

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF
AMERICA, INC.,

Respondent,

and

UNITED AUTO WORKERS,
LOCAL 42,

Charging Party.

*Re: Volkswagen Group of
America, Inc.*, No 16-1309
(D.C. Cir., Dec. 26, 2017),
Order remanding, 364 NLRB
No. 110 (2016), Board Case
Nos. 10-CA-166500, 10-CA-
169340 and 10-RC-162530

**REPLY OF CHARGING PARTY
UNITED AUTO WORKERS, LOCAL 42**

Blair K. Simmons
8000 East Jefferson Avenue
Detroit, MI 48214

Matthew J. Ginsburg
815 Sixteenth Street NW
Washington, DC 20006
(202) 637-5397

**REPLY OF CHARGING PARTY
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Charging Party United Auto Workers, Local 42 (“Local 42”) files this reply to Volkswagen Group of America’s (“Volkswagen”) Response to the Union’s Statement of Position. Local 42 explained in its Position Statement that the Board should reaffirm its decision based on its alternative holding that the petitioned-for unit of skilled maintenance employees is appropriate under pre-*Specialty Healthcare* unit determination law – precisely the standard the Board embraced in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). Volkswagen’s arguments in response are unavailing – in fact, the company fails altogether to respond to the substance of Local 42’s straightforward argument.

1. Instead, the bulk of Volkswagen’s response brief is dedicated to reiterating the same pre-*Specialty Healthcare* unit determination argument – based on application of the traditional community-of-interest factors – that the company previously presented to the Board in its Request for Review. *Compare* VW Response 4-12 *with* VW Request for Review 22-30. Substance aside, this argument is unsuccessful for the basic reason that the Board has already fully considered and rejected Volkswagen’s contention that a skilled maintenance employee unit is inappropriate under pre-*Specialty Healthcare* law, holding that “[t]he same factors the Board relied on in [pre-*Specialty Healthcare* cases such as *Capri Sun, Inc.*, 330 NLRB 1124 (2000), and *Ore-Ida Foods*, 313 NLRB 1016

(1994)] . . . *compel the conclusion* that the petitioned-for unit in this case is an appropriate unit.” *Volkswagen Group of America, Inc.*, 10-RC-162530, at 1-2 n.1 (April 13, 2016) (emphasis added)).

As Local 42 explained in detail in its Position Statement, this alternative ground for the Board’s prior decision was fully litigated by both parties, decided by the Board, and is fully consistent with *PCC Structurals*. See Local 42 Position Statement at 2-12. In similar circumstances – where a Regional Director’s decision issued under *Specialty Healthcare* also rests on an alternative ground – the Board has not hesitated to summarily affirm that decision, notwithstanding the intervening decision in *PCC Structurals*. See, e.g., *Clifford W. Perham, Inc.*, 01-RC-191238, at 1-2 n.1 (Jan. 4, 2018); *New Foundations Charter School, Inc.*, 04-RC-199928, at 1 n.1 (Jan. 3, 2018). As Member Kaplan has explained, summary affirmance is particularly appropriate in cases where “the Board has already considered the applicable evidence and determined that the unit [] is appropriate under the traditional community-of-interest standard renewed by *PCC Structurals*.” *Baker DC, LLC*, 05-RC-135621, at 1-2 n.2 (April 24, 2018) (separate statement of Member Kaplan). See also *ibid.* (separate statement of Member McFerran) (“concur[ring] with Member Kaplan that the unit is appropriate under the traditional community of interest standard”). The Board should follow this

entirely sensible approach here and reaffirm its prior decision in this case on pre-*Specialty Healthcare* grounds.¹

2. Secondly, and perhaps in an effort to distract from the fact that the Board has already held that the skilled maintenance unit at issue here is appropriate under pre-*Specialty Healthcare* law, Volkswagen mischaracterizes Local 42's argument as turning on a novel interpretation of *Specialty Healthcare* rather than

¹ Volkswagen's argument suggests that anything less than a wall-to-wall unit is presumptively inappropriate in a workplace where employees share certain common terms and conditions of employment, *e.g.*, the same benefit plan or employee handbook, because "employees in the petitioned-for unit [will] not have 'meaningfully distinct interests' that outweigh their similarities with the excluded employees." VW Response at 4. Of course, this not only flies in the face of the statutory language – "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) – but *PCC Structurals* holds nothing of the sort, instead repeatedly acknowledging that "nothing in today's decision provides for the Board to reject an appropriate petitioned-for bargaining unit on the basis that a larger unit is *more* appropriate" and "nothing in today's decision precludes the possibility that, in a given case, multiple potential bargaining units may be appropriate." 365 NLRB No. 160, slip op. 12 (emphasis in original).

In fact, Volkswagen acknowledges, as it must, that the application of *PCC Structurals* often will result in a smaller bargaining unit being found appropriate under the traditional community-of-interest test, as was the case in *PCC Structurals* itself. See VW Response at 15 n.7 (explaining that, in the *PCC Structurals* case, "on remand, the RD issued a non-binding decision based on the facts of the case, finding that the petitioned-for unit . . . constituted a craft unit of highly skilled welders and was appropriate for the purposes of collective bargaining"). See also *Baker DC*, 05-RC-135621, at 1-2 n.2 (separate statement of Member Emanuel) (stating that prior unit determination should be affirmed because "the Board considered the traditional community-of-interest factors (now reinstated in *PCC Structurals*) when finding the unit of cement masons appropriate," where cement masons constituted small percentage of total workforce and employer contended that unit must include all employees).

on the Board's own prior holding. That argument – which attacks a strawman and ignores the clear alternative basis for the Board's prior decision – is similarly unsuccessful.

