

Nos. 18-1958 & 18-1995

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

**AMERICAN MUNICIPAL POWER, 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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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to undisputed facts, and that argument therefore would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF JURISDICTION

This case is before the Court on the petition of American Municipal Power, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on August 14, 2018, and reported at 366 NLRB No. 160. (JA 1-3.)¹ The Board found that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by refusing to bargain with the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816 (“the Union”) as the duly certified collective-bargaining representative of employees at the Company’s Smithland, Kentucky facility. (JA 2.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction and venue is proper under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties and the Company transacts business in this judicial circuit.

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.

As the Order is based, in part, on findings made in an underlying representation proceeding, the record in that proceeding (Board Case No. 10-RC-213684) 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 ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

The Company filed its petition for review on August 24, 2018, and the Board filed its cross-application for enforcement on August 30, 2018. These filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether, in the underlying representation proceeding, the Board acted within its broad discretion in determining the description of an undisputedly appropriate bargaining unit comprised of the electrical workers with the job title of "Operators" who work at the Company's power generation facility in Smithland,

Kentucky. If so, the Board's finding in the subsequent unfair-labor-practice proceeding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the Operators' duly elected representative must be upheld.

STATEMENT OF THE CASE

It is well settled, under the Board's statutory authority to determine representation issues, that the Board's findings with regard to bargaining-unit determinations are matters that fall within its broad discretion because they "involve[] of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). In this case, it is undisputed that the Operators at the Company's Smithland facility constitute an appropriate bargaining unit. In refusing to bargain with the Union after those Operators voted unanimously for union representation in a Board-conducted, secret-ballot election, the Company challenges only the Board's description of the Smithland unit because the Board did not expressly note the exclusion of permanent employees from other company facilities who might possibly, at some future date, be temporarily assigned to the Smithland facility. The Board's findings relevant to this exceedingly narrow representation issue and the subsequent refusal to bargain are summarized below.

I. THE REPRESENTATION PROCEEDING

A. The Union Petitions To Represent a Unit of Operators at the Company's Smithland Facility; a Dispute Arises Over the Specificity of the Unit Description

The Company operates power generation facilities near dams, including the Smithland facility, which opened in May 2017. (JA 121; 32, 41.) Like the Company's other facilities, Smithland has its own dedicated staff of "Operators" who are electrical workers. (JA 121; 57-59, 76-77.) In January 2018, the Union filed a petition with the Board seeking to represent those Operators. (JA 119; 15-18.) The petition described the unit as consisting of "[a]ll full-time and regular part-time employees performing work" at the Company's Smithland facility, excluding "[o]ffice clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees." (JA 119; 115-18.)

There were eight employees in the petitioned-for unit of Smithland Operators. (JA 17, 25, 63, 92.) Although the parties agreed that the unit was an appropriate one and only those employees should be eligible to vote in an election,² the Company argued that the unit description should be worded to specifically note the exclusion of permanent employees from other facilities who might possibly, at

² An employee who is eligible to vote is necessarily included in the bargaining unit, making unit composition and voting eligibility "inseparable issues." *Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257 (7th Cir. 2003).

some future date, be temporarily assigned to Smithland for as-yet-to-be-determined periods of time. (JA 119; 16-21, 27, 33-34, 92, 98-100.)

At a hearing on the petition conducted before a hearing officer appointed by the Board's Regional Director, the Company acknowledged that it currently had no employees from other facilities temporarily assigned to Smithland, and that it lacked any current plans or schedule for any such assignments in the future. (JA 27; 49-50, 59-60.) Nevertheless, the Company claimed that the unit description should be modified to specifically note the exclusion of permanent employees from other facilities who might be temporarily assigned to Smithland in the future. (JA 121-22; 16-21, 98-99.) The Company based its request for a modified unit description on the fact that during Smithland's initial startup, before the facility became fully operational, the Company had occasionally assigned permanent employees from its Cannelton, Kentucky facility to work at Smithland.³ (JA 121; 34, 49-50, 73-74.)

³ Specifically, over a five-month period during the startup, the Company sent four Cannelton Operators to work at Smithland, with each typically serving there for one to four days. (JA 121; 46-50.) In addition, a fifth Operator, Joe Frakes, temporarily worked about five days a week at Smithland between June and October 2017, and thereafter one day a week until mid-January 2018. (JA 38, 42-45, 51, 59.) His job was to ensure "a smooth transition" and transfer of data from a retiring Smithland supervisor, and to assist with administrative tasks for a period after the supervisor retired. (JA 121-22; 39-40, 42, 45, 51.)

