UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE NEIMAN MARCUS GROUP, INC., d/b/a BERGDORF GOODMAN, Employer, and LOCAL 1102 RETAIL, WHOLESALE DEPARTMENT STORE UNION, Petitioner.	Case No. 02-RC-076954

BRIEF OF *AMICI CURIAE* COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, NATIONAL COUNCIL OF CHAIN RESTAURANTS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 4

I. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT 4

A. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Decide the Appropriate Unit "In Each Case" 5

B. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Consider All of the Rights Guaranteed By the Act 8

1. Key Language Added to Section 9(b) by the Taft-Hartley Act Requires the Board to Consider Not Only the Rights to Organize a Union, But the Right to Refrain From Doing So As Well 8

2. In Devising and Applying *Specialty Healthcare*'s Generally Applicable Standard for Determining Appropriate Bargaining Units, the Board Has Ignored the Right to Refrain 9

II. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(c)(5) OF THE NATIONAL LABOR RELATIONS ACT 11

A. The Fourth Circuit's Decision in *Lundy Packing* Demonstrates How and Why the Rule Enunciated in *Specialty Healthcare* Contravenes Section 9(c)(5) of the Act 12

B. The Board's Reliance on the District of Columbia Circuit's Decision in *Blue Man Vegas* to Distinguish *Lundy Packing* Is Misplaced 13

III. THE BOARD ABUSED ITS DISCRETION IN *SPECIALTY HEALTHCARE* BY USING ADJUDICATION INSTEAD OF RULEMAKING TO PROMULGATE A NEW, GENERALLY APPLICABLE STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS 18

A. Rulemaking Versus Adjudication Generally 19

B. Federal Appellate Courts Have Found Agency Abuses of Discretion Under Circumstances Similar to *Specialty Healthcare* 20

C. The Dissenting Board Member in *Specialty Healthcare* Correctly Concluded that the Majority Abused Its Discretion 23

IV. APPLYING *SPECIALTY HEALTHCARE* WILL HAVE A PARTICULARLY UNWARRANTED, ADVERSE IMPACT ON THE RETAIL INDUSTRY AND ITS EMPLOYEES 26

CONCLUSION.....30

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

1st Aviation Servs., Inc.,
No. 22-RC-61300, 2011 WL 4994731 (NLRB Oct. 19, 2011) 24

1st Bancorporation v. Bd. of Governors of Fed. Reserve Sys.,
728 F.2d 434 (10th Cir. 1984) 21, 25

Alexander v. Sandoval,
532 U.S. 275 (2001) 10

Am. Hosp. Ass'n v. NLRB,
499 U.S. 606 (1991) 5, 20

Arcadian Shores, Inc. v. NLRB,
580 F.2d 118 (4th Cir. 1978) 11

Blue Man Vegas, LLC v. NLRB,
529 F.3d 417 (D.C. Cir. 2008) 13, 14, 16, 17

Chamber of Commerce of U.S. v. NLRB,
--- F. Supp. 2d ---, Civ. A. No. 11-2262 (JEB),
2012 WL 1664028 (D.D.C. May 14, 2012) 17

Ctr. for Soc. Change, Inc.,
358 NLRB No. 24 (2012) 4

Curry v. Block,
738 F.2d 1556 (11th Cir. 1984) 22

Dismas Charities, Inc. v. U.S. Dep't of Justice,
401 F.3d 666 (6th Cir. 2005) 19

DTG Operations, Inc.,
357 NLRB No. 175 (2011) 24

Ford Motor Co. v. FTC,
673 F.2d 1008 (9th Cir. 1981) 22, 26

Foreman & Clark, Inc.,
97 NLRB 1080 (1951) 26

Grace Indus., LLC,
Nos. 29-RC-12031 & 29-RC-12043,
2011 WL 6122778 (NLRB Dec. 8, 2011) 24

Haag Drug Co.,
169 NLRB 877 (1968) 16

Laidlaw Waste Sys., Inc. v. NLRB,
934 F.2d 898 (7th Cir. 1991) 12

Matzke v. Block,
732 F.2d 799 (10th Cir. 1984) 21

Nestle Dreyer's Ice Cream,
No. 31-RC-66625, 2011 WL 6835227 (NLRB Dec. 28, 2011),
appeal pending sub nom. Nestle Dreyer's Ice Cream Co. v. NLRB,
No. 12-1684 (4th Cir.) 24

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1973) 18, 21, 22

NLRB v. Lundy Packing Co.,
68 F.3d 1577 (4th Cir. 1995) ..... *passim*

Northrop Grumman Shipbuilding, Inc.,
357 NLRB No. 163 (2011) 24

Odwalla, Inc.,
357 NLRB No. 132 (2011) 24

Performance of Brentwood LP,
No. 26-RC-63405, 2011 WL 5288439 (NLRB Nov. 4, 2011) 24

Pfaff v. U.S. Dep't of Housing & Urban Dev.,
88 F.3d 739 (9th Cir. 1996) 21, 22, 25, 26

Prevost Car U.S.,
No. 03-RC-71843, 2012 WL 928253 (NLRB Mar. 15, 2012) 24

Sav-On Drugs,
138 NLRB 1032 (1962) 16

Specialty Healthcare & Rehab. Ctr. of Mobile,
356 NLRB No. 56 (2010) 23

Specialty Healthcare & Rehab. Ctr. of Mobile,
357 NLRB No. 83 (2011), *appeal pending sub nom.*
Kindred Nursing Ctrs. E., LLC v. NLRB, Nos. 12-1027 & 12-1174 (6th Cir.) ..... *passim*

Stern's Paramus,
150 NLRB 799 (1965) 27

Super K Mart,
323 NLRB 582 (1997) 26

United States v. Utesh,
596 F.3d 302 (6th Cir. 2010) 19

W & J Sloane, Inc.,
173 NLRB 1387 (1968) 27

STATUTES

Administrative Procedure Act,
5 U.S.C. §§ 500-596, 701-706 18

5 U.S.C. § 551(4) 19, 24

5 U.S.C. § 551(5) 19

5 U.S.C. § 551(6) 20, 24

5 U.S.C. § 551(7) 20

5 U.S.C. § 553(b) 19

5 U.S.C. § 553(c) 20

5 U.S.C. § 554(a)(6) 20

Labor-Management Relations Act, 1947 (Taft-Hartley Act),
ch. 120, 61 Stat. 136 ..... 4, 8

