

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

**VOLKSWAGEN GROUP OF AMERICA  
CHATTANOOGA OPERATIONS, LLC**

**Employer**

**and**

**Case No. 10-RC-239234**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
(UAW),**

**Petitioner**

**VOLKSWAGEN’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S ORDER  
AND MOTION TO STAY PROCEEDINGS**

Pursuant to Section § 102.67(c), (d), and (j) of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, Volkswagen Group of America Chattanooga Operations, LLC (“Volkswagen” or “Company”) requests that the Board review the Regional Director’s Order Deferring Ruling on Motion to Dismiss<sup>1</sup> and moves the Board to stay all further proceedings in the underlying representation case until the Board rules on the issues herein.

**I.  
INTRODUCTION**

On April 15, 2019, Volkswagen filed its Emergency Motion to Dismiss Petition Based on Prior Certification of Maintenance Unit (the “Motion”). Based on well-established Board law, it requested that the Regional Director dismiss the International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW)’s (the “International Union”) April 9, 2019 petition (“Petition”)<sup>2</sup> seeking an election in a unit of production and maintenance employees

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<sup>1</sup> Attached hereto as Exhibit A.

<sup>2</sup> Attached hereto as Exhibit B.

at Volkswagen's Chattanooga plant. Volkswagen is not opposed to elections—as its history strongly supports—rather, the issue is a Board procedural one, namely whether given the circumstances of this case, the Regional Director may continue processing the Petition and moving towards an election under applicable Board law. Volkswagen filed its Motion because the International Union's Petition is barred by the Board's prior certification of United Automobile Workers, Local 42 (the "Local Union") as the exclusive representative of a unit comprised of the maintenance employees also covered by the International Union's Petition. Moreover, the Board's prior certification is currently the subject of a test-of-certification case awaiting Board disposition in Case Nos. 10-CA-166500, 10-CA-169340, and 10-RC-162530 (the "Prior Petition").<sup>3</sup>

On April 16, 2019, Volkswagen filed its Statement of Position, raising the same certification bar issue.<sup>4</sup> Also on April 16, 2019, the Regional Director of Region 10 issued the Order Deferring Ruling on Motion to Dismiss Petition, stating that he is deferring ruling on the Motion "pending development of a record at hearing, scheduled for April 17, 2019, and consideration of that record evidence and post-hearing briefs."<sup>5</sup> The hearing was held on April 17, 2019. Volkswagen stated on the record that by participating in the hearing, it was not waiving its arguments regarding the validity of the hearing or its ability to pursue other remedies. No live

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<sup>3</sup> Subsequent to the filing of the Petition, on April 15, 2019, the Local Union notified Volkswagen and the Region in an e-mail that it disclaimed interest in the maintenance-only unit. (Attached hereto as Exhibit C). The Local Union's disclaimer of interest has not been approved, its certification has not been revoked, and the unfair labor charges predicated on its certification are still pending.

<sup>4</sup> Attached hereto as Exhibit D.

<sup>5</sup> See Exhibit A. At about the same time, the Region also provided Volkswagen's counsel a proposed joint motion on behalf of the Counsel for the General Counsel and the Local Union to dismiss two of the four pending unfair labor practice charges arising out of the certification. An unsigned copy is attached hereto as Exhibit E. The proposed joint motion was signed by the Counsel for the General Counsel and counsel for the Local Union during the hearing and introduced into evidence.

testimony was presented. Rather, the parties jointly agreed to the admission of Joint Exhibits 1 – 18, all of which relate to the certification bar question.<sup>6</sup>

The Regional Director’s action warrants review because it raises a substantial question of law and policy in that the Regional Director is departing from well-established Board precedent by continuing to process the Petition and conduct representation proceedings when the Petition is barred by the Board’s certification year rule. The International Union’s Petition seeks to represent a combined unit of maintenance and production employees at Volkswagen’s Chattanooga plant, but the Local Union was certified as the exclusive bargaining representative for all Chattanooga maintenance employees on December 14, 2015.<sup>7</sup> Subsequent to the certification, the Local Union filed various unfair labor practice charges, some of which have been held in abeyance, and also requested bargaining predicated on the certified status of the maintenance employee unit.<sup>8</sup> Volkswagen declined this request in order to exercise its right to test the Local Union’s certification and to obtain judicial review of the Board’s maintenance unit determination. In turn, the Local Union filed unfair labor practice charges, the Region issued a complaint, and the Board issued a decision sustaining the maintenance unit determination. *See Volkswagen Group of America, Inc.*, 364 NLRB No. 110, slip op. at 1 (Aug. 26, 2016).<sup>9</sup> The certification of the maintenance unit is still extant, and the case is now pending before the Board after being remanded from United States Court of Appeals for the D.C. Circuit for further consideration in light of the Board’s decision in *PCC Structural Inc.*, 365 NLRB No. 150 (Dec. 15, 2017).

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<sup>6</sup> The Regional Director set the due date for post-hearing briefs limited to the question of whether the certification bar applies on April 24, 2019.

<sup>7</sup> Certification attached hereto as Exhibit F.

<sup>8</sup> *See* Case Nos. 10-CA-166500, 10-CA-169340, 10-CA-209575, 10-CA-191620.

<sup>9</sup> Attached hereto as Exhibit G.

The Board's longstanding certification year rule renders the International Union's Petition not proper at this time. Had there not been a maintenance-only unit already certified, then there would be no obstacle to processing the Petition for the combined unit. But the rule prohibits any petitions from being processed before the end of the certification year, which, in this case, has not yet expired, but rather continues because of the pendency of the case remanded to the Board by the D.C. Circuit. Moreover, besides violating the certification year bar, proceeding with a petition and possibly an election in a combined production and maintenance unit is fundamentally inconsistent with the prior certification of the maintenance-only unit and with the pending unfair labor practice charges. For these reasons, Volkswagen requests that the Board grant review of the Regional Director's action and stay all further proceedings in the representation case until it issues a final ruling.

## **II.** **FACTUAL BACKGROUND**

Volkswagen manufactures and assembles automobiles at its Chattanooga, Tennessee plant, which began production in 2011. At relevant times, the plant had approximately 2,400 employees, including approximately 1,300 team members and team leaders ("production employees") and 162 skilled team members and skilled team leaders ("maintenance employees"). The plant is divided into three shops corresponding to the three main processes in building a car, specifically Body, Paint, and Assembly. There is no separate maintenance department. Rather, both production and maintenance employees work together in one of the three shops.

Having lost an election in a production and maintenance unit in February 2014, the Local Union then filed a petition just for the maintenance employees. On October 23, 2015, the Local Union filed a petition seeking to represent the approximately 162 maintenance employees spread throughout the three shops at the plant. Region 10 held a representation hearing, and on November

18, 2015, the Regional Director (“RD”) directed an election in the petitioned-for unit. The election was held on December 3 and 4, 2015, and the Union prevailed by a vote of 108 to 44. The Local Union was certified as the exclusive collective bargaining representative of “[a]ll full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility.”

Following the vote, Volkswagen filed a Request for Review (“RFR”), contending that any appropriate unit had to include the production employees as well. A Board majority consisting of Members Hirozawa and McFerran, with Member Miscimarra dissenting, denied the RFR on April 13, 2016,<sup>10</sup> and stated that the petitioned-for unit satisfied the standards set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).

As noted above, after Volkswagen declined to bargain with the Local Union to test the unit determination, the NLRB found that Volkswagen violated Sections 8(a)(5) and (1). *See* 364 NLRB No. 110, slip op. at 1. Volkswagen appealed the unfair labor practice finding to the D.C. Circuit on September 1, 2016, and the Board filed a cross-application for enforcement. After oral argument, but before the D.C. Circuit ruled on the merits, the NLRB decided *PCC Structural*s, which overruled *Specialty Healthcare*. As a result, on December 19, 2017, the NLRB filed a motion to remand the case to the Board for further proceedings in light of *PCC Structural*s. On December 26, 2017, the D.C. Circuit granted the motion.<sup>11</sup>

In a January 17, 2018 letter, the Local Union asked the Board not to remand the case to the RD, contending that reconsideration of the decision was unnecessary, and to reaffirm its decision. Volkswagen responded on January 24, 2018, disagreeing with the Local Union’s assertion that

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<sup>10</sup> Attached hereto as Exhibit H.

<sup>11</sup> Order attached hereto as Exhibit I.

there was no basis for reconsidering the unit determination. On April 18, 2018, the Board notified the parties that it would accept statements of position concerning the remand on or before May 16, 2018. On May 16, 2018, Volkswagen filed a letter and the Local Union filed a Statement of Position, both of which stated that the Board should retain the case for decision and not remand it to the RD. Volkswagen later filed a response to the Local Union's Statement of Position. The Board has not yet issued a decision.

On April 9, 2019, the International Union filed the instant Petition for a unit including "all full-time and regular part-time production and maintenance employees" employed at Volkswagen's Chattanooga plant—seeking a third vote for the maintenance employees and a second vote for the production employees. On April 15, 2019, the Local Union purported to disclaim interest in the maintenance-only unit, withdraw the Prior Petition, and withdraw its pending unfair labor practice charges. The Local Union's disclaimer of interest has not been approved, its certification has not been revoked, and the test of certification case has not been dismissed.

On April 16, 2019, Volkswagen filed its Statement of Position, raising the same certification bar issue. On April 16, 2019, the Regional Director of Region 10 issued the Order Deferring Ruling on Motion to Dismiss Petition, stating that he is deferring ruling "pending development of a record at hearing, scheduled for April 17, 2019, and consideration of that record evidence and post-hearing briefs."

### **III.** **ARGUMENT**

#### **A. The Regional Director's Order Warrants Reviews Because It Is a Departure from the Board's Precedent.**

Under Section 102.67(c) of the Board's Rules and Regulations, the Board "may review any action of a Regional Director delegated to him under Section 3(b) of the Act except as the Board's

Rules provide otherwise.” Review is appropriate where “a substantial question of law or policy is raised because of...[a] departure from, officially reported Board precedent.” *Id.* at § 102.67(d)(1)(ii). In this case, the Regional Director’s issuance of an order deferring ruling on Volkswagen’s Motion satisfies the Board’s requirements for review because the Regional Director is continuing to process the Petition in violation of the Board’s certification year rule.

Under the certification year rule, the International Union’s Petition cannot proceed because it was filed while the maintenance-only unit was certified and before the expiration of the Local Union’s certification year. To afford an employer and a certified union a reasonable time for bargaining without outside interference and to foster stability in labor relations, the Board developed the rule upheld by the U.S. Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the status of a certified union may not be disturbed during the certification year. Accordingly, petitions (whether representation, employer, or decertification) will be dismissed if they are filed before the end of such year. *See NLRB Outline of Law and Procedure in Representation Cases*, Section 10-200, 117 (June 2017). The Board applies this rule strictly. *United Supermarkets*, 287 NLRB 119, 120 (1987). Typically, the rule applies for one year following the date of certification, but will be extended in situations where the employer has failed to bargain in good faith with the union to insure that the parties have “at least one year of actual bargaining.” *See Mar-Jac Poultry Co.*, 136 NLRB 785, 787 n. 6 (1962). And where there has not been bargaining because an employer has pursued its right to judicial review, as is the case here, the certification year clock begins on the date of the parties’ first bargaining session following final affirmance of the Board’s order. *Virginia Mason Medical Center*, 350 NLRB 923, 923 (2007); *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 278 (1990), *enfd.* 939 F.2d 402 (6th Cir. 1991).

Thus, in this case, the Petition should have been dismissed, and the Region is prohibited

from taking steps to process it. Although more than a year has passed since the Local Union was certified as the bargaining agent for the maintenance-only unit, the certification year is still in effect because of the delay arising out Volkswagen's exercise of its rights to seek judicial review. Depending on the Board's ultimate ruling in the unfair labor practice case, the certification year could be extended for one year from the date of Volkswagen's first bargaining session with the Local Union.

Further, the certification year rule applies to petitions involving the representation of employees in the unit certified. *See American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720, 721-722 (1960) ("certification is, under Board law, a bar for 1 year to a petition for employees *in that unit*"). Because the Petition seeks an election in a unit including the same maintenance employees in the certified unit, the rule applies to bar the Petition. Under these circumstances, the Region could not entertain a withdrawal of recognition by Volkswagen, a representation petition by a rival union, a decertification petition by employees, or an employer petition at this time. Likewise, the Region also should not entertain the International Union's Petition for a combined production and maintenance unit, which is the functional equivalent of a petition by a rival, albeit affiliated, union.

The Regional Director's deferral of his ruling on Volkswagen's Motion is tantamount to a denial, and in fact is in excess of his delegated authority because he has no discretion as to the impact of the certification bar once its existence is established, as it has been here. While some issues are not required to be resolved before an election, the certification year rule is a bar to *the petition itself*, meaning it is a threshold issue in any representation case. Highlighting the strict application of this rule, the Board has found that even the "*mere retention on file of such petitions*" detracts from the full import of a Board certification. *See Centr-O-Case & Engineering Co.*, 100 NLRB 1507, 1508 (1951) (emphasis added). Given this explicit authority requiring prompt

dismissal of petitions barred by the certification year rule, the Regional Director's delay in doing so demands Board review.

**B. All Further Representation Proceedings Should Be Stayed.**

Sections 102.67(j)(1) and (2) of the Board's Rules and Regulations provide that a party requesting review may also request "a stay of some or all of the proceedings, including the election...upon a clear showing that it is necessary under the particular circumstances of the case." The unique circumstances of this case, in which a union and a Regional Director continue to proceed towards an election in a unit containing a group of employees for whom a representative has already been certified and before that certification year has expired, demonstrate that extraordinary relief in the form of a stay of all further proceedings in the representation case is appropriate.

As explained above, in the Petition, the International Union seeks to represent a production and maintenance unit, despite the fact that the Local Union has already been certified as the bargaining agent of the maintenance employees, and its certification has not been revoked.<sup>12</sup> Continuing these proceedings towards such an objective is fundamentally inconsistent with the prior certification and "necessarily at odds" with the principle of exclusive representation. *See Bentson Contracting Co.*, 941 F.2d 1262, 1266 (D.C. Cir. 1991) ("Two unions simply cannot be

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<sup>12</sup> Although the International Union contends the Local Union's disclaimer of interest resolved this issue, the Board must take action to revoke the certification and dismiss the unfair labor practice charges over which it has jurisdiction. This is especially so in this case where the Unions have taken varying positions regarding the appropriate unit. The Local Union's statement alone is insufficient to accomplish this, and the Region has no authority to act for the Board on these matters. Counsel for the General Counsel and the Local Union have recognized as much in their Motion for Dismissal of Complaint, attached hereto as Exhibit J. They seek dismissal of the underlying unfair labor practice complaints, but they do not say anything about the certification. And rather than dismissing the International Union's Petition, as is required by extant law, the Region improperly continues to process the Petition, which should cause any party faced with a barred Petition significant concern. *See, e.g.*, Outline of Law and Procedure in Representation Cases at 10-200-10-221(citing cases) (June 2017). Accepting the Region's rule would mean that an RD, an RM, or another union's RC petition could be processed and parties could be required to go to a hearing to litigate the existence of the certification bar—something about which there is no doubt in this case. The prior certification and the pending unfair labor practices need to be decided first. Then the International can file its Petition if appropriate.

the ‘exclusive’ bargaining representative of the same employee with respect to the same conditions of employment”). Ultimately, the maintenance employees can only be represented by one *exclusive* bargaining representative in one bargaining unit.<sup>13</sup> And while Volkswagen has consistently maintained that its stable, integrated manufacturing process in which all production and maintenance employees work side-by-side and are subject to the same rules, benefits and compensation structure, and bonus program make a traditional production and maintenance unit appropriate, the Local Union has spent the better part of four years emphasizing that the maintenance-only unit was appropriate for bargaining. Now, for reasons of expediency, the Local Union has attempted to disclaim interest before the Board resolves the issue. Proceeding with the representation case at this time is improper and would be contrary to the principles underlying the National Labor Relations Act because the International Union seeks to represent employees who are already part of a certified unit.

