UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

PATHWAY VET ALLIANCE, LLC, VETERINARY SPECIALISTS & EMERGENCY SERVICES
Employer

and **Case 03-RC-281879**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
Petitioner

PETITIONER'S POST-HEARING BRIEF

The employees of Veterinary Specialists and Emergency Services ("VSES"), a large veterinary hospital in Rochester, New York, seek to be represented by the International Association of Machinists and Aerospace Workers (hereinafter "Union"), and the Union has accordingly filed a petition for a wall-to-wall non-professional unit at that facility. Their employer, Pathway Vet Alliance, LLC (hereinafter "Employer"), disputes the appropriateness of the petitioned-for unit, contending instead that the "most appropriate" unit is three time larger and must include the employees of 18 additional far-flung facilities that it owns in the Rochester area. Because the Employer has fallen far short of meeting its burden of rebutting the presumption in favor of a single-facility unit, an election should be directed within the originally petitioned-for unit.

STATEMENT OF THE CASE

VSES, located at 825 White Spruce Boulevard in Rochester, is a large veterinary hospital providing specialty services as well as around-the-clock emergency services. Andrea Battaglia, the VSES Administrator, testified that VSES provides "services that relate to specialty veterinary services. So that can involve surgery, internal medicine consults. We also involve part-time ophthalmologists. We have some imaging services that we provide, and that's more on the specialty side. And then we provide emergency services that range from anything from a general urgent care visit, up to a service that is required for something that's critically ill or injured." (Tr.95:3-10) It is the only Employer-owned facility in the area that operates round-the-clock, 365 days per year. (Tr.95:12-13) It is managed by Ms. Battaglia, who in turn reports to Director of Ecosystem Sheryl Valente. (ER Ex. 30) Ms. Battaglia has no managerial responsibility for 17 of the 18 other facilities (including the 15 general practices, a laboratory, and a crematorium)[1] which the Employer contends must be included in the unit.[2] (Tr.124:6-12)

According to the Employer (which the Union does not dispute) the petitioned-for unit at VSES includes 145 individuals in 35 job classifications. (Board Ex. 3(c)) The most-heavily staffed positions are Licensed Veterinary Technician ("LVT") with 30 individuals employed, Animal Care Assistant II ("ACA II") with 23 individuals, and Customer Service Representative ("CSR")[3] with 19 individuals employed. *Id.* The VSES facility encompasses 28,219 square feet and has 15 examination rooms. (ER Ex. 4, p.31)

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[1] The only exception is Roc Rehab, located across the street from VSES, which is managed by Corey Hafler, who in turn reports to Ms. Battaglia. *See* ER Exhibit 30.

[2] Ms. Battaglia admitted that she has not visited any of the outside general practices. (Tr.125:23)

[3] The CSRs are inconsistently referred to as "Client" (as well as "Customer") Service Representatives in the record; to the Union's knowledge, both titles refer to the same set of classifications.

VSES was formerly owned by a Rochester-area network of veterinary practices known as the Monroe Veterinary Group. In addition to VSES, the Monroe Group consisted of 15 general-practice veterinary clinics, as well as a rehabilitation facility, a laboratory, and a crematorium. (Bd. Ex 3(d) and ER Ex. 4) The laboratory is located at the same address as VSES, while the rehabilitation facility is located across the street. (Bd. Ex. 3(d)) The Crematorium is located 14 miles from VSES.[4] The 15 general-practice clinics are located between 1.4 and 34 miles from VSES.[5] (Bd. Ex. 3(d); ER Ex. 4) The Monroe Group facilities (excluding VSES) range in size from 1,800 square feet (Roc Rehab) to 12,756 square feet (Animal Hospital of Pittsford). (ER Ex. 4, p.31) Pittsford also has the largest number of examination rooms of any of the general-practice clinics, with 8. *Id.*

On or around May 14, 2021, the entire Monroe Group, including VSES, was purchased by the Employer. (ER Ex. 4.) The Employer is a for-profit enterprise. (Tr.88:13-15) Odis Pirtle, the Employer's Chief Operating Officer (Tr.16:13), testified that the Employer's basic business model consists of buying and operating veterinary practices. (Tr.20:13-14) It currently has approximately 10,000 employees who are located in approximately 450 veterinary practices spread over 37 states. (Tr.21:17-22:4) The Employer strives to acquire and/or develop what it calls "ecosystems," which are "tight geographic cluster[s] of hospitals that function together and operate as one unit." (23:2-3) They are, according to Mr. Pirtle, structured in "kind of this hub-and-spoke effect. So our goal is to start with a multi-specialty ER facility in the center of a geographic area that has the ability to accept referrals from general practices that are circular or

[4] Distances between locations cited herein are driving distances and were calculated by Google Maps (available at https://www.google.com/maps/) utilizing the street addresses provided by the Employer as set forth in the Petition and by the Employer as set forth in Bd. Ex. 3(d).
[5] The closest general practice clinic – Companion Animal Hospital – is located 1.4 miles from VSES, while the furthest – Canandaigua Veterinary Hospital – is located 34 miles from VSES.

