BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

THE BOEING COMPANY,

Employer,

and

SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, LOCAL 2001, IFPTE, AFL-CIO

Petitioner.

Case No. 19-RC-15419

REQUEST FOR REVIEW OF REGIONAL DIRECTOR DECISION AND ORDER DATED NOVEMBER 1, 2011

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BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
THE BOEING COMPANY,	
Employer,	
and	
SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, LOCAL 2001, IFPTE, AFL-CIO	Case No. 19-RC-15419
Petitioner.	

REQUEST FOR REVIEW OF REGIONAL DIRECTOR DECISION AND ORDER DATED NOVEMBER 1, 2011

THE REGIONAL DIRECTOR'S DECISION IN THIS CASE calls out for review by the Board. (See Attachment 5) It represents a radical rejection of decades of Board law regarding community of interest. Existing law focuses on the relationship within a petitioned-for bargaining unit, whether new or to be formed under an *Armour-Globe* procedure. In the instant case, the Regional

Director discards this focus and relies on a footnote from the Board's recent *Specialty Healthcare*[1] case to deny employees the right to form a unit of their choosing, based on relationships between the proposed unit employees and others who are neither represented, nor could be represented, in some cases, under the Act. He describes the traditional analysis as "micro," and rejects it for what he characterizes as a more meaningful "macro" view of the employer, placing on the union and the employees a burden the Act never intended.

I. RULE CONCERNING REQUEST FOR REVIEW

SECTION 102.67(C) OF THE BOARD'S RULES AND REGULATIONS provides that the grounds for granting a Request for Review include:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. . .

The Regional Director's decision departs from Board precedent by relying on a novel analysis of community of interest. He requires the employees for whom the Petitioner seeks an *Armour-Globe*[2] election to have a **unique** community of interest with the existing bargaining unit, and rejects employees' rights to a self-determination election on the basis of an arguable "community of interest" with other, non-represented, employees. The decision applies this novel analysis through purported reliance on, and misapplication of, *Specialty Healthcare*. Indeed, it reaches its conclusion by turning the holding of *Specialty Healthcare* precisely on its head.

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[1] *Specialty Healthcare and Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011).

[2] See *Armour and Company*, 40 NLRB 1333 (1942); *Globe Machine and Stamping Co.,* 3 NLRB 204 (1937)

Further, as enumerated specifically below, the Regional Director reached his incorrect legal conclusion by way of numerous factual findings that are clearly erroneous and prejudicially affected the rights of SPEEA and employees in the petitioned-for unit under section (2) above.

II. STATEMENT OF THE CASE

THE SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE filed an RC petition (19-RC-15372) on January 3, 2011, seeking an *Armour-Globe* election in which a group of between 90 and 100 Field Service Representatives (FSRs) would choose whether to join an existing bargaining unit of approximately 14,000 professional engineers.[3] A hearing was conduc ted in Seattle, Washington, covering 12 hearing days from January 19, 2011, through February 3, 2011. The record consists of 1800 pages of transcript and over 150 exhibits.

In a decision dated April 13, 2011, the Regional Director determined that the FSRs were not professional employees. He did not address whether they shared a sufficient community of interest with the professional engineers such that they would otherwise be allowed to join that bargaining unit, nor the (employer's claim of) supervisory status for the Team Lead employees whom the union wished to include in the unit as well. He suggested that, **if** the FSRs were found to have a community of interest with the professional engineers (and **if** the Team Leads were found not to be supervisors), the procedure for adding these employees into the existing unit would be what could be characterized as a "reverse *Sonotone*" election – one in which the non-professionals could vote on whether they wished to join the existing professional unit, and the

[3] The Decision recites that there are approximately 13,600 employees in the engineering unit. The Regional Director apparently limited his consideration to those who are described in Art. 1.1(a) of the collective bargaining agreement, Joint Exhibit 1. See Stipulation, Case No. 19-RC-15372, Joint Exhibit 2. However, there are roughly 14, 000 employees covered by the CBA, and the parties only dispute the unit placement of a few of them. July 27, 2011 Stipulation, Case 19-RC-15419, ¶ 4, Attachment 1. The 14,000 figure is apparently the more accurate one, and will be used herein.

professionals could vote on whether they wanted to permit non-professionals to join them in a single unit.[4]

The Petitioner requested Board review of this decision, which the Board denied on July 7, 2011. Thereafter the Petitioner filed the Petition in the instant case, seeking a two-part election as suggested in the Regional Director's April decision. On July 15, the Regional Director issued a Notice of Hearing on the new petition for July 26th, but (after that hearing date had been continued to July 28th), on July 27th the parties entered into a Stipulation, Attachment 1, allowing the case to be decided on the existing record and in conformity with the stipulations.

Thereafter, briefs were filed by both parties and the instant Decision and Order issued on November 1. The Regional Director concluded that the FSRs do **not** share a sufficient community of interest with the professional engineers to be permitted to vote to enter that unit, on (apparent) grounds that they **do** share a community of interest with a miscellaneous collection of **un**represented Boeing professional engineers, as well as various other employees and non-employees. (Decision, p. 39)[5] The Regional Director also concluded that the FSR Team Leads are not supervisory employees, presumably thereby permitting them to be included in (some unidentified) bargaining unit. The Petitioner does not request review of that determination.

[4] An election under *Sonotone Corp.,* 90 NLRB 1236 (1950), is held to meet the requirements of Section 9(b)(1). In a *Sonotone* election, the professional employees are asked first whether they desire to be included in a group along with nonprofessional employees, and second, their choice with respect to a bargaining representative.

This would be a "reverse-*Sonotone*" because the professionals are already organized and represented by SPEEA, and would be deciding whether to allow the (presumptively) non-professional FSRs to bargain with them.

[5] While the Regional Director notes at p. 2 and p. 28 of the Decision that the Employer "does not oppose the direction of an election" in a standalone FSR unit, he also notes that the Petitioner did not seek such an election. He does not express an opinion on whether that unit would be appropriate. In light of his reasoning relating to the shared community of interest between the FSRs and "unrepresented engineers, internationally placed co-located FSRs, represented and probably unrepresented (Long Beach) technical unit employees, independent contractors or contracted engineers, certain sales related employees, and more" (Decision, p. 39), it would appear that he might reject such a unit as well, but since none of his reasoning comports with established Board law, it is hard to judge.

III. STATEMENT OF THE FACTS[6]

BOEING IS A LARGE MULTI-NATIONAL CORPORATION that manufactures and sells both military and commercial airplanes. It employs more than one hundred thousand employees throughout the United States and numerous foreign countries. It has collective bargaining agreements with several different unions and at least three collective bargaining agreements with SPEEA. The existing contract most relevant to this case (Joint Exhibit 1) covers professional employees in Washington, Oregon, Utah, Florida[7] and California, as well as employees on travel status from locations in Washington and California. Another contract covers technical employees in those same states, except Utah. An additional contract covers professional employees in Wichita, Kansas.

The NLRB certified the original and largest unit described in Joint Ex. 1 in 1946. Since that time, various groups of employees have negotiated and been covered by the same collective bargaining agreement as that group, whether or not they constitute the same bargaining unit. (The parties agree that employees in Florida, Oregon and Utah described in Sections 1.1(b), (c), and (d) of Joint Ex. 1 constitute separate bargaining units. However, the parties disagree whether those described in 1.1(e) are part of the unit described in 1.1(a) or are a separate unit.[8]) In any event, however, the parties have historically negotiated one professional contract that covers all of the units listed in Section 1.1(a) through (e).

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[6] Rather than offering a prolonged and detailed preliminary description of the facts developed during 12 days of hearing, at this juncture SPEEA will provide a short overview of the relevant facts. Then, in discussing its arguments and the law dealing with the various issues, SPEEA will discuss the specific facts relevant to those arguments and law in detail.

[7] No employees worked in this unit at the time of the hearing.

[8] See the Stipulation ¶ 4, Attachment 1.

Field Service Representatives assure customer satisfaction with Boeing Commercial Airplanes (BCA) products and services through on-site, in-service problem resolution and representation. Assignments vary among operators depending on the size of the airline, its route structure, and the location of its facilities. Field assignments for FSRs include domestic -- those located within the boundaries of the 50 states -- and international, those located outside U.S. national boundaries. The instant petition seeks only to represent FSRs based in the United States.

Domestic FSRs perform several different functions. About 37 of them are assigned to customer (airline) bases throughout the United States (referred to as either co-located or permanent reps during the hearing). Three of them work in what is known as the Boeing Business Jet group (BBJ)[9] and are also located in different places in the United States. Another group of FSRs (about 15) function as FSR Controllers, based in the Puget Sound area. Intro Rep's based in the Puget Sound Area (about 29, some of whom are on temporary loan to SPEEA-represented units), currently break down into two subgroups, some for planes that had yet to be delivered at the time of the hearing (specifically the 787 and 747 - 800 series), and the rest assigned to other planes in the Boeing fleet. About eight FSRs work at the Boeing Field Service Seattle Support Center (BFSSSC) located in Seattle, WA. Since they work in the United States, they qualify as domestic FSRs even though they provide this service both to international and domestic customers.[10]

[9] The titles given to various groupings within Boeing are confusing, at best. SPEEA will just use the generic term "group." It is not intended to have any legal significance.

[10] About four FSRs are assigned to work on special projects. The record contains no evidence related to these employees.

All FSRs have the same Boeing job code (GEC7) and are covered by the same three job descriptions (based on level).[11] All FSRs except the Controllers are subject to assignment rotations into any of these various groups as well as assignment to customer bases overseas. The assignments for rotations are intended to last from 4 to 5 years, except that the manager of the BBJ group prefers his FSRs to hold that assignment for 7 years. As will be explained in detail below, all receive compensation under the same system and have common benefits. All FSRs have regular and periodic contact with some of the professionals in the SPEEA professional bargaining unit.

The FSRs assigned to a customer base provide the initial point of contact for the airline relating to technical issues. They generally have offices at an airfield and in the same building (sometimes on the same floor) as the airline engineering staff. When either the maintenance or engineering departments of the airline cannot solve a technical issue with the airplane, it will likely go to the FSR. The FSR will either solve the problem or collaborate with the service engineering group in the professional bargaining unit at Boeing.

