

Nos. 08-2360, 08-2446

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

**MULTI-FLOW DISPENSERS OF TOLEDO, INC. d/b/a BEVERAGE
DISPENSING SYSTEMS**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court upon the petition for review filed by Multi-Flow Dispensers of Toledo, Inc. d/b/a Beverage Dispensing Systems (“the Company”), and upon the cross-application for enforcement filed by the National Labor Relations Board (“the Board”), of a Decision and Order by the Board against the Company. That Order requires the Company to bargain with the

International Brotherhood of Teamsters, Local No. 20 (“the Union”). The Board found that the Company unlawfully refused to bargain with the Union after the Board had certified that an appropriate unit of its employees fairly elected the Union as their exclusive bargaining representative. The Board’s Order issued on September 29, 2008, and is reported at 353 NLRB No. 22 (D&O 1-3; JA 199-201).¹

The Board has subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices. The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)), because the Company does business within the Circuit and the Board’s Order is a final order issued by a properly-constituted, two-member

¹ Pursuant to 6th Cir. Local Rule 28, the citations to the record and appendix are as follows: “D&O” refers to the Board’s September 29, 2008 Decision and Order; “JA” refers to the Joint Appendix; “Tr” refers to the October 22, 2007 representation hearing transcript; “D&DE” refers to the Regional Director’s November 7, 2007 Decision and Direction of Election; “ODRR” refers to the Board’s December 5, 2007 Order Denying the Company’s Request for Review; “OBJ” refers to the Company’s December 13, 2007 Objections to the Election; “RO” refers to the Regional Director’s January 18, 2008 Report on Objections; and “DCR” refers to the Board’s April 10, 2008 Decision and Certification of Representative. All other references to documents will consist of a description of the document in the record (*i.e.*, “Bd Ex to Pre-Election Hrg,” “Co Appeal of D&DE,” etc.). References preceding the first semicolon are to the Board’s findings, references preceding the second of two semicolons are to the supporting evidence, and remaining “JA” references are to the Joint Appendix.

Board quorum within the meaning of Section 3(b) of the Act, 29 U.S.C. § 153(b). (D&O 1, n.1; JA 199.)² The Company filed its petition for review on October 23, 2008, and the Board filed its cross-application for enforcement on November 12, 2008. Both filings were timely; the Act places no time limits on petitioning to review or applying to enforce Board orders.

The Board's unfair labor practice order is based, in part, on findings from an underlying representation proceeding, in which the Company contested (1) the Board's unit determination and direction of election and (2) the Board's certification of the Union as the employees' exclusive bargaining representative. Therefore, the record in that proceeding (Board Case No. 8-RC-16923) is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). Pursuant to Section 9(d), the Court has jurisdiction to review the Board's actions in the representation proceeding for the purpose of "enforcing, modifying or setting aside in whole or in

²In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, ___ F.3d ___, 2009 WL 638248 (1st Cir. Mar. 13, 2009).

part the [unfair labor practice] order of the Board” (29 U.S.C. § 159(d)). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the rulings of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of well-settled legal principles to substantially-supported findings. Accordingly, the Board believes that oral argument is unnecessary. However, if the Court deems that oral argument is necessary, the Board requests that it be allowed to participate.

STATEMENT OF THE ISSUE

The ultimate issue in this case is whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. Specific subsidiary issues are:

1. Whether the Board acted within its broad discretion in determining that the Company’s drivers shared a community of interest with the Company’s installers, service technicians, floaters, and beer line cleaners to constitute an appropriate plant-wide unit among these employees, and that the Company failed to show that the drivers’ interests were so disparate as to render such a unit inappropriate.

2. Whether the Board acted within its broad discretion in overruling the Company's election objections—that an employee spread a rumor that the Company “paid off” another employee, and that the Union and other employees made improper statements about union initiation fees—by determining that the Company failed to demonstrate that such statements created a general atmosphere of fear and reprisal rendering a free election impossible, or otherwise demonstrated that the election should be overturned.

STATEMENT OF THE CASE

This case requires the Court to decide if the Board acted within its broad discretion in directing an election in an appropriate unit of the Company's employees and in certifying the Union as the employees' bargaining representative, and therefore properly ordered the Company to bargain with the Union. The Company refuses to recognize or bargain with the Union, and instead challenges the Board's unit determination and raises election objections.

STATEMENT OF THE FACTS

I. THE REPRESENTATION PROCEEDINGS

The Union filed an election petition on October 9, 2007. (D&DE 1; Bd Ex. to Pre-Election Hearing 1; JA 77, 111.) The Union sought to represent a unit of company employees that comprised all full-time drivers, service technicians, beer

line cleaners, floaters, and installers at its facility. (D&DE 1; JA 111.)³ The Company challenged the petition, contending that an appropriate unit must exclude the drivers.

A. The Board Holds a Unit Determination Hearing

A hearing officer held a hearing on October 22, 2007. (Tr 1-74; JA 1-75.)

The hearing established the following facts.