For its part, the Union took the position that the unit description was sufficient without the specific exclusion that the Company sought. (JA 34, 100.) The Union also suggested that if, in the future, the Company temporarily assigned employees from other facilities to Smithland, and a question arose regarding their eligibility to be included in the unit, the parties could resolve the matter through bargaining. (JA 34.)

B. The Regional Director Issues a Decision and Direction of Election, Finding that the Smithland Operators Constitute an Appropriate Unit, and Declining to Reword the Unit Description To Specifically Note the Exclusion of Employees Who Might Be Temporarily Assigned to Smithland in the Future

Following the hearing, the Regional Director issued a Decision and Direction of Election, finding that the petitioned-for unit was an appropriate one for the purpose of collective bargaining. (JA 119-27.) The Regional Director slightly modified the proposed unit description to identify the unit more clearly as including “[a]ll full-time and regular part-time Operator I and Operator II employees employed by [the Company] at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky.” (JA 120.) He also removed the Union’s proposed generic exclusion of “all other employees,” but retained language specifically noting certain established exclusions (of “office clerical employees, professional employees, confidential employees, guards, and supervisors”) pursuant to the Act and Board policy. (JA 120.)

The Regional Director, however, found it unnecessary for the unit description to address the status of any employees who might be temporarily assigned to Smithland at some future time because there were currently “no employees in that status” and, so far as the hearing testimony showed, the Company had “no scheduled plans for any employees from other facilities to perform temporary work assignments at the Smithland facility.” (JA 119, 122.)

As the Regional Director noted, omitting from the unit description any reference to the possibility of future temporary employees accords with Board precedent, which emphasizes the importance of present conditions—here, the absence of temporary employees or any definite plans to resume assigning such employees to Smithland—in determining unit placement issues. (JA 123, citing *Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844, 844 (1993).) As an illustration of the emphasis on present conditions, the Regional Director noted that the Board has dismissed representation petitions where there were “no actual employees within the classification” to which the petition referred. (JA 123.) *See, e.g., Milwaukee Children’s Hosp.*, 255 NLRB 1009, 1013 n.9 (1981) (finding it unnecessary to address the “unit eligibility” of two nursing positions “[b]ecause th[o]se positions were vacant at the time of the representation hearing”).

In delineating the unit, the Regional Director also distinguished two cases—*Indiana Bottled Gas Company*, 128 NLRB 1441 (1960), and *F.W. Woolworth*

Company, 119 NLRB 480 (1957)—where the Board had found it appropriate to specifically note in the unit description that the unit excluded temporary employees. (JA 99, 122-23.) As the Regional Director explained, in those cases, unlike the present one, the employers had “consistently hired temporary or ‘intermittent’ employees during their busy seasons and thus it made sense in those cases to settle the[] status” of such employees, “notwithstanding that the employer[s] had no such employees at the time of the hearing.” (JA 123.) The Regional Director also noted that unlike the cited cases, which involved “truly ephemeral employees,” any putative temporary workers here would be “actual permanent employees of the [Company]” at a different location. (JA 123.)

The Regional Director added that it made practical sense to leave non-Smithland employees out of the unit description. As the Regional Director explained, doing so would give the parties room “to adjust their unit description by negotiation, if they wish, in the event the [Company] begins to assign such employees to Smithland.” (JA 123.)

C. The Board Denies the Company’s Request for Review, Finding It Unnecessary To Modify the Unit Description Approved by the Regional Director; the Smithland Operators Unanimously Vote for Union Representation; the Board Certifies the Union

The Company sought Board review of the Regional Director’s Decision and Direction of Election, challenging his wording of the unit description because it did

not expressly note the exclusion of permanent employees from other facilities who might be temporarily assigned to Smithland in the future. (JA 1 n.2, 143; 131-42.) The Company also took issue with the Regional Director's failure to at least accept the more generic language excluding "all other employees" from the unit. (JA 143 n.1; 139.)

