

Nos. 16-1565 & 16-1930

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

CARGILL, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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SUMMARY OF THE CASE

The Company admittedly refused to bargain with the Union in order to challenge the Union's certification as the representative of a unit of packaging, shipping, and receiving department employees. Accordingly, its refusal violated Section 8(a)(5) and (1) of the Act. First, the Board properly exercised its discretion in denying the Company's motion to dismiss the Union's representation petition. As the Board explained, the Company failed to cite any applicable authority requiring dismissal. Next, the Board acted within its broad discretion in finding the petitioned-for unit appropriate. The unit employees are readily identifiable as a group and share a community of interest, and the Company failed to meet its burden of showing that the excluded employees share an overwhelming community of interest with those in the unit. Finally, the Board properly exercised its discretion in overruling the Company's election objection alleging boisterous behavior by employees outside the polling room. The Company failed to demonstrate that such third-party conduct created an atmosphere of fear and reprisal rendering a free election impossible. Nor did the Board agent engage in misconduct by declining to end employees' conversations.

Although this case involves the application of settled legal principles to largely undisputed facts, the Board believes that oral argument of 15 minutes per side may be of assistance to the Court.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition for review of Cargill, Inc. (“the Company”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of an Order issued against the Company on February 4, 2016, and reported at 363 NLRB No. 110. (JA 1980-82.)¹ The Board

¹ Record references in this brief are to the Joint Appendix (“JA”). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” References are to the Company’s opening brief.

found that the Company unlawfully refused to bargain with United Food and Commercial Workers International Union, Local No. 324 (“the Union”), which the Board had certified as the bargaining representative of a unit of packaging, shipping, and receiving employees at the Company’s Fullerton, California facility.

The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties. The Court has jurisdiction over the case under Section 10(e) and (f) of the Act, and venue is proper, because the Company transacts business within the geographic boundaries of this Circuit. The Company’s petition for review, filed on March 3, 2016, and the Board’s cross-application for enforcement, filed on April 13, 2016, are timely, as the Act places no time limitation on such filings.

Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 21-RC-136849), the record in that proceeding is part of the record before this Court, pursuant to Section 9(d) of the Act. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477, 479 (1964). Section 9(d) of the Act does not give the Court general authority over the representation proceeding, but authorizes review of the Board’s actions in the representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or

set[] 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17
n.3 (1999) (citing cases).

STATEMENT OF THE ISSUES

1. Whether the Board acted within its broad discretion in denying the Company’s motion to dismiss the petition. *Alldata Corp. v. NLRB*, 245 F.3d 803 (D.C. Cir. 2001); *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763 (8th Cir. 1953); *Service Employees Union, Local 87*, 324 NLRB 774 (1997).
2. Whether the Board acted within its broad discretion in finding that a unit of packaging, shipping, and receiving employees constitutes an appropriate unit for collective bargaining. *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016); *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
3. Whether the Board acted within its broad discretion in overruling the Company’s election objection. *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Polymers*, 174 NLRB 282, 282 (1969).

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 bargain with the Union as the exclusive representative of an appropriate unit of its packaging, shipping, and receiving employees. (JA 1981.) The Company admits its refusal but claims that the Board abused its discretion in denying its motion to dismiss the petition, certifying the unit, and overruling its election objection. The Board's findings of fact, the procedural history of the representation proceeding and the unfair labor practice case, and the Board's conclusions and Order, are set forth below.

I. THE BOARD'S FINDINGS OF FACT

A. Overview of the Company's Operations and Organization

The Company operates a plant in Fullerton, California, that processes food-grade oil. (JA 1980; 351, 458.) On one side of the plant is a facility where terminal and quality-control department employees unload, store, and test incoming oil. (JA 813, 817-22.) Maintenance employees are also based in this facility because their department office is housed there. (JA 819; 337, 372.)

After terminal and quality-control employees complete their work and the processed oil is ready for packaging and shipping, it is transferred to the other side of the plant via a pipeline. (JA 820; 337, 367-68, 462-63.) There employees in the packaging, shipping, and receiving departments work in a single building known as

the packaging warehouse, or simply “packaging.” (JA 822; 462, 555-56.) The packaging warehouse is devoted exclusively to packaging and shipping processed oil; it is separated from the facility containing the other departments by a road and three lines of rail track. (JA 822, 824-26; 337, 554-56.) In the packaging warehouse, packaging department employees fill containers with processed oil; shipping department employees load the containers onto trucks; and receiving department employees purchase and receive raw materials used in the packaging process. (JA 820-22.)

B. Working on One Side of the Tracks, Terminal, Quality-Control, and Maintenance Department Employees Perform Distinct Job Functions; Have Little Contact with Other Employees; and Lack Other Commonalities with Packaging, Shipping, and Receiving Department Employees

On their side of the plant, the eight terminal department employees unload incoming oil when it arrives by railcar or truck. (JA 817; 366, 375-77, 608.) With respect to incoming oil, terminal employees deliver samples to the lab, where quality-control department employees test it to ensure that it meets specifications. (JA 817; 366, 375-77.) As for oil that will remain unprocessed, terminal employees load it onto bulk tanker trucks. (JA 817; 367.) In handling both types of oil, terminal employees remain on their side of the tracks, and never enter the packaging warehouse on the other side. (JA 817-18; 367.)

The terminal department offices are housed in a small building on the terminal employees' side of the plant. (JA 818; 337, 371, 376-77, 379.) In the past, terminal employees had a separate supervisor, although they currently share one with the packaging, shipping, and receiving department employees. (JA 826; 454-55.)

Quality-control department employees function as lab technicians who test the oil each time it is moved within the facility. (JA 818-19; 378-79.) They perform most of their work in the lab, which is located on the same side of the plant as the terminal department. (JA 818-19; 371, 394, 402-08.)

Two of the four quality-control employees enter the packaging warehouse about once a week to pick up paperwork, escort a rabbi who inspects the warehouse, and inspect a line that fills containers with oil. (JA 818; 470, 528, 588, 608.) However, in doing so they rarely interact with the packaging, shipping, and receiving employees. (JA 818; 374, 470, 528, 588.) Similarly, although packaging employees periodically bring pre-labeled oil samples to the lab for testing, they have minimal communication with the quality-control employees. (JA 819, 826; 402, 459-60.)

The four employees in the maintenance department are also based on the same side of the plant as the terminal and quality-control employees. (JA 819; 337, 372, 607.) The maintenance employees' primary responsibility is to repair

equipment throughout the entire plant and to schedule work orders. (JA 819; 444-47.) Although their work includes repairing equipment in the packaging warehouse, they do not interact with packaging, shipping, and receiving employees beyond asking packaging-department operators and lead persons about the equipment. (JA 819; 575, 596.)

C. Working Together in the Packaging Warehouse, Employees in the Packaging, Shipping, and Receiving Departments Perform Integrated Job Functions; Have Frequent Contact and Interchange; Are Commonly Supervised; and Have the Same Benefits and Similar Wages

The packaging, shipping, and receiving department employees work together in the packaging warehouse, which is devoted to the packaging and shipping of processed oil. (JA 820-22.) After processed oil enters the warehouse via a pipeline, some of the packaging department's 22 employees first operate machines that adjust the oil's viscosity. (JA 820; 355, 424-25.) Packaging employees known as votators do the same thing to unprocessed oil, and then send it back to the terminal department through a pipeline, communicating with the terminal department about the transfer by phone. (JA 821; 425-26, 467-68.) Other packaging employees place containers on a conveyor, where they are filled with oil and then transported via forklift to a storage area for further handling by the shipping employees. (JA 820; 410, 416-19, 424-25.) To prevent an employee's

absence from affecting production, the packaging department employs relievers who can take the place of other packaging employees. (JA 820; 410.)

