

September 20, 2013

Bargaining Unit Determinations
Following *Specialty Healthcare*

Michael J. Hunter
Hunter, Carnahan, Shoub, Byard & Harshman
3360 Tremont Road, Suite 230
Columbus, Ohio 43221
614.442.5626
mhunter@hcands.com

Table of Contents

I.	Introduction.....	1
II.	Background.....	1
	A. Park Manor.....	1
	B. The Regional Director’s <i>Specialty Healthcare</i> Decision and Direction of Election.....	2
	C. The Board Issues its Notice and Invitation to File Briefs.....	2
III.	The <i>Specialty Healthcare</i> Decision.....	4
	A. The Majority Decision.....	4
	B. The Dissent.....	6
	C. <i>Wheeling Island Gaming</i> and <i>Blue Man Vegas</i>	6
	D. Sixth Circuit Grants Enforcement.....	7
IV.	Reported Decisions Subsequent to <i>Specialty Healthcare</i>	8
V.	Unreported Decisions Evaluating Which Cases are Subject to a <i>Specialty Healthcare</i> Analysis.....	15
	A. <i>Armour-Globe</i> Elections.....	15
	B. Severance Elections.....	20
	C. Multi-facility Units.....	21
	D. Single-Facility Presumption.....	23
	E. Presumption of Wall-to-Wall Unit Appropriateness.....	30
	F. Public Utilities Presumption.....	31
VI.	Unreported Board and Regional Director’s Unit Determination Cases....	32
	A. Retail Stores.....	32
	B. Nursing Home/Sub-Acute Healthcare Facilities.....	35
	C. Group Homes.....	37
	D. Mental Health.....	37
	E. Private Colleges.....	38
	F. Truck Drivers.....	39
	G. School Bus Drivers.....	43
	H. Restaurant Employees.....	44
	I. Craft Units.....	46
	J. Maintenance Units.....	49
	K. Aircraft Service Technicians.....	52
	L. Auto/Agricultural Implement Service.....	52
	M. Assembly.....	55
	N. Production and Maintenance.....	57
	O. Production Only.....	58
	P. Defense Contractors.....	59
	Q. Stevedores.....	60

R. Printing Trades..... 61
S. Research and Development..... 62
T. Security System Installers..... 62

I. Introduction

On August 26, 2011, the National Labor Relations Board issued its decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), *enforced*, *Kindred Nursing Ctrs. East, LLC v. NLRB*, 2013 U.S. App. LEXIS 16919 (6th Cir. 2013). (“*Specialty Healthcare*”). *Specialty Healthcare* overruled the so-called “empirical community of interest” test for determining the appropriateness of bargaining units in non-acute healthcare facilities. The test was first propounded by the Board in *Park Manor Care Center*, 305 NLRB 872 (1991).

In *Specialty Healthcare*, the Board also articulated a general standard for evaluating the appropriateness of bargaining units in the face of claims that additional employees or classifications must be added to the unit. Depending on one’s perspective, that standard is either a simple restatement and clarification of existing principles of unit determination or a radical transformation that will plague the country with “micro-units.” This paper outlines the trajectory of bargaining unit jurisprudence since the issuance of the *Specialty Healthcare* decision.

II. Background

A. Park Manor

Following approval by the Supreme Court of the Board’s establishment, through rulemaking, of appropriate units in acute care hospitals¹ the Board considered, in *Park Manor*, the test that it would apply in ascertaining appropriate bargaining units in non-acute healthcare facilities such as nursing homes. The Board established an analytical framework that it suggested could be called the “pragmatic or empirical community of interest” approach.²

In *Park Manor* the Board rejected both the application of a traditional community of interest test and its short lived “disparity of interests”³ standard for evaluating units in health care facilities not covered by the Rules. The specific issue that gave rise to *Park Manor* was whether a small number of LPN’s employed at the facility must be included in a service and maintenance unit.

The Board noted that henceforth:

[W]e prefer to take a broader approach utilizing not only “community of interest” factors but also background information gathered during rule making and prior precedent. Thus... our

¹ *American Hospital Assn v NLRB*, 499 US 606 (1991).

² *Park Manor*, *supra* at n. 16.

³ *St. Francis Hospital*, 271 NLRB 948 (1984).

consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute.⁴

The Board anticipated that certain factual patterns would emerge that would illustrate which units are “typically appropriate.”⁵ Over time, such “typically appropriate” units emerged, such as finding that service and maintenance units are presumptively appropriate under the test.⁶ Employees who otherwise would be properly excludable, such as business office clericals, would sometimes be shoe-horned into a service and maintenance unit.⁷

B. The Regional Director’s *Specialty Healthcare* Decision and Direction of Election

On December 18, 2008, a union filed a petition seeking to represent a unit consisting of all CNA’s employed by *Specialty Healthcare* at its Mobile, Alabama facility. The employer took the position that the only appropriate unit was a wall-to-wall unit of all non-professional employees. In her January 20, 2009 decision and direction of election, the Regional Director noted that she was following the *Park Manor* test, but found that in the circumstances of the case before her, a unit limited to all CNA’s at the facility was appropriate.

The employer filed a request for review, and the two-person Board granted review on February 19, 2009. Subsequent to *New Process Steel*, the Board reaffirmed its decision to grant review on August 27, 2010.

C. The Board Issues its Notice and Invitation to File Briefs

On December 22, 2010, the Board issued its notice and invitation to file briefs⁸ regarding issues raised by the facts underlying *Specialty Healthcare*. The majority noted its belief that it is obligated under the Act to continually evaluate whether its decisions and rules are serving their statutory purposes. It noted that this is particularly the case with decisions such as *Park Manor*, which adopted a new approach to determining healthcare units, but that such an obligation also extended to procedures and standards for determining units in all industries.

⁴ *Park Manor*, supra, at 875.

⁵ *Park Manor*, supra, at 875.

⁶ *Jersey Shore Nursing & Rehabilitation Center*, 325 NLRB 603 (1998).

⁷ *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995).

⁸ *Specialty Healthcare*, 356 NLRB No. 56 (2010).

Accordingly, the majority invited the parties and *amici* to submit briefs addressing the following questions:

- 1) What has been their experience applying the “pragmatic or empirical community or interests approach” of *Park Manor* and subsequent cases?
- 2) What factual patterns have emerged in the various types of nonacute health care facilities that illustrate what units are typically appropriate?
- 3) In what way has the application of *Park Manor* hindered or encouraged employee free choice and collective bargaining in nonacute health care facilities?
- 4) How should the rules for appropriate units in acute health care facilities set forth in Section 103.30 be used in determining the appropriateness of proposed units in nonacute health care facilities?
- 5) Would the proposed unit of CNAs be appropriate under *Park Manor*?
- 6) If such a unit is not appropriate under *Park Manor*, should the Board reconsider the test set forth in *Park Manor*?
- 7) Where there is no history of collective bargaining, should the board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter?
- 8) Should the board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are “readily identifiable as a group whose similarity of function and skills create a community of interest”?

Member Hayes dissented to the notice and invitation to file briefs. He noted that *Park Manor* had been undisturbed for two decades, and expressed a broader concern that the Board would use *Specialty Healthcare* to address the standard for unit determinations in other industries.

III. The *Specialty Healthcare* Decision

A. The Majority Decision

The board issued its decision in *Specialty Healthcare*⁹ on August 26, 2011. As an initial matter, the majority concluded that the *Park Manor* approach to determining appropriate bargaining units in nursing homes had become obsolete, was not consistent with the Board's statutory charge, and did not provide clear guidance to the parties or the Board.

Accordingly, the Board overruled the *Park Manor* "empirical community of interest test" and held that a traditional community of interest test would be applicable to determining bargaining units in the nursing home industry.

The Board rejected the concept, which as a practical matter flowed from *Park Manor*, that there is only one set of units that are appropriate at non-acute healthcare facilities.¹⁰ It noted that it had recognized that certain units found by rule to be appropriate in acute care hospitals are presumptively appropriate in nursing homes, and that it would continue to adhere to that principle and those holdings. It rejected, however, the notion that such units were the only appropriate units.¹¹

Applying traditional principles of unit determination to the facts in *Specialty Healthcare* the Board concluded that a CNA unit was appropriate. It noted that while the desires of employees are not determinative, they may be considered as a factor in evaluating whether a unit is appropriate.¹² In concluding that the CNA-only unit was appropriate, the Board noted the lack of overlap between the jobs of CNA's and other employees, the specific certification requirements for CNA's, separate supervision, training requirements, lack of transfers, and the fact that CNA's were the only employees at issue that worked 24 hours a day, seven days a week.¹³

The Board next considered, as a general matter, the application of the traditional community of interest standard when the employer contends that the smallest appropriate unit contains employees not in the petitioned-for unit. The Board acknowledged that it had sometimes used different words to describe its standard and had sometimes decided cases without articulating any clear standard. It held that once it is determined that a proposed-unit describes employees readily identifiable as a group *and* that the employees share a community of interest, the proponent of an argument that only a larger unit is appropriate must demonstrate that

⁹ 357 NLRB No. 83 (2011).

¹⁰ *Id.* slip op at 7.

¹¹ *Id.*

¹² *Id.* slip op. at 8-9.

¹³ *Id.* slip op. at 9-10.

the employees proposed for inclusion share an “overwhelming community of interest” with the other unit employees.¹⁴

The Board described its changes to the law as “relatively modest ones” and summarized them as follows:

- 1) We overrule one decision, *Park Manor*, which has created a unique test for unit determination in non-acute healthcare facilities (the “pragmatic or empirical community of interest” test).
- 2) We hold that the traditional community of interest test – to which we adhere – will apply as the starting point for unit determinations in all cases not governed by the Board’s Health Care Rule (including cases formerly controlled by *Park Manor*).
- 3) We set out a clear test – using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit – for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, the employer must show that the excluded employees share an “overwhelming community of interest” with the petitioned-for employees.¹⁵

While receiving little commentary in the aftermath of the decision, *Specialty Healthcare* contains three additional pronouncements that significantly temper the impact of the decision:

1) **Rules for Specific Industries**

The decision leaves intact, with the exception of healthcare, special rules and presumptions that have been developed for determining bargaining units in specific industries.¹⁶

2) **Fractured Units**

The Board reiterated that it will not approve of “fractured” units that are too narrow in scope or have no rational basis.¹⁷

3) **Undue Proliferation**

While the Board majority noted that the Supreme Court in *American Hospital Assn. v NLRB*, 499 US 606 (1991) made clear the non-binding nature of congressional statements about

¹⁴ *Id.* slip op. at 11.

¹⁵ *Id.* slip op. at 14.

¹⁶ *Id.*, slip op. at 13, n. 29.

¹⁷ *Id.*, slip op. at 13.

proliferation of units in the healthcare industry, it noted that the Board has nevertheless respected the suggestion that it seek to avoid undue proliferation. While it noted that this deference may present some “tension” in a future case, such deference appears for now to have been left intact.¹⁸

B. The Dissent

In his dissent, Member Hayes asserted that “the majority decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board’s jurisdiction.”¹⁹ He asserted that while the wording may be different, the test is, as practical matter, the standard espoused by the dissent and rejected by the Board in *Wheeling Island Gaming, Inc.*, 355 NLRB No 127 (2010).²⁰ He asserted that there was no sound reason to overturn *Park Manor* and that *Specialty Healthcare* will encourage union organizing in units as small as possible, in tension with, if not in conflict with, the section 9(c)(5) prohibition against extent of organizing being the controlling factor in unit determinations.²¹

C. *Wheeling Island Gaming and Blue Man Vegas*

In the immediate aftermath of the Board’s decision in *Specialty Healthcare*, its detractors insisted that the Board had now adopted a test that it had rejected a year earlier in *Wheeling Island Gaming, Inc.*,²² while its defenders noted that it had simply reiterated a test that had been approved by the D.C. Circuit in *Blue Man Vegas, LLC v NLRB*.²³

In *Blue Man Vegas*, the Regional Director approved and directed an election in a unit of stage hands that excluded “musical instrument technicians (MIT’s)” that had a number of working conditions and a supervisory structure that separated them from other stagehands. The employer refused to bargain, maintaining that the Board had certified an inappropriate unit. The court noted that:

As long as the Board applies the overwhelming community of interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union’s organization not be given controlling weight.

¹⁸ *Id.* slip op. at 13.

¹⁹ *Id.* slip op. at 15.

²⁰ *Id.*

²¹ *Id.* slip op. at 19.

²² 355 NLRB No. 127 (2010).

²³ 529 F3d 417 (D.C. Cir. 2008).

529 F3d at 423. Member Hayes, in his dissent in *Specialty Healthcare* suggested that *Blue Man Vegas* was wrongly decided.²⁴

Wheeling Island Gaming, Inc. involved a petition seeking to represent a unit limited to poker dealers, and excluding other dealers employed by the employer. The majority found that the poker dealers did not have a community of interest that was “separate and distinct” from craps, roulette, and blackjack dealers, and was accordingly an inappropriate unit. Member Becker dissented, suggesting that the analysis set forth in *American Cyanamid Co.*, 131 NLRB 909 (1961) should control and that the poker dealers are an appropriate unit because they are “readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation.”²⁵

In his dissent in *Specialty Healthcare*, Member Hayes suggests that “the wording may be different” but that the test articulated by the *Specialty Healthcare* majority is the same standard espoused by Member Becker in his *Wheeling Island Gaming* dissent, and rejected by the Board.²⁶ The *Specialty Healthcare* majority, however, was quite specific in its reaffirmation that *Wheeling Island Gaming* remains good law.²⁷

D. Sixth Circuit Grants Enforcement

The employer in *Specialty Healthcare* contested the certification by refusing to bargain, and on December 30, 2011 the Board granted summary judgment to the General Counsel on a refusal to bargain charge.²⁸ The employer petitioned for review and the Board cross-petitioned for enforcement.²⁹

On August 15, 2013, the Sixth Circuit, in *Kindred Nursing Centers East, LLC v. National Labor Relations Board*³⁰ denied the employer’s petition for review and granted the Board’s cross-petition for enforcement. The Court concluded that the Board had acted within its discretion in deciding *Specialty Healthcare*.

It found that the Board is within its purview in fulfilling its statutory duty to determine an appropriate bargaining unit when it adopts a test from one of its precedents over another. It found that the Board appropriately clarified its community of interest test, and that it could place the burden on a party arguing that additional employees must be added to a unit demonstrating that

²⁴ *Specialty Healthcare*, slip op. at 19, n.17.

²⁵ *Wheeling Island Gaming, Inc.*, *supra*, slip op. at 2 quoting *American Cyanamid Co.*, 131 NLRB at 910.

