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**The Boeing Company and International Association of Machinists and Aerospace Workers.** Case 10–RC–215878

September 9, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,  
KAPLAN, AND EMANUEL

The issue here is whether the petitioned-for unit limited to two classifications within the Employer’s South Carolina production line of the 787 aircraft is an appropriate unit under the National Labor Relations Act. On May 21, 2018, the Regional Director issued a Decision and Direction of Election in which he found the petitioned-for unit appropriate under the National Labor Relations Board’s decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (2017). The election took place on May 31, 2018, and the Petitioner prevailed. Absent any objections or determinative challenged ballots, the Regional Director issued a Certification of Representative on June 12, 2018. Thereafter, pursuant to Section 102.67 of the Board’s Rules and Regulations, the Employer timely filed a request for review asking the Board to find the petitioned-for unit inappropriate. The Petitioner filed an opposition.<sup>1</sup>

Having carefully considered the record and briefs, we find, as explained in detail below, that the unit is inappropriate because the two classifications in the petitioned-for unit do not share a community of interest with each other, and even if they did, they do not share a community of interest that is sufficiently distinct from the interests of other production-and-maintenance employees excluded from the unit. Accordingly, we grant review, reverse the Regional Director’s decision, vacate the Petitioner’s certification, and dismiss the petition.

I. FACTS

The Employer manufactures commercial 787 aircraft at its facility in North Charleston, South Carolina. The complex integrated production line required to produce these sophisticated aircraft employs around 2700 production-and-maintenance employees, and each aircraft requires the completion of about 9000 tasks, called “Shop Order

Instances” (SOIs), over about 119 days. Broadly, production consists of constructing the tail of the airplane in the AFT Building and the body and wings of the airplane in the Mid-Body Building. These sections then travel to the Final Assembly Building, where they are joined and additional components are installed. In each of these three buildings, there are technicians who perform the work and quality inspectors who check it.

After Final Assembly, the airplane is towed across a taxiway to the Flight Line, which consists of nine stalls, each with a workspace and a breakroom. At the Flight Line, the aircraft is fully powered for the first time, finalized, tested, certified, and delivered to the customer. The technicians permanently assigned to the Flight Line are called Flight-Line Readiness Technicians (FRTs), and the quality inspectors permanently assigned there are called Flight-Line Readiness Technician Inspectors (FRTIs). The Petitioner petitioned to represent a unit consisting of only these two classifications, about 178 employees.

FRTs and FRTIs, respectively, perform and inspect three types of work on the Flight Line. First, they perform about 107 SOIs exclusive to the Flight Line (always performed by FRTs, but not always inspected by FRTIs), such as fueling the aircraft for the first time and conducting numerous preflight checks. Many of these checks are redundant of what has been performed in prior stages, though now the airplane is fully operational. Second, they rework SOIs completed in prior stages when problems are found with them on the Flight Line. Third, they complete traveled work, which are SOIs that were not finished at an earlier stage (e.g., Final Assembly) where they should have been completed. There are routinely a significant number of SOIs, from as few as 75 to more than 450, that travel on because parts were unavailable or due to other issues. By hours spent, about 14 percent of FRTs’ and FRTIs’ work is rework and traveled work, though by number of SOIs completed and inspected, the share of rework and traveled work is much higher.

A travel team of 10 or more technicians from Final Assembly is regularly on the Flight Line to help with traveled work. Other technicians from earlier stages also come to the Flight Line as needed. Inspectors based in earlier stages sign off on a portion of the traveled work and even sign off on 11 percent of the SOIs exclusive to the Flight Line. There is a 10-employee cabin systems team

<sup>1</sup> The Board accepted six amicus curiae briefs: (1) the Coalition for a Democratic Workplace, the Independent Electrical Contractors, the National Association of Wholesaler-Distributors, the National Federation of Independent Business, the National Retail Federation, the Restaurant Law Center, and the Retail Industry Leaders Association; (2) the Business Roundtable and the Chamber of Commerce of the United States; (3) the State of South Carolina ex rel. Alan Wilson, Attorney

General; (4) the National Association of Manufacturers, the HR Policy Association, and the Society for Human Resource Management; (5) the South Carolina Manufacturers Alliance and the South Carolina Chamber of Commerce; and (6) the Governors of South Carolina, Maine, Kentucky, and Mississippi. The Petitioner filed a combined response to these briefs.

permanently assigned to the Flight Line to work on cosmetic items in the cabin.

Once an aircraft is certified by the Federal Aviation Administration (FAA), it enters “repair station status,” which means employees working on the airplane must hold a qualifying certification and are subject to mandatory drug testing. Repair station status, on average, lasts only the final 4 or 5 days the aircraft is on the production line. The Employer requires FRTs and FRTIs to hold an Airframe & Powerplant (A&P) license, a certification that satisfies the FAA’s requirements, so that they have the flexibility to work on aircraft in repair station status. An A&P license requires 1.5 to 2.5 years of schooling with classroom and hands-on work, as well as passing written, oral, and practical testing. Only about 6 percent of employees excluded from the unit hold an A&P license. FRTs and FRTIs share most other skills and training with excluded technicians and inspectors, respectively.

FRTs belong to the Employer’s operations department with the other technicians throughout the facility. FRTIs are in the quality department with the rest of the production line’s quality inspectors. In addition to being in separate departments, FRTs and FRTIs work under entirely separate supervisory structures, all the way up to CEO. FRTs are supervised by nine operations managers, two of whom also supervise excluded employees on the cabin systems team. FRTIs are supervised by field quality managers, who also give direction to inspectors based in earlier stages while they are working on the Flight Line. FRTIs also share supervision at the second level with other employees excluded from the unit.

Excluded employees have never interchanged into either FRT or FRTI roles. Before 2017, FRTs and FRTIs occasionally have been temporarily loaned to other production stages when those stages were behind or the Flight Line lacked work. During 2017, there was a higher level of temporary interchange because of a shortage of work on the Flight Line. The Employer reassigned 30 FRTs to earlier production stages for about 6 months, selected several FRTs to work on a special project with technicians from other stages, and rotated at least eight FRTIs into Final Assembly. There has never been interchange between FRTs and FRTIs.

FRTs and FRTIs earn higher wages than many, though not all, excluded employees. Beyond a few minor differences, such as being able to wear shorts and having slightly different shift times, FRTs and FRTIs share all other terms and conditions of employment with excluded production-and-maintenance employees. All production-and-maintenance employees have the same timekeeping system, the same payroll and direct-deposit system, the same performance-management system to determine pay

and pay increases, the same attendance guidelines, the same overtime system, the same corrective-discipline system, the same policies for environmental health and safety, the same hiring process, the same leave policies, the same healthcare benefits and dental plan, the same voluntary-investment plans, the same life-insurance and disability plans, the same flexible-spending accounts, the same gift-matching program, the same physical-fitness program, the same cash-awards program, the same badge protocols, and the same alternative dispute resolution program.

## II. LEGAL PRINCIPLES

In *PCC Structural, Inc.*, supra, 365 NLRB No. 160, the Board announced its “return[] to the traditional community-of-interest standard that [it] has applied throughout most of its history.” *Id.*, slip op. at 7. Under that standard, when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board applies its traditional community-of-interest factors to “determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *Id.*

The Board has historically considered the following factors under its traditional community-of-interest test:

“[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.”

*Id.*, slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). In determining appropriate bargaining units, the Board has also long given substantial weight to prior bargaining history. The Board is reluctant to disturb units established by collective bargaining as long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act. *Buffalo Broadcasting Co.*, 242 NLRB 1105, 1106 fn. 2 (1979).

When weighing these factors, the Board

never addresses, solely and in isolation, the question whether the employees in the unit sought have interests in common with one another. Numerous groups of employees fairly can be said to possess employment conditions or interests “in common.” Our inquiry—though perhaps not articulated in every case—necessarily

proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the establishment of a separate unit.

*Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 2 (2010) (emphasis and citation omitted). As the Board explained in *PCC Structural*s, supra, slip op. at 5:

[t]he required assessment of whether the sought-after employees' interests are sufficiently distinct from those of employees excluded from the petitioned-for group provides some assurance that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or "fractured"—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than "overwhelming") community of interests with the sought-after group are taken into consideration.

The Board's inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Boeing Co.*, 337 NLRB 152, 153 (2001). Moreover, as the Board reaffirmed in *PCC Structural*s, a proposed unit need only be an appropriate unit, and need not be the *most* appropriate unit. 365 NLRB No. 160, slip op. at 12.

In determining *whether* the petitioned-for unit is appropriate, *PCC Structural*s makes clear that the Board will consider "both the shared and the distinct interests of petitioned-for and excluded employees." *PCC Structural*s, supra, slip op. at 11. This analysis, in turn, is firmly rooted in the Board's traditional, pre-*Specialty Healthcare* precedent. See, e.g., *Wheeling Island Gaming*, supra; *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980). Nevertheless, we recognize that both *PCC Structural*s and the precedent on which it is based have not clearly described *how* the shared and distinct interests should be weighed.<sup>2</sup> In addition, the Board in *PCC Structural*s adopted the Second Circuit's standard in *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016) (emphasis in original), that the community-of-interest analysis must consider whether excluded employees "have meaningfully distinct interests in the

context of collective bargaining that *outweigh* similarities" with the included employees, but it did not clearly articulate how that standard should be applied. In light of the contentions of the parties and amici, we believe that further guidance with respect to these matters is warranted here.<sup>3</sup>

Accordingly, we clarify that *PCC Structural*s contemplates a three-step process for determining an appropriate bargaining unit under our traditional community-of-interest test. First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

#### (1) Step One: Shared Interests Within the Petitioned-for Unit

The first step requires "'identify[ing] shared interests among members of the petitioned-for unit.'" *PCC Structural*s, supra, slip op. at 9 (quoting *Constellation Brands*, 842 F.3d at 794). Thus, the traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. See, e.g., *Saks & Co.*, 204 NLRB 24, 25 (1973) ("[T]he record indicates that [the petitioned-for employees] perform dissimilar functions, work throughout the entire store and service center, and do not share any common supervision. Thus we are unable to find that the unit sought is appropriate on the basis of similarity of job function."); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004) ("In reaching the conclusion that the Regional Director's unit determinations are not appropriate, we rely on the fact that the differences *among* the fluid processing unit employees and *among* the distribution unit employees are nearly as great as the differences *between* the units" (emphasis in original)). In sum, the analysis logically begins by considering whether the petitioned-for unit has an internal community of interest using the traditional criteria discussed above. A unit without that internal, shared community of interest is inappropriate.

<sup>2</sup> Indeed, the Board frankly acknowledged in *Wheeling Island Gaming* that the Board's historic examination of the community of interest of employees within and outside the proposed unit, as noted above, has "not [been] articulated in every case." 355 NLRB at 637 fn. 2.

