RECORD NOS. 14-2222(L); 14-2339

In The
United States Court of Appeals
For The Fourth Circuit

NESTLE DREYER'S ICE CREAM COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER AND CROSS-RESPONDENT

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The undersigned counsel for Amicus Curiae furnishes the following statement in compliance with Rule 26.1 of the Federal Rules of Appellate Procedure.

1. Does the party/amicus have any parent corporation? If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

   No.

2. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation? If yes, identify all such owners.

   No

3. Does any publicly held corporation, whether or not a party to the present litigation, have a direct financial interest in the outcome of the litigation by reason of a franchise, lease, or other profit sharing agreement, insurance, or indemnity agreement?

   No.

Date: January 13, 2015 s/ Bernard P. Jeweler
Bernard P. Jeweler

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STATEMENT PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5)

NAM, *Amicus Curiae*, hereby makes the following statements:

(A) No party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) No person – other than the *amicus curiae*, it members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE OF AMICUS CURIAE

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

According to the Bureau of Labor Statistics, there were approximately 1,558,000 union-represented employees employed by manufacturers in 2013 – the largest industry group of unionized private sector workers.

The NAM's labor policy is based on the principle that both manufacturers and their employees rely on fairness and balance in our labor law system, and that maintaining the time-tested balance between labor unions and employers is critical to economic growth and job creation. For several decades, the NAM has participated as amicus curiae in the large majority of significant labor cases before the Supreme Court, federal courts of appeal, and the NLRB, where such participation has been permitted.

NAM members, therefore, have a vital interest in the Board's application of *Specialty Healthcare*, 357 NLRB No. 83 (2011) in the manufacturing setting, especially where, as here, the Petitioner and Union have a history of bargaining over terms and conditions of employment for a unit of employees that includes both production and maintenance employees.

All parties, including the Petitioner, Respondent and Intervenor, have consented to the filing of this brief of NAM, Amicus Curiae, in support of Petitioner Nestle Dreyer's Ice Cream Company. As such, and in accordance with Federal Rule of Appellate Procedure 29(a), NAM is not required to file an accompanying motion for leave to file as Amicus Curiae.

PROCEDURAL HISTORY

This case arises from Nestle Dreyer's Ice Cream Company's (the "Company" or "Dreyer") technical refusal to bargain following the NLRB's certification of the petitioned-for unit consisting solely of maintenance employees.

On October 13, 2011, the International Union of Operating Engineers, Local 501, AFL-CIO (the "Union") filed a petition in Case 31-RC-066625 seeking to represent a unit consisting solely of maintenance employees at the Dreyer's Bakersfield, California facility, excluding, among other classifications, the production employees. At the subsequent representation case hearing and in its post hearing brief, the Company objected to the exclusion of production workers.

The Company argued that not only did the production and maintenance employees share a strong community of interest, bargaining history favored inclusion of both groups of employees in a single unit.[1]

On November 23, 2011, the Regional Director of Region 31 issued his Decision and Direction of Election ("DD&E") rejecting Dreyer's objections regarding the exclusion of the production employees. The DD&E cited to the Board's recent decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), for the proposition that "in order to establish that the petitioned-for maintenance unit could not be appropriate, the Employer must establish that the production and maintenance employees share an *overwhelming community of interest*." DD&E at 19 (citing *Specialty Healthcare*, supra, at 16)(emphasis added).

The Union subsequently won that election with a small majority of the vote (56 to 53 voted in favor of unionizing). Thereafter, Dreyer's engaged in a technical refusal to bargain in order to preserve its right to appeal the Board's decision to certify the maintenance-only unit.

On May 18, 2012, the Board ruled that the Company's technical refusal to bargain violated Section 8(a)(5) of the National Labor Relations Act (the "Act").

[1] In 1991 the Union petitioned to represent both groups of employees in a single unit. Although the Union won that election and was certified to represent both production and maintenance employees at the Bakersfield facility, the Sixth Circuit subsequently invalidated the election because it found that the Union improperly conferred benefits on employees prior to the election.

