NATIONAL LABOR RELATIONS BOARD
REGION 14

IN THE MATTER OF:

ALLIED SERVICES LLC d/b/a REPUBLIC SERVICES OF DEXTER	)	**CASE NO. 14-RC-192027**
	)	
Employer	)	
	)	
and	)	
	)	
LOCAL TEAMSTERS UNION 600	)	
	)	
Petitioner	)	

EMPLOYER'S REQUEST FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF THE REQUEST FOR REVIEW.

Pursuant to § 102.67 of the Rules and Regulations of the National Labor Relations Board ("the Board"), the Employer, Allied Services LLC d/b/a Republic Services of Dexter (the "Employer," "Republic," or "Republic Services"), requests the Board's review of the Decision and Order issued by the Acting Regional Director (the "RD") on April 26, 2017 ("the Decision"). Board review is required by law, when, as here, compelling reasons exist such as:

- The regional director's decision on a substantial factual issue in this case is clearly erroneous on the record and such error prejudicially affects Republic's rights, and
- There are compelling reasons for reconsideration of an important Board rule or policy relied on by the regional director.

29 C.F.R. § 102.67(d)(2) and (4).

Specific compelling reasons requiring the Board's review in this case include:

1. The RD's failure to apply the "overwhelming community of interest" standard required by *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) when considering the Union's request to add a classification to the petitioned-for unit;

2. The RD's failure to complete the analysis required by *Specialty Healthcare* when she failed to explain why the additional employees sought to be included by the Employer (and which the RD excluded) had interests "sufficiently distinct from those of other employees to warrant the establishment of a separate unit." *Constellation Brands, U.S. Operations, Inc. v. Nat'l Labor Relations* Bd., 842 F.3d 784, 793 (2d Cir. 2016);

3. The RD's discriminatory and unlawful application of one standard - the simple "community of interest" standard - to Petitioner's request to include employees beyond the petitioned-for unit, while applying the considerably more burdensome "overwhelming community of interest" standard to Republic's equally important request to include other employees beyond the petitioned-for unit;

4. To the extent that *Specialty Healthcare* in fact requires a lesser burden of unions than that required of employers when determining the appropriate bargaining unit under the framework of the National Labor Relations Act ("the Act"), it violates not only the Act itself but the employer's Constitutionally-protected due process and equal protection rights and thus can no longer stand as binding law – all as

compellingly reasoned in Member Hayes' dissent in *Specialty Healthcare*, Chairman Miscimarra's dissent in *Macy's, Inc.,* 361 NLRB No. 4, slip op. at 25-32 (2014), and Member Johnson's dissent in *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 9-19 (2015); and

5. The RD's finding that the scale operator is a plant clerical employee, and should be included in the unit with the stipulated petitioned-for classifications of drivers and operators is predicated on factual findings that are incomplete and clearly erroneous on the record, and as such, prejudicially affected the Employer.

The reasons in support of the Request for Review are discussed in detail below. The Employer respectfully requests that the Board grant this Request for Review and impound the election ballots subject to challenge pending a decision by the Board in this case.

II. STATEMENT OF THE CASE.

On January 30, 2017[1] Teamsters Local 600 (the "Union" or the "Petitioner") filed an RC Petition seeking to represent all full-time and regular part-time employees at Republic in the following job classifications: residential, commercial, industrial drivers, container delivery and pick-up, swing drivers, post-collection/heavy equipment operators, and scale clerk. The petition also sought to exclude: "office clerical employees, guards and supervisors as defined by this Act." Republic objected to the requested unit. Following negotiation, the parties entered into a stipulated election agreement modifying the petitioned-for unit as follows:

> All full-time and regular part-time residential, commercial, industrial drivers, container delivery and pick-up, swing drivers[2], and post-collection/heavy equipment operators[3], employed by the Employer at its 15250 Old Bloomfield Road, Dexter, Missouri facility, EXCLUDING all office clerical and professional employees, guards, and supervisors as defined by the Act.

[1] All dates are in 2017 unless otherwise noted.
[2] Hereafter referred to collectively as "drivers."
[3] Hereafter referred to as "operators."

See Stipulated Election Agreement dated February 6 ("Agreement").

Significantly, the parties agreed in Paragraph 1:

> "The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, **that the petition is amended to conform to this Agreement**, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations."

Id. (emphasis added).

On February 8, Region 14 approved the Agreement. The parties agreed that the maintenance shop technicians, maintenance shop lead technicians, maintenance shop clerks and gate attendant/scale operator would be permitted to vote subject to challenge. The Union sought to add the gate attendant/scale operator and Republic sought to add the maintenance technicians, maintenance lead technicians and maintenance shop clerks. Each party objected to the other party's request to add additional classifications to the agreed-upon unit. Consequently, the process agreed to by the parties, and approved by the Board, was to allow those in the disputed classifications to vote in the election subject to challenge:

> **Others permitted to vote:** The parties have agreed that all maintenance/ technicians, maintenance clerk(s), and scale clerk(s) employed by the Employer at its 15250 Old Bloomfield Road, Dexter, Missouri facility, may vote in the election but their ballots will be challenged since their eligibility has not been resolved. **No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit.** The eligibility or inclusion of these individuals will be resolved, if necessary, following the election. (Emphasis added).

The election was held on February 22, and the Tally of Ballots reflected 16 votes for the Union and 16 votes against representation. There were seven challenged ballots, including one for the Gate Attendant/Scale Clerk, Jacquiline Bradshaw ("scale operator"

or "Bradshaw")[4] and five for the maintenance technicians, Clifford Allen, Roger Rice, Garry Scroggins, Roger Short and Scott Tilley. Both parties also timely filed objections to the election. Since the challenged ballots were determinative, on March 6, the RD ordered a hearing on the challenged ballots and objections, which was held on March 15 and 16.

The Hearing Officer issued a report on April 5, recommending that challenges to the ballots of the five maintenance technicians and the maintenance shop clerk be sustained, that the challenge to the ballot of the scale operator be overruled and the ballot be opened and counted, that the Employer's objections be overruled in their entirety, and that the Petitioner's objection be conditionally sustained pending the results shown by a revised tally of ballots counting the ballot of the scale operator (hereinafter "Report").

Republic timely filed, on April 19, exceptions to the Hearing Officer's Report based upon the Hearing Officer's discriminatory and patent misapplication of the *Specialty Healthcare* standard, applied differing burdens of proof to the Union and Employer when determining the identical issue – i.e., which positions should be added to the agreed-upon bargaining unit, and made clearly erroneous and incomplete findings of fact that find no support in the record.