1. The Company and Its Employee Classifications

The Company operates a wholesale beverage and juice dispensing business in Toledo, Ohio. (D&DE 2; Tr 11, 18; JA 12, 19, 112.) It services bars, restaurants, and nightclubs in Northwest Ohio and Southeast Michigan. (*Id.*)

The Company employs two installers, four service technicians, two beer line cleaners, seven drivers (also referred to as “route drivers”), and two floaters at its facility. (D&DE 2; Tr 11-21; JA 12-22, 112.) These classifications are described below.

Installers: The two installers install the equipment needed to dispense beer, soda, or liquor at the customer’s place of business. (D&DE 2; Tr 19; JA 20, 112.)

³ Although the Union’s petition originally sought to include a classification of warehousemen in the unit, the Union amended the petition to exclude that classification at the subsequent hearing. (D&DE 2; Tr 8-9; JA 9-10, 112.)

Service Technicians: The four service technicians, who call in for their assignments each day, are responsible for maintaining and repairing the equipment at the customer's place of business. (D&DE 2; Tr 21; JA 22, 112.)

Beer Line Cleaners: The two beer line cleaners flush out the equipment lines to keep them operating properly. (D&DE 2; Tr 20; JA 21, 112.)

Route Drivers: The seven route drivers report to the facility in the morning and deliver to customers the Company's soft drink syrups, juice products, and the CO-2 gas needed to operate its beverage dispensing equipment. (D&DE 2; Tr 21, 23; JA 22, 24, 112.) They use hand-held computer devices to invoice customers and inventory stock. (D&DE 2; Tr 29; JA 30, 112.)

Floater: The two floaters fill in as necessary to perform all of the above duties. (D&DE 2; Tr 20; JA 21, 112.) When filling in for the route drivers, they use the same hand-held computer device that the drivers use. (D&DE 3; Tr 67; JA 68, 113.)

2. Shared Duties, Working Conditions, and Interchange

All employees wear the same company uniforms. (D&DE 5; Tr 35-36; JA 36-37, 115.) All employees also sell company products and work on time schedules that vary from day-to-day. (D&DE 3; Tr 21-24; JA 22-25; 113.)

Moreover, all employees drive company vans to the customer's place of business in the course of their duties. (D&DE 2, 6; Tr 27-28; JA 28-29, 112, 116.)

The route drivers' vehicle is an extended van/route truck, and has a 12-14 foot box on the back. (D&DE 2; Tr 26; JA 27, 112.) All employees, except for 5 of the 7 route drivers, take their vans home at night. (D&DE 2; Tr 27; JA 28, 112.)

In addition, most employees maintain a supply of product in their vans, are responsible for customer goodwill, and collect money from customers. (D&DE 3; Tr 27, 64; JA 28, 65, 113.) For example, the service technicians—like the route drivers—regularly deliver beverage products to customers. (D&DE 3; Tr 64; JA 65, 113.)

Moreover, although the drivers are required to have a Commercial Driver's License ("CDL") with a Hazmat endorsement for CO-2 gas, service technicians and installers who have their CDL's fill in for route drivers on an emergency basis. (D&DE 2; Tr 28, 65; JA 29, 66, 112.) Twelve of the 17 total employees in the unit have CDL's. (D&DE 2; Tr 44; JA 45, 112.) One service technician, Thomas Rembowski, filled in for route drivers 3 to 6 times a year. (D&DE 3; Tr 65; JA 66, 113.)

In turn, the route drivers also perform service technician duties for customers as often as "twice weekly to four times a month." (D&DE 3; Tr 54; JA 55, 113.) If route drivers are to perform service work on their routes, they receive their service assignments along with their delivery schedules when they report to the Company's facility at the start of the day. (D&DE 3; Tr 55; JA 56, 113.)

The route drivers—like all other employees with service training—are also on call on a rotating basis, every 6 or 7 weeks, to perform service work and deliver product to customers. (D&DE 3; Tr 55; JA 56, 113.) While the employees are on call, an answering service contacts them with their assignments. (D&DE 3; Tr 55; JA 56, 113.)

Over the last 10 years, there have been about eight to ten transfers between job classifications. (D&DE 3; Tr 27-53; JA 28-54, 113.) In two instances, route drivers transferred to other classifications. (D&DE 3; Tr 39-40; JA 40-41, 113.) In one instance, an installer, Ron Deverna, temporarily filled in as a route driver for approximately one year. (D&DE 3; Tr 58; JA 59, 113.) The Company then moved him permanently into the route driver's position. (*Id.*)

3. Wages: All Employees Earn Hourly or Base Wages Plus Any Commission for Sales

All employees are eligible to receive a set commission for sales of product in addition to their regular wages. (D&DE 3; Tr 21-23; JA 22-24, 113.) The installers, service technicians, and beer line cleaners are paid by the hour, plus any commission for sales. The route drivers are paid a weekly base amount, plus any commission for sales. (D&DE 3-4; Tr 34, 60-61; JA 35, 61-62, 113-114.)