Pursuant to the Supreme Court's holding in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) that decision was invalidated, along with the other decisions of the unconstitutionally-appointed Board members. A properly constituted quorum of the Board later reconsidered the case and reissued a new decision on November 5, 2014 in which it found, again, that the Company's technical refusal to bargain violated Section 8(a)(5) of the Act. On November 7, 2014, Dreyer timely filed a petition for review of the Board's Order. On December 9, 2014, the Board cross-petitioned for enforcement of its Order.

SUMMARY OF ARGUMENT

This Court should reverse the Board's decision that Dreyer's technical refusal to bargain violates Section 8(a)(5) of the Act because by certifying the petitioned-for unit of maintenance employees, the Board erroneously: (1) failed to give proper consideration to the bargaining history that included a broader unit of maintenance and production employees; (2) made the extent of organization a controlling factor in the unit determination, which is in direct contravention of Section 9(c)(5) of the Act; (3) relied on the "overwhelming community of interest" test announced in *Specialty Healthcare* supra, which this Court explicitly rejected in *Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995); and (4) ignored long-standing Board precedent that production and maintenance units are presumptively appropriate.

ARGUMENT

A. THE BOARD ABUSED ITS DISCRETION BY ABANDONING LONG-ESTABLISHED UNIT DETERMINATION STANDARDS WHERE THERE WAS CLEARLY-ESTABLISHED BARGAINING HISTORY

As noted in the DD&E, in 1988 the predecessor employer recognized and negotiated a collective bargaining agreement with the General Teamsters and Food Processing Union, Local No. 87. Article 1 (Recognition) of the agreement defined the bargaining unit as:

> …all hourly production, maintenance and materials team members at the plant but specifically excluding all office and plant clerical, security, team coordinators and Supervisory Personnel as defined in the Act, resource specialists and information automation services.

DD&E at 12.

However, the International Union of Operating Engineers, Local 501 (AFL-CIO), the Intervenor in the instant matter, (hereafter "Intervenor" or Union") objected to the representation and the Teamsters agreed to cease representing employees at the Bakersfield facility.

Thereafter, in 1991, the Teamsters and Intervenor filed a joint petition to represent the production and maintenance employees at Dreyer's Bakersfield facility. *Nestle Ice Cream Co., v. NLRB*, 46 F.3d 578, 579 (6th Cir. 1995). The NLRB subsequently conducted an election involving that same maintenance and production unit at the Bakersfield facility with no challenge to the unit's

appropriateness. Although the unions won the election to represent the production and maintenance employees, that election victory was subsequently invalidated on the grounds that the unions provided substantial monetary benefits to employees (free legal services) in advance of the election. *Id.* at 584.

This history of union organization and collective bargaining is relevant because the Board has recognized that prior bargaining history is to be given substantial weight in making unit determinations. *See, e.g. ADT Security Services, Inc.*, 355 NLRB 1388 (2010).

In fact, even the Board's decision in *Specialty Healthcare* reaffirms this well-established precedent, as the majority in that case explicitly disavowed application of the "overwhelming community-of interest" test in cases where prior bargaining history exists in the plant. Specifically, the Board noted in *Specialty Healthcare* that one of the issues presented to it was "[w]here 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 healthcare facilities. Should such a unit be presumptively appropriate as a general matter." *Id.* at *2. Later in its *Specialty Healthcare* decision, the Board answered these questions in the negative stating that the "overwhelming community of interest" test did not apply where there is a history of collective bargaining. The Board further clarified that "[i]t is highly significant that, ***except***

in situations where there is prior bargaining history, the community of interest test focuses almost exclusively on how the employer has chosen to structure its workplace." *Id.* at fn.19. (emphasis added)

The Board's decision in the instant matter, therefore, erroneously broadens its *Specialty Healthcare* "overwhelming community of interest" test as applying to unit determinations where there is a history of union organizing and collective bargaining. Moreover, by ignoring the above-described bargaining and organizing history the Board's decision in this case conflicts with its statutory objective of stability in industrial relations. *See, Hi-Way Billboards*, 191 NLRB 244 (1971).

