

Nos. 18-1958 and 18-1995

IN THE 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 OF THE DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD IN *AMERICAN MUNICIPAL
POWER, INC. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, LOCAL UNION NO. 816*,
NLRB CASE NO. 10-CA-221403

**REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT AMERICAN
MUNICIPAL POWER, INC.**

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GLOSSARY

“Act” means the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

“AMP” means Petitioner/Cross-Respondent American Municipal Power, Inc.

“Board” or “NLRB” means the National Labor Relations Board.

“Order” means the Board’s Decision and Order in *American Municipal Power, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816*, Case No. 10-CA-221403, 366 NLRB No. 160 (August 14, 2018).

“Union” means the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 816.

I. STATEMENT OF THE ISSUES

The primary issue in this appeal is whether the Board certified an inappropriate bargaining unit. The Board does not dispute that: (1) a bargaining unit containing employees who lack a community of interest is inappropriate; (2) the Smithland Operators lack a community of interest with the Non-Smithland Operators (i.e., Operators from other AMP facilities); and (3) if the bargaining unit is inappropriate, the Board's Order finding that AMP violated the Act by refusing to bargain with this inappropriate unit cannot stand. In other words, if Non-Smithland Operators are in the bargaining unit certified by the Board, AMP's petition for review should be granted.¹

Because the Board cannot defend its decision not to exclude Non-Smithland Operators from the bargaining unit, the Board mischaracterizes the issue. The Board claims it was tasked in the representation proceeding with "determining the description of an undisputedly appropriate bargaining unit comprised of the electrical workers with the job title of 'Operators' who work at" AMP's Smithland facility. (NLRB Br. 3)

AMP never agreed that the above group is an appropriate bargaining unit. On the contrary, AMP objected to this definition of the bargaining unit at every

¹ The petition for review should also be granted for other reasons, but this reason is particularly clear.

turn because it overlooks an important reality of AMP's operation: AMP sometimes assigns Non-Smithland Operators to work at Smithland temporarily.

Despite AMP's repeated efforts to exclude the Non-Smithland Operators from the bargaining unit through simple revisions to the unit definition during the representation case, the Board defined the bargaining unit broadly enough to include them—they are Operators employed by AMP who work at Smithland when on temporary assignment there. The Board has **never** explained, either in the representation case or on appeal, how the plain language of the Board's unit definition fails to include Non-Smithland Operators in the bargaining unit. The Board's reference to an "undisputedly appropriate bargaining unit" ignores AMP's repeated and consistent objection to an over-inclusive and therefore inappropriate bargaining unit.

II. SUMMARY OF THE ARGUMENT²

Much to AMP's surprise, the Board's first argument is that AMP prevailed on the sole issue in dispute in the underlying representation proceeding: whether the bargaining unit should exclude Non-Smithland Operators. The Board now claims the bargaining unit is already limited to Smithland Operators, either explicitly by the Board's unit definition or by operation of law.

² The Joint Appendix will be cited as "JA" followed by the page numbers.

Unfortunately, the Board's appellate argument contradicts the result of the representation case. In that case, the Regional Director and the Board rejected AMP's repeated attempts to include this limitation and instead defined the bargaining unit in terms broad enough to include Non-Smithland Operators who temporarily work at Smithland. The Regional Director and the Board did **not** find that Non-Smithland Operators are already excluded from the bargaining unit either explicitly by the Board's unit definition or by operation of law. Despite AMP's efforts, the Board decided to "leave [Non-Smithland Operators'] status unanswered" altogether. (JA 120–24, 143) As a result, the certified bargaining unit cannot possibly be "limited to Smithland Operators," even though there now seems to be no dispute that it should have been so limited given the Board's current (unsupported) contention that it is.³

Accordingly, the Board's argument that the current bargaining unit definition is appropriately "limited to Smithland Operators" is incorrect. Although AMP welcomes the Board's new position, the Board cannot in its brief correct the Board's decision in the representation case by limiting the scope of the bargaining unit in a way the Board's decision refused to do. If the Board now agrees that

³ To be sure, the Board also makes the contradictory assertion that it "rightly found no reason to definitively resolve the status of" Non-Smithland Operators, which shows the Board does not really believe the bargaining unit includes only Smithland Operators. (NLRB Br. 26)

Non-Smithland Operators are or should be excluded from the bargaining unit, AMP's petition for review should be granted.⁴

