

**No. 10-2549**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**ADT SECURITY SERVICES, INC.**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement regarding oral argument.....	2
Statement of issues presented .....	2
Statement of the case.....	3
I. The Board’s findings of fact.....	4
A. Company background and its 29-year bargaining history with workers in the Kalamazoo area leading up to June 2, 2008 .....	4
B. On June 2, 2008, the Company repudiated the collective-bargaining agreement and withdrew recognition from the Union.....	8
II. The Board’s conclusions and order.....	10
Summary of argument.....	11
Argument.....	13
I. The Board acted within its discretion in determining that the Kalamazoo bargaining unit remained appropriate despite its administrative functions being relocated to Wyoming.....	13
A. Applicable principles and standard of review .....	13
B. Substantial evidence supports the Board’s conclusion that the Kalamazoo unit remained appropriate and that the Company unlawfully withdrew recognition.....	15
C. Despite the Company’s claim, there was not functional integration between the units .....	19

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
D. The Board’s order was well within its remedial authority .....	26
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the employees terms and conditions of work without notifying and bargaining with the Union .....	31
Conclusion .....	32

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>American Hosp. Ass'n v. NLRB</i> , 499 U.S. 606 (1991).....	15,27
<i>Armco, Inc. v. NLRB</i> , 832 F.2d 357 (6th Cir. 1987) .....	14,18,31
<i>B. Siegel Co. v. NLRB</i> , 670 F.2d 64 (6th Cir. 1982) .....	15
<i>Buffalo Broad. Co.</i> , 242 NLRB 1105 (1979) .....	14
<i>Canal Carting, Inc.</i> , 339 NLRB 969 (2003) .....	17-18,31
<i>Children's Hosp. of San Francisco</i> , 312 NLRB 920 (1993), <i>enforced</i> , 87 F.3d 304 (9th Cir. 1996) .....	14
<i>Comar, Inc.</i> , 339 NLRB 903 (2003) <i>enforced</i> , 111 F. App'x 1 (D.C. Cir. 2004) .....	14,17,18,24,27,31,
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	19
<i>Fraser &amp; Johnson Co.</i> , 189 NLRB 142 (1971), <i>enforced in relevant part</i> , 469 F.2d 1259 (9th Cir. 1972) .....	18
<i>Glasser v. ADT Security Services, Inc.</i> , 2009 WL 1383291 (W.D. Mich. 2009), <i>rev'd and remanded by</i> 379 F. App'x 483 (6th Cir. 2010) .....	4,29
<i>H.K Porter v. NLRB</i> , 397 U.S. 99 (1970).....	28

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>Holly Farms Corp.</i> , 311 NLRB 273 (1993) .....	17
<i>Kalamazoo Paper Box Corp.</i> , 136 NLRB 134 (1962) .....	15
<i>Kelly Business Furniture, Inc.</i> , 288 NLRB 474 (1988) .....	21
<i>L.M. Berry &amp; Co. v. NLRB</i> , 668 F.2d 249 (6th Cir. 1982) .....	15
<i>Leach Corp. v. NLRB</i> , 312 NLRB 990 (1993), <i>enforced</i> , 54 F.3d 802 (D.C. Cir. 1995) .....	19,28
<i>Meijer, Inc. v. NLRB</i> , 564 F.2d 737 (6th Cir. 1977) .....	15
<i>Michigan Hosp. Serv. Corp. v. NLRB</i> , 472 F.2d 293 (6th Cir. 1972) .....	15
<i>Molded Acoustical Prod., Inc. v. NLRB</i> , 815 F.2d 934 (3d Cir. 1987).....	19
<i>NLRB v. American Seaway Foods, Inc.</i> , 702 F.2d 630 (6th Cir. 1983) .....	15
<i>Northland Hub, Inc.</i> , 304 NLRB 665 (1991) <i>enforced mem.</i> , 29 F.3d 633 (9th Cir. 1994) .....	14,15,23
<i>Oklahoma Installation Co.</i> , 305 NLRB 812 (1991) .....	29

**TABLE OF AUTHORITIES**

<b>Cases – Cont’d</b>	<b>Page(s)</b>
<i>P.J. Dick Contracting</i> , 290 NLRB 150 (1988) .....	29
<i>Peerless Publ’ns, Inc.</i> , 190 NLRB 658 (1971) .....	28
<i>Radio Station KOMO-AM</i> , 324 NLRB 256 (1997) .....	14,18,22,24-25,31
<i>Ramada Inns, Inc.</i> , 278 NLRB 691 (1986) .....	21
<i>Renaissance Center Partnership</i> , 239 NLRB 1247 (1979) .....	21
<i>South Prairie Const. Co. v. Local 627, Int’l Union of Operating Eng’rs</i> , 425 U.S. 800 (1976).....	14-15
<i>Trane</i> , 339 NLRB 866 (2003) .....	26
<i>Trident Seafoods, Inc. v. NLRB</i> , 101 F.3d 111 (D.C. Cir. 1996).....	14,18

<b>Statutes:</b>	<b>Page(s)</b>
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2,3,10,13,31
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2,3,10,13,31
Section 9(b)(29 U.S.C. § 159(b)).....	27
Section 10(a) (29 U.S.C. § 160(a)) .....	1
Section 10(e) (29 U.S.C. § 160(e)) .....	1
Section 10(j)(29 U.S.C. 160(j)).....	3,4,29

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**BRIEF FOR THE  
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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

The National Labor Relations Board (the “Board”) had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. 160(a)) (the “Act”). The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. 160(e)). The unfair labor practices found by the Board occurred in Michigan. The Board’s Decision and

Order (“Board’s Order”) against ADT Security Services, Inc. (“the Company”), issued on September 30, 2010, and is reported at 355 NLRB No. 223. On October 26, 2010, the Company’s attorney notified the Board’s Regional Office that the Company would not comply with the Board’s Order. The Board filed an application for enforcement on November 24, 2010. The Act imposes no time limitation on filing for enforcement of Board orders.

