

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIXTEEN**

AIRGAS USA, LLC

Employer,

and

Case No. 16-RC-262896

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 745**

Petitioner.

**PETITIONER'S RESPONSE TO AIRGAS USA, LLC'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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Petitioner, International Brotherhood of Teamsters, Local 745 (“Local 745” or “the Union”) files this its Response to Airgas USA, LLC’s (“Airgas” or “the Employer”) Request for Review of the Regional Director’s Decision and Direction of Election. As will be shown below, the Employer’s Request for Review should be denied.

**I. INTRODUCTION AND STATEMENT OF ISSUE AT THE
REPRESENTATION HEARING**

The Union petitioned that it be recognized as the certified representative for a collective bargaining unit consisting of “[a]ll full-time and regular part-time Drivers employed at the Employer’s Grand Prairie, Texas facility.” *Bd. Ex. 2*. The Employer objected to the petitioned-for unit, asserting that “[t]he petitioned-for unit is fractured and is inappropriate.” It further alleged that the petitioned-for unit “excludes drivers and production employees with whom the petitioned-for shares a community of interest,” and that the only appropriate unit is a multi-facility unit, including production operations (production operators, leads, coordinators, and lab technicians) and Class A and Class B drivers at the Grand Prairie (801 W. Carrier Pkwy), Fort Worth (319 NE

23rd St.), and Dallas (3116 Quebec Street) sites.” *Bd. Ex. 1(e)*.

In light of the wording of the Employer’s Statement of Position, the parties stipulated that “[t]he only issues to resolve were:

- a. Whether the Employer’s Drivers at its Grand Prairie facility share a community of interest with its Production Operator 1, Production Operator 2, Production Lead, Operations Coordinator, and Lab Technician employees; **AND** (emphasis added)
- b. Whether the appropriate unit should include the foregoing named job classifications at the Employer’s Grand Prairie, Fort Worth, and Dallas (Quebec Street), Texas, facilities.”

II. STATEMENT OF FACTS

A. The Company.

Airgas USA, LLC (“the Employer” or “Airgas”) is engaged in the business of distributing industrial, medical, and specialty gases. *Bd. Ex. 2*. Airgas in the North Texas area has production and distribution locations in Grand Prairie, Fort Worth, and Dallas. *Tr. 18-19*. In addition to Drivers, the Employer in the North Texas area also employs Production Operators, Production Leads, Operations Coordinators, and Lab Technicians.

B. Drivers Hold Unique and Distinct Job Duties and Generally Report to Unique and Distinct Management.

The Local Drivers that make up the vast majority of the petitioned-for bargaining unit all report up through Distribution.¹ *Tr. 24-26; Emp. Ex. 1*. Distribution Managers manage and supervise the Local Drivers and have no management or supervisory authority over the production employees. *Tr. 279-80*. The production employees and operations coordinators do not go on the

¹ There are two Interbranch or Shuttle Drivers working out of Grand Prairie that currently report up through Production, but that has only been a recent change. See p. 6, *infra*.

road and drive company vehicles like the Drivers do. *Tr.* 281. All of the Drivers must have a commercial drivers' license that is a class A or B certification with a hazmat and other endorsements; whereas the production employees and operations coordinators do not hold any license from the state or federal government to do their jobs. *Tr.* 281, 437-39; *Emp. Exs.* 8 and 9. The Drivers undergo fifteen days of company training that is given specifically to Drivers. *Tr.* 154-55, 483, 826-28; *Emp. Ex.* 22. In fact, the training that the Drivers receive involve detailed information regarding the unique position of Driver on twelve of the fifteen days. *See Emp. Ex.* 22. Days 1, 2, and 8 are the only days that are not unique to the position of Driver. *Id.*

Drivers' hours are regulated by the Department of Transportation ("the DOT"); the production employees' and operations coordinators' hours encounter no such regulations. *Tr.* 282. Likewise, unlike the Drivers, the production employees and operations coordinators cannot clock-in to work using an onboard computer. *Id.* The production employees and operations coordinators have specific and uniform shift start and end times, while the Drivers do not have specific and uniform start and end times. *Tr.* 283-84. Their day fluctuates depending on how quick or slow their deliveries get completed. *Id.* The Drivers' start times are also staggered, which is unique to that position. *Tr.* 285.

The Drivers begin their day by checking paperwork specific to the Driver position, including the hazmat manifest, load sheets, and trip sheets. *Tr.* 284, 829-33; *Emp. Ex.* 11. The production employees do not have any of those tasks and responsibilities. *Id.* The Drivers also perform pre-trip inspections of their vehicles, which takes approximately fifteen (15) to twenty (20) minutes. *Tr.* 284-85, 833-34. The production employees and operations coordinators do not do this task. *Id.* Drivers log in to the truck onboard computer after they complete the pre-trip inspection. *Tr.* 833-34.

Next up on the to-do list for the Drivers is to check and see if all the cylinders are actually on the truck. *Tr. 834-35*. If all of the cylinders are there, that usually takes twenty (20) to twenty-five (25) minutes. *Tr. 835*. John Durr estimated that roughly forty percent (40%) of the time all of the cylinders are correctly on the truck. *Tr. 836*.