National Labor Relations Act (Wagner Act),
ch. 372, 49 Stat. 449 (1935) 8

National Labor Relations Act,
29 U.S.C. §§ 151-169 1

29 U.S.C. § 156 19

29 U.S.C. § 157 ..... 8, 9, 10

29 U.S.C. § 159(b) ..... *passim*

29 U.S.C. § 159(c)(5) ..... *passim*

LEGISLATIVE MATERIALS

Administrative Procedure Act: Legislative History, S. Doc. No. 79-248 (1946) 19

Comparison of S. 2926 and S. 1958 (Comm. Print 1935) 5, 6

H.R. Rep. No. 80-510 (1947) (Conf. Rep.)..... 8, 9

The Labor Management Relations Act, 1947: Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. (1935) 7

RULES

Final Rule, Representation—Case Procedures, 76 Fed. Reg. 80,138 (Dec. 22, 2011)..... 25

Proposed Rule, Representation—Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011)..... 25

Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (Dec. 22, 2010)..... 25

Amici Curiae Coalition for a Democratic Workplace, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, National Council of Chain Restaurants, International Foodservice Distributors Association and International Council of Shopping Centers respectfully submit this brief in support of The Neiman Marcus Group, Inc., doing business as Bergdorf Goodman.

INTEREST OF *AMICI CURIAE*

The Coalition for a Democratic Workplace ("CDW"), which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW has advocated for its members on several important legal questions, including the one implicated by this case: the standard used by the National Labor Relations Board ("Board") to determine appropriate bargaining units under the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 151-169.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Association of Wholesaler-Distributors ("NAW") is comprised of direct member companies and a federation of national, regional, state and local associations and their member firms, which collectively total approximately 40,000 companies with locations in every State in the United States. NAW members are a constituency at the core of our economy—the

link in the marketing chain between manufacturers and retailers as well as commercial, institutional and governmental end users. Industry firms vary widely in size, employ millions of American workers, and account for over $4 trillion in annual economic activity.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF's global membership includes retailers of all sizes, formats and distribution channels as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the United States, NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs—one in four American jobs. The total gross domestic product impact of retail in the United States is $2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

The National Council of Chain Restaurants ("NCCR") is the leading trade association exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that best serves the interests of restaurant businesses and the millions of people they employ. NCCR members include the country's most-respected quick-service and table-service chains.

The International Foodservice Distributors Association ("IFDA") is the non-profit trade association that represents more than 135 companies in the foodservice distribution industry. Its members are found across North America and internationally and include leading broadline, system, and specialty distributors who operate more than 700 distribution facilities and represent annual sales of more than $110 billion. These companies help make the food away from home industry possible, delivering food and other related products to restaurants and institutions, ranging from casual to formal dining local restaurants to foodservice in nursing homes and hospitals to military mess halls and school cafeterias. IFDA provides research, educational opportunities, and business forums to its members that make them more competitive. In the United States, IFDA also provides important representation on Capitol Hill and government agencies, sharing the perspective of leading foodservice distributors with lawmakers to shape the legislative and regulatory process.

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry with 55,418 members worldwide, 47,279 in the United States. ICSC has nearly 6,400 retailer members. Other members include developers, owners, lenders and others that have a professional interest in the shopping center industry. Shopping centers account for more than $2.3 trillion in retail sales per year and generate $136 billion in state sales tax revenue. More than 13 million people rely on America's shopping center related industries for employment, making shopping centers one of the largest economic forces in the nation.

Each of the *amici* has been actively engaged in addressing the significant legal questions presented by the Board's splintered decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), which has great impact on the employer members of each of the *amici*. In *Specialty Healthcare*, a majority of the Board held that "in cases in which a party

contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Id.* at 1. The legality of the *Specialty Healthcare* standard, which was applied by the Regional Director in this case, remains subject to considerable doubt pending the outcome of the *Specialty Healthcare* employer's appeal and the Board's cross-application for enforcement. *See Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir.). As set forth below, the *amici* submit that *Specialty Healthcare* was wrongly decided and should be overruled. Among other things, the Board's decision in *Specialty Healthcare* violates Section 9(b) and 9(c)(5) of the Act, unlawfully promulgates a generally applicable standard that should have been accomplished (if at all) through rulemaking, and will overturn decades of Board precedent if extended to the retail industry.[1]

ARGUMENT

I. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(b) OF THE NATIONAL LABOR RELATIONS ACT

Congress significantly amended Section 9(b) of the Act in 1947. *See* Labor-Management Relations Act, 1947 (Taft-Hartley Act), ch. 120, sec. 101, § 9(b), 61 Stat. 136, 143. In doing so,

[1] *Amicus* CDW has filed a motion to intervene in *Noel Canning, A Division of the Noel Corporation v. NLRB*, No. 12-1115 (D.C. Cir.) (motion filed Mar. 15, 2012). The purpose of the motion in that case is, *inter alia*, to litigate as a party the claim that the three purportedly recess-appointed members serving on the Board at the time of that decision were not properly appointed and that, therefore, the Board lacked the necessary three-member quorum. *Amicus* CDW also raises the quorum issue here, but notes that the Board has previously held that it will decline to rule on this very question based on the purported presumption of the validity of Presidential appointments. *See Ctr. for Soc. Change, Inc.*, 358 NLRB No. 24 (2012).

however, Congress left certain key language unchanged. Both the changed and unchanged portions are crucial to the correct understanding of Section 9(b).

A. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Decide the Appropriate Unit "In Each Case"

In the Taft-Hartley Act, Section 9(b)'s key instruction that the Board "shall decide" the appropriate unit "in each case" was not changed from the original language of Section 9(b) enacted in 1935. In its current form, Section 9(b) commands that the Board "*shall decide in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." 29 U.S.C. § 159(b) (emphasis added). The words "shall decide in each case" mean that "whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. . . . Congress chose not to enact a general rule that would require plant unions, craft unions or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991).

The legislative history of Section 9(b) demonstrates Congress's belief that the Board must have discretion to determine unit issues based on the circumstances before it. Section 9(b) is based on Section 2(4) of the Railway Labor Act of 1934 ("RLA"), which provides that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have a right to determine who shall be the representative of the craft or class for the purpose of this act." *Comparison of S. 2926 and S. 1958*, at 30 (Comm. Print 1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act of 1935*, at 1355 (1949) ("*1935 Legislative History*").