### **STATEMENT REGARDING ORAL ARGUMENT**

Although this case presents the application of settle law to well-supported, and largely undisputed, fact-findings, the Court may find oral argument helpful. The Board believes that 15 minutes per side would be sufficient.

### **STATEMENT OF ISSUES PRESENTED**

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the employees’ exclusive representative, upon the Company’s administrative relocation within Michigan from Kalamazoo to Wyoming.

2. Whether substantial evidence supports the Board’s finding that Company violated Section 8(a)(5) and (1) by unilaterally changing the employees’ terms and conditions of work without first notifying the Union and giving it an opportunity to bargain.

## STATEMENT OF THE CASE

Based upon unfair labor practice charges filed against the Company by the International Brotherhood of Electrical Workers, AFL-CIO, Local 131 (“the Union”), the Board’s General Counsel issued a complaint alleging violations of Section 8(a)(5) and (1) of the Act (29 U.S.C. 158 (a)(5) and (1)), for unlawfully withdrawing recognition from the Union and for unilaterally changing employees’ overtime pay, unpaid travel time, and vacation eligibility without notifying and bargaining with the Union. (A 15; 23-28.)<sup>1</sup> Following a hearing, an administrative law judge issued a decision and recommended order on December 30, 2008, in which he found merit to the complaint allegations. (A 21.) After the Company filed timely exceptions, the Board issued its Order on September 30, 2010, affirming the judge’s rulings, findings, and conclusions, and adopting, with a slight modification, the recommended remedial order. (A 22.)

In a separate but related action commenced before the issuance of the Board’s decision, the Board’s Regional Director filed for a preliminary injunction against the Company, under Section 10(j) of the Act (29 U.S.C. 160(j)), in the Western District of Michigan on March 12, 2009. The petition sought an interim order requiring the Company to recognize and bargain in good faith with the Union, reinstate the parties’ collective-bargaining agreement, and rescind the

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<sup>1</sup> “A” refers to the pages of the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

unilateral changes it had made to the employees' working conditions. The district court denied the petition, but on appeal, this Court reversed and remanded the case. *See Glasser v. ADT Security Servs., Inc.*, 2009 WL 1383291 (W.D. Mich. 2009), *rev'd and remanded by* 379 F. App'x 483 (6th Cir. 2010). This Court found reasonable cause to support the injunctive relief requested, which required the Company to recognize and bargain with the Union, and remanded the case on the issue of whether the injunction was necessary to protect the Board's remedial powers under the Act. *Id.* The Board's final order in this case pretermitted further proceedings before the district court, because the court's Section 10(j) jurisdiction ends once the Board issues a final order.

Following the Board's Order, the Company refused to comply with it, and the Board initiated these proceedings.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Company Background and Its 29-Year Bargaining History with Workers in the Kalamazoo Area Leading up to June 2, 2008**

The Company is part of a nationwide enterprise that sells, services, and installs security systems for residential and commercial customers. The Company operates numerous facilities in Michigan. One of its union facilities was located in Kalamazoo. (A 16; 30.)

For 29 years, starting in 1979, the Company's service technicians and installers who operated out of its Kalamazoo facility were represented by the

Union. (A 11, 16; 149-50.) The most recent collective-bargaining agreement began on January 24, 2007, and was set to expire on January 22, 2010. (A 13, 16; 31.) There were 14 Kalamazoo service employees who worked primarily in a distinct service territory in southwest Michigan, including the cities of Kalamazoo, Battle Creek, and Benton Harbor. (A 11, 16; 34, 106, 156, 198, 201-02, 237, 242, 279, 163, 286, 373-74.) They largely worked near where they lived, with the vast majority of their work occurring within the Kalamazoo service territory. (A 16, 18; 108.) The Kalamazoo service territory was identified in the Company's computer records with a separate number from the Company's other service areas, and the Company assigned the Kalamazoo employees to portions of the Kalamazoo service territory that corresponded to a color-coded map showing the Kalamazoo service territory as a separate area. (A 11, 16; 108.)

The Kalamazoo bargaining-unit employees were paid either hourly or piece rates for different kinds of jobs, as specified in the collective-bargaining agreement between the Union and the Company. For instance, commercial installers and service technicians were paid hourly rates. (A 11, 17-18, 20-21; 156, 203, 325.) The residential installers were paid piece rates based on the number and type of equipment installed. (A 18, 21; 199-200.) And the rates for the Company's Kalamazoo employees were lower than the rates paid to the Company's employees who did the same type of work but operated out of the Wyoming facility. The

Company's director of labor relations stated that the Kalamazoo employees were paid at lower wage rates than Wyoming because the Kalamazoo and Wyoming employees worked in different labor markets. (A 11, 17-18, 21; 325.)