Contradicting its first argument, the Board's second argument continues to advance an arbitrary and legally unsupported standard to try to justify its refusal to limit the bargaining unit to Smithland Operators. The Board contends that it "rightly found no reason to definitively resolve the status of" Non-Smithland Operators because: (1) no Non-Smithland Operators were working at Smithland on the day of the hearing (the "empty classification" argument), and (2) AMP had no "scheduled plans" for such assignments in the future on the day of the hearing. (NLRB Br. 23–27)

The Board still has not identified any authority that purports to authorize the Board to "leave [Non-Smithland Operators'] status unanswered" due to the lack of any current temporary assignments or "scheduled" future temporary assignments of Non-Smithland Operators on the day of the hearing. AMP undisputedly has a concrete history of making such temporary assignments. AMP intends to continue to do so in the future under certain reasonably foreseeable and likely operational

⁴ The Board's about-face on this issue supports AMP's request for oral argument. The Board's brief did not even try to reconcile its new contention that the bargaining unit is "limited to Smithland Operators" with the fact that the Regional Director (with the Board's approval) explicitly refused to decide that issue. Oral argument will assist the Court's review of the Board's apparent attempt to limit the scope of the bargaining unit in this appeal after it refused to do so in the representation case.

scenarios. The Board’s requirement that AMP know precisely when it will do so in the future on the day of the hearing is both arbitrary and unprecedented, and its decision not to resolve the unit status of the Non-Smithland Operators violates the Board’s duty under the Act to define an appropriate bargaining unit.

Significantly, the Board does **not** claim that Non-Smithland Operators have a community of interest with Smithland Operators, yet the Board rejected AMP’s efforts to have them expressly excluded. The bargaining unit is therefore inappropriate.

Accordingly, the Board abused its discretion by arbitrarily refusing to decide the unit placement of Non-Smithland Operators temporarily assigned at Smithland and to define a bargaining unit appropriately limited to employees who share a community of interest—Smithland Operators. Because the Board’s unit definition includes employees who do not share a community of interest, the Board’s certification of the Union is invalid and should be vacated. The Board’s Order that AMP violated the Act should also be vacated.

III. ARGUMENT

A. There Is No Dispute That The Bargaining Unit Should Be Limited To Smithland Operators And That Non-Smithland Operators Should Not Be Included.

The Board admits that AMP’s Smithland facility “has its own dedicated staff of ‘Operators’” and that the Union sought “to represent **those Operators**” in the

underlying representation proceeding. (NLRB Br. 5 (emphasis added)) The Union initially petitioned to represent “All . . . employees of [AMP] **performing work at**” the Smithland facility (JA 115–18), but the Union agrees that Non-Smithland Operators **who occasionally perform work at Smithland** do not share a community of interest with Smithland Operators and therefore should not be included in the unit. (JA 120, 20–21)

The Regional Director acknowledged that “Both the Employer and the Petitioner agree that employees who work at other facilities but who work temporarily at the Smithland facility should not be permitted to vote in this election,” because they lack a community of interest and are therefore not eligible for inclusion in the unit. (JA 120)

The Board now claims for the first time in its brief that the unit is in fact “limited to Smithland Operators,” meaning Non-Smithland Operators are supposedly not included in the unit. (NLRB Br. 18) Although AMP agrees this should be the case, the Board’s new contention finds no support in the administrative record or the unit definition’s plain language.

B. The Board's Unit Definition Is Not Limited To Smithland Operators, Either Expressly Or By Operation Of Law.

1. The Board's unit definition encompasses Non-Smithland Operators who work at Smithland.

AMP agrees that a bargaining unit limited to Smithland Operators, those who are primarily assigned or “dedicated” to the Smithland facility, would be an appropriate bargaining unit. (NLRB Br. 4–5) But the Board, at the Union’s urging (for unclear reasons given the Union’s agreement that Non-Smithland Operators should not vote in the election) and over AMP’s objections, insisted on a unit definition that is not limited to Smithland Operators: “All full-time and regular part-time Operator I and Operator II employees employed by [AMP] at its facility” in Smithland. (JA 120, 129)

The Board’s unit definition is broad enough to include AMP Operators who are primarily assigned to other facilities but who occasionally work at Smithland temporarily.⁵ Such Non-Smithland Operators are “full-time Operators employed by AMP at Smithland” during such assignments. The Board has **never** explained how the unit definition on its face does not include Non-Smithland Operators who work at Smithland.

