UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE BOEING COMPANY, Employer, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Petitioner.	Case No. 10-RC-215878

BRIEF OF AMICUS CURIAE THE COALITION FOR A DEMOCRATIC WORKPLACE, INDEPENDENT ELECTRICAL CONTRACTORS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL RETAIL FEDERATION, RESTAURANT LAW CENTER AND RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF THE BOEING COMPANY'S REQUEST FOR REVIEW

Ronald Meisburg HUNTON ANDREWS KURTH LLP 2200 Pennsylvania Avenue NW Washington, DC 20037-1701 (202) 955-1500 Telephone (202) 778-2201 Facsimile rmeisburg@huntonAK.com	Kurt G. Larkin HUNTON ANDREWS KURTH LLP Riverfront Plaza, East Tower 951 East Byrd Street Richmond, VA 23219-4074 (804) 788-8776 Telephone (804) 343-4886 Facsimile klarkin@huntonAK.com Robert T. Dumbacher Rebekah K. Herman HUNTON ANDREWS KURTH LLP 600 Peachtree Street NE, Suite 4100 Atlanta, Georgia 30308 (404) 888-4000 Telephone (404) 888-4190 Facsimile rdumbacher@huntonAK.com bherman@huntonAK.com

Counsel for Amici

TABLE OF CONTENTS

I. INTEREST OF *AMICI* 1

II. SUMMARY OF ARGUMENT 4

III. *PCC STRUCTURALS* RESTORES THE TRADITIONAL ANALYSIS IN BARGAINING UNIT DETERMINATIONS. 6

A. The Board's Traditional Analysis Considered the Interests of Employees *Outside* the Proposed Group. 6

B. The Board's Traditional Analysis Sought to Avoid a Fractured Workforce. 7

C. *PCC Structurals* Rejects *Specialty Healthcare* and Restores the Traditional Analysis. 9

IV. THE BOARD SHOULD TAKE THIS OPPORTUNITY TO DEMONSTRATE THE PROPER APPLICATION OF *PCC STRUCTURALS* IN BARGAINING UNIT DETERMINATIONS. 12

A. *Specialty Healthcare* is No Longer the Law and its Requirements Should Not Be Followed 13

B. *PCC Structurals* Requires a *Meaningful* Evaluation of the Interests of Employees *Outside* of the Proposed Unit. 14

C. *PCC Structurals* Requires Consideration of Traditional Presumptions. 18

D. *PCC Structurals* Requires Consideration of Bargaining History. 20

E. Certification Of The Petitioned-For Unit Would Have Been Improper Even Under The More Expansive, But Now Defunct, *Specialty Healthcare* Decision. 21

V. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Airco, Inc., 273 NLRB 348, 349 (1984) 5

Airco, Inc., 273 NLRB at 348 18

Airco, Inc., 273 NLRB at 349 16

Avon Products, 250 NLRB 1479, 1482-84 (1980) 16

Boeing ..... passim

Constellation Brands, 842 F.3d at 794 12

Constellation Brands, U.S. Operations, Inc. v. NLRB, 842 F.3d 784, 794 (2d Cir. 2016) 2, 9

DPI Secupint, Inc., 362 NLRB No. 172, slip op. at 10 (2015) 15

Gustave Fisher, Inc., 256 NLRB 1069 (1981) 17

Gustave Fisher, Inc., 256 NLRB at 1069 18

Holmberg, Inc., 162 NLRB at 410 18

International Bedding Co., 356 NLRB No. 168 (2011) 5, 16

Mann Mfg., Inc., 191 NLRB 863, 864-65 (1971) 16

Newton-Wellesley Hospital, 250 NLRB 409 (1980) 3

Newton-Wellesley Hospital, 250 NLRB 409, 410-11 (1980) 5

North American Rockwell, 193 NLRB 983 (1971) 15

Northrop Grumman Shipbuilding, Inc., 357 NLRB 2015, 2021 15

Odwalla, Inc., 357 NLRB 1608 (2011) 20

PCC Structurals ..... passim

Publix Super Markets, Inc., 343 NLRB 1023, 1024 (2004) 16

Specialty Healthcare ..... passim

Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011) 2, 4

Specialty Healthcare, 357 NLRB at 945-46 7

The Boeing Co., 337 NLRB 152, 153 (2001) 17

The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman, 361 NLRB 50 (2014)..... 19

Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 120 (D.C. Cir. 1996) 9

Westinghouse Electric Corp., 300 NLRB 834, 834 (1990) 15

Wheeling Island Gaming, 355 NLRB 637 (2010) 3, 4

Wheeling Island Gaming, 355 NLRB 637, 637 n.2 (2010) 8

Statutes

29 U.S.C. §§ 151-169 ..... 1, 2

Amicus Curiae the Coalition for a Democratic Workplace, Independent Electrical Contractors, National Association of Wholesaler-Distributors, National Federation of Independent Business, National Retail Federation, Restaurant Law Center and Retail Industry Leaders Association (together, "*Amici*") respectfully submit this brief in support of The Boeing Company's ("Boeing") Request for Review of the Decision and Direction of Election issued on May 21, 2018 by the Regional Director for Region 10 ("Decision" or "DDE") of the National Labor Relations Board ("Board"). Boeing's Request for Review should be granted pursuant Section 102.67(d) of the Board's Rules and Regulations for all of the reasons articulated in Boeing's Request for Review of the Regional Director's Decision and Direction of Election, but also because the Decision is not a correct application of the traditional community of interest criteria now called for by *PCC Structurals*. Allowing the Decision to stand will negatively impact not just Boeing and its employees, but other employers, employees, unions, and the Board's Regional offices by creating uncertainty regarding the proper application of *PCC Structurals* in bargaining unit determinations generally.