Although the route drivers' base pay is lower than the other employees' total hourly wages, they supplement their pay through eligibility for weekly and yearly bonuses. (D&DE 3-4; Tr 61; JA 62, 113-114.) They also sell products more

frequently than the other employees, and thus make about 25 percent of their total pay from sales commission. (D&DE 3-4; Tr 21; JA 22, 113-114.)

4. Supervision: All Employees Ultimately Report to General Manager Cassidy, Who Has Final Authority for All Personnel Matters in the Facility

Michael Cassidy is the General Manager of the Company's facility. (D&DE 2; Tr 17; JA 18, 112.) Cassidy has overall responsibility for all daily operations. (D&DE 4; Tr 19; JA 20, 114.) Installers, service technicians, beer line cleaners, and floaters report directly to Cassidy. (D&DE 4; Tr 25-27; JA 26-27, 114.) The route drivers also report to Cassidy through two area managers. (*Id.*)

The primary function of the area managers is to assist the route drivers in maintaining customer goodwill. (D&DE 4; Tr 25; JA 26, 114.) These area managers can recommend disciplinary action for route drivers and other employees to Cassidy, but Cassidy retains the ultimate decision-making authority. (D&DE 4; Tr 24-27; JA 25-28, 114.)

B. The Board Determines that a Unit Including the Drivers Is Appropriate and Directs an Election

On October 22, 2007, the Regional Director issued a Decision and Direction of Election finding, based on the above facts, that the drivers shared a community of interest with the other employees. (D&DE 111-115.) In the Decision and Direction of Election, the Regional Director held that a unit of the installers, service technicians, beer line cleaners, floaters, and route drivers was appropriate,

and ordered an election in that unit. (*Id.*) On November 21, 2007, the Company appealed this decision. (Co Appeal of D&DE 1-10, JA 121-130.) On December 5, 2007, the Board (Members Schaumber, Kirsanow, and Walsh) affirmed the Regional Director's decision without modification. (ODRR 1, JA 131.)

C. The Board Holds a Secret-Ballot Election, the Union Wins, and the Company Files Objections

On December 6, 2007, the Board held a secret-ballot election among the appropriate unit employees. The Union won by a count of 10-7. (Tally of Ballots 1, JA 132.)

On December 13, the Company filed two objections to the election. (OBJ 1-2, JA 133-134.) Its first objection alleged that the election should be overturned because the Union, "through its agents and representatives, and those working with it," made a substantial misrepresentation to employees that the Company paid an employee \$3500 or otherwise "bought him off" to change his vote and convince other employees to vote against the Union. (OBJ 1, JA 133.) Its second objection alleged that the Union, "through its agents and representatives, and those working with it," unlawfully promised employees "that initiation fees would be reduced if [the Union] won the election, although not for everyone in the bargaining unit." (OBJ 2, JA 134).

In support of its objections, the Company submitted a two-page exhibit entitled, "Statement of Evidence In Support of Objections: List of Witnesses and

Brief Overview of Anticipated Testimony.” (Co Ex. A p. 1-2, JA 143-144.) In this exhibit, the Company claimed that in support of its first objection to the election, employees would testify that their co-worker, Thomas Rembowski, spread a rumor in the days immediately prior to the election that the Company “paid off” employee Paul Morris to try to get him to vote against the Union and to persuade others to do the same. (*Id.*) Regarding its second objection, the Company asserted that employees would testify that a union organizer said that the Union’s initiation fee would be higher for anyone who had been a previous union member than it would be for other employees. (*Id.*) The Company also claimed that testimony would indicate that Rembowski and other unnamed employees made statements that the Union would reduce its initiation fees. (*Id.*)

D. The Regional Director Overrules the Company’s Objections

On January 18, 2008, after considering and investigating the Company’s objections, the Regional Director issued a Report on Objections (RO 1-5; JA 145-149.) In this Report, the Regional Director, assuming all of the Company’s proffered evidence to be true, determined that the Company’s objections lacked merit and recommended that the Board overrule them. (*Id.*)

The Regional Director first considered (RO 2, JA 146) the Company’s assertion that an unproven rumor—that the Company paid an employee \$3500 or otherwise “bought him off” to change his vote and to convince as many other

employees as possible to vote against the Union—required overturning the election. Accepting the Company’s proffered evidence as true, the Regional Director nonetheless found (RO 2-3, JA 146-147) that the employees themselves were responsible for the rumor and it amounted to “nothing more than mere election propaganda,” capable of being evaluated as such by the employees. (*Id.*) Thus, the rumor was not “so egregious as to create [the] general atmosphere of fear and coercion” necessary to set aside the election.

