home Depot USA, Inc.*, 331 NLRB 1289, 1289-91 (2000) (approving petitioned-for unit of drivers who regularly performed duties of excluded puller position, up to 30-40 percent of their total work time, and who could be assigned additional non-driver work if delivery volume was low or weather conditions were hazardous); *Dick Kelchner Excavating*, 236 NLRB at 1414-15 & n.2 (approving

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payroll documents for employee Meranda McNeill are not particularly instructive, as she worked only four calls outside of the Chambers Bay project; nonetheless, three out of those four calls were in rigger positions. (A. 406-07.)

petitioned-for unit of operators notwithstanding that employer assigned them to perform work of excluded laborers whenever operator work was unavailable, where operators nonetheless spent “50 percent or more” of their time performing operator work).

Finally, the Company gains no ground in noting (Br. 23) that most of the Union’s collective bargaining agreements—all of which are with *other* employers—do not cover riggers-only bargaining units. There is no evidence concerning whether the Board determined the appropriateness of any of those bargaining units, and in any event, because “the statutory standard . . . requires only that the proposed unit be *an* appropriate unit . . . prior precedent holding a different unit to be appropriate in a similar setting is not persuasive.” *Specialty*, 357 NLRB at 939 n.11.

**C. The Bulk of the Company’s Challenges to the *Specialty* Standard Are Not Properly Before the Court, and In Any Event, They Are Meritless**

In its opening brief, the Company advances numerous attacks on *Specialty*, most of which bear little resemblance to the arguments it raised before the Board. In its request for Board review of the Regional Director’s unit determination, the Company challenged *Specialty* solely on the basis that it purportedly constitutes an unworkable policy—claiming in a speculative manner that the test “unduly burdens the operations of employers,” “create[s] unnecessary inefficiencies,”

“complicat[es] the work of employees,” “creates the potential for conflicts between groups of employees,” and is therefore “contrary to the interests of industrial peace, employers, and employees alike.” (A. 487-88.) The Company did not add to this limited challenge in its subsequent filings to the Board in the unfair-labor-practice case, where it summarily asserted that *Specialty* “was incorrectly decided as a matter of law,” and otherwise “relie[d] on . . . [and] incorporated . . . by reference” its request for review in the representation case. (A. 502, 516.)

To preserve an issue for appeal under Section 10(e) of the Act, a party must raise the issue before the Board. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313, 316 (D.C. Cir. 2015); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015).

Thus, while the Company arguably may have preserved for review its claim that *Specialty* does not properly account for the Act’s collective-bargaining purposes (Br. Section III.B), it failed to identify, much less explain, any of the other challenges it articulates at length in its opening brief (Sections

III.A,C,D,&E).<sup>8</sup> Having not apprised the Board of those challenges, and having not presented the Court with any “extraordinary circumstances” that would excuse that failure, the Board submits that those challenges are not properly before the Court. In any event, as shown below, none of the Company’s arguments against *Specialty* have merit.

Before proceeding to the specific challenges, however, two global comments on the deficiencies of the Company’s position are worth noting. First, the Company does not even attempt to address—indeed, it does not even cite—the opinions of the five circuits that have unanimously upheld *Specialty* in the face of similar challenges. *See FedEx Freight*, 2016 WL 4191498, at \*4-9; *Macy’s*, 824 F.3d at 564-70; *Nestle*, 821 F.3d at 495-502; *FedEx Freight*, 816 F.3d at 522-27; *Kindred*, 727 F.3d at 559-65. Foremost among the Company’s omissions in this regard is its failure to acknowledge that each of those five circuits have recognized that, in *Specialty*, the Board “clarified—rather than overhauled—its unit-determination analysis.” *FedEx Freight*, 2016 WL 4191498, at \*6 (internal quotation marks omitted); *accord Macy’s*, 824 F.3d at 567; *Nestle*, 821 F.3d at

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<sup>8</sup> Specifically, the Company did not mention before the Board its arguments regarding the “in each case” language of Section 9(b) of the Act (Br. Section III.A); the mistaken proposition that *Specialty* makes classification or departmental units irrefutably or per se appropriate (Br. Section III.A); the supposed presumption favoring broad units that *Specialty* purportedly reversed (Br. Section III.C); the Section 7 right to refrain from other protected activity and excluded employees’ Section 7 rights (Br. Section III.D); or the Administrative Procedure Act (Br. Section III.E).