Further, there are unfair labor practice charges predicated on the certification of the maintenance unit still pending before the Board. These charges allege violations of Section 8(a)(5) of the Act and seek to establish a bargaining relationship, the remedy for which includes an affirmative bargaining order. There is no question that the potential issuance of an order requiring Volkswagen to bargain with the Local Union as the representative of the maintenance-only unit is inherently inconsistent with the International Union’s Petition seeking to represent an overlapping unit of production and maintenance employees. While the International Union asserts that the

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<sup>13</sup> While the International Union and the Local Union may argue that they are effectively the same union for purposes of representing the maintenance employees, it is well established that, for purposes of the Act, a local union is a distinct legal entity apart from its international. *See e.g., Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, (2010) (Member Becker denying recusal motion in part on basis that courts have distinguished local unions “as autonomous entities separate and apart from international unions with which they are affiliated”); *Electrical Workers Local 5 (Franklin Electric Construction Co.)*, 121 NLRB 143, 146-148 (1958) (collecting cases).

Local Union has withdrawn its unfair labor practice charges, the withdrawal of the test-of-certification complaint has not been approved, and the unfair labor practice case has not been dismissed. As such, the representation case should not move forward until these issues are fully resolved by the Board.

**IV.**  
**CONCLUSION**

For the reasons above, Volkswagen requests that the Board grant review of the Regional Director's Order Deferring Ruling on Motion to Dismiss Petition, as this action constituted a departure from Board precedent, namely, the well-established certification year bar. Further, Volkswagen asks that the Board order a stay of all proceedings in the representation case to prevent the Regional Director from continuing to process the barred Petition.

Dated this 17th day of April, 2019.

Respectfully submitted:

LITTLER MENDELSON, P.C.

/s/ Arthur T. Carter

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Arrissa K. Meyer  
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**CERTIFICATE OF SERVICE**

I hereby certify that a complete copy of *Volkswagen's Request for Review of Regional Director's Order and Motion to Stay Proceedings* was e-filed with the NLRB on April 17, 2019, was also served on the following persons by electronic filing and/or email on April 17, 2019:

Roxanne L. Rothschild  
Executive Secretary  
Office of the Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001  
***Via e-filing at NLRB.gov***

Peter B. Robb  
General Counsel  
National Labor Relations Board  
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John D. Doyle, Jr.  
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National Labor Relations Board  
Region 10  
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***Attorney for Involved Party***

*/s/ Arthur T. Carter*  
\_\_\_\_\_  
Arthur T. Carter

# **EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**VOLKSWAGEN GROUP OF AMERICA  
CHATTANOOGA OPERATIONS, LLC**

**Employer**

**And**

**Case 10-RC-239234**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE &  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA**

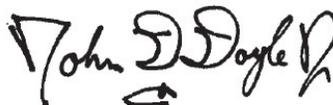
**Petitioner**

**ORDER DEFERRING RULING ON MOTION TO DISMISS PETITION**

On April 15, 2019, the Employer filed an Emergency Motion to Dismiss Petition Based on Prior Certification of Maintenance Unit. On April 16, 2019, the Employer filed a Statement of Position raising the same certification bar issue.

I am deferring ruling on the Employer's Motion to Dismiss pending development of a record at hearing, scheduled for April 17, 2019, and consideration of that record evidence and post-hearing briefs.

Dated: April 16, 2019



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JOHN D. DOYLE, JR.  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 10  
233 Peachtree St NE  
Harris Tower Ste 1000  
Atlanta, GA 30303-1504

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**VOLKSWAGEN GROUP OF AMERICA  
CHATTANOOGA OPERATIONS, LLC**

**Employer**

**and**

**Case 10-RC-239234**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE &  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA**

**Petitioner**

**AFFIDAVIT OF SERVICE OF: ORDER DEFERRING RULING ON MOTION TO  
DISMISS PETITION**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on, I served the above-entitled document(s) by **electronic mail** and/or **regular mail** upon the following persons, addressed to them at the following addresses:

Michael B. Schoenfeld, Esq.  
Stanford Fagan, LLC  
2540 Lakewood Ave SW  
Atlanta, GA 30315-6328

American Counsel of Employees  
c/o Maury Nicely, Attorney  
Evans Harrison Hackett PLLC  
835 Georgia Ave Suite 800  
Chattanooga, TN 37402-2225

International Union, United Automobile,  
Aerospace & Agricultural Implement  
Workers of America  
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Nicole Koesling, Sr. VP of HR  
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Samuel Morris, Attorney  
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United Auto Workers Local 42  
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April 16, 2019

TERRANCE MARTIN,  
Designated Agent of NLRB

Date

Name

/s/ Terrance Martin

Signature

# **EXHIBIT B**

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**RC PETITION**

DO NOT WRITE IN THIS SPACE	
Case No. <b>10-RC-239234</b>	Date Filed <b>April 9, 2019</b>

**INSTRUCTIONS: Unless e-Filed using the Agency's website, [www.nlr.gov](http://www.nlr.gov), submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.**

**1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

<b>2a. Name of Employer</b> Volkswagen Group of America Chattanooga Operations, LLC	<b>2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)</b> 8001 Volkswagen Drive, Chattanooga, TN 37421
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<b>3a. Employer Representative - Name and Title</b> Nicole Koesling, Sr. VP of HR	<b>3b. Address (If same as 2b - state same)</b> 8001 Volkswagen Drive, Chattanooga, TN 37421
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<b>3c. Tel. No.</b> 423-320-0767	<b>3d. Cell No.</b>	<b>3e. Fax No.</b>	<b>3f. E-Mail Address</b> nicole.koesling@vw.com
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<b>4a. Type of Establishment (Factory, mine, wholesaler, etc.)</b> Automobile Manufacturer	<b>4b. Principal product or service</b> Automobiles	<b>5a. City and State where unit is located:</b> Chattanooga, TN
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<b>5b. Description of Unit Involved</b> <b>Included:</b> See attachment  <b>Excluded:</b> See attachment	<b>6a. No. of Employees in Unit:</b> Approx. 1709	<b>6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/></b>
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**Check One:**  7a. Request for recognition as Bargaining Representative was made on (Date) 4/9/19 and Employer declined recognition on or about No reply (Date) (If no reply received, so state).  
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

<b>8a. Name of Recognized or Certified Bargaining Agent (if none, so state).</b> United Auto Workers, Local 42	<b>8b. Address</b> Godwin, Morris, Laurenzi & Bloomfield, PC, 50 North Front St., Suite 800, Memphis, TN 38103
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<b>8c. Tel. No.</b> 901-528-1702	<b>8d. Cell No.</b>	<b>8e. Fax No.</b>	<b>8f. E-Mail Address</b> smorris@gmlblaw.com
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<b>8g. Affiliation, if any</b> <small>International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)</small>	<b>8h. Date of Recognition or Certification</b> 12/15/15	<b>8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)</b>
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9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? \_\_\_\_\_  
(Name of labor organization) \_\_\_\_\_, has picketed the Employer since (Month, Day, Year) \_\_\_\_\_.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)  
None

<b>10a. Name</b>	<b>10b. Address</b>	<b>10c. Tel. No.</b>	<b>10d. Cell No.</b>
		<b>10e. Fax No.</b>	<b>10f. E-Mail Address</b>

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type:  Manual  Mail  Mixed Manual/Mail

<b>11b. Election Date(s):</b> April 29 & 30, 2019	<b>11c. Election Time(s):</b> 4:30a-9a; 2:30p-5:30p; 7p-9p; 11:30p-3:30a	<b>11d. Election Location(s):</b> Conference Center and/or RB1
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<b>12a. Full Name of Petitioner (including local name and number)</b> International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)	<b>12b. Address (street and number, city, state, and ZIP code)</b> 8000 East Jefferson Avenue, Detroit, MI 48214
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12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)

<b>12d. Tel. No.</b>	<b>12e. Cell No.</b>	<b>12f. Fax No.</b>	<b>12g. E-Mail Address</b>
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**13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.**

<b>13a. Name and Title</b> Michael B. Schoenfeld, Attorney	<b>13b. Address (street and number, city, state, and ZIP code)</b> Stanford Fagan LLC, 2540 Lakewood Ave SW, Atlanta, GA 30315
---	---

<b>13c. Tel. No.</b> 404-622-0521, ext. 2244	<b>13d. Cell No.</b>	<b>13e. Fax No.</b>	<b>13f. E-Mail Address</b> michaels@sfglawyers.com
---	----------------------	---------------------	---

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

<b>Name (Print)</b> Michael B. Schoenfeld	<b>Signature</b> s/ Michael B. Schoenfeld	<b>Title</b> Attorney	<b>Date</b> April 9, 2019
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**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

# **EXHIBIT C**

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**From:** Samuel Morris <smorris@gmlblaw.com>  
**Sent:** Monday, April 15, 2019 2:45 PM  
**To:** Ian.Leavy@vw.com; nicole.koesling@vw.com  
**Cc:** Carter, Arthur T.; Harper III, A. John; Meyer, Arrissa; Kerstin.Meyers@nlrb.gov  
**Subject:** Disclaimer - UAW Local 42 - Volkswagen Group of America, Inc.

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

I represent UAW Local 42.

Please be advised that UAW Local 42 hereby waives and disclaims any right to represent the employees of Volkswagen Group of America, Inc, in the following bargaining unit:

All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined by the Act.

You may contact the undersigned with any questions concerning the above.



**Samuel Morris**  
Godwin Morris Laurenzi Bloomfield  
50 N. Front St  
Suite 800  
Memphis, TN 38103  
901 528 1702  
901 949 1144

# **EXHIBIT D**

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**STATEMENT OF POSITION**

**DO NOT WRITE IN THIS SPACE**

Case No.

Date Filed

**INSTRUCTIONS:** Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

**Note:** Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position: Volkswagen Group of America Chattanooga Operations, LLC		1c. Business Phone: (423)582-4000	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code): 8001 Volkswagen Drive, Chattanooga, TN 37421		1d. Cell No.:	1f. e-Mail Address:
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If not, answer 3a and 3b.)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.) See Attachment B			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. Added: _____ Excluded: _____			
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position. See Attachment B.			
6. Describe all other issues you intend to raise at the pre-election hearing. None			
7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at <a href="http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015">http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015</a> (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D).			
8a. State your position with respect to the details of any election that may be conducted in this matter. Type: <input checked="" type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s): See Attachment B	8c. Time(s): See Attachment B	8d. Location(s): See Attachment B	
8e. Eligibility Period (e.g. special eligibility formula): None	8f. Last Payroll Period Ending Date: March 29, 2019	8g. Length of payroll period <input type="checkbox"/> Weekly <input checked="" type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length) _____	
<b>9. Representative who will accept service of all papers for purposes of the representation proceeding</b>			
9a. Full name and title of authorized representative Arthur T. Carter	9b. Signature of authorized representative <i>Arthur T. Carter</i>		9c. Date 4/16/2019
9d. Address (Street and number, city, state, and ZIP code) 2001 Ross Ave., Ste. 1500, Dallas, TX 75201		9e. e-Mail Address atcarter@littler.com	
9f. Business Phone No.: 214-880-8105	9g. Fax No.: 214-595-8601	9h. Cell No.: 214-709-2816	

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)  
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.



**CASE NO. 10-RC-239234**  
**ADDENDUM TO ATTACHMENT A**

**Name, Address and Relationship of All Related Entities**

Volkswagen Group of America, Inc., 2200 Ferdinand Porsche Dr., Herndon, VA 20171-5884.  
Volkswagen Group of America, Inc., is the sole member of the Employer, Volkswagen Group of America Chattanooga Operations, LLC.

**CASE NO. 10-RC-239234**

**ATTACHEMEMNT B TO VOLKSWAGEN'S STATEMENT OF POSITION**

**3(a): State the basis for your contention that the proposed unit is not appropriate.**

The petition in the proposed unit is barred by a certification bar. The maintenance employees cannot be included in the proposed production and maintenance unit. The Board has already issued a certification that such employees are represented in a separate unit by another union, despite Volkswagen's position that the maintenance-only unit was inappropriate for all of the reasons Volkswagen stated in NLRB Case Nos. 10-RC-162530, 10-CA-166500, 10-CA-169340 and D.C. Circuit Case No. 16-1309. At the same time, a unit consisting only of production employees cannot be approved without the maintenance employees because maintenance employees' terms and conditions of employment are not sufficiently distinct from the production employees' terms and conditions of employment so as to justify separate units. *See PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. (Dec. 15, 2017).

**3(b): State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.**

While the certification year bar is in effect, the Union's petition cannot go forward. A unit consisting only of production employees cannot be approved without the maintenance employees because maintenance employees' terms and conditions of employment are not sufficiently distinct from the production employees' terms and conditions of employment so as to justify separate units. *See PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. (Dec. 15, 2017). A list of maintenance employees is attached hereto as Exhibit 1. A list of production employees is attached hereto as Exhibit 2.

**5: The Union's Petition is Barred by a Certification Bar.**

For all of the reasons set forth in Volkswagen's Motion to Dismiss the Union's Petition,

which is attached as Exhibit 3 to this Attachment B and fully incorporated herein by reference, the Union's petition is barred and should be dismissed. Employees covered by the instant petition—the maintenance employees—are already in a certified bargaining unit, but bargaining in that unit has not begun because of a test-of-certification case, 10-CA-166500, which remains pending at the Board.

**8: Election Details.**

Scheduling any election at this time is inappropriate because the petition is barred by a certification bar. Subject to and without waiving this position and subject to all unfair labor practice charges being dismissed and the prior certification being revoked prior to the following election dates, Volkswagen proposes the following:

Election Dates: May 16, 17, 2019

Vote Times: 4:45 a.m.-8:30 a.m.; 2:45 p.m.-8:30 p.m.

Vote Location: VW Conference Center

ATTACHMENT B TO VOLKSWAGEN'S STATEMENT OF POSITION

7(a): A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition.

This exhibit has been redacted for the public version of this filing.

**EXHIBIT 1**  
**MAINTENANCE EMPLOYEES**

This exhibit has been redacted for the  
public version of this filing.

**EXHIBIT 2**  
**PRODUCTION EMPLOYEES**

This exhibit has been redacted for the  
public version of this filing.

**EXHIBIT 3**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10**

**VOLKSWAGEN GROUP OF AMERICA  
CHATTANOOGA OPERATIONS, LLC**

**Employer**

**and**

**Case No. 10-RC-239234**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
(UAW),**

**Petitioner**

**VOLKSWAGEN’S EMERGENCY MOTION TO DISMISS PETITION  
BASED ON PRIOR CERTIFICATION OF MAINTENANCE UNIT**

Volkswagen Group of America Chattanooga Operations, LLC (“Volkswagen” or “Company”) files this Emergency Motion and, based on well-established Board law, requests the Regional Director to dismiss the International Union, United Automobile, Aerospace and Agricultural Implement Workers (UAW)’s (the “International Union”) April 9, 2019 petition (“Petition”)<sup>1</sup> seeking an election in a unit of production and maintenance employees because the Board has not yet issued a ruling in Case Nos. 10-CA-166500, 10-CA-169340, and 10-RC-162530 (the “Prior Petition”), which involve a unit of the same maintenance employees for whom the United Automobile Workers, Local 42 (the “Local Union”) has been certified as the exclusive collective bargaining representative.<sup>2</sup> The International Union’s Petition would only be appropriate if the Board had not certified the unit or if it had already disposed of the Prior Petition.

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<sup>1</sup> Attached hereto as Exhibit A.

<sup>2</sup> Subsequent to the filing of the Petition, on April 15, 2019, the Local Union notified Volkswagen and the Region in writing that it disclaims interest in the maintenance-only unit. The Local Union’s disclaimer of interest has not been approved, its certification has not been revoked, and the unfair labor charges predicated on its certification are still pending.

**I.**  
**INTRODUCTION**

On April 9, 2019, the International Union filed the Petition to represent a combined unit of maintenance and production employees at Volkswagen’s Chattanooga plant. However, the Local Union was certified as the exclusive bargaining representative for all Chattanooga maintenance employees on December 14, 2015.<sup>3</sup> Subsequent to the certification, the Local Union filed various unfair labor practice charges, some of which have been held in abeyance, and also requested bargaining predicated on the certified status of the maintenance employee unit. Volkswagen declined this request in order to exercise its right to test the Local Union’s certification and to obtain judicial review of the Board’s maintenance unit determination. In turn, the Local Union filed unfair labor practice charges, the Region issued a complaint, and the Board issued a decision sustaining the maintenance unit determination. *See Volkswagen Group of America, Inc.*, 364 NLRB No. 110, slip op. at 1 (Aug. 26, 2016).<sup>4</sup> The certification of the maintenance unit is still extant, and the case is now pending before the Board after being remanded from United States Court of Appeals for the D.C. Circuit for further consideration in light of the Board’s decision in *PCC Structural Inc.*, 365 NLRB No. 150 (Dec. 15, 2017).