Importantly, however, the RLA provision is different from what became Section 9(b) of the Act in an extremely critical respect: the RLA does *not* contain language mandating a decision by the National Mediation Board ("NMB") as to the appropriate unit "in each case." Congress explained this fundamental difference between the RLA and the Act in its comparison of Senate Bill 2926 (the original Senate bill proposing what was to become the Act) to Senate Bill 1958 (what ultimately was enacted as the Act): "The same necessity for unit determinations is embraced in the definition of majority rule in the [RLA] as set out above, *although in that industry the nature of the department or craft alinement* [sic] *is so clearly defined as to require no express elaboration*." *Id.* (emphasis added), *reprinted in* 1 *1935 Legislative History* 1356.

In this distinction between the RLA and the Act, Congress recognized that the range of employers and areas of commerce that fall under the jurisdiction of the Act are vastly broader than, and different from, the railroad (and now airline) industry in any number of material respects. Unlike the RLA, the Act covers virtually unlimited types of businesses, employing individuals with myriad levels of skill sets, ranging in size from but a few employees to hundreds of thousands of employees, having but a single location to having hundreds or thousands of locations around the country, all following multiple lines of ownership, organization and business purpose.

In sum, Congress recognized that while a "one size fits all" approach to bargaining-unit determination might be acceptable in the more homogeneous business types covered by the RLA, such an approach would be neither possible nor desirable for the far broader range of employers and employees in the industries subject to the Act. For that reason, the Board was directed to make its determinations not on the basis of a simplistic formula, but to consider the factors making up an appropriate unit "in each case."

The specific role of the Board in making a decision "in each case" pursuant to Section 9(b) was part of a larger debate over the wisdom of majority elections, another mechanism borrowed from the pre-Act labor boards, including the NMB. This "majority rule" debate naturally led to a discussion of why the Board needed to decide *who* among the employees should be allowed to vote:

> The major problem connected with the majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies. Ordinarily, of course, there is no serious problem. Section 9(b) of the Wagner bill provides that the Board shall decide the unit appropriate for the purpose of collective bargaining. This, as indicated by the act, may be a craft, plant or employer unit. The necessity for the Board deciding the unit and the difficulties sometimes involved can readily be made clear where the employer runs two factories producing similar products: Shall a unit be each factory or shall they be combined into one? Where there are several crafts in the plant, shall each be separately represented? To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units 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*.

The Labor Management Relations Act, 1947: Hearings on S. 1958 Before the S. Comm. on Educ. & Lab., 74th Cong. 82 (1935) (statement of Francis Biddle, then-Chairman of the precursor to the Board) (emphasis added), *reprinted in* 1 *1935 Legislative History* 1458. The rule in *Specialty Healthcare* is contrary to concerns raised by Congress in investing the Board with the authority to make unit determinations, as we will demonstrate below.

B. The New Rule Enunciated in *Specialty Healthcare* Contravenes the Obligation of the Board Under Section 9(b) of the Act to Consider All of the Rights Guaranteed By the Act

1. Key Language Added to Section 9(b) by the Taft-Hartley Act Requires the Board to Consider Not Only the Rights to Organize a Union, But the Right to Refrain From Doing So As Well

Section 9(b) of the Act instructs that the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the *rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b) (emphasis added). This key language was added by the Taft-Hartley Act, sec. 101, § 7, 61 Stat. at 140, replacing the earlier formulation that the Board's unit decisions were to insure to employees "the full benefit of their right to self-organization and collective bargaining." National Labor Relations Act (Wagner Act), ch. 372, § 9(b), 49 Stat. 449, 453 (1935).

The language in Section 9(b) was changed consistent with amendments made by the Taft-Hartley Act to the rights of employees set out in Section 7, 29 U.S.C. § 157. Section 7 contains the core rights guaranteed under the Act, including the right to join, form or assist a union and the right to engage in concerted activities for mutual aid and protection. The Taft-Hartley Act added an additional right, "the right to refrain from any and all such activities . . . ." Taft-Hartley Act, sec. 101, § 7, 61 Stat. at 140. This change is striking, and important, because it requires the Board to broaden the considerations taken into account in making unit determinations to include all the rights guaranteed under Section 7 of the Act, 29 U.S.C. § 157.

Accordingly, Congress's modification of the Act in 1947 "emphasized that one of the principal purposes of the [Act] is to give employees full freedom to choose *or not to choose* representatives for collective bargaining." H.R. Rep. No. 80-510, at 47 (1947) (Conf. Rep.),

reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 551 (1948) (emphasis added). By guaranteeing "in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so," Congress believed it would "result in a substantially larger measure of protection of those rights when bargaining units are being established than has heretofore been the practice." *Id.*

Thus, Section 9(b)'s language requiring full consideration of the "rights guaranteed by this subchapter" must include—as Section 7 makes unflinchingly clear—not only the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," but also—importantly—the "right to refrain from any or all" of the foregoing activities. *Id.* We submit that the Board has breached that obligation in both deciding and applying *Specialty Healthcare.*

2. In Devising and Applying *Specialty Healthcare*'s Generally Applicable Standard for Determining Appropriate Bargaining Units, the Board Has Ignored the Right to Refrain

Claiming that the "right to self-organization" is the "first *and central* right set forth in Section 7 of the Act," *Specialty Healthcare*, slip op. at 8 (emphasis added), the Board explained that employees "exercise their [Section] 7 rights not merely by petitioning to be represented, but by petitioning to be represented in a particular unit." *Id.* at 8 n.18. "A key aspect of the right to 'self-organization,'" the Board believed, "is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Id.* The Board therefore ignored Section 9(b)'s command that the Board must "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter" when making bargaining-unit determinations. Instead, the Board has decided to pick and choose among the "rights guaranteed by the subchap-

ter," and to consider only those which assure employees the fullest freedom in exercising the "right to self-organization" by protecting the "right to choose whom to associate with, when we determine whether their proposed unit is an appropriate one." *Id.*

At no point in devising a new standard for determining appropriate bargaining units in *Specialty Healthcare* did the Board ever consider the right of employees to *refrain* from activities protected by the Act. Instead, as noted above, the language of the Board's *Specialty Healthcare* decision demonstrates that the Board deemed the "right to self-organization" to be more important than all other Section 7 rights. That policy decision, however, was and is not for the Board to make. In adding the right to refrain to the Act and enacting a facially neutral unit-determination standard sixty-five years ago, Congress made a policy decision that the Board is bound to respect. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (explaining agencies "may play the sorcerer's apprentice but not the sorcerer himself," the latter role being Congress's sole prerogative).

