UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

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

REQUEST FOR SPECIAL PERMISSION TO FILE BRIEF OF *AMICI CURIAE* RETAIL INDUSTRY LEADERS ASSOCIATION AND RETAIL LITIGATION CENTER

Dated: June 13, 2012

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The Retail Industry Leaders Association ("RILA") and Retail Litigation Center ("RLC") respectfully request special permission to file the attached amicus brief.

As explained in full in the attached amicus brief, 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.

The RLC is another membership association of leading companies in the retail industry that was formed to provide courts with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be decided in pending cases.

RILA and RLC (collectively "amici") strongly disagree with the Regional Director's decision in this case certifying a bargaining unit of two floors of shoe sales associates in a single retail store. Instead, amici believe that the Board's longstanding presumption in favor of whole-store or "wall-to-wall" units in the retail industry strikes the appropriate balance between the interests of employees and unions in organizing, as well as the interest of employers in productively managing their business. Any change in the presumption would serve to balkanize the structure of the employer's business, adversely affecting amici's members and their businesses, complicating labor relations and collective bargaining, threatening to embroil customers and other members of the pubic in labor disputes, and building in delay and increased costs in the Board's currently fair and efficient representation process. Amici and their members are thus concerned

that affirmance of the Regional Director's decision will cause a massive disruption in their industry without any necessary precipitating purpose.

The unit determination standards used by the Board have a significant impact on amici's members because most, if not all, fall under the jurisdiction of the Act. Amici thus submit that they have a significant interest in the Board's activities in this area. For these reasons, amici respectfully request special permission to file the attached amicus brief.

Respectfully Submitted,

Dated: June 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, I caused a true and correct copy of the foregoing Request for Special Permission to File Brief of *Amicus Curiae*, as well as the proposed Brief of *Amicus Curiae*, to be served via electronic filing through the National Relations Board's website on the following:

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Copies were also served on counsel of record for Local 1102 Retail, Wholesale Department Store Union; counsel of record for The Neiman Marcus Group, Inc.; and the Regional Director for Region 2 via Federal Express at the following addresses of record:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The Regional Director approved a unit consisting of "full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department" employed at Bergdorf Goodman's New York retail location. Op. 25. This unit is a hybrid and a fiction—a conglomeration of two separate departments that, other than at the whole-store level, do not share common management. It is also the proverbial canary in the coal mine: if this unit is sustained, a cascade of similarly artificial units will fragment the retail workforce, sow discord among employees, limit employee opportunities for advancement, and undermine the efficient and effective operation of retail stores.

Fragmentation of the retail workforce is fundamentally at odds with the central purpose of a retail establishment, which is to provide seamless and effective customer service throughout the store. A retail employee must be ready and able to respond to questions outside her particular area of expertise, and cannot effectively operate within a narrow operational fiefdom. The workforce in a typical retail store is therefore highly integrated. Employees work in close proximity under common management, common policies, and the same working conditions. For precisely this reason, a half-century of Board precedent has consistently recognized a presumption in the retail context in favor of the whole-store unit.

Nothing in this case justifies a departure from the Board's traditional approach to retail bargaining unit determinations. A bargaining unit consisting only of 2nd and 5th floor shoe departments fractures the whole-store unit, and a proliferation of similar bargaining units would hamstring retail operations, while also undermining the Act's policy of promoting stable labor relations and the free flow of commerce. Administrative costs would multiply. A single store's workforce could be dissected into dozens of bargaining units, with the number of units increasing dramatically across a retail chain. Segregation of the workforce would reduce flexibility and

hamper customer service, as well as limit opportunities for employees who could be denied the chance for advancement or additional shift work because of union line-drawing. The introduction of multiple bargaining units in a single store (some of which would inevitably have more bargaining power than others) would set employees against each other, prompt competition for benefits and frequent strikes and stoppages, and lower morale of similarly-situated employees who could enjoy less favorable working conditions simply by virtue of the relative bargaining power of the different units. Employers would face substantial administrative and practical impediments to fulfilling their fundamental statutory obligation to "meet . . . and confer in good faith" with employees "with respect to wages, hours, and other terms and conditions of employment"—the core purpose of the NLRA. 29 U.S.C. § 158(d).

There is no good reason to inflict such discord and disruption on the retail industry. Indeed, two-thirds of the U.S. economy is driven by consumer spending, and the retail industry employs nearly 15 million Americans in retail jobs that offer wages and benefits where none would otherwise exist. The importance of a healthy, well-functioning retail industry to employees, communities and the economy cannot be overstated.

II. STATEMENT OF INTEREST

The Retail Industry Leaders Association ("RILA") promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include 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.

The Retail Litigation Center ("RLC") was formed to provide courts with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequenc-

es of legal principles that may be determined in pending cases. Its membership includes many of the country's largest and most innovative retailers.

RILA and RLC ("amici") strongly disagree with the Regional Director's decision in this case certifying a bargaining unit of shoe sales associates on two different floors in a single retail store. Instead, amici believe that the Board's longstanding presumption in favor of whole-store or "wall-to-wall" units in the retail industry strikes the appropriate balance between the interests of employees and unions in organizing, as well as the interest of employers in productively managing their business. Any change in the presumption would serve to balkanize the structure of the employer's business, adversely affecting amici's members and their businesses, complicating labor relations and collective bargaining, threatening to embroil customers and other members of the public in labor disputes, and building in delay and increased costs in the Board's current representation process. Amici are thus concerned that affirmance of the Regional Director's decision will cause a massive disruption in their industry without any necessary precipitating purpose.