Thus, the Board’s longstanding certification year rule renders the International Union’s Petition not proper at this time. Had there not been a maintenance-only unit already certified, then there would be no obstacle to processing the Petition for the combined unit. But the rule prohibits any petitions from being processed before the end of the certification year, which, in this case, has not yet expired, but rather continues because of the pendency of the case remanded to the Board by the D.C. Circuit. Moreover, besides violating the certification year bar, proceeding with an

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<sup>3</sup> Certification attached hereto as Exhibit B.

<sup>4</sup> Attached hereto as Exhibit C.

election in a combined production and maintenance unit is fundamentally inconsistent with the prior certification of and determination that a maintenance-only unit is appropriate for bargaining. For these reasons, Board law requires that the Petition be dismissed.

## **II. FACTUAL BACKGROUND**

Volkswagen manufactures and assembles automobiles at its Chattanooga, Tennessee plant, which began production in 2011. At relevant times, the plant had approximately 2,400 employees, including approximately 1,300 team members and team leaders (“production employees”) and 162 skilled team members and skilled team leaders (“maintenance employees”). The plant is divided into three shops corresponding to the three main processes in building a car, specifically Body, Paint, and Assembly. There is no separate maintenance department. Rather, both production and maintenance employees work together in one of the three shops.

On October 23, 2015, the Local Union filed a petition seeking to represent the approximately 162 maintenance employees spread throughout the three shops at the plant. Region 10 held a representation hearing, and on November 18, 2015, the Regional Director (“RD”) directed an election in the petitioned-for unit. The election was held on December 3 and 4, 2015, and the Union prevailed by a vote of 108 to 44. The Local Union was certified as the exclusive collective bargaining representative of “[a]ll full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility.”

Following the vote, Volkswagen filed a Request for Review (“RFR”), contending that any appropriate unit had to include the production employees as well. A Board majority consisting of Members Hirozawa and McFerran, with Member Miscimarra dissenting, denied the RFR on April 13, 2016<sup>5</sup>, and stated that the petitioned-for unit satisfied the standards set forth in *Specialty*

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<sup>5</sup> Attached hereto as Exhibit D.

*Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011).

As noted above, after Volkswagen declined to bargain with the Local Union to test the unit determination, the NLRB found that Volkswagen violated Sections 8(a)(5) and (1). *See* 364 NLRB No. 110, slip op. at 1. Volkswagen appealed the unfair labor practice finding to the D.C. Circuit on September 1, 2016, and the Board filed a cross-application for enforcement. After oral argument, but before the D.C. Circuit ruled on the merits, the NLRB decided *PCC Structural*s, which overruled *Specialty Healthcare*. As a result, on December 19, 2017, the NLRB filed a motion to remand the case to the Board for further proceedings in light of *PCC Structural*s. On December 26, 2017, the D.C. Circuit granted the motion.<sup>6</sup>

In a January 17, 2018 letter, the Local Union asked the Board not to remand the case to the RD, contending that reconsideration of the decision was unnecessary, and to reaffirm its decision. Volkswagen responded on January 24, 2018, disagreeing with the Local Union's assertion that there is no basis for reconsidering the unit determination. On April 18, 2018, the Board notified the parties that it would accept statements of position concerning the remand on or before May 16, 2018. On May 16, 2018, Volkswagen filed a letter and the Local Union filed a Statement of Position, both of which stated that the Board should retain the case for decision and not remand it to the RD. Volkswagen later filed a response to the Local Union's Statement of Position. The Board has not yet issued a decision.

On April 9, 2019, the International Union filed the instant Petition seeking to represent "all full-time and regular part-time production and maintenance employees" employed at Volkswagen's Chattanooga plant. On April 15, 2019, the Local Union purported to disclaim interest in the maintenance-only unit. The Local Union's disclaimer of interest has not been

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<sup>6</sup> Order attached hereto as Exhibit E.

approved, its certification has not been revoked, and the unfair labor charges predicated on its certification are still pending.

### **III. ARGUMENT**

#### **A. The Petition Is Untimely Under the Certification Year Rule.**

Under the Board's certification year rule, The International Union's Petition cannot proceed because it was filed before the expiration of the Local Union's certification year. To afford an employer and a certified union a reasonable time for bargaining without outside interference and to foster stability in labor relations, the Board developed the rule upheld by the U.S. Supreme Court in *Brooks v. NLRB*, 348 U.S. 96, 103 (1954), that the status of a certified union may not be disturbed during the certification year. Accordingly, petitions (whether representation, employer, or decertification) will be dismissed if they are filed before the end of such year. See NLRB Outline of Law and Procedure in Representation Cases, Section 10-200, 117 (June 2017). The Board applies this rule strictly. *United Supermarkets*, 287 NLRB 119, 120 (1987). Typically, the rule applies for one year following the date of certification, but will be extended in situations where the employer has failed to bargain in good faith with the union to insure that the parties have "at least one year of actual bargaining." See *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 n. 6 (1962). And where there has not been bargaining because an employer has pursued its right to judicial review, as is the case here, the certification year clock begins on the date of the parties' first bargaining session following final affirmance of the Board's order. *Virginia Mason Medical Center*, 350 NLRB 923, 923 (2007); *Van Dorn Plastic Machinery Co.*, 300 NLRB 278, 278 (1990), *enfd.* 939 F.2d 402 (6th Cir. 1991).

Thus, in this case, the Board's certification year rule prevents the International Union's Petition from proceeding at this time. Although more than a year has passed since the Local Union

was certified on as the bargaining agent for the maintenance-only unit, the certification year is still in effect because of the delay arising out Volkswagen's exercise of its rights to seek judicial review. Depending on the Board's ultimate ruling, the certification year could be extended for one year from the date of Volkswagen's first bargaining session with the Local Union.

Further, the certification year rule applies to petitions involving the representation of employees in the unit certified. *See American Concrete Pipe of Hawaii, Inc.*, 128 NLRB 720, 721-722 (1960) ("certification is, under Board law, a bar for 1 year to a petition for employees *in that unit*"). Because the Petition seeks an election in a unit including the same maintenance employees in the certified unit, the rule applies to bar the Petition. Under these circumstances, the Region could not entertain a withdrawal of recognition by Volkswagen, a representation petition by a rival union, a decertification petition by employees, or an employer petition at this time. Likewise, the Region also should not entertain the International Union's Petition for a combined production and maintenance unit, which is the functional equivalent of a petition by a rival, albeit affiliated, union.<sup>7</sup> Accordingly, Board precedent requires that the Petition be dismissed.

**B. The New Petition Is Inconsistent with the Prior Certification and Unit Determination.**

As explained above, in the Petition, the International Union seeks to represent a production and maintenance unit, despite the fact that the Local Union has already been certified as the bargaining agent of the maintenance employees. Such an objective is fundamentally inconsistent with the prior certification and "necessarily at odds" with the principle of exclusive representation. *See Bentson Contracting Co.*, 941 F.2d 1262, 1266 (D.C. Cir. 1991) ("Two unions simply cannot be the 'exclusive' bargaining representative of the same employee with respect to the same conditions of employment"). Ultimately, the maintenance employees can only be represented by

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<sup>7</sup> It is our understanding that the Union has not presented any authority suggesting an exception to the certification year rule that would apply under these circumstances.

one *exclusive* bargaining representative in one bargaining unit.

While the International Union and the Local Union may argue that they are effectively the same union for purposes of representing the maintenance employees, it is well established that, for purposes of the Act, a local union is a distinct legal entity apart from its international. *See e.g., Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, (2010) (Member Becker denying recusal motion in part on basis that courts have distinguished local unions “as autonomous entities separate and apart from international unions with which they are affiliated”); *Electrical Workers Local 5 (Franklin Electric Construction Co.)*, 121 NLRB 143, 146-148 (1958) (collecting cases). In any event, the fact remains that the ultimate goal of the Petition is still contrary to the prior unit determination, in which the Local Union argued, the Region found, and the Board affirmed that the maintenance employees have a sufficiently distinct identity to be an appropriate unit. While Volkswagen has consistently maintained that its stable, integrated manufacturing process in which all production and maintenance employees work side-by-side and are subject to the same rules, benefits and compensation structure, and bonus program make a traditional production and maintenance unit appropriate, the Local Union has spent the better part of four years emphasizing the appropriateness of a maintenance-only unit.

Indeed, the Local Union argued to the D.C. Circuit that because maintenance employees’ terms and conditions of employment “differ so significantly from those of production employees, it is entirely sensible for Volkswagen to negotiate with maintenance employees separately from production workers.” *See* Brief of Intervenor at 11.<sup>8</sup> The Board at the time agreed. The International Union now takes exactly the opposite position. For all of the reasons set forth in VW’s briefing in the unfair labor practice cases and the related appeal, a separate maintenance unit

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<sup>8</sup> Attached hereto as Exhibit F.

is not appropriate, but because the separate maintenance unit is a certified unit, and because test of certification proceedings with respect to the maintenance-only unit remain pending, the International Union's Petition is barred by the Board's certification year rule.

#### **IV.** **CONCLUSION**

For the reasons above, the Petition threatens Volkswagen's and its employees' interests in stable labor relations and industrial peace. Before the unfair labor practice case has been resolved and Volkswagen's bargaining obligations with respect to the maintenance-only unit have been finally determined, another petition of an overlapping unit has already been filed. Proceeding with an election before the Board has resolved the unfair labor practice case serves no purpose and would be contrary to the principles underlying the National Labor Relations Act. Thus, Volkswagen respectfully requests that the Regional Director grant its motion and dismiss the Union's Petition.

Dated this 15th day of April, 2019.

Respectfully submitted:

LITTLER MENDELSON, P.C.

/s/ Arthur T. Carter

Arthur T. Carter  
Texas State Bar No. 00792936  
Arrissa K. Meyer  
Texas State Bar No. 24060954  
2001 Ross Ave., Suite 1500  
Dallas, Texas 75201  
Telephone: (214) 880-8105  
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A. John Harper III  
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Telephone: (713) 652-4750  
Facsimile: (713) 513-5978  
ajharper@littler.com

**CERTIFICATE OF SERVICE**

I hereby certify that a complete copy of *Volkswagen's Emergency Motion to Dismiss Petition Based on Prior Certification of Maintenance Unit* was e-filed with the NLRB on April 15, 2019, was also served on the following persons by electronic filing and/or email on April 15, 2019:

Peter B. Robb  
General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001  
***Via e-filing at NLRB.gov***

Michael B. Schoenfeld  
Stanford Fagan LLC  
2540 Lakewood Ave. SW  
Atlanta, GA 30315  
***Via Email: [michaels@sfglawyers.com](mailto:michaels@sfglawyers.com)***  
***Attorney for Petitioner***

John D. Doyle, Jr.  
Regional Director  
National Labor Relations Board  
Region 10  
233 Peachtree Street NE  
Harris Tower, Suite 1000  
Atlanta, GA 30303-1504  
***Via e-filing at NLRB.gov***

Kerstin Meyers  
Field Attorney  
National Labor Relations Board  
Region 10  
233 Peachtree Street NE  
Harris Tower, Suite 1000  
Atlanta, GA 30303-1504  
***Via e-filing at NLRB.gov***

/s/ Arthur T. Carter  
Arthur T. Carter

# EXHIBIT A

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
**RC PETITION**

DO NOT WRITE IN THIS SPACE	
Case No. 10-RC-162530	Date Filed 10-23-2015

**INSTRUCTIONS: Unless e-Filed using the Agency's website, [www.nlr.gov](http://www.nlr.gov), submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.**

**1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer Volkswagen Group of America, Inc.		2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 8001 Volkswagen Drive, Chattanooga, TN 37421	
3a. Employer Representative - Name and Title Sebastian Patta - Vice President of Human Resources		3b. Address (If same as 2b - state same) Same	
3c. Tel. No. 423-582-5401	3d. Cell No. 423-598-2268	3e. Fax No.	3f. E-Mail Address sebastian.patta@vw.com
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Automobile Manufacturer		4b. Principal product or service Automobiles	5a. City and State where unit is located: Chattanooga, TN

**5b. Description of Unit Involved**  
**Included:** All full-time and regular part-time maintenance employees including Skilled Members and Skilled Team Leaders employed by Volkswagen Group of America and/or its wholly-owned subsidiary Chattanooga Operations LLC at its facility located at 8001 Volkswagen Drive, Chattanooga, TN 37421  
**Excluded:** All other employees  
 6a. No. of Employees in Unit: 164  
 6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes  No

**Check One:**  7a. Request for recognition as Bargaining Representative was made on (Date) 08-06-2015 and Employer declined recognition on or about 08-06-2015 (Date) (If no reply received, so state).  
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state). None		8b. Address	
8c. Tel No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address
8g. Affiliation, if any		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? \_\_\_\_\_  
 (Name of labor organization) \_\_\_\_\_ has picketed the Employer since (Month, Day, Year) \_\_\_\_\_

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)  
 See 10a below

10a. Name American Council of Employees: c/o Masry Nicely, Esq.; Evans Harrison Hackett PLLC	10b. Address One central Plaza; 835 Georgia Avenue - Suite 800, Chattanooga, TN 37402	10c. Tel. No. 423-648-7851	10d. Cell No. 423-313-1705
		10e. Fax No. 423-648-7897	10f. E-Mail Address mnicely@ehlaw.com

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.  
 11a. Election Type:  Manual  Mail  Mixed Manual/Mail

11b. Election Date(s): November 5 and 6, 2015	11c. Election Time(s): 12:30am - 1:30am; 7:30am - 10:30am; 4:30pm - 9:00pm	11d. Election Location(s): Conference Center, Employer's Plant
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12a. Full Name of Petitioner (including local name and number) UAW Local 42	12b. Address (street and number, city, state, and ZIP code) 3922 Volunteer Drive, Suite 7, Chattanooga, TN 37416
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12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)  
 International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)

12d. Tel No. 423-893-0576	12e. Cell No. 423-653-1571	12f. Fax No. 423-893-0577	12g. E-Mail Address mikedcantrell@gmail.com
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**13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.**

13a. Name and Title James D. Fagan Jr.		13b. Address (street and number, city, state, and ZIP code) 191 Peachtree St. NE, Suite 4200, Atlanta, GA 30303	
13c. Tel No. 404-897-1000	13d. Cell No. 404-374-0843	13e. Fax No. 423-893-0577	13f. E-Mail Address jfagan@sfglawyers.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) James D. Fagan Jr	Signature 	Title Attorney	Date October 23, 2015
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**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)**

**PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

# **EXHIBIT B**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

Volkswagen Group of America, Inc.

Employer

and

Case 10-RC-162530

United Auto Workers, Local 42

Petitioner

TYPE OF ELECTION: REGIONAL DIRECTOR DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

United Auto Workers, Local 42

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**Unit:** All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.



December 14, 2015

*Claude T Harrell Jr*

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CLAUDE T. HARRELL JR.  
Regional Director, Region 10  
National Labor Relations Board

## NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,<sup>1</sup> an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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<sup>1</sup> Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

# EXHIBIT C

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Volkswagen Group of America, Inc. and United Auto Workers, Local 42.** Cases 10–CA–166500 and 10–CA–169340

August 26, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to charges and an amended charge filed by United Auto Workers, Local 42 (the Union), the General Counsel issued the consolidated complaint on April 26, 2016, alleging that Volkswagen Group of America, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union’s certification in Case 10–RC–162530. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 120.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations of the consolidated complaint, and asserting affirmative defenses.<sup>1</sup>

<sup>1</sup> On May 10, 2016, counsel for the Respondent filed a document styled “Respondent Volkswagen Group of America Chattanooga Operations, LLC’s Answer and Affirmative Defenses to Complaint.” The opening paragraph of that document states:

Volkswagen Group of America, Inc. is not the employer herein. Rather the employer is Volkswagen Group of America Chattanooga Operations, LLC (hereinafter “Respondent”), which hereby files this Answer to the General Counsel’s Complaint . . . (footnote omitted).

The text of the document goes on to admit or deny the various allegations of the complaint, and to assert certain affirmative defenses. This document is signed by the attorneys who entered an appearance in this matter on behalf of the Respondent, Volkswagen Group of America, Inc.

The complaint in this matter names only one Respondent, Volkswagen Group of America, Inc. Volkswagen Group of America Chattanooga Operations, LLC is not a party, no attorney has entered an appearance on its behalf, nor has that entity filed a request to intervene in this matter.

