

Nos. 19-1256 & 20-1011

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

PCC STRUCTURALS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 63**

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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

PCC STRUCTURALS, INC.)	
)	
)	
Petitioner/Cross-Respondent)	Nos. 19-1256 & 20-1011
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	19-CA-207792
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 63)	
)	
Intervenor)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. *Parties and Amici:* PCC Structurals, Inc. was the respondent before the Board, and is the Petitioner/Cross-Respondent in this Court proceeding. The Board’s General Counsel was a party before the Board. International Association of Machinists and Aerospace Workers, Local Lodge 63 was the charging party before the Board, and has intervened in support of the Board. HR Policy Association filed an amicus brief in this Court.

B. *Rulings Under Review:* The ruling under review is a Decision and Order of the Board, *PCC Structurals, Inc.*, 368 NLRB No. 122 (November 27, 2019). The Decision and Order relies on findings made by the Board and Board officials in unpublished decisions in an earlier representation (election) proceeding, Board Case No. 19-RC-202188, including a Regional Director's Supplemental Decision (May 4, 2018), and a Board order denying review of the Regional Director's Decision (November 28, 2018).

C. *Related Cases:* This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

/s/ David Habenstreit
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Dated at Washington, DC
this 26th day of August 2019

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GLOSSARY

A.	Joint Appendix
ABr.	Brief of <i>amicus curiae</i> HR Policy Association
Act	National Labor Relations Act (29 U.S.C §§ 151 <i>et seq.</i>)
Board	National Labor Relations Board
Br.	Opening brief of PCC to this Court
PCC	PCC Structurals, Inc.
Union	International Association of Machinists and Aerospace Workers, Local Lodge 63

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ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of PCC Structurals, Inc. (“PCC”) for review, and cross-application of the National Labor Relations Board for enforcement, of a Board Decision and Order that issued on November 27,

2019. 368 NLRB No. 122. (A.8-12.)¹ The Board had jurisdiction over this case pursuant to Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., as amended (“the Act”). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings. International Association of Machinists and Aerospace Workers, Local Lodge 63 (“the Union”) intervened in support of the Board.

The Board’s Order is based, in part, on findings made in an underlying representation (election) proceeding (Board Case No. 19-RC-202188), and thus the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d); *see Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation proceeding for the limited purpose of “enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the Court’s rulings. 29 U.S.C. § 159(c); *see Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

¹ “A.” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to PCC’s opening brief. “ABr.” refers to the amicus curiae brief of the HR Policy Association.

STATEMENT OF THE ISSUE

The issue before the Court is whether the Board acted within its discretion in determining that a unit of PCC's welding employees constitutes an appropriate unit for collective bargaining. If so, then substantial evidence supports the Board's finding that PCC's admitted refusal to recognize, bargain with, or provide requested information to the Union following its victory in the representation election violated Section 8(a)(5) and (1) of the Act.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory provisions are reproduced in the attached Addendum.

STATEMENT OF THE CASE

The Union filed a petition with the Board seeking a representation election among approximately 100 rework welders and rework specialists, and the one crucible-repair welder at PCC's Portland operation. (A.1212; A.870.) PCC challenged the petitioned-for unit as inappropriate, arguing that the smallest appropriate unit was a "wall to wall" unit of all 2,565 production and maintenance employees in over 100 job classifications. (A.1212.) After determining in a representation proceeding that the welders unit was an appropriate unit, and conducting a representation election won by the Union, the Board certified the Union as the welders' representative. In a subsequent unfair-labor-practice proceeding, the Board found unlawful PCC's admitted failure to recognize, bargain

with, and provide information to the Union. The facts and procedural history relevant to both the representation and unfair-labor-practice proceedings are set forth below.

I. STATEMENT OF FACTS

A. PCC's Operations

PCC's operations in the Portland, Oregon area consist of three production centers, all located within a 5-mile radius. (A.1213; A.34-35, 47-48.) PCC manufactures metal castings for aviation, medical, and other industries. (A.946; A.24.) *See PCC Structural, Inc.*, 365 NLRB No. 160, 2017 WL 6507219 (2017) ("*PCC I*") (A.1085). Each final product, or casting, is different, according to the customer's specifications, and the three centers specialize in casting different types of metals and parts. (A.1220-21; A.24-28.) For all castings, PCC's lengthy and specialized manufacturing process has two major stages, the "front end" and "back end," each of which consists of multiple steps. (A.1220-21.)

The "front end" stage involves creating a wax mold of the product that is coated with a hard ceramic shell and "invested" with liquid metal to create the casting. (A.1220; A.29-31.) Those steps involve numerous classifications of employees, including: wax operators and inspectors, mold makers, and pattern makers for the waxing process; investing specialists and helpers, and shell-finishing employees, for the investing process; and furnace operators, electrode

fabricators, foundry specialists, and the crucible-repair welder for the casting process. (A.1220; A.98-99, 391-93.)

The product is then finalized during the “back end” stage, which consists of inspecting the metal casting to discover, and “reworking” it to correct, any defects. (A.1220; A.32-33, 391-93, 404-05.) Various classifications of employees, including penetrant inspectors, radiographers, and visual-dimension inspectors, use different tools to identify any problems with the castings. Other employees, including rework welders, rework specialists, and grinders complete any needed repairs. (A.1220-21; A.98-99, 404-06, 459.)

No PCC department consists solely of unit employees. Welders are included in several different production departments organized by type of product, each of which also includes employees in a few other classifications. (A.1214, 1240; A.35.) The crucible-repair welder is the sole welder in a department of electrofabrication employees. (A.1218.) Most classifications of PCC production employees work in departments that do not have any welders, as do all maintenance employees, who are in a separate maintenance department. (A.1215.)

Because they are dispersed through several departments, rework welders and rework specialists report to a variety of direct supervisors who also supervise grinders and inspectors. (A.1214-15; A.39, 143, 148.) Welders consult with their lead, not their supervisor, on specific welding issues, and they only consult their

supervisor on administrative issues such as vacations. (A.1214-15, 1232, 1246; A.335-36, 344, 452.)

B. Unit Welders Have Distinct Job Functions and Qualifications from Excluded Employees

The unit welders have a distinct role in PCC's complex and intertwined manufacturing process. (A.1220-21, 1243.) Their job duties are almost exclusively confined to welding metal. Rework welders repair defects in PCC's product (casting) itself, using various welding techniques specific to the metal or alloy in question. (A.1219; A.74, 261, 322, 473.) Rework specialists perform the same rework-welder duties, train rework welders, and develop rework plans to repair parts with particularly numerous defects. (A.1219; A.94, 241, 507.) The crucible-repair welder also focuses on specialized metal welding, but works on the copper crucibles used to melt other metals for the casting, rather than on the final product. (A.1219-20; A.399, 412, 510-13.)

Employees from a few classifications excluded from the unit also perform some welding. (A.1219, 1242.) For example, millwrights, who work in the maintenance department, weld to repair equipment. They do not work in the production department or ever weld metal on, or otherwise work on, either the castings or the crucibles. (A.1219; A.70, 112, 139, 464-68.) Wax assemblers weld only wax components, not metal, at the front end of the process to make a larger mold. (A.1219; A.67, 125, 461.) The vast majority of employees in excluded

classifications perform no welding at all. (A.1219, 1242; A.79, 83, 87-94, 97, 477-81, 488-504, 527-29.) They perform other, highly specialized steps in the production process, such as x-raying castings to locate subsurface defects, or, in the case of maintenance employees, repairing the production equipment. (A.1219-20; 464-68, 477-79.)

Welder classifications require employees to have specialized skills, training, and certifications commensurate with their job duties, both at the time of hire and thereafter. (A.1216-18; A.473-76, 507-13.) Rework-welder applicants must have: either two years applicable welding experience or the equivalent combination in classroom training and work experience; specific welding certifications; and completion of both the PCC-approved welding-tech training and a “Certification to PCC Weld Test Standards.” (A.1216-18; A.176, 207, 239-40, 250, 260-61, 285-86, 306-08, 319-20, 475.) Rework-specialist applicants must have five years’ experience in the highest level of the rework-welder classification. In addition, they must have an 80% first-try success rate on passing their certification tests and, once hired, must complete a multi-week, in-house training program. (A.1216-18; A.239-40, 250, 509.)

All unit welders, including the crucible-repair welder, must maintain certifications for several types of welding processes, and certifications specific to the particular alloys and metals they weld. (A.1218; A.254, 269, 320-21, 358-59.)

Only the crucible-repair welder needs a copper-welding certification. (A.1217-18; A.510-13.) Most welding certificates must be renewed every two to three years, a process that can take several weeks. (A.1218; A.359-62, 531.)

Some excluded classifications also require specialized certifications and training in their areas of expertise. For example, radiographers must have 200 hours of hands-on training and complete a 40-hour class run by a third party. (A.1218; A.477-80.) No excluded classification, even those whose job duties include some amount of welding, requires specialized certifications and training in advanced welding techniques or welding specific metals or metal alloys. (A.1218; A.128, 183, 190.) Many excluded classifications, such as grinders, require no certification at all, and receive only on-the-job training. (A.1219; A.366.) All unit welders—as well as inspectors and some other classifications—must pass an annual eye exam. (A.1217, 1218.) All production employees receive the same general safety training and orientation on company policies, procedures, and work rules. (A.1218; A.54.)

