

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRISTAL USA, INC.

and

INTERNATIONAL CHEMICAL WORKERS
UNION COUNCIL OF THE UNITED FOOD
AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC,

Case No. 08-CA-08-CA-200737

**ICWUC'S MOTION FOR SUMMARY JUDGMENT REGARDING WAREHOUSE UNIT
WITH SUPPORTING MEMORANDUM**

Now come the Charging Party, the International Chemical Workers Union Council/UFCW (Union), and hereby moves that summary judgment be granted in the above-captioned matter in favor of Counsel for General Counsel.

MEMORANDUM

In support of its motion, the Union incorporates by reference and relies herein on the Counsel for General Counsel's memorandum supporting her earlier-filed, pending motion for summary judgment in this case filed on September 22, 2017, as well as the Union's earlier-filed memorandum supporting Counsel for General Counsel's motion for summary judgment in this case, as well as its,

and Counsel for General Counsel's, memoranda supporting Counsel for General Counsel's pending summary judgment motion in Case 08-CA-200330, which it incorporates by reference.

The Union continues to rely on its motion for recusal filed earlier in this matter and in Case 08-CA-200330 and incorporates by reference its memoranda supporting those pending recusal motions. It further submits that Member Emanuel also should have recused himself from participation in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), since he was on the brief in *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), *enfin*g, *Specialty Healthcare and Rehab. Ctr. of Mobile*, 357 NLRB No. 83 (2011)(copy attached), in which his then-law firm sought the reversal of *Specialty Healthcare* based on many of the same arguments relied on by the majority in *PCC Structurals*. Member Emanuel's participation, as a Board member in *PCC Structurals*, in the reversal of *Specialty Healthcare* – the very case in which he and his firm sought reversal of *Specialty Healthcare* (a/k/a Kindred Nursing Centers East) in the 6th Circuit – raises at a minimum an appearance of a conflict of interest and/or an appearance of bias, which required that he not participate in that, or this, case. Indeed, while the Union is unclear as to the status of bargaining at the unit involved in *Specialty Healthcare/Kindred Nursing*, it is likely that, if applied retroactively, the decision in *PCC Structurals* could have a significantly-negative impact on labor-management relations at that unit. Established units in closed RC cases should not be lightly disturbed.

The Union submits that *PCC Structurals* is not applicable here, and should not be applied, retroactively, *or otherwise*, to this case. If Member Emanuel had recused himself from *PCC Structurals*, as the Union submits that he should have, the decision in that case likely would have been 2-2 and, therefore, non-precedential. Moreover, the underlying RC case in this matter, Cristal

USA, Inc, 365 NLRB No. 74 (2017)("Cristal II"), may not be re-litigated in this CA case. *See*, NLRB Rule 102.67(g).

Nevertheless, even if Member Emanuel appropriately participated in *PCC Structural*s and even if the Board might need to decide in other cases whether to apply *PCC Structural*s retroactively, the Board need not (and should not) decide the retroactivity question, *here*, particularly since the related RC case is now *closed*. NLRB Rule 102.67(g). In *this* case, the Employer failed to clearly or adequately preserve in its Statement of Position, p. 14, in the underlying RC case (SOP)(copy attached), as argued in the "Union's Response and Opposition to Cristal USA, Inc.'s Request for Review of the Regional Director's Decision and Direction of Election" in **Cristal II**, that it was seeking a reversal of *Specialty Healthcare*, primarily arguing that *Specialty Healthcare* had not been appropriately applied.¹ Thus, Cristal may not raise its argument now, including that the Regional Director ("RD") violated Section 9(c)(5) of the Act in his DDE. Cook Inlet Tug & Barge, Inc., 2014 WL 265834n.1, Case 19-RC-106498 (Order 01/23/2014).²

¹At best, Cristal only challenged *Specialty Healthcare* as violating Section 9(b) of the Act, not Section 9(c)(5).

²While the Board need not (and should not) re-visit the warehouse-unit issue in this case, the Union submits that, even under the *PCC Structural*s standard, the Regional Director's approval of the petitioned-for warehouse unit was appropriate. Contrary to Cristal's arguments, the RD effectively did determine that the warehouse employees had "sufficiently distinct" interests from those of other, excluded employees, to warrant establishment of their own separate unit. Among other things, the excluded employees require greater skills and specialized training specific to producing chemicals; the North Plant production employees' contact with the South plant production employees is very limited and sporadic at best; the maintenance and production employees have different skills and training requirements and entirely different chains of command from the warehouse employees, whose disciplinary issues are determined, even at the corporate level, separate from the production and maintenance employees; the North and South production employees are separately supervised on a day-to-day basis; the Operations Manager, who had responsibility over both plants, had little knowledge about the differing local vacation,

Thus, given (a) that Member Emanuel should have recused himself in *PCC Structural*s (and should recuse himself in this case), (b) that NLRB Rule 102.67(g) provides for no exceptions to that rule on non-re-litigation, (c) that eight courts of appeal have approved the *Specialty Healthcare* standard, and, importantly (d) that the Employer failed to clearly or adequately preserve the issue, that it was seeking the whole-sale reversal of *Specialty Healthcare*, when it filed its SOP in the underlying RC case, the Board need not address and decide the retroactivity issue in *this* case.³

on-call, and overtime policies between the North and South Plant production employees, both of which are separately supervised. (DDE, pp 11-13)(Plant DDE, pp. 10-13). Significantly, even Cristal's own, main witness admitted that, while the North Plant production employees produce TiCl₄, the South Plant employees do not produce TiCl₄, nor do they use, nor are they trained on, the admittedly "unique" equipment used by the North Plant production employees at the North Plant. (RC transcript in **Cristal I** at pp. 107, 154-54, a copy of said transcript being filed also in the **Cristal II** warehouse case). Indeed, the RD found that there are "great distinctions between the duties of warehouse employees as compared to production and maintenance employees." Clearly, he found that the warehouse employees have a "sufficiently distinct" interest in having their own unit.

³When deciding whether to apply a new standard retroactively, the Board must either apply its decision retroactively to all cases, or to none. Applying *PCC Structural*s retroactively will not serve the purposes of the Act to stabilize labor-management relations, since that standard has been applied in many cases in the nearly six (6) years since *Specialty Healthcare* was decided, with presumably many subsequent labor-management negotiations, contracts, and related Board decisions being based on units determined under that standard, a standard approved by eight circuit courts of appeal. To apply *PCC Structural*s retroactively in *closed* RC cases and, thus, possibly put into question many units decided with *Specialty Healthcare* in mind – whether the units were litigated, or decided through voluntary recognition – will promote industrial strife, seriously interfere with labor-management relations, fail to promote orderly procedures for preventing interference with rights provided for by the Act, all in violation of 29 U.S.C. §141, and/or fail to encourage the practice and procedure of collective-bargaining and/or seriously interfere with the exercise by workers/employees of *their* full freedom of association, *self*-organization, and designation of representatives of *their* own choosing, in violation of not only 29 U.S.C.¶151, but also the First Amendment of the U.S. Constitution. The Act protects SELF-organization of THOSE employees, who seek to join together for their mutual aid and protection.

PPC Specialties, contrary to the statute and the Constitution, elevates the interest of those employees, who have not chosen to engage in SELF-organization, over, or equal to, the interests of those employees, who have. That is not what the statute provides for, nor the Constitution

Based on the Employer's failure to clearly, adequately, and timely preserve any right to seek reversal of *Specialty Healthcare*, as well as on Rule 102.67(g), the Board should not, and need not, disturb its decision in **Cristal I** and/or **Cristal II**. While not necessarily controlling, the petitioning employees' statutory and constitutional associational rights may, and should, be given strong consideration above and beyond the interests of non-petitioning employees.

The previously-determined warehouse unit has been determined in a now-closed RC case. The Employer, in this "test of cert" case, is relying solely on its challenge to that unit to defend against its admitted refusal to recognize and bargain with the certified representative, including failing to provide presumptively-relevant information. Thus, for the further reasons stated herein, the Charging Party hereby requests that its motion for summary judgment be granted.

Respectfully submitted,

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allows. The freedom of association includes the freedom to exclude others from their group. Excluding employees, who do not seek to be part of the unit, does not violate Section 157 or 158(a)(3) of the Act, since such an exclusion does not inhibit their ability to refrain from union activities. Thus, to the extent that *PPC Specialties* may be applicable, it must be reversed as inconsistent with the purposes of the Act and the Constitutional-protection of the freedom of association and First Amendment rights for the petitioning employees and their organization.

