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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CANNERY, WAREHOUSEMEN, FOOD
PROCESSORS, DRIVERS AND
HELPERS, LOCAL UNION NO. 601,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Petitioner,

v.

CONSTELLATION BRANDS,
WOODBRIDGE WINERY,

Employer.

Case Nos.: 32-CA-148431

**UNION'S STATEMENT OF
POSITION ON REMAND**

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I. INTRODUCTION

This case is on remand from the Second Circuit Court of Appeals (hereinafter, “Court”) for further proceedings consistent with the Court’s opinion. The Court found that, at step one of the *Specialty Healthcare* analysis, the Regional Director appropriately recited the community of interest standard and declared that employees in the petitioned-for unit have distinct characteristics. However, the Court concluded that the Regional Director “did not explain *why* those employees had interests “sufficiently distinct from those of the other employees to warrant the establishment of a separate unit.” (*Constellation Brands v. NLRB*, Case Nos. 15-2442, 15-4106, slip op. 18 (2d Cir., Nov 21, 2016) (emphasis in original)). The Court held that “[t]his misapplication of *Specialty Healthcare* requires us to deny the Board’s petition for enforcement.” (*Id.* at 20.)

In light of the limited nature of the Court’s remand and the extensive record already developed by the hearing officer in this case, no additional fact-finding is required. In fact, as the Court recognized, the Regional Director made a number of *factual* findings that tend to show that the Cellar Department employees had interests distinct from other employees,” particularly the Barrel Department employees. However, the Court found that the Regional Director “never explained the weight or relevance of those findings.” (*Id.* at 19.) The reason the Regional Director was less than exhaustive in his analysis of the specific differences between the Cellar Department employees (the petitioned-for unit) and the Barrel Department employees (the excluded employees whom the Employer argued on appeal must be included) was because during the entire evidentiary hearing before the Regional Director, the Employer limited its argument to the position that the only appropriate unit would be one composed of all “production and maintenance employees.” (See Regional Director’s Decision and Direction of Election (DDE) at 40, n.20.)

In any event, because the Regional Director has already made the “factual findings” that tend to show that the Cellar employees had interests distinct from other employees, and those findings are well-supported in the existing record, all that remains is for the Board to provide the legal analysis “explain[ing] the weight or relevance of those findings” as between the Cellar employees and the Barrel employees. (*Constellation, supra*, at 19.)

II. COMMUNITY OF INTEREST FACTORS

1. The Regional Director’s Factual Findings Regarding the Community of Interest Factors as Applied to Cellar and Barrel Employees.

The Employer, Constellation Brands, Woodbridge Winery¹ (hereinafter referred to as “Constellation” or “the Employer”), employs over two hundred (200) non-exempt hourly workers at its winery located in Acampo, California. These employees are distributed in various departments and job categories under five “Directors”: the Director of Cellar Operations, the Director of Maintenance, the Director of Bottling, the Director of Technical Services, and the Director of Winemaking. (DDE 3-5; Resp. Exh. 9.) The employees at issue in this case work in the Cellar Department and the Barrel Department which fall under the Director of Cellar Operations. (DDE 3; Resp. Exh.9; Tr. 92-93.) There are approximately 46 employees in the Cellar Department² and 25 employees in the Barrel Department³ which are at issue in this case.

¹ The Employer is referred to in several different ways in the record evidence, such as Constellation Brands Woodbridge Winery (*See* Respondent’s Exhibit 1, hereinafter referred to as “Resp. Exh.”), Constellation Brands, Inc. (Resp. Exh. 2), Constellation Wines U.S. (Resp. Exh. 18), or simply Constellation Brands (Resp. Exh. 25).

² Cellar Department includes 46 Cellar Operator I, Cellar Operator II, Senior Cellar Operators, and Cellar Foremen. *See* Petitioner’s Exhibit 6 (hereinafter referred to as “Pet. Exh.”).

³ Barrel Department includes 18 Barrel Operator I, Barrel Operator II and Senior Barrel Operators, 6 Cellar Services employees, and 1 Recycler. (Pet. Exh. 10.)

The Cellar Department consists of those winery employees who are primarily responsible for receiving grapes or juice and making wine in the large stainless steel tanks located outdoors in tank farms around the multi-acre facility. (DDE 3, 8; Tr. 239.) Their duties include receiving and unloading trucks containing bulk grapes or tanker trucks containing juice. (DDE 8; Tr. 239.) Upon receipt of the bulk grapes, Cellar Department employees operate presses and the hopper to extract juice from the grapes. (DDE 8; Tr. 239-240, 312-313.) In addition to storing the bulk or extracted juice in large stainless steel storage tanks,⁴ the Cellar Department employees are responsible for moving and transferring wine around the facility from one tank to another using hoses and pumps. In addition to adding a vast array of chemicals to the wine and assembling blends of wine pursuant to winemaker instructions, the Cellar employees are also responsible for clarifying the wine through designated procedures and equipment. Ultimately, the Cellar employees are responsible for transferring the product to the Bottling Department. (DDE 8; Tr. 259.) All employees in the Cellar Department are “essentially interchangeable,” (DDE 9), completing the same tasks as all other Cellar Department employees.

The Barrel Department, in contrast, includes employees in three distinct job titles – “Barrel,” “Cellar Services,” and “Recycler” – each with different responsibilities and each working in different areas of the winery.⁵ (DDE 3, 6.) Approximately 18 Barrel

⁴ These massive steel tanks may contain up to 650,000 gallons of wine. Tr. 16-17.

⁵ Constellation has argued that there is no “Cellar Department” or “Barrel Department” at the winery, but rather both “are part of a single cellar operations department,” even while acknowledging that “cellar and barrel are at times colloquially referred to as ‘departments.’” Employer’s Appellate Brief (“ER. Br.”) 7 n.4. Constellation does not dispute, however, that “the cellar operations department contains two . . . sub-groups, outside cellar and barrel, each of which is supervised by a cellar master.” ER. Br. 7. And, the record is replete with statements by Constellation’s own witnesses and documents referring to the “Cellar Department” and the “Barrel Department.” *See, e.g.*, Transcript (“Tr.”) 47-48; 964-65, 968, Petitioner Local 601’s Exhibit (“Pet. Ex.”) 1, Pet. Ex. 8, Pet. Ex. 10, Respondent Constellation’s Exhibit (“Resp.