<sup>3</sup> Multifactor tests "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations,

which factors are significant and which less so, and why." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). Absent such explanations, a "totality of the circumstances" analysis can become "simply a cloak for agency whim." *Id.*

(2) Step Two: Shared Interests of Petitioned-For and Excluded Employees

Step Two requires a comparative analysis of excluded and included employees. In restoring the traditional community-of-interest analysis, the Board in *PCC Structural*s stressed that it is not enough to “focus[ ] on the interests shared among employees *within* the petitioned-for group.” *Id.*, slip op. at 10 (emphasis in original). Instead, the inquiry must also consider whether “excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*, slip op. at 11 (quoting *Constellation Brands*, 842 F.3d at 794) (emphasis in *Constellation Brands*).<sup>4</sup> Again, this inquiry is firmly rooted in traditional community-of-interest principles. See, e.g., *Harrah’s Club*, 187 NLRB 810, 812–813 (1971) (finding that “a unit limited to maintenance department employees does not comprise a homogeneous grouping of employees possessed of interests sufficiently distinct from other employees to constitute a separate unit appropriate for purposes of collective bargaining” and that all employees performing a similar primary function must be included in the unit); *Texas Color Printers, Inc.*, 210 NLRB 30, 31 (1974) (“[I]n view of the frequent work contacts and temporary interchange and overlapping supervision of employees of the shipping and receiving and bindery departments, and in the absence of any bargaining history as to any of the plant employees, we find that the shipping and receiving department employees do not enjoy a sufficiently distinct community of interest to warrant their establishment as a separate appropriate unit apart from other employees.”)<sup>5</sup>

Of course, the fact that excluded employees have *some* community-of-interest factors in common with included employees does not end the inquiry. Consistent with *PCC Structural*s, the Board must determine whether the employees excluded from the unit “have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*, slip op. at 11 (quoting *Constellation Brands*, supra). If those distinct interests do not outweigh the similarities, then the unit is inappropriate.

This inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate

merely because a different unit might be more appropriate. Instead, as the court’s opinion in *Constellation Brands* makes clear, what is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit. “Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective-bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation.” *Constellation Brands*, supra at 794–795.

(3) Step Three: Special Considerations of Facility, Industry, or Employer Precedent

As the Board explained in *PCC Structural*s, supra, slip op. at 11, the traditional community-of-interest standard includes, where applicable, consideration of guidelines that the Board has established for specific industries with regard to appropriate unit configurations. See, e.g., *Colorado Interstate Gas Co.*, 202 NLRB 847, 848 (1973) (public utilities); *North American Rockwell Corp.*, 193 NLRB 983 (1971) (defense contractors); *Stern’s, Paramus*, 150 NLRB 799, 803 (1965) (retail establishments). These guidelines are appropriately considered at the third and final step of the community-of-interest analysis.

III. APPLICATION TO FACTS

(1) Step One: Shared Interests Within the Petitioned-For Unit

On balance, we find that the interests shared by the petitioned-for employees, FRTs and FRTIs, are too disparate to form a community of interest within the petitioned-for unit. FRTs and FRTIs do share some interests that weigh in favor of the petitioned-for unit. They share nearly identical terms and conditions of employment, have frequent daily contact with each other on the Flight Line, and share many of the same skills and much of the same training, including A&P licenses. But FRTs and FRTIs also have significantly different interests in the context of collective bargaining. They belong to separate departments and do not share any supervision with each other, immediately or at any level below CEO. Beyond working toward completing the same SOIs, they have fundamentally different job functions from each other. FRTs are technicians who

with unit members.” *PCC Structural*s, supra, slip op. at 11 (quoting *Constellation Brands*, 842 F.3d at 794) (emphasis in *Constellation Brands*).

<sup>5</sup> Fractured units are one example of this issue. A fractured unit is a “combination[] of employees that [is] too narrow in scope or that ha[s] no rational basis” because the petitioned-for employees have duties, skills, and other interests that are so similar to those of excluded employees that it would be arbitrary for the two groups to be represented in different units. See *Seaboard Marine*, 327 NLRB 556, 556 (1999).

<sup>4</sup> In this regard, *PCC Structural*s rejected the *Specialty Healthcare* standard, under which units would be found appropriate unless the employer proved there was an *overwhelming* community of interest between the petitioned-for unit and excluded employees. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enf. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). *PCC Structural*s corrected that error by requiring a determination “whether ‘excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities

do the mechanical work, and FRTIs are inspectors who assure quality. Moreover, there has never been interchange between the FRT and FRTI classifications. Lacking an internal community of interest, the petitioned-for unit is inappropriate at the first step, and we need not continue the analysis any further. We do continue here, however, to demonstrate how this three-step analysis works and to provide an alternative basis for our conclusion.

(2) Step Two: Shared Interests with Excluded Employees

Even if the petitioned-for unit here had shared an internal community of interest, on balance the interests of excluded employees are not meaningfully distinct from and do not outweigh similarities with the interests of the petitioned-for employees.

Particularly compelling here is that the FRTs and FRTIs, the employees in the petitioned-for unit, have a high degree of functional integration with excluded employees on the Employer's 787 production line. The 2700 production-and-maintenance employees stationed throughout the production line all work toward producing a single product, 787 aircraft. The 178 included FRTs and FRTIs are only exclusively responsible for about 107 of the 9000 SOIs, or about 1 percent of the tasks necessary to deliver a single aircraft to a customer. Otherwise, they aid earlier production stages by finishing and fixing many other SOIs alongside or in place of excluded employees. As the Board has observed before, it is "particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit." *Publix Super Markets*, 343 NLRB at 1027.

The petitioned-for unit's shared collective-bargaining interests with excluded employees by no means end there. FRTs are in the same department as excluded technicians, and FRTIs are in the same department as excluded inspectors. FRTs and FRTIs separately share overall supervision with excluded technicians and inspectors, respectively, including some immediate and secondary supervision.<sup>6</sup> FRTs and FRTIs have meaningful similarities in job functions with excluded employees. A significant 14 percent of FRTs' and FRTIs' functions by time spent, and even more by SOIs performed, overlap entirely with work also performed by excluded employees—the rework and traveled work.<sup>7</sup> Even a portion of the work that is exclusive to the Flight Line is at least similar to, if not redundant of,

work performed by excluded employees earlier on the production line. FRTIs do not even exclusively perform this Flight Line work. Excluded inspectors sign off on 11 percent of it.

By contrast, the factors here that might distinguish excluded employees from the FRTs and FRTIs are relatively insignificant in the context of collective bargaining. FRTs and FRTIs have higher wages than many excluded employees, but FRTs and FRTIs share almost all other terms and conditions of employment, including all personnel policies and benefits, with excluded employees.<sup>8</sup> FRTs and FRTIs are the only classification required to hold the A&P license, which requires significant schooling and testing to secure. This signals that FRTs and FRTIs have more training and greater skills than most excluded employees. But we find this distinction between included and excluded employees tempered by other facts in the record. First, FRTs and excluded technicians share almost all other skills and training, as do FRTIs and excluded inspectors. Second, the Employer's A&P license requirement is in place to meet FAA regulations about who can work on an airplane in repair station status, following FAA certification. Repair station status lasts only a short portion of the time the aircraft is on the Flight Line. In any event, evidence tends to support that FRTs and FRTIs largely use the same skills as excluded employees before and even during repair station status. Although FRTs and FRTIs may share some different interests arising from their A&P license, it seems unlikely, overall, that their interests related to skills and training in these circumstances are much different than the interests of excluded employees.

Regarding interchange, it is true that excluded employees have never interchanged into the FRT or FRTI classifications, and the history of permanent or temporary transfers of FRTs or FRTIs into excluded positions is limited. But there was a material amount of temporary interchange of FRTs and FRTIs into excluded jobs in 2017. Contact is the only factor that unreservedly favors the petitioned-for unit. The Flight Line is located across a taxiway from other production buildings, and FRTs and FRTIs tend to park at the Flight Line lot and eat at the Flight Line breakrooms, instead of making the 10-minute walk to the common "Hub" cafeteria. FRTs and FRTIs generally only

<sup>6</sup> See *Harrah's Illinois Corp.*, 319 NLRB 749, 750 (1995) (sharing overall and immediate supervision with excluded employees are each relevant to the supervision factor).

<sup>7</sup> See *Brand Precision Services*, 313 NLRB 657, 658 (1994) (petitioned-for unit not sufficiently distinct in part because excluded employees did 10 percent of the same work as the included employees).

<sup>8</sup> See *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004) (finding petitioned-for unit not sufficiently distinct after weighing higher wages in favor of the petitioned-for unit and "common working conditions and terms and conditions of employment" against the petitioned-for unit); *United Operations, Inc.*, supra, 338 NLRB at 125 (weighing "significantly higher wages" in favor of the petitioned-for unit and "common . . . personnel policies[] and work rules" against the petitioned-for unit).

have contact with the subset of excluded employees that come to the Flight Line to help with traveled work.

At most, FRTs and FRTIs are a group of employees with higher wages and A&P licenses working in a physically separate area that tend to stay in their respective job classifications. However, the interests they share with excluded employees are far more significant than those that differentiate them. FRTs and FRTIs are fully functionally integrated with excluded employees, share departments with excluded employees, share supervision with excluded employees, perform a significant portion of the same job functions as excluded employees, share most terms and conditions of employment with excluded employees, and share most of the same skills and training with excluded employees. We find that excluded production-and-maintenance employees would largely have the same interests as FRTs and FRTIs in the context of collective bargaining and thus the petitioned-for unit's distinct interests certainly do not outweigh the interests shared with excluded employees. Because the petitioned-for unit does not share a community of interest that is sufficiently distinct from the interests of excluded employees, the unit is also inappropriate under the second step.