499–500; *FedEx Freight*, 816 F.3d at 523-25; *Kindred*, 727 F.3d at 561. Thus, contrary to the premise of the Company’s position (Br. 25-51), there is no “new” rule at issue here. This fact alone is sufficient basis to reject the bulk of the Company’s arguments, including its claim that the Board issued *Specialty* contrary to the requirements of the Administrative Procedure Act (“APA”). See *FedEx Freight*, 2016 WL 4191498, at \*9 (rejecting APA challenge, holding that *Specialty* test “was not new policy”); *Nestle*, 821 F.3d at 501 (rejecting APA challenge, holding that Board in *Specialty* “did not create a new obligation for employers,” but “merely clarified the employer’s evidentiary burden”).<sup>9</sup>

Second, the Company mischaracterizes *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), in an attempt to escape that in-circuit precedent. Contrary to the Company’s claims (Br. 33-35), *Blue Man* did not involve “the propriety of adding a historically excluded group of employees” to an existing bargaining unit, but instead involved “an initial bargaining unit determination.” (Br. 33.) To be sure, bargaining history was at play in *Blue Man* to the extent that

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<sup>9</sup> Moreover, contrary to the Company’s related assertion, the Supreme Court has made clear that the Board is “not precluded from announcing new principles in an adjudicative proceeding.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *accord Macy’s*, 824 F.3d at 570 (“Even accepting the premise that [*Specialty*] announced a new standard, the contention that the Board violated the APA is . . . unavailing.”); *FedEx Freight*, 816 F.3d at 526. And, as the Sixth Circuit observed in *Kindred*, “if the Board may announce a new principle in an adjudication, . . . it may choose to follow one of its already existing principles,” as it did in clarifying the overwhelming-community-of-interest test in *Specialty*. 727 F.3d at 565.

the petitioned-for group of employees had previously been represented when employed by a different employer (a casino). *Blue Man*, 529 F.3d at 419.

Nonetheless, the respondent production company began to employ those workers when it moved its production to a different casino, and five months later, “the [u]nion petitioned the Board for a representation election.” *Id.* at 420. After a hearing, the Board’s Regional Director “determined, pursuant to [Section] 9(b) of the [Act] . . . that the unit proposed by the [u]nion was an appropriate unit and ordered a representation election,” which the union won, leading the Board to certify it as the unit employees’ bargaining representative. *Id.* Thus, notwithstanding “*the prior unit’s* bargaining history,” *Blue Man* plainly was an initial “unit determination case[,],” as the Court recognized. *Id.* at 420-21 (emphasis added).

Further, adding insult to injury, the Company alternatively contends that “[t]o the extent [*Blue Man*] . . . stands for the proposition that the ‘overwhelming’ standard applies to initial unit determinations,” the Court “misconstru[ed] . . . Board precedent” and was “simply incorrect.” (Br. 34-35.) Despite the Company’s disagreement with *Blue Man*, the Court’s well-reasoned approval, pre-*Specialty*, of the “overwhelming community of interest” standard as an integral component of the “consistent analytic framework” of the Board and the courts “in unit determination cases” not only is correct—here, it is binding. *Blue Man*, 529

F.3d at 421; *see, e.g., Ali v. Rumsfeld*, 649 F.3d 762, 771 n.13, 775 n.20 (D.C. Cir. 2011) (arguments asking Court to “abandon” or “reconsider” its prior precedent are “misplaced,” because the Court is “of course . . . bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court”). Indeed, the five circuits to uphold *Specialty* have recognized the valuable and instructive quality of this Court’s thorough analysis in *Blue Man*. *See FedEx Freight*, 2016 WL 4191498, at \*6–8 (citing *Blue Man* with approval); *Macy’s*, 824 F.3d at 564–65, 567 (same); *Nestle*, 821 F.3d at 496, 500 (same); *Kindred*, 727 F.3d at 562–63 (same); *FedEx Freight*, 816 F.3d at 524–26 (citing the Court’s “comprehensive opinion” in *Blue Man* as “[m]ost instructive”).

There is similarly no merit to the Company’s specific challenges to *Specialty*, even if they had been properly raised. For instance, it incorrectly contends (Br. 25–35) that the Board “has abandoned its statutory obligation under Section 9(b) to determine the appropriate unit in each case” (Br. 25), by no longer applying the traditional community-of-interest test under step one of *Specialty*, but instead asking only whether the petitioned-for unit is readily identifiable as a group. (Br. 25–26.) To the contrary, at *Specialty* step one, the Board determines *both* whether the employees in the petitioned-for unit are readily identifiable as a group *and* whether they “share a community of interest,” *Specialty*, 357 NLRB at

945, as reviewing courts have recognized.<sup>10</sup> Thus, as in *FedEx Freight*, the Company's apparent suggestion that "the union's initial burden to show the proposed unit is appropriate has been truncated," and that the union "now only has to show the employees in the proposed unit are readily identifiable as a group," is mistaken. 2016 WL 4191498, at \*8.