After packaging employees finish their tasks, shipping department employees load the packaged oil onto trucks. (JA 821; 436.) The nine employees in this department include individuals whose job is to schedule and check in trucks upon arrival. (JA 821; 355, 440-44.)

Receiving department employees also work in the warehouse. Of the four employed in that department, one coordinates the purchase of materials used by the packaging department, and the other three use a forklift to unload the packaging materials and store them in the warehouse. (JA 821; 355, 433-35.)

The receiving department's work leads to frequent interchange with the packaging department. (JA 820-22.) For instance, a receiving employee occasionally assists packaging employees with a packaging line, and a packaging employee often assists the receiving department with unloading materials from trucks. (JA 821, 825; 418, 435.) Additionally, the Company once transferred a packaging employee to the receiving department without prior notice. (JA 825; 583-84.)

In addition to the packaging, shipping, and receiving employees' common purpose and shared location, employees in all three departments have similar wage rates and earn the same benefits. (JA 822; 502-03.) They also share a history of

common supervision separate from that of employees on the other side of the plant. (826; 454-55.) Additionally, the Company tasked a single individual with training employees in packaging, shipping, and receiving to use a new computer system. (JA 822; 562-64.)

Due to their close proximity and common purpose, employees in the packaging, shipping, and receiving departments know each other personally and frequently interact. (JA 825; 528-29.) For example, although there are break rooms on both sides of the plant, packaging, shipping, and receiving employees only use the one in the packaging warehouse. (JA 825; 600-02.) Similarly, those employees park and enter the plant on the warehouse side. (JA 825; 481-84.) In addition, because the plant is split into two sides, and employees based in the warehouse work together on the common goal of packaging and shipping the product, they rarely interact with employees who work on the other side. (JA 818-20; 528, 565-67.)

II. THE BOARD PROCEEDINGS

A. The Regional Director Denies the Company's Motion to Dismiss the Petition, and Finds that the Petitioned-for Unit Is an Appropriate Unit; the Board Denies the Company's Request for Review

On September 16, 2014, the Union filed a petition with the Board (Case No. 21-RC-136849) seeking an election to become the bargaining representative of all “full-time and regular part-time packaging, shipping and receiving employees” at

the Company's Fullerton facility. (JA 811, 1981; 17, 271.) The petition excluded all "other employees, maintenance employees, terminal employees, quality-control employees, staffing agency employees, office clerical employees, guards and supervisors as defined in the Act." (JA 811, 1981; 16-17, 271.)

On September 24, 2014, the Company filed a motion to dismiss the instant petition with prejudice, contending that it was identical to the unit sought in a previous case (Case No. 21-RC-133636). (JA 815-16; 777-785, 874.) In the earlier case, unlike the instant one, the Union's petition explicitly excluded packaging and shipping leads from the proposed unit; the Union claimed they were supervisors. (JA 815-16; 351.) Rejecting that claim, the Board's Regional Director found that because the leads were statutory employees, they could not be excluded, and therefore that the unit petitioned for in Case No. 21-RC-13336 was not appropriate. (JA 206-08, 815-16; 280-93.) Because the Union did not at the time wish to proceed to an election in a unit that included the leads, the Regional Director dismissed that petition without deciding whether an alternative unit would be appropriate. (JA 206-09, 815-16; 282-83.)

On September 26, 2014, the Regional Director denied the Company's motion to dismiss the petition in the instant case. (JA 206-09.) In so ruling, the Regional Director emphasized that the new petition was not identical to the prior petition because the new one included the leads. (JA 208-09; 16-17, 351.) She

also noted that the parties in the instant case did not seek to re-hear or reopen the record in the earlier case, which was no longer pending before the Board. (JA 208.) Additionally, she noted that under its Rules and Regulations, the Board does not dismiss petitions with prejudice. (JA 208.) Finally, she noted that neither the Rules and Regulations nor the Casehandling Manual prohibited the Union from filing the instant petition following dismissal of the prior one. (JA 208-09.)²

On October 29, the Regional Director issued a Decision and Direction of Election, affirming her denial of the Company's motion to dismiss, and her finding in the earlier case that the leads are statutory employees. Additionally, the Regional Director found that the petitioned-for unit constituted an appropriate unit for collective bargaining. (JA 812-13, 815-27.) In so ruling, she applied the standard clarified by the Board in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). (JA 823-25.) Consistent with *Specialty Healthcare*, the Regional Director first determined that the packaging, shipping, and receiving employees are readily identifiable as a group and share a community of interest, and therefore that they constitute an appropriate unit. (JA

² On October 1, 2014, the Company filed a request for special permission to appeal the Regional Director's denial of the motion to dismiss. (JA 1162.) The Executive Secretary informed the Company that Board procedures did not allow a party to appeal the Regional Director's pre-hearing ruling directly to the Board, and that the Board could consider the issue through a request for review of any subsequent, post-hearing decision issued by the Regional Director. (JA 1162.)

825.) Next, applying the second step of *Specialty Healthcare*, the Regional Director considered but rejected the Company's contention that the excluded terminal, quality-control, and maintenance employees shared an overwhelming community of interest with employees in the petitioned-for unit. (JA 825-26.)

The Company requested review of the Regional Director's decision, again alleging that the unit must include the terminal, quality-control, and maintenance employees, and that the Union's petition should have been dismissed with prejudice. (JA 1148; 831-50.) On December 3, 2014, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) denied the request, finding that the Company had raised no substantial issues warranting review. (JA 1149.)

B. Following the Election, the Company Files Objections, which the Regional Director Overrules; the Board Adopts Her Findings; the Union Is Certified

On December 4, 2014, the Regional Director conducted a secret-ballot election for the unit of packaging, shipping, and receiving employees, with one voting session in the morning and one in the afternoon. (JA 827, 1893; 147.) A tally of the ballots showed 14 votes for the Union, 14 votes against the Union, and three challenged ballots, which was sufficient to affect the election results. (JA 1893-94; 1150.)

The Company filed five objections to the election. (JA 1151-60.) Objection 1 reiterated the Company's claim that the Board should have dismissed the

Union's petition. (JA 1151.) Objection 2 alleged that the Union threatened employees, while Objections 3 and 4 alleged electioneering by the Union and its supporters. (JA 1152.) Objection 5 alleged that pro-union employees "engaged in a loud demonstration just outside the polling room while waiting in line to vote," which the Board agent did not investigate or stop. (JA 1152.)