The unit determination standards used by the Board have a significant impact on amici's members because most, if not all, fall under the jurisdiction of the Act. Amici thus submit that they have a significant interest in the Board's activities in this area, and therefore submit this *amicus* brief.

III. ARGUMENT

Longstanding Board precedent makes this an easy case. The Regional Director's decision must be reversed because it does not comport with the well-established rule creating a presumption in favor of the whole-store unit in the retail context. This whole-store presumption has been repeatedly applied, across the past half-century, to reject far more inclusive proposed units of retail employees than the two shoe departments at issue in this case. Once the Board has es-

tablished such a policy through adjudication, "subsequent decisions must be reasonably consistent with the expressed policy." *Consol. Papers, Inc. v. NLRB*, 670 F.2d 754, 757 (7th Cir. 1982); *see also Westvaco, Va., Folding Box Div. v. NLRB*, 795 F.2d 1171, 1173 (4th Cir. 1986). "Whatever the Board's chosen criteria for decision, they must be applied consistently." *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1583 (4th Cir. 1995).

Even in the absence of the Board's longstanding precedent, the Regional Director's decision would have to be reversed. The decision creates a fantastical unit that has no relationship to the organizational structure of the employer or to the categories of units permitted by section 9(b) of the Act. *See* 29 U.S.C. § 159(b). Because the decision approves an arbitrary unit proposed by the union, it violates the requirement of 9(c) that the Board not give controlling effect to the extent of organization by the union. *Id.* § 159(c)(5). The decision will compound the administrative costs of the retail business, reduce employee opportunities, create unnecessary discord within the retail workforce, and effectively disenfranchise similarly-situated workers excluded from the approved unit. Such a rule has no basis in law or policy.

A. The Regional Director's Decision Impermissibly Departs From A Half-Century Of Board Precedent Establishing A Presumption In Favor Of Whole-Store Units In The Retail Context

Applying a standard drawn from *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011)—in direct conflict with the Board's clear direction that the standard adopted in that case for non-acute healthcare employers was not intended to disrupt traditional industry presumptions such as the retail whole-store presumption, slip op. at 13 n.29—the Regional Director erroneously concluded that a whole-store unit was not required in this case because "the Employer has not established that employees in a store-wide unit . . . have an overwhelming community of interest with the petitioned-for employees." Op. at 2–3. Yet, for over a half century, the Board has recognized a presumption in favor of whole-store units in the retail

context, and has required unions seeking a narrower bargaining unit to justify departure from that baseline. The Regional Director's importation of the *Specialty Healthcare* standard to disrupt the traditional retail industry presumption effectively reversed this longstanding approach, requiring the employer to establish an "overwhelming" community of interest among all employees in the store in order to avoid recognition of a narrower bargaining unit.

1. Specialty Healthcare Was Flawed And Should Either Be Reversed Or, At Minimum, Cabined To Its Specific Facts

As an initial matter, the "overwhelming" community of interest test adopted by the Board in *Specialty Healthcare* to determine the appropriate size of an initial bargaining unit constitutes a radical, unreasoned departure from decades of precedent. The test is inconsistent with the statutory commands in Sections 9(b) and 9(c)(5) of the Act that the Board determine the appropriate unit and that it not be created according to the extent of union organization. To the extent the test is applied outside the non-acute healthcare context in which it arose, it threatens to cause substantial damage, including to the vitality and operation of the retail industry.

The only decision prior to *Specialty Healthcare* of which *amici* are aware in which the Board purported to apply an "overwhelming community of interest" standard to an initial unit determination was in *Lundy Packing Co.*, 314 N.L.R.B. 1042 (1994). The Fourth Circuit, however, overturned this decision as inconsistent with the NLRA, which provides that in determining whether a particular unit is appropriate, "the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5); *Lundy Packing Co.*, 68 F.3d 1577. The court reasoned that "[b]y 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." 68 F.3d at 1581. "This is because the union will propose the unit it has organized." *Id.* (internal quotation marks omitted). In *Specialty*

Healthcare, the Board adopted virtually the same standard overturned by the Fourth Circuit, and thereby infringed on the rights of employees with similar interests in the same store from voting on whether, and on what terms, to collectively bargain—in plain violation of the NLRA.

The Board derived its "overwhelming" community of interest standard from *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008). The D.C. Circuit, however, impermissibly borrowed this "overwhelming" community of interest standard from accretion cases, in which employers seek to add new employees into a preexisting unit without an election—for example, employees from a newly-acquired department store. *See id.* at 422. These cases, whose purpose is to preserve the right of employees to vote on whether or not to unionize, are plainly inapposite here, where the issue is whether to *expand* voting rights in representation elections to additional employees with common interests in the same store. The only Board decisions cited in *Blue Man Vegas* from the initial representation context are plainly inapposite. *See Jewish Hosp. Ass'n*, 223 NLRB 614, 617 (1976) (describing *employer's characterization* of two groups of employees as sharing an "overwhelming community of interest"); *Lodgian, Inc.*, 332 NLRB 1246, 1255 (2000) (applying traditional community-of-interest analysis to include concierges in unit of hotel employees, while noting that shared interests in that case were "overwhelming").