Volkswagen states without citation that, “[i]n its Statement of Position, the Union tries to frame the first step of the *Specialty Healthcare* test as ‘an alternative basis’ for the Board’s holding because it purported to apply the traditional community of interest analysis.” VW Response at 14. That characterization of Local 42’s position is incorrect. Local 42 made clear throughout its Position Statement that “[b]ecause the parties previously litigated the appropriateness of this unit under both *Specialty Healthcare* and pre-*Specialty Healthcare* law, and because the Board found that the unit was appropriate under the pre-*Specialty Healthcare* standard as an alternative basis for its decision, the Board should simply reaffirm its unit determination decision on that alternative ground.” Local 42 Position Statement at 2 (footnote omitted). *See also id.* at 1, 2-12, 13 (stating same). In other words, because “the Board has already considered the applicable evidence and determined that the unit [] is appropriate under the traditional community-of-interest standard renewed by *PCC Structurals*[,]” *Baker DC*, 05-RC-135621, at 1-2 n.2 (separate statement of Member Kaplan), the Board should simply reaffirm its decision on that basis.

In fact, elsewhere in its response, Volkswagen concedes that, “[b]oth in its Statement of Position *and throughout these proceedings*, the Union has also argued that the petitioned-for unit is a typical maintenance unit like those routinely approved by the Board.” VW Response at 15 (emphasis added). And, by spending a large portion of its response brief arguing that “pre-*Specialty Healthcare* decisions upholding maintenance-only units are distinguishable because the maintenance employees do not share a sufficient community of interest to warrant a separate unit,” *ibid.* (indentation, capitalization, and bold omitted), Volkswagen implicitly acknowledges that the Board decided this case in the alternative on pre-*Specialty Healthcare* grounds.

As we have already explained in the first section of this reply, this argument – that pre-*Specialty Healthcare* decisions upholding maintenance-only units are distinguishable from the unit at issue here – was already fully litigated in this case and considered and rejected by the Board. Volkswagen’s reiteration of its disagreement with the Board over the application of pre-*Specialty Healthcare* unit determination law to the facts of this case has nothing to do with *PCC Structurals* and thus falls outside the scope of the D.C. Circuit’s remand. *See Volkswagen Group of America, Inc. v. NLRB*, Case Nos. 16-1309, 16-1353, Doc. #1710538 (unpublished order dated Dec. 26, 2017) (D.C. Cir.) (remanding “for further consideration in light of the Board’s recent decision in *PCC Structurals*[]”).

Further, the company’s claim that the “[p]re-*Specialty Healthcare* decisions upholding maintenance-only units are distinguishable,” VW Response at 15, does not constitute anything near the showing of “special circumstances” required to permit “a respondent in a proceeding alleging a violation of Section 8(a)(5) . . . to relitigate issues that were or could have been litigated in a prior representation proceeding.” *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 922, 922 (1997) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941)).²

For all of the reasons stated in its Position Statement and this Reply, Local 42 respectfully requests that the Board reaffirm its prior determination that the petitioned-for skilled maintenance unit is appropriate under pre-*Specialty Healthcare* unit determination law and that, therefore, Volkswagen committed an unfair labor practice by refusing to bargain with Local 42.

² At the very end of its Response, Volkswagen briefly contends that Local 42 has “fail[ed] to address the significant impact the Board’s prior decision will have on excluded employees’ Section 7 rights and Volkswagen’s labor relations if it is reaffirmed.” VW Response at 19. Of course, these concerns are integrated into the traditional community-of-interest test. *See PCC Structural*s, 365 NLRB No. 160, slip op. 5 (quoting traditional community-of-interest standard with approval and stating that “it ensures that the Section 7 rights of excluded employees who share a substantial (but less than ‘overwhelming’) community of interests with the sought-after group are taken into consideration”). The Board, in applying pre-*Specialty Healthcare* law to reach its alternative holding in this case, fully accounted for these concerns.

Blair K. Simmons
8000 East Jefferson Avenue
Detroit, MI 48214

Respectfully submitted,

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg
815 Sixteenth Street NW
Washington, DC 20006
(202) 637-5397

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Reply of Charging Party United Auto Workers, Local 42 was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 30th day of May, 2018.

Arthur T. Carter, Esq.
Littler Mendelson, P.C.
2001 Ross Avenue, Suite 1500
Dallas, TX 75201-2931

Electronic mail: atcarter@littler.com

A. John Harper III, Esq.
Littler Mendelson, P.C.
1301 McKinney Street, Suite 1900
Houston, TX 77010

Electronic mail: ajharper@littler.com

Elizabeth Parry, Esq.
Littler Mendelson, P.C.
1255 Treat Blvd., Suite 600
Walnut Creek, CA 94597-7605

Electronic mail: mparry@littler.com

Maurice Baskin, Esq.
Littler Mendelson, P.C.
815 Connecticut Avenue, NW, Suite 400
Washington, DC 20006

Electronic mail: mbaskin@littler.com

John Doyle, Esq., Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street NE
Harris Tower, Suite 1000
Atlanta, GA 30303-1531

Electronic mail: John.Doyle@nlrb.gov

/s/ Matthew J. Ginsburg
Matthew J. Ginsburg
815 Sixteenth Street NW
Washington, DC 20006
(202) 637-5397