Thereafter, the Regional Director issued a Supplemental Decision and Order directing a hearing on Objections 2 through 5 as well as the challenged ballots. (JA 1155.) In her order, she also overruled Objection 1 without a hearing, explaining that the Board had previously rejected the Company's argument. (JA 1160-64.)³

At the hearing on the remaining objections, the Company's election observer, Donna Teucher, testified that employees who intended to vote stood in line in a hallway and entered a conference room to vote one at a time. (JA 1918; 103-05.) The Board agent and the election observers appointed by the Company and the Union sat inside the conference room, with the door closed except when employees entered or left the room. (JA 1918; 105-06, 120-21.) Teuscher also testified that while seated inside the conference room, she could hear employees talking in Spanish on the other side of the closed door, but could not understand

³ Thereafter, the Company filed a request for the Board to review the Regional Director's decision to overrule the first objection without a hearing, which the Board denied on June 24, 2015, finding that the Company had not raised any substantial issues warranting review. (JA 1527-47, 1932.)

them because she does not speak Spanish. (JA 1918; 106.) She further testified that when she asked the Board agent about the noise, the agent said it was “fine” and “no problem.” (JA 1918; 106.) The Union’s observer, Israel Ramirez, also testified. He said that although he spoke Spanish, he could not understand what the employees were saying through the closed door. (JA 1919; 179-81.) He added that he did not recall Teuscher asking the Board agent about the noise. (JA 1919; 179-81.)

In addition, two employees who voted in the morning session testified about their experiences in line. (JA 1919-20.) Jamie Sedano testified that some Spanish-speaking employees were chanting “yes we can” and said curse words while in line. (JA 1919; 148-49.) He added that some employees in line booed a coworker who had just left the polling room; upon being booed, the voter “kind of smiled” and appeared embarrassed. (JA 1919; 151-52.) Sedano knew that the coworker had planned to vote no, but he was uncertain whether that was why other employees were booing. (JA 1919; 150-52.) Employee Josh Ennulat testified that the employees waiting in line were loud because they were speaking to each other over the noise from nearby machines. (JA 1919; 170-71.) He also testified that he did not hear other employees discuss how they were going to vote, and did not hear any booing. (JA 1919-20; 163.)

On March 25, following the hearing, the Region's Hearing Officer issued a Report on Challenged Ballots and Objections, recommending that the challenged ballots be opened and counted, and that the Company's remaining objections (numbers 2 through 5) be overruled. (JA 1892-1927.) In overruling the Company's fifth objection, which alleged that employees engaged in loud conversations that the Board agent did not investigate, the Hearing Officer found that even if she were to credit the testimony of company witnesses, which conflicted with Ramirez and Ennulat's testimony, the alleged conduct did not warrant setting aside the election. (JA 1922.) As she noted, there was no evidence that those waiting in line outside the conference room said or did anything to persuade employees to vote for the Union. (JA 1923.) She further noted that, at most, the loud and boisterous behavior lasted 15 minutes and was observed by only 10-15 employees. (JA 1923.) As for the employees who booed a voter and chanted "yes we can," she noted that their conduct was isolated and brief in nature, and the actions were unaccompanied by threats or physical violence. (JA 1923.) Accordingly, the Hearing Officer concluded that the Company had failed to meet its burden of showing that the employees created an atmosphere of fear and reprisal that would render a free election impossible. (JA 1923, citing *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)). She also found that "it logically follows" from the lack of objectionable conduct by employees that the Board agent

also did not engage in objectionable conduct by declining to investigate or stop the employees' conduct. (JA 1924 n.14.)

Thereafter, the Company filed an exception to the Hearing Officer's overruling of its fifth objection, but it did not except to her other rulings. (JA 1930.) On September 30, the Board issued a Decision and Direction, adopting the Hearing Officer's overruling of the ballot challenges and Objections 2 through 4 in the absence of exceptions. (JA 1933-34 n.2.) In its Decision and Direction, the Board also adopted the Hearing Officer's recommendation to overrule Objection 5, agreeing that the employee conduct did "not so substantially impair[] the employees' exercise of free choice as to require the election to be set aside." (JA 1933-34 n.2 (internal citations omitted).)

On October 8, the Regional Director opened and counted the challenged ballots and issued a revised tally showing 16 votes for the Union and 15 votes against it. (JA 1981; 1935.) Accordingly, on October 22, she issued a certification of representative, certifying the Union as the collective-bargaining representative of a unit of packaging, shipping, and receiving employees at the Company's Fullerton facility. (JA 1981; 1936-37.)

C. The Unfair Labor Practice Proceeding

Following the Union's certification, the Company refused its requests to bargain. (JA 1981; 1970-78.) Based on a charge filed by the Union, the General

Counsel issued a complaint alleging that the Company had unlawfully refused to recognize and bargain with the Union. (JA 1980; 1942-50.) Thereafter, the General Counsel filed a Motion for Summary Judgment and Notice to Show Cause why the Board should not grant its motion. (JA 1980; 1958-69.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On February 4, 2016, the Board (Chairman Pearce and Members Miscimarra and Hirozawa) issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (JA 1981-82.) The Board concluded that all representation issues raised by the Company in the unfair-labor-practice proceeding were, or could have been, litigated in the underlying representation proceeding, and that the Company neither offered any newly discovered or previously unavailable evidence. (JA 1981.) The Board also noted that the Company did not allege the existence of any special circumstances that would require the Board to reexamine its decision to certify the Union. (JA 1981.)

The Board's Order requires the Company to cease and desist from refusing to recognize and bargain with the Union, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 1982.) Affirmatively, the

Board's Order directs the Company, on request, to bargain with the Union, to embody any resulting understanding in a signed agreement, and to post remedial notice. (JA 1982-83.)

SUMMARY OF ARGUMENT

The Company admittedly refused to recognize and bargain with the Union in order to contest the Union's certification. Contrary to the Company's arguments, the Board acted well within its broad discretion in rejecting those challenges. Accordingly, the Company's refusal violated Section 8(a)(5) and (1) of the Act.

First, the Board properly exercised its discretion in denying the Company's motion to dismiss the Union's petition with prejudice. The Company erroneously asserts that the Board's ruling contravenes the Board's Rules and Regulations, the Casehandling Manual, and precedent, but the cited provisions and cases are not on point. As the Board aptly noted, the Company failed to cite any rule, regulation, guidance, or Board decision requiring dismissal of the petition.

Contrary to the Company's further claim, the Board acted within its broad discretion in finding that the petitioned-for unit of packaging, shipping, and receiving department employees constituted an appropriate unit for collective bargaining. In so ruling, the Board appropriately applied the analytical framework set forth in *Specialty Healthcare*, which this Court approved in *FedEx*. Following that framework, the Board first found that the employees in the petitioned-for unit

are readily identifiable as a group and share a community of interest. The Company does not contest those findings, which are strongly supported by the record. After all, the petitioned-for unit tracks departmental lines drawn by the employer; the employees in those departments perform related job functions and their work is functionally integrated; they work in the same building, the packaging warehouse, and have frequent contact; and they share common supervision as well as the same benefits and similar wages.

To overcome the Board's finding that the petitioned-for unit is appropriate, the Company had the burden of showing, under *Specialty Healthcare*, that the terminal, quality-control, and maintenance department employees share an overwhelming community of interest with the included employees, such that there is no legitimate basis for excluding them. The Board reasonably found that the Company failed to meet its burden. Thus, the excluded employees work on the other side of the plant, which is separated from the packaging warehouse by a road and three lines of rail track. Moreover, they perform different job functions, taking in the oil and testing it, and repairing equipment. In addition, given their physical separation, their interactions with the unit employees are minimal at best. There is also little interchange between the two groups, and no history of common supervision. The few commonalities the Company identifies between included and excluded employees do not suffice to show that the two groups share an

overwhelming community of interest. Accordingly, the Board reasonably concluded that the proposed unit constitutes an appropriate unit for collective bargaining.