If there is a discrepancy in which there are too many cylinders on the truck, the Driver will take off the cylinders that should not be there or get a Loader to take them off. *Tr. 841-42*. When there are cylinders missing from the truck, the Driver will ask the Loader if it will be loaded. *Tr. 843*. If the Loader answers that it will not be loaded, the Driver will tell the Operations Coordinator, who would then reprint the paperwork with the revised loads. *Tr. 843-44*. This process could take anywhere from five (5) to twenty (20) minutes depending how busy the Operations Coordinator is at that time. *Tr. 844*. If the Loader tells the Driver that the cylinders will be ready within a certain time, the Driver will ask a Distribution Manager if it is okay to wait for it. *Tr. 845-46*. If the Distribution Manager gives his consent, the Driver just waits until the cylinders are loaded. *Tr. 848-49*.

When there are no issues with what is on the truck and everything checks out, the Driver who arrives at 5:30 a.m. is usually on the road by 6:30 a.m. or 6:40 a.m. *Tr. 848*. When the Distribution Manager gives the Driver consent to wait for cylinders to be filled, the Driver may not be on the road until 7:30 a.m. or 8:00 a.m. *Tr. 848*.

Once the cylinders are properly accounted for, the Driver will go the distribution office to inform the Operations Coordinator that everything looks good and asks her to send him the shipment information for the trip report to his handheld computer. *Tr. 836-37*. The Driver then returns to the truck and gets either a Lead Driver or manager to check that the cylinders on the truck are correct and accurate, which usually takes five (5) to ten (10) minutes. *Tr. 839-40*. After

making one last walk-around and picking up the chocks and cones around the truck, the Driver leaves the facility to start his deliveries. *Tr. 841.*

The Drivers must complete the trip report as they go through their deliveries throughout each day. *Tr. 286; Emp. Ex. 11.* There is no such requirement for production employees and operations coordinators. *Id.* The Drivers travel to customers and unload cylinders at the customer location. *Tr. 852-53.* Drivers also deal directly with customer representatives at the customer location. *Id.* Local Drivers' job descriptions require them to collect money from customers, make change, and record transactions on customer receipts. *Tr. 439; Emp. Ex. 9.* The production employees do not have any similar responsibilities. *Tr. 439.* The Local Drivers' job descriptions state that they listen to and resolve service complaints and give feedback to supervisors about customer complaints and requirements. *Tr. 439-40; Emp. Ex. 9.* The Lab Techs and Production Operators do not deal directly with customers like the Local Drivers do. *Id.* Drivers take their lunch away from the Employer facility while they are on the road. *Tr. 640-41, 854.* The production employees and operations coordinators do not take their lunch on the road, but rather in the facility where they work. *Tr. 85-86.*

At the end of the day, the Driver reconciles the deliveries on the trip sheet, places the empty cylinders in one area of the truck, and places the remaining full cylinders in a separate area of the truck. *Tr. 855.* If there are no full cylinders on the truck (which occurs eighty-five percent (85%) of the time), the Driver enters the facility, parks the truck, and the Loaders unload the empty cylinders. *Tr. 857.* The Driver does not help with the unloading when there are only empty cylinders to unload. *Id.* The unloading process takes roughly ten (10) minutes under that scenario. *Tr. 858.* If there are remaining full cylinders, the Loader will determine if the full cylinders can remain on the truck for a delivery the next day or need to be taken off and unloaded.

Once the truck is unloaded, the Driver then drives the truck to the staging area, where it will be loaded for the next day. *Tr. 858-59*. Once parked at the staging area, the Driver does his post-trip inspection, goes into the distribution office to turn in his paperwork, handheld, and printer, and finally checks his paperwork for the next day. *Tr. 859*.

The Production Operators (Fillers, Loaders, and Leads) participate in a meeting at the beginning of their shift called a tailgate meeting. *Tr. 791-93*. Drivers are not present at this meeting. *Id.* Fillers such as Erik Perez seldom help load trucks. Perez testified that he recalls helping load trucks three times over the course of two and a half years in Grand Prairie. *Tr. 800*. On those occasions, Perez was only helping the Loader, and the Driver was not present. *Tr. 801*. Likewise, Perez recalls helping load just one truck since he has been in Fort Worth. *Tr. 808*.

There are only two Interbranch Drivers (also known as Shuttle Drivers) in Grand Prairie, one in Fort Worth, and none in Dallas. *Tr. 282-83*. Although the Interbranch Driver in Fort Worth sometimes helps the loaders sort cylinders, that is not the primary responsibility of that position. *Tr. 283*. The Interbranch Drivers reported to the Distribution Managers until February or March 2020. *Tr. 551-52*. They now report to the Plant Manager. *Id.* The Interbranch Drivers usually are gone for the entire day doing their deliveries similar to the Local Drivers. *Tr. 573-74*.

C. Lab Techs Have Either No or Severely Limited Interactions With Drivers and Have Vastly Different Job Tasks and Responsibilities.

There are no Lab Techs in Fort Worth or Dallas. *Tr. 435*. That is a position that is only in Grand Prairie. *Id.* There is not any type of license or certification requirement to be a Lab Tech. *Tr. 435-36*. Lab Techs spend eighty-five percent (85%) of their time testing products. *Tr. 724*. The only time that Lab Techs deal with Drivers is when they come into the Lab and request that the Lab Tech print out certifications. *Tr. 736-37*. Those occasions are rare, estimated to be two to three Drivers per week making such requests. *Tr. 737*. In fact, John Durr testified that he has never had

to get anyone to print a certification for him. *Tr.* 862.

D. The Facilities in Dallas and Fort Worth are Primarily Separate and Distinct From the Grand Prairie Facility.

The three different facilities have different cylinder-making capabilities. Grand Prairie can fill the most gases, while the Dallas facility is capable of only distributing a handful of gases. *Tr.* 442. The three facilities all have separate managers and supervisors. Although there are currently Drivers out of the Dallas facility working out of Grand Prairie, the primary reason for that is due to so many Grand Prairie Drivers being out due to Covid 19. *Tr.* 863-64. As for interactions that Durr has had with the other facilities, he has never worked out of Fort Worth or Dallas. *Tr.* 862-63.