⁵ At the very least, the Board’s unit definition is sufficiently ambiguous to require the Board to decide whether the Non-Smithland Operators are included within it.

Instead, the Board attempts to side-step its own unit definition by arguing that AMP has not articulated how Non-Smithland Operators could be included in “a unit that specifically includes only ‘full-time and regular part-time’ Operators ‘employed by [AMP] at’ Smithland, as if to say the phrase “full-time and regular part-time” somehow excludes Non-Smithland Operators. (NLRB Br. 20–21) But Non-Smithland Operators are full-time Operators employed by AMP, including when they are temporarily assigned to Smithland. AMP employs them at Smithland during such assignments. The words “full-time and regular part-time” define an employee’s employment classification with AMP, not the employee’s work location.

Is the Board saying that Non-Smithland Operators are not “employed at” Smithland when on temporary assignment there? If so, the Board has identified no authority for such a narrow interpretation of the phrase “employed at” (although AMP would welcome it if that is actually what the Board intended). No dictionary defines the word “employed” or “employ” to have any bearing on an employee’s work location. Rather, the word “employed” simply means that a person is being

paid to work, or being put to an employer's use for compensation.⁶ The addition of "at" or "at Smithland" to the word "employed" does not limit the unit definition to Smithland Operators, or those "dedicated" to Smithland. Non-Smithland Operators and Smithland Operators are both "employed" by AMP, both perform work for AMP for pay. And when Non-Smithland Operators are on temporary assignment at Smithland, their employment during that time takes place "at Smithland."

⁶ See, for example, Black's Law Dictionary at 639–41 (10th ed. 2014), which provides the following pertinent definitions:

employ, *vb.* (15c) **1.** To make use of. **2.** To hire. **3.** To use as an agent or substitute in transacting business. **4.** To commission and entrust with the performance of certain acts or functions or with the management of one's affairs.

employee. (1822) Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.

employer. (16c) A person, company, or organization for whom someone works; esp. one who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.

employment. (15c) **1.** The relationship between master and servant. . . . **2.** The act of employing. **3.** The quality, state, or condition of being employed; the condition of having a paying job. **4.** Work for which one has been hired and is being paid by an employer.

The Board has **never** previously claimed that the existing unit definition is limited to Smithland Operators. The Board's decision in the representation case did not do so. If the Board is now saying the phrase "employed at" does not include Non-Smithland Operators, AMP's petition for review should be granted and the Board should revise its decision in the representation case to accomplish that outcome.

Unfortunately, it is improbable that the Board intended to use the phrase "employed at" to exclude Non-Smithland Operators from the bargaining unit. If the Board intended the words "employed at Smithland" to mean only Operators "dedicated" to Smithland or "primarily assigned" at Smithland, the Regional Director and the Board surely would have said so in the representation case. After all, it is not as if the Board was unaware of this ambiguity (if one exists) or lacked the opportunity to clarify the unit definition (if it is unclear). AMP repeatedly challenged the Board's failure to make clear that the unit is limited to Smithland Operators, either through more specific inclusionary language (such as "primarily assigned at Smithland") or through an explicit exclusion. The Board refused to include such language in the unit definition. In refusing AMP's requests to modify the unit definition, the Board has never claimed the bargaining unit is already limited to Smithland Operators. Until now.

AMP welcomes the Board's new interpretation of the unit definition (which is what AMP has asked for all along), but such an interpretation needed to be issued in the representation case to be enforceable. As discussed below, the Board did precisely the opposite in the representation case.

2. **Despite the parties' agreement that Non-Smithland Operators should not be in the bargaining unit, the Regional Director declined to address their unit placement and instead defined the bargaining unit broadly enough to include them.**

The only dispute in the representation case was how to define the bargaining unit in light of the parties' agreement that Non-Smithland Operators should not be included. (JA 120) Given AMP's clear history of assigning Non-Smithland Operators to work at Smithland, including one such assignment that ended just days before the petition was filed (JA 120–22; NLRB Br. 6 n.3), as well as AMP's undisputed intent to continue making such assignments in the future (JA 121–22, 49, 65–66), AMP asked the Board to make clear that the unit includes only Operators "primarily assigned" to Smithland. (JA 120–22, 17, 98–100) In other words, AMP asked the Board to define the bargaining unit to include only the Operators the Union seeks to represent, which are supposedly the Operators "dedicated" to Smithland (NLRB Br. 5), and **not** Non-Smithland Operators who occasionally work there but who undisputedly lack a community of interest with Smithland Operators.