Finally, the Board acted within its broad discretion in overruling the Company's election objection, which alleged that some employees engaged in a "loud conversation" while waiting in line to vote, chanting "yes we can" and booing a coworker who had just voted, and that the Board agent should have investigated or ended their conversations. The Board reasonably found that even crediting the Company's witnesses, their testimony failed to establish that a "demonstration" occurred, and further that the Company failed to meet its heavy burden of showing third-party behavior that created a general atmosphere of fear and reprisal rendering a free election impossible. As the Board also correctly noted, this finding logically leads to the conclusion that the Board agent did not engage in misconduct by declining to end employees' conversations simply because they were boisterous.

ARGUMENT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees"

29 U.S.C. § 158(a)(5).⁴ Here, the Company has admittedly refused to bargain with the Union in order to test the Union’s certification. As we now show, the Company provides no basis for setting aside the certification. The Company therefore violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

I. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN DENYING THE COMPANY’S MOTION TO DISMISS THE INSTANT PETITION WITH PREJUDICE

A. Courts Afford the Board Wide Discretion in Processing Representation Cases

“The Board has a wide degree of discretion in establishing the procedure and safeguards necessary to insure the free and fair choice of bargaining representatives by employees.” *Warren Unilube, Inc. v. NLRB*, 690 F.3d 969, 974 (8th Cir. 2012); *accord NLRB v. Monark Boat Co.*, 800 F.2d 191, 193 (8th Cir. 1986); *Beaird-Poulan Div. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). Moreover, reviewing courts give “controlling weight to the Board’s interpretation” of its own rules and regulations unless it is “plainly erroneous or inconsistent with the regulation itself.” *Alldata Corp. v. NLRB*, 245 F.3d 803, 807 (D.C. Cir. 2001); *accord NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1125-26 (11th Cir. 2008).

⁴ An employer that violates Section 8(a)(5) also violates Section 8(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” 29 U.S.C. § 158(a)(1); *see NLRB v. Seedorff Masonry, Inc.*, 812 F.3d 1158, 1155 n.5 (8th Cir. 2016).

Further, when a party alleges that the Board failed to follow its own procedures in a representation case, courts review the Board's action "for abuse of discretion." *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015).

B. The Board Properly Denied the Company's Motion To Dismiss

As shown above (p.10), after the Regional Director found that the Union's first petition inappropriately excluded leads from the proposed unit because they are employees rather than supervisors, she dismissed the petition without deciding whether an alternative unit would be appropriate. (JA 815; 643-48.) The Union therefore had to decide whether to further litigate the leads' status by seeking Board review or moving for reconsideration or rehearing, or to pursue representation of a unit that included the leads. The Union opted for the latter course, and filed a new petition, seeking to represent a unit that included the leads. (JA 814; 16-17, 271.)

Nevertheless, the Company moved to dismiss the new petition with prejudice, asserting incorrectly that the unit sought in the new case was identical to the one sought in the first case. Based on that faulty premise, the Company argued that the new petition should be dismissed with prejudice. In so claiming, the Company relied on inapposite provisions of the Board's Rules and Regulations, as well as the Case Handling Manual, mistakenly arguing that they prohibited the Union from filing the new petition. (Br. 27-31, 33-35.) The Company also

contended—again relying on inapposite authority—that the new petition constituted an improper attempt to litigate issues piecemeal. (Br. 31-33.) As shown below, the Board—exercising its broad discretion over procedural matters in representation cases—reasonably adopted the Regional Director’s rejection of the Company’s claims, and denied the motion. (JA 206-09, 1149.)

To begin, in denying the Company’s motion the Board emphasized the Company’s complete failure to cite any rule or regulation requiring dismissal of the instant petition. (JA 208.) As the Board noted, nothing in its Rules and Regulations prevents a union from filing a new petition for a unit that is the same as or similar to one previously requested in a dismissed petition. (JA 208.) Contrary to the Company’s claim (Br. 27-28), this is so regardless of whether the new petition is filed during or after the period in which a request for review could have been filed in the first case. (JA 208.) And contrary to the Company’s related claim (Br. 22), no rule or regulation required the Union to seek Board review of the Regional Director’s order dismissing the first petition, or to ask for rehearing or reconsideration of that order. (JA 208.)

The Company likewise has no basis for asserting (Br. 27-29) that by filing a new petition in the instant case, the Union in effect was making an improper request for rehearing or reconsideration of its dismissed petition. (JA 208.) The new petition was simply that; it was not a request to reconsider the first petition.

Indeed, contrary to the Company's suggestion (Br. 29), the Regional Director's finding in the first representation case—that the leads are employees rather than supervisors—was not disturbed in the instant case, where the Union provided no evidence challenging their employee status. (JA 817.) As for the unit scope issue, it was decided in the instant case, not in the first case. (JA 815; 637-38.) In these circumstances, the Board correctly rejected the Company's assertion that inapposite rules regarding reconsideration and review mandated dismissal of the Union's second petition. (JA 208.)

As the Board further explained in rejecting the Company's contrary claim, nothing in the Representation Casehandling Manual prevented the Union from filing the instant petition. (JA 208-09.)⁵ Section 11011, which the Company mistakenly cites (Br. 33), addresses dismissal of a petition when a question concerning representation does not exist—for example, if “the unit sought is inappropriate.” Casehandling Manual (Part Two), Representation Proceedings § 11011 (2014). Section 11011, however, is inapplicable here because the unit sought in the second petition is (as the Board found) an appropriate unit. (JA 209, 815-16.) In suggesting otherwise, the Company labors under the false impression

⁵ In any event, the Manual, which was prepared by the General Counsel to provide guidance to Agency personnel, is not binding authority. NLRB Casehandling Manual (Part Two), Representation Proceedings, Purpose of the Manual (2014); *see also Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998).

that the unit sought here is the same as the one sought in the first petition (Br. 33), which was not appropriate because it excluded the leads. It is plain, however, that in her order dismissing the first petition, the Regional Director did not consider or rule on the appropriateness of a unit like the one petitioned for here, which sought to include the leads if they were found to be employees. (JA 637-38.) In short, because the petition in the first case sought a different unit from the one petitioned for here, it cannot be said that in the first case the Regional Director ruled on the appropriateness of the unit sought here. (JA 208-09; 637-38.)

The Company also errs in arguing (Br. 33-35) that the representation petition in the instant case should be dismissed with prejudice under Sections 11112.1 and 1118 of the Representation Casehandling Manual because it was filed less than six months after the first petition was dismissed. (JA 208.) As the Board explained in rejecting this argument, those provisions are inapplicable because they involve “prejudice as it applies to the *withdrawal* of a petition.” (JA 208, emphasis added.) Here, the Union’s first petition was dismissed by the Regional Director, not withdrawn by the Union. (JA 208; 638-38, 648.)