²⁶ *Specialty Healthcare*, *supra*, slip op. at 15.

²⁷ *Id.*, slip op. at 13 n. 32.

²⁸ *Specialty Healthcare and Rehabilitation Center*, 357 NLRB No. 174 (2011).

²⁹ *Kindred Nursing Centers East v. NLRB*, Case Nos. 12-1027; 12-1174.

³⁰ Case Nos. 12-1027/1174 (August 15, 2013).

the additional employees proposed for inclusion share an “overwhelming community of interest” with a readily identifiable group of employees who share a community of interest. The Court further noted that there was not only Board precedent for the test adopted in *Specialty*, but that this approach had been approved by the District of Columbia Circuit in *Blue Man Vegas, supra*.

Thus, the Sixth Circuit in *Kindred* found that:

Because the overwhelming community of interest standard is based on some of the Board’s prior precedents, has been approved by the District of Columbia Circuit, and because the Board did cogently explain its reasons for adopting the standard, the Board did not abuse its discretion in applying this standard in *Specialty Healthcare II*.³¹

The court further found that the Board is not precluded from announcing new principles in and adjudicatory proceeding, and that the choice between rulemaking and adjudication “lies in the first instance within the Board’s discretion.”³²

IV. Reported Decisions Subsequent to *Specialty Healthcare*

Odwalla, Inc., 357 NLRB No 132 (December 9, 2011).

Fractured Unit

Odwalla is a significant decision because it addresses how it can be determined if a proposed unit is “fractured” and implicitly addresses concerns about the “Gerrymandering” of units by noting that, even if a smaller constituent part of a proposed-unit would constitute an appropriate free-standing unit, the unit may nevertheless become inappropriate if additional employees are proposed for inclusion who have less community of interest with one another than do the excluded employees. The case arose in the context of a stipulated election agreement in which the parties agreed to allow individuals classified as “merchandisers” to vote under challenge. A single one of the five merchandisers voted, and his vote was outcome determinative.

The employer and the union had entered into a stipulated election agreement covering a unit that included both a distribution center from which juice drinks and products were distributed, and a refurbishing center at which coolers, etc., were repaired. Route Service

³¹ *Kindred, supra*, slip op. at 16

³² *Id.*, slip op. at 19.

Representatives (“RSR’s”) were included in the stipulated unit, while the Merchandisers voted under challenge. The Board found that it would fracture the unit to exclude the merchandisers because the non-merchandise employees did not share a community of interest with one another that the merchandiser’s did not “equally share.” The merchandisers, for example, shared common supervision with the RSR’s and, like the RSR’s worked routes that took them off the grounds of the facilities. To exclude the merchandisers while including employees who did not share common supervision and overlapping duties would fracture the unit.

Significantly, the Board noted that this was the case even though the RSR’s could have, by themselves, constituted a separate appropriate unit.³³ Member Hayes joined with Chairman Pearce and Member Becker in this opinion.

Northrop Grumman Shipbuilding, Inc., 357 NLRB No. 163 (December 30, 2011).

*Subset of Technical
Employees*

In this case, the Regional Director had, pre- *Specialty Healthcare*, found that a sub-set of the technical employees at a shipyard, those in the radiological control department, had a community of interest sufficiently distinct from other technical employees to find that they constituted an appropriate unit. The Board majority affirmed the Regional Director’s Decision.

The employer argued that the Board had established special rules for technical employees and in particular, for technical employees in the nuclear industry. The majority noted that “to the extent that the Board has developed special rules applicable to technical employees... those rules remain applicable.”³⁴ The Board noted that arguably, it has developed a special standard for determining whether a technical unit is appropriate, finding that a sub-set of technical employees is appropriate only when the employees in the requested unit possess a sufficiently distinct community of interest apart from other technicals to warrant their establishment as a separate unit. The majority found that it need not decide if such a special test applies, because it would find the radiological control department to constitute an appropriate unit even if such were the case.

It found that in the facts of this case, the radiological control department could appropriately be viewed as discreet from the employer’s major service of shipbuilding and refurbishing.³⁵ The majority distinguished cases involving nuclear research facilities where radiation issues were at the heart of the facilities’ function. It concluded that under either

³³ *Odwalla, supra*, slip op. at 6.

³⁴ *Northrop Grumman Shipbuilding., supra* slip op. at 4.

³⁵ *Id.* slip op. at 6.

Specialty Healthcare or under the arguable special test for technicals, the employees in the radiological control department constituted an appropriate unit distinct from other technicals.³⁶

Member Hayes dissented, indicating that the petition would properly have been dismissed pre- *Specialty Healthcare*. He argued that the Board’s longstanding policy has been that all technical employees should be combined who carry out functionally related duties.³⁷

DTG Operations, Inc., 357 NLRB No 175 (December 30, 2011).

Rental Service Agents

This case involved a petition seeking to represent a unit of Rental Service Agents (RSA’s) working for an employer operating a rental car business under the Thrifty and Dollar brands at the Denver International Airport. The Regional Director, in a pre-*Specialty Healthcare* decision, had found that the petitioned-for unit was inappropriate because the RSA’s share an “overwhelming community of interest” with the remaining employees, such as lot agents, courtesy bus drivers, mechanics, return agents, etc., and that only a wall-to-wall unit was appropriate.

The Board majority noted that *Specialty Healthcare* set forth principles to be applied in cases such as this one. It found that the RSA’s share a community of interest with one another, but do not share an “overwhelming” community of interest with the other hourly employees.³⁸ It noted that there is little interchange between RSA’s and other hourly classifications, and that RSA’s only have limited interaction with other employees.

The employer did not argue that some, but not all hourly employees shared an overwhelming community of interest with the RSA’s; rather it argued that they all did. The Board majority found the Regional Director’s reliance on *United Rentals*, 341 NLRB 540 (2004) for the proposition that a wall-to-wall unit was the smallest appropriate unit was misplaced because that case involved a small operation in which all of the employees pitched in to perform the functions of different classifications.³⁹ The majority pointed instead to a pair of decisions, *Avis Rent-A-Car System Inc.*, 132 NLRB 1136 (1961) and *Budget Rent-A-Car of New Orleans, Inc.*, 220 NLRB 1264 (1975) in which the Board had rejected claims that rental agents must be included in petitioned for units of other employees.⁴⁰

³⁶ *Id.* slip op. at 6.

³⁷ *Id.* slip op. at 7.

³⁸ *DGT Operations, Inc., supra*, slip op. at 5.

³⁹ *Id., supra*, slip op. at 7.

⁴⁰ *Id.* slip op. at 6.

Member Hayes dissented, offering the view that “so long as a petitioner does not make the ‘mistake’ of petitioning for a unit that consists of only a part of a group of employees in a particular classification, department, or function, i.e. a fractured unit, it will be impossible for a party to prove that an overwhelming community of interest exists with the excluded employees.”⁴¹

Grace Industries, LLC, 358 NLRB No. 62 (June 18, 2012).

Self-Determination Election

In this case, rival unions filed petitions covering paving work in New York City. The Laborers petitioned for a unit of both asphalt and concrete paving workers, while the United Plant and Production Workers sought a unit limited to asphalt laborers. The Regional Director, in a pre-*Specialty Healthcare* decision, found that notwithstanding an industry history of separate bargaining, a unit limited to asphalt laborers was not appropriate for bargaining.

On December 8, 2011, the Board issued an order remanding the case. The majority ordered a remand for consideration in light of *Specialty Healthcare*. Member Hayes concurred in the remand, noting that although he had dissented in *Specialty Healthcare*, further consideration and explanation was needed as to why an asphalt workers unit was not appropriate.

On remand, the Regional Director issued a Second Supplemental Decision on December 28, 2011 in which he concluded that *Specialty Healthcare* does not apply where two different unions seek two different units. On February 8, 2012, a panel consisting of chairman Pearce, Member Hayes, and Member Griffin granted review of the Regional Director’s Second Supplemental Decision.

The Board, in a panel consisting of Chairman Pearce and Members Hayes and Griffin concluded, contrary to the Regional Director, that a unit comprising employees who primarily perform asphalt paving was also appropriate. The Board noted not only the history of separate bargaining for asphalt and concrete units, but also the lack of significant overlap between asphalt pavers and other employees and the distinct skills involved in asphalt paving. Accordingly, it found that a self-determination election was appropriate to determine the scope of the unit.

The Board noted that although it had remanded the case to the Regional Director for consideration under *Specialty Healthcare*, it was “unnecessary to address” the Regional Director’s conclusion that *Specialty Healthcare* did not apply to this case.⁴²

⁴¹ *Id.* slip op. at 9.

⁴² *Id.* at n.31.

Kinney System, Inc. d/b/a Central Parking System of Massachusetts, 358 NLRB No. 136 (September 14, 2012).

*Specialty Applied to
Challenged Ballots*

The employer operates numerous parking lots and parking garages. The parties did not reach a stipulated election agreement, but did stipulate to a unit at hearing. They agreed to a unit that included attendants, valets, cashiers, dispatchers, shuttle drivers and maintenance workers. The parties agreed at hearing to allow seven “accounting specialists” to vote under challenge.

The votes of the accounting specialists and other challenged ballots were outcome determinative. In his report on the challenged ballots, the ALJ, sitting as a hearing officer, applied a *Specialty Healthcare* analysis to determine if the accounting specialists shared an overwhelming community of interest with the petitioned-for employees. He concluded that they did not, and also concluded that they did not, in any event, share a “substantial” community of interest with the petitioned-for employees. There was no overlap of duties, little interaction, and the accounting specialists, unlike other employees, worked in offices and could properly be characterized as business office clericals.

A unanimous panel of the Board upheld the findings of the hearing officer. Member Hayes agreed that the challenges to the ballots of the accounting specialists should be sustained, but relied only on the finding that they did not share a “substantial” community of interest with the petitioned-for employees.

Fraser Engineering Co., Inc., 359 NLRB No. 80 (March 20, 2013).

*Subsidiary’s Employees
Excluded*

In this published decision, the Board denied review of the Regional Director’s decision finding that employees of an employer’s subsidiary were properly excluded from the unit. The Board adopted the Regional Director’s reasoning in all but one respect, finding, unlike the Regional Director, that it was unnecessary to distinguish *Wheeling Island Gaming* on the basis that it was a pre- *Specialty* case.

The union petitioned to represent a unit of 26 pipefitters, welders, and plumbers, along with service technicians employed by Fraser Engineering. The employer took the position that

the smallest appropriate unit must also include about 13 pipefitters, welders and plumbers employed by its subsidiary corporation, Fraser Petroleum.

The Regional Director found that the petitioned-for unit was a readily identifiable group of employees who shared a community of interest. She further found that the employees of Fraser Petroleum did not share an overwhelming community of interest with the petitioned-for Fraser Engineering employees.

The two groups had common supervision at the top levels, but separate supervision at the first and second levels. The pay for the employees in the two groups was “within the same ballpark” and employees received the same benefits including insurance and retirement benefits. There was a common employee handbook and common policies for both groups.

On the other hand, employees reported directly to the various jobsites, and in general the two groups did not work side-by-side. There were some temporary assignments from one group to another, but the Regional Director found this to be relatively insignificant. The employees wear uniforms that have separate logos.

The Regional Director found that the petitioned-for unit tracked a distinct departmental grouping, and that the employer had failed to meet its burden of establishing an overwhelming community of interest between the two groups. The Regional Director distinguished *Wheeling Island Gaming*⁴³ on a number of grounds, one of which is that it was a “pre-*Specialty Healthcare*” case,⁴⁴ a distinction not relied upon by the Board in denying review.⁴⁵

The Board noted that, in finding that the subsidiaries employees were properly excluded, it was properly relying on community of interest factors that were solely within the control of the employer.

Guide Dogs for the Blind, 359 NLRB No. 151 (July 3, 2013).

Training Department Unit

Prior to the issuance of the *Specialty Healthcare* decision, the Regional Director for Region 20 issued a decision in which he found that a petitioned-for unit of canine welfare technicians and instructors was appropriate because those employees shared a substantial community of interest and that other employees proposed for inclusion by the employer had

⁴³ 355 NLRB No. 127 (2010).

⁴⁴ *Fraser Engineering Company, Inc.*, 01-RC-080901 (R.D. decision August 9, 2012) slip op. at 15.

⁴⁵ *Fraser Engineering Company, Inc.* 359 NLRB No. 80 at n. 4.

separate and distinct interest from the petitioned-for employees. The Board granted review in March of 2010.

The canine welfare technicians (CWT's) and instructors worked with the training dogs and with students while training was taking place at the facility. The CWT's cared for the dogs that were actively engaged in the training process, exercising, feeding, bathing them etc., as well as picking up new students and orienting them to their dormitories. The instructors trained both the dogs and the students while training took place at the facility. Instructors started as "apprentice" instructors, most of whom are drawn from the ranks of the CWT's.

Other employees that the employer proposed for inclusion included employees in the breeding department, the puppy raising department, the kennel department, the veterinary department, and "field services managers." While CWT's occasionally interacted with the breeding department, there was no evidence of temporary or permanent transfers between these functions. Employees in the puppy raising department have separate supervision, and while there are some interactions with the training department regarding development of particular dogs, there is no evidence of temporary or permanent transfers between this department and the training department.

While kennel department employees do work similar to that of the CWT's, they do it in a separate location caring for dogs other than guide dogs in training, and under separate supervision. While two kennel technicians were former CWT's, there was no evidence of transfers in the other direction. While veterinary department employees interact with most other employees, including the training department, there was no evidence of temporary or permanent transfers between the departments.

Finally, while "field service managers" perform an instructional function, they do so off-site around the country and spend 75-80% of their time in the field.

The Board found that the petitioned-for unit constituted a readily identifiable group in that they are the employees who perform the function of training and caring for the active service dogs at the employer's facility. They share a community of interest with the petitioned-for unit. While there was some overlap in duties between CWT's and the kennel department, the work was done in separate kennels, under separate supervision. While field services manager perform an instructional function, they do so off-site under separate supervisors. Citing *Grace Industries, supra*, the Board noted that "some overlap" of functions does not alone render a separate unit inappropriate.

The Board concluded that they petitioned-for unit constituted an appropriate unit under *Specialty Healthcare*.