The Board refused AMP's requests. The Board contends that "The Regional Director slightly modified the proposed unit description to identify the unit more clearly" as being "limited to the Smithland Operators . . . 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." (NLRB Br. 7, 18, 20) But, as discussed above, the words "employed at" do not limit the unit to Smithland Operators. The Board has not explained why Non-Smithland Operators on assignment at Smithland are not "employed by AMP at Smithland" during such assignments. In rejecting AMP's request for more specific language (such as "primarily assigned"), the Regional Director never said the unit definition was already limited to Smithland Operators. Were that the case, he would have done so in response to AMP's objections.

On the contrary, the Regional Director decided to "leave [Non-Smithland Operators'] status unanswered for now," meaning whether they are in or out of the unit is an open question. (JA 120–22) The Board confirms this in its brief, stating that the Regional Director "found it unnecessary for the unit description to address the status of" Non-Smithland Operators, and "The Board rightly found no reason to definitively resolve [their] status." (NLRB Br. 8, 26)

The Board's contention that the unit description is in fact limited to Smithland Operators coupled with its recitation of the Board's non-decision on this issue is contradictory. To recap, the Board acknowledges it did not address the status of Non-Smithland Operators in the unit definition, yet the Board claims the unit is limited to Smithland Operators. The Board makes no effort to reconcile the text of the Board's unit definition with the claim that the unit is limited to Smithland Operators or to explain why the Board rejected AMP's requests to define the unit in a way that would have clearly excluded Non-Smithland Operators.

3. In denying AMP's request for review, the Board did not exclude Non-Smithland Operators from the bargaining unit, either expressly or by operation of law.

In denying AMP's request for review, the Board affirmed the Regional Director's unit definition. (JA 143)⁷ The Board, in a footnote, rejected portions of the Regional Director's legal analysis, but the Board did not: (1) change the unit definition; (2) articulate any express or implied exclusion of Non-Smithland Operators; or (3) reverse the Regional Director's decision to "leave their status unanswered."

⁷ AMP's request for review and the Board's May 31, 2018 decision denying the request for review occurred after the Regional Director's March 6, 2018 certification of the Union, contrary to the Board's indication that the request for review was resolved pre-election. (NLRB Br. 9-11)

The Board “note[d] that, contrary to the Regional Director’s suggestion, the Board will in fact exclude as temporary an otherwise-permanent employee who is only temporarily assigned to the facility at which an election is being conducted. See *Marian Medical Center*, 339 NLRB 127, 128-129 (2003).” (*Id.*) But what the Board **will** do and what the Board actually did in AMP’s case are two different things.

The Board merely noted that it will in fact provide the unit scope limitation that the Regional Director refused to incorporate in the unit definition in this case. The Board did not say that permanent employees on temporary assignment are excluded “as a matter of law,” as the Board now claims. (NLRB Br. 10, 13, 21–22) The Board’s decision in *Marian Medical Center*, 339 NLRB 127 (2003) does not provide for an automatic exclusion by operation of law.⁸ The Board also points to other cases where it has articulated the “general rule” that temporary, seasonal, or contingent employees do not share a community of interest with regular permanent employees of the employer. (NLRB Br. 21) But those cases also do

⁸ In *Marian Medical Center*, the Board articulated the standard for evaluating on a case-by-case basis whether temporary employees (including permanent employees on temporary assignment) share a community of interest with regular permanent employees. The Board noted that “as a general rule” such employees likely will not have a community of interest, which leaves open the possibility that in some cases they may in fact have a community of interest. 339 NLRB at 128–29 (2003). The Board’s determination in that case that the particular employee lacked a community of interest did not establish an exclusion as a matter of law.

not create an automatic exclusion for permanent employees on temporary assignments.