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I hereby certify that on this 2nd day of January, 2018, a copy of the foregoing (with the following attachments) was electronically filed using the Board's electronic filing system and served via email on:

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Case Nos. 12-1027 and 12-1174

In The United States Court Of Appeals For The Sixth Circuit

KINDRED NURSING CENTERS EAST, LLC
d/b/a Kindred Transitional Care And Rehabilitation—Mobile f/k/a
Specialty Healthcare And Rehabilitation Center Of Mobile,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION

Intervenor.

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

Case 15-RC-8773, 357 NLRB No. 83 (Aug. 26, 2011) and
Case 15-CA-68248, 357 NLRB No. 174 (Dec. 30, 2011)

MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE* OF THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS AS FRIENDS OF THE COURT

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Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Movants, The Honorable John Kline, Chairman, The House Committee on Education and the Workforce, The Honorable Phil Roe, Chairman, the House Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and the Workforce, Senator Michael B. Enzi, Ranking Member, Committee on Health, Education, Labor, and Pensions, and Senator Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions, respectfully move the Court for leave to participate as *amici curiae* and file the accompanying brief in support

of the Petitioner, Cross-Respondent inasmuch as The National Labor Relations Act (“the Act”) and legislative history establish that the National Labor Relations Board (“the Board”) exceeded its authority and acted in contravention of the Act by issuing *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2011).

I. INTEREST OF MOVANTS

Movants are Members of Congress who believe it is critical to preserve the policies that underlie the labor laws administered by the National Labor Relations Board (“NLRB”). Movants believe that the NLRB, an independent government agency created by statute, attempted to circumvent the legislative process and Congressional policy when it decided *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2012). Movants, as Members of Congress, have an interest in preserving the policy that went into enacting the legislation, and believe it would be most helpful to this Court to have the benefit of their perspectives on such important matters.

II. AN AMICUS BRIEF IS DESIRABLE AND THE MATTERS ASSERTED ARE RELEVANT TO THE DISPOSITION OF THE CASE

Movants wish to bring to this Court’s attention the incompatibility between the Acts of Congress establishing national labor policy, and the Board’s *Specialty Healthcare* decision. In particular, the Movants believe the Board’s *Specialty Healthcare* decision changes the determination of appropriate bargaining units for

every workplace under the Board's jurisdiction by rendering the extent of employee organization the primary, and likely only, factor relevant to establishing a bargaining unit. This effectively eliminates Section 9(c)(5) the Act, which Congress inserted in 1947 to enhance the principle of majority rule and workplace democracy, as well as to address the NLRB's practice of permitting the extent of organizing to be the deciding factor in bargaining unit determinations. A major change in the law such as that made by the NLRB in *Specialty Healthcare* should only be achieved through amendment to the statute, not administrative decision. The former is within the exclusive province of Congress. As Members of Congress, with the authority and responsibility to enact laws, the Movants believe the Board's decision contravenes the Act and unlawfully exceeds the authority Congress conferred upon the NLRB. Movants conclude that they find it appropriate and necessary to provide this Court the legislative history and guidance relevant to the issues raised by *Specialty Healthcare*, and the Board's disregard for express Congressional intent.

III. CONCLUSION

WHEREFORE, Movants request this Court to grant the present Motion and allow them to participate as *amici curiae*.

Date: April 23, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, I filed the Motion for Leave to Participate as *Amici Curiae* electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit, using the CM/ECF system, which will send notification of that filing to all counsel of record in this litigation.

/s/ Stefan Marculewicz

An Attorney for *Amici*

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Case Nos. 12-1027 and 12-1174

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BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE,
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I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Members of the United States Congress, The Honorable John Kline, Chairman, The House Committee on Education and the Workforce, The Honorable Phil Roe, Chairman, the House Health, Employment, Labor, and Pensions Subcommittee of the House Committee on Education and the Workforce, Senator Michael B. Enzi, Ranking Member, Committee on Health, Education, Labor, and Pensions, and Senator Johnny Isakson, Ranking Member, Subcommittee on Employment and Workplace Safety, Committee on Health, Education, Labor and Pensions. The *Amici* are all currently serving in the One Hundred Twelfth United States Congress.¹

Section 9(c)(5) of the National Labor Relations Act, as amended (“the Act” or “NLRA”), provides that “[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.” The decision of the National Labor Relations Board (“Board”) in *Specialty Healthcare*, 357 NLRB No. 83 (Aug. 26, 2011) essentially removes Section 9(c)(5) from the Act, and returns the statute to its pre-1947 state. As Members of Congress, the *Amici Curiae* have a strong interest in ensuring that Congressional intent is effectuated, and believe it is

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amici Curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission.

important to apprise the Court of the significant legislative history and policy considerations that went into the passage of Section 9(c)(5). The Board's authority in this area was defined by statute. When the Board creates policy that conflicts with that statute, or circumvents the legislative process, the *Amici*, as Members of Congress, feel they have a duty to preserve the legislative decisions that went into the statute's creation. The *Amici* also believe such a major change in the law as the elimination of Section 9(c)(5) should only be made through an amendment of the statute, which is the exclusive province of Congress.

As democratically elected officials themselves, the *Amici* also believe that one of the principal considerations in defining a bargaining unit under the NLRA is to preserve and protect the notion of majority rule. Ensuring majority rule was a key consideration of Congress when it enacted Section 9(c)(5) in 1947. As such, the *Amici* believe they are uniquely positioned to address this topic and offer this Appellate Court important insight into the legislative history.

The *Amici Curiae* support the Petitioner/Cross-Respondent's Petition for Review inasmuch as the Act and legislative history establish that the Board exceeded its authority, acted in contravention of the Act, and rendered the extent of employee organization the primary, and likely only, factor relevant to establishing a bargaining unit. Because the Board's decision in *Specialty Healthcare* exceeds

the legislative authority granted to it, the *Amici* respectfully request that this Court not enforce the Board's Order in this case.

II. ARGUMENT

A. **Specialty Healthcare Effectively Eliminates Section 9(c)(5) From The Act And Returns The NLRA To Its Pre-1947 Legislative Position**

1. **The Plain Language of the Act and the Legislative History Establish That Congress Did *Not* Intend for the Board to Rely Upon the Extent of Employee Organizing as the Basis for Unit Determinations**

Congress did not grant the Board authority to rely upon the extent of employee organizing as the basis for determining whether a unit is appropriate for collective bargaining. The National Labor Relations Act (Pub.L. 74-198, 49 Stat. 449, codified as amended at 29 U.S.C. §§ 151–169) (“NLRA” or “the Act”), was enacted in 1935 and includes Section 9(b), which requires the Board to decide the appropriate bargaining unit in *each* case:

“The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . .”²

29 U.S.C. § 159(b).

² The remaining provisions in Section 9(b) were added by The Labor Management Relations Act (Pub.L. 80-101, 61 Stat. 136, enacted June 23, 1947, 29 U.S.C. §§ 141, *et seq.*, informally the Taft–Hartley Act), and are not relevant to the issues addressed in the instant brief.

Limitations on the Board's ability to determine the appropriateness of a bargaining unit based upon the extent of organizing, while not expressly included in the 1935 legislation, were clearly a concern of Members of Congress at the time.

“The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. *If the employees themselves could make the decision without proper consideration of the elements which could constitute the appropriate units they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant.*”

Hearing on S. 1958 Before the Committee on Finance, Education and Labor, Indian Affairs, and Manufacturers, 74th Cong. 1458 (1935) (Testimony of Francis I. Biddle, Chairman of the precursor to the National Labor Relations Board) (emphasis added). The final Senate report issued before the NLRA was enacted in

1935 also portrayed Congress's intent that the *Board not rely upon the extent of organizing* when determining an appropriate unit:

“Section 9(b) empowers the National Labor Relations Board to decide whether the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit or other unit. Obviously, there can be no choice of representatives and no bargaining unless units for such purposes are first determined. *And employees themselves cannot choose these units, because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind.*”

S. Rep. No. 74-573 (1935) (emphasis added).

Despite expressions of Congressional intent the Board failed to honor it. Instead, it proceeded to develop precedent that condoned reliance upon the extent of organizing as a basis to determine the appropriateness of a bargaining unit. *See Botany Worsted Mills*, 27 NLRB 687 (1940) (Board decision approving unit of trappers and sorters, which comprised one department in employer's plant, expressly criticized by the House Report on Section 9(c)(5) (*discussed infra*), *see* H.R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947)). The debate came to a head in the case *Garden State Hosiery Co.*, 74 NLRB No. 52 at 326 (1947), where the Board majority endorsed and justified its use of the extent of organization as a principal criterion for defining a bargaining unit. *Id.* at 322. Board Member Reynolds wrote in a passionate dissent that “[e]ven more important, no minority group—either pro-union or anti-union—may be permitted to manipulate the

boundaries of the appropriate unit for the sole purpose of constructing another wherein it comprises a majority. Obviously indulgence in such tactics—commonly referred to in political science as ‘gerrymandering’—makes a mockery of the principle of majority rule.” *Id.* at 326.