On May 31, 2018, the Board (Members Pearce, Kaplan, and Emanuel) denied the Company's request for review, finding that the Company had failed to raise any substantial issue warranting review, see 29 C.F.R. § 102.67(d), and making minor adjustments to the Regional Director's analysis. (JA 143.) In particular, the Board clarified that as a matter of law, employees who are only temporarily assigned to a unit facility are excluded from the unit as temporary employees, notwithstanding their status as permanent employees at a non-unit facility. (JA 143 n.1, citing *Marian Medical Center*, 339 NLRB 127, 128-29 (2003).) The Board also noted that if a question were to arise in the future regarding the unit placement of any temporary assignees, the Company might be able to resolve the issue through the Board's unit-clarification procedure. (JA 143 n.1.) Finally, the Board found it unnecessary to modify the Regional Director's decision to omit a generic exclusion of "all other employees" from the unit description, as "the absence of this phrase does not render the unit inappropriate and did not affect the [voting] eligibility of any employees." (JA 143 n.1.)

Thereafter, the Board conducted a secret-ballot election among the bargaining-unit employees, who voted unanimously for union representation. (JA 1; 128.) Accordingly, on March 6, 2018, the Board certified the Union as the exclusive collective-bargaining representative of the unit of Operators at the Smithland facility. (JA 1; 129.)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

On April 10 and May 14, 2018, the Union requested, by letter, that the Company recognize and bargain with it as the exclusive collective-bargaining representative of the Smithland Operators. (JA 2; 144-52.) The Company did not respond. (JA 2; 112-13.) Thereafter, acting on an unfair-labor-practice charge filed by the Union, the Regional Director issued a complaint alleging that the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (JA 1; 153-58.) In its answer to the complaint, the Company admitted its refusal, but claimed that it had no duty to bargain because the unit, as described in the certification, was inappropriate. (JA 1; 156, 159-60.)

The General Counsel subsequently filed a motion for summary judgment, and the Board issued a notice to show cause. (JA 1; 111-14, 164.) The Company opposed the motion, reiterating the position taken in its answer, that it had no duty to recognize and bargain with the Union. (JA 1; 164.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 14, 2018, the Board (Members Pearce, Kaplan, and Emanuel) 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 1-3.) 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, nor alleged the existence of any special circumstances, that would require the Board to reexamine its decision to certify the Union. (JA 1.)

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 2.) 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 a remedial notice. (JA 2.)

SUMMARY OF ARGUMENT

Although the Company professes to challenge the Board's designation of the appropriate bargaining unit, there is in fact no dispute that the unit here—consisting of the Company's Smithland Operators—is an appropriate unit. Thus, in the proceedings below, the Company acknowledged that the eight Operators employed at Smithland were eligible to vote in the underlying representation election, which the Union won by a unanimous vote. The Company's only quarrel is with the description of this undisputedly appropriate unit. Contrary to the Company's claims, however, the Board did not abuse its broad discretion in leaving out of the unit description any reference to permanent employees at other company facilities who might be temporarily assigned to Smithland at some undetermined point in the future.

As the Board found, employees who are only assigned to a unit facility to fulfill a temporary or finite need—whether permanent employees at another facility or not—are deemed temporary employees and excluded from the unit on that basis as a matter of law. Thus, the Company is wrong in arguing that the unit description here implicitly permits inclusion of hypothetical employees from other facilities who might be temporarily assigned to Smithland to address short-term contingencies, such as a planned outage requiring additional staff.

Further, it was entirely appropriate for the Board to base the wording of the unit description on present conditions, rather than hypothetical future conditions. Accordingly, in finding that a specific exclusion of non-Smithland employees was unwarranted, the Board reasonably took into account the absence of any temporary assignees at Smithland, and the lack of any definite plans to make temporary assignments there. Moreover, because there were no temporary assignees at Smithland, nor any scheduled plans to make temporary assignments there, this case is plainly distinguishable from *Indiana Bottled Gas* and *F.W. Woolworth*, on which the Company relies. In those cases, unlike here, the facts established that the employers would hire temporary employees on a predictable and recurring schedule, making it sensible to specifically address the status of those employees in the unit description.

Because the Company has failed to show that the Board acted beyond its discretion in wording the unit description as it did, it has no basis for refusing to bargain with the Union as the duly elected and certified representative of employees in that unit. Accordingly, the Board is entitled to enforcement of its order requiring the Company to bargain.