In view of the importance that Congress attached to the right to refrain and its relevance during the unit-determination process, it is telling that nowhere did the Board address how this right might be affected by the rule announced. Nor is it difficult to see how the rule announced could adversely impact the right to refrain.

For example, under the Board's traditional, pre-*Specialty Healthcare* standard for determining appropriate bargaining units, a union seeking to organize would have to contend with the fact that a majority of individuals in a presumptively appropriate unit might not want to be represented by a union that would, if elected, become their exclusive agent for purposes of collective bargaining. The union could respond to this reality either by foregoing the organizing effort or by initiating a campaign to win over those employees who did not wish to be represented.

Under the regime announced by the Board in *Specialty Healthcare* and applied by the Regional Director in this case, however, the union now has a third option: organize in a gerrymandered unit in which the union knows it has majority support. In such a gerrymandered unit, the union does not have to worry about convincing those individuals who may wish to exercise their right to refrain, because they are outnumbered. The rule established in *Specialty Healthcare* thus relegates those individuals to an artificial minority position, much as exists in political gerrymandering. Congress enshrined the right to refrain in the Act itself so that it would be recognized and protected by the Board, particularly during the unit-determination process. The Board's failure in *Specialty Healthcare* to even consider, much less address, how the right to refrain may be impacted by its new rule, demonstrates why the *Specialty Healthcare* standard is not in accordance with law and should be overruled.

II. THE BOARD'S DECISION IN *SPECIALTY HEALTHCARE* IS CONTRARY TO SECTION 9(c)(5) OF THE NATIONAL LABOR RELATIONS ACT

Section 9(c)(5) of the Act, 29 U.S.C. § 159(c)(5), provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." This provision "does not merely preclude the Board from relying 'only' on the extent of organization. The statutory language is more restrictive, prohibiting the Board from assigning this factor either exclusive or 'controlling' weight." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995) (citing *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 120 (4th Cir. 1978)). Thus, the Act specifically prohibits what *Specialty Healthcare* establishes as a rule, i.e., Board "determined" bargaining units that in all but the rarest of cases will be the exact one requested by the petitioning union on the basis of the union's extent of organizing.

A. The Fourth Circuit's Decision in *Lundy Packing* Demonstrates How and Why the Rule Enunciated in *Specialty Healthcare* Contravenes Section 9(c)(5) of the Act

In *Lundy Packing*, the Fourth Circuit held that the Board had run afoul of Section 9(c)(5) when it found a bargaining unit proposed by the union appropriate primarily because the Board had given "controlling weight" to the extent of union organization within the employer's facility. 68 F.3d at 1579. The Board in *Lundy Packing* had applied virtually the same standard as set forth by the Board in *Specialty Healthcare*, and held that the unit requested by the union, which excluded quality-control employees, could only be challenged if the employer could demonstrate that the excluded quality-control employees shared an "overwhelming community of interest" with those employees the union had included in the unit. In rejecting the Board's analysis, the appellate court stated:

> By presuming the union-proposed unit proper unless there is "an overwhelming community of interest" with excluded employees, the Board effectively accorded controlling weight to the extent of union organization. This is because "the union will propose the unit it has organized."

Id. at 1581 (quoting *Laidlaw Waste Sys., Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991)).

In *Lundy Packing*, certain quality-control and industrial-engineering employees had been excluded from the unit requested by the union. The excluded employees were nevertheless allowed to vote under challenge in the representation election. After the election, the Regional Director conducted an investigation and determined that the challenged ballots should be counted, and that the formerly excluded employees should—based on their shared community of interest—be included in the unit.

The union appealed to the Board, which reversed the Regional Director. The Board presumed that the petitioned-for unit was appropriate and applied an "overwhelming community of interest" test to the quality-control and industrial-engineering employees. The Board ruled that

their ballots should not be counted because they did not meet the "overwhelming community of interest" test, notwithstanding that they nevertheless, as found by the Regional Director, shared a community of interest with the employees included in the unit.

The court of appeals observed that under these circumstances the Board's ruling made it "impossible to escape the conclusion that the . . . ballots [of the quality-control and industrial-engineering employees] were excluded [by the Board] 'in large part because the Petitioners do not seek to represent them.'" *Lundy Packing*, 68 F.3d at 1581 (quoting underlying Board decision). Thus, according to the Fourth Circuit, the Board's ruling bore "the indicia of a classic [Section] 9(c)(5) violation." *Id.* We submit that the Board's decision in *Specialty Healthcare* violates Section 9(c)(5) in the same way as *Lundy Packing.* Apparently the Board understands this, because it attempted to distinguish what it did in *Specialty Healthcare* (and continues to do in this case and others), as discussed below.

B. The Board's Reliance on the District of Columbia Circuit's Decision in *Blue Man Vegas* to Distinguish *Lundy Packing* Is Misplaced

In *Specialty Healthcare*, the Board attempted to distinguish *Lundy Packing* by relying on the D.C. Circuit's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). In *Blue Man Vegas*, the D.C. Circuit distinguished *Lundy Packing* as follows:

> The Fourth Circuit there objected to the combination of the overwhelming-community-of-interest standard and the presumption the Board had employed in favor of the proposed unit: 'By presuming the union-proposed unit proper unless there is 'an overwhelming community of interest' with excluded employees, the Board effectively accorded controlling weight to the extent of union organization.' . . . As long as the Board applies the overwhelming community-of-interest standard *only after the proposed unit has been shown to be prima facie appropriate*, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight.

Id. at 423 (quoting *Lundy Packing*, 68 F.3d at 1581) (citation omitted and emphasis added). Thus, on its face, *Blue Man Vegas* contemplates that the Board must first find a "*prima facie* appropriate unit" before imposing the "overwhelming community of interest" standard.

In *Specialty Healthcare*, the Board seized on this passage, but in a way that does not fulfill the requirement that the Board first find a "*prima facie* appropriate unit." Instead, the Board announced a new, shorthand test for determining a *prima facie* appropriate unit, stating:

> We . . . take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of *employees who are readily identifiable as a group* . . . 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 which would also be appropriate or even more appropriate, 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.

Slip op. at 12-13 (emphasis added, footnote omitted).

