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**MV Transportation, Inc. and Amalgamated Transit Union Local 1309.** Case 21–UC–279131

December 27, 2023

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN  
AND PROUTY

On September 30, 2021,<sup>1</sup> the Regional Director issued a Decision and Order Clarifying Unit, in which he clarified the existing unit to exclude maintenance supervisors based on his conclusion that the maintenance supervisors do not share a sufficient community of interest with the employees in the existing unit. In accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, on October 15, the Petitioner filed a timely request for review, contending that the maintenance supervisors share a community of interest with the employees in the existing unit and that the unit should be clarified to include the maintenance supervisors.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Petitioner’s request for review is granted as it raises substantial issues warranting review. Having carefully considered the entire record,<sup>2</sup> including the request for review, we find that the maintenance supervisors share a community of interest with employees in the certified unit. Accordingly, we reverse the Regional Director and clarify the bargaining unit to include the maintenance supervisors.

I. PROCEDURAL HISTORY

On April 22, the Petitioner filed a petition in Case 21–RC–276059 seeking to represent a unit of “Road Supervisors, Dispatchers/Radio Dispatchers, Shop Supervisors, [and] Part Clerks.” The parties subsequently entered into a stipulated election agreement providing for an election in a unit including road supervisors, OCC dispatchers, traffic controllers/radio dispatchers, and maintenance clerks employed at the Employer’s facilities in Oceanside and Escondido, California. The stipulated election agreement also provided that the eligibility of the maintenance supervisors<sup>3</sup>—whom the Petitioner has

<sup>1</sup> All dates hereinafter are in 2021 unless otherwise noted.

<sup>2</sup> The Board has exercised its discretion to read the entire record. See Sec. 102.67(e) of the Board’s Rules and Regulations.

<sup>3</sup> The maintenance supervisors are also referred to in the record as “shop supervisors,” “fleet supervisors,” and “facility supervisors.” For simplicity, we have followed the Regional Director’s lead in referring

at all times sought to include in the unit—was not resolved, and that individuals in that classification could vote subject to challenge.

A mail-ballot election was conducted, and, out of approximately 30 eligible voters, 17 voted for the Petitioner, 0 voted against representation, and 6 ballots were challenged—a number not sufficient to affect the results of the election. In the absence of objections or determinative challenges, the Regional Director issued a Certification of Representative on June 21; the Certification stated that the maintenance supervisors were neither included in nor excluded from the bargaining unit.

On June 25, the Petitioner filed the instant petition seeking to clarify the unit to include the maintenance supervisors. The Regional Director directed a hearing, at which the Employer contended that the maintenance supervisors should be excluded both because they are supervisors within the meaning of Section 2(11) of the Act and because they do not share a community of interest with the employees in the existing unit. On September 30, the Regional Director issued his decision in which he found that the Employer had not established that the maintenance supervisors are supervisors within the meaning of Section 2(11), but also concluded that the maintenance supervisors do not share a community of interest with employees in the existing unit. He therefore clarified the unit to exclude the maintenance supervisors. The Petitioner then timely filed a request for review.<sup>4</sup>

II. FACTS

The Employer contracts with the North County Transit District (NCTD) to provide public transportation services including fixed route transportation, paratransit, maintenance, and facility maintenance services. In performing these services, the Employer operates from its Escondido (Division 290) and Oceanside (Division 291) facilities.<sup>5</sup> General Manager Peter Leonard oversees both Divisions. The NCTD operations are subdivided into departments, including Operations and Maintenance, the two departments at issue here. The Operations Department is overseen by Deputy General Manager (DGM) Curtis Burlingame. Two Operations Managers, Robert Silk and Bre’Ana Jackson, report to DGM Burlingame.<sup>6</sup> The Maintenance Department is overseen by DGM Freddy

to these employees as “maintenance supervisors” throughout this decision.

<sup>4</sup> The Employer has not sought review of the Regional Director’s findings on the supervisory status issue, nor has it filed an opposition to the Petitioner’s request for review.

<sup>5</sup> Escondido and Oceanside are also referred to as the East and West Divisions, respectively.

<sup>6</sup> It is unclear from the record whether Silk and Jackson are responsible for separate facilities. The Employer’s organizational chart lists both as “Ops. Mgr. West.”

Jimenez. In theory, two Maintenance Managers—one at each facility—report to Jimenez. John Larios is currently the Maintenance Manager at Escondido, but due to a vacancy Jimenez is currently acting as the Maintenance Manager at Oceanside. At both facilities, the Operations and Maintenance Departments have their own separate buildings.

#### A. Included Classifications

As previously noted, in the underlying election case the parties stipulated that the road supervisors, OCC dispatchers, traffic controllers/radio dispatchers (hereinafter “dispatchers”<sup>7</sup>), and maintenance clerks are appropriately included in the unit.

The *road supervisors* work in the Operations Department and report to the Operations Managers. Operations DGM Burlingame testified that they serve as the Employer’s real-time eyes and ears in the relevant service area, where they provide support for bus drivers and passengers. More specifically, their duties include checking in-service vehicles for compliance with policies (for example, cleanliness and wheelchair securement); monitoring street operations for on-time performance and schedule and route adherence; responding to accidents and other incidents; and ensuring that drivers are fit for duty and meet uniform, equipment, and licensing requirements. In the event of an accident or incident, they assist dispatch and operations staff to restore service levels, and they also participate in the investigation of the accident (including determining whether the accident was preventable and recommending future training).