Instead of recognizing and correcting the Hearing Officer's errors of both fact and law and engaging in an independent analysis, the RD's Decision summarily affirmed and "rubber stamped" all of the Hearing Officer's rulings, findings, recommendations and conclusions.

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[4] While the petition and Agreement refer to "scale clerk," the Employer's records refer to this position as Gate Attendant/Scale Operator and record testimony at the hearing primarily referred to Bradshaw as "scale operator" so will be referred to as such hereafter.

III. STATEMENT OF FACTS.

Republic Services operates a landfill facility and hauling operation in Dexter, Missouri. (Hearing Transcript (hereinafter "Tr.") 61). The landfill receives third-party waste as well as waste collected by Republic's hauling operation. (Tr. 61). The hauling operation consists of route trucks and drivers, and three lines of business: commercial accounts, residential accounts, and industrial accounts. (Tr. 61-62). The Republic's technicians work on the route trucks, site vehicles and landfill equipment. (Tr. 62). Some sales employees and accounting staff also work at the Dexter site. (Tr. 62).

Doug McFarland is the General Manager for the Dexter location and is responsible for all aspects of Republic's integrated waste handling business there. (Tr. 61). Chad Bridges was the operations manager, and he supervised the route drivers in the aforementioned three lines of business. (Tr. 63). James Board and Robert Hurlebusch, operations supervisors, reported directly to Bridges and supervise the drivers. (Tr. 30, 63)[5]. A dispatcher also reported to the operations manager, Bridges. (Tr. 91). The maintenance shop is managed by Jay Penrod, the fleet maintenance manager, who is responsible for the Dexter site and a couple of other Republic Services locations. (Tr. 63). Two supervisors report to Penrod: Tony McGowen and the other position is currently vacant. (Tr. 63). Celeste Armstrong, the area human resources manager, is responsible for human resources at the Dexter facility. (Tr. 77, 151-152).

The third primary part of the Dexter operation is the post-collection or landfill. (Tr. 63). Gary Pearson is the division manager for the landfill and Pearson manages two landfills; one in Dexter, MD and one in Illinois. (Tr. 63-64; Tr. 201-202). Crystal Young

[5] Bridges resigned his employment with Republic in April 2017.

was the operations supervisor for the landfill and reported directly to Pearson. (Tr. 64; 202)[6]. The scale operator, Jacquiline Bradshaw, reported to Young; and in Young's absence, she reported to Pearson. (Tr. 27, 31, 202-203).

IV. COMPELLING REASONS REQUIRE BOARD REVIEW.

A. The RD's Prejudicial Misapplication of Specialty Healthcare.

The RD manifestly misapplied *Specialty Healthcare* in three (3) equally important respects – all of which have prejudiced Republic's rights and require this Board's intervention. First, when considering the Union's request to add the scale operator to the petitioned-for unit, the RD found that the Union only had the burden of meeting the traditional "community of interest" standard despite the fact that *Specialty Healthcare* and its progeny expressly hold:

> ***the burden is … on the proponent of a larger unit to demonstrate*** that the additional employees it seeks to include share an "***overwhelming*** community of interest" with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community of interest factors "overlap almost completely."

DPI Secuprint, Inc., 362 NLRB No. 172, 204 LRRM 1263, 1266 (2015).

The RD seeks to justify this blatant departure from Board law by conflating the "petitioned-for unit" – which clearly excludes the scale operator – with the original petition filed with the Board by the Union which included the position. However, the original request, by express agreement of the Union and approval by the Board, was modified and the petitioned-for unit no longer includes the scale clerk (see Agreement, ¶ 1). Once the petitioned-for unit has been identified and approved by the Board, the *Specialty*

[6] Crystal Young's employment with Republic terminated on March 27, 2017.

Healthcare analysis applies to ***any*** proponent of a larger unit – regardless of whether it is the Union, the Employer or an individual employee. The Union should not get a "second bite at the apple" under a lesser standard because in exchange for deferring claim to the position for later consideration, it secured a valuable benefit – the Employer's agreement to an appropriate unit without the necessity of a Board hearing prior to the election. And in this case where there were 32 employees in the agreed-upon unit, the Employer almost certainly would have been granted the right to submit evidence at a pre-election unit determination hearing. The RD's erroneous application of the standard gave the Union a substantial benefit, especially since the election was so close (16 to 16).

The fatal flaw in the RD's argument is easily unmasked by considering the fact that had the Union received 21 or more favorable votes, excluding the challenged ballots, none of the challenged ballots, including that of the scale operator, would have been counted because they would have made no difference to the outcome of the election and the Board would have certified the petitioned-for unit ***without*** inclusion of the scale operator.

Second, the RD committed an equally egregious error when considering Republic's request to include the maintenance technicians and maintenance shop clerk. While she analyzed whether the petitioned-for unit and the scale operator had a community of interest, she failed to examine whether, let alone find, there is no legitimate basis upon which to exclude maintenance technicians and maintenance shop clerks from the larger unit. *Specialty Healthcare,* in recognition of the Board's preference that there not be fractured units at one employee location, however, **requires** a finding that the excluded employees have interests "sufficiently distinct from those of other employees to

warrant the establishment of a separate unit." *Constellation Brands, U.S. Operations, Inc. v. Nat'l Labor Relations* Bd., 842 F.3d 784, 793 (2d Cir. 2016). The Court went on to observe that as did the RD here:

> [T]he RD based his step-one determination on his finding "that the employees in that unit are a readily identifiable group, such that there is a rational basis for grouping them together in a bargaining unit." Special App. 32. Reciting the legal framework does not substitute for analysis of differences between unit-members and other employees, as required by Specialty Healthcare. Indeed, as one of our sister circuits has stated, the very purpose of step one is "to guard against arbitrary exclusions" that have no purchase in the context of collective bargaining.
>
> To be sure, the RD made a number of factual findings that tend to show that outside cellar employees had interests distinct from other employees. But he never explained the weight or relevance of those findings. For instance, the RD did not explain why some factual findings, which seemed to indicate the presence of distinct interests, e.g., "physically separate locations" or "separate front-line [and] immediate supervisors," should have outweighed other findings of similarities, e.g., similar "job functions and duties," evidence of "interchange" and "work[ing] together," and "identical skills and training requirements." Special App. 44 n.20. To the extent that the RD did provide such explanations, it did so only at step two, i.e., only to rebut a heightened showing that the excluded employees share an "overwhelming community of interest" with the presumptively appropriate petitioned-for unit. This misapplication of Specialty Healthcare requires us to deny the Board's petition for enforcement.

Id. at 793–94 (footnotes omitted) (Granting employer's petition for review). The RD's Decision here suffers from the same prejudicial omissions and requires Board review.

