Bargaining Unit Determinations
In the Wake of *Specialty Healthcare*

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I. Introduction

On August 26, 2011, the National Labor Relations Board issued its decision in Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011) (“Specialty Healthcare”). Specialty Healthcare overruled the so-called “empirical community of interest” test for determining the appropriateness of bargaining units in non-acute healthcare facilities. The test was first propounded by the Board in Park Manor Care Center, 305 NLRB 872 (1991).

In Specialty Healthcare, the Board also articulated a general standard for evaluating the appropriateness of bargaining units in the face if claims that additional employees or classifications must be added to the unit. Depending on one’s perspective, that standard is either a simple restatement and clarification of existing principles of unit determination or a radical transformation that will plague the country with “micro-units.” While it is still early too evaluate the ultimate impact of Specialty Healthcare on bargaining unit jurisprudence, it must be said that up until now, its impact has been modest.

II. Background

A. Park Manor

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

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

The Board noted that henceforth:

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

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2 Park Manor, supra at n. 16.
3 St. Francis Hospital, 271 NLRB 948 (1984).
consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking proceedings, the evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute.\(^4\)

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

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

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

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

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

On December 22, 2010, the Board issued its notice and invitation to file briefs\(^8\) regarding issues raised by the facts underlying *Specialty Healthcare*. The majority noted its belief that it is obligated under the Act to continually evaluate whether its decisions and rules are serving their statutory purposes. It noted that this is particularly the case with decisions such as *Park Manor*, which adopted a new approach to determining healthcare units, but that such an obligation extended as well to procedures and standards for determining units in all industries.

\(^4\) *Park Manor*, supra, at 875.

\(^5\) *Park Manor*, supra, at 875.

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

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

\(^8\) *Specialty Healthcare*, 356 NLRB No. 56 (2010).
Accordingly, the majority invited the parties and *amici* to submit briefs addressing the following questions:

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

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

A. The Majority Decision

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

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

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

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

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

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9 357 NLRB No. 83 (2011).
10 Id. slip op at 7.
11 Id.
12 Id. slip op. at 8-9.
13 Id. slip op. at 9-10.
the employees proposed for inclusion share an “overwhelming community of interest” with the other unit employees.\textsuperscript{14}

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

1) We overrule one decision, \textit{Park Manor}, which has created a unique test for unit determination in non-acute healthcare facilities (the “pragmatic or empirical community of interest” test).

2) We hold that the traditional community of interest test – to which we adhere – will apply as the starting point for unit determinations in all cases not governed by the Board’s Health Care Rule (including cases formally controlled by \textit{Park Manor}).

3) We set out a clear test – using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit – for those cases in which an employer contends that a proposed bargaining unit is inappropriate because it excludes certain employees. In such cases, the employer must show that the excluded employees share an “overwhelming community of interest” with the petitioned-for employees.\textsuperscript{15}

While receiving little commentary in the aftermath of the decision, \textit{Specialty Healthcare} contains three additional pronouncements that could significantly temper the impact if the decision:

1) \textbf{Rules for Specific Industries}
The decision leaves intact, with the exception of healthcare, special rules and presumptions that have been developed for determining bargaining units in specific industries.\textsuperscript{16}

2) \textbf{Fractured Units}
The Board reiterated that it will not approve of “fractured” units that are too narrow in scope or have no rational basis.\textsuperscript{17}

3) \textbf{Undue Proliferation}
While the Board majority noted that the Supreme Court in \textit{American Hospital Assn v NLRB}, 499 US 606 (1991) made clear the non-binding nature of congressional statements about

\textsuperscript{14} \textit{Id.} slip op. at 11.
\textsuperscript{15} \textit{Id.} slip op. at 14.
\textsuperscript{16} \textit{Id.}, slip op. at 13, n. 29.
\textsuperscript{17} \textit{Id.}, slip op. at 13.
proliferation of units in the healthcare industry, it noted that the Board has nevertheless respected the suggestion that it seek to avoid undue proliferation. While it noted that this deference may present some “tension” in a future case, such deference appears for now to have been left intact.\textsuperscript{18}