In any event, the purpose of the cited guideline is “to conserve the Agency’s resources by discouraging repetitive and duplicative findings.” Casehandling Manual § 11118. Here, the Board and the parties conserved resources by agreeing to use the transcript from the hearing in the first case, which addressed the

supervisory status and unit scope issues. (JA 1162; 21.) Further, no findings were repetitive or duplicative, because the Regional Director deferred to her original decision on the status of the leads and ruled on the unit scope only once, in the second proceeding. (JA 208-09; 637-38.)

Finally, the Company misses the mark in contending (Br. 31-33) that by filing the petition in the instant case, the Union was improperly attempting to litigate issues in a piecemeal fashion. (JA 208.) The Company mistakenly relies (Br. 31-33) on the narrow rulings in *Peyton Packing Co.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Co.*, 200 NLRB 992 (1972), which only apply to cases involving unfair labor practices, not representation proceedings. (JA 208.) In citing those cases, the Company forgets that the Board has long limited their application. Thus, as the Board made clear in *Service Employees Union, Local 87*, 324 NLRB 774 (1997), the earlier rulings only govern “the specific circumstances” presented there, “where the General Counsel has attempted to twice litigate the same act or conduct as a violation of different sections of the act, or to litigate the same [unfair labor practice] charges in different cases.” *Id.* at 775.

This narrow rule does not apply to representation proceedings, because such an application would “improperly interfere” with the ability of employees to pursue representation. *Id.* Here, the Union’s second petition gave employees an opportunity to vote for or against representation in an appropriate unit; permitting

the petition to proceed therefore furthered this public interest. *See NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953) (“The Board acts in the public interest and not in vindication of private rights.”). Thus, in denying the Company’s motion to dismiss the instant petition, the Board acted within its broad discretion over representation matters, thereby preserving the employees’ right to choose whether to be represented by the Union.

II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN DETERMINING THAT A UNIT OF PACKAGING, SHIPPING, AND RECEIVING EMPLOYEES CONSTITUTES AN APPROPRIATE UNIT FOR COLLECTIVE BARGAINING

A. Applicable Principles and Standard of Review

Section 9(a) of the Act provides that a union will be the exclusive bargaining representative if chosen “by the majority of the employees in a unit appropriate for” collective bargaining. 29 U.S.C. § 159(a). Section 9(b) authorizes the Board to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by th[e Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. § 159(b). Construing Section 9(b), the Supreme Court has stated that the determination of an appropriate unit “lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed.” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (internal quote marks and citation omitted); *accord FedEx*

Freight, Inc. v. NLRB, 816 F.3d 515, 521 (2016). Section 9(b), moreover, does not tell the Board how to decide whether a particular grouping of employees is appropriate. Accordingly, the Board’s selection of an appropriate unit “involves of necessity a large measure of informed discretion.” *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); accord *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1378 (8th Cir. 1975).

The Board has long recognized that there is nothing in the Act’s language requiring that the unit be “the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be ‘appropriate.’” *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950). The Supreme Court has agreed, stating that “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991); accord *FedEx*, 816 F.3d at 523 (if the Board “concludes that the petitioned for unit is ‘an appropriate unit,’ it has fulfilled the requirements of the Act and need not look to alternative units”).

As the Board clarified in *Specialty Healthcare*, 357 NLRB at 945-46, in determining whether the petitioned-for unit constitutes an appropriate unit, the Board asks whether the unit employees “are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar

factors)” and “share a community of interest.” In making its assessment regarding community of interest, the Board considers a number of relevant factors:

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

Id. at 942; *accord FedEx*, 816 F.3d at 522; *see also Mayflower Contract Servs., Inc. v. NLRB*, 982 F.2d 1221, 1226 (8th Cir. 1993) (listing similar factors).

Moreover, the Board’s “discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1217-18 (8th Cir. 1992).

As the Board further explained in *Specialty Healthcare*, 357 NLRB at 943-44, to overcome a finding that the unit is appropriate, an employer must do more than establish that another unit would be appropriate, or even more appropriate. Instead, the Company must show that the excluded employees share “an overwhelming community of interest” with those in the petitioned-for unit, such as there is no legitimate basis to exclude them. *Id.*; *accord FedEx*, 816 F.3d at 523-24; *Kindred*, 727 F.3d at 562. “[A] unit would be truly inappropriate if, for example, there were no legitimate basis upon which to exclude certain employees

from it.” *FedEx*, 816 F.3d at 525 (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008)); accord *Specialty*, 357 NLRB at 943.

Every court that has considered the standard clarified in *Specialty Healthcare*, including this Court, has approved it. See *FedEx Freight*, 816 F.3d at 521-26; accord *Macy’s Inc. v. NLRB*, ___ F.3d ___, 2016 WL 3124847 (5th Cir. 2016); *Nestle Dryer’s Ice Cream Co. v. NLRB*, ___ F.3d ___, 2016 WL 1638039 (4th Cir. 2016); *Kindred*, 727 F.3d at 554; see also *Blue Man Vegas*, 529 F.3d at 421-23 (applying a similar standard).

In its opening brief, the Company does not challenge the *Specialty Healthcare* standard and it has therefore waived such a claim. *Marksmeier v. Davie*, 622 F.3d 896, 902 n.4 (8th Cir. 2010) (citing Fed.R.App.P. 28(a)). The Company’s passing references (Br. 23, 36) to the *FedEx Freight* petition for panel rehearing and rehearing *en banc*, which this Court denied,⁶ hardly constitute a challenge to the *Specialty Healthcare* standard sufficient to save it from waiver. See *Anderson v. Durham D&M, LLC*, 606 F.3d 513, 515 n.2 (8th Cir. 2010) (considering claim waived where opening brief “made only passing reference” to issue); *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007) (“[P]oints not meaningfully argued in an opening brief are waived.”).

⁶ *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016), *reh’g and reh’g en banc denied* (May 26, 2016).

It is settled that “a reviewing court may not ‘displace the Board’s choice between two fairly conflicting views [as to what constitutes an appropriate unit in a given case], even though the court would justifiably have made a different choice had the matters been before it de novo.” *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1313 (8th Cir. 1981) (citation omitted); *accord Noranda Aluminum, Inc. v. NLRB*, 751 F.2d 268, 271 (8th Cir. 1984). Review of the Board’s unit certification “‘is limited to a determination of whether the decision is arbitrary, capricious, an abuse of discretion, or lacking in substantial evidentiary support.’” *FedEx*, 816 F.3d at 521 (quoting *NLRB v. St. Clair Die Casting, LLC*, 423 F.3d 843, 848 (8th Cir. 2005)); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (under 29 U.S.C. § 160(e), the Board’s findings of fact are “‘conclusive’” if supported by substantial evidence in the record considered as a whole); *Chemvet Laboratories, Inc. v. NLRB*, 497 F.2d 445, 449 (8th Cir. 1974) (same). Moreover, the Court must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted).

B. The Board Properly Found that the Packaging, Shipping, and Receiving Employees Are Readily Identifiable as a Group and Share a Community of Interest, so that They Constitute an Appropriate Unit

The Board reasonably applied its longstanding, judicially approved test to find that the petitioned-for unit of packaging, shipping, and receiving employees is appropriate for collective bargaining. To begin, the record evidence fully supports the Board's finding (JA 817-26, 1149) that those employees are readily identifiable as a group and share a community of interest, making them an appropriate bargaining unit. (JA 825.) Indeed, the Company does not challenge those findings.