Finally, the RD committed serious prejudicial error in applying one standard when considering the Union's request but an entirely different – and more burdensome – standard when considering the Employer's request. The unfairness is obvious, thus explaining the machinations resorted to by the RD in an attempt to justify differing standards for review of identical issues.

The Board's task is simple – to determine unit appropriateness under the criteria set forth in the Act. Regardless of who advocates for what unit composition, the Board's role is the same – determination of unit appropriateness by consideration of all the facts before it. By applying a more lenient standard to union requests for a certain unit composition than to an employer's request, the RD has effectively ceded the determination process to the union, which is far more likely to conform the scope of its request to the scope and relative success of its organizing efforts than based on the criteria set forth in the Act. Independent and fair review divorced from union organizing efforts is needed to ensure the balanced approach to labor relations expressly contemplated by the Act.

In fact, Section 9(c)(5) of the Act provides that the extent of a union's organizing efforts cannot be controlling in determining whether a petitioned-for unit is appropriate. 29 U.S.C. § 159(c)(5). As then-Member and now Chairman Miscimarra explained in dissent in *Macy's*:

> [T]he *Specialty Healthcare* standard is irreconcilable with the role that Congress intended that the Board would play ""in each case" regarding bargaining unit questions, and *Specialty Healthcare* renders "controlling" the "extent to which the employees have organized" contrary to Section 9(c)(5). As recited at some length above, the Act and its legislative history indicate that Congress requires the Board-- as reflected in mandatory statutory language--to undertake an active inquiry that is twofold: (a) the Board "shall decide in *each case* whether" the appropriate unit "shall be the *employer unit*, *craft unit*, *plant unit*, or *subdivision thereof*"; and (b) when making such a decision in each case, the Board must determine which of these competing groupings operates "to assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act." By its terms, *Specialty Healthcare* appears to guarantee that the Board will *not* "in each case" decide which of the unit configurations enumerated in the statute (i.e., the "employer unit," "craft unit," "plant unit," or "subdivision thereof") operates to "assure employees the *fullest* freedom in exercising the rights" associated with union elections. Under *Specialty Healthcare*, the petitioned-for unit "in each case" will govern, except in the rare and unusual situation

> where an opposing party proves the existence of [an] "overwhelming community of interest[s]" between excluded employees and those in the proposed unit. I believe Congress has required that the Board "in each case" will undertake a broader and more refined analysis, and play a more active role, when determining whether or not a unit is "appropriate" than is permitted under the *Specialty Healthcare* standard.

Macy's, Inc., 361 NLRB No. 4, slip op. at 32 (2014) (citations omitted).

Federal courts have also taken issue with the foundation of the "overwhelming community of interest" standard when applied to non-union proponents. In *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1582 (4th Cir. 1995), the Fourth Circuit Court of Appeals held that the Board's application of the "overwhelming community of interest" standard to approve a unit that excluded certain employees who otherwise shared a community of interest with the petitioned-for employees "effectively accorded controlling weight to the extent of union organization." The Court explained this was because "'the union will propose the unit it has organized,'" and "[g]iven the community of interest between the included and excluded employees . . . it is impossible to escape the conclusion that the [employees who were not petitioned-for] were excluded 'in large part because the Petitioners do not seek to represent them.'" *Id*. (quoting *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991) and *Lundy Packing*, 314 NLRB 1042, 1046 (1994) (Member Stephens, dissenting). See also *NLRB v. Enterprise Leasing Co. Se., LLC*, 722 F.3d 609, 627 fn. 9 (4th Cir. 2013), cert. denied 134 S. Ct. 2902 (2014) ("[T]he overwhelming community of interest component of the community of interest standard may run afoul of our decision in *Lundy Packing*. *See* 68 F.3d at 1581 ("By presuming the union-proposed unit proper unless there is an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of

union organization. This is because "the union will propose the unit it has organized.") (citation and internal quotation marks omitted).").

In his dissent in *Specialty Healthcare*, Member Hayes foreshadowed that future application of the overwhelming community of interest test would run afoul of Section 9(c)(5): "This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units." *Specialty Healthcare*, 357 NLRB 934, 952. See also *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 10 fn.5 (2015) (Member Johnson, dissenting) ("I agree with Member Miscimarra that *Specialty Healthcare* affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board to play, contrary to Section 9(c)(5) and Section 9(a) and 9(b) of the Act.") (internal quotations omitted). The community of interest test has become so arbitrary, in fact, that almost any unit the union proposes can be an appropriate unit merely by having some distinguishing factor. As Chairman Miscimarra states, "the petitioned-for unit 'in each case' will govern, except in the rare and unusual situation where an opposing party proves the existence of an 'overwhelming community of interests' between excluded employees and those in the proposed unit." *Macy's, Inc.,* 361 NLRB No. 4, slip op. at 32 (2014). If the Union chooses to exclude a particular classification from the petitioned for unit, it is most likely that classification will not be added to the unit as the heightened community of interest test has proven to be a nearly insurmountable burden.[7]

[7] The burden has proven to be insurmountable, except for: *Odwalla, Inc.*, 357 NLRB. No. 132, at *5 (2011) (using the overwhelming-community-of-interest test to find additional employees should be included in the otherwise appropriate unit because the

The predictions from the dissents from Members Miscimarra, Hayes, and Johnson have been proven true in this case. Here, despite the fact that the drivers and operators have different supervisors, have separate job duties, have brief interaction with each other, and work in different locations, the Hearing Officer's Report found that the drivers and operators meet the community of interest test. Based on the application of the community of interest test, the maintenance technicians would likely meet this test if the Petitioner had sought to add them to the petitioned unit. However, the Petitioner did not seek to add them to the petitioned-for unit due to union organizing strategy and fear of a lack of union support. Therefore, the extent to which the employees have organized effectively controls who is eligible to participate in the election, which is a clear violation of Section 9(c)(5). As such, the *Specialty Healthcare* standard must be reconsidered and amended pursuant to the text and goals of the NLRA.

B. To the Extent Specialty Healthcare in Fact Requires Application of a Lesser Burden on Unions than on Employers When Determining Unit Appropriateness, then it Violates Rights Protected by the Constitution, Cannot Continue as Binding Authority and Should be Overruled by the Board.