The FSRs assigned to Boeing Business Jets perform similar functions to the co-located reps, with some differences. They are not based at a customer location because the customers are corporations and individuals who have purchased or are purchasing a Boeing commercial airliner and outfitting it for private use. However, they serve as the initial point of contact for

[11] One FSR, with a job code of GEC6 constitutes the lone exception. With respect to this person, the parties entered into the following stipulation. "Juan Molina, M-o-l-i-n-a, is an international local hire, and is permanently assigned, or co-located at the Tulsa base. He is Job Code GEC-6. If an election is directed that includes FSRs permanently assigned or co-located at a base in the bargaining unit, he will be considered in that unit." Tr. p. 1794 - 1795. The RD incorrectly states in footnote 28 of the Decision that each classification of FSR has a different job description. Actually, each of the three levels of FSR has only one job description, regardless of role. See Employer Exhibits 21, 22, and 23.

technical issues arising with these planes. In addition, they provide technical expertise during the outfitting of the plane.

Intro Reps travel from their headquarters in Seattle to spend 30 to 90 days at a customer location when a customer takes delivery of a new model plane or its first Boeing plane. Intro Reps assume responsibility for identifying and resolving issues associated with any new airplane. In doing so, they will work with any co-located FSR at the base.

FSRs in the BFSSSC perform a combined co-located FSR and FSR Controller function for second-tier airlines. These airlines have purchased Boeing airplanes from a third party rather than directly from Boeing. These FSRs work from the Duwamish site in the Puget Sound area.

Finally, FSRs assigned as Controllers work in the Boeing Operations Center (BOC) also located at the Duwamish site. The BOC operates 24 hours per day, seven days per week to deal with AOGs -- airplanes on the ground. The BOC addresses the problems primarily with AOGs that need to regain airworthy status within 24 hours. The FSR Controller often operates as the initial point of contact for the customer at the BOC when technical issues cause AOGs.

The professional employees covered by the SPEEA professional contract perform an immense variety of functions. Some do what would be commonly described as traditional engineering work, engaging in complex mathematical calculations and product design. Others perform duties as instructors, and some function like a project manager.[12]

IV. ARGUMENT

A. SUMMARY

[12] Union Exhibit 29, the arbitration decision in the Richard Rotruck Grievance, although decades old, illustrates the breadth of functions performed by “engineers” under the SPEEA professional contract.

CASE LAW CONCERNING *ARMOUR-GLOBE* ELECTIONS dates back nearly to the inception of the National Labor Relations Board. The doctrine originated with *Globe Machine and Stamping Co.,* 3 NLRB 204 (1937), in which the Board permitted employees to determine whether they wished to form several separate bargaining units or a larger single unit. The Board extended this doctrine to permit a group of historically unrepresented employees to decide whether they wished to join an existing unit in *Armour and Company*, 40 NLRB 1333 (1942). The labor law community refers to elections of this type as *Armour-Globe* or self-determination elections. A history of the development of the doctrine appears in *NLRB v. Raytheon Company,* 918 F2d 249 (1st Cir. 1990).

That history recounts the decisions of the Board holding that to obtain a self-determination election the petitioner need not establish that the designated voting group would constitute an appropriate unit by itself. *Maryland Drydock Co.,* 50 NLRB 363 (1943). A petitioner need only show that the employees seeking inclusion share a community of interest with the unit employees and that the former employees form an "identifiable, distinct segment so as to constitute an appropriate voting group." *Warner Lambert*, Co. 298 NLRB 993, 995 (1990). The Board most recently updated its views regarding *Armour-Globe* elections in a two-member decision issued in 2009, *Unisys Corporation and UAW, 354 NLRB No. 92* (2009)[13] In *Unisys* the Board reaffirmed the *Warner Lambert* rule.

[13] While that decision is not currently binding precedent in view of *New Process Steel v. NLRB*, 560 U.S. ___, 130 S.Ct. 2635 (2010), it provides insight into the Board's recent views of this issue, particularly in light of the two-member Board's stated principle that it decided only those cases that were uncontroversial applications of existing law.

As the FSRs meet both prongs of the test – they share a community of interest with the existing unit, and form a distinct and identifiable segment of the workforce – they qualify for a self-determination election, and the Regional Director erred in failing to direct such an election.

The Regional Director's decision correctly recites the standard community of interest factors in evaluating the status of the FSRs, but evaluates them through a peculiar and idiosyncratic lens – not, as the Board has done for decades, in terms of whether the disputed classification shares a sufficient community of interest with the existing unit to permit it to vote to join that unit, but whether it's right to self-determine its representation is defeated by sharing a similar community of interest with non-represented employees (and contractors) based solely upon the "structure of the Employer's workplace." This method of analysis leads to a conclusion that is wrong "at a macro-level" (Decision, p. 35), using the Regional Director's phrase, and also wrong at numerous steps along the way.

Thus, taking the factors upon which the Regional Director errs in his conclusions in the order stated in the decision, **he concludes wrongly that**:

1. The current geographic scope of the bargaining unit is not a "compelling argument in regard to bargaining history," (Decision, p. 30) **because** (as he correctly observes) bargaining units can grow.

His reasoning in this respect appears to accept the employer's argument that the current unit **is** geographically compact, effectively damning by faint praise the union's alternative and correct argument that the unit is already geographically dispersed in a manner that supports the community of interest between the FSRs and the existing unit;

2. The bargaining history is "essentially a neutral factor, in that it does not give any particular weight to either side in their arguments regarding a community of interest . . ." (Decision, p. 31)

This is error. The parties' bargaining history, properly evaluated, favors allowing the elections sought by Petitioner.

As noted, and as the Regional Director properly notes, the bargaining history is of a geographically dispersed unit. While that geographically dispersed unit has not included the FSRs, the Regional Director is correct in his additional assessment of the role of bargaining history, when he affirms the very purpose of an *Armour-Globe/Sonotone* election to change the composition of the historical unit. ("An *Armour Globe* election can, by its nature, bring unrepresented employees into an existing unit, and the mere fact that a bargaining unit has had a certain characteristic for a period of time does not, alone, weigh against allowing such an *Armour Globe* election." Decision, p. 38)

The Regional Director goes astray, though, in failing to tie together his evaluation of the significance of the size and complexity of the employer's workforce with the bargaining history. The Regional Director's decision ultimately rests on his conclusion that the employer's internal structure would be consistent with a **larger** bargaining unit, one that would presumably include "significant numbers of unrepresented engineers, internationally placed co-located FSRs, represented and probably unrepresented (Long Beach) technical unit employees, independent contractors or contracted engineers, certain sales related employees, and more.[14]" (Decision, p. 39) This is a fundamentally wrong-headed analysis, except as to the one question to which the Regional Director failed to apply it – bargaining history, which reveals a history of the parties bargaining successfully in part of that entire workplace structure.

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[14] Petitioner can only quote the language of the Decision as it appears; the Regional Director does not suggest what the significance is of the internationally placed co-located FSRs (over whom the Board has no jurisdiction) or the independent contractors or contracted engineers to his analysis: He simply asserts that they play some role in his decision on the community of interest factors as between the FSRs and the represented engineers.

3. "The consideration of the employees' skills, training, and job functions weighs against finding a community of interest between the voting group sought and the engineering unit." (Decision, p. 34)

As he sets it forth in the Decision, this is basically just a restatement of the Regional Director's earlier finding that the FSRs are not professionals, a matter resolved by the proposed reverse-*Sonotone* election procedure. Essentially, the exact same finding would weigh against **any** mixed professional and non-professional unit and yet the Regional Director significantly undervalues the analogy to *Lockheed Aircraft Corp.,* 202 NLRB 1140 (1973) in his conclusion that this is a factor that weighs against permitting the employees to make their own decision on whether they share a **sufficient** common skill set, training and job functions to bargain effectively together;

4. The acknowledged functional integration of the FSRs with the bargaining unit engineers as part of the "highly integrated" "Employer's technical support mechanism for airline customers" (Decision, p. 35) is merely a "neutral factor." (Decision, p. 36)

It is here, at the core of his decision, that the Regional Director began his misguided analysis of "the macro-level," writing that

> I agree with Petitioner that the record contains strong evidence of an integrated technical support process, and as I acknowledged previously, FSRs are a critical conduit of information in this process. Absent anything else, this would be strong evidence of a community of interest between the FSRs and the engineering unit. To view only these examples is, however, a micro-view that ignores several realities. First, the scope of the engineering unit is less than nationwide, that engineers in service engineering for McDonnell Douglas aircraft in Long Beach are not part of the engineering unit, while the scope of the voting group sought is nationwide. Second, the FSRs assigned internationally interact with service engineering in Seattle and Long Beach. Viewed at a macro- level, it is apparent that there is an incongruity between the engineering unit and the voting group sought, and I find this incongruity makes functional integration a neutral factor. . . . In each of [a great many examples that demonstrate the integrated nature of the problem solving process] I fully acknowledge that the extensive communication between the FSRs and service engineering, up to and including jointly developed solutions, demonstrates functional integration. . . .

> However, the weight of the evidence also harms Petitioner's argument, because anything that can be said regarding the FSRs' functional integration with the engineering unit can also be said regarding engineers *outside* the engineering unit. It is critical to remember in the instant case that the engineering unit is not coextensive with all the engineers employed by the Employer. Indeed, the approximately 13,600 engineers' in the engineering unit only represent about a third of the engineers employed by the Employer. Many of these unrepresented engineers presumably do not come into contact with the FSRs and therefore are not particularly relevant to the instant analysis. However, the parallel service engineering department in Long Beach for McDonnell Douglas aircraft is very relevant to the instant analysis, as it represents a group with whom the FSRs are equally integrated, but are outside the engineering unit. In my assessment this incongruity in scope diminishes the weight to be given Petitioner's evidence of functional integration.

Decision, p. 35. Each of the Regional Director's factual assertions in the second paragraph of the above quote is a *non sequitur*, a statement that is true but irrelevant to the Board's historical analysis of community of interest factors in the context of a self-determination election. It is, indeed, "critical to remember in the instant case that the engineering unit is not coextensive with all the engineers employed by the Employer," and therefore to question why this unit **that does not currently contain even every engineer** nonetheless cannot be expanded to include another distinct segment of the workforce;

5. The Petitioner "posits" that the FSRs are a "final unrepresented piece of the technical support process" (Decision, p. 36), of that it would be relevant if they were.

This statement by the Regional Director[15] attributes to the Petitioner opinions that are not its own. The Petitioner did not argue (and does not believe) that the FSRs represent a "final unrepresented piece . . ." Nor would it matter if it did, or if they were. The *Armour-Globe* process is not restricted to the "final piece" of a larger potential unit;

[15] With apologies to Jane Austen.

6. Only those working conditions that are **exclusively similar** between members of the petitioned-for unit favor finding a community of interest; conditions that are shared with others don't count.