The Regional Director next considered (RO 4; JA 148) the Company’s second election objection. The Regional Director began by accepting as true (*id.*) the Company’s proffered witness testimony claiming that the Union told employees that “the initiation fees would be \$250 for former members, but only \$5 for all other employees.” As the Regional Director noted (*id.*), such an “illogical” statement “would not seem to induce the affected employees, or any other employees,” to vote for the Union. In any event, the Regional Director found (*id.*) that it was not objectionable to “treat employees who have already paid initiation fees differently than those who have not,” and the offer was not limited to employees who joined before the election, nor was it conditioned on voting for the Union. Accordingly, he found (*id.*) that the alleged statement by the Union, and other statements by employees “about the Union reducing initiation fees,” did not

constitute objectionable offers to reduce fees “as a quid pro quo for joining the Union.”

E. The Board Certifies the Union

The Company petitioned the Board for review of the Regional Director’s decision on January 31, 2008, contending that the Regional Director erred in overruling its objections and that the Board should set aside the election or, in the alternative, hold a hearing on the matter. (Co Exceptions 1-7, JA 150-156.) On April 10, 2008, the Board (Chairman Schaumber and Member Liebman) found no merit to the Company’s position and adopted the Regional Director’s Report. (DCR 1-2; JA 168-169.)⁴ Accordingly, the Board certified the Union as the employees’ exclusive bargaining representative. (*Id.*)

II. THE UNFAIR LABOR PRACTICE PROCEEDING

On May 18, 2008, the Union sent the Company a letter requesting that the Company recognize the Union as bargaining representative and begin negotiations. (D&O 1; JA 199.) After the Company refused, the Union filed an unfair labor practice charge. (D&O 1; JA 170.)

⁴ Chairman Schaumber noted (JA 168, n.2) that he “relies on the Regional Director’s findings that rumors occur in an election and that employees were able to evaluate the substance of the rumor for themselves.” He also observed that “the [Company] failed to show that the rumor had a reasonable likelihood of impairing employee free choice warranting that the election be set aside.”

Finding merit to the charge, the Board's General Counsel issued a complaint on July 31, 2008, alleging that the Company's failure to bargain violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (Complaint 1-5, JA 171-175.) The Company admitted that it refused to bargain but defended on the grounds that it contested the Board's unit determination and the validity of the election proceedings. (GC Mtn for Summary Judgment at 3, Co Opposition to GC Mtn 2, JA 180, 185-186.)

The Board's General Counsel filed a summary judgment motion on August 21, 2008. (GC Mtn for Summary Judgment 1-6; JA 178-182.) The Company responded by repeating its challenge to the Board's unit determination and the validity of the election proceedings. (Co Opposition to GC Mtn 1-14, JA 185-198.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Schaumber and Member Liebman) granted the General Counsel's summary judgment motion on September 29, 2008. (D&O 1, JA 199.) The Board determined that all representation issues were or could have been litigated in the prior representation proceeding. (*Id.*) The Board also noted that the Company did not offer to adduce at a hearing any newly discovered and previously unavailable evidence. (*Id.*)

The Board found that the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O 2, JA 200.) The Board's Order directs the Company to cease and desist from refusing to bargain with the Union and in any like or related manner interfering with employees' rights under the Act. (D&O 2-3, JA 200-201.) It also directs the Company to bargain with the Union and to embody any understanding reached in a signed agreement, and to post a notice to employees that the Company will bargain with the Union. (*Id.*)

SUMMARY OF ARGUMENT

The Company admits that it refused to bargain with the Union, but defends its failure by challenging the Board's unit determination and the validity of the election. Both defenses fail.

The Company ignores that to prevail on court review of a unit determination, it must do more than establish that another unit would be appropriate, or even more appropriate; rather, it must show that the Board's unit is clearly inappropriate. The Company's brief merely points to unremarkable differences between the drivers and the other classifications in the unit. Thus, the Company has fallen far short of overcoming the Board's amply-supported finding that any differences between the drivers and the other classifications in the unit are significantly outweighed by a community of interest in their shared driving, selling, servicing and maintenance

duties. Accordingly, the Board's inclusion of the drivers in an appropriate unit should be affirmed.

Moreover, the Board acted within its discretion when it overruled the Company's election objections and certified the Union. The Board reasonably found that even assuming that the Company's proffered evidence about a pay-off rumor was true, the rumor, spread by the employees themselves, was merely common election propaganda, capable of being evaluated as such by the employees. The rumor was therefore a far cry from creating an atmosphere of fear and reprisal sufficient to overturn the election. Further, the Company failed to demonstrate that the Union unlawfully offered to reduce initiation fees as a quid pro quo for employees who manifested support for the Union prior to the election.

Accordingly, the Board is entitled to enforcement of its Order requiring the Company to bargain with the Union.