V. Unreported Decisions Evaluating Which Cases are Subject to a *Specialty Healthcare* Analysis

A. Armour-Globe Elections

Oleander Holdings LLC dba Sacramento Sub-Acute Care, 20-RC-074337 (Bd. decision July 19, 2012). <http://www.nlr.gov/case/20-RC-074337>

Respiratory Therapists

The petitioning union sought an *Armour-Globe* Election for respiratory therapists (RT's) to vote upon whether they wished to be included in a recognized unit of service and maintenance employees. The Regional Director noted that in *Specialty Healthcare* the Board had determined that the traditional community of interest test would henceforth be applied to skilled nursing facilities. The Regional Director found that RT's share a substantial community of interest with CNA's. He found that the RT's technical status, higher wage rates and lack of interchange with unit employees was not enough to overcome factors establishing a community of interest with unit employees. In this circumstance, the Regional Director essentially applied *Specialty Healthcare* in reverse, concluding that there was no evidence that the RT's had such an overwhelming community of interest with employees in any classification outside of the recognized unit as to preclude a finding that they would properly be included in the recognized unit if they so desired.⁴⁶

A panel majority comprised of members Hayes and Flynn, initially granted review, with Member Griffin dissenting. Upon review, however, a panel consisting of Chairman Pearce, Member Hayes, and Member Griffin affirmed the Regional Director's decision, Member Hayes noting that the Regional Director had referenced *Specialty Healthcare*, and that he had dissented in that case. Nevertheless, he joined the majority here.

Century Tel of Minnesota, Inc d/b/a/ Century Link 18-RC-096793 (R.D. decision February 15, 2013). <http://www.nlr.gov/case/18-RC-096793>

Regional Director Finds Specialty Not Applicable to Armour-Globe Elections

The petitioner sought, through a representation election, to add plant technicians and communications technicians at three facilities to an existing multi-facility bargaining unit. The

⁴⁶ *Oleander Holdings LLC d/b/a Sacramento Sub-Acute Care, 20-RC-074337 (R.D. decision March 7, 2012).* Slip op. at 14.

employer contended that the employees proposed for inclusion lacked a community of interest with existing unit employees and, in the alternative, that technicians at additional plants shared an overwhelming community of interest with those proposed for inclusion, and should be added to the voting groups.

The Regional Director rejected the proposition that *Armour-Globe* voting groups are subject to either *Specialty Healthcare's* overwhelming community of interest analysis or the traditional analyses concerning the appropriateness of residual units. Rather, he evaluated 1) whether the employees proposed for inclusion shared a community of interest with existing unit employees and 2) whether the petitioned-for employees are an identifiable, distinct segment of the employer's employees.

Answering both questions in the affirmative, the Regional Director concluded that the petitioned-for employees constitute an appropriate voting group for a self-determination election.

Northwestern Corporation d/b/a Northwestern Energy, 19-RC-095978 (Bd. decision March 11, 2013). <http://www.nlr.gov/case/19-RC-095978>

*Regional Director Implicitly
Finds Specialty Analysis
Inapplicable*

In this case, the Board denied review of a Regional Director's decision finding that it was appropriate to permit an *Armour Globe* election to determine if about eight warehouse employees wished to be represented in an unit of about 330 currently represented employer opposed a self-determination election on the basis that the warehouse employees do not share a sufficient community of interest with the other employees.

The Regional Director cited *Specialty* for its general description of bargaining unit factors and for the proposition that precedent finding that different unit is appropriate in similar circumstances is of no particular value in determining if another unit under those circumstances is inappropriate.

He then implicitly found that *Specialty's* overwhelming community of interest analysis is inapplicable to *Armour-Globe* petitions when he distinguished cases relied upon by the employer as dealing not with *Armour-Globe* elections, but with the "scenario outlined in *Specialty Healthcare*." The Regional Director found the appropriate inquiry to be 1) whether the petitioned-for employees share a community of interest with the existing unit employees and 2) whether those employees constitute an identifiable, distinct segment so as to constitute an appropriate voting group."

Answering both questions in the affirmative, the Regional Director ordered an *Armour-Globe* election to be held.

UAG-Stevens Creek II, Inc. d/b/a AudiStevens Creek, 32-RC-108320 (R.D. decision July 29, 2013). <http://www.nlr.gov/case/32-RC-108320>

*Specialty Applied By
Regional Director*

A union that currently represents the Service Technicians at an automobile dealership sought to add Service Advisors to the existing unit through a petition for an *Armour-Globe* election. The parties stipulated that the Service Advisors could appropriately constitute an appropriate, free-standing unit. The union, however, did not seek an election for such a unit.

The employer objected that the Service Advisors and Service Technicians did not constitute an appropriate unit because they did not share a sufficient community of interest, arguing in part, that the Service Technicians constituted a craft unit to which Service Advisors could not be added.

The Regional Director found that the stipulation itself, along with the record of evidence, showed that the Service Advisors constituted an identifiable, distinct segment that constituted an appropriate voting group. He went on, through traditional community of interest factors, to determine that Service Advisors shared a community of interest with Service Technicians.

He continued, however, to apply *Specialty Healthcare* by noting that there was no evidence that Service Advisors have an overwhelming community of interest with employees outside of the recognized unit so as to preclude a finding that they may properly be included in the recognized unit if they choose.⁴⁷

Doyan Utilities, LLC, 19-RC-090124 (R.D. decision, November 2, 2012).
<http://www.nlr.gov/search/simple/all/19-RC-090124%20>

Election for 1 Employee

The employer operates power and water utility series for a military base in Anchorage, Alaska. Two unions represent the employees. The petitioner's agreement covers power grid employees while the intervenor's agreement covers water and wastewater employees.

⁴⁷ *Id.*, Regional Director's decision at 11.

The employer recently constructed a landfill gas plant, and hired a gas plant operator. The petitioner sought an *Armour-Globe* election to determine if the Gas Plant Operator should be added to its unit, to the intervenor's unit, or to neither. The employer and intervenor took the position that the new position constituted an accretion to the intervenor's unit.

The Regional Director looked at *Specialty* for its description of an overwhelming community of interest in evaluating whether an accretion had occurred. He concluded that there was not an overwhelming community of interest between the Gas Plant Operator and the employees in either unit, and directed a one-person *Armour-Globe* election to determine if the employee wished to be added to the unit represented by the petitioner, the intervenor, or neither.

Mission Healthcare d/b/a Evergreen Terrace, 18-RC-068641 (R.D. decision December 2, 2011). <http://www.nlr.gov/case/18-RC-068641>

LPN's

The petitioner sought to add LPN's to its existing service and maintenance unit through an *Armour-Globe* election. The employer took the position that the LPN's should be a separate unit.

The Regional Director cited *Specialty Healthcare* for the general proposition that the Board will apply traditional community of interest standards to nursing homes, and that the Board need only find that a unit is an appropriate unit, not the most appropriate unit. He noted that the Board had approved health care units that included technical employees with service and maintenance employees in *Appalachian Regional Hospitals*, 233 NLRB 542 (1977).

Finding such a unit appropriate in this case, he directed an *Armour-Globe* election

San Francisco Symphony, 20-RC-077284 (R.D. decision April 16, 2012).
<http://www.nlr.gov/case/20-RC-077284>

Orchestra Librarians

Petitioning union represented a unit of performing musicians and one librarian. The petition sought an election to add two assistant librarians to the unit. The employer argued that *Specialty Healthcare* did not apply to this situation, and that the assistant librarians shared a community of interest with other Orchestra employees such as stage technicians.

The Regional Director found that *Specialty Healthcare* does apply in the *Armour-Globe* context. He found, as an initial matter, that the assistant librarians shared an obvious community of interest with the unit librarians.

They also shared a community of interest with the performance musicians in that they possessed substantial musical skills and training, including performance skills. Additionally, they were required to have a performance background in at least one musical instrument.

The Regional Director found that the employer failed to demonstrate that the stage technicians and other unrepresented employees shared an overwhelming community of interest with the assistant librarians, and ordered an *Armour-Globe* election.

The Boeing Company, 19-RC-71950, (R.D. decision March 23, 2012).

<http://www.nlr.gov/case/19-RC-071950>

Instructor Pilots

A union that already represented 38 of the employer's instructor pilots sought a self-determination election among a voting group of 62 technical pilots, standards pilots, safety pilots and simulator-only pilots. The employer argued that the proposed combined unit would constitute a "fractured" unit under *Specialty Healthcare* and that it did not track the employer's organizational structure.

The Regional Director noted, however, that all of the pilots worked within the employer's Training and Flight Services organization. While the employer proffered that additional employees shared an equal community of interest with the petitioned-for group, the Regional Director found that the employer had failed to produce evidence at hearing regarding the duties of these additional employees.

The employer also argued that other excluded pilots within its organization were FAA licensed and maintained their "type-ratings." Such limited shared characteristics, particularly in pilots not within the Training Flight Services part of the company, fell short of demonstrating an "overwhelming community of interest."

Other employer objections, such as the fact that the group voting upon inclusion was twice the size of the existing unit were rejected, and an *Armour-Globe* election was directed.

B. Severance Elections

Freeman Decorating Services, 16-RC-070839 (R.D. decision February 13, 2012).

<http://www.nlr.gov/case/16-RC-070839>

*Specialty Doesn't Alter
Severance Standards*

This case addressed, *inter alia*, whether *Specialty Healthcare* has any impact upon the deference traditionally accorded to historic units. The employer is in the business of providing labor, installation, dismantling, and other services for trade shows, conventions, and other special events. The Painters had a 27-year bargaining history with the employer at its San Antonio location in a unit that encompassed all helpers, apprentices, and journeymen who perform convention and trade show work, including installing and dismantling booths and exhibits.

The Carpenters filed a petition seeking to represent a unit of about 100 employees who primarily worked installing and tearing down the trade show booths and exhibits, but excluding employees who perform freight work, dock work, warehouse work and work at the employer's sign shop.

The Teamsters, meanwhile, filed a petition seeking to represent a unit of about 30 employees who worked in the warehouse, freight dock or as drivers. The employees in both of the petitioned-for units, as well as sign shop employees, were contained in the unit historically represented by the Painters. Neither the Carpenters nor the Teamsters sought to represent the sign shop employees.

The Regional Director did not reach the employer's arguments regarding the appropriateness of craft severance under *Mallinckrodt Chemical Workers*, 162 NLRB 387 (1966);⁴⁸ the petitioner itself had conceded that it was not seeking a traditional craft unit.⁴⁹

In applying traditional community of interest standards, the Regional Director found that the history of collective bargaining weighs heavily in favor of finding that a historic unit is appropriate, and that a party challenging such a unit bears a heavy burden.⁵⁰ He specifically found that nothing in *Specialty Healthcare* dictated a different result, and that *Specialty Healthcare* is inapposite to a case such as this one.⁵¹

⁴⁸ *Freeman, supra*, slip op. at 5, n. 12.

⁴⁹ *Id.* slip op. at 4.

⁵⁰ *Id.* slip op. at 22.

⁵¹ *Id.* slip op. at 30.

Applying traditional community of interest standards factoring in the history of bargaining, and noting that the rival petitions could leave the small group of sign shop employees out in the cold, the Regional Director directed an election in the historic unit.

C. Multi-Facility Units

Bread of Life, LLC, 7-RC-072022 (Bd. decision March 21, 2012)

<http://www.nlr.gov/case/07-RC-072022>

*Board Avoids Deciding
Applicability of Specialty to
Multi-Facility Units*

A panel consisting of members Hayes, Griffin and Flynn denied the employer's request for review. The members noted in a footnote that it was unnecessary to reach the issue of whether *Specialty Healthcare* applies to a multi-facility case such as this one.

The employer operated seventeen Panera Bread Cafes in Western Michigan. The union filed a petition seeking a unit of bakers and related employees at six Panera Bread locations in the I-94 corridor district, and excluding non-bakery employees and employees at other locations. The employer argued that the only appropriate unit would include all seventeen locations that it operated in the Western Michigan market.

The Regional Director had applied a *Specialty Healthcare* analysis to the case, but also relied upon pre-*Specialty Healthcare* cases applicable to multi-location units.⁵² He noted that the petitioned-for unit in this case was consistent with the employer's organizational structure and that there was more employee interaction within the I-94 corridor than with employees at other Michigan locations.⁵³

Jones Lang LaSalle Americas, Inc., 7-RC-072323 (R.D. decision March 2, 2012).

<http://www.nlr.gov/case/07-RC-072323>

*Regional Director Applies
Specialty to Multi-Facility
Units*

In this case, the Regional Director applied *Specialty Healthcare* to determine whether an employer's insistence that an additional facility should be added to a unit survived an "overwhelming community of interest" analysis. The employer had three facilities within eight

⁵² *Bread of Life*, 07-RC-072022 (R.D. decision February 24, 2012), slip op. 7-9.

⁵³ *Id.*

miles of one another. These were the “Delta”, the “Stamping” and the “LGR” facilities. Two of the facilities, Delta and Stamping, were right next to one another, while the third, LGR, was about eight miles away.

The union argued that the Delta and Stamping facilities, for the purposes of a unit determination, constituted a single plant. The Regional Director determined, however, that even if considered as separate plants, the Delta and Stamping facilities could constitute an appropriate unit without the addition of the LGR plant.

He noted that some Delta and Stamping employees worked at both facilities and that there was more interaction between employees of those facilities than with employees at the LGR facility. He further noted that while an eight mile separation is not generally significant in evaluating multi-facility units, it stands out when the other two facilities are right next to each other.

Applying *Specialty Healthcare*, he determined that the employer had not met its burden to establish an overwhelming community of interest between employees in the LGR facility and those of the Stamping and Delta facilities. Accordingly, a unit limited to the Delta and Stamping facilities was found to be appropriate.

No request for review was filed.

United States Infrastructure Corporation, 13-RC-090072 (R.D. decision November 6, 2012). <http://www.nlr.gov/case/13-RC-090072>

*Regional Director Applies
Specialty to Multi-Location
Unit*

The union filed a petition seeking to represent a single unit consisting of four out of five of the employer’s districts in Illinois. The employer argued that the only appropriate unit must include all five districts; i.e. a statewide unit. Applying *Specialty*, the Regional Director concluded that, while each district could appropriately constitute a separate unit, the only appropriate multi-district unit must be statewide. Although the employees at each district could constitute separate units, there was nothing unique to this four-district configuration that wasn’t shared equally by the employees in the fifth, un-petitioned-for district.

Accordingly, he ordered elections for each of the four petitioned-for districts, constituting four separate units.

D. Single-Facility Presumption

King Soopers, 27-RC-104452 (Bd. decision September 13, 2013).

<http://www.nlr.gov/case/27-RC-104452>

*Board Avoids Deciding If
Specialty Applies to Single
Facility Presumption*

In this case, the Board denied review of the Regional Director's decision finding the employer had failed to rebut the single facility presumption. However, the Board noted that it need not reach the question of whether a *Specialty* analysis was applicable to the case.