AMP agrees with the Board that, under the standard articulated in Marian Medical Center, Non-Smithland Operators undisputedly lack a community of interest with Smithland Operators. As this is so, the Board should have excluded them from the unit on that basis or at least made clear that under the Board's unit definition only Smithland Operators are included. But the Board did not amend the Regional Director's unit description to add such an exclusion or limitation. Nor did the Board say that the unit definition as written limits the bargaining unit to Smithland Operators. The Board merely noted that it will provide such an exclusion under the right circumstances, but the Board otherwise affirmed the Regional Director's decision which explicitly did not decide the unit status of Non-Smithland Operators on temporary assignment at Smithland. (JA 143)

Moreover, the Board did not alter the Regional Director's decision to "leave [Non-Smithland Operators'] status unanswered." To the contrary, the Board suggested AMP may have to resort to a unit clarification proceeding at some point in the future to resolve this scope of the unit dispute, which confirms the Regional Director and the Board left the issue unresolved. (JA 143)

In sum, the Board's refusal to include an explicit limitation in the unit definition's language (like "primarily assigned at Smithland"), or to otherwise say

in response to AMP's objections in the proceedings below that the bargaining unit is already limited to Smithland Operators, strongly suggests the Board did not intend to limit the bargaining unit to Operators primarily assigned or dedicated to Smithland. Moreover, the Regional Director's decision to "leave [Non-Smithland Operators'] status unanswered" and the Board's contention that it "rightly found no reason to definitively resolve the status" of Non-Smithland Operators (NLRB Br. 8, 26) foreclose the Board's new claim that the bargaining unit is already either expressly or as a matter of law limited to Smithland Operators.

C. The Board Abused Its Discretion By Refusing To Limit The Bargaining Unit Description To Smithland Operators Based On An Unprecedented And Arbitrary Requirement That AMP Have "Scheduled" Or "Finite" Plans For Future Assignments Of Non-Smithland Operators At Smithland To Have Their Unit Status Decided.

The Board agrees that it is obligated under the Act to determine "the appropriate unit 'in each case,' meaning wherever there is a dispute." (NLRB Br. 27 (quoting Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611 (1991))) Yet the Board claims it was not obligated to resolve the dispute in this case over whether the bargaining unit encompasses Non-Smithland Operators on assignment at Smithland because: (1) no Non-Smithland Operators were working at Smithland on the day of the hearing (i.e., the "empty classification" argument), and (2) AMP had no "scheduled plans" for such assignments in the future on the day of the hearing. (NLRB Br. 23–27) The Board's claims have no basis in law.

The Board repeats, but does not attempt to defend, the “empty classification” argument. The Regional Director’s reliance on the lack of a temporary assignment on the day of the hearing was unquestionably incorrect. To require temporary assignments (which naturally occur sporadically) to coincide with the hearing date in order to resolve a dispute over whether such temporary employees are included in the unit is arbitrary. It is well-established that the Board will decide a disputed classification even if there are no employees in the position at the time of the hearing, including with respect to temporary employees. See, e.g., Indiana Bottled Gas Co., 128 NLRB 1441 (1960); F.W. Woolworth, 119 NLRB 480 (1957).

As AMP pointed out in its opening brief, the Board identified no authority in support of the proposition that AMP must have “scheduled,” “finite,” or “current” plans for future assignments of Non-Smithland Operators at Smithland as a precondition to the Board’s duty to resolve a dispute over their unit placement. (AMP Br. 18–20) Yet the Board still has not identified any authority that supports this proposition, which is arbitrary and should be rejected.

Instead, the Board merely repeats its unavailing arguments that Indiana Bottled Gas and F.W. Woolworth are distinguishable because those cases dealt with “employers [who] had a definite practice of hiring temporary employees on a seasonal or recurring basis.” (NLRB Br. 24–26) As AMP explained in its opening brief, neither Indiana Bottled Gas nor F.W. Woolworth provides that an employer

must have definite or scheduled plans for temporary assignments for the unit placement of temporary employees to be decided. (AMP Br. 18–19) Just because the employers in those cases followed a seasonal pattern of using temporary employees does not mean, as the Board claims, that an employer must have “certainty of recurring temporary assignments” to compel resolution of the unit status of such employees. (NLRB Br. 25–26)

AMP established its plans to make such temporary assignments in the future under several reasonably foreseeable and likely operational scenarios with evidence the Board did not discredit.⁹ (JA 121–22, 49, 65–66) AMP’s plan to make such assignments in the future is confirmed by AMP’s concrete and

⁹ The Board is incorrect that AMP submitted that it “might possibly make temporary assignments” going forward. (NLRB Br. 24) To the contrary, AMP identified several likely scenarios where it planned to make such assignments. The Board ignored AMP’s undisputed evidence that AMP intends to utilize temporary assignments during outages at Smithland (JA 65–66) and otherwise did not give proper weight to (or seemingly even consider) the scenarios AMP identified where it plans to make such assignments. (JA 122) No contrary evidence exists. Accordingly, substantial evidence does not support the claim that AMP’s plan to use temporary assignments of Non-Smithland Operators is too uncertain to require the Board to decide the scope of the unit issue.