Because *Specialty Healthcare* was wrongly decided and inconsistent with key provisions of the NLRA, the Board should take this opportunity to revisit the damage caused by the decision and, at minimum, confirm that it is limited to the nonacute healthcare context in which it arose.[1] It should also reaffirm that the Board meant what it said when it indicated that it did not

[1] Amici also adopt by reference the arguments made in the amicus brief filed by the Coalition for a Democratic Workplace, *et al.*, which provides further explanation as to why *Specialty Healthcare* was wrongly decided.

intend to disrupt established industry rules, including the whole-store presumption that has traditionally governed in the retail industry.

2. The Board Should Reaffirm Its Traditional Whole-Store Presumption

For over a half-century, the Board has consistently recognized a presumption in favor of the whole-store unit in the retail industry. As early as 1957, the Board recognized that it had "long regarded a storewide unit of all selling and nonselling employees as a basically appropriate unit in the retail industry." *I. Magnin & Co.*, 119 NLRB 642, 643 (1957). The Board further explained that it has a "policy" favoring units that "encompass all store employees." *Kushins & Papagallo*, 199 NLRB 631, 631–32 (1972). Indeed, "a single store in a retail chain . . . is *presumptively* an appropriate unit for bargaining." *Haag Drug Co.*, 169 NLRB 877, 877 (1968); *see also Charrette Drafting Supplies Corp.*, 275 NLRB 1294, 1297 (1985) ("[T]he Board finds a single-facility unit presumptively appropriate."). A smaller unit would only be appropriate where a petitioner could show that employees within the proposed unit "constitute a functionally distinct group with special interests sufficient to warrant their separate representation." *Levitz Furniture Co.*, 192 NLRB 61, 63 (1971); *see also I. Magnin*, 119 NLRB at 643 (employees in proposed unit must be "sufficiently different from those of other employees to warrant their establishment in a separate unit").

The Board in *Specialty Healthcare* recognized that it had "developed various presumptions and special industry and occupational rules in the course of adjudication" and stated that its decision was "not intended to disturb any rules applicable only in specific industries." 357 NLRB at 13 n.29. Yet the Regional Director in this case speculated that the Board did not truly mean what it said, and observed that the Board in fact expressed "reservation at creating generalizations about appropriate industry units," op. 23, in its recent decision in *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011). But that is an incorrect reading of *Northrop*

Grumman, which itself reiterated that "to the extent that the Board has developed special rules applicable to" a particular industry or type of employee—as it indisputably has in the retail context—those existing "rules remain applicable" even after *Specialty Healthcare*. Slip op. at 5 (citing *Specialty Healthcare*, 357 NLRB No. 83, slip op. at 13 n.29). In any event, the Regional Director's misreading of *Northrop Grunman*, coupled with several other recent decisions that have applied *Specialty Healthcare* outside of the nonacute-care context, make clear that the decision has been and will continue to be used by Regional Directors and the Board to approve arbitrary, fractured units in a host of industries. *See, e.g.*, *Prevost Car U.S.*, Case 03-RC-071843 (NLRB Mar. 15, 2012); *DTG Operations, Inc.*, Case 27-RC-8629 (NLRB Dec. 30, 2011). The Board should therefore use this case as an opportunity to stop this steady accretion of error, reject *Specialty Healthcare*'s "overwhelming community of interest" test, and reaffirm clearly and unmistakably the application of traditional industry presumptions, including the traditional retail whole-store presumption.

Indeed, this case provides a particularly compelling opportunity for the Board to reaffirm its longstanding analysis for determining the appropriate bargaining unit in the retail context. The whole-store presumption has been consistently recognized by the Board in multiple cases decided over the course of a half-century, and it has engendered substantial reliance by scores of employers in one of the largest sectors of the United States economy. It is among the most prominent of the rules and presumptions referenced in *Specialty Healthcare*'s footnote 29. A decision finding that *Specialty Healthcare* swept aside that presumption would dramatically confirm the unprecedented and revolutionary nature of the rule announced in that case. *See generally* Br. Amicus Curiae of Retail Industry Leaders Association, *Kindred Nursing Ctrs. E., LLC v. NLRB*, Nos. 12-1027 & 12-1174 (6th Cir. Apr. 23, 2012).

Applying *Speciality Healthcare* to strip away the entire body of precedent governing the myriad industries subject to the Act would be insupportable. It would, at a stroke, eliminate all the rules and standards that have been painstakingly developed by the Board, over the course of decades, to guide the actions of employers and employees. *Cf. Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611–12 (1991) (explaining that the Board's decisionmaking is necessarily guided by "the rules that the Board develops to circumscribe and to guide its discretion"). Such an action would drastically upset the settled expectations of employees and employers, who have relied on those longstanding, industry-specific principles to order their activities. The result—an unnecessary and largely unprecedented reordering of labor relations across whole sectors of the economy—would be disruptive and expensive, would run counter to the purpose and intent of the Act, and could lead to a loss of jobs and even closure of some businesses. That is the type of burden on the free flow of commerce that the Act was intended to avoid (and certainly not a cost that should be imposed on a weak economy struggling to recover from financial crisis).