The Regional Director observed accurately that while the "FSRs and the employees in the engineering unit have the same benefits and are salaried employees in the same pay system . . . these are working conditions shared with many employees of the Employer, not necessarily working conditions exclusive to the FSRs and the engineering unit." (Decision, p. 37) He erred in concluding that the similarity in these working conditions between the FSRs and the existing unit did not help establish a community of interest in the proposed unit.

As with the Decision's conclusion on functional integration, he looked at this issue through a distorted lens – the issue is not whether the FSRs share some of the community of interest factors with people outside the bargaining unit, but whether they share those factors with employees within;

7. "While FSRs and engineers in the engineering unit are paid on the same scale, their actual pay is, on whole, 11 to 25 percent lower than the employees in the engineering unit." (Decision, p. 37)

The record does not provide information regarding the individual salaries of either FSRs or professionals in the existing bargaining unit. Therefore, the record does not support any inference regarding actual pay, including the inference drawn by the Regional Director above. Employer Exhibits-131 and 132 (Salary Reference Tables or SRTs) do not show actual salaries. The SRTs reflect comparative market data on compensation for the job levels within each classification. Accordingly, it shows Boeing's assessment of the **range** of what it **should pay** at each of those levels to stay consistent with the market. It does not show actual pay. (Tr. p. 1241-1242)

Furthermore, it is impossible to compare the SRTs for FSRs with those for the classifications in the bargaining unit and derive the 11 to 25% differential indicated by the Regional Director even for recommended pay ranges. To explain why, the Union has attached a chart comparing the SRT minimum midpoint and high recommended salary levels for Levels 3, 4, and 5, in the classifications of FSR and Customer Support Engineer, Attachment 2. Attachment 2 demonstrates that at Level 3, Boeing recommends slightly higher pay for the Customer Engineers. At Job Level 4, Boeing recommends exactly equivalent pay for the two classifications. At Level 5, Boeing recommends slightly higher pay for the FSRs. Therefore, no analysis of the SRTs in the record can produce the Regional Director's 11-25% differential for recommended (not actual) salaries. That differential is simply wrong.

The declaration of lower pay "on whole" appears not to have been derived by legitimate mathematics at Decision p. 26, where the Regional Director attempts an analysis of the Salary Reference Tables for FSRs and bargaining unit engineers (Employer's Exhibits 131 and 132). It is for good reason that neither party analyzed these tables in this manner in their briefs. The analysis makes no sense;[16]

8. The record supports a finding of any "significant difference" between FSR dress codes and those of unit employees, or in the need to "honor the customers' security and/or identification process." (Decision p. 37)

[16] The Regional Director's analysis is an illustration of the adage, often attributed to Mark Twain, that there are lies, damn lies, and statistics. By way of example, it is impossible to say if any individual in any "classification" of engineer is paid more or less than (generic) FSRs where the record shows no information about any of how many FSRs were in each of the 44 salary ranges stated in Employer's Exhibit 131, or where (or even if) any individuals in any classification fall within the minimum to maximum recommended range for their own classification. The only thing the Regional Director concludes that appears to be broadly supported by the evidence is that it is possible for engineers who are Level 6 to make 25% more than the highest paid FSRs (although Petitioner calculates it at roughly 23%, comparing $161,000 for highest paid FSRs to $198,000 for highest paid engineer). That is not enough to defeat a community of interest between groups of employees with as much overlap in both the method of determination of their salaries and their actual (potential) pay as the engineers and FSRs have.

As to dress codes, while the record contains some minimal testimony about FSRs conforming to the dress codes of their customers (more "formal" in some foreign locations; more casual at Southwest Airlines – Tr. p. 40, ll. 3-9; p. 583, ll. 2 – 15), the even more scanty testimony about what Boeing unit engineers wear would have indicated that most fall within the same broad fashion range -- Dockers and a collared shirt (Tr. p. 1535, ll. 14-19) at Boeing headquarters; probably clothing that would fit in when at other worksites; and in all cases, personal and comfortable clothing appropriate to the physical working environment, rather than a uniform. Similarly as to customer security and/or identification processes: The record reveals minimal evidence on this question of any kind, but it is apparent from the range of locations where bargaining unit engineers work – some on Boeing property, many on Air Force bases, with military security – that the current bargaining unit honors a variety of customer security and/or identification processes.[17]

9. The unarguable fact that much of the current bargaining unit shares no low-level common supervision is not relevant, on the bizarre grounds that "[i]n an organization this large, whether employees share a common supervisor at the fourth or eighth level would seem to have little impact on their workplace concerns, and accordingly has little import here." (Decision, p. 39)

It is precisely **because** employees are unlikely to share common supervisors below a high level **within the bargaining unit** in an organization this large and **because** this union and this employer have obviously been able to bargain successfully for a unit with little common first or second level supervision that the Petitioner's observation was relevant. Applying a standard of

[17] The Regional Director Decision in Case 31-UC-311, *Boeing Company and SPEEA*, Attachment 3, notes at p. 7 that "[s]ome aspects of employment conditions for employees at Edwards/Palmdale are arguably unique . . . because both locations are military installations, employees have access badges and security codes to use for entering the base in addition to the Employer-Petitioner's standard identification; employees from other facilities who are temporarily assigned to Edwards/Palmdale receive access badges while working there. In terms of standard work attire, there is a policy governing when shorts are permissible." This information wasn't presented in the instant case but it is, frankly, obvious – people who work on military bases are subject to military security. The decision in the UC case was provided to this Regional Director before he issued the decision in this case.

common "first or perhaps second level" supervision as an important factor in community of interest calculations would automatically put this criterion in the "no community of interest" column in every large bargaining unit at every large employer. (Indeed, it is hard to reconcile this observation by the Regional Director with his emphasis elsewhere on "the macro level." On "the macro level" huge swathes of the "actual workplace structure" that the Regional Director appears to conclude would define the only appropriate bargaining unit share minimal common low level supervision.)

10. The professional engineering bargaining unit, which already operates as a successful bargaining group within the "actual workplace structure that is significantly larger in geographic, operational, and functional scope . . ." (Decision, p. 40) does not share a **sufficient** community of interest with FSRs to be allowed to merge the FSRs into their unit **simply because** of the size and functional integration of the employer's **entire technical support system**.

The Regional Director makes this finding despite also concluding, in his analysis of the discrete community of interest factors, that the FSRs and professional engineering unit have significant shared interests and despite the fact that a correct analysis would recognize still more shared interests. **He thus concludes, in effect, that bargaining *cannot* take place under the exact circumstances that it historically *has* taken place, in a unit that is less than the employer's entire "actual workplace structure."**

Each of these points is addressed separately below:

B. THE CURRENT GEOGRAPHIC SCOPE OF THE BARGAINING UNIT FAVORS PERMITTING A SELF-DETERMINATION ELECTION TO ALLOW THE FSRS TO JOIN THE EXISTING UNIT.

THE REGIONAL DIRECTOR WRITES at Decision, p. 23 that "[t]he engineering unit employees are largely located in the Seattle area and at Edwards Air Force Base, [and] unit engineers also include employees in Utah, Oregon, and in Washington outside the greater Seattle

area." He contrasts this with the wider dispersion of the FSRs to conclude at p. 38 that "the instant petition seeks an election in a voting group dispersed over many locations and geographically disparate from the work location of a vast majority of the engineering unit employees."

The significance of the work locations of the current bargaining unit as compared to that of the FSRs is mostly a matter of how one chooses to describe them. The Regional Director glosses over the distance between the two main worksites for the professional unit, ignoring the fact that urban Seattle and Edwards Air Force, where the current unit employees "largely" work, are approximately 900 miles apart. The Puget Sound Area contains 21 widely dispersed worksites listed on Union Exhibit 11. Engineers in Washington itself work at distances as far apart as Seattle and Spokane, roughly 300 miles separated. (Tr. p. 1557, ll. 10 - 16). The engineers in the bargaining unit described in Section 1.1(a) of the agreement have successfully bargained with engineers in Weber County, Utah (Joint Ex. 1, Sec. 1.1(b)) which is about 800 miles from Seattle. Florida – where no unit members resided at the time of the hearing, but where successful bargaining has taken place, historically, under one contract with the rest of the represented engineers – is as far from Seattle as you can get within the continental United States. Portland, Ore., where the petitioner currently represents 51 engineers under the same contract, is roughly 175 miles from downtown Seattle. Even Edwards and Palmdale are more than 35 miles apart, enough to destroy "community of interest" if distance were the primary issue. The FSRs are in **more places** than the engineers in the current unit but, domestically, are **similarly** dispersed. What is the significance of all these distances for purposes of labor law, labor relations, and the rights of employees to organize as the Petition requests?

The answer is very little. Bargaining units concentrated in a single location differ qualitatively from those whose members have little face-to-face contact. But **once the face-to-face contact in the bargaining unit is broken,** as it was in this unit from almost the very start, given the dispersion within Washington State itself, **the separation by 175, or 300 or 800 or 900 or 3,000 miles makes little practical difference. Likewise the character of the existing unit that has thousands of members clustered, largely, in two (widely separated sites) along with a half dozen or so satellite areas would not change by the addition of the proposed voting group that adds in some even smaller groups of members scattered in an even more dispersed geographic area**.

The distribution of the FSRs resembles the geographic makeup of the existing professional unit. Employer's Exhibit 27 lists 92 FSRs who would comprise the voting group. That exhibit identifies as the "Work State" the state of Washington for 56 or 61% of them.[18] Additionally, 4 (4%) of them have as their "Work City" Palmdale California, one of the work sites in the bargaining unit. Accordingly, 65% of the FSRs work geographically within the boundaries already specified in the professional bargaining unit. The other 32 FSRs are co-located at 14 locations around the country.[19] Similarly, Union Exhibits 21 and 22, depict the wide smattering of locations of the bargaining unit professionals on Domestic Temporary Assignments at two points in time. DTA assignments can last up to 2 years. (Tr. p. 1199,

[18] Two of the co located FSRs work at the Alaska Airlines base at SeaTac Airport in Seattle. (Tr. 35)

[19] The Regional Director incorrectly found on page 23 of the Decision that the co-located FSRs are assigned to over 20 separate domestic locations outside Seattle. Employer's Exhibit 27 demonstrates otherwise. Furthermore, in Footnote 43 of the Decision, the Regional Director incorrectly attributes the work location of intro reps in Seattle to the current state of the 787 and 747-800. In actuality, all intro reps have their base location permanently in Washington and perform temporary assignments for approximately 90 days. (Tr. p. 499)

Rommel) Accordingly, no meaningful distinction can be drawn between the FSRs and the existing unit regarding geographic scope.