B. THE BOARD ABUSED ITS DISCRETION BY MAKING "EXTENT OF ORGANIZATION" A CONTROLLING FACTOR IN THE UNIT DETERMINATION

The Board further abused its discretion by making "extent of organization" a controlling factor for unit determinations. Prior to the Taft-Hartley Act amendments in 1947, the Board found extent of organization – that is, the extent to which a petitioning union has sought to represent a discrete group of employees whom the union believes will vote for the union – to be a significant, and in some cases "controlling" factor in determining the appropriateness of a bargaining unit determination.

With the passage of the Taft Hartley Act, however, and as this Court has long recognized, Section 9(c)(5) of the Act prohibits the Board from establishing a

bargaining unit solely on the basis of extent of organization. *See*, *NLRB v. Morganton Hosiery Co.*, 241 F.2d 913 (4th Cir. 1957); *See also, Metropolitan Life Insurance Co., v. NLRB*, 380 U.S. 438 (1965).

Importantly, this Court's holding in *Lundy Packing Co.* made clear that the Act does not "merely preclude the Board from relying 'only' on the extent of organization" it "prohibit[s] the Board from assigning this factor either exclusive or 'controlling' weight" even where the Board considers additional community of interest factors in its analysis. *Lundy Packing Co.*, supra at 1580. This means that the Board cannot simply consider factors other than the extent of organization while it nevertheless allows extent of the organization to guide its decision.

The important labor policy reasons why Congress chose not to allow petitioning unions to gerrymand fragmented bargaining units to the extent of organization, and the reasons behind Section 9(c)(5), are clearly demonstrated in this case. Especially in the manufacturing industry, permitting a union to select small, fragmented bargaining units in critical areas of the manufacturing operation to organize would privilege a striking union to shut down a key part of the manufacturing process. This, in turn, could disrupt, and possibly shut down, the entire operation thus spreading the dispute and exerting exaggerated pressure on the manufacturer to capitulate to the union's bargaining demands.

There is another critical basis in national labor policy demonstrated here for rejecting the Board's unit determination. By authorizing a small, fragmented bargaining unit, the Board ignores the desires of other employees who may want to be included in the unit or who may have a bargaining history in the unit.

Finally, with the Board's issuance of new representation election rules set to go into effect in April 2015, many of the critical bargaining unit determinations will be rushed into a 7-day time frame from the date of the union's petition, and then possibly delaying the resolution until after the election. This is what dissenting Board Members Miscimarra and Johnson termed: "Vote now, understand later." The new rules, combined with the extension of the *Specialty Healthcare* rule to manufacturing, will result in needless confusion and controversy.

The Board abused its discretion by approving the petitioned-for bargaining unit of maintenance-only employees to the extent of the Union's ability to organize, and ignoring bargaining history, apparently simply to facilitate union organizing in violation of Section 9(c)(5) of the Act and well-established labor policy.

C. THE BOARD ABUSED ITS DISCRETION AND VIOLATED THE ACT BY REQUIRING AN "OVERWHELMING COMMUNITY OF INTEREST" BURDEN OF PROOF

This Court recognized in *Lundy* that the Board's "overwhelming community of interest" test "accord[ed] controlling weight to the extent of union organization" and constituted "a classic 9(c)(5) violation." *Id.* at 1581. There can be no dispute that the Board's "overwhelming community of interest" test in *Specialty Healthcare* sets forth the same test that this Court explicitly rejected in *Lundy*. This Court's decision in *Lundy's* controls here and, therefore, the Board's Order applying *Specialty Healthcare* to the maintenance-only bargaining-unit certified in this case cannot be enforced.

Before its decision in *Specialty Healthcare*, the Board's traditional practice in unit determination was to evaluate the petitioned-for unit in conjunction with an assessment of the community of interest factors shared by other employees not sought by the union. Following the Board's decision in *Specialty Healthcare*, however, the petitioned-for unit of single job classifications in a single location is "presumptively" appropriate, as indeed it was so determined in the instant matter. This new "presumption" imposes a nearly impossible burden of proof on all employers that a broader unit consisting of employees excluded by the union shares an "overwhelming" community of interest with the employees sought by the union. As the Board stated in *Specialty Healthcare*: "(it) 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." *Specialty Healthcare*, supra, at 13.