ARGUMENT

I. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN INCLUDING THE DRIVERS IN AN APPROPRIATE UNIT; THEREFORE THE COMPANY'S CHALLENGE TO THIS DETERMINATION FAILS TO EXCUSE ITS UNLAWFUL REFUSAL TO BARGAIN WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT

The Act prohibits an employer from refusing to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). Here, the Company acknowledges (Br 2) its refusal to bargain with the Union in order to contest the

Board's certification of the Union as the representative of the employees. Contrary to the Company's first defense, the Board reasonably determined that the drivers shared a sufficient community of interest with other employees to warrant inclusion in the same unit. Therefore, the Company's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.⁵ *See NLRB v. Child World, Inc.*, 817 F.2d 1251, 1252-53 (6th Cir. 1987) (employer must establish that Board abused its discretion in designating the unit to justify an employer's refusal to bargain).⁶

A. Applicable Principles and Standard of Review

Section 9(b) of the Act (29 U.S.C. § 159(b)) provides that “[t]he Board shall 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” The determination of an appropriate unit “lies largely

⁵ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” Section 7 (29 U.S.C. § 157), in turn, grants employees “the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing” A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

⁶ We address the Company's second meritless defense in Section II.

within the discretion of the Board, whose decision, ‘if not final, is rarely to be disturbed’” *South Prairie Constr. Co. v. Operating Eng’rs, Local 627*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Co. v. NLRB*, 330 U.S. 485, 491 (1947)). *Accord Bry-Fern Care Center, Inc. v. NLRB*, 21 F.3d 706, 709 (6th Cir. 1994).

It is well-settled that in exercising its discretion under Section 9(b), the Board need not select the most appropriate unit, only *an* appropriate unit. *American Hospital Ass’n v. NLRB*, 499 U.S. 606, 610 (1991). *Accord Bry-Fern*, 21 F.3d at 709. Therefore, in order to prevail on review, the employer must do more than establish that another unit would be appropriate, or even more appropriate; it must “show that the Board’s unit is clearly inappropriate.” *Dunbar Armored, Inc. v. NLRB*, 186 F.3d 844, 847 (7th Cir. 1999) (citation omitted).

Accordingly, the scope of review of a Board unit determination is “exceedingly narrow.” *NLRB v. American Seaway Foods, Inc.*, 702 F.2d 630, 632 (6th Cir. 1983) (“The Board’s determination should be upheld unless it is arbitrary, unreasonable or an abuse of discretion.”). Further, a court must accept the Board’s factual findings if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Dayton Newspapers v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005). “Substantial evidence consists of ‘such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion.” *Dayton Newspapers*, 402 F.3d at 659 (citation omitted).

In deciding whether a unit is appropriate, the Board considers whether the proposed unit consists of employees who share a “community of interests sufficient to justify their mutual inclusion in the same bargaining unit.” *Bry-Fern*, 21 F.3d at 709. The factors that the Board generally considers in evaluating whether employees share a community of interest include “the employees’ similarity in skills, interest, duties, and working conditions; functional integration of the plant including interchange and contact among the employees” and “the employer’s organizational and supervisory structure.” *Id. Accord Tallahassee Coca-Cola Bottling Co. Inc.*, 168 NLRB 1037, 1038 (1967), *enforced* 409 F.2d 201 (5th Cir. 1969) (“*Tallahassee Coca-Cola*”); *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

B. Substantial Evidence Supports the Board’s Finding That a Unit Including the Drivers Is Appropriate and the Company Has Failed to Demonstrate That the Drivers’ Interests Are So Disparate From the Other Employees As to Mandate Their Exclusion From the Unit

The Board reasonably found (D&DE 2, 4; JA 112, 114) that “the drivers share a sufficient community of interest with the other employees to warrant their inclusion in the bargaining unit.” Given this community of interest in the unit sought in this case, the Board reasonably found (D&DE 4; JA 114) that the

Company utterly failed to establish that “the interests of the drivers were so disparate from the other employees that they cannot be represented in the same unit.” At most, the Company’s claim (Br 3-8, 10-14) consists of little more than an unremarkable observation that there are some differences between the drivers and the other employees, which is woefully inadequate to disturb the Board’s finding.

Indeed, the record amply supports the Board’s finding (D&DE 5; JA 115) that the route drivers share a community of interest with the other employees because “there is a significant degree of job overlap and functional integration” among them. *See Bry-Fern*, 21 F.3d at 709 (considering job overlap in duties, skills and working conditions, as well as functional integration). All of the employees wear company uniforms, sell company products, and drive company vans to the customer’s place of business where they interact with the customer and have the opportunity to earn commission. (D&DE 2, 3, 5, 6; Tr 21-29; JA 22-30, 112, 113, 115, 116.) *See Levitz Furniture Co.*, 192 NLRB 61, 62 (1971) (substantial contact between customers and most of selling and non-selling employees supports community of interest finding); *Tallahassee Coca-Cola*, 168 NLRB 1037, 1038 (employees sharing selling and driving functions share community of interest), *enforced* 409 F.2d 201. Moreover, the floaters fill in for all of the other classifications, including all of the duties performed by the drivers. (Tr 20, 22, JA 21, 33.)

In particular, the jobs of the service technicians and the route drivers are significantly functionally integrated. The service technicians, like the route drivers, make deliveries, stock their vans with product, and collect money from customers on a substantial and regular basis. Moreover, as the Regional Director noted (D&DE 2; JA 112), like all route drivers, some of the service technicians have their CDL's, thus sharing a skill with the drivers that enables them to fill in for them when needed.