The single location presumption has long been abandoned in this unit. As we all experience every day now, modern technologies allow people to communicate freely over great distance. Once you eliminate the possibility of gossiping together in the lunchroom, it really makes almost no difference if your co-worker is in the next office, the next state, or even across the country. This is the work pattern that already exists in this bargaining unit – a dispersed bargaining unit and one which (depending on one's viewpoint) enjoys or suffers from comparatively common and lengthy Domestic Temporary (up to 2 year) Assignments. (Decision, p. 23) Under the facts of this case, the issue of geographic dispersion favors permitting a self-determination vote, as the FSRs share with the existing engineering unit a history of working in close cooperation with people who have scarcely met each other, and long assignments to distant locations.

C. THE MOST SALIENT ASPECT OF THE PARTIES' BARGAINING HISTORY IS THE HISTORIC ABILITY OF THE PARTIES TO BARGAIN SUCCESSFULLY IN WHAT THE REGIONAL DIRECTOR CORRECTLY RECOGNIZES IS ONLY A PORTION OF A POTENTIALLY LARGER UNIT. HE ERRED IN FAILING TO FIND THAT THIS FACTOR FAVORED PERMITTING A SELF-DETERMINATION ELECTION.

THE ROLE OF "BARGAINING HISTORY" in the context of an *Armour-Globe* election is uncertain. As the Regional Director notes, *Armour-Globe* elections only take place where a historically unrepresented distinct segment of the workforce seeks to join a group with a history of bargaining and the petitioning group shares a community of interest with existing unit employees. Indeed, in the instant case, the Regional Director rejected the Employer's arguments based on (lack of) community interest findings in two cases in a very different setting – one, *Canal Carting, Inc.*, 339 NLRB 969 (2003), involving a dispute between two different unions

over continuing representation of two historical bargaining units and the other, *Children's Hospital of San Francisco*, 312 NLRB 920 (1993), involving withdrawal of recognition by a successor employer. The Regional Director properly dismissed these as fundamentally irrelevant to the *Armour-Globe* setting (Decision, p. 31), but then failed to recognize the manner in which bargaining history **is** directly relevant to, and supportive of, this petition.

The oft-cited preamble to the National Labor Relations Act guides every representation decision: The Act is intended "To preserve to employees an atmosphere in which they have full freedom of choice with respect to collective bargaining and the designation of a bargaining representative." The role of the Board in delimiting the units within which employees can be permitted to bargain stands in unavoidable tension with this basic goal, and the Board's power to **prevent** employee choice in the name of unit determination should be exercised with caution.[20] Fundamentally, if the employees themselves believe that they share a sufficient community of interest that they wish to bargain together as a unit, the Board should be loathe to rebuff them as a matter of law. This observation is embedded in the oft-cited rule that a petitioned-for unit need only be **an**, and not either "the only" or even "the most," appropriate unit. So long as the employer cannot establish that **it** cannot bargain with the proposed unit, for practical or structural reasons, the best measure of whether different groups of employees share a "community of

[20] The Board's "exercise of caution" in relation to unit determinations has largely been noted in other contexts – the need to exercise great caution" to avoid "undue proliferation" of health care bargaining units (**Error! Main Document Only.**120 Cong. Rec. §6940(1974)); the exercise of caution 'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Chevron Shipping Co.,* 317 NLRB 379 at 381 (1995); the "exercise of caution" in determining whether the employees of employers who are found to be a single or alter ego for labor purposes are therefore parts of a single bargaining unit (*Tabernacle Sand & Gravel Corporation,* 232 NLRB 957, 963 (1977)(Decision of ALJ Normal Zankel). **Each of these latter examples illustrates a principle very close to that stated above: The Board should be slow to exercise its authority to limit employee rights to exercise their freedom to organize.**

interest" is found in allowing them to vote on whether **they** believe they can bargain successfully as a group.

The bargaining history here establishes that such bargaining **can** take place in the proposed unit; that despite having many of the same distinctions internally that the Regional Director identifies as separating the professional engineering unit from the FSRs (geographical dispersion; lack of low-level common supervision among the majority of employees; functional integration into a larger working group; widely ranging pay[21]), there is sufficient cohesion among the 14,000 represented engineers distinct from the 21,000 unrepresented ones that they can bargain together, and the employer can bargain with them. As discussed further below, the Regional Director engaged in an inappropriate analysis of the "macro-level" of the workplace to deny the professional engineering unit and the FSRs the right to exercise their freedom to choose to bargain together, but he missed the most obvious, and only appropriate, macro-level observation: These parties have negotiated in a unit that would be statistically, practically, and realistically unaffected by the addition of the 99 FSRs.[22]

D. THE SKILLS, TRAINING AND JOB FUNCTIONS OF THE FSRS ARE SUFFICIENTLY SIMILAR TO THOSE OF THE PROFESSIONAL ENGINEERS TO FIND A COMMUNITY OF

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[21] The Regional Director describes engineers as making, "on whole" 11 – 25% more than the "highest paid" FSRs. As noted above, this assertion itself reflects confusion on his part. But the Petitioner would note that the same Exhibit that the Regional Director appears to have relied upon, Employer's Exhibit 131, shows that the recommended salary range for the **worst paid** engineers begins as low as $41,000 for a Portland-based, minimum salaried Industrial Engineer and goes as high as a recommended maximum of $198,000 for an Edwards/Palmdale Level 6, maximum salaried Test & Evaluation Engineer. This demonstrates the ability of the parties to negotiate within a large range of salaries, not that the people at the top and bottom of the negotiated scales lack a community of interest.

[22] The 99 FSRs would represent roughly .7% of the professional engineers unit if they are added in to the current 14,000. One might well question of this case, as the 7th Circuit did of the employer's position in *NLRB v. Southern Indiana Gas and Electric Co*., 853 F.2d 580 (7th Cir.1988), *cert. denied*, 488 U.S. 1031 (1989), whether the employer is not simply wasting resources – the union's; the Board's and its own – in resisting its employees' rights to self-determination under these facts.

INTEREST FOR PURPOSE OF THE COMBINED *ARMOUR-GLOBE* AND *SONOTONE* ELECTION THAT IS SOUGHT HEREIN.

THE REGIONAL DIRECTOR REVIEWS THE FACTS relating to the skills, training and functions of the FSRs at Decision, p. 7 – 14, and reaches his conclusions in relation to those facts at p. 32 – 34. These sections are each little more than restatements of the findings and conclusions he reached in his decision in Case 19-RC-15372 that the FSRs are not professionals, and therefore cannot join the professional unit without the agreement of a majority the existing unit members. However, that is no longer the issue. The issue is whether the FSRs and professional engineers have a **sufficient** community of interest even to be allowed to (mutually) self-determine that they can bargain together. When the question is asked correctly, the answer is apparent: They do. The Regional Director reached his conclusion through a combination of factual and legal errors.

1. The Decision largely ignores both the near-identity of FSR work with that done by at least some segments of the represented engineers and the fact that the engineers themselves exhibit a wide range of skills, training and functions.

ALTHOUGH PETITIONER BELIEVES THAT THE REGIONAL DIRECTOR'S MOST SERIOUS ERRORS were legal, his incorrect factual findings are also significant, as he seriously understates the degree of similarity between the FSRs and at least some of the represented engineers.

It is obvious that the FSRs cannot have similar skills, training, and job functions as **all** the engineers, since the engineers themselves display a broad range of such skills, training and functions, but the Decision studiously ignores this obvious fact. One can conclude simply from the Salary Reference Table, Employer's Exhibit 132 and the list of job classifications in Appendix B of the collective bargaining agreement that this bargaining unit already incorporates almost every skill and function, requiring every kind of training, that can be called "engineering" from acoustic through quality, with electrical, environmental remediation, structure and payload

and more along the way. Within this context, the similarity of the skills, training and job functions of the FSRs and the airline support engineers ("ASEs" also known as Airline Support Account Manager "ASAM") is of critical importance – it establishes that the FSRs fit as comfortably in this diverse engineering unit as does any other specific engineering classification. The Regional Director acknowledged the overlapping work of the ASEs and FSRs in his statement of the facts, but ignores them in his analysis of skills, training and functions, yet the evidence shows that the FSRs and ASEs have almost identical skills, training and functions.

The testimony of Dominique Fontana, an ASE, demonstrates this point. She testified specifically concerning Union Ex. 4, comparing the work of the ASEs and FSRs:

Q And the title of it is, "What Do You Do Every Day as an ASAM," right?
A Right.
Q And does it, in fact, describe that?
A Yes, in very good detail.
Q All right, let's walk through it.
A Okay.
Q Go in -- unfortunately these pages are not numbered, so go in four pages, to the -- up in the blue, "ASAM Vision Statement."

. . .

Q BY MR. BUESCHER: Take a moment and read that to yourself.
A Okay.
Q Does that slide represent your understanding of what your vision statement is as part of your job?
A Yes.
Q The slide uses the term "integrated." Can you describe, in your job, what that means?
A Well, I work with a variety of organizations including the Field Service Representatives, and when we come up with a coordinated solution to an issue, we want to make sure it is integrated with all of the players that are impacted by the issue at hand, so whether it be the Spares organization, Warranty, Design, Service Engineering, we kind of resolve the issue as a team, and part of the team, of course, is our contact with the Field Service Representative.
Q Okay, go in two more pages.
A Okay.
Q Below the box, "Partners with Customers, Too." Do you see that?

A Uh-huh. Yes.
Q Four bullets. Three goes over to yourself.
A Okay.
Q Do those represent things that you do in your job?
A Yes.
Q Okay.
. . .
Q BY MR. BUESCHER: What does the first bullet say?
A "Ensure safety stays number one."
MR. HANKINS: Okay. Thank you.
Q BY MR. BUESCHER: Now, the third bullet, can you describe to us how that really functions in your day to day job?
A Well, all of these items are exactly -- we do exactly the same thing. The Boeing FSR and the Airline Support Engineer, we both try to ensure safety stays number one. We are an in-service house single point of contact. We act as a proactive advocate by continuously voicing the customers concerns and striving for a win-win. **We both do those same jobs, so to be an extension, he is with the customer, or the -- the Field Service Rep is with the customer and I am in Duwamish working with the Service Engineers, so we have to make sure we are linked together whenever we are solving an issue.**
Q We are linked together, being who?
A The Field Service Representative and the Support Engineer.
Q All right, look at the next page. Again, four more bullets. Do they describe your job?
A Yes.
Q Based upon your experience working with the FSR's in your job, do they do any of these things?
A We work together to try to improve the dispatch reliability, that is a function we do together. We both monitor customer satisfaction. The third bullet, I don't personally -- I haven't had an opportunity to interface with the local airline resident reps. I am not sure -- I can't speak for my Field Service Representatives, whether or not they do. And, we definitely both provide visibility of top customer concerns' operations and culture within Boeing.