### (3) Step Three: Special Unit Rules

No industry-specific guidelines are applicable to this case. In this regard, we reject the Employer's contention that the Board has established a presumption in favor of a plantwide unit for integrated manufacturing facilities that must be rebutted by a union seeking a smaller unit. We recognize that, consistent with Section 9(b) of the Act, the Board has long held that "[a] plantwide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees." *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136 (1962) (refusing to sever truck drivers from existing production and maintenance unit). But neither *Kalamazoo Paper Box* nor any other case establishes that a less-than-plantwide manufacturing unit is presumptively inappropriate, or that a petitioner seeking such a unit bears any heightened burden of proving that it is appropriate. "[T]he Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate." *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964) (citing cases) (petitioned-for unit of automotive service center service

department employees was appropriate, even though the employer contended that only a storewide-unit was appropriate). To be sure, functional integration is a factor in determining whether a petitioned-for unit is appropriate and, where present, cuts against the appropriateness of a less-than-plantwide unit, as this case demonstrates. But it is only one factor in the community-of-interest analysis.<sup>9</sup>

#### IV. RESPONSE TO THE DISSENT

Our dissenting colleague continues in this case to protest our overruling, in *PCC Structural*s, the *Specialty Healthcare* standard, which discounted or altogether eliminated any assessment of whether shared interests among employees within the petitioned-for unit are sufficiently distinct from the interests of excluded employees to warrant a finding that the smaller petitioned-for unit is appropriate. Not quarreling with the first and third steps outlined above, the dissent also claims the second step is a significant, impermissible departure from precedent, even including *PCC Structural*s. This is not so. As we explained above, the Board has long required that included employees have a sufficiently distinct community of interest from excluded employees, and we adopted in *PCC Structural*s the Second Circuit's expression of when interests are sufficiently distinct, i.e., when "excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." 365 NLRB No. 160, slip op. at 9 (quoting *Constellation Brands v. NLRB*, 842 F.3d at 794). Each case in this area is highly specific to its unique mix of facts, but we read the conclusions of our prior cases to be consistent with this standard.

Our colleague maintains that the interests of included employees are insufficiently distinct from those of excluded employees only where the two groups share "a substantial community of interests." She finds this substantiality requirement in cases such as *Harrah's Club*, 187 NLRB 810 (1971), and *Texas Color Printers, Inc.*, 210 NLRB 30 (1974), in which the Board found the petitioned-for units inappropriate where excluded employees had substantial similarities with included employees. Those cases, like this one, may have involved substantial similarities, but they by no means set the lower bounds of insufficient distinctness, below which the petitioned-for unit must be found appropriate. We also reject that we are

<sup>9</sup> *Boeing Co.*, 337 NLRB 152 (2001), cited by the Employer, is not to the contrary. There, the Board found that a petitioned-for unit of 10 recovery and modification (RAM) employees was inappropriate and that the smallest appropriate unit was an overall production and maintenance unit. But the Board's unit determination was based on its conclusion, after considering all of the traditional community-of-interest factors, that the factors supporting the petitioned-for unit were "offset by the highly integrated work force, the similarity in training and job functions

between the RAM and" excluded employees, and the comparable terms and conditions of employment among the overall work force. *Id.* at 153. The Board neither stated nor applied a presumption in favor of the broader unit. To the contrary, the decision specifically acknowledges that the Board "generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employee classifications" and that "the unit need only be an appropriate unit, not the most appropriate unit." *Id.*

creating a presumption “in favor of the largest and most comprehensive units.” We are, in each case, considering the rights of all employees, included and excluded, and the prospects of a stable and productive collective-bargaining relationship.

Our colleague’s criticism of our second step betrays her belief that nearly any distinction between the interests of included and excluded employees is sufficient to warrant a separate appropriate unit, and almost any petitioned-for unit should be approved. In her mind the “fullest freedom in exercising the rights guaranteed by this Act” described in Section 9(b) effectively means employees should get the unit they ask for, which generally coincides with the extent of their organization—what Section 9(c)(5) expressly provides “shall not be controlling” in determining an appropriate unit. Her application to the facts here shows how small of a distinction she finds sufficient. Under her analysis, anytime higher paid, higher skilled employees work in a separate area, they constitute a separate appropriate unit when they ask for it, no matter how many other interests they share with excluded employees. We profoundly disagree with her view.

#### V. CONCLUSION

We find the petitioned-for unit inappropriate both because the employees in that unit do not share an internal community of interest and because their interests are not sufficiently distinct from the interests of excluded employees. We accordingly vacate the Union’s certification, and because the Union expressed an unwillingness at the hearing to proceed to an election in a unit extending beyond the Flight Line, we also dismiss the petition.<sup>10</sup>

#### ORDER

IT IS ORDERED that the certification of representative issued on June 12, 2018, is vacated and the petition is dismissed.

Dated, Washington, D.C. September 9, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

<sup>10</sup> We accordingly do not pass here on whether the smallest appropriate unit encompasses all production and maintenance employees plant-wide.

<sup>1</sup> 365 NLRB No. 160 (2017) (*PCC Structural*s).

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

In *PCC Structural*s,<sup>1</sup> a Board majority purported to “return[] to the traditional community-of-interest standard that the Board has applied throughout most of its history.”<sup>2</sup> Taking *PCC Structural*s at its word, the Regional Director faithfully applied traditional community-of-interest principles here and determined that the petitioned-for unit of 178 Flight Readiness Technicians (FRTs) and Flight Readiness Technician Inspectors (FRTIs) is *an* appropriate unit. That is manifestly the correct result here.

Yet now, the majority reverses the Regional Director and declares, after professing to “clarify” *PCC Structural*s, that the petitioned-for unit is inappropriate because the FRTs and FRTIs are not “sufficiently distinct” from “other” production and maintenance employees that were excluded from the unit. The majority makes no effort to explain precisely which of these “other” production and maintenance employees have notable similarities with the petitioned-for employees, or to suggest which of these “other” classifications should be included to render the petitioned-for unit appropriate; indeed, my colleagues neglect to mention any specific non-FRT or FRTI classifications at all. Rather, they find the unit inappropriate based on factors which apply to every single production and maintenance employee at the plant, leading to the inescapable conclusion that the *only* appropriate bargaining unit here, at least under the majority’s analysis, is one that combines every production and maintenance employee at the Employer’s North Charleston plant—a unit that would include approximately 2,700 employees. This conclusion cannot be reconciled with the “traditional community-of-interest standard” that *PCC Structural*s claimed to reinstate.

Not surprisingly then, the majority’s “clarification” of *PCC Structural*s is actually much more than that. The majority has fashioned a new standard—embedded in a “three-step process”—that departs from the traditional community-of-interest test and the unit determination principles that have guided the Board for almost 70 years. Step One of the majority’s process is uncontroversial in principle—the Board must determine whether the

<sup>2</sup> *Id.*, slip op. at 7. For the reasons articulated in the dissent in *PCC Structural*s, 365 NLRB No. 160, slip op. 13–26, I continue to believe that the Board’s decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), *enfd.* sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th

petitioned-for employees share a community of interest among themselves—but as explained below the majority’s application here is clearly erroneous. Step Three is also unremarkable—the Board must consider long-established unit-determination guidelines for specific industries.

But Step Two of the majority’s new test is a significant (and statutorily impermissible) departure from traditional community-of-interest principles. Under that step, the majority says “the Board must determine whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. If those distinct interests do not outweigh the similarities, then the unit is inappropriate.” (internal quotations omitted). This “weighing” of excluded employees’ interests is not a mere clarification of *PCC Structural*s, but an upending of well-settled unit determination principles that *PCC Structural*s purported to reinstate. For the majority to pretend otherwise, and not acknowledge or explain the dramatic change it makes, constitutes a failure to engage in the reasoned decision-making required of administrative agencies.<sup>3</sup>

Even accepting the majority’s new test, however, there is no basis for finding this petitioned-for unit inappropriate. As demonstrated below, the FRTs and FRTIs share a strong internal community of interests, and there is no industry-specific standard mandating a broader unit. The Employer’s more than 2500 other production employees certainly share some terms and conditions of employment with the FRTs and FRTIs (many of those being general Employer-wide policies), but those commonalities are far outweighed by key terms and conditions that plainly distinguish those 2500 employees from the FRTs and FRTIs. In finding otherwise, the majority erroneously downplays fundamental subjects of collective bargaining that matter most to workers, impermissibly prioritizes employer preference over employees’ organizational desires, and ultimately robs employees of their fullest freedom to organize in an appropriate unit of their choosing. Such an outcome cannot be squared with the mandates of the National Labor Relations Act.

#### I.

The Employer’s North Charleston facility has been in operation since 2011 and is primarily responsible for producing commercial 787 aircraft. Aircraft are

manufactured in stages, with different sections of the aircraft being produced separately and then fused together in the “Final Assembly” building. After final assembly, aircraft are towed to the “Flight Line,” a geographically separate area of the North Charleston facility consisting of nine stalls and an active taxiway on which airplanes take off and land for flight tests. It is only at this point that the petitioned-for FRTs and FRTIs enter the manufacturing process.

The FRTs, FRTIs, and their supervisors form the bulk of the small group of employees who work at the Flight Line. They are accompanied only by a handful of painters; the 10-member Cabin Systems Team, which works on making the final adjustments to the interior of the plane after it has been assembled; and a “travel team” of about 10 employees who perform “traveled work” that was not timely completed in earlier stages of the manufacturing process. As the majority concedes, the isolated nature of the Flight Line and the work performed there leads to limited contact between the FRTs and FRTIs and the rest of the Employer’s production force.

At the Flight Line, the FRTs and FRTIs are responsible for rendering aircraft operational for the first time in the manufacturing process, performing an extensive array of pre-flight checks to ready aircraft for flight testing, and assisting in “rework” to cure any defects discovered during the test flights. These duties include over 100 unique functions, or “shop order instances,” that are not performed by any other employees, such as fueling the plane for the first time (a process that takes 10–12 hours, if all goes smoothly), setting the compass, performing engine tests, and engaging in systems testing with respect to the aircraft’s fuel and power systems, which have never before operated on independent power. To the extent that FRTs and FRTIs also complete “rework” or “traveled work” that other employees perform, this represents only 14 percent of their total working hours.

The FRTs and FRTIs perform their work in tandem: the FRT performs the work while the FRTI watches, ensures that it is being done properly, and then “signs off” on the task in the Employer’s workflow system to indicate that it has been completed. Because the work of the FRTs and FRTIs is so highly integrated, the FRTs, FRTIs, and their supervisors meet every morning to coordinate the day’s activities. Their actual work tasks also substantially

Cir. 2013), which *PCC Structural*s overruled, correctly summarized the Board’s “traditional” community-of-interest standard and was entirely consistent with the Act. As I explain below, it is clear that the majority’s decision today fails on both counts.

<sup>3</sup> *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 374–375 (1998). Further, just as it did in *PCC Structural*s, the majority once again issues a significant decision without notifying the public that it is reconsidering its unit determination standard, inviting amicus briefs or public

input of any kind, or even allowing the parties an opportunity to brief the case after the Board has granted review. For the reasons articulated in *PCC Structural*s, it remains my view that proceeding in this fashion abrogates the Board’s duty, under the Administrative Procedures Act, to engage in “reasoned decisionmaking” and amounts to an abuse of discretion. 365 NLRB No. 160, slip op. at 14–17 (Members Pearce and McFerran, dissenting).



overlap; indeed, the Employer has assigned them the same job code and same job description.<sup>4</sup> That the FRTs and FRTIs perform the same underlying work is underscored by the fact that, in 2017, a shortage of work for the FRTs and FRTIs affected both classifications equally, resulting in a voluntary layoff package that the Employer offered exclusively to the FRTs and FRTIs as a group. The FRTs and FRTIs are also paid the same amount, at a rate notably higher than most of the other production and maintenance employees at the plant.<sup>5</sup> In fact, the FRTs and FRTIs were given an exclusive pay increase in 2016. This exclusive pay increase was granted, according to the Employer's communications regarding the pay raise, because "[t]he flight readiness technician's skill requires additional expertise and certifications which [sic] is why the pay scale is different at Boeing and other companies." They also have the same hours and shifts, which are different from the shifts of other production and maintenance employees at the plant and bid on these shifts only amongst themselves.

