DPI Secuprint, Inc. *and* Graphic Communications Conference/International Brotherhood of Teamsters, Local 503-M, Petitioner. Case 03–RC–012019

August 20, 2015

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On May 20, 2011, the Acting Regional Director for Region 3 issued a Decision and Direction of Election, in which he found that the petitioned-for unit of hourly prepress, digital press, offset bindery, digital bindery, and shipping and receiving employees at the Employer's Rochester, New York facility, was appropriate. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. The Employer contends that the Acting Regional Director erred in approving the petitioned-for unit because it excludes hourly offset-press employees—the press operators and feeder-tenders. The Petitioner filed an opposition.

On June 16, 2011, the Board granted the Employer's request for review. Thereafter, the Employer and Petitioner filed briefs on review, as did amicus the Graphic Communications Conference of the International Brotherhood of Teamsters (GCC/IBT). The Employer also filed a brief in response to GCC/IBT's amicus brief.

The Board has delegated its authority in this proceeding to a three-member panel. We have carefully considered the entire record in this proceeding, including the briefs on review. For the reasons set forth in the Acting Regional Director's decision and the additional reasons set forth below, we affirm the Acting Regional Director's finding that the petitioned-for unit is appropriate and that the offset-press employees need not be included in the unit.

Facts

The Employer is engaged in commercial printing, with an emphasis on security printing products such as vehicle titles and birth certificates. The Employer employs 12 salaried and 20 hourly employees. Two nonsupervisory hourly employees work in the prepress department, one in digital press, seven in offset press, two in the digital bindery, four in the offset bindery, and three in shipping and receiving. For both offset and digital printing, the process begins in prepress, where images and text supplied by the customer are used to create proofs. For offset printing, once the customer approves the proofs, prepress employees create plates and place them in a rack in the offset department. The offset-press employees pick up the plates left by the prepress employees, hang the plates on one of the two offset presses the Employer owns (the Komori and the GTO), use the presses to print text and images on blank paper, and prepare printed sheets for pickup by offset-bindery employees. Offset-bindery employees cut, fold, or stitch the printed paper, depending on the specifications of the job. Shipping and receiving employees shrink wrap and palletize completed jobs, fill out packing slips, and load finished product onto delivery trucks. For digital printing, once the customer approves the proofs, prepress employees transmit a digital file to the digital press department. The digital-press employee prints on paper from the digital file, and production is then completed in the digital-bindery department before the product goes to shipping and receiving.

The entire facility is arranged to accommodate workflow. The prepress department is located at one end of the building, with doors connecting it to the digital room (which houses both the digital press and digital bindery equipment) and the offset press room (which houses both the offset press and offset-bindery equipment). A door connects the digital room and the offset press room; another door leads from the offset press room to the shipping and receiving room.[1]

The departments in the proposed unit operate Monday through Friday. The prepress and digital-bindery departments operate on two shifts, offset bindery and shipping and receiving operate only on the first shift, and the digital press operates only on the second shift. Although there is some variation in the exact hours, all but one of the first-shift employees in the proposed unit begin work between 7 and 8:30 a.m.; that employee, in offset binding, begins work at 5 a.m. The record does not specify the exact hours of the second shift, but it appears to end at midnight. The offset-bindery and the shipping and receiving employees report directly to Jason Colline, the Employer's vice president of operations. The first-shift prepress and digital bindery employees report to other supervisors, who in turn report to Colline. All second-shift employees report to the second-shift plant manager, Mike Remmerly, who reports to Colline.

The offset-press department operates on a different, two-shift schedule. The first shift runs from 5 a.m. to 3 p.m., and the second from 3 p.m. to 1 a.m. The offset

[1] Emp. Exh. 2, showing the layout of the facility, is attached as an appendix.

press also has a "weekend shift" that runs from 6 a.m. to 6 p.m. on Fridays, Saturdays, and Sundays.

There are a total of three offset-press operators and three feeder-tenders (or press helpers) who work on the Komari press, plus an operator for the GTO press. Press operators set up the presses (by, among other things, selecting the proper paper stock, inks, and plates, and mixing ink colors as needed), operate the presses, ensure proper print quality, make adjustments to the presses during printing, and perform maintenance on the presses. Feeder-tenders load paper into the press and assist the press operators as needed. According to Vice President Colline, feeder-tenders are capable of operating the presses, because press operator and feeder-tender responsibilities overlap. Colline also testified that "a lot of" offset-press employees "come from that feeder tender background." Offset-press employees working the first shift report to Colline, while those on the second report to Remmely. It is not clear who employees report to on the weekend shift, but it is either Colline or Remmely.

All company employees are trained on the job, although some employees come with prior experience. Offset-press operators generally come with prior experience; feeder-tenders and bindery employees may or may not have past experience. It takes longer for the Employer to train offset-press operators than any other employees.[2]

Apart from testimony that some feeder-tenders have become offset-press operators, there is no evidence that other employees have ever permanently or temporarily transferred from one job classification to another. Employees from one department do, however, assist employees in other departments on an ad hoc basis. Within the petitioned-for unit, employees in each of the departments have assisted in at least one other department.[3] There is no evidence, however, that employees from other departments have worked in the offset-press department, and the Employer testified that shipping and bindery employees do not possess the requisite skill to perform offset-press work.

Employees from the various departments regularly come into contact with each other. Press employees (both digital and offset) will discuss particular jobs with prepress employees (when there are questions about a particular job, or when a plate or digital file appears to have a problem), and will consult with bindery employees (to see if a problematic printing run can be salvaged, for instance); such interactions take place on a daily basis. Similarly, shipping and receiving employees deliver supplies and materials to all the various departments, and employees from other departments may go to shipping and receiving to retrieve necessary materials.

There is no specific pay rate for any position, but the record indicates that digital and offset-press operators are paid about $20 per hour, feeder-tenders about $16, bindery employees between $16 and $18, shipping and receiving employees between $10 and $17, and prepress employees between $15 and $20. All employees receive the same health benefits, holiday pay, and 401(k) plan, and all employees are subject to the same general policies and operating procedures manual. All hourly employees use the same entrance, timeclock, and lunchroom.[4] The Employer periodically holds meetings for all employees, e.g., to discuss production problems.[5] On slow days, shipping and receiving employees, bindery employees, and feeder-tenders have been sent home early, but offset-press operators are not, unless they ask to be.

The Acting Regional Director's Decision

The Acting Regional Director found that the petitioned-for employees shared a sufficient community of interest to constitute an appropriate unit. Specifically, he determined that there is functional integration among their departments, as each handles an aspect of producing a single product; that there is a high degree of contact among the petitioned-for employees, and some ad hoc job interchange; that although the skills and functions of the various petitioned-for employee classifications differ, none requires any prior training; that all petitioned-for employees have at least a common second-level supervisor (Colline); and that the petitioned-for employees share roughly similar wages, hours, benefits, and working conditions.

The Acting Regional Director then considered but rejected the Employer's argument that the offset-press employees must be included in the unit. The Acting Regional Director reasoned that the offset-press operators are more highly skilled than the other employees, that it takes longer to train an offset press operator than it does

[2] Offset-bindery employee Robert Schultz testified that it can take "months" to learn to operate offset-bindery equipment. Colline testified that an inexperienced but "really, really sharp" employee could learn to operate one of the offset presses in 6 months. The record does not indicate the amount of training necessary for employees with no past experience to be trained to do prepress, digital press, digital bindery, feeder-tender, or shipping and receiving work.

[3] In recent years, the Employer's welcome letter to newly hired employees has stated that they are expected to assist in other departments as needed.

[4] The offset press, bindery, and shipping and receiving employees also share a locker room.

[5] In the past, the Employer has also hosted social occasions (such as Christmas parties or summer picnics) to which all employees are invited, but Colline testified that the last such occasion was several years ago.

other employees, that offset-press employees work different schedules than the petitioned-for employees, and that offset-press operators are treated differently when work is slow: they are allowed to stay on the job while other employees are sent home. Based on the foregoing considerations, the Acting Regional Director found that the offset-press employees do not share an overwhelming community of interest with the petitioned-for employees such that the petitioned-for unit is inappropriate without them.

The Acting Regional Director also rejected the Employer's argument that *AGI Klearfold, LLC*, 350 NLRB 538 (2007), and *Moore Business Forms, Inc.*, 216 NLRB 833 (1975), require that the offset-press employees be included in the unit. In both cases, the Board held that an offset-press-only unit was inappropriate because it excluded prepress employees. The Acting Regional Director acknowledged that, in keeping with those cases, the Board generally finds units of offset-press and prepress employees—which the Board refers to as the "traditional lithographic unit"—appropriate. But he observed that *AGI Klearfold* states only that "appropriate weight" be given to the traditional lithographic unit, and that the Board has found both press/prepress and press-only units appropriate in particular cases. See, e.g., *NTA Graphics, Inc.*, 307 NLRB No. 224 (1992) (not reported in Board volumes), enfd. 996 F.2d 1216 (6th Cir. 1993), judgment vacated on other grounds 511 U.S. 1124 (1994); *Continental Web Press*, 262 NLRB 1395 (1982), enf. denied 742 F.2d 1087 (7th Cir. 1984).[6] The Acting Regional Director also pointed out that in *AGI Klearfold* and *Moore Business Forms*, the pressmen regularly entered the prepress room for various reasons. The Acting Regional Director stated that, in the present case, by contrast, there is no evidence of comparable contact between offset-press employees and the petitioned-for employees, or of offset-press employees performing any duties in other departments, and the offset-press employees work different shifts from the other employees. The Acting Regional Director also observed that the Employer was not arguing that the prepress employees should be included with the offset-press employees, but rather was seeking a unit comprising all of its employees. He therefore found that, even according the appropriate weight to the traditional lithographic unit, the offset-press employees need not be included in the unit.