The Due Process Clause of the Fifth Amendment states no person shall be "deprived of life, liberty, or property without due process of law." *U.S. Const. Amend. V*. Further, the Equal Protection Clause of the Fourteenth Amendment provides "no State shall 'deny to any person within its jurisdiction the equal protection of the laws,'" which applies to the federal government in addition to private institutions, is essentially a

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recommended unit was a fractured unit – an "arbitrary segment" with no rational basis); *Neiman Marcus Grp., Inc.*, 361 N.L.R.B. No. 11, 2014 WL 3724884, at *4 (2014) (finding there was no community of interest because "[t]he boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the Employer," but not reaching the overwhelming-community-of-interest test).

direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 439 (1985) (quoting *U.S. Const. Amend. XIV*). Because decisions of how to operate its business and manage its employees affect the liberty and property rights of Republic, due process must be granted. Standards and tests developed by the Board (or any federal agency) cannot be based on rationales that are "so unreasonable as to be arbitrary and capricious." *West Coast Media, Inc. v. F.C.C.*, 695 F.2d 617, 620-621 (D.C. Cir. 1982). Additionally, the Taft-Hartley Act added new language to provide that employees had the "right to refrain from participating in union or mutual aid activities," providing equal protection to those who did not wish to participate in collective actions. 29 U.S.C § 157.

The overwhelming community of interest test was initiated in the context of accretion cases and morphed to wider application. *See* Member Hayes' dissent in *Specialty Healthcare*, 357 NLRB 934, 951-52 (2011). In accretion, new employees are added to an existing bargaining unit *without* a representation election; therefore, the showing of shared characteristics must be higher to protect employee interests. *Westvaco, Va., Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir. 1986) (citing *Safeway Stores, Inc.*, 256 NLRB 918 (1981)). The accretion standard of overwhelming community of interest was adopted by the *Specialty Healthcare* Board for initial representation cases, the application of which has resulted in micro-units not contemplated in the accretion context. As Member Johnson noted in his dissent in *DPI Secuprint, Inc.*, "[t]he trend toward smaller units--or units comprised of employees not significantly distinguishable from their coworkers except by the extent of organizing--cannot foster labor peace." *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 12 (2015).

Additionally, the resulting overwhelming community of interest test defies the basic principle that "[a]n employer is entitled to a reasonably adequate protection from the results of piecemeal unionization." *NLRB v. Pinkerton's, Inc*., 428 F.2d 479, 485 (6th Cir. 1970). As Member Hayes' dissent in *Specialty Healthcare* made clear, the test "make[s] it virtually impossible for a party opposing [a] unit to prove that any excluded employees should be included." 357 NLRB 934, 952 (2011).

The new obligation imposed by the *Specialty Healthcare* decision may have been reasonable until it was compounded by the softening of the traditional unit determination test in *DPI Secuprint*. 362 NLRB No. 172 (2015). Specifically, the Board in *DPI Secuprint* was the first to suggest that readily identifiable as a group occurs when "a description of the unit is sufficient to specify the group of employees the petitioner seeks to include." *Id.* at slip op. at 4 fn.10. Prior to *DPI Secuprint*, the test for readily identifiable as a group was a real test based on job classifications, departments, functions, work locations, skills, or similar factors. Now, any difference will suffice to distinguish one group from another unless they are, coincidentally, *overwhelmingly* similar. Fifty years of precedent was discarded when *DPI Secuprint* conflated the traditional unit test with the overwhelming standard from *Specialty Healthcare*. The result is that meager differences between two groups now sufficiently identifies an appropriate bargaining unit where such a designation would have previously been inappropriate.

Due process has been compromised in light of the Board's duty to support organizing in combination with a community of interest analysis which can be manipulated to allow any one factor, except for the extent of organizing, to take a dominant position. The arbitrary test that has evolved since *Specialty Healthcare* nearly always results in a

petition that creates an appropriate unit. This nearly irrefutable determination of an appropriate unit flies in the face of equal protection and the Act's purpose to provide employees the "fullest freedom in exercising the rights guaranteed under" the Act. 29 U.S.C. § 159(b);*Great Lakes Pipe Line, Co.*, 92 NLRB 583, 585 (1950) (the Board is duty bound "to prevent injustice being done to minority groups by gerrymandering practices which would require the arbitrary inclusion of such groups in a larger unit wherein they would have no effective voice to secure the benefits of collective bargaining."). Here, the injustice occurs for those who would share a majority interest in working union-free in a larger unit where that interest is irrelevant and suppressed in a carved out unit the Union is sure to win.

Although the Board has made clear which factors are considered when determining the appropriateness of a bargaining unit, the weight of one factor versus another is not clear, resulting in further erosion of due process and equal protection rights. The court in *Nestle Dreyer's Ice Cream Co. v. NLRB,* 821 F.3d 489, 500 (4th Cir. 2016) pointed out that "before the overwhelming-community-of-interest test is applied, the Board at the very least must ensure that employees are not excluded on the basis of 'meager differences.'" (citing *Lundy*, 68 F.3d at 1581).

In *Constellation Brands, U.S. Ops., Inc. v. NLRB*, 842 F.3d 784, 793-94 (2nd Cir. 2016), the Board was criticized for approving a unit without explaining why *distinct* interests of the excluded employees outweighed similarities with unit members. In that case, the Second Circuit pointed out that the Regional Director found distinctions such as separate locations and separate supervision, but there was no indication why those distinctions outweighed similarities such as job functions, interchange, working together,

or skills and training. *Id.* at 794. The Court explained that the Board must "must *analyze* at step one the facts presented to: (a) identify shared interests among members of the petitioned-for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *Id*. Such an explanation is necessary, the Court said, "to avoid arbitrary lines of demarcation and to avoid making step one of *Specialty Healthcare* a mere rubber stamp."[8] *Id.* at 795. To the extent the Regional Director did provide such explanations, it did so only at step two, i.e., only to rebut a heightened showing that the excluded employees share an "overwhelming community of interest" with the presumptively appropriate petitioned-for unit.[9]

Other cases point to a similar problem, that the weight of a given factor is critical in one situation and disregarded in another. In *Bergdorf Goodman,* 361 NLRB No. 11, slip op. at 3 (2014), the community of interest test focused "almost exclusively on how the employer [chose] to structure its workplace." Prior to *Specialty Healthcare*, in *Wheeling Island Gaming, Inc.,* 355 NLRB No. 637 (2010), job duties of poker dealers and other dealers were essentially the same, but the type of game did not provide adequate distinction to justify carving out one group of dealers from the other under the traditional community of interest test. After *Specialty Healthcare*, the opposite result occurred in *Guide Dogs for the Blind Inc.,* 359 NLRB 1412, 1415-17 (2013), under similar facts. In

[8] Referred to as step one from *Specialty Healthcare*, the Court in *Constellation Brands* combined three steps of the traditional analysis for an appropriate bargaining unit: 1) readily identifiable as a group, 2) shared community of interest, and 3) distinct from other groups. *Id.* at 793-94.