The Board's additional finding (D&DE 5; JA 115), that "[c]onversely, the route drivers perform duties associated with the service technicians," further buttresses the Board's community of interest determination. The route drivers perform such duties as often as "twice weekly to four times a month." (D&DE 3; Tr 54; JA 55, 113.) Further, when the route drivers are on call, every 6 or 7 weeks, they, like all other on-call employees with service training, perform service work for customers. (D&DE 3; Tr 55; JA 56, 113.)

The Company's organizational and supervisory structures also demonstrate a community of interest among the employees in the unit. Indeed, all employees work out of the Company's facility in Toledo—the only location at issue here. Moreover, the Regional Director reasonably found (D&DE 5; JA 115) that all employees are subject to the same ultimate supervisory authority that General Manager Cassidy retains over all personnel decisions. *Bry-Fern*, 21 F.3d at 709

(organizational and supervisory structure are factors in establishing community of interest.)⁷

The Company's faulty claims (Br 10-14) that the drivers do not share a community of interest with the other employees in the unit are powerfully belied by the record evidence, discussed above. At most, such claims only amount to an assertion that there are some differences between the drivers and the other employees indicating that a unit without the drivers would also be appropriate. This unremarkable observation, however, is not enough.

In order to prevail on review, the employer must do more than establish that another unit would be appropriate, or even more appropriate; it must "show that the Board's unit is clearly inappropriate." *See* cases above at p. 19. However, the Company blithely ignores (Br 10-14) this high standard and fails to make the showing necessary to overturn the Board's unit determination. *See Tallahassee Coca-Cola*, 168 NLRB at 1038 ("the fact that driver-salesmen may be shown to possess certain separate interests which could support their exclusion [from an inclusive unit] would not necessarily preclude the inclusion of such employees where the employees in question . . . evidenc[e] a community of interest with

⁷ Thus, contrary to the Company's assertion (Br 11), the supervisory structure here cuts in favor of the Board's community of interest finding.

the production and maintenance employees”), *enforced*, 409 F.2d 201 (5th Cir. 1969).

As the Regional Director here explained (D&DE 4; JA 114), “[w]hile there are some differences in working conditions, such as the drivers earn a higher percentage of commission and are eligible for bonuses, this does not detract from the fact that the record evidence in this case establishes that the petitioned-for unit is an appropriate unit.” Indeed, the Company’s reliance on pay differences between the drivers and other employees is misplaced given that the general wage structure is geared toward commensurately compensating employees. For example, the installers may earn a higher regular wage, but, as the Regional Director noted (D&DE 4; JA 114), the drivers can make up for that with their bonuses and more frequent sales opportunities. (D&DE 4; Tr 60-61; JA 61-62, 114.)

The Company’s remaining claims (Br 12-14) concerning minor differences in work schedules and the number of transfers here, amount to little more than quibbles which in no way require the Court to overturn the Board’s decision to include the drivers in the unit. For example, the Company’s reliance on *Home Depot* (Br 12) is misplaced, as that case is readily distinguishable. Unlike this case, the initial petition in *Home Depot* was for a separate unit of drivers, and the employees did not share duties. *See Home Depot*, 331 NLRB 1289, 1290 (2000).

Likewise, the Company's citation (Br 13-14) to *Aerospace Corp.*, 331 NLRB 561 (2000)—calling into question the sufficiency of the transfer evidence here—is misplaced. Indeed, the Company simply ignores the Regional Director's finding (D&DE 6; JA 116) that although the *Aerospace* Board unremarkably considered transfers as “one factor among many,” that case “does not establish that under the facts of the instant case, the only possible appropriate unit for the drivers is a separate unit.”

As shown above, given “the significant degree of overlap in duties among the drivers and other employees, the functional integration present in this case, the lack of standard hours for all job classifications, the fact that all employees wear the same type of uniform, drive a commercial van or modified van/route truck, and the General Manager's overall responsibility for the supervision of the employees,” the Regional Director reasonably found (D&DE 5-6; JA 115-116) that the Company did not meet its burden of proving that “the interests of the drivers were so disparate from the other employees that they cannot be represented in the same unit.” This Court should therefore uphold the Board's finding (D&DE 5; JA 115) that the drivers “share a sufficient community of interest to be included in the bargaining unit [].”

II. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY’S ELECTION OBJECTIONS; THEREFORE THE COMPANY’S OBJECTIONS DO NOT EXCUSE ITS UNLAWFUL REFUSAL TO BARGAIN WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT

The Company also attempts to justify its refusal to bargain by challenging the Board-conducted representation election that led to the Union’s certification. The Board, however, reasonably determined that the Company failed to meet its burden to justify overturning the election results. Thus, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB v. Duriron Co.*, 978 F.2d 254, 255-59 (6th Cir. 1992).