Despite their focus on bus drivers and passengers, road supervisors also have contact with maintenance personnel. In this regard, the job description states that road supervisors “[a]ssist dispatch and maintenance staff with vehicle change outs that occur in the field,” and they provide feedback regarding service needs of buses that might affect safety and performance. There is no indication that road supervisors have contact with the maintenance clerks, but they do have contact with the maintenance supervisors. Maintenance DGM Jimenez testified that road supervisors interact with maintenance supervisors during the daily “morning pull” (which involves getting the buses ready for daytime routes), as well as with respect to accidents (both in the field and in the shop). Similarly, maintenance supervisor Andrew Danz

<sup>7</sup> Although referred to as “traffic controllers/radio dispatchers” in the unit description, this position is, for the most part, referred to simply as “dispatcher” throughout the record, including in the written job description. In a few instances, Operations DGM Burlingame referred to this position as “window dispatcher”; he also indicated that this position is often referred to as a “vendor dispatcher” in the transit industry.

stated that he has daily contact with road supervisors, particularly with respect to reviewing accidents (given that road supervisors photograph and file accident reports that the maintenance supervisors review when repairing buses) and ensuring that necessary buses are “ready to go.”<sup>8</sup>

Road supervisors are required to have a high school diploma or equivalent and some certifications pursuant to local contract requirements. They are also required to have passenger transportation or similar experience.<sup>9</sup> Although they are expected to have knowledge of project-specific vehicles, they are not required to have maintenance or mechanical training. They are paid hourly (starting at \$22/hour) and do not have any required uniform. The record does not indicate the road supervisors’ specific hours of work.

Like the road supervisors, the *dispatchers* work in the Operations Department and report to the Operations Managers.<sup>10</sup> According to Operations DGM Burlingame, the dispatchers make sure that vehicles begin their daily route service as scheduled. More specifically, dispatchers communicate with drivers and the Employer’s clients, track and report driver sign-in and sign-out times, ensure routes are timely, and relay any service issues to their superiors. They also may assign trips to drivers to ensure adequate distribution of trips among assigned routes. Although dispatcher duties may include radio use, they are not radio dispatchers in the traditional sense (the OCC dispatchers, discussed below, fill that function); instead, this position dispatches drivers in that they assign vehicles and routes to drivers at the start of the shift.

There is no indication that dispatchers interact with maintenance clerks, but the record establishes that they have regular contact with other maintenance personnel. Maintenance supervisor Jeremy Burrie testified that he typically interacts with the dispatch office around 1:30 a.m. to discuss upcoming assignments and ensure adequate bus and route coverage. He will also confer with dispatch as issues arise during pullout or during the course of repairing a bus; he estimated this took up 5

<sup>8</sup> By contrast, Operations DGM Burlingame testified that road supervisors have “minimal interaction” with maintenance supervisors; even so, he acknowledged the potential for interaction during morning pull. Burlingame did not address the potential for accident- or incident-related contact.

<sup>9</sup> Operations DGM Burlingame stated that road supervisors must also have a commercial driver’s license, although this requirement is not explicitly listed in the job description.

<sup>10</sup> The dispatchers’ job description states that they report to “Dispatch Supervisors,” but Operations DGM Burlingame clarified that this position no longer exists; his testimony and the Employer’s organizational chart reflect that dispatchers now report to the Operations Managers.

percent of his work time.<sup>11</sup> Similarly, maintenance supervisor Danz stated that he was often on the phone with dispatchers, and that he speaks with them every morning before pullout. Operations DGM Burlingame agreed that dispatchers and maintenance supervisors are in regular contact, though he estimated such interactions occurred only “a couple” times each week.<sup>12</sup> General Manager Leonard related a specific example of a dispatcher reporting that four additional buses were needed to cover the day’s routes; Leonard (who was apparently covering for both Maintenance DGM Jimenez and Operations DGM Burlingame that day) worked with a maintenance supervisor to determine which buses could be repaired quickly enough to ensure coverage. According to Leonard, during this interaction the maintenance supervisor “was the one who was talking to our dispatcher” to arrange for repairs and coverage.<sup>13</sup>

The dispatchers are required to have a high school diploma or equivalent, experience with Trapeze software, and a commitment to customer service; the Employer prefers that dispatchers have 1 year of previous dispatcher experience and 2 years of customer service experience. They are paid hourly (starting at \$21/hour) and do not have any required uniform. The record does not establish the dispatchers’ specific hours of work.

The *OCC dispatchers*<sup>14</sup> also work in the Operations Department and report to an Operations Manager.<sup>15</sup> They work in Escondido, but not at the Employer’s facility; instead, they work at the Sprinter Operating Facility, a maintenance facility for NCTD’s light rail system which also houses communications infrastructure for all trains and buses in NCTD’s service area. OCC dispatchers perform traditional radio dispatcher or traffic control functions. As such, they communicate directly with drivers (as well as road supervisors, dispatchers, and other persons) during the course of the day while coordinating bus operations, responding to vehicle breakdowns, managing on-time performance, coordinating emergency responses

when needed, and responding to calls from drivers and customers.

The OCC dispatchers are involved in daily communication with maintenance supervisors, drivers, road supervisors, and dispatchers. With respect to maintenance supervisors in particular, OCC dispatchers interact with them regarding issues with vehicles; there is no dispute that such interactions are frequent, though testimony differed as to how frequent. Operations DGM Burlingame stated that OCC dispatchers will contact maintenance supervisors to help coordinate vehicle repairs, and estimated such interactions take place a dozen times a week. Maintenance DGM Jimenez commented that maintenance supervisors’ contact with OCC dispatchers is currently “frequent,” particularly because OCC dispatchers have to submit service tickets to the radio vendor when maintenance supervisors or technicians detect issues with a vehicle’s radio. Maintenance supervisor Danz, for his part, testified that he speaks to OCC dispatchers frequently enough that he knows who is calling before he hears the voice, and that there have been days when he has spent several hours on the phone with OCC dispatchers.