This test announced in *Specialty Healthcare*, therefore, requires a unit to meet two criteria. First, it must be composed of "employees who are readily identifiable as a group." Second, it must be established that the employees in the group share a community of interest with one another. We submit that these criteria are not formulated, nor would they lead (except by coincidence), to the finding of a *prima facie* appropriate unit, as required by *Blue Man Vegas*, because the criteria effectively gives controlling weight to the "employees . . . identifiable as a group." This is because *no* unit could be appropriate in which its members did not share a community of interest. The concept of "employees . . . identifiable as a group" has no relevance, *unless the phrase refers to the group petitioned for by the union on the basis of the extent of their organization*. Put another way, because any appropriate unit must contain employees who share a community of interest, what really governs the appropriate unit under *Specialty Healthcare* is the

employees "identifiable as a group," one almost certainly chosen by the union on the basis of the extent of organization.[2] Upon what other basis would a readily identifiable group of employees be chosen?

Under *Specialty Healthcare* this question is never asked and never answered. Instead, the union's extent of organization is elevated to controlling status save only if an employer (or another petitioner) can show an overwhelming community of interest of non-included employees. We submit that under these circumstances, the group identified by the union is nothing more than a subterfuge for the extent of union organization. At the very minimum, the Board should require that a petitioner—who will have near-exclusive control of the evidence on this point—demonstrate that the "employees readily identifiable as a group" are constituted on the basis of factors other than the extent of union organization. In making this determination, the Board should also keep in mind the principle that "extent of union organization" does not mean unanimity, but merely that the group was chosen on the basis that the union believed it had sufficient strength, as demonstrated by cards or other means, to win an election in that group. Where this is the only basis for the petitioned-for unit, which under *Specialty Healthcare* may not be overcome by anything other than an overwhelming community of interests, then the group identified by the petitioner (i.e., the extent of union organization) is accorded controlling weight. Thus, *Specialty Healthcare* necessarily results in a violation Section 9(c)(5).

A "*prima facie* appropriate" unit has not been historically determined by the Board simply on the basis of whether the employees in the unit share a community of interest among them-

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[2] It should be noted that the "extent of organization" does not on its face require that the union have gained the support of every member of the proposed unit, but rather that the union has organized a majority of the group as of the filing of the petition.

selves. Instead, historically, the Board has considered factors in addition to community of interest, including the desires of the employees, any relevant bargaining history, and the employer's organizational and administrative structure. Further, the Board has identified numerous presumptively (not conclusively) appropriate units in various industries, based on the experience gained through the application of such factors over many years and in myriad factual contexts.[3] All of this requires, as we have demonstrated above, wholly consonant with the requirement of Section 9(b) of the Act, that the Board engage in a holistic approach that considers "in each case" the interests not only of those in the petitioned-for unit, but all of the factors necessary to vindicate "the rights guaranteed by this subchapter," and make collective bargaining real and practical, and not burdened by proliferating units, union whipsawing and rivalry, employee balkanization, and endless administrative headaches for the employer. It is those considerations that caused Congress to enact Section 9(c)(5) in the first place.

For the same reason, whatever may be the validity of the D.C. Circuit's formulation in *Blue Man Vegas* regarding when the "overwhelming community of interest" may properly be imposed as a barrier by the Board, *see Specialty Healthcare*, slip op. at 19 n.17 (Member Hayes, dissenting) (concluding that *Blue Man Vegas* was wrongly decided), it is clear that the appellate court conditioned it on the Board's having first made a proper finding of a *prima facie* appropriate unit. However, the test mandated by *Specialty Healthcare* is not formulated to, and except by

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[3] For example, in the retail industry involved in the instant case, for nearly a half-century the presumptively appropriate unit has been "the single store unit unless countervailing factors were present." *Haag Drug Co.*, 169 NLRB 877 (1968); *see also Sav-On Drugs*, 138 NLRB 1032 (1962) (abandoning policy of multi-store units determined by geographic-area/employer administrative-division). As discussed below in Section IV, the application of *Specialty Healthcare* in the instant case undermines this longstanding presumption and is particularly harmful to the retail industry.

coincidence will not, result in the finding of a *prima facie* appropriate unit, but instead a unit resulting from the extent of union organization.

In sum, the rule enunciated in *Specialty Healthcare* begins with a presumption that the petitioned-for unit—one likely based on the extent of union organizing—is appropriate based solely and exclusively on one factor: that the members of the unit share a community of interests among themselves, without regard to any other factors. It then effectively insulates that unit from challenge by erecting the "overwhelming community of interest" barrier. Dissenting Board Member Hayes accurately described the effect of the new standard on the Board's establishment of bargaining units in *Specialty Healthcare*, explaining:

> This will in most instances encourage union organizing in units as small as possible, in tension with, if not actually conflicting with, the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units. Next, by proposing to revise the rules governing the conduct of representation elections to expedite elections and limit evidentiary hearings and the right to Board review, the majority seeks to make it virtually impossible for an employer to oppose the organizing effort either by campaign persuasion or through Board litigation.

Specialty Healthcare, slip op. at 19 (footnote omitted).[4] This is the same problem that the *Lundy Packing* court recognized as a "classic [Section] 9(c)(5) violation." In light of the decision in *Lundy Packing*, a proper reading of the decision in *Blue Man Vegas*, and Member Hayes's dissent in *Specialty Healthcare* itself, the Board should overrule *Specialty Healthcare*.

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[4] The proposed revised rules referenced by Member Hayes were the subject of the Notice of Proposed Rulemaking issued by the Board on June 22, 2011, 76 Fed. Reg. 36,812, which advocate significant changes to the current procedures for holding secret-ballot elections. The Board attempted to issue the Final Rule on December 22, 2011, 76 Fed. Reg. 80,138, but that attempt was set aside because a quorum of the Board did not participate in the vote to do so. *Chamber of Commerce of U.S. v. NLRB*, --- F. Supp. 2d ---, Civ. A. No. 11-2262 (JEB), 2012 WL 1664028 (D.D.C. May 14, 2012).

III. THE BOARD ABUSED ITS DISCRETION IN *SPECIALTY HEALTHCARE* BY USING ADJUDICATION INSTEAD OF RULEMAKING TO PROMULGATE A NEW, GENERALLY APPLICABLE STANDARD FOR DETERMINING APPROPRIATE BARGAINING UNITS

The new standard announced by the Board in *Specialty Healthcare* holds that any identifiable group of employees sought by the union, who share a community of interest, is an appropriate unit, save only for those rare situations in which an employer can show that excluded employees share an overwhelming community of interest with the included employees. *Specialty Healthcare*, slip op. at 12-13. The Board asserted that it was only clarifying the law in this area. *Id.* at 1. However, the asserted clarification is in reality an entirely new, sweeping standard that has since been applied to alter decades of Board precedent across a multitude of industries. We submit that the change wrought in *Specialty Healthcare* should have been accomplished, if at all, through notice-and-comment rulemaking, and that the rule announced in *Specialty Healthcare* is contrary to law.