A. Applicable Principles and Standard of Review

The Board has a “wide degree of discretion” to establish the “safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. at 324. Ballots cast under these safeguards presumptively reflect the true desires of the participating parties. Thus, an objecting party carries the “heavy” burden of establishing that the election was not conducted fairly. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). *Accord NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961).

A party seeking to overturn an election based on third-party conduct must demonstrate that the conduct was so “aggravated” as to “have created a general

atmosphere of fear and reprisal rendering a free election impossible.” *NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d at 639, citing *NLRB v. V&S Schuler Engineering, Inc.*, 309 F.3d 362, 375 (6th Cir. 2002).

B. The Board Reasonably Overruled the Company’s First Election Objection About an Employee “Pay-Off” Rumor

The Board reasonably found (RO 3; JA 147) that even accepting the Company’s proffered evidence as true—that employees Thomas Koch and Rick Oehlers would testify that employee Rembowski told them that the Company “bought off” employee Morris, and that 10 other employees made similar statements—such employee-generated rumors “were nothing more than election propaganda capable of being evaluated as such by employees.” As the Regional Director noted (*id.*), “it is not uncommon for rumors such as these to circulate during strongly contested union campaigns,” and the Board has routinely found that such statements are a far cry from the “general atmosphere of fear and coercion” making free choice “impossible” to warrant overturning the majority vote of employees. *See Alladin Plastics, Inc.*, 182 NLRB 64, 64 (1970) (third-party rumor that employer “bought off” Board agent insufficient to overturn election); *Phoenix Mechanical, Inc.*, 303 NLRB 888, 889 (1991) (third-party rumor that vote for one union was, in actuality, a vote for a different union, insufficient to overturn election).

The Company's challenge (Br 15-17) to this finding relies on sheer conjecture that "Rembowski was an agent of the Union." Thus, the Company claims (Br 15-17) that the Board should have given greater weight to the rumor and analyzed it under a different standard because it was initiated by a party to the election. *See NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d 636, 640 (6th Cir. 2006) (greater weight given to conduct committed by party or agent of party to election; such conduct is enough to overturn election if it reasonably tends to interfere "to such an extent that it materially affected the results of the election").

The fatal flaw in this argument lies in the Company's failure to demonstrate that Rembowski was a union agent. Although its objection (OBJ 1, JA 166) baldly claims that the "Union, through its agents . . ." made the alleged statements, the Regional Director correctly noted (RO 2, nn. 2 & 3, JA 146, nn. 2 & 3) that there was no evidence that "the Union originated or circulated this rumor" or that it was even "aware of the rumor." At best, the Regional Director found (*id.*), the Company merely made "insufficient" assertions that Rembowski "initiated contact with the Union and was the leading Union supporter at the facility," but such naked allegations are insufficient to find that the Union was responsible for the statements attributed to Rembowski. *See Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 355 (6th Cir. 1983) (must show union "instigated, authorized, solicited, ratified, condoned or adopted" an employee's statements, or that the union "has

clothed the employee with apparent authority to act” on its behalf; showing of apparent authority must, “at a minimum,” show that rank-and-file employees perceived the employee to have acted on behalf of the union).⁸

Accordingly, the Company’s claim (Br 16-17) that the Board should have assigned greater weight to the rumors—for example, by considering the employer’s opportunity to respond to the rumors before the election—is misplaced, because it primarily relies on cases involving the more authoritative statements made by union agents. *See NLRB v. St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000) (union agents responsible for alleged conduct); *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984) (same); *Albert Trostel*, 229 NLRB 436, 436 (1977) (same). To be sure, the Company also cites (Br 16) *Alladin Plastics*, 182 NLRB 64 (1970), a case involving a third-party rumor, for the general proposition that one factor to consider in evaluating a rumor is whether the employer had the opportunity to reply to it before the election. *Alladin*, 182 NLRB 64. However, as the Regional Director found (RO 3, n.4; JA 147, n.4), the Board in *Alladin* simply looked at that factor as well as others, and did not mandate consideration of an employer’s ability to respond to a third-party rumor. Thus, the

⁸ Indeed, in the absence of anything other than the Company’s bare assertions about Rembowski’s agency status, the Regional Director found that a hearing was unnecessary. The Company does not challenge this decision, thus waiving any such argument pursuant to FRAP 28(a)(9)(A) (party waives argument it fails to make in opening brief).

Board reasonably overruled the Company's objection to the third-party rumor and found (RO 3; JA 147) that under the circumstances, it did not "create an atmosphere of fear and reprisal such as to render a free choice impossible."

C. The Board Properly Overruled the Company's Second Election Objection About Union Initiation Fees

Again accepting all of the evidence proffered by the Company in support of its objection that the Union "promised employees that initiation fees would be reduced if the [Union] won the election, although not for everyone in the bargaining unit," the Regional Director found (RO 4-5; JA 148-149) that such evidence failed to show that the Union improperly conditioned a reduction of fees on employee support for the Union prior to the election. Accordingly, the Board reasonably found the alleged conduct to be unobjectionable.