All of the Kalamazoo employees had company-provided trucks and, except when they stopped at the Kalamazoo office, drove directly from their homes to the job sites. They received their job assignments from a national dispatch center. The assignments originated in Rochester, New York, or Jacksonville, Florida, and were communicated to the employees' handheld computers or via phone. When finished for the day, the Kalamazoo employees returned from the job sites to their homes. The employees had little direct contact with their immediate supervisors. (A 11, 18; 183-84, 199, 201, 389.) The Kalamazoo employees visited the Kalamazoo office to drop off their time sheets and to pick up parts and work orders. (A 18; 201, 398.) The frequency that the Kalamazoo employees visited the Kalamazoo office varied with the employee's classification, from every day to once every 2 weeks. (A 12, 18, 19; 172-74.)

Approximately 43 miles north of the Kalamazoo facility, the Company employed 27 service and installation employees at a separate non-union facility in Wyoming, Michigan.<sup>2</sup> The Wyoming employees worked primarily in the large

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<sup>2</sup> The Company also has union-represented facilities in the Detroit and Lansing areas of Michigan and a non-union facility in Flint, Michigan. (A 26; 146-47.)

Grand Rapids territory, which extends further north to Traverse City and to the Mackinaw Bridge. (A 16; 144-49, 378, 387.)<sup>3</sup>

There was some limited interaction between the Wyoming and Kalamazoo employees. Two Wyoming employees drove to Kalamazoo twice a week and delivered parts, which were separated in bins for the Kalamazoo employees. (A 19; 172-74, 222-24.) Additionally, in the case of power outages, on larger jobs, and as otherwise needed, the Company assigned work across geographical boundaries, requiring Kalamazoo employees to work in the Grand Rapids service area and workers from the Wyoming facility to work in the Kalamazoo service area. (A 17; 279, 442-43.) There was a provision in the collective-bargaining agreement accounting for such circumstances, as the Company was required to notify the Union when it used non-bargaining unit employees to perform work in the Kalamazoo service territory. (A 17-18; 59, 164.) As a general rule, however, the Kalamazoo and Wyoming employees worked in their respective geographical areas. For instance, the Company maintained separate on-call lists for the Grand Rapids and Kalamazoo service territories. The Kalamazoo employees were only required to perform after-hours and weekend work in the Kalamazoo service territory. (A 11, 18; 159, 226.)

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<sup>3</sup> The Wyoming facility is located in a suburb of Grand Rapids, both of which are part of the greater Grand Rapids service area.

**B. On June 2, 2008, the Company Repudiated the Collective-Bargaining Agreement and Withdrew Recognition from the Union**

On May 19, 2008, Roy Rogers, then the Grand Rapids area branch manager who oversaw operations at the Kalamazoo facility, held a meeting with the Kalamazoo unit employees. (A 17; 169.) Rogers announced that, effective June 2, the Company would close its Kalamazoo facility and consolidate its operations at its Wyoming office, and that the Company would no longer recognize the Union. He also told the assembled bargaining-unit employees that their “jobs would basically remain the same.” (A 17; 198.) He said that they would be servicing the same areas; they would continue to go to their job assignment from their homes; and they would receive the same hourly wage rates and piece rates. (A 17; 198-200, 237, 242, 286.) He further explained, however, that their overtime and drive-time entitlements, as specified under the collective-bargaining agreement, would be decreased. The employees would be paid overtime for hours worked over 40 a week, instead of over 8 a day, and they would not receive compensation until their commutes to their jobsites exceeded 45 minutes, instead of the 30 minutes set forth in the collective-bargaining agreement. (A 17, 18, 21; 179.) The Company also made changes to the rules for determining the employees’ vacation eligibility. (A 17, 18, 21; 180, 242, 251.)

The Company had not notified the Union of the changes to the employees working conditions. (A 17; 69) Instead, James Nixdorf, the Company’s director

of labor relations, faxed and mailed the Union a letter announcing that the Kalamazoo office was going to be “absorbed” into the Company’s Wyoming office and that all of the managerial, operations, and administrative functions would be conducted from the Wyoming location. In the letter, the Company indicated that, because the Union would not represent a majority of employees located in Wyoming facility, the Company was withdrawing recognition from the Union as the representative of the former Kalamazoo employees, effective June 2. (A 16, 17; 60, 169.) The Union responded by filing the unfair labor practice charges. (A 17; 61.)

As announced, the Company closed the Kalamazoo facility to the Kalamazoo employees on June 2. The Company, however, continued to lease the Kalamazoo facility, and its sales operation continued to operate out of the building. (A 16; 200, 392.) But the bargaining-unit employees were no longer allowed access to the building. (A 17, 19; 348.) All of the Kalamazoo employees were retained, but they were reassigned to managers who worked out of the Company’s Wyoming facility. (A 16, 20; 143-50, 163,170.) And the Kalamazoo employees began to fax or email their timesheets into the Wyoming office. (A 12, 18; 202, 242.)

The Company also adjusted the way parts were delivered to the Kalamazoo employees. Following June 2, for a period of about 6 weeks, the same 2

employees, who previously delivered parts to the Kalamazoo employees at the Kalamazoo facility, met the Kalamazoo employees in a supermarket parking lot, which was located down the street from the closed Kalamazoo facility. (A 19; 222, 288, 348). After 6 weeks, the Company began shipping parts from the Wyoming office/warehouse to the homes of the Kalamazoo employees or delivering them to the employees' jobsites or other prearranged locations. (A 19; 177, 222, 240, 288, 345-46.) Starting in September – after the Board's Regional Director issued its complaint in this case and shortly before the hearing – the Company began phasing in a requirement that certain Kalamazoo employees report to the Wyoming warehouse once a week to get parts. (A 19; 178.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board, in agreement with the Administrative Law Judge, found that the Company unlawfully withdrew recognition from the Union and that it unilaterally, without notice to and bargaining with the Union, changed the manner in which overtime was paid to unit employees, increased unpaid travel time, and altered vacation eligibility. The Board found that the Company's conduct violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)). (A 12, 21.)