Notably, the FRTs and FRTIs are the only employees at the North Charleston plant required to possess an Airframe and Powerplant, or "A&P," license. An A&P license requires about 18–30 months of instruction, including classroom and hands-on training; involves extensive written and practical exams; and can cost up to \$30,000 to procure. Only 6 percent of employees at the Employer's plant, besides the FRTs and FRTIs, possess an A&P license. Among other reasons, the FRTs and FRTIs are required to hold the A&P license because they represent some of the very few employees at the plant allowed to perform work on aircraft that have entered "repair station" status, which occurs after the FAA has certified the craft for use by the public, and any further work on an aircraft in this status requires additional safety precautions and heightened expertise. On that count, because they perform "repair station" work, the FRTs and FRTIs are subject to random, mandatory drug tests, unlike the vast majority of the Employer's production force. And, because FRTs and FRTIs are some of the few employees who work with operational planes on the Flight Line, they are also subject to special Flight Line safety procedures that have no application elsewhere in the Employer's facility. In fact, one manager testified that whenever non-FRT or FRTI personnel make decisions about work performed on the Flight Line, an FRT or FRTI manager "has to be involved in

every one of [the] decisions just from a safety standpoint because there's power on the airplane."

Given that the FRTs and FRTIs perform highly skilled, specialized work, it is not surprising that there is no evidence of any other employee classifications temporarily or permanently transferring into FRT or FRTI positions. Similarly, there is limited evidence of FRTs or FRTIs transferring into other classifications on a temporary or permanent basis outside of a brief period in 2017, discussed above, when FRTs and FRTIs accepted temporary transfers to avoid layoff during a shortage of work on the Flight Line. And, as stated, they have little contact with the Employer's other production employees due to the geographic separation of the Flight Line.

Although the FRTs and FRTIs are organized in the same departments as some excluded production employees, the FRTs do not share immediate or secondary supervision with any other production and maintenance employees except for the 10 Cabin Systems Team Employees, and the FRTIs do not share immediate supervision with any other employees at all. This separate immediate supervision plays an important role with respect to many of the FRTs' and FRTIs' terms and conditions of employment, as the Employer's first-line supervisors are given discretion and responsibility for implementing a large number of the Employer's universal personnel policies, including discipline, granting time off, resolving scheduling disputes, and managing overtime. Also, as mentioned, the FRTs' and FRTIs' daily work assignments are coordinated in morning meetings with their supervisors at the Flight Line, meetings not attended by other production employees.

## II.

On those facts, the petitioned-for unit of FRTs and FRTIs clearly is *an* appropriate unit. Section 9(a) of the Act explains that a designated or selected labor organization represents employees "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."<sup>6</sup> To facilitate this representation, Section 9(b) provides that "the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, *or subdivision thereof*."<sup>7</sup> This statutory language mandates that the Board "maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective

<sup>4</sup> Specifically, FRTs and FRTIs "perform[] final component installation and systems operational functional testing [and] [t]rouble shoot[] pre-flight and post-flight functions for delivery."

<sup>5</sup> FRTs and FRTIs are paid an average of \$32.70 per hour. This wage is about \$8 an hour, or 32.55 percent, more than the average wage for the

excluded production and maintenance employees at the North Charleston facility.

<sup>6</sup> National Labor Relations Act, 29 U.S.C. §159(a).

<sup>7</sup> National Labor Relations Act, 29 U.S.C. §159(b) (emphasis added).

bargaining and of fostering industrial peace and stability through collective bargaining.”<sup>8</sup>

In gauging whether employees’ chosen unit is “appropriate” for collective bargaining, the Board looks to a variety of factors to assess whether a “community of interest” exists among the employees. These factors include whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.<sup>9</sup> The Board’s role in evaluating these factors is “to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment.”<sup>10</sup> As the Supreme Court has explained, “[s]uch a mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit,” and therefore “effectuate[s] the policy of the act, the policy of efficient collective bargaining.”<sup>11</sup>

To “prevent a functionally distinct minority group of employees from being submerged in an overly large unit,” the Board has consistently required that a petitioned-for unit be only *an* appropriate unit for collective bargaining. That other unit configurations may be equally or even more appropriate does not warrant rejecting the proposed unit.<sup>12</sup> As the Supreme Court has recognized, “the initiative in selecting an appropriate unit resides with the employees.” *American Hospital Assn. v. NLRB*, 499 U.S.

606, 610 (1991). “[E]mployees may seek to organize ‘a unit’ that is ‘appropriate’—not necessarily the single most appropriate unit . . . .”<sup>13</sup> The sole issue in any unit determination case then is “simply whether [the unit sought] is appropriate in the circumstances of this case and not whether another unit consisting of . . . [additional excluded employees] would also be appropriate, more appropriate, or most appropriate.”<sup>14</sup> Taking this approach is essential to fulfilling the Act’s command that the Board “assure to employees the fullest freedom in exercising” their rights.

Under any faithful application of those traditional community-of-interest principles, the petitioned-for unit of FRTs and FRTIs is manifestly an appropriate unit. Indeed, *six of the eight* community-of-interest factors set forth above weigh in favor of finding the unit appropriate: the FRTs and FRTIs are highly skilled individuals who possess an A&P license, which only 6 percent of other production and maintenance workers also possess; they perform the distinct job function of rendering operational and then testing said fully operational aircraft, which involves over 100 tasks not performed by any other employee; they have no meaningful contact with other employees; they have, at best, limited interchange with other employees; they are separately supervised and attend separate supervisory meetings with each other on a daily basis; and they have distinct terms and conditions of employment, including a significantly higher wage than the average worker, their own unique shifts and hours, a mandatory drug testing program, and special safety procedures for dealing with live aircraft on the Flight Line. The Board has frequently approved units in which the petitioned-for employees possessed these similarly distinct interests, and I would do so here.<sup>15</sup>

<sup>8</sup> See *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

<sup>9</sup> *United Operations*, 338 NLRB 123, 123 (2002).

<sup>10</sup> 15 NLRB Annual Rep. 39 (1950).

<sup>11</sup> *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 172 (1971).

<sup>12</sup> As the Board put it nearly 70 years ago, the word “appropriate” in this context merely means “[s]uitable for the purpose and circumstances; befitting the place or occasion,” with “no overtones of the exclusive or the ultimate or the superlative.” *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 fn. 13 (1950) (internal quotations omitted).

<sup>13</sup> See also *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964) (“the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees unless such grouping constitutes the only appropriate unit.”).

<sup>14</sup> Accordingly, the Board has consistently held that “the appropriateness of an overall unit does not establish that a smaller unit is inappropriate.” *Montgomery Ward & Co.*, supra, 150 NLRB at 601. This fundamental principle is rooted in Sec. 9(b) itself, which explicitly contemplates that numerous unit configurations of employees may be appropriate for union representation, including “the employer unit, craft unit,

plant unit, or subdivision thereof.” National Labor Relations Act, 29 U.S.C. §159(b). See also *Overnite Transportation Co.*, 322 NLRB 723, 723 (1996) (“For example, under Section 9(b), the same employees who may constitute part of an appropriate employerwide unit also may constitute an appropriate unit if they are a craft unit or are a plantwide unit. The statute further provides that units different from these three, or ‘subdivisions thereof,’ also may be appropriate.”).

<sup>15</sup> See, e.g., *Bartlett Collins*, 334 NLRB 484, 485–486 (2001); *Home Depot USA*, 331 NLRB 1289, 1291 (2000); *Fresno Community Hospital*, 241 NLRB 521, 522–523 (1979); *St. Vincent Hospital and Medical Center of Toledo, Ohio*, 241 NLRB 492, 493 (1979); *J.C. Penney Company Store*, 196 NLRB 446, 446–447 (1972); *Monsanto Research Corp.*, 185 NLRB 137, 141 (1970); *E. I. DuPont de Nemours and Co.*, 162 NLRB 413, 418–420 (1966); *Union Carbide*, 156 NLRB 634, 639–640 (1966); *G. Fox & Co.*, 155 NLRB 1080, 1081–1082 (1965); *American Cyanamid Co.*, 131 NLRB 909, 910 (1961). Thus, while the majority states that my approach would require the Board to approve a petitioned-for unit “any time higher paid, higher skilled employees work in a separate area”—as if this would somehow be an unusual or even idiosyncratic result—this is *precisely what the Board has regularly done* under its traditional community-of-interest test. That is especially so where, as here, the

## III.

The majority purports to acknowledge the traditional community-of-interest factors and even repeats the assertion, reaffirmed in *PCC Structural*s, that “a proposed unit need only be *an* appropriate unit, and need not be the *most* appropriate unit.”<sup>16</sup> Yet, despite such affirmations, the majority concludes that the petitioned-for unit here is inappropriate. The majority can reach this conclusion only by first rewriting the Board’s unit-determination standard, under the guise of “clarifying” *PCC Structural*s, and then misapplying the Board’s longstanding community-of-interest factors.

## A.

As described, the majority holds at Step Two of its “three-step process” that a petitioned-for unit is appropriate only if “the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.”<sup>17</sup> The majority’s focus on the interests of excluded employees is rooted in *PCC Structural*s, itself a flawed decision. In *PCC Structural*s, a Board majority held that, when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board will apply its “traditional” community-of-interest factors to “determine whether the petitioned-for employees share a community of interest *sufficiently distinct* from employees excluded from the proposed unit to warrant a separate appropriate unit.”<sup>18</sup> The *PCC Structural*s majority maintained that by reinstating the “sufficiently distinct” test it was merely returning to the Board’s “traditional” or “historical community-of-interest standard.”<sup>19</sup> But the *PCC Structural*s majority did not explain what degree of difference makes the petitioned-for employees’ interests “sufficiently distinct,” and it did not adopt the Step Two weighing of excluded employees’ interests that the present majority adopts today.<sup>20</sup>

The majority now tries to answer the question left unresolved by *PCC Structural*s, but its answer—again, that a

petitioned-for unit is appropriate only if “the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members”—cannot be right. This standard is not grounded in any prior Board precedent. Indeed, I am aware of no Board case finding a unit inappropriate because a petitioner failed to prove that the petitioned-for employees were more different from than they were similar to excluded employees.