In view of the fact that this document was filed by the attorneys who entered an appearance on behalf of the Respondent, we will consider this document to be an answer filed on behalf of Volkswagen Group of America, Inc. Similarly, we will consider all other documents that have been filed by the same attorneys, regardless of how they are styled, to be filed on behalf of the Respondent as well.

We do this in order to give the Respondent the benefit of the doubt. We presume that they have retained experienced labor counsel and caused them to enter an appearance in this matter on their behalf be-

On May 13, 2016, the General Counsel filed a Motion for Summary Judgment.<sup>2</sup> On May 18, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response on June 1, 2016.<sup>3</sup> Also on June 1, 2016, the Union filed a brief in support of the General Counsel’s Motion for Summary

cause they wish to be represented and defend their position. To take the documents as styled at face value would lead to the conclusion that the Respondent has filed no responsive pleadings. If this were the case, all of the allegations of the complaint would be “deemed to be admitted to be true” under Sec. 102.20 of the Board’s Rules and Regulations, and the Respondent would have waived its right to assert a defense.

<sup>2</sup> In its motion, the General Counsel asserts that the Respondent’s name in this proceeding is in accord with the name of the employer in the certification of representative and the stipulation entered into by the employer in Case 10–RC–162530. The General Counsel asserts that therefore the Respondent’s argument that it has been incorrectly named in this proceeding should be rejected. In the alternative, the General Counsel states that the Respondent’s name should be modified as requested.

<sup>3</sup> In its response to the Notice to Show Cause (Response), the Respondent repeats its assertion that it has been incorrectly named in the consolidated complaint:

Counsel for the General Counsel misunderstands Volkswagen’s point regarding its proper name. The employer of the employees at issue in this case is Volkswagen Group of America Chattanooga Operations, LLC. This entity is the appropriate Respondent. This entity filed the Request for Review wherein it noted that the Petition incorrectly identified Volkswagen Group of America, Inc. as the employer. (See GC Ex. 5 at 1, n. 1.) This entity also filed the Answer to the complaint underlying Counsel for the General Counsel’s Motion for Summary Judgment. (GC Ex. 11 at 1 & n.1). Therefore, Volkswagen requests that the style of this case be amended to reflect the appropriate corporate respondent.

(Response p.1, fn.1.)

The Respondent is mistaken. The attorneys who represent the Respondent in this matter also represented the Respondent as the Employer in the underlying representation proceeding. (See Case 10–RC–162530.) The petition below named the Respondent as the Employer of the employees in the requested unit, and the Respondent’s attorneys stipulated at the hearing that “UAW Local 42” and “Volkswagen Group of America, Inc.” were the correct names of the parties. (See Case 10–RC–162530, Bd. Ex. 2, Transcript of Hearing p. 8.) Although Respondent’s request for review of the Decision and Direction of Election stated in a footnote that “[t]he petition incorrectly identified the Employer as ‘Volkswagen Group of America, Inc.’,” the Respondent did not seek Board review on that basis. Furthermore, the Respondent did not file a post-election request for review challenging the Certification of Representative on the basis that it named the Respondent as the Employer. Because the Respondent failed to request Board review of this issue, the Respondent is precluded from raising this issue here. See Sec. 102.67(g) of the Board’s Rules and Regulations.

Moreover, in an earlier representation proceeding involving the Chattanooga facility, the Respondent filed its own petition for election naming itself as the Employer, and it signed a Stipulated Election Agreement in its own name as well. (See Case 10–RM–121704.) Under these circumstances, we find that the Respondent is estopped from denying that it is the employer of the employees at issue in this case.

Judgment, and the Respondent filed a reply to the Union's brief on June 15, 2016.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

#### Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the petitioned-for maintenance unit is not an appropriate unit because it does not include the Respondent's production employees.<sup>4</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>5</sup>

<sup>4</sup> The Respondent contends in its response to the Notice to Show Cause that the Board's April 13, 2016 Order in Case 10-RC-162530 did not rule on the Respondent's contention that the "Regional Director's approval of the Union's chosen unit also violates Section 9(c)(5) of the Act which prohibits giving extent of organization controlling weight[.]" However, the Board's April 13, 2016 Order denied the Respondent's request for review of the Regional Director's Decision and Direction of Election, finding that it raised no substantial issues warranting review, and thereby affirming the Regional Director's finding that the petitioned-for unit is appropriate for the purposes of collective bargaining. In doing so, the Board considered and rejected each contention raised in the Respondent's request for review.

The Respondent's answer raises an affirmative defense that it "did not have a duty to bargain with the Union from the date the election was certified to the date that the Board issued its order denying Respondent's request for review" of the Regional Director's Decision and Direction of Election in Case 10-RC-162530. We find no merit in this contention. See *L. Suzio Concrete Co.*, 325 NLRB 392, 396 (1998) (employer "acted at its peril" by relying on its filing of a request for review in refusing to bargain with the union after the date of certification), *enfd. mem.* 173 F.3d 844 (2d Cir. 1999). Moreover, once the Board denied the Respondent's request for review on April 13, 2016, the Union made another bargaining request on April 15, 2016, and the Respondent admits that it refused to recognize and bargain with the Union thereafter.

<sup>5</sup> Member Miscimarra would have granted review in the underlying representation proceeding regarding whether the petitioned-for maintenance-only bargaining unit constituted an impermissibly fractured unit that departed from the Employer's organizational structure, see *Odwalla, Inc.*, 357 NLRB 1608, 1611-1613 (2011), and whether an overwhelming community of interest warranted including production and/or other employees in any bargaining unit, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 945-946 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). While he remains of that view, he agrees, however, that the

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has maintained an office and place of business in Chattanooga, Tennessee (the Respondent's facility) and has been engaged in the manufacture of automobiles.<sup>6</sup> During the 12-month period preceding issuance of the consolidated complaint the Respondent, in conducting its operations described above, sold and shipped from its Chattanooga facility goods valued in excess of \$50,000 directly to points outside the State of Tennessee.

We find that that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Certification*

Following the representation election held on December 3 and December 4, 2015, the Union was certified on December 14, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

<sup>6</sup> The Respondent's answer denies the complaint allegation that it is a New Jersey corporation, affirmatively stating that that Volkswagen Group of America Chattanooga Operations, LLC is a Tennessee limited liability corporation and that it has an office and place of business in Chattanooga, Tennessee at which it manufactures automobiles. The Respondent's answer, however, admits the jurisdictional allegations in the complaint, and that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Its answer also admits that the Union requested that the Respondent recognize and bargain with it, and that the Respondent failed and refused to do so. In these circumstances, we find that the Respondent's denials do not raise any issues warranting a hearing.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### B. *Refusal to Bargain*

On December 15, 2015, January 8, 2016, and April 15, 2016, the Union, by letter or electronic mail, requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

Since about December 15, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since December 15, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).<sup>7</sup>

<sup>7</sup> The Union has requested that the Board additionally order the Respondent to "set aside any discipline and/or discharge of a bargaining unit employee that is carried out without the required Section 9(a) involvement of [the Union], in derogation of its status as exclusive bargaining representative." The charges in this matter do not allege that such conduct has occurred, and in its brief the Union avers only that such conduct may occur during the pendency of this litigation. Thus, there has been no showing that the Board's traditional remedies are insufficient to remedy the Respondent's violation of the Act, as alleged in the complaint. Accordingly, we deny the Union's request for this additional remedy. Our denial of this request in the instant pro-

#### ORDER

The National Labor Relations Board orders that the Respondent, Volkswagen Group of America, Inc., Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Auto Workers, Local 42, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Chattanooga, Tennessee copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent custom-

ceeding in no way impairs the Union's ability to file an appropriate charge if such conduct does occur.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

arily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

\_\_\_\_\_  
Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Auto Workers, Local 42 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time maintenance employees at our Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

VOLKSWAGEN GROUP OF AMERICA, INC.

The Board's decision can be found at [www.nlr.gov/case/10-CA-166500](http://www.nlr.gov/case/10-CA-166500) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



# **EXHIBIT D**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF AMERICA, INC.  
Employer

and

Case 10-RC-162530

UNITED AUTO WORKERS, LOCAL 42  
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.<sup>1</sup>

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<sup>1</sup> We agree with the Regional Director that the petitioned-for unit satisfies the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and that the Employer failed to meet its burden of demonstrating that the additional employees it seeks to include share an “overwhelming community of interest” with the petitioned-for unit. The employees in the petitioned for-unit are readily identifiable as a group, as it consists of all maintenance employees employed by the Employer at its Chattanooga, Tennessee facility. See *DPI Secuprint, Inc.*, 362 NLRB No. 172 (2015) (“‘readily identifiable as a group’ means simply that the description of the unit is sufficient to specify the group of employees the petitioner seeks to include”). They also share a community of interest under the traditional criteria—similar job functions; shared skills, qualifications, and training; supervision separate from the production employees’; wages different from the production employees’; hours and scheduling different from production employees’; other unique terms and conditions of employment (e.g., expectation to work on production shutdown days and to work through scheduled breaks and lunch if the need arises); and a human resources manager dedicated solely to maintenance employees. We find that these factors substantially outweigh the fact that the Employer assigns the maintenance employees to three separate departments. See *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (2014) (“petition’s departure from any aspect of the Employer’s organizational structure might be mitigated or outweighed by other community-of-interest factors”).

For many of those same reasons, the Employer failed to demonstrate that the production employees share an “overwhelming community of interest” with maintenance employees, such that there is “no legitimate basis upon which to exclude certain employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Specialty Healthcare*, supra at 944. As described above, many of the traditional community-of-interest

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., April 13, 2016.

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factors differentiate the production employees from the maintenance employees; it is impossible to say that the factors “overlap almost completely.” The Board’s decisions in *Capri Sun, Inc.*, 330 NLRB 1124 (2000), and *Ore-Ida Foods*, 313 NLRB 1016 (1994) further support our conclusion. In *Capri Sun*, the employer maintained a facility where, similar to the Employer here, it divided its operations into several different departments to which both production and maintenance employees were assigned. The Board found that the maintenance employees constituted an appropriate bargaining unit. Similarly, in *Ore-Ida*, the employer divided its production operations among several different departments, each with its own maintenance employees with the skills necessary to maintain the equipment of that department. Again, the Board found a maintenance-only unit appropriate. The same factors the Board relied on in those cases, including the limited interchange between maintenance and production workers, compel the conclusion that the petitioned-for unit in this case is an appropriate unit. See *Overnite Transportation Co.*, 322 NLRB 723 (1996) (the Act does not require a petitioner to seek to represent employees in the most appropriate unit possible, only in an appropriate unit).

The Employer’s requests for a stay of certification and oral argument are also denied.

Member Miscimarra, dissenting:

Unlike my colleagues, I would grant review because I believe the Regional Director's Decision and Direction of Election gives rise to substantial issues regarding the potential inappropriateness of the petitioned-for bargaining unit, which consists exclusively of maintenance employees and excludes production and other employees. Among other things, I believe substantial issues exist based on the following considerations, which in my opinion warrant review by the Board: (1) there is no centralized maintenance department;<sup>2</sup> (2) the Employer's facility includes three distinct departments (body weld, paint, and assembly), each of which includes both production and maintenance employees; (3) the maintenance employees in one department have little or no interaction or interchange with maintenance employees in other departments; (4) there is no common maintenance supervisor having responsibility over maintenance employees across the three combined production-and-maintenance departments; (5) the maintenance employees in any one of the combined production-and-maintenance departments work in a different physical location within the facility than the maintenance employees in the other combined production-and-maintenance departments; (6) there are substantial differences in the equipment used in each combined production-and-maintenance department, which means the job duties and work functions of maintenance employees in a particular department relate to the specific equipment used by production employees in that department; (7) to the extent that similarities exist among maintenance employees across departments, many of the same similarities exist among production employees across departments (e.g., hiring procedures and orientation, applicable policies and handbook provisions, payroll procedures, bonus programs, benefit plans, peer review, and potential bargaining history); and (8) to the extent that dissimilarities exist between production employees and maintenance employees, many of the same dissimilarities exist between the maintenance employees who work in one department and the maintenance employees who work in the other departments (e.g., different supervisors, different operations, different equipment, and different job duties and work functions).

As I have stated elsewhere, I disagree with the Board's standard in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which in my view "affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board to play" when evaluating bargaining-unit issues, contrary to Section 9(a), 9(b) and 9(c)(5) of the Act.<sup>3</sup> However, even if one applies *Specialty Healthcare*, I believe substantial

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<sup>2</sup> According to the Decision and Direction of Election, the Employer uses the terms "shop" and "department" interchangeably when referring to its distinct organizational groups or functions.

<sup>3</sup> See *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 25-32 (2014) (Member Miscimarra, dissenting); Sec. 9(b) ("The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the

questions warrant Board review regarding whether the petitioned-for maintenance-only bargaining unit constitutes an impermissible fractured unit that departs from the Employer's organizational structure, see *Odwalla, Inc.*, 357 NLRB 1608, 1611-1613 (2011), and whether an overwhelming community of interest warrants including production and/or other employees in any bargaining unit, *Specialty Healthcare*, 357 NLRB at 945-946.

Accordingly, I respectfully dissent from my colleagues' denial of review.

PHILIP A. MISCIMARRA, MEMBER

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purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."); *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611 (1991) ("Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision 'in each case' in which a dispute arises is to be made by the Board."); *id.* at 614 (Section 9(b) requires "that the Board decide the appropriate unit in every case in which there is a dispute.").

# **EXHIBIT E**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 16-1309****September Term, 2017**

**NLRB-10CA166500  
NLRB-10CA169340  
NLRB-10RC162530**

**Filed On: December 26, 2017**

Volkswagen Group of America, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

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United Auto Workers, Local 42,  
Intervenor  
-----

Consolidated with 16-1353

**BEFORE:** Rogers, Millett, and Wilkins, Circuit Judges

**ORDER**

Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, the response and the opposition thereto, it is

**ORDERED** that the motion be granted and the cases be remanded to the Board for further consideration in light of the Board's recent decision in PCC Structural Inc., 365 NLRB No. 160 (Dec. 15, 2017)

The Clerk is directed to issue the mandate forthwith to the agency.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Scott H. Atchue  
Deputy Clerk

# EXHIBIT F

Nos. 16-1309, 16-1353

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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VOLKSWAGEN GROUP OF AMERICA, INC.,

*Petitioner/Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent/Cross-Petitioner,*

and

UNITED AUTO WORKERS, LOCAL 42,

*Intervenor.*

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On Petition for Review and Cross-Application for Enforcement  
of an Order of the National Labor Relations Board

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**BRIEF OF INTERVENOR UNITED AUTO WORKERS, LOCAL 42  
IN SUPPORT OF RESPONDENT**

---

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

- A. **Parties and Amici.** All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.
- B. **Ruling Under Review.** References to the rulings at issue appear in the Brief for the National Labor Relations Board.
- C. **Related Cases.** This case has not previously been before this Court or any other court. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

Respectfully submitted,

/s/Matthew J. Ginsburg  
Matthew J. Ginsburg  
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Washington, DC 20006

Date: May 22, 2017

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## GLOSSARY

“DDE”	Decision and Direction of Election
“JA”	Joint Appendix
“Local 42”	United Auto Workers, Local 42
“NLRA or “the Act”	National Labor Relations Act
“NLRB” or “the Board”	National Labor Relations Board
“NLRB Br.”	Brief of the National Labor Relations Board
“Or.”	NLRB Order Denying Request for Review
“Pet. Br.”	Brief of Petitioner Volkswagen Group of America, Inc.
“Tr.”	Transcript of the pre-election hearing
“Union Ex.”	Union Exhibit
“VW Ex.”	Volkswagen Exhibit

**BRIEF OF INTERVENOR UNITED AUTO WORKERS,  
LOCAL 42 IN SUPPORT OF RESPONDENT**

**INTRODUCTION**

Volkswagen Group of America, Inc. (“Volkswagen”) has organized its manufacturing workforce into two facility-wide job classifications: maintenance employees, referred to as “skilled team members,” and production employees, referred to as “team members.” Volkswagen has created a supervisory structure in which maintenance employees are supervised separately from production employees at both the first and second level of supervision and has assigned a separate human resources manager for maintenance employees. Volkswagen has established a pay scale that remunerates maintenance employees at significantly higher rates than production employees and results in even the lowest-paid maintenance employee earning as much as the highest-pay production worker. And, Volkswagen has in a variety of other ways – such as training, scheduling, and the responsibility to work during plant shutdown periods – established essential terms and conditions for maintenance employees that are significantly different from those of production employees.