[9] Referred to as step two from *Specialty Healthcare*, the Court in *Constellation Brands* meant the "overwhelming community of interest test."

that case, job duties were extremely similar for two groups, but types of dogs (service dogs vs. non-service dogs) were sufficient to distinguish the groups, resulting in an appropriate bargaining unit of one group without the other.

In *Macy's*, employees selling fragrances and cosmetics were carved out of a store with multiple other departments because there were some distinctions between these sales associates and other sales associates in different departments despite multiple similarities with each other. *Macy's, Inc*., 361 NLRB No. 4 (2014). The decision was validated by a panel at the Fifth Circuit, but a dissent in a Petition for an En Banc Rehearing, with a total of 6 judges dissenting, noted the lack of analysis in the crucial step of rigorously weighing the community of interest factors by comparing the employees in the petitioned-for unit with employees outside of that unit. *Macy's Inc. v. NLRB*, 844 F.3d 188, 189-97 (5th Cir. 2016)[10]. These examples provide evidence that factors are weighted arbitrarily as the test is applied today.

The traditional and overwhelming community of interest tests are unpredictable because there is no explanation for why some factors are considered almost exclusively while others are disregarded, depending on the case, thus violating the due process rights of the Employer.

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[10] In pertinent part, the six judge dissent stated:

> Regrettably, the panel has failed properly to grasp and to apply the principles that guide step one of the *Specialty Healthcare* analysis. It is clear to any reasonable reader that the panel did not require the NLRB actually to engage the crucial step of rigorously weighing the community of interest factors by comparing the employees in a petitioned-for unit with employees outside of that unit. Instead, in a blow-by treatment of whether the NLRB applied the correct standard, the panel stated without further explanation "[t]hat [rigorously weighing the factors] is precisely what the [NLRB] has done in the instant case. As a result, the test and its application do not violate Section 9(c)." *Macy's*, 824 F.3d at 568.

Macy's Inc. v. NLRB, 844 F.3d 188, 194 (5th Cir. 2016)

In this case, the Hearing Officer's Report disturbingly provided only an extremely brief analysis of whether the drivers and operators shared a community of interest and instead simply relied upon the fact that the parties stipulated that the drivers and operators compromise an appropriate unit by executing the Agreement (and notably incongruously ignored the fact that the parties also had stipulated that the scale operator be *excluded*). The failure of the Hearing Officer, and the RD by adoption of those recommendations, nearly skipped entirely the crucial first step of the analysis, which if properly applied is fatal to the Union's request to add the scale operator. Several of the traditional community of interest factors are not met between the drivers and operators, including the fact that they have different supervisors, have separate and entirely different job duties, have brief interaction with each other, and work in different locations. Thus, as in the six-judge dissent in an En Banc Rehearing in *Macy's*, there was no analysis provided by the RD in the crucial step of rigorously weighing the community of interest factors by comparing the employees in the stipulated-for unit with employees outside of that unit. Republic, as with other employers in this context, have their due process and equal protection Constitutional rights violated under the *Specialty Healthcare* standard and its predictably inconsistent application. As such, this standard should be overruled.

C. <u>The Board Must Clarify what the Appropriate Standard is for Classifications which are Voted Subject to Challenge in a Stipulated Election Agreement and Later Sought to be Added to the Stipulated for Unit by a Petitioner</u>.

While the *Specialty Healthcare* standard has been applied by the Board in numerous cases, the Board has not made irrefutably clear what standard must be applied in cases like this where a petitioner seeks to add a classification to a stipulated-for unit where the classification it is seeking post-election to add to the unit was in the original

petition but the petitioner agreed to exclude it in the stipulated election agreement. Republic's position on this issue has been consistent from the March 15 and 16 hearing through its Exceptions to the Hearing Officer's Report filed on April 19. While the Hearing Officer's Report acknowledged Republic's argument that the Board's decision in *Odwalla, Inc.*, 357 NLRB 1608 (2011) established that when an employer and union agreed to a stipulated bargaining unit, that unit is constructed as the petitioned-for bargaining unit for the purpose of applying the *Specialty Healthcare* analysis, she then fails to discuss, analyze or even cite one Board case on point to support her recommendation to ignore Republic's argument, and the Board's finding in *Odwalla* with regard to the appropriate standard to apply to the analysis of adding the scale operator position.

Pursuant to *Odwalla* and *Specialty Healthcare*, the stipulated-for unit is the unit to be evaluated for determining whether it has a readily-identifiable group of employees and that the employees in the group share a community of interest. If that stipulated-for unit of employees meet the readily-identifiable as a group standard and the traditional community of interest standard, then any additional classifications/employees sought to be added to the unit may be added only if the proponent of the additional classifications/employees can show that these employees share an overwhelming community of interest with the stipulated-for employees such that there is no legitimate basis upon which to exclude these employees from the larger unit because the traditional community of interest factors overlap almost completely.

Unlike the RD's conclusory and unsupported finding, Republic's position is based on the Board's statement in *Odwalla* that "in applying *Specialty Healthcare* to cases like

this one, in which the parties stipulated to a unit and the union has accepted an interpretation of the stipulated unit, we treat the stipulated unit, as construed, as the petitioned-for unit for purposes of the analysis." *Odwalla* at 1611, fn.27. Despite this clear and bold pronouncement, the RD departs from Board law and simply states that Republic ignored the factual context of *Odwalla* and interprets this language too broadly by asserting that in all cases the stipulated unit takes place at the petitioned-for unit. The RD relies on these factual differences yet ignores the fact that the parties entered into a contractual Agreement which specifically states "that the petition is amended to conform to this Agreement." The RD, in another machination to support the decision, stated generally, also without any supporting Board precedent, that the Board's revised representation case rules underscore the necessity of consistent application of unit burdens, and that to increase the petitioner's burden of proof post-election would raise an unnecessary barrier to the fair and expeditious resolution of representation cases. Clearly, due to the apparent conflict between the clear and direct pronouncement from the Board in *Odwalla* and the RD's explanation contrary to that pronouncement, there are compelling reasons for the Board to provide clear and unmistakable guidance about how the *Specialty Healthcare* analysis must be applied in this factual situation. Such guidance from the Board is imperative, especially in light of the new election rules and the Board's efforts to avoid pre-election hearings utilizing stipulated election agreements.