I. INTEREST OF *AMICI*[4]

Coalition for a Democratic Workplace ("CDW") consists of over 600 member organizations and employers, who in turn represent millions of employers nationwide, the vast majority of whom are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA. CDW members have joined together to express their mutual concern regarding a range of labor issues that threaten the statutorily protected rights of employers and employees and thereby hampers economic growth. CDW has advocated for its

[4] *Amici* certify that no counsel for a party authored this motion in whole or in part; no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this motion; and no persons other than the *amici,* their members or their counsel made a monetary contribution to its preparation or submission.

members on several important legal questions, including the one implicated by this case: the standard used by the Board to determine appropriate bargaining units under the NLRA, 29 U.S.C. §§ 151-169.[5]

The **Independent Electrical Contractors, Inc**. ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors, with over 50 chapters representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC contractor member companies are responsible for over $8.5B in gross revenue annually and are composed of some of the premier firms in the industry. IEC aggressively works with the industry to establish a competitive environment for the merit shop—a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all.

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 small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

The **National Association of Wholesaler-Distributors** ("NAW") is a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 40,000 companies operating at

[5] A complete list of CDW's members is publicly available at: http://myprivateballot.com/membership/

more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small to medium size, closely held businesses. The wholesale distribution industry generates $5.6 trillion in annual sales volume and provides stable and good-paying jobs to more than 5.9 million workers.

The **National Retail Federation** ("NRF") is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

The **Restaurant Law Center** ("Law Center") is an independent public policy organization providing a voice for the restaurant and foodservice industry in the courts. Nationally, the industry is comprised of over one million restaurants and other foodservice outlets employing almost 15 million people—approximately ten percent of the U.S. workforce. The RLC seeks to provide courts with the industry's perspective on legal matters meaningfully impacting the industry. As the nation's second largest private-sector employer, our industry has a profound interest in national labor policy in general and interpretation of the National Labor Relations Act in particular.

The **Retail Industry Leaders Association** ("RILA") is a membership association consisting of the largest and fastest growing companies in the retail industry—retailers, product manufacturers, and service suppliers—which together account for more than $1.5 trillion in

annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers located both domestically and abroad. RILA promotes consumer choice and economic freedom through public policy discussions on issues of importance to its members, including labor issues.

II. SUMMARY OF ARGUMENT

Amici submit the instant brief in support of Boeing's Request for Review because their members have a significant interest in the uniform development of the law under *PCC Structurals*. The Board has not yet had the opportunity to apply that standard to the facts of any case. The Regional Director's difficulty applying the *PCC Structurals* standard in *this* case demonstrates the need for the Board's guidance. This case squarely presents the issue for consideration as well as an opportunity to ensure that the principles of *PCC Structurals* are consistently applied going forward.

In reaffirming the validity of the traditional standard used for determining bargaining unit appropriateness, the Board embraced an approach used "[t]hroughout nearly all of its history." *PCC Structurals* at 5. That standard requires that the Board assess whether employees in a petitioned-for unit share a community of interest *sufficiently distinct* from the interests of excluded employees to warrant a finding that the proposed group constitutes a separate appropriate unit. *Id.* In making this determination, the Board must assess whether "'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'" *Id*. (emphasis in original) (approving and quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). Thus, any evaluation of a proposed unit must include a "careful examination of the community of interests of employees both within *and* outside the proposed unit." *Id.* at 3, 7. Moreover, "the

analysis must consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations." *PCC Structurals* at 11.

The Regional Director's Decision does not correctly apply these principles—it misapplies the *PCC Structurals* standard and incorporates, and perverts, vestiges of the rejected *Specialty Healthcare* test that do not belong in bargaining unit analysis. Allowing his Decision to stand would sow confusion among the regulated community, including among *Amicis*' many members, over the proper application of *PCC Structurals*. This case presents an important opportunity for the Board to grant review and to provide uniform and nationwide standards, particularly for those in manufacturing and other industries where wall-to-wall units have been deemed presumptively appropriate for decades. The Board should clarify how to properly apply the traditional principles articulated in *PCC Structurals*, so that the regulated community and the Board Regions charged with overseeing representation cases will have clear guidelines for conducting unit determinations going forward.

