



## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	iii
I. RELEVANT PROCEDURAL HISTORY .....	2
II. FACTS .....	8
A. Background Regarding K&N .....	8
B. The Layout Of K&N’s Riverside Operations .....	9
C. K&N’s Production And Production Support Employees Share Common Terms And Conditions Of Employment .....	12
D. Specific Information Relating To K&N’s Maintenance Techs And The Machine Adjustment Coordinator, Pleating .....	18
E. K&N’s Janitorial Staff And Facilities Maintenance Technician .....	21
F. The Union’s Inappropriate Conduct During The Critical Period .....	22
G. Board Agent Misconduct Affecting The Election .....	22
III. LAW AND ARGUMENT .....	23
A. The Regional Director Erred In Not Overturning The Results Of The Election As The Board Agent Misconduct Identified Is Objectionable And The Election Results Must Be Overturned .....	23
B. Contrary To The Recommendation Of The Hearing Officer, The Regional Director Erred By Finding The Unit Defined In Stipulation Was Appropriate .....	25
C. The Only Appropriate Unit In This Matter Is All Production Workers, Including The Maintenance Techs And The Machine Adjustment Coordinator, Pleating .....	29
1. All Production Workers Share A Community Of Interest.....	32
2. The Maintenance Techs And Machine Adjustment Coordinator, Pleating Have A Community Of Interest With K&N’s Other Production Employees .....	33
3. K&N’s Janitors And Facilities Maintenance Technician Do Not Share A Community Of Interest With The Appropriate Unit In This Matter.....	40

**TABLE OF CONTENTS**  
**(CONTINUED)**

	<b>PAGE</b>
D. If The Election Results Are Not Set Aside, Then The Unsigned Challenged Ballots Should Be Counted (Along With Maintenance Techs Ballots).....	42
IV. CONCLUSION.....	43
CERTIFICATE OF SERVICE .....	45

## TABLE OF AUTHORITIES

	PAGE(S)
<b>CASES</b>	
<i>A.S.V., Inc.</i> , 360 NLRB No. 138 (2014) .....	27, 42
<i>American Cyanamid Co.</i> , 131 NLRB 909 (1961) .....	36
<i>Athbro Precision Engineering Corp.</i> , 166 NLRB 966 (1967) .....	23
<i>Bergdorf Goodman</i> , 361 NLRB No. 11, slip op. (2014).....	25, 29, 30, 33
<i>Blue Man Vegas LLC v. NLRB</i> , 529 F.3d 417 (D.C. Cir. 2008).....	28
<i>Buckhorn, Inc.</i> , 343 NLRB 201 (2004) .....	31, 32
<i>DPI Secuprint, Inc.</i> , 362 NLRB No. 172, slip op. (2015).....	26, 29
<i>Durham Sch. Servs., Lp &amp; Int’l Bhd. of Teamsters, Local 991</i> , 360 NLRB No. 108 (May 9, 2014), recon. den. by 361 NLRB No. 66 (Oct. 20, 2014).....	23
<i>Fraser Engineering Co.</i> , 359 NLRB No. 80, slip op. (2013).....	29
<i>Fresenius USA Mfg., Inc. &amp; Int’l Bhd. of Teamsters Local 445</i> , 352 NLRB 679 (2008) .....	23
<i>Goucher College</i> , 364 NLRB No. 71, slip op. 2 (2016).....	27
<i>Guide Dogs for the Blind, Inc.</i> , 359 NLRB No. 151, slip op. (2013).....	25
<i>Gustave Fisher, Inc.</i> , 256 NLRB 1069 (1981) .....	26
<i>International Paper Co.</i> , 96 NLRB 295 (1951) .....	36

**TABLE OF AUTHORITIES**  
(CONTINUED)

	<b>PAGE(S)</b>
<i>Kalamazoo Paper Box</i> , 136 NLRB 134 (1962) .....	28, 35, 41
<i>Kindred Nursing Centers East, LLC v. NLRB</i> , 727 F.3d 552 (6th Cir. 2013) .....	25
<i>Macy’s, Inc.</i> , 361 NLRB No. 4, slip op. (2014).....	25, 33
<i>Monsanto Co.</i> , 183 NLRB 415 (1970) .....	30
<i>Northrup Grumman Shipbuilding, Inc.</i> , 357 NLRB 2015 (2011) .....	25, 29
<i>Odwalla, Inc.</i> , 357 NLRB 1608 (2011) .....	25, 26, 27, 42
<i>Physicians &amp; Surgeons Ambulance Service</i> , 356 NLRB No. 42, slip op. (2012), enfd. 477 Fed. Appx. 743 (D.C. Cir. 2012) .....	23
<i>Polymers, Inc.</i> , 175 NLRB 282 (1969), enfd 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970) .....	23
<i>Pratt &amp; Whitney</i> , 327 NLRB 1213 (1999) .....	27
<i>Seaboard Marine, Ltd.</i> , 327 NLRB 556 (1999) .....	27, 32, 42
<i>Sonoma Health Care Center</i> , 342 NLRB 933 (2004) .....	24
<i>Specialty Healthcare</i> , 357 NLRB 934 (2011) .....	7
<i>Specialty Healthcare</i> , 357 NLRB 938-39.....	29
<i>Specialty Healthcare and Rehabilitation Center of Mobile</i> , 357 NLRB 934 (2011), enfd. sub nom., <i>Kindred Nursing Centers East, LLC</i> <i>v. NLRB</i> , 727 F.3d 552 (6th Cir. 2013) .....	<i>passim</i>
<i>Stretch-Tex Co.</i> , 118 NLRB 1359 (1957) .....	24

**TABLE OF AUTHORITIES**  
**(CONTINUED)**

	<b>PAGE(S)</b>
<i>Student Transportation of America, Inc.</i> , 362 NLRB No. 156 (2015) .....	24
<i>United Operations, Inc.</i> , 338 NLRB 123 (2002) .....	26
<i>Wheeling Island Gaming, Inc.</i> , 355 NLRB 637 (2010) .....	32, 42
<i>White Cloud Products</i> , 214 NLRB 516 (1974) .....	27

**STATUTES**

National Labor Relations Act of 1935, 29 U.S.C. § 152(11) (“Section 2(11)”) .....	20
29 U.S.C. § 159(b) (“Section 9(b)”) .....	35

**OTHER AUTHORITIES**

Regional Director’s Decision, Directed Election and Order, <i>Future Environmental Inc.</i> , Case No. 13-RC-124781 .....	27, 42
Rules and Regulations of the National Labor Relations Board, Section 102.69(c)(2) .....	1



production workers, including Maintenance Techs and Machine Adjustment Coordinator, Pleating, but excluding the Janitors).

To the extent that a new election is not ordered, the Employer's arguments in support of overruling the challenges to the Maintenance Techs are meritorious should be sustained. Thus, alternatively, if a new election is not ordered, the National Labor Relations Board should grant the Employer's Request for Review, overturn the Decision, and order that the challenged ballots be opened, and sustain the Employer's objections to the conduct affecting the election.

#### **I. RELEVANT PROCEDURAL HISTORY**

The Petitioner filed a petition in Case 21-RC-174486 on April 20, 2016<sup>1</sup> seeking to represent production and support employees of the Employer. On April 22, the Petitioner filed a petition in Case 21-RC-174700 seeking to represent tube benders and welders. The parties entered into a Stipulated Election Agreement, which was approved on May 2, 2016, for an election in a single voting unit that combined the petitioned-for employees from both petitions. In their Stipulated Election Agreement, the parties agreed that the stipulated unit included:

[a]ll full-time and regular part-time production employees (including, Aluminum Welders I, Aluminum Welders II, Aluminum Welders III, Fabricators, Metal Fabricators, Helper Powder Coats, Janitors, Machine Shop Production Leads, Production Workers, Punch Press Operators, RD Fabricators – Fixtures, Sanders, Stainless Welders I, Stainless Welders II, Stainless Welders III, Team Leader – Tube Bending, Powder Coat Techs, Tube Benders I, Tube Benders II, Tube Benders III, Aluminum TIG Welders, Sr. Product Technicians, CNC Operators, CNC Operators II, CNC Programmer/Operators, CNC Programmer/Operators III, Electrical Controls Techs, Machine Design Engineers, Sr. Machine Builders, Media Painters, Robotic Welders I, Robotic Welders II and Robotic Welders III) employed by the Employer at its manufacturing and warehouse facilities in Riverside, California.

Excluded: All other employees, office clerical employees, professional employees, confidential employees, managers, guards and supervisors as defined in the Act.

The parties disagreed about whether certain individuals were eligible voters and those employees voted utilizing the Board's challenged ballot procedure. Specifically, the parties stipulated in the election agreement that Maintenance Leads, Maintenance Techs I, Maintenance Techs II, and Maintenance Techs III would be permitted to vote in the election but that their ballots would be challenged since their eligibility had not been resolved. The parties further agreed that all remaining employees, including, but not limited to, K&N's Facilities Maintenance Technician<sup>2</sup> and Machine Adjustment Coordinator, Pleating, were not permitted vote in this election.