The absence of precedent supporting the majority’s new standard should come as no surprise, moreover, because its standard substantially impairs the Act’s stated objective to assure to employees the “fullest freedom in exercising the rights guaranteed by this Act.” As described above, the Board traditionally has fulfilled that statutory objective by requiring only that a proposed unit be *an* appropriate unit. The majority’s standard contradicts this fundamental principle because it effectively creates a default rule that every employee who shares some similar interests with the petitioned-for employees must be included in the unit, unless the union can prove that the excluded employees are *more different from, than they are similar to* the petitioned-for employees. Simply put, if the union cannot make that showing—and it is unclear how this evaluation will be conducted, as the outcome in this case suggests that the majority clearly finds some factors more significant than others—then the petitioned-for unit is inappropriate. But the fact that excluded employees may have similar interests with petitioned-for employees would establish only that a broader unit *might also be appropriate*. Again, that is not a reason to reject a proposed unit. And, in fact, the Board, with court approval, has never held—as the majority does here, regardless of the lip service it pays to prior precedent—that a unit is inappropriate simply because excluded employees also happen to share some community of interest with petitioned-for employees.<sup>21</sup>

petitioned-for employees also have separate shifts, separate immediate supervision, and no meaningful interchange or contact with excluded employees.

<sup>16</sup> 365 NLRB No. 160, slip op. at 2.

<sup>17</sup> I have no quarrel with other aspects of the majority’s decision. Specifically, I have no objection to the majority’s statements that a unit is inappropriate if the petitioned-for employees do not share a community of interest with each other (Step One of the majority’s “three-step process”), as this is clearly an essential component of the Board’s historical unit determination case law. Similarly, I agree that the Board’s unit determinations should be consistent with the various industry-specific rules and guidelines that have been developed over the years (Step Three).

<sup>18</sup> 365 NLRB No. 160, slip op. at 7 (emphasis added).

<sup>19</sup> *Id.*, slip op. at 8. Indeed, the Board has described the applicable standard using the “sufficiently distinct” language quoted by the *PCC*

*Structurals* majority. See *Specialty Healthcare*, supra, 357 NLRB at 944–945.

<sup>20</sup> The Step Two language was suggested in *PCC Structural*s, but the majority in that case stated clearly that the Board was “return[ing] to the traditional community-of-interest standard that the Board has applied throughout most of its history” and categorically denied that it was making any significant changes to the Board’s traditional test. If the *PCC Structural*s majority can be taken at its word, then it could not have been simultaneously adopting the new standard imposed by the majority today. See 365 NLRB No. 160, slip op. at 9, 11.

<sup>21</sup> See, e.g., *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (“If the employees in the proposed unit share a community of interest, then the unit is *prima facie* appropriate. In order successfully to challenge that unit, the employer must do more than show there is another appropriate unit because more than one appropriate bargaining unit

Rather, if the petitioned-for employees share a community of interest among themselves that is suitable for bargaining, then the Board traditionally has required a heightened showing that excluded employees share such a substantial community of interests with the included employees that the proposed unit is unsuitable for bargaining.<sup>22</sup> Indeed, the two Board cases cited by the majority in support of its new standard follow this traditional approach: although both *Harrah's Club*<sup>23</sup> and *Texas Color Printers*<sup>24</sup> were cases in which the Board used the “sufficiently distinct” formulation the majority purports to apply here, the Board found the petitioned-for units inappropriate in those cases because, in each case, the unit sought excluded employees who shared *substantial similarities* with unit employees.<sup>25</sup>

The majority turns that traditional approach on its head in cases where a party seeks to add employees to a petitioned-for unit. In such cases, the majority’s new standard effectively imposes a heightened burden *on the union*. Thus, it is no longer enough that a union has demonstrated that the petitioned-for employees share an internal community of interests, and that those interests are distinct from the interests of excluded employees. Under the majority’s formulation, the union must then also establish that those distinctions are so great that they outweigh

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logically can be defined in any particular factual setting.”) (internal quotations omitted).

<sup>22</sup> As previously indicated, the exact verbal formulation of that showing has varied, but Board precedent is clear that the showing is indeed heightened: for example, the shared community of interest must be significant or substantial to render the petitioned-for unit inappropriate. See, e.g., *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 701 (1967) (observing that “[w]hile there are also some employment interests which both groups share—identical insurance and holiday benefits and their current common supervision—these factors are *not so significant as to require* the inclusion of all the employees in a single unit”) (emphasis added); *Colorado National Bank of Denver*, 204 NLRB 243, 243 (1973) (“On the basis of the foregoing facts, we find that the unit sought is too narrow in scope in that it excludes employees who share a *substantial community of interest* with employees in the unit sought.”) (emphasis added).

<sup>23</sup> 187 NLRB 810, 812–813 (1971).

<sup>24</sup> 210 NLRB 30, 31 (1974).

<sup>25</sup> See *Harrah's Club*, supra, 187 NLRB at 811–813 (maintenance unit found inappropriate where certain excluded employees performed many of the same functions as the maintenance employees, and often did so in cooperation with the maintenance employees; the maintenance employees did not perform highly skilled maintenance work; there was constant contact between the two groups; and the maintenance employees shared “common working conditions and benefits” with the excluded employees); *Texas Color Printers*, supra, 210 NLRB at 31 (finding a combined unit required “in view of the frequent work contacts and temporary interchange and overlapping supervision of employees of the shipping and receiving and bindery departments.”). The majority acknowledges that these cases “may have involved substantial similarities” between the petitioned-for and excluded employees, but states that they “by no means set the lower bounds of insufficient distinctness” under the Board’s “sufficiently distinct” standard, despite the fact that the

whatever commonalities exist between the excluded and included employees. This scheme effectively, and impermissibly, creates a presumption in favor of the largest and most comprehensive units in which the greatest number of employees can be said to share a general community of interest, and places a corresponding burden on the union to rebut that presumption. The majority’s approach thus contradicts the accepted principle that “it is not the Board’s function to compel all employees to be represented or unrepresented at the same time or to require that a labor organization represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist.”<sup>26</sup>

The majority contends that its approach is supported by the Second Circuit’s decision in *Constellation Brands v. NLRB*, 842 F.3d 784 (2d Cir. 2016). But there is no merit to that contention. In *Constellation Brands*, the court was presented with two questions: first, whether the *Specialty Healthcare* two-part framework<sup>27</sup> violated the Act or was a meaningful departure from the Board’s past precedents; and, second, whether the Board had misapplied that framework in finding that a unit of the employer’s “outside cellar” employees was an appropriate unit, contrary to the employer’s contention that the only appropriate unit

majority relies on these cases as the sole support for its interpretation of that standard. If there are different cases which actually demonstrate the “lower bounds of insufficient distinctness” that the majority suggests are part and parcel of the Board’s traditional community-of-interest test it would certainly be helpful for the majority to identify those authorities.

<sup>26</sup> *Mc-Mor-Han Trucking*, supra, 166 NLRB at 701. This is why, contrary to the standard established by the majority today, the Board’s “traditional” or “historical” test has always placed a burden on the party seeking to include additional employees in a proposed unit to show that the petitioned-for employees are not “sufficiently distinct” from excluded employees with whom they also share a community of interest, as opposed to placing a burden on the union to show that the petitioned-for employees are “sufficiently distinct” (or, under the majority’s standard, more distinct) from excluded employees with whom they might appropriately form a larger unit. For similar reasons, a burden is also applied in the opposite situation, where a union petitions for a “presumptively appropriate” unit—that is, a unit configuration in which the Board has determined that “a community of interest inherently exists among such employees,” see *Kalamazoo Paper Box Corp.*, supra, 136 NLRB at 136—and the employer contends that a subset of the petitioned-for employees should be excluded from the unit. See *Airco, Inc.*, 273 NLRB 348, 349 (1984) (observing that “the burden is on the [party opposing the unit] to demonstrate that the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit.”).

<sup>27</sup> Under *Specialty Healthcare*, the initial burden was on the petitioner to show that the proposed unit comprised a “readily identifiable” group of employees who shared a sufficient community of interests to make the unit appropriate for collective bargaining. If so, then the Board would find the unit appropriate, unless the party seeking to expand the unit demonstrated that excluded employees shared an “overwhelming” community of interests with the petitioned-for employees, thus requiring their inclusion in the unit. 357 NLRB at 942, 944.

had to include all of its production and maintenance employees, or at least its “barrel” employees.

As to the first question, the court squarely upheld the validity of the *Specialty Healthcare* framework, as had seven other federal appellate courts.<sup>28</sup> Notably, in rejecting the employer’s challenge to that framework, the court unambiguously concluded that *Specialty Healthcare* was consistent with “earlier Board precedents that imposed a *heightened burden* on a party who urges the Board to add employees to a unit that has otherwise been deemed appropriate.”<sup>29</sup>

With respect to the Board’s application of *Specialty Healthcare*, the court found that the Regional Director (whose decision the Board had declined to review) had not adequately analyzed at Step One of the *Specialty Healthcare* framework why the petitioned-for employees were “sufficiently distinct” from the excluded employees. The court observed that the Regional Director had recorded the similarities or differences between included and excluded employees, but had not explained how and why their collective-bargaining interests were relevant and supported finding a unit limited to the “outside cellar” employees appropriate.<sup>30</sup> To be sure, the court said that at Step One of the *Specialty Healthcare* framework the Board had to “explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.”<sup>31</sup> But, in context, it is evident that the court did not contemplate the wholesale revision of the Board’s traditional unit-determination analysis imposed by the majority today.

As described, the court *upheld* the *Specialty Healthcare* framework, which clearly required only that a petitioned-for unit be *an* appropriate unit, even if other, broader units might also be appropriate. As the court recognized, moreover, that framework did incorporate the element of “distinctness” into the analysis of a unit’s appropriateness. At bottom, the court held only that the Regional Director had not explained adequately why the petitioned-for employees’ distinct interests made them a suitable grouping for purposes of collective bargaining. The court certainly did not impose some heightened burden on a petitioning union to justify why employees’ chosen “subdivision,” in the

Act’s words, may be *an* appropriate unit, even where that subdivision of employees may also share a community of interests with excluded employees. If the court *was* imposing such a heightened burden, one surely would have expected the court to say so, particularly given its acceptance of *Specialty Healthcare* as a whole, which reaffirmed that there was a heightened burden *on an employer* to prove that excluded employees shared “overwhelming” interests with petitioned-for employees.<sup>32</sup> For those reasons, the majority’s invocation of *Constellation Brands* here is mistaken, if not disingenuous.<sup>33</sup>

The Board has primary responsibility to deliver on the Act’s promise that employees should have the “fullest freedom” to exercise their statutory rights, and thus must take great care in developing its unit-appropriateness standards.<sup>34</sup> The majority’s new standard undermines that goal by making it significantly more difficult for employees to organize in appropriate subdivisions of their choosing, rather than an employer’s overall work force. It is no secret that large units are more difficult to organize: as the Board has observed, “[t]he failure of any labor organization to file a petition for, no less win an election in, [a larger unit than the one petitioned for] . . . vividly attests to its adverse impact on organizational development.”<sup>35</sup> Accordingly, “[t]o withhold from these employees the opportunity to express their wishes unless and until the [larger unit] is successfully organized would, in practical effect, deny them their statutory rights to self-organization and bargaining.”<sup>36</sup> This denial of rights is precisely the effect of the new standard adopted by the majority today.