[6] The Supreme Court vacated the judgment in *NTA Graphics* because the union had disclaimed interest in representing the employees at issue. See *NTA Graphics*, 316 NLRB 25 (1995).

For the reasons that follow, we agree that the petitioned-for unit is appropriate and need not include offset-press employees.

Analysis

The Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which issued subsequent to the Acting Regional Director's decision, sets forth the principles that apply in cases like this one, in which a party contends that the smallest appropriate bargaining unit must include employees or job classifications not included in the petitioned-for unit. As explained in that decision, when a union seeks to represent a unit of employees "who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit. . . ." See id., slip op. at 12.

If the petitioned-for unit satisfies that standard, the burden is then on the proponent of a larger unit to demonstrate that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees, such that there "is no legitimate basis upon which to exclude certain employees from" the larger unit because the traditional community of interest factors "overlap almost completely." Id., slip op at 11–13 and fn. 28 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008)); *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4 (2011); *Northrop Grumman Ship Yard*, 357 NLRB No. 163, slip op. at 3 (2011); *DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 4 (2011); *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 7 (2014).[7]

[7] The dissent argues that the *Specialty Healthcare* standard is flawed. We need not address that argument at length. *Specialty Healthcare* was enforced by the United States Court of Appeals for the Sixth Circuit, and the "overwhelming community of interest" standard has been endorsed by the District of Columbia Circuit. See *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Blue Man Vegas*, supra at 421–422. Both of those courts, as well as the Board, have also squarely rejected the dissent's argument that the overwhelming community-of-interest test contravenes Sec. 9(c)(5) of the Act, which provides that, in determining an appropriate unit, "the extent to which the employees have organized shall not be controlling." See *Kindred*, supra at 563–565 (discussing the issue at length); *Blue Man Vegas*, supra at 423; *Macy's*, supra, slip op. at 18 fn. 71; *Specialty Healthcare*, supra, slip op. at 8–9. As the court stated in *Blue Man Vegas*, "[a]s long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be prima facie appropriate, the Board does not run afoul" of Sec. 9(c)(5). 529 F.3d at 423. Here, the Regional Director made an initial determination, and we

In any particular workplace, there may be a number of ways in which the employees could be appropriately grouped for collective bargaining. See *Overnite Transportation Co.*, 322 NLRB 723 (1996). Therefore, "demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed [smaller] unit is inappropriate." *Specialty Healthcare*, supra, slip op. at 10.[8]

Applying these principles, we find that the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, and that the Employer has not demonstrated that the offset-press employees share an overwhelming community of interest with the petitioned-for employees.[9]

To begin, the petitioned-for employees are "readily identifiable as a group." They are all the hourly employees in the prepress, digital press, bindery, and shipping and receiving departments—in short, all the hourly employees who do not work on the offset presses. Thus, the petitioned-for employees are readily identifiable as a group based on departments and functions.[10] See *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2 (2014); *Specialty Healthcare*, supra, slip op. at 12.

As the Acting Regional Director found, the petitioned-for employees also share a community of interest. In making this determination, the Board examines

> 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.

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agree, that the unit was prima facie appropriate based on traditional community-of-interest factors; indeed, the Employer does not dispute that the employees in the petitioned-for unit share a community of interest.

Similarly, the Board and the courts have rejected the dissent's argument that *Specialty Healthcare* is "irreconcilable" with Sec. 9(b), which provides that the Board decide the appropriate unit "in each case . . . in order to assure to employees the fullest freedom in exercising" their rights under the Act. *Macy's*, supra, slip op. at 18 fn. 72; see *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610–614 (1991) ("in each case" simply means that whenever parties disagree over union appropriateness, the Board shall resolve the dispute, and the imposition of a rule defining appropriate units in acute care hospitals does not run afoul of the "in each case" command so long as the Board applies it in each case).

[8] See also *American Hospital Assn.*, supra at 610 ("employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit") (emphasis in original; quoting Sec. 9(b)); *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950) ("There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be 'appropriate.'") (emphasis in original), enfd. 190 F.2d 576 (7th Cir. 1951), cert. denied 346 U.S. 909 (1953).

[9] *Specialty Healthcare* clarified that it is the nonpetitioning party—here, the Employer—who bears the burden of demonstrating an overwhelming community of interest among employees in a group larger than an otherwise appropriate petitioned-for unit. Id., slip op. at 12–13 fn. 28. And it is the Board's usual rule in representation cases to apply its decisions retroactively, including to all pending cases. See *SNE Enterprises*, 344 NLRB 673, 673–674 (2005). Even assuming, however, that *Specialty Healthcare* changed the law in this respect, we find that imposing the burden of proof on the Employer here is not a retroactive change that "work[s] a 'manifest injustice.'" Id. at 673 (citations omitted); see also *Northrop Grumman*, supra, slip op. at 3 fn. 8. First, there was no "significant departure from a well-settled area of the law." *SNE Enterprises*, supra at 674. Second, as in *SNE Enterprises*, there is no evidence that the Employer relied on contrary precedent; indeed, the Employer presented extensive evidence aimed at demonstrating the extent of the community of interest between the offset-press employees and the employees in the petitioned-for unit. Finally, the Employer's brief in response to GCC/IBT's amicus brief expressly argues that the Employer met the burden articulated in *Specialty Healthcare*. Accordingly, although the Acting Regional Director's decision may not have clearly allocated the burden of proof on this issue, we apply that rule in affirming his decision, and do so without prejudicing any party.

[10] The dissent argues that the petitioned-for unit does not track departmental lines because the Employer has drawn no such lines "around this collection of employees." It states that the unit is "a list of four departments *gathered by the petitioner*" (emphasis in dissent) and therefore not an "identifiable group."

This argument is flawed in two respects. First, the Act directs the Board to make appropriate unit determinations that "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." See Sec. 9(b). In doing so, "the petitioner's desire[] as to the unit is always a relevant consideration.'" *Marks Oxygen Co. of Alabama*, 147 NLRB 228, 230 (1964). And Sec. 9(a), "read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees." *American Hospital Assn.*, supra at 610; see also *Overnite*, supra at 724 ("In deciding the appropriate unit, the Board first considers the union's petition and whether that unit is appropriate.") As explained in fn. 7 above, these principles in no way contravene the requirement in Sec. 9(c)(5) that the extent of organizing "shall not be controlling."

Second, the dissent misapprehends *Specialty Healthcare*'s preliminary requirement, that the petitioned-for employees be readily identifiable as a group. "Readily identifiable as a group" is not, as the dissent seems to suggest, another version of the community-of-interest analysis. It means simply that the description of the unit is sufficient to specify the group of employees the petitioner seeks to include. Here, the employees in the petitioned-for unit are readily identifiable as a group based on the departments in which they work and their job functions and classifications. Whether that group has enough in common for bargaining collectively to make sense is addressed in the community-of-interest analysis, and the Employer does not dispute that the petitioned-for employees share a community of interest. Compare *Bergdorf Goodman*, supra, slip op. at 2 ("the petitioned-for employees are readily identifiable as a group, [but] lack a community of interest").

Id., slip op. at 9 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). Here, the petitioned-for unit "conform[s] to the departmental lines established by the [E]mployer." *Bergdorf Goodman*, supra, slip op. at 3. The petitioned-for employees' work is functionally integrated, they have daily contact with each other and substitute for one another on an ad hoc basis, and they have similar skill levels, common supervision, and roughly equivalent wages, hours, and working conditions.

The Employer does not deny that the petitioned-for employees share a community of interest. Instead, as stated above, it contends that the offset-press employees share an overwhelming community of interest with the petitioned-for employees, such that excluding the offset-press employees would result in a "fractured" unit. See *Odwalla*, supra, slip op. at 5. We do not agree.

As an initial matter, we acknowledge that the offset-press employees share some community-of-interest factors with the petitioned-for employees, such as common supervision and functional integration.[11] The offset-press employees also enjoy the same benefits as the petitioned-for employees, and they have roughly similar pay rates.[12] These commonalities, however, do not establish an overwhelming community of interest. See *DTG Operations*, supra, slip op. at 7 (no overwhelming community of interest despite common supervision, functional integration, and similar benefits and base wages).

Rather, other factors demonstrate that the offset-press employees do not share an overwhelming community of interest with other employees. First, there is no dispute that the offset-press employees work in a separate department from the petitioned-for employees and that their work requires greater skill and lengthier training. Although there is considerable sharing of work at the facility, the offset-press employees are the only employees who set up, operate, adjust, and maintain the offset printing presses. The offset-press employees also work different hours from other employees. They work longer shifts and are the only nonsupervisory employees who work weekends. Unlike the other employees, the offset-press operators are not sent home when work is slow.

In the face of these differences, the Employer's arguments that the offset-press employees must be included in the unit are unpersuasive. First, the Employer suggests that the unit should not include the digital press operator while excluding feeder-tenders. The record, however, does not establish that digital press operator duties are similar to those of offset-press operators. Indeed, Vice President Colline testified that the digital printer is little more than a "glorified [photo]copier."

Second, the Employer contends that the offset-press employees must be included in the petitioned-for unit on the basis of interchange and contact with the other employees. But concerning interchange, the record is clear that any work the offset-press employees perform in other departments is infrequent and incidental to their primary duties.[13] Moreover, as shown, any interchange runs purely one way, as no employees in the petitioned-for unit perform work in the offset-press department. Such one-way "interchange" is not sufficient to establish an overwhelming community of interest. See *DTG Operations*, supra, slip op. at 7.