On May 12, 2016, the election was held. Region 21's Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections reveals that an initial ballot count was conducted which resulted in 30 challenged ballots. On July 5, 2016, the Regional Director of Region 21 approved a Supplemental Stipulation that resolved the eligibility of 11 of the 30 challenged ballots, leaving in the remaining 19 challenged ballots. These challenged ballots were:

1. Alejandro Davila Jr. (Automatic Challenge);
2. Harry Evans (Automatic Challenge);
3. Hector Irizarry (Automatic Challenge);
4. Ross Leja (Automatic Challenge);
5. Paul Likhterman (Automatic Challenge);
6. Thomas Manning (Automatic Challenge);
7. Richard Mejia (Automatic Challenge);
8. Douglas Morgan (Automatic Challenge);

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<sup>2</sup> Despite the fact that the Facilities Maintenance Technician was unable to vote in the election—and the parties' Stipulation that he was not a part of this unit—the Union now argues that this position should be included in the unit.

9. Kevin Murphy (Automatic Challenge);
10. Samuel Nevarez Jr. (Automatic Challenge);
11. Brian Nichols (Automatic Challenge);
12. Paul Ochoa (Automatic Challenge);
13. Christopher Paws (Automatic Challenge);
14. John Sanchez (Automatic Challenge);
15. Rene Solorio (Automatic Challenge);
16. Robert Vasquez (Automatic Challenge);
17. Armando Lopez (Automatic Challenge);
18. 1st Blank Envelope;
19. 2nd Blank Envelope.<sup>3</sup>

On July 15, Region 21 issued a revised tally of ballots showing that 289 votes were cast for the Petitioner, 275 votes were cast against the Petitioner, with 19 challenged ballots, 16 of which were cast by employees in the disputed maintenance classifications. The 19 challenged ballots are sufficient to affect the results of the election.

On May 18, 2016, K&N timely filed objections to the conduct of the election, including:

1. The Board agents conducting the election improperly permitted the Union, its agents, or supporters to stand immediately outside one of the voting locations and speak with eligible voters while the polls were open.
2. While the polls were open, a Board agent stated to voters waiting in line to vote that he was “with the Union.”
3. The Board agents failed to include identifying information on two challenged ballot envelopes, as required.
4. The conduct in Objections 1, 2, and 3 impugned the NLRB’s integrity, impartiality and neutrality in the eyes of the voters and parties, and cast doubt on the integrity, impartiality, neutrality and fairness of the election.

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<sup>3</sup> Region 21 subsequently identified the unsigned envelopes as belonging to Raymundo Vasquez and John Spencer, Jr., two of the Employer’s Maintenance Technicians.

5. Union agents engaged in improper electioneering, or threatened, coerced or intimidated voters in the voting area.
6. Union agents and supporters engaged in threatening, intimidating, coercive and abusive conduct which caused employees to fear for their safety and other reprisals if they did not support or vote for the Union.
7. Union agents and supporters created a general atmosphere of fear, coercion and confusion during the critical period that affected the results of the election.
8. The Union distributed false, misleading and deceptive flyers that depicted the Employer's logo and which led employees to believe that the Employer supported the Union.

On August 1, the Acting Regional Director of Region 21 issued an Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections (Order Directing Hearing). The Order Directing Hearing directed a hearing on the 19 remaining challenged ballots and the Employer's 10 objections. The Order Directing Hearing identifies that 16 of the challenged ballots were challenged by a Board agent in accordance with the parties' Election Agreement, because the voters work in one of the four Maintenance Tech classifications that the parties agreed to reserve for the challenged ballot procedure. Another voter was challenged by the Board agent for not being on the voter list. The remaining two challenged ballots did not have any voter identifying information or reason for the challenges recorded on the envelopes, however, the Order Directing Hearing identifies the ballots as belonging to two voters who work in one of the four Maintenance Tech classifications that the parties agreed to reserve for the challenge ballot procedure.

On August 4, General Counsel Richard F. Griffin, Jr. transferred the above-captioned cases from Region 21 to Region 27, "solely for the purpose of adjudicating the Order Directing Hearing on Challenges and Objections issued on August 1, 2016." The Regional Director for Region 21 ordered that a hearing be conducted to give the parties an opportunity to present

evidence regarding the challenged ballots and objections. A hearing was held on September 19-22, 2016 in front Hearing Officer Stephanie Stroup Scaffidi of Region 27 of the Board.

The Hearing Officer issued her Hearing Officer's Report on Challenged Ballots and Objections on October 24 ("Hearing Officer's Report"). The Hearing Officer's Report recommended that the Employer's objections be overruled in their entirety. The Hearing Officer's Report also recommended overruling all 16 of the challenged ballots that involved voters in one of the four Maintenance Tech classifications that the parties reserved for the challenged ballot procedure, on the basis that the bargaining unit was not a readily identifiable group or an appropriate unit without including the four Maintenance Tech classifications. The Hearing Officer's Report further recommended sustaining the challenged ballot for the voter who was not on the list, determining that the parties' Election Agreement clearly and unambiguously excluded his job classification of Facilities Maintenance Technician from eligibility.

The Hearing Officer's Report recommended sustaining the two challenged ballots that do not contain identifying information on the basis that there was insufficient evidence to adduce which voter cast each of the ballots. Finally, the Hearing Officer's Report determined that the new eligibility issue involving the Machine Adjustment Coordinator, Pleating was not properly before her because it was not included in the Order Directing Hearing. On that basis, she declined to make a substantive determination on the issue.

On November 7, 2016, Petitioner filed 10 numbered exceptions to the Hearing Officer's Report and a Brief in Support of Exceptions to Hearing Officer's Report on Challenged Ballots and Exceptions. On November 7, the Employer also filed 10 numbered exceptions to the Hearing Officer's Report and a Brief in Support of Exceptions to Hearing Officer's Report on

Challenged Ballots and Exceptions. On November 14, the Employer filed a response in opposition to the Petitioner's exceptions.

On January 20, 2017, the Regional Director of the Region 27 of the Board issued the Decision. The Regional Director rejected the Hearing Officer's determination that the stipulated-for unit was improper and determined that the parties' stipulation was to be given effect. From there, applying *Specialty Healthcare*, 357 NLRB 934 (2011), and its progeny, the Regional Director determined that K&N did not satisfy its burden of proving that the Maintenance Technicians shared an overwhelming community of interests with stipulated-for unit such that there is no rational basis to exclude them from this unit. As a result, the Regional Director sustained the challenges to all of the ballots cast by the Maintenance Leads, Maintenance Techs I, Maintenance Techs II, and Maintenance Techs III.

The Regional Director also determined that the two unmarked, blank challenged ballots were cast by Maintenance Techs and, then, sustained the challenges to these unmarked ballots for the same reasons as the other Maintenance Tech challenged ballots. The Regional Director also overruled all of K&N's objections to the conduct of the election. As a result, the Regional Director noted that a majority of the valid ballots were cast for Petitioner and certified it as the representative of the following unit:

All full-time and regular part-time production employees (including, Aluminum Welders I, Aluminum Welders II, Aluminum Welders III, Fabricators, Metal Fabricators, Helper Powder Coats, Janitors, Machine Shop Production Leads, Production Workers, Punch Press Operators, RD Fabricators — Fixtures, Sanders, Stainless Welders I, Stainless Welders II, Stainless Welders III, Team Leader — Tube Bending, Powder Coat Techs, Tube Benders I, Tube Benders II, Tube Benders III, Aluminum TIG Welders, Sr. Product Technicians, CNC Operators, CNC Operators II, CNC Programmer/Operators, CNC Programmer/Operators III, Electrical Controls Techs, Machine Design Engineers, Sr. Machine Builders, Media Painters, Robotic

Welders I, Robotic Welders II and Robotic Welders III) employed by the Employer at its manufacturing and warehouse facilities in Riverside, California; but excluding all other employees, Maintenance Leads, Maintenance Techs I, Maintenance Techs II, Maintenance Techs III, office clerical employees, professional employees, confidential employees, managers, guards and supervisors as defined in the Act.

The Employer now files this Request for Review of the Regional Director's Decision and Certification of Representative.

## **II. FACTS**

### **A. Background Regarding K&N**

K&N manufactures and assembles after-market reusable, washable, cotton air filters and intake systems for automobiles, trucks, and motorcycles. (*See* Transcript of Hearing, September 19-22, 2016 ("Tr."), pp. 23, 239 ("[T]he best description for K&N is it's an after market manufacturer of performance products and reusable long life filters.")). However, not only does K&N produce air filters and exhaust systems, it designs and manufactures its equipment and the tooling used in its production processes; "[a]t K&N, everything is manufactured. We make the tooling, we make the machines, we install them. So everything produced for production is actually manufactured at K&N." (Tr. at 246).

Its plant in Riverside, California is its only manufacturing facility in the United States. The plant produces product for the domestic United States and international markets. (Tr. 239). Overall, K&N has approximately 800 employees and over 600 production and production support workers in the petitioned-for unit in Riverside, including 20 Maintenance Techs and one Machine Adjustment Coordinator, Pleating at the time of the election.

**B. The Layout Of K&N’s Riverside Operations**

K&N’s Riverside operations span 11 buildings, 10 of which house some portion of the production and manufacturing processes in place at K&N. (Employer Ex. 8). Within these buildings, production employees<sup>4</sup> perform operations tasks in 19 procurement areas or work cells, including, round filter, pleat pack, panels, packaging, metal fabrication, powder coating, composites, tube bending, roto molding, material handling, shipping, receiving, distribution, maintenance, machine shop, original equipment manufacturing, RU carousels, RX carousels, and flat panel carousels. (Tr. at 315-16). These 19 procurement areas all operate at different levels, some producing “10,000 products a shift and some can produce 2,000 products a shift,” requiring that K&N be able to flex employees throughout its production process. (Tr. at 241 (“So think of it in terms of different volumes and people have to move from one area to the other to be able to come up with a common volume of production every day.”)).