As mentioned above, it is instructive that previous efforts to apply the "overwhelming community of interest" test have been struck down by this Court in *Lundy*:

> The Board ... adopted a novel legal standard which effectively accomplished the exclusion. Under this new standard, any union-proposed unit is presumed appropriate unless an "overwhelming community of interest" exists between the excluded employees and the union-proposed unit: "Here, [the Board] find[s] ... that the technicians do not share such an overwhelming community of interest with the petitioned-for production and maintenance employees as to mandate their inclusion in the unit despite the Petitioners' objections." *Lundy Packing Co., Inc.*, 314 NLRB 1042,1045 (1994). 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." *Laidlaw Waste Systems, Inc. v. NLRB*, 934 F.2d 898, 900 (7th Cir. 1991); see *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984) ("the fact that [ ] the union wanted a smaller unit ... could not justify the Board's certifying such a unit if it were otherwise inappropriate").

Lundy Packing Co., supra at 1581

D. THE BOARD ABUSED ITS DISCRETION BY ESTABLISHING A PRESUMPTION IN FAVOR OF SINGLE JOB CLASSIFICATION UNITS IN THE MANUFACTURING SECTOR

On December 22, 2010, a majority of the National Labor Relations Board invited the pubic to file amicus briefs in *Specialty Healthcare*. The Notice propounded eight questions for the parties and interested amici to address.[2] Buried within a subpart of one of the eight questions, the Notice only hinted at the Board's subsequent broad application of what appeared to be a limited issue all but confined to health care bargaining units. Instead, the Board asked merely in passing for the reaction of the parties and amici if the Board were to consider applying a new standard to all unit determinations in other industries.[3]

Member Hayes's dissent blew the whistle:

> This was a simple case. * * * The majority, however, has made a different choice. It seizes upon this case as an occasion for reviewing not only Park Manor and the standards for unit determinations in nonacute health care facilities, but also for reviewing "the procedures and

[2] *Id.* Of the eight questions, only two are relevant here: "(7) Where there is no history of collective bargaining, should the Board hold that a unit of all employees performing the same job at a single facility is presumptively appropriate in nonacute health care facilities. Should such a unit be presumptively appropriate as a general matter. (8) Should the Board find a proposed unit appropriate if, as found in *American Cyanamid Co.*, 131 NLRB 909, 910 (1961), the employees in the proposed unit are "readily identifiable as a group whose similarity of function and skills create a community of interest."[*Id.*, at 1-2.]

[3] Had broader application of a changed rule been the Board's original intention, it should have announced it as such, which NAM argues would have warranted notice and comment rulemaking under the protections of the Administrative Procedures Act.

> standards for determining whether proposed units are appropriate in all industries." This is no longer a simple case.

Specialty Healthcare, 356 NLRB No. 56, slip op at 4. (2011).

In dissenting from the Notice, Board Member Hayes, stated:

> (T)he notice and invitation to file briefs is a stunning initiative by my colleagues to consider replacing decades of Board law applying the community of interest standards with a test that will likely find any group of employees who perform the same job in the same location is an appropriate bargaining unit, without regard for whether the interests of the group sought are sufficiently distinct to warrant the establishment of a separate unit. This initiative clearly represents broad scale rulemaking without the "inconvenience" of complying with the various statutory requirements for rulemaking under the Administrative Procedures Act, and without the scrutiny and broad-based review that such requirements are designed to insure. The compelling need for such review and scrutiny is patent here, inasmuch as the result contemplated could reduce to insignificance the mandate under the Act that extent of organization shall not be a controlling factor in unit determinations.

Specialty Healthcare, supra at 4.

On August 26, 2011, the Board, again over the dissent of Member Hayes, issued its Decision on Review and Order in *Specialty Healthcare* in which the Board Majority, as Member Hayes had predicted it would do, fundamentally altered the Board's historical interpretation and application of Section 9 of the Act 29 U.S.C. § 159, in all future bargaining unit determinations by the Board.

The warnings from Member Hayes about the Board Majority's intent were clairvoyant. While the Board Majority described these changes as mere "clarifications" and "relatively minor changes" of existing case law, Member Hayes more accurately wrote:

> Make no mistake. Today's decision fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction. My colleagues' opinion stunningly sweeps far more broadly even than suggested by the questions posed in the notice and invitation to file briefs to which I previously dissented.