As for contact, the Employer claims that offset-press employees are in "constant" contact with bindery and prepress employees, and argues that this "heavily" favors including the offset-press employees in the unit. Although we agree with the Employer that there is evidence of regular contact, both production-related and informal, between offset press and petitioned-for employees, such contact in the absence of interchange does not establish an overwhelming community of interest.[14]

The Employer's remaining arguments are similarly unconvincing. For example, the fact that bindery and offset-press employees both set and adjust machines does not establish that they share the same skill level. It is undisputed that bindery machines and offset-press machines require distinct training; indeed, as Employer Vice President Colline testified, no other employees are capable of operating the offset presses.

We also reject the Employer and dissent's contention that, without the offset-press employees, the petitioned-for unit is "fractured," as was the case in *Odwalla*, supra. In *Odwalla*, the petitioned-for unit did not follow any

[11] As the Employer is primarily engaged in producing printed materials and utilizes a straight-line operation, we do not agree with the Petitioner's claim that the offset-press employees lack "meaningful functional integration" with other employees.

[12] The Petitioner claims that offset-press employees are paid more than other employees, but the record shows that they are paid about $20 per hour and that prepress employees are paid $15 to $20 per hour.

[13] We nevertheless reject the Petitioner's suggestion that to establish interchange, the offset-press employees would occasionally have to operate all of the production equipment or spend more than 30 percent of their time outside their own department. The cases the Petitioner cites do not impose such requirements; they merely show that such facts demonstrate employee interchange weighing in favor of a community of interest. See *Journal-Times Co.*, 209 NLRB 745, 747 (1974) (all employees able to perform all jobs in particular department); *Continental Can Co.*, 171 NLRB 798, 800 (1968) (employees spent about 30 percent of time performing other duties).

[14] In each of the cases cited by the Employer, both interchange (or shared functions) and contact were present. See *Sears, Roebuck & Co.*, 319 NLRB 607, 607–608 (1995) (shared job functions); *Lifeline Mobile Medics*, 308 NLRB 1068, 1069–1070 (1992) (evidence of transfer between classifications); *Westin Hotel*, 277 NLRB 1506, 1507 (1986) (evidence of transfer policy).

lines drawn by the employer, such as classification, department, or function. The Board found "no rational basis" for excluding certain employees—the merchandisers—from the unit because no community-of-interest factors suggested that the employees in the petitioned-for unit shared a community of interest that the merchandisers did not also share. Id., slip op. at 5. In fact, certain classifications in the recommended unit had more in common with the merchandisers than with another included classification (route service representatives). See id., slip op. at 5–6. The merchandisers worked in the same department as other employees in the unit and shared "very similar" functions with two of the included classifications. Id., slip op. at 5. At the same time, the petitioned-for unit included refurbishment center cooler technicians, who worked in a functionally and structurally separate part of the business, under separate supervision, from the rest of the included employees. Id., slip op. at 2, 5.

As the foregoing discussion shows, the present case is different: the offset-press employees work in a separate department and share community-of-interest factors distinct from those of the petitioned-for employees. Nothing in the record indicates that any of the employees in the petitioned-for unit have more in common with the offset-press employees than they do with other petitioned-for employees.[15]

Finally, we disagree with the Employer's argument that Board precedent concerning the "traditional lithographic unit" requires the inclusion of offset-press employees in the unit. In cases involving the printing industry, the Board has often stated that a unit comprising press and pre-press employees—a "traditional lithographic unit"—is an appropriate unit for bargaining. See *AGI Klearfold*, 350 NLRB at 538. In most cases implicating the traditional lithographic unit, a petitioner seeks such a unit but another party contends that other employees must be added to the unit. See, e.g., *Meyer Label Co.*, 232 NLRB 933, 933–934 (1977); *George Rice & Sons*, 212 NLRB 947, 947–948 (1974). Alternatively, the traditional lithographic unit has been a consideration in cases where a petitioner seeks a unit limited only to press employees. See, e.g., *AGI Klearfold*, supra at 538; *Moore Business Forms*, 216 NLRB at 833. Here, unlike both of those scenarios, no party is seeking a press-only unit, nor is any party seeking the traditional lithographic unit.

The Employer nevertheless argues that if the petitioned-for unit is found appropriate, it will have the effect of isolating the offset-press employees, which is inconsistent with the traditional lithographic unit analysis. We are aware of no case that stands for that proposition, but even if traditional lithographic unit principles applied to this case, we would reach the same result. As *Specialty Healthcare* makes clear, it does not displace the industry-specific presumptions and rules that the Board has developed over time. See *Specialty Healthcare*, supra, slip op. at 13 fn. 29; *Northrop Grumman*, supra, slip op. at 4. But the traditional lithographic unit is neither a presumption nor a rule. Instead, where implicated, it is simply entitled to "appropriate weight." See *AGI Klearfold*, supra at 540.[16] Thus, even if it applied here, the traditional lithographic unit would be but one factor to consider. It does not establish the requisite overwhelming community of interest between offset-press employees and the petitioned-for employees.

The traditional lithographic unit cases cited by the Employer do not warrant a contrary result. In both *Moore Business Forms* and *AGI Klearfold*, the Board

[15] Our colleague notes the linear nature of the Employer's operation and contends that excluding the offset-press employee from the unit "pluck[s] the heart from the production process." He predicts a series of dire consequences for the Employer's ability to function. But the nature of the Employer's production process and the physical layout of the plant do not make the petitioned-for unit inappropriate. This point is demonstrated by the Board's recent decision in *AT Wall Co.*, 361 NLRB No. 62 (2014). In *AT Wall*, the workers in the employer's new Metalform department, a production department recently added to the employer's plant, did not share an overwhelming community of interest with AT Wall's unit employees, including two pre-existing production departments (Tubing and Stamping) and four other departments (Inspection, Maintenance, Materials Handling and Toolroom). The Metalform department, like DPI's offset-press department and the other AT Wall production departments, occupied the middle of a linear operation: "Each manufacturing process begins with a material handler moving the appropriate starting material to an inspection area where in inspector verifies that it is ready to be placed in inventory for use. All three processes end with a material handler moving the finished product to the Employer's shipping area." Id., slip op. at 2. In addition, all three production departments shared a common production floor, which "consist[ed] mostly of open work areas marked off by yellow lines painted on the floor." Id.

While *AT Wall* was an accretion case, it used the same standard as *Specialty Healthcare*, the overwhelming community-of-interest standard, to conclude that the existing unit remained appropriate notwithstanding the exclusion of the Metalform employees. Thus, it illustrates an important point: the exclusion of a department of employees from the bargaining unit, even where they work in the same space and form part of the same workflow as unit employees, will not necessarily render the remaining unit inappropriate, nor will it necessarily impede the employer's ability to manage its business effectively. Notably, in *AT Wall*, it was the employer that argued against including the Metalform employees in the unit, despite the fact that all of the production processes took place on the same production floor, Metalform employees and unit employees used the same common areas, and the unit employees' work both preceded and followed that of the Metalform employees in the linear production process.

[16] The Employer is simply wrong when it states that *AGI Klearfold* stands for the proposition that press employees cannot be separated from other lithographic employees who share a community of interest.

found that a press-only unit was inappropriate and that the smallest appropriate unit was the traditional lithographic unit. In *AGI Klearfold*, this finding was based largely on the fact that press employees regularly entered the prepress room to search for missing items, entered the prepress room to solve problems when a prepress supervisor was not on duty, and even made plates when necessary. See *AGI Klearfold*, supra at 539–540. In *Moore Business Forms*, the press employees similarly entered the prepress area to correct and cut plates and performed prepress work on the graveyard shift (when no prepress employees were at work); the prepress employees also performed work in the press area on special color or problem jobs and were assigned tasks in the press area. See *Moore Business Forms*, supra at 833–834. In the present case, by contrast, offset-press employees may occasionally consult with prepress employees about printing problems, but there is no evidence that the offset-press employees regularly enter the prepress area to search for materials, solve problems when a prepress supervisor is absent, or perform any prepress duties such as cutting plates. Likewise, apart from consulting with bindery employees about printing issues, there is no evidence that the offset-press employees regularly enter the digital press, digital bindery, offset bindery, or shipping and receiving areas, nor is there evidence that offset-press employees perform these departments' functions (apart from the limited assistance feeder-tenders lend to the offset bindery). Finally, in contrast to *Moore Business Forms*, there is no evidence that prepress or any other employees have ever been assigned tasks in the offset-press department.

Conclusion

We have little doubt that the offset-press employees share a community of interest with the petitioned-for employees. And if they do, a unit including the offset-press employees would be an appropriate unit, or perhaps even a more appropriate unit. But that is not, and has never been, the relevant question. The Act requires only that the unit be "appropriate," and the petitioned-for unit satisfies that standard. It is undisputed that the employees in the petitioned-for unit constitute an identifiable group and share a community of interest, and the Employer has not carried its burden of proving that the offset-press employees share an overwhelming community of interest with them. We therefore find that the petitioned-for unit is an appropriate unit for bargaining.

ORDER

The Acting Regional Director's finding that the petitioned-for unit is appropriate is affirmed, and the case is remanded to the Regional Director for further appropriate action consistent with this Decision on Review and Order.