The Board's Order requires the Company to cease and desist from withdrawing recognition from, and failing and refusing to bargain with, the Union, and it also must cease and desist from unilaterally, without notice to and

bargaining with the Union, changing the manner in which overtime is paid to unit employees, increasing unpaid travel time from 30 to 45 minutes, and altering vacation eligibility. Additionally, the Company must cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act. (A 12, 21.)

Affirmatively, the Board's Order requires the Company to rescind the withdrawal of recognition and extend recognition to the Union as the bargaining representative of its former Kalamazoo employees, reinstate the collective-bargaining agreement without retracting any benefit conferred, and bargain collectively in good faith with the Union. Specifically, the Company must rescind the unilateral changes made in the manner in which overtime and travel time are paid to unit employees and make whole, with interest, any employees whose benefits were decreased as a result of those unilateral changes. Upon request from the Union, the Company must rescind the manner in which vacation eligibility is determined. And the Company must also post a remedial notice. (A 12, 21-22.)

### **SUMMARY OF THE ARGUMENT**

In determining whether a unit remains appropriate, the Board considers a host of factors including the similarity of skills, interests, duties, and working conditions between employees in the existing unit and employees in the new group. And in this case, because the parties have considerable bargaining history,

the Company carries a heavy burden; compelling circumstances are required to strip the employees of their choice of representation. Here, substantial evidence supports the Board's finding that, after the Company's consolidation of certain administrative and supervisory functions to Wyoming, Michigan, the Kalamazoo employees continued to remain an appropriate unit with an identity separate and apart from the Company's Wyoming employees.

Weighing the community-of-interest factors, the Board found that, other than the relocation of the supervisors to the Wyoming facility, the critical differences that had historically distinguished the Kalamazoo and Wyoming employees remained the same. As the vast majority of the Kalamazoo employees' work did not involve their presence in the Kalamazoo facility, they did not experience a significant shift in their day-to-day work after it closed. There were no "compelling circumstances" justifying the Company's rejection of its long established bargaining relationship with the Union.

Furthermore, the Board did not exceed its authority by requiring the Company to continue bargaining with the workers who are regularly assigned to work in the Kalamazoo territory. One of the Board's functions is to resolve disputes over appropriate bargaining units, and this necessarily involves defining the contours of such units. The Board did not require the Company to accept an impermissible contractual concession. And the Board's Order merely describes the

unit the Company has historically worked with; it is specific, clearly defined, and workable.

As the Kalamazoo employees maintained their separate identity, the Company unlawfully repudiated the bargaining relationship with the Union in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. 158 (a)(5) and (1)). It follows, under the same provisions of the Act, that the Company unlawfully made changes to the employees' terms and conditions of work, including entitlements to drive-time, overtime, and vacation, without notifying and bargaining with the Union prior to making such changes.

## **ARGUMENT**

### **I. THE BOARD ACTED WITHIN ITS DISCRETION IN DETERMINING THAT THE KALAMAZOO BARGAINING UNIT REMAINED APPROPRIATE DESPITE ITS ADMINISTRATIVE FUNCTIONS BEING RELOCATED TO WYOMING**

#### **A. Applicable Principles and Standard of Review**

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) makes it an unfair labor practice for an employer to withdraw recognition from an incumbent union when the bargaining unit retains its separate identity after being consolidated into another facility. In determining whether the bargaining unit retains its separate identity, the Board has looked to the traditional community-of-interest factors including: common supervision and organizational structure, functional integration, interchangeability and contact between the two groups of

employees, similarity of skills, functions and duties, general working conditions, and bargaining history. *See Armco, Inc. v. NLRB*, 832 F.2d 357, 359, 362-63 (6th Cir. 1987); *Radio Station KOMO-AM*, 324 NLRB 256, 262-63 (1997); *Comar, Inc.*, 339 NLRB 903, 903 n.2, 910-11 (2003), *enforced*, 111 F. App'x 1 (D.C. Cir. 2004) (table); *see also Northland Hub, Inc.*, 304 NLRB 665, 667 (1991) (community-of-interest factors are weighed at the time the employer withdraws recognition), *enforced mem.*, 29 F.3d 633 (9th Cir. 1994).

When a long history of collective bargaining exists, “compelling circumstances” are required to strip the employees of their choice of representation. *Radio Station KOMO-AM*, 324 NLRB at 262-63. The Board “places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate . . . .” *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996); *see also Children’s Hosp. of San Francisco*, 312 NLRB 920, 929 (1993), *enforced*, 87 F.3d 304 (9th Cir. 1996). And the Board “is reluctant to disturb units established by collective-bargaining as long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act.” *Buffalo Broad. Co.*, 242 NLRB 1105, 1106 n.2 (1979).