Tr. p. 1154, line 9 – 1157, line 5

Later in her testimony, she noted that

> . . . we usually have Executive Review Meetings with customers, probably once a year, maybe twice a year, and these are high level meetings with executives, and that would be like the Vice-President of the customer, and Senior Directors, as well, usually, and it would be -- I am in the Americas Region, so we have a Vice-President of the Americas Region, and he would be in attendance at the meeting. Sometimes Lynne Thompson, our Senior Director, would be there, the Chief Engineer Peter Weertman, Lynne's boss sometimes, even Lou Mancini sometimes.

Q And do FSR's ever participate in these?
A Yes, they always do.

Tr. p. 1165, ll. 2 – 13

And

> . . . Focal Technical Reviews with customers. Tell us what that means?
> A Well, this meeting is a little bit different than the Executive Review Meeting. The Technical Review Meetings are more to talk about fleet issues, so the Fleet Chiefs and the Deputy Fleet Chiefs attend those meetings, as well as the Field Service Representative and myself, and the engineering managers at the customer and their direct reports will a lot of times attend these Technical Review Meetings. They are pretty big meetings; they have a lot of people at them usually.
> Q Now, when you say attend, something else I have learned through this process, is sometimes that means by telephone or by internet or in person. What happens in these Technical Review Meetings?
> A They are always in person.
> Q All right, what is the nature of the things discussed at a Technical Review Meeting?
> A Fleet -- fleet issues.
> Q What kind of fleet issues?
> A Well, like right now, there is a big fleet issue on the 757 for crown skin cracking, the same with the 737, so that is a fleet issue.
> Q Okay, so -- it says they are Technical Review Meetings.
> Are they technical issues?
> A Yes
> Q Okay.
> A Very much so.
> Q Okay, and based upon your experience, describe how an FSR participates, if at all, during these meetings.
> A Well, the Field Service Representative is there to help voice the concerns of the customer, and also making sure that Service Engineering and Boeing and the Fleet Chief and the Deputy Fleet Chief, make sure we really understand what the issue is, so the Field Service Representative will provide any details necessary to make sure that we understand the problem, as well as the customer, of course, will also provide that input.

Tr. p. 1166, line 5 – 1167, line 13.

Each of these aspects of Ms. Fontana's testimony establishes all or some similarity in skills and job function as between the ASEs and FSRs; each is touched on only lightly, if at all, in the Regional Director's recitation of the facts, and ignored in his conclusions. Each

establishes what would appear to be a closer bond between the ASEs and the FSRs than between many of the classifications currently included in the unit. Each helps establish a strong community of interest between the FSRs and the existing unit.

2. The Decision's treatment of skills, training and job function applies a legal standard that is inconsistent with Board precedent.

THIS PORTION OF THE REGIONAL DIRECTOR'S DECISION HIGHLIGHTS THE LARGE DEGREE OF SUBJECTIVITY that inevitably creeps into the community of interest analysis, and suggests an inevitable question: How 'similar' does 'similar' have to be?

The Regional Director writes at p. 32 of the Decision that

> The record indicates a significant portion of the FSRs, the co- located FSRs and BBJ FSRs at a minimum, are engaged in the dual job functions of technical advisor and relationship building. The technical work includes answering questions regarding the Employer's aircraft and providing guidance to the customers' engineers and mechanics when they are troubleshooting a technical issue with an aircraft. . . . intro reps, controllers, and FSRs in the Seattle Support Center are only involved in the technical half of this equation.
>
> In regard to the technical advisor function, some similarities exist with the engineering unit. The skills of the FSRs, in the most general sense, are intellectual and focused on problem solving, similar to the engineering unit. I recognize FSRs, like engineers, are prohibited from "touch labor" on aircraft, and perform no manual or physical tasks. Further, the technical knowledge of the FSRs is demonstrated by their undisputed ability to resolve at least some of the technical issues brought to their attention independently, without contacting service engineering.

Nonetheless, he concludes that these similarities aren't enough; that many of the very features that led him to determine, originally, that the FSRs weren't professionals also means that they lack even a **sufficient** community of interest with the professional engineers to allow both groups to vote on joining in a single unit. They "do not independently design engineering solutions" or "apply science and mathematics to design, manufacture, test, operate and service aircraft in the manner required of engineering unit employees." *Id.* (Which is to say, they are

not engineers.) They "do not perform mathematical calculations, make technical drawings, or otherwise perform functions associated with the engineering unit work." *Id.* (Which is to say, they are not engineers.) Even where an FSR who is a trained and academically credentialed engineer, Ross Hirsch (Mr. Hirsch has a Bachelor's of Science in mechanical engineering and a Master's of Education in the same field. Tr. p. 868, ll. 17 – 23) is acknowledged to play a crucial role in resolving an engineering dilemma – the pylon cracks, discussed at Decision p. 15- 17; 32-33 – "It does not appear he is actually applying engineering principles, but instead is facilitating communication." (Decision p. 33) (Which is to say, he is not acting as an engineer[23].) "[A] significant number of FSRs do not have engineering degrees, yet are able to function apparently quite well as FSRs." (Which is to say, **they are not engineers**.) Yet all he can say of the nearly identical facts of *Lockheed Aircraft Corp, supra,* is that while it

- "has some appeal" and, indeed**,** that
- "[i]n *Lockheed* **none** of the non-professionals had the same educational background as the engineers, whereas here a significant portion of the FSRs do have engineering degrees" [Emphasis supplied][24] and
- "[l]ike the FSRs in the instant case, the non-professionals in *Lockheed* had taken engineering related training courses. While not an exact parallel to the relationship between the non-professional employees and producibility and value

[23] This observation of the Regional Director's is particularly problematic, because it is inconsistent with his own finding in case 19-RC-015372, at page 32 of the Decision and Conditional Order where he found directly that, in developing the "bathtub fix" for the pylon crack, Mr. Hirsch was "applying engineering knowledge. Clearly, some of the FSRs are degreed engineers and they use this knowledge in making some recommendations."

[24] Petitioner emphasizes "none" in this phrase, since the Regional Director concludes this same paragraph by noting the importance of the fact that "a significant number of the FSRs **have not been shown** to possess an engineering degree or background prior to becoming an FSR." **Intentionally to belabor the point, *none* of the non-professionals who were found to have a community of interest with the engineers in *Lockheed* had such a degree or background.**

> engineers in *Lockheed,* the present case does include similar comparisons such as the ASE and co-located FSR, where the skill set and function overlap is present,"

he will view this record "as a whole" as indicating that "the employees' skills, training, and job functions weighs [sic] against finding a community of interest between the voting group sought and the engineering unit." Decision, p. 34

It is impossible to reconcile the Regional Director's logic either with the *Lockheed* case, the closest analogy either party has found in reported decisions, or with the broader treatment of community of interest as it has evolved under other facts and at other times. The *Lockheed* case illustrates that non professionals need not demonstrate professional skills and job functions to be included in a professional unit and need not meet the professional standards delineated in Section 2(12) of the Act to share a community of interests with professionals.

Logic dictates that the standards for professional status and community of interest **must be** different, or no Board-certified unit of professionals and nonprofessionals could ever be formed. Indeed, if a petitioned-for unit is required to have **identical** skills to an existing bargaining unit in order to be permitted a self-determination election, even aside from the professional/non-professional issue, few such elections could take place. So one must start with the assumption that the nonprofessional group cannot be held to have the exact same professional skills and training as the professionals, nor can they be expected to perform all the same functions. Yet that is, in effect, the standard to which the Regional Director's decision here holds the FSRs.

There is some irony in attempting to address the Regional Director's decision on the enumerated community of interest factors (he concludes, ultimately, that some such factors

support a finding of community of interest; some refute it; and some are neutral – Decision, p. 39), given that he ultimately rejects the enumerated list in favor of a *gestalt* finding that the traditional community of interest analysis "fails accurately to reflect the larger manner in which the Employer has structured the workplace in which these two groups of employees work." (Decision, p. 40) This broad assertion, based on the Regional Director's (mis)interpretation of *Specialty Heathcare, supra*, will be addressed below. But to the extent that he looked at, and that the Board will consider, the traditional analysis, he erred in finding that the skills, training, and job functions of the FSRs, similar in so many ways to those of the engineers and different in some others, did not suggest a **sufficient** community of interest to permit the reverse *Sonotone* election procedure.

E. THE ACKNOWLEDGED HIGH DEGREE OF FUNCTIONAL INTEGRATION OF THE FSRS WITH THE PROFESSIONAL ENGINEER BARGAINING UNIT IS STRONG EVIDENCE OF A SUFFICIENT COMMUNITY OF INTEREST TO PERMIT A SELF-DETERMINATION ELECTION, AND IS NOT DEFEATED BY THE (MERELY PRESUMED) SIMILAR FUNCTIONAL INTEGRATION WITH OTHER WORKERS.

ALTHOUGH THE REGIONAL DIRECTOR LISTS "FUNCTIONAL INTEGRATION" as only one of the community of interest factors, analyzing it at Decision, p. 35-36, his ultimate conclusion that it is "neutral" is the analytic heart of his decision. It is here that he moves from what he calls a "micro-view" of the "**strong evidence of a community of interest between the FSRs and the engineering unit**" (Decision, p. 35) to a view from the "macro-level" that evaluates the relationship between the FSRs and the rest of Boeing's technical support group to conclude that there is "an incongruity between the engineering unit and the voting group sought." Decision, p. 36

This analysis is profoundly wrong in three different ways: First, it is based on a mischaracterization both of the actual holding in *Specialty Healthcare*, *supra*, and on the most

fundamental statutory (and historical case law) rules governing the role of the Board in determining bargaining units. Second, it is based only on a **presumption** that the FSRs' work is as integrated with other work classifications as the **evidence** shows that it is with the unit engineers. Third (in a point related to the second), it suggests that defining the community of interest in any representation situation for a large employer will necessarily be a massive task, so unwieldy that the parties can never realistically hope to prove, nor the Board to find, that such a petition should be granted.

1. The Regional Director's decision is at odds with the fundamental principle of bargaining unit determination that the petitioned-for unit need only be *an* appropriate one, misreading the thrust of *Specialty Healthcare* to reach a conclusion diametrically opposed to the Board's opinion in that case.