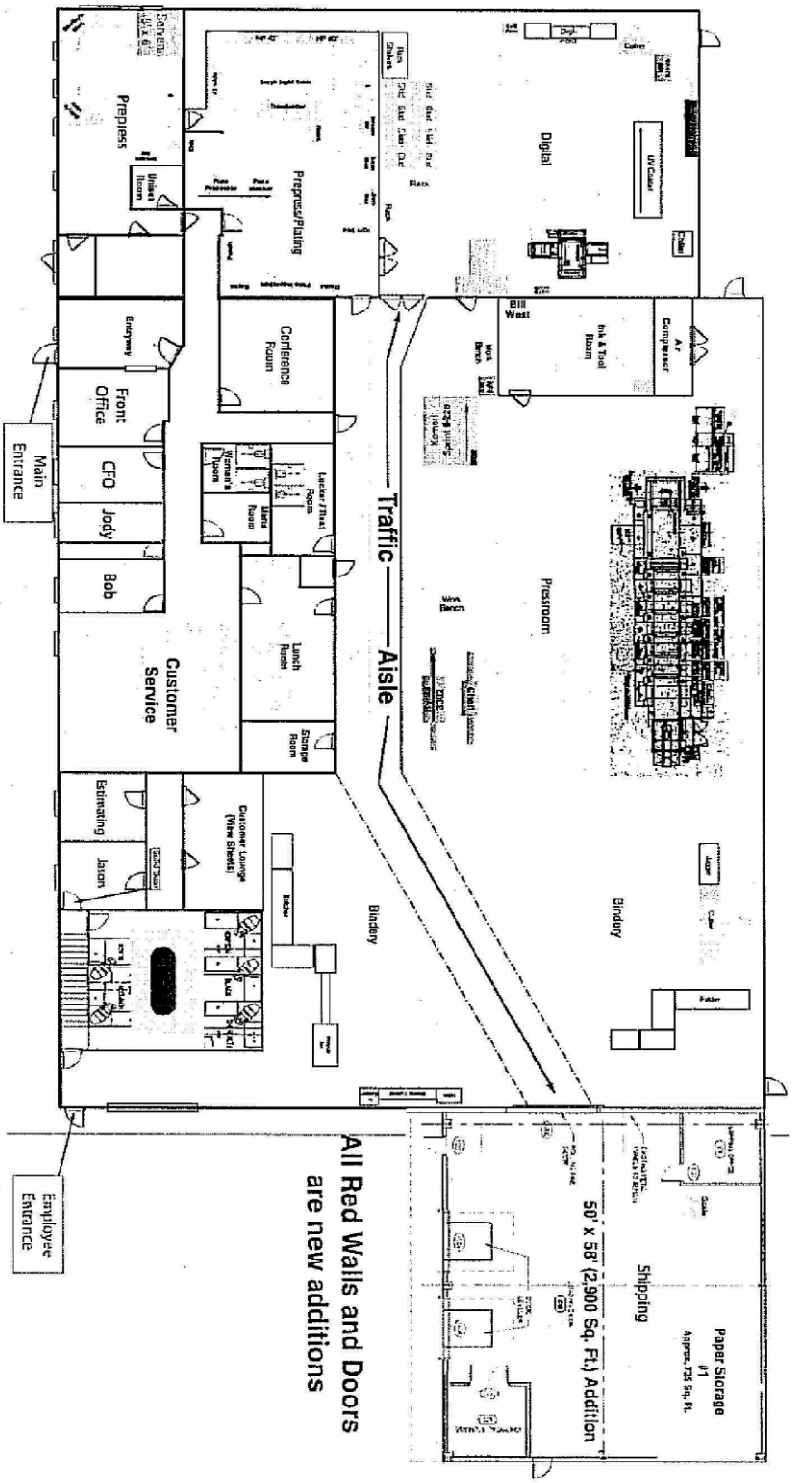
Dated, Washington, D.C. August 20, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX


Prepress
Prepress/Plating
Digital
Conference Room
Front Office
CFO
Jody
Bob
Customer Service
Lunch Room
Change Room
Estimating
Jason
Traffic Aisle
Bill West
Pressroom
Bindery
Main Entrance
Employee Entrance
All Red Walls and Doors are new additions
50' x 58' (2,900 Sq. Ft.) Addition
Shipping
Paper Storage

MEMBER JOHNSON dissenting.

Eighty years ago, Francis Biddle, Chairman of the pre-Wagner Act National Labor Relations Board as originally established under Public Resolution 44, and one of the architects of the 1935 Act, warned us of the precise danger presented by the Board's decision today. Chairman Biddle made clear at the Senate committee hearings prior to passage of the Wagner Act that authority to determine appropriate bargaining units must be vested with the Board to avoid, on the one hand, manipulative gerrymandering were employers to make the decision, and, on the other, destabilizing proliferation of units were the decision left to employees. "If the employees themselves make the decision without proper consideration of the elements which should constitute the appropriate unit, they could in any given instance defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant." [1] He further recognized then that there was always the risk "of your Board gerrymandering and not carrying out the purposes of the Board," but noted that "any arbitrary act of the Board in selecting the unit is subject to check on review by the court."

As explained below, I dissent from today's decision both because it approves an inappropriate unit too narrow in scope for bargaining, and because the manner in which my colleagues conducted their analysis illustrates the type of arbitrary gerrymandering that Chairman Biddle was referring to in 1935. Additionally, *Specialty Healthcare & Rehabilitation Center of Mobile,*[2] as evident from the successive cases applying it, encourages destabilizing proliferation of fractured units and minimizes any meaningful analysis of the community-of-interest factors in making unit determinations.

In making unit determinations, the Board over several decades has applied our multifactor test to ensure, in each case, that a petitioned-for unit of employees shares a "community of interest" as distinct from other employees in the workplace, so that they comprise a unit appropriate for bargaining.[3] Over the decades that the Board has applied and refined the analysis in various workplaces and industries, there has emerged a coherent body of law that has generally guided this agency to results that are intelligible and predictable based on the standard itself, rather than the panel applying it.

It must be understood that our obligation to develop and apply coherent legal standards requires ceding a certain amount of discretion in the interests of viable and understood law, even where a panel would personally prefer that law led to different results. That necessary ceding of discretion is the tension at the heart of good governance. And the agency has, at times, struggled with the constraints imposed by clear legal standards against the otherwise seductive freedom of purely result-driven, and therefore arbitrary, action. Unfortunately, today's decision moves the ticker backward on the spectrum from clarity toward such arbitrary action, from understood standards to outcome-driven rationalizations. To be sure, the Board is vested with the discretion to interpret the statute and accordingly adjust and clarify standards so that they can effectively evolve with the changing American workplace. But shifts in the way we construe and apply the Act can only be deemed *clarification* if they actually provide clarity.[4] What today's decision illustrates is that *Specialty Healthcare* was more a loosening of the constraints requiring the Board to act with transparency and intelligibility than it was a clarification of standards, and that it has introduced an approach to unit determination that permits easy rationalization of any desired result.

Congress established the Board to resolve problems in a rational manner so that the courts would not have to, and so that the labor and business community would have some certainty beforehand as to appropriate bargaining units. But purportedly objective standards that mask subjective ones whose application is only predictable by the composition of the agency at a given time look like a mere screen for obfuscating result-driven jurisprudence. And, no agency can earn the trust of the regulated community or deference of the courts if it does not transparently weigh and apply its established standards. At times, the courts have had to admonish the Board for manipulating standards to achieve a desired outcome, particularly in decisions involving the scope and composition of bargaining units. In *Spentonbush/Red Star Co. v. NLRB,* 106 F.3d 484, 492 (2d Cir. 1997), denying. enf. 319 NLRB 988 (1995), for example, the court stated, "Recognizing that the NLRB earns and forfeits deferential judicial review by its performance," . . . [several cited cases] "hold in substance that the Board's manipulation

[1] 1 Leg. Hist. 1458–1459 (NLRA 1935) (statement of Francis Biddle).

It was with the passage of the LMRA in 1947 that Congress added Sec. 9(c)(5) to the Act, stating: "In determining whether a unit is appropriate . . . *the extent to which the employees have organized shall not be controlling*." 29 U.S.C. § 159(c)(5) (emphasis added). See Member Miscimarra's discussion of the legislative history in *Macy's,* 361 NLRB No. 4, slip op. at 25–26 (2014) (Member Miscimarra, dissenting).

[2] 357 NLRB No. 83 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[3] E.g., *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 10 (2010).

[4] *Specialty Healthcare*, id., slip op at 1 (claiming only to reiterate and clarify the extant unit determination analysis).

of the definition of supervisor has reduced the deference that otherwise would be accorded its holdings." In another context, writing for the United States Court of Appeals for the District of Columbia Circuit, then-Judge Roberts remarked that the need for the Board to explain its analysis "is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (citations and quotations omitted), denying enf. 338 NLRB No. 92 (2003). The application of the multifactor analysis in the context there (whether faculty were managerial personnel) "can 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 . . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse." Id.

As for this workplace, we are looking at a very small, 20-employee print shop where all employees work in a linear, functionally integrated production process. The petitioned-for unit impermissibly excludes the offset-press employees in the middle of the production line from the unit—thereby plucking the heart from the production process—despite an overwhelming community of interest among all employees. As to the manner in which the majority reaches its result, today's decision confirms that under *Specialty Healthcare* the determination of whether there is a readily identifiable group has become an infinitely malleable standard that shows that anything goes, regardless of whether the "group" tracks any organizational or other lines drawn by the Employer. As described below, the decision does not meaningfully assess community-of-interest standards and provides no explanation of the elevation of insignificant distinctions, to the extent they exist, over critical factors such as functional integration, contact, common supervision, similar wages, and virtually all other factors. Today's decision also demonstrates that the shifting of the burden to the Employer to show an overwhelming community of interest imposes a nearly impossible requirement because the majority has gone to extraordinary lengths to inflate the most insignificant of distinctions to defeat the Employer's showing.