Since selecting an appropriate bargaining unit lies within the Board’s discretion “whose decision, ‘if not final, is rarely to be disturbed,’” *South Prairie*

*Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805 (1976) (citation omitted), this Court's review of such a decision is exceedingly narrow. See *NLRB v. American Seaway Foods, Inc.*, 702 F.2d 630, 632 (6th Cir. 1983). While the Board's discretion is not unlimited, see *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962), the Board need select only *an* appropriate bargaining unit rather than the most appropriate unit. See, e.g., *Michigan Hosp. Serv. Corp. v. NLRB*, 472 F.2d 293, 294 (6th Cir. 1972). And the weight the Board affords to such community-of-interest factors must be upheld on review, unless arbitrary, unreasonable, or an abuse of discretion. See *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611-13 (1991) (it is within the Board's purview to determine reasons for selecting one unit over another so long as the reasons comport with the Act's policies); see also *B. Siegel Co. v. NLRB*, 670 F.2d 64, 65 (6th Cir. 1982); *L.M. Berry & Co. v. NLRB*, 668 F.2d 249, 251 (6th Cir. 1982); *Meijer, Inc. v. NLRB*, 564 F.2d 737, 743 (6th Cir. 1977).

**B. Substantial Evidence Supports the Board's Finding that the Kalamazoo Unit Remained Appropriate and that the Company Unlawfully Withdrew Recognition**

The Board did not abuse its discretion in finding that the Kalamazoo unit maintained its integrity as a separate unit even after the Company's consolidation of certain operational activities from Kalamazoo to Wyoming. See *Northland Hub*, 304 NLRB at 677 (appropriate time for determining appropriateness of unit is at

time of withdrawal of recognition). After the Company withdrew recognition from the Union, the Kalamazoo employees continued to use the same trucks, and traveled directly to the clients from their homes. (A 12, 17; 165-68.) Both before and after June 2, the Kalamazoo employees continued to do the vast majority of their work in the same service territory, and the Company still assigned Kalamazoo service employees to work in specific subdivisions of the Kalamazoo service territory as delineated by a color-coded map. (A 11, 16; 108.) And just as before, they received their assignments from the Company's national dispatch center in Rochester, New York, and Jacksonville, Florida. (A 18.) The Kalamazoo employees also continued to be on a separate on-call list. (A 11, 18.)

Furthermore, the Kalamazoo employees continued to receive the same wages after June 2. Kalamazoo commercial installers and service technicians continued to be paid the same hourly rates, and the residential installers were still paid the same piece rates. (A 11, 18, 21; 156, 199-200, 203, 325.) Both before and after June 2, the Kalamazoo employees were paid less than the Wyoming employees because – as the Company described – the two groups of employees continued to work in separate labor markets. (A 11, 17, 20; 325-26.)

The Kalamazoo employees did not experience any significant shift in their job functions or duties. The Kalamazoo facility was closed and the supervisors were relocated to Wyoming, but the Kalamazoo bargaining-unit employees always

did the vast majority of their work at the location of their installations and away from their supervisors. The Company altered the way parts were delivered to these employees, but the Company's plan at the time it withdrew recognition was to continue to deliver parts to Kalamazoo. As the Board noted, with the exception of the new requirement that employees report to Wyoming once a week for parts, which occurred 3 months after the withdrawal of recognition, "there [was] virtually no change in the work the service technicians and installer perform[ed] or where they perform[ed] it." (A 8.) Indeed, the Company told the Kalamazoo employees at the time of the closure that their jobs "would basically remain the same." (A 17; 198-200, 237, 242, 286.)<sup>4</sup>

Moreover, the Kalamazoo employees' 29-year bargaining history with the Company is one of the more significant factors to be considered in this case. The Board has long found that bargaining history, while not dispositive, is a critical factor in determining the continued appropriateness of a unit. *See, e.g., Canal*

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<sup>4</sup> To the extent that the terms and conditions of employment of the Kalamazoo unit employees became more congruent with those unrepresented Wyoming employees, it was the direct result of the changes made by the Company after its unlawful withdrawal of recognition and the repudiation of the collective-bargaining agreement. The Company changed the rules with respect to vacation eligibility, the overtime eligibility, and unpaid drive time for the Kalamazoo unit employees, and it did so without notifying or bargaining with the Union. (A 11.) These unilaterally changed conditions of employment, the Board properly found, should not be relied on as evidence that the Kalamazoo unit became inappropriate following June 2. *See Comar*, 339 NLRB at 911; *Holly Farms Corp.*, 311 NLRB 273, 279 (1993).

*Carting, Inc.*, 339 NLRB 969, 970 (2003); *Radio Station KOMO-AM*, 324 NLRB at 262-63; *Comar*, 339 NLRB at 903 n.2, 910-11. And this Court has stated that a “long bargaining history . . . alone suggests the appropriateness of a separate bargaining unit.” *Armco, Inc. v. NLRB*, 832 F.2d 357, 362-63 (6th Cir. 1987).

As this Court has recognized, when confronted with a challenge to the continued viability of a historical bargaining unit, the test is not whether the Board would have found the unit appropriate “under Board standards [as] if it were being organized for the first time.” Rather, the employer has “a heavy burden” not simply to show that operational changes have occurred, but also that, from the employees’ perspective, the “historical unit[] w[as rendered] unworkable or [could no longer] produce harmonious labor relations, so as to be repugnant to the Act.” *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117-18 (D.C. Cir. 1996). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (successor must show that, from the employees’ perspective, changes have occurred such that their historical bargaining unit no longer remains viable).

Bargaining history is significant not simply because of the Act’s policy of fostering stability in established relationships, but also because of the strong separate identity and community-of-interests such a history necessarily implies. *See, for example, Fraser & Johnston Co.* 189 NLRB 142, 151 n.50 (1971), *enforced in relevant part*, 469 F.2d 1259 (9th Cir. 1972). Thus, with the

mechanisms of successful bargaining already in place and a proven track record of employees coalescing for bargaining around their mutual interests, the Board appropriately is mindful not to undo the employees' choice of representation simply because a relocation has occurred that leaves the "job situations [of employees] essentially unaltered." *Leach Corp. v. NLRB*, 54 F.3d 802, 810 (D.C. Cir. 1995) (attribution omitted). Indeed, as the Third Circuit noted in an analogous circumstance, any other conclusion would permit an employer to push "the Union . . . out the door" whenever an employer might opt to "modernize its facility." *Molded Acoustical Prod., Inc. v. NLRB*, 815 F.2d 934, 940 (3d Cir. 1987).