Volkswagen nevertheless comes before this Court and argues that the National Labor Relations Board’s determination that a bargaining unit composed of maintenance employees is appropriate is “arbitrary, unreasonable, and not supported by substantial evidence.” Pet. Br. 41. Even more astonishingly,

Volkswagen suggests that the NLRB acted in bad faith by using its “decision [as] a cloak for reliance on the extent of [union] organization as the dispositive factor” to approve an allegedly “gerrymandered maintenance unit.” *Id.* at 53. Much to the contrary, the Board’s conclusion that a maintenance employee unit is appropriate in this case is amply supported by the evidence presented and fully in accord with the Board’s historical practice of approving similar maintenance units in various manufacturing settings.

## STATEMENT OF THE CASE

### I. Facts

Volkswagen operates an automobile manufacturing facility in Chattanooga, Tennessee. DDE 1 [JA 604]. The plant, which is Volkswagen’s only manufacturing facility in the United States, began operation in 2011. Tr. 33 [JA 43].

The Chattanooga facility consists of three main areas in which various stages of the production process take place: the body weld shop, the paint shop, and the assembly shop. DDE 2, 4-5 [JA 605, 607-08]. Production begins in the body weld shop, where employees assemble welded body panels into a body shell. DDE 3 [JA 606]. The body shell is then sent to the paint shop for painting. *Ibid.* Finally, the painted shell is sent to the assembly shop, where employees install the remaining components of the vehicle. *Ibid.*

Volkswagen employs a total of 162 maintenance employees in these three shops, all of whom share the common job title of “skilled team member.” *Ibid.* The company also employs 1141 production employees in the three shops, all of whom share the job title of “team member.” *Ibid.*<sup>1</sup> Although maintenance employees are assigned to a specific shop, they may transfer to “other Skill Team Member positions in any production shop.” VW Ex. 6, p. 97 [JA 539].

There is a plant-wide Director of Manufacturing at the facility who oversees all maintenance and production employees. DDE 3 [JA 606]. *See also* VW Ex. 3 [JA 424] (organizational chart showing management and supervisory structure). In addition, each shop has a general manager in charge of all employees in the shop. DDE 3 [JA 606]; VW Ex. 3 [JA 424].

Below these higher levels of management, maintenance employees are separately managed by two levels of maintenance-specific supervision. DDE 3-4 [JA 606-07]; VW Ex. 3 [JA 424]; Union Ex. 1 & 5 [JA 585 & 599] (organizational charts showing maintenance departments in the assembly and paint shops). There is a separate assistant manager for maintenance in each shop. DDE 4 [JA 607]; VW Ex. 3 [JA 424]; Union Ex. 1 & 5 [JA 585 & 599]. Below the assistant manager for maintenance in each shop are several maintenance supervisors, one

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<sup>1</sup> There are an additional 105 production employees in the logistics and quality control departments; there are no maintenance employees in either department. DDE 3 [JA 606].

for each shift. DDE 4-5 [JA 607-08]; VW Ex. 3 [JA 424]; Union Ex. 1 & 5 [JA 585 & 599]. Below each maintenance supervisor are several maintenance team leaders. DDE 4-5 [JA 607-08]; VW Ex. 3 [JA 424]; Union Ex. 1 & 5 [JA 585 & 599]. Maintenance employees sign in at the beginning of each shift on a separate sign-in sheet from production employees. DDE 10 [JA 613]; Tr. 284, 331 [JA 294, 341].

There are two levels of separate management for production employees in each shop that parallel the two levels of maintenance supervision. Below the general manager in each shop is a separate assistant manager for production. DDE 4 [JA 607]; VW Ex. 3 [JA 424]. Below the assistant manager for production are several production supervisors, one for each shift. DDE 4-5 [JA 607-08]; VW Ex. 3 [JA 424]. Below each production supervisor are several production team leaders. DDE 4-5 [JA 607-08]; VW Ex. 3 [JA 424].

There is a human resources manager dedicated solely to maintenance employees throughout the facility. DDE 10 [JA 613]. Tr. 162-63, 191-92, 229-30, 272-73 [JA 172-73, 201-02, 239-40, 282-83]. This human resources manager met with maintenance employees at their separate pre-shift meetings to introduce himself and sent every maintenance employee an e-mail stating that he is their human resources “direct representative” and providing his contact information. Tr. 229-30 [JA 239-40].

The responsibility of maintenance employees throughout the facility is to keep the production line running. DDE 12 [JA 615]. Maintenance employees accomplish this both by performing preventative maintenance and by making adjustments and repairs when a machine is not functioning properly. *Ibid.* Much of this work requires a high degree of technical skill. For example, a maintenance employee from the paint shop testified about his duties maintaining and repairing equipment in a “highly explosive” environment where equipment must “not cause a spark, which could cause an explosion.” Tr. 263 [JA 273]. While the precise work undertaken by maintenance employees varies somewhat between shops, Volkswagen’s Assembly General Manager testified that these are “just slight differences. All areas have conveyors. All have electrical. All have mechanical.” Tr. 171 [JA 181].

Depending on the nature of the repair or maintenance needed, maintenance employees conduct some of this work on the production line – often while production employees are on lunch or break, Tr. 226, 330 [JA 236, 340] – while other maintenance work is conducted in fenced-in or partitioned maintenance workshops or “cages” within each shop. DDE 12-13 [JA 615-16]. For example, when a maintenance employee needs to rebuild a piece of equipment, the employee will typically “carry it back to our shop and repair it in our shop.” Tr. 220-21 [JA 230-31].

The responsibility of production employees is to “assemble the cars.” Tr. 250 [JA 260]. This involves highly repetitive work such as loading parts onto a robot or conveyer in the body shop, Tr. 317-318 [JA 327-28], or checking that sealer is sprayed correctly onto the bottom of the car in the paint shop, Tr. 340 [JA 350]. Production employees do not do maintenance work. DDE 10 [JA 613]. There is also no interchange between maintenance and production employees. *Ibid.* Production employees do not have access to locked toolboxes or locked areas used by maintenance employees and do not work in the maintenance workshops. DDE 13 [JA 616]; Tr. 297-99 [JA 307-09].

Maintenance employees throughout the facility share the same or similar work schedules, which differ substantially from the work schedules of all production employees. Maintenance employees in the body weld and paint shops work 12.5-hour shifts and staff these two shops 24 hours per day, 7 days per week. DDE 11 [JA 614]. Maintenance employees in the assembly shop work three 8-hour shifts and staff that shop 24 hours per day, Monday through Friday. *Ibid.* In contrast, production employees in all three shops work one of two ten-hour shifts – either 6 a.m. to 4:45 p.m. or 6 p.m. to 4:45 a.m. – and only work Monday through Thursday. DDE 10 [JA 613]. Maintenance employees are expected to work when production employees are on breaks and lunches. DDE 11-12 [JA 614-15]. As a

result, maintenance employees never take breaks or lunch at the same time as production employees. DDE 12 [JA 615].

Maintenance employees are required to work on days and at times when production employees are not. Volkswagen shuts down production during certain days and weeks of the year for maintenance, construction, or the installation of new equipment. Tr. 214 [JA 224]. For example, in 2015, the facility went on “summer shutdown” for the week leading up to July Fourth. Union Ex. 2 [JA 586]. Maintenance employees from throughout the facility, but not production employees, work on these “shutdown days,” and maintenance employees are restricted from taking vacation or other leave on these days. DDE 11 [JA 614]. If there is a breakdown or if a line runs out of parts, production employees are sometimes released before the end of their scheduled shift. *Ibid.* In contrast, maintenance employees are never released early. *Ibid.*

Maintenance employees who were hired when the plant first opened were required to have experience in industrial electricity, industrial mechanical, electronics, or facilities maintenance (HVAC, chillers, boilers, water treatment). DDE 6 [JA 609]; Union Ex. 4A [JA 597] (job advertisement for “skilled maintenance team members”). For example, the maintenance employees who testified at the hearing had significant prior skilled maintenance experience, including one employee who worked as an electrician in the maintenance

department at General Motors for 24 years and another who worked as a pipefitter at a tire manufacturing facility for ten years and, before that, as a mechanic at an aluminum manufacturing plant. Tr. 203-04, 261-62 [JA 213-14, 271-72]. In contrast, applicants for production positions were not required to have any specific experience. DDE 6 [JA 609]; Union Ex. 4B [JA 598] (job advertisement for “production team members”).

Applicants for maintenance positions were required to take both a written and a skills test and, once selected, were required to undertake six months of training before beginning work. *Ibid.* Applicants for production positions were not required to take any tests other than a basic physical agility test and, after some brief hands-on training, were permitted to start work almost immediately. *Ibid.*

Subsequent to opening the facility, Volkswagen, together with a local community college, began a three-year training and apprenticeship program for new maintenance employees. *Ibid.* Graduates of this program are generally placed in maintenance positions, although if no maintenance position is open, a graduate may be placed in a production or salaried position. DDE 6-7 [JA 609-10]. Since the program began, 50 graduates have been hired by Volkswagen – 36 in maintenance, nine in production, and five in salaried positions. DDE 7 [JA 610].

Once hired, all maintenance employees from throughout the facility receive ongoing training at Volkswagen’s on-site training facility that is not available to

production employees. DDE 14 [JA 617]; Tr. 141-42 [JA 151-52]. Maintenance employees from throughout the facility also receive occasional training about equipment that is common to all shops, such as conveyors. *Ibid.*; Tr. 224-25 [JA 234-35]. Production employees do not participate in any of this training. *Ibid.*; Tr. 225 [JA 235].

Maintenance employees are paid significantly more than production employees. DDE 8 [JA 611]. The entry-level pay rate for maintenance employees – \$23 per hour – is the same as the highest pay rate for production employees. *Ibid.* All maintenance employees receive about \$7 more per hour than production employees with equivalent length of service at the company. *Ibid.*

## II. PROCEDURAL HISTORY

In October 2015, United Auto Workers, Local 42 (“Local 42”) petitioned the NLRB to represent a unit consisting of all maintenance employees, including maintenance team leaders, at the Chattanooga facility. DDE 1 [JA 604]. Volkswagen opposed the petitioned-for unit on the ground “that employees in the petitioned-for unit do not share a sufficient community of interest” and that “the smallest appropriate unit must include the petitioned-for employees plus production employees and leads (team members and team leaders).” DDE 19 [JA 622].

An NLRB hearing officer conducted a fact-finding hearing and, on the basis of the facts established at the hearing, the NLRB Regional Director issued a detailed decision concluding that the petitioned-for unit was appropriate and ordered an election. DDE 23-24 [JA 626-27]. On December 3 and 4, 2015, employees voted 108 to 44 in favor of representation by Local 42. *Volkswagen Group of America, Inc.*, Case No. 10-RC-162530 (December 4, 2015) (tally of ballots) [JA 1].

Volkswagen filed a request for review of the Regional Director's decision with the NLRB. The Board denied the company's request for review, explaining that the petitioned-for unit was appropriate because "[t]he employees in the petitioned-for unit are readily identifiable as a group, as it consists of all maintenance employees employed by the Employer at its Chattanooga, Tennessee facility" and also that the maintenance employees "share a community of interest under the traditional criteria[.]" Or. 1-2 n.1 [JA 685-86 n.1]. The Board also rejected Volkswagen's claim that the smallest appropriate unit had to include all production employees, explaining that "many of the traditional community-of-interest factors differentiate the production employees from the maintenance employees; it is impossible to say that the factors 'overlap almost completely.'" *Ibid.* (quoting *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB

934, 944 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013)).

Volkswagen refused to bargain with Local 42 in order to test the Board's unit determination. The union filed an unfair labor practice charge and the Board issued a decision finding that Volkswagen had violated the NLRA by refusing to recognize and bargain with Local 42. *Volkswagen Group of America, Inc.*, 364 NLRB No. 110 (Aug. 26, 2016) [JA 689-92].

Volkswagen then filed this petition for review challenging the Board's unfair labor practice decision and decision in the underlying representation proceeding. The NLRB filed a cross-petition to enforce its decision and order.

### **SUMMARY OF ARGUMENT**

The NLRB properly applied its traditional community of interests test to determine that a unit consisting of all maintenance employees at Volkswagen's automobile manufacturing facility is appropriate for collective bargaining. That conclusion is fully supported by the evidence, which shows that maintenance employees are much more highly skilled, trained, and paid than the company's production employees, are separately supervised, have their own dedicated human resources manager, work different schedules including working during plant shutdowns, never interchange with production workers, and perform a fundamentally different function in the workplace, *viz.*, production employees

assemble the cars; maintenance employees maintain and repair the specialized machinery used to build those cars. Because the skills, working conditions, and job function of maintenance employees differ so significantly from those of production employees, it is entirely sensible for Volkswagen to negotiate with maintenance employees separately from production workers. The NLRB's conclusion in that regard fully accords with its longstanding practice of approving separate maintenance units in cases presenting similar facts.

Against all this, Volkswagen's principal argument is that because maintenance employees work in three separate shops and are not organized in a single plant-wide maintenance department, maintenance employees from across the facility do not share a sufficiently strong community of interest with each other to constitute an appropriate unit. The NLRB correctly rejected this argument based on the evidence, concluding that the similarities shared by maintenance employees throughout the facility – a common job title, a common job function of maintaining and repairing equipment, common skills, common initial training as well as ongoing training, common or substantially similar work schedules, a common requirement of working during plant shutdowns – substantially outweigh any slight differences between maintenance employees who work in different shops.

Volkswagen also contends that production employees share such an overwhelming community of interest with maintenance employees that the

smallest appropriate unit in the facility must include both groups of workers.

Again, the NLRB correctly rejected this argument based on the facts, explaining that the many significant differences between production and maintenance employees – such as that maintenance employees have a significantly higher degree of skill, receive different training, are paid significantly more, work different schedules, perform a different role in the manufacturing process, and never interchange with production workers – clearly demonstrate that maintenance employees are sufficiently distinct from production employees to constitute their own appropriate bargaining unit.

Finally, Volkswagen argues briefly that the NLRB's decision is flawed because the Board allegedly relied on the extent of union organization in reaching its unit determination in violation of Section 9(c)(5) of the NLRA. Because Volkswagen acknowledges that the Board did not expressly rely on the extent of organization in reaching its decision, the nub of the company's argument seems to be an unsupported allegation that the Board acted in bad faith by approving the unit after Local 42 had previously sought to organize a broader unit at the plant. There is no merit to Volkswagen's entirely unsupported allegation that the NLRB acted in bad faith in reaching its decision. Nor was it improper for the Board to approve the petitioned-for unit despite Local 42's previous effort to organize a larger group. As long as a unit is appropriate on its own terms, neither the fact that

a larger appropriate unit also exists nor the fact that the union previously sought to organize the larger unit renders the smaller unit inappropriate.

### ARGUMENT

The unit at issue in this case – consisting of all maintenance employees at Volkswagen’s automobile production facility – is of the sort that the NLRB has historically found appropriate in a manufacturing setting. After reviewing all the relevant facts, the Board approved of the petitioned-for unit here, concluding that Volkswagen’s maintenance employees share a strong community of interest with each other and that that community of interest is sufficiently distinct from Volkswagen’s production employees such that a separate maintenance employee unit is appropriate.

Volkswagen argues that this case is different from other maintenance unit cases because the company has organized the facility on a shop-by-shop basis such that maintenance employees do not have enough in common with each other across shops to constitute a single appropriate unit and, consequently, the only appropriate unit consists of all production and maintenance employees throughout the entire facility. In addition, Volkswagen argues that the NLRB failed to properly apply the analytical framework, set forth in the Board’s *Specialty Healthcare* decision, that applies when an employer contends that additional employees should be added to the petitioned-for bargaining unit and that the Board violated Section 9(c)(5) of

the NLRA by allowing the extent of union organization to control its unit determination.<sup>2</sup> As we explain in detail below, none of the company's arguments have merit.