The OCC dispatcher position requires a high school diploma or equivalent, 1 year of previous dispatcher experience, 2 years of customer service experience, and experience with Orbital software. In addition, OCC dispatchers must be at least 21 years old, must have a valid California driver’s license with 2 years of driving experience, and must have a commercial bus driver’s license with appropriate endorsements. The OCC dispatchers are paid hourly (\$23/hour to start) and do not have a required uniform. As with the road supervisors and the dispatchers, the record does not establish the OCC dispatchers’ specific hours of work.

The *maintenance clerks* work in the Maintenance Department and report to the Maintenance Managers. They are primarily involved in filing paperwork, completed by the maintenance supervisors and maintenance technicians, related to bus maintenance. More specifically, they review and file various types of work orders that are completed by technicians and “closed” by maintenance supervisors. In addition, they deal with payroll and time and attendance records.<sup>16</sup> In filing such paperwork, maintenance clerks interact with day shift maintenance supervisors on a daily basis (maintenance supervisor Burrie, who works on the night shift, commented that he rarely interacts with the maintenance clerks). There is no indication that maintenance clerks have any contact with

<sup>11</sup> Burrie indicated that, in addition, dispatchers may contact maintenance supervisors when drivers report issues with their assigned vehicles.

<sup>12</sup> Burlingame’s testimony, however, appears to have been limited to situations where dispatchers contact maintenance supervisors based on driver-reported issues; his testimony did not address the morning conversations discussed by Burrie and Danz.

<sup>13</sup> In addition to this testimony, Maintenance DGM Jimenez testified that “dispatchers” communicate back and forth with maintenance supervisors throughout the day regarding bus availability and the need for repairs. It is unclear, however, whether he was testifying about this position or the OCC dispatchers.

<sup>14</sup> OCC dispatchers are also referred to as “OCC supervisors” at various points in the record.

<sup>15</sup> Based on the Employer’s organizational chart, it appears that all OCC dispatchers report to Operations Manager Jackson.

<sup>16</sup> Unlike the other classifications involved in this case, the record does not include a job description detailing the maintenance clerks’ specific duties and job requirements.

road supervisors, dispatchers, or OCC dispatchers. As indicated, maintenance clerks work on the day shift. They do not have required uniforms, and the record contains no information as to their wage rate or their required skills and qualifications.

### B. *The Disputed Maintenance Supervisors*

The *maintenance supervisors*<sup>17</sup> work in the Maintenance Department and report to the Maintenance Managers. Generally speaking, the maintenance supervisors coordinate and oversee the repair work done by maintenance technicians and servicers<sup>18</sup> on the company's fleet of buses, ensuring that the vehicles are safe and ready for use and that there are enough of them to meet daily pullout requirements. Among other things, they prioritize, assign, and monitor work orders for vehicle repairs; manage preventive maintenance inspections (PMIs) performed by the technicians; carry out periodic quality control inspections to ensure buses are working properly; perform required monthly "efficiency tests" created by the Employer's training manager to gauge the technicians' skills; monitor time and attendance; and, on occasion, make repairs themselves. Both of the maintenance supervisors who testified estimated that they spend the vast majority of their time—70 to 75 percent—on paperwork related to the completion of work orders, PMIs, accidents or other incidents. In particular, they review work orders and PMI documents to ensure completion, and, if further actions are required, will work with the maintenance technicians to complete the necessary tasks. Maintenance supervisors give their completed paperwork to the maintenance clerks, who, as previously indicated, also review the paperwork for completion prior to filing it.

The maintenance supervisor job description states that they maintain "close communications" with the Operations Department; as indicated above, this stated responsibility is consistent with the testimony that maintenance supervisors have regular contact with road supervisors, frequent contact with the dispatchers, and still more frequent (and by some accounts constant) contact with the OCC dispatchers. As also indicated above, they similarly interact with the maintenance clerks on a daily basis.

The maintenance supervisors have an office in the maintenance building at each facility. They are paid a salary starting at about \$65,000.00 annually<sup>19</sup> and are not

eligible for overtime. They have an optional uniform.<sup>20</sup> When at full complement, the maintenance supervisors generally provide 24/7 coverage, so in a facility with three maintenance supervisors, they work back-to-back shifts with a 30-minute overlap.<sup>21</sup> They are permitted a 30-minute lunch break, for which they do not have to "clock out." If there is no maintenance supervisor on a shift, a senior technician is designated as a "lead" and performs the duties of the maintenance supervisor on that shift. The maintenance supervisors must have a high school education, relevant computer skills, and mechanical skills, including the ability to perform inspections and repair work on buses, among other requirements.

### III. ANALYSIS

Where employees are permitted to vote under challenge, but their status is not determinative of the election results, the Board will certify the union if it received a majority of the ballots cast. If, as here, the parties cannot thereafter resolve the status of the nondeterminative challenged voters, the Board will process a timely filed unit clarification petition to determine the placement or status of the contested individuals. See, e.g., *Kirkhill Rubber Co.*, 306 NLRB 559, 559 (1992).

In processing the instant petition, the Regional Director expressed some uncertainty regarding the legal standard to be applied in these circumstances. We clarify here that when a unit clarification petition seeks to resolve the unit placement of a classification that voted subject to challenge, but whose placement was unnecessary to resolve prior to the issuance of the certification of representative, the applicable standard is the same standard that would have been applied had the issue been litigated prior to the underlying election.<sup>22</sup>

Here, the parties previously stipulated to the inclusion of the road supervisors, dispatchers, OCC dispatchers, and maintenance clerks in the unit, but the Employer contends that the petitioned-for unit is inappropriate if it includes the maintenance supervisors. Accordingly, the

<sup>20</sup> The job description states that the maintenance supervisors are required to wear a "standard uniform," and maintenance supervisor Burrie referred to a gray polo shirt and dark blue pants as the maintenance supervisor uniform. However, General Manager Leonard testified that this is not required attire.