The petitioner sought a single store unit of all employees engaged in the handling of selling merchandise, including Starbucks employees but excluding meat department and deli department employees. The employer stipulated to the exclusion of the deli and meat department employees.

The employer maintained that two additional stores, one 3 miles away and the other 5 miles away composed a functionally integrated geographic grouping that must comprise a multi-facility unit. The employer also argued for the exclusion of the Starbucks employees, as they had more in common with the deli department employees than with those in the petitioned-for unit.

In evaluating whether the single facility presumption had been rebutted, the Regional Director applied parallel analyses under both traditional factors and under *Specialty Healthcare*. Noting that the Board had not yet applied a *Specialty* analysis in a reported multi-facility case, he found that "there is no reason to conclude it would not apply that analysis."⁵⁴

The Regional Director found significant local authority regarding labor relations, noting no evidence that local suspensions and terminations are routinely overturned. There was evidence of voluntary temporary transfers between locations and of a unique area-wide seniority system. The Regional Director noted that most temporary transfers were voluntary, and that these have less weight than involuntary transfers in rebutting the single facility presumption.

While noting that the three stores in question were in relatively close geographic proximity, the Regional Director noted that there were single store units of meat department, or meat, deli, and Starbucks employees at the other two stores proposed for inclusion.

The Regional Director concluded that the employer had not rebutted the single facility presumption under a traditional analysis, and then went on to conclude that under *Specialty* the

⁵⁴ *King Soopers*, R.D. decision at 23 (July 11, 2013).

employer had not demonstrated that the employees of the other stores shared an overwhelming community of interest with those in the petitioned-for unit.

He rejected arguments that the Starbucks employees should be excluded because they had more in common with deli department employees, noting that the employer had stipulated to the exclusion of meat and deli department employees.

Member Miscimarra would have granted review of the inclusion of coffee shop employees in the unit.

Stericycle, Inc. , 19-RC-088671, (Bd. decision November 14, 2012)

<http://www.nlr.gov/case/19-RC-088671>

*Traditional Factors Applied
to Scope, Specialty Applied to
Composition*

In this case, the Board denied review of a Regional Director's decision finding that unit of drivers employed at the employer's facility in Kent, Washington was appropriate.

In regard to scope, the employer asserted that the smallest appropriate unit must include all of facilities units through the United States. When the union sought a unit of drivers at a single facility, the employer objected to both the scope and the composition of the proposed unit.

In regard to scope, the employer asserted that the smallest appropriate unit must include all of the facilities in its Northwest Pacific District. In regard to composition, it asserted that the unit should also include warehousemen, plant workers, maintenance, etc.

The Regional Director evaluated whether the employer had overcome the single facility presumption by applying traditional factors without reference to *Specialty*. Applying traditional factors including control over labor relations and daily operations, employee interchange and contact, and distance between facilities, the Regional Director concluded that the employer had failed to rebut the presumption.

He then went on to apply a *Specialty Healthcare* analysis to the unit composition issues. He noted that the drivers' specialized skills and training distinguish them from the other employees proposed for inclusion. While there was a small degree of functional integration between drivers and dispatchers, there was little with the other employees. There was no evidence of interchange between driver and other employees. While drivers shared some terms and conditions of employment with other employees, they worked under separate first level supervision.

The Regional Director found the proposed drivers unit to be prima facie appropriate under *Specialty*, and that the employer had failed in its burden of demonstrating that additional employees shared an overwhelming community of interest with them.

Unity Health System, 03-RC-103449 (Bd. decision June 19, 2013).

<http://www.nlr.gov/search/simple/all/03-RC-103449%20>

*Regional Director Applies
Traditional Standards and
Specialty*

In this case, the Board denied review of a Regional Director's decision concerning whether the employer had overcome the single facility presumption. The employer operates three skilled nursing facilities in Greece, New York. The union filed a petition seeking to represent the employees at one of the three facilities. The employer argued that the only appropriate unit must also include a second facility that was 9 miles away.

While noting that the Board has not provided specific guidance as to the applicability of *Specialty* to the question of whether the single facility presumption had been overcome, she proceeded to analyze the issue both under traditional standards and under *Specialty Healthcare*. She concluded that the employer had failed to overcome the single facility presumption under traditional standards, and also concluded that, under *Specialty* the employer had failed to demonstrate that the employees at the second location shared an overwhelming community of interest with those in the petitioned-for unit.

Performance of Brentwood LP, 26-RC-63405 (Bd. decision November 4, 2011).

<http://www.nlr.gov/case/26-RC-063405>

Auto Sales and Service

The union filed a petition seeking to represent all full-time and part-time service technicians and lube technicians employed at the employer's new car facility and a nearby pre-owned facility, collectively known as the "South" facility. The employer took the position that the unit should also include its facility in a nearby town known as the "North" facility, and also took the position that the detail technicians, diagnostic technicians, pre-delivery technicians, service advisors and workflow coordinators should be included in the unit.

In a post-*Specialty Healthcare* decision issued on September 29, 2011, the Regional Director applied the single facility presumption to the collective "South" location and concluded that the employer had failed to rebut the presumption. The Regional Director also concluded,

without reference to *Specialty Healthcare*, that the detail technicians, “get ready” technicians and service advisors did not share a sufficient community of interest with the petitioned-for employees, but that the diagnostic technicians and workflow coordinators should be included into the unit.

The employer sought review on November 4, 2011. The Board granted review and remanded the case to the Regional Director for consideration of: 1) whether the collective “South” locations were properly treated as a single facility worthy of a presumption of appropriateness, 2) whether, even if they were, the employer hadn’t successfully rebutted the presumption of appropriateness, 3) whether the petitioned-for unit is appropriate even if a presumption of appropriateness doesn’t apply, and 4) whether the service advisors, get ready technicians and detail technicians are properly excludable under the standard set forth in *Specialty Healthcare*.⁵⁵

In the meantime, the employer had filed a motion seeking to withdraw its Request for Review, and on November 8, 2011 the order granting review was rescinded.

Jaspers Foods Management, Inc., 19-RC-088681 (R.D. decision October 11, 2012).

<http://www.nlr.gov/case/19-RC-088681>

*Specialty “Not Particularly
Instructive” Regarding
Single Facility Presumption*

The union petitioned for a unit comprising the four retail clerk’s employed at the Doozy’s delicatessen in Wilsonville, Oregon. The employer asserted that the only appropriate unit must include all 115 retail clerks employed at all 37 of its locations.

Noting that the dispute concerned not the composition of the unit, but its scope, the Regional Director found that *Specialty Healthcare* is “not particularly instructive” in evaluating whether the single facility presumption had been overcome. Rather, he found that the Board’s traditional factors were the proper evaluation tool. The Regional Director articulated their factors as 1) control over daily operations and labor relations; 2) employee skills, functions, and working conditions; 3) employee interchange on contact; 4) bargaining history; and 5) distance between facilities.

While the employer presented some evidence in support of overcoming the presumption, such as common wages, benefits, shifts and working conditions, the minimal interchange and

⁵⁵ Member Becker would have denied review of this final issue, on the grounds that the Regional Director had adequately explained the reasons for their exclusion.

contact among employees, and the geographic distances between independently operating weighed in favor of the single unit presumption.

Finding that the employer had failed to meet its burden in overcoming the presumption, an election was directed in the petitioned-for unit.

Pac Tell Group, Inc., d/b/a U.S. Fibers, 10-RC-101166 (R.D. decision May 3, 2013⁵⁶).
<http://www.nlr.gov/case/10-RC-101166>

*Overwhelming Community of
Interest Necessary to Defeat
Single Facility Presumption*

In this case, the Acting Regional Director used a *Specialty Healthcare* analysis combined with traditional factors in concluding that the employer had not overcome the single facility presumption. The employer is engaged in the business of recycling polyester and manufacturing recycle, fibers. The union petitioned to represent a unit of employees at the employer's Trenton, South Carolina facility. The employer took the position that the unit must include the employees of a facility in Laurens, South Carolina, about 75 miles away.

While the Laurens facility engaged only in recycling, the Trenton facility engaged both in recycling and in manufacturing. About 25% of the recycled material used in the Trenton facility came from the facility.

The Regional Director evaluated the situation noting both that the party seeking to overcome the single facility presumption must show that the single facility has been effectively merged into a broader unit, or is so functionally integrated with another unit that it has lost its separate identity. She also concluded that the proponent of the larger unit, under *Specialty*, must show that the additional employees proposed for inclusion share an overwhelming community of interest with the petitioned-for employees.

Noting that day-to-day labor relations are handled locally, that the Trenton facility requires a wider range of employee functions and skills, that employee interchange is virtually non-existent and that the distance between the facilities is substantial, the Acting Regional Director concluded that the employer had failed to overcome the single facility presumption.

⁵⁶ The employer sought review of some supervisory excesses but not of the decision regarding the single plan presumption. *PAC Tell Group*, 10-RC-101166, (Bd. decision May 31, 2013).

Parkside Utility Construction, LLC., 04-RC-106177 (R.D. decision July 11, 2013).
<http://www.nlr.gov/case/04-RC-106177>

*Regional Director Analyzes
Under Both a Traditional
and a Specialty Standard*

The union petitioned for a unit of construction employees, including yard workers, equipment operators and truck drivers working out of the employer's Harleysville, Pennsylvania facility. The employer contended that the unit must include those construction employees based at its Allentown, State College and York facilities.

The Regional Director noted that the Board in *Specialty Healthcare* did not indicate whether the analytical framework set forth therein is intended to apply to a single location vs. multi-location unit issue. Because of that uncertainty, he analyzed the issue under both traditional and *Specialty Healthcare* standards.

In the first instance, he rejected an argument that because the employer provided construction for a public utility, the unit should be subject to the public utilities presumption favoring system-wide units. He then applied both a single facility presumption analysis and a *Specialty Healthcare* analysis to conclude that a single location unit was appropriate in this case.

McCoy Logistics Services Joint Venture, 30-RC-062064 (R.D. decision September 9, 2011). <http://www.nlr.gov/case/30-RC-062064>

Government Contractors

The substantive issue in this case was whether a petition to represent employees at a single facility was appropriate, or whether the employer had successfully rebutted the single facility presumption. *Specialty Healthcare* was cited solely for the general proposition that the fact that a larger unit would also be appropriate is not in itself sufficient to render a smaller unit inappropriate.⁵⁷ Otherwise, the Regional Director utilized a traditional analysis in determining whether or not the employer had rebutted the single facility presumption.⁵⁸

In this case, the Regional Director concluded that the employer had not rebutted the presumption.

⁵⁷ *McCoy Logistics, supra*, slip op. at 19.

⁵⁸ *Id.* slip op. at 16-21.

Western Refining Wholesale, Inc., 28-RC-080650 (R.D. decision June 4, 2012).
<http://www.nlr.gov/case/28-RC-080650>

*Petroleum Product
Distribution*

The employer is engaged in the purchase, transportation, and sale of petroleum products to retail facilities. The union petitioned for a unit of all finished product drivers, lube drivers and warehouse employees employed at its Albuquerque, New Mexico facility. The employer contended that the appropriate unit must include such employees at not only its Albuquerque facility but also at its Gallup and Bloomfield, New Mexico facilities. The employer contended that the three facilities constituted a single administrative grouping that effectively rebutted the single-facility presumption and, in the alternative, that the employees of the Gallup and Bloomfield facilities share an overwhelming community of interest with the Albuquerque employees.

The Regional Director found that the employees at the Albuquerque facility shared a sufficient community of interest to constitute an appropriate unit. Further, while a common dispatch system dispatched drivers from all three facilities, the drivers and warehouse employees at the individual facilities maintained a stronger connection to their assigned terminals through shared supervision. He further noted that no transfers between terminals had occurred in at least two years.

He therefore found that the employer had neither rebutted the single facility presumption through a common administrative grouping analysis or through a *Specialty Healthcare* overwhelming community of interest analysis.

Children's Health Care d/b/a Children's Hospital and Clinics of Minnesota, 18-RC-073160 (R.D. decision February 24, 2012). <http://www.nlr.gov/case/18-RC-073160>

*Undue Proliferation Doctrine
Applied Post-Specialty*

The employer operated acute-care hospitals ten minutes apart in Minneapolis and St. Paul. The union filed a petition seeking to represent the technicals at the Minneapolis facility. The Regional Director cited *Specialty Healthcare* only for the proposition that it had cited with approval *Manor Healthcare Corp.*, 285 NLRB 224 (1987), which permits a party in the health care industry to argue that a single-facility unit presents an increased risk of adverse consequences from labor disputes.

The Regional Director went on to conclude that centralized control of management and supervision, functional integration, system-wide job postings, etc. were enough to overcome the single-facility presumption. He did not apply a *Specialty Healthcare* analysis to the employer's insistence upon inclusion of the technical employees at the St. Paul facility into the unit, or explore whether or not *Specialty Healthcare* applies to such a situation.

The petition apparently was withdrawn after issuance of the decision.

E. Presumption of Wall-to-Wall Unit Appropriateness

American Medical Response Ambulance Service, Inc., Case 28-RC-74676 (Bd. decision April 19, 2012). <http://www.nlr.gov/case/28-RC-074676>

In this case the Board denied review of the Regional Director's decision finding that a wall-to-wall unit was appropriate. Member Flynn dissented only in regard to a supervisory issue. The union petitioned for a wall-to-wall unit that included not only EMT's but also clerks, billers, mechanics and trainers. The employer took the position that the non-EMT classifications should be excluded.

The Regional Director noted that a wall-to-wall unit is presumptively appropriate and that the burden shifts to the employer to demonstrate that the classifications are so disparate that they cannot be represented in the same unit.⁵⁹ The Regional Director relied upon *Specialty Healthcare* only for its having reaffirmed that the Act requires only "an" appropriate unit, not the *most* appropriate unit. In finding the petitioned-for unit appropriate, he noted that all of the classifications regularly interacted with one another, and are functionally integrated.⁶⁰

Community Voices Heard, 2-RC-93771 (R.D. decision January 11, 2013).
<http://www.nlr.gov/case/02-RC-093771>

Specialty Standard "Wholly Inapposite" to Wall-to-Wall Unit Presumption

The union petitioned for a wall-to-wall unit of all full time and regular part-time employees of the employer. In addition to raising managerial and supervisory issues, the employer sought to exclude a Coordinator position from a unit that otherwise consisted of organizers, on the basis that there was not a sufficient community of interest.