The presumption in favor of the whole-store unit is also justified by the characteristics of the retail industry. The appropriate unit analysis is guided by multiple factors, which look to whether employees are "separately supervised"; have distinct "terms and conditions of employment"; are "functionally integrated" with other employees; are "organized into a separate department"; have "frequent contact with other employees"; have "distinct job functions and perform distinct work"; and "have distinct skills and training." *Specialty Healthcare*, slip op. at 9 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). The ultimate question guiding the application of these factors is "whether the employees share a 'community of interest.'" *Id.* (quoting *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 491 (1985)). Application of this well-

established community-of-interest test in the retail context yields the conclusion that the appropriate unit in the retail context will, generally speaking, be the entire store.

In the retail industry, the single, overriding task of every employee in a store is to provide a seamless, hassle-free experience to customers interested in purchasing the employer's goods. That overriding task requires substantial integration of employees within a single store. Employees must be willing and able to answer customers' questions and respond to customers' requests regardless of whether they technically fall within the employees' assigned department. A single store is also a physically open environment; employees share a common workspace, and even backroom employees come into frequent contact with sales employees as they move inventory into the store. Sales employees work in even closer confines, and they necessarily have frequent contact and interchange with other employees. A single store is also, generally, under common management. Retail employees generally have similar skill sets and training; although some employees may have more experience in a particular role or with certain products, few if any employees have special education directed to their job, and all are ultimately exercising the shared skills of salesmanship and customer service. A unit smaller than a single store is generally inappropriate because it rends apart a group of employees that otherwise would naturally function as a single unit.

The Board has explained that the presumption in favor of a whole-store unit arises from the application of the community-of-interests test. In *Haag Drug Co.*, 169 NLRB at 877–78, the Board stated: "The employees in a single retail outlet form a homogenous, identifiable, and distinct group, physically separated from the employees in the other outlets of the chain; they generally perform related functions under immediate supervision apart from employees at other locations; and their work functions, though parallel to, are nonetheless separate from, the functions

of employees in the other outlets, and thus their problems and grievances are peculiarly their own . . . ."

The Board recently declined to review a decision by a Regional Director that reaffirmed the connection between the whole-store presumption and the community-of-interests test. *See Home Depot U.S.A., Inc.*, Case 20-RC-067144 (R.D. Nov. 18, 2011). In that case, the Regional Director explained that the "Board has long favored wall-to-wall bargaining units in the retail industry." Slip op. at 12. The Regional Director emphasized the community of interest between employees in a single store: They "work at the same situs with common supervision, require no particular background or experience, come into contact on a daily basis, and overlap in many duties, despite assignment to a particular department." *Id.* at 14. Moreover, "all Associates in each department play a role in selling the Employer's goods to customers, and all of the Associates interface with Associates from other departments." *Id.* For these reasons, the petitioned-for unit in that case, which included some jobs at the store but excluded others, was a "fractured unit," or "an arbitrary grouping of employees in [the] retail store setting." *Id.* at 15. Given these factors, the Regional Director correctly concluded that all the employees in the store shared an overwhelming community of interests, and the only appropriate unit for the store was a whole-store unit.

The whole-store unit presumption is also consonant with the Board's recognition that an appropriate unit will generally track organizational structures put in place by the employer. *See Specialty Healthcare*, slip op. at 9 n.19. As the Board has recognized, "the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace." *Id.* This focus ensures "that bargaining will occur within boundaries that make sense in the employer's particular workplace." *Id.* In the retail context, the retail store is the unit accord-

ing to which employers generally structure the workplace. The presumption in favor of the whole-store unit ensures that this basic organizational premise remains undisturbed, thus avoiding unnecessary disruption of the employer's business and the free flow of commerce.

3. Petitioners Cannot Justify Departure From A Whole-Store Unit In Favor Of A Unit Consisting Of Two Women's Shoe Departments

Applying the presumption in favor of a whole-store unit, it is evident that the Regional Director erred by approving the two shoe department unit approved here. While the presumption in favor of a whole-store unit can be rebutted, the Board has never approved a proposed bargaining unit that departed from the whole-store presumption as dramatically as the unit approved by the Regional Director here.

The Board's decision in *I. Magnin* cannot be meaningfully distinguished from this case. 119 NLRB 642. There, a proposed unit would have consisted solely of employees of a department store's four shoe departments. Despite observing that employees in the shoe department were paid according to "a different method of compensation," the Board concluded that a separate bargaining unit was not appropriate because the skills of the various salespeople were "of the same general type." *Id.* at 643. The shoe department employees were not "craft or professional employees," or otherwise "sufficiently different . . . to warrant their establishment in a separate unit." *Id.* Neither petitioners nor the Regional Director can explain why, if a unit of shoe department employees was inappropriate in *I. Magnin*, it is appropriate here.