IT IS, PERHAPS, THE SINGLE MOST FUNDAMENTAL principle of NLRB unit determinations that the petitioned-for unit need not be the only, or even the best, possible unit so long as it is "an" appropriate unit.[25] It is fitting that what is now frequently cited as the lead case reciting this rule in recent times involves the same employer as this one. In *Boeing Co*., 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. **If that unit is appropriate, then the inquiry into the appropriate unit ends.** If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. See, e.g., *Overnite Transportation Co*., 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997). **[*Emphasis supplied*]**

Quoting from the Board's Outline of Law and Procedure in Representation Cases, p. 127:

[25] This is one of the ways in which the Board addresses the inherent tension, noted above, between employee free choice and Board unit determinations. See *NLRB v. Hillview Health Care Cent*er, 705 F.2d 1461, 1469–1470 (7th Cir. 1983)

> It will be observed that there is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Bartlett Collins Co*., 334 NLRB 484 (2001); *Overnite Transportation Co.,* 322 NLRB 723 (1996); *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Federal Electric Corp*., 157 NLRB 1130 (1966); *Parsons Investment Co.,* 152 NLRB 192 fn. 1 (1965); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co*., 166 NLRB 173 (1967); *NLRB v. Carson Cable TV,* 795 F.2d 879 (9th Cir. 1986); and *Dezcon, Inc*., 295 NLRB 109 (1989). **A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist."** *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Indeed, "the Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees." *Bartlett Collins Co*., supra. [*Emphasis supplied*]

The Board repeats and relies on this principle in *Specialty Healthcare* itself at 357 NLRB at fn. 11, of which the Decision quotes only a portion, at Decision fn. 55. However, the Regional Director does not even pay lip-service to this fundamental principle, which is recited in most representation decisions as a matter of course.[26] Instead, he relies on a different footnote in *Specialty Healthcare* to reject the petitioned-for unit because the workplace structure surrounding the FSRs is "significantly larger in geographic, operational, and functional scope" (Decision, p. 40) than the existing bargaining unit of represented engineers and the voting group of FSRs.

Thus, at p. 40 of the Decision, the Regional Director sets out footnote 19 to the recent *Specialty Healthcare* decision in full, and concludes from that footnote that the Board has

[26] See e.g., *OS Transport LLC.*, Case 32- RC- 5761, Decision and Direction of Election, p. 13 (January 14, 2011); *Stericycle, Inc*., Case 4- RC- 21788, Decision and Direction of Election, p. 3 (March 11, 2011); *Johnson Controls, Inc*., Case 1- RC- 22514, Decision and Direction of Election, p. 7 (February 11, 2011); *Macy's, Inc.*, Case 1-RC-22530, Decision and Direction of Election, p. 6 (April 22, 2011).

rejected the fundamental principle that it will look first at the petitioned-for unit and end the inquiry there if that unit is appropriate (as well as the frequent corollary, that it will look for the **smallest** appropriate unit before it looks to add in individuals or classifications that the employer wants to add[27]). In context, this misreads the footnote – Its placement indicates that footnote 19 was intended largely as an empirical observation, to reassure potential critics. As a factual matter, and **"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." **[*First* e*mphasis supplied*]** Setting aside the question, addressed below, of whether the Regional Director has misread this decision as a whole, it must be reemphasized that this **is** a situation where there **is** prior bargaining history – as discussed above, a history of bargaining in a unit much smaller than the "larger structure of their actual workplace" to which the Regional Director points. Thus, even within the framework of the Regional Director's own analysis, he erred.

He erred more dramatically, though, in his overall interpretation of *Specialty Healthcare.* Far from breaking entirely new ground in unit determination law by requiring that any bargaining unit formed by Board election procedures must primarily reflect the manner in which the Employer has structured the workplace, *Specialty Healthcare* stands (among other things) for the specific proposition that

> . . . **we reiterate and clarify that, in cases in which a party contends that a petitioned-for unit containing employees readily identifiable as a group who**

[27] "**Error! Main Document Only.**The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned- for employee classifications. See, e.g., *R & D Trucking*, 327 NLRB 531 (1999); and *State Farm Mutual Automobile Insurance Co.,* 163 NLRB 677 (1967)." *Bartlett Collins, supra.* The size of the unit approved in *Specialty Healthcare* has been at the eye of the firestorm the decision ignited, but isn't relevant to the instant case, except (ironically) to the degree that one might characterize the standalone unit the employer seeks as unreasonably small in the context of this employer.

> **share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to demonstrate that the excluded employees share an overwhelming community of interest with the included employees**. [*Emphasis supplied*]

357 NLRB at 1. It cites with approval the 7th Circuit decision in *Hillview Health Care Center*, *supra* at 1469–1470 regarding the balance to strike between over-large and too-small units:

> The statute gives little guidance to the Board on where to strike the balance but does suggest that any tilt should be in favor of unions. Section 9(b) of the Act, 29 U.S.C. § 159(b), requires the Board to "decide in each case whether, *in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." (Emphasis added.) . . . . Consistently with the statutory slant, the Board's unit determinations emphasize homogeneity ("community of interest") rather than the adverse effect of multiple units on the employer. Id. at 1469 (citation omitted) *[Emphasis in original]*

357 NLRB at fn. 12. It notes that the presumptive rules governing, and limiting, units in acute care hospitals is an exception to this general rule, never intended to supplant it. *Id*. at fn. 15. It quotes the Supreme Court's observation that "read in light of the policy of the Act, [Section 9(a)] implies that the initiative in selecting an appropriate unit resides with the employees" (*Id.* at p. 8, quoting *American Hospital Assn.,* 499 U.S. 606, 610 (1991)), and a long-ago Board's observation that "Section 9(b) of the Act directs the Board to make appropriate unit determinations which will 'assure to employees the fullest freedom in exercising rights guaranteed by this Act.' i.e., the rights of self-organization and collective bargaining." *Federal Electric Corp*., 157 NLRB 1130, 1132 (1966).

With this background, the Board came "to the question of what showing is required to demonstrate that a proposed unit consisting of employees who are readily identifiable as a group

who share a community of interest is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees." 357 NLRB at 10.

Before addressing the Board's answer to that question, Petitioner needs to make it clear that this **is** the central question raised by the Regional Director's decision. The procedural posture in the instant case is unusual: The employer never argued that the FSRs could only be included in a **larger** than the petitioned-for unit. The Regional Director is alone in (perhaps) advocating that position. And, perhaps because no advocate proposed any units other than the petitioned-for one or a standalone FSR unit, the Regional Director did not have to identify what unit he **would have** found to be appropriate. However, the reader can identify that which the writer did not make explicit: If this Regional Director had to make a unit determination *ab initio*, he would (apparently) find that the only appropriate unit is one with "boundaries that make sense in the Employer's particular workplace," although that would include such problematic additions as the internationally placed co-located FSRs, and independent contractors or contracted engineers.[28] Since it is not within his authority to reverse the historical certification of only some of the professional engineers, he does what is, in effect, the next best thing (from the employer's point of view, at least) – adopts a community of interest rule that will effectively prevent additions to the existing unit of fewer than everyone in the service engineering group who is within the Board's jurisdiction.

Thus, since the Regional Director played the role, here, of an employer attempting to force additional employees or classifications into a petitioned-for unit, Petitioner will look to the

[28] The Regional Director notes at fn. 59 that the exclusion of the internationally co-located FSRs doesn't undermine the Petition, because of the limits of the Board's jurisdiction, but he does not suggest how he reconciles the limits of the Board's jurisdiction to his own view of the relevant scope of "material community of interest factors" in light of the employer's "boundaries." Petitioner will assume that he would find **some** unit to be appropriate, despite this apparent anomaly.

actual holding of *Specialty Healthcare* in this regard. What showing did the Board hold was required to demonstrate that the smallest appropriate unit contains additional employees beyond that petitioned for?

> It is clear what types of showings are not sufficient. **Given that the statute requires only *an* appropriate unit, *once the Board has determined that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate.*** Stated in terms directly relevant to this case, "the Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate." *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964) (citing cases). **Because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.** More must be shown. As the District of Columbia Circuit held, "[t]hat the excluded employees share a community of interest with the included employees does not, however, mean there may be no legitimate basis upon which to exclude them; that follows apodictically from the proposition that there may be more than one appropriate unit." *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The Seventh Circuit has agreed: "[I]t is not enough for the employer to suggest a more appropriate unit; it must 'show that the Board's unit is clearly inappropriate.'" *Dunbar Armored, Inc. v. NLRB* , 186 F.3d 844, 847 (7th Cir. 1999) (quoting *NLRB v. Aaron's Office Furniture* , 825 F.2d 1167, 1169 (7th Cir. 1987)). [*Emphasis supplied*]
>
> *Id.* at 10. Indeed, the decision notes that
>
> The Board has articulated a "polic[y] of not compelling labor organizations to seek representation in the most comprehensive grouping." *Mc-Mor-Han Trucking Co.*, 166 NLRB at 701. "A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer unless 'an appropriate unit compatible with that requested unit does not exist.'" *Overnite*, 322 NLRB at 723–724 (citations omitted); see also *Federal Electric Corp.*, 157 NLRB at 1132.

Id. at 11. Thus

> When the proposed unit describes employees readily identifiable as a group and when consideration of the traditional factors demonstrates that the employees share a community of interest, both the Board and courts of appeals have necessarily required a heightened showing to demonstrate that the proposed unit

> is nevertheless inappropriate because it does not include additional employees. Although different words have been used to describe this heightened showing, in essence, a showing that the included and excluded employees share an overwhelming community of interest has been required.

Id.

In describing what kind of showing would meet this "overwhelming community of interest" standard, the Board cites *Blue Man Vegas, LLC v. NLRB,* 529 F.3d 417 (D.C. Cir. 2008) which suggests that it would be, in essence, a Venn diagram with the community of interest factors for the petitioned-for group and the additional employees overlapping almost completely. However, in the instant case, the Board cannot find that the additional employees cited by the Regional Director must be pulled into the unit because of a perfect overlap of community of interest factors; even the Regional Director doesn't make that finding. Instead, the Regional Director presumes, in effect, that the FSRs have no **closer** community of interest with the unrepresented engineers than with the represented ones, effectively finding that **no** group has an overwhelming community of interest with the FSRs. At the same time, he also makes no finding that the addition of 99 FSRs to an existing 14,000 person unit would create a "fractured" unit nor could he. Not only did the employer (and, apparently, the Regional Director) acknowledge that an FSR stand-alone unit would be appropriate, but it is obvious that a group of 14,099 is far less fractured than the standalone unit proposed by the employer, which would portend a proliferation of equally small fractured groups organizing in the future. Thus, the actual evidence failed to support **either** of the grounds upon which the Board would find that a petitioned-for unit is inappropriate under *Specialty Healthcare.*

2. The conclusion that the FSRs' work is as fully integrated into that of other work classifications as it is with the bargaining unit engineers is factually unsupported in the record.