More specifically, K&N operations are housed in:

1. 1455 Citrus Avenue (“1455 Citrus”), in which K&N’s corporate offices and the majority of K&N’s production operations are located. Production work performed in this location includes shipping and receiving, urethane production, flat filter production, round filter production, pleat pack, packaging, kit packaging, kits accessories, and material handling. Production employees who work in 1455 Citrus include Maintenance Techs and Production Workers. (Tr. 140-43, 268; Employer Exs. 8-9).
2. 555 Palmyrita Road (“Palmyrita”), in which exhaust manufacturing and warehousing/material handling operations are performed. Exhaust systems, material handling and some shipping functions are performed. Production employees who work in Palmyrita include Production

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<sup>4</sup> At K&N, all employees within the appropriate unit are considered “production employees”, including unskilled employees titled Production Workers, who perform a number of unskilled tasks, and skilled craftsmen, who work as Maintenance Techs, Aluminum Welders I, Aluminum Welders II, Aluminum Welders III, Fabricators, Metal Fabricators, Helper Powder Coats, Machine Shop Production Leads, Punch Press Operators, RD Fabricators – Fixtures, Sanders, Stainless Welders I, Stainless Welders II, Stainless Welders III, Team Leader – Tube Bending, Powder Coat Techs, Tube Benders I, Tube Benders II, Tube Benders III, Aluminum TIG Welders, Sr. Product Technicians, CNC Operators, CNC Operators II, CNC Programmer/Operators, CNC Programmer/Operators III, Electrical Controls Techs, Machine Design Engineers, Sr. Machine Builders, Media Painters, Robotic Welders I, Robotic Welders II and Robotic Welders III. (Employer Ex. 1).

Workers, Tube Benders, Aluminum Welders, and a Maintenance Tech. (Tr. 140-43, 269; Employer Ex. 8).

3. 1360 Citrus Street, in which K&N's machine shop sits. K&N's machine shop produces air filter molds, production equipment and other materials necessary for production. Production employees who work in this location include CNC Operators, CNC Operators II, CNC Programmer/Operators, CNC Programmer/Operators III, Production Workers and a Maintenance Tech. (Tr. 143-45; Employer Ex. 8).
4. 1380 Citrus Street ("1380 Citrus") houses filter painting, in which K&N's filters are painted, and machine integration, in which specialty items are tested and produced. 1380 Citrus also houses a portion of the pleating/pleat pack department, in which the cotton and aluminum material of an air filter, K&N's core product, is pleated. Production employees who work at this address include the Media Painter, Tool Designers, CNC Operators, Production Workers Maintenance Tech, and the Machine Adjustment Coordinator, Pleating. (Tr. 144-47, 267-68; Employer Exs. 8, 11-13).
5. 561 Iowa Street, which includes five separate buildings, labeled A&B, C, D, E, F and G. Iowa Building A&B houses K&N's roto molding operations, which make plastic and aluminum tubing for K&N's air intake kits. Production Workers work in this facility and, when necessary to assist production, a Maintenance Tech will be called to work on production equipment. (Tr. 150-151, 270; Employer Ex. 8).
6. Iowa Building C is where the aluminum ends of K&N's tube products are produced and painted. This building is also where K&N's powder coating and vacuum metalizing operations are performed. Production employees working in this facility include Power Coat Techs, Helper Powder Coater, Production Workers, and Maintenance Techs. (Tr. 151-152, 270; Employer Ex. 8).
7. Iowa Building D is used by K&N as an inspection, cleaning and surface preparation site, where Production Worker and welders are employed to ensure that the tubes are clean before they move along in the production process. (Tr. 153-154, 270; Employer Ex. 8).
8. Iowa Building E is used by K&N for surface preparation, washing, welding and tube bending. Production Workers, Welders, Tube Benders and Maintenance Techs work in this location. (Tr. 154-156, 270; Employer Ex. 8).
9. Iowa Building F houses K&N's research and design, annealing, and AM filter production operations. In this building, Production Workers, Tube

Benders and Maintenance Techs work. (Tr. 156-157, 270; Employer Ex. 8).

10. Iowa Building G is where K&N's composite operations are housed and where Production Workers produce hard plastic covers and carbon fiber air filters. (Tr. 157-158, 268; Employer Ex. 8).
11. 1350 Citrus Street is only a storage facility. No production employees work at this location. (Tr. 143, 270; Employer Ex. 8).

All of K&N's production employees are employed at these locations. Each of the 10 production buildings in K&N's Riverside location (that is, excluding 1350 Citrus) are integral to K&N's operations and production of its two main product lines: reusable air filters and intake systems. In fact, as noted above, K&N also designs and manufactures all of the machines, molds, and tooling necessary to produce its products. (Tr. at 246). As a result, a portion of K&N's operations are designed to provide support for the production process. Without all segments of the production process, including unskilled and skilled workers, K&N would be unable to produce its products.

Further, the segmenting and design of K&N's buildings is based upon production needs. For instance, 1455 Citrus is the location where K&N's receives all of its raw materials. (Tr. 278; Employer Ex. 17). These materials, upon receipt, are logged into K&N's Business Management System ("BMS"). The BMS is a comprehensive, electronic management tool through which K&N manages its production operations. All of K&N's production employees have access to the BMS to perform their job duties and are trained on the BMS. (Tr. 61). After the materials are logged into the BMS, Production Workers performing material-handling functions put these materials into specific locations or deliver them to another K&N building in Riverside, as directed by K&N's BMS. (Tr. 279-80; Employer Ex. 17). Thereafter, in 1455 Citrus, when needed in the production process, these raw materials, or components, are "picked" by unskilled Production Workers, placed into totes and delivered to other skilled and unskilled production

workers working in the production process via an automatic conveyer system. (Tr. 280-81; Employer Ex. 17).

Thereafter, depending upon the product being made, any number of procurement areas and/or work cells may perform functions to produce a finished air filter in 1455 Citrus. Some of the procurement areas within this building—where the majority of K&N’s air filter production occurs—include flat panel, round urethane “carousels” and ovens (RU/RX production), pleat pack sawing, kitting, packaging, kits assembly, and shipping and receiving. (Tr. 278-90). The materials are carried throughout the production process in totes riding along the automatic conveyer in 1455 Citrus. (Tr. 280; Employer Ex. 17). Once a product is fully produced, packaged and ready for sale, it returns to Production Workers working in the pick module for storage until it is ready for shipment. (Tr. 280; Employer Ex. 17).

**C. K&N’s Production And Production Support Employees Share Common Terms And Conditions Of Employment**

All of K&N’s production employees share common terms and conditions of employment. This is true even though some of these employees are unskilled Production Workers and others are skilled employees, like Maintenance Techs, Welders, Benders, and CNC Programmers and Operators. (Tr. 58). First, all of these employees, including Maintenance Techs, work the same shifts. (Tr. 54-55). At K&N, production employees work on one of two shifts: the first shift, which is generally, from 5:00 AM through 1:30 PM, or the second shift, which is generally from 2:00 PM to 10:30 PM. (Tr. 55). Despite these common start times, some Maintenance Techs, “production workers that work in round filters and production workers that work in powder coating do come in earlier to get everything up and running.” (Tr. 55). More specifically, at 1455 Citrus, in order to allow production to begin at 5:00 AM, a Maintenance Tech arrives early to address and fix any alarms which may have gone off from the previous night, start all of

K&N's flat panel, RU and RX carousels and ovens to bring them to temperature (which takes about 30 minutes), and start K&N L-sealers and oilers (Tr. 422-24):

On the ovens, you've got to go through a starting process, which is just basically going down the line of starting blowers and burners. After purge time, an amount where the air is expelled from the oven for the gas fumes, then it will light. And it takes a certain amount of time to get up to temperature. Sometimes we have issues with that. So the maintenance will get on that right away to make sure that it's ready for when the rest the production comes in. Carousels, they'll go around and fire up the carousels and get them warmed up. They are electric heated. So it takes them a little while. So that will sequentially turn on and off the heater so it doesn't all do it at once and trip breakers.

(Tr. 204). Production Workers are not trained start K&N's ovens or to shut down K&N's equipment. The Maintenance Techs in K&N's 561 Iowa Buildings and at 555 Palmyrita work the same shift as production. (Tr. 205). Then, at the end of the shift, some Maintenance Techs are required to stay later than other production employees to shut down equipment. (Tr. 205, 311). As is clear, these few varied shift times are dictated by the needs of the production process.

All production employees are also, at times, required to work weekend overtime as dictated by the needs of the business. (Tr. 620-21). At times, this weekend work can be production, which requires all production employees, including Maintenance Techs and the Machine Adjustment Coordinator, Pleating, to perform their duties alongside other production employees. (Tr. 621). Other times this weekend work may be preventative maintenance projects, which Maintenance Techs **and** Production Workers complete together. (Tr. 426-27). By way of example, Production Workers assist the Maintenance Techs in cleaning the ovens located at 1455 Citrus on weekends because ovens must be cool to be cleaned. (*Id.*). This project, which can span four to six hours, is performed on at least a monthly basis. (*Id.*). Oven

cleaning is performed jointly by Maintenance Techs, who open and close the ovens, and Production Workers, who help perform the cleaning task. (*Id.*).