Crucially, the Board did not qualify its pronouncement in *Odwalla* to allow a petitioner to contractually agree to a particular unit and if the vote was close enough that the challenges were determinative, the additional classifications sought by petitioner

would be analyzed under the traditional community of interest standard. Indeed, the only qualification the Board stated in *Odwalla* was if the "Union has accepted an interpretation of the stipulated unit" then the Board treats the "stipulated unit, as construed, as the petitioned-for unit" for the *Specialty Healthcare* analysis. *Odwalla* at 1611, fn.27. Without question, the Petitioner and Employer in this case agreed that the stipulated-for unit was to include only the drivers and landfill operators. Therefore, because the Union seeks to add a classification to the agreed-upon unit, under *Specialty Healthcare*, the overwhelming community of interest factors must be applied to the unit to determine whether to add the scale operator.

If the Board allows a union to contractually agree "that the petition is amended to conform to this Agreement" and then later seek to add a classification of employees using the lesser traditional community of interest factors it essentially would be allowing unions to have their cake and eat it too. It would allow a union to enter into a stipulated election agreement with an agreed-upon unit, with other classifications allowed to vote subject to challenge, and then only if those ballots are determinative, the union's challenges would be considered under the lesser standard, but the ballots of any classification the employer seeks to add would have to meet the overwhelming community of interest factors. With all due respect, Republic does not believe that this discriminatory and prejudicial application of the law is what the Board intended under *Specialty Healthcare* and its progeny.

Moreover, not only is holding the Petitioner and the Employer to different standards for adding classifications to the stipulated-for unit not supported by Board law and discriminatory, but it is illogical. Indeed, the Hearing Officer even cites Board precedent

that election agreements are a contract binding on the parties who executed them. (Report, p. 13) (citing *T&L Leasing*, 318 NLRB 324 (1995)). And goes on to state, "if the agreed-upon unit consists of a readily identifiable group of employees who share a community of interest, it will be found appropriate unless there are additional employees with whom those employees share an overwhelming community of interest." *Id.* (citing *Specialty Healthcare*, 357 NLRB at 944). Further, the Hearing Officer states that when applying *Specialty Healthcare*, the Board requires that "the party seeking a broader unit must demonstrate 'that employees in the larger unit share an overwhelming community of interest with those in the petitioned for unit.'" (Report, p. 5) (quoting *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 8 (2014) *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2 (2014)). But without any good reason, the RD departs from the Board precedent cited and applies the lesser standard to the Union in its attempt to add to the agreed-upon unit.

The Hearing Officer's Report, which the RD adopted without much analysis or meaningful discussion, made clear statements of law that additional employees sought by a party, not just an employer, broader than an agreed-upon unit, must have an overwhelming community of interest with the employees in that agreed-upon unit. Republic agrees with the Hearing Officer on this point, which is the logical endpoint to the Board's pronouncement in *Odwalla*. However, the Hearing Officer, and the RD by adopting her recommendations, went on to improperly and incorrectly apply the traditional, and lesser, community of interest factors to find that the scale operator should be included in the unit and have her ballot opened and counted. Regardless of whether *Specialty Healthcare* is eventually amended or discarded completely (which Republic believes it should be for the reasons discussed above), under current Board law, the

Board must apply the overwhelming community of interest factors to any position sought to be added to the stipulated-for unit, including the scale operator classification at issue.

D. The RD's Decision on Whether the Scale Operator Shares a Community of Interest with the Drivers and Operators is Clearly Erroneous on the Record and Prejudicially Affects Republic's Rights.

If the Board properly applies the *Specialty Healthcare* overwhelming community of interest standard to the scale operator, the Union cannot meet its burden of proof and Bradshaw's ballot must not be opened and counted. Contrary to the RD's Decision, the Petitioner cannot meet the burden to show that the scale operator meets even the traditional community of interest with the drivers and operators. The RD affirmed the Hearing Officer's recommendation that the scale operator, drivers and operators are readily identifiable as a group and that they share a community of interest. However, the RD does not discuss or analyze the Hearing Officer's Report and simply "rubber-stamped" the Hearing Officer's Report without further explanation. In so doing, the RD relied on factual findings by the Hearing Officer that are incomplete and unmistakably erroneous on the record. And as such, analysis and conclusions regarding the community of interest factors are based on erroneous factual findings, and the decision that the scale operator is a plant clerical employee is fatally flawed. This decision prejudicially affects Republic and the Board has certain grounds for review under the Board's Rules and Regulations.

1. Substantial factual determinations made in the Hearing Officer's Report are clearly erroneous on the record regarding whether the scale operator shares a community of interest with the operators and drivers.

The traditional community of interest factors that apply under the *Specialty Healthcare* standard include: [W]hether the employees are organized into a separate department; 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. *Specialty Healthcare*, 357 NLRB 934, 942 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

In the case of the scale operator, several of the community of interest factors are not met and do not overlap with the stipulated-for unit employees (i.e., drivers and operators) and the RD relies upon facts either not in the record or contradicted by the record to reach the legally incorrect decision. First, contrary to the Hearing Officer's Report on page 15 where she analyzes these factors in relation to the community of interest test, the scale operator does not work in the same building as the operators and drivers. While the operators clock in and out of the operations building where the scale operator works all day, the operators work at the landfill; not in the operations building. *See* Report p. 7 ("The operators maintain the landfill area where waste is disposed, compacted, and covered by heavy equipment such as compactors and bulldozers."); *also see* Tr. pp. 57, 79, 211 (Bradshaw testified that she only sees the operators when they are at lunch in the break room or if they need to pick up something from the operations building; operators do not have offices in the operations building and she occasionally sees them when the operators clock in, but not always; operators punch in at 6:30 a.m. and then head up to the landfill by 7:00 a.m. as that is when customers begin coming in for the day). The drivers also punch in and out at the operations building but they drive trucks and are out on their daily routes, sometimes miles away from the Dexter facility all

day. (Report, p. 7) ("The hauling operation employees [drivers] pick up waste from customers and dispose of it at the Employer's landfill or other transfer stations. Routes are located as much as 1 [and a half] hours driving time from the Dexter facility."); *also see* Tr. pp. 79, 228-229, 305-306, 348, 354 (drivers "… are out on the road all day collecting trash from customers."; Technician Roger Rice testified that it sometimes takes him an hour and a half of driving just to get to a broken down trash truck on a road call; Driver Robert Ordway testified that he has a weekly residential route that is an hour and a half away from the Dexter facility; Driver Bryan Pennington testified that he typically does not take lunch breaks in the operations building because he is in a different city on his route, one of which is 70 miles away from Dexter; and Driver Kaleb Shaver testified he works "far away" so he doesn't take lunch breaks in the operations building). Not one witness testified that the scale operator, drivers and operators work in the building. Therefore, the Hearing Officer's Report is a factually inaccurate and erroneous on the record.