surrounding those centralized locations." (Tr.23:8-12) Mr. Pirtle confirmed that the specialty hospitals (including VSES) are distinct from the general practices because of their 24-hour operation and "and some of the higher-tiered specialties that are housed in those locations." (87:24-88:7)

Mr. Pirtle testified that the Employer maintains a hospital incentive program – known as "HIPS – which provides bonuses to "support team members" (i.e., not including veterinarians) at locations shown to have been successful and growing. (Tr.27:25-28:6) The HIPS bonuses are awarded to staff members at individual hospitals and/or clinics, rather to entire "ecosystems" (regional organizations). (Tr.85:22-86:16) Mr. Pirtle also testified that the Monroe Group was a particularly attractive acquisition for the Employer because it already consisted of a complete and mature "ecosystem." (Tr.72:4-9) He also confirmed that VSES, like most specialty hospitals owned by the Employer, is more than twice as large as any of the Employer-owned general practices in its vicinity. (Tr.88:9-11)

The Employer argues that the "most appropriate unit" consists of all nonprofessional employees at all 19 facilities of the former Monroe Veterinary Group – a unit consisting of 289 additional employees. (Bd. Exhibit 3(d)) These individuals are employed in 21 job classify-cations, approximately10 of which don't exist at VSES; of the 35 job classifications at VSES, only about 10 exist at the other facilities. (Bd. Exhibits 3(c),(d)) Among the job classifications that exist at VSES but not at the other Monroe Group facilities are: ACA II Internal Medicine, ACA II Surgery, ACA II Emergency, ACA III, Blood Bank Administrator, CSR II, CSR Team Lead, Environmental Service Technician, Hospital Operations Support, Hospital Trainer, IM Coordinator, Imaging Tech Lead, Inventory Leader, LVT Internal Medicine, LVT Surgery, LVT

Nursing Care, Office Administrator, Patient Care Assistant-Surgery, Patient Care Coordinator (I and II), Surgery Animal Care Attendant, and Veterinary Ultrasound Tech. *Id.*

LVTs are employed at each of the general practice clinics in the Monroe Group, as well as at VSES. As the job title suggests, individuals employed as LVTs are licensed by the State of New York. (Tr.95:24-96:1) They are authorized to perform "invasive procedures, including venipuncture, monitoring for anesthesia, as well as inducing animals with anesthetic drugs [and] nursing care, [as well as additional tasks] under the direction of a veterinarian[.]" (Tr.96:13-18)

ACAs provide nursing care to animals as well as communications with customers, but are restricted from performing invasive and other medical procedures which require an LVT license. (Tr.96:21-97:3)

The CSRs are involved in answering phones, making appointments, and fielding questions from customers. (Tr.97:5-7)

The 15 general practices "provide general veterinary services. . . . usually wellness visits. Also, they'll certainly help with patients that are sick. So like [VSES], needing maybe some basic fluid therapy for recovery, or maybe it's a surgery for a foreign body. Those are things that overlap a little bit. . . . [M]ost of the general practices will do dental procedures, too, which is something [not offered at VSES]." (Tr.99:13-20)

When asked by Employer counsel to describe "the real differences between services" offered at VSES as opposed to the general practices, Ms. Battaglia testified that "VSES offer[s] the services that the general practices may not be able to. So if their patient ends up becoming critically ill or injured that exceeds their ability to assist, they will send [it] to us. So that would include, let's say, any multi-trauma victim that needs more specialized surgical care for the repair of the bone, that -- that would . . . come to us. Also, if they're in need of some special imaging.

So we have the capability to provide special imaging services, like MRI, CT. And then we do offer an ultrasound service as well. (Tr.99:22-100:7) With regard to the types of surgeries generally performed only at VSES, Ms. Battaglia explained that "at VSES, we have specialists. So surgeons who are capable of doing the actual procedure; they have the skill set and the knowledge base to do that actual procedure. And also the equipment. So I -- I refer to bones because it -- it might be easier to conceptualize. But fracture of a bone, depending on what that bone is, and -- and where it's located, may require certain types of drills and plates, and something a general practice certainly wouldn't have in stock. Or the surgeon at the general practice would not have the ability to do the surgery just because it's very specialized.
And not to mention imaging. There's sometimes the imaging is required, CTs and MRIs, that are required to identify where exactly these -- what surgery is needed." (Tr.100:12-24)

Most of the animals seen at VSES are there because they require procedures and care that are not available at general practices, including those of the Monroe Group. (Tr.124:1-5) Sheryl Valente, the Employer's Director of Ecosystems for the Monroe Group[6], admitted that there are special services offered only at VSES (i.e., which are not offered at any of the other clinics/hospitals operated by the Employer in the Rochester area), including: advanced imaging (MRI, CT, ultrasound), telemetry, ICU, ophthalmology, surgeries requiring blood transfusions, endoscopic procedures, and chemotherapy. (Tr.161:3-162:8) Todd Wihlen, the Employer's Medical Director for the Monroe Ecosystem, added that some orthopedic procedures requiring advanced equipment are performed only at VSES. (Tr.263:10-264:1) Ms. Battaglia acknowledged that all veterinarians employed by the Employer who had board certifications in advanced areas are located at VSES. (Tr.163:2-7)

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[6] Ms. Valente was previously Managing Director of VSES (Tr.139:21)