⁵⁹ *American Medical Response Ambulance Service, Inc., Case 28-RC-74676 (R.D. decision March 21, 2012) slip. Op. at 11-13.*

⁶⁰ *Id.*

The Regional Director found the “overwhelming community of interest” standard articulated in *Specialty* to be “wholly inapposite” to a case where the employer is seeking to rebut the wall-to-wall unit presumption. Applying a traditional analysis, the Regional Director found that the burden was on the employer to demonstrate the interests of the classifications proposed for exclusion are so disparate from those of other employees that they cannot be represented in the same unit.

Here the Regional Director concluded that the employer had not met this burden.

F. Public Utilities Presumption

Idaho Power, 27-RC-+093439 (R. D. decision January 8, 2013).

<http://www.nlr.gov/search/simple/all/27-RC-%2B093439%20>

*Specialty Inapplicable to
Public Utilities Presumption*

In this case the union petitioned for a 31 employee unit limited to Load Servicing Operators and Balancing Operators who work for an electric utility. The employer, while not insisting that all system employees be included in the unit, asserted that the smallest appropriate unit must include some 504 employees.

The union relied upon *Specialty Healthcare* in arguing that its proposed unit shared a community of interest and did not share an overwhelming community of interest with the excluded employees. The Regional Director, however, noted that *Specialty* does not disturb any rules applicable only in specific industries, and as a consequence does not establish the proper framework for resolving public utility bargaining unit cases.⁶¹

She went on to conclude that the petitioner had not, under traditional standards, rebutted the system wide presumption for public utilities. The Regional Director conceded that if *Specialty Healthcare* had applied in this case, a different result may be warranted.⁶²

The Regional Director applied traditional factors, such as whether the less-than-system wide unit consisted of employees who work in an administrative subdivision or a distinct geographic service area, and does not result in undue disturbance to the company’s ability to perform its necessary functions. The Regional Director noted that the employer’s operations in

⁶¹ *Idaho Power*, slip op at 8.

⁶² *Id.* Slip op. at 38.

Idaho had in recent years become much more consolidated and centralized, and concluded that the system-wide presumption had not been rebutted.

Because the petitioner did not express an interest in proceeding to an election in a broader unit, the petition was dismissed.

Alaska Power & Telephone Company, 19-RC-102002 (R. D. decision June, 20, 2013).

<http://www.nlr.gov/case/19-RC-102002>

*Public Utility Presumption
Successfully Rebutted*

In this case, the Regional Director found that the public utility presumption, though applicable, had been successfully rebutted by the petitioner. The union petitioned for a unit of six classifications of employees employed on Prince of Wales Island in Southeast Alaska.

The Regional Director found that the extreme geographical separation between the petitioned-for unit and off-island employees undercuts the system wide presumption. He cited *Specialty Healthcare* only for its recitation of traditional community of interest standards; he did not apply the “overwhelming community of interest” prong in finding the presumption to be rebutted.

While finding some traditional factors to be neutral as to whether the presumption had been rebutted, he noted that there was little evidence that a labor dispute on Prince of Wales Island could disrupt service on the mainland, the sparsity of off-island transfers and the supervisory structure all supported the petitioner in rebutting the system wide presumption.

The Regional Director agreed with the employer that the public utilities presumption was applicable, but found that it had been overcome.

VI. Unreported Board and Regional Director’s Unit Determination Cases

A. Retail Stores

1. Decision on Review:

Home Depot USA, 20-RC-067144 (Bd. decision May 31, 2012).

<http://www.nlr.gov/case/20-RC-067144>

The petitioner sought a unit of “merchandise department specialists” that would exclude other store employees such as cashiers, loaders, bookkeeping, etc. The Regional Director noted that the Board has long favored wall-to-wall units in the retail industry, and that the proposed unit met none of the traditional exceptions, such as geographic separation without substantial integration of the workforce. He noted that in this case, there was a high degree of functional integration with regard to the tasks performed, as well as a degree of supervisory overlap between employees proposed for inclusion and exclusion.

Applying *Specialty Healthcare*, he concluded that the employer had met its burden of establishing that the remaining employees shared an overwhelming community of interest with the employees in the petitioned-for unit. He concluded that the petitioned-for group would constitute a “fractured” unit representing only an “arbitrary segment” of what would be an appropriate unit.⁶³

The Board denied a request for review, noting that since the petitioned-for unit was in any event inappropriate, “we find it unnecessary to pass on the Regional Director’s further finding that only a wall-to-wall unit is appropriate.”

2. Review Granted With Decision Pending:

Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 02-RC-076954, (Bd. decision May 30, 2012). <http://www.nlr.gov/case/02-RC-076954>

In this case, the Board has granted review and a decision is pending, regarding the Regional Director’s decision finding that a unit of full-time and regular part-time women’s shoe department associates constitutes an appropriate unit. The Board granted leave to a number of industry and employer groups to file amicus briefs. The case is now fully briefed and awaiting a decision.

The employer’s “men’s” store and “women’s” store are separate but in direct proximity. The union petitioned for a unit of women’s shoe associates who work in a casual shoe and a separate dress-shoe area of the store, located on separate floors. The employer argued that a modified wall-to-wall unit, excluding restaurant, visual, alterations and craft employees is the smallest appropriate unit. In the alternative, the employer argued that the smallest appropriate unit must include all sales associates and assistants.

In finding a separate unit of women’s shoe department associates to be appropriate, the Regional Director gave significant weight to the fact that these employees are paid differently than other sales personnel. They are paid on a “draw vs. commission” basis and earn

⁶³ *Home Depot, R.D. decision (November 18, 2011)*, slip op. at 15.

commissions of 9-10% as opposed to 3-5% in the rest of the store. She noted the low number of permanent transfers into the department and the lack of any temporary transfers into the department. She also noted cases referencing voluntary recognition of a shoe department unit, and questioned the existence of a wall-to-wall presumption in the retail industry.

These and other factors were found to outweigh the fact that all sales employees are subject to the same health benefits, vacation and holiday policies, evaluation forms, probationary periods, and access to common break areas.

Macy's Inc., 01-RC-091163 (Bd. decision December 4, 2012).

<http://www.nlr.gov/case/01-RC-091163>

*Fragrances/Cosmetics
Department*

In this case, the Board has granted review and a decision is pending regarding the Regional Director's decision finding that a unit limited to cosmetics and fragrances employees at the employer's Saugus, Massachusetts store is appropriate. As in *Neiman Marcus Group, supra*, a number of industry and employer groups have filed *amicus* briefs.

Of about 150 employees at the store, approximately 120 are in sales. Of those, about 41 work in cosmetics/fragrances. The employer argued for a wall-to-wall unit or, in the alternative, for a unit consisting of all sales employees. The Regional director found that the cosmetics/fragrances employees were a readily identifiable group who share a community of interest, and that the employer had failed to demonstrate that other employees shared an overwhelming community of interest with the petitioned-for employees.

He noted that there were some similarities between the excluded and included employees. All employees are subject to the same handbook and work rules, and are evaluated on the same matrix. Some employees in other departments shared the same classification as cosmetics/fragrances employees.

The Regional Director noted that temporary transfers between cosmetics/fragrance and other departments are almost non-existent, as was functional integration. The petitioned-for employees were paid differently than most other sales employees, and wore distinctive uniforms. While it was unclear how the units came into existence, the Regional Director noted that cosmetics/fragrances employees had been excluded from the otherwise wall-to-wall units recognized by the employer at a number of its Massachusetts stores.

The Regional Director found *Wheeling Island Gaming, supra*, to be inapplicable because it was a "pre-*Specialty Healthcare* case."

B. Nursing Homes/Sub-Acute Healthcare Facilities

Extendicare Homes Inc., d/b/a Texas Terrace 18-RC-70382 (Bd. decision January 24, 2012). <http://www.nlr.gov/case/18-RC-070382>

Specialty Healthcare Redux

This case is essentially a straight-up repeat of the *Specialty Healthcare* facts. The Regional Director on December 30, 2011, found that a unit limited to “Nursing Assistants Registered” and “Trained Medical Aides” was appropriate under *Specialty Healthcare*. The employer argued that dietary employees should also be included. (Maintenance and housekeeping were contracted out).

On review, the employer argued that the nursing department employees in this case interacted more with dietary employees than was the case in *Specialty Healthcare*. Essentially, however, the employer argued that *Specialty Healthcare* was improperly decided.

Review was denied on January 24, 2012, by a panel majority consisting of Chairman Pearce and Member Griffin. Member Hayes, dissenting, would have granted review for the reasons stated in his *Specialty Healthcare* dissent.

Riverview Health and Rehabilitation Center North, 07-RC-089352 (Bd. decision November 14, 2012). <http://www.nlr.gov/search/simple/all/07-RC-089352%20%20>

This is another repeat of the facts in *Specialty Healthcare*. The union sought a unit limited to CNA’s. In addition to arguing that *Specialty* was improperly decided the employer argued that a prior Stipulated Election Agreement seeking a larger unit created a “history of collective bargaining,” an argument rejected by the Regional Director.

The Board denied review, noting that the employer had failed to meet its burden to demonstrate that additional employees proposed for inclusion shared an overwhelming community of interest with the CNA’s.

Windsor Anaheim Healthcare, 21-RC-071722 (R.D. decision February 9, 2012).
<http://www.nlr.gov/case/21-RC-071722>

*Service and Maintenance
Excluding Techs*

In this case the petitioner sought a service and maintenance unit of nursing, housekeeping, laundry and maintenance employees that excluded LVN's, RN's, Receptionists, Assistant MDS Coordinators, and Business Office Coordinators. The employer asserted that only a wall-to-wall unit of all non-professional employees was appropriate.

The Regional Director concluded that “[u]nlike *Specialty Healthcare* ... the union herein has not proposed a unit consisting of a set of employees who are clearly definable as a group.”⁶⁴ He concluded, however, that the employees in the proposed unit shared a community of interest.⁶⁵ In determining that LVN's were properly excludable, the Regional Director did not look to previous Board determinations that LVN's were properly excludable as technical employees, but found that they had duties significantly different enough from the petitioned-for unit to properly exclude them.⁶⁶ He reached a similar conclusion regarding the Receptionist, Assistant MDS Coordinator, and Business Office Coordinator positions.⁶⁷

Accordingly, an election was directed in the petitioned-for unit.

Champlin Shores Assisted Living, 18-RC-087228 (Bd. decision October 3, 2012)

<http://www.nlr.gov/case/18-RC-087228>

*Specialty Applied to Assisted
Living Center*

This case is similar to the facts of *Specialty Healthcare*, but in a non-nursing home, assisted living facility context. The union sought a unit of Resident Assistants and Medical Technicians. The Resident Assistants help residents with daily living activities such as dressing, bathing, etc. The Medical Technicians perform these duties as well, but also administer medication.

The employer sought to add dietary employees to the unit, as well as a Life Enrichment Assistant who essentially was involved in planning for and taking residents to various activities. The Regional Director concluded that the employees in the petitioned-for unit were a clearly identifiable group who shared a community of interest and that the employer had failed to demonstrate that the dietary and activities employees shared an overwhelming community of interest with the petitioned-for employees.

While Resident Assistants and Medical Technicians were allowed in residents' rooms, the employees the employer sought to add to the unit were not. The employees in the petitioned-

⁶⁴ *Windsor-Anaheim, supra*, slip op. at 15.

⁶⁵ *Id* slip op. at 16.

⁶⁶ *Id* slip op. at 16.

⁶⁷ *Id* slip op. at 18-19.

for unit all were in the same department and had common supervision that was distinct from that of other employees. Further, employees in the petitioned-for unit had distinct functions related to resident care.

The Board denied review of the Regional Director's decision, Member Hayes dissenting on the basis of his dissent in *Specialty Healthcare*.

C. Group Homes

Jawonio, NJ. 22-RC-084183 (R.D. decision August 9, 2012).

<http://www.nlr.gov/case/22-RC-084183>

*“Per-Diems” Share
Overwhelming Community of
Interest with Other
Employees*

The union petitioned for a unit that included full-time and “regular part-time” Direct Support Professionals (DSP's) but excluded “per diem” DSP's. For the purposes of this employer's vernacular, “regular part-time” DSP's were those with a regular schedule, while “per diem” DSP's were those who, although working enough hours to be “regular part-time” employees under Board precedent, were not regularly scheduled but called as needed.

The Regional Director found that the per diem DSP's shared an overwhelming community of interest with the other DSP's. They did the same work, and started at the same pay rate. The employer had also recently started all DSP's as per diem until they could be given a regular schedule.

Accordingly, an election was scheduled in a unit that included the per diems.

D. Mental Health

MHM Services, Inc., 04-RC-100225 (R.D. decision April 22, 2013).

<http://www.nlr.gov/case/04-RC-100225>

*“Per-Diem” Nurses Share
Overwhelming Community of
Interest with Other RNs*

The union filed a petition for a unit of full-time and regular part-time RN's, excluding “per diem” RN's who are part-timers working irregular hours. The Regional Director noted that per diem nurses in dispute worked sufficient hours not to be considered casual employees, and

that the Board has traditionally not found that per diem nurses have a separate community of interest.

The petitioner, however, contended that the unit was appropriate under a *Specialty Healthcare* analyses. While the per-diems had a different wage and benefit package, they had the same qualifications, training and supervision, and they worked side-by-side with other RN's and did the same work. The Regional Director thus concluded that the per-diems shared an overwhelming community of interest with other RN's, and that a unit excluding them would constitute a "fractured" unit.

E. Private Colleges

Pacific Lutheran University, 19-RC-102521, (R.D. decision June 7, 2013).

<http://www.nlr.gov/case/19-RC-102521>

*Unit of Contingent Faculty
Approved*

The union petitioned for a unit of non-tenure eligible contingent faculty. In addition issues concerning the religious nature of the institution and claims that some faculty were management employees under *Yeshiva*, they alleged not that additional employees should be added to the unit, but that the contingent faculty did not share a sufficient community of interest with one another to constitute an appropriate unit.

The Regional Director cited *Specialty Healthcare* for the proposition that a clearly identifiable group that shares a community of interest can constitute an appropriate unit. He noted that some contingent faculty are paid a salary based on a fraction of tenure eligible faculty salary, some are paid a lump sum per course, and some are paid hourly. This distinction was ameliorated, however, by the fact that contingent faculty may move between these categories from year to year. He noted that while there were differences in the terms and conditions of full-time and part-time contingent faculty, there was also considerable commonality in working conditions. He concluded that because of the nature of a university system, functional integration is not a critical factor in ascertaining unit appropriateness.

The Regional Director concluded that a unit of all full-time and regularly part-time contingent faculty is appropriate. He also rejected the employer's arguments regarding the religious nature of the institution and the managerial status of some contingent faculty.