In light of the failure of the Board to heed Congressional intent following passage of the NLRA in 1935, Congress amended the Act to include an *express* prohibition of reliance on the extent of organization as controlling in determination of the appropriateness of a bargaining unit. In 1947, as one of the Taft-Hartley amendments to the Act, Congress included Section 9(c)(5), which provides that “[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5). Under this provision, Congress sought to preclude the Board from using the extent of employee organization as a controlling factor when determining the appropriate unit in each case. *See NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441 (1965) (“[I]n passing [Section 9(c)(5)] Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization . . . [.]”).

The House Report on the proposed 1947 amendments confirmed that Section 9(c)(5) was specifically targeted to “strike[]” at the Board’s use of the extent of organization factor:

*“Section 9[(c)(5)] strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (Matter of New England Spun Silk Co., 11 NLRB 852 (1939); Matter of Botany Worsted Mills, 27 NLRB 687 (1940)). While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9[(c)(5)] provides, is not controlling.”*³

1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 328 (1947) (House Report No. 245, April 11, 1947) (emphasis added).⁴ Senator Taft also confirmed that Section 9(c)(5) was aimed at preventing Board action premised upon the “extent of organization” theory, because it was contrary to Congressional intent:

“This [Section 9(c)(5)] amendment was contained in the House bill. It overrules the ‘extent of organization’ theory sometimes used by the Board in determining appropriate units. Opponents of the bill have stated that it prevents the establishment of small operational units and effectively prevents organization of public utilities insurance companies and other businesses whose operations are widespread. It is sufficient to answer to

³ As of the House Committee Report on April 11, 1947, Section 9(c)(5) was still referred to as Section 9(f)(3). It became Section 9(c)(5) in a subsequent conference agreement. See Committee of Conference, House Report No. 510, June 3, 1947. The language of the statutory provision was unaltered.

⁴ References to the two volume treatise on the Legislative History of the Labor Management Relations Act are abbreviated herein as “__ Leg. Hist. __.”

say that the Board evolved numerous tests to determine appropriate units, such as community of interest of employees involved, extent of common supervision, interchange of employees, geographical consideration, etc., any one of which may justify the finding of a small unit. *The extent-of-organization theory has been used where all valid tests fail to give the union what it desires and represents a surrender by the Board of its duty to determine appropriate units.*”

2 Leg. Hist. 1625 (Congressional Record, Senate, June 12, 1947) (emphasis added). The Board itself has long recognized Congress’s mandate that “[a]lthough the extent of organization may be a factor evaluated, under section 9(c)(5) it cannot be given controlling weight.” *See* National Labor Relations Board, Twenty-Eighth Annual Report 51 (1963).

2. Congress Did *Not* Grant the Board Authority to Define National Labor Policy Unsupported by Congressional Intent

The Board’s power “is no greater than that delegated by Congress,” *Lyng v. Payne*, 476 U.S. 926, 937 (1986), and Congress did *not* grant the Board “general authority to define national labor policy by balancing the competing interests of labor and management.” *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965). The Board does *not* have the authority to institute a reevaluation of labor policy. “[T]hat is for Congress. Congress has demonstrated its capacity to adjust the Nation’s labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the

country.” *See NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499-500 (1952). As the Supreme Court explained, if Congress’s policy has not yet moved in a particular direction, “we do not see how the Board can do so on its own.” *Id.*, 361 U.S. at 500.

When the Board exceeds its legislative authority, the courts are the last line of defense to protect legislative policy. The Supreme Court acknowledged this duty when it wrote that:

“Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. *** But . . . ‘the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.’”

NLRB v. Brown, 380 U.S. 278, 291-292 (1965), quoting *American Ship Building Co.*, 380 U.S. at 318 (emphasis added).

3. *Specialty Healthcare* Makes the Extent of Employee Organizing the Only Real Factor in Unit Determinations

In *Specialty Healthcare* the Board supplanted decades of established law and practice with a new standard that enables any group of employees in a workplace

to be found an appropriate unit for purposes of collective bargaining. The Board held that:

“[w]hen employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, *unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.*”

Specialty Healthcare, 357 NLRB No. 83 at 17 (emphasis added). The definition of “readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)” is extremely broad. Its breadth becomes apparent when one considers how the Board indicated it would treat a challenge to the petitioned-for unit. The Board held that to conclude a unit is inappropriate necessitates a finding of “overwhelming” considerations established by the party challenging the appropriateness of the petitioned-for unit. *Id.* Indeed, the Board went so far as to assert that a unit that was also appropriate or even *more* appropriate would not satisfy the test. *Id.*

Because of these criteria, and the burden they impose upon the party challenging a petitioned-for unit, the standard established by *Specialty Healthcare*

makes the extent of organization a primary consideration. Not only does it provide a ready passage for a petitioner to gerrymander a bargaining unit based upon the extent of its ability to secure support from employees, but it places an insurmountable burden upon a party contesting a petition, whether an employer or a competing labor organization, to prove the unit is insufficient.⁵ See *NLRB v. Lundy Packaging Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995), stating that:

“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.”

Id. at 1581 (quoting *Laidlaw Waste Syst., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)). As a practical matter, the parameters established by *Specialty Healthcare* assign controlling weight for appropriate unit determinations to the extent of employee organization. That approach violates Section 9(c)(5), and Congressional intent.

Perhaps in an attempt to deflect the inevitable criticism that its disregard of the directives of 9(c)(5) would draw, the Board attempted to conform its holding in *Specialty Healthcare* with that statutory provision. 357 NLRB Slip Op. at 9. It did so by stating that “Congress intended to overrule Board decisions where the unit

⁵ *Amici Curiae* believe that the Board provided such little guidance about the criteria for rebutting the presumption of an appropriate unit because the real goal of *Specialty Healthcare* is to overcome the limitations Congress imposed through Section 9(c)(5).

determined could *only* be supported on the basis of the extent of organization.” *Id.* (quoting *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965)) (emphasis in original). “In other words, the Board cannot stop with the observation that the petitioner proposed the unit, but must proceed to determine, based on additional grounds (while still taking into account the petitioner’s preference), that the proposed unit is an appropriate unit.” *Id.* Notwithstanding the Board’s efforts to clarify how *Specialty Healthcare* conforms to Section 9(c)(5), the Board’s decision brings to the forefront the extent of organization as the primary factor for consideration, and relegates to an afterthought the traditional principles used since 1947 to determine an appropriate unit.

B. *Specialty Healthcare’s Impact On Collective Bargaining, The Majority Rule, Industrial Peace, And Employer Operations, Demonstrates The Importance Of The Congressional Policy Protected By Section 9(c)(5)*

“It has long been recognized that the democratic principle of majority rule is the basis of the National Labor Relations Act and the *sine qua non* of effective collective bargaining which the Congress prescribed as a substitute for internecine warfare between management and labor.” *Garden State Hosiery*, 74 NLRB 318, 326 (1947) (Member Reynolds dissenting). Nothing is more fundamental to our democratic society. The Board’s *Specialty Healthcare* decision not only contradicts the plain-language of the Act, Congressional intent, and long-standing precedent, it is also contravenes this fundamental principle behind the Act.

The legislative history confirms that the Board was charged by Congress with promoting industrial peace through effective collective bargaining, and that is why a cornerstone policy of the Act is majority rule.

“The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And, by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chose by the majority than with numerous warring factions.”

2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2313 (1935) (Senate Report No. 573, Congressional Record, National Labor Relations Act, 74th Congress, 1st Session) (emphasis added). Later during the debate over the 1947 amendments to the Act, Senator Taft expressed support for the fact that Section 9(c)(5) would serve to eliminate a particularly bad practical result in the workplace. He stated that “[the extent of organization theory]’s use has been particularly bad where another union comes in and organizes the remainder of the unit which results in the establishment of two

inappropriate units.” 2 Leg. Hist. 1625 (Congressional Record, Senate, June 12, 1947). There can be no doubt that his remarks favored a single appropriate unit that encompassed the full complement of employees, the majority of which would decide whether a petitioning labor organization would represent them all.