There is no question that the "choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1973). However, like all grants of discretion, the Supreme Court has acknowledged that there "may be situations where the Board's reliance on adjudication [instead of rulemaking] would amount to an abuse of discretion or a violation of the Act." *Id.* Although the Supreme Court has not examined the issue further, the dissenting Board Member in *Specialty Healthcare* believed that the majority had overstepped the "bounds of its discretion in making sweeping changes to established law through this adjudication, without adhering to any approximation of a rulemaking procedure that would comply with requirements under the Administrative Procedure Act (APA) designed to safeguard the process by ensuring scrutiny and broad-based review." *Specialty*

Healthcare, slip op. at 15 (Member Hayes, dissenting). As set forth below, dissenting Board Member Hayes was correct.

A. Rulemaking Versus Adjudication Generally

Congress has given the Board the authority to "make, amend, and rescind, in the manner prescribed by [the APA], such rules and regulations as may be necessary to carry out the provisions of [the Act]." NLRA § 6, 29 U.S.C. § 156. First enacted in 1946, the APA was seen as a "strongly marked, long sought, and widely heralded advance in democratic government." Administrative Procedure Act: Legislative History, S. Doc. No. 79-248, at iii (1946) (statement of Sen. McCarran). Central to that advance in democratic government were the APA's rulemaking requirements, which "assure fairness and mature consideration of rules of general application." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005) (internal quotations and citation omitted). The APA's rulemaking requirements also ensure that "affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *United States v. Utesh*, 596 F.3d 302, 310 (6th Cir. 2010) (internal quotations and citation omitted).

The APA defines rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is broadly defined as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." § 551(4). To engage in rulemaking, an agency must first publish a notice of proposed rulemaking in the *Federal Register*. § 553(b). Among other things, that notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* The agency must then give interested persons an

opportunity to participate in the rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation." § 553(c).

"After consideration of the relevant matter presented," the agency must "incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* Importantly, the product of the rulemaking process constitutes final agency action usually subject to immediate, broad-based judicial review by anyone aggrieved by the rule. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (addressing pre-enforcement challenge of Board regulations brought by trade association on behalf of its members).

Adjudication is something altogether different. As defined by the APA, "adjudication" means the agency process for formulating an "order," 5 U.S.C. § 551(7), which the APA defines as the "whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." § 551(6). The APA's procedural protections for adjudication do not govern proceedings for the "certification of worker representatives." § 554(a)(6). Moreover, the agency's final order in an adjudication is not subject to immediate, broad-based attack by persons or entities who are not parties to the adjudication. Instead, one must wait until the agency order is applied to it personally or, as in this case, participate as an *amicus* in a third party's legal challenge.

B. Federal Appellate Courts Have Found Agency Abuses of Discretion Under Circumstances Similar to *Specialty Healthcare*

Numerous federal courts have articulated standards for when an agency should engage in rulemaking rather than use adjudication. We submit that because the Board did not follow these standards, its decision in *Specialty Healthcare* is contrary to law and ought not be applied in this or any other cases.

For example, in *First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10th Cir. 1984), a bank holding company argued that federal regulators had abused their discretion by using an adjudication of the bank holding company's application to offer two types of accounts at certain of the company's holdings as a means for establishing a general rule of widespread application without having to engage in rulemaking. *Id.* at 435. In granting the holding company's petition for review, the court of appeals acknowledged that, under *Bell Aerospace*, agencies have discretion in choosing whether to use adjudication instead of rulemaking. *Id.* at 437. However, "like all grants of discretion," it could be abused. *Id.* In finding federal regulators had abused their discretion, the court of appeals paid particular attention to how federal regulators had applied the orders under review in subsequent proceedings involving different companies. *Id.* Noting that on at least three occasions federal regulators had cited the orders in question as having decided whether banks could offer both types of accounts, the appellate court concluded that the orders under review were "merely a *vehicle by which a general policy would be changed*." *Id.* (emphasis added). Therefore, the court of appeals determined that federal regulators had abused their discretion by using adjudication instead of rulemaking. *Id.* at 438; *see also Matzke v. Block*, 732 F.2d 799, 802-03 (10th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

The Ninth Circuit reached a similar conclusion in *Pfaff v. United States Department of Housing & Urban Development*, 88 F.3d 739 (9th Cir. 1996). The respondent-agency in *Pfaff* alleged that the petitioner-landlords violated federal housing laws by having a policy of refusing to rent a particular home to families of more than four people. *Id.* at 743. An administrative law judge found in favor of the respondent-agency, using a burden-shifting scheme not unlike that at

issue here. Once the agency presented a *prima facie* case that a landlord's policy had a disparate impact on families, the landlord had to demonstrate a "compelling business necessity" for the policy. *Id.* This burden-shifting scheme had been established by a recent agency decision in another case known as "*Mountain Side*." *Id.* at 747.

The court of appeals granted the landlords' petition for review and vacated the agency's order. *Id.* at 750. Recognizing that it was an "established principle of administrative law that 'the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion,'" *id.* at 747 (quoting *Bell Aerospace*, 416 U.S. at 294) (brackets supplied by *Pfaff* court), the appellate court found that "[j]ustice" dictated the "general rule of deference to announcements of law by adjudication have its exceptions." *Id.* at 748. The court explained that such a situation may present itself where, among other things, the "new standard, adopted by adjudication, *departs radically* from the agency's previous interpretation of the law" and "is very broad and general in scope and prospective in application." *Id.* (emphasis added). Finding that the agency had abused its discretion, the court of appeals explained that there could be "no question that the *Mountain Side* [burden-shifting] standard is broad, general, and prospective in application." *Id.*; *see also Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (explaining that "agencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"); *Curry v. Block*, 738 F.2d 1556, 1564 (11th Cir. 1984) (finding agency's planned use of adjudication instead of rulemaking would constitute an abuse of discretion).