A request for review of the Regional Director's decision is pending.

Becker College, 01-RC-081265, (R.D. decision June 22, 2012).

<http://www.nlr.gov/case/01-RC-081265>

*Service and Maintenance
Unit Must Include Drivers*

The union petitioned for a unit of facilities maintenance employees, including grounds department, maintenance department, housekeeping and equestrian facility employees, but excluding the college's transportation department employees, who consisted of van drivers and bus drivers.

The Regional Director, applying the first prerequisite of *Specialty Healthcare*, found that the proposed unit was inappropriate as it did not contain employees readily identifiable as a group who share a community of interest. She then proceeded to the next prong of the test and found that the transportation department employees, in any event, shared an overwhelming community of interest with the petitioned-for employees. Specifically, she found that the proposed unit was a fractured unit because all of the employees in the proposed unit did not share a community of interest that the transportation department employees didn't equally share.

The departments all had separate supervisors and minimal contact with one another, and there was little evidence of employee interchange. Without specifying what the differences were, the Regional Director acknowledged that the petitioner had presented evidence of differences between transportation and the departments in the unit sought by the union, but she discounted them.

Accordingly, she directed an election in a unit that included transportation department employees.

F. Truck Drivers

US Foods, Inc., 15-RC-076271 (Bd. decision May 23, 2012).

<http://www.nlr.gov/case/15-RC-076271>

*Van Drivers Vote Subject to
Challenge*

The petition sought a unit of truck drivers, spotters, fuelers and truck mechanics working in the Montgomery Division of the employer's wholesale food distribution business. The employer contended that the only appropriate unit should also include van delivery drivers, shipping and receiving clerks, custodians, quality control clerks, stockers, etc.

The Regional Director had found that under *Specialty Healthcare*, the employer had failed to demonstrate that these additional classifications shared an overwhelming community of interest with the proposed driver unit.⁶⁸ He noted that van drivers are in the transportation department and deliver products to customers. The regulatory scheme under which they work, and the method by which they perform their deliveries, was significant enough to distinguish them from employees in the petitioned-for unit.

On review, the Board found that the employer had raised a substantial issue only in regard to the unit placement of the van drivers. It was ordered that the van drivers be permitted to vote under challenge.

Corliss Resources, Inc., 19-RC-080317 (Bd. decision July 11, 2012)

<http://www.nlr.gov/case/19-RC-080317>

*Unit Limited to Dump Truck
Drivers*

In this case the Board, with member Hayes dissenting, denied review of the Regional Director's decision finding that a unit of dump truck drivers that excluded the employer's other drivers was appropriate for bargaining.

The employer operated a set of gravel quarries and concrete manufacturing plants, and, operated a fleet of trucks both for supplying its plants and for delivering products to its customers. The petitioning union sought to represent a unit composed of the employer's 29 dump truck drivers, and excluding its 45 concrete mixer drivers and drivers of other vehicles. In applying *Specialty Healthcare*, the Regional Director found that the employer had not met its burden of proving that the concrete mixer and other drivers shared an overwhelming community of interest with the dump truck drivers.

All drivers were on the same pay scale and similar benefits. They were cross-trained and there were recurring instances of temporary transfers between dump truck and concrete mixer drivers.

However, the dump truck drivers were in a separate department and had a history of separate supervision. Functionally, the dump truck drivers made deliveries within the employer's various operations, while the concrete drivers made deliveries to customers. While there was considerable overlap of skills and training between the truck driver groups, the positions also had distinct skills and training. While there were temporary transfers between the groups, they otherwise had little work contact between one-another.

⁶⁸ *US Foods, Inc.* 15-RC-076271(R.D. decision April 23, 2012).

The Regional Director found that two factors- skills and training, and conditions of employment favored the employer's position but that the remaining factors favored the union. Accordingly, it was found that the employer had not met its burden, and the petitioned-for unit was found to be appropriate.

Dora's Naturals, Inc, 22-RC-070173, (R.D. decision January 18, 2012).

<http://www.nlr.gov/case/22-RC-070173>

*Exclusion of Warehouse
Employees OK*

The employer is engaged in the distribution of organic milk and dairy products. The union filed a petition seeking to represent a unit consisting of all truck drivers employed by the employer at its South Hackensack, New Jersey, location. The employer contended that the smallest appropriate unit must also include all warehouse employees at the same location.

The Regional Director applied the *Specialty Healthcare* analysis to conclude that the warehouse employees did not share an overwhelming community of interest with the drivers. He noted the separate supervision, different qualifications, lack of interchange and difference in wages between the groups. While applying *Specialty Healthcare*, the Regional Director also cited pre-*Specialty Healthcare* cases that supported a finding of an appropriate unit limited to truck drivers.⁶⁹

The Regional Director directed an election in the petitioned-for truck driver unit.

T.G.F. Management Group Holdco, Inc., d/b/a Toll, 31-RC-072975 (R.D. decision March 12, 2012).

<http://www.nlr.gov/case/31-RC-072975>

*Unit Excluding Non-Driver
Trucking Operation
Employees*

The union sought a unit of tractor trailer drivers employed by the employer at its San Pedro, California facility. The employer asserted that the smallest appropriate unit must include all full-time and regular part-time trucking operation and logistics personnel working out of its San Pedro facility. Additional classifications proposed by the employer included dispatchers, forklift operators, body mechanics, switchers, customer service representatives and warehouse laborers.

⁶⁹ *Dora's Naturals, supra*, slip op. at 11.

The Regional Director concluded that based upon relevant Board law, including *Specialty Healthcare*, a unit limited to drivers was appropriate. He noted that drivers do not load or unload containers, are not assigned to work at the warehouse, and have little contact with other employees except for dispatchers. None of the other classifications drive trucks for delivery purposes, although mechanics sometimes drive them within the shop to test them.

The Regional Director found that drivers are a readily identifiable group who share a community of interest and that the employer failed to demonstrate that the additional employees the employer sought to add shared an overwhelming community of interest with the petitioned-for unit. None of the classifications the employer sought to add performed the work of the drivers, there was no evidence of transfer between the groups and with the exception of dispatchers, there was no common supervision.

The dispatchers were salaried employees and never actually visited the port. While dispatchers and drivers had regular contact, this was not enough to establish an “overwhelming community of interest.”

Accordingly, an election was directed in a unit limited to the drivers.

Republic Services/Allied Waste Services, 11-RC-068882 (R.D. decision December 12, 2011).

<http://www.nlr.gov/case/11-RC-068882>

Unit Excluding Mechanics

The union filed a petition seeking a unit of drivers employed at the employer’s solid waste facility. The employer asserted that the unit should also include mechanics, technicians for stationary equipment, and a maintenance clerk, referred to collectively as the “mechanics.”

The Regional Director concluded applying *Specialty Healthcare* that the mechanics did not share an overwhelming community of interest with the drivers. She noted that the two groups have distinct terms and conditions of employment, are separately supervised, have limited interaction with one another, and do not share the same job functions. She cited to a number of pre-*Specialty Healthcare* cases for the proposition that the Board has “generally found units limited to drivers to be appropriate when they lack substantial interchange with other employees, perform significantly different functions, possess different skills and work under different immediate supervision.”⁷⁰

⁷⁰ *Republic Services, supra*, slip op. at 8.

Accordingly, an election was directed in a unit limited to drivers.

Rinchem Company, 19-RC-102000 (R.D. decision May 10, 2013).

<http://www.nlr.gov/case/19-RC-102000>

*Warehouse and Driver Unit
Approved*

The employer provides chemical and transport services at a facility in Hillsboro, Oregon. The petitioner sought a unit of warehouse technicians, drivers, and clean room technicians. The employer contended that the unit must also include Customer Service Representative (CSR's) and Waste Coordinators.

Applying a *Specialty Healthcare* analysis, the Regional Director found the petitioned-for unit to be appropriate.⁷¹ While CSR's shared common supervision and similar wages and benefits with the proposed unit, Waste Coordinators did not have similar wages and benefits.

Drivers were responsible for also performing warehouse functions, while the CSR's in dispute worked at desks where they had computers and telephones, although they also needed to handle materials and sometimes operate forklifts. The CSR's and Waste Coordinators had regular but limited contact with employees in the petitioned-for unit.

Noting the employer's stipulation that the unit should, at minimum, contain the petitioned for employees, the Regional Director found that they were a readily identifiable group who shared a community of interest, and the employer had failed to demonstrate that the excluded classification shared an overwhelming community of interest with them.

G. School Bus Drivers

First Student, Inc., 21-RC-089564 (R.D. decision, October 24, 2012).

<http://www.nlr.gov/case/21-RC-089564>

In this case, the Regional Director concluded that the employer had met its burden in demonstrating that additional employees proposed for inclusion shared an overwhelming community of interest with the petitioned-for employees.

⁷¹ One CSR, however, was permitted to vote under challenge because the union conceded in the brief that the individual was actually a shipping/receiving clerk.

The union had petitioned for a unit of 101 bus drivers who worked pursuant to a contract with the Los Angeles County Office of Education (LACOE). At the same terminal, the employer also employed 86 drivers who worked pursuant to a contract with the Los Angeles Unified School District (LAUSD), 7 drivers who worked pursuant to a contract with Green Dot public schools and 5 drivers who worked pursuant to a contract with the Redondo Beach Unified School District.

Regardless of which contract they serviced, the bus drivers had common supervision. The petitioned-for LACOE drivers transported only special-needs students, while drivers servicing the other contracts out of the terminal transported some special needs students, but did not do so exclusively. The employer maintained separate seniority lists for drivers servicing each contract; drivers who bid for a route servicing a different school district would lose their prior seniority. Such permanent transfer were rare; however temporary transfers were more frequent, with LAUSD drivers substituting for drivers servicing the LACOE, Green Dot and Redondo contracts.

All drivers, regardless of the contract they serviced, were subject to the same wage scale, and received the same benefits.

The Regional Director concluded that the other school bus drivers at the terminal shared an overwhelming community of interest with those in the petitioned-for LACOE unit, and that the petitioned-for unit would constitute a “fractured” unit. He noted that all of the employees at this terminal share the same yard, the same supervisors, the same work rules, the same benefits, and the same wages. He noted that the primary duty of all of the employer’s drivers at this terminal was to transport students.

Accordingly, he directed an election in a unit consisting of all unrepresented bus drivers working out of this particular terminal.

H. Restaurant Employees

Copper River Grill, 10-RC-098046 (R.D. decision March 7, 2013).

<http://www.nlr.gov/case/10-RC-098046>

*Unit Excluding Cooks and
Dishwashers*

The union petitioned for a unit of servers, bartenders and hostesses that did excluded dishwashers and cooks. The employer contended that the cooks and dishwashers share an overwhelming community of interest with the petitioned-for employees, warranting their inclusion in the unit.

Applying *Specialty*, the Regional Director found that the petitioned-for dining area employees are a readily definable group who share a community of interest and that the employer had not met its burden in demonstrating that the cooks and dishwashers shared an overwhelming community of interest with the petitioned-for employees. Kitchen employees had almost no interaction with customers, the groups worked in different areas of the restaurant, much of the interactions between the two areas was done through “expeditors” who are managers there was only nominal interchange of employees, there was separate supervision, and the dining employees received low-hourly wages, but, unlike kitchen employees, received substantial income from tips.

Thus, despite being subject to the same handbook and work rules, and the same medical benefits, the kitchen employees did not share an overwhelming community of interest with the dining area employees.

East Village Grand Sichuan d/b/a Grand Sichuan, 02-RC-099300 (R.D. decision April 12, 2013). <http://www.nlr.gov/case/02-RC-099300>

*Unit Limited to Delivery
Workers and Packers Not
Appropriate*

The union petitioned for a unit of delivery workers and packers that excluded waiters, cashiers, and kitchen staff. The employer argued that the unit should include all employees except cashiers or, in the alternative, must include all kitchen employees.

Applying *Specialty Healthcare*, the Regional Director concluded that the proposed unit would constitute a “fractured” unit because the kitchen staff shared as much of a community of interest with the packers as the delivery workers do. The packers and kitchen staff worked side-by-side in the kitchen, their wages started at the same hourly rate, and the kitchen workers sometimes assisted the packers when the restaurant was busy.

The delivery workers, unlike the packers, received tip income. The Regional Director concluded that the petitioned-for unit was not a readily definable group and that there was no rational basis for excluding the kitchen employees, who shared an overwhelming community of interest with the proposed unit.

Because the petitioner did not wish to proceed in an alternate unit, the petition was dismissed.

I. Craft Units

Alternative Mechanicals, LLC, 19-RC-70030 (R.D. decision January 10, 2012).

<http://www.nlr.gov/case/19-RC-070030>

Apprentices

The petition sought a unit limited to five sheet metal installers employed by an employer that provides sheet metal installation services to commercial companies. The employer contended that the smallest appropriate unit must include two apprentices.

The Regional Director looked both to *Specialty Healthcare* and to historic craft unit cases in concluding that the apprentices share an overwhelming community of interest with the installers, and that a unit of installers that excluded the apprentices would constitute a “fractured” unit.⁷² Accordingly, she directed an election in a unit that included the apprentices.

Firetrol Protection Systems, Inc., 27-RC-080251 (R.D. decision June 15, 2012).

<http://www.nlr.gov/case/27-RC-080251>

Sprinkler Fitters

The union petitioned for a unit limited to sprinkler fitters based out of the employer’s Denver, Colorado facility. The employer operates a full service fire safety and protection company. The employer contended that the smallest appropriate unit must include alarm technicians and inspection employees.

Applying a *Specialty Healthcare* analysis, the Regional Director concluded that a unit limited to sprinkler fitters is appropriate. She noted that similarities in wages and conditions of employment favored a broader unit, but that other factors stood in the way of there being an overwhelming community of interest between the sprinkler fitters and the excluded classifications.

Sprinkler fitters have separate licensure requirements and learn their skills through an apprenticeship process. They install various fire suppression systems.

Alarm technicians on the other hand, installed fire alarms, while inspection employees inspect and test the functionality of the alarm and the suppression systems. While the sprinkler fitters did some inspection work, this related to their core skills and functions: opening and closing valves, repairing the sprinkler systems, etc. This was found to be distinct from inspecting

⁷² *Alternative Mechanicals, supra*, slip op. at 1.

the entire system for functionality. Similarly, the sprinkler fitters' overlap in duties with alarm installation employees was found to be very limited.

Because of the distinct skills and qualifications of the sprinkler fitters, including their separate and distinct training, they were found to constitute an appropriate unit without the inclusion of the alarm installers and the inspectors.