Dr. Wihlen testified at length about the types of surgeries that are performed at each of the Monroe locations, as well as those procedures that are sometimes referred from the general practices to VSES, and vice versa, based on expertise or caseloads. (Tr.247:14-260:1) He stated that the general practices, as part of triage, will refer animals assessed to be in the "red zone" to VSES when they are likely to require hospitalization or significant ongoing care. (Tr.249:6-10) He added that the Monroe Group maintains a list of red-zone conditions (i.e., those that should be referred to VSES) and that there are occasions when some of these procedures are nevertheless performed at an outlying location due to the customer's financial constraints, but that the "best medicine" would be for such procedures to be performed at VSES. (Tr.262:11-21)

There are numerous procedures of a more routine nature (such as expulsion of a dog's anal glands) which are generally not handled by VSES, but are instead referred to the general practices for handling. (Tr.124:21-125:16) Similarly, other than the rabies vaccine, VSES does not administer routine vaccinations, which are not even kept in stock at VSES. (Tr.88:23-25, 124:13-20)

While all of the Employer-owned facilities in the area utilize the Infinity program for electronic storage of medical records, those records are not directly accessible between facilities (i.e., VSES personnel are not able to view records of the outlying locations, and vice versa). (Tr.163:19-25) All medical records are obtained in the same manner, regardless of whether the animal has been seen at another Monroe Group facility – i.e., the records must be requested by phone or email from the referring practice, which then emails or faxes the requested records to VSES. (Tr.406:8-23) The only exception is imaging records, which are directly accessible between the Monroe Group facilities electronically. (Tr.406:24-407:7)

Prior to its acquisition by the Employer, inventory for all of the facilities in Monroe Group were handled out of a central stockroom; since the acquisition, each location orders its inventory directly from an Employer-owned facility outside of the Rochester area. (Tr.215:24-216:5) The Employer offered a document (ER Exhibit 39) purporting to show the medical supplies shared between VSES and other Monroe Group facilities during an unspecified period; given the size of VSES and the large number of outlying facilities, the number of items shared is remarkably meager.

Customer billing is not centralized within the Monroe Group facilities; specifically, ACAII Tara McGrain testified that bills for her pets' care come from the Perinton general practice where they are seen, rather than from a centralized billing facility (Tr.524:19-525:2), and when she needed to speak with someone about a billing adjustment, she was directed to speak to the practice manager at Perinton. (Tr.525:7-25)

VSES has its own operating procedures, including its Medical Standards of Operation (ER Exhibit 38) and Lepto Suspect Handling Protocol. (ER Exhibit 37) The also VSES maintains a blood bank which is rarely, if ever, utilized by the outside general practices. (Tr122:10-12)

All employees are interviewed by, and hired for, particular locations; none are hired to work generally for the Monroe Group without reference a particular job location. (Tr.117:19-118:6,132:20-133:4)

Hospital Administrator Battaglia admitted that not all of the animals seen at VSES are referred from one of the general practices in the Monroe Group. (Tr.126:12-21) Samuel Estes, an Ultrasound Technician and former Supervisor in the Surgery and Emergency Departments, testified that approximately one third of the animals for which he performs ultrasounds are not

referred by, or otherwise affiliated with, any of the outlying Monroe Group clinics. (Tr.405:14-20) Tamara Day, the Imaging Team Lead, testified that an even higher proportion of the CT and MRI patients are referred from general practices not affiliated with the Monroe Group. (Tr.457:19-22) All animals are processed in the same manner regardless of whether they are referred by another Monroe Group practice, or by a veterinary practice not affiliated with the Employer. (Tr.405:21-406:6)

When an employee at one of the Monroe Group facilities wishes to permanently transfer to another location, they are treated in the same manner as applicants from outside the organization. (Tr.112:14-20) Hospital Administrator Battaglia testified that "we . . . use the same recruitment platform, . . . the same process in hiring, so the employee given from other hospitals will go ahead and apply as an outside candidate will apply. We do the same thing for internal candidates, and once they apply, they receive an interview. And then that person is brought in to have a shadow experience with the team that they could potentially be working with . . . . And then once the offer is given to the employee, and the employee accepts, we will notify the practice manager." (Tr.111:23-112:7)

Employees at the outlying general practice clinics within the Monroe Group are required to make themselves available to work shifts at either VSES or the Urgent Care practice one of the general practice sites on designated holidays a specified number of days per year, based on their years of service. (ER Exhibit 81) The mandatory holiday shift schedule is posted at least a half year in advance. (Tr.506:13-18) Normally, approximately 55 nonprofessional slots are filled for a holiday (Tr.507:13-20), of these, typically four-to-six are assigned to non-VSES staff. (Tr.507:23-508:2) Non-VSES personnel may fulfill their holiday-shift obligation by signing-up to be "on call" and their obligation is met regardless of whether they are actually called-in to

work; in practice, the VSES are reluctant to call upon the non-VSES personnel on call because (in the words of ACA Adam Kotecki), it is perceived that they "will not be much of a help." (Tr.508:3-15)