ARGUMENT**THE BOARD ACTED WELL WITHIN ITS BROAD DISCRETION IN DESCRIBING A PLAINLY APPROPRIATE BARGAINING UNIT, AND THE COMPANY THEREFORE VIOLATED THE ACT BY REFUSING TO BARGAIN**

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 obtain judicial review of the Board’s unit determination. *See Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139 (1971); *Twin City Hosp. Corp. v. NLRB*, 889 F.2d 1557, 1559 n.2 (6th Cir. 1989). The Company does not seriously dispute the appropriateness of the unit. Instead, it quarrels with the Board’s description of that unit, asserting that it should expressly exclude Operators who are permanently employed at other company facilities but might be temporarily assigned to Smithland.

There is no dispute that if the Board certified an appropriate unit for collective bargaining and properly exercised its discretion in describing that unit, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain

⁴ An employer who 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 Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

with the Union as the elected representative of that unit. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 152 (1941); *accord Union Sav. & Trust Co. v. NLRB*, 643 F.2d 1249, 1251 (6th Cir. 1981). Accordingly, the sole issue before the Court is whether the Board acted within its “wide discretion to delineate the bargaining unit.” *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 554 (6th Cir. 2013) (internal quotation marks and citation omitted).

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).

By its plain terms, Section 9(b) leaves the Board to determine whether a given grouping of employees is appropriate. Moreover, because the Act does not favor any particular unit composition or suggest how the Board should determine appropriateness, the Board’s designation 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) (noting that “[t]he issue as to what unit is

appropriate for bargaining is one for which no absolute rule of law is laid down by statute”).

As the Supreme Court has observed, the Board does not exercise its discretion in this area “aimlessly.” *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). The starting point for the Board’s analysis is the unit for which the petition has been filed because, under Section 9(a) of the Act, “the initiative in selecting an appropriate unit resides with the employees.” *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991); *see also Overnite Transp. Co.*, 325 NLRB 612, 614 (1998) (noting that the “petition, which must according to the statutory scheme and the Board’s Rules and Regulations be for a particular unit, necessarily drives the Board’s unit determination”).

In evaluating the petitioned-for grouping, the Board focuses its inquiry on whether the employees share a “similarity of function and skills [that] create a community of interest.” *Int’l Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 703 n.15 (D.C. Cir. 1987) (citation omitted). Likewise, this Court “follow(s) the community of interest test in evaluating the appropriateness of a unit determination.” *Bry-Fern Care Ctr. v. NLRB*, 21 F.3d 706, 709 (6th Cir. 1994); *accord NLRB v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012) (listing factors commonly considered to establish community of interest). As this Court has recognized, however, “[o]ften there will be a range of appropriate units, and

the Board is not required to select the *most* appropriate unit.” *ADT Sec. Servs.*, 689 F.3d at 633 (internal quotation marks and citations omitted).

The scope of review of a Board unit determination is exceedingly narrow. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *NLRB v. American Seaway Foods, Inc.*, 702 F.2d 630, 632 (6th Cir. 1983). “The Board’s ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion.” *ADT Sec. Servs.*, 689 F.3d at 634. Inasmuch as the Board’s unit determination depends on facts, the Court is “constrained to uphold the Board’s determination if it is supported by substantial evidence in the record.” *NLRB v. American Printers & Lithographers*, 820 F.2d 878, 881 (7th Cir. 1987); *see* 29 U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. 474, 477 (1951); *Dayton Newspapers v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005). Accordingly, the Board’s certification of an appropriate bargaining unit, “if not final, is rarely to be disturbed.” *South Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs, AFL-CIO*, 425 U.S. 800, 805 (1976) (internal quotation marks and citation omitted).

B. The Board Did Not Abuse Its Discretion in Describing an Appropriate Unit Limited to the Smithland Operators

The Company does not question the Board’s finding that the eight Smithland Operators were the only employees eligible to vote in the election, nor does it

seriously dispute the Board's companion finding that those Operators share a community of interest and therefore constitute an appropriate bargaining unit. Instead, the Company merely quibbles with the Board's *description* of a plainly appropriate unit. The Company argues that the unit description should specifically note the exclusion of Operators permanently employed at other facilities who might possibly be given temporary assignments at Smithland at some as-yet-to-be-determined future time. As explained below, the Board's unit description is entirely reasonable and consistent with settled law and practice. The Board specifically identified the Operators included in the single-facility bargaining unit at issue and declined to add special exclusionary language because the record failed to establish a need for it.