Important policy reasons compel the Board to use this case as a vehicle for reaffirming and explaining how *PCC Structurals* should be applied. Given that the Board expressly recognized it "reinstate[d] the traditional community-of-interest standard[,]" *PCC Structurals* at 1, *Amici* advocate here for an application of *PCC Structurals* that most faithfully follows that traditional law and requires a meaningful evaluation of the interests of the employees excluded from the petitioned-for group, as only such an analysis assures ***all*** employees potentially impacted by the petition "the fullest freedom in exercising" their Section 7 rights. 29 U.S.C. §159(b); *see also*, *Wheeling Island Gaming*, 355 NLRB 637 (2010); *Newton-Wellesley Hospital*, 250 NLRB 409 (1980).

III. *PCC STRUCTURALS* RESTORES THE TRADITIONAL ANALYSIS IN BARGAINING UNIT DETERMINATIONS.

In order to assure employees the "fullest freedom in exercising the rights guaranteed by" the Act, Section 9(b) of the Act requires the Board "to decide *in each case*" whether a petitioned-for unit is "appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). Prior to its decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) ("*Specialty Healthcare*"), the Board had developed a body of unit determination precedent that reflected a careful balancing of the competing interests of employees, employers, and unions alike. It is this analysis, jettisoned in *Specialty Healthcare*, that the Board restored in *PCC Structurals*.

A. The Board's Traditional Analysis Considered the Interests of Employees *Outside* the Proposed Group.

The Board's traditional bargaining unit analysis was faithful to its statutory mandate to meaningfully evaluate "in each case" whether employees' rights under Section 7 were adequately protected. The Board did this primarily by determining whether employees in a proposed unit for bargaining possessed a community of interest that was ***sufficiently distinct*** from the interests of other employees ***outside*** the proposed group. This assessment necessarily included a searching examination of the interests of those excluded employees—not just those sought inside the proposed unit.

This principle is perhaps best expressed in the Board's decision in *Wheeling Island Gaming*, 355 NLRB 637 (2010), a case decided just before *Specialty Healthcare*. There, the Board noted that it:

> 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.

Id. at 637, n. 2 (quoting *Newton-Wellesley Hospital*, 250 NLRB 409, 410-11 (1980).

By making sure to examine the community of interest factors as they relate to employees excluded from the petitioned-for group, and to explain how and why those employees' interests were "sufficiently distinct" from those inside the proposed group before approving a petitioned-for unit, the Board guarded against allowing the extent of organizing to overwhelm the analysis. As the *PCC Structurals* Board correctly observed, the Board's traditional test, "consistent with Section 9(c)(5) [of the Act] . . . ensures that bargaining units will not be arbitrary, irrational, or 'fractured'—that is, composed of a gerrymandered grouping of employees." *PCC Structurals* at 5.

B. The Board's Traditional Analysis Sought to Avoid a Fractured Workforce.

The Board also traditionally weighed carefully the potential consequences of approving a bargaining unit covering only a portion of a particular facility or workforce. The Board was mindful of the potential disruption that multiple smaller units could have on business operations, stable labor relations, and effective, realistic collective bargaining. For example, the Board long acknowledged that it "does not favor organization by department or classification" in manufacturing settings. *Airco, Inc*., 273 NLRB 348, 349 (1984) (cited with approval in *International Bedding Co*., 356 NLRB No. 168 (2011)).

The Board's precedent in manufacturing settings is typical of the care it used, prior to *Specialty Healthcare*, to take in deciding questions of unit appropriateness. In those cases, the Board was consistently clear that it would not make a unit determination without considering the realities of the particular business setting and how a given unit might affect the employer's operations, so that neither bargaining rights nor industrial peace and stability were undermined.

For example, in *Kalamazoo Paper Box Corp.*, which was quoted by the Board with approval in *PCC Structurals*, at 3 n.8, the Board articulated its responsibility in bargaining unit determinations as follows:

> As we view our obligation under the [Act], it is the mandate of Congress that this Board shall decide in each case . . . the unit appropriate for the purpose of collective bargaining. In performing this function, the Board must maintain the two-fold objective of insuring to employees their *rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability* . . . . At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, *efficient and stable collective bargaining is undermined rather than fostered.*

136 NLRB 134, 137 (1962) (emphases added) (internal citations and quotation marks omitted).

Applying these principles in *Kalamazoo Paper Box,* the Board rejected an attempt to sever truck drivers from an existing production and maintenance bargaining unit at a manufacturer. In doing so, it articulated the problem with relying only on job classifications as the basis for unit determinations, explaining:

> In these circumstances, permitting severance of truck drivers as a separate unit based upon a traditional title . . . would result in creating a fictional mold within which the parties would be required to force their bargaining relationship. Such a determination could only *create a state of chaos* rather than foster stable collective bargaining, and could hardly be said to 'assure to employees the fullest freedom in exercising the rights guaranteed by this Act' as contemplated by Section 9(b).

Id. at 139-40 (emphasis added). The "chaos" the Board sought to avoid is not theoretical or speculative; rather, it represents the real, negative consequences that flow from a proliferation of units that can carve up an employer's workplace.