The decision here reads like a doctrinal obstacle course where the overwhelmingly shared interests connecting the petitioned-for and excluded employees are factors to be explained away in a post-hoc justification of that result, a justification so strained that it is difficult to track the actual rationale being applied here. Finally, today's decision marks a further retreat, beginning with *Specialty Healthcare*, from the clear standards that we have successively developed in our unit-determination decisions to something more arbitrary that guarantees whatever result the panel wants to achieve. As this decision shows us, the more the Board strains to distort extant standards into the circumstances of any given case, the more shapeless those standards become, and the more our standards regress from coherence to arbitrariness, from objectivity to the appearance of bias.

I. *SPECIALTY HEALTHCARE* WILL DESTABILIZE LABOR RELATIONS BECAUSE IT REMOVES CLARITY FROM OUR UNIT DETERMINATION ANALYSIS AND ENCOURAGES ROUTINE APPROVAL OF FRACTURED UNITS

In *Specialty Healthcare*, the Board majority did away with the longstanding criteria for determining whether a petitioned-for unit is appropriate for bargaining and replaced it with an open-ended standard that minimizes (or, for all practical purposes, ignores) the importance of shared interests between petitioned-for employees and their excluded coworkers. Under the approach announced there, "when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit . . . unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit." Id., slip op. at 12–13 (fns. omitted). Dissenting, former Member Hayes aptly explained that the overwhelming community-of-interest test would make the relationship between petitioned-for unit employees and excluded coworkers irrelevant "in all but the most exceptional circumstances." Id., slip op at 15 (Member Hayes, dissenting). He also predicted that the majority approach would elevate the extent of organizing to the paramount consideration in determining an appropriate unit, contravening the statutory requirement that the extent of organizing not be given controlling weight.[5]

[5] And as Member Miscimarra pointed out in dissenting in *Macy's*, above, slip op. at 25 (Member Miscimarra, dissenting), the *Specialty Healthcare* standard is irreconcilable with the role that Congress intended that the Board would play "in each case" regarding bargaining unit questions, and *Specialty Healthcare* renders "controlling" the "extent to which the employees have organized." I agree with Member Miscimarra that "*Specialty Healthcare* affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board to play, contrary to Section 9(c)(5) and Sections 9(a) and 9(b) of the Act." Id.

The accuracy of these insights is clear with today's decision.

Some of the changes *Specialty Healthcare* ushered in are apparent only in successive decisions. It did not change the threshold requirement that the petitioned-for unit must be a readily identifiable group, nor change the meaning of that phrase. But today's decision jettisons that requirement, either by sub silentio change in the definition of the term or by factual error in its claim that the petitioned-for unit here tracks department lines drawn by the Employer, which it certainly does not.[6] Further, *Specialty Healthcare* is somewhat cagey about its abandonment of the historical requirement that the Board, in its initial analysis, must determine whether petitioned-for employees share a community of interest among themselves *as distinct from other employees*. Post-*Specialty Healthcare*, the Board will merely look at shared interests of petitioned-for employees without regard for whether others share identical interests, shifting the burden to the Employer to show that any employees it seeks to add to the unit have virtually identical interests to those petitioned for.[7] That is a mistake, a foolproof recipe for an inappropriate unit, and, in the majority's hands, a nearly impossible burden for the Employer (unless a union seeks to represent only some employees in a particular job classification or department). *Specialty Healthcare* also purports to retain precedent that strongly favors certain specific unit configurations in several industries, yet the approach established there makes no room whatsoever for such considerations. That comes into play here because today's decision fails to give meaningful weight to what the Board has recognized as "the traditional lithographic unit" in multiple decisions that weigh strongly in favor of keeping the two prepress employees who work each shift in the same unit as the excluded offset-press employees.[8]

In contrast with the analysis applied here, the pre-*Specialty Healthcare* standards provided reasonably effective bulwarks against approval of units too narrow in scope for bargaining. For most industries, we did not need to ponder a maximum number of units a workplace could reasonably bear because the standard itself had a limiting function so long as it was objectively applied. The requirement that the petitioned-for unit, in itself, be readily identifiable as a group, coupled with an *objective* analysis of the community-of-interest factors shared among petitioned-for employees *as distinct from those excluded* has, for the most part, preserved majority rule and contributed to the establishment of appropriate bargaining units as Congress intended.[9] Also implicit in our analysis and in the statutory language is a balancing of the petitioned-for employees' representation preferences against the rights of other employees who should arguably be included in a unit *and* the legitimate need of an employer to manage a business.

Specialty Healthcare fairly well guarantees the proliferation of fractured units that can only hobble a unionized employer's ability to manage production and to re-

[6] A main culprit here is the reliance in the post-*Specialty Healthcare* cases upon job classification as the "lowest common denominator" to drive the determination of what makes up *Specialty Healthcare's* "readily identifiable group." In some limited circumstances, a job classification may simultaneously define an employee's function as so uniquely separate and distinct from that of all other employees that the classification serves as a proxy for a community of interest. But that tends to be the exception and not the rule, especially in the modern era of ambiguous (e.g., "Customer Service Specialist") or multitiered ("Engineer II") job titles that entail overlapping work functions with other job titles. Moreover, daisy chaining a number of distinct job classifications together, *simply because they are distinct job classifications*, cannot logically create an organizational or departmental line in order to define a legitimate "bargaining unit" any more than aggregating any group of distinct cells will then result, biologically, in a functioning "organ." If the employer itself never recognized such classifications as a separate department in its day-to-day operations, this should indicate that they are merely a selective collection of functionally disparate workers and not an appropriate unit for bargaining. See also fn. 7, infra, and accompanying text.

[7] Despite this change, the *Specialty Healthcare* majority claimed to be relying on extant precedent. In so doing, it relied heavily on decisions requiring that, in order for a unit to be appropriate, the petitioned-for employees must share community-of-interest factors *as distinct from other employees*. See *Wheeling Island Gaming*, 355 NLRB at 637 fn. 2, which explained that 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.' *Newton-Wellesley Hospital*, 250 NLRB 409, 411–412 (1980) (emphasis added)." And see *Specialty Healthcare*, slip op. at 13 fn. 32 (affirming that the decision in *Wheeling Island Gaming* is "an integral part of our analysis here"). *Specialty Healthcare* also relied heavily on *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (2008), which also stated that community-of-interest "factors include whether, *in distinction from other employees*, the employees in the proposed unit have 'different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit'" (emphasis added).

[8] E.g., *AGI Klearfold, LLC,* 350 NLRB 538 (2007).

[9] Prior Boards spent much effort developing appropriate standards for different industries, e.g., eight presumptively appropriate units in acute health care facilities, *Collective-Bargaining Units in the Health Care Industry*, 284 NLRB 1515 (1987–1988); *AGI Klearfold, LLC*, above (traditional lithographic unit in printing industry); *Charrette Drafting Supplies Corp.*, 275 NLRB 1294 (1985) (presumption in favor of the whole-store unit in the retail context); *Colorado Interstate Gas Co.*, 202 NLRB 847, 848–849 (1973) (systemwide units are "optimal" for public utilities).

tain a necessary flexibility to respond to industry change. After *Specialty Healthcare*, even if all employees, petitioned-for and not, share relevant interests, that won't play into the Board's consideration except after the burden shifts to the Employer to show an "overwhelming community of interest." That does not sound like much at first: simply require the Employer to prove that a petitioned-for unit must include additional employees. But it is the application that counts, and the Board has set an insurmountable bar that is apparent here in this case with the majority's seizing upon insignificant distinctions to defeat the Employer's showing in an arbitrary manner without considering the relevance of the factors relied on in relation to the work force as a whole.

The trend toward smaller units—or units comprised of employees not significantly distinguishable from their coworkers except by the extent of organizing—cannot foster labor peace. The proliferation of such units can only create instability from internal jurisdictional disputes, from the costs and burdens of multiunit bargaining and the administration of multiple separate contracts (including, for example, separate benefit plans), from conflicting or irreconcilable demands from separate units, and from the potential that one unit will disrupt production with unique demands that burden all employees. Moreover, multiple units in a functionally integrated workplace with a linear production process like this one erect artificial barriers separating employees and departments that can only impede an employer's ability to retain needed flexibility and respond quickly to industry change. An employer in a small operation such as this, where employees must be available to assist in other departments, cannot function effectively if various interdependent tasks become fixed in stone within discrete units—fixed not because of anything inherent in the work itself, but because a union has only organized some subset of the employees who, together with nonorganized employees, share in one linear production process. Workflow management becomes driven not by efficiencies and the demands of the work but by artificial barriers dividing functionally integrated production workers into separate units so that the simplest of changes may require negotiation with multiple and sometimes competing representatives and then the agreement of all of them. And in an organization where complex decisionmaking occurs both at the micro, or departmental level and on a macro, or organization-wide level, a need to bargain efficiencies and needs of each department with separate bargaining representatives can grind an operation to a halt. Department managers are, of course, part of the greater organization and have the needs of the organization as a whole in mind. They must cooperate to swiftly incorporate changes on a department level in concert with those in other departments to facilitate change in the workplace as a whole, in what is often a highly complex decisional process involving shifting priorities among separate departments. In contrast, multiple bargaining representatives are obviously *not* part of one organization and do not have to be responsive to the needs of all or most of the employees within the organization. Nor do the representatives of different departments have to act in concert. Large-scale organizational changes will depend on agreement of multiple separate entities who are not part of the overall organization, may have interests that are at odds with the interests of other departments and large-scale flexibility and change, and may have no understanding of or interest in cooperating in complex, integrated decisional processes necessary to move an organization forward. Finally, where, as here, we approve a unit that excludes a subset of employees who are part of the same production process as those in the unit and who share virtually all employment terms subject to mandatory bargaining, the excluded employees will be subject to negotiated terms involving the production process and, for all practical purposes, the same employment terms for the unit employees, except in the unlikely event that the employer sets up entirely separate benefits plans, work rules, and other terms for unit and nonunit employees where none had existed in the past. That subverts the fundamental requirement of majority rule in the representation decision.