Regarding the "overwhelming community of interest" standard of *Specialty* step two, the Company wrongly argues that it is "unattainable" (Br. 15) when the petitioned-for unit consists of all employees in a job classification or department, and therefore the standard violates Section 9(b) of the Act (Br. 14-15, 26-35) and has effectively "establish[ed] a *per se* rule" that such units are "irrebuttably appropriate." (Br. 15, 27-28, 32, 35.) That assertion finds no support in applicable precedent. To begin, this Court's broad holding in *Blue Man*, 529 F.3d at 421, that the overwhelming community of interest standard governs in unit determination cases, is not qualified or limited based on the contours of the particular unit proposed. And the Court no doubt was aware that unions may petition to represent

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<sup>10</sup> See *FedEx Freight*, 2016 WL 4191498, at \*5–6 (under *Specialty*'s "initial community-of-interest test, the Board . . . appl[ies] relevant traditional factors," in line with Board and court precedent); *Macy's*, 824 F.3d at 568 (*Specialty* incorporates traditional community-of-interest test "based on Board precedent going back to 1964"); *Nestle*, 821 F.3d at 495 (4th Cir. 2016) (explaining that the first step of *Specialty* "[i]n essence . . . is the traditional community-of-interest test"); *FedEx Freight*, 816 F.3d at 523 ("the first step in the analysis described by [*Specialty*], in which the Board analyzes the union's proposed bargaining unit under the traditional community of interest test, is not a departure from the Board's precedent"); *Kindred*, 727 F.3d at 561.

all manner of employee combinations, including employees in a classification or department. Moreover, three of the circuits to uphold *Specialty*, all of which addressed petitioned-for units of employees in a classification, have specifically rejected the claim that the overwhelming community of interest standard imposes an “impossible” burden. *FedEx Freight*, 2016 WL 4191498, at \*9 (unit of drivers); *FedEx Freight*, 816 F.3d at 526 (same); *Kindred*, 727 F.3d at 563 (unit of certified nursing assistants). *See also Macy’s*, 824 F.3d at 561 (unit of all employees in employer’s cosmetics and fragrances department).

Moreover, job-classification and departmental lines typically are drawn by the employer (*FedEx Freight*, 2016 WL 4191498, at \*9), and “the 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 in the plant.” *Specialty*, 357 NLRB at 942 n.19. Thus, by employers’ own design, classification and departmental boundaries often correspond to significant distinctions in matters such as supervision, wages, hours, job function, and the like. And, as this Court has instructed, the overwhelming community of interest standard does require that the objecting party show that the excluded and included employees share a “nearly complete overlap” in community-of-interest factors. *Blue Man*, 529 F.3d at 425.

Contrary, then, to the Company's specific challenge to *Specialty* step two, the Board, "in each case," applies the court-approved standard to the unique facts, carefully considers all relevant factors, and determines the appropriate unit.<sup>11</sup> Indeed, the Third Circuit rejected a similar contention that "recent Board decisions suggest" that the overwhelming standard is "impossible . . . as applied" because the Board purportedly "promotes the departmental or administrative form over all commonly shared factors." *FedEx Freight*, 2016 WL 4191498, at \*9. "Even if the Board has approved more units organized along departmental lines," the Court held, the employer's contention "[did] not follow" and was ultimately "unconvincing." *Id.*

Further, despite the Company's speculation about the potential for a "multiplicity" of units, the Board's finding here, as discussed, was that—based on the particular facts of this case—the specific, petitioned-for unit of riggers is an appropriate unit. Any future petition to represent a distinct group of the Company's employees will likewise be considered on its own facts. Further, 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.

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<sup>11</sup> The Supreme Court has explained that Section 9(b)'s phrase "in each case," "simply . . . indicate[s] that whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute," because "the words 'in each case' are synonymous with 'whenever necessary' or 'in any case in which there is a dispute.'" *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991).

§ 159(b). Indeed, “the Board’s history of approving multiple units [at a single employer] . . . suggests that neither workers nor businesses will suffer grave consequences as a result of the Board’s order.” *Macy’s*, 824 F.3d at 566; *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).