1. The Board's unit description reasonably identifies the employees included in the unit

Consistent with its finding, which is essentially unchallenged, that the petitioned-for Smithland Operators constitute an appropriate unit, the Board described the bargaining unit as including “[a]ll full-time and regular part-time Operator I and Operator II employees employed by [the Company] at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky.” (JA 120.) In so stating, the Board hewed to its standard practice of describing the unit in terms of all full-time and regular part-time employees in the classifications, and at the locations, where employees have been found to share a community of interest.

See, e.g., Eagle Ray Elec. Co., 355 NLRB 589 (2010) (certified unit of “[a]ll full-time and regular part-time” electrical workers at specified employer facility); *Eastern Natural Gas Co.*, 330 NLRB No. 143 (2000) (same; service employees); *Data Printer Corp.*, 224 NLRB 682 (1976) (same; production and maintenance employees). The Board also added specificity to the unit description in the petition, by identifying the unit, not in terms of those who are “performing work at” the Smithland facility, but in terms of those who are “employed by [the Company] at” the Smithland facility in one of two Operator classifications. (JA 119-20.)

Notwithstanding the clear and standard language used by the Board to describe an indisputably appropriate unit of Smithland Operators, the Company makes a baseless assertion that the unit “on its face includes Non-Smithland Operators temporarily assigned to Smithland,” and is inappropriate for that reason. (Br. 16.) But as the Company acknowledged at the hearing, the petitioned-for unit, which consists of the Smithland Operators who voted in the election, is an appropriate one. (JA 19-20, 27, 33-34, 92.) Moreover, the Company fails to explain how employees who might be sent from other facilities on assignments that would admittedly be temporary could possibly enter into a unit that specifically includes only “full-time and regular part-time” Operators “employed by [the

Company] at its facility located at 1297 Smithland Dam Road, Smithland, Kentucky.” (JA 120. *See also* Br. 4-5, 7.)

Moreover, the Company utterly fails to square its reading of the unit description with the background law that must inform any reading of the terms that the Board used to describe the unit. “The Board has long applied a general rule that temporary, seasonal, or contingent employees are not part of a unit comprised of regular and part-time employees.” *B B & L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995). The exclusion of temporary workers is based on the broadly accepted recognition that “a worker whose anticipated tenure is short and definite is unlikely to share a community of interests with regular permanent workers.” *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1434 (2d Cir. 1996). Thus, along with the Board, the “courts generally deem [such] temporary employees ‘ineligible to be included in the bargaining unit.’” *Id.* (quoting *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982)).

The Board excludes from the unit temporary employees who are hired for a limited duration, or who lack a substantial expectation of continued employment. *See Marian Med. Ctr.*, 339 NLRB 127, 128 (2003). And as the Board emphasized in approving the Regional Director’s unit description here, “the Board will in fact exclude [from the unit] as temporary an otherwise-permanent employee who is only temporarily assigned to the facility at which an election is being conducted.”

(JA 143 n.1, citing *Marian Med. Ctr.*, 339 NLRB at 128-29.) Indeed, in *Marian Medical Center*, on which the Board relied in this case, the Board found an employee ineligible to vote in a representation election, notwithstanding his status as a permanent company employee, because his assignment to the unit facility “was at all times a temporary assignment . . . tied to [fulfillment of] specific conditions and events.” 339 NLRB at 129. The employee accordingly lacked a reasonable expectation of continued employment at the unit facility that could support a finding of community of interest with the unit employees.⁵

Given these settled principles, which necessarily limit what it means to be a “full-time or regular part-time” employee in a bargaining unit, the Company’s idiosyncratic reading of the unit description here—as possibly including employees who might later be temporarily assigned to Smithland—is untenable. As the Board noted, under settled law employees temporarily sent from other facilities to address short-term contingencies, “such as an operations issue requiring additional expertise” or employee illness, would not by virtue of those obviously limited

⁵ As the Board explained in *Marian Medical Center*, a temporary employee will be found to have a sufficient community of interest with unit employees to warrant inclusion in the unit “only” if he is placed at the unit facility for an indefinite period, or if his tenure at the unit facility is otherwise uncertain. *Id.* at 128 (citing cases); *see also NLRB v. New England Lithographic Co.*, 589 F.2d 29, 35-38 (1st Cir. 1978) (finding two temporary employees eligible to vote in representation election where their tenure was uncertain as of the election date).

assignments become members of the Smithland bargaining unit. (JA 122, 143 n.1.) The Company therefore fails to meet its heavy burden of showing that the Board abused its discretion in adopting a reasonable and standard unit description.