## B.

The injury to employees’ statutory rights is only exacerbated by the majority’s application of its new standard. As stated, the majority finds, at “Step One” of its framework, that the petitioned-for employees do not share a community of interest amongst themselves, and then goes on to find, at “Step Two,” that they do not have “meaningfully distinct interests” that “outweigh similarities” with excluded employees. At both steps, the majority’s analysis of the relevant community of interest factors is deeply flawed; it reflects a troubling deference to the Employer’s convenience and preferences while devaluing the factors that most directly implicate the concerns of workers and

<sup>28</sup> *Constellation Brands*, supra, 842 F.3d at 792–793; see also *Rhino Northwest, LLC v. NLRB*, 867 F.3d 95, 100–101 (D.C. Cir. 2017) (collecting cases from Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits).

<sup>29</sup> *Constellation Brands*, supra, 842 F.3d at 792 (emphasis added).

<sup>30</sup> *Id.* at 794–795.

<sup>31</sup> *Id.* at 794 (emphasis in original).

<sup>32</sup> *Id.* at 791.

<sup>33</sup> The majority’s eagerness to rely on the Second Circuit’s decision is a remarkable about-face. Less than 2 years ago, the *PCC Structural*

majority had no qualms about disregarding multiple federal appellate court decisions in reversing *Specialty Healthcare*, which those courts had approved.

<sup>34</sup> The Board “must be wary lest its unit determinations unnecessarily impede the exercise by employees of these rights.” *P. Ballantine & Sons*, 141 NLRB 1103, 1106 (1963).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

the collective-bargaining process. Not surprisingly, the result the majority reaches is irreconcilable with Board precedent, and serves neither the employees' interests nor the Act's interest in fostering units appropriate "for the purposes of collective bargaining."<sup>37</sup>

1.

There is no basis for the majority's finding that the FRTs and FRTIs do not share a community of interest with each other. The majority concludes that the FRTs and FRTIs "have significantly different interests in the context of collective bargaining," but in reaching that conclusion the majority turns a blind eye toward the substantial similarities between the FRTs and FRTIs. As described above, the FRTs and FRTIs share myriad interests that render a unit combining both classifications "suitable" for collective-bargaining. FRTs and FRTIs work hand-in-hand to execute and approve the same tasks, or "shop order instances," thus carrying out a distinct stage of the Employer's manufacturing process (rendering aircraft operational, performing systems testing on operational aircraft, and readying aircraft for flight testing).<sup>38</sup> The functional integration of FRTs and FRTIs is accordingly self-evident, as is the fact that any changes to these tasks, or to the standards and procedures governing them, implicate the interests of both the FRTs and the FRTIs, even if they perform different functions in completing these tasks together. Indeed, this is likely why the FRTs, FRTIs, and their supervisors act as a single operational unit that meets every day to coordinate their activities. Perhaps more importantly, that fact that FRTs and FRTIs work on the same underlying tasks means that a shortage in tasks can result, and has resulted, in voluntary layoff packages and temporary transfers that apply to both groups equally, and which represent an important subject for negotiation. Moreover, FRTs and FRTIs share the same base job code, job description, and job requirements, all of which could be negotiated at the bargaining table. In fact, one of these jobs requirements is the A&P license, a highly skilled

certification that requires a great investment of time and money to procure, as well as considerable efforts to maintain. Finally, the FRTs and FRTIs share similar interests with respect to some of the most essential terms and conditions of employment, including that their wage rates are determined as a group, that they bid on the same unique shifts, that they undergo the same mandatory drug testing, and that they adhere to the same Flight Line safety procedures.

As the majority observes, there are some differences between the FRTs and FRTIs: there is no evidence that they interchange with each other, and they are technically located in different departments and therefore are placed under different supervisory structures. Initially, though, it should be recognized *any* unit combining more than one classification will have *some* differences that could be characterized as "significant," but that does not necessarily mean the unit is inappropriate for collective-bargaining. To the contrary, the Board has consistently found units to be appropriate where, as here, the petitioned-for employees are highly skilled, perform distinct work, have their own space apart from the rest of the work force, and have separate immediate supervision from other employees, even though the petitioned-for employees are in different departments and do not necessarily share immediate supervision.<sup>39</sup> And, even in cases where employees may be administratively placed in different departments, they may form an appropriate unit that is "departmental in character" where, as here, the two different groups perform heavily integrated tasks in service of the same overarching function.<sup>40</sup> Thus, Board precedent plainly supports a finding that the FRTs and FRTIs, who share substantial bargaining interests with one another, have an internal community of interests appropriate for bargaining.

2.

Board precedent also weighs strongly against the majority's conclusion that the unit is inappropriate because the FRTs and FRTIs are not "sufficiently distinct" from

<sup>37</sup> National Labor Relations Act, 29 U.S.C. §159(b).

<sup>38</sup> Even though the FRTs physically perform the work while the FRTIs inspect it, this hardly precludes them from sharing a community of interest, as their work is in service of the same distinct function. See *Monsanto Research Corp.*, 185 NLRB 137, 141 (1970) ("We are also of the opinion that there is, contrary to the Employer's contention, a community of interest among employees in the machine shop. Whether the employee is a glassblower or a modelmaker he shares the same relationship with the research and production personnel. Each machine shop employee . . . supplies the skill necessary to physically create component parts and instruments necessary to complete the research and production projects. In other words, all these employees in the proposed unit serve the same function within the laboratory's organizational structure.").

<sup>39</sup> See, e.g., *Bartlett Collins Co.*, 334 NLRB 484, 485 (2001); *St. Vincent Hospital and Medical Center of Toledo, Ohio*, 241 NLRB 492, 493 (1979); *E. I. DuPont de Nemours and Company*, 162 NLRB 413, 418–

420 (1966); *Union Carbide Corp.*, 156 NLRB 634, 636, 640 (1966); *American Cyanamid Co.*, 131 NLRB 909, 910 (1961).

<sup>40</sup> See *Johnson Controls, Inc.*, 322 NLRB 669, 671 (1996) ("Thus, we find that the employees in the petitioned-for unit work in an integrated process which requires that they work together in the interrelated process of installing and servicing the Employer's systems."); *Fresno Community Hospital*, 241 NLRB 521, 521 (1979) (unit appropriate where "[t]he engineering, electronics, and maintenance employees are a distinct administrative grouping of employees apart from other service employees" such that "[t]hey are organized in three departments which are administered as a single entity"); *J.C. Penney Company Store*, 196 NLRB 446, 447 (1972) ("[T]he record in this case persuades us that the automotive service employees are a homogeneous and identifiable grouping, departmental in character and sufficiently distinct from the other departments in the store to warrant their separate representation.");

“other” production and maintenance employees. In fact, the majority’s finding on almost every community-of-interest factor is contrary to Board precedent, as is the majority’s finding when weighing the community-of-interest factors as a whole.

First, the majority asserts that the FRTs and FRTIs spend a “significant” portion of their time performing the same work as excluded employees. The record establishes, however, that FRTs and FRTIs spend only 14 percent of their working hours on rework and traveled work that is performed by other employees. It is well-established that *some* overlap of functions does not render a unit inappropriate, and the degree of overlapping work here, a mere 14 percent, is fully consistent with, and in fact less than, the degree of overlap the Board has found acceptable in prior cases.<sup>41</sup> The single case cited by the majority on this point, *Brand Precision Services*,<sup>42</sup> is readily distinguishable. In finding the petitioned-for unit inappropriate in that case, the Board did not rely solely on the fact that excluded employees spent up to 10 percent of their time performing the same duties as petitioned-for employees, but also on the fact that “portions of all 3 jobs [on the site] overlap” and that the job descriptions for various included and excluded employees expressly covered many of the same functions. By contrast, the FRTs and FRTIs perform over 100 unique tasks that are limited to the Flight Line and not performed by any other employee.<sup>43</sup>

The unique work performed the FRTs and FRTIs is due, in part, to their specialized skills, which represent another

factor supporting the appropriateness of the unit and which is unduly downplayed by the majority. The majority notes that, apart from their A&P license requirement, the FRTs and FRTIs share “almost all other skills and training” with excluded employees. But the focus here must be on the FRTs and FRTIs *greater* skills. In other words, it should come as no surprise that highly skilled employees will have the same baseline skills and training as their lesser-skilled counterparts. As an example, a master carpenter undoubtedly would be qualified to perform tasks typically assigned to a laborer, but that would not mean the laborer must be included in the same unit as the master carpenter. Accordingly, the Board has regularly held that “some overlap of lesser skilled duties does not negate the separate identity of the petitioned-for unit.”<sup>44</sup> And the Board has routinely found that the possession of particular certifications or other licenses weighs in favor of finding a unit appropriate, even where the petitioned-for employees perform less-skilled work along with excluded employees.<sup>45</sup>

Moreover, it is significant that the Employer itself has recognized that the FRTs and FRTIs greater skills distinguish them from other production and maintenance employees. The Board has consistently observed that when petitioned-for employees receive a higher wage than excluded employees, this indicates that they exercise greater skill in the performance of their work,<sup>46</sup> a fact that the Employer itself acknowledged when it explained why the FRTs and FRTIs had been granted an exclusive pay raise.

<sup>41</sup> See *United Operations*, 338 NLRB 123, 125 (2002) (observing that the presence of some overlapping work “does not render the unit inappropriate where, as here, the HVAC techs spend a *substantial majority* of their time performing distinctive duties” (emphasis added)); *Home Depot USA, Inc.*, 331 NLRB 1289, 1290 (2000) (drivers unit appropriate where drivers spent 30–40 percent of their time on overlapping “pulling” functions and there was no evidence that other employees performed the petitioned-for function of operating large delivery trucks); *G. Fox & Co., Inc.*, 155 NLRB 1080, 1082 (1965) (mechanics perform sufficiently separate duties because the “great majority of their working time . . . is spent on the trucks,” even though they “do some work in other parts of the store where their special skills are needed”).

<sup>42</sup> 313 NLRB 657, 657–658 (1994).