Even apart from *I. Magnin*, the Board's precedents set out a test to rebut the whole-store presumption that cannot be satisfied here. In *A. Harris & Co.*, 116 NLRB 1628 (1956), the Board set out three conditions under which a smaller unit than a whole-store unit would be appropriate: (1) when the proposed unit is "geographically separate" from the rest of the retail store; (2) when there is "separate supervision" of the proposed unit; and (3) when there is "no

substantial integration" among the employees in the proposed unit and those in the rest of the store. *Id.* at 1631–32; *see also Home Depot U.S.A., Inc.*, at 12–13 (explaining that the Board in *A. Harris* "set forth three conditions under which it would make an exception for finding a subsection of employees of a retail store operation (in that case a warehouse unit) in the retail industry appropriate").

Not one of those conditions is met in this case. The two separate women's shoe departments are not "geographically separate" from the rest of Bergdorf Goodman. The shoe departments are not separately supervised from the rest of the store (although they are subject to separate direct management from each other). The entire store is under common management; the two shoe departments that form the proposed bargaining unit are under separate direct management, and their direct managers report to different intermediate managers, who in turn report to the common store manager; the direct manager for the 5th floor shoe department is also the manager for contemporary sportswear; and, on Sundays, the direct managers are "officers on duty" with responsibility for multiple departments. *See* Request for Review at 8–9. Finally, petitioners have failed to demonstrate a lack of "substantial integration" between employees in the shoe departments and the rest of the store. Among other things, employees sell outside their own departments, attend the same orientation and training programs, and attend meetings together on a regular basis. And, as the Regional Director conceded, all store employees "are subject to the same health benefits, vacation and holiday policies, evaluation forms, and probationary periods, and all have access to a common cafeteria." Op. 20–21. The Regional Director's decision effectively disregarded these commonalities, and thus "gave insufficient weight to the uniformity of treatment of the Company's personnel." *NLRB v. Meyer Label Co.*, 597 F.2d 18, 22 (2d Cir. 1979).

It is, of course, possible to point to differences between the employees of the women's shoe departments and employees of other departments within the store—for one thing, shoe department employees primarily sell shoes—but a review of the Board's precedents makes it amply clear that the mere presence of such differences has never been enough to justify carving a sales department of retail employees out from the rest of the store. To the contrary, the Board has rejected proposed units far broader than the unit approved by the Regional Director here.

In *Sears, Roebuck & Co.*, for instance, the Board rejected a proposed division of a Sears retail establishment into three separate units—one for drivers and others employed at the warehouse; a second for installers employed at the service station connected with the store; and a third for "store and service station salesmen, store clericals, and maintenance employees." 191 NLRB 398, 398, 404 (1971). The Board credited the employer's contention that "in order to make this kind of retail operation viable, a high degree of compartmentalization cannot be utilized." *Id.* at 404. "To the contrary, in all phases of the operation, there must be a direct line of communication and supervision, coupled with flexibility of job functions in support of a sole objective." *Id.* The Board therefore concluded that the "only appropriate unit should consist of all employees of the service station, warehouse, and retail store," *id.*—in other words, the entire retail establishment. Given the Board's disapproval of a unit encompassing *all* sales, clerical, and maintenance employees in the circumstances of *Sears, Roebuck & Co.*, it is difficult to imagine how a unit consisting solely of two separate shoe departments could possibly be appropriate here.

The Board's decision in *Charette Drafting Supplies* also illustrates the point. 275 NLRB at 1294. There, the Board rejected a proposed unit limited to the "operations department employees" of a single retail store. *Id.* at 1294. Although "much of the operations employees'

work is performed in the basement," those employees also spent "a substantial amount of time on the street level" and occasionally "answer sales employees' questions" regarding the location of stock or the scheduling of deliveries. *Id.* at 1295–96. This level of integration was sufficient for the Board to conclude that the "operations department employees do not have a community of interest sufficiently distinct from other employees to warrant a separate operations unit." *Id.* at 1296. If the backroom employees at issue in *Charette Drafting Supplies* could not be separated from the store's sales employees under the circumstances of that case, it cannot possibly be appropriate to carve employees of Bergdorf Goodman's second and fifth floor women's shoe departments out from the remainder of the store, including nearby departments under common direct management with significant crossover in sales.

Similarly, in *Levitz Furniture*, the Board rejected a proposed unit that would have consisted of truckdrivers and truckdriver helpers employed at a single retail store. 192 NLRB 61. Observing that "[t]he entire store activities are devoted to all phases of selling merchandise," *id.* at 62, the Board concluded that truckdrivers and truckdriver helpers shared a "community of interest [with] all of the employees at the Employer's store" and that they did not possess "special interests sufficient to warrant their separate representation." *Id.* at 63. It was true that members of the proposed unit spent "a majority of their time away from the plant," but the Board nevertheless found sufficiently "regular and frequent interchange" between the members of the proposed unit and other employees "as to warrant a finding that they do not constitute a separate identifiable unit." *Id.* If truckdrivers and their helpers who spend a "majority" of their time outside the store were not sufficiently distinct in *Levitz Furniture* to form a separate bargaining unit within a retail establishment, how can a unit limited to 2nd and 5th floor women's shoe-department sales employees possibly be appropriate?