C. Unit Welders Have Some Interchange Among Themselves and Little Contact or Interchange with Excluded Employees

PCC employees can only perform work in another classification if they are qualified to do so. (A.1228.) Rework welders and rework specialists may interchange with each other if they have the requisite specialized certifications. Neither perform crucible-repair welding. (A.1226, 1228, 1234; A.358-59).

Because all excluded employees lack the necessary skills and certifications, they do not (and cannot) ever substitute for unit welders. (A.1227-28, 1244; A.79, 83, 87-94, 97, 241, 289, 322.) Welders spend the vast bulk of their work time on welding. As a small percentage of their duties, welders may occasionally perform some tasks from a limited number of excluded job classifications to avoid being sent home when welding work runs low. Such fill-in duties usually consist of grinding work, lower-skilled work, or duties that the welder had performed in a prior position. (A.1226, 1228, 1234; A.203-05, 241-42, 262, 288-89, 322, 334-35, 344-46.) There is some temporary interchange among certain excluded classifications that do not require certifications, for example, among various grinder positions, which are considered unskilled and frequently filled with temporary employees. (A.1228; A.375.)

There are very few permanent transfers into or out of the unit welding classifications to or from excluded classifications. While many welders previously held other positions at PCC, only about 8 employees had transferred into a welding position since 2010, 5 of them from rework-grinder positions. (A.1227, 1244; A.199-202, 235, 867.) Welders very rarely transfer into excluded classifications except to avoid layoff. (A.1227, 1244; A.168-72, 197-99, 203.)

There are some transfers among unit-welder classifications. As noted, all rework specialists were previously rework welders. The sole crucible-repair

welder, who was set to retire at the time of the hearing, was to be replaced by a rework welder. (A.1218; A.421.)

Welders have limited contact with other employees. They usually work alone in welding booths or in open-air welding chambers. (A.1222; A.298-99, 309-10, 328, 347.) Their occasional contacts with non-welders tend to be limited to a few other classifications in the inspection and rework cycle. For example, rework welders and rework specialists interact once or twice a week (about 5-10% of their work time) with grinders and visual-dimension employees to develop work plans to correct product defects. (A.1222-23; A.240-41, 262-67, 290-91, 310, 344-347.) They have little or no interaction with most other excluded employees. For example, they rarely see classifications of employees engaged in the front-end aspects of the production process, such as wax, investing, or casting employees. (A.1222-23; A.238-43, 260-62, 310.) The crucible-repair welder works in an enclosed booth set apart from surrounding operators, rarely leaves his work area, and has only limited interaction with other employees. (A.1223; A.422, 428.)

All employees use the same lunch and break rooms and are invited to occasional company social events. (A.1223-24, 1226; A.99-100.) And they all attend quarterly “coffee talks” held by their production center’s general manager, which involve little employee interaction. Employees are discouraged from talking during those events, aside from a very brief question-and-answer period following

the main presentation. (A.1224; A.254-58, 268-69, 323-24.) All production employees may serve, if elected, on employee-management committees, including the grievance and policy-review committees. (A.1225.)

D. Unit Welders Have Higher Wages than Most Excluded Employees, and Other Distinct Terms and Conditions of Employment

PCC pays all employees according to the same wage scale. The scale includes pay grades 5-20 (there is no 17), with hourly rates ranging from \$14.21 to \$38.85. (A.1230; A.222-25, 865.) Unit welders are all paid on the higher end of that range, earning over \$30 per hour. Rework welders are paid at grade 15, rework specialists at grade 16, and the crucible-repair welder at grade 18. (A.1230; A.215-18, 227, 243, 270, 293, 311, 327, 351); *compare* A.125, 461 (wax classifications paid at grade 7); A.369, 375, 497, 527 (grinders at grade 9); A.477 (radiographers at grade 10); A.481, 504 (inspectors at grade 11.) Only a small number of excluded classifications are paid at grade 15 or higher, including some maintenance positions, such as millwrights, electricians, and other highly skilled employees. (A.1230; A.227-28.) All production employees are eligible for quarterly bonuses based on their center's performance; receive the same annual market-based wage adjustments, a percentage of the employee's salary; and receive the same health and retirement benefits. (A.1230; A.105-09.)

To perform their jobs, unit welders use specialized tools, including tig torches, grinders, air nozzles, and welding lenses. Certain inspector classifications may occasionally use some of the same tools. The only other employees who use the same style of grinder are those in grinder classifications, who also use additional grinding tools welders do not use. No excluded employees use tig torches. (A.1231; A.283, 298-99, 336.)

PCC does not have a work uniform, but all production employees must wear steel-toed shoes and safety glasses. Some unit welders must don additional protective equipment for certain tasks, such as a screened hood while using a welding arc. All rework welders wear face shields while welding; some grinders use face shields when cutting discs. Some grinders wear shop coats or aprons to block dust; welders do not use those items. The crucible-repair welder wears a respirator, arc mask, lab coat, leather gloves, and ear plugs. (A.1232; A.100, 422, 428.)

All production employees use the same barcode to clock in at the start of their shifts, and are subject to the same employee handbook, and safety, attendance, and leave policies. (A.1229; A.54, 99-100.) PCC uses the same forms (with the same broad categories) and process to appraise all employees. (A.1229; A.55, 64.) Most production employees work on one of three shifts. (A.1231.)

II. THE REPRESENTATION PROCEEDING

Acting on the Union's election petition, the Regional Director found, after an evidentiary hearing, that the petitioned-for welders unit was appropriate pursuant to the Board's then-controlling standard in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934 (2011) ("*Specialty Healthcare*"), enforced *sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and directed an election. (A.973-74.) PCC requested that the Board review the Regional Director's decision and stay the election pending the Board's decision. The Board denied the stay, and held an election on September 22, 2017, which the Union won by a vote of 54-38. (A.1213.) On October 2, the Regional Director certified the Union as the exclusive collective-bargaining representative of the unit employees. (A.1213.)

On December 15, 2017, the Board issued an order granting review of the Regional Director's decision and overturning *Specialty Healthcare*. *PCC I*, 365 NLRB No. 160 (2017) (A.1085). The Board remanded the case to the Regional Director for reconsideration pursuant to the standard for assessing bargaining units set forth therein. *Id.* After holding another hearing allowing the parties to present additional evidence, the Regional Director issued a Supplemental Decision finding that the petitioned-for unit is an appropriate unit under the standard set forth in *PCC I*. (A.1212.) Specifically, the Regional Director found that the petitioned-for

welders shared a community of interest sufficiently distinct from excluded employees, and that the welders also constituted an appropriate unit of skilled craft workers. PCC requested Board review of the Supplemental Decision, which the Board denied on November 28, 2018. One two-member Board majority found the welders unit appropriate because they shared a sufficiently distinct community of interest, while a different two-member majority found the unit appropriate as a craft unit. (A.1309 n.1.)

III. THE UNFAIR-LABOR-PRACTICE PROCEEDING

On December 3, 2018, PCC admittedly refused the Union's requests for recognition, bargaining, and relevant information. (A.10; A.1318.) The Union filed an unfair-labor-practice charge, and the Board's General Counsel issued a complaint, alleging that PCC's refusals violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). PCC defended itself on the ground that it was testing the validity of the Union's certification as bargaining representative. (A.8.) On April 3, 2019, the Board's General Counsel filed a motion for summary judgment, and PCC reiterated its challenges to the Board's unit determination from the representation proceedings. (A.8.)

IV. THE BOARD'S CONCLUSIONS AND ORDER

On November 27, 2019, the Board (Members McFerran, Kaplan, and Emanuel) granted the General Counsel's motion for summary judgment and found that PCC violated Section 8(a)(5) and (1) of the Act by refusing to recognize, bargain with, or provide information to the Union. (A.8, 10.) More specifically, the Board found that all representation issues raised by PCC were or could have been litigated in the underlying representation proceeding. (A.8.) The Board also noted that PCC did not offer to adduce at a hearing any newly discovered and previously unavailable evidence or allege any special circumstances that would require reexamination of the representation proceedings. (A.8.) In the same Order, the Board rejected PCC's arguments that the overlapping majorities' analyses in the November 28, 2018 Order denying review of the Regional Director's Supplemental Decision were inconsistent, mutually exclusive, or contrary to Board precedent. (A.8 n.3.)

The Board's Order requires PCC to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (A.10.) Affirmatively, the Board's Order requires PCC to, on request, recognize and bargain with the Union as the exclusive representative of employees in the certified unit, to embody any understanding reached in a signed agreement,

to furnish the Union with the requested information, and to post a remedial notice.

(A.10-11.)

SUMMARY OF ARGUMENT

The Board found that PCC violated the Act by refusing to recognize, bargain with, and provide information to its employees' duly certified union. PCC admits those (ongoing) refusals but argues that they are justified because the represented unit of welders is inappropriate and, consequently, that the Union's certification is invalid. Because the Board acted well within its discretion in finding the welders unit appropriate and certifying the Union, PCC's conduct is unlawful.

The Act requires the Board "to decide in each case" whether the appropriate bargaining unit "shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). In fulfilling this duty, the Board must only select an appropriate unit, not necessarily the most appropriate unit. As long as the unit certified by the Board is appropriate—even if other units would also be appropriate—the certified unit is valid. Here, the Board found the welders unit appropriate both under its newly articulated *PCC I* "sufficiently distinct" community-of-interests standard and under its separate craft-unit standard. PCC failed to meet its heavy burden of proving that the unit is "truly inappropriate" under either analysis.