The Supreme Court recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary [under the Act],” and “[i]n carrying out this task, of course, the Board must act so as to give effect to the principle of majority rule set forth in § 9(a), a rule that ‘is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.’” See *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-331 (1946), *citing* S. Rep. No. 573, 74th Cong., 1st Sess. 13. It is only within this democratic framework that the Board can adopt policies and promulgate rules and regulations under the Act. Again, Board Member Reynolds noted this fact in his dissent in *Garden State Hosiery* when he wrote, “[w]here workers are bound together by the similarity of their skills and duties, and by the administration and organization of the employer’s business, it is practically impossible to apply different terms and conditions of employment to separate parts of the group without encountering resentment and reproach. Indeed it was this very thought that impelled the Congress to insert the principles of majority rule into the Act.” 74 NLRB at 326.

Specialty Healthcare presents a compelling argument that the Board is no longer concerned with the effectiveness of collective bargaining between the parties (despite mandates to the contrary in the Act), and is instead focused on the success rate of petitioners in representation elections. Instead of fostering an environment in which the Board considers the impact of unit determinations on the greater group of employees and the promotion of collective bargaining, *Specialty Healthcare* creates distinctions among employees in name only to further bargaining units whose scope is dictated solely by support or lack of support for a petitioning labor organization. It is axiomatic that petitioners will petition the Board to represent the group they have organized. *See Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991). The heavy burden *Specialty Healthcare* imposes on an employer or intervening labor organization to contest a petitioned-for unit demonstrates that the Board will no longer have to provide as much as a cursory review of whether the interests of the minority unit are “sufficiently distinct from those of other employees to warrant the establishment of a separate unit.” *See Wheeling Island Gaming*, 355 NLRB No. 127, n. 2 (2010). *Specialty Healthcare* essentially creates a result-oriented standard that disregards the core principles of workplace democracy. This is precisely the scenario Congress intended to avoid by placing Section 9(c)(5) into the Act.

The Board's decision in *Specialty Healthcare* may lead to more bargaining units in the short term, but it will not lead to effective collective bargaining in the long term. As a practical matter, in a worst-case scenario where there is a proliferation of mini-units, an employer could find itself in a situation where it is in a near constant state of bargaining with competing mini-units. Administration of so many bargaining relationships is costly, time consuming and inefficient as employers will likely be required to establish internal structures equipped to address a host of issues with each mini unit, such as grievances, seniority, transfers, wages, benefits and other issues. A large number of mini-units would also have interests that conflicted with each other, but when convenient, they could also work together to whipsaw the employer into making unjustified concessions. A proliferation of mini-units could also threaten an employer's ability to respond to changes in technology and operations by impeding the ability to draw across departments, job classifications and shifts, situations that would be more easily accommodated if they were all in a single larger unit. Ultimately, employers will be required to split their resources, energy and focus among various competing units rather than dealing with a uniform collective bargaining process, the effect of which will undermine the labor peace and stability the Board was charged with promoting.

The Board's *Specialty Healthcare* decision will also adversely impact workers. The proliferation of mini-units could have the effect of preventing employees from developing the experience and knowledge in the workplace and making the American workplace competitive in a global economy. As a practical matter, it will be much more difficult for workers to transfer into, out of, or between mini-units, each governed by a separate collective bargaining agreement, with its corresponding seniority and bidding procedures. Ultimately, this will adversely impact worker skill development because workers will be unwilling to sacrifice their seniority in one mini-unit to transfer and learn the skills in another. At the same time, impediments created by having multiple mini-units in the same facility will also discourage employers from cross-training and enhancing the skills of the workforce. The added costs in time and resources will force many employers to pursue the path of least resistance. Such a result is untenable because it leads to things like facility closure or relocation overseas.

Employee morale within the workplace will also be negatively impacted by the proliferation of mini-units under *Specialty Healthcare* because of the risk of having multiple collective bargaining agreements, each with different terms and conditions, some of which are likely to be more favorable than others. Market conditions that exist at the time of bargaining frequently lead to different results in negotiated contracts. As market conditions fluctuate, so do contract results. The

cohesive workforce atmosphere that most employers strive to achieve is likely to suffer from the inevitable envy, competition and conflict that results from having employees work side-by-side, but who have very different terms and conditions of employment.

The Board's decision in *Specialty Healthcare* does not just violate Congressional intent, as evidenced by Section 9(c)(5), it also critically injures the productivity of the American workplace in an ever more competitive economic environment.

III. CONCLUSION

The *Amici Curiae* respect the Board's powers to interpret the law and issue decisions as allowed by Congress. However, the Board's decision in *Specialty Healthcare* exceeds its authority, and violates Section 9(c)(5) of the Act. Accordingly, for the above considerations, the *Amici Curiae* request that this Court grant Petitioner, Cross-Respondent's Request for Review, deny Respondent, Cross-Petitioner's Cross-Application for Enforcement and find the Board's decision in *Specialty Healthcare* a violation of Section 9(c)(5) of the Act.

Respectfully submitted,

***AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE**

**HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE
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SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON
HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR
JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTEE ON
EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON
HEALTH, EDUCATION, LABOR AND PENSIONS.**

Date: April 23, 2012

LITTLER MENDELSON, P.C.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure the foregoing Brief of *Amici Curiae* has been prepared using 14 point Times New Roman font and contains 4,546 words (excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)), relying on the word counting system of Microsoft Word, which complies with the type-volume limitation.

/s/ Stefan Marculewicz

An Attorney for *Amici*

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012, I filed a true and correct copy of the foregoing “BRIEF OF *AMICI CURIAE* THE HONORABLE JOHN KLINE, CHAIRMAN, THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, THE HONORABLE PHIL ROE, CHAIRMAN, THE HOUSE HEALTH, EMPLOYMENT, LABOR, AND PENSIONS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE, SENATOR MICHAEL B. ENZI, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, AND SENATOR JOHNNY ISAKSON, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY, COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS AS FRIENDS OF THE COURT” electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit, using the CM/ECF system, which will send notification of that filing to all counsel of record in this litigation.

/s/ Stefan Marculewicz

An Attorney for *Amici*

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE
Case No. _____ Date Filed _____

INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.
Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position
Cristal USA Inc.

1c. Business Phone: **440.994.1617** 1e. Fax No.: **440.994.1777**

1b. Address (Street and number, city, state, and ZIP code)
2426 Middle Road, Ashtabula, OH 44004

1d. Cell No.: _____ 1f. e-Mail Address: **misty.hejduk@cristal.com**

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? Yes No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? Yes No (if not, answer 3a and 3b.)

a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)

See Exhibit A

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added See Exhibit A	Excluded See Exhibit A
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4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

See Exhibit A

5. Is there a bar to conducting an election in this case? Yes No If yes, state the basis for your position.

6. Describe all other issues you intend to raise at the pre-election hearing.
See Exhibit A

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at <http://www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015>.

- (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
- (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit. (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: Manual Mail Mixed Manual/Mail

8b. Date(s) See Exhibit A	8c. Time(s) See Exhibit A	8d. Location(s) See Exhibit A
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative David A. Kadela	9b. Signature of authorized representative /s/ David A. Kadela	9c. Date 11-29-2016
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9d. Address (Street and number, city, state, and ZIP code) Littler Mendelson, 21 E. State St., Columbus, OH 43215	9e. e-Mail Address dkadela@littler.com
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8f. Business Phone No.: 614.423.4211	8g. Fax No.: 614.221.3301	8h. Cell No.: 614.746.1473
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WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

EXHIBIT A TO CRISTAL USA INC. STATEMENT OF POSITION

3(a): State the basis for your contention that the proposed unit is not appropriate.

The Petitioner, the International Chemical Workers Union Council of the United Food & Commercial Workers International Union (the "Union"), has petitioned for an election in a proposed unit of employees who work for Cristal USA Inc. ("Cristal" or the "Company") in Ashtabula, Ohio at what is known as "Plant 2." The proposed unit consists of "[a]ll full and regular part-time warehouse employees(Warehouse Person)". Cristal submits the unit the Union has proposed is inappropriate because: (1) the employees the Union seeks to include in the unit do not share the requisite community of interest to constitute an appropriate unit; (2) the proposed unit is derived from a gerrymandered, fractured segment of the Company's workforce based upon the extent of the Union's organizing, in violation of Section 9(c)(5) of the Act; (3) the employees in the proposed unit share an overwhelming community of interest with other employees who must be included in any potential unit; and (4) the only acceptable unit is a plant-wide, wall-to-wall unit of production, maintenance, and warehouse employees. The discussion that follows addresses these contentions in detail.