Of course, the Board's decision in *I. Magnin* answers this question: such a unit is emphatically not appropriate. 119 NLRB 642. In those cases where the presumption in favor of a whole-store unit *has* been rebutted, the proposed unit has been far more distinct than the "full-time and regular part-time women's shoes associates in the 2nd Floor Designer Shoes Department and in the 5th Floor Contemporary Shoes Department." Generally, these cases have divided employees that serve selling and non-selling roles. In *A. Harris*, the Board approved a unit of "drivers, helpers, and delivery employees," many of whom worked out of warehouses physically separate from the retail store. 116 NLRB at 1628, 1630. In *Allied Stores of New York, Inc.*, the Board approved "separate units for the selling employees and the nonselling employees." 150 NLRB 799, 806 (1965). And in *Wickes Furniture*, the Board approved a unit consisting of "[a]ll salespersons" employed at a single retail location. 231 NLRB 154, 155 (1977). These cases provide no support whatsoever for a far narrower unit consisting of the 2nd and 5th floor designer and contemporary shoe departments of the Bergdorf Goodman department store.

Nor does *Montgomery Ward & Co.* provide any support for such a unit. 150 NLRB 598 (1964). In that case, the Board approved a unit consisting of employees of an automotive service station located within a retail store. It stressed that the employees "exercise different skills, have separate supervision, work in an area different from the other employees, wear uniforms which set them apart, and perform no selling function." *Id.* at 601. Not one of those things is true of the shoe department employees at issue in this case: they do *not* exercise different skills, do *not* have separate supervision, do *not* work in a different physical location, do *not* wear different uniforms, and *do* perform a selling function.

Likewise, this case has nothing at all in common with *May Department Stores Co.*, where the Board approved a separate unit of hair stylists, beauticians, and manicurists based on the fact

that they were required to be licensed by the state and, as a condition of licensure, were required to attend beauty school and pass a fitness examination. 97 NLRB 1007, 1008 (1952). The employees "singularly different work and training skills" justified departing from the general rule that "a store-wide unit of all selling and nonselling employees . . . is the optimum unit for the purposes of collective bargaining." *Id.* The same simply cannot be said of shoe department salespeople.

Indeed, cases applying the whole-store presumption have relied upon the types of interests shared between selling employees in the 2nd and 5th floor women's shoe departments and employees in the remainder of the store. To name just a few commonalities: The employees "enjoy substantially the same benefits." *Levitz Furniture*, 192 NLRB at 63; Request for Review at 28. They "spend a substantial portion of their time working alongside, or in close proximity with, other employees." *Levitz Furniture*, 192 NLRB at 63; Request for Review at 14, 20. "Supervision is set up to provide fairly direct control by the store manager . . . over almost all phases of activities" at the store. *Sears, Roebuck & Co.*, 191 NLRB at 404; Request for Review at 8. There are "regularly scheduled meetings for all salesmen and a monthly meeting for all employees." *Sears, Roebuck & Co.*, 191 NLRB at 405; Request for Review at 15, 20. "All employees participate in taking inventory once a year . . . ." *Levitz Furniture*, 192 NLRB at 62; Request for Review at 20. And, the "operation is highly integrated, with employees in different departments assisting each other and overlapping in their job functions in order to serve the customers." *Charette Drafting Supplies*, 275 NLRB at 1296; Request for Review at 14, 25. The Regional Director nowhere explained how—if these similarities required a whole-store bargaining unit in previous cases—a unit consisting of the second- and fifth-floor women's shoes sales associates could be deemed appropriate in this case.

Departure from this longstanding line of precedent to ratify the proposed unit of women's shoes sales associates, without adequate reasoning and without notice and comment, would be arbitrary and capricious and would not comport with the requirement of consistency that governs the Board's adjudicative decisionmaking.

4. The Regional Director's Decision Itself Acknowledges The Whole-Store Presumption, And Is Therefore Internally Inconsistent

The Regional Director's decision rejects the proposition that shoe department employees in Bergdorf Goodman's separate men's store should be included in the bargaining unit, relying on the fact that "there is a presumption for single-store units in the retail industry." Op. 23. The Regional Director thus recognized that the presumption in favor of whole-store units applies to prevent expansion of the bargaining unit to other stores (erroneously concluding that the integrated men's store under common management was a separate store), but failed to recognize that the same presumption operates to prevent splintering of a single store into multiple departments. This approach—which can have no purpose but to stack the deck in favor of the petitioner—is internally inconsistent, and therefore arbitrary and capricious.

B. The Regional Director's Decision Will Fragment The Retail Workforce And Is Arbitrary, Unlawful, And Unworkable

The two departments that comprise the approved unit have been cobbled together on the basis of a single characteristic (the sale of women's shoes) that has no relevance to the internal organization of the employer's business. There is no single unit consisting of 2nd and 5th floor designer and contemporary women's shoes. To the contrary, the Bergdorf Goodman store is overseen by three directors, and the two departments fall within the purviews of two different directors. Request for Review at 8. They do not share a department manager. *Id.* The department manager of 5th floor contemporary shoes also manages the contemporary sportswear department. *Id.*

The logical consequences of approving such a unit are easy to imagine, and would quickly spiral out of control. If the 2nd and 5th floor contemporary and designer women's shoe departments can form a bargaining unit, why not also 3rd floor casual men's apparel, 1st floor women's summer dresses, and 4th floor designer jeans all as separate bargaining units? Why not a unit comprised of consumer electronics and home appliances? Paper products and detergents? Why not separate units for groceries, cosmetics, drugs, toys, and pet supplies? Why not a separate unit for the entire 2nd floor? This splintering of the retail store into arbitrary bargaining units unconnected with the actual business structure cannot be squared with the text of the Act, will undermine the operation of the retail business, interferes with employee rights and opportunities, and invites impermissible gerrymandering of elections.