Hospital Administrator Battaglia testified that the general practice staffers require nothing more than an orientation before working their mandatory holiday shifts at VSES because "their skill set transfers perfectly to what the VSES needs." (Tr.107:9-10) However Christine-59 West, the Employer's Staffing and Workload Administrator, confirmed that non-VSES personnel assigned to holiday shifts at VSES are not placed in ICU because they lack the necessary extra training. (Tr.596:15-597:1) Similarly, she testified that non-VSES LVTs performing holiday-shift duty at VSES are not assigned to Surgery. (Tr.600:5-14)

Employees at all facilities have the opportunity to work open shifts at other locations within the Monroe Group, including VSES; all such open shifts are undertaken by the employees concerned on a purely voluntary basis; none are mandated by the Employer. (Tr.126:22-127:3, 601:14-18) The Employer introduced documents (ER Exhibits 77 and 78) purporting to show the temporary and permanent "transfers" between locations in the Monroe Group since its acquisition by the Employer in May 2021 (although not all of the individuals included are employed in positions located in either of the proposed bargaining units (see, e.g., Tr.289:10-11)). Of the 442 temporary (single-shift) transfers between Monroe facilities shown to have taken place since May 2021, only two involved a shifts worked by a single VSES employee at another facility (Tr.285:13-16), while 88 of the shifts were those of employees from another facility working at VSES. (Tr.287:23-288:1) Almost of half of those 88 shifts (41) were performed by a single individual – Chelsea Whitmore, who is a CSR at Greece who regularly picks up extra shifts at VSES. (Tr.288:4-17)

All of the LVTs, ACAs, and CSRs employed at VSES receive a wage premium of $0.75 per hour; they do not receive this premium if they work hours at a non-VSES facility.[7] (Tr.375:19-376:2, 385:21) Allen Ibrisimovic, the Senior People Operations Partner for the Monroe Group, testified that the $0.75 premium is paid solely because of the unscheduled nature of the work flow and the round-the-clock operation at VSES. (Tr.388:2-10) This testimony conflicted with an email sent by then-VSES Administrator Jen Bidwell to all VSES staff in December 2015 stating that the "incentive was created in recognition of the advanced skill set and knowledge base necessary to meet the minimum standard of care at VSES, as well as the additional responsibilities of mandatory on-call and the demands of working in a 24 hour facility." (Union Exhibit 1; Tr.543:1-544:15)

Samuel Estes is currently employed at VSES as an Ultrasound Technician. (Tr.398) He has an LVT license and employed at VSES since 2008 in a number of positions, Emergency Technician and Surgery Department Supervisor. *Id.* When he became an Ultrasound Technician he was sent for extra training in Guelph, Ontario. (Tr.400:5-12) He testified that the Emergency Department, which operates around the clock, normally employs approximately 12 LVTs and 6 to 9 ACAs during a 24-hour period. (Tr.401:14-402:3) He further testified that Surgery (which only operates days) is normally staffed with 6 LVTs and 5 ACAs (Tr.402:5-9), and that Radiology/Imaging (which also operates a single shift per day) currently has five employees. (Tr.402:24-403:1) In his experience, the number of employees from the outside locations working at VSES is "low overall" (Tr.405:10), and he testified that, in his five years as Surgery Supervisor (where he was responsible for scheduling – Tr.399:21-22) there were few, if any,

[7] In addition, VSES employees working evening or overnight shifts receive an additional shift premium, which are available only at VSES as the only 24/7 operation within the Monroe Group. (Tr.410:10-12)

instances when employees based outside VSES performed tech work at VSES Surgery. (Tr.418:12-419:1) Tara McGrain, an ACAII in Surgery, also confirmed that she has never seen a staff member based outside of VSES perform any work in VSES Surgery. (Tr.523:4-11)

Mr. Estes testified at some length about specialized skills required of LVTs working in the VSES Surgery Department (*See*, e.g., Tr.410:25-414:6, 415:17-417:1), as well as the types of procedures generally performed only at VSES. (*See*, e.g., Tr.419:2-423:8) He stated that, based on his experience, that very few of the LVTs based in the outlying general practices (other than those who previously been stationed at VSES) had the skills required by VSES surgery. (Tr.417:2-10) His testimony was disputed in large part by several Employer witnesses, notably Perinton Practice Manager Kathleen Sercu. (Tr.603:18-604:5, 605:7-612:22)

Mr. Estes testified that all of the animals he sees are referred from a general practice and that if diagnostic-quality imaging is required, they are generally referred to VSES, because of the advanced imaging technology and higher degree of training of the VSES staff. (Tr.412:8-423:13) To his knowledge, no employee based at one of the outlying locations has ever been assigned to work in VSES imaging. (Tr.423:14-17)

Summarizing his more than eight years' experience as a Supervisor in the VSES Emergency and Surgery Departments, Mr. Estes testified that he would generally assign LVTs from the outlying practices working a shift at VSES to do

> simple procedure type things. They can obviously do catheters because we're all taught that in school. If it's a simple, stable anesthesia that -- that's like, a big dog, little dog bite wounds -- that's something that I would feel comfortable . . . as long as they had previous experience [at] a GP. I think . . . if there's like, sub-Q fluids or something like that, I'd feel comfortable, but as far as like, advanced patient care in the ICU, . . . I would not feel comfortable putting them in there or -- or any of the advanced procedures that we perform at VSES.