A. The Extent of Union Organizing at Cristal's Ashtabula Locations.

Cristal is part of a family of companies that manufactures titanium dioxide products internationally on five continents. In Ashtabula, Ohio, the Company operates two plants, Plant 1 and Plant 2, on 140 acres just south of Lake Erie. Each plant produces purified titanium dioxide (TiO_2) for sale to various markets. They do so through a system that uses chlorine to react with titanium-bearing ores, in a high temperature process, to create titanium tetrachloride ($TiCl_4$), which is condensed and purified, and then oxidized to create TiO_2 . After that process is completed, the TiO_2 is finished, packaged, warehoused and shipped to customers.

Plant 1 employs approximately 250 employees, while Plant 2 employs around 220 employees. Local 7334 of the United Steelworkers Union represents a wall-to-wall unit of production, maintenance, and warehouse employees at Plant 1 – it has represented the employees in that unit since the 1960s, around the time Plant 1 was built.

In May 2008, this Region, on a petition filed by the Steelworkers, conducted an election in a stipulated wall-to-wall unit of production, maintenance, and warehouse employees – the employees voted against representation. Then, on September 13, 2016, the Union filed a petition for election in Case No. 08-RC-184028. The proposed unit in that case was also located out of Plant 2. It consisted of “[a]ll full time and regular part time TICL4 (North) plant production (chemical operators, CRO’s, step ups/relief operators), maintenance (mechanical, I&E, & planner), and South Plant warehouse employees,” a larger unit than the currently proposed unit, but not a wall-to-wall production, maintenance, and warehouse unit. The Union withdrew its petition in Case No. 08-RC-184028 on September 22, 2016 and, four days later, filed a petition for election in Case No. 08-RC-184947 seeking to represent a much smaller unit than originally sought - the TIC14 Operators at Plant 2, only. After conducting a hearing on the appropriateness of the petitioned-for unit where the Company argued that the petitioned-for unit was inappropriate and that the only appropriate unit was a wall-to-wall unit of all production, maintenance, and warehouse employees at Plant 2, the Regional Director rejected the Company’s arguments and directed that an election be held to determine whether the petitioned-for unit wished to be represented by the Union. The election was held in November 2016. Shortly thereafter, the instant petition was filed.

B. Pertinent Facts Relating to Cristal’s Ashtabula Plant 2 Operations

Overall management responsibility for Plant 1 and Plant 2 rests with Scott Strayer, the

Ashtabula Complex General Manager. Strayer's direct reports include the operations manager for all of Plant 2, and the reliability and maintenance manager for Plant 1 and Plant 2. Two operations superintendents report to the operations manager and, in turn, eight frontline operations supervisors report to the superintendents. The reliability and maintenance manager's direct reports include the Plant 2 maintenance superintendent, whose responsibilities cover the entire plant. Three frontline maintenance supervisors report to the superintendent, as do the maintenance planners, maintenance coordinators, and maintenance specialists.

Unlike at Plant 1, which consists of contiguous facilities, the process by which TiO_2 is produced at Plant 2 is separated by the public road on which Plant 2 is located. On the north side of the road is what is referred to as the North Plant or Plant 2 North. On the south side of the road, kitty-corner from the North Plant, is what is referred to as the South Plant or Plant 2 South.

The production process begins at Plant 2 at the North Plant with the use of chlorine to react with titanium-bearing ores, in an automated high temperature process, to create gaseous $TiCl_4$. The $TiCl_4$ is then condensed to liquid form, and purified. Raw materials used in these phases of the production process are received and stored at the North Plant, and effluent from the process is removed there. A waste water treatment facility is also located on the north side of the road, behind the North Plant.

The Company employs four 7-person teams of operations department employees at the North Plant – process technicians (a/k/a $TiCl_4$ operators) and step up operators – who work 12-hour rotating shifts, with one 7-person team working at a time. Each team has a supervisor who reports to the North Plant manufacturing superintendent. Sixteen maintenance mechanics (including one step up maintenance mechanic), and 12 instrument and electrical (“I&E”) technicians (including one step up I&E technician), work in the maintenance department at the

North Plant. Twelve of the maintenance mechanics work a 7:00 a.m. to 3:30 p.m. schedule. The other four work a 12-hour rotating shift, with one each assigned to work the same hours as one of the four rotating North Plant operations teams. The maintenance mechanics share the same supervisor, who reports to the maintenance superintendent. Eight of the I&E technicians work a 7:00 a.m. to 3:30 p.m. schedule, including the step up I&E technician, who works in both the North and the South Plant. The other four I&E technicians work a 12-hour rotating shift, with one assigned at a time consistent with the shifts worked by the operations teams. They are responsible for instrument and electrical work during their shifts in both the North and the South Plant. All of the I&E technicians who work in either the North Plant or South Plant report to the same supervisor.

Moving to the South Plant, the TiO_2 manufacturing process seamlessly continues there with the transport by pipe of TiCl_4 to the oxidation system, an automated process in which oxygen and other components are used to react with the TiCl_4 to produce TiO_2 , and the chlorine removed from the TiCl_4 is reclaimed and recycled to the North Plant for use in the production process. The TiO_2 produced in the oxidation system moves by pipe to the finishing system, an automated process in which the TiO_2 is washed and dried and converted either to slurry for shipment in that state or moved in dry form to the packaging area. Raw materials used in these phases of the production process are received and stored at the South Plant. Waste water created by the South Plant is transported back to the waste water treatment facility located behind the North Plant.

The Company employs four 13 or 14 employee teams of operations department employees at the South Plant to complete the oxidation, finishing and packaging processes. Each team has one supervisor, who reports to the South Plant manufacturing superintendent. Like the

operations employees at the North Plant, the teams work 12-hour rotating shifts, with one team working at a time. In the maintenance department at the South Plant, the Company employs 21 maintenance mechanics, and eight I&E technicians (besides those noted earlier who work in both the North and South Plant). Seventeen of the maintenance mechanics work a 7:00 a.m. to 3:30 p.m. schedule. The other four work a 12-hour rotating shift, with one each assigned to work the same hours as one of the rotating South Plant operations teams. All the maintenance mechanics share the same supervisor, who reports to the maintenance superintendent. The eight I&E technicians work a 7:00 a.m. to 3:30 p.m. schedule. Again, there are four I&E technicians who work a 12-hour rotating shift, with one assigned at a time, in both the North and the South Plant. The South Plant and North Plant I&E technicians report to the same supervisor.

The last phase of the process occurs in the warehouse, where packaged TiO_2 that has been moved to the warehouse by finished product operators is sealed and staged for shipment. Six hourly employees work in the warehouse, five warehouse persons and one warehouse lead. They report to the warehouse superintendent, a position that is currently vacant, whose chain of command leads to North American distribution manager Lisa Powers.

As the foregoing description depicts, the production process is highly integrated. Each phase of the process is inextricably linked to the other phases. One phase cannot proceed unless the others do and a breakdown, stoppage or slowdown in one process has or will soon have the same effect on the other processes. In fact, employees regularly interact to ensure appropriate lockout/tagout procedures are completed and to ensure that the appropriate safety measures are taken when repairing machinery.

The workforce also is linked by employee interchange, both on a temporary and permanent basis, and cross-departmental interaction and contact on a daily basis. One example

of permanent interchange is the lines of progression between jobs. The most common progressions are from the packaging area at the South Plant (finished product operator) to North Plant operations (process technician) and from North Plant operations to South Plant operations (either oxide operator or WAT operator) to Warehouse Person. In fact, of the five individuals who are currently employed as Warehouse Persons, all of them were previously employed as a finished product operator and three of them were also previously employed as a Chemical Operator at either the North or South plant.