<sup>21</sup> The specific shifts appear to differ between Escondido and Oceanside. According to Maintenance Manager Larios, at Escondido first shift is 12 a.m. to 8:30 a.m., second shift is 8:00 a.m. to 4:30 p.m., and swing shift is 4 p.m. to 12:30 a.m. At Oceanside, maintenance supervisor Burrie currently works a 9:30 p.m. to 6 a.m. shift, and maintenance supervisor Danz currently works a 5:30 a.m. to 2:00 p.m. shift. Danz indicated that there were currently only two maintenance supervisors at Oceanside.

<sup>22</sup> The same is true of postelection proceedings when the ballots of the employees voting subject to challenge are dispositive of the election results. See, e.g., *Odwalla, Inc.*, 357 NLRB 1608, 1608 (2011).

<sup>17</sup> Maintenance supervisors are frequently also referred to as "fleet supervisors" in the record.

<sup>18</sup> The maintenance technicians and servicers are members of a bargaining unit currently represented by the Teamsters.

<sup>19</sup> One maintenance supervisor testified that he currently receives about \$69,000.00 a year.

relevant inquiry is whether the maintenance supervisors and the included employees share a sufficient community of interest. See, e.g., *Johnson Controls, Inc.*, 322 NLRB 669, 670 (1996). This inquiry is guided by well-established, judicially approved principles. We recently reaffirmed those principles, explaining that “in every unit determination case, the Board’s inquiry will ‘consider only whether the requested unit is an appropriate one even though it may not be the optimum or most appropriate unit for collective bargaining.’” *American Steel Construction, Inc.*, 372 NLRB No. 23, slip op. at 3 (2022) (footnote omitted) (quoting *Black & Decker Mfg. Co.*, 147 NLRB 825, 828 (1964)). As the Supreme Court has observed:

Section 9(a) of the Act provides that the representative “designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes” shall be the exclusive bargaining representative for all the employees in that unit. This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize “a unit” that is “appropriate”—not necessarily *the* single most appropriate unit.

*American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original; citations omitted).<sup>23</sup>

The Board considers the following factors in determining whether employees share a community of interest:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*United Operations, Inc.*, 338 NLRB 123, 123 (2002).

The Regional Director, applying the factors, concluded that the maintenance supervisors did not share a commu-

<sup>23</sup> Sec. 9(c)(5) of the Act provides that a union’s extent of organization “shall not be controlling” with respect to the Board’s unit determinations, but “it is well established that Sec[.] 9(c)(5) does not render employees’ choice of unit irrelevant (to the contrary, the extent of organization ‘is always a relevant consideration’).” *American Steel Construction*, supra, 372 NLRB No. 23, slip op. at 5 (footnote omitted) (quoting *Marks Oxygen Co.*, 147 NLRB 228, 229 (1964)); see also *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441–442 (1965) (explaining that Sec. 9(c)(5) “was not intended to prohibit the Board from considering the extent of organization as one factor, though not the controlling factor, in its unit determination”).

nity of interest with the included classifications. Despite finding that the factors of functional integration and contact favored finding a community of interest, he found that all other factors weighed against finding a community of interest. He therefore clarified the unit to exclude the maintenance supervisor classification.

Contrary to the Regional Director and our dissenting colleague, we conclude that the maintenance supervisors share a community of interest with the included employees and therefore may appropriately be included in the unit.

To begin, there is no dispute that the factors of functional integration and contact favor finding a shared community of interest. With respect to functional integration, it is clear that the maintenance supervisors and unit employees necessarily depend on each other to accomplish their respective tasks: the operations employees rely on the maintenance supervisors to ensure adequate fleet coverage, the maintenance supervisors rely on the operations employees to advise them of accidents and coverage issues, and the maintenance supervisors and maintenance clerks work together to ensure that work orders and other paperwork have been properly completed.<sup>24</sup> Regarding contact, we find that this factor strongly favors finding a community of interest. The record clearly establishes that maintenance supervisors are in at least daily contact with OCC dispatchers, dispatchers, road supervisors,<sup>25</sup> and maintenance clerks.<sup>26</sup>

Next, we find that the factor of departmental organization supports finding a community of interest between the maintenance supervisors and the unit employees. There is no dispute that the maintenance supervisors are in the same department as the included maintenance clerks. Although the Regional Director acknowledged as much, he nevertheless concluded (as does our dissenting colleague) that this factor weighed against finding a shared community of interest because the maintenance

<sup>24</sup> In so finding, we note that, contrary to the Regional Director’s overly broad characterization, functional integration exists only where employees must work together and depend on one another to accomplish their tasks. See, e.g., *WideOpenWest Illinois, LLC*, 371 NLRB No. 107, slip op. at 7 fn. 16 (2022).

<sup>25</sup> With respect to the frequency of contact between the maintenance supervisors and the Operations Department employees, we accord greater weight to the testimony of the maintenance supervisors, the Maintenance Manager, and Maintenance DGM Jimenez than we do to the testimony of Operations DGM Burlingame, who generally offered more conservative estimates. In particular, the maintenance supervisors who testified offered more specific and detailed testimony about their contact with operations employees than did Burlingame.

<sup>26</sup> We acknowledge that the contact with the maintenance clerks is partly limited by the fact that maintenance clerks only work on the day shift. Even so, the uncontradicted testimony establishes that maintenance supervisors as a group have daily contact with maintenance clerks, even if not every maintenance supervisor does.

clerks constitute only a minority of included employees. We do not agree with this reasoning. The parties stipulated to a unit that includes three classifications from the Operations Department and one classification from the Maintenance Department. There is accordingly no dispute that classifications from both departments may appropriately be included in this unit.<sup>27</sup> The maintenance supervisors are, like the maintenance clerks, part of the Maintenance Department. The fact that maintenance clerks constitute a minority of the undisputedly included employees is not a countervailing consideration; it is simply indicative of the fact that the parties *agreed* to a diverse unit straddling two departments, and the unit placement of the maintenance supervisors should be assessed in the context of that diversity.<sup>28</sup> In addition, we are unaware of any precedent supporting the Regional Director's reasoning that the departmental placement of a majority of included classifications somehow negates the fact that the maintenance supervisors undisputedly share a department with a minority of included classifications. In fact, in an analogous context the Board has found that this factor supported finding a community of interest where the classification in question shared a department with only a minority of unit employees. See *Public Service Co. of Colorado*, supra, 365 NLRB No. 104, slip op. at 1 fn. 4.<sup>29</sup> In short, the maintenance supervisors share a

department with included maintenance clerks, and this factor therefore favors finding a community of interest.