2. The Board reasonably found it unnecessary for the unit description to specifically note the exclusion of hypothetical temporary employees from other facilities, or other employees generally

Turning to the express exclusions from the unit, the Board reasonably limited those to just a few required by statute and Board policy.⁶ Thus, the unit description specifically notes that “office clerical employees, professional employees, confidential employees, guards, and supervisors as defined in the Act” are excluded from the unit. As the Board explained, it stopped with these standard exclusions because it perceived no need, on the record presented, for additional explicit exclusions. (JA 119-20, 122-23.)

In particular, the Board reasonably rejected the Company’s suggestion to adopt a unit description that explicitly excludes employees from other company facilities, because the Board found that there were no such employees working at

⁶ See generally NLRB Office of General Counsel, *An Outline of Law and Procedure in Representation Cases* (June 2017), §§ 17-500 (supervisors), 18-100 (professional employees), 18-200 (guards), 19-100 (confidential employees), 19-400 (office clerical employees), https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.

Smithland at the time of the hearing and the Company “acknowledged there was no current plan or schedule for any temporary assignments in the future.” (JA 121-22.) Thus, although the Company had initially made a handful of temporary assignments from Cannelton, they were limited to the 2017 startup of the Smithland facility, an event that would not be repeated. The Company gains no ground by noting the testimony of its Director of Hydroelectric Operations that it might make temporary assignments in the future. (Br. 21-22, citing JA 65-66.) His testimony, which merely suggests that the Company might possibly make temporary assignments at some undetermined time, does nothing to undermine the Board’s finding that, on the record here, the Company has “no scheduled plans for any employees from other facilities to perform temporary work assignments at the Smithland facility.” (JA 122.) Absent such plans, the Board reasonably found it unnecessary to include in the unit description language expressly excluding such hypothetical workers. After all, as explained above pp. 21-22, temporary workers whose tenure is finite would be excluded from the unit as a matter of law, and the record fails to show the terms, if any, on which the Company might possibly hire temporary workers in the future.

As the Board explained, moreover, the lack of any scheduled plans to place workers from other facilities at Smithland makes this case markedly different from *Indiana Bottled Gas Company*, 128 NLRB 1441 (1960), and *F.W. Woolworth*

Company, 119 NLRB 480 (1957), two cases on which the Company relied in arguing for unit-description language expressly excluding non-Smithland employees. In those cases, unlike the instant one, the record showed that the employers had a definite practice of hiring temporary employees on a seasonal or recurring basis. In that very different situation, it was appropriate for the Board to specifically note their exclusion in the unit description, so as to distinguish them from nominally temporary employees who might end up working for an indefinite period and thereby become eligible for inclusion in the unit. *See, e.g., MJM Studios of New York*, 336 NLRB 1255, 1257 (2001).

Thus, in *F.W. Woolworth*, the Board added a clause to the unit description specifically “exclud[ing] seasonal and intermittent or on-call employees,” because the employer had a practice of using those employees multiple times each year, and they performed the same work as unit employees, raising a natural question as to their unit placement. 119 NLRB at 484. Similarly, in *Indiana Bottled Gas*, the Board’s unit description specifically noted the “exclu[sion of] . . . temporary and casual employees,” where the employer regularly relied on such employees during a three-to-four-month busy season for periods of a week at a time. 128 NLRB at 1442-43 & n.4. By contrast, as the Board found in this case, there is no similar certainty of recurring temporary assignments that “compel[s] . . . settle[ment of

the] status of the [Company's] employees temporarily assigned to the Smithland facility.” (JA 123.)

Contrary to the Company claims, it was entirely appropriate and reasonable for the Board to base its wording of the unit description on the current conditions that obtain at the facility in question, rather than speculating about conditions that might arise in the future. (Br. 19-20.) *See Coca-Cola Bottling Co. of Wisconsin*, 310 NLRB 844, 844 (1993) (noting that the Board looks not to “abstract” possibilities but to “employees actually working to determine the composition of units”); *Milwaukee Children’s Hosp.*, 255 NLRB 1009, 1013 n.9 (1981) (finding it unnecessary to address the unit placement of two nursing classifications that were vacant as of the representation hearing). The Board rightly found no reason to definitively resolve the status of currently nonexistent temporary assignees to Smithland, given the overall absence of concrete information about them—for example, the duration and frequency of their assignments. *See also Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947) (“The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision.”).