There is significant temporary interchange as well. For example, the I&E technicians who work rotating shifts have maintenance-related functions in both the North Plant and the South Plant. In addition, North Plant maintenance mechanics and I&E technicians frequently work overtime at the South Plant and vice versa. Additionally, operations employees at both the North and South Plant also regularly work overtime in the warehouse, a need that exists on an ongoing basis. Specifically, from January to October 2016, overtime hours were voluntarily worked in the warehouse by operations employees in each month. In fact, operations employees from the South plant worked more overtime hours in the warehouse than the warehouse employees themselves in six of the ten months. Additionally, operations employees from both the North Plant and South Plant travel to the lab, which is located at the South Plant, to drop off samples on a daily basis. Finished product operators regularly visit the warehouse to use equipment in the warehouse (e.g. the warehouse's pallet inverter which helps assist employees in replacing broken pallets). Moreover, selected employee volunteers from all positions at Plant 2 participate in plantwide committee and team meetings.

The terms and conditions under which the production, maintenance and warehouse employees at Plant 2 work are, in virtually all respects, the same. The employees work under the

same policies and procedures, including the same appraisal, promotion, disciplinary, transfer, layoff, leave of absence and seniority policies and procedures; are paid on an hourly basis on the same payday, under the same compensation system, and using the same timesheets to record their hours of work; receive the same fringe benefits, including group health insurance, retirement benefits, vacation, holidays and the like; wear the same uniforms; attend the same meetings and functions; and are members of the same committees. The Plant 2 human resources team administers the Company's personnel policies and procedures, and plays an active role in personnel decisions for the North and South Plants, including decisions relating to hiring, training, promotions, discipline, transfers, evaluations, and compensation and benefits.

Besides human resources, the North Plant and the South Plant are also supported by the same health and safety, engineering, procurement, information technology, and finance and accounting teams. Both plants also utilize the same computer system and the same lab.

C. The Proposed Unit Is a Fractured Unit And Violates Section 9(c)(5) of the Act.

Section 9(a) of the Act permits employees to form a bargaining unit "appropriate" for collective bargaining purposes. 29 U.S.C. § 159(a). The Act grants the Board discretion to determine whether a petitioned-for unit is appropriate. Id. § 9(b). The Board's seminal decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 N.L.R.B. 934 (2011), *enfd sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), describes the steps for determining if a petitioned-for unit is appropriate. The first step is assessing whether the proposed unit (1) is readily identifiable as a group and (2) shares a sufficient community of interest to constitute an appropriate unit. Here, when considered in light of the Board's more recent decision in *Neiman Marcus*, 361 NLRB No. 11 (2014), the evidence will show that the unit the Union has proposed falls well short of satisfying either of these factors.

In *Neiman Marcus*, the union sought to organize employees working in the second floor salon shoe department of the company's multi-floor, Manhattan store and the contemporary footwear employees working on the fifth floor of the store who themselves were a subset of the larger contemporary sportswear department. 361 NLRB at *3-7. The Board held that the petitioned-for unit was fractured in *Neiman Marcus* because it did not constitute a true "departmental unit" that included *the entire* group of employees who shared a community of interest. *Id.* at *12.

The Union's proposed unit here must be rejected for similar reasons. Here, as an initial matter, the proposed unit carves out the Lead Warehouse Person. This individual works alongside the other warehouse employees with the same job skills, functions, working conditions and training. Further, the Lead is subject to the same policies and procedures, schedule, and overtime obligations as the other warehouse employees.

Additionally, the unit carves out part of a completely integrated team at Plant 2 creating a gerrymandered, fractured unit that the Company's evidence will show:

1. Excludes operations employees from both the North and South Plant who work in a functionally integrated operation; who interact regularly with warehouse employees and whose lines of progression intersect; who work alongside warehouse employees when working overtime in the warehouse; and who share the same terms and conditions of employment and work under the same policies and procedures; and
2. Arbitrarily excludes maintenance employees from the North and South Plants, who are equally integral to the production process; who regularly interact with operations employees from both the North and South Plants, and who share the same terms and conditions of employment and work under the same policies and procedures as each other and the warehouse employees.

The petitioned-for unit also must be rejected because it necessarily violates Section 9(c)(5) of the Act. While unit determinations fall within the Board's discretion, "the Board must operate within statutory parameters." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir.

1995). Section 9(c)(5) provides that in determining whether a unit is appropriate for collective bargaining “the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5). In fact, “[t]he Board has long disfavored fractured units that may arbitrarily exclude certain groups of employees or could invite ‘gerrymandering’ of interests among employees.” *Constellation Broads v. NLRB*, 2016 U.S. App. LEXIS 20768, *12 (2nd Cir. Nov. 21, 2016).

Here, the Union’s history of originally filing a petition seeking an election among a larger group of employees at Plant 2, only to withdraw the petition and file separate petitions for elections in two separate, smaller units leaves only one explanation for its action. The explanation is that the Union petitioned for these two specific units based on the extent of its organizing.

D. The Proposed Unit is Not Appropriate Because the Employees in the Unit Share An Overwhelming Community of Interest With The Operations employees and Maintenance Employees.

Under *Specialty Healthcare*, if a proposed unit to which an employer objects is found to be readily identifiable as a group and to share a community of interest, the burden shifts to the employer to show that other employees whom the employer seeks to include in the unit share an overwhelming community of interest with employees in the petitioned-for unit. 357 NLRB at 943. In determining whether employees share a community of interest, the Board examines whether the employees: (1) are organized into separate departments; (2) have distinct skills and training; (3) have distinct job functions; (4) are functionally integrated with the employer’s other employees; (5) have frequent contact or interchange with other employees; (6) have distinct terms and conditions of employment; and (7) are separately supervised. *Id.* at 942, quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

Cristal's evidence will show that, upon application of these community of interest factors here, the conclusion is inescapable that Plant 2's maintenance, and operations employees share an overwhelming community of interest with the employees in the petitioned-for unit and that the only appropriate unit is a plant-wide, wall-to-wall unit of all Plant 2 production, maintenance and warehouse employees. The facts Cristal will present that lead to that conclusion include:

1. The North Plant and the South Plant operations employees are part of the same operations department, which is under the direction of the operations manager, and two superintendents who have day-to-day responsibilities for all operations functions.
2. The North Plant and the South Plant maintenance employees are part of the same maintenance department, which is under the direction of the reliability and maintenance manager for the Ashtabula complex and the Plant 2 maintenance superintendent, who has day-to-day responsibility for all maintenance functions.
3. The North Plant and South Plant operations employees and maintenance employees all report to the same General Manager.
4. With the exception of finished product operators, the North Plant and the South Plant operations employees receive the same or similar training, have many of the same basic skills, and perform similar job functions.
5. The North Plant operations and maintenance employees are functionally integrated with each other and with the South Plant operations, maintenance and warehouse employees based upon the connection of each phase of work at Plant 2 to, and the dependence of each phase of work at the plant on, the other phases.
6. The employees interchange between jobs at the North and the South Plant (including maintenance and warehouse positions) as part of their normal permanent career progression.
7. All Plant 2 employees frequently come into contact with each other when delivering samples to the lab, using tools located in the warehouse, or working overtime in the warehouse.
8. The North Plant operations and maintenance employees and the South Plant operations, maintenance and warehouse employees work under the same terms and conditions of employment.
9. The North Plant operations and maintenance employees and the South Plant operations, maintenance and warehouse employees participate in the same committees/teams regarding various workplace issues and concerns.

3(b): State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Additions to the Unit:

North Plant maintenance and operations employees and South Plant operations and maintenance employees must be included in the unit to make the unit appropriate, including the employees who work in the following classifications:

- North Plant: Chemical Operators; Relief Step/Up Operators; Maintenance Mechanic and I&E Technician; and
- South Plant: Step Up Operator; Lead Oxide Operator; Relief Oxide Operator; Oxide Operator; Lead WAT Operator; Relief WAT Operator; WAT Operator; Lead Finished Product Operator; Finished Product Operator; Maintenance Mechanic; I&E Technician.

The reasons these employees must be included in the unit are outlined in 3(a) above.

In addition, for the reasons outlined in section 3(a) above, in the event the petitioned-for unit is found to be appropriate, the Lead Warehouse Person must be included in the unit to make the unit appropriate.

Exclusions from the Unit:

The Company does not believe that any of the petitioned for employees should be excluded from the unit, rather it believes that the operations and maintenance employees from the North Plant and the operations and maintenance employees from the South Plant should be added.

4. Other than the individuals in classifications listed in 3(b), list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

Cristal intends to contest the eligibility of any employee who is not eligible to vote in an

election among the employees in the Company's proposed unit.

6. Describe all other issues you intend to raise at the pre-election hearing.

Cristal incorporates by reference all issues identified in response to Items 3 through 5 and intends to raise all issues mentioned therein at the pre-election hearing.