Thus, in an objective assessment of our community-of-interest factors—and I say *our* because it is a statutory responsibility of *the Board* to make this assessment—we should consider the scope of a petitioned-for unit with respect to the potential number of units that could be spawned by assumptions used by the initial unit determination, and be mindful of the number of units that any given workplace could reasonably bear. Here, for example, the rationale my colleagues apply in approving a unit that excludes the offset-press employees also suggests that appropriate units could be found in any configuration of departments or a single department (except for the lone digital-press employee—and who knows where that individual would go, if not the offset-press department?).[10] The offset-press employees, by their exclusion here, must be found appropriate; and the prepress, bind-

[10] Of course my colleagues are not approving four separate units now, but the salient points are their lack of awareness of the consequences of approving this fractured unit and the possibility that if the Union does not succeed this time, it can try and try again with increasingly piecemeal, fractured configurations based on the groundwork laid here. Using job classification as the building block for a unit often guarantees this result. See fn. 6, above.

ery, and shipping and receiving employees would also be found appropriate under today's rationale if petitioned for separately. Each can be defined as a group because it comprises employees in specific job classifications or in the same department. Each has its own task within the linear production and fulfillment process, and none is any more distinguishable from the others than are the excluded offset employees (although the shipping and receiving employees are more removed from the production employees than are the excluded press employees). Each shares a community of interest among themselves as well as almost identical interests with all workers in the shop. And each can be distinguished from the others by insignificant factors like the ones my colleagues rely on here, as discussed below. Yet it would be absurd to require a business with 20 employees working in one production process to contend with four separate bargaining representatives. This is a 20-employee print shop, not a shipbuilding operation. And we would fail in our obligation to the regulated community if we waited to think about these impacts until *after* an employer is locked in to an unsustainable obligation to bargain with multiple, inappropriate units.

II. THE PETITIONED-FOR UNIT IS TOO NARROW IN SCOPE FOR BARGAINING AND MUST INCLUDE THE OFFSET-PRESS EMPLOYEES

1. The Employer's linear production process

The 20 hourly employees work a linear, functionally integrated production process where each task depends on the completion of the preceding one. (See Figure 1, "The Employers' Production Process," with the process superimposed on the layout of the plant.) For both digital and offset printing, the process begins with the two prepress employees (one per shift), where images and text supplied by the customer are used to create proofs. Once the customer approves the proofs, prepress employees either create plates and place them in a rack in the offset-press department, comprising four press operators and three feeder-tenders who assist them, or transmit a digital file to the one digital-press employee. For offset jobs, the offset-press

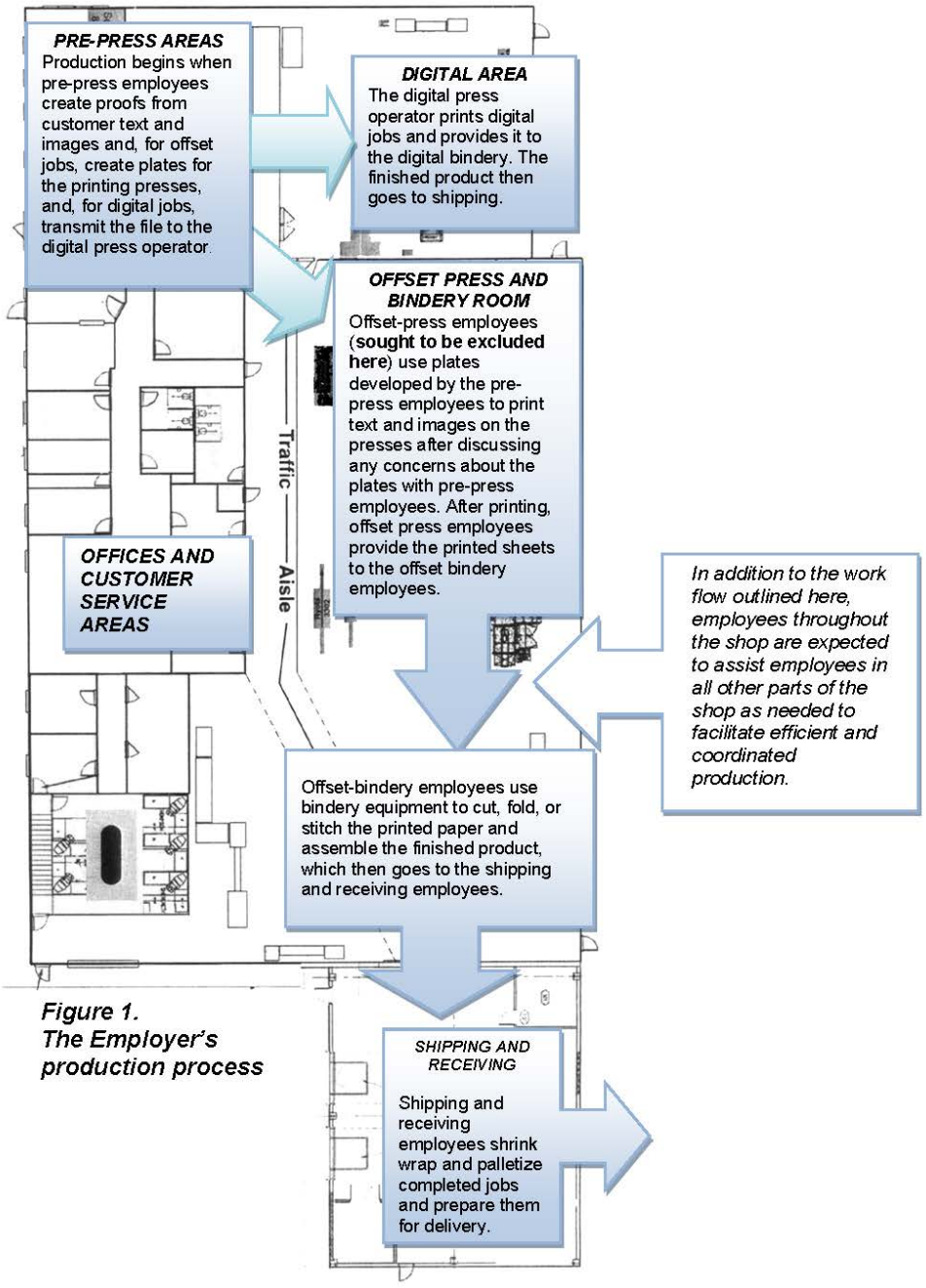


Figure 1.
The Employer's production process

employees use the plates developed by the prepress employees, print text and images on blank paper using one of two types of presses, and prepare printed sheets for finishing by offset-bindery employees who work across the room from them. There four offset-bindery employees cut, fold, or stitch the printed paper, depending on the job. The two digital-bindery employees perform much the same tasks. Once the production process is complete, the finished product goes to the shipping and receiving department, where there are three employees who shrink wrap and palletize completed jobs, fill out packing slips, and load finished jobs onto delivery trucks.

The facility is arranged to accommodate workflow. The prepress department is located at one end of the building, with doors connecting it to the digital room and the offset-press room. A door also connects the digital room and the offset-press room. The offset press and offset bindery occupy the same space. A traffic aisle runs from the doors connecting the offset-press room to the prepress and digital rooms, along the side of the offset-press area, through the offset-bindery area, and to the opposite side of the offset-press and bindery room, terminating at a door that connects the shipping and receiving room to the offset-bindery area.

2. The petitioned-for employees are not a readily identifiable group

The threshold question in determining the appropriateness of a bargaining unit is whether the petitioned-for employees are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors).[11] Today's decision guts the term of meaning. It declares that the petitioned-for employees are "readily identifiable as a group" because they are "all the hourly employees in the pre-press, digital press, bindery, and shipping and receiving departments—in short, all the hourly employees who do not work on the offset presses." It then declares that the petitioned-for employees "are readily identifiable as a group based on departments and functions," and cites *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 2 (2014), for the proposition that the petitioned-for unit conforms "to the departmental lines established by the employer." Wrong. First, as a group, the proposed unit conforms to nothing except for the Petitioner's organizing efforts. The Employer has drawn no departmental lines whatsoever around this collection of employees. Rather, the proposed unit is an *amalgamation* of all but one department. It is the production employees minus one department with the shipping and receiving employees lumped into the mix. Yes, the unit can be described in a sentence, as the majority has done (conceived by job classification, the unit is a + c + d + e, but not b). That is not an identifiable group. Not even close. It is a list of four departments *gathered by the petitioner*. Further, the majority's claim that we have a coherent group directly conflicts with the Board's post-*Specialty Healthcare* decision in *Odwalla, Inc.*, 357 NLRB No. 132 (2011). There, like here, the petitioned-for unit included employees in several job classifications and in different departments. Recognizing an inappropriate unit when it saw one, the *Odwalla* Board explained that the unit did not track any lines drawn by the Employer: The unit was not drawn along classification grounds because (like here) it "aggregates various classifications," nor along departmental lines because (like here) it comprises employees in various different departments.[12]

Nor are the petitioned-for employees here readily identifiable based on any relatedness of job classification, as the unit includes several disparate classifications (shipping and receiving employees, offset-bindery employees, digital bindery employees, digital-press employees, and prepress employees). The departments that constitute the petitioned-for unit also have the same supervision as the excluded offset-press department. The proposed unit is not readily identifiable based on functions or skills either: The unit is most production employees (but plucking out those at the heart of production), all of whom have varying functions and skills. Prepress employees perform entirely different functions (creating digital proofs, formatting and creating plates) than bindery em-

[11] *Specialty Healthcare*, above, slip op. at 12.