C. *PCC Structurals* Rejects *Specialty Healthcare* and Restores the Traditional Analysis.

The Board in *Specialty Healthcare*—inexplicably and without warrant—abandoned this well-developed and well-established body of precedent. Describing its holding as a mere "clarification" of the standards described above, the Board in *Specialty Healthcare* proceeded to drastically change those rules. It provided that if a group of petitioned-for employees were "readily identifiable" as a group and shared a community of interests among themselves, this inward-looking inquiry would be controlling, regardless of the interests of excluded employees—except for the rare instance where the employer could prove that the excluded employees shared an "overwhelming" community of interests with those in the petitioned-for unit. *See Specialty Healthcare*, 357 NLRB at 945-46; *see also PCC Structurals*, 365 NLRB No. 160 at 6. The test articulated in *Specialty Healthcare* spawned predictably lopsided results and led many in the regulated community to argue that its one-sided "readily identifiable" and "overwhelming community of interest" standards strayed too far from the Board's statutory mandates.

In *PCC Structurals*, the Board rejected *Specialty Healthcare* and its misguided "clarifications" of Board precedent. In doing so, the Board expressly reinstated the traditional standard for determining the appropriateness of a bargaining unit, properly recognizing that the traditional framework fulfilled the Board's statutory role in determining the appropriateness of a bargaining unit and furthered the purposes of collective bargaining. *Id.*

This traditional standard, used "[t]hroughout nearly all of [the Board's] history," for determining the appropriateness of a bargaining unit, *PCC Structurals* at 5, requires an examination of whether the employees in the petitioned-for group share a community of interest

"sufficiently distinct" from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit. *Id.*

The Board also noted in *PCC Structurals* that when determining the appropriateness of a proposed bargaining unit under the traditional community-of-interest standard, the Board would employ a multi-factor test that asked whether employees in the petitioned-for group:

(1) are organized into a separate department;

(2) have distinct skills and training;

(3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;

(4) are functionally integrated with the Employer's other employees;

(5) have frequent contact with other employees;

(6) interchange with other employees;

(7) have distinct terms and conditions of employment; and

(8) are separately supervised.

PCC Structurals at 5.

In restoring this standard, the Board further observed that rote recitation of these factors while performing the analysis is insufficient. Instead, a "meaningful evaluation" is required, including a "careful examination of the community of interests of employees *both within and outside* the proposed unit." *Id.* at 3, 7 (emphasis added). Thus, the Board recognized that under the traditional test it would never address, "'solely and in isolation, the question of whether the employees in the unit sought have interests in common with one another.'" *Id.* at 5 (quoting *Wheeling Island Gaming*, 355 NLRB 637, 637 n.2 (2010)). As stated in *Wheeling Island Gaming*, "[n]umerous groups of employees fairly can be said to possess employment conditions

or interests 'in common.'" *Id.* Rather, the Board's inquiry "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.'" *Id.* (emphasis in *Wheeling Island Gaming*).

The Board additionally noted that in proceeding to that "further determination" called for in *Wheeling Island Gaming*, "the Board must determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'" *Id*. (emphasis in original) (approving and quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d at 794).

Finally, the Board held that going forward, its unit determinations must consider the factual situation within which the parties operate, and "the analysis must consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations." *PCC Structurals* at 3, n. 8, and 11. In this regard, "the Board may not certify petitioned-for units that are 'arbitrary' or 'irrational' – for example, where functional integration and similarities between two employee groups 'are such that neither group can be said to have any separate community of interest justifying a separate bargaining unit.'" *PCC Structurals* at 5 (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 120 (D.C. Cir. 1996)).

Thus, the Board in *PCC Structurals* fully restored the traditional bargaining unit analysis previously used by the Board for decades. In doing so, the Board "correct[ed] the imbalance created by *Specialty Healthcare*, which makes 'the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances." *PCC Structurals* at 8 (quoting *Specialty Healthcare* at 948 (Member Hayes, dissenting)).[6]

[6] The Board acknowledged that several reviewing courts had accepted the *Specialty Healthcare* standard as a permissible construction of the Act. *PCC Structurals* at 9, n. 44. However, the Board

IV. THE BOARD SHOULD TAKE THIS OPPORTUNITY TO DEMONSTRATE THE PROPER APPLICATION OF *PCC STRUCTURALS* IN BARGAINING UNIT DETERMINATIONS.

In restoring the traditional community of interest standard in *PCC Structurals*, two prevailing themes emerge from the Board's analysis:

- Proper application of the Board's traditional "sufficiently distinct" analysis requires a *meaningful* evaluation of the community of interest factors of employees *outside* the proposed voting group, and

- Before ratifying a proposed unit, the Board should carefully evaluate whether doing so will foster, or frustrate, stable collective bargaining relations; at a minimum, the Board should strive to avoid fractured units.

While these principles are clear and easy to understand, the Board did not have occasion to apply them in *PCC Structurals*. Rather, the Board remanded the case for reconsideration in light of its newly announced standard. *See PCC Structurals* at 13. To date, the Board has not provided guidance in any subsequent case on how to correctly apply the core principles articulated in *PCC Structurals*. The instant case squarely presents such an opportunity.