The Board acted within its discretion in approving the welders unit, and rejecting PCC's argument that only a wall-to-wall unit was appropriate, under the *PCC I* analysis. The Board explained that unit welders share a community of interest amongst themselves, based on several traditional factors, that is sufficiently distinct from that of excluded employees. Notably, the welders are the only employees who perform their primary job duty of specialized welding, which requires significant experience and training and specialized certification requirements, and they earn significantly higher wages than most excluded employees, with whom welders have limited contact and interchange. The Board found that those meaningfully distinct bargaining interests, tied to the welders' core daily functions and requisite qualifications, outweighed the functional integration of PCC's operations and the welders' shared departments and supervision with some excluded employees.

As the Board's detailed analysis demonstrates, there is no merit to PCC's arguments that the welders unit is a "fractured" or arbitrary grouping or that the Board did not correctly apply its *PCC I* standard. In particular, PCC is mistaken in claiming that the Board issued a "new" unit-determination test in *The Boeing Company*. That decision reiterates the analytical framework from *PCC I*, and is entirely consistent with the Board's analysis here.

The Board also acted within its discretion in finding the welders constitute an appropriate craft unit—an analysis that incorporates the community-of-interest-factors but also looks at two distinct factors, regarding formal training or apprenticeship and assignment of work along craft lines. The Board found the hallmarks of craft status are present here based on: the welders’ extensive, formal training, specialized skills and experience, and progression through promotions based on those characteristics rather than tenure; the assignment of welding work along craft lines, i.e., only to unit welders; little overlap of job duties with excluded employees; and higher pay. Contrary to PCC, the remaining craft factor, functional integration, does not outweigh those critical factors (and other community-of-interest factors) favoring the unit.

PCC’s other challenges to the craft-unit finding also fail. The Board was not inconsistent in relying on and distinguishing craft-severance precedent, which it clearly explained. And its consideration of the unit’s appropriateness under the craft-unit standard did not violate due process—PCC had adequate notice of, and indeed fully litigated, that issue, and suffered no prejudice. Contrary to PCC, the *PCC I* remand did not preclude a craft-unit analysis. And PCC identifies no relevant fact or factor under the craft-unit analysis as to which the parties did not present, or were prevented from presenting, evidence—nor does it proffer any evidence that might change the Board’s conclusion.

Finally, PCC’s claim that the Board failed to provide a reasoned explanation for its decision wrongfully cleaves the Board’s decision from the detailed analysis of the Regional Director’s decision that it adopts. Only by ignoring that foundation can PCC claim the Board provided an “inscrutable” or conclusory analysis, or blurred the lines between the community-of-interest and craft-unit analysis. The Regional Director’s careful, factor-by-factor account under both standards belies those claims. And, that only two of three Board members found each standard was met confirms that the Board viewed the two tests separately and reached two separate, but independently valid, rationales supporting its unit determination.

STANDARD OF REVIEW

The Supreme Court and this Court have recognized that “determining what constitutes an appropriate bargaining unit ‘involves of necessity a large measure of informed discretion.’” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Accordingly, the Court gives “great deference to the Board’s selection of bargaining units,” and reviews such determinations for abuse of discretion. *S. Power Co. v. NLRB*, 664 F.3d 946, 951 (D.C. Cir. 2012); *see Country Ford Trucks*, 229 F.3d at 1186 (affirming the Board because petitioner “fail[ed] to demonstrate that [the Board] abused its discretion in making the unit determination”). The

Court will uphold the Board's choice of bargaining unit unless the Board's decision "is arbitrary or not supported by substantial evidence in the record." *Country Ford Trucks*, 229 F.3d at 1189; accord *Blue Man Vegas LLC v. NLRB*, 529 F.3d 417, 420 (D.C. Cir. 2008); see also 29 U.S.C. § 160(e). Under the substantial-evidence standard, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In reviewing the record, this Court will thus accord "substantial deference to inferences drawn from the facts," as well as to "the reasoned exercise of [the Board's] expert judgment." *Country Ford Trucks*, 229 F.3d at 1189 (quoting *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991)).

ARGUMENT

An employer violates Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5), (1), when it refuses to recognize, bargain with, or provide relevant requested information to the duly certified bargaining representative of its employees. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967); *Beverly Enters.-Mass., Inc. v. NLRB*, 165 F.3d 960, 961-62 (D.C. Cir. 1999). PCC has admittedly refused to recognize, bargain with, or provide information to the Union in order to contest the Board's certification of the Union as the exclusive representative of its

welders. Thus, PCC has violated the Act unless it demonstrates that the Board abused its discretion in certifying the Union. *Id.*

As detailed below, the Board acted well within its discretion in determining that the welders unit is appropriate both under the traditional community-of-interest analysis described in *PCC I* and under the related analysis applicable to craft units of specialized, skilled employees. In challenging those determinations, PCC claims that the smallest appropriate unit is a wall-to-wall unit of its 2,565 production and maintenance employees. Specifically, PCC contends that the Board erred in applying both standards for assessing unit appropriateness, violated due process in applying the craft-unit standard at all, and failed to provide a reasoned explanation of its rationale sufficient for court review. As shown below, PCC's arguments are wholly without merit.

BECAUSE THE BOARD ACTED WITHIN ITS DISCRETION IN FINDING THE WELDERS UNIT APPROPRIATE, PCC'S ADMITTED REFUSAL TO RECOGNIZE, BARGAIN WITH, AND PROVIDE INFORMATION TO THE UNION VIOLATES SECTION 8(a)(5) AND (1) OF THE ACT

A. The Board May Approve a Bargaining Unit Based Solely on Traditional Community-of-Interest Factors or Considering Additional Craft-Unit Factors

Section 9(a) of the Act provides for the selection of an exclusive bargaining representative by the majority of employees in a bargaining unit "appropriate for such purposes." 29 U.S.C. § 159(a). Section 9(b) vests in the Board the authority to "decide in each case whether, in order to assure to employees the fullest freedom

in exercising the rights guaranteed by th[e] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b); *see PCC I*, slip op. at 3, 6, 8 nn.40 & 43, 12. Congress thus granted the Board broad discretion in order to ensure “flexibility in shaping the [bargaining] unit to the particular case.” *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (internal quotation and citation omitted). And courts have long held that the Board’s task is to determine simply whether the proposed grouping constitutes “an appropriate unit,” *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015) (internal quotations omitted)—not “necessarily *the* single most appropriate unit,” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991). *Accord PCC I*, slip op. at 3 n.7; *The Boeing Co.*, 2019 WL 4297642, 368 NLRB No. 67 (2019), slip op. at 3.

When, as here, an employer asserts that a petitioned-for unit must include additional employees, the Board will determine—pursuant to the standard announced in the representation proceedings in this case—“whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *PCC I*, slip op. at 7. To assess community of interest, the Board considers its traditional factors, such as whether employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work

(including job overlap between classifications); are functionally integrated with other employees; have interchange and frequent contact with other employees; have distinct terms and conditions of employment; and separate supervision. *PCC I*, slip op. at 11 (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). *Accord Boeing Co.*, 368 NLRB No. 67, slip op. at 3. No one factor is dispositive. *Id.*

As the Board clarified in *Boeing*, the *PCC I* analysis logically entails two complimentary inquiries. The Board will examine whether the employees in the proposed unit share a community of interest amongst themselves. *PCC I*, slip op. at 11. *Accord Boeing*, 368 NLRB No. 67, slip op. at 3. And it will also compare them to the excluded employees to determine whether the unit employees' shared interests are "sufficiently distinct" from those of excluded employees to warrant a separate unit. *PCC I*, slip op. at 7, 11. *Accord Boeing*, 368 NLRB No. 67, slip op. at 3. Stated another way, the Board analyzes whether "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *PCC I*, slip op. at 11 (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). *Accord Boeing*, 368 NLRB No. 67, slip op. at 3. *See also Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (noting that the Board's analysis considers whether petitioned-for unit shares community of interest "in distinction from other

employees”).² If applicable, the Board will also consider any established guidelines for appropriate unit configurations in specific industries. *PCC I*, slip op. at 11. *Accord Boeing*, 368 NLRB No. 67, slip op. at 3.

Moreover, in cases involving skilled, specialized employees, as here, a petitioned-for unit may also qualify as appropriate under the related craft-unit standard. A craft unit is defined as:

[O]ne consisting of a distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment.

Burns & Roe Servs. Corp., 313 NLRB 1307, 1308 (1994). In non-construction-industry cases like this one, a craft-unit analysis considers “all factors present in the case,” incorporating the traditional community-of-interest factors just described along with other craft-unit-specific factors. *MGM Mirage d/b/a The Mirage Casino-Hotel*, 338 NLRB 529, 532 (2002) (internal quotations and citation

² In *PCC I*, the Board overruled *Specialty Healthcare*, *supra*, and “return[ed] to the traditional community-of-interest standard,” under which it “evaluate[s] the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an ‘overwhelming’ community of interests.” *PCC I*, slip. op. at 7. As the Board explained, *PCC I* does not conflict with *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95 (D.C. Cir. 2017), or *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), because both of those cases relied on the traditional community-of-interest factors and assessed the petitioned-for unit’s “distinction from other employees.” *PCC I*, slip op. at 9 n.44.

omitted). Specifically, in determining whether a group of employees constitutes an appropriate “craft unit,” 29 U.S.C. § 159(b), the Board looks at:

[1] Whether the petitioned-for employees participate in a formal training or apprenticeship program; [2] whether the work is functionally integrated with the work of the excluded employees; [3] whether the duties of the petitioned-for employees overlap with the duties of the excluded employees; [4] whether the employer assigns work according to need rather than on craft or jurisdictional lines; and [5] whether the petitioned-for employees share common interests with other employees, including wages, benefits, and cross-training.