### **C. Despite the Company's Claims, There Was Not Functional Integration Between the Units**

The Company argues the Board misapplied the facts and law in determining that the Kalamazoo employees remained a distinct unit after the Kalamazoo facility closed. But the Company's argument that the Kalamazoo workers became functionally integrated into the Wyoming facility ignores the fact that the Kalamazoo workers, both before and after facility closed, performed the same job, under the same conditions, servicing the same geographical area, earning the same market wages, with the same limited level of supervision.

The Company's assertion (Br 6-7, 10-11, 12)<sup>5</sup> that the Kalamazoo employees were transferred to the Wyoming facility and that they became functionally interchangeable and work side-by-side with the Wyoming employees mischaracterizes how the work is accomplished. When that work is closely examined, it does not provide a basis for finding that only a combined unit is appropriate. While the Wyoming and Kalamazoo employees may perform similar types of work, installing and servicing alarm and other security systems, this was also the case prior to June 2. Other than the fact that their supervisors were relocated to Wyoming, little else changed for the Kalamazoo employees.

The Kalamazoo employees continued to exercise their duties in a different and distinct geographic area after the June 2 consolidation, and any integration was something that had existed before. Before and since June 2, the Company has used Wyoming employees in the Kalamazoo area and Kalamazoo employees in Grand Rapids service territory. This was and remains infrequent and occurs in cases of natural disasters, when a specific skill is needed, or on larger jobs. (A 17, 20; 163-64, 442.) And the Kalamazoo employees' collective-bargaining agreement recognized that there would be times when the Company would utilize workers from other areas to assist. (A 17; 279, 442-43.) The Company disregards that the parties historically allowed some work overlap under the terms of the collective-

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<sup>5</sup> "Br" references are to the Company's opening brief.

bargaining agreement. And the interchange between the Wyoming and Kalamazoo employees did not significantly change after the Kalamazoo supervisors were relocated to Wyoming. Accordingly, contrary to the Company's claims of integration (Br 11, 17, 22-25), the Board's finding (A 18) that the amount of interchange did not increase appreciably following the closure of the Kalamazoo office is supported by substantial evidence.<sup>6</sup>

The Company also asserts that the Kalamazoo employees were engaged in the same work as those in Wyoming facility. (Br 13.) More specifically, it argues that the uniformity of work supports a finding that the relocation integrated the work of the two locations, and the Kalamazoo unit thereby lost its separate identity. (Br 23, 25-26.) This is not correct. There was no functional integration as a result of the Company's consolidation, which was essentially administrative, and the Company fails to overcome its burden of proving that the Kalamazoo workers should be stripped of their collective-bargaining agreement or their

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<sup>6</sup> Moreover, among other distinguishing factors, there is no evidence of bargaining history in a number of the cases cited by the Company (Br 20) for the proposition that integration destroys the identity of a previously separate unit: *see, e.g., Kelly Business Furniture, Inc.*, 288 NLRB 474, 478-79 (1988) (increased employee interchange and contacts occurred before union was even certified, and there was no geographical separation among employees); *Ramada Inns, Inc.*, 278 NLRB 691 (1986) (newly petitioned-for union, thus no bargaining history, and there was daily interaction among workers who all worked in the same hotel); *Renaissance Center Partnership*, 239 NLRB 1247 (1979) (recently certified union with no bargaining history, where workers interacted daily in a common work center in which there was no geographic separation).

historical choice of union representation. *See Radio Station KOMO-AM*, 324 NLRB 256, 262-63 (1997) (compelling circumstances required).

The Company states that the Kalamazoo and Wyoming employees are functionally interchangeable, that both groups wear the same uniforms, are subject to the same general work rules and procedures, are evaluated for wage increases based on the same criteria, and have work contact with each other during jobs that require more than one serviceman and during training and safety meetings. (Br 11.) Many of these factors appear to be shared by all of the Company's employees in these job classifications throughout the country and were shared by these two groups even before the office relocation. The record does not establish that the Kalamazoo employees started wearing the same uniforms or otherwise started following the same work rules only after the consolidation. In fact, the Company's Team Member Handbook, which sets forth work rules and the uniform policy, states in its introduction that the handbook "applies to all team members in the United States. However, if you are covered by a collective-bargaining agreement any specific provision in that agreement will supersede the corresponding provision in this handbook." (A 20; 69.) Therefore, before the consolidation, the Kalamazoo and Wyoming employees and service and installation employees all across the country were subject to the same general work rules and procedures and

to the same uniform policies, except to the extent that they were varied by the terms of a collective-bargaining agreement.<sup>7</sup>

Furthermore, the Board properly relied on the continued separate wage structure as evidence in support of the Kalamazoo unit's separate identity. As the Company's director of labor relations explained at trial, the Kalamazoo employees were paid lower wages than the Wyoming employees because they continued to work in a different market. (A 19; 326.) Nonetheless, the Company contends (Br 11) that the Kalamazoo employees were subject to same criteria for wage increases as the Wyoming employees. But at the time of withdrawal of recognition, the proper time for determining the appropriateness of the unit, *Northland Hub*, 304 NLRB at 667, the Kalamazoo employees were not told of any plans regarding adjustment to their wage structure. In fact, at the May 19 meeting when the Company announced it would be withdrawing recognition from the Union, the managers told the Kalamazoo employees that their jobs would remain the same. (A 17; 198-99, 203, 237.) And the Company's witnesses admitted at trial that the Company had not granted or considered any of the Kalamazoo employees for wage increases following the consolidation. For instance, Dan Beuschel, the immediate