For similar reasons, we also find, contrary to the Regional Director and our dissenting colleague, that the factor of supervision favors finding a community of interest between maintenance supervisors and included employees. Here too, there is no dispute that the maintenance supervisors share supervision with the maintenance clerks, who are undisputedly included in the unit. Here, too, the Regional Director nevertheless found (and our dissenting colleague would also find) that this factor weighed against finding a community of interest because the maintenance clerks constitute only a minority of included employees. And here, too, the minority status of the maintenance clerks simply reflects the multidepartmental unit to which the parties stipulated. Minority or not, the parties agree the maintenance clerks belong in the unit, and the maintenance supervisors share common supervision with the maintenance clerks.<sup>30</sup>

With respect to the remaining factors, we agree with the Regional Director that they do not favor finding a community of interest, but we give them less weight than the Regional Director did. With respect to job functions, we note that there is at least some overlap between maintenance supervisors and maintenance clerks, in that they both review the same paperwork to ensure completion; we find that this factor is accordingly entitled to less weight. Similarly, with respect to terms and conditions of employment, we observe that none of the classifications at issue have required uniforms, and although evidence regarding specific hours of work is limited to the maintenance supervisors, the evidence of contact establishes that there is at least some overlap in the included classifications' and maintenance supervisors' hours of work. These similarities at least partly reduce the significance of the differences in terms and conditions.<sup>31</sup> Finally, as previously noted, we are, as an overall matter, mindful that the parties have previously agreed to a diverse unit. Significant differences among included employees are therefore to be expected but must be considered in the context of the diverse unit. For this reason, we agree with

<sup>27</sup> We also note that the fact that a unit combines employees from different departments does not, by itself, render a unit inappropriate. See e.g., *The Phoenixian*, 308 NLRB 826, 826–828 (1992) (after finding a separate unit of golf course maintenance employees inappropriate, the Board found appropriate a unit of golf course maintenance employees and landscaping employees notwithstanding their placement in separate departments).

<sup>28</sup> The Board has observed that although the diversity of an existing unit is not a traditional community-of-interest factor, such diversity “may be relevant to consider generally.” *Public Service Co. of Colorado*, 365 NLRB No. 104, slip op. at 1 fn. 4 (2017). Our colleague faults us for describing the stipulated unit as diverse because “there is no community-of-interest analysis of the stipulated unit” (insofar as “the shared and disparate interest among the included classifications were not a subject of litigation”). The record, however, contains ample evidence bearing on the community-of-interest factors as they pertain to the included classifications, and that evidence demonstrates that the stipulated unit is diverse. We do not agree with our colleague's additional suggestion that this unit is not diverse simply because the maintenance clerks and Operations Department classifications are all paid hourly.

<sup>29</sup> *Public Service Co. of Colorado* involved a self-determination election where the petitioner sought to add a classification (planners) to an existing unit. See id. In finding that the planners shared a community of interest with unit employees, the Board observed that “most of the planners work in the same departments as unit maintenance employees, and all of the planners are more broadly part of the energy supply area, along with approximately 500 of the 2000 unit employees.” Id. As this quote makes clear, the planners shared a department (and larger “area”) with only a minority of unit employees, yet the Board found that the shared department supported finding a community of interest.

<sup>30</sup> In analyzing this factor, we note that *Executive Resources Associates*, 301 NLRB 400, 402 (1991), and *NCR Corp.*, 236 NLRB 215 (1978), cited by the Regional Director, both involved an analysis of supervision in the context of analyzing whether a party has rebutted the presumptive appropriateness of a petitioned-for single-facility unit, an issue that is not present here.

<sup>31</sup> To be clear, we agree with the Regional Director and our dissenting colleague that job functions and terms and conditions of employment do not support finding that the maintenance supervisors share a community of interest with the included employees. We merely observe that there are countervailing considerations that reduce the weight of these factors.

the Petitioner that the lack of evidence of interchange between maintenance supervisors and included classifications is entitled to little weight given that there is no evidence of interchange between any of the included classifications.

Our dissenting colleague asserts that we have given controlling weight to the Union's extent of organization. We reject that assertion. As noted, it is well established that a union's extent of organization is always an appropriate consideration, but our analysis here should make clear that we do not give it controlling weight. Rather, as the foregoing analysis makes clear, we have fully assessed the relevant community of interest factors in light of the available evidence. Our colleague offers no precedential support, meanwhile, for his claims that our analysis represents an "unprecedented watering down" or "distortion" of the community-of-interest test. Consistent with Board precedent—which is clear that the diversity of a preexisting unit is a relevant consideration, if not itself a community-of-interest factor—we have considered the nature of the unit to which the parties stipulated in the course of our community-of-interest analysis. Finally, under well-established principles already cited, we need not find that a unit including the maintenance supervisors is the *only* appropriate unit or the *most* appropriate unit, only that it is *an* appropriate unit.