(Tr.426:18-427:3)

ARGUMENT

I. The Wall-to-Wall, Single-Facility, Unit Petitioned-for by the Union is Appropriate.

Section 9(b) of the Act directs that "[t]he Board shall 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[.]" To carry out this function, the Board applies its traditional multi-factor "community of interest" test to determine "whether the employees in the petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." *PCC Structurals, Inc*., 365 NLRB No. 160, at 5 (2017). The test queries

> 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.

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

The application of this test is quite simple where, as here, the petitioned-for group is a wall-to-wall unit of all nonprofessional employees at a single facility. In such circumstances, the Board has long held "that a single-facility unit is presumptively appropriate, unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *Kroger LP*, 348 NLRB 1200 (2006). The presumption means that the party arguing against the single-facility unit must present evidence demonstrating that the

petitioned-for unit is somehow inappropriate. *Id.* As discussed at length below, the Employer in the instant matter has clearly failed to meet this high burden.

II. The Employer's Proffer of an Alternate Allegedly "Most Appropriate" Unit is Irrelevant to the Question of Whether the Petitioned-for Unit is Appropriate for Collective Bargaining.

In its Statement of Position filed in response to the Petition, the Employer asserted that the petitioned-for single-facility unit "fractures the most appropriate bargaining unit, which is a multi-facility bargaining unit." (Board Exhibit 3(b), p.2) Employer counsel repeated this assertion, word-for-word, at the commencement of the hearing. (Tr.13:2-4) After summarizing the evidence he believed to support that position, he reiterated for a third time that "the Employer believes the most appropriate bargaining unit would cover all of the locations that it identified in its statement of position." *Id.* at 18-20.

The Employer's opposition to the petitioned-for unit is thus squarely grounded upon its claim that its alternative multi-facility group is *the most appropriate* unit. This argument displays a striking misunderstanding of the applicable law: unit determinations under the National Labor Relations Act turn on whether a petitioned-for unit is "appropriate" and not whether some other alternative proposed unit might somehow be "more" appropriate or even "the most appropriate unit." The Supreme Court has stated that "[s]ection 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 . . . 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). This

suggested interpretation of the statute offered by the Supreme Court has been adopted as authoritative by every federal circuit; as the Third Circuit has declared, "the NLRB need not select the most appropriate unit--any unit that is an appropriate one will do, even if there are several better possible units." *NLRB v. Saint Francis College*, 562 F.2d 246, 249 (3d Cir. 1977). *See also Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 574 (1st Cir. 1983); *Staten Island University Hospital v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994); *Arcadian Shores, Inc. v. NLRB*, 580 F.2d 118, 119 (4th Cir. 1978); *NLRB v. Bogart Sportswear Manufacturing. Co*., 485 F.2d 1203, 1206 (5th Cir. 1973); *NLRB v. First Union Management, Inc*., 777 F.2d 330, 333 (6th Cir. 1985); *NLRB v. Aaron's Office Furniture Co.*, 825 F.2d 1167, 1169 (7th Cir. 1987); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016); *NLRB v. Mercy Hospitals of Sacramento, Inc*., 589 F.2d 968 , 972 (9th Cir. 1978); *NLRB v. Foodland, Inc.,* 744 F.2d 735, 737 (10th Cir. 1984); *Daylight Grocery Co. v. NLRB*, 678 F.2d 905 , 908 (11th Cir. 1982); *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262 , 1267 , 291 U.S. App. D.C. 345 (D.C. Cir. 1991). This uniform interpretation by the courts of appeals is consistent with the long-standing practice of the Board. As the Eighth Circuit in *FedEx Freight* noted, when considering the appropriateness of a unit, the Board "'first considers the union's petition and whether that unit is appropriate.' If the Board concludes that the petitioned for unit is 'an appropriate unit,' it has fulfilled the requirements of the Act and need not look to alternative units." *FedEx Freight*, 816 F.3d at 528 (quoting *Overnite Transportation Co*., 322 NLRB 723 (1996)).

This focus upon whether the petitioned-for unit is *an* appropriate unit, rather than upon whether one or more alternative units proposed by the employer are somehow "more" or "most" appropriate, is consistent with the Act's policy of promoting employee freedom of choice. As the Supreme Court in *American Hospital Association* declared, the statutory language of section

9(a) of the Act referring to the choice by employees of a collective bargaining representative "in a unit appropriate for such purposes . . . "implies that the initiative in selecting an appropriate unit resides with the employees." 499 U.S. 606, 610. In other words, it is *the employees* rather than the employer who have the right to select their unit, a decision which may be overturned only by evidence showing that the chosen unit is somehow inappropriate. An employer's proffer of an alternative unit – regardless of whether it be "more" appropriate or even "most appropriate" – is completely irrelevant. Only if the petitioned-for unit is shown to be inappropriate may such alternative units be considered. Consequently, the Employer's proffer in the instant matter of a much larger multi-facility unit spread across an extensive geographic area as an alternative to the petitioned-for single facility unit on the basis that it is somehow the "most appropriate" unit must be rejected as irrelevant.