<sup>43</sup> These unique tasks include, but are not limited to, the 10–12-hour process of fueling aircraft for the first time; performing engine checks; setting the compass; and testing the aircrafts’ fuel and auxiliary power systems. The Employer references an isolated statement from a single manager that portions of the pre-flight testing performed by the FRTs and FRTIs are “redundant” of checks performed earlier in the manufacturing process, in which components are tested individually using independent power carts. Other testimony, however, established that the testing done by FRTs and FRTIs is substantively different: it occurs once the plane is operating on its own internal power system and when all systems are working simultaneously with one another, introducing new variables and complications into the testing process. For example, FRTI Chris Jones testified to the differences between the testing done during the initial installation of fuel pipes (where the production employees use air pressure to check for leaks) with the comprehensive testing and

monitoring done when the aircraft is being filled with live fuel, observing that the former “is not remotely a full systems check with a liquid and quantities and weight and temperatures. That’s a completely different—that’s—it’s kind of silly, actually.”

<sup>44</sup> *Capri-Sun, Inc.*, 330 NLRB 1124, 1126 (2000). See also *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978) (observing that “although [the petitioned-for employees] perform some laborers’ functions during cold weather, the primary function of operators at all times remains the operating of heavy construction equipment and they require special training and skills in order to do that work.”); *E. I. DuPont de Nemours*, supra, 162 NLRB at 418 (“[A]lthough other employee classifications, such as instrument mechanics and oilers, perform some of the less skilled functions of electricians, they do so infrequently, and none exercise all of the electrical skills.”).

<sup>45</sup> See *United Operations*, supra, 338 NLRB at 123 (finding that the factor of skills and training weighs in favor of finding the unit appropriate because “only HVAC techs are required to be certified by the EPA to handle refrigerants.”); *Southern Baptist Hospitals, Inc.*, 242 NLRB 1329, 1330 (1979) (finding unit appropriate in part because one quarter of the petitioned-for maintenance employees are licensed and many went through on-the-job or vocational training); *The Long Island College Hospital*, 239 NLRB 1135, 1136 (1978) (maintenance employees more highly skilled than other service employees because some are required to be licensed by the city).

<sup>46</sup> See *United Operations*, supra, 338 NLRB at 123 (observing that “[t]he Employer bills its clients for work performed by the HVAC techs at a separate, higher rate based on the fact that the HVAC techs have a set of skills that the Employer sells as a separate service to its clients”);

If the bulk of the FRTs' and FRTIs' duties did constitute lesser-skilled work, as the majority contends, then it would make little sense for the Employer to pay them almost 33 percent more than the average production and maintenance worker. In sum, the FRTs' and FRTIs' possession of the A&P license, as well as their higher wages, demonstrates special skills and training that heavily favor finding the petitioned-for unit appropriate, notwithstanding some overlap with excluded employees.<sup>47</sup>

The factor of interchange also favors finding the petitioned-for unit appropriate, as the record contains no evidence that any excluded employees have transferred, either temporarily or permanently, into an FRT or FRTI position, and there is no evidence that FRTs or FRTIs regularly interchange into excluded classifications absent unusual circumstances. Although the majority characterizes the temporary interchange in 2017, spurred by a shortage of work that would otherwise have resulted in layoffs, as "material," the Board has made clear that interchange due to such circumstances is not persuasive.<sup>48</sup> And, even if the

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*Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019 (1994), aff'd, 66 F.3d 328 (7th Cir. 1995) (finding maintenance unit appropriate in part because "[t]he greater skill of the maintenance employees is also reflected in the fact that their wages are clustered at the two highest wage rates paid by the Employer").

<sup>47</sup> Although the majority asserts that FRTs and FRTIs "largely use the same skills as excluded employees before and even during repair station status," it provides no examples from the record to suggest that lesser-skilled tasks comprise the bulk of the FRTs' and FRTIs' work, no doubt because the record does not contain any such evidence. Although the A&P license is a requirement under federal aviation law for the performance of repair station work, one of the Employer's managers testified that the A&P license is required so that FRTs and FRTIs can perform the "totality of work that happens on the Flight Line," and not just repair station work, which, as the majority notes, is only a small portion of manufacturing process. For example, the "P" in "A&P license" stands for "Powerplant" work, which is work related to the aircraft's engines, fuel supply, and internal power system. The FRTs and FRTIs are the *only* employees at the plant who test the aircraft's engines and who test and monitor the aircraft's operational fuel and power systems, and only a small handful of other employees even work with live aircraft—all considerations that clearly reflect the distinct and significant skills imparted by the A&P license.

<sup>48</sup> *Dick Kelchner Excavating*, supra, 236 NLRB at 1415 (evidence of interchange not persuasive where "such assignments are secondary in nature and are made basically to give [the petitioned-for employees] something to do when there are no operator tasks for them to perform"); *R.L. Stott*, 183 NLRB 884, 885 (1970) (observing that "drivers may aid service or installation men during the summer, when the demand for fuel is low," but that "such interchange as exists is not shown to be so substantial as to destroy [the petitioned-for employees'] separate identity as an appropriate unit"); *Herron Testing Laboratories*, 182 NLRB 508, 509 (1970) ("The [temporary] interchange is limited and irregular. Transfers of drillers to other departments result in the performance of unskilled tasks only and occur only when the drillers are unable to perform their regular functions due to unforeseeable circumstances.").

<sup>49</sup> See *MGM Mirage*, 338 NLRB 529, 533 (2002) (limited one-way interchange is not "the type of periodic temporary transfers or lateral, two-way transfers between departments that may suggest blurred

FRTs and FRTIs interchanged into excluded classifications on a more regular basis, one-way interchange is of limited weight.<sup>49</sup> In sum, there is simply no support in Board law for the majority's assertion that the limited amount of interchange here renders a plantwide unit necessary.

The factor of supervision is yet another instance in which the majority meaningfully departs from the Board's traditional community-of-interest precedent. The FRTIs do not share immediate supervision with any excluded employees, and the FRTs have largely exclusive first- and second-level supervision.<sup>50</sup> Separate immediate supervision has always weighed strongly in favor of finding a petitioned-for unit appropriate.<sup>51</sup> Because the FRTs and FRTIs have separate immediate supervision and there is no evidence that they are subject to additional supervision from individuals who supervise the excluded production and maintenance workers, the present case is readily distinguishable from *Harrah's Illinois Corp.*, the only case the majority cites with respect to this factor.<sup>52</sup>

departmental lines and a truly fluid work force with roughly comparable skills" (internal quotations omitted)).

<sup>50</sup> The FRTs do share immediate and secondary supervision with the 10-member Cabin Systems Team, a group of employees who, like the FRTs and FRTIs, work exclusively at the Flight Line and have no meaningful contact with the rest of the Employer's production and maintenance force. While this shared supervision might support the inclusion of the Cabin Systems Team in the petitioned-for unit, it cannot reasonably be said to constitute any meaningful shared interests between the FRTs and the Employer's remaining 2,500 production and maintenance workers, with whom the FRTs do not share either first or second-level supervision.

<sup>51</sup> See, e.g., *United Operations*, supra, 338 NLRB at 125 (finding that the factor of supervision weighs in favor of finding the unit appropriate where "[t]he [petitioned-for] HVAC techs and the [excluded] BSEs have separate immediate supervision. The HVAC techs share common immediate supervision with the [excluded] policers"); *Transerv Systems*, 311 NLRB 766, 766 (1993) ("Here, there are some factors which support finding the petitioned-for unit appropriate, such as . . . the separate immediate supervision"); *Associated Milk Producers*, 251 NLRB 1407, 1408 (1980) (unit appropriate, in part, due to "their separate immediate supervision and less frequent contact with [the excluded] Stephenville drivers"); *Monsanto Research Corp.*, supra, 185 NLRB at 141 ("The record is clear that all administrative functions relating to the employees in the proposed unit are carried out through the machine shop regardless of where they are working and at whose direction . . . Each employee in the proposed unit is under the supervision of a machine shop foreman. This foreman determines to which project the employee is to be assigned and makes the evaluation of the employee's performance").

<sup>52</sup> See 319 NLRB 749, 751 (1995) ("[E]mployees within the EVS and maintenance department, including cleaners and heavy-duty cleaners, share not only the same overall supervision but also some common immediate supervision. Thus, although there is one supervisor, Terry Felowitz, to whom maintenance employees specifically report, there are four other supervisors within the department, three assigned to cleaners and one to heavy-duty cleaners. All five of these supervisors possess, and at least some have exercised, authority to direct and discipline any employee in the department as necessary.").



Although the majority emphasizes that the FRTs and FRTIs share common higher-level and overall supervision with excluded employees in their department, the Board rarely relies on common upper-level supervision to find a unit inappropriate, and does so only under unique circumstances, namely where the second-level supervisors are responsible for the implementation of personnel policies such as discipline, overtime, and other terms and conditions of employment which are important subjects of bargaining.<sup>53</sup> That makes a great deal of sense: if the mere presence of shared higher-level supervision were a relevant consideration, it would be redundant and duplicative of the “department” factor under the community-of-interest test, as individuals in the same department inherently share higher-level supervision. Accordingly, shared higher-level supervision may be relevant, but only when higher-level supervisors engage in functions typical of a direct supervisor. Here, however, such functions are governed by the Employer’s first-level supervisors, and the FRTs and FRTIs do not share this first-level supervision with the vast majority of excluded employees. Under Board precedent, therefore, this factor also weighs in favor of finding the petitioned-for unit appropriate.

The majority’s disregard for fundamental subjects of bargaining is even more evident in its discussion of the FRTs’ and FRTIs’ basic terms and conditions of employment. The majority states that “the factors here that might distinguish excluded employees from the FRTs and FRTIs”—which include higher wages, distinct shifts, and mandatory drug tests—“are relatively insignificant in the context of collective bargaining.” This is an astonishing statement, considering that the Act specifically contemplates that unions should represent employees “for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment*, or other conditions of employment.”<sup>54</sup> Under well-established precedent, the FRTs and FRTIs significantly higher wage rates alone strongly supports finding a separate unit appropriate.<sup>55</sup> Their distinct shifts also heavily favor finding a separate unit appropriate.<sup>56</sup> Contrary to the majority’s assertions, there is no precedential basis for deeming these critical

distinctions “insignificant” or “outweighed” by the other more general terms and conditions the FRTs and FRTIs share with excluded employees.