In any event, it is plain that the petitioned-for unit of employees is "readily identifiable based on classification and function." *Macy's, Inc.*, 361 NLRB No. 4, 2014 WL 3613065, at *10 (2014), *enforced*, 2016 WL 3124847 (5th Cir. 2016). As the Board noted, the Company chose to track departmental lines by classifying the workers as packaging, shipping, and receiving employees, and to identify their job functions on that basis. (JA 824-25.) As the Board further noted, those employees are also readily identifiable because they are "clearly distinguishable" from other employees at the plant. (JA 824-25.) After all, in addition to working in departments and performing duties that differ from those of the excluded employees, they are located in a building that is physically separated from the rest of the plant by a road and three lines of rail track. (JA 824-25; 337, 554-56.)

The Board's further finding that the packaging, shipping, and receiving employees share a community of interest is likewise not subject to challenge. (JA 825.) Thus, in addition to working together in the same building, the packaging warehouse, they share the common goal of packaging and shipping processed oil. (JA 825.) Moreover, the receiving department's very purpose is to support the packaging and shipping departments, in that it purchases raw materials and supplies for that end. (JA 821, 825; 548-49.) The fact that only the employees in these three departments share this common goal underscores their community of interest. *See FedEx Freight*, 816 F.3d at 523. Indeed, the three departments are so intertwined that employees simply refer to their work area as "packaging." (JA 822; 554-56.)

It is also undisputed that packaging, shipping, and receiving employees share common supervision and training. The three departments currently have a single supervisor, as well as a history of common supervision. (JA 822-23, 825; 454-55, 480.) Additionally, the Company tasked one individual with training the packaging, shipping, and receiving department employees to use a new computer system. (JA 822; 562-64.)

Moreover, because the three departments have a shared purpose, employees in those departments frequently interchange jobs. (JA 825; 418, 583-84.) For example, one packaging employee often assists the receiving department with

unloading materials from trucks, and another packaging employee transferred to receiving without prior notice. (JA 825; 418, 583-84.)

In addition, because they work together in the same building, employees in the three departments know each other personally and frequently interact. (JA 825; 528-29, 551.) This daily interaction includes using the same break room and parking areas. (JA 825; 481-84, 600-02.) Further, employees within the three departments have similar wage rates and receive the same benefits. (JA 825; 503-04, 600.) These considerations strongly support the Board's unchallenged finding that the packaging, shipping, and receiving employees share a "distinct community of interest" and therefore constitute an appropriate unit. *See Mayflower Contract Servs.*, 982 F.2d at 1226.

C. The Company Failed To Show that the Terminal, Quality-Control, and Maintenance Employees Share an Overwhelming Community of Interest with the Packaging, Shipping, and Receiving Employees

It is well settled, as discussed above, that the Act requires only *an* appropriate unit. *Am. Hosp. Ass'n*, 499 U.S. at 610; *accord Arlington Hotel Co. v. NLRB*, 712 F.2d 333, 336 (8th Cir. 1983). It "follows inescapably" that simply demonstrating that another unit would also be appropriate "is not sufficient to demonstrate that the proposed unit is inappropriate." *Specialty Healthcare*, 357 NLRB at 943. Instead, to demonstrate that excluded employees share an overwhelming community of interest with those in the petitioned-for unit, the

employer “has the burden to show that there is no legitimate basis” for excluding them. *FedEx Freight*, 816 F.3d at 527. For instance, the Board has found that excluded employees share an overwhelming community of interest with unit employees where the petition arbitrarily sought to “fracture a unit” in a way that did “not track any lines drawn by the employer, such as classification, department or function.” *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011).

Consistent with these principles, the Board reasonably found that the Company failed to carry its burden of proving that the terminal, quality-control, and maintenance department employees share an overwhelming community of interest with the petitioned-for employees such that excluding those departments would render the unit inappropriate. (JA 825-26.) The packaging, shipping, and receiving employees possess major commonalities not shared with the terminal, quality-control, and maintenance employees; thus, any community of interest among employees of the entire plant is far from overwhelming. (JA 825-26.) Moreover, as the Board noted, employees in the petitioned-for unit are not arbitrarily fractured from the rest of the plant, as they track departmental lines and classifications, and share a common function—namely, the packaging and shipping of processed oil, rather than the unloading and testing of incoming oil or the maintenance of machinery. (JA 817-22, 826.)

Employees in the packaging, shipping, and receiving departments also have minimal interaction and interchange with other employees, given that they work in the packaging warehouse, which is separated from the rest of the plant by a road and three tracks of rail. (JA 820, 826; 337, 462-63.) Packaging, shipping, and receiving employees rarely go to the other side of the plant where the non-unit employees are based (JA 820-22, 826; 459-61, 573-74), and vice versa. (JA 818-20, 826; 528, 565-67.) Although some packaging employees occasionally bring samples to the lab and votate unprocessed oil for the terminal department, their communications with quality-control and terminal employees are minimal. (JA 818-819, 821; 425-26, 459-60.) As for maintenance employees, although, as the Company notes (Br. 19, 37), they perform maintenance on equipment in the packaging warehouse, they work under different supervision and only interact with other employees to the extent needed to facilitate repairs. (JA 819; 574-75.) Cf. *Nestle Dryer's*, 2016 WL 1638039, at *6 (upholding Board finding that maintenance employees did not share overwhelming community of interest with production employees, given the departments' different skills and functions).⁷

⁷ The Board has long noted that production and maintenance employees have communities of interest that are distinct from each other, regardless of how frequently they interact. See *Nestle Dryer's*, 2016 WL 1638039, at *6 (citing *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1020 (1994)). The same logic distinguishes maintenance workers from the employees included in the petitioned-for unit here.

The Board also found no meaningful interchange between the two sides of the plant. Thus, contrary to the Company's claim that packaging employees "regularly" transfer to terminal positions (Br. 37), in the five years preceding the petition, only three employees transferred from the packaging warehouse to the other side of the plant, and two of them may have been hired by a temporary agency. (JA 825-26; 466-67.) Moreover, during that time, no employees transferred into the packaging, shipping, and receiving departments from the other side of the plant. (JA 825-26; 466-67.) Thus, any interchange is one-sided at best. *See DTG Operations, Inc.*, 357 NLRB 2122, 2128 (2011) ("limited, one-way 'interchange' does not require" employees to be included in the unit).

Further underscoring the almost complete lack of interaction on the job, employees in the petitioned-for unit are physically separated from other employees not only by the fact that they work in a different building but also because they arrive at the plant through separate entrances and use different break rooms. (JA 822, 826; 481-84, 600-02.) Contrary to the Company (Br. 11-12), the mere fact that an employee can use any entrance or break rooms on either side of the plant (Br. 11-12) hardly renders a community of interest overwhelming. After all, the two sides of the plant are physically separate, and the employees' habits regarding entry and break room use track organizational "lines drawn by the employer." *Odwalla*, 357 NLRB at 1612. Thus, "several common sense logical distinctions

separate” the packaging, shipping, and receiving employees from the terminal, quality-control, and maintenance employees. *FedEx Freight*, 816 F.3d at 527.

Finally, with the exception of terminal employees, who were only recently given the same supervisor as employees in the petitioned-for unit, the excluded employees do not share common supervision with the unit. (JA 826; 454-55.) By contrast, historically the packaging, shipping, and receiving employees shared common supervision separate from that of the excluded employees. (JA 826; 454-55.)