Here, the Regional Director misapplied *PCC Structurals* and reached an improper result, prejudicing the parties in this particular case and creating general uncertainty about the proper

---

observed that most of those courts "expressly relied on the *Specialty Healthcare* majority's recitation of traditional community-of-interest principles" and that when they upheld *Specialty Healthcare*, they opined that the "community-of-interest test requires the Board to evaluate shared interests both within *and outside* the petitioned-for unit as an essential part of the first step of the *Specialty Healthcare* analysis, where the Board determines whether the petitioned-for employees share a community of interests." *Id.* (emphasis in original). The Board cited in particular the Second Circuit's decision in *Constellation Brands*, in which the Court held in unequivocal terms that even under *Specialty Healthcare*, the Board "must . . . explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *PCC Structurals* at 9, (quoting *Constellation Brands*, 842 F.3d at 794)(emphasis in original); *see also, e.g.*, *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 637 (7th Cir. 2016)(Board must determine whether proposed unit has community of interest "different from the concerns of the company's other employees"); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016)(proper application of *Specialty Healthcare* requires examining whether "included employees share a community of interest and are unlike all the other employees the Employer would include in the unit"). Thus, even the courts that upheld *Specialty Healthcare* did so in a way that constrained its application in a manner consistent with *Wheeling Island Gaming* (and, now, *PCC Structurals*). In other words, those courts recognized that adequate bargaining unit analysis must include consideration of the interests of employees outside the proposed bargaining group.

application of the new standard. To *Amicis*' knowledge, the Decision is the first case, besides the remand of *PCC Structurals* itself, in which the *PCC Structurals* standard has been applied by a Regional Director. As such, the Decision carries outsized weight inasmuch as other Regional Directors may look to it for guidance on how they should apply *PCC Structurals* in a future case. Importantly, the Decision does not appear to "meaningfully" consider the community-of-interest factors in the manner called for by the Board in *PCC Structurals*. Review of the Decision is necessary not just to correct the errors made in this case, but to clarify how the Board's new bargaining unit standard should be applied in future cases.

A. ***Specialty Healthcare*** **is No Longer the Law and its Requirements Should Not Be Followed**

The Board in *PCC Structurals* expressly overruled *Specialty Healthcare*. As such, its dubious "readily identifiable" and "overwhelming community of interest" standards no longer have a place in bargaining unit analysis. The Regional Director, however, appears to have injected a *Specialty Healthcare*-like analysis into the Decision. In analyzing the evidence, he noted that the employees in the petitioned-for group "are readily identifiable as a group." *See* Decision at 25. He also observed that Boeing "readily identifies the petitioned-for unit in a variety of ways." *Id*.

These appear to be references to step-one of the *Specialty Healthcare* test, which used to require the Board to determine at the outset whether employees in a petitioned-for unit are "readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors)." *Specialty Healthcare* at 945-46. It is unclear why these references appear in the Decision, as they no longer have any place in bargaining unit analysis. The Board in *PCC Structurals* expressly rejected this "inward-looking inquiry" as a departure from the its statutory mandate: "We believe this aspect of *Specialty Healthcare* undermines

fulfillment of the Board's responsibility to 'assure' to employees 'in each case' their 'fullest freedom' in the exercise of Section 7 rights, as stated in Section 9(b) of the Act." *PCC Structurals* at 6. In granting review, the Board should clarify what ought to be an obvious point: *Specialty Healthcare* is no longer the law, and its cabined, threshold analysis of whether employees in a proposed unit are "readily identifiable"—an inquiry that shuts out consideration of those outside of the proposed unit—should not be part of any determination whether employees in a proposed unit have interests that are sufficiently distinct from those outside the group.

B. ***PCC Structurals*** **Requires a** ***Meaningful*** **Evaluation of the Interests of Employees** ***Outside*** **of the Proposed Unit.**

Under *PCC Structurals*, bargaining unit analysis must involve a "meaningful evaluation" of the appropriateness of a unit, including a "careful examination of the community of interests of employees both within *and* outside the proposed unit." *Id.* at 3, 7. This inquiry must include "whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.'" *Id.* In addition, "the Board must determine whether 'excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.'" *Id*. (emphasis in original) (approving and quoting *Constellation Brands*, 842 F.3d at 794).

These dictates are relatively straightforward. The Board must, when conducting unit analysis, weigh the community of interest factors as they relate to *all* of the employees in a given workplace. And, where commonalities between and among those in the unit outweigh any similar commonalities shared with those outside the unit, the Board must provide a "meaningful" analysis and explanation of how that is the case.

Here, it does not appear the Decision adequately—"meaningfully"—presents such an analysis. While the Decision *addresses* the eight community-of-interest factors set forth in *PCC Structurals*, it does not appear the Regional Director engaged in the searching evaluation of those factors called for by the Board in *PCC Structurals*. While *Amici* do not seek to re-litigate all of those factors here, it is worth noting that the manner in which the Decision analyzes some of them suggests the need for clarification of how the *PCC Structurals* Board intended those factors be applied. For example:

• ***Separate Department***. The Decision states the employees in the petitioned-for group share a "separate department" in that they are classified under the same job code in the employer's human resources system. However, the employees at issue actually work in two *different* departments. Moreover, after acknowledging that the petitioned-for group is comprised of employees in two different departments, the Decision does not analyze whether any *excluded* employees *also* work in those departments.