B. The Dissent

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

C. \textit{Wheeling Island Gaming} and \textit{Blue Man Vegas}

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

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

As long as the Board applies the overwhelming community of interest standard only after the proposed unit has been shown to be \textit{prima facie} appropriate, the Board does not run afoul of the

\textsuperscript{18} \textit{Id.} slip op. at 13.
\textsuperscript{19} \textit{Id} slip op. at 15.
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} \textit{Id} slip op. at 19.
\textsuperscript{22} 355 NLRB No. 127 (2010).
\textsuperscript{23} 529 F3d 417 (D.C. Cir. 2008).
statutory injunction that the extent of the union’s organization not be given controlling weight.

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

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

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

IV. Decisions Subsequent to Specialty Healthcare

A. Board Decisions

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

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

24 Specialty Healthcare, slip op. at 19, n.17.
25 Wheeling Island Gaming, Inc., supra, slip op. at 2 quoting American Cyanamid Co., 131 NLRB at 910.
26 Specialty Healthcare, supra, slip op. at 15.
27 Id, slip op. at 13 n. 32.
The employer and the union had entered into a stipulated election agreement covering a unit that included both a distribution center from which juice drinks and products were distributed, and a refurbishing center at which coolers, etc., were repaired. Route Service Representatives (“RSR’s”) were included in the stipulated unit, while the Merchandisers voted under challenge. The Board found that it would fracture the unit to exclude the merchandisers because the non-merchandiser employees did not share a community of interest with one another that the merchandiser’s did not “equally share.” The merchandisers, for example, shared common supervision with the RSR’s and, like the RSR’s worked routes that took them off the grounds of the facilities. To exclude the merchandisers while including employees who did not share common supervision and overlapping duties would fracture the unit.

Significantly, the Board noted that this was the case even though the RSR’s could have, by themselves, constituted a separate appropriate unit.28 Member Hayes joined with Chairman Pearce and Member Becker in this opinion.

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

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

The employer argued that the Board had established special rules for technical employees and in particular, for technical employees in the nuclear industry. The majority noted that “to the extent that the Board has developed special rules applicable to technical employees… those rules remain applicable.”29 The Board noted that arguably, it has developed a special standard for determining whether a technical unit is appropriate, finding that a sub-set of technical employees is appropriate only when the employees in the requested unit possess a sufficiently distinct community of interest apart from other technicals to warrant their establishment as a separate unit. The majority found that it need not decide if such a special test applies, because it would find the radiological control department to constitute an appropriate unit even if such were the case.

It found that in the facts of this case, the radiological control department could appropriately be viewed as discreet from the employer’s major service of shipbuilding and refurbishing.30 The majority distinguished cases involving nuclear research facilities where

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28 *Odwalla, supra*, slip op. at 6.
29 *Northrop Grumman Shipbuilding, supra* slip op. at 4.
30 *Id.* slip op. at 6.
radiation issues were at the heart of the facilities’ function. It concluded that under either Specialty Healthcare or under the arguable special test for technicals, the employees in the radiological control department constituted an appropriate unit distinct from other technicals.31

Member Hayes dissented, indicating that the petition would properly have been dismissed pre- Specialty Healthcare. He argued that the Board’s longstanding policy has been that all technical employees should be combined who carry out functionally related duties.32

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

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

The Board majority noted that Specialty Healthcare set forth principles to be applied in cases such as this one. It found that the RSA’s share a community of interest with one another, but do not share an “overwhelming” community of interest with the other hourly employees.33 It noted that there is little interchange between RSA’s and other hourly classifications, and that RSA’s only have limited interaction with other employees.