The Company also misses the mark in asserting that “[e]mployees from all areas of the Plant attend the daily 10:00 a.m. production meeting.” (Br. 12.) Only two employees attend those meetings (JA 394, 398-99, 473); the other attendees are supervisors or temporary workers. (JA 116, 361-62, 398-99, 520, 533.) In any event, attendance at such meetings would hardly establish an overwhelming community of interest. *See Macy’s, Inc.*, 2014 WL 3613065, at *5.

Nor does the Company gain traction by noting (Br. 15) that two quality-control employees occasionally enter the packaging warehouse to escort a rabbi, collect paperwork, and inspect a packaging line. As the Board explained, they primarily work in the lab on the other side of the plant (JA 818-819; 394, 402-08), and rarely interact with packaging employees while in the warehouse (JA 818; 470, 528, 588). Given these distinctions, the Board properly found that any similarities

alleged by the Company fail to establish an almost complete overlap that the unit would fracture, and the Company thus failed to establish an overwhelming community of interest. (JA 826-27.) *See Macy's, Inc.*, 2014 WL 3613065, at *15; *accord Blue Man Vegas*, 529 F.3d at 421-22.

The cases cited by the Company (Br. 38-40) in a vain attempt to meet its burden predate *Specialty Healthcare*, and are inapposite because they fail to consider whether excluded employees share an “overwhelming community of interest” with the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at 934. Further, some of the cited cases involve entirely unrelated issues. Thus, the Company (Br. 38-40) mistakenly relies on inapposite cases like *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 117 (D.C. Cir. 1996), where the issue was whether a unit’s “historical status” could bind a successor employer to bargaining even though “the unit fails to conform reasonably well to Board standards of appropriateness.” Similarly, *NLRB v. Catherine McAuley Health Center*, 885 F.2d 341 (6th Cir. 1989), is also inapposite; the issue there was whether service and maintenance employees of one health center comprised a separate unit from employees at a different health center to which the former unit relocated after the employer integrated operations. *Id.* at 348.⁸ In short, none of the cited cases

⁸ *International Bedding Co.*, 356 NLRB 1336 (2011), is also not on point. There the Board rejected an employer’s claim that employees in petitioned-for unit lacked a mere community of interest. *Id.* at 1336-37.

recognize the employer's burden of meeting the "heightened standard" explained in *Specialty Healthcare*, which requires a showing that the excluded employees share an "overwhelming community of interest" with the petitioned-for unit.

FedEx Freight, 816 F.3d at 515.

III. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S ELECTION OBJECTION

A. Applicable Principles and Standard of Review

It is settled that in examining allegations of objectionable conduct by employees and other third parties, the Board will not overturn the election results unless the conduct created "an atmosphere of fear and reprisal such as to render free expression of choice impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *accord Millard Processing Servs., Inc. v. NLRB*, 2 F.3d 258, 261 (8th Cir. 1993); *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992). The Board sets a high bar for finding employee conduct objectionable because as third parties to the election, they generally lack the coercive power over potential voters that employers and unions can exercise. *Millard Processing Servs.*, 2 F.3d at 261; *accord Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997).

Moreover, it has long been recognized that "a 'certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election.'" *Deffenbaugh Indus.*, 122 F.3d at 586 (citing *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984)). "A representation election is often the climax of an

emotional, hard-fought campaign and it is unrealistic to expect parties to refrain totally from any and all types of electioneering in the vicinity of the polls.” *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118 (1982), *enforced* 703 F.2d 876 (5th Cir. 1983). Accordingly, instead of imposing a zero-tolerance rule on electioneering, the Board evaluates “whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set aside.” *Rheem Mfg. Co.*, 309 NLRB 459, 463 (1992) (citing *Southeastern Mills*, 227 NLRB 57, 58 (1976)). In making that judgment, the Board considers the nature and extent of the electioneering; whether it occurred contrary to the instructions of the Board agent, within a designated “no-electioneering” area, and/or near the polling place; and whether a party or nonparty to the election engaged in the conduct. *Boston Insulated Wire*, 259 NLRB at 1119; *see also Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 270 (D.C. Cir. 1998); *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1135, 1139 (7th Cir. 1987).

Congress has entrusted to the Board the task of deciding representation questions under the Act, and has given the Board a “wide degree of discretion” to establish the “safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord Warren Unilube*, 690 F.3d at 974. Moreover, in reviewing an election proceeding, “[t]here is a strong presumption that [the election] reflects the

employees' true desires regarding representation." *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d at 586. After all, "the conduct of representation elections is the very archetype of a purely administrative function, with no Quasi about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704, 706 (2d Cir. 1978). The party seeking to set aside a Board-supervised election therefore "carries a heavy burden" of demonstrating that the Board has abused its discretion. *Millard Processing Servs., Inc. v. NLRB*, 2 F.3d at 261. To meet that burden, the objecting party must "show by specific evidence not only that improprieties occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the election results." *Id.* (quoting *Beaird-Poulan Div. v. NLRB*, 649 F.2d at 592). This is a high burden: the Act "does not require the Board to treat employees as if they were bacteria on a petri dish that must be kept free of contamination." *NLRB v. Lovejoy Indus., Inc.*, 904 F.2d 397, 402 (7th Cir. 1990). Thus, laboratory conditions can exist even in a setting that "depart[s] from a perfectly neutral environment." *Certainfeed Corp. v. NLRB*, 714 F.2d 1042, 1063 (11th Cir. 1983) (quoting *NLRB v. Klinger Elec. Corp.*, 656 F.2d 76, 89 (5th Cir. 1981)).

B. The Company Failed To Meet Its Burden of Showing Employee Conduct that Created an Atmosphere of Fear and Reprisal that Would Render a Free Election Impossible

As the Hearing Officer noted, company witnesses testified that during the first 10 or 15 minutes of the first voting session, about 8 of the 10 to 15 employees waiting in line to vote outside the voting room shouted profanities, chanted “yes we can” in Spanish, and booed a coworker known to have voted against union representation. (JA 1918-19, 1933-34 n.2; 103-06, 148-52.) The witnesses also testified that the employees were loud and boisterous during that time, although the Company’s election observer, who was seated inside the voting room with the door shut, admitted that she could not understand what they were saying. (JA 1918-19; 106.) As the Board, adopting the Hearing Officer’s findings, reasonably concluded, even crediting this testimony, it did not establish conduct that would warrant setting aside the election results. (JA 1933-34 n.2.) Simply put, on this slender record, the Company failed to meet its heavy burden of showing that the alleged employee conduct created a general atmosphere of fear and reprisal that rendered free choice impossible. *Westwood Horizons Hotel*, 270 NLRB at 803; *accord Rheem Mfg. Co.*, 309 NLRB at 463.