Burns, 313 NLRB at 1308; *MGM*, 338 NLRB at 532. Outside the construction industry, the second, third, and fifth factors overlap with the broader community-of-interest inquiry.

Because the Board’s unit determinations involve “a large measure of informed discretion,” are entitled to deference, and are “rarely to be disturbed,” the Court will uphold them unless they are “arbitrary or not supported by substantial evidence.” *Country Ford Trucks, Inc*, 229 F.3d 1189 (internal quotation and citation omitted). Critically, it is insufficient for PCC, as the objecting party, to demonstrate that a larger unit is also appropriate—or even more appropriate—than the petitioned-for unit; rather, to invalidate the Union’s certification, PCC must show that the chosen unit is “truly inappropriate.” *Id.*; *Blue Man Vegas*, 529 F.3d at 421-22.

B. The Unit Welders' Interests Are Sufficiently Distinct from Those of Excluded Employees To Constitute an Appropriate Unit

The Board reasonably found, based on substantial evidence in the record, both that employees in the welders unit share a community of interest amongst themselves, and that their shared interests are sufficiently distinct from the interests of excluded employees. No established industry standard compels rejection of the unit nor dictates that PCC's preferred wall-to-wall unit is the smallest appropriate unit.

1. Unit welders share a community of interest

As the Board explained, several traditional factors support its finding that the welders share a community of interest. (A.1240-48.)

Job duties. All unit welders' job duties focus "almost exclusively" on welding metals and metal alloys using advanced welding techniques specific to the materials they weld. Rework welders and rework specialists weld on the product itself, and the crucible-repair welder welds on the copper crucible. (A.1242; *see* p.6, above.) That similarity in job functions among all unit welders supports finding they have a community of interest. *See, e.g., United Operations, Inc.*, 338 NLRB at 124-25 (common primary function of HVAC technicians demonstrated community of interest); *accord Rhino Northwest*, 867 F.3d at 98 (similarity of job function may demonstrate community of interest).

Skills and Qualifications. All unit welders also have distinct training and certifications that are tailored to the advanced welding techniques required to perform their job duties. They must have specific welding training and experience at the time of hire, pass a preliminary welding test, go through extensive welding training upon hire, receive welding training specific to the metals or alloys with which they will be working, and progress through pay steps based on achieving additional welding skills and qualifications. (A.1240; *see* pp.7-8, above.) Rework specialists must have already advanced through the pay steps for rework welders and be able perform more advanced welding skills. (A.1240; *see* p.7, above.)

As the Board acknowledged, unit welders are so specialized in their certifications that they cannot substitute for one another unless they hold identical certifications (e.g., for welding the same metal or alloy). (A.1240; *see* p.8, above.) However, their required skills and certifications overlap right up to those specific certifications, which build on other, shared certifications. They can therefore obtain the necessary final certification for a new metal or alloy relatively efficiently by adding just one more training and certification. (A.1240.) The welders' overall similarity in skills and qualifications supports finding they share a community of interest. *See, e.g., Home Depot USA*, 331 NLRB 1289, 1289, 1291 (2000) (petitioned-for drivers' shared special qualifications and licensing requirements demonstrated community of interest).

Contact and interchange.³ By design, there is contact among unit welders, because rework specialists train rework welders. (A.1219.) Additional contacts may occur, because those two welder classifications typically work in adjacent welding booths or welding areas. (A.1222, 1243.) Further, rework welders and rework specialists may temporarily interchange if they have the specialized certifications necessary for the advanced welding in question. (A.1244.) Neither group ever performs the functions of the sole crucible repair welder, who has little contact with other employees. (A.1243-44.) Moreover, there is significant permanent interchange among unit welders. All rework specialists previously worked as rework welders. (A.1227, 1240.) And, further demonstrating the cohesive nature of the petitioned-for-unit, the crucible-repair welder, who was set to retire at the time of the hearing, was being replaced by a rework welder. (A.1244.) Thus, the welders' contact and interchange amongst themselves supports finding they share a community of interest (A.1243, 1244).

Terms and conditions of employment. The unit welders are, like all PCC employees, subject to the same work rules and policies, work hours, benefits, and schedules. (A.1245.) The welders also share similar wages, as they are all paid wages in the top third of PCC's wage scale. (A.1245; *see* p.11, above.) Moreover,

³ Interchange refers to both temporary and permanent transfers between job classifications. *See United Operations*, 338 NLRB at 125.

because of their specialized job duties, unit welders all use similar specialized tools and wear the same protective equipment for particular tasks—except for the crucible-repair welder, whose job requires additional protective gear. (A.1245; *see* p.12, above.) The unit welders’ similarly high wages and otherwise nearly uniform terms and conditions of employment further support the Board’s finding of a community-of-interest among unit employees. *See, e.g., United Operations, Inc.*, 338 NLRB at 125 (unit employees share similar wages, benefits, and applicable employer policies).

Functional integration, departmental organization, and supervision.⁴

As the Board found, PCC’s manufacturing process involves a series of highly specialized, intertwined steps from start to finish, and unit welders’ jobs thus “must be viewed as pieces of the whole production process.” (A.1243.) Moreover, because departments are organized around the type of metal being cast in that integrated process, there is no separate welding department—unit welders are spread out among several departments and their unit therefore does not correspond to any administrative grouping. (A.1214-15, 1240.) For the same reason, the unit welders do not share common supervision, but report directly to a variety of

⁴ Functional integration refers to work that constitutes an integral element of an employer’s production process, such as when employees work on different phases of the same product or service as a group, or the employer’s “work flow” involves all such employees. (A.1242.)

supervisors who also supervise some excluded employees. (A.1246.)

Accordingly, the Board found that functional integration, departmental organization, and supervision did not support finding a community of interest among unit welders. (A.1240, 1243, 1246.)

In sum, as the Board described, unit welders share many common interests relevant to bargaining, particularly their very similar, specialized job function and the substantial training, skills, and certifications required to obtain and perform their jobs, as well as their top wages. The Board reasonably found that those common factors, which define most aspects of their daily work life, outweigh the factors separating them, satisfying the *PCC I* (and *Boeing*) requirement that the unit welders share a community of interest amongst themselves. (A.1246-47.)

And because the several commonalities the Board identified between unit welders—particularly their specialized skills, training, and duties—provide rational bases for grouping them together, there is no merit to PCC’s assertion (Br.30) that the welders make up an improper, “fractured” unit, i.e., a combination of employees “that [is] too narrow in scope or that ha[s] no rational basis.” *Seaboard Marine*, 327 NLRB 556, 556 (1999).

2. Unit welders’ interests are distinct from those of excluded employees

Broadening its examination to the rest of PCC’s employees, the Board also found that the unit welders’ shared interests are sufficiently distinct from those of

the excluded employees to warrant a separate welders unit, completing the *PCC I* (and *Boeing*) community-of-interest analysis. (A.1212, 1246-47.) *See PCC I*, slip op. at 7, 11; *Boeing*, slip op. at 3-4.

Job duties. It is undisputed that the welders and the excluded employees have distinct duties. The welders spend the vast bulk of their time using advanced techniques to weld metal onto castings, or on the copper crucible. They are the only employees that perform those duties. (A.1242; *see* pp.6-7, above.) A limited number of excluded classifications also do some welding, broadly defined. However, no other classifications weld as such a significant part of their overall duties, perform specialized metal welding like the unit welders, or weld metal on the product or the copper crucible.⁵ (A.1242; *see* pp.6-7, above.) Finally, the vast majority of excluded employees perform no welding at all, let alone on metal, and no excluded employees have the necessary certifications to perform the work of petitioned-for welders. (A.1242; *see* pp.6-7, 9, above.) Those distinct job duties support finding that a separate welders' unit was appropriate. *See Rhino Northwest*, 867 F.3d at 102 (distinct duties supported finding that separate unit was appropriate); *accord NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1372-74 (11th Cir. 2012); *Western Lodging*, 287 NLRB 1291, 1292 (1988).

⁵ PCC essentially concedes this, stating “[t]he certified unit . . . comprises all welders employed by PCC.” (Br.10 n.1.)

Skills and Qualifications. As shown (p.27), welders indisputably have distinct and specialized training and certification requirements that are tailored to the advanced welding techniques required to perform their unique job duties. They are the only employees who must have welding certifications. (A.1216-18, 1240-41; *see* pp.6-8, above.) More specifically, unit welders—and only unit welders—must have specific welding training and experience at the time of hire, go through extensive additional welding training upon hire, obtain and maintain welding certifications specific to the alloys that their particular job assignments require, and progress through pay steps based on achieving additional welding skills and qualifications. (A.1216-18, 1240-41; *see* pp.6-8, above.) Some other classifications require certifications and specialized training, but not in welding. (A.1218, 1240-41; *see* p.8, above.) Many classifications, such as grinders, require no certification at all. The welders’ distinct training requirements further support finding they have sufficiently distinct interests from excluded employees to constitute an appropriate, separate unit. *See Rhino Northwest*, 867 F.3d at 102 (distinct training requirements supported separate unit); *accord Home Depot USA*, 331 NLRB at 1291 (special qualifications and licensing supported separate unit).