Further, all employees share common break and lunch times and break areas in all of K&N's production facilities. (Tr. 429). There are times that Production Workers performing certain tasks and Maintenance Techs sometimes complete tasks while other employees are on break. (Tr. 429). Despite this, all production employees, including Maintenance Techs and the Machine Adjustment Coordinator, Pleating, have the same lunch and break times and areas. (Tr. 375-76). Similarly, all employees are able to request and use a personal locker at the 1455 Citrus building. (Tr. 60-61).

All hourly employees also share common procedures for their arrival at work. All production employees who drive to work park in the same lots at each of K&N's facilities. (Tr. 56-57). For instance, the production employee parking for K&N's Iowa and Citrus Street buildings utilize a common parking lot between the Iowa buildings and 1455 Citrus. (Tr. 57). In order to enter this parking lot, all production employees are required to use their K&N badge. (Tr. 58). Thereafter, employees enter the building and are required to scan into K&N's payroll management system, Empower, for work. (Tr. 56). Time clocks are placed throughout each K&N facility, including in each department. (Tr. 56, 124). While employees routinely punch-in in the department in which they will perform their duties on a particular day, they are able to utilize any of K&N's time clocks. (Tr. 422).

Unskilled Production Workers do not always clock into one department because they are routinely "flexed" to perform tasks throughout K&N's production process. This flexing process allows K&N to normalize production needs and ensure that they have proper staffing levels, and trained employees in each of the procurement areas in its production process. (Tr. at 241).

In addition to normalizing production, the flexing process also allows K&N to train its unskilled employees to perform skilled positions and, eventually, apply for and be hired into these skilled positions. K&N has a history of developing unskilled Production Workers and hiring them to work in skilled positions. (Employer Ex. 2). Many of these positions allow for Production Workers to flex into the skilled positions for training purposes. For instance, Production Workers can flex to become trained to be welders, while they remain a Production Worker, and “[o]nce they hit a certain amount of hours, they become welders.” (Tr. 109-10). However, Maintenance Techs and CNC Operators cannot be trained via the flex process. (Tr. 110). Rather, to work in these positions, Production Workers must apply for the position, be hired, and then receive on-the-job training. (*Id.*) **In the last five years, at least five Production Workers have been promoted into Maintenance Tech positions at K&N.** (Tr. 181-83; Employer Ex. 2).

After clocking in to report to work each day, all production employees proceed to their work area for the day and log into K&N’s BMS. (Tr. 178). As noted above, the BMS is a system through which K&N tracks and manages its business. All production employees utilize the BMS. (Tr. 61). All employees use the BMS to “log in” to work stations, so that K&N can keep track of the time being spent by employees performing a certain function. (Tr. 178).

With respect to production employees, they use the BMS to guide their work and are trained on how to use this system. (Tr. 61). By way of example, Production Workers performing material handling tasks in 1455 Citrus’s three-story pick module spend their day pulling materials for production and putting away finished goods for storage until sale. (Tr. 649). The BMS, which these Production Workers in material handling access through the use of handheld scanning devices, informs the Production Worker of the materials to place into

a tote for production, the location of the material and the specific tote into which this raw material it must be placed. (Tr. 649-50). Similarly, employees installing molds on K&N's carousels in 1455 Citrus use the BMS to determine which molds a particular product requires. In other words, the BMS is informing the Production Worker performing these tasks the specific functions he or she must perform. (Tr. 629-30). Similarly, Production Workers working as mold pullers in K&N's carousels use the BMS to determine which molds to utilize to produce the appropriate product. (Tr. 629-30).

Likewise, K&N's Maintenance Techs use the BMS system to receive messages on where any production issues needing their attention have arisen. (Tr. 178). This system will direct the Maintenance Tech on what the issue is and where it is located. (*Id.*). Other production workers first identify the problem they are encountering and the specific location where the problem is occurring. (*Id.*). In this way, the Maintenance Tech communicates with the production worker reporting the problem that he needs to address and correct. (*Id.*). Maintenance Techs also use the BMS to receive maintenance calls, track their scheduled or preventative maintenance tasks and to use reports for trouble shooting certain issues. (*Id.*).

All production employees, including Maintenance Techs and the Machine Adjustment Coordinator, Pleating, are reviewed and evaluated on a daily basis by their immediate supervisors. (Tr. 39-40; Employer Ex. 3). These employees are graded on "[t]heir attendance, their performance, how they met the needs of other departments." (Tr. 118). However, while the evaluations are completed by an employee's immediate supervisor, these supervisors receive input from supervisors in other departments who work with the employee on any given day. (Tr. 41). These daily evaluations are entered into K&N's BMS and used by management to review and evaluate production and efficiency.

All production employees are paid on an hourly basis.<sup>5</sup> (Tr. 57). Likewise, these employees all share the same benefits programs. (Tr. 58). These benefits include “[h]ealth insurance, dental insurance, vision insurance, paid time-off hours, holiday pay, floating holiday, short-term disability insurance, company paid life insurance, eligib[ility] for leaves of absence” and eligibility for K&N’s 401(k) program. (*Id.*).

They also work under the same policies and procedures, including a disciplinary procedure that is “applied uniformly” to all production employees and uniform attendance requirements. (Tr. 58-60). All employees have the same procedure through which they call off work. (Tr. 64). All production employees work with the same Human Resources Manager, who is responsible for investigating and adjusting grievances for all K&N production employees. (Tr. 29, 58-59, 64-65). Indeed, all human resources functions are “centralized” through the Human Resources Manager’s office. (Tr. 60). Similarly, all administrative tasks relating to production employees are centralized. (*Id.*). Likewise, all production employees go through the same hiring process and complete the same forms at the outset of their employment. (Tr. 33-34).

All production employees are also provided the opportunity to purchase uniforms from K&N. (Tr. 59-60). However, K&N does not require that its employees wear uniforms, or any particular style of uniform. (*Id.*). All production employees also have the opportunity to use personal lockers, which are located at the break room in 1455 Citrus, “if they choose to use them.” (Tr. 60-61).

All production employees are provided safety equipment, like safety glasses, “gloves, back braces, wrist supports, respirators. Anything that is safety required by the company, the company does provide.” (Tr. 63, 429-30). All employees also receive the same monthly safety

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<sup>5</sup> One production employee, the Machine Adjustment Coordinator, Pleating, is paid on a salary basis. This salary, however, is a vestige from a supervisory position the employee previously worked. (Tr. 510-11).

training, the subject of which is determined by K&N's Safety Manager, though this training is provided to each production employee in his or her department. (Tr. 62).

**D. Specific Information Relating To K&N's Maintenance Techs And The Machine Adjustment Coordinator, Pleating**

K&N's Maintenance Techs are considered skilled production employees at K&N and, as such, are considered part of the production process. (Tr. 117, 430). No production can occur at K&N without Maintenance Techs. (*Id.*). These individuals are required to start up and shut down K&N's production equipment. (Tr. 204, 422-24). As noted above, it is for this reason that some Maintenance Techs are required to start their shift before or end their shift after the rest of K&N's production employees.

Maintenance Techs are required to ensure that all production equipment maintains operations. (Employer Ex.14-16). After start up occurs, they are routinely called to address mechanical problems with production equipment. (Tr. 424 (after start up, "it's walk the floor, check to see if there's any issues, ask operators how machinery is running for them.")). These calls are routinely placed through the BMS, which generates a text message to all Maintenance Techs relating to the issue; via an email to the Maintenance Techs; or by flagging down and raising the issue with a Maintenance Tech who is working that day. (Tr. 425). When a Maintenance Tech is alerted to a problem, he will communicate directly with the production employees regarding the problem and will begin to troubleshoot the issue. (Tr. 162 (Maintenance Techs interact with production employees "on a daily basis), 425). By way of example, when a product is unmixed, the urethane on the outside of a filter is soft, and:

when we go over to the machine operator, production worker, we will discuss with them, is it just one station. Because some of the machineries have six stations, some have eight, some have 12. Is it just one particular mold, is it one station, is it all of them? So we can get an insight of what's going on with the piece of equipment

by talking to the Production Worker. (Tr. 163-64). Production employees are Maintenance Techs “first line of trouble shooting.” (Tr. 164). Some issues, such as with tube bending, also require that the production employee stay with the Maintenance Tech to help troubleshoot and address the issue. (Tr. 166-67, 425-26). However, at other times, the Production Worker may be reassigned for efficiency and production reasons to another area by his or her supervisor to perform another function. (*Id.*). In order to ensure that the issue is fixed, the Maintenance Tech may operate the machine and produce a product. (Tr. 165 (“[P]ersonally we’ll run the machine a couple of times to make sure that the equipment is operating correctly and safely. And then at that point in time if we are getting good product out of the piece of equipment we will call the operator back over and have them run it to verify that everything is correct.”)). If, upon inspection, the product produced by a Maintenance Tech is determined to be good, then this product continues in the production process and is eventually sold by K&N. (Tr. 429). Once completed with his work, the Maintenance Tech will again communicate with the production employee to explain the issue and the fix, and at times, provide training and/or guidance on how the production employee should operate the equipment to attempt to avoid the issue. (Tr. 165).

As part of their duties, Maintenance Techs also perform preventative maintenance (“PM”) on K&N equipment. (Tr. 426-28). Sometimes PM can be performed when machines are operating and, other times, PM must wait until production is not occurring. For instance, one type of PM which cannot be conducted during work is oven cleaning. (*Id.*). As a result, on at least a monthly basis, both Maintenance Techs and production employees work together to clean the ovens. (*Id.*). Oven cleaning is “essential” because failing to clean the ovens would cause too much smoke in the oven, which affects the final product. (*Id.*). Similarly, production employees on round carousels also perform PM by scraping and cleaning built up urethane on production

equipment. (*Id.*). This PM is conducted on weekends at the same time Maintenance Techs are performing other PM duties. (*Id.*).

While there is a maintenance shop area in which Maintenance Techs store their personal tools, other production employees are permitted to enter this shop to work on product or tooling necessary to perform their functions. (Tr. 124, 324-25). This area is separated from the rest of K&N's 1455 Citrus facility by a fence for safety reasons: at times, Maintenance Techs use welding equipment in this area and, because of the sparks that may be caused by welding, K&N's fencing ensures that no individuals are able to walk directly through this potentially dangerous area. (Tr. 325).

Like the Maintenance Techs, the Machine Adjustment Coordinator, Pleating is integral to K&N's production process.<sup>6</sup> (Tr. 491-92; Employer Ex. 22). He has a common supervisor with other employees the Pleating Department, Dwayne Richardson, the manager over the Pleating Department, like other employees performing pleating functions. (Tr. 491-92). As part of this process, the Machine Adjustment Coordinator, Pleating has the same lunch and break areas, benefits plans, and also uses the BMS like the other production employees in his department. (Tr. 499-500). His job duties are essentially in maintenance for the Pleating Department at 1380 Citrus. (Tr. 493 ("I was just always told my position was to make sure the machines stay running and whenever they break down, get to it, fix them and get -- get them back on line."); Employer Ex. 22). Because of the frequent need to adjust wiring, saws and belts and other portion of the pleating machines at K&N's 1380 Citrus location, K&N created a Machine Adjustment Coordinator, Pleating position for these maintenance-like tasks and to avoid having a Maintenance Tech being constantly called to this area for small adjustments. (Tr. 504). He

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<sup>6</sup> During the hearing in this matter, the parties stipulated that the Machine Adjustment Coordinator, Pleating was not a supervisor under Section 2(11) of the Act.

works alongside and directly with production employees at this location every shift. (Tr. 497-98 (“If they have any type of a problem, they come and get me and I’ll ask them what it’s doing or what it’s not doing, and then I’ll make an assessment from there what I need to do.”)).

**E. K&N’s Janitorial Staff And Facilities Maintenance Technician**

K&N’s janitorial staff and Facilities Maintenance Technician perform no duties on any production equipment, in production areas, or with or alongside any production employees. (Tr. 120-21). The only job duties of janitorial employees which are performed on near the production floors of K&N’s facilities is cleaning and/or repairing K&N’s bathrooms. In fact, their duties are generally, to “[c]lean offices, clean bathrooms, clean the break rooms.” (*Id.*). Production employees, and not janitors, are responsible for cleaning the departments on the main floor. (*Id.*).

Likewise, the Facilities Maintenance Technician is not a part of K&N’s production process. (Tr. 117). In fact, the employee holding this position admits he is not a production employee. (Tr. 593). This position does not do any repairs in the production area and “never” works with Maintenance Techs. (Tr. 593, 596). For instance, if there is a bulb out in K&N’s Palmyrita production facility, a Maintenance Tech, not the Facilities Maintenance Technician is responsible for changing this bulb. (Tr. 590-91). In 1360 and 1380 Citrus, he is only responsible for changing light bulbs in the bathrooms and not on the production floor. (Tr. 591). He receives his job duties directly from his manager and does not utilize or receive messages from the BMS for any portion of his job. (Tr. 594, 604). Further, no employee flexes to perform his job duties while he is not at work. Rather, his duties will “wait” to be completed until he returns to work. (Tr. 592-93).

Given the foregoing, even in the most general terms, these employees cannot be said to be production or even production support workers.

**F. The Union's Inappropriate Conduct During The Critical Period**

During the election, there were a number of union and union-supporter incidents which are objectionable. Most relevantly, the Union distributed pamphlets which were misleading and suggested that K&N supported the Union's campaign efforts. (Tr. 301; Employer Ex. 19). In fact, at least one employee was confused by the pamphlet and spoke with K&N management about whether K&N was actually in favor of the Union's organizational efforts. (Tr. 301; Employer Ex. 19).

Additionally, the Union improperly campaigned on the day of the election at the polling place. In fact, a Union agent spoke to the Employer's observer, Raymundo Vazquez, Jr., during the pre-election meeting at 561 Iowa Building G. (Tr. 378-83). During this conversation, the union representative inquired about why Mr. Vazquez was participating as an observer for the Employer. (Tr. 379). This inappropriate conduct led Mr. Vazquez to be concerned about vandalism and the safety of his truck while he was observing the election. (Tr. 383).

**G. Board Agent Misconduct Affecting The Election**

Not only have union agents threatened, intimidated and harassed expected Employer supporters, but Board Agent misconduct has also jeopardized this election. Of most concern is a statement made at the 561 Iowa Building G voting location during the morning voting session. (Tr. 386-90). Because a group of employees were waiting to vote and were being loud in the line, one of the two Board Agents, a young male who was fluent in Spanish, addressed the voters in line to tell them to quiet down. In response to a question from a voter, the Board Agent indicated, in Spanish, that he was "for the union." (Tr. 387-88). He made this representation in front of approximately 15-20 eligible voters who shortly thereafter entered the voting area where this same Board Agent was standing and visible to them. (Tr. 389). Upon reporting the

exchange to the second, more senior, female Board Agent stationed at this location, the junior Board Agent attempted to correct his improper statement. (Tr. 387-88).

In addition to a Board Agent stating that he was “for the union,” Board Agents failed to properly supervise the election by allowing two challenged voters to cast envelopes without signing a challenge envelope. (Tr. 383-85). Even though Region 21 has subsequently identified the unsigned envelopes as belonging to Mr. Vasquez and John Spencer, Jr., the uncertainty relating to these challenged envelopes further demonstrates the Region’s failure to properly control and run this election.

### **III. LAW AND ARGUMENT**

#### **A. The Regional Director Erred In Not Overturning The Results Of The Election As The Board Agent Misconduct Identified Is Objectionable And The Election Results Must Be Overturned**

“The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board’s election procedures ... is a sufficient basis for setting aside that election.” *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967). The standard to overturn an election due to board agent misconduct is whether “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” *Durham Sch. Servs., Lp & Int’l Bhd. of Teamsters, Local 991*, 360 NLRB No. 108 (May 9, 2014), recon. den. by 361 NLRB No. 66 (Oct. 20, 2014), quoting *Polymers, Inc.*, 175 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Physicians & Surgeons Ambulance Service*, 356 NLRB 199 (2012), enfd. 477 Fed. Appx. 743 (D.C. Cir. 2012). The standard is not a “per se rule that . . . elections must be set aside following any procedural irregularity.’ . . . [T]he Board ‘requires more than mere speculative harm to overturn an election.’” *Fresenius USA Mfg., Inc. & Int’l Bhd. of Teamsters Local 445*, 352 NLRB 679, 680 (2008) (quotations omitted).

The record clearly demonstrates serious questions about the fairness and validity of the election in this matter. Most importantly, a Board Agent told a group of approximately 15-20 voters that he was “for the union.” (Tr. 387-88). That this egregious comment raises a reasonable doubt about the Board’s impartiality in this election is clear. Further, given the exceedingly close outcome of the vote in this matter, the apparent partiality of a Board Agent—and his comment to a group of approximately 15-20 voters—raises serious questions about the validity of the election. (Tr. 387-89). The Board has already determined that conduct similar to that at issue in this case is sufficient to necessitate setting aside an election. See *Sonoma Health Care Center*, 342 NLRB 933 (2004). Likewise, in this case, the Board must determine that comments calling into question the partiality of its Board Agents during the election require a rerun election. Similarly, the Region’s inability to properly oversee the challenged envelope process further calls into doubt the validity of the election here. (Tr. 383-85).

Despite the clarity of the record, the Regional Director stated that “[t]he Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” *Student Transportation of America, Inc.*, 362 NLRB No. 156, slip op. 1 fn. 1 (2015) (citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)). Here, there is no question that the Board Agent acted inappropriately and the Regional Director erroneously failed to overrule the Hearing Officer’s credibility determination. Again, the patent Board Agent misconduct in this matter and the issues facing the validity of the election was objectionable as a matter of law. K&N respectfully requests that the Board set aside the election results and order a new election be held, with an appropriate unit, as defined below.

**B. Contrary To The Recommendation Of The Hearing Officer, The Regional Director Erred By Finding The Unit Defined In Stipulation Was Appropriate**

A petitioned-for unit is appropriate under *Specialty Healthcare and Rehabilitation Center of Mobile* if two conditions are satisfied: (i) the petitioned-for employees must be readily identifiable as a group; and (ii) the petitioned-for employees must share a sufficient community of interest. 357 NLRB 934 938-42 n.25 (2011) enfd. sub nom., *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); accord *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2 (2014); *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 7, 8 (2014); *Northrup Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2016-17 (2011). The Board analyzes whether employees are a readily identifiable group based on job classifications, departments, functions, work locations, skills and similar factors. See *Macy's*, 361 NLRB No. 4, slip op. at 7. However, where there is no legitimate basis on which to exclude employees, the petitioned-for unit would be fractured, or an “arbitrary segment of what would be an appropriate unit”, the Board should include the additional employees from the proposed larger unit. *Odwalla, Inc.*, 357 NLRB 1608, 1612 n. 29 (2011).

The Board must find that the employees are readily identifiable as a group and that they share an adequate community of interest before the burden shifts to the employer to demonstrate an overwhelming community of interests between the petitioned-for employees and another group. See *Guide Dogs for the Blind, Inc.*, 359 NLRB No. 151, slip op. at 5 (2013).

The analysis of whether the petitioned-for employees are readily identifiable as a group is a separate analysis from whether they share a sufficient community of interests. See *Bergdorf*, 361 NLRB No. 11, slip op. at 2-3 (holding that even though the petitioned-for employees were readily identifiable as a group, the petitioned-for unit was inappropriate because it did not share a community of interests); *Guide Dogs for the Blind*, 359 NLRB No. 151, slip op. at 5.

Employees are a readily identifiable group when they are based on departments **and** functions. *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 5 (2015).

An important consideration is whether the employees sought are organized into a separate department or administrative grouping. Also important are whether the employees sought by a union have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002), see also *Specialty Healthcare*, 357 NLRB at 938-42. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

Moreover, the fact that an issue of unit composition is being raised in a post-election setting does not alter the applicability of *Specialty Healthcare* or otherwise render the matter procedurally defective. *Odwalla, Inc.*, supra at 1608 fn. 27 (holding that the analysis in *Specialty Healthcare* was the appropriate analysis to apply in that case which involved a determinative challenged ballot). The stipulated bargaining unit should have been considered as the petitioned-for bargaining unit by the Regional Director for the purpose of applying the *Specialty Healthcare* analysis. *Id.*

Despite the necessary first prong of the analysis conducted by the Board in *Specialty Healthcare*, the Decision all but ignored determining whether "the petitioned-for employees are readily identifiable as a group." Rather, the Decision relied upon the parties' Stipulation to

summarily conclude that the employees identified in it were an appropriate unit. It is true that the “Board’s longstanding policy is to permit parties to stipulate to the appropriateness of the unit, and to various inclusions and exclusions, if the agreement does not violate any express statutory provisions or established Board policies.” See, e.g., *Goucher College*, 364 NLRB No. 71, slip op. 2 (2016) quoting *White Cloud Products*, 214 NLRB 516, 517 (1974).

However, the Board’s longstanding policy does not permit the parties to stipulate to any group they desire, as the Regional Director has done in this instance, nor does the parties’ Stipulation absolve the Regional Director from conducting the appropriate unit analysis. A petitioner cannot seek and a stipulation cannot allow the fracture of a unit, by permitting representation of “an arbitrary segment” of what would be an appropriate unit. *Odwalla, Inc.*, 357 NLRB at 1612 citing *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999); see also *A.S.V., Inc.*, 360 NLRB No. 138 (2014); Regional Director’s Decision, Directed Election and Order, *Future Environmental Inc.*, Case No. 13-RC-124781. A fractured unit occurs when a petitioned-for unit arbitrarily excludes certain classifications, lacks a distinctive community of interest from the excluded employees, or is too narrow in scope. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999); *Pratt & Whitney*, 327 NLRB at 1216-1217.

In the instant case, the parties’ Stipulation fails to satisfy the Board’s basic standards because it does not set forth an appropriate unit. Indeed, the Hearing Officer’s Recommendation to the Regional Director determined that stipulated unit was not an appropriate unit because “the stipulated unit is a fractured unit. That is, there is no rational basis for excluding the maintenance technicians, while including the janitors.” (Hearing Officer’s Recommendation, p. 12). The Hearing Officer determined that “the stipulated unit does not track any administrative lines drawn by the Employer, such as classification, department or function.” *Id.*

As determined by the Hearing Officer, the inclusion of the Janitors in the Stipulation creates an inappropriate unit under the Act because they are not a readily identifiable part of the “production employees” sought to be included in the Stipulation. The Janitors do not share an adequate community of interest with K&N’s actual production employees to justify including them in the same unit. Janitors have dissimilar qualifications, training and skills; differences in job functions and are completely separate from the production process; have infrequent contact with K&N’s production employees; are not integrated with production employees; and have no interchange with production employees. See *Kalamazoo Paper Box*, 136 NLRB 134 (1962).

Second, the unit permitted by the Regional Director is further inappropriate because it improperly results in a fractured unit. The stipulated-for unit is fractured by virtue of its exclusion of the Maintenance Techs, the only group of employees integrated in the production process who would not be included. There is “no legitimate basis upon which to exclude” the maintenance technicians while at the same time including the janitors, which are included in the stipulated unit.” *Blue Man Vegas LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). Here, the Decision allows this illegitimate circumstance to occur.

The Regional Director’s failure to conduct the proper *Specialty Healthcare* analysis in the Decision was error. The stipulated-for unit in this case is inappropriate and should not have been deferred to by the Regional Director. Because the Decision fails to conduct the appropriate analysis under *Specialty Healthcare*, its conclusion should be rejected. Rather, the Board set aside the election and should issue an Order designating an appropriate bargaining unit, as defined below.

C. **The Only Appropriate Unit In This Matter Is All Production Workers, Including The Maintenance Techs And The Machine Adjustment Coordinator, Pleating**

In *Specialty Healthcare*, the Board emphasized that the way an employer structured its operations is a critical factor in determining the appropriate unit.

[T]he manner in which an 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 and is thus an important consideration in any unit determination.

*Specialty Healthcare*, 357 NLRB 938-39 n.19 (citations and internal quotation marks omitted).

The Board consistently applies this rule. In *Northrup Grumman*, the Board emphasized that the employer placed all of the petitioned-for employees in a separate department under separate supervision. 357 NLRB at 2017-18; *DPI Securprint*, 362 NLRB No. 172, slip op. at 5 (2015) (petitioned-for unit conformed to the employer's departmental lines); *Fraser Engineering Co.*, 359 NLRB No. 80, slip op. at 1 n.2 (2013).

Even when employees constitute a readily identifiable group, they must share a sufficient community of interests. *Bergdorf*, 361 NLRB No. 11, slip op. at 3-4. In *Bergdorf*, the union sought to represent a unit of all women's shoes sales associates in one store. *Id.* at 1. The Board found that the employees were readily identifiable as a group by virtue of their functions. The petitioned-for unit comprised all of the employees who sold women's shoes in the store. *Id.* at 2. However, the Board found the unit inappropriate because the employees the union grouped together from different departments, employees in the women's shoes department plus a subgroup of employees in another department also selling women's shoes, lacked a sufficient community of interests. The Board found the cobbled together unit did not conform to the employer's organizational structure. Although the Board acknowledged that the employees shared some community of interest factors, the balance weighed against an appropriate unit

because “the boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the Employer.” *Id.* at 3.

As noted above, the facts in this case establish that the Union’s petitions and the parties’ subsequent Stipulation depart from K&N’s operational lines. The stipulated-for unit is an improperly gerrymandered set of employees lumped together to create a fictitious “group” of employees where none exists and, in doing so, ignores other, related employees. In essence, the Union is attempting to carve out a Maintenance only unit by creating another unit around them through the Stipulation. That this is an inappropriate unit is clear when one considers that the Union’s international and district lodge affiliates represent mixed units with maintenance and production employees combined in one unit. (Tr. 680-81). The Board has consistently found that maintenance employees are not a separate, readily identifiable group from the rest of an employer’s production process if they are organized around the production process. Indeed, the Board concluded that a unit of maintenance employees was not a readily identifiable unit when the a manufacturing operation was divided into six basic process areas, maintenance and production employees regularly worked within the same process area, and there was little work contact between maintenance employees of different plant groups. *Monsanto Co.*, 183 NLRB 415, 416 (1970). The majority of the maintenance classifications’ time was spent on the production floor in contact with production employees and working in conjunction with them under common supervision. *Id.* at 416-17.

The Decision erroneously distinguishes *Monsanto*, largely because: (a) Maintenance Supervisors perform the daily evaluations and (b) “there is also no interchange or cross-assignment of tasks between the two groups.” (Dec., 24). However, these conclusions misconstrue the record evidence. First, there is ample evidence in the record that, while

Maintenance Supervisors perform daily evaluations, feedback from production workers and production supervisors is routinely considered in evaluating the performance of the Maintenance Techs. As a result, the Decision elevates form (who actually records an evaluation) over substance (whose input is considered when actually evaluating Maintenance Tech performance). Second, the idea that there is no interchange or cross assignment of employees altogether ignores the record evidence that Maintenance Techs and production workers work together to perform maintenance on production equipment, both during routine maintenance calls and as part of K&N's preventative maintenance program.

In *Buckhorn, Inc.*, the Board found a unit of maintenance only employees did not constitute a distinct, homogenous group of employees that would warrant granting the union's request for a separate unit. 343 NLRB 201 (2004). In that case, the skilled maintenance employees were primarily responsible for the maintenance and repair of the production presses and programming computerized robots. They spent approximately 90 percent of their time on the production floor. Additionally, skilled maintenance employees were responsible for the upkeep of the production facility and the automated system. Those skilled maintenance employees reported directly to the maintenance supervisor. The maintenance supervisor reported to the production supervisor, who reported directly to the plant manager. The skilled maintenance employees were assigned to rotating shifts, however the maintenance employees worked the same shifts as production employees. The Board found that the maintenance employees were not a distinct group of employees primarily based on the highly integrated nature of the employer's operation and the "significant degree of contact and interaction" among the maintenance employees and the production employees. The maintenance employees spent

almost all their working time on the production floor, working with production employees to produce a finished product. *Id.* at 202.

The union's petitioned-for units and the stipulated-for unit fails to share a sufficient community of interests because it is merely an amalgamation of sub-departments. The Board has held that it will not approve "fractured units," combinations of employees that are too narrow in scope or that have no rational basis." *Wheeling Island Gaming, Inc.*, 355 NLRB 637 (2010) citing *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). The unit approved by the Regional Director via the Stipulation is clearly too narrow in scope and has no rational basis given K&N's highly integrated production process. Again, in this matter, as will be demonstrated below, all production employees share a community of interest such that they should be included in the unit in this matter.

**1. *All Production Workers Share A Community Of Interest***

All production employees at K&N share a community of interest—and an overwhelming one—with each other. For instance, all production employees share the same common terms and conditions of employment, including common supervision; scheduling and shifts; hourly pay; benefits; parking; shifts; clock in procedures; attendance and PTO policies; access to the BMS to perform their job functions; employment handbook and policies; daily interaction with each other and Maintenance Techs; location of work, on the production floor; integration in the production process; break time and break facilities; lunch times and lunch facilities; daily evaluations; and safety training and equipment. These commonalities clearly demonstrate that all production employees share a community of interest, including unskilled Production Workers and skilled, craft employees, like Aluminum Welders I, Aluminum Welders II, Aluminum Welders III, Fabricators, Metal Fabricators, Helper Powder Coats, Machine Shop Production Leads, Punch Press Operators, RD Fabricators – Fixtures, Sanders, Stainless Welders I, Stainless

Welders II, Stainless Welders III, Team Leader – Tube Bending, Powder Coat Techs, Tube Benders I, Tube Benders II, Tube Benders III, Aluminum TIG Welders, Sr. Product Technicians, CNC Operators, CNC Operators II, CNC Programmer/Operators, CNC Programmer/Operators III, Electrical Controls Techs, Machine Design Engineers, Sr. Machine Builders, Media Painters, Robotic Welders I, Robotic Welders II and Robotic Welders III.

These employees are readily identifiable and share a community of interest such that they must form part of the unit in this matter.

**2. *The Maintenance Techs And Machine Adjustment Coordinator, Pleating Have A Community Of Interest With K&N's Other Production Employees***

Employees share an “overwhelming community of interests” when there is no legitimate basis upon which to exclude certain employees from the petitioned-for unit because the traditional community of interests factors “overlap almost completely.” See *Macy's*, 361 NLRB No. 4, slip op. at 7 (quoting *Specialty Healthcare*, 357 NLRB at 941). Under this standard, both the Maintenance Techs and the Machine Adjustment Coordinator, Pleating share an overwhelming community of interest with the remaining production employees at K&N, such that there is no legitimate basis for excluding them from the unit in this matter. **However, because the Union’s proposed units and the stipulated unit fail at the first *Specialty Healthcare* step, the Region need not analyze whether the challenged Maintenance Techs or the Machine Adjustment Coordinator, Pleating share an overwhelming community of interests with K&N’s production employees.** See *Bergdorf*, 361 NLRB No. 11, slip op. at 3-4.

Despite this, even assuming that the Board analyzes this relationship under the *Specialty Healthcare* “overwhelming community of interest standard”, the Maintenance Techs and Machine Adjustment Coordinator, Pleating must be included in a unit of production employees. As an initial matter, both the Maintenance Techs and the Machine Adjustment Coordinator,

Pleating share the same terms and conditions of employment in all significant respects with the remaining production employees. These terms and conditions include common supervision; scheduling and shifts; hourly pay;<sup>7</sup> benefits; parking; shifts; clock in procedures; attendance and PTO policies; training; access to the BMS to perform their job functions; employment handbook and policies; daily interaction with each other and production employees; location of work on the production floor; break time and break facilities; lunch times and lunch facilities; daily evaluations; and safety training and equipment. Clearly, the Maintenance Techs and the Machine Adjustment Coordinator, Pleating have nearly identical terms and conditions of employment as the remaining production employees at K&N.

With respect to scheduling, the Decision wrongly concludes that Maintenance Techs do not share an overwhelming community of interest with the remaining production workers at K&N. In reality and as demonstrated by the record evidence, the Maintenance Techs and the Machine Adjustment Coordinator, Pleating are fully integrated in and integral to the production process at K&N. Thus, a unit including these employees is drawn along K&N's organizational lines and appropriate under *Specialty Healthcare*. Production cannot occur or be maintained at K&N without the Maintenance Techs and the Machine Adjustment Coordinator, Pleating. Maintenance Techs start up and shut down production equipment each day. Likewise, the Machine Adjustment Coordinator, Pleating is constantly adjusting pleating machines to ensure they remain operational throughout a day. These employees are responsible for upkeep and maintenance on all of the production equipment at K&N. (Employer Ex. 14-16). Importantly, however, production employees are also responsible for the maintenance of equipment and actually perform preventative maintenance. For instance, production employees work alongside

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<sup>7</sup> As noted above, the Machine Adjustment Coordinator, Pleating, is paid on a salary basis because he was paid on this basis in a supervisory position in which he previously worked and not returned to hourly when he was transferred into his current position. (Tr. 510-11).

the Maintenance Techs to clean ovens and round carousels. Likewise, production employees change saws so the Machine Adjustment Coordinator, Pleating is not required to perform this task for every employee working in the Pleating Department.

This integration is at the core of collective bargaining and would serve the purposes of the Act. The Board has long held that part of its mission is to create efficient and stable collective bargaining relationships. See *Kalamazoo Paper*, 136 NLRB at 137. Section 9(b) of the Act requires the Board to approve appropriate bargaining units “in each case” that assure employees the “fullest freedom in exercising the rights guaranteed by” the Act. 29 U.S.C. § 159(b). Historically, in the manufacturing industry, the Board has recognized that it must consider the business realities of an employer’s business, and how a unit might impact the employer’s operations, balanced against the need for bargaining rights, industrial peace and stability. In *Kalamazoo Paper*, the Board recognized this balance of both objectives:

Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

136 NLRB at 137 (internal citations omitted). The Board wanted to avoid:

creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only create a state of chaos rather than foster stable collective bargaining, and could hardly be said to ‘assure to employees the fullest freedom in exercising the rights guaranteed by this Act’ as contemplated by Section 9(b).

*Id.* at 139-40. The “chaos” the Board wanted to avoid is the artificial result employers experience when unions carve out micro units from their production process at the workplace under *Specialty Healthcare*. The Board has long recognized that the manner the employer

organizes his or her employees has a direct bearing on the community of interest of employees within the plant. *International Paper Co.*, 96 NLRB 295, 298 n.7 (1951). Each unit determination must have a direct relevancy to the circumstances where collective bargaining is to take place. *American Cyanamid Co.*, 131 NLRB 909, 911 (1961). Under the Act, the Board must apply a functional approach that examines how the requested bargaining unit impacts the operation of K&N's business.

The *Specialty Healthcare* rule eliminates consideration "in each case" of the "circumstances within which collective bargaining is to take place." Instead, the first step of *Specialty Healthcare* requires an "employees readily identifiable as a group" test that elevates job titles or classifications over the practical reality of running a complex facility that manufactures automobiles. *Specialty Healthcare* allows the union to choose unrelated groups of employees, in three separate departments, and cobble them into one unrelated unit just because the employees share the same job title. In this case, the elevation of job titles and classifications, over K&N's operational approach, could create a bargaining obligation for a group of employees that share no real community of interest. Rather than fostering stability, this is a sure-fire recipe for instability.

With respect to scheduling, the Decision wrongly concludes that Maintenance Techs do not share overwhelming community of interest standard with production employees. First, the Decision wrongly construes the evidence about scheduling. There is no question that one Maintenance Tech does arrive early to start machines, so production can begin at the start of a shift, and one leaves late to turn off machines at the end of the day, the record evidence demonstrates that the vast majority of Maintenance Techs work on the same shifts as the rest of production. Further, the Decision ignores the fact that a Maintenance Tech arrives to start

machines further serves to demonstrate their integration into the production process: without Maintenance Techs no production at K&N can occur. It also disregards the fact that there is record evidence that other production workers at K&N also arrive earlier than the rest of the unit to prepare for production. Similarly, the Decision ignores the fact that production workers routinely work overtime on weekends with Maintenance Techs to perform preventative maintenance on production equipment.

The Decision also wrongly distinguishes Maintenance Techs and production workers because they use of the BMS in different fashions. After clocking in to report to work each day, all production employees proceed to their work area for the day and log into K&N's BMS. (Tr. 178). As noted above, the BMS is a system through which K&N tracks and manages its business. All production employees utilize the BMS. (Tr. 61). All employees use the BMS to "log in" to work stations, so that K&N can keep track of the time being spent by employees performing a certain function. (Tr. 178, 629-30). In determining that the Maintenance Techs and production workers utilize the BMS in different fashion, the Regional Director ignores that production workers all use the BMS in a different way. For instance, production worker in K&N's pick module use the BMS via handheld scanners, while production workers at the round molding stations use the BMS via their stations. Further, the reason that a production worker does not "input" information into the BMS is because the BMS is designed as an automated management system, which, when working correctly, continually updates via scanners and tracks production automatically. The Maintenance Techs work on maintaining and fixing equipment which means the BMS is and cannot be automatically logging these activities. However, all of the Maintenance Techs work is logged into the BMS system so K&N can accurately monitor the business and production activities (including maintenance tasks). Thus, the Regional Director's

attempt to use the BMS as a way to “differentiate” Maintenance Techs and production workers loses the forest through the trees. The BMS is used to manage all employees who work in K&N’s production process, but all employees in the production process access the BMS in different ways.

Likewise, the Regional Director misconstrued the evidence relating to employees interchange and interaction throughout the work day. First, the Regional Director conflates the evidence by asserting that “[t]here have been no permanent transfers from the Maintenance Tech classifications to any, of the production classifications” which only serves to minimize the record evidence showing that production workers at K&N apply for and, if accepted, are trained to become more skilled Maintenance Techs, not vice versa. (Employer Ex. 2).

Second, the Regional Director also minimizes the interaction between Maintenance Techs and production workers. Indeed, the record demonstrates that production workers are integral to Maintenance Techs’ jobs, as they are the “first line of trouble shooting.” (Tr. 164). Moreover, some issues, such as with tube bending, require that the production employee stay with the Maintenance Tech to fix the issue. (Tr. 166-67, 425-26). Once completed with his work, the Maintenance Tech will again communicate with the production employee to explain the issue and the fix, and at times, provide training and/or guidance on how the production employee should operate the equipment to attempt to avoid the issue. (Tr. 165). The Regional Director also largely ignored the fact that a Maintenance Tech’s produce product in their regular maintenance duties. (Tr. 165). If, upon inspection, the product produced by a Maintenance Tech is determined to be good, then this product continues in the production process and is eventually sold by K&N. (Tr. 429).

Third, the Regional Director wrongly discards the record which shows that Maintenance Techs perform preventative maintenance with Production Workers. Both Maintenance Techs and production employees work together to clean the ovens on a monthly basis, at least. Oven cleaning is “essential” because failing to clean the ovens would cause too much smoke in the oven, which affects the final product. Similarly, production employees on round carousels also perform PM by scraping and cleaning built up urethane on production equipment. This PM is conducted on weekends at the same time Maintenance Techs are performing other PM duties.

Rather than crediting this evidence, the Decision attempts to minimize this preventative maintenance. This attempt to minimize the preventative maintenance tasks performed by serves to highlight the bias inherent in the Decision: it appears as though the Decision was merely a results-driven attempt to exclude the Maintenance Techs and certify the stipulated-for unit. This is made further clear by the Decision’s incorrect conclusion that “there is no avenue to include [the Machine Adjustment Coordinator, Pleating] along with the Maintenance Techs in this proceeding.” In actuality, the Regional Director has the power to conclude—and should have concluded—that the stipulated-for unit was inappropriate.

However, by punting on the first prong of the *Specialty Healthcare* analysis, the Regional Director ignored her obligation to consider whether the stipulated-for unit was appropriate. If the Decision had correctly applied the *Specialty Healthcare*, it would have concluded that the stipulated-for unit was inappropriate. From there, the Decision could have and should have determined that the only appropriate unit in this matter includes all production employees, including Maintenance Techs and the Machine Adjustment Coordinator, Pleating. Indeed, the both Maintenance Techs and the Machine Adjustment Coordinator, Pleating share a community of interest with the remaining K&N production workers. Likewise, failing to include the

Machine Adjustment Coordinator, Pleating in the unit in this matter would improperly result in a residual unit of one and a fractured unit.

The Decision also wrongly concludes that there is no unit that would not result in a fracturing. As noted above, a unit of K&N employees who work in/on the production process, including the Machine Adjustment Coordinator, Pleating and the Maintenance Techs, is the only appropriate unit here. This would not result in the fracturing of a unit. Rather, as discussed below, the janitors and Facilities Maintenance Technician, who job duties consist of janitorial work in the production facility and the front office, share a community of interest among themselves, but not with any other production employees at K&N. Likewise, these positions would not be fractured as their work has no relation to the production process at K&N.

For the foregoing reasons, the only appropriate unit in this matter is one consisting of all K&N production employees, including skilled and unskilled workers, Maintenance Techs, and the Machine Adjustment Coordinator, Pleating.

Moreover, as the foregoing discussion indicates, the Decision also wrongly concludes that the K&N's Maintenance Techs do not share an overwhelming community of interest with the remaining K&N production employees. Rather, as set forth above, including skilled and unskilled workers, Maintenance Techs, and the Machine Adjustment Coordinator, Pleating all share an overwhelming community of interest.

**3. *K&N's Janitors And Facilities Maintenance Technician Do Not Share A Community Of Interest With The Appropriate Unit In This Matter***

Given that the only appropriate unit in this matter includes all of K&N's production employees, it follows that non-production employees (i.e., those not integrated into the production process) do not share a community of interest with production employees and should not be included in the unit in this matter. Thus, K&N's Janitors and the Facilities Maintenance

Technician, whose duties have no relation to the production process, do not share a community of interest and should not be included in the unit of production employees in this matter.

Neither Janitors, nor the Facilities Maintenance Technician's duties have any relation to the production process at K&N. As noted above, the Janitors do not share an adequate community of interest with the remaining production employees to justify including them in the same unit. Janitors have dissimilar qualifications, training and skills; differences in job functions and are completely separate from the production process; have infrequent contact with K&N's production employees; are not integrated with production employees; and have no interchange with production employees. See *Kalamazoo Paper*, 136 NLRB 134. Rather than being integrated into the production process, Janitors are almost entirely removed from the production process. They only "relation" these employees have to production employees is that they clean the bathrooms that production employees use and clean some areas that production employees access. Janitors do not clean the production floor and do not clean or otherwise maintain K&N's production equipment. Further, in the performance of their job duties, Janitors do not have meaningful, job-related contact with K&N's production employees. As a result, Janitors share no community of interest with the K&N's production employees.

Likewise, K&N's Facilities Maintenance Technician does not share a community of interest with K&N's production employees. The Facilities Maintenance Technician also has no relation to the production process and, in fact, he admits that he "never" performs functions in K&N's production areas or works with Maintenance Techs. Rather, he maintains K&N's corporate offices, in addition to performing "building maintenance." He is not functionally integrated with K&N's production process. He also admits that he is not considered part of K&N's Maintenance Department by the Maintenance Techs, does not have access to the BMS

system in performing his duties, and does not attend meetings with K&N's Maintenance Department. Further, no employees assist him in performing his job functions, nor does any other perform his duties if he misses a day of work.

Again, the Board has held that it will not approve "fractured units," combinations of employees that are too narrow in scope or that have no rational basis." *Wheeling Island Gaming, Inc.*, 355 NLRB 637 (2010) citing *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999). In this matter, excluding the Janitors and the Facilities Maintenance Technician does not result in a fractured unit that has no rational basis. These employees do not share any community of interest with production employees at K&N. Likewise, excluding these employees would not result in a fractured unit. *Cf. Odwalla, Inc.*, 357 NLRB 1608; *A.S.V., Inc.*, 360 NLRB No. 138 (2014); Regional Director's Decision, Directed Election and Order, *Future Environmental Inc.*, Case No. 13-RC-124781. The Decision's conclusion to the contrary is error. (Dec., 24-26).

On the contrary, including these employees in a unit of production workers has no rational basis given that they share no community of interest with K&N's production workers. The Decision's deferral to the stipulated-for unit is inappropriate.

**D. If The Election Results Are Not Set Aside, Then The Unsigned Challenged Ballots Should Be Counted (Along With Maintenance Techs Ballots)**

As detailed above, the conduct of Board Agents and the Union and its representatives dictate that the election results should be set aside and that the Region must order a new election in this matter. However, to the extent that the Region disagrees and refuses to order a new election, then the challenged ballots of the Maintenance Techs must be opened.

The Decision correctly determines that there is:

there is no need to distinguish between the two challenged ballots. Both ballots belong to individuals in one of the Maintenance Tech classifications that the parties agreed would be reserved to the challenged ballot procedure. Thus, there is only one valid basis to

challenge each of these votes, and it is the same in both cases. Neither party has raised any additional or alternative basis that would necessitate distinguishing the ballots, such as an additional basis to challenge one of the votes but not the other.

(Dec., 26). Indeed, the Region had previously determined that the identity of the voters who cast these unsigned ballots, Raymundo Vazquez, Jr. and John Spencer, Jr. (Tr. 687-88).

However, the Decision incorrectly concludes that these ballots need not be opened as because they should be treated like the other Maintenance Tech ballots and the challenge that was sustained with respect to those ballots. (Dec. 26). K&N agrees that, because there is no question that these ballots belong to Maintenance Techs, that they should be treated similarly to the remaining Maintenance Tech ballots. However, as discussed in detail above, there is no legitimate basis upon which to argue that these votes should not be counted—except in an attempt to disenfranchise two voters who should have an opportunity to vote in this election.

#### **IV. CONCLUSION**

For all of the foregoing reasons, K&N respectfully requests that the Board review the Regional Director's Decision, set aside the election results and order a new election be run in this matter with the only appropriate unit consisting of all production employees, including the Maintenance Techs and the Machine Adjustment Coordinator, Pleating. In the event that a new election is not ordered in this matter, K&N respectfully requests that the Board order that all of the unopened challenged ballots belonging to K&N Maintenance Techs be opened and counted.

Respectfully submitted,

*/s/ Richard S. Falcone*

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Dated: February 3, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> day of February, 2017, I e-filed the foregoing *Employer K&N Engineering, Inc.'s Request for Review of the Decision and Order Sustaining Challenges, Overruling Objections, and Certification of Representative Issued by the Regional Director on January 20, 2017* on the NLRB's E-Filing system and served a copy of it via electronic mail upon:

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