Along the same lines, the Board reasonably found nothing in the record that compelled unit-description language generically excluding “all other employees” from the unit, given that the listing of included employees clearly delimited the

relevant boundaries: all full-time and regular part-time employees occupying the Operator I and Operator II classifications at the Smithland facility. To be sure, the parties agreed at the hearing to a generic exclusion of “all other employees.” (JA 17.) But as the Board found, “it remained the Regional Director’s decision whether to include such language.” (JA 143 n.1.) The Regional Director was in no way obliged to incorporate the parties’ verbiage where, as here, he had an independent obligation as an officer of the Board to define an appropriate unit based on his expert assessment of the situation presented.⁷ *See Am. Hosp. Ass’n*, 499 U.S. at 611 (Section 9(b) of the Act provides that “[t]he Board shall decide” the appropriate unit “in each case,” meaning wherever there is a dispute). The Regional Director determined that language specifically noting the exclusion of “all other employees” was not necessary here. And as the Board found, this discretionary choice in no way “render[ed] the unit inappropriate” or “affect[ed] the eligibility of any employees.” (JA 143 n.1.) On appeal, the Company does not challenge the Regional Director’s choice to omit from the unit description

⁷ The Board will forego its usual community-of-interest analysis and give effect to the parties’ preferred unit language only where, unlike the instant case, they have entered into a stipulated election agreement providing a complete and unambiguous description of the bargaining unit. *See McFarling Foods, Inc.*, 336 NLRB 1140, 1140 (2001). Even in such circumstances, the Board independently evaluates the parties’ unit description to ensure that it does not run counter to any provision of the Act or Board policy. *Id.*

language excluding “all other employees,” and accordingly it has failed to establish any error warranting reversal of the Board’s reasonable finding that the unit was appropriate without that language. *See Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2002) (challenge waived where not addressed in opening brief).

As the Board further found, to the extent that questions arise in the future regarding the unit placement of employees from other facilities—for example, if particular non-Smithland employees were to serve regularly at Smithland—the parties could resolve the status of those future employees by mutual agreement. (JA 123.) Indeed, this Court has recognized that bargaining is an available option where questions arise about unit scope. *See Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 902 (6th Cir. 1996) (noting that although a party cannot insist on bargaining over unit scope, the parties “may bargain about that subject by mutual consent”). Contrary to the Company’s defeatist view, moreover, the potential for fruitful bargaining is not negated simply because the Company cannot “compel” modifications to the scope of the bargaining unit through collective bargaining. (Br. 24-25.) Importantly, the Union in this case has already volunteered to negotiate over future unit placement questions surrounding temporary assignees to Smithland. (JA 121; 34.) Thus, the Company has no practical basis for its concern.

As the Board additionally noted, the parties also “may be able to resolve the unit placement of future temporary assignees, under the appropriate circumstances, through the unit-clarification process.” (JA 143 n.1, citing *Union Elec. Co.*, 217 NLRB 666, 667 (1975) (unit-clarification process is available where there are ambiguities regarding the unit placement of either newly established classifications or those that have undergone recent, substantial changes).) Here again, the Company reflexively rejects the Board’s suggestion, hyperbolically arguing that the Board is “forc[ing]” it to pursue litigation over an issue that the Board should resolve now. (Br. 27.) First, as explained above, the Board reasonably found that there is no present question regarding the unit placement of any temporary assignees to Smithland, both because there are no such assignees and because the Company failed to show any concrete plan of assignments that would even remotely create a question of unit placement. The Company, thus, is simply mistaken that there is a present question that the Board has improperly deferred to a future unit-clarification proceeding. Second, far from forcing litigation, the Board merely suggested unit clarification as an additional path that may be available *if* the parties are not able to resolve future unit placement issues between themselves.

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In sum, because the Board acted well within its discretion in describing a bargaining unit that is plainly appropriate, the Company is obligated to bargain with the Union as the duly certified representative of that unit. The Company's admitted refusal to bargain therefore violates Section 8(a)(5) of the Act, as the Board found. (JA 2.)

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.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD)	
)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 6,685 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, D.C.
this 20th day of December 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that all parties or their counsel of record are CM/ECF users and accordingly have been served with the foregoing document through the CM/ECF system.

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Dated at Washington, D.C.
this 20th day of December 2018