Although it is true that Grand Prairie shares equipment with Fort Worth and Dallas, it is equally true that the Grand Prairie and Fort Worth facilities share equipment and exchange products and cylinders with facilities outside of the North Texas area in Abilene, Amarillo, and Belton. *Tr.* 288-89, 696-98.

E. Compensation of Drivers is Different From Compensation for the Other Hourly Employees.

Production Operator I salary is \$16.00 per hour, Production Operator II compensation is \$17.00 per hour, and Production Operator III pay is \$18.00 per hour. *Tr.* 437. Drivers are paid a higher hourly rate that ranges from \$20.00 to \$29.00 per hour. *Tr.* 98. In addition to that hourly pay, Drivers have been eligible for quarterly bonuses of \$1,000.00 per quarter if they meet certain goals and objectives. *Tr.* 865-66. Durr testified that he received the quarterly bonus every quarter while it existed. *Tr.* 866. The production employees have never had a bonus program. *Tr.* 867.

III. ARGUMENT AND AUTHORITIES

A. The Employer's Request for Review.

Airgas submitted its Request for Review on the following grounds:

The Board should grant Airgas' Request for Review because the Regional Director abused his discretion in ordering a mail-ballot election and erred in finding that International Brotherhood of Teamsters, Local 745's ("Union") petitioned-for unit, consisting of "[a]ll full-time and regular part-time Drivers employed at the Employer's Grand Prairie, Texas facility" is appropriate. The Regional Director's significant erroneous factual findings and his departure from officially reported Board precedent, prejudice Airgas, interfere with the rights of Airgas employees, and raise substantial questions of law and policy.

In finding that drivers from two separate departments – the Distribution and Production departments at Airgas' Grand Prairie plant – constitute an appropriate unit and that a mail ballot is appropriate, the Regional Director:

1. Ignores the National Labor Relations Act ("Act") and Board precedent that prohibits fractured units;
2. Departs from Board precedent and record evidence in failing to find that a multisite unit of Production and Distribution employees who collectively comprise the Airgas' North Texas area operation was the only appropriate unit for representation; and
3. Abuses his discretion and errs in ordering a mail ballot election despite Board precedent and a GC memorandum supporting a manual ballot election, and the parties' stipulated agreement to a manual ballot election, following appropriate COVID-19 safeguards.

Request for Review, pp. 1-2.

B. Applicable Law and Grounds for Requests for Review.

Pursuant to § 102.67(d) of the Rules and Regulations of the NLRB, the Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

C. The Employer's Request for Review is Limited Based Upon the Grounds Alleged in its Request for Review.

A careful review of the Employer's grounds for submitting its Request for Review shows that such request is limited to § 102.67(d)(1) and § 102.67(d)(2). Airgas has not raised § 102.67(d)(3) or § 102.67(d)(4) as a basis for the Request for Review. Thus, the only questions to be decided in connection with the Request for Review is (1) whether a substantial question of law or policy is raised because of the absence or departure from officially reported Board precedent, and (2) whether the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the Employer. As will be shown below, the answers to those two questions is an emphatic no.

D. Applicable Law and Standards Regarding Appropriateness of the Petitioned-For Unit.

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. See *NLRB v. American Printers & Lithographers*, 820 F.2d 878, 881 (7th Cir. 1987) (the Board is responsible for designating an appropriate unit for collective bargaining); *Kendall College v. NLRB*, 570 F.2d 216, 219 (7th Cir. 1978).

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”). The Act allows the employees to “organize ‘a unit’ that is ‘appropriate.’” *Am. Hosp. Ass’n*, 499 U.S. at 610. It need not be “the single most appropriate unit.” *Id.*

To determine whether the petitioned-for unit is an appropriate unit, the Board asks whether the employees in that unit are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors) and share a community of interest. *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996). In making its assessment regarding community of interest, the Board considers a variety of factors. *State Farm Mut. Auto Ins. Co. v. NLRB*, 411 F.2d 356, 358 (7th Cir. 1969) (en banc). “The company organization, the numerical size of the unit, the geographical distribution of the employees in the unit, the type of work done by the employees in the unit,” the nature of their supervision, “the organizability of the unit, and the extent to which the unit has already been organized, are all relevant considerations and no one factor is determinative.” *Id.*; *NLRB v. Kostel Corp.*, 440 F.2d 347, 349 (7th Cir. 1971).

The Board determines what weight to give each factor in the circumstances of the case. *NLRB v. Lake County Ass'n for the Retarded, Inc.*, 128 F.3d 1181, 1186-87 (7th Cir. 1997). Accordingly, the Board “is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.” *Macy's*, 2016 WL 3124847, at *4.