unrebutted history of making such assignments in the past.¹⁰ (JA 120–22) These circumstances establish a legitimate and non-hypothetical unit scope issue that the Act compels the Board to resolve in the representation proceeding. AMP's inability to see the future to know with certainty on the date of the hearing when such circumstances will arise does not make AMP's plans for such assignments "hypothetical" or illegitimate, as the Board contends. The Board's unprecedented requirement for "scheduled plans" arbitrarily disregards AMP's real and legitimate plans for such assignments.

The arbitrariness of the Board's requirement that AMP show either a current temporary assignment or definite plans for a future assignment (presumably including identifying the individuals and the date) is further demonstrated by Cannelton Operator Joe Frakes. Mr. Frakes worked on a temporary assignment at Smithland for over six months ending in mid-January 2018, **only a few weeks before the hearing in the representation case**. So, under the Board's rationale, the Board would have had to address the issue of Non-Smithland Operators had the

¹⁰ The Board's suggestion that because AMP's start-up period is complete AMP will no longer assign Non-Smithland Operators to Smithland on a temporary basis is incorrect. AMP's lengthy assignment of Non-Smithland Operator Joe Frakes to Smithland occurred well after Smithland was fully operational. The undisputed facts demonstrate that AMP has and intends to continue to make temporary assignments as needed. AMP has also identified specific circumstances not involving the plant start-up where it plans to make future temporary assignments, such as a need for particular expertise or to address staffing issues (both of which describe Joe Frakes' assignment).

Frakes assignment lasted only a few weeks longer or if the Union filed its petition a few weeks earlier. The Board's statutory duty to resolve scope of the unit issues cannot possibly turn on pure coincidence.

The current assignment/definite plan requirement the Board deployed in AMP's case is also legally baseless. The Board again cites Coca-Cola Bottling Co. of Wisconsin, 310 NLRB 844 (1993) in support of the Board's contention that it was right "to base its wording of the unit description on the current conditions [at Smithland at the time of the hearing], rather than speculating about conditions that might arise in the future." But as AMP explained in its opening brief, Coca-Cola Bottling's reference to "existing" or "current conditions" arose in a different context that has no bearing on this case. (AMP Br. 20 n.6)

In Coca-Cola Bottling, the Board looked to the "existing composition" of the workforce at the time of the representation proceeding to determine if certain production employees shared a community of interest with the rest of the unit following the employer's resumption of operations after a 12-year hiatus. The Board relied on that "existing composition" as opposed to relying on any "abstract grants of recognition" (i.e., prior negotiated contractual recognition clauses that included those production employees) based on the composition of the workforce

in the two decades preceding the 12-year hiatus.¹¹ 310 NLRB 844 (1993).

Contrary to the Board's suggestion, Coca-Cola Bottling does not support the Board's myopic focus on the day of the hearing and the coincidence that AMP had no current temporary assignments at Smithland or "definite" or "scheduled" plans for future assignments on that particular day.

The Board's reliance on Milwaukee Children's Hospital, 255 NLRB 1009, 1013 n.9 (1981) is also misplaced. (NLRB Br. 26) In that case, the Board stated in one sentence in a footnote that it was "unnecessary to determine the unit eligibility of" employees hired in the future to fill two vacant positions, without providing any rationale for it being unnecessary. The Board did not provide any analysis or even mention the employer's future plans for those positions. Thus, Milwaukee does not support the Board's arbitrary requirement that AMP needs to have "certain" or "scheduled" plans for future temporary assignments at Smithland for the issue to be decided now.

The Board's argument that it properly refused to decide the unit placement status of Non-Smithland Operators on temporary assignment at Smithland based

¹¹ The Board incorrectly quotes Coca-Cola Bottling as saying "the Board looks not to 'abstract' possibilities" to try to support the Board's contention that a lack of certainty about future temporary assignments of Non-Smithland Operators excuses the Board from deciding their unit placement. (Board Br. 26) But Coca-Cola Bottling referred to "abstract grants of recognition" based on past, decades-old operating conditions and workforce composition, not reasonably foreseeable albeit uncertain future conditions.

on the unprecedented notion that AMP needed to have on the day of the hearing “scheduled” plans to continue making such assignments should be rejected. The Board’s refusal to make clear whether Non-Smithland Operators are in or out of the unit is arbitrary and unreasonable. Such employees had recently worked at Smithland, and AMP established through undisputed evidence that they will do so again under certain reasonably foreseeable and likely scenarios. The parties agree the Non-Smithland Operators lack a community of interest with the Smithland Operators.