Specialty Healthcare, supra at 19.

Indeed, in *Specialty Healthcare*, the Board Majority's reversal of precedent and dramatic change in Board unit determination jurisprudence and procedures are "stunning." As predicted by Member Hayes, the Board has now subsequently applied its new unit determination standard, described below, in cases throughout the country to employers and industries well beyond simply nonacute health care institutions.[4] The changes in Board unit determination jurisprudence and

[4] In the brief period since the Board issued its decision in *Specialty Healthcare*, Regional Directors and the Board have already applied the new *Specialty Healthcare* standard in a number of cases, in addition to the instant matter, affecting employers industry-wide. For example, see the following sampling of decisions all of which applied the new *Specialty Healthcare* unit determination standard outside the healthcare industry: *DTG Operations, Inc*. 357 NLRB No. 175 (2011); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011); *Odwalla, Inc.*, 357 NLRB No. 132 (2011); *Texas Terrace Care Center*, 18-RC-070382, 2012 WL 252255 (NLRB 2102); *First Aviation Services, Inc.*, 22-RC-

procedures, and their impact and importance to employers and employees throughout the country, can hardly be described as merely a minor "clarification."

While unit determinations by the Board have received deference by reviewing courts, that same deference should not be accorded where, as here, the Board sweeps aside decades of established, consistently applied precedent for production and maintenance units in the manufacturing sector. Even assuming, for the sake of argument, that bargaining history for the Company's production and maintenance unit did not exist, the Board has long recognized that it is "well settled that a plantwide production and maintenance unit is presumptively appropriate." *J.P. Stevens & Co.*, 268 NLRB 63, 76 (1983); *See also*, *RTW Industries*, 296 NLRB 910, 912 (1989).[5]

The Board's certification of the maintenance-only unit in the instant matter is especially objectionable since the parties have historically recognized a unit of production and maintenance employees. If allowed to stand, the Board's decision in the instant matter would force on manufacturing employers such as the

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061300, 2011 WL 4994731 (NLRB 2011); *Nova Bus*, 3-RC-071843, 2012 WL 870846 (NLRB 2012), *corrected*, 2012 WL 928253 (NLRB 2012); *Bread of Life, LLC*, No. 7-RC-072022, 2012 WL 957661 (NLRB 2012). In all but one of the above decisions, *Odwalla Inc.* 357 NLRB No. 132 (2011), employers' attempts to argue for a larger, more inclusive unit under traditional community of interest standards, were rejected under the Board's new *Specialty Healthcare* standard.

[5] This is especially true where, as here, the production and maintenance employees (1) work closely together, (2) interchange frequently, (3) are paid nearly the same wages; (4) receive the same benefits; and, (5) are subject to identical terms and conditions of employment.

Petitioner the impossible burden to overcome the union's petitioned-for single classification units by proving an "overwhelming community of interest" in formerly presumptively appropriate units of production and maintenance employees.

CONCLUSION

To simply allow the instant certification of a maintenance-only unit to stand in contravention of Section 9(c)(5) of the Act, bargaining history, the Board's long-standing recognition that production and maintenance units are presumptively appropriate, and this Court's clear precedent in *Lundy Packing Co.*, would be a disservice to employees, employers, orderly collective bargaining, and national labor policy.

For all the above reasons, NAM respectfully requests that this Court grant Petitioner's review, deny enforcement of the Board's November 5, 2014 Decision and Order, and dismiss the case.

Dated: January 13, 2015.

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Dated: January 13, 2015

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of January, 2015 I caused this Brief of Amicus Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that on Jan. 13, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Bernard P. Jeweler
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NESTLE DREYER'S ICE CREAM COMPANY Petitioner-Cross Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent-Cross Petitioner	)	No. 14-2222

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

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I hereby certified that the Brief of Amicus Curiae National Association of Manufacturers in Support of Petitioner and Cross Respondent was filed with the Clerk for the Court for the United States Court of Appeals for the Fourth Circuit, by using the appellate CM/ECF system on January 13, 2015 on the following individuals:

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