“In any given case, a variety of different bargaining units may be appropriate.” *Smith Steel Workers v. A. O. Smith Corp.*, 420 F.2d 1, 11 (7th Cir. 1969); *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). The Board “is not required by the Act to choose the most appropriate unit, but only to choose an appropriate unit within the range of several appropriate units in a given factual situation.” *State Farm*, 411 F.2d at 358; *C & D Foods*, 626 F.2d at 583; *W. F. Hall Printing Co. v. NLRB*, 540 F.2d 873, 875 (7th Cir. 1976). Moreover, in making its selection, the Board may properly take into account the employees’ desire to organize and bargain in a specific grouping, and a union’s interest in representing them in that grouping. See *Lake County Ass'n*, 128 F.3d at 1187-88 (upholding the Board’s selection of a unit based, in part, on extent of employee organization and the union’s interest in representing those in the organized group); *Kostel Corp.*, 440 F.2d at 349 (noting that Section 9(b) requires the Board to select an appropriate unit that will “assure the employees ‘the fullest freedom in exercising the rights guaranteed by [the Act]’”); *NLRB v. Local 404, Int’l B’hd of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 205 F.2d 99, 103 (1st Cir. 1953) (the Board may properly “c[o]me to the conclusion that the single factor that would tip the scales [i]s the preference of the employees”

E. Airgas Stipulated That the Petitioned-For Unit of Drivers at the Grand Prairie Facility is an Appropriate Unit, Which Should End This Entire Proceeding.

Where the Board has found that the petitioned-for unit is an appropriate unit, an objecting party can only overcome that finding by showing that the unit is clearly inappropriate. *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (1999); *Smith Steel Workers*, 420 F.2d at 11; *Kmart*

Corp. v. NLRB, 174 F.3d 834, 838 (7th Cir. 1999) (employer has the burden to show that the Board-approved unit is “utterly inappropriate”); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016). In other words, “it is not enough for the employer to suggest a more suitable unit.” *Dunbar Armored*, 186 F.3d at 847; *Kmart Corp.*, 174 F.3d at 838; *NLRB v. Office Depot, Inc.*, 28 F. App’x 579, 581 (7th Cir. 2002).

In the present case, although the Employer initially asserted in its Statement of Position that “[t]he petitioned-for unit is fractured and is inappropriate,” it nevertheless agreed to Board Exhibit 2, which specifically states that the petitioned-for “unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.” *Bd. Ex. 2*. Thus, the Employer, by stipulating to the fact that the petitioned-for unit is an appropriate unit, cannot now argue that the unit is inappropriate. With that stipulation, the employer is essentially estopped from asserting the exact opposite of its agreement that the unit is, in fact, appropriate.

Out of an abundance of caution, the Union will address the substantive merits of the Employer’s original position that the petitioned-for unit is fractured and inappropriate.

F. The Board’s Recent Holdings Essentially Revert Back to the Applicable Law Before *Specialty Healthcare*.

In 2017, the Board in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017) rejected the Obama-era Board’s “micro-unit” concept (overruling *Specialty Healthcare*, 357 NLRB 934 (2011)) and reinstated the previously long-standing traditional community of interest test for determining whether a proposed bargaining unit is appropriate. Under that test, the Board may consider a multitude of factors to determine if the petitioned-for unit shares a community of interest “sufficiently distinct” from employees excluded from the unit. Such factors include, as previously stated, the organization of departments, skills and training of employees, job functions, functional

integration, contact, interchange, terms and conditions of employment, shared or separate supervision, and prior bargaining history. The Board, however, did not provide further guidance on how to apply the factors.

In 2019, in *The Boeing Company*, 368 NLRB No. 67 (2019), the Board applied *PCC Structurals* and the traditional community of interest factors and provided guidance on how it will apply the community of interest test to bargaining unit requests. The Board articulated a three-step process for determining whether a petitioned-for unit is appropriate under the traditional community of interest standard, as follows:

- *Step One: Shared Interests Within the Petitioned-For Unit.* Per the Board, the analysis begins by assessing whether the classifications in the petitioned-for unit share sufficient interests among themselves, pursuant to the traditional community of interest criteria, discussed above. If the putative members of the petitioned-for unit do not share sufficient interests, the unit is not appropriate, and the inquiry ends there.
- *Step Two: Shared Interests of Petitioned-For and Excluded Employees.* Under the second step, the Board requires a comparative analysis to determine if the interests of employees excluded from the petitioned-for unit are sufficiently and meaningfully distinct and outweigh any similarities with those included in the petitioned-for unit. If such distinct interests do not outweigh similarities, the unit is inappropriate, ending the inquiry.
- *Step Three: Special Considerations of Facility, Industry, or Employer Precedent.* Pursuant to the third and final step, the Board explained that the analysis considers guidelines, if any, the Board has previously established for specific industries regarding appropriate unit configurations.

G. Application of Community of Interest Standards.

1. Shared Interests Within the Petitioned-For Unit.

As far as the Union could decipher, there was no real dispute as to the community of interest of the drivers at the Grand Prairie facility. Nevertheless, the Union will address this step in the community of interest standard.

The Board has historically considered the following factors under its traditional community-of-interest test: “whether 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.” *United Operations, Inc.*, 338 NLRB 123 (2002).

In the present case, it is clear that the Grand Prairie Drivers share a community of interest. The Drivers share the same skills and training in that they all possess commercial drivers’ licenses (CDLs) and undergo the same fifteen days’ company training that is given specifically to Drivers. *Tr. 154-55, 483, 826-28; Emp. Ex. 22.*

They also share the unique job function of being the only employees that drive and transport the Employer’s products. *See pp. 2-6, supra.* While it may be true that Interbranch Drivers bring the product to internal locations versus Local City Drivers delivering to third party customers, that is a minutely small difference that does not change the fact that all the Drivers share the same unique task of driving and transporting the Employer’s products. The Drivers also are paid differently from the other employees, and even had the separate opportunity to earn bonuses based on their meeting certain driving and safety standards prior to the Employer having

to end the bonus program due to the coronavirus pandemic. Based on the foregoing factors and all of the facts cited in the Statement of Facts section of this Brief, the Drivers in the petitioned-for unit share sufficient interests among themselves to easily satisfy the first step of the community of interest analysis.