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<sup>7</sup> In the same vein, the Company points to training (Br 10-11) to support a finding of new functional integration. But the employees who testified at the trial explained that they received training at different locations, including the Detroit and Lansing facilities, before and since the June 2 consolidation. (A 20-21; 167-68, 248, 272, 308, 323-24.)

supervisor of the installers, testified that he had not been advised that the employees would be evaluated or considered for merit increases. (A 11, 17-18, 20, 21; 156, 203, 325, 444-45.)

Contrary to the Company's assertion (Br 23-24), the Board did not put it in a no-win situation by, in part, relying on the Company's stated reason for paying the Kalamazoo employees lower area-based market wages to show that they were a distinct group of employees, while also finding certain other changes were unfair labor practices. The Company ignores the fact that it unilaterally denied the Kalamazoo employees their chosen Union, thereby avoiding its obligation to bargain over terms and conditions of employment. It did so by claiming there were overwhelming similarities between the two units. At the same time, the Company wants the Court to ignore its basis for paying the Kalamazoo lower wages. It is illogical for the Company to claim there is no difference in the work done by the employees in the two geographic markets while, at the same time, basing their wage rates on the different geographic markets.

Finally, in an attempt to advance the view that there was an integration of the employees' work, the Company places great emphasis on the change in supervision. (Br 19.) But the Board has long held that sharing the same supervisors post-consolidation is not enough to render the represented unit indistinct. *See Comar*, 339 NLRB at 909, 910-11; *Radio Station KOMO-AM*, 324

NLRB at 259, 263 (“all employees had the same ultimate supervision”). The Company’s consolidation did produce a shuffling of supervisors, but it did not alter the separate identity of the Kalamazoo unit employees. Before and after June 2, Wyoming manager Rogers had ultimate supervision over the Kalamazoo unit employees. (A 20; 143-50, 163.) And while the Company continued to shuffle managers and to assign Kalamazoo employees new immediate supervisors who worked out of the Wyoming office after June 2, the Kalamazoo workers did not experience a significant change in how they were supervised.

After June 2, the level of interaction between the Kalamazoo employees and their supervisors did not increase. The employees continued to work out of their homes, with no regular onsite supervision. When they talked to their supervisors, it was done remotely via phone, fax or email or when the supervisors came to them in the Kalamazoo area. (A 12; 201-02, 290, 296.) The Kalamazoo unit employees otherwise continued to get their daily assignments, as they had done before June 2, via handheld computers or phone calls from the dispatch centers in Rochester, New York, or Jacksonville, Florida. (A 18; 183-84, 399.) And if the Company needed to contact employees to work on service calls either after hours or on the weekends, it continued to use separate on-call lists for the two service territories. Both before and since June 2, the Kalamazoo unit employees have only been

required to perform on-call work in the Kalamazoo service territory. (A 11, 18; 159, 226.)

As the Board recognized, the rather minimal non-intrusive change in supervision in this case bears less weight than a change of supervision may illustrate in other cases. (A 12.) In any event, none of the cases cited by the Company stands for the proposition that the community-of-interest test turns solely on the question of supervision.<sup>8</sup> It is just one factor among many. And the Board properly relied upon other factors to find the Kalamazoo employees remained a separate unit.

#### **D. The Board's Order Was Well Within Its Remedial Authority**

In finding that the Kalamazoo employees remained in a distinct appropriate bargaining unit despite the fact that the Kalamazoo facility had closed, the Board modified the way the unit was described. (A 12.) Instead of describing the unit by linking the Kalamazoo employees to the facility, as stated in parities' collective-bargaining agreement (A 11, 34), the Board defined the appropriate unit as “[a]ll full-time and regular part-time servicemen regularly assigned to work in the Kalamazoo territory . . . .” (A 12.) The Company argues that this alters the

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<sup>8</sup> As the Board recognized (A 2), cases cited by the Company (Br 19-20), like *Trane*, do not stand for the proposition that common supervision, without more, determines whether a bargaining unit remains appropriate. 339 NLRB 866 (2003). Additionally, among other distinguishing factors, there was also no bargaining history present in *Trane*.

parties' contract in a way that the Company never agreed. Furthermore, the Company states that the description is vague and unenforceable.

The Company's assertion (Br 26-27) that the Board's Order is not within the Board's remedial authority because it changes how the bargaining unit is described is incorrect. Under the clear and natural meaning of Section 9(b) of the Act (29 U.S.C. § 159(b)), "whenever there is a disagreement between employers and employees about the appropriateness of a bargaining unit, the Board shall resolve the dispute." *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 611 (1991) (it is within the Board's purview to determine reasons for selecting one unit over another so long as the reasons comport with the Act's policies).