#### IV. CONCLUSION

Taking the foregoing considerations together, we find that the maintenance supervisors share a community of interest with the included employees. The factors of functional integration, contact, departmental organization, and supervision all favor including the maintenance supervisors. Based on the circumstances of this case, the absence of interchange evidence is entitled to limited weight, and the considerations discussed above reduce the significance of the differences in job functions and terms and conditions of employment. Accordingly, on balance the relevant factors support including the maintenance employees in the unit. Cf. *K&N Engineering, Inc.*, 365 NLRB No. 141, slip op. at 4 (2017) (finding that including maintenance tech classifications in a stipulated unit of janitors and production employees "effectively tie[d] the unit together" and was therefore appropriate where the maintenance techs worked in the same department as and shared supervision with the janitors, while also being functionally integrated and having contact with the production employees); *Public Service Co. of Colorado*, supra, 365 NLRB No. 104, slip op. at 1 fn. 4 (finding community of interest based on functional integration, contact, departmental organization, and skills

and functions).<sup>32</sup> We therefore reverse the Regional Director's decision clarifying the unit to exclude maintenance supervisors and shall instead clarify the unit to include the maintenance supervisors.<sup>33</sup>

#### ORDER

The National Labor Relations Board clarifies the collective-bargaining unit represented by Amalgamated Transit Union Local 1309 specifically to provide that the classification of maintenance supervisor is included.

Dated, Washington, D.C. December 27, 2023.

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

I disagree with my colleagues' decision to grant review and to reverse the Regional Director's decision excluding the Maintenance Supervisors because, to put it succinctly, the Regional Director got it right. As he found, the disputed Maintenance Supervisors share only two of the factors of the Board's community-of-interest test with the stipulated unit, which is insufficient to include them. My colleagues' decision to the contrary is the result of an unprecedented watering down of the community-of-interest test and effectively gives controlling weight to the Union's extent of organizing, which is prohibited by Section 9(c)(5) of the Act.<sup>1</sup> Accordingly, I would deny review.

<sup>32</sup> We therefore do not agree with the Regional Director's comment, embraced by our dissenting colleague, that the result would be the same if the factors of departmental organization and supervision were found to favor a community-of-interest finding. We observe that neither the Regional Director nor our dissenting colleague offer any analysis or case law in support of this assertion. Although our dissenting colleague attempts to distinguish *Public Service Co. of Colorado* and *K&N Engineering* on various grounds, the fact remains that the overall balance of the relevant community-of-interest factors in those cases is comparable to our balancing of the factors here.

<sup>33</sup> Given that the maintenance supervisors are properly included in the unit under community-of-interest principles, we need not address the Petitioner's argument—raised for the first time in its request for review—that the inclusion of maintenance supervisors in the unit results in or perfects a "residual" unit.

<sup>1</sup> Sec. 9(c)(5) provides: "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling."

I note that my colleagues complain that I have "offer[ed] no precedential support" for my assertion that their decision constitutes an "un-

### *Background*

The Employer provides public transportation services under contracts with various government entities, including the North County Transit District in San Diego County, California. The Petitioner filed a petition for certification of a unit operating out of the Employer's facilities in Oceanside and Escondido. Thereafter, the parties stipulated to a unit of all non-represented, hourly wage-earning employees in the Employer's Operations and Maintenance departments. The stipulated Operations Department employees comprise twelve Road Supervisors, five Operations Control Dispatchers, and eight Traffic Controllers/Radio Dispatchers; the stipulated Maintenance Department employees are two Maintenance Clerks. In addition, the Petitioner seeks to include the six Maintenance Supervisors, who are also in the Maintenance Department.<sup>2</sup> If included, they would be the only salaried employees in the unit. Disagreeing on whether the Maintenance Supervisors belong in the unit, the parties agreed to allow the Maintenance Supervisors to vote, with the understanding that the Employer would challenge their ballots. The Union prevailed in the election and filed the instant unit-clarification petition to clarify the certified unit to include the Maintenance Supervisors.<sup>3</sup>

### *Regional Director's Decision*

In reviewing the Petitioner's unit-clarification petition, the Regional Director considered the Board's traditional community-of-interest factors for determining whether a petitioned-for unit is appropriate for bargaining. Under this analysis, the Board considers:

whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employ-

ees; have distinct terms and conditions of employment; and are separately supervised.

*United Operations, Inc.*, 338 NLRB 123, 123 (2002).

The Regional Director found that, with the exception of the factors of functional integration and contact, the community-of-interest factors weigh against finding that the Maintenance Supervisors share a community-of-interest with the employees in the stipulated unit. With regard to departmental organization and supervision, the Regional Director noted that the Maintenance Supervisors and the two Maintenance Clerks are organized in the Maintenance Department and share the same supervisors. He found, however, that the fact that the Maintenance Supervisors share these interests with only two of the employees in the stipulated unit—who only represent approximately 7 percent of the unit—weighs against their inclusion. As for skills and training, the Regional Director found that the Maintenance Supervisors possess technical mechanical skills for the purpose of performing inspections and maintenance on vehicles, familiarity with laws and regulations associated with the safe operation of a maintenance facility, and numerous other technical qualifications required for their duties of overseeing the Employer's technicians and maintenance of vehicles. By contrast, no other employees possess similar skills or training. With regard to job function, the Regional Director found that Maintenance Supervisors oversee preventative maintenance and compliance and sign off on repairs, and have numerous related functions that no other unit employees perform. Those functions that they alone perform include handling, reviewing, and verifying work orders; reviewing preventative maintenance inspections sheets for accuracy; completing accident-related paperwork and estimates; and performing preventative maintenance inspections. Because no other employees perform similar functions, this factor also weighs against their inclusion in the unit.