Contact and interchange. In part because the welders and excluded employees have such different job functions and qualifications, there is little contact and interchange between them, which further shows the welders’ distinct

community-of-interest. (A.1241-42, 1243-44.) PCC touts (Br.41) the welders' supposed frequent, even "daily," contact with other employees. However, it fails to address the evidence supporting the Board's findings (*see* A.1222-24, 1243; p.10, above) that such contact is in fact limited, brief, and only ever involves just a few of the over-100 classifications that PCC claims should be included in a wall-to-wall unit. For example, welders occasionally interact with grinders during a small percentage of their work time, but they rarely see employees from waxing or many other classifications. Moreover, there is little evidence substantiating PCC's vague claim that welders "share roles" on "tiger teams" (Br.41) that work on process improvements. It is, for example, unclear how many welders may do so, how frequently, or whether the resulting contacts with excluded employees are sustained or significant. Nor, as with other claimed commonalities between unit welders and excluded employees, does it appear that the majority of excluded classifications participate on such teams. (A.1221; A.243, 267, 291, 344.)

Further, as to temporary interchange, excluded employees indisputably do not and cannot perform rework-welding or crucible-repair duties because they lack the necessary training and certification. (A.1244; *see* p.9, above.) PCC, moreover, overstates its case in claiming (Br.42, 57) that "welders . . . perform the duties of excluded employees," including "commonly" or "on a near daily basis" performing grinding work. Rather, as the Board found, welders occasionally perform tasks

from a limited number of other job classifications, when their welding work runs low, as a small percentage of their duties. (A.1244; *see* p.9, above.) The non-welding work is usually grinding work, lower-skilled work, or duties that the particular welder had performed in a prior position. (A.1244; *see* p.9, above.) Those findings are supported by the rework-specialist testimony cited by PCC, which states that, about 10 months prior, he had done a day or so of non-welding work when his welding work ran low, as an alternative to being sent home. (Br.57; A.344-46.)

The evidence of permanent transfers into and out of welding classifications is similarly limited. There are few substantiated examples, and they are dated and generally go only in one direction—into the unit. While many petitioned-for welders previously held other positions at PCC, only 8 employees have transferred into a unit welding position since 2010—a small number in a unit of about 100 employees and a workplace of well over 2000. (A.1244; *see* p.9, above.) There is little or no evidence of welding employees transferring into non-welding positions, except to avoid layoff, which makes sense because most other classifications pay far less. (A.1244; *see* pp.9, 11, above.) Such limited contact and (and one-way) interchange between welders and excluded employees supports the Board’s finding that the welders appropriately constitute a separate unit. *See Elec. Data Sys Corp. v. NLRB*, 938 F.2d 570, 574 (5th Cir. 1991) (“sporadic” contact and interchange

with other employees may support separate unit); *Inverrary Country Club, Inc.*, 251 NLRB 1143, 1145 (1980) (same); *accord Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). *See Courier Dispatch Grp.*, 311 NLRB 728, 728, 732 (1993) (limited and ambiguous evidence of employee interchange does not compel conclusion “that the separate identity of the petitioned-for unit has been negated”).

Terms and conditions of employment. Welders share company policies, breakrooms, and other terms and conditions with excluded employees. (A.1245; *see pp.11-12, above.*) However, the Board found that those “overall similarities” between the two groups’ terms and conditions of employment were offset by welders earning a significantly higher hourly wage (approximately \$10 higher on average) than the vast bulk of excluded employees. (A.1245; *see p.11, above.*) Moreover, the Board noted that unit welders use specialized tools, such as tig torches, and wear protective equipment not used by other classifications. (A.1245; *see p.12, above.*) The welders’ higher wages and use of distinct tools and equipment further supports finding that they share a sufficiently distinct community of interest from excluded employees to warrant their inclusion in a separate unit. *See Rhino Northwest*, 867 F.3d at 102-03 (significant difference in applicable wage range and use of different equipment supports appropriateness of separate unit); *United Operations*, 338 NLRB at 125 (2002) (hourly wage

differential of \$5 sufficient to establish different terms and conditions of employment); *accord Hilton Hotel Corp.*, 287 NLRB at 359.

It is, therefore, misleading for PCC to claim (Br.37-38) that welders share “every” term and condition of employment, including “wage scale,” with “all” other job classifications. As just shown, welders are paid at the higher end of that scale, at hourly rates higher than those of all but a small percentage of excluded employees.⁶ Welders also use some different equipment than excluded employees, and, as shown, are subject to different training and certification requirements in order to perform their distinct welding functions, which no other classifications perform. Those important differences—along with the limited interchange and contact between the two groups—support the Board’s finding that the welders’ interests are sufficiently distinct from those of excluded employees to warrant their inclusion in a separate unit.

⁶ PCC wrongly claims (Br.57) that finding the welders have higher hourly wages than all but a few other classifications contradicts the Board’s finding in *PCC I* that all employees “are paid on the same wage scale.” *PCC I*, slip op. at 2. This ignores the fact that welders are paid at the higher end of that wage scale. And PCC highlights the welders’ higher wages when it points out (Br.40) that Pay Grade 18 is shared by the crucible-repair welder and seven other job classifications—a very small percentage of the more than 100 classifications of excluded employees. Notably, PCC fails to identify those other seven classifications much less demonstrate that they share any other characteristics, or interact at all, with the crucible-repair welder or other unit employees.

Functional integration, departmental organization, and supervision

The Board acknowledged that the factors of departmental organization, functional integration, and supervision weigh against finding that welders constitute an appropriate, separate unit. (A.1240, 1243, 1246.) But as the Board explained (A.1240, 1243, 1246-47), those considerations, while important, are not dispositive, as PCC wrongly assumes (Br.32-33, 37, 40). *See Boeing*, 368 NLRB No. 67, slip op. at 6 (functional integration is “only one factor in the community-of-interest analysis”). Rather, the significance of such functional and administrative integration is diminished by distinctions in job function and training, wages, and limited contact and interchange between the two groups. (A.1240-45, 1246.) *See Home Depot USA*, 331 NLRB at 1291 (operational integration offset where petitioned-for employees had distinct job functions, special qualifications and licensing, and lacked substantial interchange with excluded employees); *accord Contemporary Cars, Inc.*, 667 F.3d at 1372-74; *Blue Man Vegas*, 529 F.3d at 426. PCC counters (Br.40) that “supervision—an important part of any employee’s daily life—is shared.” As the Board explained, however, that shared supervision carries less weight here than in some cases

because welders consult those shared supervisors only on administrative issues.

(A.1246.)

In sum, having compared the unit welders' interests to those of the excluded employees, the Board found that the differences between the two groups outweighed the commonalities. (A.1246). Specifically, as just described, it discounted the two groups' common interests stemming from PCC's functional integration based on the many important distinct interests and minimal contact and interchange between the groups. (A.1240-46.) The Board also found that although they shared many basic terms and conditions of employment, like benefits and company policies, those similarities were outweighed by the "significant" difference in actual earned wages between the welders and all but a few excluded classifications, as well as the welders' use of different tools and equipment than most. (A.1244-45.) And the Board discounted the common administrative supervision of welders and some excluded employees because the welders discuss the welding issues central to their job responsibilities and daily work experiences not with their supervisors but with their leads. (A.1246.)

In light of those findings, there is no merit to PCC's assertion that the Board failed to discuss "any" of the traditional community-of interest-factors (Br.30) or to identify any distinct issues the welders "might seek to bargain over" that diverge from the bargaining concerns of the vast majority of excluded employees (Br.42).

In other words, the Board’s detailed discussion and rationale plainly demonstrates that the “distinctions sufficiently ‘differentiate the employment interests’” of those welding employees “such that [the welders] may form their own bargaining unit.” *Rhino Northwest*, 867 F.3d at 103 (quoting *Blue Man Vegas*, 529 F.3d at 424).

C. The Board’s Decision Is Consistent with its Clarification in *The Boeing Company* of the Standard Articulated in *PCC I*

PCC’s claim (Br.35-37) that the Court should remand the case for the Board to reconsider the unit under the Board’s decision in *The Boeing Company*, 368 NLRB No. 67 (2019), misinterprets that decision. It does not, as PCC asserts, impose a distinct “new” standard or “an intervening change to the applicable legal standard” set forth in *PCC I*. (Br.35-37). Rather, as PCC otherwise acknowledges (Br.35), the Board in *Boeing* “clarified” the three-step analysis under *PCC I* for determining whether a petitioned-for unit is an appropriate unit. *Boeing*, slip op. at 3. As discussed (pp.22-24), both *PCC I* and *Boeing* and require the Board to address: (1) whether members of the petitioned-for unit share a community of interest with each other; (2) whether employees excluded from the unit have meaningfully distinct interest in the context of collective bargaining that outweigh similarities with unit members; and (3) whether any guidelines the Board has established for appropriate unit configurations in specific industries are applicable. The two cases are in accord and describe the same unit-determination principles. While *Boeing*, slip op. at 3-4, provides further guidance as to the analysis to be

conducted in applying step two of *PCC I*, it outright rejects the idea that, in so doing, it “depart[s]” from any aspect of the unit-determination standard set forth in *PCC I. Boeing*, slip op. at 6.⁷

In any event, the Board here fully engaged in the unit analysis called for by *Boeing* and *PCC I*. PCC does not seriously claim the Board skipped the first step of the analysis, namely, assessing whether the welders share a community of interest with each other. Instead, it repeats its conclusory assertion that the welders “do not share a community of interest” because they are spread among multiple departments and supervisors. (Br.37.) That claim fails because, as discussed (pp.26-30), it ignores the many significant interests the welders share in terms of distinct job function, training, qualifications, and certain important terms and conditions of employment.

Nor did the Board skip *Boeing/PCC I* step 2, which requires balancing the similarities and differences between included and excluded employees. Contrary to PCC and amici, the Board did not “merely record[] similarities and differences between employees,” without explaining their relative weight or significance. (Br.39, citation omitted; ABr.15). Rather, as shown (p.38), the Board

⁷ That situation is unlike in *PCC I* (Br.36-37), where the Board, after having overturned the *Specialty Healthcare* standard applied by the Regional Director, remanded for him to reconsider the petitioned-for unit under the new standard.

comparatively weighed and analyzed the employees' interests, and found that unit welders and excluded employees have meaningfully distinct bargaining interests—tied to the welders' specialized core daily functions and requisite qualifications—which outweigh their common interests.

PCC also fails to support—or even fully explain—its claim that the third step of *Boeing* “forecloses” certification of a bargaining unit of welders. (Br.42-43.) That step requires the Board to consider any guidelines the Board has established for appropriate unit configurations in specific industries. *Boeing*, slip op. at 3-4. PCC does not seriously argue that the Board contravened any announced, industry-specific standard discussed in *Boeing*. To the extent it means to suggest that a wall-to-wall unit is such an industry-specific standard in highly integrated manufacturing, that is not the case. *See Boeing*, slip op. at 6 (no presumption favoring plantwide units at integrated manufacturing facilities). And PCC's invocation of the cases it later cites to contest the Board's separate finding that the welders also constituted an appropriate “craft” unit is inapposite. *Boeing* does not speak to that issue. (Br.42-43.)

Finally, PCC's reliance (Br.34, 39 n.5) on *Boeing* as a factual analogy is also misplaced. In *Boeing*, the unit employees only needed a particular license for a few days a year, such that the requirement did not overcome their community of interest with excluded employees, slip. op. at 5. Here, in contrast, the petitioned-

for welders always need their specialized welding certifications to work as welders. And, unlike *Boeing*, where included and excluded employees shared similar job functions and overlap within a functionally integrated operation, slip op. at 5 (*see* Br.41 n.6), the opposite is true here where no excluded employee can perform any unit employee's primary welding functions.

For similar reasons, this case is also unlike others cited by PCC, where the included and excluded employees had "interchangeable job functions" within a "highly integrated" process, *A.C. Pavement Striping Co.*, 296 NLRB 206, 210 (1989) (Br.31); or the "same skills, qualifications, and certifications" and similar job functions. *The Boeing Company*, 337 NLRB 152, 153 (2001) (Br.31, 34); *see also Seaboard Marine*, 327 NLRB 556, 556 (1999) (Br.30-31) (included and excluded employees performed similar, unskilled tasks within employer's functionally integrated operations); *Avon Prods.*, 250 NLRB 1479, 1483-84 (1980) (Br.31) (similar skills and job functions); *Chromalloy Photographic Indus.*, 234 NLRB 1046, 1047 (1978) (Br.31) (similar skills and overlapping job functions); *Harrah's Club*, 187 NLRB 810, 812-13 (1971) (Br.38) (similar job functions). Nor is this a case involving "frequent work contacts and temporary interchange" between included and excluded employees. *Texas Color Printers, Inc.*, 210 NLRB 30, 31 (1974) (Br.38); *see also Publix Super Markets, Inc.*, 343 NLRB 1023, 1025-

27 (2004) (Br.30) (2004) (significant interchange, as well as similar skills and overlapping functions).

More fundamentally, PCC's insistence that the "only appropriate bargaining unit" would be a "wall-to-wall" unit of all 2,565 of its production and maintenance employees, spread across over 100 job classifications (Br.4, 32-33, 35, 40), disregards that the Act requires only *an* appropriate bargaining unit. *See Am. Hosp. Ass'n*, 499 U.S. at 610. Therefore, the only question before the Court is whether the unit certified by the Board is appropriate, not whether it is the most or only appropriate unit. *Dodge of Naperville*, 796 F.3d at 38. In other words, even if PCC could show that a wall-to-wall unit would be preferable, "[m]ultiple potential bargaining units may be appropriate" and the Board is not required to reject a petitioned-for unit merely because "a larger unit is *more* appropriate." *PCC I*, slip op. at 12. *Accord Boeing*, slip op. at 3 (proposed unit "need only be *an* appropriate unit") (emphasis in original).⁸

⁸ This Court also need not be detained by PCC's (Br.34, 36) and amici's (ABr.6, 9-11) dire and unsupported prediction that enforcing the Board's unit determination will lead to disruptions in bargaining and frequent strikes or prevent necessary employee "collaboration." The Board has long approved less than wall-to-wall units in this and other industries without the grave effects prophesied here. *See, e.g. Elec. Data Sys.*, 938 F.2d at 572-74 (approving separate unit of 42 print shop employees at data processing company); *United Operations*, 338 NLRB at 125-26 (approving separate unit of HVAC technicians at building maintenance company); *see also Hughes Aircraft, infra* (approving separate welders unit at aircraft manufacturing plant), and cases cited at p.46.

D. The Welders Unit Is Appropriate as a Craft Unit

The Board acted within its discretion in finding that PCC's welders also constitute a craft unit of highly skilled, highly trained employees who work along craft or jurisdictional lines. (A.1212, 1239.) The Board's findings are well supported by substantial evidence and precedent, contrary to PCC's arguments. And PCC's claim that application of the craft-unit standard to assess the welders unit violates due process has no merit.

1. The welders have the specialized skills, functions, training, experience, and distinct interests of craft employees

As described above (pp.24-25), the Board considers "all factors present in the case" when assessing a craft unit outside the construction industry, including the traditional community-of-interests factors outlined in *PCC I*, some of which overlap with craft-unit factors. *MGM*, 338 NLRB at 532. Two factors are unique to the craft-unit inquiry: whether the unit employees participate in a formal training or apprenticeship program, and whether the employer assigns work to the unit employees based on craft or jurisdictional lines. But the analysis also entails consideration of the common interests between the unit and excluded employees, the functional integration of the unit employees' work with excluded employees' work, and whether their duties overlap, *Burns*, 313 NLRB at 1308—which are also community-of-interest considerations, *PCC I*, slip op. at 11. Here, the Board considered them all and found a welders craft unit appropriate.

First, as the Board found, the training/apprenticeship factor favors finding an appropriate craft unit. (A.1241.) PCC’s welders typically have extensive, specialized experience, training, and certifications prior to hire. (A.1216-18, 1240; *see* pp.7-8, 28, 33, above.) Upon hire, the welders must undergo further specialized, in-house training and obtain certifications for the particular metals they will weld. (A.1216-18, 1240; *see* pp.7-8, 27, 32, above.) They must also maintain their specialized metal certifications throughout their employment, which requires regular, stringent renewal procedures every 2-3 years. (A.1216-18, 1240, 1309 n.1; *see* pp.7-8, above.) And, finally, they advance through PCC’s wage progression based on qualifications and experience rather than just tenure—a similar process to formal journeyman training. (A.1240-41.) No other classifications require that applicants have, or employees maintain or obtain, such welding experience, training, or certifications. (A.1216-18, 1241; *see* pp.8, 33, above.)

Contrary to PCC’s suggestion (Br.55), a formal apprenticeship program is not required as a matter of law for craft-unit status. Rather, as the Board explained, it is sufficient that the employer requires extensive experience at the time of hire—a criterion clearly met here. (A.1241.) *See Burns*, 313 NLRB at 1308 (lack of formal apprenticeship program does not “negate separate craft status” where employer requires that employees have “extensive” specialized

experience); accord *MGM Mirage*, 338 NLRB at 532; *Anheuser-Busch, Inc.*, 170 NLRB 46, 47 (1968); *Mallinckrodt Chem. Works*, 162 NLRB 387, 389-90 n.3 (1966); *Hughes Aircraft Co.*, 117 NLRB 98, 100-02 (1957). Accordingly, the Board has approved craft units of welders in the absence of formal apprenticeship programs where, as here, the employer seeks to hire welders with extensive experience, and the welders use advanced skills to weld specialized alloys and must periodically renew their welding certifications. See, e.g., *Hughes Aircraft*, 117 NLRB at 100-02; *Aerojet Gen. Corp.*, 129 NLRB 1492, 1493 (1961); *Lockheed Aircraft Corp.*, 121 NLRB 1541, 1542 (1958); *Arrowhead Prods*, 120 NLRB 675, 675-76 & n.3 (1958).⁹

Factually, the limited testimony cited by PCC (Br.55, A.154, 177-78) does not compel the conclusion that PCC does not require that welding applicants have specialized experience, training, or certification prior to hire.¹⁰ Rather, the Board's

⁹ PCC does not even argue that the welders' required skills and qualifications are not advanced or specialized enough to qualify for craft status. In any event, the Board noted (A.1241, 1309 n.1) that it has recognized craft units for welders working on aerospace parts like some of PCC's welders, see, e.g., *Hughes Aircraft* and *Lockheed Aircraft, supra*, and there is no suggestion in the record that the welders in PCC's non-aerospace departments have lesser skills or qualifications.

¹⁰ Indeed, the cited testimony does not even specify how many welders were supposedly hired without prior welding experience or certifications, or when, or into which classifications. It does, however, confirm that PCC provides welders with specialized training after hire, and that welders cannot perform their jobs without training and certification for the particular alloys they weld.

finding that such pre-hire requirements exist is supported by extensive evidence—including the testimony of the welders themselves, and PCC’s job descriptions for welder positions. (A.1216-18, 1241; A.176, 207, 239-40, 285, 307-08, 319, 473, 507.) And even setting aside pre-hire requirements, PCC does not deny the other key aspects of welders’ craft specialization, that its welders must have and actively maintain extensive experience and specialized training and certifications in order to do their jobs, and are promoted according to those characteristics.

Second, as the Board found, PCC strictly “assigns rework welding and crucible welding according to craft or jurisdictional lines” rather than need, further supporting a welders craft unit under the jurisdictional-assignment factor.

(A.1244.) *See Burns*, 313 NLRB at 1308-09; *MGM Mirage*, 338 NLRB at 532-34.

The welders have a distinct and highly specialized role in PCC’s operation: they focus almost exclusively on welding metal alloys on the product itself, or weld on the copper crucible, and they are the *only* employees that can or do perform those welding functions. Excluded employees are not cross-trained to perform that specialized work, lack the required training and certification to do so, and the vast majority do not use any of the specialized equipment the welders’ work requires.

Thus, third, and contrary to PCC’s claim (Br.56), the duties of welders and excluded employees do not “overlap” in any significant way. Notably, there is absolutely no evidence that PCC assigns *welding* work by need rather than based

on welders' specialized craft skills and qualifications. (A.1241-42.) *See Burns*, 313 NLRB at 1308-09 (finding craft status for electricians who use specialized skills and equipment to perform electrical work not performed by other employees, and which other employees are not cross-trained to perform); *MGM Mirage*, 338 NLRB at 532-33 (finding craft unit of highly skilled carpenters who use specialized tools to perform virtually all of employer's carpentry work); *accord Hughes Aircraft*, 117 NLRB at 100 (fact that only certified welders may perform certain functions supports craft unit); *Anheuser-Bush*, 170 NLRB at 47 (specialized electrical work performed only by craft-unit electricians).

The only "overlap" or non-jurisdictional assignment PCC cites is unit welders' occasional performance of some grinding work, typically when welding work runs low. *See* p.9. Such limited, one-way interchange does not negate craft status, particularly where welders spend the vast bulk of their work time on technical tasks specific to their craft that no other employees can or do perform. *See MGM Mirage*, 338 NLRB at 533-34 (carpenters' craft status not negated by limited instances of non-carpenters performing lower-skilled carpentry work); *Burns*, 313 NLRB at 1309 (limited evidence of cross-over work on lower-skilled tasks insufficient to negate separate craft identity of electricians); *accord Anheuser-Busch*, 170 NLRB at 47.

Fourth, the Board found that the common-interests craft-unit factor supported finding a welders unit appropriate. (A.1245.) That factor examines whether the welders share common interests with excluded employees, specifically including wages, benefits and cross-training; in a non-construction-industry case like this one, consideration of other community-of-interest factors is also appropriate. *See* p.24. While, as PCC notes (Br.57), unit welders and excluded employees share many basic terms and conditions of employment, such as work rules, benefits, schedules, and general safety training, the welders have significantly higher wages than most excluded classifications. *See, e.g., MGM Mirage*, 338 NLRB at 532-33 (employees' craft status reflected in their higher pay); *Hughes*, 117 NLRB at 100 (welders' craft status reflected in "top wages"). The welders also use different tools and protective equipment from most excluded employees and have no cross-training with excluded employees with respect to their craft or core job duties. (A.1245; *see* pp.8, 11-12, above). Outside of the specific interests listed in the craft-unit standard, moreover, welders have interests distinct from most excluded employees with respect to other traditional community-of-interest factors, such as lack of significant contact or interchange outside their craft group.¹¹ *See* pp.8-10.

¹¹ In light of the many craft-specific and community-of-interest factors favoring a welders unit, the lack of a separate welders' department or welders' supervision is less significant here than in some cases. Moreover, the combined departments and supervision stem from the functional integration, and the lack of dedicated

Fifth, while PCC is correct (Br.55-56) that the Board found that the remaining craft-unit factor, functional integration, does not favor the welders' unit, that one factor does not outweigh the many in support of the craft-unit designation. Rather, as the Board observed (A.1234), it has found, in factually analogous cases, that the highly integrated nature of an employer's business did not obliterate a craft unit's separate identity. *See, e.g., MGM Mirage*, 338 NLRB at 532-33 (integrated nature of employer's operations did not negate craft status of unit with specialized skills, function, training and little interchange with other employees); *Anheuser-Busch, Inc.* 170 NLRB at 47 (integrated operations did not obliterate separate craft identity of electricians who, with their traditional craft skills, extensive experience, and specialized licenses, were the only employees able to perform their highly technical work). *Accord NLRB v. Contemporary Cars, Inc.*, 667 F.3d 1364, 1372-74 (11th Cir. 2012) (integrated operations did not preclude craft status of automotive service technicians who performed tasks not performed by other employees, which required skill and specialized tools and equipment).

supervisors is particularly immaterial with respect to the craft unit because welders' leads, not their supervisors, oversee welders' performance of their craft. (A.1246.) *See E.I. Dupont de Nemours & Co.*, 192 NLRB 1019 (1971) (craft unit of mechanics appropriate even though supervisor also supervised excluded positions where mechanics retained separate foreman).

It follows that this case is unlike *North American Aviation, Inc.*, 162 NLRB 1267 (1967), upon which PCC heavily relies (Br.42, 49-52). There, in addition to being functionally integrated into the employer's operations, the welders lacked "a strong craft identity" or the distinct skills and specialization associated with craftsmen, and their interests were "submerged" into a larger community of interest shared with other employees with whom they had frequent contact. *Id.* at 1270. The same cannot be said of the welders here.¹²

Finally, there is no merit to PCC's assertions that the Board's reliance on and distinction of craft-severance precedent in this case "cannot be harmonized" (Br.47). PCC confuses the distinct issues of defining and severing craft units. In a craft-severance case, the Board must: (1) address whether there is a craft unit and, if so, (2) determine whether that otherwise appropriate craft unit should be severed from a larger, historical bargaining unit. *Mallinckrodt Chem. Works*, 162 NLRB 387 (1966). The first issue *does* bear on this case; because there is no larger, historical unit, the second does not. As the Board explained, there is thus no conflict or inconsistency where the Board relies on craft-severance cases' pertinent

¹² PCC wrongly assumes (Br.49 n.8) that because the employer in *North American Aviation* operated in a highly specialized industry, those *welders* must have had correspondingly specialized functions, skills and training. However, the Board found that was not the case for those welders, just as it is not for some excluded PCC employees who perform basic welding, like the millwrights.

discussions of welder craft units as “instructive,” but disregards their irrelevant severance discussions. *See* A.1309 n.1.

More specifically, PCC is plainly mistaken in arguing that “had the Board applied *Mallinkrodt* instead of pre-*Mallinckrodt* craft-severance precedent, the welders could not have been certified as a craft unit.” (Br.53.) As the Board explained (A.8 n.3), *Mallinkrodt* modified only the inapplicable, severance part of the analysis. *See* 162 NLRB at 391-99 (modifying severance standard). Moreover, *Mallinckrodt*’s craft analysis supports the Board’s decision here—it found that mechanics were a craft unit where, like the welders here, they were skilled, mostly worked along craft lines, and the employer, despite having no special apprenticeship program, preferred to hire mechanics with several years of experience. 162 NLRB at 389-90 & n.3.

In sum, the Board acted well within its discretion, supported by substantial evidence and precedent, in finding that the welders constitute an appropriate craft-based bargaining unit

2. The Board’s craft-unit finding did not violate due process

PCC fares no better in claiming (Br.43-47) that certification of the welders as a craft unit violated its procedural due-process rights. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S 306, 313, 315 (1950) (procedural due process requires notice and a fair opportunity to be heard); *see also Casino Ready Mix, Inc.*

v. NLRB, 321 F.3d 1190, 1199-1200 (D.C. Cir. 2003) (due process satisfied by notice and full litigation of issue). PCC asserts that it “never” had notice that certification of welders as a craft unit was at issue in this case after the Board remanded in *PCC I* for reconsideration, and thus “never” had the opportunity to present evidence or argument bearing on that issue. (Br.43.) As shown below, those claims are unsupported and, even if PCC could show otherwise, its due-process argument would fail due to its inability to demonstrate any prejudice. *NLRB v. Ingredion Inc.*, 930 F.3d 509, 519 (D.C. Cir. 2019) (due process claim fails where party “points to no prejudice”).

Long before the remand, PCC was well aware of the Union’s position that the welders constitute an appropriate craft unit. The Union argued, in its original post-hearing brief to the Regional Director, that the welders are “akin to a craft unit” as “they must take extensive training in advance, like an apprenticeship, and they are then certified, like a license.” *See* Union’s initial closing brief, filed on August 11, 2017, at p.20 (A.940). PCC itself independently understood the potential applicability of the craft-unit standard and argued, in its simultaneous post-hearing brief, that the record evidence and applicable precedent did not warrant certifying the welders as a craft unit. *See* PCC’s August, 11, 2017, post-hearing brief, at p.18 (A.895). Notably, PCC relied on the same case (*North American Aviation, supra*) in that brief to support the same argument (that

functional integration weighed against certifying the welders as a craft unit) it now makes (Br.43, 49, 51-52, 55-56). *See* PCC’s August, 11, 2017, post-hearing brief, at p.18 (A.895). Thus, PCC plainly had notice of, and litigated its opposition to, the craft-unit designation.