Under *PCC Structurals*, this kind of grouping should result in a fragmented (and rejected) unit. *Amici* understand *PCC Structurals*—and the decades of precedent it cites—to include the "separate department" factor as a means of establishing whether the petitioned-for group is *itself* organized into its own department or grouping that is separate from other employees, or—on the other hand—whether it is part of a department that includes other employees. It is not a fair reading of *PCC Structurals* to hold that when groups of employees who work in different departments nevertheless have the same job classification, they constitute a "separate department" within the meaning of the traditional community of interest test. The Board should clarify on review that this not what it intended in *PCC Structurals* and that the "separate department" factor does not militate in favor of a petitioned-for unit where employees in that unit

are not actually organized in a "separate department." This kind of analysis gives short shrift to employees who may actually share organizational structure with employees in the petitioned-for unit.[7]

• ***Common Supervision***. The Decision notes that while the petitioned-for employees do not all share common supervision with each other, they *do* share common supervision with other, excluded employees. Under *PCC Structurals*, this would suggest that the petitioned-for unit does not have "common supervision" that is "sufficiently distinct" from employees outside the unit. Where employees in a petitioned-for unit do not share uniformity of supervision with one another, but do share supervision with excluded employees, one would think the petitioned-for group does not enjoy "common supervision" under traditional principles. The Decision somehow reaches the opposite conclusion.

On review, the Board should clarify that for "common supervision" to weigh in favor of a petitioned-for unit, employees in the unit *must actually have common supervision*. The Board should further clarify this factor by explaining what level of analysis is required before a Regional Director may justifiably discount evidence that employees in the petitioned-for unit share supervision with employees outside of the proposed unit. Again, discounting evidence of shared supervision between employees inside and outside of the proposed unit, and without adequate explanation why, appears not to provide the "meaningful" analysis called for in *PCC Structurals*.

[7] Indeed, finding the existence of a "separate department" based primarily on the fact that the petitioned-for employees are classified the same way in the employer's computer system harkens back to *Specialty Healthcare's* dubious implication that employees could be deemed "readily identifiable" simply because they all share a job title. *See Specialty Healthcare* at 945-46 (holding petitioned-for group can be "readily identifiable as a group (based on ***job classifications***, departments, functions, work locations, skills or similar factors)")(emphasis added); *see also* discussion at IV.E., p. 19-21 *infra*. As noted above, *PCC Structurals* rejected that kind of analysis.

• ***Functional Integration*.** The Decision notes that while the petitioned-for employees are all part of the employer's "integrated manufacturing process," they were "functionally integrated *as to each other* to a much greater extent than they are with the rest of the workforce." *See* Decision at 31 (emphasis added). This analysis is at odds with the notion of what it means to be "functionally integrated." Historically, the Board has rejected departmental units (if that is what this unit can be called) "in cases involving defense contractors with highly-integrated and centralized operations like those at issue here." *Northrop Grumman Shipbuilding, Inc*., 357 NLRB 2015, 2021 (Member Hayes, dissenting)(citing *North American Rockwell*, 193 NLRB 983 (1971)). Moreover, the Board has routinely rejected attempts to fragment highly integrated workforces merely because a petitioned-for group of employees share functional integration among themselves. *See, e.g., Westinghouse Electric Corp*., 300 NLRB 834, 834 (1990)(petitioned-for employees' "tasks are essential to enable other technicians to perform their work and to fulfill the Employer's mission"); *see also DPI Secupint, Inc.*, 362 NLRB No. 172, slip op. at 10 (2015)(Member Johnson, dissenting)(separate unit of offset press employees "pluck[s] the heart from the [employer's] production process" in which all employees worked "in a linear, functionally integrated production process").

The Board should clarify on review that the functional integration factor weighs heavily in the employer's favor where the employer is a highly integrated operation in which all of the employees in the plant work in concert to produce a single product at a single location. By minimizing and disregarding the highly integrated nature of Boeing's operations, the Regional Director here gave a shrift to this factor that the *PCC Structurals* Board would regard as inappropriately "perfunctory." *PCC Structurals* at 4.

C. *PCC Structurals* Requires Consideration of Traditional Presumptions.

In *PCC Structurals*, the Board expressly recognized that "where applicable, the [bargaining unit] analysis must consider guidelines that the Board has established for specific industries with regard to appropriate unit configurations." *PCC Structurals* at 11. Prior to *Specialty Healthcare,* the Board recognized that a plant-wide unit is presumptively reasonable and that the Board "does not favor organization by department or classification" in manufacturing settings. *See Airco, Inc.*, 273 NLRB at 349 (*cited with approval in International Bedding Co.*, 356 NLRB No. 168 (2011)). A "highly integrated operation with the function of each department being integrally dependent upon the functions of other departments" was precisely the type of situation where micro-units typically were found inappropriate. *Avon Products*, 250 NLRB 1479, 1482-84 (1980) (accepting the Employer's assertion that a wall-to-wall unit of employees involved in the various aspects of the "order flow process" was appropriate).