The employer did not argue that some, but not all hourly employees shared an overwhelming community of interest with the RSA’s; rather it argued that they all did. The Board majority found the Regional Director’s reliance on United Rentals, 341 NLRB 540 (2004) for the proposition that a wall-to-wall unit was the smallest appropriate unit was misplaced because that case involved a small operation in which all of the employees pitched in to perform the functions of different classifications.34 The majority pointed instead to a pair of decisions, Avis Rent-A-Car System Inc., 132 NLRB 1136 (1961) and Budget Rent-A-Car of New Orleans, Inc., 220 NLRB 1264 (1975) in which the Board had rejected claims that rental agents must be included in petitioned for units of other employees.35

Member Hayes dissented, offering the view that “so long as a petitioner does not make the ‘mistake’ of petitioning for a unit that consists of only a part of a group of employees in a

31 Id. slip op. at 6.
32 Id. slip op. at 7.
33 DGT Operations, Inc., supra, slip op. at 5.
34 Id., supra, slip op. at 7.
35 Id. slip op. at 6.
particular classification, department, or function, i.e. a fractional unit, it will be impossible for a party to prove that an overwhelming community of interest exists with the excluded employees.”36

B. Regional Director’s Descriptions of the Impact of Specialty Healthcare

While many of the Regional Director’s decisions that cite Specialty Healthcare do not opine as to the extent to which it may or may not constitute a departure from precedent, those that have done so have not been uniform. For example, Region 11 has described the Specialty Healthcare analysis as a clarification,37 as has Region 20.38 Region 21 has described the overwhelming community of interest burden as being “reiterated” in Specialty Healthcare.39

Region 22, on the other hand, has described it in one case as establishing a “heightened burden of proof” for inclusion of additional employees40 while describing this burden in another case as the “traditional standard.”41 Region 14 has described the “heavy burden” under Specialty Healthcare.42

C. Board Orders On Requests for Review

1. Remands ordered

Grace Industries, LLC, 29-RC-12031 (February 8, 2012).

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

On December 8, 2011, the Board issued an order remanding the case. The majority ordered a remand for consideration in light of Specialty Healthcare. Member Hayes concurred

36 Id. slip op. at 9.
37 Republic Services/Allied Waste Services, 11-RC-068882 (December 12, 2011), slip op. at 8.
39 Windsor Anaheim Healthcare, 21-RC-071722 (February 9, 2012), slip op. at 14.
41 First Aviation Services, 22-RC-61300 (October 19, 2011), slip op. at 23.
42 Sexton Ford Sales, Inc., 14-RC-068800, slip op. at 22.
in the remand, noting that although he had dissented in *Specialty Healthcare*, further consideration and explanation was needed as to why an asphalt workers unit was not appropriate.

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

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

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

In a post-*Specialty Healthcare* decision issued on September 29, 2011, the Regional Director applied the single facility presumption to the collective “South” location and concluded that the employer had failed to rebut the presumption. The Regional Director also concluded, without reference to *Specialty Healthcare*, that the detail technicians, “get ready” technicians and service advisors did not share a sufficient community of interest with the petitioned-for employees, but that the diagnostic technicians and workflow coordinators should be included into the unit.

The employer sought review on November 4, 2011. The Board granted review and remanded the case to the Regional Director for consideration of: 1) whether the collective “South” locations were properly treated as a single facility worthy of a presumption of appropriateness, 2) whether, even if they were, the employer hadn’t successfully rebutted the presumption of appropriateness, 3) whether the petitioned for unit is appropriate even if a presumption of appropriateness doesn’t apply, and 4) whether the service advisors, get ready technicians and detail technicians are properly excludable under the standard set forth in *Specialty Healthcare*.43

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

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

*Extendicare Homes Inc.*, d/b/a Texas Terrace 18-RC-70382 (January 24, 2012).

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

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

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

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

The employer operates a business that provides aviation services and materials to aircraft at the Teterboro Airport. The union petitioned for a unit of line service technicians and leads. The employer maintained that the smallest appropriate unit must also include customer service employees, aircraft cleaners, etc. Applying *Specialty Healthcare*, the Regional Director found that the line service technicians and line service leads are readily identifiable as a group and share a community of interest with one another. He further found that the employer had failed to establish that the additional employees it sought to include shared an overwhelming community of interest with the line service employees.44

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

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

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

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

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


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

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

D. Regional Director’s Decision with Request for Review Pending

1. Retail Store


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

Applying *Specialty Healthcare*, he concluded that the employer had met its burden of establishing that the remaining employees shared an overwhelming community of interest with the employees in the petitioned-for unit. He concluded that the petitioned-for group would constitute a “fractured” unit representing only an “arbitrary segment” of what would be an appropriate unit.45

A request for review is pending.