C. The Dissenting Board Member in *Specialty Healthcare* Correctly Concluded that the Majority Abused Its Discretion

There is no question that, when the circumstances are considered in their totality, the Board in *Specialty Healthcare* abused its discretion by deciding to issue a rule of general applicability via adjudication instead of rulemaking. The Board would only compound its error by applying *Specialty Healthcare* to the facts of this case.

First and most fundamentally, the Board majority in *Specialty Healthcare* raised *sua sponte* the issue whether to devise a new, generally applicable standard for determining appropriate bargaining units in all industries. In its call for *amicus* briefs, the majority asked third parties to brief the following issue, among numerous others:

> Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. *Should such a unit be presumptively appropriate as a general matter*.

Specialty Healthcare & Rehab. Ctr. of Mobile, 356 NLRB No. 56, slip op. at 2 (2010) (emphasis added).

As highlighted in an atypical dissent from the Board's call for *amicus* briefs, none of the parties asked the Board to revise the general standard for making bargaining-unit determinations. "This was a simple case," the dissenting Board Member explained. *Id.* at 4 (Member Hayes, dissenting). "The majority, however, . . . seizes upon this case as an occasion for reviewing not only . . . the standard for unit determinations in nonacute health care facilities, but also for reviewing the procedures and standards for determining whether proposed units are appropriate in all industries." *Id.* (internal quotations omitted). As a consequence, the dissent concluded, "[t]his is no longer a simple case." *Id.*

Second, as is clearly demonstrated by this case involving a purported unit of women's shoe department employees in a large department store, it cannot be denied that in *Specialty Healthcare* the Board created a rule of general applicability designed to implement policy outside the narrow factual context presented by that case involving a skilled nursing facility, thereby making the majority's decision in *Specialty Healthcare* a "rule," not an "order." *See* 5 U.S.C. § 551(4), (6). Indeed, the Board has now issued a number of published decisions relying on the governing "principles" established in *Specialty Healthcare*. *See DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving a rental-car facility: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one."); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 (2011) (explaining, in the context of a bargaining-unit dispute involving technicians at a defense contractor making submarines and aircraft carriers: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in this type of case."); *Odwalla, Inc.*, 357 NLRB No. 132, slip op. at 4 (2011) (explaining, in the context of a bargaining-unit dispute involving a producer of juice drinks and fruit bars: "The Board's recent decision in *Specialty Healthcare* . . . set forth the principles that apply in cases like this one.").[5]

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[5] The Board has done the same thing in numerous unpublished orders. *Compare, e.g.*, *Grace Indus., LLC*, Nos. 29-RC-12031 & 29-RC-12043, 2011 WL 6122778 (NLRB Dec. 8, 2011) (granting request for review in bargaining-unit dispute involving road construction company and remanding for reconsideration in light of *Specialty Healthcare*); *and Performance of Brentwood LP*, No. 26-RC-63405, 2011 WL 5288439 (NLRB Nov. 4, 2011) (doing same in bargaining-unit dispute involving car dealership), *with Prevost Car U.S.*, No. 03-RC-71843, 2012 WL 928253 (NLRB Mar. 15, 2012) (denying bus manufacturer's request for review because majority believed request did not present substantial issues in light of *Specialty Healthcare*); *Nestle Dreyer's Ice Cream*, No. 31-RC-66625, 2011 WL 6835227 (NLRB Dec. 28, 2011) (denying review in bargaining-unit dispute involving ice cream manufacturer), *appeal pending sub nom. Nestle Dreyer's Ice Cream Co. v. NLRB*, No. 12-1684 (4th Cir.); *and 1st Aviation* (continued)

That these published decisions involved rental cars, submarines, aircraft carriers, juice drinks and fruit bars has been of no consequence to the Board. *Specialty Healthcare*, the Board majority explained, established a rule of general applicability that was to be obeyed. That, in turn, is a hallmark of rulemaking, not adjudication. *See First Bancorporation*, 728 F.2d at 437 (finding agency abused its discretion in using adjudication instead of rulemaking where federal regulators had cited the orders under review as having definitively decided a broad question, such that the court concluded that the orders were "merely a vehicle by which a general policy would be changed").

Third, that the Board utilized adjudication in *Specialty Healthcare* while engaging in rulemaking on various other important issues supports the conclusion that the Board majority abused its discretion by spurning rulemaking on this question. At the time of the Board's decision in *Specialty Healthcare*, the Board had recently issued proposed rules altering significantly the Board's procedures for conducting representation elections and requiring employers to post notices regarding employees' rights under the Act. *See* Proposed Rule, Representation—Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011); Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act, 75 Fed. Reg. 80,410 (Dec. 22, 2010). Thus, despite invoking rulemaking contemporaneously on two other issues of widespread importance that drew tens of thousands of public comments, *see, e.g.*, Final Rule, Representation—Case Procedures, 76 Fed. Reg. 80,138, 80,140 (Dec. 22, 2011) (explaining that the Board received over 65,000 public comments), the Board—for reasons known only to it—chose adjudication in *Specialty Healthcare* to alter the general standard for determining appropriate bargaining

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Servs., Inc., No. 22-RC-61300, 2011 WL 4994731 (NLRB Oct. 19, 2011) (doing same in bargaining-unit dispute involving aviation company).

units. That, we submit, constituted an abuse of discretion, as does the continued application of the *Specialty Healthcare* rule in this and other cases. *See Pfaff*, 88 F.3d at 748 (finding agency abused its discretion in using adjudication to promulgate a burden-shifting standard that was "broad, general, and prospective in application," and then applying that standard in subsequent cases); *Ford Motor Co.*, 673 F.2d at 1010 (finding agency abused its discretion in using adjudication and citing agency's recent rulemaking as opportunity to use same instead of adjudication).

Therefore, the dissenting Board Member in *Specialty Healthcare* correctly concluded that the majority abused its discretion by choosing to use adjudication to promulgate a new, generally applicable rule for determining appropriate bargaining units in all industries. As in *Pfaff*, the Board will compound its abuse of discretion by applying the *Specialty Healthcare* standard in this and future cases. Accordingly, *Specialty Healthcare* should be overruled.