The Board abused its discretion by not deciding this scope of the unit issue.

D. Collective Bargaining And Unit Clarification Are Not Appropriate Mechanisms To Resolve This Dispute Over The Scope Of The Bargaining Unit.

The Regional Director heavily and improperly relied on the prospect of resolving this scope of the unit issue through collective bargaining. (JA 120–24) For its part, the Board ignored bargaining as a tool to resolve a dispute over the scope of the unit (presumably because bargaining over the scope of the unit is permissive), but noted that a unit clarification proceeding may resolve the issue. (JA 143) AMP’s opening brief explained why these suggested alternatives are inappropriate. (AMP Br. 23–28)

The Board’s brief provides no meaningful response. The Board admits that unit scope is a permissive subject that neither party can insist upon in bargaining,

and that it is merely a possibility that the parties could adjust the unit description by mutual agreement. (NLRB Br. 28) The Board labels AMP's view of such permissive bargaining "defeatist." But AMP did try to negotiate with the Union over the scope of the unit during the representation case. In response to AMP's efforts, the Union conceded that Non-Smithland Operators do not share a community of interest with Smithland Operators such that the Union did not want them to vote in the election, yet the Union refused to stipulate to a unit definition that clearly limits the unit to Smithland Operators (such as AMP's proposed "primarily assigned" language).¹² Why should AMP expect "fruitful bargaining" from the Union on this issue in the future? And because bargaining over the scope of the unit is permissive, there is no way to compel the Union to resolve this issue in that forum. AMP quite reasonably wants a definitive outcome now.

More importantly, there is absolutely no precedent supporting the Board's effort to punt its statutory obligation to resolve scope of the unit issues to collective bargaining over a permissive subject. Because the Court cannot determine how much influence this legally impermissible rationale had on the Board's decision, AMP's petition for review should be granted.

¹² Because the Union decided not to intervene in this case, the Union does not have to explain this contradiction to the Court.

Undercutting the Board's professed faith in permissive bargaining to resolve scope of the unit disputes, the Board acknowledges the parties could have to try to resort to a unit clarification proceeding to resolve the scope of the unit. (NLRB Br. 29) AMP emphasizes "try" because the Board does not explain how unit clarification would be appropriate in this scenario. The Board does not explain how AMP's continued assignment of Non-Smithland Operators at Smithland in the future would create "ambiguities regarding the unit placement of either newly established classifications or those that have undergone recent, substantial changes." (*Id.*) AMP's continuation of its practice of assigning Non-Smithland Operators at Smithland temporarily would not involve a "newly established classification" or "substantial changes." The only ambiguity in the scope of the unit here is the result of the Board's refusal to resolve whether the bargaining unit is limited to Smithland Operators in the underlying representation case.

In any event, the prospect of a mutual agreement concerning the scope of the unit and the parties' ability to resort to a unit clarification proceeding are irrelevant considerations that the Regional Director and the Board erroneously raised. The Board had a statutory duty to decide the scope of the unit issue in the representation proceeding, yet the Regional Director (with the Board's approval) decided to "leave [Non-Smithland Operators'] status unanswered" and thus leave open the question of whether they are included in the bargaining unit. By doing so,

the Board condemned AMP to bargain with an uncertain unit that would contain conflicts of interest and employees who lack a community of interest with the Smithland Operators without any meaningful recourse other than this Court.

IV. CONCLUSION

For each and all of the foregoing reasons, as well as those stated in AMP's opening brief, AMP respectfully requests that its petition for review be granted and that the Board's cross-application for enforcement be denied. The Board's certification of the Union in the representation case and the Board's Order in the unfair labor practice case should be vacated.

Respectfully submitted

January 24, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word-processing system used to prepare the brief, Microsoft Word, indicates that this brief contains 5,660 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on January 24, 2019, I filed the foregoing Reply Brief of Petitioner/Cross-Respondent American Municipal Power, Inc., using the Court's CM/ECF filing system which will send electronic notice to all parties or their counsel of record.

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