THE REGIONAL DIRECTOR MAKES WHAT IS, FOR PURPOSES OF HIS ANALYSIS, a (perhaps **the**) crucial factual finding in a footnote. He writes at fn. 12 that

> Since the merger, the Employer has supported McDonnell Douglas aircraft in the same manner it supports its other aircraft. What is of significance here is that the petitioned- for voting group of FSRs interact, interchange, and/or are functionally integrated with non- unit engineers in this support process for McDonnell Douglas aircraft in the same manner the FSRs interact, interchange, and/or functionally integrate with some in the engineering unit who support the Boeing line of commercial planes. **However, the parties did not detail in the record the extent of this interaction, interchange, and/or functional integration in the record as it relates to the FSRs and non- unit engineers**. [*Emphasis supplied*]

Decision, p. 4. To similar effect (although in the body of the decision) he writes at p. 24 that

> In addition to the engineering unit of approximately 14,000 employees, the Employer additionally employs 21,000 plus unrepresented engineers employed outside the contractually defined geographic scope of Petitioner's engineering unit. These non- unit engineers include the Employer's McDonnell Douglas operations in Long Beach, California where FSRs also interact and have contact with non- unit engineers and others in providing support services for customers of McDonnell Douglas aircraft, as with Boeing aircraft. However, the parties did not detail the extent and nature of such interaction, contact, interchange, and/or functional integration with these unrepresented engineers. ***Presumably*****, FSR interaction, contact, interchange, and/or functional integration with unrepresented engineers in the McDonnell Douglas operations are similar in nature and extent to the community of interests factors at issue here with regard to the FSRs and engineering unit.** [*Emphasis supplied*]

Since it is, in essence, the "macro-level," presumed high degree of functional integration of the employer's entire service engineering group that ultimately drives the decision, it is simply astounding that the Regional Director based his macro-level analysis on **no evidence.** **If** this were the relevant analysis (as it is not – see above), then the Hearing Officer was obliged to ensure that there was evidence either to support or refute his finding.

> The R case hearing is a formal proceeding the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under

> Section 9 of the Act. As such, it is investigatory, intended to make a full record and nonadversarial.
>
> *Casehandling Manual, Part Two, Representation Proceedings,* § 11181

> In addition to being aware of and prepared for the issues in a given case, it is the duty of the hearing officer to see that a full record is developed.
>
> *Casehandling Manual, Part Two, Representation Proceedings,* § 11188.1

At the same time, as argued further above and below, it is hardly Petitioner's position that the Board should remand for further evidence: It makes the point, for now, simply that no Regional Director can "presume" facts that drive the outcome of the case.

3. If the Board were to affirm this decision, it would amount to a declaration that R-cases of all sorts can only be decided on an evaluation of the classic community of interest factors for *every employee.* In the case of large employers, this means, in effect, months of hearing on every such dispute.

IT TOOK 12 DAYS OF HEARING, 1,800 pages of transcript, more than 150 exhibits and roughly 20 witnesses to make a record that the Regional Director describes as fundamentally incomplete.[29] If the degree of integration of the entire service engineering group – all 21,000 additional engineers plus unknown numbers (and number of classifications) of "represented and probably unrepresented (Long Beach) technical unit employees, independent contractors or contracted engineers, certain sales related employees, and more" -- is relevant to whether 99 FSRs can be permitted to join in the 14,000-strong existing professional engineering unit, one would have to guess that the hearing that begun in January 2011 would still be going today and well into 2012.

[29] A prior hearing between these parties to add a group of facilities engineers to the professional unit lasted 60 hearing days and consumed 14,515 pages of transcript. See Union Exhibit 28, footnote 4.

Boeing is a very large employer, but it isn't uniquely large, or anything close to the largest. Its website lists 171,448 total employees as of October 27, 2011.[30] General Electric (another manufacturer) has 133,000 employees in America[31]; Walmart has an estimated 2.1 million workers.[32] The Regional Director's novel focus on "the macro-level" effectively implies that unions cannot organize -- **and that employees cannot *choose* to organize** – in large corporations unless they are prepared, at a minimum, to sink hundreds of thousands of dollars simply into the hearing process.

F. THE PETITIONER DOES NOT ASSERT THAT THE FSRS ARE THE "FINAL UNREPRESENTED" PORTION OF THE TECHNICAL SUPPORT EMPLOYEES, NOR NEED THEY BE SUCH IN ORDER TO BE PERMITTED A SELF-DETERMINATION ELECTION.

THE REGIONAL DIRECTOR WRITES AT P. 32 of the Decision that "the FSRs in the voting group are not, as Petitioner posits, a final unrepresented piece of this technical support process and as such, I find functional integration is a neutral factor." Petitioner has never made any such assertion, and it would be irrelevant if it had. Even if the FSRs are **not** such a final piece, it makes no difference. The *Armour-Globe* process is not designed to apply only where the union seeks to organize a residual group consisting of the final piece of a comprehensive group of employees. It applies any time the petitioner seeks any distinct and identifiable segment of the workforce, whether that segment constitutes the "final piece" of anything or not.

G. IN ADDRESSING THE 'GENERAL WORKING CONDITIONS' OF THE FSRS AND UNIT EMPLOYEES, THE REGIONAL DIRECTOR OVERSTATED THE DIFFERENCES AND

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[30] http://www.boeing.com/aboutus/employment/employment_table.html

[31] "Notice of 2010 Annual Meeting and Proxy Statement" http://www.ge.com/pdf/investors/financial_reporting/proxy_statements/ge_proxy_2010.pdf, p. 48

[32] See http://articles.businessinsider.com/2010-09-20/news/30081785_1_minimum-wage-real-wages-employees

UNDERSTATED THE SIMILARITIES, AND MISTAKENLY RELIED AGAIN ON THE RELATIONSHIP BETWEEN THE FSRS AND OTHER NON-REPRESENTED EMPLOYEES.

UNDER THE HEADING OF 'GENERAL WORKING CONDITIONS,' addressed at pp. 37 – 38 of the Decision, the Regional Director concludes that "the general working conditions of the FSRs relative to the engineering unit support the Employer's position. The similarities present here in benefits are outweighed by the differences in pay and, most importantly, work location and the working conditions relating to location." He also notes, in this context, that "FSRs and the employees in the engineering unit have the same benefits and are salaried employees in the same pay system. I do note, however, that these are working conditions shared with many employees of the Employer, not necessarily working conditions exclusive to the FSRs and the engineering unit.[33]"

His analysis is flawed from each angle – the similarities between the FSRs and the unit are greater than acknowledged, the differences less, and the similarities with the rest of the workforce are not relevant.

1. The record contains no evidence of any pay differential "on whole" between the FSRs and the represented engineers, and such differential as the Regional Director identifies as between the highest paid engineers and highest paid FSRs is not sufficient to defeat their community of interest.

IT IS HARD TO KNOW EVEN WHAT TO MAKE OF the assertion that there is an 11-25 percentage difference "on whole" between the salaries of represented engineers and the FSRs. The record contains no evidence of what any individual FSR or engineer earns, nor any evidence

[33] The FSRs and employees in the engineering unit are in more than "the same pay system;" they have the same job code and, largely, the same three level descriptions. The G indicates that the occupation is product support. (Tr. p. 1544) In this respect, the FSRs share their job purpose with ten occupations in the professional bargaining unit listed in Joint Exhibit 1, Appendix B, page 70, the occupation codes for which are also G. The E signifies Field Service. *Id*. The C7 further defines the job family or the tasks performed by FSRs. *Id.* See also Employer Exhibit 132.

of how many individuals fall into each of the job code levels on Employer's Exhibit 131 for bargaining unit employees or on Employer's Exhibit 132 for FSRs. There **is** a difference between the recommended top range for the highest paid engineers and the highest paid FSRs of (roughly, by Petitioner's calculation) 23%, but the significance of that difference is unclear, both because the record doesn't tell us how many people are in that highest-paid-engineer group and because a simple statement of the potential percentage gap in recommended salary among highly paid salaried employees isn't terribly informative as to community of interest.

A 25% wage differential among low-wage hourly workers may be huge – the difference between $8.00/hour and $10 represents a real difference in the lives of the workers involved – but while a 25% difference at the top of a well-paid salaried scale is more **money**, it is probably less significant in terms of the marginal utility of the money, which is what really identifies who has a community of interest in terms of their pay. The $161,000/year FSR and the $198,000/year engineer have a strong common bond of earning near the top of American salaried workers.

Once again, the issue is "how similar?" Petitioner would argue that these salary scales are, in terms of what gives employees a common interest, **very** similar.[34]

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[34] In *Rockridge Medical Care Center,* 221 NLRB 560 (1975), the employer argued that employees whose average salaries were separated by 20% did not share a community of interest. The Board rejected the argument, noting that the difference simply reflected some additional duties that one classification had as compared to the other, describing it as among several "surface distinctions" *Id* at 561. In *Wurster, Bernardi & Emmons, Inc.,* 192 NLRB 1049 (1971), the employer wanted to include architectural associates and nonassociates in a single unit; the Petitioner wanted to exclude the associates. The Board noted that "[the main distinctions between the two groups are that the lowest paid associate receives approximately 30 percent more pay than the highest paid nonassociate, associates are listed in the firm's brochure, receive an annual salary as opposed to an hourly wage, share in a special fund set aside from the profits, and are privileged to attend quarterly meetings with the principals to discuss the general status of the firm; but associates, as such, do not participate in corporate decisionmaking" but "[b]enefits under the Employer's medical and dental programs are identical, both participate in the same profit-sharing plan and are equally eligible for merit bonuses, receive Christmas bonuses on the same basis, receive the same paid holidays, and have the same vacation benefits. We conclude that they share a sufficient community of interest to be included in the same unit." *Id* at 1051.

2. There is no significant difference in the dress codes that most FSRs and most unit engineers follow, nor in the security and/or identification process.