[12] Compare what the Board has found to be a readily identifiable group in other post-*Specialty Healthcare* cases. In *Specialty Healthcare* itself the petitioned-for employees were such a group because they comprised a single, entire job classification: *all* the employer's CNAs. Id., slip op. at 12. In *Bergdorf Goodman*, above, slip op. at 2, the petitioned-for employees were at least readily identifiable as a group along functional lines because they comprised all women's shoes salespeople. See also *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011) (all technical employees in radiation control department, comprising the employees uniquely tasked with protecting against radiation contamination at shipyard). In those cases, there was an effort to conform to the requirement that the units were identifiable groups. Contrary to my colleagues, neither I (nor those cases) suggest that "readily identifiable as a group" is a version of the community-of-interest analysis. And, in fact, my analysis flows directly from, inter alia, *Specialty Healthcare* (see my fn. 11, above). But the salient point is that there is no coherent or objectively recognizable factor tying the petitioned-for employees together as an identifiable group except that the Petitioner seeks to represent them. Nor is it sufficient that the petitioned-for unit merely "specify" a group of employees the petitioner seeks to include. The ability to "specify" a proposed unit by simply compiling various job classifications into a sentence does not give us an actual, *substantive* group, as my colleagues suggest. An agglomeration of disparate job classifications cannot logically constitute a "readily identifiable group," just because job classifications are the basic unit of addition.

ployees (cutting, folding, and stitching printed sheets), digital-press employees (running the digital press), and the shipping and receiving employees (shrink wrapping and palletizing finished jobs, filling out packing slips, and loading trucks). The latter do not participate in the actual production of the Employer's products. There are clearly different skills involved in these different functions, so the petitioned-for employees are also not readily identifiable based on skills.[13] They are not readily identifiable based on their work location, because all employees work in the same facility in close proximity. The prepress employees work in a separate room, as do the digital press and digital-bindery employees. Offset-bindery employees work in the same room as the excluded offset-press employees, and shipping and receiving employees also have a separate room.[14] Although *Specialty Healthcare* indicates that "similar factors" can be used to establish that a petitioned-for unit is readily identifiable as a group, the majority points to no unifying characteristic that distinguishes them from the offset-press employees, except for the fact that they are not offset-press employees, and (the actual rationale here) the fact that they comprise the employees that the Petitioner seeks to represent.

3. The petitioned-for employees do not share a community of interest distinct from the excluded press employees, and the excluded employees have an overwhelming community of interest with those in the petitioned-for unit

The petitioned-for and excluded employees share almost identical community-of-interest factors. That is evident even in my colleagues' own recitation of the facts. As my colleagues recognize, petitioned-for employees and the excluded offset-press operators and feeder-tenders are functionally integrated in the Employer's linear production process and work in the same space with dividing walls laid out to facilitate workflow. The offset-press employees are the heart of production and without them there is no direct "functional integration" connecting prepress and offset-bindery employees. The excluded offset-print employees share space with petitioned-for employees (the offset press department is in the same room as the bindery department). All employees' pay ranges from $10-$20 per hour. They have the same health benefits, holiday pay, 401(k) plan, and are subject to the same general policies and operating manual. All use the same entrance, timeclock, and lunchroom. They have common supervision, depending on the shift. All have considerable contact with each other both formally and informally. Petitioned-for and excluded employees work varying hours and shifts. At all times when petitioned-for employees are working, offset-press employees are working too, although not all petitioned-for employees have overlapping hours with one another.[15]

While the offset-press employees work in a separate department from the petitioned-for employees, the petitioned-for employees are themselves divided among four departments and multiple job classifications.

Contrary to my colleagues' characterizations, other factors are significantly in common as well. My colleagues contend that the offset-press employees require "greater skill and lengthier training" than the petitioned-for employees. That's not accurate. The excluded offset-press employees are two classifications: Four press operators, who may require up to 6 months on-the-job training, and the three feeder-tenders who assist them by feeding paper into the presses. The lengthy training applies to the four employees running the presses, but is not necessary for the feeder-tenders, who require little training and are often hired with no prior experience.[16] Moreover, while there was testimony that offset-press operators may require 6 months training, there is no evidence of how long it takes to train the prepress and shipping employees, and the training of bindery employees also takes "months." There is no basis to extrapolate a finding from that testimony that the four offset-press employees require significantly more training than the bindery employees except for the unconvincing distinction between "6 months" and "months." None of the employees, in any case, require special certification of any kind to do their jobs or can be considered craft employees. That the majority ignores the feeder-tenders from their analysis and then finds a dispositive line between "months" and "6 months" to differentiate press operators from bindery employees illustrates my earlier point that the majority rationale is so strained that it does

[13] Nor on the level of skill or the amount of training required for employees in the various departments: It takes "months" to learn to operate bindery equipment, for example, similar to the offset-press operators.

[14] Nor are the petitioned-for employees readily identifiable based on their hours, because the offset bindery and shipping and receiving only operate on one shift, whereas the other departments operate on two shifts. The petitioned-for employees also are not readily identifiable based on their wages, because the range of prepress wages ($15-$20/hour) is notably higher than in shipping and receiving ($10-$17/hour), while excluded press employees are paid $16/hour and $20/hour, which is in line with petitioned-for employees.

[15] Despite such commonality, my colleagues grudgingly characterize the offset-press employees as sharing only "some" community-of-interest factors with the petitioned-for employees.

[16] Even if some may learn how to use presses by virtue of working in the department, they cannot be considered highly skilled employees as compared to those in the petitioned-for unit.

not appear to be the product of an objective standard at all. It looks like the sort of post-hoc justification that is antithetical to our obligation to develop and apply meaningfully articulated standards that guide us to predictable results. In sum, there is no meaningful distinction between petitioned-for and excluded employees on the basis of skills and training.

The majority also finds that the excluded press employees work different hours from the petitioned-for employees and, implicitly, that the distinctions they find are meaningful for collective-bargaining purposes. First, the majority points to evidence that, unlike other employees, offset-press operators have not been sent home when the work is slow. But the record also shows that feeder-tenders have been among those asked to go home, like petitioned-for employees, so there's no meaningful distinction between petitioned-for and excluded employees there. (And none of this is to suggest that being asked to go home on an ad hoc basis some unknown number of times should have any role in this analysis). Second, the majority contends that offset-press employees may be scheduled on weekends, unlike petitioned-for employees, and work 10-hour shifts. At the same time, however, the petitioned-for employees themselves work multiple, varied shifts. All have significantly overlapping hours with offset-press employees even though they may have no overlapping hours with each other. Thus, shipping and receiving employees work 7 a.m. to 3:30 p.m. The first-shift prepress employee begins work at 8:30 a.m. There is evidence that this employee works until 5 p.m., but the Acting Regional Director said that neither this nor the second-shift hours were in the record. Digital bindery employees work first and second shifts, but precise times are not in the record. Offset-bindery employees work from 7 a.m. to 3:30 p.m. One works from 5 a.m. until 1 p.m. Monday through Thursday, first-shift press employees work from 5 a.m. to 3 p.m.; second shift from 3 p.m. to 1 a.m. The Acting Regional Director stated that it was not clear from the record exactly when the second-shift prepress, digital-press, and digital-bindery employees start and finish, but that "it can reasonably be inferred that their hours are similar." The extent to which their hours correspond to those of other employees (both in and excluded from the unit) is not entirely clear. There is always at least one petitioned-for employee working between 5 a.m. and midnight during the week, while, as noted, offset-press employees work in two shifts spanning 5 a.m. to 1 a.m. One bindery employee begins his day with the offset-press employees at 5 a.m. Thus, some petitioned-for employees have no contact with others during working time (there is a second shift for prepress and digital-bindery employees but not for offset-bindery employees, for example), but all have significantly overlapping shifts with offset-press employees. At all times during all petitioned-for employees' shifts, offset-press employees are also scheduled to work. So a rational justification for finding these distinctions significant enough for a unit-determination decision escapes me. The shift distinctions for the offset-press employees are overstated and far too insignificant to justify exclusion from the unit given the varied shifts among all petitioned-for employees. See *Moore Business Forms*, 216 NLRB 833, 834 (1975) (press and prepress employees formed appropriate unit notwithstanding that, unlike press employees, prepress employees did not work graveyard shift).

Moreover, if the Board is going to rely on these minor distinctions, it should explain how they are meaningful for bargaining purposes. Assuming that one purpose for looking at working hours is to determine whether employees have contact with each other at work, several petitioned-for employees have no contact with each other while *all* have contact with the offset-press employees during their shifts, and my colleagues in any event recognize that there is significant contact among petitioned-for and offset-press employees. If the presence of small scheduling variations is relevant to looking at the extent of functional integration, that is also not implicated here, where extensive functional integration among all production employees is beyond question. Nor are the distinctions related to common supervision. If minor scheduling variations are deemed relevant just because they are a distinction that the majority can seize upon in the absence of actually relevant ones to find that the Employee has not carried its overwhelming community-of-interest burden, that underscores the arbitrariness of their assessment of shared interests.