III. The Employer Has Failed to Rebut the Presumption Favoring the Petitioned-for Single-Facility Unit.

A. The Single-Facility VSES Unit Has a Clear Separate Identity and is Not Functionally Integrated with the Other Facilities in the Proposed Alternate Unit.

As noted previously, a single-facility unit is presumptively appropriate. *Kroger, LP, supra*. *See also J&L Plate, Inc*., 310 NLRB 429 (1993); *Kapok Tree Inn*, 232 NLRB 702, 703 (1977). The presumption is dispositive "unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity." *New Britain Transportation Co*., 330 NLRB 397 (1999), citing *J & L Plate*. Where, as here, the party advocating a multi-location seeks to rebut the presumption, the Board will examine a number of factors, including: "(1) central control over daily operations and labor relations, including extent

of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) degree of employee interchange; (4) distance between locations; and (5) bargaining history, if any." *Kroger LP*, 348 NLRB 1200, *citing J&L Plate*.

The record evidence unquestionably demonstrates that the employees in the petitioned-for unit have a strong identity within the VSES wall-to-wall unit. Particularly noteworthy in this respect is that the petitioned-for unit matches the Employer's organizational structure: all departments at VSES report to Andrea Battaglia, the Hospital Administrator. (ER Ex. 30) Ms. Battaglia has no managerial responsibility for 17 of the 18 other facilities (including the 15 general practices, a laboratory, and a crematorium) which the Employer contends must be included in the unit. (Tr.124:6-12)

By contrast, in cases where the Board has found a unit to be inappropriately fractured, the fact that the proposed unit crossed organizational lines is frequently a significant factor in the Board's finding. *See, e.g., The Boeing Company,* 368 NLRB No. 67 at 4 (2019) (the two groups of employees in the petitioned-for unit reported to different managers).

Further evidence of the strong identity of employees within the VSES unit include:

- It is the only Employer-owned facility in the area with a round-the-clock, 365-day per year operation (Tr.95:12-13);
- The unique nature of the emergency and "higher-tiered specialties" offered solely at VSES (87:24-88:7);
- The existence of VSES-specific operating procedures (ER Exhibits 37 and 38);
- All employees are interviewed by, and hired for, particular locations; none are hired to work generally for the Monroe Group without reference a particular job location. (Tr.117:19-118:6,132:20-133:4)

- In recent years, employees based at VSES have rarely, if ever, worked at any of the other Monroe Group facilities (Tr.285:13-16; ER Exhibit 78)
- Of the 35 job classifications at VSES, only about 10 exist at the other facilities, and of the 21 job classifications at the outlying facilities, approximately 10 don't exist at VSES (Bd. Exhibits 3(c),(d)). The Employer presented no evidence or argument to explain why the VSES employees must be included in the larger unit where there is so little overlap between employee job classifications. Even if some of the job titles are largely duplicative, the disparity in job titles evinces a lack of uniformity (and, consequently, a lack of functional integration) between VSES and the outlying general practices.[8]

In *Kroger LP*, 348 NLRB 1200 (2006), the Board ruled that the employer, which proposed a six-store unit, had failed to rebut the single-location presumption. In that case, evidence favoring the larger unit included centralized overall management, as well as administrative services and human resources, were centralized, with a common budget for all six stores, and common personnel policies, employee handbook, and benefits. There were also mandatory transfers between stores to cover vacation absences. On the other hand, interviewing of new hires was handled by individual store managers, who also were responsible for all assignments, work schedules, overtime and time-off approvals, vacation scheduling, and breaks. In addition, there was minimal interchange and transfers between stores, the stores were located between 8 to 13 or 14 miles apart from each other, and "day-today decisions . . . [at] each . . . facility [were] handled, in large part, separately within each store by the store manager, co-managers, department heads, and other supervisory personnel." *Id.* at 1202-1203.

Explaining its decision to reject the larger unit, the Board stated that

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[8] No evidence presented regarding the job requirements of most of the positions unique to VSES; nor has the Employer provided any explanation as to why these employees somehow must somehow be included with the outlying facilities, with whom they apparently share no common interests.

> [a]lthough the Employer contends that its centralized control over personnel and labor relations policies requires a finding that the 7 facilities function as one unit, centralization, by itself, is not sufficient to rebut the single-facility presumption where there is significant local autonomy over labor relations. *New Britain Transportation*, 330 NLRB 397 (1999). Instead, the Board puts emphasis on whether the employees perform their day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems. For example, in *Renzetti's Market*, 238 NLRB 174, 175 (1978), despite centralization and similarity of employee skills, functions, and pay, the Board found a single-facility unit to be appropriate where immediate supervisors issued oral warnings, granted leave requests, and participated in hiring and discharge decisions. This level of involvement, according to the Board, was not routine but "demonstrate[d] meaningful local autonomy and participation in matters directly affecting the service representatives' working lives." *Rental Uniform Service, Inc*., 330 NLRB 334, 335-336 (1999)."