1. The Unit Approved By the Regional Director Is Inconsistent With The Text Of The National Labor Relations Act

The arbitrary unit approved by the Regional Director cannot be squared with the text of the Act, which limits the ability of unions to artificially construct units that do not have an organic basis in the structure of the organization of the employer's business.

First, the Regional Director's decision fails to comply with the directive of section 9(b) that *the Board* select "the unit appropriate for the purposes of collective bargaining." *See* 29 U.S.C. § 159(b). The rule adopted by the Regional Director effectively grants unions unfettered discretion to organize any portion of the employer's workforce. As long as the proposed unit of employees shares some minimal set of common characteristics, it will be approved unless all employees within the store are similarly situated in "almost every" respect. Op. 18. An approach to selecting "the" appropriate unit for collective bargaining that results in the approval of almost any selection of employees proposed by a union cannot be squared with the language of the statute: By requiring the Board to identify "the" appropriate unit, Congress must have in-

tended that some proposed units be deemed *inappropriate*. Moreover, the decision effectively delegates the selection of the appropriate unit to the union, in contravention of Congress's determination that such selection is properly made by the Board.

Nor is the unit approved by the Regional Director consistent with the requirement that the unit approved by the Board constitute a craft, employer, or plant unit, or some subdivision thereof. *See* 29 U.S.C. § 159(b). The employees of 2nd and 5th floor women's contemporary and designer shoes do not share a "craft"; they do not constitute the entire workforce of the employer; and they do not constitute the entire workforce of the plant, or store. *See id.*; *see also Specialty Healthcare*, slip op. at 7 nn.16, 17. Nor can such a gerrymandered unit be justified as a "subdivision" of such an organizational unit. The term "subdivision" is a term of art, also used, for example, in the Secretary of Labor's wage and hour regulations, and refers to a group of employees with "a permanent status and continuing function"—not "a mere collection of employees." 29 C.F.R. § 541.103(a). That term cannot be used to refer to two cherry-picked departments located on different floors, with different managers.

Such a unit also cannot be squared with Congress's direction, in section 9(c)(5), that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). That provision is intended to prevent artificial units of the sort at issue in this case: It prevents a union from proposing a unit that lacks significance within the employer's organization, and that makes sense only as a division of employees likely to vote in favor of union organization. *See, e.g.*, *Lundy Packing Co.*, 68 F.3d at 1581–82. The Board must, instead, authorize a unit that is "appropriate" in the context of the employer's organization. In the context of the retail industry, that appropriate unit will usually be the employer's entire store.

Recognizing (although ultimately disregarding) these considerations, the Board explained in *Specialty Healthcare* that a unit would be inappropriate if its members did not "perform distinct work under distinct terms and conditions of employment." Slip op. at 13 n.31 (citing *Wal-Mart Stores, Inc.*, 328 NLRB 904 (1999)). And, "some distinctions are too slight or too insignificant to provide a rational basis for a unit's boundaries." *Id.* at 13; *see, e.g.*, *I. Magnin*, 119 NLRB at 643. This is such a case. The proposed unit of the 2nd and 5th floor Designer Shoes Department and Contemporary Shoes Department is an artificial, gerrymandered agglomeration of two departments, each of which is under separate management, with effectively nothing in common that distinguishes them from other store employees except that they are charged with selling shoes as part of their overall common mission to provide seamless and effective customer service throughout the store. This is nothing more than an arbitrary subset of a true community of interests.

2. The Regional Director's Decision Threatens To Overwhelmingly Complicate Store Administration And To Limit The Opportunities Of Employees

The proliferation of bargaining units threatened by the Regional Director's decision would hamstring retail employers and curtail opportunities available to employees. Retailers generally strive to enable employees to assist customers seeking to purchase goods located anywhere in the store. Unions, however, typically insist that members of a unit have exclusive rights to perform their work and establish rigid work rules that establish what tasks bargaining-unit members can and cannot perform (which in turn affects the work that employees outside the unit can perform). These rules would prevent the employer from cross-training employees and, therefore, from meeting customer expectations. Flexibility would suffer to the detriment of customers, employers and employees. An employee in women's handbags could not walk a customer to her next destination in designer shoes and help her make a purchase in that area; nor

could the employee cover for an absent employee in men's formal apparel. An employee in household appliances could not be temporarily reassigned to electronics to cover a short-term staffing need or to earn additional wages. Productivity and customer service would decline. Limited to their own departments, employees would also enjoy fewer skill-development opportunities, while rigid barriers would limit promotions and transfers. The balkanization of retail stores would also result in fewer scheduled hours for most employees, because they would not be permitted to rotate into other departments (whose employees would be represented by other unions).