The majority also relies on a lack of interchange in finding that the offset-press employees lack an overwhelming community of interest with the petitioned-for employees. There are particular problems in relying on lack of interchange to defeat an employer's overwhelming community-of-interest showing, which I describe below. But first, it is certainly true that the employees are in several job classifications and primarily perform the duties of their particular classification. But a condition of employment common to all employees here is that they are expected to—and do—cross into other departments to assist their coworkers. The offset employees, like the petitioned-for employees, are expected to help in other departments as needed, and do so on an ad hoc basis, such as when an offset-press operator runs the digital press, or—more commonly—a feeder-tender assists offset-bindery employees, which was established by

both the Petitioner's and Employer's witnesses. Offset-press employees have operated bindery equipment, particularly the jogger or cutter, when bindery employees are not available to operate these machines. Moreover, it is because employees generally perform their assigned work based on their job description that my colleagues dismiss evidence of interchange as incidental to their regular work, and work the offset-press employees do in other departments is dismissed as "one way." As to the latter point, the salient fact here is that even if employees in other departments do not operate presses, the excluded press employees may be called on to perform unit work. That underscores the Employer's need to maintain a flexible workplace and cuts in favor of placing the offset employees in the petitioned-for unit.

But more broadly, the manner in which my colleagues use the interchange factor here confirms that an Employer will rarely be able to establish an overwhelming community of interest when seeking to include additional job classifications in a proposed unit. To be sure, a finding of interchange among employees, where various tasks can be assigned to any number of employees in a petitioned-for unit, is very compelling evidence in finding a shared community of interest (because employees are doing the same work as each other). But while its *presence* is important, the lack of it is not. That is because the lack of it tells us only that employees are in different job classifications and usually do work assigned to their particular jobs. To the extent that such employees perform work outside of their typical assignment or job classification, that will of course be "incidental" to their normal duties. Minimal interchange among employees shows us that the Employer has an organized production process where employees by and large keep to their job responsibilities. If the lack of interchange is enough to show the lack of an overwhelming community of interest, that is tantamount to elevating the fact of separate job classifications to a dispositive level, which is itself a grave error, as I have addressed above. And most situations in which an employer does seek to include more employees in the unit will involve an effort to include additional job classifications. Which underscores the point that an employer will almost never be able to show an overwhelming community of interest when it seeks to include additional job classifications in a petitioned-for unit (unless job descriptions are so loose and permeable that employees are regularly tasked with work outside of their nominal classification).[17]

An objective view of the shared interests indicates that approving the petitioned-for unit would not reflect majority rule. The production process is so tightly integrated that any changes to it requiring bargaining would impact the offset-press employees who would be left out of the bargaining process, and with the shared wages, benefits, work rules, and virtually all other terms and conditions of employment that are mandatory bargaining subjects, the excluded press employees would be subject to bargained-for changes as well unless the Employer establishes two regimes including entirely separate health plans, 401(k) plans, etc. That is impractical and unrealistic. In this way, the impact of an inappropriate unit is to make the nonunit employees' employment terms subject to whatever is negotiated for the represented employees, contravening our statutory mandate. This brings me back to my earlier point that in the initial unit determination must rationally consider the overall impact on the workplace—including the impact on excluded employees who share almost all community-of-interest factors with the unit.[18]

[17] As former Member Hayes put it, so long as a union "does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification, department, or function . . . it will be impossible for a party to prove that an overwhelming community of interests exists with excluded employees." *DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 8–9 (2011) (Member Hayes, dissenting).

[18] My colleagues reliance on *AT Wall Co*., 361 NLRB No. 62 (2014), is misplaced both with respect to facts and the applicable analytical framework. That was an accretion case and involved employees working in *separate* production lines. The employer there acquired a gun magazine manufacturing operation and moved it to an existing facility where it already operated separate tubing and stamping manufacturing production lines. The question was whether the newly hired gun magazine production employees (Metalform employees) should be accreted into the existing and narrowly defined unit of employees working on the other two production lines. Contrary to my colleagues' suggestion, Metalform employees were engaged in an entirely different production process from the employees in the existing unit. In the current case, of course, the petitioned-for and excluded employees are all engaged in the same linear production process. Further, in *AT Wall*, the employees sought to be accreted had different wages, hours, supervision, vacation and holidays, and different medical insurance benefits from unit employees. In sum, they produced "an entirely different product using different processes under different working conditions." Id., slip op. at 3. The similarity, irrelevant in context, is that there too all employees worked in the same open facility. Further, that was an accretion case, governed by entirely different policy considerations than the case at bar, as the Board follows a "restrictive policy in finding accretions to existing units" to ensure that the right of employees to determine their own bargaining representative is not foreclosed (Id., slip op. at 3). That the Board found that the Metalform employees should not be accreted, and thus should retain the right to select their own bargaining representative, is utterly irrelevant to today's decision.

4. Today's decision also departs from precedent generally finding units of press and pre-press employees—the "traditional lithographic unit"—appropriate or bargaining

In *Specialty Healthcare*, the Board recognized that it "has developed various presumptions and special industry and occupation rules in the course of adjudication" and made clear that the holding in *Specialty Healthcare* was "not intended to disturb any rules applicable only in specific industries."

Here, such precedent establishes that press and prepress employees, comprising the "traditional lithographic unit," should ordinarily be included in the same unit. See *AGI Klearfold, LLC*, above;[19] *Moore Business Forms*, above, decisions holding that a press-only unit was inappropriate because it excluded prepress employees.

The majority's effort to distinguish these cases is unconvincing. My colleagues are correct that in those cases, press employees regularly entered the prepress room for various reasons. See *AGI Klearfold*, above at 539; *Moore Business Forms*, above at 834. But the same is true here, as the offset-press employees seek out prepress employees on a daily basis to discuss plate issues, and there is no dispute that there is frequent contact between all employees. The employees are engaged in a fully integrated, linear production process beginning with the one prepress employee on each shift, and the offset printers' work wholly depends on the one prepress employee on that shift. The processes in place here, and the interdependence of the prepress and press employees, are substantially identical to those in *AGI Klearfold* and *Moore*, and the prepress and offset-press employees have the same roles and interdependence as in those cases. As far as I can tell, my colleagues' strained effort to distinguish those cases appear to come down to an asserted difference in the amount of time that employees in the one department come into the other department. Somehow my colleagues have found a line demarking the *sufficient* interaction in those cases from an assertedly *insufficient* interaction in this one. But contact and functional integration have already been firmly established here. And for all practical purposes these are the very factors my colleagues rely on to try to distinguish *Klearfold* and *Moore*. Thus, I do not see that the majority has given any weight whatsoever to the "traditional lithographic unit" nor that it can meaningfully distinguish *AGI Klearfold*, and *Moore Business Forms* from the current case. Longstanding precedent strongly favors including the offset-press employees in a unit with the prepress employees, which in this case favors including the offset-press employees in the petitioned-for unit.

III. CONCLUSION

The petitioned-for unit is inappropriate under both our traditional community-of-interest analysis and the standard announced in *Specialty Healthcare* because the offset-press employees share an overwhelming community of interest with the employees the Union seeks to organize. My colleagues approve the unit based on insignificant distinctions that do not provide a rational basis for a unit's boundaries. As the *Specialty Healthcare* majority itself said, " . . . no two employees' terms and conditions of employment are identical, yet some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." Id. slip op. at 13. Today's decision also omits an assessment of the relative importance of the various community-of-interest factors relied upon, particularly in light of those overwhelmingly shared. As the Board explained in *American Cyanamid Co.*, 131 NLRB 909, 911 (1961):

> To be effective . . . each unit determination must have a direct relevancy to the circumstances within which collective bargaining is to take place. While many factors may be common to most situations, in an evolving industrial complex the effect of any one factor, and therefore the weight to be given it in making the unit determination, will vary from industry to industry and from plant to plant. We are therefore convinced that collective-bargaining units must be based upon all the relevant evidence in each individual case.

And it bears repeating that the application of a multifactor test can "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 at 61. Here, my colleagues inflate the significance of slight scheduling variations and minimal interchange and transfer (i.e., the fact that employees stick to their assigned jobs) to overcome the critical importance of functional integration in a linear production process, frequent contact, common supervision, and other accumulated and overwhelming shared interests between the petitioned-for and excluded employees. The decision illustrates the unpredictability of the post-

[19] Noting that the Board has "ordinarily found a unit limited to press and prepress employees appropriate, eventually referring to such a grouping as the 'traditional lithographic unit.'" Id. at 540 (citing *Allen, Lane & Scott*, 137 NLRB 223, 226 (1962); *Earl Litho Printing Co.*, 116 NLRB 1538, 1539 (1956); *Shumate, Inc.*,131 NLRB 98, 99 (1961); *A.B. Hirschfeld Press, Inc.*, 140 NLRB 212, 216 (1962); *George Rice & Sons*, 212 NLRB 947, 947–948 (1974); *Moore Business Forms, Inc.*, 216 NLRB 833, 834 (1975); and *Meyer Label Co.*, 232 NLRB 933, 934 (1977)).

Specialty Healthcare landscape, with the standard the majority actually applies difficult to track despite their claimed adherence to whatever remains of our community-of-interest analysis.

Finally, today's decision illustrates an agency's resistance to clear and intelligible standards that constrain its ability to engage in a result-driven and thus arbitrary decisional process when the standards lead to a result contrary to the panel's desired outcome. Our obligation is to adhere to clarity, to apply the standard we claim to be applying, and to avoid the impulse to manipulate a desired result by distorting the standards that the regulated community is entitled to rely on. This decision fails to fulfill that obligation, and I respectfully dissent.

Dated, Washington, D.C. August 20, 2015

Harry I. Johnson, III, Member

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