IV. APPLYING *SPECIALTY HEALTHCARE* WILL HAVE A PARTICULARLY UNWARRANTED, ADVERSE IMPACT ON THE RETAIL INDUSTRY AND ITS EMPLOYEES

The adverse impact of the rule announced in *Specialty Healthcare* raises particularly serious issues for retail employers and their employees, undermining decades of precedent demonstrating that the presumptively appropriate unit in the retail industry is the single store unit. *See* n.3, *supra.* Board precedent prior to *Specialty Healthcare* allowed for smaller, discrete units in the retail setting only in situations where specialized skills were involved; but even in these cases consideration is given to various factors. *See, e.g., Super K Mart*, 323 NLRB 582, 586, 588 (1997) (Regional Director concluded meat department unit was appropriate because 40 percent of the employer's meat sales derived from fresh meats requiring traditional meatcutting skills; Regional Director specifically noted Board's evolution from a presumption that a meatcutting unit was appropriate, noting "it is incumbent on the Board to consider the actual work performed

by the meatcutters in order to determine whether they continue to exercise substantial, traditional meatcutter skills"); *Foreman & Clark, Inc.*, 97 NLRB 1080, 1082 (1951) (alteration employees deemed separate unit due to high skill); *W & J Sloane, Inc.*, 173 NLRB 1387, 1389 (1968) (same for display employees); *Stern's Paramus*, 150 NLRB 799, 806 (1965) (employer consisted of 130 departments spread across five floors, yet Board adopted three separate broad units of selling, non-selling and restaurant employees, noting that the "specific facts of these cases, the current bargaining pattern in the industry, the history of bargaining in the area and a close examination of the composition of the workforce in the industry require a recognition of the existing differences in work tasks between the selling and nonselling employees in department stores").

These are but a few examples of the thoughtful, deliberate analysis employed by the Board in determining appropriate bargaining units in the retail industry "in each case," as required by Section 9(b). These analyses all reflect the experience gained by the Board through decades of unit determinations in the retail industry, taking into account the realities of the retail business in all of its diverse forms, products, structures, sizes and locations. There was no deviation from the presumptive single store unless the Board had conducted a thorough investigation and analysis and had determined that the facts before it deemed such a change necessary. All parties can look at this body of law and determine with reasonable certainty what the appropriate bargaining unit should look like in the retail industry. Importantly, none of the analyses used the "overwhelming community of interest" standard.

Now, as dramatically illustrated by this case, all of this is thrown into doubt by the *Specialty Healthcare* decision. The adverse impact of the new rule in *Specialty Healthcare* is potentially devastating. For example, where the Board found three broad units of selling, non-

selling and restaurant employees appropriate in a retail department store setting in *Stern's Paramus*, it is now possible that with respect to the employer in this case, unions could seek dozens of separate units, one for each department. This could be repeated in thousands of other retail settings, resulting in a proliferation of separate bargaining units that would cripple a retail employer with endless multiple negotiations, conflicting union demands and contract obligations, and burdensome administrative duties.

Specialty Healthcare now enables unions to organize by cherry-picking a bargaining unit composed of a small subset of employees with little regard for whether those employees constitute a practical bargaining unit. All they need be is a readily identifiable group of employees. As a result, unions will often organize by forming smaller bargaining units based on the extent of their organization, creating a proliferation of units with no limiting feature other than that they all are identifiable groups.

The facts of this case provide a prime example. The union chose to organize sales associates from the women's shoe department of Bergdorf Goodman, rather than sales associates throughout the store or a wall to wall unit, likely because the union had determined that the majority of the employees in shoes support the union, while the sales associates in other departments, such as men's and women's clothing, may not. Under this same approach, any number of unions may organize any number of the other departments, resulting in the problems noted above.

Allowing the Regional Director's decision to stand in this case will, further, have a negative impact on employee skill development that is easy to envision. Currently, in most retail settings, employees perform tasks in a variety of different departments and settings in order to develop their skills and knowledge base and to provide a high level of customer service through-

out the store. In a situation where a business is faced with multiple units as contemplated under *Specialty Healthcare*, each perhaps represented by a different, competing union, union rules will prevent—or at a minimum greatly complicate—the ability to cross-train employees and meet customer and client expectations via flexible staffing, as employees generally may not and cannot perform work assigned to another unit. Employees would be limited to micro-units and the job duties assigned to that particular unit, thus reducing skill building, training and job opportunities as cross-training, promotions and transfers would be hindered by barriers created by multiple smaller bargaining units.

Employees and employers would also lose flexibility as workers from one store location or one department could not pick up shifts at another if different units represented the different departments or stores in the different locations. For example, those working as a fitting-room associate could not be reassigned to the sales floor, if that was where more staff was needed. A greeter could not cover for an absent cashier if they were in separate units. Similarly, hardware store workers assigned to the gardening center might not be able to service customers in the plumbing department if such work is assigned to a different bargaining unit. The impact of this on business productivity and competitiveness would be significant. Today's economic environment is challenging enough for workers without government-fostered barriers that cripple productivity and hamper opportunities for skill and career development.

Under *Specialty Healthcare*, in addition to multiple balkanized units, retail businesses will have to contend with multiple collective bargaining agreements (e.g., different agreements for cashiers and stockers, employees in men's shoes, women's shoes, men's clothing, women's clothing, etc.), in which the unions may insist on different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance processes and layoff and recall procedures. Juggling

the administrative tasks associated with multiple bargaining agreements could overwhelm businesses in retail, where a store may have dozens of departments and—under *Specialty Healthcare*—possibly dozens of different units.

Finally, multiple unions representing multiple bargaining units within a single store could lead to rivalry and tension among employees, not to mention rivalry among competing unions. Dissatisfied workers comparing salaries and benefits could cripple the business with work stoppages, creating a situation where a union representing only a handful of employees could threaten the economic well-being of the rest of the company's employees, nonunion and union alike, and their families. For example, if the cashiers go on strike, the rest of a store might be shut down, leaving all employees without work.

In sum, under *Specialty Healthcare*, the bargaining-unit proliferation and balkanization that Congress discouraged is now a reality that will unnecessarily and improperly impact the retail industry to the detriment of both employers and employees, and the economic well-being of families and communities who depend on them. It is impossible to conceive that this is the labor peace that Congress intended to foster in passing the Act.

CONCLUSION

For the foregoing reasons, the Board should overrule *Specialty Healthcare*. In the absence of the foregoing, the Board should at a minimum return the retail industry to the traditional bargaining-unit standards that existed before *Specialty Healthcare.*

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this thirteenth day of June, 2012, he caused the foregoing Brief of *Amici Curiae* Coalition for a Democratic Workplace, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, National Council of Chain Restaurants, International Foodservice Distributors Association and International Council of Shopping Centers to be filed using the National Labor Relations Board's E-Filing Program. The foregoing brief was also served by e-mail upon the following counsel:

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