Administrative costs would also proliferate. Managers of a single store could conceivably be required to administer separate collective bargaining agreements with cashiers, greeters, backroom employees, men's designer clothing, men's business attire, men's sportswear, women's designer clothing, women's business attire, women's sportswear, men's shoes, women's shoes, sheets and towels, dishware, sporting goods, baby products, music and movies, garden products, and home office supply sales—to name just a few possibilities. These agreements could impose different or conflicting work rules, pay scales, benefits, bargaining schedules, grievance procedures, and layoff and recall procedures. Across a company, these complexities would be even greater. An employer with one thousand retail locations, each with ten unions, would be required to keep track of ten thousand separate union agreements. An employer with three thousand retail locations, each with twenty unions, would be required to keep track of sixty thousand. The administrative difficulties involved would become overwhelming.

These administrative difficulties will also multiply exponentially if the approved units (like the unit at issue in this case) do not grow organically from the organization of the store. In that instance, there will no longer be any assurance that "bargaining will occur within boundaries

that make sense in the employer's particular workplace." *Specialty Healthcare*, slip op. at 9 n.19. The task of reordering a store's organization to accommodate essentially arbitrary bargaining units would entail significant (and unnecessary) disruption and expense.

The tension among workers that will result from a proliferation of bargaining units could also cripple the employer's business, while simultaneously weakening employees' bargaining power. Some departments would possess more economic leverage than others simply by virtue of their individual function, and those departments would be able to negotiate more favorable terms and conditions of employment. Other departments, lacking such bargaining power, could see their benefits sacrificed to make up the difference. Cashiers, for instance, might shut down an entire store by going on strike—leaving the rest of the employees temporarily without a job—whereas a strike by 3rd floor children's designer shoes might have little impact on the business, and therefore might win little in the way of concessions from the employer. The resulting disparity in benefits and pay between employees performing similar jobs in close proximity would drastically undermine morale. Divisions between employees would leave the workforce of the store, in the aggregate, with less bargaining power, as employees would be unable to present a united face and could be played off against each other in the course of negotiations. Yet frequent strikes and stoppages by the various warring departments would also make running the business practically impossible, and would impose economic hardship on workers in non-striking departments.

This is not the result intended by Congress when it instructed the Board to determine the "appropriate" unit for collective bargaining. To the contrary, the legislative history of the Act reflects Congress's concern that employees could, "by breaking off into small groups, . . . make it impossible for the employer to run his plant." *Hearing on S. 1598 Before the S. Comm. on*

Educ. & Labor, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, National Labor Relations Board). A unit that threatens to spark conflict between employees, decimate morale, hamper effective customer service, slash productivity, and compound administrative difficulties does not further the Act's purpose of advancing the "friendly adjustment of industrial disputes" and the "free flow of commerce," 29 U.S.C. § 151, and is not "appropriate" in any sense of the word.

3. The Regional Director's Decision Invites Harmful Gerrymandering

The Regional Director's approval of such an artificial unit is also an open invitation to gerrymandering. The possibilities are endless. A union that believes it has the votes to organize greeters, but not cashiers, need only seek to organize the greeters. A union may limit a proposed unit to labor-enthusiasts in 2nd floor designer men's socks, or 3rd floor televisions. Or, a union might simply try to organize the entire 3rd floor of a store, merely because that is where it enjoys its strongest support. Unions will face little impediment to organizing by cherry-picking a small subset of employees with little regard for whether those employees constitute a practical bargaining unit, and with little regard to whether the designated subset of employees has organizational significance within the employer's business.

Not only is such bargaining unit manipulation harmful to the employer, it inappropriately deprives employees of a meaningful election and their right of free choice. *See Meyer Label Co.*, 597 F.2d at 22 (expressing concern that employees excluded from a unit "might be adversely affected because they might have their conditions set by a union which does not represent them"). The Fourth Circuit has explained that "[t]he predilections of employees are often revealed during early organizational efforts, and the inclusion or exclusion of certain employees may thus determine which party will prevail." *Lundy Packing Co.*, 68 F.3d at 1579.

Arbitrary units that do not track the organization of the employer's business inherently exclude employees that are similarly situated to those within the unit. Excluded employees may have significant interests in common with the members of the unit. In this case, as the Regional Director acknowledged, all store employees are subject to the same policies regarding benefits, vacation, evaluation, and discipline; receive the same training; are subordinate to the same store manager; and share a common cafeteria. *See, e.g.*, Op. 20–21. Nonetheless, employees outside the 2nd and 5th floor contemporary and designer women's shoe departments will have no opportunity to vote as to whether those interests should be made subject to collective bargaining. And, if the union succeeds in organizing the women's shoe department unit, those employees outside the unit will also be denied union representation in negotiations over benefits, pay, and other matters that equally affect all store employees, thus effectively encouraging the union and the employer to sacrifice the interests of excluded members in favor of those who fall within the unit.

There is absolutely no reason to permit such a result, which runs contrary to the directive of the Act to determine an "appropriate" bargaining unit, as well as longstanding Board precedent holding, again and again, that units smaller than an entire store generally are not appropriate in the retail industry.

IV. CONCLUSION

For the foregoing reasons, the Board should conclude that a unit composed of 2nd and 5th floor designer and contemporary women's shoe departments is not an appropriate unit for collective bargaining, reverse the decision of the Regional Director, and utilize this opportunity to affirm that the Board's decision in *Specialty Healthcare* does not erase the Board's longstanding precedent regarding the appropriate analysis for bargaining unit determinations in retail stores.

Respectfully Submitted,

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