The Company offered to produce an employee statement that Union Organizer Norm Llewallen told employees that the Union's initiation fee would be \$250 for "anyone who was a member before," but only \$5 for all other employees. (RO 4; Co Ex A; JA 148, 157-158.) The Company also proffered (RO 4; Co Ex A; JA 148, 157) that employee Josh Pawloski would testify that he "heard comments during the campaign from a few different employees, one of whom was Rembowski, about the Union reducing the initiation fee." The Company asserted (*id.*) that Pawloski "did not understand" who would get the reduced fee, and that he

was “under the impression” that it would be reduced “only for those employees who had approached the Union at the beginning of the campaign.”

Prior to an election, a union may offer to waive or reduce its initiation fees as long as it does not limit its offer to only those employees who manifest support for the union before the election. *See NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 272 n. 4, 277-78 (1973). *Accord NLRB v. S&S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975) (waiver of initiation fees does not in and of itself interfere with an employee’s freedom of choice; waiver only interferes if it is made conditional for those who pledge their support to the union before the election.)

The Regional Director reasonably recognized (RO 4; JA 148) that it “seemed illogical” that a union statement, requiring “former members to pay higher initiation fees than other employees,” would “seem to induce the affected employees, or any other employees,” to vote for the Union. *See Precision Indoor Comfort Inc.*, 456 F.3d at 640 (conduct by party must reasonably tend to interfere “to such an extent that it materially affected the results of the election”). Indeed, the Regional Director also reasonably found (*id.*) that even if such an illogical offer was made, it was not improper “to treat employees who have paid initiation fees differently than those who have not” as long as the Union did not limit the offer to employees who joined before the election. *See De Jana Industries, Inc.*, 305

NLRB 294, 295 (1991) (not improper to treat employees who have already paid initiation fees differently than those who have not). *Accord NLRB v. S&S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312 (6th Cir. 1975) (waiver only interferes with employee choice if made conditional for those who pledge union support before the election).

The Company's only challenge to this finding (Br 18-19)—that “the waiver of initiation fees offered by the Union” was improperly “ambiguous” (based on *Inland Shoe Mfg.*, 211 NLRB 724, 725 (1974))—is without merit. The offer in *Inland Shoe*, unlike the alleged offers here, was directed to “charter members.” Such language was ambiguous on its face as “to when an employee would have to join the union” to qualify for the offer. *Id* at 725. In contrast, the statements here did not raise the question as to “when an employee would have to join the union” to qualify for reduced fees. Indeed, the offer was open, without qualification, to all employees who were not already union members.

To be sure, the Company asserts (Br 19) that Pawloski was confused about the offer he heard from other employees “about the Union reducing the initiation fee.” However, as the Regional Director (RO 4-5; JA 148-149) observed, the “open-ended” statements allegedly heard by Pawloski were, like the union organizer's statements, properly “unconnected with support for the Union before the election, and without distinction between joining the Union before or after the

election.”⁹ In any event, the Regional Director also found (RO 4, n.6; JA 148, n.6) that the Company presented no evidence that the Union was responsible for any statements heard by Pawloski, so “at most,” they were “misrepresentation[s] by a third party that do[] not warrant setting aside the election.”

Finally, the Company suggests (Br 17) that the close 10-7 results of the election boosts its claim that the election should be overturned. “[I]t is well settled, however, that there is “simply no presumption against the validity of a closely contested election.” *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 261, 268 (4th Cir. 2000). *See also CSC Oil Co. v. NLRB*, 549 F.2d 399, 400 (6th Cir. 1977) (upholding election that union won by a single vote, even though employer had raised numerous unmeritorious objections).

⁹ Moreover, the proper standard to assess the statements is an objective, not subjective, one and thus Pawloski’s “impression” of what was said is irrelevant. *See ATR Wire & Cable Co., v. NLRB*, 752 F.2d 201, 202 (6th Cir. 1985).

CONCLUSION

The Company has failed to demonstrate to this Court that the Board abused its discretion when it determined an appropriate unit and overruled the Company's election objections, thereafter certifying the Union as the employees' bargaining representative. Thus, there is no basis upon which this Court should disturb the Board's findings. As there is no reason to disturb those findings, the Company has committed an unfair labor practice by failing to bargain with the Union. Therefore, the Board respectfully requests that this Court deny the Company's petition for review and enforce its Order in full.

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March 2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MULTI-FLOW DISPENSERS OF TOLEDO, INC.,	*
d/b/a BEVERAGE DISPENSING SYSTEMS	*
	* Nos. 08-2360,
Petitioner/Cross-Respondent	* 08-2446
	*
v.	* Board Case No.
	* 09-CA-37734
NATIONAL LABOR RELATIONS BOARD	*
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,835 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 19th day of March 2009

UNITED STATES COURT OF APPEALS
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	*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent the Board's brief to the Clerk of the Court by electronically filing in accordance with Fed. R. App. P. 25(d) and to counsel:

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