To begin, “a loud outburst in the polling area by a nonagent, even involving a partisan message, does not rise to the level of objectionable third-party conduct.” *SNE Enterp., Inc.*, 344 NLRB 673, 681 (2005); *accord Rheem Mfg. Co.*, 309

NLRB at 463 (employees loudly encouraging coworkers to vote for union not objectionable). For instance, in *Hood Furniture Manufacturing Co.*, 297 NLRB No. 51 (1989), *enforced*, 941 F.2d 325 (5th Cir. 1991), the Board, with court approval, found that third party conduct failed to warrant setting aside the election where terminated employees approached former coworkers waiting in line to vote, and told them they “kn[e]w damn well the way” they were “supposed to vote.” *Id.* at 329. The conduct alleged by the Company is even less severe, as it consisted only of chanting and boisterous conversations rather than “targeting voters with last minute campaigning.” (JA 1923-24.) Indeed, the conduct was so insignificant that at least one voter waiting in line could not recall any of the alleged activity. (JA 1919; 163, 179-81.)

The Company gains no more ground in relying on testimony by one of its witnesses that employees waiting in line booed a coworker after he voted and left the conference room. (Br. 21.) As the witness testified, the coworker reacted by smiling, and the implications of the encounter were unclear. (JA 1923-24; 151-52.) Further, it is undisputed that the actual voting occurred inside the conference room behind closed doors, and the Company failed to show that anyone inside the room could hear what was being said outside. (JA 1923; 120, 179-81.) In addition, the Company failed to establish that the booing incident was anything more than brief and isolated, as the Hearing Officer found. (JA 1923-24.) Indeed,

as the Hearing Officer further noted, the alleged boisterousness occurred only during the first 10 to 15 minutes of the first polling session. (JA 1918, 1923; 106.) In these circumstances, the Board reasonably adopted the Hearing Officer's finding that the Company had failed to meet its burden of establishing third-party conduct that created a "general atmosphere of fear and reprisal rendering a free election impossible." (JA 1923, quoting *Westwood Horizons Hotel*, 270 NLRB at 803.)

The Company primarily responds to the Board's reasonable conclusion by latching on (Br. 46) to the Hearing Officer's apt observation that the "conduct was unaccompanied by threats or physical violence." (JA 1923.) The Company then devotes the remainder of its argument to noting that threats and violence are "not a prerequisite" to setting aside the election (Br. 46-50), even though the Board did not hold to the contrary here. The Company's argument misses the mark entirely. The Board and the Hearing Officer discussed *Westwood Horizons Hotel*, 270 NLRB 802 (1984), a case that happened to involve electioneering alongside overt threats of physical harm, because it is a lead decision that articulates the relevant standard for assessing third-party conduct. (JA 1921, 1924, 1934.) See p. 40 above. To be sure, the Board and the Hearing Officer factually distinguished *Westwood Horizons Hotel* on the ground that the conduct alleged here did not involve threats or violence. (JA 1924, 1934.) It is false logic, however, to conclude (as the Company incorrectly does) that because *Westwood* happened to

involve objectionable physical threats, anything short of such conduct must be *unobjectionable*.

The Company wastes additional ink (Br. 46-50) in relying on a litany of distinguishable cases that do not mandate a different result. All of them, save one, set aside elections based on the conduct of union agents, not third parties.⁹ The other case cited by the Company, *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988), is also distinguishable because there the Board set aside an election based on the “critical” factor that the third-party conduct occurred in a no-electioneering zone. *Id.* at 578-79. By contrast, as the Hearing Officer noted, the Company failed to show whether the Board agent had designated the hallway where employees waited to vote as a no-electioneering zone. (JA 1923 n.23.)

Finally, although the Company correctly notes (Br. 47) that the closeness of the election is a relevant factor, as the Board explained, close results “do[] not alter the objecting party’s burden to prove that there has been misconduct to warrant setting aside the election in the first instance.” (JA 1934 n.2, citing *Consumers*

⁹ See *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 442-46 (4th Cir. 2002) (setting aside election where union agents threatened job loss if employees voted against the union); *NLRB v. Mr. Porto*, 590 F.2d 637, 638-40 (6th Cir. 1978) (setting aside election where union adherents threatened violence with union representative present and where union representative placed nails on employer’s driveway); *Philips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991) (setting aside election where union organizers had an argument with the employer’s president in front of voters); *Athbro Precision Eng’g Corp.*, 166 NLRB 966, 966 (1967) (setting aside election where Board agent was seen drinking with a union representative before the election).

Energy Co., 337 NLRB 752, 752 n.2 (2002).) As the Board reasonably found, the Company failed to show misconduct. For this reason, the Company errs in relying (Br. 47-48) on cases like *Kentucky Tennessee Clay, Mr. Porto*, and *Athbro Precision Engineering*, which are distinguishable because, unlike the instant one, they involved party misconduct that was otherwise objectionable. See p. 46 n.9 above. The Board was therefore correct in determining that, “even taking the closeness of the election into account,” the alleged conduct “was not so disruptive or coercive that it substantially impaired the employees’ exercise of free choice.” (JA 1925.)

C. The Board Agent’s Failure To Investigate or Interrupt Employees Waiting in Line To Vote Did Not Raise a Reasonable Doubt as to the Fairness and Validity of the Election

It is settled that the Board will not set aside an election based on a Board agent’s actions unless “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” *Polymers*, 174 NLRB 282, 282 (1969); accord *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000); see also *NLRB v. Superior of Missouri, Inc.*, 351 F.3d 805, 809 (8th Cir. 2003) (party must show Board agent conduct “tends to destroy confidence in the Board’s election process, or . . . could reasonably be interpreted as impugning the election standards”) (quoting *Athbro Precision Eng’g Corp.*, 166 NLRB at 966). The Company made no such showing here.

The Company contends (Br. 44) that the election results should be set aside because the Board agent declined to stop employee conversations outside the voting area after the Company's observer inquired about the noise. As the Hearing Officer found, however, given the Company's complete failure to establish objectionable employee conduct, "it logically follows that the Board Agent[] did not engage in objectionable conduct by failing to investigate or end the conduct." (JA 1924.) *Accord Angelica Healthcare Servs. Grp.*, 280 NLRB 864 (1986), *enforced sub nom. Amalgamated Serv. and Allied Indus. Joint Bd. v. NLRB*, 815 F.2d 225, 231 (2d Cir. 1987) (the Board overruled objection alleging Board agent failed to prevent employees from chanting and union observers from talking with them; court agreed that "any disruption that occurred is insufficient to void the election, and the Board agent's decision to refrain from intervening . . . did not impugn the integrity of the election."); *see also Dumas Mfg. Co.*, 205 NLRB 919, 929 (1973) (overruling objection alleging improper conduct where Board agent allowed voters in line to talk freely among themselves).

Simply put, because there was no objectionable employee conduct, the Board agent could not have appeared to be compromising the Board's neutrality, and did not impugn the Board's election standards, by failing to halt the conduct. (JA 1924 n.14.) After all, the Company's observer testified that she merely brought some noise to the agent's attention; she admittedly could not even

understand what the employees were saying on the other side of the closed door. (JA 1918; 106.) In these circumstances, the Board did not abuse its discretion by refusing to overturn the election based on the Board agent declining to investigate noisy conduct that was unobjectionable.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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July 2016

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

CARGILL, INC.	*
	*
Petitioner/Cross-Respondent	*
	* Nos. 16-1565
v.	* 16-1930
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 21-CA-164025
Respondent/Cross-Petitioner	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,402 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

Board counsel certifies that the electronic version of its brief has been scanned for viruses using Symantec Endpoint Protection version 12.1.6.

According to that program, the brief is free of viruses.

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Dated at Washington, DC
this 5th day of July, 2016

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	*

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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