The Company also errs in contending (Br. 40-45) that *Specialty* “reverses” a supposed presumption favoring “larger, broader bargaining units” over smaller ones. (Br. 40.) To begin, as the Board has explained, 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*, 357 NLRB at 943. Indeed, a “cohesive unit—one relatively free of conflicts of interest—serves the Act’s purpose of effective collective bargaining” and prevents “a minority interest group from being submerged in an overly large unit.” *NLRB v. Action Auto., Inc.*,

469 U.S. 490, 494 (1985). Thus, contrary to the Company’s claim, there is no general presumption favoring larger units.<sup>12</sup>

Moreover, the Company misconstrues the basic significance and function of those unit presumptions that do exist—for example, the plant-wide presumption. Specifically, “recognition that a unit is presumptively appropriate does not lead to a requirement that *only* that unit can be appropriate.” *Macy’s*, 824 F.3d at 570 (emphasis in original). Rather, as this Court has held with respect to the plant-wide presumption, because “the Supreme Court [has] made it clear that the Board may certify any appropriate unit, and is not limited to the single most appropriate one,” the presumption “[t]hat a plant-wide unit . . . would be proper . . . has no necessary bearing upon whether a smaller unit also would be proper.” *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 518 (D.C. Cir. 1999) (internal quotation marks and citation omitted); *accord Woodbridge Winery*, 32-RC-135779, 2015 WL 800374, at \*1 n.1 (Feb. 25, 2015) (“That a certain kind of unit is presumptively appropriate . . . does not alter the longstanding principle that employees may seek to organize in any appropriate unit”).

Therefore, when a union seeks to represent a group of employees that is not covered by a presumption of unit appropriateness, such presumptions are

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<sup>12</sup> Notably, the Company seems to concede the point elsewhere in its brief, stating that—despite the “so-called ‘micro unit’” misnomer—“[i]t is not the size of the post-*Specialty* units that is in issue.” (Br. 28 n.6.)

“irrelevant to the determination [of] whether the petitioned-for unit is appropriate.” *Woodbridge*, 2015 WL 800374, at \*1 n.1; *accord Sundor*, 168 F.3d at 518 (“the Board applies the presumption in favor of a plant-wide unit only when the union proposes and the employer opposes such a unit, not when the union proposes a smaller unit”); *Specialty*, 357 NLRB at 940 (“A party petitioning for a unit other than a presumptively appropriate unit . . . bears no heightened burden to show that the petitioned-for unit is also an appropriate unit.”).

Furthermore, *Specialty* does not make “the smallest identifiable group of employees” a (or “the”) “presumptively appropriate unit.” (Br. 45.) As discussed, the Board’s analysis clarified in *Specialty* focuses on the petitioned-for unit, and as reviewing courts have consistently recognized, the Board’s determination of whether the employees in that unit “are readily identifiable as a group” and “share a community of interest” does not presume the unit is appropriate. *FedEx Freight*, 2016 WL 4191498, at \*8; *Macy’s*, 824 F.3d at 568; *Nestle*, 821 F.3d at 498–99; *FedEx Freight*, 816 F.3d at 525–26. Accordingly, the Company is mistaken in its contention that *Specialty* somehow conflicts with authority that presumes a petitioned-for plant unit, employer unit, or other type of unit to be *an* appropriate unit. *See Macy’s*, 824 F.3d at 570 (“even if a store-wide unit were presumptively appropriate in the retail industry . . . the application of [*Specialty*] to the retail context would not mark a deviation from Board precedent”).

Nor is there any merit to the Company's argument (Br. 45-47) that the *Specialty* standard fails to guarantee employees the right to refrain from engaging in concerted activity or "disregard[s]" the rights of excluded employees. Here, the Company's non-rigger 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). *See Macy's*, 824 F.3d at 566 (rejecting employer's argument that the Board's approval of departmental units under *Specialty* "will undermine workers' rights"). Accordingly, even if properly before the Court, none of the Company's challenges to the Board's *Specialty* standard provide a basis to disturb its Order here.

## CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board

October 2016

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

RHINO NORTHWEST, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1089, 16-1115
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	19-CA-160205
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
INTERNATIONAL ALLIANCE OF	)	
THEATRICAL STAGE EMPLOYEES,	)	
LOCAL 15	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,184 words of proportionally-spaced, 14-point type and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 24th day of October, 2016

## **STATUTORY ADDENDUM**

**STATUTORY ADDENDUM**

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## THE NATIONAL LABOR RELATIONS ACT

### **Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

### **Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:**

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees . . . .

### **Section 9 of the Act (29 U.S.C. § 159) provides in relevant part:**

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . .

(B) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

\* \* \*

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

**Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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THEATRICAL STAGE EMPLOYEES,	)	
LOCAL 15	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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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