Kroger LP, 348 NLRB at 1203. Particularly noteworthy was the Board's rejection of evidence of common job skills possessed by employees across facilities, noting that "although the employees at the 6 stores have essentially the same skills and functions, there is no evidence that these differ significantly from those of Kroger employees in its many other stores—stores which the Employer does not seek to include in the unit." *Id.*

Summarizing its conclusion, the Board stated that "we find that the similarity of employee skills and working conditions, centralized personnel and labor relations policies, and limited functional integration among the 7 facilities, is outweighed by significant local autonomy, lack of substantial interchange or functional integration, geographic separation, and absence of bargaining history. *New Britain Transportation Co., supra*, 330 NLRB at 397-398; *Foodland of Ravenswood*, 323 NLRB 665, 666 (1997); *Red Lobster*, 300 NLRB 908, 911 (1990); *Carter Hawley Hale Stores*, 273 NLRB 621, 622-623 (1984)." *Kroger LP* at 1204 (footnote omitted).

In a footnote, the *Kroger* Board summarized decisions where employers had amassed evidence sufficient to rebut the single-facility presumption:

> *Waste Management Northwest*, 331 NLRB 309 (2000)(lack of local autonomy at the second facility where there was no permanent supervisor and employees interacted and coordinated deliveries and pickups to customers); *Dayton Transport Corp.*, 270 NLRB 1114 (1984) (final authority on all personnel decisions centralized; over 400 instances of interchange among three facilities in 1 year); *Novato Disposal Services*, 328 NLRB 820 (1999) (common supervision of employees at all locations; frequent permanent and temporary interchange); *R&D Trucking*, 327 NLRB 531 (1999) (common supervision—no local manager at one of the facilities; frequent interchange —12 instances a month among 10 employees); *Big Y Foods, Inc*., 238 NLRB 860 (1978)(significant central control of day-to-day labor relations including hiring, discipline, and grievance handling); *Dan's Star Market Co*., 172 NLRB 1333 (1968)(division managers directly supervised departments in store; half of numerous temporary transfers involved store sought by petitioner).

Kroger LP at 1204, fn12.

In *General Mills Restaurants, Inc., d/b/a Red Lobster* 300 N.L.R.B. 908, 911(1990), the Board held that the employer failed to rebut the single-facility presumption and rejected a 13-location unit consisting of all Red Lobsters in the Detroit area. The Board noted that

> [t]he separate Red Lobster restaurants in the Detroit area are not physically proximate to each other, nor are they functionally integrated. None of the restaurants in question has any collective-bargaining history, and the identity of the employees as a separate grouping at each restaurant is apparent, particularly in that hiring is done locally at each restaurant. Further, we find that the degree of employee interchange is minimal, and the significance of that interchange is diminished because the interchange occurs largely as a matter of employee convenience, i.e., it is voluntary. Temporary transfers in this case consist of employees working some hours during the week in a store other than the one to which they are assigned. Even in the Dearborn Heights restaurant, where the degree of temporary interchange is most extensive, only 19 employees out of a work force of 85 employees were affected by a temporary work assignment during 1988, usually for very short periods of time.16 Permanent transfers, a less significant indication of actual interchange than temporary transfers, were similarly minimal, with 11 permanent transfers in a combined work force of 185 employees within a 1-year period. Thus, the evidence is insufficient to support the Employer's claim that the separate units at the two petitioned-for restaurants is inappropriate.

In the instant matter, while the Employer has introduced evidence of centralized human resources, benefits, and personnel policies, these are facts common to virtually every large corporate enterprise and, as the Board concluded in *Kroger*, are insufficient to overcome the single-facility presumption. By contrast, there is evidence that day-to-day personnel decisions such as hiring and internal transfers are handled at the individual-facility level (Tr.117:19-118:6, 132:20-133:4), and there is a paucity of evidence showing any other centralization control over personnel matters such as scheduling or discipline.

Nor is there evidence that VSES is functionally integrated with the other Monroe Group facilities. To the contrary, ample evidence demonstrates that VSES operates largely autonomously from the other facilities, including:

- Lack of centralized medical records (Tr.163:19-25);
- Lack of centralized billing (Tr.524:19-525:2);
- Lack of centralized inventory for the Monroe Group (Tr.215:24-216:5);
- HIPS bonuses awarded by the Employer to employees on an individual facility basis, rather than to the employees in an entire "ecosystem" such as the Monroe Group (Tr.85:22-86:16);
- The presence of numerous patients at VSES that were not referred from other Monroe Group facilities, and who are processed in the same manner regardless of whether they are referred from another Employer-owned facility (Tr.126:21-21, 405:14-406:6, 457:19-22).

A great deal of evidence was presented by the Employer in attempt to show that the skills possessed by VSES employees are largely fungible with those possessed by employees in the same classifications at the outlying general practices and that, in short, there is nothing really

"special" about VSES's status as a "Specialty" hospital. See, e.g., Tr.603:18-604:5, 605:7-612:22. This evidence, which flies in the face of common sense, was also bluntly contradicted by evidence demonstrating that the Employer restricts personnel from the outlying practices from being placed in several VSES departments, including ICU and Surgery (Tr.596:15-597:1, 600:5-14), as well as the testimony of VSES employees who are reluctant to bring in employees from the outlying facilities who are on-call for a holiday because, due to their lack of requisite job skills, "will not be much of a help." (Tr.508:3-15)