E. Additional Regional Directors’ Decisions

1. Nursing Homes/Convalescent Centers


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

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

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


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

The Regional Director concluded that “[u]nlke *Specialty Healthcare* … the union herein has not proposed a unit consisting of a set of employees who are clearly definable as a group.”46 He concluded, however, that the employees in the proposed unit shared a community of

45 *Home Depot, supra*, slip op. at 15.
46 *Windsor-Anaheim, supra*, slip op. at 15.
interest. In determining that LVN’s were properly excludable, the Regional Director did not look to previous Board determinations that LVN’s were properly excludable as technical employees, but found that they had duties significantly different enough from the petitioned for unit to properly exclude them. He reached a similar conclusion regarding the Receptionist, Assistant MDS Coordinator, and Business Office Coordinator positions.

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

2. Apprentices

*Alternative Mechanicals, LLC, 19-RC-70030 (January 10, 2012).*

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

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

3. Truck Drivers

*Dora’s Naturals, Inc, 22-RC-07013, (January 18, 2012).*

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

The Regional Director applied the *Specialty Healthcare* analysis to conclude that the warehouse employees did not share an overwhelming community of interest with the drivers. He noted the separate supervision, different qualifications, lack of interchange and difference in wages between the groups. While applying *Specialty Healthcare*, the Regional Director also

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47 Id slip op. at 16.
48 Id slip op. at 16.
49 Id slip op. at 18-19.
50 *Alternative Mechanicals, supra*, slip op. at 1.
cited to pre-Specialty Healthcare cases that supported a finding of an appropriate unit limited to truck drivers.  

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

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

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

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

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

### 4. Single Facility Presumption  

**McCoy Logistics Services Joint Venture, 30-RC-062064 (September 9, 2011).**  

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

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51 Dora’s Naturals, supra, slip op. at 11.  
52 Republic Services, supra, slip op. at 8.  
53 McCoy Logistics, supra, slip op. at 19.  
54 Id. slip op. at 16-21.
In this case, the Regional Director concluded that the employer had not rebutted the presumption.

5. **Automobile Sales and Service**

* Sexton Ford Sales, Inc, 14-RC-068800 (December 8, 2011) *

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

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

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

6. **Printing Trades**

* Print Fulfillment Services, LLC, 9-RC-063284 (September 29, 2011). *

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

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

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55 Sexton Ford Sales, supra, slip op. at 13-15.
56 Id., slip op. at 22-23.
57 Print Fulfillment Services, Inc, supra, slip op. at 11.
proposed to add to the unit shared an overwhelming community of interest with the petitioned for employees.58

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

7. **History of Collective Bargaining/ Severance**

*Freeman Decorating Services, 16-RC-070839 (February 13, 2012).*

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

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

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

The Regional Director did not reach the employer’s arguments regarding the appropriateness of craft severance under *Mallinckrodt Chemical Workers*, 162 NLRB 387 (1966);59 the petitioner itself had conceded that it was not seeking a traditional craft unit.60

In applying traditional community of interest standards, the Regional Director found that the history of collective bargaining weighs heavily in favor of finding that a historical unit is appropriate, and that a party challenging such a unit bears a heavy burden.61 He specifically found that nothing in *Specialty Healthcare* dictated a different result, and that *Specialty Healthcare* is inapposite to a case such as this one.62

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58 *Id*. slip op. at 14-15.
59 *Freeman, supra*, slip op. at 5, n. 12.
60 *Id*. slip op. at 4.
61 *Id*. slip op. at 22.
62 *Id*. slip op. at 30.
Applying traditional community of interest standards factoring in the history of bargaining, and noting that the rival petitions could leave the small group of sign shop employees out in the cold, the Regional Director directed an election in the historic unit.

V. Conclusion

While the impact of the Board’s decision in Specialty Healthcare is still in its early stages, it must be said that up until now, outside of the non-acute healthcare industry, its impact has been rather modest. There has been no deluge of decisions establishing “micro-units” and many of the decisions reached under a Specialty Healthcare analysis could have reached the same conclusion pre-Specialty Healthcare.