Indeed, prior to *Specialty*, the Board rejected attempts to carve out particular departments in integrated operations where employees' terms and conditions of employment were similar. *See, e.g., Publix Super Markets, Inc.*, 343 NLRB 1023, 1024 (2004) (rejecting single department at distribution facility; analysis included consideration of excluded employees); *Buckhorn, Inc.*, 343 NLRB 201, 203 (2004) (finding maintenance-only unit inappropriate because of employer's "highly integrated" operations); *Boeing, Inc.*, 337 NLRB 152 (2001) (rejecting petitioned-for group of employees and finding that two other groups must be included in the unit); *Avon Products*, 250 NLRB 1479, 1482-84 (1980) (reversing regional director's decision that failed to account for employer's "highly integrated process" and holding numerous classifications were improperly excluded); *Mann Mfg., Inc.*, 191 NLRB 863, 864-65 (1971) (rejecting petitioned-for unit of shipping department employees of clothing manufacturer with integrated facilities);

Holmberg, Inc., 162 NLRB 407, 409-10 (1966) (rejecting separate unit of tool room employees at manufacturing plant; recognizing that "the toolroom employees, even when engaged in their specialized tasks, perform work that is an integral part of the production process in which other employees in the existing bargaining unit are also engaged."); *see also Gustave Fisher, Inc.*, 256 NLRB 1069 (1981) (finding unit limited to warehouse workers at retail store inappropriate and that all-employee unit is appropriate where employer's operation is, among other factors, highly integrated).

For example, in *The Boeing Co.*, 337 NLRB 152, 153 (2001), the Board considered a petitioned-for unit of mechanics, tools and parts attendants, and quality assurance employees employed by Boeing at a separate flight line operation at the Charleston, South Carolina Air Force Base. *Id.* at 152. The petitioned-for group was responsible for repairing, inspecting, and maintaining the engines of C-17 aircraft. *Id.*

Applying the traditional community-of-interests analysis, the Board found that the proposed unit of employees did not possess a community of interest separate and distinct from the excluded employees that would justify a separate unit. *Id.* at 153. The Board found that "the Employer's servicing of the C-17 aircraft is only accomplished through the coordinated efforts of the [petitioned-for employees and the excluded employees]." *Id.* Despite the fact that the petitioned-for employees were separately supervised, attended separate employee meetings, worked in separate areas from the excluded employees, and never temporarily transferred into the excluded employees' groups, the Board found the proposed unit was not appropriate due to the highly integrated work force, the similarity in training and job functions, and the comparable terms and conditions of employment among the included and excluded employees. *Id.* The

Board held that "the smallest appropriate unit must include all production and maintenance employees at the Charleston Air Force facility." *Id.* at 152.

The 2001 *Boeing* decision is directly on point with the present case. The Regional Director did not mention the case in the Decision. On review, the Board should clarify that traditional presumptions—such as that wall-to-wall units are presumptively reasonable in large, highly integrated manufacturing settings—***must*** be specifically addressed where applicable, particularly where such precedent involves the same employer, a similar operation, and similar facts. Discounting such history (and precedent) results in a bargaining unit analysis that is necessarily incomplete.

D. *PCC Structurals* Requires Consideration of Bargaining History.

The Board has repeatedly recognized that bargaining history at a facility is relevant in a bargaining unit determination. *See, e.g., Airco, Inc.*, 273 NLRB at 348 (noting bargaining history is a relevant factor); *Gustave Fisher, Inc.*, 256 NLRB at 1069 (noting there was no history of collective bargaining with the employees); *Holmberg, Inc.*, 162 NLRB at 410 (noting that the 24-year history of collective bargaining at the facility was a relevant factor). Here, although prior attempts at organization at this facility have been unsuccessful, such a history is also relevant. The Regional Director did not take into account that the Petitioner twice requested a wall-to-wall bargaining unit at this same facility.

In 2015, Petitioner requested a wall-to-wall unit (Case No. 10-RC-148171) and then agreed to an election by all full-time and regular part-time production employees. Petitioner withdrew its Petition days before the election. In early 2017, Petitioner again requested a similar unit (Case No. 10-RC-191563), and again agreed to an election by all full-time and regular part-time production employees.

It was not until the instant case that the Union changed its focus to organizing a smaller group. This fact is highly relevant because it demonstrates that even the Union agrees that a wall-to-wall unit is appropriate. The Board recognized in *PCC Structurals* that "[a]ll statutory employees have Section 7 rights" that must be taken into account. *PCC Structurals* at 8; *see also id.* (the Board should not "unduly limits its focus to the Section 7 rights of employees in the petitioned-for unit, while disregarding or discounting the Section 7 rights of excluded employees").