Countrywide Mechanical Systems, 21-RC-078429 (R.D. decision May 11, 2012).
<http://www.nlr.gov/case/21-RC-078429>

HVAC- Sheet Metal Workers

The union petitioned for a unit of the employer's sheet metal workers in the construction department, including employees employed on a project covered by a Project Stabilization Agreement, but excluding employees in the "Special Projects" department and the sheet metal worker who performs "startup" work. The employer maintained that sheet metal workers subject to the Project Stabilization Agreement should be excluded from the unit, but that those in the Special Projects department and the "startup" employee should be included.

The Regional Director agreed with the employer that the employees employed under the Project Stabilization Agreement should be excluded from the unit. Their group was covered under an 8(f) agreement with a different Sheet Metal Workers local, and drew its employees from that Local's referral hall. They had a separate history of bargaining, different benefits, and had no interchange with the other petitioned-for employees.

The Regional Director applied a *Specialty Healthcare* analysis to the employees that the employer proposed for inclusion. She found that sheet metal workers in the construction department were a readily identifiable group who shared a community of interest. The sheet metal workers in the Special Projects department worked on smaller jobs, had separate supervision, seldom traveled out of town, etc. The record also reflected that even the employer considered "startup" work to be separate and distinct from traditional sheet metal work. Accordingly, the Regional Director found that the employer had not met its burden of proving that these employees shared an overwhelming community of interest with the construction department sheet metal workers.

Climattech, Inc., 06-RC-080123 (R.D. decision June 7, 2012)

<http://www.nlr.gov/case/06-RC-080123>

HVAC Systems

The employer is in the business of fabricating and installing HVAC equipment. The union petitioned for a unit of the employer's employees in Pennsylvania, Ohio, and West Virginia. The employer argued, *inter alia*, that the employees it used in West Virginia and Ohio did not share a community of interest with the employer's "core" employees based at its Pittsburgh facility.

The Regional Director agreed with the employer. He noted that *Specialty Healthcare* requires, in the first instance, that there be a community of interest among the petitioned-for employees. He found that the interests of the Pennsylvania-based "core" employees and those of the Ohio and West Virginia employees were "sufficiently distinct" enough to render their placement together inappropriate.

The "core" employees in Pennsylvania were hired directly by the company and subject to the company's pay and benefits package. The West Virginia and Ohio employees, on the other hand, were for the most part obtained from referrals from another local of the same union, and in one case, were covered by an 8(f) project labor agreement. While the Pennsylvania employees occasionally worked in West Virginia and Ohio, the reverse never took place. The Regional director concluded that the two sets of employees did not share the "requisite community of interest."

As a second and independent reason for excluding the West Virginia and Ohio employees, he noted that the projects in those states were winding down.

Elysian Brewing Company, 19-RC-082934 (R.D. decision July 13, 2012).

<http://www.nlr.gov/case/19-RC-082934>

Boiler Operators/Mechanics

The union petitioned for a unit of two boiler operators and one maintenance mechanic at one of the employer's breweries. The employer argued that there was no community of interest between the two classifications and at hearing, made an "off-hand" remark that additional employees must also be added.

The employer put on no evidence regarding the inclusion of additional employees, and while the union briefed the issue, the employer did not. Accordingly, the Regional Director concluded that he need not conduct an "overwhelming community of interest" analysis regarding

inclusion of additional employees. Instead, he evaluated whether there was a sufficient community of interest between the boiler operator and the maintenance mechanics. He noted that while the two classifications had dissimilar skills and training, there was an overlap in job function, regular contact, and similar terms and conditions of employment. In finding the proposed unit to be appropriate he noted that the Board had a history of placing boiler operators and mechanics together in combined craft units.

Sexton Ford Sales, Inc, 14-RC-068800 (R.D. decision December 8, 2011)

<http://www.nlr.gov/case/14-RC-068800>

Auto Service

The petitioner sought what was asserted to be a craft unit consisting of service technicians, lube rack employees, body shop repair employees, painters and painter assistants. The employer contended that the appropriate unit should include all employees in the service department, body shop and parts department.

In the first instance, the Regional Director applied a traditional craft unit analysis and concluded that the petitioned-for unit constituted a craft unit as defined by the Board.⁷³ He then went on to conclude that the proposed unit, under *Specialty Healthcare*, constituted a distinct appropriate unit even if it did not constitute a craft unit. He based this upon the distinct skills, the homogeneity of the petitioned-for unit, and working conditions.

He concluded that the employer had not met its “heavy burden” under *Specialty Healthcare* of proving that the additional classifications that the employer proposed for inclusion shared an overwhelming community of interest with the petitioned-for employees.⁷⁴

J. Maintenance Units

Nestle Dryer’s Ice Cream, 31-RC-66625 (Bd. decision December 28, 2011).

<http://www.nlr.gov/case/31-RC-066625>

*Separate Maintenance Unit
Appropriate*

The union sought a unit limited to maintenance employees. The employer sought to add production employees. The Regional Director, applying a *Specialty Healthcare* analysis, found a unit limited to maintenance employees to be appropriate.

⁷³ *Sexton Ford Sales, supra*, slip op. at 13-15.

⁷⁴ *Id.* slip op. at 22-23.

The Board unanimously denied review. Member Hayes noted that, without relying upon *Specialty Healthcare*, he found that a unit limited to maintenance employees was appropriate.

Weyerhaeuser N.R. Company, 06-RC-079980 (R.D. decision June 11, 2012).

<http://www.nlr.gov/case/06-RC-079980>

*Separate Maintenance Unit
Not Appropriate*

The employer operates a press wood facility in Heaters, West Virginia, where it employs approximately 103 employees. The union petitioned for a maintenance unit of about 26 employees, while the employer insisted that the smallest appropriate unit should also include production employees, known in the facility as “operators”. The employer also maintained that there was a presumption in the lumber industry favoring wall-to-wall units.

The Regional Director agreed with the employer that the unit must include Operators. He noted that the employer’s reliance upon the so-called “Weyerhaeuser doctrine,”⁷⁵ rejecting separate maintenance units in the lumber industry, no longer constituted a *pro-se* prohibition against separate maintenance units in the lumber industry.⁷⁶

However, the Regional Director found that the employer had met its burden of demonstrating that the production employees shared an overwhelming community of interest with the petitioned-for maintenance employees. There was evidence of employees in the separate classifications working together on repairs, and of operations employees filling in for maintenance employees in their absence. Many employees in both groups also participated in the employer’s “Advancement by Contribution” program by which they were cross-trained to perform the functions of the employees in the other classifications.

While performing a *Specialty Healthcare* analysis, the Regional Director also cited pre-*Specialty* case law.

VSP Global, 20-RC-108858 (R.D. decision August 16, 2013).

<http://www.nlr.gov/case/20-RC-108858>

*Separate Maintenance Unit
Appropriate*

The employer is engaged in providing vision care products and services. The petitioner sought a unit limited to the three maintenance employees, two classified as maintenance

⁷⁵ *Weyerhaeuser Timber Co.*, 87NLRB 1076 (1949).

⁷⁶ *U.S. Plywood Papers, Inc.*

mechanics and one maintenance representative. The employer contended that the smallest appropriate unit must include four additional employees in the “move” team. These additional classifications essentially worked on finding and configuring space for employees to move into, and effectuating the moves.

While the maintenance team and the move team had common supervision, they performed substantially separate tasks. The maintenance team used specialized tools associated with building trades work, while move team employees used specialized computer software to design work space and coordinate employee relocations, scheduling conference rooms, and assembling and disassembling those conference rooms. While the two teams shared a common supervisor, the supervisor testified that their work does not overlap and that the teams do not perform one another’s work.

Applying a *Specialty Healthcare* analysis, the Regional Director concluded that the maintenance team were a readily identifiable group who shared a substantial community of interest, and that the employer had not met its burden in showing that the move team employees shared an overwhelming community of interest with the maintenance mechanics.

MBI HVAC, Inc., 04-RC-089309 (R.D. decision October 18, 2012).

<http://www.nlr.gov/case/04-RC-089309>

*Unit Limited to Service
Technicians Approved*

The Union petitioned for a unit of 6 HVAC Service Technicians. The employer contended that the unit must include about 20 installers as well.

Applying *Specialty*, the Regional Director concluded that a unit limited to the Service Technicians was appropriate. Service Technicians worked in separate departments, were separately supervised and spent most of their time performing distinct functions. They wore different uniforms and worked different hours from the installers.

Thus, despite the fact that Service Technicians and Installers receive comparable benefits and wages, and use similar skills, the employer was not successful in establishing that the Installers shared an overwhelming community of interest with the Service Technicians.

K. Aircraft Service Technicians

First Aviation Services, Inc., 22-RC-61300 (Bd. decision October 19, 2011).

<http://www.nlr.gov/case/22-RC-061300>

*Cleaners and Customer
Service Employees Excluded*

The employer operates a business that provides aviation services and materials to aircraft at the Teterboro Airport. The union petitioned for a unit of line service technicians and leads. The employer maintained that the smallest appropriate unit must also include customer service employees, aircraft cleaners, etc. Applying *Specialty Healthcare*, the Regional Director found that the line service technicians and line service leads are readily identifiable as a group and share a community of interest with one another. He further found that the employer had failed to establish that the additional employees it sought to include shared an overwhelming community of interest with the line service employees.⁷⁷

On review, the employer argued that the Regional Director did not apply a traditional community of interest analysis to the petitioned for unit prior to applying the “overwhelming community of interest” analysis to the additional employees the employer proposed for inclusion.

The Board denied review on January 24, 2012. Member Hayes, dissenting, would have granted review for the reasons expressed in his dissent in *Specialty Healthcare*.

L. Auto/Agricultural Implement Service

Oliver C. Joseph, Inc., 14-RC-12830 (Bd. decision September 7, 2011).

<http://www.nlr.gov/case/14-RC-012830>

*Exclusion of “Detail”
Employees OK*

The union had petitioned-for a unit that included journeymen, service technicians and lube and oil employees, and excluding detail employees. In a pre-*Specialty Healthcare* decision, the Regional Director found that the unit was appropriate because the excluded detail employees did not share an overwhelming community of interest with the petitioned-for employees and the

⁷⁷ *First Aviation Services*, 22-RC-61300 (R.D. decision, September 13, 2011) slip op. at 22-23.

petitioned-for employees constituted a craft unit. The employer sought review asserting that the detail employees must be included in the unit.

The Board denied review, noting that although the Regional Director's decision was issued pre-*Specialty Healthcare*, it contained a compatible analysis. Member Hayes agreed that a unit of journeymen, service technicians and oil and lube employees is an appropriate unit without relying on an overwhelming community of interest analysis. Additionally, Chairman Pearce and Member Hayes did not pass on the Regional Director's finding that the proposed unit was a craft unit from which the detail employees must be excluded.

Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda, 12-RC-083701 (Bd. decision November 1, 2012).

<http://www.nlr.gov/case/12-RC-083701>

*Unit Limited to Service Techs
and Lube Techs*

In this case the Board denied review of the Regional Director's finding that a unit limited to service techs and lube techs was appropriate. The union petitioned to represent a unit of service technicians and lube technicians at an automobile dealership and service center. Employees in the petitioned-for unit numbered about 24 of the employer's 100 employees. The employer argued that the smallest appropriate unit must include other employees in the service and parts department including service advisor, appointment taker, warrantee administrator, retail parts counter employee, wholesale parts counter employee, shipping and receiving etc. The employers proposed unit included about 54 employees.

In finding the petitioned-for unit to be appropriate, the Regional Director in the first instance found it to be an appropriate craft unit within the meaning of the Act. He then went on to conclude that the petitioned-for unit was appropriate in any event, under a *Specialty Healthcare* analysis and that the employer had not met its burden of demonstrating that the remaining employees proposed for inclusion shared an overwhelming community of interest with the petitioned-for employees.

The employer argued that the inclusion of less-skilled lube technician employees with more skilled auto mechanics destroyed the proposed unit's craft unit character. The Regional Director, however, rejected this claim, noting that the lube technicians in this context were akin to apprentices and "helpers" in other craft situations. Further, lube technicians and service technicians were the only employees to perform repairs on vehicles. Each had to acquire certifications and also provided at least some of their own tools.

The Regional Director found that the proposed unit was readily identifiable as a group, and shared a community of interest, for much the same reasons as he found that they constituted an appropriate craft unit. Additionally, they were the only employees who were paid according to a “flat-rate” system, shared common supervision, and performed tasks that are functionally integrated.

The Regional Director found that the employer failed to demonstrate that the other employees it proposed for inclusion shared an overwhelming community of interest with the petitioned-for employees. While they all reported to the same Service Manager, the other employees were paid according to a different scheme, had none of the mechanical training, did not have certifications required of employees in the proposed unit, and there was no employee interchange between the petitioned-for group and those proposed for inclusion.

Accordingly, an election was directed in the proposed unit.

In denying review, the Board found it unnecessary to rely on the Regional Director’s conclusion that the petitioned-for unit constituted a craft unit. Additionally, member Hayes found that the unit would be appropriate even without applying a *Specialty Healthcare* analysis.

Astoria Car Wash and Hi-Tek 10 Minute Lube, Inc., 29-RC-85638 (R.D. decision August 15, 2012).

<http://www.nlr.gov/case/29-RC-085638>

Combined Unit of Car Washers and Oil Changers

The union petitioned for a unit that included all full-time and regular part-time car washers and oil changers. The employer argued that the oil changers had a separate community of interest, while the union argued that it was a presumptively appropriate wall-to-wall unit.

The car washers worked outside while the oil changers worked inside, however, they all worked similar schedules and the work was functionally integrated; all oil changes came with a free car wash. While there were no transfers between the two groups, the Regional Director found that the interests of the two groups were not so disparate that they could not be represented in the same unit.

Cross Implement, Inc., 25-RC-100457 (Bd. decision May 21, 2013).

<http://www.nlr.gov/search/simple/all/25-RC-100457%20>

*Unit Limited to “Detail”
Employees OK*

In this case, the Board denied review of a Regional Director’s decision finding that a unit limited to detail employees was appropriate. The employer is a John Deere dealership in Minier, Illinois. The union petitioned for a unit comprised of 5-6 detail employees, while the employer took the position that the smallest appropriate unit must include all of the 31 employees in its Service Department, which includes the detail employees.

The detailers were responsible for “detailing” equipment that had been repaired or was ready to sell by cleaning it, repairing it, and attaching labels. Five of the six detailers worked in a separate work area, and company documents referred to the “detailing department.” Detailers had limited training required for the job, whereas other service technicians not only had past experience or trade school training, but also received ongoing training to improve their skills or learn about new equipment.