2. Shared Interests (or More Accurately, Lack Thereof) of Petitioned-For Unit Employees and Excluded Employees.

Drivers and the other production employees and operations coordinators differ in terms and conditions of employment in many respects including, but not limited to, their basic function, hours of work, equipment, qualifications and licensing, regulation, job assignment, compensation, supervision, training, and other conditions of employment.

a. Basic Function.

The main job function of Drivers is to drive and transport freight to and from customers and other internal stores. They primarily work away from the facility the vast amount of time in their day. The other employees do not drive or transport freight, and they only perform their work at the facility.

b. Hours of Work.

Drivers' hours are regulated by the Department of Transportation ("the DOT"); the production employees' and operations coordinators' hours encounter no such regulations. *Tr.* 282. Likewise, unlike the Drivers, the production employees and operations coordinators cannot clock-in to work using an onboard computer. *Id.* The production employees and operations coordinators have specific and uniform shift start and end times, while the Drivers do not have specific and uniform start and end times. *Tr.* 283-84. Their day fluctuates depending on how quick or slow their deliveries get completed. *Id.* The Drivers' start times are also staggered, which is unique to that position. *Tr.* 285.

c. Equipment.

Drivers drive the same types of trucks and tractors when performing their driving duties. The production employees and operations coordinators do not drive any vehicles whatsoever. Additionally, Drivers use onboard computers located in their vehicles, handheld computers, and handheld printers. The production employees, on the other hand, do not use such equipment.

d. Qualifications & Licensing.

. All of the Drivers must have a commercial drivers' license that is a class A or B certification with a hazmat and other endorsements; whereas the production employees and operations coordinators do not hold any license from the state or federal government to do their jobs. The actual minimum qualifications for the Driver position contain numerous requirements that are not contained in any of the job descriptions of the other positions at issue here. *See Emp. Exs. 7, 8, 9, and 10.* These minimum qualifications include, in addition to a CDL, the following:

- Must provide current medical card and copy of current MVR (Motor Vehicle Record report).
- Three years driving experience with Class A CDL.
- Clean driving record of at least three years.
- Must be willing to perform a road test as a condition of employment.
- Must be able to drive hazardous cargo for up to 12 hours.
- Must be able to travel overnight when required.

Emp. Ex. 9.

e. Regulation.

Drivers are regulated by the Department of Transportation (DOT) and must keep DOT logs and other paperwork associated with their work. The other employees do not have such requirements.

f. Pay and Compensation.

Drivers are the highest paid hourly employees at the facility. Drivers are paid a higher hourly rate that ranges from \$20.00 to \$29.00 per hour. In addition to that hourly pay, Drivers have been eligible for quarterly bonuses of \$1,000.00 per quarter if they meet certain goals and objectives. *Tr. 865-66*. Durr testified that he received the quarterly bonus every quarter while it existed. *Tr. 866*. The production employees have never had a bonus program. *Tr. 867*.

g. Supervision.

Drivers are generally supervised by a separate supervision group, the Distribution Supervisors and Managers. There are two Interbranch or Shuttle Drivers working out of Grand Prairie that currently report up through production, but that has only been a recent change and only applies to two of those Drivers.

h. Training.

The Drivers undergo fifteen days of company training that is given specifically to Drivers. In fact, the training that the Drivers receive involve detailed information regarding the unique position of Driver on twelve of the fifteen days. Days 1, 2, and 8 are the only days that are not unique to the position of Driver.

i. Other Differences.

The Drivers begin their day by checking paperwork specific to the Driver position, including the hazmat manifest, load sheets, and trip sheets. The production employees do not have any of those tasks and responsibilities. The Drivers also perform pre-trip inspections of their vehicles, which takes approximately fifteen (15) to twenty (20) minutes. The production employees and operations coordinators do not do this task. Drivers log in to the truck onboard computer after they complete the pre-trip inspection. *Tr. 833-34*. No such log in is done by any other employees.

The Drivers must complete the trip report as they go through their deliveries throughout each day. There is no such requirement for production employees and operations coordinators. The Drivers travel to customers and unload cylinders at the customer location. Drivers also deal directly with customer representatives at the customer location. Local Drivers' job descriptions require them to collect money from customers, make change, and record transactions on customer receipts. The production employees do not have any similar responsibilities. The Local Drivers' job descriptions state that they listen to and resolve service complaints and give feedback to supervisors about customer complaints and requirements. The Lab Techs and Production Operators do not deal directly with customers like the Local Drivers do. Drivers take their lunch away from the Employer facility while they are on the road. The production employees and operations coordinators do not take their lunch on the road, but rather in the facility where they work.

Lab Techs spend eighty-five percent (85%) of their time testing products. The only time that Lab Techs deal with Drivers is when they come into the Lab and request that the Lab Tech print out certifications. Those occasions are rare, estimated to be two to three Drivers per week

making such requests. In fact, John Durr testified that he has never had to get anyone to print a certification for him.

The Production Operators (Fillers, Loaders, and Leads) participate in a meeting at the beginning of their shift called a tailgate meeting. Drivers are not present at this meeting. Fillers such as Erik Perez seldom help load trucks. Perez testified that he recalls helping load trucks three times over the course of two and a half years in Grand Prairie. On those occasions, Perez was only helping the Loader, and the Driver was not present. Likewise, Perez recalls helping load just one truck since he has been in Fort Worth.

j. Petitioned-For Unit Request is Another Factor Weighing in Favor of Denial of the Employer’s Arguments.