The Company nonetheless argues (Br 26) that the Board's Order, by defining the contours of the bargaining unit differently than was described in the parties' contract, impermissibly alters its contract with the Union and forces a contractual concession. The fact, however, that a collective-bargaining agreement happens to describe the contours of the bargaining unit does not displace the Board's obligation to ensure that, unless an employer makes a significant change to that unit, the employees' right to continue to bargain through their chosen representative remains honored. *See Comar*, 339 NLRB at 904, 905, 914 (requiring employer to continue to bargain with representative of relocated employees and describing the unit in terms of workers at previously located

facility); *see also Leach Corp.*, 312 NLRB 990, 990 (1993) (requiring employer to continue to bargain with representative of employees who were relocated to Buena Park facility from historical Los Angeles unit), *enforced*, 54 F.3d 802 (D.C. Cir. 1995). Moreover, the Board has authority to change unit descriptions by clarifying units and has done so mid-contract. *See, for example, Peerless Publ'ns, Inc.*, 190 NLRB 658, 660 (1971) (excluding independent contractors from the unit).

The Company also claims (Br 27) that the Supreme Court's decision in *H.K. Porter v. NLRB*, 397 U.S. 99, 102 (1970), prohibits the Board from altering the description of a bargaining unit that is contained in the contract. That case does no such thing. There, the Supreme Court held that the Board does not have the power to compel the employer to agree to a proposed check-off clause. The decision prohibits the Board from forcing the employer to make concessions related to the substantive terms and conditions of employment, like wage, hours, and working conditions. The decision does not prohibit the Board from defining the contours of a bargaining unit. Indeed, the Company overlooks that in *H.K. Porter*, the Court specifically recognized that the Board has the power to certify appropriate units and to require the employer to bargain in good faith with the employees' chosen representative. *Id.* at 103. The decision also recognized that the parties' freedom of contract was not absolute under the Act. *Id.* at 108, n.6 (freedom of contract does not extend to certain representational matters).

Moreover, the Company already made the argument to this Court in the preceding Section 10(j) case that the contract's description of the bargaining unit must, as a matter of law, prevent continuation of the bargaining obligation. This Court clearly disagreed because, in *Glasser v. ADT Security Servs., Inc.*, 379 F. App'x 483 (6th Cir. 2010), it specifically found merit to the legal theory that the Board's Regional Director advanced for why the bargaining obligation should continue in the facts of this case – notwithstanding that the parties' contract described the unit differently than any future unit would be described.

Finally, there is no merit to the Company's contention (Br 28) that the Board's Order is impermissibly vague because it requires the Company to bargain with a unit described as "workers regularly assigned to work in the Kalamazoo area." The Board has long found geographically described units workable. *See Oklahoma Installation Co.*, 305 NLRB 812, 814 (1991) (finding appropriate a unit of carpenters "employed by the employer in Davidson County, Tennessee"); *see also P.J. Dick Contracting*, 290 NLRB 150, 151 (1988) (finding appropriate unit of operators, mechanics, and helpers "employed by the Employer within 11 Pennsylvania counties).

The unit in the present case is based on the Kalamazoo service territory where the employees do the vast majority of their work. The Kalamazoo service area is not an arbitrary designation. The Company still makes the distinction in its

records using a computer numbering system that separately identifies jobs performed in the Kalamazoo service area, and it still assigns Kalamazoo service employees to work in specific subdivisions of the Kalamazoo service territory as delineated by a color-coded map. (A 11, 16; 108.) The Kalamazoo service territory is a coherent, definable, geographic territory where the Kalamazoo employees have traditionally performed and are still performing the overwhelming majority of their work.

Indeed, the Kalamazoo service area defined the contours of the bargaining unit before the supervisors were relocated to Wyoming, and there is no reason that this description cannot continue to define the unit now. The Company's claim (Br 28) that the Board's unit definition is unworkable because it includes the words "regularly assigned to work in the Kalamazoo service territory" ignores the fact that the Company has dealt with the workers who have regularly worked in this territory for 29 years. In fact, the Company and Union have used such language in the contract to define their relationship before. In the parties' collective-bargaining agreement under "Article 6, Working Conditions," compensation for certain work is determined based on the employee's "regularly assigned reporting place and job." (A 38.) And in "Article 3, Voluntary Check-Off," the Company was required to notify the Union when certain employees worked in the "Kalamazoo service territory." (A 11, 6; 36.) The parties' prior conduct shows that these are

not foreign concepts, and there is nothing vague about requirement that the parties continue living by this geographic description in their bargaining going forward.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING THE EMPLOYEES TERMS AND CONDITIONS OF WORK WITHOUT NOTIFYING AND BARGAINING WITH THE UNION**

As part of the requirement to bargain in good faith, it is unlawful for an employer to unilaterally alter certain terms and conditions of work in a unionized setting without notifying and bargain with the employees' representative. Following the Company's unlawful withdrawal of recognition from the Union on June 2, it changed the Kalamazoo employees' entitlements related to vacation eligibility, overtime eligibility, and unpaid drive time, and it did so without notifying or bargaining with the Union. (A 11.) This is undisputed by the Company. The Board's finding that the Company unlawfully withdrew recognition also requires a finding that the Company violated Section 8(a)(5) and (1) of the Act when it subsequently changed the Kalamazoo employees terms and conditions of work without notifying and bargaining with the Union. *Armco*, 832 F.2d at 362; *Canal Carting*, 339 NLRB at 970; *Comar*, 339 NLRB at 903 n.2, 910-11; *Radio Station KOMO-AM*, 324 NLRB at 262-63.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests this Court to enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board  
March 2011

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**ADT SECURITY SERVICES, INC.**

**Respondent**

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\* **No. 10-2549**  
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\* **Board Case No.**  
\* **GR-7-CA-51288**  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,844 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 17th day of March, 2011

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC  
this 17th day of March, 2011