Second, the Hearing Officer's Report is factually inaccurate about the degree of skill required to perform the job functions of the scale operator position as compared to that required of the drivers and operators. The drivers are required to have a commercial driver's license and they drive residential and commercial trash trucks to collect waste and return it to the landfill as their "sole job function." (Report at pp. 6, 17). Operators drive heavy equipment as their primary job duty. (Report, p. 21). The Hearing Officer describes the scale operator's "sole function is the weighing, recording, ticketing, and collecting of monies for the receipt and disposal of the waste collected by the drivers and third parties and disposed of by the operators in the Employer's landfill." (Report, p. 17).

Clearly, the record evidence establishes that the skills needed to perform the clerical tasks of the scale operator position are extremely distinct and different from the skills needed to perform the duties required of the drivers and operators. As such, the RD's decision is based on factually inaccurate and erroneous findings.

Third, consistent with the facts on the record and contrary to the Hearing Officer's Report, Bradshaw has extremely brief contact with the drivers or operators, and there is no functional integration with either group of employees (she cannot operate heavy equipment or drive a trash truck). Other than printing a ticket, calling a landfill operator on the rare occasion when the supervisor is not available, and occasional socializing with the drivers and operators if she happens to see them, Bradshaw has no contact with the drivers and operators.

These substantial factual inaccuracies contained within the Report, relied upon without any analysis or meaningful discussion by the RD, are clearly erroneous on the record. As such, the RD's Decision that the scale operator shares a community of interest with the stipulated-for unit and her ballot must be counted prejudicially affects Republic's rights and creates ground for the Board to review and amend the RD's determination.

2. <u>Substantial factual determinations made in the Hearing Officer's Report are clearly erroneous on the record regarding whether the scale operator is an office clerical employee</u>.

The Hearing Officer also wrongly recommended that the scale operator is a plant clerical employee and the RD failed to even discuss this recommendation in the Decision, despite Republic's discussion of the issue in its Exceptions to the Report. Contrary to the RD's Decision, the scale operator is undoubtedly an office clerical employee. She has the same benefits as Republic's other office clerical employees, parks in the office/admin parking area, provides clerical support to the operations manager unrelated to the work

of the operators and drivers, and is relieved for breaks, lunches and vacation by another office clerical employee. (Tr. 24, 39-43, 169, 203-205). Additionally, the scale operator has her own office where she performs all of her job duties, and her office is located in the operations building with other non-unit employees, including the dispatcher (another clerical employee), the operations manager, and three operations supervisors. Bradshaw does not spend **any** of her time outside of the office area. The Hearing Officer's statement, "The record does not include any evidence that Bradshaw performs any job duties that are office clerical in nature" is wholly unfounded and patently false. To the contrary, the undisputed sworn testimony of the witnesses is that in addition to printing tickets from a computer program, Bradshaw answers the general phone calls coming in to the landfill, files and provides clerical support. (Tr. 43, 205). Bradshaw even testified, "If somebody asks me to do something, I generally will. If I'm not doing anything, I will generally do it for them … If all I'm doing all day is weighing scales, it's a long day." (Tr. 43). She rarely interacts with the operators and interacts with the drivers only for a minute or so when they pick up their scale tickets. (Tr. 47-49, 57).

With these facts in mind, Republic submits that it is crystal clear, based on Board precedent, that the scale operator is a clerical "whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit." *Mitchellace Co.*, 314 NLRB 536, 537 (1994) (citing *Container Research Corp.*, 188 NLRB 586, 587 (1971)). The Court in *Mitchellace* goes on to say that an employee is an office clerical "even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel." In a typical shift, Bradshaw

spends no time outside of her office area other than walking to/from her car. She has never worked at the landfill with the operators, driven a trash truck or worked in the maintenance shop. In this case, the scale operator does not spend **any** time in the "production" areas (i.e., the landfill with the operators or in the trucks with the drivers). The scale operator is undeniably an office clerical employee.

When the Board finds employees to be office clericals, "it consistently relies heavily on the absence of evidence of substantial contact with production employees to conclude that the asserted plant clericals do not share a community of interest with production employees." *Palagonia Bakery Co. Inc.*, 339 NLRB 515, 536-37 (2003) (citing *Aerospace Co.*, 331 NLRB 561, 572 (2000); *Mitchellace*, supra; *Cook Composites*, 313 NLRB 1105, 1108 (1994) (distinguishing *Hamilton Halter Co.*, [270 NLRB 331, 332 (1984)] on its basis) (distinguishing *Columbia Textile*, 293 NLRB 1034, 1037-1038 (1984)); *Conchemco, Inc.*, 182 NLRB 125 (1970); *Famous Barr Co.*, 153 NLRB 341, 345 (1965).

Specifically, the Board has found that employees held office clerical positions when:

- Clerical employees only "on occasion" handed orders to mechanics, or placed orders in mechanics boxes, had in total "little interaction" with employees, and "therefore such 'minimal interface' with such employees does not provide the requisite community of interest." *Palagonia*, 339 NLRB at 536-37 (quoting *Aerospace*, 331 NLRB at 572).

- Clerical employees are "separately located in the office area, are separately supervised, and have limited work-related contact with the production employees." *Mitchellace Co.*, 314 NLRB at 537.

- Clerical employees are physically separated and do not work alongside other unit employees, have separate supervision, despite the fact they receive the same starting pay, identical benefits, and the same safety training as other unit employees. *Cook Composites*, 313 NLRB at 1108-09. "[C]ontacts and interaction between the

> operators and other unit employees in their work and nonworking settings is negligible. The minor contact highlighted … does not, by itself, make employees plant clericals." *Id.* (citing *Container Research*).

In this case, similar to the clerical employees in *Palagonia*, Bradshaw is physically separated from the drivers and operators, she works in an office in the operations building with supervisors, managers and the dispatcher, and has minimal interface with the drivers and operators. Although most of the drivers see her when they pick up their scale ticket before they dump their waste loads (assuming they do not return while Bradshaw is on break and dump more than once a day), this 30-second to few-minute interaction, oftentimes only once a day, is insufficient to establish the requisite interaction. Moreover, only 53% of the 70-75 vehicles weighed for which she prints tickets are Republic drivers. Therefore, almost half of her scale operating duties are not in any way connected with or related to the drivers and operators. Additionally, she has only rare occasion to interact, by phone, with the landfill operators for work-related reasons (i.e., to notify or ask about a special waste load) and only if the supervisor is not available.