The employees and Union have petitioned for a unit consisting of Drivers at the Grand Prairie facility. It is well-settled that the Board may properly take into account the employees’ desire to organize and bargain in a specific grouping, and a union’s interest in representing them in that grouping. See *Lake County Ass’n*, 128 F.3d at 1187-88.

3. The Employer Failed to Meet Its Burden of Showing That the Drivers Share a Community of Interest With the Non-Driver Employees in This Case.

Given the above, it is clear that the Drivers share a strong community of interest and are a proper bargaining unit. It is also clear that the Drivers’ interests are distinct from the production employees’ and operations coordinators’ interests, and thus such employees need not be included in such a unit. The burden of proof is on the Employer to show that the petitioned-for unit is clearly inappropriate. *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (1999); *Smith Steel Workers*, 420 F.2d at 11; *Kmart Corp. v. NLRB*, 174 F.3d 834, 838 (7th Cir. 1999) (employer has the burden to show that the Board-approved unit is “utterly inappropriate”); *Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 495 (4th Cir. 2016). The Employer in this case has totally failed to make that required showing.

4. Special Considerations of Facility and Industry Precedent Weigh Heavily in Favor of the Petitioned-For Unit of Drivers.

Pursuant to the third and final step in *Boeing, supra*, the analysis considers guidelines, if any, the Board has previously established for specific industries regarding appropriate unit configurations. As explained herein, there are numerous Board decisions, issued over many years, that have consistently found drivers-only units to be appropriate.

As explained above, the record establishes that the Drivers share a separate and distinct community of interest from the other production and coordinator employees. The Drivers perform the unique job function of driving tractor-trailers and use unique specialized equipment to perform this function. The Drivers, unlike the other employees, spend the majority of their time away from the facility. The Drivers, unlike the other employees, are subject to specialized licensing requirements and work qualifications.

Community of interest factors similar to those present in this case have long supported Board determinations of drivers-only units. *See, e.g., Office Depot, Inc. v. NLRB*, 184 F.3d 509 (1999) (upholding Board's certification of a truck drivers-only unit in part because truck drivers spend most of their time away from the facility); *Beechnut Foods Division*, 118 NLRB 123 (1957) (granting petition to sever truck driver unit in part because drivers spend between 22 and 52 percent of their time driving); *Home Depot USA*, 331 NLRB 1289 (2000) (despite overlapping supervision and interchange, drivers shared a distinct community of interest in part because of their unique qualifications and licensing); *Mc-Mor-Han Trucking Co.*, 166 NLRB 700 (1967) (overturning

Regional Director's determination that petitioned-for unit of truck drivers was inappropriate in part because there were separate and distinct hiring qualifications for drivers).

Throughout the underlying proceedings, the Employer relied primarily on employee interchange in an attempt to argue an overwhelming community of interest between the Drivers and other employees. However, the amount of interchange is insufficient to make the drivers-only unit inappropriate. Importantly, all interchange is one way, as no other employee ever performs y driving work. *See, e.g., DTG Ops.*, 357 NLRB No. 175 (2011) (finding limited, one-way interchange amongst minority of unit did not require inclusion).

Additionally, the amount of interchange between the Drivers and other employees is a very small fraction of time. Drivers spend a very small amount of time with Loaders and Operations Coordinators each day. The amount of interchange between Drivers on the one hand and Fillers and Lab Techs on the other hand is even less than that, and most times not at all during a normal day. In sum, the Drivers spend the substantial majority of their time driving and away from the facility, and the other employees spend all working hours at the facility performing their job functions. To the extent that Drivers sometimes use forklifts to load or unload their trucks and trailers, that activity is few and far between. Such a small amount of overlapping duties with only Loaders does not create sufficient interchange to render a drivers-only unit inappropriate.

Indeed, the Board has certified drivers-only units in workplaces with significantly more interchange than is present here. For example, in *Home Depot USA*, the Board held that a separate unit of drivers was appropriate though drivers spent thirty to forty percent of time on non-driving duties. 331 NLRB 1289 (2000); *see also Glenside Lumber & Coal Co.*, 100 NLRB 1470 (1952) (drivers appropriately in a separate unit even though spent as much as fifty percent of their time

loading vehicles); *Alamo-Braun Beef Co.*, 128 NLRB 32 (1960) (directing an election in a separate truck driver unit though drivers only spent fifty percent of work time driving).

The Employer's arguments in this case are contrary to longstanding Board precedent that requires only *an* appropriate unit, not the only appropriate unit. *See, e.g., Riteway Motor Parts*, 115 NLRB 294 (1956) ("Although [the truck drivers] could appropriately be joined with the warehousemen, as the Union seeks to represent them separately, we shall, in accordance with the Board's usual policy of permitting truck drivers to be separately represented, establish the truck drivers as a separate unit.") Airgas has not and cannot show that the production employees and Operations coordinators share a community of interest with the petitioned-for unit, as there is a material lack of shared interest on virtually all of the key factors. Drivers-only units are appropriate, both historically and in this specific instance. As such, the Board should deny the Employer's request for review and let stand the Regional Director's direction of election with respect to the requested unit in this case.

H. The Employer's Arguments Concerning the Need to Have a Multi-Location Unit are Without Merit.

1. The Employer's Bid to Have a Multilocation Unit Must Fail Based on Losing the Community of Interest Part of the Case.

As stated on pages 1-2 of this Brief, Airgas was required to show that the Drivers share a community of interest with the other employees **AND** that the employees in the unit should be from all three facilities in the area. Since it has been shown that the community of interest prong of the test cannot be met by the Employer, it results in not even having to address the multi-facility part of its argument. Failing one test, essentially means a failure of all tests. That being said, the Union will address the Employer's case on having a multilocation unit.