Further, the Regional Director found no evidence of interchange among the unit classifications, and also found that the critical factor of terms and conditions of employment weighed against including the Maintenance Supervisors in the unit. As noted above, the Maintenance Supervisors are the only petitioned-for employees who are paid on a salaried basis and are exempt from overtime, while all others are paid an hourly wage. Maintenance Supervisors work daytime and nighttime shifts covering 24 hours. The work shifts of other employees are not in the record, although it appears that the Maintenance Clerks do not work nights and only have contact with the day-shift Maintenance Supervisors. The Regional Director concluded that none of the above factors

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precedented watering down" of the community-of-interest test. This is a strange criticism; by definition, it is impossible to offer precedent supporting something that is unprecedented. Indeed, the only way to establish that my colleagues' decision is *not* unprecedented is to show that the Board has previously applied the community-of-interest test in the manner in which it is being applied in this case. However, I have not found any case in which the Board has done so and, for the reasons set forth in this dissent, I do not believe that my colleagues have been successful in their attempt to identify such a case.

<sup>2</sup> The Maintenance Supervisors oversee the work of maintenance technicians and servicers, who are also in the Maintenance Department in a separate bargaining unit, which is represented by a different union from the Petitioner.

<sup>3</sup> The challenged ballots were not determinative of the results of the election.



weigh in favor of including the Maintenance Supervisors in the unit.

Indeed, he found that the only community-of-interest factors shared by the Maintenance Supervisors and the other employees are functional integration and contact, which, as he found, is not enough to include them in the unit.<sup>4</sup>

### *Analysis*

The Regional Director correctly applied the traditional community-of-interest standard and correctly found that the interests shared by the petitioned-for employees here are too disparate to form a community of interest within the stipulated unit.<sup>5</sup> As he found, although two factors supported inclusion, the differences between the Maintenance Supervisors and the other employees far outweighed the similarities.<sup>6</sup>

My colleagues, however, reject the Regional Director's conclusion and rely instead on novel grounds that are inconsistent with the Board's traditional community-of-interest analysis.<sup>7</sup> To begin, my colleagues conclude that because the Employer agreed to include the two Maintenance Clerks, the stipulated unit is "diverse." From there they seem to conclude that the parties' stipulation to the so-called "diverse" unit justifies their failure to adequately apply the community-of-interest test in determining the appropriateness of the Maintenance Supervisors' inclusion. To be precise, they make this suggestion with respect to the factors that the employees *do not share*, arbitrarily minimizing the importance of those factors while elevating the importance of the few factors that they do share. To the extent that they attempt to justify their interpretation of the community-of-interest standard because the unit at issue is "diverse," Board law establishes that, even for "diverse" units, the traditional community-of-interest analysis is controlling.<sup>8</sup> Our in-

<sup>4</sup> The Regional Director also found, and I agree, that even assuming arguendo that the limited shared departmental organization and supervision with the two Maintenance Clerks weighed in favor of finding a shared community of interest with the unit, that would not warrant clarifying the Maintenance Supervisors into the unit.

<sup>5</sup> E.g., *Bergdorf Goodman*, 361 NLRB 50, 53 (2014).

<sup>6</sup> For the reasons he states, I agree with the Regional Director that the Maintenance Supervisors share the factors of functional integration and contact with all unit employees, but that these do not warrant including them in the unit.

<sup>7</sup> I agree with my colleagues that when a unit clarification petition seeks to resolve the unit placement of a classification that voted subject to challenge, but whose placement was unnecessary to resolve prior to the issuance of the certification of representative, the applicable standard is the same standard that would have been applied had the issue been litigated prior to the underlying election—namely, whether the disputed classification shares a sufficient community of interest with the existing unit.

<sup>8</sup> My colleagues' reliance on *Public Service Company of Colorado*, 365 NLRB No. 104 (2017), is misplaced. The Board there expressly

quired whether the Maintenance Supervisors share a sufficient community of interest with the unit based on the traditional community-of-interest factors. It is not whether the lack of mutual interests can be excused based on the so-called "diversity" of the unit or some other strategically applied label.<sup>9</sup>

Further, this "diverse" unit label itself is misplaced. Although the unit includes one classification of employees outside of the Operations Department—the Maintenance Clerks—it is telling that the Maintenance Clerks are hourly wage earners like the rest of the agreed-upon employees. And it is further telling that the Maintenance Clerks are the *only* other hourly wage earners left unrepresented in their department.<sup>10</sup> The fact that the Employer included these hourly employees in a unit with other hourly employees does not justify shoehorning an additional classification with substantially disparate interests into the unit, let alone claiming that they share sufficient interests with the unit as a whole, or that the lack of shared interests is of less importance. Furthermore, labeling the unit "diverse" is unwarranted in light of the fact that there is no community-of-interest analysis of the stipulated unit. Rather, consistent with the parties' arguments, the Regional Director focused on the Maintenance Supervisors' supervisory status and on their interests in relation to those of the other employees.<sup>11</sup>

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declined to rely on the diversity of the existing unit in place of a showing of a shared community of interest. *Id.*, slip op. at 1 fn. 4. In contrast, my colleagues rely on the so-called diversity of the stipulated unit to justify glossing over the lack of relevant shared interests between the disputed Maintenance Supervisors and the unit employees. But, as my colleagues acknowledge, the Board in *Public Service Company* emphasized that "diversity" is not one of the traditional community-of-interest factors. *Id.*

<sup>9</sup> My colleagues offer no compelling justification why less weight should be applied to three of the community-of-interest factors that do not favor inclusion—namely interchange, job function, and terms and conditions of employment—but not to the rest of the factors. For example, they contend that the lack of interchange should be given less weight because there is no evidence of interchange among other stipulated employees. No surprise there: there was no need for a community-of-interest analysis among the stipulated employees to determine whether there was interchange among them. Moreover, the Regional Director properly refuted the same argument made by my colleagues when he said, "[t]o the extent that Petitioner argues that there is limited to no evidence of interchange between any of the positions, I do not find this persuasive, as it does not establish that interchange exists between maintenance supervisors and positions in the existing unit."

<sup>10</sup> Now that the majority clarifies the unit to include the Maintenance Supervisors, what may have been a simple matter of bargaining a single wage scale for a unit of hourly employees may be far more complicated with the inclusion of a salaried, overtime-exempt job classification that lacks sufficient shared interests with more than 90 percent of the unit.