The other service technicians were primarily involved with equipment repair, as opposed to cleaning. While the employer also employed three painters, these individuals did the sort of painting associated with body shop work. There was little evidence of employee interchange or of detailers having the ability to advance to more skilled jobs.

The Regional Director thus concluded that the detailers were a readily identifiable group who shared a community of interest, and that the remaining service department employees did not share an overwhelming community of interest with them.

M. Assembly

Prevost Car U.S. d/b/a Nova Bus, 03-RC-071843 (Bd. decision March 15, 2012).

<http://www.nlr.gov/case/03-RC-071843>

Bus Assembly

In this case a union petitioned to represent a unit of 89 assemblers employed by a business that assembles transit buses for public transportation authorities and for private transit companies. The employer essentially asserted that only a “wall to wall” unit was appropriate, and

that such unit must include material handlers, maintenance mechanics, inventory control technicians, quality technicians, and quality monitors.

The Regional Director, applying *Specialty Healthcare*, found that the assemblers shared a community of interest and that the employer had not established that the additional employees proposed for inclusion share an overwhelming community of interest with the assemblers. She noted that the material handlers did most of their work in the warehouse rather than in one of the assembly “loops” and that while there was a degree of functional integration with other classifications, this was outweighed by factors such as separate supervision, a different probationary period, different training, different compensation and the fact that the assemblers, unlike other employees, are hired through an employment agency. She also noted that “[t]he Employer does not seek an alternative unit consisting of, for example, assemblers and the two other hourly paid classifications, material handlers and maintenance mechanic.”⁷⁸ She ordered an election in the petitioned-for unit of assemblers.

The Board denied review by a vote of 2-1, member Hayes dissenting. The majority noted in a footnote that the employer had not sustained its burden of establishing that any of the disputed classifications, “either individually or collectively” shared an overwhelming community of interest with the petitioned-for employees.

GKN Aerospace Monitor, Inc., 29-RC-062580 (R.D. decision October 25, 2011).

<http://www.nlr.gov/case/29-RC-062580>

Aircraft Assembly

The union petitioned for a unit of production and maintenance and quality inspection employees. The employer contended that the unit should also include six classifications that it deemed to be plant clericals, as well as programmers, program manufacturing engineers, process engineers, buyers, and design/method employees.

The Regional Director found that the petitioned-for unit of production and maintenance employees was appropriate with the addition of the plant clerical classifications of inspection clerk and maintenance inventory clerk, which he found, under *Specialty Healthcare*, to share an overwhelming community of interest with the other production and maintenance employees. He further found that the remaining employees proffered by the employer as plant clericals did not share a community of interest with the production and maintenance unit.

In regard to the remaining classifications in dispute, the Regional Director noted that they were paid a salary and did not share common supervision with the P & M unit employees, and

⁷⁸ *Prevost Car U.S. d/b/a Nova Bus*, 03-RC-071843 (R.D. decision February 17, 2012), slip op. at 34.

had little interaction with them. As a consequence, the employer failed to demonstrate that they shared an overwhelming community of interest with the petitioned-for employees.

The employer filed, but withdrew, a request for review.

N. Production and Maintenance

General Electric Company, 14-RC-073765 (Bd. decision June 6, 2012).

<http://www.nlr.gov/case/14-RC-073765>

*OK to Exclude Service,
Technology, and Engineering
Departments*

A unanimous panel of the Board denied the employer's request for review.

A union petitioned for a production and maintenance unit at the employer's West Burlington, Iowa plant which produces low voltage switch gears. The union sought to exclude employees in the service, engineering and technology department of the plant. Additionally, within the production and maintenance departments, the union sought to exclude certain employees as business office clericals, and to exclude materials buyers as lacking a community of interest with the other employees. The employer took the position that the only appropriate unit must include all hourly employees.

The Regional Director ruled against the union as to some of the clericals, which he found to be plant clericals, and as to the buyers.

He found, however, that the employer had not met its burden under *Specialty Healthcare* of demonstrating that employees in the service, technology and engineering departments share an overwhelming community of interest with the production and maintenance employees.⁷⁹

The work of the petitioned-for employees was more functionally integrated with the other petitioned-for employees, and remaining community of interest factors also favored this unit.⁸⁰

The Regional Director noted that even though the unit proposed by the employer was also appropriate, this did not shift the burden to the union to rebut the presumptive appropriateness of the employer's unit.⁸¹

⁷⁹ *General Electric Company*, 14-RC-73765, (R.D. decision March 12, 2012), slip op. at 21.

⁸⁰ *Id.* at 21-22.

⁸¹ *Id.* at 15.

O. Production Only

Dyno Nobel, Inc., 19-RC-075260 (Bd. decision April 23, 2012).

<http://www.nlr.gov/case/19-RC-075260>

Maintenance and Shipping Employees Excluded

The union petitioned for a unit of “operations” (production) technicians at the employer’s chemical manufacturing plant, excluding maintenance and shipping employees as well as the operation trainer/breaker classification. The employer took the position that the shipping and maintenance department employees should be added, as should the operations department trainer/breaker.

The Regional Director applied a *Specialty Healthcare* analysis to conclude that the maintenance and shipping department employees were properly excluded, but that the operations trainer/breaker classification shared an overwhelming community of interest with the other operations department employees.

Operations department employees primarily worked in a control room, while maintenance employees generally worked in a separate building. The shipping employees were primarily responsible for a network of storage tanks. There were separate skills and classifications for the employees in the three primary groupings. The facility was functionally integrated but there was little contact between operations employees and shipping employees.

The operations trainer/breaker, on the other hand, had the same skills and training as did operation technicians and assisted the operations technicians in their regular work. The Regional Director approved the proposed unit with the addition of the operation trainer/breaker.

A panel of the NLRB unanimously denied review. Member Flynn noted that although the Regional Director had applied a *Specialty Healthcare* analysis, he would have reached the same conclusion applying pre-*Specialty Healthcare* analysis.

Henkel Corporation, 32-RC-108535 (R.D. decision August 8, 2013).

<http://www.nlr.gov/case/32-RC-108535>

*Production Only Unit
Approved*

The employer manufactures adhesives for the Aerospace industry. The union petitioned for a unit of about 64 paste and film production employees. The employer maintained that the smallest appropriate unit must also include warehouse operators, maintenance mechanics, lab technicians, and planners.

Applying a *Specialty Healthcare* analysis, the Regional Director concluded that a production only unit was appropriate. While the excluded employees had similar wages and benefits, and the operations were in several aspects functionally integrated, the production employees were in a separate department and spent 95 percent of their time on production. Employees were not cross-trained to perform one another's jobs and employees did not exchange duties across unit lines. There was little evidence of meaningful contact between the production employees and those proposed for inclusion.

The Regional Director concluded that the production employees were readily identifiable group who shared a community of interest, and the employer had failed to demonstrate that the excluded employees shared an overwhelming community of interest with them.

P. Defense Contractors

General Dynamics Land Systems, 19-RC-76743 (Bd. decision July 20, 2012).

<http://www.nlr.gov/case/19-RC-076743>

*Overseas Employees
Excluded*

In this case, a panel majority with Member Hayes dissenting denied review of the Regional Director's decision and direction of election.

The employer operates a vehicle fielding, service and repair operation specific to Stryker light armored combat vehicles. The petitioner sought to represent a unit of mechanics who perform the tasks of inspecting, de-processing and retrofitting the vehicle for delivery to the army. The petitioner sought a unit of mechanics performing the function both in the United States and overseas.

The employer sought to add additional employees including mechanics and material handlers who are embedded with troops in the field, including overseas, as well as warehouse and other employees.

The Regional Director took it upon himself to evaluate whether he had jurisdiction over the employees who worked overseas and concluded that he did not. He concluded that even if he did, the working conditions and wages of the overseas employees were different enough that there was no community of interest with those mechanics who were working stateside.

On the other hand, he concluded that the material handlers who worked side by side with mechanics who were responsible for preparing new and refurbished Stryker vehicles for hand off to the military shared an overwhelming community of interest with those mechanics and must be included in the unit.

He rejected the employer's contention that employees from additional departments must also be added, noting that the included employees had much more interaction with one another than with other employees, had separate job functions, and worked in two departments separate from other employees.

In his dissent to the denial of review, Member Hayes commented that the Regional Director misapplied a "strict presumption of extraterritoriality" to employees who were essentially on temporary assignments and that he believed that, even applying *Specialty Healthcare*, excluded employees showed an overwhelming community of interest with those in the unit that the Regional Director found to be appropriate.

Q. Stevedores

Marine Terminal Corp-East dba Parts America, 10-RC-080061 (Bd. decision July 16, 2012). <http://www.nlr.gov/search/simple/all/10-RC-080061%20>

"Part-Time Hourly" Unit

In this case, a unanimous panel of the Board, including member Hayes, denied review of the Regional Director's decision.

The Union petitioned for a unit of all hourly Deck, Dock and Field Stevedores (also called "part time" Stevedores) at the employer's Garden City Terminal. The employer contended that the smallest appropriate unit must also include salaried, full-time Stevedores, also known as "superintendents." The employer further contended that the unit must include its other terminal in the Port of Savannah and that all of its Stevedores were supervisors.

The Regional Director applied the single-facility presumption without reference to *Specialty Healthcare* in finding that a unit limited to the Garden City Terminal was appropriate and found that the petitioned-for hourly Stevedores were not statutory supervisors.

In applying *Specialty Healthcare*, he concluded that the full-time salaried Stevedores did not share an overwhelming community of interest with the part-time hourly Stevedores. Unlike the part-time hourly employees, the full-time salaried Stevedores are entitled to paid vacation, have their own offices, receive health coverage and have paid holidays. Additionally, while they attend some meetings with part-time Stevedores, they also attend meetings for full-timers only. Additionally, only the full-timers have a log in and password to the employer's computer system for tracking containers.

While noting in passing that the full-timers are "very likely supervisors" the Regional Director found it unnecessary to rule on that issue because they do not, in any event, share an overwhelming community of interest with the part-timers.

R. Printing Trades

Print Fulfillment Services, LLC, 09-RC-063284 (R.D. decision September 29, 2011).
<http://www.nlr.gov/case/09-RC-063284>

Lithographic Production Unit

The petitioner sought to represent what it characterized as a traditional lithographic production unit including pre-press, plate makers, offset press operators, finders and press helpers, and excluding other employees. The employer contended that the smallest appropriate unit is a wall-to-wall unit of its production and maintenance employees.

The Regional Director, applying a traditional craft unit analysis, concluded in the first instance that the petitioned for unit constituted a craft unit.⁸² He noted additionally that as set forth in *Specialty Healthcare*, the proposed unit possessed a separate and distinct community of interest and that the employer had failed to establish that the additional employees that it proposed to add to the unit shared an overwhelming community of interest with the petitioned for employees.⁸³

Accordingly, he directed an election in the unit proposed by the petitioner.

⁸² *Print Fulfillment Services, Inc, supra*, slip op. at 11.

⁸³ *Id.* slip op. at 14-15.

S. Research and Development

Koch Foods of Fairfield, Inc., 09-RC-078964 (R.D. decision May 10, 2012).

<http://www.nlr.gov/case/09-RC-078964>

R & D Unit Appropriate

In this case, the Regional Director found a unit of ten research and development employees at a meat processing plant to be appropriate. The Regional Director found that the R & D employees were readily identifiable as a group and shared a community of interest. In applying a *Specialty Healthcare* analysis, he found that none of the excluded employees shared an overwhelming community of interest with the R & D employees.

R & D employees worked in a separate department under separate supervisors, and wore lab coats when visitors were at the plant. They did not have frequent contact with other employees, and their work was not functionally integrated with other employees. They worked in separate areas of the plant and did not interchange with other plant employees.

The petition was withdrawn subsequent to the decision, rendering an employer request for review moot.

T. Security System Installers

ADT Security Services, Inc., 12-RC-071890 (Bd. decision May 9, 2012).

<http://www.nlr.gov/case/12-RC-071890>

*Board Splits Unit Found
Appropriate by Regional
Director*

This case has a tortured procedural history that involved two primary unit issues: 1) whether a single unit of the employer's security system installers was appropriate and 2) whether any unit of security system installers/technicians must also include clerical employees, permit clerks, administrative employees, etc.

The petitioning union petitioned for a unit consisting of all installers/technicians working both in the employer's "high volume operations" division and its "commercial core" division, and excluding all other employees. The "high volume operations" division essentially installed security systems in homes and small businesses, while the "commercial core" division installed security systems in large commercial and governmental buildings.

The employer argued that the unit should be split in two along its division lines, and that the two units should include their incidental clerical and administrative employees.

The Regional Director found that a single unit limited to security system installers/technicians was appropriate.⁸⁴ He noted that some factors, such as separate supervision, lack of transfers between divisions, and length of assignments favored separate units, but found that these factors were outweighed by the similar electrical training, similar skills, tools, uniforms and equipment, as well as the same work rules, favored inclusion in a single unit.⁸⁵

In regard to the non-installer/technician employees, the Regional Director, applying *Specialty Healthcare*, concluded that the employer had not met its burden in demonstrating that the disputed classifications shared an overwhelming community of interest with the technicians.⁸⁶ He went on, however, to conclude that the technician's shared a community of interest that was "separate and distinct" from other employees.⁸⁷

The employer requested review and on April 9, 2012, a panel majority consisting of members Hayes and Flynn granted review and concluded that elections should be held in separate units of "high volume" and "commercial" installation and service technicians.⁸⁸

The employer then sought reconsideration of the Board's order because it did not address the non-technician employees. The Board panel unanimously rejected the motion as lacking in merit.⁸⁹ The Regional Director, pursuant to the remand, ordered an election in two separate installer/technician units excluding other employees.⁹⁰

The employer sought review of the direction of election, and a unanimous panel of the Board denied review.⁹¹

⁸⁴ *ADT Security Services, Inc.*, 12-RC-071890(R.D. decision February 17, 2012).

⁸⁵ *Id.* Slip op. at 29-31.

⁸⁶ *Id.* at 37.

⁸⁷ *Id.*

⁸⁸ Member Griffin dissented, indicating that he would find the single petitioned for unit appropriate, and would have denied review.

⁸⁹ *ADT Security Systems*, 12-RC-71890 (Board Order April 24, 2012).

⁹⁰ *ADT Security Systems*, 12-RC-71890 (R.D. decision April 20, 2012).

⁹¹ *ADT Security Services, Inc.*, 12-RC-071890 (Board Order May 9, 2012).