Department employees work in the indoor temperature-controlled Barrel Building “to barrel age specific wine” in fifty-eight gallon wooden casks, “oversee[ing] their designated product from the time it leaves the presses until it is ready for bottling.” (DDE 3, 9.) Constellation’s General Manager described this operation as “like a winery within a winery.” (Tr. 147.) The four to six Cellar Services employees are in charge of sanitation, ensuring cleanliness throughout the facility by power washing tanks and getting tanks cleaned and prepped. In addition, these Cellar Services employees sanitize the hoppers, augers, bladders, and presses prior to the crush. (DDE 3, 9; Tr. 469-470.) Finally, the single Recycling employee, who is also a member of the Barrel Department, is responsible for recycling throughout the entire facility. (*Id.*; Tr. 1062.)⁶

Beyond the different functions employees in each department play in Constellation’s winemaking process, Cellar Department and Barrel Department employees have “very little interaction” with each other. (DDE 35.) Cellar Department employees work primarily outside in the tank farms, while Barrel employees – who make up the bulk of the Barrel Department – work almost exclusively inside the Barrel Building. (DDE 8-9.) Cellar Department and Barrel Department employees “punch in, take breaks, and receive work orders” in different buildings located in disparate parts of

Ex.”) 21, Resp. Ex. 22, Resp. Ex. 23, Resp. Ex. 32, Resp. Ex. 33, Resp. Ex. 47, Resp. Ex. 48, Resp. Ex. 49, Resp. Ex. 52, Resp. Ex. 53, Resp. Ex. 58(c), and Resp. Ex. 71. We therefore adopt that location here, which the record demonstrates is how both Constellation and its employees, *see, e.g.*, Tr. 183, Tr. 673, 677, understand their workplace to be organized.

⁶ Practically speaking, Constellation has not and cannot make a showing that either the Cellar Services employees or the Recycling employee have any community of interest with the Cellar Department employees. Rather, as the Court accurately noted, this case essentially boils down to a dispute about whether the 46 Cellar employees (the petitioned-for unit) are sufficiently distinct from the 18 Barrel employees such that they may be treated separately for collective bargaining purposes under Section 9 of the Act. (*Constellation*, slip op. at 5.) For this reason, the Union will focus on the distinctions between the Cellar Department employees and the 18 Barrel employees, and not the Cellar Services employees or the Recycler. Therefore, all further references to the “Barrel Department” pertain to the 18 employees who work primarily in the Barrel Building aging wine in wooden casks.

the facility. (DDE 15.) Although there are occasional facility-wide meetings and celebrations in which both Cellar Department and Barrel Department employees participate (along with all other employees at the winery), the Regional Director concluded that these “are not a regular part of the employees’ functions” and “when viewed as a percentage of the amount of hours worked by an employee during a given month or year, these types of activities constitute a very small amount compared to regular day-to-day activities.” (DDE 35.)

A. Employees in the Cellar and Barrel Departments Have Meaningfully Distinct Interests.

1. Departmental Organization

The Cellar and Barrel Department employees are organized by the Employer into separate departments. (See, e.g., Resp. Exh. 15, 23, 49.) The Regional Director correctly found that the petitioned-for unit consists of an entire department drawn along the same lines drawn by Constellation. Separate departmental organization is a “particularly significant fact” in the Board’s community of interest analysis. (*Macy’s Inc.*, 361 NLRB No. 4 (2014) (citing *Fraser Engineering Company*, 359 NLRB No. 1 (2013)).)

2. Skills and Training

While there is some overlap in the training, skills, and job functions of Barrel Department and Cellar Department employees (DDE 5), the distinctions in these categories are significant for collective bargaining. A review of the Barrel Department Training Record (Pet. Exh. 10) and Barrel Department ISO Procedures (Pet. Exh. 11) reveal twelve (12) procedures entirely unique to the Barrel employees including:

Department Operation

Barrel Sampling Procedure

ISO Procedure

BBLP 006-01

Barrel Line One Procedure	BBLP 016-01
Silicon Bung Washing	BBLP 013-02
Ozone Generator Operation	BBLP 008-01
Barrel Line Two Procedures	BBLP 017-01
Barrel Warehouse Procedures	BBLP 001-01
Floor Scrubber Operation	BBLP 010-01
SO2 Solution Preparation	BBLP 009-04
Empty Barrel Case -- SO2 Gassing	BBLP 014-02
Fermenting Barrel Lots	BBLP 007-02
Barrel Inventory Procedures	BBLP 003-02
Lift Truck Battery Charging	BBLP 011-02

The Cellar Department employees do not receive training for any of these duties and responsibilities. (Tr. 604-610.) In contrast the Cellar Department employees have thirty-two (32) Cellar Department ISO Procedures which are entirely unique to Cellar Department employees including the following:

<u>Department Operation</u>	<u>ISO Procedure</u>
Tank Measuring Procedures	CELP 040-01
Press Operating Procedures	CELP 025-01
Cleaning and Safety Guidelines	CELP 014-04
Red Ribbon Tank Procedures	CELP 037-02
400 Tanks - Argon Gas Blanketing	CELP 053-01
Crusher Operating Procedures	CELP 028-02
Chiller Operating Procedures	CELP 026-02
Wine Additions - Vitaben Bentonite	CELP 002-03
Wine Additions - Acid Additions	CELP 001-04
Wine Additions - Carbon	CELP 003-04
Wine Additions - Potassium Bitartrate	CELP 004-03
Wine Additions - Frozen Egg Whites	CELP 005-03
Wine Additions - Gelatin	CELP 006-03
Wine Additions - Isinglass	CELP 007-03
Wine Additions - Kolofine	CELP 008-03
Wine Additions - Milk	CELP 009-03
Wine Additions - Oak Chips	CELP 010-03
Wine Additions - Dry Active Yeast	CELP 012-04
Wine Additions - Yeast Nutrients	CELP 013-04
Wine Additions - PVPP Fining Agent	CELP 051-01
Shipping and Receiving	CELP 042-02
Cellar Cross Flow Operations	CELP 050-01
Rotovac Operations Procedure	CELP 022-02
SB-80 Centrifuge Operation Procedure	CELP 021-01