<sup>11</sup> Although my colleagues contend that there is "ample evidence bearing on the community-of-interest factors as they pertain to the included classifications," the shared and disparate interests *among* the included classifications were not a subject of litigation, and neither the

As discussed, my colleagues' analysis is based on an incorrect—and strikingly skewed—interpretation of the community-of-interest factors. Significantly, because the Maintenance Supervisors are in the same department and share supervision with the two Maintenance Clerks, my colleagues find that the factors of departmental organization and supervision support finding a community of interest between the Maintenance Supervisors and the whole unit. In so finding, they pass over the fact that the other twenty-five employees—more than 90 percent of the unit—are in the Operations Department and separately supervised. They find that the commonalities are shared with a stipulated *classification*, and, further, that the fact that there are only two employees in this classification should not matter in the analysis. This conclusion is a distortion of the purpose of the community-of-interest test. Our responsibility is “to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment.”<sup>12</sup> Although our test does not require a formula by which a particular number of factors must be shared among employees, the fact that more than 90 percent of the unit is in a different department under different supervision than the Maintenance Supervisors does not establish “substantial mutual interests” and cannot weigh in favor of inclusion as my colleagues find.<sup>13</sup>

With regard to the job function and terms and conditions of employment factors, my colleagues point to insignificant similarities between the Maintenance Supervisors and the two Maintenance Clerks. They note that Maintenance Supervisors and Maintenance Clerks review the same paperwork to ensure job completion. The evidence in fact shows that the majority of the paperwork handled by the Maintenance Supervisors relates to work orders, inspections, accidents, efficiency, and quality

limited evidence nor the cases my colleagues rely on justify their watered-down application of the community-of-interest test and the resulting inclusion of the maintenance supervisors in the unit.

<sup>12</sup> *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172–73 (1971).

<sup>13</sup> My colleagues' reliance on *Public Service Company of Colorado*, 365 NLRB No. 104, for the proposition that a job classification may be included in a unit even if it shares interests with a minority of that unit is irrelevant to this case. *Public Service Company* involved an *Armour-Globe* election of employees in a job classification that was in a department with other unit employees and was “more broadly part of the energy supply area, along with approximately 500 of the 2000 unit employees.” *Id.*, slip op. at 1 fn. 4. The 2000-employee unit was spread throughout dozens of facilities across the state of Colorado and was divided among three “areas.” Sharing substantial interests with the unit as a whole and being organized in a functional “area” with 500 employees is not comparable to the current case, in which the disputed employees share minimal interests with the unit as a whole and share two additional factors with only 7 percent of the unit, thus weighing *against*, not *for*, inclusion.

control of work performed by the technicians and servicers who report to them and are in a different bargaining unit. The Maintenance Clerks file work orders and deal with payroll and time and attendance records. As the Regional Director found, “[w]hile the maintenance supervisor completes a significant amount of paperwork and the maintenance clerk files that paperwork, their actual job duties in relation to the paperwork are distinct, as the supervisor’s role is substantive in nature, and the clerk’s role is clerical in nature.” The lack of substantive overlap in what the Maintenance Supervisors and Clerks do with the department paperwork highlights the *lack of* similarity in their respective job functions. Moreover, the Maintenance Supervisors, unlike the Maintenance Clerks, work in designated offices, and the night-shift Maintenance Supervisors have no contact with Maintenance Clerks, who only work day shifts. My colleagues also essentially ignore the differences in terms and conditions of employment—notably the fact that, as noted above, the stipulated unit comprises all hourly wage earners in the two departments, while the Maintenance Supervisors are salaried. In light of these factors, and in particular the different method of providing wages, there is no basis for finding that the Maintenance Supervisors share a community of interest with the employees in the unit.<sup>14</sup>

<sup>14</sup> *K&N Engineering, Inc.*, 365 NLRB No. 141 (2017), cited by my colleagues, is inapposite, as my colleagues omit numerous community-of-interest factors shared by disputed and stipulated employees in citing that decision. There, the Board determined that a stipulated unit of 641 production employees in more than thirty classifications was not appropriate under the traditional community-of-interest test because of a lack of shared interests between the stipulated janitors and the other stipulated employees. *Id.*, slip op. at 4. However, the Board found that disputed maintenance tech employees should be included in the unit. *Id.* The stipulated employees and the disputed maintenance tech employees were all hourly employees; had the same health and welfare, 401(k), and leave benefits; were subject to the same employee handbook, attendance policies, disciplinary policies, and parking and clock-in procedures; and had contact with janitors as well as with the other production employees. *Id.* In addition, the maintenance techs shared a department and supervision with the janitors and attended the same meetings. *Id.* Their work was functionally integrated with that of the other production employees; they repaired and maintained production employees' machines and, in testing repairs, manufactured products that were counted toward production employees' quotas. *Id.* The Board concluded that the maintenance techs should be included. In contrast, the Maintenance Supervisors here have no such breadth of shared interests with the unit.

Accordingly, contrary to my colleagues' assertion, the manner in which the Board balanced the community-of-interest factors in *K&N Engineering*, as well as in the above-described *Public Service Company of Colorado*, is not at all comparable to the manner in which my colleagues are balancing the community-of-interest factors here.

*Conclusion*

For the above reasons, I would not piggyback the six Maintenance Supervisors into the unit on the backs of the two Maintenance Clerks based on two factors that the Clerks themselves do not share with the other 93 percent of the unit. Nor would I rely on the so-called diversity of the unit to minimize the importance of the traditional community-of-interest test, which my colleagues do here. Accordingly, because the Regional Director correctly determined that the Maintenance Supervisors should be excluded from the existing unit, and the Petitioner has failed to establish grounds for granting review, I would deny review.

Dated, Washington, D.C. December 27, 2023

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Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD