No. 10-13920-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROPSACE WORKERS

Intervenor

v.

CONTEMPORARY CARS, INC. d/b/a MERCEDES-BENZ OF ORLANDO

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE BROIDO
Supervisor Attorney

CHRISTOPHER W. YOUNG
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2988

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

NLRB *vs.* Contemporary Cars, Inc. Appeal No. 10-13920-B

11th Cir. R. 26.1 (enclosed) requires that a Certificate of Interested Persons and Corporate Disclosure Statement must be filed by the appellant with this court within 14 days after the date the appeal is docketed in this court, and must be included within the principal brief filed by any party, and included within any petition, answer, motion or response filed by any party. **You may use this form to fulfill this requirement.** In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

AutoNation, Affiliate of Respondent

Steven M. Bernstein, Bob Berryhill, General Manager, Julie Broido, Attorney

Contemporary Cars , Brian Davis, Director of Labor Relations, Linda Dreeben, Attorney

Fisher & Phillips, Attorneys

Brian M. Herman, Attorney

Rochelle Kentov, Regional Director, National Labor Relations Board

Wilma B. Liebman, Chairman, National Labor Relations Board

National Labor Relations Board

Mark Gaston Pearce, Member, National Labor Relations Board, David A. Rosenfeld, Attorney

Peter C. Schaumber, Former Member NLRB, Jeffrey M. Smith, Grand Lodge Representative

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

NLRB *vs.* Contemporary Cars, Inc. Appeal No. 10-13920-B

11th Cir. R. 26.1 (enclosed) requires that a Certificate of Interested Persons and Corporate Disclosure Statement must be filed by the appellant with this court within 14 days after the date the appeal is docketed in this court, and must be included within the principal brief filed by any party, and included within any petition, answer, motion or response filed by any party. **You may use this form to fulfill this requirement.** In alphabetical order, with one name per line, please list the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

(please type or print legibly):

Douglas R. Sullenberger, Attorney

James M. Waters, Attorney

Weinberg, Roger & Rosenfeld-Counsel Intervenor

International Association of Machinists and Aerospace Workers

Christopher W. Young, Attorney

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Statutes: **Page(s)**

Rules and Regulations:

Treatises:

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-13920-B

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROPSACE WORKERS

Intervenor

v.

CONTEMPORARY CARS, INC. d/b/a MERCEDES-BENZ OF ORLANDO

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a final Board order issued against

Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando ("the Company") on August 23, 2010, and reported at 355 NLRB No. 113. (DO II 1-2.)[1] The International Association of Machinists and Aerospace Workers ("the Union") has intervened on the side of the Board.

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"). The Board's Order is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act because the unfair labor practices occurred in Maitland, Florida, where the Company operates an automobile dealership. (29 U.S.C. § 160(e) and (f)).

As the Board's unfair labor practice order is based, in part, on findings made in the underlying representation proceeding, the record in that

---

[1] "DO II" refers to the Board's August 23, 2010 Decision and Order, which can be found at Tab 27 of the Board's Volume of Pleadings. "DO I" refers to the Board's August 28, 2009 Decision and Order; it can be found at Tab 26 of that same volume. "DDE" refers to the Regional Director's Decision and Direction of Election, found at Tab 6. Other documents are identified solely by the tab number ("T") under which they are placed in the Volume of Pleadings. "BDX" refers to Board exhibits, "EX" to employer exhibits, "UX" to union exhibits, and "Tr" to the transcript of the preelection hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

proceeding (Board Case No. 12-RC-9344) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Under Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair labor practice] order of the Board" (29 U.S.C. § 159(d)). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *Freund Baking Co.*, 330 NLRB No. 13 (1999); *River Walk Manor*, 293 NLRB 383 (1989); *Medina County Publications*, 274 NLRB 873 (1985).

The Board's application for enforcement, filed on August 25, 2010, was timely; the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves well-settled principles that are fully presented in the briefs, and therefore that argument would not be of material assistance to the Court. If, however, the Court believes that argument is necessary, the Board is fully prepared to participate, and to assist the Court in its understanding and resolution of this case.

STATEMENT OF ISSUE PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. The underlying issue is whether the Regional Director reasonably acted within her broad discretion in determining that the Company's service technicians constitute an appropriate unit.

STATEMENT OF THE CASE

The Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union. (DO II 1-2.) The Company took those actions in order to challenge the Union's certification as the exclusive collective-bargaining representative of the Company's full-time and regular part-time service technicians, a unit that the Company claims is inappropriate. Below we explain the procedural history of this case and the Regional Director's findings of fact concerning the appropriateness of the unit.

I. COURSE OF PROCEEDINGS

A. The Representation Proceeding

On October 3, 2008, the Union filed a petition with the Board, seeking certification as the representative of "full-time and regular part-time Mercedes Ben[z] service technicians" employed at the Company's Maitland,

Florida facility. (DO I 2; BDX 1(a).) The Regional Director determined that a question of representation existed and issued a notice of hearing. (BDX (1)(b).) At the hearing, the Company contended that the unit should include all fixed operations department employees, except for team leaders, rather than just the service technicians sought by the Union. (DDE 1-2.) On November 14, the Regional Director issued a Decision and Direction of Election based on the record compiled in the preelection hearing. In her decision, she directed an election in a unit consisting of all full-time and regular part-time service technicians, but excluding all other employees. (DDE 1-45.)

The Company filed a request for review of that decision, which a two-member panel of the Board denied because it "raised no substantial issues warranting review." (T 12.) On December 16, 2008, the Regional Director, acting pursuant to Section 102.67(b) of the Board's Rules and Regulations (29 U.S.C. § 102.67(b)), conducted a secret ballot election among the Company's service technicians. (DO II 1; T 13) The tally of ballots cast in the election revealed 16 votes in favor of representation by the Union, and 14 against.[2] (T 13.) On February 11, 2009, the Regional Director issued a

[2] There were three challenged ballots, a number sufficient to affect the election outcome. Those ballots were segregated, ultimately opened and found to be cast in favor of representation. (T 18.)

Certification of Representative, certifying the Union as the exclusive collective-bargaining representative of the Company's full-time and regular part-time service technicians. (DO I 2; T 17.)

B. The Initial Unfair Labor Practice Proceeding

By letter dated April 17, 2009, the Union requested that the Company provide it with certain information as a precursor to bargaining, and suggested initial bargaining dates. (DO I 2.) The Company (Br 5) denied the Union's bargaining request by letter dated June 4. (DO I 2 n.3.)

Thereafter, the Union filed an unfair labor practice charge, and the General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. (DO I 1; T 20-21.) In its answer, the Company admitted its refusal to bargain, but denied the validity of the Regional Director's certification, claiming the unit was inappropriate. (DO I 2; T 22.)

On July 13, 2009, the General Counsel filed a motion for summary judgment. (T 23.) Thereafter, the proceeding was transferred to the Board, and a notice was issued to show cause why the General Counsel's motion should not be granted. (DO I 1; T 23.) On August 28, 2009, the only two sitting members of the Board issued a Decision and Order granting the

General Counsel's motion for summary judgment, and finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (DO I 1-3.)

C. The Prior Appeal

On September 3, 2009, the Company filed with the Unite States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's August 28 Decision and Order. The Board filed a cross-application for enforcement. On October 16, 2009, the Court granted the Company's motion to hold the case in abeyance. Accordingly, the Board did not file the record with the Court.

On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that under Section 3(b) of the Act (29 U.S.C. § 153(b)), a delegee group of at least three Board members had to be maintained in order to exercise the delegated authority of the Board. Accordingly, on July 13, 2010, the Board filed a motion with the D.C. Circuit requesting a remand of the case for further consideration in light of *New Process Steel*.

In the meantime, two new Board members were sworn in. On August 17, 2010, a three-member panel of the Board issued an order setting aside the August 28, 2009 Decision and Order of the two-member Board, and

retaining the case on its docket for further action as appropriate. (T 26A.) The three-member panel acted in light of the Supreme Court's decision in *New Process Steel*, and pursuant to Section 10(d) of the Act (29 U.S.C. § 160(d)), which provides that "until the record in a case shall have been filed in a court, . . . the Board may at any time . . . modify or set aside, in whole or in part, any finding or order issued by it."

Thereafter, the Board filed a motion with the D.C. Circuit seeking dismissal of the case because the Board, pursuant to Section 10(d) of the Act, had vacated the Decision and Order that was the subject of the Company's petition for review. The Court granted the Board's motion to dismiss on September 29, 2010.

D. The Board's August 23, 2010 Decision and Order

On August 23, 2010, a three-member panel of the Board issued the Decision and Order that is the subject of the instant proceeding. In its Decision and Order, the Board explained that because the pre-election proceeding had resulted in a decision by the two-member Board, it would not give preclusive effect to the two-member Board's rulings, including the December 15, 2008 order denying the Company's request for review of the

Regional Director's Decision and Direction of Election.[3] (DO II 1.) Accordingly, the Board considered the pre-election issues raised by the Company, but found them to be without merit. On that basis, the Board "affirm[ed] the decision to deny the [Company's] request for review." [4] (DO II 1.)

Additionally, in its Decision and Order, the Board ruled on and granted the General Counsel's motion for summary judgment. In so doing, the Board noted that the Company had admitted its refusal to bargain in its answer to the General Counsel's complaint in the refusal-to-bargain case. The Board added that while it presumed that the Company's position on bargaining remained unchanged, if the Company had or intended to

---

[3] By contrast, the Board gave preclusive effect to the postelection proceeding (which included the Regional Director's Certification of Representative) because it was resolved by the Regional Director, whose authority to act was not affected by *New Process Steel*, and because no party had sought review before the Board of the postelection proceeding. (DO II 1 n.3.)

[4] In its August 23, 2010 Decision and Order, the Board also considered the question whether the Board could rely on the election results. The Board concluded that the Regional Director, acting pursuant to Section 102.67(b) of the Board's Rules and Regulations, properly conducted the election as scheduled, and therefore that the tally of ballots was a reliable expression of employee free choice. The Board explained that with or without a two-member decision on the original request for review, the election would have been conducted as scheduled; accordingly, the Regional Director's Certification of Representative, which was based on the tally of ballots, was valid. (DO II 1-2.) Before this Court, the Company does not contest the Regional Director's authority to issue the Certification.

commence bargaining, it could "file a motion for reconsideration so stating, and the Board would issue an appropriate order." (DO II n.5.) The Company, however, did not file a motion for reconsideration.[5]

Finally, in its Decision and Order, the Board considered anew and decided to adopt the findings of fact, conclusions of law, remedy and order set forth in its prior Decision and Order, which it incorporated by reference. In so doing, the Board concluded that all issues pertaining to the validity of the Union's certification had been, or could have been, litigated in the underlying representation case proceeding and thus could not be re-litigated in the unfair labor practice proceeding. Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union. (DO II 2-3.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (DO II 3-4.) Affirmatively, the Board's Order requires the

---

[5] By contrast, after the Board applied for enforcement with this Court, but before filing the record, the Union filed a motion for reconsideration with the Board. The Union's motion concerned an aspect of the Board's Decision and Order that no party contests on review. The Board subsequently denied the Union's motion. (T 28-29.)

Company to bargain with the Union upon request; to embody any understanding that is reached in a signed agreement; and to post an appropriate notice. (DO II 2-3.)

II. STATEMENT OF FACTS

Before this Court, the factual findings challenged by the Company are limited in scope.[6] Aside from its belatedly raised procedural contention, which is addressed below pp. 42-58, the Company challenges only the appropriateness of the service technician unit certified by the Regional Director. The Regional Director's fact findings pertaining to this issue are summarized below.

A. The Company's Organizational and Supervisory Structure

The Company, a franchisee of AutoNation, sells and services new and pre-owned Mercedes-Benz automobiles. This case concerns the 34 skilled service technicians who repair automobiles in a service operation that is encompassed within a service and parts department referred to by the Company (Br 9) as its "Fixed Operations department." This department,

---

[6] The Company does not challenge the Board's finding (DO II at 2) that it has refused to bargain with the Union. The Company also does not contest the Regional Director's decision to conduct the election as scheduled, and to open and tally the ballots. Nor are the post-election proceedings involving ballot challenges at issue here. *See* DO II 1-2 & n.3.

which consists of about 72 employees, plus about 9 managers or supervisors, is under the overall supervision of a general manager, and is divided into service and parts operations with distinct lines of supervision. (DDE 3; Tr 68, 136.)

The Service Director heads the service operation, which includes the 34 service technicians, 14 service advisors, three detailers, three booking and warranty employees, one maintenance employee, a trainee, a greeter, two courtesy drivers, a porter, two cashier/administrators, three service appointment coordinators, and those groups' respective supervisors. (DDE 3; Tr 51-62, 68-69, 71.) While all service employees are assigned to one of three teams whose composition is mixed, the service technicians are supervised separately by a team leader who directly oversees the 10 to 13 service technicians on his or her team. (DDE 3 n.7; Tr 68, 264-68.) The team leader assigns work to the service technicians and participates in semi-annual evaluations that determine their pay rates. The other service employees have different lines of supervision. For example, the service director directly supervises the service advisors, greeters, and cashiers, even though they are also assigned to teams. (DDE 3; Tr 64, 68, 132-35.)

The Parts Director, assisted by the Parts Manager, heads the parts operation. This operation has about 12 or 13 employees, including six retail

parts employees, three retail counter employees, one wholesale parts employee, three inventory control associates or parts runners. The Parts Director and Parts Manager supervise the parts employees. (DDE 2-3; Tr 70, 137, EX 5.)

B. The Service Technicians' Duties and Working Conditions

Service technicians are the only employees who perform repairs and maintenance on vehicles. Of the 34 service technicians, 30 are qualified to diagnose and perform a variety of repairs. The other four are specialized service technicians, two of whom work exclusively on wheel alignments using specialized equipment located in the service bays that they were trained on the job to operate. (DDE 2 n.3; Tr 118-19.). The two remaining specialized service technicians work exclusively on tires and wheels using wheel balancers and other specialized equipment located in a separate area in the service shop. (DDE 2 n.3, 9-10; Tr 118-19.)

Every service technician is responsible for performing the work specified on a repair order generated by a service advisor who has spoken to the customer. Once a repair order is prepared, it is sent to a team leader, who then assigns the work to a service technician on his or her team. Upon receiving the assignment, the service technician is expected to perform the job with efficiency and accuracy in accordance with dealership and factory

standards; to document the work performed; to obtain needed parts; to diagnose the cause of any malfunction and perform the needed repairs when authorized by the customer; to examine the vehicle and determine if additional safety or service work is required; and to advise the team leader promptly if there will be a problem meeting the anticipated time for completing the repairs. (DDE 5-6, 9; Tr 72, EX 6.) Generally, service technicians spend about one to two hours per day diagnosing needed repairs, and the remainder of the day performing repairs, replacing parts, and doing basic preventive maintenance such as oil changes. (DDE 9; Tr 72-79.)

Each service technician is assigned a service bay that is equipped with lifts to raise the vehicle. The service technician uses tools valued at $15,000 to about $24,000. The technician provides some of those tools, and the Company supplies others. The service technician also uses diagnostic tools such as hand-held computers, oscilloscopes, and measuring tools like calipers. No other employees in the fixed operations department use such tools or equipment. (DDE 10; Tr 321.)

Service technicians work a uniform schedule from 8:00 a.m. to 5:30 p.m., Monday through Friday, and from 8:00 a.m. to 5:00 p.m. on Saturday. They log in and out on every job performed, doing so on computers located in the service shop. They are the only fixed operations employees to do so.

(DDE 12; Tr 184, 326, UX 3.)

C. The Service Technicians' Unique Skills and Qualifications

The service technicians possess specialized skills and qualifications not shared by any other fixed operations department employees. At a minimum, they are required to have general mechanical skills; preferred qualifications include three or more years of experience as a service technician, and certification by the National Institute for Automotive Service Excellence. (DDE 10; EX 6.) Service technicians must also be certified by Mercedes-Benz, and must maintain their certification through annual online and in-person course work on authorized repair procedures. Courses that service technicians have taken include classes on the Clean Air Act Amendments of 1990, which are needed in order to work on Mercedes-Benz air conditioning systems, and classes in electrical fundamentals, climate control, telematics, and engine diagnostics. Some of this training is conducted at the Company's facility, some at the manufacturer's training facility, and some at other dealerships. Service technicians are also responsible for keeping abreast of weekly Mercedes-Benz Dealer Technical Bulletins that update repair procedures to conform to the latest standards. (DDE 11-12; Tr 303-24.)

Service technicians must also be able to exert 20 to 50 pounds of force

occasionally, and/or 10 to 25 pounds of force frequently, and/or up to 10 pounds of force frequently to move objects. In addition, they must either walk or stand to a significant degree, or push and/or pull arm or leg controls, or work at a production rate pace while pushing and/or pulling materials. (DDE 10; EX 6.)

D. The Service Technicians' Unique Compensation

Unlike other fixed operation department employees, service technicians are paid a flat hourly rate according to the number of hours that Mercedes-Benz allots to a particular job, regardless of how long it actually takes the service technician to complete the work. For example, if the job is allotted four hours and the service technician completes it in two hours, s/he technician receives the hourly rate for four hours and can perform another job during the remaining two hours. Conversely, if the job is allotted four hours and it takes the service technician six hours, the technician is only paid for four hours. A service technician can earn additional fees by "up-selling" additional repairs beyond those initially requested by the customer. (DDE 12; Tr 264-68.)

The service technicians' hourly rate of pay ranges from $16 to $26 per hour, and they can earn from $50,000 to $70,000 per year. Their pay rate is determined in part by performance reviews that are conducted twice a year.

The first review is by the technician's team leader in conjunction with the service director; thereafter, reviews are conducted by the team leader alone. The team leader recommends raises in the hourly rate of pay based on whether the service technician has shown a "skill adjustment." The service director must approve or veto the team leader's recommendation, which is ultimately passed on by the general manager before taking effect. (DDE 12-13; Tr 251, 264-69.)

The semi-annual reviews of the service technician's skill adjustment assess whether the service technician has advanced to a higher skill level. These "level qualifications" are scaled alphabetically from "D" to "A," with A being the highest level. For example, a "C" level qualification means that the service technician "perform[s] minor diagnosis and repair with minimal assistance," while a "B+" level means that the service technician has demonstrated "[p]roven competency and proficiency in most areas of diagnosis and repair," including the latest electronic and fuel systems and the "latest systems diagnosis." The higher the service technician's "level qualification," the higher his or her rate of pay. (DDE 13-14; Tr 264-69.)

Service technicians are also eligible for hourly rate increases, called production bonuses, if they average at least nine "flat rate hours" per day over the period of a month. The average number of flat rate hours is

calculated by adding the service technician's total hours worked for the month and dividing it by the number of days worked. The bonus increases as the average number of flat rate hours increases. (DDE 13; Tr 264-69.)

E. The Other Employees' Different Wages, Duties, Skills, Supervision, and Employment Conditions, and Their Lack of Interchange with the Service Technicians

Unlike the service technicians, none of the other fixed operations employees are paid a flat rate or have their pay rate determined by "skill adjustment" reviews, or receive monthly bonuses based on a daily average of flat rate hours. For instance, the pay rate of service advisors is based on a complicated formula that includes factors like the repairs that they write up, as well as the overall production of the fixed operations department. As another example, the pay of parts retail associates and other parts employees is based on an hourly rate that takes into account overall parts sales. Other fixed operation employees, such as the trainee, the shipping and receiving employees, the courtesy driver, the cashier, the porter, and the greeter receive a fixed hourly rate that is tied to the number of hours that they actually work. All of these compensation schemes differ markedly from that of the service technicians. (DDE 16-24; Tr 264-68, 269.)

Other factors also distinguish the service technicians from other fixed operation employees. As noted above p.13, the service technicians are the

only employees who perform skilled work on automobiles, and who are supervised separately. The service technicians are also the only classification of employees that uses hand tools. Additionally, only the service technicians work in service bays. Other fixed operation employees work behind desks or in offices (aside from the porter, the greeter, and the courtesy drivers, who also do not work in service bays). And, aside from the porter, who performs general maintenance, the service technicians are the only employees who wear a distinctive blue uniform. (DDE 14-24; Tr 215, 359.)

There is almost no interchange between service technicians and other employees in the fixed operations department. Other employees have never substituted for a temporarily absent service technician, although a porter once transferred into and then out of a service technician job. In addition, only once did a service technician temporarily perform the work of a service advisor. (DDE 26; Tr 292.)

SUMMARY OF ARGUMENT

The Company admittedly has refused to bargain with the Union, claiming that the bargaining unit should consist of all of its fixed operations department employees, rather than just its service technicians. It is settled, however, that the Board's Regional Director need only select an appropriate

unit. In this case, the Regional Director did not abuse her discretion in concluding that the Company's service technicians constitute an appropriate craft unit, and, alternatively, that they comprise an appropriate unit because of their shared community of interest.

Before this Court, the Company (Br 47) essentially concedes the appropriateness of a craft unit, but argues that the inclusion of four service technicians who perform slightly less skilled alignment and tire work "destroyed" the unit's craft character. The Regional Director, however, reasonably included those service technicians in the unit because they are the only other employees who repair and service vehicles using specialized tools and equipment, and who share a distinct community of interest with their fellow service technicians.

As the Regional Director also found, regardless of whether the service technicians are a craft unit, they also constitute an appropriate unit because they share a community of interest separate from that of other fixed operation department employees. In addition to being the only employees who repair and service vehicles with specialized tools and equipment, the service technicians possess distinctive skills and have a unique compensation scheme. They are also supervised separately and evaluated under criteria that are not applied to any other job classifications.

Additionally, they perform their duties in specialized areas. Finally, any interchange with other fixed operation employees is minimal at best, and any interactions with those employees are peripheral to the service technicians' regular work.

In these circumstances, the Company fails to meet its heavy burden of showing that the certified unit is clearly inappropriate. Accordingly, the Court should uphold the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

Having failed to meet its heavy burden of challenging the appropriateness of the unit, the Company focuses on attacking the manner in which the Board processed this case, asserting (Br 33-44) that the Board acted in an "arbitrary and unfair manner." The Company, however, failed to raise its procedural claims before the Board through a motion for reconsideration. The Company's failure is particularly puzzling because the Board expressly noted in its decision its willingness to consider such a motion. Accordingly, Section 10(e) of the Act creates a jurisdictional bar to judicial review of the Company's belated claims.

In any event, the Company's assertions lack merit. The Company utterly fails to rebut the presumption of regularity that courts afford to the

decision-making process of administrative agencies like the Board. Moreover, the Company cannot show that it was prejudiced by the specific procedure that the Board followed in this case.

ARGUMENT

THE REGIONAL DIRECTOR REASONABLY ACTED WITHIN HER BROAD DISCRETION IN DETERMINING THAT THE COMPANY'S SERVICE TECHNICIANS CONSTITUTE AN APPROPRIATE UNIT; ACCORDINGLY, THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. Applicable Principles and Standard of Review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions" of Section 9(a) of the Act (29 U.S.C. § 159(a)). In the present case, the Company admittedly (Br 5) has refused to recognize and bargain with the Union, claiming that a unit limited to service technicians is not appropriate for collective bargaining. Accordingly, if the Regional Director acted within her discretion in concluding that the Company's service technicians constitute an appropriate unit, the Company's refusal to bargain violated

Section 8(a)(5) and (1) of the Act.[7] *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 913 (1941); *NLRB v. West Texas Utilities Co.*, 214 F.2d 732, 734 (5th Cir. 1954); *Vicksburg Hosp., Inc. v. NLRB*, 653 F.2d 1070, 1073 (5th Cir. 1981).[8]

Section 9(a) of the Act provides: "Representatives 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 representatives of all the employees in such unit for the purposes of collective bargaining . . . ." (29 U.S.C. § 159(a)) (emphasis added). Section 9(b) of the Act (29 U.S.C. § 159(b)), in turn, provides: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the[ir] rights . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." *See NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985).

---

[7] A "derivative" violation of Section 8(a)(1) of the Act results from the Section 8(a)(5) violation. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[8] Decisions of the Fifth Circuit rendered before October 1, 1981, are binding on panels of this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207,1209 (11th Cir. 1981).

It is well settled that "[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting." *NLRB v. The Episcopal Community of St. Petersburg*, 726 F.2d 1537, 1541 (11th Cir. 1984). It is equally well settled that the "Board is not required to select the most appropriate unit in a particular factual setting; it need only select *an* appropriate unit from the range of units appropriate under the circumstances." *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 574 (1st Cir. 1983) (emphasis in original). Accordingly, an employer seeking to challenge the unit determination may not merely point to the existence of a more appropriate unit. Rather, "the burden of proof is on the employer to show that the Board's unit is clearly inappropriate." *Id. Accord Vicksburg Hosp., Inc. v. NLRB*, 653 F.2d 1070, 1075 (5th Cir. 1981); *NLRB v. J.C. Penney Co., Inc.*, 559 F.2d 373, 375 (5th Cir. 1977).

In *Boeing Co.*, 337 NLRB 152, 153 (2001), the Board, summarizing its long-standing policy for determining appropriate units, explained that its "procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends." *Accord NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 n.2 (7th Cir. 1997); *Vicksburg Hosp.*,

Inc. v. NLRB, 653 F.2d 1070, 1073 (5th Cir. 1981); *Overnite Transp. Co.*, 331 NLRB 662, 663 (2000).

The unit determination may not be disturbed absent a "'gross abuse of . . . discretion,'" and "'is binding upon [the Court] unless the Board has abused this discretion or otherwise violated the mandate of the statute.'" *NLRB v. West Texas Utilities Co.*, 214 F.2d 732, 734 (5th Cir. 1954) (citation omitted). The Board's underlying findings of fact are "conclusive" under Section 10(e) of the Act (29 U.S.C. § 160(e)) if they are supported by substantial evidence on the record as a whole, even if "the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In this case, the Regional Director found (DDE 32) that the Company's service technicians, including its alignment and wheel technicians, but excluding all other employees of the fixed operations department, constitute an appropriate craft unit. A craft unit "is one consisting of a distinct and homogeneous group of skilled journeymen craftsmen, who, together with helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment." *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994).

In the alternative, the Regional Director also found (DDE 35) that the service technicians "share a community of interest separate from those outside the unit, and thus constitute an appropriate unit." As this Court explained in *NLRB v. The Episcopal Community of St. Petersburg*, 726 F.2d 1537, 1541 (1984) (citation omitted), "[u]nder traditional unit criteria, '[t]he critical consideration in determining the appropriateness of a proposed unit is whether the employees comprising the unit share a "community of interest."'" Further, under the community-of-interest standard, "'[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider. Rather, unit determinations must be made only after weighing all relevant factors on a case-by-case basis.'" *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). Those factors include "whether, in distinction from other employees, the employees in the proposed unit have 'different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.'" *Id.* (citation omitted).

We show below that substantial evidence supports the craft unit and appropriate unit findings, and that both findings fall well within the realm of the Board's discretion to determine an appropriate bargaining unit.

B. The Regional Director Reasonably Found that a Unit Limited to Service Technicians Is an Appropriate Craft Unit

1. Substantial evidence supports the craft unit finding

As noted above p. 4, the Union petitioned for a unit consisting of all the Company's service technicians. The petitioned-for unit included some 30 service technicians engaged in general vehicle repair, and four service technicians who perform more limited repairs consisting of wheel alignment and straightening, as well as tire repair, replacement and balancing. The Regional Director found, as an initial matter, that this entire group of automotive service technicians constitutes an appropriate craft unit, noting that they "possess unique skills, use more complex and valuable tools and equipment than other fixed operations employees, are paid according to a different method, are supervised separately from the other fixed operations employees, and receive separate and additional certification and training not obtained by other fixed operations employees." (DDE 32.) As we now show, substantial evidence supports that finding.

In determining whether a petitioned-for unit constitutes a "distinct and

homogeneous group of skilled journeymen craftsmen," the Board examines a number of factors, including: (1) whether the craftsmen take part in formal training or apprenticeships; (2) whether they are assigned work along craft lines; (3) whether their duties are separate, or overlap with those of other employees; (4) whether they share common interests with other employees; and (5) whether their work is functionally integrated with that of other employees. *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994). Evaluating these factors, the Regional Director (DDE 2) had an ample basis for finding that a unit consisting of the service technicians, but excluding all other fixed operation employees, is an appropriate craft unit.

Thus, as the Regional Director noted, "[t]he work performed by service technicians is highly skilled and requires special training." (DDE 29.) In this regard, the record shows that the service technicians' job consists of the complicated task of diagnosing and repairing the modern Mercedes-Benz automobile. To this end, the service technicians must use a variety of expensive and specialized mechanical and electronic tools, some of which they supply themselves at a personal cost of up to $24,000. Moreover, due to the specialized demands of the job, the Company requires applicants to have three years of prior experience. (DDE 11-12 & n.31; Tr 155, 321.)

In addition to prior experience, the Company and Mercedes-Benz require service technicians to undergo continuous training to keep abreast of the latest diagnostic and repair procedures. That training includes keeping current with Mercedes-Benz issued Dealer Technical Bulletins and undergoing online and in-person training. Service technicians must also obtain special certifications. Additionally, they are the only fixed operation employees whose evaluations are based on their competency in performing various specialized tasks. (DDE 11; Tr 221, 239, 264-67, UX 2.)

As the Regional Director further explained (DDE 29), the craft character of the unit is reinforced by the service technicians' unique method of compensation. Service technicians are the only employees whose pay rate is determined by their skill levels. They are also the only employees who are paid a flat rate that is based on the time assigned to a repair or service job, rather than the time actually spent performing it. Service technicians are also unique in that they receive production bonuses based on performing nine hours or more of daily repair or service work for the month. All of the service technicians, including those who perform alignment and wheel work, but no other employees in the fixed operation department, have this unique compensation system. (DDE 12-14; Tr 140-43.)

As the Regional Director also observed (DDE 29-30), the craft

character of the service technician unit is also supported by the separate and unique process by which the Company supervises and evaluates them. As shown, service technicians are the only employees who are assigned work and evaluated by the team leaders on a semi-annual basis. Again, only the service technicians, including the alignment and wheel technicians, fall under this supervisory and evaluative regime, from which all other fixed operation employees are excluded. (Tr 238-40, UX 2.)

Given the foregoing facts, the service technicians plainly share common interests that are distinct from those of other fixed operation employees. *See Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1042 (9th Cir. 1978) ("[t]he most reliable indicium of common interests among employees is similarity in their skills, duties, and working conditions[ ]").

As the Regional Director further found (DDE 30), "[t]he duties of service technicians do not overlap substantially with those of other fixed operations employees[.]" For example, no other employee even occasionally performs the diagnostic and repair work expected of service technicians. And just one other classification—service advisor—evenly remotely performs any mechanical work on customers vehicles. (Tr 199-203.) Although service advisors occasionally may be called upon to perform the unskilled task of changing a customer's windshield wipers or replacing a

burned out lamp, this can hardly be equated with the skilled diagnostic and repair work that all service technicians, including the alignment and wheel technicians, perform using specialized tools and equipment. (Tr 199-203.)

Finally, there is minimal functional integration between the service technicians' jobs and the work of other fixed operation employees. So far as the record shows, it principally consists of little more than retail parts associates supplying service technicians with parts they need to perform the skilled work of repairing and servicing vehicles. (DDE 37; EX 6.) In addition, although service advisors prepare work orders reflecting customers' reasons for bringing the vehicle in, this paperwork is transmitted to the technician through the team leaders. (DDE 5-6; Tr 72.) The service technicians' contacts with other classifications, such as the booker, the cashier, and the warranty administrator, likewise merely involve accounting for the work performed. (DDE 20-21; EX 6.) Those ministerial and clerical tasks have little to do with aiding the technicians as they perform the skilled work of diagnosing, servicing, and repairing vehicles.[9] Accordingly, the Regional Director reasonably found (DDE 33 & n.70) that the degree of

---

[9] The bookers "ensure that service technicians are paid according to the hours allotted by Mercedes-Benz for the task[;]" the warranty administrator performs a similar function "so that the [Company] can be reimbursed for warranty work." (DDE 20-21; EX 6.)

integration here was "not sufficient to require that all fixed operations employees be included in the bargaining unit." *See Fletcher Jones Chevrolet*, 300 NLRB 875, 876-77 (1990) (distinctions between work performed by service technicians and by other employees, and the minimal integration of their jobs with those of other employees, warranted their placement in a separate unit).

Finally, the Regional Director's finding that the service technicians constitute a separate appropriate craft unit is consistent with a long line of cases. Since 1958, the Board has recognized that "the repair and maintenance of the modern automobile require[s] the requisite skill and know-how of properly trained craftsmen." *Overnite Transportation Co. v. NLRB*, 327 F.2d 36, 39 (4th Cir. 1963) (citing *International Harvester Co.*, 119 NLRB 1709 (1958)). Accordingly, the Board has found, with court approval, that automobile mechanics and helpers constitute an appropriate unit within an automobile service department when the mechanics possess skills and training unique among employees to constitute a group of craft employees. *See, for example, Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189-90 (D.C. Cir. 2000), discussed below p.__; *Overnite Transportation Co. v. NLRB*, 327 F.2d at 39 (unit limited to mechanics, mechanic helpers and trainees, as opposed to all shop employees, found

appropriate); *Carriage Enterprises Ltd.*, 330 NLRB 331, 332 (1999) (inclusion of trainee was consistent with craft unit finding); *Fletcher Jones Chevrolet*, 300 NLRB 875, 875, 876 (1990) (appropriate unit consisted of service technicians and "quick service technicians" who performed lube, oil and filter changes and other simple mechanical repair work); *Dodge City of Wauwatosa, Inc.*, 282 NLRB 459, 459-461 (1986) (finding appropriate a craft unit of mechanics, and rejecting employer's claim that only appropriate unit included all service department employees).

2. The Company's contentions lack merit

The Company concedes (Br 47) that the regular service technicians, "standing alone, may constitute a separate appropriate craft unit." It argues (Br 47), however, that including the alignment and tire/wheel technicians "destroyed the integrity of any craft unit" because they are not as highly skilled as the other service technicians. As we now show, the Regional Director reasonably rejected the Company's argument.

Initially, it must be noted that contrary to the Company's claim (Br 11), the Regional Director implicitly recognized (DDE 33-34) that the wheel and alignment service technicians are slightly less skilled than the other service technicians. Nonetheless, she appropriately included them in the unit because they share important characteristics with the other service

technicians and are similarly distinct from the other fixed operations department employees. Thus, as the Regional Director noted (DDE 34), "the [Company] pays service technicians who perform tire/wheel and alignment work in the same manner as other service technicians[;] [it] provides them the same uniforms, and places them under the same supervisory authority . . . [and gives them the same] job title." Moreover, the wheel and alignment technicians are the only other fixed operation classifications who use specialized tools to perform service and repair of customers' vehicles in the same work area as the other service technicians. In these circumstances, the Regional Director reasonably concluded that a unit including all service technicians, but excluding all other fixed operation employees, constituted an appropriate craft unit.

Indeed, the Board, with court approval, has traditionally found that the inclusion of such lesser skilled employees does not destroy the craft character of an automotive technician unit. Thus, in *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189-90 (D.C. Cir. 2000), the Court agreed with the Board that including lube workers who had "limited responsibilities" and lacked "technician training" did not destroy the craft nature of a unit of service technicians. Similarly, in *Fletcher Jones Chevrolet*, 300 NLRB 875, 875-76 (1990), the Board designated a craft unit

of service technicians even though it included "quick service technicians" who performed lube, oil and filter changes and other simple mechanical repair work.

The Company fails (Br 50-51) in its attempt to distinguish *Country Ford Trucks* and *Fletcher Jones Chevrolet* by claiming that the lesser skilled employees in those cases assisted the service technicians. Indeed, the Court of Appeals rejected that very argument in *Country Ford Trucks*, 229 F.3d at 342, by agreeing with the Board that the lube workers belonged in the craft unit because they were the only other employees that provided "hands-on, manual assistance with repairs and service." Thus, the lube workers were "'akin to the sorts of 'helpers or trainees' included in craft units in prior cases [because they] 'engaged in mechanical work' alongside the service technicians"—even though they were not trainees and did not themselves perform any skilled repairs. *Id.* (citation omitted). Based on similar reasoning, the Regional Director placed the alignment and wheel technicians in the craft unit because they are the only other employees who repair and service customer vehicles using specialized tools.[10]

---

[10] The Company errs in relying on the duties of the window tinter, detail technician, and service advisor to suggest (Br 51) that including the wheel and alignment technicians in a unit of service technicians somehow destroyed its craft character. The window tinter only puts tint on vehicles and installs clear film on doors; he does not diagnose or repair problems, and

C. The Regional Director Reasonably Found, in the Alternative, that the Service Technicians Constitute an Appropriate Bargaining Unit Because They Share a Distinct Community of Interest Separate from that of Other Fixed Operation Employees

As noted above p.26, the Regional Director, applying settled principles recognized by this Court in *NLRB v. The Episcopal Community of St. Petersburg*, 726 F.2d 1537,1541 (1984), found in the alternative that the service technicians constitute an appropriate unit because they share a community of interest. Among the factors the Board and the courts consider in determining whether the employees share a community of interest are their job duties, skills, and training; their method and level of compensation; their supervision; their hours of work and other terms and conditions of employment, including their work location; the history of collective bargaining, if any; the level of employee interchange and contact; and the extent of functional integration. *See NLRB v. J.C. Penney Co*., 559 F.2d 373, 375 (5th Cir. 1977); *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019, 1020 (1994).

---

or use the service technicians' bays or equipment. (DDE 15; Tr 75-76, 151-53.) Similarly, the service advisor, while he may change wiper blades or lamplights, does not diagnose or repair vehicles, check brakes, or use the service technicians' tools and equipment; instead, he mainly works in an enclosed office. (DDE 16, 37; Tr 199, EX 4.)

As shown below, based on these factors, the evidence in this case weighs heavily in favor of the Regional Director's finding (DDE 36) that the petitioned-for unit of service technicians constitute an appropriate stand-alone unit because they share a community of interest separate from that of other fixed operation department employees. As further shown, the Company fails to meet its heavy burden of establishing the petitioned-for unit is clearly inappropriate.

Thus, from the evidence presented above pp.12-19, it can readily be seen that the service technicians, as a whole, share distinctive features that set them apart from other fixed operation employees. Notably, in terms of job duties, skills, and training, the service technicians are the only employees engaged in the repair and servicing of customer vehicles using specialized tools and equipment. Additionally, unlike other fixed operations employees, the service technicians alone are required to have prior mechanical experience and maintain certifications for performing service and repairs. Their compensation scheme is also unique, and not shared by any other classification within the fixed operations department. They are supervised separately, and evaluated under criteria that are not applied to any other classification within the fixed operations department. Further, they perform their duties in the shop area and in individually assigned

service bays, unlike other fixed operation employees, who work in offices, at desks, or in different areas or buildings. In addition, the Company provides service technicians with their own uniform as well as and a changing room/locker area. (DDE 25; Tr 215.)

The Regional Director (DDE 26-27, 37-38) also considered the remaining community of interest factors and concluded that they did not warrant a different result. Thus, with respect to bargaining history, "because the parties have no bargaining history to the contrary, this factor weighs in favor" of the unit sought by the Union. *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 850 (7th Cir. 1999).

Further, the lack of interchange between service technicians and other fixed operations employees actually supports a finding that the former classification shares a separate community of interest. Thus, as the Regional Director found (DDE 37), and the Company does not dispute, "[t]here has been little permanent interchange and virtually no temporary interchange between the positions that the Union seeks to represent and the remaining fixed operations positions." Indeed, the absence of interchange also cuts against the Company's argument for a broader unit because it highlights the "differences in jobs and skills" between the service technicians and the other

fixed operation employee classifications. *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1020 (1994).

As to the remaining factor, the degree of functional integration, the Regional Director reasonably found (DDE 38) that the service technicians' interactions with other employees are at best "'peripheral to the[ir] regular repair work'" (citation omitted). As the she noted (DDE 38), because those contacts are not integral to the service technicians' performance of service and repair work, they are "insufficient to negate the appropriateness of a separate unit." *Compare Capri Sun*, 320 NLRB 1124, 1126 (2000) (occasional assistance from production employees did not negate separate character of production unit), and *Yuengling Brewing Co. of Tampa*, 333 NLRB 892, 893 (2001) (same), *with Johnson Controls, Inc.*, 322 NLRB 669, 671 (1996) (noting that, unlike the Company's conception of this factor, "an integrated process [is one] which requires that [the employees] work together in the interrelated process of installing and servicing the [e]mployer's systems").

The Company (Br 55-60) seeks to make a case for functional integration based on the service technicians' contacts with other classifications, particularly the service advisors, regarding the processing of work orders, their use of a computerized recordkeeping system, and the use

that is made of that electronic record for billing and accounting purposes. Even if this provided some evidence of functional integration, as opposed to mere administrative integration, it would not overcome the countervailing factors supporting a separate unit of service technicians. As the Regional Director noted here (DDE 38), functional integration is "only one factor in the community of interest analysis." And in this case any integration would at most be minimal and outweighed by the unique aspects of the service technicians' job, as reflected in their distinctive skills, training and compensation, as well as their separate supervision.

Contrary to the Company's suggestion, the automotive service department cases that it cites (Br 61-62) do not require the Board to recognize only department wide units in the modern automotive dealership. The cases cited by the Company are distinguishable. For instance, in *W. R. Shadoff*, 154 NLRB 992 (1965), unlike the instant case, the union sought to represent a unit of highly skilled mechanics and certain other, less skilled service positions, while excluding other more skilled service positions. In finding that an appropriate unit included all service department employees, the Board noted that "not all the mechanics whom the [union] would include in the unit are engaged in servicing and repairing automotive engines, while some of those whom it would include require less experience than bodyshop

employees" whom the union sought to exclude. *Id.* at 993. Thus, in *W.R. Shadoff*, unlike the instant case, the petitioned-for unit was not appropriate because it did not consist of a "distinct or homogenous group." *Id.* at 993-94.

Worthington Chevrolet, Inc., 271 NLRB 365, 366 (1984), is inapposite for similar reasons. In that case, the union sought a unit consisting only of unskilled positions in separate departments (sales and service), with separate lines of supervision, varied hours of work, but with benefits the same as all the other employees of the employer. In those different circumstances, the Board found that "there [was] no clear line of demarcation between the classifications the [p]etitioner [sought] to include in the unit and those it would exclude and . . . their work tasks overlap[ped]." By contrast, in the instant case, the Union does not seek such a combination of unskilled and differently supervised employees. Nor, as shown, is there substantial overlap of work functions between the service technicians and other employees of the fixed operations department.[11]

---

[11] *Austin Ford*, 136 NLRB 1398 (1962), also cited by the Company (Br 61), is likewise distinguishable. In *Austin Ford*, the Board found a service department-wide unit appropriate because, unlike here, all the employees in that department, including porters, service writers and dispatchers, performed to some degree the work of automobile mechanics. Indeed, in *Austin Ford*, the service writers and dispatchers were "experienced mechanics" who assisted the mechanics, and parts department employees

In sum, on this record, the Company has failed to meet its heavy burden of showing that the certified unit was clearly inappropriate. Further, the Company has admittedly refused to recognize and bargain with the Union in order to challenge the Union's certification as the representative of the service technician unit. Accordingly, the Court should uphold the Board's finding (DOII at 1-2) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to recognize and bargain with the Union.

D. The Court Lacks Jurisdiction To Consider the Company's Belated Claims that the Board Processed this Case in and "Unfair and Arbitrary" Manner; In Any Event, the Claims Are Meritless

The Company asserts (Br 33-44) that the Board processed the instant case in an "arbitrary and unfair manner," and insinuates that the Board did not "truly" review the case "at all." These contentions suffer from several fatal flaws. First, the Company failed to give the Board an opportunity to

---

dismantled engines and transmissions and assisted mechanics. *Id.* at 1399-1400. Moreover, in *Austin Ford*, all service and parts department employees had "the same opportunity to improve their mechanical ability by attending Ford Motor Company instruction schools." *Id.* at 1400. In those very different circumstances, the Board did not exclude any employee classification in the service and parts department that exercised the skills of automotive mechanics or assisted them in the service and repair of automobiles.

respond to its allegations; as a result, Section 10(e) of the Act (29 U.S.C. § 160(e)) bars the Company from presenting its claims here. Second, in any event, it is well settled that courts grant administrative agencies like the Board a presumption of regularity in their decision-making processes, and will not delve into their deliberative methods based on speculation—all the Company offers here. Finally, the Company utterly fails to show how it was prejudiced by the specific procedures that the Board utilized in this case. Accordingly, the Court should reject the Company's belated and meritless contentions.

1. The Company waived its challenges to the Board's deliberative process by failing to raise its claims below

After the three-member panel of the Board issued its Decision and Order, the Company had every opportunity to file with the Board a motion for reconsideration, rehearing, or reopening of the record pursuant to Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. § 102.48(d)(1)). Specifically, the Company had 28 days from service of the Decision and Order in which to file such a motion. *See* 29 C.F.R. § 102.48(d)(2). It did not do so, even though the Board in its Decision and Order expressly reminded the Company of its right to file such a motion. (DO II 2 n.5.)

Given the Company's failure to file a motion for reconsideration, the Court lacks jurisdiction to consider the Company's challenges to the Board's decision-making process. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides: "[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Thus, where, as here, the objections were not raised before the Board, the reviewing court lacks jurisdiction to consider them in a subsequent enforcement proceeding, absent extraordinary circumstances.[12] *See Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue not raised by either party before the Board); *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1126 n.13 (11th Cir. 2008) ("because the Company did not raise its due process argument before the Board, this Court does not have the power to review it here on appeal under 29 U.S.C. § 160(e)").

---

[12] *See generally United States v. L. A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952) ("[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts . . . . Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

There are no extraordinary circumstances to excuse the Company's failure to move for reconsideration. An extraordinary circumstance "exists only if there has been some occurrence or decision that prevented a matter which should have been presented to the Board from having been presented at the proper time." *NLRB v. Allied Prods., Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). And the Supreme Court has made clear that there *is* a proper time to challenge aspects of a case that arise for the first time in a Board decision—namely, in a timely motion for reconsideration. *See Woelke & Romero,* 456 U.S. at 665; *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Indeed, in its Decision and Order, the Board expressly noted that it was open to considering such a motion. (DO II 2 n.5.) It is undisputed that the Company failed to file a motion for reconsideration that would have given the Board an opportunity to respond to the challenges about its decision-making process; accordingly, Section 10(e) deprives the Court of authority to consider those claims.

The Company's implicit suggestion (Br. 8) that it did not file a motion for reconsideration because the Board promptly filed an application for enforcement does not constitute an extraordinary circumstance. To the contrary, the Company could have filed its motion for reconsideration after the Board filed the application for enforcement—just as the Union did in this

case. This is so because, as noted above pp. 7-8, Section 10(e) of the Act vests the Court with exclusive jurisdiction over a case only *after* the record has been filed. *See* 29 U.S.C. § 160(e) ("[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive . . . ."). Indeed, the Court has already recognized and applied this rule here—by granting the Board's unopposed motion to hold the filing of the record in abeyance pending Board consideration of the Union's motion for reconsideration. Based on the Court's ruling, the Board did not file the record on review until December 6, 2010. In short, the Company's failure to act in a timely manner creates a jurisdictional bar to its attempt to present its claims for the first time in an appellate brief.

Nor could the Company plausibly assert that moving for reconsideration would have been futile, and therefore an extraordinary circumstance that warranted bypassing the Board. Futility is a narrow exception to Section 10(e): "an objection would be futile only when the Board has unequivocally rejected a party's position by expressly refusing to follow the authority or line of authorities relied upon by that party." *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 358 n.13 (6th Cir. 1983). The Company cannot make such a showing here. Simply put, "probable futility cannot be equated with extraordinary circumstances." *Keystone Roofing Co. v. OSHA*, 539 F.2d

960, 964 (3d Cir. 1976) (rejecting the employer's argument that it was not required to raise an issue before OSHA because the agency had issued a prior ruling that was contrary to the outcome that the employer sought).

In sum, the Company failed to give the Board an opportunity to counter the Company's challenges to the Board's decision-making processes in a timely motion for reconsideration. Accordingly, the Court lacks jurisdiction to consider the Company's belated claims.

2. In any event, the Company's attacks on the Board's procedure for deciding this case lack merit

In any event, there is no merit to the Company's assertion (Br 33) that the Board processed this case in an "unfair and arbitrary" manner, and therefore that the Court should deny enforcement. It is settled that courts afford administrative agencies like the Board a presumption of regularity in their decision-making, and will not delve into their internal deliberative processes. The Company offers nothing but conjecture in asserting (Br 35) that the Board acted "unfairly, arbitrarily, and discriminatorily." Moreover, the Company cannot show that it was prejudiced by the specific procedure that the Board used in this case. Thus, its contentions must be rejected.

a. The Company fails to rebut the presumption of regularity that courts afford to administrative agencies

As noted above, courts apply a "presumption of regularity" under which they presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *see also Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) ("A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the views of their colleagues."). The Company's speculation cannot rebut the presumption of regularity afforded by these cases.

For instance, in *United States v. Morgan*, 313 U.S. 409, 422 (1941), the Supreme Court concluded that it was error to permit the Secretary of Agriculture to be deposed regarding the process by which he reached his decision, including the extent to which he studied the record and consulted with subordinates. As the Court explained, the courts may not "probe [the Secretary's] mental processes" because, "[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." Following this logic, the Supreme Court has held that it will accept at face value the Board's assurances that it adequately

considered the record before issuing a decision. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947) (rejecting argument that Board failed to consider additional evidence upon remand where the Board assigned case to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time).

Contrary to the Company (Br 34-35), neither the fact that the Board issued its Decision and Order six days after vacating the two-member Board's Decision and Order, nor the number of decisions issued during this time period, can counter the presumption that Board members properly discharged their duties.[13] Courts have consistently rejected attempts to delve into administrative agencies' decision-making processes based on how quickly they carried out their duties. *See*, *e.g.*, *National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974) (FDA Commissioner issued new regulations 13 days after he took office; court rejects claims that

---

[13] The Company errs in suggesting (Br 35 n.6) that there was something "dubious" about the Board issuing an order setting aside the two-member Board's Decision and Order before the D.C. Circuit dismissed the case. As noted above pp. 7-8, because the D.C. Circuit had placed the case in abeyance, the Board never filed the agency record. Accordingly, under Section 10(d) of the Act (29 U.S.C. § 160(d)), the three-member panel of the Board had concurrent jurisdiction to enter an order setting aside the two-member Board's Decision and Order, and to issue the August 23, 2010 Decision and Order.

it was impossible for the Commissioner to have reviewed and considered the more than 1,000 exceptions filed in opposition to the proposed regulations); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) ("bare allegation" that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process). Indeed, the Company implicitly recognizes this principle by conceding (Br 35) that it "does not suggest that all the decisions rendered during this period are *per se* invalid."

The Company also cannot overcome the presumption of regularity by complaining (Br 35, 38) about the manner in which the three-member panel of the Board reconsidered the request for review of the Regional Director's Decision and Direction of Election. In its August 23, 2010 Decision and Order, the Board specifically stated that it was not giving preclusive effect to the two-member Board's prior ruling on the Company's request for review. Instead, the Board considered the pre-election issues raised by the Company in its request for review—and specifically "f[ou]nd them to be without merit." (DO II 1.) The Company offers no relevant support, much less any "clear evidence to the contrary" as the Supreme Court requires, *Chemical Foundation*, 272 U.S. at 14-15, that would warrant disregarding this explanation or delving into the Board's deliberative processes. Instead, the Company relies on supposition to impugn the Board's actions.

Similarly, the Company cannot overcome the presumption of regularity by noting (Br 38) that the three-member panel of the Board affirmed its denial of the request for review in just a few sentences. Indeed, the Company itself acknowledges (Br 38-39) that it is "not uncommon for the Board to deny requests for review without a full explanation." This is so because under Section 102.67(c) of the Board's Rules and Regulations (29 C.F.R.§ 102.67(c)), the Board will grant a request for review only upon a showing of "compelling reasons"—a standard that the Company could not meet, given the limited nature of its challenge to the appropriateness of the unit. In these circumstances, the Company has no basis for insinuating (Br 39) that the Board's denial of the request for review "without a full explanation . . . calls into question whether any review actually occurred."

Indeed, the Company premises its entire argument on a fundamental misunderstanding of Board procedure in representation cases. The Company seems not to realize that the Board, acting pursuant to Section 3(b) of the Act (29 U.S.C. § 153(b)), has delegated to its regional directors its authority to determine appropriate bargaining units.[14] The Company also

---

[14] Section 3(b) of the Act (29 U.S.C. §153(b)) authorizes the Board to delegate to its regional directors its powers under Section 9 of the Act (29 U.S.C. §159), including the power to determine appropriate bargaining units, to direct elections, and to certify the results, which the Board has done. *See* 26 Fed. Reg. 3911 (Apr. 28, 1961) (delegating this authority to the regional

overlooks *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-43 (1971), where the Supreme Court upheld this delegation, and found that plenary Board review of the regional director's unit determination is not required. *See id.* at 142 ("Whatever the reason for the delegation, Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination."); *accord NLRB v. Marinor Inns, Inc.*, 445 F.2d 538, 543 & n.3 (5th Cir. 1971) (following *Magnesium Casting*). Thus, where, as here, the Regional Director has acted pursuant to his delegated authority in representation cases, he "has acted, in effect, as the Board, and therefore no independent determination *de novo* by the Board is required or warranted." *Seven-Up Bottling Co. of Boston, Inc.*, 211 NLRB 521, 522 (1974), *enforced*, 506 F.2d 596 (1st Cir.).[15]

---

directors); Section 102.67 of the Board's Rules and Regulations (29 C.F.R. § 102.67) (codifying this delegation).

[15] The Company also notes (Br 39) that in the two-member Board's December 15, 2008 order denying the request for review, Member Schaumber explained in a footnote that he did not pass on the Regional Director's craft unit finding. (T 12.) Contrary to the Company (Br 39), the fact that he did not express a similar view when, as part of the three-member panel, he again voted to deny the request for review (DO II 1) hardly establishes that the Board "rubber stamped" the earlier order. The Company's conjecture about Member Schaumber's thought processes—whether he changed his mind, or simply found it unnecessary to specifically address this point—is just that. The fact remains that on both occasions, he

The Company fares no better in challenging (Br 36) the Board's reliance on its long-approved summary judgment procedure to resolve the unfair labor practice case. Indeed, the Company itself recognizes (Br 37, 42) that the Board appropriately utilizes summary judgment in these circumstances. This is so because, as the Company correctly notes (Br 37), under *Pittsburgh Plate Glass Co .v. NLRB*, 313 U.S. 146, 162 (1941), the underlying representation issue—here, the Company's challenge to the appropriateness of the unit—may not be relitigated in the unfair labor practice case, where the employer is refusing to bargain in order to "test" the certification by seeking judicial review of the unit question. Thus, as the Company implicitly acknowledges (Br 37), a refusal to bargain was the only issue that it could have litigated in the unfair labor practice case. But because the Company never denied its refusal to bargain with the Union, there was nothing for it to litigate in the unfair labor practice case. It was

---

voted to deny the request for review, and therefore to affirm the Regional Director's decision. *See* Section 102.67(f) of the Board's Rules and Regulations ("Denial of a request for review shall constitute an affirmance of the Regional Director's action"); *United Health Care Services, Inc.*, 326 NLRB 1379, 1379 (1998) ("as the Board Members are equally divided, and there is no majority to grant review, the Regional Director's Decision and Order is affirmed").

therefore entirely proper for the three-member panel of the Board to rule on and grant the General Counsel's motion for summary judgment.[16]

There is no more merit to the Company's assertion (Br 42) that granting summary judgment was "impermissible" because the three-member panel of the Board stated that it would "presume the Respondent's legal position remains unchanged, and therefore conclude that the Respondent will continue to refuse to bargain" in order to test the Union's certification. (DO II 2 n.5.) The Company admits (Br 5)—as it always has (T 22)—its refusal to bargain for this reason. Given this admission, there would have been nothing to litigate in the unfair labor practice proceeding. Accordingly, the Board appropriately granted summary judgment.

Moreover, in its Decision and Order, the Board expressly noted that it was open to a motion for reconsideration, which the Company could have filed if it had desired to alert the Board of any change in its position on refusing to bargain. As the Board stated (DO II 2 n.3), if the Company "has

---

[16] The Company effectively concedes this point by correctly noting (Br 37) that "because there is usually nothing left to litigate [in the unfair labor practice proceeding], and there are no material facts at issue, the Board will generally grant summary judgment finding the employer seeking to test certification to have violated Section 8(a)(5)." Thus, because there was no dispute concerning the material facts, summary judgment was appropriate here. *See, e.g.*, *NLRB v. USPS*, 888 F.2d 1568, 1570 (11th Cir. 1989).

or intends to commence bargaining at this time, it may file a motion for reconsideration so stating and the Board will issue an appropriate order." As noted above, however, the Company never filed such a motion.

b. The Company cannot show that it was prejudiced by the specific procedures that the Board used in this case

To the extent the Company complains that the Board's procedures were arbitrary, and couches its complaint as a due process challenge, those complaints must be rejected. Simply put, the Company cannot show that it was prejudiced by the specific procedures that the three-member panel utilized in deciding this case. It is settled that in administrative proceedings, "[p]roof of a denial of due process requires a showing of substantial prejudice." 16D CORPUS JURIS SECUNDUM § 1810 (2005). *See, e.g.*, *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (stating that the "burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury," and applying that burden to reject a due process claim for lack of prejudice).

Thus, even if Section 10(e) of the Act did not bar judicial consideration of the Company's claims, the Company still could not prevail, because an agency's decision will not be overturned without making "the normal appellate assessment" as to whether an alleged error was "harmless or prejudicial." Charles H. Koch, Jr., 1 ADMIN. L. & PRAC. § 929 (3d ed.).

Indeed, Congress expressly instructed that, in court review of federal agency decisions, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. In this case, the Company cannot show that it was prejudiced by the Board inviting a motion for reconsideration rather than issuing a show cause notice because, as explained below, in both situations parties have an opportunity to present evidence related to the "technical" Section 8(a)(5) violation. Given the Company's failure to move for reconsideration, it cannot complain that it was denied an opportunity to present relevant evidence. *See, e.g., Ashley v. NLRB*, 255 Fed.Appx. 707, 710 (4th Cir. 2007) (petitioners' failure to avail themselves of a procedural right before the Board "means that they have failed to state a due process claim").

In any event, the Company errs in relying (Br 40 & n.7) on procedurally distinguishable cases as support for its belated challenge to the specific procedures that the Board used here. In those cases, such as *Carambola Beach Resort*, 355 NLRB No. 69 (2010), 2010 WL 3119110, from which the Company (Br 40-41) quotes extensively, the three-member Board had to reconsider and reissue the certifications of representative that previously were issued by the two-member Board. By contrast, in the instant case, the validity of the certification was never in doubt, because it was issued by the Regional Director, whose longstanding authority to act

was not affected by *New Process Steel*. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141-43 (1971) (upholding the Board's delegation of final authority in unit determination cases to its regional directors, absent the Board granting a request for review).[17]

Further, the Company cannot show that it was prejudiced by the procedural difference. Even though in *Carambola Beach Resort* the Board gave the employer an opportunity to respond to a show cause order, whereas here it gave the Company an opportunity to contest summary judgment by filing a motion for reconsideration based on changed circumstances, that difference is not, in itself, a *per se* due process violation. *See NLRB v. Health Tec Div./San Francisco*, 566 F.2d 1367, 1371 (9th Cir. 1978) (holding that "[p]rocedural irregularities are not per se prejudicial; each case must be determined on its own facts"). Even if a case is handled in a "highly unusual, even unprecedented" manner, absent a "violation of established law or procedures" or a showing of "specific[] prejudice[], . . . an element of confusion or novelty alone does not violate due process." *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1244 (2d Cir. 1990).

---

[17] As noted above p. 52 n.15, the Board long ago delegated to its regional directors the authority to certify election results.

The Company here had the same opportunity as the parties in the cited cases to present evidence to the Board on the only factual issue that it could have litigated in the "technical" refusal to bargain case—namely, that it had bargained or was willing to bargain. It is of no moment that the Company was tasked with presenting such evidence in a motion for reconsideration rather than in response to a show cause order. The same evidence can be presented when a case is in either posture. Because the Company failed to present such evidence or to proclaim its willingness to bargain, the Board appropriately rendered summary judgment against it. In sum, given the Company's continuing refusal to bargain, it fails to show how it was prejudiced by the Board's decision to grant summary judgment in the unfair labor practice case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment enforcing the Board's order in full.

s/ Julie Broido
JULIE BROIDO
Supervisory Attorney

s/ Christopher W. Young
CHRISTOPHER W. YOUNG
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-2988

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Acting Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

March 2011

H:/FINAL/Contemporary Cars-final brief-jbcy

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 10-13920-B
	*	
v.	*	
	*	Board Case No.
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	*	12-CA-26377
	*	
	*	
Intervenor	*	
	*	
CONTEMPORARY CARS, INC. d/b/a MERCEDES-BENZ OF ORLANDO	*	
	*	
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,908 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 21st day of March, 2011

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	No. 10-13920
	*	
v.	*	
	*	Board Case No.
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	*	12-CA-26377
	*	
	*	
Intervenor	*	
	*	
CONTEMPORARY CARS, INC. d/b/a/ MERCEDES-BENZ OF ORLANDO	*	
	*	

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify 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:

David A. Rosenfeld
Weinberg, Roger & Rosenfeld
1001 MARINA VILLAGE PKWY STE 200
Alameda, CA 94501-6430

Steven Mark Bernstein
Brian Matthew Herman
Douglas R. Sullenberger
James Michael Walters
Fisher & Phillips LLP
1075 Peachtree Street, NE, Suite 3500
ATLANTA, GA 30309

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 21st day of March, 2011