Importantly, Bradshaw does not perform the same or similar work as the drivers or operators (indeed, she is prohibited from driving a truck or operating heavy equipment), is not required to attend the same safety or job skills training, is not required to have any special licenses or certifications like the drivers, does not attend the morning meetings with either the drivers or the operators, and does not have the same work schedule as the operator or drivers. She does not take her breaks or lunches with any of the drivers or operators, and starts her shift after all but one of the eligible voters starts their shifts.

Bradshaw also is not eligible for all of the same benefits as the operators and drivers, including the boot allowance, uniform rental and cleaning, Employer-provided cell

phone, personal protective equipment, and safety incentive program. She is treated like the other office/administrative employees under the PTO policy, is excluded from an Employer safety incentive program which the drivers and operators are eligible for, does not wear a uniform, and even parks in the "office/admin employee" section of the employee parking lot. She also is one of only four employees authorized to handle cash from landfill customers and has access to the Employer's safe and its confidential information. While she has common supervision with the three operators, she does not attend the morning meetings that the supervisor holds with the operators each morning, and her work is evaluated differently than the operators (i.e., no intermittent performance reviews like the drivers and operators and her performance evaluation process is the system for office/administrative employees). Bradshaw's rate of pay also is below the wage ranges for both the operators and the drivers.

Therefore, Bradshaw meets the Board's analysis for an office clerical; not a plant clerical. The Board has "long drawn a distinction between 'plant clericals' and 'office clericals.'" *Caesar's Tahoe*, 337 NLRB 1096, 1098 (2002). The Board in *Caesar's Tahoe* explained:

> The distinction between plant clericals and office clericals is rooted in community-of-interest concepts, *Cook Composites & Polymers Co.*, 313 NLRB 1105, 1108 (1994), albeit it is occasionally difficult to discern. *Gordonsville Industries*, 252 NLRB 563, 590 (1980), affd. 673 F.2d 550 (D.C. Cir. 1982), cert. denied 457 U.S. 1117 (1982), citing *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1041 (9th Cir. 1978). Certain factors predominate in Board decisions finding employees to be plant, rather than office, clericals. "The indispensable and conclusive element is that the asserted plant clericals 'perform functions closely allied to the production process or to the daily operations of the production facilities at which they work.'" *Id.* at 591, quoting *Fisher Controls Co.*, 192 NLRB 514 (1971). Normally, plant clericals spend most of their working time in the plant production area. The test generally is whether the employees' principal

> functions and duties relate to the production process, as distinguished from general office operations.

Caesar's Tahoe, 337 NLRB 1096, 1098 (2002).

Plant clericals are "normally included in production and maintenance units, while 'office clericals' are excluded." *Caesar's Tahoe*, 337 NLRB at 1100 (citing *Gordonsville Industries*, 252 NLRB 563 (1980); *Brown & Root, Inc.*, 314 NLRB 19 (1994); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971). "In cases where employees were found to be plant clericals, the Board consistently relies upon the presence of significant direct contact with production employees in finding functional integration with the production process and a sufficient community of interest." *Id.* (citing *Columbia Textile*, 293 NLRB 1034, 1037-1038 (1984); *Hamilton Halter*, supra; *Raytee Co.*, 228 NLRB 646 (1977); *Weyerhaeuser Co.*, 132 NLRB 84, 85 (1961)). None of the employees deemed plant clerical in these cases have factual any similarities with the job functions and duties of the scale operator.

In *Gordonsville*, clerical employees who received the same fringe benefits and were on the same pay schedule as the production employees, had the same supervisor as unit employees, worked in the production area, and contributed "directly and meaningfully to the production process" by creating time sensitive items used by production employees were deemed to be plant clerical employees. *Gordonsville*, 252 NLRB at 592. In the present case, the scale operator at Republic does not contribute "directly and meaningfully" to the operators or drivers.

In *Brown & Root*, employees whose "primary function of ordering construction materials and equipment [was] intimately connected to the construction process and require[d] regular and substantial work contacts with unit employees" were deemed to be

plant clerical. *Brown & Root*, 146 LRRM at 1234. Additionally, the employees were required to "frequently check on inventories in the warehouse and toolroom as well as consult with craft persons with respect to needed equipment and material." *Id.*

Consistent with the facts on the record and contrary to the Hearing Officer's Report, which was adopted by the RD apparently without much analysis that the Employer could find, Bradshaw does not have "significant direct contact" with the drivers or operators, and there is no functional integration with either group of employees (she cannot operate heavy equipment or drive a trash truck). Other than printing a ticket, calling a landfill operator on the rare occasion when the supervisor is not available, and occasional socializing with the drivers and operators if she happens to see them, Bradshaw has no contact with the drivers and operators.

Applying the law to the record evidence in this case, the scale operator is an office clerical employee specifically excluded by the Agreement. The RD's decision to the contrary is not supported by the facts or applicable law, and erroneously relies on facts that are contrary to the sworn hearing testimony in the record.

The substantial factual inaccuracies contained within the Report and misapplication of the law are the foundation for the RD's Decision that the scale operator is a plant clerical and should be included in the unit. Since the scale operator is an office clerical based on the record and the law, and is expressly disqualified from the unit per the terms of the Agreement, such a determination prejudicially affects Republic's rights and creates grounds for the Board to review and amend this determination.

V. CONCLUSION.

Republic respectfully submits that sufficiently compelling reasons exist to require the Board to grant review in this case. Specifically, there are at least five specific compelling reasons that necessitate Board review and intervention: (1) the RD failed to apply the appropriate standard to the Union's request to add a classification to the petitioned-for unit; (2) the RD failed to complete the analysis required by *Specialty Healthcare* and its progeny when he failed to explain why the additional classifications sought to be included by Republic, which the RD excluded, had interests sufficiently distinct from those of other employees to warrant the creation of a separation unit; (3) the RD's discriminatory and unlawful application of one standard (a lesser community of interest standard) to the Union's request to add employees to the petitioned-for unit and another standard (a heightened "overwhelming" community of interest standard) to the Employer's equally important request to add employees to the petitioned-for unit; (4) to the extent *Specialty Healthcare* requires a lesser burden of unions than employers when determining the appropriate bargaining unit under the Act, it violates not only the Act but employers' Constitutionally-protected due process and equal protection rights and can no longer stand as binding law; and (5) the RD's finding that the scale operator is a plant clerical employee to be included in the unit of drivers and operators is based on factual findings that are incomplete, inaccurate or clearly erroneous on the record and as such prejudicially affected Republic.

Republic respectfully requests that the Board grant this Request for Review and impound the seven election ballots subject to challenge pending a decision by the Board in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing *Employer's Request for Review* has been e-filed with the Board and the Acting Regional Director of Region 14, and served via email this 10th day of May, 2017, upon:

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