1. The NLRB's determination that all of the maintenance employees at the Chattanooga facility share a sufficient community of interest to constitute an appropriate unit is clearly correct. Although Volkswagen directs its maintenance employees through shop-based maintenance managers and maintenance shift supervisors rather than through a single facility-wide maintenance director, maintenance employees throughout the facility easily share a sufficient community

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<sup>2</sup> Volkswagen's *amici* argue that the NLRB's *Specialty Healthcare* framework for evaluating bargaining units when an employer contends that additional employees should be included in the unit – a framework based on this Court's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008) – is flawed and should be overruled. But other than a bare assertion that *Specialty Healthcare* was “wrongly decided” and in some unspecified sense “inappropriate,” Pet. Br. 49, 55 n.18, Volkswagen does not challenge the *Specialty Healthcare* framework. To the contrary, Volkswagen's primary arguments are that the NLRB *misapplied Specialty Healthcare* by allegedly failing to “apply its ‘traditional’ community of interest test before shifting the burden to an employer to prove that excluded employees share an ‘overwhelming’ community of interests with the employees in the petitioned-for unit,” and wrongly concluding that maintenance employees do not share “an ‘overwhelming community of interests’ with the excluded production employees.” Pet. Br. 22-23, 25 (quoting *Specialty Healthcare*).

In any event, as the NLRB correctly explains in its brief, the attacks on *Specialty Healthcare* leveled by Volkswagen's *amici* “have met with repeated failure in other courts and are inconsistent with this Court's own precedent.” NLRB Br. 40-47. *See id.* at 21 n.4 (listing circuit cases uniformly approving of the *Specialty Healthcare* framework).

of interest with each other based on numerous other traditional factors to constitute an appropriate unit.

The NLRB's rejection of Volkswagen's argument that all production employees must be included in the unit is correct as well. While a combined production and maintenance employee unit would also have been appropriate at this facility, that fact does not render a unit composed solely of maintenance employees inappropriate. Rather, the Board correctly concluded that the differences between production and maintenance employees are sufficiently significant such that a unit composed only of maintenance employees is appropriate.

a. Section 9(b) of the NLRA delegates to the Board the authority to “decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, 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). “The Board . . . has ‘broad discretion in making unit determinations, and its unit determinations are accorded particular deference by a reviewing court.’” *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8-9 (D.C. Cir. 2008) (quoting *Speedrack Prods. Group, Ltd. v. NLRB*, 114 F.3d 1276, 1278 (D.C. Cir. 1997)). For this reason, this Court will uphold the Board's unit determination unless it is “‘arbitrary and without substantial evidence.’” *Salem*

*Hospital Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015) (quoting *Cleveland Construction, Inc. v. NLRB*, 44 F.3d 1010, 1014 (D.C. Cir. 1995)).

It is highly pertinent in regard to the Board’s application of its broad discretion to make unit determinations that “‘more than one appropriate bargaining unit logically can be defined in any particular factual setting.’” *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (quoting *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000)). “[T]he language [of the NLRA] suggests that employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate unit.” *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 610 (1991) (quoting 29 U.S.C. § 159(a)) (emphasis in original). “Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.” *Ibid.*

In accordance with this statutory framework, “[u]nder NLRB law, the Board first looks to the unit sought by the union. If the unit is appropriate, the Board’s inquiry ends.” *Cleveland Construction*, 44 F.3d at 1013. In evaluating whether a unit is appropriate, “the Board’s focus is on whether the employees share a ‘community of interest.’” *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (quoting *South Prairie Constr. Co. v. International Union of Operating Engineers*, 425 U.S. 800, 805 (1976)). “A cohesive unit – one relatively free of conflicts of interest – serves the Act’s purpose of effective collective bargaining and prevents a

minority interest group from being submerged in an overly large unit.” *Ibid.* (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941), and *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971)). This Court has emphasized that “[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider under the community-of-interest standard. Rather, unit determinations must be made only after weighing all relevant factors on a case-by-case basis.” *Blue Man Vegas*, 529 F.3d at 421 (quoting *Country Ford Trucks*, 229 F.3d at 1190-91). Such relevant factors include “whether, in distinction from other employees, the employees in the proposed unit have ‘different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.’” *Ibid.* (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n.11 (D.C. Cir. 1996)).

Where an employer challenges a unit that the NLRB has found appropriate on the ground that it improperly excludes additional employees, “the employer must do more than show there is another appropriate unit because ‘more than one appropriate bargaining unit logically can be defined in any particular factual setting.’” *Ibid.* (quoting *Country Ford Trucks*, 229 F.3d at 1189). “‘Rather, . . .

the employer's burden is to show the *prima facie* appropriate unit is 'truly inappropriate.'" *Ibid.* (quoting *Country Ford Trucks*, 229 F.3d at 1189).

"A unit is truly inappropriate if, for example, there is no legitimate basis upon which to exclude certain employees from it," such as "[i]f . . . the excluded employees share an overwhelming community of interest with the included employees." *Ibid.* In contrast, as long as the "differences between the [excluded employees] and the employees included in the bargaining unit [a]re sufficiently substantial," *id.* at 423, the fact that the two groups' interests overlap to some extent will not render the petitioned-for unit inappropriate, *see id.* at 422 & Fig. 1 (illustrating, through use of a Venn diagram, the difference between alternative appropriate units – in which a limited degree of overlap indicates only that the "groups have common interests" – and units that are inappropriate because the interests of excluded employees "overlap almost completely"). Again, this conclusion flows logically from the language of the NLRA: because the Act permits "employer unit[s], craft unit[s], plant unit[s], or subdivision[s] thereof," 29 U.S.C. § 159(b), "employees may seek to organize 'a unit' that is 'appropriate' – not necessarily *the* single most appropriate unit." *American Hosp. Ass'n*, 499 U.S. at 610 (emphasis in original).

b. In this case, the NLRB straightforwardly concluded that the petitioned-for unit comprising all the maintenance employees in the Chattanooga facility is

appropriate because all maintenance employees share “similar job functions; shared skills, qualifications, and training; supervision separate from the production employees’; wages different from the production employees’; other unique terms and conditions of employment (e.g., expectation to work on production shutdown days and to work through scheduled breaks and lunch if the need arises); and a human resources manager dedicated solely to maintenance employees.” Or. 1-2 n.1 [JA 685-86 n.1]. As the Board noted, that conclusion accords with the Board’s prior cases involving similar units of maintenance employees in manufacturing facilities. *Ibid.* (citing and discussing *Capri Sun, Inc.*, 330 NLRB 1124 (2000), and *Ore-Ida Foods*, 313 NLRB 1016 (1994), *enfd.* 66 F.3d 328 (7th Cir. 1995)).

The NLRB’s conclusion in this case is entirely consistent with its over half-century old policy of finding separate maintenance units appropriate where “maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation.” *American Cyanamid Co.*, 131 NLRB 909, 910 (1961). Cases applying that policy to find separate maintenance employee units appropriate in manufacturing facilities similar to this one are legion. *See, e.g., Nestle Dreyer’s Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016); *Skyline Distributors v. NLRB*, 99 F.3d 403, 406-07 (D.C. Cir. 1996); *Yuengling Brewing Co.*, 333 NLRB 892 (2001); *Capri Sun, Inc.*, 330 NLRB 1124 (2000); *Ore-Ida Foods, Inc.*, 313

NLRB 1016 (1994), *enfd.* 66 F.3d 328 (7th Cir. 1995); *Franklin Mint Corp.*, 254 NLRB 714 (1981); *Phillips Products Co.*, 234 NLRB 323 (1978); *Mobay Chemical Corp.*, 225 NLRB 1159 (1976); *Crown Simpson Pulp Co.*, 163 NLRB 796 (1967). *Cf. Lewis Mardon U.S.A., Inc.*, 332 NLRB 1282 (2000) (excluding maintenance employees from a petitioned-for unit of production employees).

In contesting the NLRB's conclusion that maintenance employees throughout the Chattanooga facility share a sufficiently strong community of interest to constitute an appropriate plant-wide unit, Volkswagen's principal claim is that its "shop structure drives critical differences in maintenance employees' terms and conditions of employment across shops," Pet. Br. 32 (bold and capitalization omitted), *i.e.*, that maintenance employees in the body weld shop, the paint shop, and the assembly shop have so little in common with each other that together they do not constitute an appropriate unit. Volkswagen emphasizes that "the shops (and thus the employees in them) are physically separated by walls," that "much of the equipment maintenance employees repair and maintain is shop-specific because each shop has a different role in the assembly process," and that "[a]s a result, [maintenance employees'] precise duties in each shop vary, the training needed to work in each shop is different, and maintenance employees cannot transfer from shop to shop without additional training." Pet. Br. 32-33.

Even if all that were so – and the evidence makes clear that the differences in maintenance employee duties between shops are “slight” because “[a]ll areas have conveyors[,] . . . electrical[, and] . . . mechanical” components, Tr. 171 [JA 181], and that maintenance employees may transfer to “other Skilled Team Member positions in any production shop,” VW Ex. 6, p. 97 [JA 539] – it would do little to detract from the Board’s overall conclusion that many *other* community of interest factors strongly point in the direction of a shared community of interest between all maintenance employees in Volkswagen’s facility.<sup>3</sup> As the Regional Director cogently explained in rejecting Volkswagen’s arguments on this point, “Maintenance employees share a job title and perform distinct functions – they all perform preventative maintenance and repairs. While they may work on different machines once they are assigned to a department, they all shared common initial hiring criteria and training. They undergo separate ongoing training and sometimes train with employees assigned to other

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<sup>3</sup> Volkswagen’s maintenance employees are thus, by analogy, like registered nurses in a hospital – they constitute their own appropriate bargaining unit based on their shared job title, specialized skills, training, and function, even if they are assigned to a specific unit and interact more frequently with non-professional staff in that unit than with nurses in other parts of the hospital. *See* 29 C.F.R. § 103.30 (unit of registered nurses presumptively appropriate in acute care hospital). *See also Newton-Wellesley Hospital*, 250 NLRB 409 (1980) (pre-healthcare rule case explaining why unit of registered nurses is appropriate based on traditional community-of-interest factors).

shops. Maintenance employees in the body weld and paint shops work an identical schedule to provide maintenance coverage around the clock, seven days a week. While maintenance employees in the assembly shop work a different schedule, they still provide coverage around the clock five days per week. All maintenance employees work at times when production employees are not working and they are all required to work on days and weeks when the plant is shut down. While there is not interchange among maintenance employees in the three shops, that fact alone would not render the unit ‘fractured.’” DDE 20-21 [JA 623-24] (citations omitted).

Volkswagen seeks to dismiss the NLRB’s decision by claiming that the Regional Director “[m]erely . . . tall[ied] a list of similarities and differences without explaining the weight assigned to those factors or why those factors outweighed Volkswagen’s shop structure in the community of interest analysis.” Pet. Br. 31. But the Regional Director *did* explain why the relevant factors outweigh Volkswagen’s shop structure, describing, for example, that “[w]hile [maintenance employees] may work on different machines once they are assigned to a department, they all shared common initial hiring criteria and training,” and that “[w]hile maintenance employees in the assembly shop work a different schedule” than maintenance employees in the body weld and paint shops, maintenance employees’ schedules in all the shops are all calibrated to “provide

coverage around the clock” in contrast to the schedules of production employees. DDE 20-21 [JA 623-24]. As the NLRB further elaborated in denying Volkswagen’s request for review, factors such as “similar job functions; shared skills, qualifications, and training” and “supervision separate from the production employees’; wages different from the production employees’; hours and scheduling different from production employees” “*substantially outweigh* the fact that [Volkswagen] assigns the maintenance employees to three separate departments.” Or. 1-2 n.1 [JA 685-86 n.1] (emphasis added).<sup>4</sup>

Relatedly, Volkswagen contends that the NLRB’s decision in this case conflicts with the Board’s decision in *Bergdorf-Goodman*, 361 NLRB No. 11 (July 28, 2014), alleging that “[h]ere, just like in *Bergdorf*, the Union broke apart

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<sup>4</sup> To the extent that Volkswagen’s claim is that the Board was required to “explain[] the weight assigned to th[e] [community of interest] factors,” Pet. Br. 31, in some arithmetic fashion, that claim conflicts with the decisions of the Supreme Court, this Court, and other circuits. *See Action Automotive*, 469 U.S. at 497 (“We do not require mathematical precision and are not prepared to second-guess the Board’s informed judgment” with regard to the application of the community of interest factors); *Blue Man Vegas*, 529 F.3d at 421 (“[U]nit determinations must be made only after weighing all relevant factors on a case-by-case basis.”); *Electronic Data Systems Corp. v. NLRB*, 938 F.2d 570, 573 (5th Cir. 1991) (“In assessing the employees’ community of interests, the Board must consider the entire factual situation, and its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors.”); *NLRB v. Lake Co. Ass’n for the Retarded, Inc.*, 128 F.3d 1181, 1186-87 (7th Cir. 1997) (“The community of interest doctrine . . . does not specify the weight to be given to various aspects of employees working conditions . . . . [I]t is not our role to second-guess the weighing of that evidence by the NLRB.”).

Volkswagen's organizational structure by cherry-picking three separate sub-groups of employees out of Volkswagen's shop structure, all with separate supervision, and lumping them together to create a fictional maintenance department where none exists." Pet. Br. 42. That argument significantly misconstrues the facts of this case, which are nothing like those of *Bergdorf-Goodman*.

In *Bergdorf-Goodman*, 361 NLRB No. 11, slip op. 1, the union petitioned for a unit of women's shoes sales employees in a large Manhattan department store. The petitioned-for unit was composed of all sales employees in the "Salon shoes" department, which was its own department on its own floor, as well as shoe sales employees from the larger "Contemporary Sportswear" department, which included both employees who sold shoes as well as employees who sold clothing. *Ibid.* After reviewing the traditional community of interest factors, the Board concluded that "the balance of the community-of-interest factors weighs against finding that the petitioned-for unit is appropriate." *Id.* at 3.

In explaining its decision, the Board noted that the petitioned-for unit did not "conform[] to the departmental lines established by the employer," insofar as "the petition carves the Contemporary shoes employees out of a . . . department, Contemporary Sportswear, excluding the other sales associates in that department." *Ibid.* Although the Board allowed that, as a general matter, "[t]he petition's departure from any aspect of the Employer's organizational structure might be

mitigated or outweighed by other community-of-interest factors,” it found that on the facts presented in *Bergdorf-Goodman* such countervailing factors were simply not present. As the Board explained, “Salon shoes and Contemporary shoes sales associates have different department managers, different floor managers, and even different directors of sales,” “do not interchange with each other on either a temporary or a permanent basis and have only limited contact,” “contact among the petitioned-for employees is limited to attendance at storewide meetings and daily incidental contact related to sharing the same locker room, cafeteria, etc.,” and “there is no evidence in the record establishing that sales associates in Salon shoes and Contemporary shoes share any distinct skills or have received any specialized training.” *Id.* at 3-4 & n. 5. In sum, “while some factors favor a finding of community of interest, they are ultimately outweighed, on these facts, by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer (such as departments, job classifications, or supervision), combined with the complete absence of any related factors that could have mitigated or offset that deficit.” *Id.* at 4.

In this case, in contrast, the NLRB found, as recounted above, that although Volkswagen does not maintain a facility-wide maintenance department, maintenance employees from across the plant nevertheless “share a community of interest under the traditional criteria.” Or. 1-2 n.1 [JA 685-86 n.1]. The most basic

point is that all maintenance employees throughout Volkswagen's facility "share a job title" of "skilled team member." DDE 20 [JA 623]. In addition, unlike the shoe sales employees at issue in *Bergdorf Goodman*, who had similar skills to the other sales employees with whom they worked, "maintenance employees possess highly specialized skills and training" without regard to which of the three shops they work in. DDE 19 [JA 622]. And, unlike the shoe sales employees in Contemporary Shoes, who were supervised by the same manager as other sales employees in the Contemporary Sportswear department, "[w]hile there is no separate maintenance department that covers the entire plant, there is, in effect a maintenance department within each shop, where [maintenance employees] are separately supervised up to the level of each shop's general manager." *Ibid.* On the basis of these facts, the Board found, in contrast to *Bergdorf Goodman*, that that the "petition's departure from any aspect of the Employer's organizational structure" was "mitigated or outweighed by other community-of-interest factors," *ibid.* (quoting *Bergdorf-Goodman*, 361 NLRB No. 11, slip op. at 3), and thus correctly concluded that the many community-of-interest factors shared by maintenance employees across shop lines "substantially outweigh the fact that the Employer assigns the maintenance employees to three separate departments," *ibid.*<sup>5</sup>

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<sup>5</sup> Insofar as Volkswagen suggests that the Board's approval of a unit that does not strictly track the company's departmental lines is legal error, *see* Pet. Br. 45 & n.15, that argument is without merit. Whether "a unit of employees" is

c. Volkswagen does not emphasize the argument in its opening brief, as it did before the NLRB, that “the smallest appropriate unit must include the petitioned-for employees plus production employees,” DDE 19 [JA 622], and, in fact, states explicitly that this Court “need not reach the issue of whether Volkswagen’s production employees share an overwhelming community of interests with the maintenance employees,” Pet. Br. 56. Nevertheless, out of an abundance of caution, and because Volkswagen argues at several points that “maintenance employees share more significant terms and conditions of employment with production employees in their assigned shop than they do with each other across shops,” *id.* at 31-32, 56,<sup>6</sup> we explain why the Board’s conclusion that production employees do not share an overwhelming community of interest with maintenance employees at the facility is correct and why, therefore, production employees need not be included in the petitioned-for maintenance unit.