While *PCC Structurals* did not discuss the importance of bargaining history in great detail, it is an important factor in this case and would be in any case where the union had sought a larger unit in a prior election and then narrowed its focus to a fragment of the larger unit in a subsequent election. As with prior on-point precedent involving the same employer, the Board on review should clarify that prior bargaining history is highly relevant to bargaining unit analysis and must be expressly considered and included in the Board's determination. At a minimum, the Board should be obligated to explain why such history does not militate against a finding that a subsequent petition for a smaller unit is not *per se* inappropriate, particularly where approving the smaller unit would fragment a highly integrated industrial workplace such as the one at issue in this case.

E. Certification Of The Petitioned-For Unit Would Have Been Improper Even Under The More Expansive, But Now Defunct, *Specialty Healthcare* Decision.

Finally, it is worth noting that while *PCC Structurals* overturned *Specialty Healthcare,* the unit sought in this case that would not even pass muster under that decision. Indeed, the present case is analogous to several cases where a proposed micro-unit was found inappropriate even under *Specialty Healthcare*.

For example, in *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, 361 NLRB 50 (2014) ("*Bergdorf*"), the union sought to organize women's shoes sales associates in two departments (Salon Shoes and Contemporary Shoes) located on two different floors. The two groups had separate direct supervisors and employees were not interchanged between these two departments. *Id.* The Salon shoe associates and the Contemporary shoe associates were readily identifiable in that they comprised all of the employer's shoes sales associates, and although they shared some community-of-interest factors such as a common purpose, they were paid the same as one another, and they received the highest commission rates of any sales associates. The Board, however, found that under *Specialty Healthcare*, the petitioned-for unit was inappropriate because the boundaries of the unit did not resemble any administrative or operational lines drawn by the Employer. *Id.*

The two groups of shoe associates were in different departments, and the department from which the Contemporary shoes associates were carved contained other sales associates who were excluded from the unit. *Id.* Additionally, the two groups of shoe associates had different managers, through several levels of the chain of command, until only at the highest level of management did they share supervision. *Id.* The Board also found significant that the two groups of shoe associates did not interchange among one another. *Id.* In light of the lack of relationship between the proposed unit and the operational lines drawn by the Employer, along with the absence of the other community-of-interest factors, the Board found that the petitioned-for unit in *Bergdorf* was inappropriate under *Specialty Healthcare*. *Id.*

In another analogous case, *Odwalla, Inc.*, 357 NLRB 1608 (2011), the Board rejected a proposed micro-unit under the *Specialty Healthcare* standard. There, the employer produced and sold juice drinks and fruit bars. *Id.* The proposed unit included delivery drivers, relief drivers,

warehouse associates, and cooler technicians, but excluded the merchandisers. *Id.* The Board found that the proposed unit was not appropriate under the *Specialty Healthcare* standard because it did not track any lines drawn by the employer, it did not aggregate employees along departmental lines, it was not drawn along functional lines, and it was not structured along supervisory lines. *Id.* at 1612-13. The Board concluded that for these reasons the proposed unit was a fractured unit, impermissible under *Specialty Healthcare*. *Id.* at 1612.

The reasoning used in *Bergdorf Goodman* and *Odwalla* would preclude the petitioned-for unit in the present case. Here, the petitioned-for employees work in separate departments from one another and those departments contain other Boeing employees excluded from the petitioned-for unit. The proposed unit does not track any lines drawn by Boeing, does not aggregate employees along departmental or functional lines, and is not structured along supervisory lines. Thus, the unit certified in the Decision is not "readily identifiable," has no community of interest *to itself* within the meaning of *Specialty Healthcare* and would be inappropriate even under that liberal standard. While it should be relatively clear that a unit that would not pass muster under *Specialty Healthcare* fails under the new, (appropriately) more restrictive standard set forth in *PCC Structurals,* the Decision evidences the need for additional clarity and specificity from the Board on application of the law to potentially fractured units.

V. CONCLUSION

The Regional Director's Decision does not properly incorporate the standards set forth by the Board in *PCC Structurals*. Allowing the Decision to stand will sow confusion among the Regions, will prevent the development of a uniform application of the *PCC Structurals* standard, and will breed confusion in the regulated community, particularly among those with businesses operating in more than one Region. The Board should use this case as a vehicle to demonstrate

the proper application of the *PCC Structurals* standard, particularly as it applies to highly integrated workplaces like the one at issue in this case.

For all these reasons, *Amici* respectfully request that the Board grant Boeing's request for review of the Regional Director's Decision and clarify the application of its *PCC Structurals* decision.

Dated: July 12, 2018

Respectfully submitted,

By: /s/ Ronald Meisburg
Ronald Meisburg
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037-1701
(202) 955-1500 Telephone
(202) 778-2201 Facsimile
rmeisburg@huntonAK.com

Kurt G. Larkin
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8776 Telephone
(804) 343-4886 Facsimile
klarkin@huntonAK.com

Robert T. Dumbacher
Rebekah K. Herman
HUNTON ANDREWS KURTH LLP
600 Peachtree Street NE, Suite 4100
Atlanta, Georgia 30308
(404) 888-4000 Telephone
(404) 888-4190 Facsimile
rdumbacher@huntonAK.com
bherman@huntonAK.com

Counsel for Amici