A. **The NLRB's Representation Case Rule Violates the National Labor Relations Act and the Administrative Procedure Act.**

For decades, the Board has adhered to a balanced set of pre-election procedures that have allowed employers sufficient time and opportunity to raise issues affecting the conduct of elections in appropriate pre-election hearings. *See* 29 C.F.R. 102.60, *et seq.* Such issues have included questions regarding the appropriateness of the petitioned-for bargaining unit as well as the eligibility of certain categories of employees to vote in the election. *Id.* at 102.66. Following such hearings, employers have generally been allowed 25 days to request review of a Regional Director's decision by the Board prior to any tally of ballots in an election. *Id.* at 102.67.

The Representation Case Rule makes sweeping changes in pre-election and post-election procedures that depart from the plain language and legislative history of the Act and exceed the Board's statutory authority. The new Rule achieves this result by preventing employers in most cases from exercising their statutory right to an appropriate hearing regarding voting eligibility, and by shortening the election period so that employers have no meaningful opportunity to lawfully communicate with affected employees about their electoral rights.

The Board's failure to provide an adequate justification renders the new rule arbitrary and capricious and an abuse of discretion, all in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Specific provisions of the new Rule violate the Act and/or the APA because they, among other things:

1. Shorten the time between the filing of a representation petition and the first day of

- a hearing. *See* Section 102.63(a).
2. Limit the purpose of a hearing conducted under Section 9(c) of the Act as being solely "to determine if a question of representation exists." *See* Section 102.64(a).
 3. Assert that "disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." *Id.*
 4. Limit the right of parties in such hearings to introduce into the record evidence that is "relevant to the existence of a question of representation" thereby excluding other issues contemplated by Section 9(c) of the Act. *See* Section 102.66(a).
 5. Require parties to make "offers of proof" at the outset of any hearing, and authorizes Regional Directors to bar the parties from entering evidence into the record if such offers of proof are deemed to be insufficient to sustain the proponent's position. *See* Section 102.66(c).
 6. Deny employers the opportunity to present post-hearing briefs and to review a hearing transcript prior to stating their post-hearing positions on the record, except upon special permission of the Regional Director and addressing only subjects permitted by the Regional Director. *See* Section 102.66(h).
 7. Require employers to disclose to unions personal and private information pertaining to employees, including home phone numbers and personal email addresses. *See* Section 102.67(l). This is unprecedented.
 8. Eliminate the longstanding requirement that election ballots be impounded while any Request for Review of the Regional Director's decision is pending at the Board and eliminates the previous 25-day waiting period for review filings which previously allowed the Board time to consider such requests for review prior to the vote. *See* Section 101.21(d).
 9. Eliminate the right of employers to obtain mandatory Board review of post-election disputes if they enter into stipulated election agreements prior to the election instead of exercising their right to a pre-election hearing. *See* Sections 102.62(b) and 102.69.

Further, because the Act does not contain an express statement that the Board should hold elections at the earliest practicable date, but emphasizes other considerations, the Representation Case Rule's primary purpose – to shorten the time to election – is contrary to Congressional intent.

In addition to violating the APA, the new Representation Case Rules and *Specialty Healthcare* improperly infringe upon employer's free speech and due process rights. Indeed, the *Specialty Healthcare* standard cannot be squared with Section 9(b) of the Act, which mandates that the Board "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). The *Specialty Healthcare* standard also defies the statutory mandate that the Board assure the "fullest freedom," 29 U.S.C. § 159(b), in the exercise of all rights guaranteed by the Act, including the right to refrain from supporting a union, *id.* § 157.

The Rules also violate due process and infringe on employer free speech because they contain provisions that:

1. Emphasize off-the-record consultations between the hearing officer and the Regional Director, who does not even attend the hearing, on such issues as exclusion of evidence at the hearing. Such off the record consultations cannot be meaningfully challenged by Cristal or reviewed by the Board.
2. Allow the hearing officer to require offers of proof in lieu of actual evidence and thus violates the statutory guarantee of an appropriate hearing.
3. Sharply limit the opportunity for employers to seek pre-election Board review or a stay of the election, and eliminate a 25-day automatic waiting period for such review.
4. Deprive employers of sufficient time to investigate factual and legal issues relevant to the petition.
5. Vest hearing officers with decision-making authority, contrary to section 9(c)(1)'s requirements that such officers "shall not make any recommendations with respect" to the hearings they conduct.
6. Provide for no penalties for misuse of employee's confidential personal information.

- 7a. A list containing the full names, work locations shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition.

Full Employee Name (Last, First)	Job Classification	Work Location	Shift
Blankenship, Eddie	Warehouse Person	Plant 2 South	7:00 a.m. - 3:30 p.m.
Falke, Mark	Warehouse Person	Plant 2 South	7:00 a.m. - 3:30 p.m.
Lane, Aaron	Warehouse Person	Plant 2 South	7:00 a.m. - 3:30 p.m.
Paolillo, Anthony	Warehouse Person	Plant 2 South	7:00 a.m. - 3:30 p.m.
Wisnyai, Jr., Louis	Warehouse Person	Plant 2 South	7:00 a.m. - 3:30 p.m.

- 7b(1). A list containing the full names, work locations, shifts and job classifications of all individuals that Cristal maintains must be added to the proposed unit to make it an appropriate unit.

Full Employee Name (Last, First)	Job Classification	Work Location	Shift
Addair, Keith	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Allshouse, Daniel	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Barnes, Raymond	Operator-Lead Oxide	Plant 2 South	12-hour rotating
Best, Gene	Operator-Oxide	Plant 2 South	12-hour rotating
Blakeslee, Timothy	Operator-Finished Product	Plant 2 South	12-hour rotating
Boyd, Nathaniel	Technician-I&E	Plant 2 North & South	12-hour rotating
Brehl, Thomas	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Brown, Craig	Technician-I&E	Plant 2 North & South	12-hour rotating
Brown, Douglas	Mechanic-Maintenance	Plant 2 South	12-hour rotating
Carlton, David	Operator-WAT	Plant 2 South	12-hour rotating
Case, Isaac	Operator-Finished Product	Plant 2 South	12-hour rotating
Clark, Larry	Operator-Finished Product	Plant 2 South	12-hour rotating
Cleversy, Dana	Operator-Oxide	Plant 2 South	12-hour rotating
Cole, David	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Conel III, Otis	Operator-WAT	Plant 2 South	12-hour rotating
Davis, Richard	Mechanic-Maintenance	Plant 2 North	12-hour rotating
Decker, Daniel	Operator-Relief Finished Product	Plant 2 South	12-hour rotating
Deligianis, John	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Drake, Jr., Michael	Operator-Finished Product	Plant 2 South	12-hour rotating
Eldred, Rodney	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Ellis, David W.	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Ellis, David D.	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Ezzone, Jeffrey	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Francis, James	Operator-WAT	Plant 2 South	12-hour rotating

Full Employee Name (Last, First)	Job Classification	Work Location	Shift
Fronk, Frank	Operator-Lead Finished Product	Plant 2 South	12-hour rotating
Gegen, Steve	Operator-Lead Oxide	Plant 2 South	12-hour rotating
Gerren, Jr., Charles	Operator-Lead Oxide	Plant 2 South	12-hour rotating
Gonzalez, Felipe	Operator-Lead WAT	Plant 2 South	12-hour rotating
Griswold, Christopher	Operator-Lead Finished Product	Plant 2 South	12-hour rotating
Guglielmo, Charles	Operator-Finished Product	Plant 2 South	7:00 a.m. - 3:30 p.m.
Hahn, Carl	Operator-Oxide	Plant 2 South	12-hour rotating
Hake, Timothy	Operator-WAT	Plant 2 South	12-hour rotating
Hall, Scott	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Hamilton, Patrick	Operator-Lead WAT	Plant 2 South	12-hour rotating
Harrison, Lawrence	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Harryman, Edwin	Operator-Lead WAT	Plant 2 South	12-hour rotating
Hartman, Eric	Technician-I&E	Plant 2 North & South	12-hour rotating
Heasley, Jason	Operator-Lead WAT	Plant 2 South	12-hour rotating
Herter, Jeffrey	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Higley, Ronald	Operator-Step Up	Plant 2 South	12-hour rotating
Hochschild, Jeffrey	Step-Up Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Hunt, Terence	Operator-Finished Product	Plant 2 South	12-hour rotating
Ines, Robert	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Johnson, Randy	Operator-Step Up	Plant 2 South	12-hour rotating
Kalinowski, Richard	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Kobernik III, Glen	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Komman, Mark	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Kosiba John	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Laugen, Joshua	Operator-Finished Product	Plant 2 South	12-hour rotating
Leonard, Thomas	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Lockwood, Brett	Operator-Finished Product	Plant 2 South	12-hour rotating
Loucks, Hugh	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Louth, Kirk	Technician-I&E	Plant 2 North & South	12-hour rotating
Lute, Charles	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Lute, Christopher	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Lute, Michael	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Maki, Jeffrey	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Marshall, Rory	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Mason, Jr., Nate	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Maydak, Jr., Daniel	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Meyer, Michael	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Mickle, Franklin	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Misinec, Ralph	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Mrva, Pete	Operator-Finished Product	Plant 2 South	12-hour rotating
Myers, Randy	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Naberezny, Richard	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Nagy, III, Stephen	Operator-Finished Product	Plant 2 South	12-hour rotating
Nerad, Edward	Operator-WAT	Plant 2 South	12-hour rotating