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“readily identifiable as a group” may turn on “job classifications, departments, functions, work locations, skills, or similar factors.” *Specialty Healthcare*, 357 NLRB at 945. Here, maintenance employees from across the facility share the same job classification, function, and skills without regard to which shop they work in.

<sup>6</sup> Volkswagen does not explicitly argue that separate units of maintenance and production employees in each shop would be the smallest appropriate units, although that is one logical conclusion to be drawn from the company’s arguments. Volkswagen also does not explain why if, as it alleges, shop-specific distinctions between maintenance employees are so significant as to destroy the community of interest required for a facility-wide maintenance unit, those same distinctions would not render a facility-wide production and maintenance unit inappropriate as well.

In the case below, the Regional Director described a long list of community-of-interest factors that distinguish maintenance employees from production employees, including that “production and maintenance employees are separately supervised and there is not interchange between the two classifications,” “maintenance workers are required to possess more experience and training” and “[o]nce employed, they are required to undergo more extensive training” than production employees, “all maintenance employees are compensated at a wage rate that exceeds the rates paid to production employees,” and “maintenance employees work a different schedule than production employees” and “are specifically required to be available when production employees are not working, which includes shutdowns.” DDE 21 [JA 624]. On the basis of these and other factors, the Regional Director concluded, and the NLRB affirmed, that “[a]lthough the Employer’s contentions may establish that the broader unit sought by the Employer is an appropriate unit, they are insufficient to establish that production employees share such an overwhelming community of interest as to require their inclusion in the unit.” DDE 23 [JA 626].

Volkswagen contends that the factors relied on by the Board are outweighed by the fact that “maintenance employees work side-by-side with the excluded production employees in their own shops” and “spend 80% of their time on the floor of their own shops interacting with the excluded production employees.” Pet.

Br. 37. As the Regional Director correctly concluded, however, where maintenance employees otherwise have a sufficiently separate community of interest from production employees, “interaction between the production and maintenance employees when working together on their functions or discussing problems about the machines’ does not mandate a combined unit.” DDE 23 [JA 626] (quoting *Capri Sun*, 330 NLRB at 1126). *Accord Ore-Ida Foods*, 66 F.3d at 328 (maintenance unit appropriate although maintenance employees “spend half or more of their time in production areas inspecting equipment or solving immediate problems with malfunctioning equipment on the line”); *Yuengling Brewing*, 333 NLRB at 893 (fact that some maintenance employees “spend most of their time on the production floor and have a significant degree of interaction with production employees . . . by itself is not sufficient to negate the appropriateness of a separate maintenance unit”). This conclusion holds true even where maintenance employees are assigned to particular shops or departments. *See Capri Sun*, 330 NLRB at 1124 (maintenance unit appropriate in case where “[t]he vast majority of the maintenance employees are assigned to one of three production departments”). In sum, the Board has long held that, although it is typical for maintenance work to be undertaken “in conjunction with production workers in the area involved,” where, as here, maintenance employees maintain their “identity as a function

separate from production” they may constitute their own unit. *American Cyanamid Co.*, 131 NLRB at 910.

The few cases cited by Volkswagen in which the Board has found maintenance units inappropriate are, as the Regional Director found, “readily distinguishable” from this case. DDE 22 [JA 625].<sup>7</sup> As the Regional Director explained, in *Buckhorn, Inc.*, 343 NLRB 201 (2004), “maintenance employees regularly performed production work so that production and maintenance employees had essentially the same job functions,” DDE 22 [JA 625], and, in addition, 14 of 19 maintenance employees reported to a production supervisor, *Buckhorn*, 343 NLRB at 202. Similarly, in *TDK Ferrites Corp.*, 342 NLRB 1006 (2004), “the petitioned-for maintenance technicians performed a significant amount of production work and were supervised by production personnel.” DDE 22 [JA 625]. The same was true in *Monsanto Co.*, 183 NLRB 415, 416-17 & n.5 (1970), where maintenance employees worked “under the immediate direction and control of production supervisors” and interchanged regularly with production

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<sup>7</sup> In addition to the cases discussed in the text, Volkswagen relies on two cases that do not involve initial petitions for maintenance employee units and are thus plainly distinguishable. *Rayonier Inc. v. NLRB*, 380 F.2d 187, 188-89 (5th Cir. 1967), involved a petition to remove powerhouse employees from an existing production and maintenance unit, requiring application of the Board’s stricter standard for severing employees from an existing unit. *Vincent M. Ippolito*, 313 NLRB 715 (1994), involved a union’s petition to represent a group of mechanics as craft employees, involving a different legal analysis than at issue here.

employees. In this case, in contrast, Volkswagen's maintenance employees *never* perform production work and *all* maintenance employees throughout the facility report to maintenance supervisors and, above the supervisory level, to assistant managers for maintenance.

The remaining cases Volkswagen relies on are distinguishable on the ground that they involve fractured units. In *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979), “the union sought to represent only a portion of the employer’s maintenance employees,” such that the petitioned-for unit was fractured. DDE 20. Likewise, in *Harrah’s Illinois Corp.*, 319 NLRB 749, 751 (1995), the union sought a unit consisting of only 16 employees out of a 115-employee maintenance department, which the Board concluded was inappropriate. In contrast, in this case, Local 42 seeks to represent *all* the maintenance employees employed at Volkswagen’s facility.

In addition to being wholly consistent with the Board’s longstanding maintenance unit jurisprudence, the facts of this case are also broadly similar to – although much clearer than – those this Court considered in *Blue Man Vegas*. That case involved the Blue Man Group theatrical show, which was assisted “by a stage crew comprising seven different departments: audio, carpentry; electricians; properties (props); video; wardrobe; and musical instrument technicians (MITs).”

529 F.3d at 419. The NLRB approved a unit consisting of employees from six of the seven departments but excluding MITs. *Ibid.*

This Court upheld the Board's unit determination, explaining,

“A unit comprising all the non-MIT stage crews is *prima facie* appropriate because, notwithstanding the differences among them, those employees share a community of interest. It may well be that a unit comprising all the stage crews, including the MITs, would also be *prima facie* appropriate because the MITs also share a community of interest with the other stage crew employees, but that does not necessarily render the unit comprising only the non-MIT stage crews ‘truly inappropriate.’ Indeed, both the differences that are unique to the MITs and the differences that can be found among all the stage crews stand in [the employer]’s way: The MITs lack an overwhelming community of interest with the other stage crews (just as each of the non-MIT crews may lack an overwhelming community of interest with each of the other non-MIT crews).” *Id.* at 424-25.

“It may well be that a unit comprising” Volkswagen’s production and maintenance employees “would also be *prima facie* appropriate” because the production employees would “also share a community of interest with” maintenance employees. *Blue Man Vegas*, 529 F.3d at 424. That does “not necessarily render the unit comprising only” the maintenance employees “truly

inappropriate.” *Ibid.* Rather, “the differences that are unique to the [production employees] . . . stand in [Volkswagen]’s way: The [production employees] lack an overwhelming community of interest with the [maintenance employees].” *Id.* at 424-25. As the NLRB aptly put it, because many significant “traditional community-of-interest factors differentiate the production employees from the maintenance employees[,] it is impossible to say that the factors ‘overlap almost completely.” Or. 1-2 n.1 [JA 685-86 n.1].

2. Volkswagen’s remaining arguments – that the Regional Director improperly applied the community-of-interest analysis set forth in *Specialty Healthcare* and that the Board’s unit determination violates Section 9(c)(5) of the Act by giving controlling weight to the union’s extent of organization – require only brief comment.

a. Volkswagen argues that “although the R[egional] D[irector] and Board majority purported to apply the ‘traditional’ community of interests test under *Specialty Healthcare*, they actually applied a less rigorous standard, or at the very least failed to adequately explain their decision.” Pet. Br. 28. Specifically, the company claims that “the R[egional] D[irector] effectively limited his analysis at the first *Specialty Healthcare* step to whether the maintenance employees were readily identifiable as a group (which they are not) and pushed the traditional community of interests analysis to the ‘overwhelming community of interests’

portion of his decision.” *Id.* at 28-29. Even a cursory review of the Regional Director’s decision, and of the NLRB’s decision denying Volkswagen’s request for review, makes clear that this is not the case.

In the section of his decision addressing “Board Law,” the Regional Director correctly stated that “the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group *and share a community of interest.*” DDE 17 [JA 620] (citing *Specialty Healthcare*, 357 NLRB at 945-46) (emphasis added). In describing the community of interest aspect of this initial inquiry, the Regional Director stated clearly that the appropriate analysis includes,

“whether the employees . . . 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.” DDE 18 [JA 621] (citing *United Operations, Inc.*, 338 NLRB 123 (2002), and *Specialty Healthcare*, 357 NLRB at 942).

The Regional Director made clear that it was only after completing this “first inquiry,” DDE 17 [JA 620] – an inquiry that includes full consideration of the community of interest factors – that he would turn to “the second inquiry” of the

*Specialty Healthcare* framework, namely, whether “additional employees share an overwhelming community of interest with the petitioned-for employees” “because the traditional community-of-interest factors ‘overlap almost completely.’” DDE 18 [JA 621] (quoting *Specialty Healthcare*, 357 NLRB at 943-45 & n.28, quoting, in turn, *Blue Man Vegas*, 529 F.3d at 421-22).

In the “Application of Board Law to the Facts of this Case” section of his decision, the Regional Director proceeded to apply this two-step *Specialty Healthcare* framework to the facts at issue. First, in a section appropriately titled “The Classifications Sought By Petitioner Share a Community of Interest,” the Regional Director concluded that, not only were “the employees in the petitioned-for unit . . . readily identifiable as a group,” but also that “the petitioned-for employees share a community of interest under the Board’s traditional criteria,” and then went on to describe those shared community of interest factors. DDE 19-21 [JA 622-24] (citation and quotation marks omitted). *See* Section 1.b., *supra*, pp. 22-23 (quoting the Regional Director’s community of interest analysis).<sup>8</sup>

It was only after fully considering whether employees in the petitioned-for unit shared a community of interest that the Regional Director turned to consider Volkswagen’s argument that “production employees share such an overwhelming

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<sup>8</sup> The Regional Director also described the similarities shared by maintenance employees with regard to each community of interest factor in the decision’s detailed statement of facts. *See* DDE 2-17 [JA 605-20].

community of interest as to require their inclusion in the unit.” DDE 23 [JA 626].

The Regional Director once again described the many factors that differentiate maintenance employees from production employees – such as that they are “separately supervised,” “there is no interchange between the two classifications,” “maintenance workers are required to possess more experience and training” than production employees, “all maintenance employees are compensated at a wage rate that exceeds the rates paid to production employees,” “maintenance employees work a different schedule than production employees,” and maintenance employees “are specifically required to be available when production employees are not working, which includes shutdowns.” DDE 21 [JA 624]. On the basis of these and other differences, the Regional Director concluded that “the production employees [Volkswagen] seeks to include in the unit do not share an overwhelming community of interest warranting their inclusion with the [maintenance] employees.” *Ibid.*

Contrary to Volkswagen’s claim, then, the Regional Director properly considered whether the petitioned-for unit of maintenance employees shared a community of interest at the first step of the *Specialty Healthcare* analysis before turning to Volkswagen’s argument that production employees share such an

overwhelming community of interest with maintenance employees as to require their inclusion in the unit.<sup>9</sup>

b. Finally, Volkswagen contends that the NLRB violated Section 9(c)(5) of the NLRA by giving controlling weight to the extent of employee organization in making its unit determination. Pet. Br. 51-52. That argument is without merit as well.

Although Section 9(c)(5) states that, in making unit determinations, “the extent to which the employees have organized shall not be controlling,” 29 U.S.C. § 159(c)(5), as Volkswagen correctly acknowledges, “the extent of organization may be ‘considered as one factor in determining whether a proposed unit is appropriate.’” Pet. Br. 52 (quoting *Blue Man Vegas*, 529 F.3d at 421).

In fact, Volkswagen acknowledges that the Board did not *actually* rely on the extent of organization at all in rendering its decision. *See id.* at 51 (“Of course, the Board is not going to expressly state that it gave controlling weight to the extent of organization.”). Nevertheless, the company seeks to persuade the Court

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<sup>9</sup> In denying Volkswagen’s request for review, the NLRB followed this same approach. The Board first determined that “employees in the petitioned for-unit are readily identifiable as a group” and “share a community of interest under the traditional criteria.” Or. 1-2 n.1 [JA 685-86 n.1]. The Board only then considered Volkswagen’s argument that “the production employees share an ‘overwhelming community of interest’ with maintenance employees, such that there is ‘no legitimate basis upon which to exclude certain employees from’ the larger unit because the traditional community-of-interest factors ‘overlap almost completely.’” *Ibid.* (quoting *Specialty Healthcare*, 357 NLRB at 944).

that it should draw an inference that “the Board’s decision was a cloak for reliance on the extent of organization as the dispositive factor” because Local 42 petitioned for a unit that purportedly is “the apex of its organizational strength” and did so “after losing an election in a plant-wide unit,” even while acknowledging that “the Union’s conduct in this regard may not be enough to establish a section 9(c)(5) violation.” *Id.* at 53-54.

The short answer is that, as Volkswagen signals by its various hedges, there is no basis for the company’s claim that the Board’s determination was “controll[ed]” by “the extent to which the employees have organized.” 29 U.S.C. § 159(c)(5). As the Regional Director correctly determined, the fact that Local 42 previously “proceeded to an election in a larger unit is not evidence that a smaller unit is inappropriate.” DDE 17 [JA 620] (citing *Macy’s, Inc.*, 361 NLRB No. 4, slip op. 6 n.30). That is true for the simple reason that ““more than one appropriate bargaining unit logically can be defined in any particular factual setting.”” *Blue Man Vegas*, 529 F.3d at 421 (quoting *Country Ford Trucks*, 229 F.3d at 1189). Not surprisingly, then, the principle that a union may petition for a smaller appropriate unit after previously having lost an election in a larger appropriate unit is longstanding and well-established. *See, e.g., Macy’s, Inc.*, 361 NLRB No. 4, slip op. 6 n.30; *Fraser Engineering Co.*, 359 NLRB 681, 681 (2013), *Amoco*

*Production Co.*, 235 NLRB 1096, 1096 (1977), *Stern's, Paramus*, 150 NLRB 799, 807 (1965); *Macy's San Francisco*, 120 NLRB 69, 71 (1958).

Volkswagen's thinly-veiled claims that the NLRB acted in bad faith in reaching its decision in this case – evidenced by such arguments that “the Board’s decision was a cloak for reliance on the extent of organization as the dispositive factor,” Pet. Br. 53, and that the Board used its “multi-factor [community of interest] test[] to ‘hide the ball’ regarding its true intentions,” *id.* at 55 n.18 – should not be countenanced. This Court has repeatedly made clear that, “[w]ithout evidence to the contrary, ‘[w]e must presume an agency acts in good faith.’” *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (quoting *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008)). In this case, there is more than ample evidence to support the NLRB’s conclusion that the unit at issue here – the sort of maintenance unit that the Board has historically approved in similar settings – is appropriate. Conversely, there is “no substance” to support Volkswagen’s “assertions bordering on accusations of . . . bad faith.” *Comcast*, 526 F.3d at 769 n.2.

## CONCLUSION

The Decision and Order of the Board should be enforced.

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

Respectfully submitted,

/s/ Matthew J. Ginsburg  
Matthew J. Ginsburg  
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS**

1. This brief complies with the type-volume limitations of Circuit Rule 32(e)(2)(B) because this brief contains 9,048 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in a 14-point type in a Times New Roman font style.