Although, as the majority points out, the Board in *United Operations* did comment that shared personnel policies and work rules “suggest[ed] a community of interest between [the petitioned-for and excluded employees],” the Board did not state that these considerations weighed against finding the petitioned-for unit appropriate, and it ultimately found that “the commonalities are insufficient to negate the propriety of a unit of the HVAC techs,” in part because of “the significantly higher wages of the HVAC techs.”<sup>57</sup> And, in *TDK Ferrites Corp.*,<sup>58</sup> the Board found that a higher wage rate weighed unmistakably in favor of finding the petitioned-for unit appropriate, but was outweighed by *all of the other community-of-interest factors in tandem*, including “the highly integrated nature of the Employer’s production process, the production and maintenance employees interact and interchange frequently, share common supervision, are functionally integrated, and have common working conditions and terms and conditions of employment.” The present case does not involve the frequent interaction, interchange, common supervision, and functional integration present in *TDK Ferrites*. Thus, neither of these cases supports the majority’s devaluing of the petitioned-for employees’ distinct wages and hours, which the text of the Act itself highlights as two of the foremost subjects for collective-bargaining.

Finally, the majority’s discussion of functional integration sweeps broadly beyond how the Board has traditionally defined and analyzed this factor. The Board has cautioned against over-reliance on the factor of functional integration, making clear that “[i]ntegration of a manufacturing process is a factor to be considered in unit determinations. But it is not in and of itself sufficient to preclude the formation of a separate [] unit, unless it results in such a fusion of functions, skills, and working conditions . . . as to obliterate any meaningful lines of separate [] identity.”<sup>59</sup> The majority has clearly relied too heavily on this factor here.

<sup>53</sup> See *Typecraft Press*, 275 NLRB 553, 554 (1985) (explaining that the second-level supervisors “handle all the personnel and labor-related matters affecting employees in every department” and therefore, “regardless of which department they are in, an employee’s evaluation or wage increase, for example, is determined solely by [the higher-level supervisor]”); *Monsanto Co.*, 183 NLRB 415, 416 (1970) (observing that the “administrative group leaders” for both petitioned-for and excluded employees are those responsible for “pay, record handling, overtime equalization, vacation scheduling, and handling leaves, sickness, grievances, and other personnel matters”).

<sup>54</sup> National Labor Relations Act, 29 U.S.C. §159(a) (emphasis added).

<sup>55</sup> See, e.g., *United Operations*, supra, 338 NLRB at 125; *Capri-Sun, Inc.*, 330 NLRB 1124, 1124 (2000); *Macy’s West, Inc.*, 327 NLRB 1222,

1228 (1999); *Executive Resources Associates*, 301 NLRB 400, 402 (1991) (noting that \$9,000 annual salary differential could become a “prime source of friction” between the two groups, and that that fact weighed in favor of a separate unit); *Farmers Insurance Group*, 164 NLRB 233, 233 (1967); *Southern Baptist Hospitals, Inc.*, supra, 242 NLRB at 1130; *Ramada Inn West*, 225 NLRB 1279, 1280 (1976).

<sup>56</sup> See *Wheeling Island Gaming*, 355 NLRB 637, 642 (2010). Cf. *Texas Color Printers*, supra, 210 NLRB at 30.

<sup>57</sup> *United Operations*, supra, 338 NLRB at 125.

<sup>58</sup> 342 NLRB 1006, 1009 (2004).

<sup>59</sup> *E. I. DuPont de Nemours*, supra, 162 NLRB at 419.

The majority asserts that the evidence of functional integration in this case is “particularly compelling” because “the 2700 production-and-maintenance employees stationed throughout the production line all work toward producing a single product” and because the FRTs and FRTIs “are only exclusively responsible for . . . about 1 percent of the tasks necessary to deliver a single aircraft to a customer.” Functional integration, however, is not established simply because multiple groups of employees are working toward the same overall goal. If that were the case, the factor of functional integration would always weigh in favor of a larger unit because every employee plays some role in accomplishing an employer’s overarching business function, whether the employer is running a hotel, manufacturing a product, or operating a hospital. Rather, the Board has historically found functional integration present only when employees must work with each other and rely on each other to perform their assigned tasks.<sup>60</sup> When employees are able to perform their tasks independently of one another, the Board finds that the two groups are not functionally integrated.<sup>61</sup> This distinction is important, as workers who must rely on each other to perform their duties have interlocking interests that affect their daily working conditions, an important consideration during the collective-bargaining process. But the mere fact that employees work at the same plant and ultimately produce the same product says very little about how one subgroup of employees’ work affects the work of another.

Here, the FRTs and FRTIs are able to perform their role in the manufacturing process independently: they perform a specialized function, testing fully operational aircraft, that has little overlap with the work of excluded employees; they perform this work in their own, geographically distinct area of the facility; and they do not complete their work in tandem with other employees, or rely heavily on excluded employees in order to do so. The majority points

to no evidence of actual *integration* between the work of the FRTs and FRTIs and the work of excluded classifications that would prove “particularly compelling” at the bargaining table. For example, the fact that the FRTs and FRTIs perform about 1 percent of the total tasks necessary to manufacture an aircraft says nothing about how the petitioned-for employees interact with and rely on excluded employees in the performance of their work. It only serves to demonstrate the rather obvious fact that manufacturing an aircraft involves a lot of tasks, and that the average employee at such a facility only performs a small number of these tasks.

Clearly, what the majority finds “particularly compelling” is not that the work of the FRTs and FRTIs is “functionally integrated” with the work of the excluded employees in any meaningful sense, but rather that the FRTs and FRTIs are a small, distinct segment of an overall production process. The Board has never held, however, that a petitioned-for unit is inappropriate simply because it represents a single segment of a more comprehensive manufacturing process. Although the majority cites the Board’s statement in *Publix Super Markets* that it is inappropriate to carve out a small portion of a functionally integrated facility,<sup>62</sup> the petitioned-for unit employees in *Publix* were heavily integrated with the excluded employees in the most fundamental and traditional sense, as they regularly interacted with excluded employees in the performance of their work, engaged in the same duties and functions as excluded employees, and performed critical support and operations work for the totality of the employer’s operations.<sup>63</sup> In those circumstances, it made sense not to carve out a small group of employees who engaged in functions that were the essential to the work of other employees. That is simply not the case here, where the FRTs and FRTIs have a unique function in the Employer’s

<sup>60</sup> *Casino Aztar*, 349 NLRB 603, 605 (2007) (observing that “[t]he functional integration between these three subdepartments is most clear with regard to the Employer’s catering operation, which relies on [excluded] restaurant and [petitioned-for] beverage employees to staff catering events on a regular basis”); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024–1025 (2004) (explaining that the petitioned-for employees perform “duties functionally integrated with all aspects of the plant,” including, but not limited to, dispatch functions that “support both the distribution operation and the milk plant operation;” pallet repair operations that “are essential to all operations at the facility;” “maintaining the building structure throughout the Deerfield Beach facility;” changing the batteries for forklifts used universally across the facility; performing pest control throughout the entire facility; shipping products from other processing operations, and much more); *Bartlett Collins*, supra, 334 NLRB at 485 (finding that “the functions of the mold-cleaning employees are highly integrated with those of the petitioned-for employees” because “[m]old-repair employees and mold-cleaning employees perform closely related work; both maintain molds for use by production employees” and because “[t]he mold-repair employees have regular and frequent

interaction with the mold-cleaning employees in the maintenance of the equipment and by providing the mold-cleaners with directions and instruction through a logbook”); *Transerv Systems*, supra, 311 NLRB at 766 (observing “that most deliveries involve both a messenger and a driver, which evidences a high degree of functional integration among, and frequent contact between, drivers and bicyclists”).

<sup>61</sup> See *United Operations*, supra, 338 NLRB at 124–125 (finding that “[t]here is no significant functional integration between the HVAC techs and the other field service employees” where the two groups service different types of calls, “[e]ach service call is independent of all others,” “[f]ew service calls require both an HVAC tech and a BSE,” and “when this does occur . . . the HVAC tech performs the necessary HVAC work and the BSE assists with unskilled labor”).

<sup>62</sup> See 343 NLRB at 1027 (finding it “particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit”).

<sup>63</sup> For a summary of some of the facts relied upon by the Board in *Publix*, see fn. 60, supra.

manufacturing process and rarely interact with the vast majority of the Employer’s production and maintenance work force.

For all of those reasons, even under the new standard introduced today, the majority should find the petitioned-for unit appropriate because the FRTs and FRTIs plainly have “meaningfully distinct interests . . . that outweigh similarities” with the Employer’s 2500 other production and maintenance workers. The only way the majority can find otherwise is by ignoring relevant precedent and handling various community-of-interest factors in a way that cannot be reconciled with how they have been handled in the past. As described, the majority erroneously downplays factors that matter most to workers on a day-to-day basis—including wages, hours, and first-line supervision—and unjustifiably elevates the importance of factors that, although relevant, have a far less immediate impact on collective bargaining—such as departmental structure, higher-level supervision, universal work rules, and the fact that everyone works on the same production line. Given the majority’s reliance on these latter factors, which apply to nearly every employee at the Employer’s North Charleston facility, it is difficult to see how, under the majority’s analysis, anything less than a plantwide unit of the Employer’s 2,700 production and maintenance employees could possibly be found appropriate, even though the facts here fall far short of the circumstances in which the Board has traditionally required such plantwide units.<sup>64</sup>

IV.

It is clear that the petitioned-for unit of FRTs and FRTIs is appropriate under the Board’s “traditional” unit determination standard—the standard allegedly “restored” by the Board less than 2 years ago in *PCC Structural*s—and

that a combined production and maintenance unit is not required on the facts present here. Even under the standard the Board has introduced today, this unit is appropriate, because the distinct interests of the FRTs and FRTIs outweigh the interests they share with excluded employees. In finding to the contrary, the majority does real damage to employees’ ability to exercise the “fullest freedom” to organize under the Act. In the process, the majority disregards the Board’s “traditional” community-of-interest standard and at the same time refuses to acknowledge that it is effecting a major change in Board law and policy by departing from that standard. That is not reasoned decisionmaking. And, perhaps that is not surprising given the majority’s failure, once again, to notify and seek input from the public on an important question.

From this flawed process emerges a flawed result: the outcome of this case—effectively telling 178 highly skilled, specialized employees that they cannot exercise their rights under the Act unless they share a bargaining unit with all of the thousands of other production and maintenance workers employed at their plant—simply cannot be reconciled with either the history of the Board’s unit determination jurisprudence or the fundamental policies underlying the National Labor Relations Act. Because I cannot condone the majority’s denial of these workers’ fundamental rights, I dissent.

Dated, Washington, D.C. September 9, 2019

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Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

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<sup>64</sup> Cf. *Buckhorn, Inc.*, 343 NLRB 201, 203–204 (2004); *TDK Ferrites*, supra, 342 NLRB at 1008–1009; *Clinton Corn Processing*, 251 NLRB 954, 954–955 (1980); *Chromalloy Photographic Industries*, 234 NLRB

1046, 1047 (1978); *Alcan Aluminum Corp.*, 178 NLRB 362, 365–366 (1969).