2. Board Law on Multilocation Units.

The Board has stated that a petitioned-for single-facility unit is presumptively appropriate, *Hilander Foods*, 348 NLRB 1200 (2006). That presumption is rebuttable, and it is the burden of the party seeking to deviate from the presumptively appropriate unit to rebut the presumption. See *Hilander Foods*, 348 NLRB 1200 (2006); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998). This, once again, means that the Employer bears the burden of rebutting the presumption that the Grand Prairie unit is appropriate.

When a petitioner seeks a single location unit, the single-facility presumption can be rebutted by a showing that the petitioned-for unit has been so effectively merged into a more comprehensive unit, or is so functionally integrated, that it has lost its separate identity. *Hilander Foods*, 348 NLRB 1200 (2006). To determine whether the presumption has been rebutted, the Board examines factors such as central control over daily operations and labor relations, similarity of employee skills, functions, and working conditions, the degree of employee interchange, the distance between locations, and bargaining history, if any. *J&L Plate*, 310 NLRB 429 (1993). Of important note here is that some of the same factors addressed in issues of shared community of interest are also present regarding single versus multilocation units.

Even if there are some factors supporting a multilocation unit, the appropriateness of such a unit does not establish the inappropriateness of a smaller unit. *McCoy Co.*, 151 NLRB 383, 384 (1965). Thus, although the optimum unit for collective bargaining may well be citywide in scope, a union is not precluded from seeking a smaller unit when the unit sought is in and of itself also appropriate for collective bargaining in light of all the circumstances. *Frisch's Big Boy Ill-Mar, Inc.*, 147 NLRB 551, 552–553 (1964).

3. The Applicable Factors in the Instant Case Cannot Establish the Inappropriateness of the Single Grand Prairie Unit.

a. Central Control Over Daily Operations and Labor Relations.

Each facility in this case has supervisors and/or management present at each location. There are three distinct Plant Managers at each location. They all run the production side of the operation. Shift supervisors are also present at the two larger facilities, although Dallas is small enough not to need anyone else on the production side. There are also Distribution Managers at each location. The Drivers report directly to the Distribution Managers. It was clear from the testimony in this case that the Drivers deal directly with the Distribution Managers at their assigned facility, and do not generally see or talk with the Distribution Managers at the other facilities. The Drivers certainly are not supervised by the Distribution Managers at other locations. Both on the production side and distribution side, it is clear that there is facility-specific control over daily operations.

Labor relations is more centralized over the three locations. The HR employees are located in a separate office and are responsible for employee and labor relations for all three facilities.

b. Local Autonomy.

Local autonomy of operations will militate toward a separate unit. *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 47 (1st Cir. 2002); *Hilander Foods*, 348 NLRB 1200, 1202–1205 (2006); *Angelus Furniture Mfg. Co.*, 192 NLRB 992 (1971); *Bank of America*, 196 NLRB 591 (1972); *Parsons Investment Co.*, 152 NLRB 192 (1965); *J. W. Mays, Inc.*, 147 NLRB 968, 969–970 (1964); *Thompson Ramo Wooldridge, Inc.*, 128 NLRB 236, 238 (1960); *D&L Transportation*, 324 NLRB 160 (1997); *New Britain Transportation Co.*, 330 NLRB 397 (1999). In *Angelus Furniture*, 192 NLRB at 993, the individual store manager could

be said to represent “the highest level of supervisory authority present in the store for a substantial majority of time.” See also *Grand Union Co.*, 176 NLRB 230, 232 (1969); *Red Lobster*, 300 NLRB 908 (1990). Compare *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *V.I.M. Jeans*, 271 NLRB 1408, 1409–1410 (1984); *R & D Trucking*, 327 NLRB 531, 532 (1999).

In the present case, Plant Managers like Joshua Chop and Rosende Espino have authority over the facilities at Grand Prairie and Fort Worth and make decisions on a daily basis with respect to all aspects of running the production side of the operation. Similarly, the Distribution Managers are involved on a daily basis at their individual locations on the transportation side of the operation.

c. Interchange of Employees.

Interchange among employees is a frequent consideration. Like the other factors, it is considered in the total context. *Gray Drug Stores, Inc.*, 197 NLRB 924 (1972); *Carter Camera Shops*, 130 NLRB 276, 278 (1961). Thus, for example, where, except for the rare instance of a new store opening, employees were not transferred from the store in question to another store, a unit confined to the one store was found appropriate. *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41, 46–47 (1st Cir. 2002); *Hilander Foods*, 348 NLRB 1200, 1203–1204 (2006); *J. W. Mays, Inc.*, 147 NLRB 968, 970. For other assessments of interchange, see *Cargill, Inc.*, 336 NLRB 1114 (2001); *Van Lear Equipment, Inc.*, 336 NLRB 1059, 1061 (2001); *Bowie Hall Trucking*, 290 NLRB 41, 42–43 (1988); *Globe Furniture Rentals*, 298 NLRB 288 (1990); *Courier Dispatch Group*, 311 NLRB 728 (1993); *Budget Rent A Car Systems*, 337 NLRB 884 (2002); *Trane*, 339 NLRB 866, 867 (2003).