All of the evidence of the purported similarity or fungibility of job skills – even if it were not disputed – is of very little relevance, however, since as the Board noted in *Kroger*, "although the employees [in the proposed multi-facility unit] have essentially the same skills and functions, there is no evidence that these differ significantly from those of Kroger employees in its many other stores—stores which the Employer does not seek to include in the unit." 348 NLRB at 1203. This reasoning is obviously persuasive: after all, it seems likely that many of the Employer's 10,000 employees working at hundreds of veterinary hospitals across the country possess nearly identical skills to those in the Monroe Group, but this likely fact obviously does weigh in favor of a finding that a nationwide unit of the Employer's employees is the only appropriate unit. After all, the question presented here is whether the petitioned-for VSES single-facility unit is *an* appropriate unit, not whether the Employer's proposed unit is also appropriate. In sum, the Employer has utterly failed to present evidence sufficient to show that the single-facility unit of employees at VSES has no distinct identity or is otherwise inappropriate.

B. Evidence of Interchange with Other Facilities is Insufficient to Rebut the Presumption Favoring the Single-Facility VSES Unit.

In addition to evidence purporting to show that the skills of the employees are essentially fungible across the Monroe Group, the Employer also provided evidence of what it termed employee "interchange." Like the fungibility evidence, however, the evidence of purporting interchange largely misses the mark, both because the interchange is not sufficiently extensive to rebut the single-facility presumption, but also because it is not the type of "interchange" that the Board deems relevant. This is because most of the so-called "interchange" consists of *voluntary* extra-shifts taken on by employees at another facility, as well as permanent facility transfers *initiated by the employee*, rather than management. In reviewing evidence of interchange in determining whether a single-facility unit is appropriate, the Board has repeatedly held that such voluntary transfers are to be given little, if any, weight. *New Britain Transportation Co*., 330 NLRB 397, 398 (1999). In that case, the Board noted that "of the 190 bona fide temporary employee transfers, 118 involved charter or special events for which drivers voluntarily sign up. Such voluntary interchange is given less weight in determining if employees from different locations share a common identity" (footnote omitted).

Similarly, in *D&L Transportation, Inc*., 324 NLRB 160 162, fn7 (1997), the Board noted that

> participation in charter and shuttle trips is voluntary; drivers must "sign-up" to participate. Hence, these trips are not necessarily a regular part of each driver's job. We note that voluntary interchange, such as a permanent transfer made at the request of an employee, is given less weight in determining if employees from different locations share a common identity. *See, e.g., Dayton-Hudson Corp.*, 227 NLRB 1436, 1438 (1977). As this contact is the result of voluntary trips, it is of less significance."

In the instant matter, it is undisputed that *all* of the extra-shift assignments worked by employees of the Monroe Group at another facility are undertaken voluntarily, and that none of

these extra shifts have ever been mandated by the Employer. (Tr.126:22-127:3, 601:14-18) It is also undisputed that *all* permanent transfers between facilities in the Monroe Group have been initiated by the employees involved. (Tr.111:23-112:20) There is no evidence whatsoever that any permanent transfer between facilities has been mandated by the Employer. Such voluntary transfers, whether temporary or permanent, are given little weight in determining whether a single-facility unit is functionally integrated into a larger multi-facility unit. *New Britain Transportation Co., supra.*

The only evidence of Employer-mandated interchange between facilities in the record pertains to the holiday-shift duty required of employees at the outlying facilities. These employees, depending upon their years of service, are required to make themselves available to work a holiday shift at another facility – either VSES or the urgent-care program at Pittsford – on designated holiday. (ER Exhibit 81) The duty may be fulfilled by signing-up for on-call duty, and is met whether or not the employee is actually called-in to work on the holiday. In practice, approximately four to six of the 55 shifts slotted for a typical holiday are actually filled by non-VSES staff. (Tr.507:13-508:2)

Such a minimal level of mandatory interchange (four to six slots on holidays, in a facility having an average of 50 or more shifts working 365 days per year) falls far below the level of interchange necessary to rebut the single-facility presumption. *See*, e.g. *Aramark Sports and Entertainment, Inc.*, 36-RC-5997, Decision and Direction of Election, 2000 BL 24754 (May 24, 2000), whether the regional director noted that "where the Board has found interchange to be a significant factor in overcoming the single-facility presumption, . . . the interchange levels are much higher than the instant situation. In *Purolator Carrier Corp*., 265 NLRB 659 (1982) over 50% of the work force was split between two locations. In *Dayton Transport Corp*., 270 NLRB

1114 (1984) there were 425 (in a unit of 87) significant temporary transfers between two locations in a one-year period."

The Employer has not presented evidence that the VSES single-facility unit is functionally integrated with the rest of the Monroe Group to the degree that it has lost its separate identity. The evidence of relevant (as opposed to voluntary) interchange is negligible, falling far below the level necessary to rebut the presumption of single-unit appropriateness.

CONCLUSION

For all of the above-stated reasons, the Employer's contention that its proposed multi-facility unit is the "most appropriate" should be rejected, and an election should be ordered within the petitioned-for, and presumptively appropriate, single-facility VSES unit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As the above-signed counsel for Petitioner, I hereby certify that I have served a true and correct copy of the foregoing brief upon Employer counsel by email to the following addresses:

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