CUNO Operating Procedure	CELP 029-01
EK Operating Procedure	CELP 034-02
SUDMO Operating Procedures	CELP 039-01
Westfalia Separator Procedures	CELP 024-03
Schenk Operation Procedures	CELP 045-02
Candle Filter Procedures	CELP 002-01
Drain and Press Operating Procedures	CELP 041-02
South Press Lock Out Procedure	CELP 023-01

The record evidence shows that there are only seven (7) ISO Procedures which are followed by both the Cellar and Barrel Department employees. (Pet. Exh. 6, 11). In other words, there are over *six times* as many ISO Procedures that are exclusive to either the Cellar Department or Barrel Department when compared to the ISO Procedures which are shared by the employees in these two departments.

There is complete overlap in the amount and types of jobs performed by Cellar Operator I, Cellar Operator II and Senior Cellar Operator. There is also complete and comprehensive overlap in the amount and types of jobs performed by the Cellar Department employees and for which Barrel employees generally do not receive training. (Pet. Exh. 6.)

The time to become fully trained in the Cellar Department reflects a disparity in job functions. Employees require two years of training to matriculate from Cellar Operator I to Cellar Operator II, and another two years of training to matriculate from Cellar Operator II to Senior Cellar Operator. (Tr. 190; Pet. Exh. 19.) The Cellar Department's lengthy training process and the procedures exclusive to it are meaningful distinctions between the groups for collective bargaining.

3. Job Duties

During the harvest season, Cellar employees are exclusively responsible for receiving all grapes and juice trucked into the facility. The Cellar employees offload the

product pursuant to the work orders by the Winemaker. (Tr. 311-312.) Then the product is either crushed or pressed. Once again, this work is done exclusively by Cellar employees. (Tr. 313.) Furthermore, the transferring, blending, adding ingredients and storage of all wine within large metal tanks outdoors in the tank farm is also performed exclusively by the Cellar employees. (Tr. 316-323, 797-798.)

As noted by the Regional Director, “cellar department employees [...] have specific tasks and expected competencies, depending on their level.” (DDE p. 8.) The Regional Director listed nineteen different types of tasks that Cellar Department employees perform. (DDE 8.) Barrel employees may have superficially similar job descriptions. However, their actual job duties, skills and training are substantially distinct. The Barrel Department employees spend a vast bulk of their time inside the temperature-controlled Barrel Building. They have substantially fewer ISO Procedures when compared to the Cellar employees, and nearly two-thirds of those are unique to the Barrel Department. They work with small fifty-eight gallon wooden casks, rather than 650,000 gallon steel tanks. (DDE 9: Tr. 18, 32.) Barrel employees oversee the aging of a tiny fraction of the total wine produced at the Constellation facility.⁷

4. Functional Integration

Functional integration is how related one employee’s function is to that of other employees. Barrel and Cellar Department employees do not work side by side. (Tr. 608.) Cellar Department employees do not work with Barrel Department employees in performing Barrel Department tasks, and Barrel Department employees do not perform Cellar Department tasks. (*Id.*)

⁷ The records shows that Constellation produces over 22 million cases of wine annually. (Tr. 11.)

Only Cellar Department employees handle the grapes prior to and during crush. (DDE 12.) Only Cellar Department employees build lines and clean lines to transfer wine after the crush. Once stored in tanks, the wine may then be blended with other wines by the Cellar employees. Eventually, this product is filtered by the Cellar employees. Finally, only Cellar Department employees are involved in transferring the wine to the Bottling Department. (DDE 12-13.) The small amount of wine destined to be aged in barrels is not handled by the Cellar Department employees. (DDE 13; Tr. 257-258.) Rather, the Barrel Department employees build separate lines and transfer the requisite wine to the Barrel Department for aging in wooden casks. (DDE 13; Tr. 153-154.)

It is true that Cellar employees routinely transfer wine to the specific storage tanks adjacent to the Barrel Department, from which it is then transferred by Barrel employees into the Barrel Building for aging in wooden casks. (Tr. 698.) It is also true that Barrel employees occasionally enter the tank farm to transfer wine from other tanks to the Barrel Department for aging. (Tr. 854.) However, whenever these transfers occur, they are always performed by separate teams of Cellar and Barrel Department employees. In fact, hoses and pumps utilized in any transfers are specifically marked and are not to be interfered with by employees from another Department. (Tr. 154, 264.) Such attenuated interaction does not compel a finding that the petitioned-for unit is functionally integrated with the Barrel Department employees.

5. Frequency of Contact

Cellar and Barrel Department employees have, at best, irregular and incidental contact. Cellar Department employees work primarily outside in the tank farm, while

Barrel employees work almost exclusively inside the Barrel Building. (DDE 9.) Barrel and Cellar Department employees start their shifts in different locations. The Cellar Department employees commence their work at a building in the center of the tank farm commonly referred to as "Taco Bell." (Tr. 799-800.) The Barrel Department employees commence their work in the Barrel Warehouse. (Tr. 853.) Barrel Department employees do not commence shifts at the same time as the Cellar employees. (Tr. 1052-1053.) Cellar Department employees have three separate shifts: day shift commencing at 7:00 a.m., swing shift commencing at 3:00 p.m., and graveyard shift commencing at 11:00 p.m. (Tr.1052.) Barrel Department employees have only two shifts: day shift commencing at 6:00 a.m. and the swing shift commencing at 2:00 p.m. (Tr. 1053.) Significantly, Barrel Department employees are not routinely required to rotate their assigned shifts, while the day shift and swing shift employees in the Cellar Department are required to rotate to the graveyard shift. (Tr. 1052-1053.)

The Barrel Department employees are assigned a specific parking lot separate and distinct from the Cellar Department employees. Cellar employees are designated to park in Lot B or the blue parking lot. (Tr. 195-196, 816-817, 1238.) They receive separate work orders from separate supervision inside the Barrel Department building which is separate and far removed from the Cellar Department Headquarters. The Cellar and Barrel employees have their own break rooms, locker rooms, and even separate smoking areas. (Tr. 203-204, 289, 815.) Additionally, Cellar employees work in pairs and are never paired with employees outside of the Cellar Department. (DDE 9-10; Tr. 221.) The evidence simply does not show that there is any regular contact between Cellar and Barrel employees.

6. Interchange Between Cellar and Barrel Department Employees

Cellar and Barrel employees rarely, if ever, interchange with each other. (DDE 36.) The evidence of interchange between these two groups of employees is insignificant. Constellation's General Manager could not identify any Cellar employee who has transferred into the Barrel Department, or any Barrel employee who transferred into the Cellar Department, in the year and a half since he assumed his role as General Manager of the Facility. (DDE 20; Tr. 134, 1178-1180.) In fact, the only example of a transfer from the Barrel Department into the Cellar Department occurred in 2005 when four employees were transferred due to downsizing. Even then, these employees were transferred back to the Barrel Department in 2009. (DDE 20; Tr. 932.) The General Manager also identified only five (5) employees who allegedly had once worked in the Cellar Department, but were currently employed in the Barrel Department. (Tr. 1176-1177; 1296-1297.) However, the General Manager failed to produce any evidence about when these transfers occurred but, more importantly, he acknowledged that each of these employees were "temporary workers" employed by Adecco Employment Agency when they were working in the Employer's Cellar Department.

Similarly, there is virtually no evidence of temporary interchange of employees between the two departments beyond the example of one particular Cellar employee who worked in the Barrel Building on two separate occasions approximately five years before the hearing - once for only half a day and on another occasion when he performed inventory in the Barrel Building over several days. (DDE 20-21; Tr. 691.)

Interchange between the Cellar and Barrel Departments is so limited, in part, because the lines of skill and promotion operate vertically within each department. The

Appellate Court questioned the Regional Director's contention "only employees of the petitioned-for cellar unit 'unlike the unit of employees sought by the Employer . . . must demonstrate skills of lower-level job classifications before moving up to higher-level job classifications within the department.'" The Court opined that "[i]t seems implausible that non-cellar employees need not 'demonstrate skills' before being promoted."

(*Constellation* 19 n.39.) The Court misses the point being made by the Regional Director. It is apparent that the Regional Director was not suggesting that demonstrable skills are required for promotion only within the Cellar Department. Rather, the Regional Director found that despite the fact that Cellar and Barrel Department employees are both classified using the same nomenclature for job titles (i.e. Operator I, Operator II, Senior Operator and Foreman), an Operator I within the Cellar Department is not equivalent to an Operator I within the Barrel Department. The Regional Director was merely pointing out the significant fact that an employee assigned as a Cellar Operator I position cannot promote to a Barrel Operator II position, nor can an employee assigned as a Barrel Operator I position promote to a Cellar Operator II position. In other words, interdepartmental transfers are functionally nonexistent because most skills are not interdepartmental and all real promotional opportunities are vertical within a particular department. This undeniable fact is borne out by the scant evidence of any interchange between the Cellar Department and Barrel Department employees.

7. Terms and Conditions of Employment

Although the Regional Director found that the employees at issue shared *similar* terms and conditions of employment (DDE 37), differences were apparent. The start times of the shifts for employees in the Cellar and Barrel Departments differed. In

addition, the Cellar Department operations include a third or graveyard shift, while the Barrel Department operations only run for two shifts. Most prominently, the Cellar Department employees have a “rotation schedule” requiring various Operators who are routinely assigned to work either day or swing shift to rotate to the graveyard shift. Such significantly disruptive scheduling rules are not applicable to Barrel Department employees.

8. Common Supervision

The Cellar Department and the Barrel Department are each run by separate managers who are in charge of their respective departments and who report to the Director of Cellar Operations. (DDE 3; Resp. Exh. 9; Tr. 92-93.) In addition, there are completely separate front-line supervisors for each shift in each of the departments. (DDE at 40 n.20; Resp. Exh. 9; Tr. 101.) The Barrel Department supervisors are entirely separate from the supervisors of the Cellar Department. These separate supervisors are responsible to hire their own employees, to direct and oversee their own employees, to evaluate their own employees, to discipline and terminate their own employees, and to authorize absences and approve requests for leaves of absence and vacation for their own employees. (Tr. 957, 1180, 1189, 1237.)

II. THE SPECIALTY HEALTHCARE ANALYSIS

1. The Petitioned-For Unit Satisfies Step One of *Specialty Healthcare* Analysis.

The petitioned-for unit of Cellar employees satisfies step one of the *Specialty Healthcare* analysis.

First, the Cellar employees are readily identifiable as a group. They are organized into a separate department by the Constellation, with separate supervisors and work in the

same area performing the same duties, tasks and responsibilities. (DDE 40 n.20.) Cellar employees have their own Cellar Department breakroom, parking lot and smoking area.

Second, the Cellar employees share a community of interest with each other. As the Regional Director found, the Cellar employees constitute an appropriate unit because they “work closely together throughout each shift; regularly interchange with one another, including as backup; have similar skills and training requirements; must demonstrate skills of lower-level job classifications before moving up to higher-level job classifications within the department; earn hourly pay in the same wage ranges; and report to the same supervisors.” (DDE 28-29.)

Third, the Cellar employees’ interests are strongly distinct from the interests of the Barrel employees. The Regional Director found that the two groups have numerous distinctions, including that Cellar and Barrel employees have “separate front-line [and] immediate supervisors,” work in “physically separate locations,” on “different portions of the Employer’s winemaking process,” and “have limited daily contact with each other.” (DDE 40 n.20.) The Cellar and Barrel employees also have different job functions and very rarely interchange between their respective separate departments. (DDE 36-37; DDE 40 n.20.)

These distinctions are of particular relevance to collective bargaining. For example, in *Macy’s, Inc.*, 824 F.3d 557 (5th Cir. 2016), the court considered a remarkably similar set of facts. In that case, the union sought to organize a unit of cosmetic and fragrance department employees, constituting only one of eleven sales departments at the store. The employer asserted that the only appropriate unit must consist of all sales employees. *Id.* at 561. While the Board acknowledging that the

petitioned-for unit shared some factors with certain other selling employees, the Board concluded that a storewide unit was not required. The Board found that all petitioned-for employees (a) work in the same department in distinct work area, (b) have common and distinct supervision, (c) work with a distinct shared purpose and functional integration, (d) have little or no contact or interchange with other selling employees, and (e) found that much of the training received was department specific. Notwithstanding that all sales employees were paid on the same basis, received the same benefits and were subject to the same employer policies, the Board concluded that the petitioned-for unit was appropriate. *Id.* at 562-564. The Board's findings, analysis and conclusion were approved by the appellate court. *Id.* at 565-566.

These very same factors deemed to reflect meaningfully distinct interests in *Macy's Incorporated* are present in this case. The Cellar and Barrel Department employees work toward distinct goals in disparate locations of the facility, operating in different departments and under entire separate front-line supervisors and managers. Furthermore, there can be little doubt that the work of the Cellar employees has a shared purpose and functional integration distinct from the Barrel employees. In addition, the facts indisputably show that the contact or interchange between the Cellar and Barrel employees is, at best, de minimis. Finally, the training received and skills required of these two separate groups of employees are substantially department specific. Similar to the conclusions reached in *Macy's Incorporated*, these significant distinctions, as well as other differences between the Cellar and Barrel Department employees, outweigh any similarities they may share in the context of collective bargaining.

Similarly, in *Guide Dogs for the Blind*, 359 NLRB No. 151 (2013), the employer argued that the petitioned-for unit of canine instructors was inappropriate for collective bargaining without inclusion of classifications from five other departments. (Slip op. 8.) However, the Regional Director found that there was little evidence of interchange between the petitioned-for unit and other employees, and that there was a “clear career ladder” within the petitioned-for unit not accessible to employees from other departments. (*Id.* at 7.) The Regional Director also pointed to the fact that the employees within the two classifications in the petitioned-for unit worked closely to provide and support training, and that they were the “only employees who regularly worked with the guide dogs and students during the training phase of the process and [...] interact with the dogs in the training kennels.” (*Id.* at 7.) Additionally, the Regional Director noted that the petitioned-for unit had separate and distinct supervision, worked in different geographic locations from the excluded employees, and had distinct skills and training from other departments. (*Id.*) These very same factors are present in this case and, for the same reasons, substantiate that the differences between the Cellar and Barrel Department employees outweigh their similarities in the context of collective bargaining.

The Board in *Guide Dogs for the Blind* also rejected the employer’s argument that the unit must include other classifications who worked in service of the same goal of working “together to accomplish the growth, development, training, and care of guide dogs throughout the dogs’ lives.” (*Id.* at 9.) In so doing, the Board correctly noted that in many work places, groups of employees may be functionally integrated in the crafting of an employer’s final product without sharing an overwhelming community of interest. (*Id.* at 9.) Here, the Cellar employees begin the winemaking process for all grapes that enter

the facility, including those eventually transferred to the Barrel Building for aging. However, the Cellar and Barrel employees' play distinct and separate roles in this process.

Here, the Cellar Department employees have unique skills and training, have job duties shared by no other department, work outdoors and have separate supervisors and are organized into a distinct department. Cellar employees have a similarly tracked career path within the Cellar Department, and there is no regular interchange between the Cellar and Barrel Departments. Additionally, while the Cellar and Barrel employees may work on a small portion of the product at different points, they have distinct roles in the process of creating the separate and distinct products - mass produced bulk wine from enormous steel storage tanks versus limited quantity varietal wines aged in small wooden barrels. Thus, the Regional Director properly recognized that the limited overlap in the transfer of a relatively small amount of product does not establish that employees are so functionally integrated that they must be included in a bargaining unit. (DDE 34.)

Both *Macy's Incorporated* and *Guide Dogs for the Blind*, as well as numerous other court and Board decisions,⁸ substantiate that the community of interest standard

⁸ *FedEx Freight, Inc. v. Nat'l Labor Relations Bd.*, 839 F.3d 636, 638 (7th Cir. 2016) (working location, licensing requirements, differences in pay, benefits and vacation policy all discussed as significant differences); *Nat'l Labor Relations Bd. v. FedEx Freight, Inc.*, 832 F.3d 432, 446 (3d Cir. 2016) (distinct work locations, lack of interchange other than occasional one-way permanent interchange from dockworker to driver, infrequent contact all significant distinction in community of interest analysis); *Nestle Dreyer's Ice Cream Co. v. N.L.R.B.*, 821 F.3d 489, 496 (4th Cir. 2016) (separate departments and classifications, and disparities in required skills and training were significant factors in community of interest analysis); *FedEx Freight, Inc. v. N.L.R.B.*, 816 F.3d 515, 527 (8th Cir. 2016) (substantially different job duties and function, licensing requirements, working hours and minimal interchange were all important factors in community of interest analysis); *DPI Secuprint, Inc.*, 362 NLRB No. 172, *6 (2015) (distinctions meaningful in the community of interest analysis included contact that was

requires an analysis of all the traditional factors, some of which will be given greater or lesser weight depending upon the circumstances of the case. In this case, the Court recognized that the Regional Director made a number of factual findings that tend to show that the Cellar employees have interests distinct from other employees. The only question before the Board on remand is to explain the “weight and relevance of those findings” which the Court found to be deficient. (*Constellation*, slip op. at 19).

Besides the compelling legal authority, as a practical matter, each of the numerous distinctions between the Cellar and Barrel employees found by the Regional Director are meaningful for purposes of collective bargaining. Those involved in the real world process of contract negotiation between labor and management representatives recognize that bargaining units consisting of disparate subgroups must often contend with competing interests which undermine the ability of the union to forge an agreement which meets the collective interests of those being represented. For example:

- *Departmental Organization* - Separate departmental organizational lines, particularly those drawn by an employer, will manifest themselves in potential conflicts at the bargaining table over competing proposals pertaining to departmental versus plant-wide seniority entitlements and protections.

infrequent and incidental to primary duties, one-way interchange, disparities in skill and training required and different hours worked); *DTG Operations, Inc.*, 357 NLRB 2122, slip op at 7 (2011) (separate rolls of each classification and limited interaction reduced significance of functional integration of groups of employees); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 2015, 2017-2018 (2011) (petitioned-for unit’s extensive and highly specialized training, separate department and supervision and distinct role were significant distinctions); *Continental Web Press*, 262 NLRB 1395, 1396 (1982), enf. denied 742 F.2d 1087 (7th Cir. 1984) (distinct community of interest where employees in department worked together to complete a discrete organizational tasks and had little interchanges or contact with other employees).

- *Skills and Training* - Disparate skills and training between a petitioned-for unit of employees and an excluded group will undoubtedly impact negotiations by potentially generating conflicting bargaining proposals pertaining to appropriate probationary periods, minimum training requirements, promotional progression ladders and pay-for-skill arrangements.
- *Job Duties* - The congregation of a group of workers with different and distinct job duties into one bargaining unit will result in potential conflicts regarding appropriate pay and benefits. In this case, one can readily imagine that the solidarity of the unit would be undermined if the 46 Cellar employees rationally insisted that they should be compensated at a much higher rate than the 18 Barrel employees because they are responsible for production of fourteen (14) times the amount of wine compared to that which is produced by the Barrel employees.⁹
- *Functional Integration* - Currently, the Cellar and Barrel employees perform their respective work in completely separate locations of the facility and under vastly different conditions. Furthermore, while the Cellar employees are involved in the production of wine from the receipt of the raw grapes or juice through to the bottling process, the Barrel employees are functionally only siphoning a small portion of the wine stored in tanks and aging that product in wooden casks. The General Manager correctly described this as a “winery within a winery.” One

⁹ The Cellar employees produce the vast majority of wine at the Woodbridge Winery. Extrapolating from the record testimony, Constellation produces 22 million cases of wine annually, which is approximately 50.6 million gallons of wine. (Tr. 11.) There are approximately 58,000 fifty-eight gallon wooden casks stored in the Barrel Building. (Tr. 18, 70.) Assuming every barrel is used each year, the Barrel Department produces approximately 3.3 million gallons of wine. Thus, Barrel employees are producing no more than about 6.5% of the total wine produced at the facility.

can well imagine that by artificially combining these two groups, in contravention to the desires of the petitioned-for employees, competing jurisdictional claims will arise at the bargaining table by groups of employees with competing interests regarding the wine production process.

- *Frequency of Contact* - The overwhelming evidence found by the Regional Director demonstrated that the contact between the Cellar and Barrel employees is, at best, sporadic and inconsequential. The frequency of contact between employees, or the lack thereof, will undoubtedly manifest itself in collective bargaining process by enhancing or undermining the solidarity of the unit in question. The invariable give and take of contract negotiations becomes increasingly more challenging as the solidarity of the unit diminishes. Forcing veritable strangers to stand up for each others' wages, hours, and other terms and conditions of employment, particularly where employers often pit one groups' interest against another, creates a dysfunctional bargaining dynamic for the union. The impact of diminished solidarity within a bargaining unit grows exponentially when a union considers the prospect of calling a strike to compel an employer to concede to demands at the negotiation table. Without significant solidarity, such protected concerted activity becomes utterly ineffectual.
- *Interchange Between Employees* - De minimis interchange between disparate groups of workers will have real life bargaining consequences. In this case, there is practically no interchange between the Cellar employees and the Barrel employees because, in part, the skill sets of the two groups are distinct and not transferable from one department to the other. The lack of evidence reflecting

any substantial permanent, temporary or other transfers between these groups will not only manifest itself in lower solidarity of such a bargaining unit as discussed above, but undoubtedly affect the nature of the union's bargaining proposals regarding layoff and transfer.

- *Terms and Conditions of Employment* - Although the Regional Director found that some of the current terms and conditions of employment of the Cellar and Barrel employees were similar, there are significant differences, particularly with regard to hours and schedules of work. In the real world, it is not unusual for a bargaining representative to propose premium pay for hours of work outside of a normal "day shift." The start and end time of the day shift for these two groups of workers are different. In addition, an enhanced premium pay for "graveyard" work is common place in contract negotiations. Only Cellar employees are suffered to work such a shift. Finally, mandated shift rotations are a particularly onerous work schedule which often results in contract proposals calling for additional enhanced premiums. Once again, given that an employer inevitable brings limited resources to the bargaining table, the union will confront conflicting interests about where to allocate those resources (base pay or premium for off-hours work) when the bargaining unit consists of workers with distinct hours of employment.
- *Common Supervision* - The evidence in this case establishes that the Cellar Department and the Barrel Department have entirely different sets of front-line supervisors and departmental managers. The undisputed evidence shows that these disparate supervisors and managers are charged with hiring, overseeing,

authorizing leaves and vacations, evaluating, disciplining and even terminating their own employees. These distinctions are meaningful for collective bargaining for obvious reasons. One set of supervisors and managers may routinely exercise discretion or implement purported policies in one manner, while another set of supervisors and managers exercise discretion or implement policies in another manner. This inevitability will necessitate the union to draft and prioritize bargaining proposals to address these distinctions. For example, by combining employees from different departments with different supervision into one bargaining unit, the union may be compelled to propose and prioritize contract proposals which would not otherwise be necessary if they were not consolidated. These bargaining proposals might include, proposals restricting supervisors from performing bargaining unit work; proposals regarding authorization of leaves of absence or vacation selection; proposals pertaining to standards for fair employee evaluations and frequency thereof; and proposals pertaining to just cause for discipline and binding arbitration. The significance of separate supervision on the collective bargaining process simply cannot be overstated.

The Regional Director made numerous factual findings detailing the differences and distinctions between the Cellar and Barrel Department employees in light of the traditional community of interest factors. The Regional Director concluded that with respect to most of those factors, the evidence clearly demonstrated that the excluded employees had meaningfully distinct interests from members of the petitioned for unit. Even with regard to those factors deemed to weigh in the Employer's favor, as we have

shown, there are various facts which reflect distinctions between the Cellar and Barrel Department employees which are meaningful in the context of collective bargaining. Having found, based on substantial record evidence, that most of the traditional community of interest factors unequivocally establish that the Cellar and Barrel employees are distinct, the Regional Director concluded that these differences outweighed the similarities between these two groups of employees. The Regional Director recognized that while an argument can be made that a unit of Cellar and Barrel employees is an appropriate unit, “there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the *ultimate* unit, or the most appropriate unit; the Act only requires that the unit be appropriate.” (DDE at 40, n.20, citing *Overnite Transportation Company, supra*, at 723.)

2. The Petitioned-For Unit Satisfies Step Two of *Specialty Healthcare* Analysis.

The petitioned-for unit of Cellar employees satisfies step two of *Specialty Healthcare* because Barrel Department employees do not share an overwhelming community of interest with Cellar Department employees.

The Regional Director made numerous factual findings that the interests of the Cellar and Barrel employees did not overlap completely. Constellation has organized the Cellar and Barrel employees into separate departments, and the petitioned-for unit completely aligns with Constellation’s own departmental demarcations. (DDE 31.) Cellar employees have numerous distinct skills, training processes, and operational procedures which differentiate this petitioned-for unit from the Barrel Department employees. (DDE 31-32.) The Regional Director found the job duties shared by Cellar and Barrel employees constitute only a limited portion of their respective job duties.

(DDE 33.) Cellar employees have limited interaction and interchange with other classifications. (DDE 34.) Additionally, the Barrel and Cellar employees have “essentially distinct” roles in the winemaking process with the Cellar Department employees doing everything from receiving the grapes, through crush to storage in large outdoor tanks and, finally, delivering the wine to the Bottling Department. The Barrel employees are only involved transporting and maintaining wine in small wooden casks indoors in the Barrel Building. (DDE 34.)

The facts in this case are comparable to the circumstances in *Blue Man Vegas*, in which the D.C. Circuit Court of Appeals upheld the Board’s unit determination consisting of all stage crew employees except for musical instrument technicians (MITs). (*Blue Man Vegas, LLC, v. NLRB*, 529 F.3d 417 (2008)). In that case, the court made clear that the unit proposed by the employer, including the MITs and petitioned-for classifications, would also have been appropriate, but the petitioned-for unit was not “truly inappropriate” because there were enough differences between the MITs and other classifications that the interests between the two groups did not overlap completely. (*Id.* at 424.) For example, the MITs had a different supervisory structure, separate sign-in sheets and a different method of compensation. (*Id.* at 423-424.) Here, a unit combining the Cellar and Barrel employees would also be appropriate, but the differences between Cellar and Barrel employees are, like in *Blue Man Vegas*, sufficient that the two groups do not share an overwhelming community of interest. Concededly, there are some similarities between the Cellar and Barrel employees. However, substantial evidence demonstrates that there are sufficient significant differences between the two groups. Simply speaking, Constellation has not and cannot show that the Cellar and Barrel

employees share such an overwhelming community of interest such that the community of interest factors overlap almost completely.

3. Alternatively, the Petitioned-For Unit is Appropriate Even Under the Pre-Specialty Healthcare Standard for Bargaining Unit Determinations.

The Board in *Specialty Healthcare* made clear that it was clarifying, not changing, its traditional approach to unit determinations where an employer contends that additional employees must be added to the petitioned-for unit. (See 357 NLRB at 946-47.)

However, even if a future Board were to disagree and decide to apply the unit determination standard set forth in pre-*Specialty Healthcare* decisions, that would not change the outcome of this case.

Prior to *Specialty Healthcare*, the Board summarized its unit determination standard as follows:

“[I]n making unit determinations, the Board’s task is not to determine the most appropriate unit, but simply to determine *an* appropriate unit. See *P. J. Dick Contracting*, 290 NLRB 150, 151 (1988), and *Overnite Transportation Co.*, 322 NLRB 723 (1996). In so doing, the Board looks first to the unit sought by the petitioner, and if it is an appropriate unit, the Board’s inquiry ends. See *Boeing Co.*, 337 NLRB 152, 153 (2001). However, the Board’s inquiry ‘never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests ‘in common.’ Our inquiry – though perhaps not articulated in every case – necessarily proceeds to a further determination whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.’ *Newton-Wellesley Hospital*, 250 NLRB 409, 411-412 (1980) (emphasis added).” *Wheeling Island Gaming, Inc.*, 355 NLRB 637, 637 n.2 (2010).

As Member Hayes explained in his dissent in *Specialty Healthcare*, “a correct application of the traditional community of interest test” requires the Board to consider both “whether the employees in the unit sought have interests in common with one

another” and “whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” (357 NLRB at 951 (Member Hayes, dissenting) (quoting *Wheeling Island Gaming*, 355 NLRB at 637 n.2, and *Newton-Wellesley Hospital*, 250 NLRB at 411-12). *Accord Macy’s, Inc.*, 361 NLRB No. 4, slip op. 31 (July 22, 2014) (Member Miscimarra, dissenting); *Bergdorf Goodman*, 361 NLRB No. 11, slip op. 2 n.2 (July 28, 2014) (separate footnote of Member Miscimarra)). In Member Hayes’ view, the majority’s decision in *Specialty Healthcare* “[n]ot only . . . effectively overrule[d] *Newton-Wellesley* . . . , but . . . distort[ed] the meaning of the aforementioned passage [from *Wheeling Island Gaming*] by suggesting it supports ending an appropriate unit analysis upon finding that the petitioned-for unit employees share a community of interest among themselves.” (*Id.*)¹⁰

The union agrees with the *Specialty Healthcare* majority’s view that its formulation of the unit determination standard is consistent with the Board’s traditional approach, as has every court of appeals to have considered the issue.¹¹ Nevertheless, even if Member Hayes’s and now-Chairman Miscimarra’s dissenting views were accepted, the unit at issue here is appropriate.