Full Employee Name (Last, First)	Job Classification	Work Location	Shift
Noland, Philip	Operator-Oxide	Plant 2 South	12-hour rotating
Nordquest, Charles	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Oboczky, Nicholas	Mechanic-Maintenance	Plant 2 South	12-hour rotating
Oliver, James	Operator-WAT	Plant 2 South	12-hour rotating
Osburn, Robin	Operator-WAT	Plant 2 South	12-hour rotating
Owen, Daniel	Mechanic-Maintenance	Plant 2 South	12-hour rotating
Painter, Glenn	Mechanic-Maintenance	Plant 2 South	12-hour rotating
Parker, Leslie	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Paxson, David	Operator-Oxide	Plant 2 South	12-hour rotating
Pelton, Wayne	Operator-Lead Oxide	Plant 2 South	12-hour rotating
Pildner, Jeremy	Warehouse Lead	Plant 2 South	7:00 a.m. - 3:30 p.m.
Post, Joshua	Mechanic-Maintenance	Plant 2 South	12-hour rotating
Randolph, James	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Rivera, James	Operator-WAT	Plant 2 South	12-hour rotating
Rodriguez, Justin	Operator-Finished Product	Plant 2 South	12-hour rotating
Rogers, Lawrence	Operator-Finished Product	Plant 2 South	12-hour rotating
Sherretts, Matthew	Mechanic-Maintenance	Plant 2 North	12-hour rotating
Showalter, Eric	Operator-Finished Product	Plant 2 South	12-hour rotating
Smith, Christopher	Operator-Finished Product	Plant 2 South	12-hour rotating
Smith, George	Step Up Maintenance	Plant 2 North & South	7:00 a.m. - 3:30 p.m.
Smith, George	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Sneck, Gary	Operator-Finished Product	Plant 2 South	12-hour rotating
Sternberg, Zachary	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Stofan, Todd	Operator-Oxide	Plant 2 South	12-hour rotating
Summers, Brandon	Mechanic-Maintenance	Plant 2 North	12-hour rotating
Summers, Nathan	Mechanic-Maintenance	Plant 2 North	12-hour rotating
Tackett, Elvis	Operator-WAT	Plant 2 South	12-hour rotating
Taylor, Raymond	Operator-WAT	Plant 2 South	12-hour rotating
Terry, Joseph	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Tucker, Jr., Raymond	Operator-Lead Finished Product	Plant 2 South	12-hour rotating
Tuttle, David	Operator-Step Up	Plant 2 South	12-hour rotating
Walker, Kenneth	Step Up I/E	Plant 2 North & South	7:00 a.m. - 3:30 p.m.
Warner, Kyle	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Weaver II, Shawn	Operator-Finished Product	Plant 2 South	12-hour rotating
Wight Thomas	Mechanic-Maintenance	Plant 2 North	7:00 a.m. - 3:30 p.m.
Wight, Robert	Technician-I&E	Plant 2 North	7:00 a.m. - 3:30 p.m.
Williams, Kevin	Technician-I&E	Plant 2 South	7:00 a.m. - 3:30 p.m.
Willis, Donald	Operator-WAT	Plant 2 South	12-hour rotating
Wilson, James	Operator-WAT	Plant 2 South	12-hour rotating
Wolfe, Randy	Operator-Lead Finished Product	Plant 2 South	12-hour rotating
Zall, William	Mechanic-Maintenance	Plant 2 South	7:00 a.m. - 3:30 p.m.
Zetlaw, Douglas	Operator-Step Up	Plant 2 South	12-hour rotating
Balascio, Michael	Technician-Process	Plant 2 North	12-hour rotating
Best, Gregory	Technician-Process	Plant 2 North	12-hour rotating

Full Employee Name (Last, First)	Job Classification	Work Location	Shift
Bihlajama, Kyle	Technician-Process	Plant 2 North	12-hour rotating
Brown, John	Technician-Process	Plant 2 North	12-hour rotating
Colby, Gena	Technician-Process	Plant 2 North	12-hour rotating
Cumpston, Julie	Technician-Process	Plant 2 North	12-hour rotating
Decker, Jonathan	Step Up Operator	Plant 2 North	12-hour rotating
Fedele, William	Technician-Process	Plant 2 North	12-hour rotating
Hall, Robert	Technician-Process	Plant 2 North	12-hour rotating
Joslin, Tiffany	Technician-Process	Plant 2 North	12-hour rotating
Laveck, Kenneth	Technician-Process	Plant 2 North	12-hour rotating
Love, George	Technician-Process	Plant 2 North	12-hour rotating
Miller, Azchary	Technician-Process	Plant 2 North	12-hour rotating
Newbold, Robert	Technician-Process	Plant 2 North	12-hour rotating
Painter, Adam	Technician-Process	Plant 2 North	12-hour rotating
Park, Clifford	Technician-Process	Plant 2 North	12-hour rotating
Patterson, Scott	Step Up Operator	Plant 2 North	12-hour rotating
Rembacki, Ryan	Technician-Process	Plant 2 North	12-hour rotating
Rice, Brian	Technician-Process	Plant 2 North	12-hour rotating
Shinault, Bryan	Technician-Process	Plant 2 North	12-hour rotating
Stitt, Jeffery	Step Up Operator	Plant 2 North	12-hour rotating
Summers, Michael	Technician-Process	Plant 2 North	12-hour rotating
Tackett, II, Larry	Technician-Process	Plant 2 North	12-hour rotating
Vance, Jason	Step Up Operator	Plant 2 North	12-hour rotating
Vance, Robert	Technician-Process	Plant 2 North	12-hour rotating
Vaughan, Edward	Technician-Process	Plant 2 North	12-hour rotating
Welton, David	Technician-Process	Plant 2 North	12-hour rotating
White, Joseph	Technician-Process	Plant 2 North	12-hour rotating

7b(2). A list containing the full names of all individuals that Cristal maintains must be excluded from the proposed unit to make it an appropriate unit.

None.

8b. Dates

Cristal requests a sufficient number of days after the date of any Decision and Direction of Election for the Company and its employees to have an adequate opportunity to communicate regarding the issues at stake in the vote, consistent with Congressional intent as expressed in Section 8(c) of the Act and legislative history. Because of the nature of the rotating 12-hour shifts many employees work, Cristal also submits that the only logistically feasible days of the week to conduct an election, if the Board directs an election of a unit consisting of all

production, maintenance, and warehouse employees, are Thursday (a morning and early evening session), and Friday (a morning session), the same days that voting sessions were held in the 2008 election and the 2016 election of TiC14 employees.

If, however, the Board were to decide that the petitioned-for unit is appropriate, Cristal submits that Wednesday is the most appropriate date for an election.

8(c) Times

In the 2008 election, the voting sessions on Thursday ran from 5:00 a.m. to 8:00 a.m. and from 5:00 p.m. to 7:00 p.m., and on Friday the voting session was from 5:00 a.m. to 8:00 a.m. Sessions at those times remain appropriate if the Board directs an election of a unit consisting of all production, maintenance, and warehouse employees.

If, however, the Board were to decide that the petitioned-for unit is appropriate, Cristal submits that a session time from 6 – 8:00 a.m. is appropriate.

8(d) Location(s)

A regular manual secret ballot election is the only appropriate election procedure in this case. The most appropriate location for the election is Cristal's training center, located at 2870 Middle Road, Ashtabula, Ohio 44004, which is where the 2008 election was conducted.