In *J&L Plate*, 310 NLRB 429 (1993), the Board found that minimal employee interchange and lack of meaningful contact between employees at the two facilities diminished the significance of the functional integration and distance between the facilities. See also *Alamo Rent-A-Car*, 330

NLRB 897, 898 (2000); *RB Associates*, 324 NLRB 874, 878 (1997). Compare *First Security Services Corp.*, 329 NLRB 235 (1999). For other cases assessing interchange, see *R & D Trucking*, 327 NLRB 531, 532 (1999); *Novato Disposal Services*, 328 NLRB 820 (1999); *Macy's West, Inc.*, 327 NLRB 1222, 1223 (1999); *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999); *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004); *Exemplar, Inc.*, 363 NLRB No. 157, slip op. at 4–5 (2016); *NLRB v. Klochko Equipment Rental Co.*, 657 Fed. Appx. 441 (6th Cir. 2016).

Although the Employer adduced some evidence of interchange of employees, such interchange was very rare over the course of the last several years. This minimal interchange and in no way is enough to show such substantial interchange to support rebutting the presumption of a single location unit.²

d. Working Conditions.

Working hours, pay rates, the nature of the employer's operations, and all terms and conditions of employment are factors in this area of unit determination. *Prince Telecom*, 347 NLRB 789, 793 (2006). A difference in working hours in each store was one among a number of factors considered. *V. J. Elmore 5¢, 10¢ and \$1.00 Stores, Inc.*, 99 NLRB 1505 (1951).

The three separate locations all have different hours and shifts for their employees. *Tr.* 353-54. Grand Prairie, being the largest operation, runs a three-shift operation, with multiple production employees on each shift. Fort Worth has different shifts and hours, and Dallas, being the smallest facility, has even less shifts that the production employees work. Additionally, Lab Techs are only at the Grand Prairie facility. There are no Lab Techs in Fort Worth and Dallas.

² The Employer may cite the fact that a few Dallas Drivers have been working out of Grand Prairie over the last several weeks. But that is a direct result of so many Grand Prairie Drivers either testing positive for Covid 19 or having to be quarantined because of contact with such Drivers during the worst pandemic in several generations. Otherwise, those Dallas Drivers would not be running out of Grand Prairie.

The foregoing diversity in working conditions militates towards a finding that the single unit is presumptively appropriate and that the evidence adduced by the Employer cannot rebut such presumption.

e. Product Integration.

Although the integration of two or more plants in substantial respects may weigh heavily in favor of the more comprehensive unit, it is not a conclusive factor, particularly when potent considerations support a single-plant unit. See *Dixie Belle Mills, Inc.*, 139 NLRB 629, 632 (1962); *J&L Plate*, 310 NLRB 429 (1993).

In this case, the three facilities produce varying degrees of product. Grand Prairie, the largest location, produces the most products, many of which Fort Worth and Dallas do not have the capability of producing. This lack of product integration is a factor weighing against a multilocation unit.

f. Geographical Separation.

Geography is another factor in determining single versus multilocation status. Although generally plants which are in close proximity to each other are distinguished from those which are separated by meaningful geographical distances, that fact alone is not determinative. This was among the factors enumerated in deciding the appropriateness of a single-plant unit where only twenty (20) miles separated it from another plant. Although not a large distance, this geographical separation added to lack of substantial interchange; the absence of a bargaining history and the fact that no labor organization sought to represent a multiplant unit were held to warrant a single-plant unit. *Dixie Belle Mills, Inc.*, 139 NLRB 629, 632 (1962).

The reasoning from *Dixie Belle Mills, Inc.* should equally apply in this case. Additionally, it bears noting that there was interchange of products and equipment between the three facilities

and facilities outside of the area in places as far as Abilene, Amarillo, and Belton, which negates the Employer's arguments of interchange of products and equipment between the three facilities only. Essentially, if exchanges were made between facilities in this area and facilities as far as West Texas, then there is no justification for the Employer's arguments that the multilocation unit be only Dallas, Fort Worth, and Grand Prairie.

4. The Employer Failed to Meet Its Burden of Showing That the Grand Prairie Single Facility Unit is Inappropriate in This Case.

In light of all of the foregoing factors, the Employer failed to show that a multilocation unit of Grand Prairie, Fort Worth, and Dallas is a more appropriate unit than the Grand Prairie facility by itself. The burden of proof was on the Employer to show that the petitioned-for single facility unit is inappropriate. The Employer in this case totally failed to make that required showing.

I. The Employer's Request for Review of the Regional Director's Direction of a Mail Ballot Election Should be Denied.

In the last section of its Request for Review, Airgas alleges that the Regional Director's Direction of a mail election constitutes "an abuse of discretion, as it contravenes Board precedent, the General Counsel's memorandum, and the stipulated agreement of the parties, without record support." Request for Review, p. 28.

The Board should summarily deny the Employer's request for review of the direction of a mail election for the simple reason that none of the bases of the Employer's arguments constitute a sufficient ground under § 102.67(d). To the extent that there could be an argument that § 102.67(d)(3) covers this type of situation, which the Union contends otherwise, the Employer would still need to show that the Regional Director's ruling "has resulted in prejudicial error." Nowhere in the Employer's Request for Review does it allege that having a mail ballot would result in any prejudice to the Employer. Although it may be true that other recent prior mail elections resulted in comparatively less of a turnout than manual elections, that fact does not and

cannot establish prejudice to Airgas.

For those reasons, the Board should deny the Employer's Request for Review of the direction of a mail election, and further deny its request to stay such election.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Board deny the Employer's Request for Review. The Regional Director's determination that the Union's petitioned-for unit of Drivers at the Grand Prairie facility is an appropriate unit and not fractured.

Respectfully submitted,

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LOCAL UNION 745

Dated: September 17, 2020.

CERTIFICATE OF SERVICE

A copy of this response has been served this day on the appropriate NLRB officials and all counsel of record.

/s/ David K Watsky

David K. Watsky