First, “appl[ying] . . . the traditional community of interest test[,]” “the employees in the unit sought have interests in common with one another.” (*Specialty Healthcare*, 357 NLRB at 951 (Member Hayes, dissenting) (quoting *Wheeling Island*

¹⁰ The majority strongly disagreed, stating that “the majority holding [in *Wheeling Island Gaming*] is, in fact, an integral part of our analysis here.” *Specialty Healthcare*, 357 NLRB at 946 n.32

¹¹ See *Constellation Brands, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 839 F.3d 432 (3d Cir. 2016); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy’s, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016), *reh’g en banc denied* (Nov. 18, 2016), *petition for cert. filed* (Feb. 22, 2017); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016), *reh’g & reh’g en banc denied* (May 26, 2016).

Gaming, 355 NLRB at 637 n.2).) Cellar employees are organized by the Employer into their own department, have common supervision that is separate from that of other employees, have frequent contact with one another and are all interchangeable amongst themselves. Cellar employees also share job duties, skills and training that are unique to the cellar department. Cellar employees share distinct term and conditions of employment in that they all work outdoors, are compensated based on the same salary schedule with the same benefits and use the same equipment. The Cellar employees clearly have interests in common with one another such that the traditional community of interest test is satisfied.

Second, again “appl[ying] . . . the traditional community of interest test[,]” “the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.” (*Specialty Healthcare*, 357 NLRB at 951 (Member Hayes, dissenting) (quoting *Newton-Wellesley Hospital*, 250 NLRB at 411-12)). Cellar employees share interests that are sufficiently distinct from the Barrel employees to warrant a separate unit. For example, the Cellar employees have a graveyard shift while Barrel employees do not. Cellar employees work nearly exclusively outdoors, while Barrel employees work inside the barrel room. Cellar employees also have a separate breakroom, parking lot and meeting area from the Barrel employees. Cellar employees are separately supervised, work with specialized equipment and have numerous procedures and job duties that are exclusive to them. There is no significant interchange or interaction between the Barrel and Cellar employees. Cellar employees have distinct roles in the winemaking process that are exclusive to them, specifically, handling the grapes prior to and during crush, building lines to transfer product

immediately after the crush, filtering and mixing the product and transferring product to large outdoor steel tanks. These and other meaningful differences demonstrate that the Cellar and Barrel employees have sufficiently distinct interests that establishment of a separate unit of Cellar employees is warranted.

Although the excluded employees do share some similarities with employees in the petitioned-for unit, those similarities are not so substantial as to require their inclusion in the unit. (See *Wheeling Island Gaming*, 355 NLRB at 637 n.2 (unit inappropriate if it “excludes employees who share a substantial community of interest with employees in the unit sought”). The petitioned-for unit is thus “sufficiently distinct” to constitute an appropriate unit under the pre-*Specialty Healthcare* formulation of the unit determination standard set forth in *Wheeling Island Gaming*.

III. CONCLUSION

While it may not be an inappropriate unit to include the Barrel employees into the petitioned-for unit of Cellar employees, that is not the question on remand. The only question is whether the Cellar Department employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with employees in the Barrel Department. A cursory review of the distinctions between the Cellar and Barrel Department show that there are meaningful distinctions between the groups on each of the traditional community of interest criteria. The Union, therefore, requests that the Board issue a decision on remand based on the already lengthy and exhaustive record in

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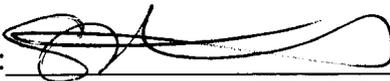
this case which substantiates that the petitioned for unit constitutes an appropriate unit for collective bargaining under the Act.

DATED: March 28, 2017

Respectfully Submitted,

BEESON TAYER & BODINE, APC

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By: 
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF SACRAMENTO**

3 I declare that I am employed in the County of Sacramento, State of California. I am over the
4 age of eighteen (18) years and not a party to this action. My business address is 520 Capitol Mall,
Suite 300, Sacramento, CA 95814-4714. On March 28, 2017, I served the following document(s):

5 **UNION'S STATEMENT OF POSITION ON REMAND**
6 **(32-CA-148431)**

7 **By Mail** to the parties in this action, as addressed below, in accordance with Code of Civil
8 Procedure §1013(a), by placing a true and correct copy thereof enclosed in a sealed envelope in a
9 designated area for outgoing mail. At Beeson, Tayer & Bodine, mail placed in that designated area is
given the correct amount of postage and is deposited that same day, in the ordinary course of business
in a United States mailbox in the City of Sacramento, California.

10 **By Personal Delivery** to the parties in this action, as addressed below, of a true and
correct copy thereof in accordance with Code of Civil Procedure §1011.

11 **By Messenger Service** to the parties in this action, as addressed below, by placing a true
12 and correct copy thereof in an envelope or package addressed to the persons at the addresses listed
13 below and providing them to a professional messenger service in accordance with Code of Civil
Procedure § 1011.

14 **By Overnight Delivery** to the parties in this action, as addressed below, in accordance
15 with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a
16 sealed envelope, with delivery fees prepaid or provided for, in an area designated for outgoing
overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course
of business, for delivery the following day via United Parcel Service Overnight Delivery.

17 **By Facsimile Transmission** to the parties in this action, as addressed below, a true and
correct copy thereof in accordance with Code of Civil Procedure §1013(e).

18 **By Electronic Service** to the parties in this action, at the electronic notification
19 address(es) below. Based on a court order or an agreement, the parties have agreed to accept service
20 by electronic transmission in accordance with Code of Civil Procedure § 1010.6. I did not receive,
21 within a reasonable time after the transmission, any electronic message or other indication that the
transmission was unsuccessful.

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28 I declare under penalty of perjury that the foregoing is true and correct. Executed in
26 Sacramento, California, on March 28, 2017.

27 
28 Johanna Gibson Ford