THE DECISION OBSERVES CORRECTLY THAT "FSRs in the field match their dress code to the customers' code and honor the customers' security and/or identification process." (Decision, p. 37). It omits the equally correct observation that, in most cases, the dress code for engineers and for FSRs will be the same – what is generally known as 'business casual' -- and that the engineers, split as they are between Boeing-owned and (largely) military properties **also** follow a range of security and/or identification processes, determined in large part by the customer. Internationally located FSRs may, as the record implies, tend to dress more formally, but they aren't part of the petitioned-for unit; and the FSRs at Southwest Airlines may be outliers from **all** other Boeing employees in terms of how casually they dress (blue jeans, rather than Dockers . . .) but the difference is hardly dramatic: As noted in the Regional Director Decision in Case 31-UC-311, *Boeing Company and SPEEA*, Attachment 3, engineers at Edwards/Palmdale can wear **shorts**. While the evidence on this factor is sparse, it supports a conclusion that the dress codes applicable to unit engineers and FSRs are broadly similar.

3. The significant finding for community of interest purposes relating to working hours is not that those of FSRs are dictated by customer needs, but that Boeing sets the hours for *all of its own employees* – FSRs and engineers alike – to suit *its* business needs, and that the working schedules within the existing unit vary widely.

AGAIN, WHILE THE DECISION IS CORRECT IN ITS OBSERVATION that "it is apparent the FSR hours of work are dictated by the customers' needs, while the Employer largely retains control over the hours of work for employees in the engineering unit," (Decision, p. 37) the observation comes at this question from the wrong direction. The relevant observation is **not** that the FSR

hours are set for the convenience of customers, but that the hours are set **by Boeing** to meet **its business needs**, just as are the hours of the engineers, **and that there is already a wide range of working hours within the unit, such that the FSRs fit quite neatly into that range.**

Thus, the parties stipulated that the current bargaining unit members work a variety of schedules, including compressed schedules (i.e., 5-8's, 4-10's, 3-12's) and on-call should a customer require assistance. (Joint Exhibit 3, page 4, ¶ 15) The same stipulation also provides that unrepresented employees work a similar variety of schedules, and that the work week is the same for both represented and unrepresented employees. *Id.*

According to Rich Plunkett, the Union's Director of Strategic Development, some professional bargaining unit employees work the varying schedules of FSRs. (Tr. p. 1243, line 25 – 1244, line 15) The professional contract contains numerous schedule alternatives, including shifts designed to provide 24 hour per day coverage. (Joint Exhibit 1, Section 11.5, pages 25-27). Under the contract, Boeing may assign professional employees to such shifts to meet operational requirements. (Joint Exhibit 1, Section 11.5(d), pages 26-27). The significant aspect of working hours for community of interest purposes is not whether any two groups of employees work exactly the same hours – the professional engineering unit already violates this standard if it is a standard – but whether their hours are set in similar ways and under similar constraints. Those of the FSRs and the professional unit meet this criterion.

4. The disparate work locations for FSRs does not distinguish them from the engineers, who work in a variety of locations, yet share a significant community of interest.

THE REGIONAL DIRECTOR FINDS THAT WORK LOCATION is a significant factor detracting from the community of interest between the FSRs and represented engineers first, because the

FSRs in the field have a “fundamentally different work location than the engineering unit employees working at the Employer’s facilities” which “generates other significant differences as noted above. . .” (Decision, p. 38) However, as argued above, the “other significant differences” are largely illusory, while the statement that the customer locations are “fundamentally different” from (Each? All?) the several dozen or more different locations in which represented engineers work is either tautological (the locations are different because they are in different locations) or meaningless. Take away, as one must, the “other significant differences” and there is no evidence of, and no reason to believe in, any important difference in the working conditions at these different locations.

The Regional Director’s second ground for finding work location to detract from community of interest is equally unpersuasive. He writes at p. 38 that

> [s]econd, as touched on earlier in the functional integration section, the instant petition seeks an election in a voting group dispersed over many locations and geographically disparate from the work location of a vast majority of the engineering unit employees. While I have found the Employer's arguments regarding geographic scope unpersuasive as they relate to bargaining history, I do find the different geographic scope of the voting group sought and the existing unit to be a relevant consideration here.

Why? Why is “the different geographic scope of the voting group sought and the existing unit” a “relevant consideration here?” Boeing took the position from the very outset of the hearing that it would not oppose an election among the domestic field service representatives as a standalone unit, something the Decision acknowledges and appears to accept as correct. Thus, neither it nor the Regional Director challenges the proposition that geographically diverse employees may share a community of interest. Temporary assignments encompass vast areas of the country. The parties have included within the collective bargaining agreement, at various times, professionals in Florida, Utah and Oregon even when they were not members of a single

bargaining unit. The bargaining unit embraces employees throughout the state of Washington and broadly across the large Puget Sound region. Physical distance has not prevented successful collective bargaining in achieving Joint Exhibit 1 and its predecessor agreements. It does not prevent the establishment of a community of interest among these geographically dispersed employees.

Boeing operates on a global scale, and utilizes advanced communications to overcome the distances among its personnel. For example, the record shows that Boeing has established the Boeing Communication System, facilitating its communications with customers and employees, as well as teleconferences and other computer tools. (Tr. p. 31, line 23 – 32, line 9) The ability to communicate and work with far-flung compatriots is a stronger bond between the FSRs and the engineers than their physical separation is a barrier.

H. THE LACK OF COMMON LOW-LEVEL SUPERVISION BETWEEN FSRS AND ENGINEERS IS EITHER IRRELEVANT OR WEIGHS IN FAVOR OF A COMMUNITY OF INTEREST FINDING IN LIGHT OF THE SIMILAR LACK OF COMMON LOW-LEVEL SUPERVISION WITHIN THE EXISTING UNIT.

THE ROTE RECITATION OF STANDARD COMMUNITY OF INTEREST criteria in representation cases can take on an Alice-in-Wonderland quality at times, reflecting a fantasy world of a stereotypical workplace of the 1930s, when the Act was born. This is, of course, directly contrary to the very purposes of **any** administrative agency, designed to respond flexibly to the realities of the world it regulates, and **specifically contrary** to the role of the Board in unit determinations, which have "always been informed by empirical knowledge acquired by the Board about the industry and workplace at issue." *Specialty Healthcare,* 357 NLRB at 6. Thus, the Regional Director recites at p. 39 the common wisdom that "employees who share a common supervisor at the first or perhaps second level are more inclined to have common interests in the

workplace, in regard to that supervisor or otherwise," dismissing as "miss[ing] the point" the fact that the current bargaining unit contains 14,000 members with only small subsets sharing common first or perhaps second level supervision, and many sharing supervision only at eight levels up.[35]

It is the Regional Director who has (widely) missed the point, which is not that the FSRs have **more** in common with engineers because their common supervision is **only** three, four or five levels up, but that common supervision at the first or second level is not a reasonable standard to apply to this bargaining unit, which has bargained for decades in a unit with comparatively little shared low level supervision. A community of interest standard that requires, or even puts any weight upon, common first level supervision would undercut the ability of a bargaining unit to form in almost any large employer. (Certainly, and at a minimum, no group with common supervision at that level could meet **this** Regional Director's "macro-level" standard.)

I. DETERMINING WHETHER DIFFERENT GROUPS OF EMPLOYEES HAVE A SUFFICIENT COMMUNITY OF INTEREST TO BE PERMITTED TO VOTE ON THEIR OWN FORM OF REPRESENTATION REQUIRES, AT THE END, A BALANCING OF FACTORS. APPLYING A REASONABLE BALANCE TO THE FACTS PRESENTED IN THIS CASE, A SUFFICIENT COMMUNITY OF INTEREST SHOULD HAVE BEEN FOUND TO EXIST.

THE REGIONAL DIRECTOR INVENTED A WHOLE NEW "MACRO-LEVEL" analysis for this case, which did not look at the community of interest between the FSRs and the existing unit and stop when it found one, but which looked instead at whether the FSRs belong either alone, or only in a much larger – if undefined – group. For the reasons stated above, this wasn't the right macro-

[35] Petitioner does note that the FSR Controllers **do** share common first level supervision with represented engineers, Tr. p. 278, 284, 308, 310, 314-317, although it does not place primary reliance on this fact. It largely illustrates the broader point that an organization as large as the Boeing technical support group will exhibit a lot of different patterns of immediate supervision, simply by virtue of the size and geographical spread of the work.

question to ask. But the Board **has** traditionally looked beyond a simple toting up of community of interest factors to determine whether different groups of employees should even be given the option to bargain as a single unit, and this is a sort of a macro, *gestalt*, analysis which would apply in this case to permit the elections to go ahead. The principle was illustrated by the Board in *New York University*, 205 N.L.R.B. 4, 8 (N.L.R.B. 1973), when it held that the professional librarians who shared only a few of the classic community of interest factors with teachers should nonetheless be allowed to bargain with them:

> Professional librarians are titled curator, associate curator, assistant curator, or library associate in descending order of rank. Unlike faculty, the function of a librarian may change with title, and promotion may depend on the existence of a vacancy. Further distinguishing librarians from faculty are their regular workweek; retirement age; tenure requirements; separate grievance procedure; lack of proportional representation in the university senate (though the dean of libraries, like other deans, is a member); and, perhaps more basically, the fact that they are not considered faculty. On the other hand, they are a professional group, charged with the responsibility for accumulating appropriate materials and serving the other members of the university community in that respect, and most fringe benefits are available to them. **We conclude that they possess a sufficient community of interest to be included in the unit, as a closely allied professional group whose ultimate function, aiding and furthering the educational and scholarly goals of the University, converges with that of the faculty, though pursued through different means and in a different manner.** [*Emphasis supplied*]

J. FSRs Comprise an Identifiable Distinct Segment of the Boeing Workforce.

Since the FSRs share a community of interest with the professional bargaining unit, and since the Regional Director found, under *Warner Lambert,* that the FSRs comprise an identifiable, distinct segment of the workforce (Decision p. 28) he should have directed both a *Sonotone* and an *Armour Globe* election in this case.

V. CONCLUSION

THE REGIONAL DIRECTOR ERRED FACTUALLY AND LEGALLY in his application of clear Board precedent concerning the necessary community of interest standards to permit a petitioned-for unit the chance to vote in an *Armour-Globe* election.

The Board should not permit the Regional Director's error to survive and spread. The Board should take review and should clarify the application of the community of interest standards to a large and complex organization in an *Armour-Globe* context.

Dated this 15th Day of November, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2011, I electronically filed the **REQUEST FOR REVIEW OF REGIONAL DIRECTOR DECISION AND ORDER** through the National Labor Relations Board website system which will send notification of such filing to the following e-mail addresses:

Executive Secretary
National Labor Relations Board
Washington, D.C.

and I hereby certify that I have served the document to the following as indicated:

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