In an effort to avoid those plain facts, PCC misconstrues the remand in *PCC I* as scrubbing the case of any craft-unit issue. It argues (Br.44) that the Regional Director’s failure to assess the welders unit *only* under general community-of-interest factors was contrary to the terms of the remand. However, the directive of the Board was not as narrow as PCC claims, and could not un-ring the bell of PCC’s notice *and litigation* of the craft-unit issue. *PCC I* remanded the case “for further appropriate action consistent with this Order, including reopening the record, if necessary, and analyzing the appropriateness of the unit under the standard articulated herein.” *PCC I*, slip op. at 13. The “standard articulated [t]herein,” repeatedly, is the Section 9(b) standard applicable “in each” unit-determination case. *See PCC I*, slip op. at 3, 4, 5, 6, 8 nn.40 & 43, 12. As shown, Section 9(b) states:

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

29 U.S.C. § 159(b) (emphasis added). The Regional Director was thus instructed to determine if the welders unit was appropriate under Section 9(b), which incorporates units based on craft or other subdivision, after holding another hearing to take additional evidence, if necessary.

Certainly, *PCC I* announced a new standard for weighing the traditional community-of-interest factors when, as here, an employer seeks a larger unit—and overruled the extant *Specialty Healthcare* standard for doing so. *PCC I*, slip op. at 7, 11. But, as described above, the Board has long maintained a distinct standard for assessing craft units, which considers traditional community-of-interest factors along with a few craft-specific considerations. And *PCC I* did not purport to overrule—and thus the remand did not bar consideration under—parallel precedent describing other, alternative tests for assessing unit appropriateness. Indeed, *PCC I* recognized that additional considerations might apply in certain cases when it expressly preserved industry-specific standards. Moreover, the Board’s ultimate representation decision in this case, which approved the welders unit under both the traditional community-of-interest analysis articulated in *PCC I* and the craft-unit standard, confirms that the Board did not, and does not, consider the two standards mutually exclusive. A.1309 n.1; *see also* A.8 n.3, A.1239-46; *see* pp.26-50, above.

The Union and the Regional Director understood that. Contrary to PCC's claim (Br.45) that neither party "argued (or presented evidence) regarding the craft unit standards" on remand, the parties presented further evidence respecting welders' formal training and assignment of welding work (*see, e.g.*, A.358-62, 412-14, 419-27, 430, 433, 436-37, 440-42, 449, 456), and the Union again advocated for finding a craft unit in its second post-hearing brief. *See* Union's second Closing Brief, filed March 5, 2018, at pp. 4-7 (A.1121-24). Nothing prevented PCC from further exploring the standard, and eliciting additional testimony or evidence applicable to, craft units in the hearing on remand. Its failure to do so is no one's fault but its own. *See Casino Ready Mix*, 321 F.3d at 1200 (party that chose not to address issue was not denied due process). Consistent with the Board's remand, and based on the evidence and arguments before him (which he described at length), the Regional Director applied both the community-of-interest and craft-unit analyses, and found the welders unit appropriate under both standards. (A.1212, 1236-39.) Finally, when PCC sought Board review of that decision, it had yet another opportunity to be heard regarding the craft-unit issue before the Board made its determination, further belying any claim it was unable to litigate the issue.

In any event, PCC's due-process argument also fails because PCC cannot show that its alleged misunderstanding of the scope of the Board's remand actually

prejudiced its case. Although it also protests that it was prevented from arguing its case, its attempt to show prejudice necessarily reduces—given its opportunity to brief the craft-unit issue to the Board—to repeating its false assertion that it was completely “unable to present any evidence” (Br.46) regarding the craft-unit standard. But, aside from listing the craft-unit and traditional community-of-interest factors side-by-side (which shows that they largely overlap), PCC makes no attempt to identify any evidence it was prevented from presenting. Even now, PCC fails to proffer a single piece of specific, additional evidence it could have presented that would bear on the craft-unit issue, much less explain how any such evidence would warrant a different result. *See Ingridion Inc.*, 930 F.3d at 519 (successful due process claim requires showing of prejudice); *accord Bruce Packing Co. v. NLRB*, 795 F.3d 18, 24 (D.C. Cir. 2015) (party claiming a lack of notice and opportunity to fully litigate issue must show a “chance” it otherwise would have successfully defended against the charge).

More broadly, PCC identifies no relevant fact or factor under the craft-unit analysis as to which the parties did not present, or were prevented from presenting, evidence. Rather, the parties submitted evidence on all of the applicable factors, including the craft-specific issues of how welders are trained, whether they participate in a formal training or apprenticeship program, and whether PCC

assigns welding work on jurisdictional lines as opposed to need.¹³ Indeed, the facts bearing on those two factors are largely undisputed here. Thus, PCC does not deny that only welders have advanced welding certifications and training, and only they perform their primary welding functions, i.e., all such work is assigned to them. *See* Br.29-42, 53-57. Accordingly, this case is entirely unlike *Bruce Packing Company* (Br.45), where the employer was blindsided by the introduction of a wholly new charge at the very end of the hearing, after the employer had rested its case. 795 F.3d at 23. Here, “the parties underst[ood] exactly what the issues were” during the proceedings, *id.* (citation and internal quotation marks omitted), and PCC had a second bite at the apple on remand when the Regional Director held a second evidentiary hearing. Accordingly, PCC was not prejudiced and due process was satisfied.

E. The Board Provided a Reasoned Analysis Capable of Court Review

As shown, the Board acted within its discretion in determining that the petitioned-for unit was an appropriate unit under both the traditional community-of-interest and craft-unit analyses, and PCC failed to undermine either determination under the applicable, substantive standard. It thus throws a “Hail

¹³ PCC’s halfhearted prejudice argument thus underscores that the parties fully and fairly litigated the craft-unit issue.

Mary” and attacks the Board’s reasoning as “inscrutable, failing to set forth sufficient reasoning for this Court to review.” (Br.25.) This claim fails because it hinges on misreading, then entirely disregarding, the Regional Director’s Supplemental Decision, which the Board adopted.

PCC argues that the Board confused the *PCC I* and craft-unit analyses and required the reader to “guess” (Br.27) which facts supported finding an appropriate unit under either standard. (*See also* Br.24-28, 53-54.) But the Supplemental Decision explicitly and distinctly applied both the community-of-interest and craft-unit analyses without confusing or equating the two. *See* A.1239 (concluding that the petitioned-for unit “constitutes a craft unit of highly skilled welders *and* is appropriate for . . . collective bargaining in that the [] welders share a community of interest sufficiently distinct from excluded employees”) (emphasis added.) In doing so, the Regional Director examined all applicable factors from both standards. His 37-page Supplemental Decision carefully analyzed each factor under separate headings, and clearly indicated which facts—and factors—he relied on in applying the *PCC I* and craft-unit standards, respectively. *See, e.g.*, A.1241, 1242, 1244-45.¹⁴

¹⁴ In his craft-unit analysis, the Regional Director did also consider the traditional community-of-interest factors not listed specifically in the *Burns & Roe* craft-unit standard. (A.1240-46.) Contrary to PCC’s apparent impression (Br.26), however, that represents not a failure to distinguish between the two standards but a

In claiming that the Board “blurred the lines” (Br.25) between the two standards by failing to explain which part of the Supplemental Decision it adopted, PCC wrongly views the Board’s decisions in isolation from the Regional Director’s decisions.¹⁵ In denying review, the Board explained that one two-member majority of the three-member Board panel agreed with the Regional Director that the welders unit was appropriate under the traditional community-of-interest analysis. (A.1309 n.1.) A different two-member Board majority agreed with the Regional Director that the welders were an appropriate unit under a craft analysis. (A.1309 n.1.) There is nothing confusing, unusual, or erroneous in the Board adopting two separate but independently valid rationales for a determination. *See, e.g., Contemporary Cars, Inc.*, 667 F.3d at 1372-74 (affirming Board’s finding of an appropriate unit of automobile service technicians based on both craft-unit and “alternative” traditional community-of-interest grounds). PCC’s assertion that the Board did not clearly present two valid rationales depends on its mischaracterization of the Supplemental Decision as blending the two

recognition that, in the non-construction-industry context, the Board does consider all circumstances, including traditional community-of-interest factors, when assessing a petitioned-for craft unit. *See* p.24.

¹⁵ The same is true of PCC’s claims that the Board’s analysis was “short and conclusory.” (Br.24.) For example, PCC misconstrues a Board Member’s discussion of one craft-unit factor, characterizing it as the totality of the Board’s craft-unit analysis and thus as a declaration that no other considerations went into the Board’s craft-unit determination. (Br.27, citing A.1309 n.1.)

analyses such that the Board could not adopt just one without spelling out which part of the Supplemental Decision it was adopting. But that argument ignores the Regional Director's painstaking, factor-by-factor account of his analysis under both standards. And that only two Board members found each standard was met confirms that they viewed the two tests separately and did not merge or confuse them. The Board confirmed as much in this unfair-labor-practice proceeding. *See* A.8 n.3 (explaining that "the overlapping majorities' analyses are neither inconsistent with one another nor mutually exclusive").

CONCLUSION

The Board respectfully requests that the Court deny PCC's petition for review and enforce the Board's Order in full.

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August 2020

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Except for the following, all pertinent statutes are contained in the statutory addendum to PCC’s opening brief to the Court.

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National Labor Relations Act, 29 U.S.C. § 151, et seq.

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Sec. 8 [§158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees’ adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(c) [Hearings on questions affecting commerce; rules and regulations] (1)
Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

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

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 [§ 160] (a) [Powers of Board generally] The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.