/s/ Matthew Ginsburg  
Matthew Ginsburg  
815 Sixteenth Street, NW  
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(202) 637-5397

Date: May 22, 2017

**CERTIFICATE OF SERVICE**

I, Matthew J. Ginsburg, certify that on May 22, 2017, the foregoing Final Brief of Intervenor United Auto Workers, Local 42 In Support of Respondent was served on all parties or their counsel of record through the CM/EFC system.

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

# **EXHIBIT E**

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

**VOLKSWAGEN GROUP OF AMERICA, INC.**

**and**

**Cases 10-CA-166500  
10-CA-169340**

**UNITED AUTO WORKERS, LOCAL 42**

**MOTION FOR DISMISSAL OF COMPLAINT**

**1. Motion**

The undersigned parties jointly request that the Board dismiss the Complaint in the above-styled matters based on the action of the Charging Party, United Auto Workers, Local 42 (the Union) disclaiming interest in continuing to represent the employees in the unit concerned and request to withdraw the charges in this matter.

**2. Background**

The above-captioned cases comprise a test of the National Labor Relations Board's Certification of Representative of the Union as the exclusive collective-bargaining representative of a unit of certain employees employed by Volkswagen Group of America, Inc. (the Respondent). On October 23, 2015, the Union filed a petition in Case 10-RC-162530 seeking to represent certain employees of the Respondent. Specifically, the Union sought to represent only the maintenance employees at the Respondent's Chattanooga, Tennessee facility, rather than a larger unit of production and maintenance employees. On November 18, 2015, the Regional Director of Region 10 issued a Decision and Direction of Election scheduling an election in an appropriate unit of maintenance employees employed by Respondent at its Chattanooga facility.

After a secret ballot election held on December 3, 2015, and December 4, 2015, the Regional Director issued a Certification of Representative on December 14, 2015, certifying the

Union as the exclusive collective bargaining representative of the maintenance unit. On December 23, 2015, the Respondent filed with the Board a Request for Review of the Regional Director's Decision and Direction of Election, a Request for Stay of Certification and a Request for Oral Argument. On April 13, 2016, the Board issued an order denying the Employer's Request for Review, Request for Stay of Certification and Request for Oral Argument.

About December 15, 2015, January 8, 2016, and April 15, 2016, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit. On April 26, 2016, a Consolidated Complaint issued alleging that the Respondent had violated Section 8(a)(1) and 8(a)(5) of the Act by its refusal to recognize and bargain with the Union as a test of the Board's certification.

On August 26, 2016, the Board issued its Order finding the Respondent's refusal to bargain unlawful. See, 364 NLRB No. 110. On September 1, 2016, the Respondent filed a Petition for Review with the U.S. Court of Appeals for the D.C. Circuit. The Board cross-petitioned for enforcement of its Order. Before the Court of Appeals ruled on the petitions, the Board issued its decision in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). In light of the issues raised by *PCC Structural*, on December 19, 2017, the Board filed a Motion to Remand the above-styled case to the Board. On December 26, 2017, the Court issued an Order Granting the Motion to Remand, and the case is presently before the Board.

### **3. The Union's Disclaimer and Requests to Withdraw**

On April 15, 2019, the Union served all parties notification of its disclaimer of interest in representing the maintenance-only unit and requested withdrawal of all pending unfair labor

practice charges, including the charges underlying this Complaint.<sup>1</sup> The Regional Director has approved withdrawal of the unfair labor practice charges that were pending in the Region. Given the Union's disclaimer of interest in continuing to represent the unit and the Union's request to withdraw the instant charges, the undersigned parties hereby request that the Board dismiss the Consolidated Complaint in this matter.

Dated this 17th day of April, 2019,

Respectfully submitted,

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Sally R. Cline  
Counsel for the General Counsel  
National Labor Relations Board  
Region 10

---

Samuel Morris, Attorney  
Godwin, Morris, Laurenzi & Bloomfield, P.C.  
50 N Front Street, Suite 800  
Memphis, TN 38103-2181

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<sup>1</sup> On April 9, 2019, the Union filed a petition in Case 10-RC-239234 seeking to represent a unit of all production and maintenance workers at the Respondent's Chattanooga facility. A hearing is scheduled to begin on April 17, 2019.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Dismissal has this date been served by regular mail and/or electronic mail where indicated upon the following:

Michael B. Schoenfeld, Esq.  
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American Counsel of Employees  
c/o Maury Nicely, Attorney  
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International Union, United Automobile,  
Aerospace & Agricultural Implement  
Workers of America  
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# **EXHIBIT F**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10

Volkswagen Group of America, Inc.

Employer

and

Case 10-RC-162530

United Auto Workers, Local 42

Petitioner

TYPE OF ELECTION: REGIONAL DIRECTOR DIRECTED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

United Auto Workers, Local 42

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

**Unit:** All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.



December 14, 2015

*Claude T. Harrell Jr.*

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CLAUDE T. HARRELL JR.  
Regional Director, Region 10  
National Labor Relations Board

## NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,<sup>1</sup> an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

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<sup>1</sup> Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

# **EXHIBIT G**

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Volkswagen Group of America, Inc. and United Auto Workers, Local 42.** Cases 10–CA–166500 and 10–CA–169340

August 26, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to charges and an amended charge filed by United Auto Workers, Local 42 (the Union), the General Counsel issued the consolidated complaint on April 26, 2016, alleging that Volkswagen Group of America, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union following the Union’s certification in Case 10–RC–162530. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 120.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations of the consolidated complaint, and asserting affirmative defenses.<sup>1</sup>

<sup>1</sup> On May 10, 2016, counsel for the Respondent filed a document styled “Respondent Volkswagen Group of America Chattanooga Operations, LLC’s Answer and Affirmative Defenses to Complaint.” The opening paragraph of that document states:

Volkswagen Group of America, Inc. is not the employer herein. Rather the employer is Volkswagen Group of America Chattanooga Operations, LLC (hereinafter “Respondent”), which hereby files this Answer to the General Counsel’s Complaint . . . (footnote omitted).

The text of the document goes on to admit or deny the various allegations of the complaint, and to assert certain affirmative defenses. This document is signed by the attorneys who entered an appearance in this matter on behalf of the Respondent, Volkswagen Group of America, Inc.

The complaint in this matter names only one Respondent, Volkswagen Group of America, Inc. Volkswagen Group of America Chattanooga Operations, LLC is not a party, no attorney has entered an appearance on its behalf, nor has that entity filed a request to intervene in this matter.

In view of the fact that this document was filed by the attorneys who entered an appearance on behalf of the Respondent, we will consider this document to be an answer filed on behalf of Volkswagen Group of America, Inc. Similarly, we will consider all other documents that have been filed by the same attorneys, regardless of how they are styled, to be filed on behalf of the Respondent as well.

We do this in order to give the Respondent the benefit of the doubt. We presume that they have retained experienced labor counsel and caused them to enter an appearance in this matter on their behalf be-

On May 13, 2016, the General Counsel filed a Motion for Summary Judgment.<sup>2</sup> On May 18, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response on June 1, 2016.<sup>3</sup> Also on June 1, 2016, the Union filed a brief in support of the General Counsel’s Motion for Summary

cause they wish to be represented and defend their position. To take the documents as styled at face value would lead to the conclusion that the Respondent has filed no responsive pleadings. If this were the case, all of the allegations of the complaint would be “deemed to be admitted to be true” under Sec. 102.20 of the Board’s Rules and Regulations, and the Respondent would have waived its right to assert a defense.

<sup>2</sup> In its motion, the General Counsel asserts that the Respondent’s name in this proceeding is in accord with the name of the employer in the certification of representative and the stipulation entered into by the employer in Case 10–RC–162530. The General Counsel asserts that therefore the Respondent’s argument that it has been incorrectly named in this proceeding should be rejected. In the alternative, the General Counsel states that the Respondent’s name should be modified as requested.

<sup>3</sup> In its response to the Notice to Show Cause (Response), the Respondent repeats its assertion that it has been incorrectly named in the consolidated complaint:

Counsel for the General Counsel misunderstands Volkswagen’s point regarding its proper name. The employer of the employees at issue in this case is Volkswagen Group of America Chattanooga Operations, LLC. This entity is the appropriate Respondent. This entity filed the Request for Review wherein it noted that the Petition incorrectly identified Volkswagen Group of America, Inc. as the employer. (See GC Ex. 5 at 1, n. 1.) This entity also filed the Answer to the complaint underlying Counsel for the General Counsel’s Motion for Summary Judgment. (GC Ex. 11 at 1 & n.1). Therefore, Volkswagen requests that the style of this case be amended to reflect the appropriate corporate respondent.

(Response p.1, fn.1.)

The Respondent is mistaken. The attorneys who represent the Respondent in this matter also represented the Respondent as the Employer in the underlying representation proceeding. (See Case 10–RC–162530.) The petition below named the Respondent as the Employer of the employees in the requested unit, and the Respondent’s attorneys stipulated at the hearing that “UAW Local 42” and “Volkswagen Group of America, Inc.” were the correct names of the parties. (See Case 10–RC–162530, Bd. Ex. 2, Transcript of Hearing p. 8.) Although Respondent’s request for review of the Decision and Direction of Election stated in a footnote that “[t]he petition incorrectly identified the Employer as ‘Volkswagen Group of America, Inc.’,” the Respondent did not seek Board review on that basis. Furthermore, the Respondent did not file a post-election request for review challenging the Certification of Representative on the basis that it named the Respondent as the Employer. Because the Respondent failed to request Board review of this issue, the Respondent is precluded from raising this issue here. See Sec. 102.67(g) of the Board’s Rules and Regulations.

Moreover, in an earlier representation proceeding involving the Chattanooga facility, the Respondent filed its own petition for election naming itself as the Employer, and it signed a Stipulated Election Agreement in its own name as well. (See Case 10–RM–121704.) Under these circumstances, we find that the Respondent is estopped from denying that it is the employer of the employees at issue in this case.

Judgment, and the Respondent filed a reply to the Union's brief on June 15, 2016.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

#### Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the petitioned-for maintenance unit is not an appropriate unit because it does not include the Respondent's production employees.<sup>4</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.<sup>5</sup>

<sup>4</sup> The Respondent contends in its response to the Notice to Show Cause that the Board's April 13, 2016 Order in Case 10-RC-162530 did not rule on the Respondent's contention that the "Regional Director's approval of the Union's chosen unit also violates Section 9(c)(5) of the Act which prohibits giving extent of organization controlling weight[.]" However, the Board's April 13, 2016 Order denied the Respondent's request for review of the Regional Director's Decision and Direction of Election, finding that it raised no substantial issues warranting review, and thereby affirming the Regional Director's finding that the petitioned-for unit is appropriate for the purposes of collective bargaining. In doing so, the Board considered and rejected each contention raised in the Respondent's request for review.

The Respondent's answer raises an affirmative defense that it "did not have a duty to bargain with the Union from the date the election was certified to the date that the Board issued its order denying Respondent's request for review" of the Regional Director's Decision and Direction of Election in Case 10-RC-162530. We find no merit in this contention. See *L. Suzio Concrete Co.*, 325 NLRB 392, 396 (1998) (employer "acted at its peril" by relying on its filing of a request for review in refusing to bargain with the union after the date of certification), enfd. mem 173 F.3d 844 (2d Cir. 1999). Moreover, once the Board denied the Respondent's request for review on April 13, 2016, the Union made another bargaining request on April 15, 2016, and the Respondent admits that it refused to recognize and bargain with the Union thereafter.

<sup>5</sup> Member Miscimarra would have granted review in the underlying representation proceeding regarding whether the petitioned-for maintenance-only bargaining unit constituted an impermissibly fractured unit that departed from the Employer's organizational structure, see *Odwalla, Inc.*, 357 NLRB 1608, 1611-1613 (2011), and whether an overwhelming community of interest warranted including production and/or other employees in any bargaining unit, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 945-946 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). While he remains of that view, he agrees, however, that the

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has maintained an office and place of business in Chattanooga, Tennessee (the Respondent's facility) and has been engaged in the manufacture of automobiles.<sup>6</sup> During the 12-month period preceding issuance of the consolidated complaint the Respondent, in conducting its operations described above, sold and shipped from its Chattanooga facility goods valued in excess of \$50,000 directly to points outside the State of Tennessee.

We find that that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5).

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Certification*

Following the representation election held on December 3 and December 4, 2015, the Union was certified on December 14, 2015, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

<sup>6</sup> The Respondent's answer denies the complaint allegation that it is a New Jersey corporation, affirmatively stating that that Volkswagen Group of America Chattanooga Operations, LLC is a Tennessee limited liability corporation and that it has an office and place of business in Chattanooga, Tennessee at which it manufactures automobiles. The Respondent's answer, however, admits the jurisdictional allegations in the complaint, and that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Its answer also admits that the Union requested that the Respondent recognize and bargain with it, and that the Respondent failed and refused to do so. In these circumstances, we find that the Respondent's denials do not raise any issues warranting a hearing.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### B. Refusal to Bargain

On December 15, 2015, January 8, 2016, and April 15, 2016, the Union, by letter or electronic mail, requested that the Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

Since about December 15, 2015, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since December 15, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).<sup>7</sup>

<sup>7</sup> The Union has requested that the Board additionally order the Respondent to "set aside any discipline and/or discharge of a bargaining unit employee that is carried out without the required Section 9(a) involvement of [the Union], in derogation of its status as exclusive bargaining representative." The charges in this matter do not allege that such conduct has occurred, and in its brief the Union avers only that such conduct may occur during the pendency of this litigation. Thus, there has been no showing that the Board's traditional remedies are insufficient to remedy the Respondent's violation of the Act, as alleged in the complaint. Accordingly, we deny the Union's request for this additional remedy. Our denial of this request in the instant pro-

#### ORDER

The National Labor Relations Board orders that the Respondent, Volkswagen Group of America, Inc., Chattanooga, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Auto Workers, Local 42, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time maintenance employees employed by the Employer at its Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Chattanooga, Tennessee copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent custom-

ceeding in no way impairs the Union's ability to file an appropriate charge if such conduct does occur.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

arily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2016

\_\_\_\_\_  
Philip A. Miscimarra, Member

\_\_\_\_\_  
Kent Y. Hirozawa, Member

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Auto Workers, Local 42 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time maintenance employees at our Chattanooga, Tennessee facility, including Skilled Team Members and Skilled Team Leaders, but excluding Team Members, Team Leaders, specialists, technicians, plant clerical employees, office clerical employees, engineers, purchasing and inventory employees, temporary and casual employees, student employees in the apprenticeship program, all employees employed by contractors, employee leasing companies and/or temporary agencies, all professional employees, managers, guards and supervisors as defined in the Act.

VOLKSWAGEN GROUP OF AMERICA, INC.

The Board's decision can be found at [www.nlr.gov/case/10-CA-166500](http://www.nlr.gov/case/10-CA-166500) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



# **EXHIBIT H**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF AMERICA, INC.  
Employer

and

Case 10-RC-162530

UNITED AUTO WORKERS, LOCAL 42  
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.<sup>1</sup>

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<sup>1</sup> We agree with the Regional Director that the petitioned-for unit satisfies the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), and that the Employer failed to meet its burden of demonstrating that the additional employees it seeks to include share an “overwhelming community of interest” with the petitioned-for unit. The employees in the petitioned for-unit are readily identifiable as a group, as it consists of all maintenance employees employed by the Employer at its Chattanooga, Tennessee facility. See *DPI Secuprint, Inc.*, 362 NLRB No. 172 (2015) (“‘readily identifiable as a group’ means simply that the description of the unit is sufficient to specify the group of employees the petitioner seeks to include”). They also share a community of interest under the traditional criteria—similar job functions; shared skills, qualifications, and training; supervision separate from the production employees’; wages different from the production employees’; hours and scheduling different from production employees’; other unique terms and conditions of employment (e.g., expectation to work on production shutdown days and to work through scheduled breaks and lunch if the need arises); and a human resources manager dedicated solely to maintenance employees. We find that these factors substantially outweigh the fact that the Employer assigns the maintenance employees to three separate departments. See *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (2014) (“petition’s departure from any aspect of the Employer’s organizational structure might be mitigated or outweighed by other community-of-interest factors”).

For many of those same reasons, the Employer failed to demonstrate that the production employees share an “overwhelming community of interest” with maintenance employees, such that there is “no legitimate basis upon which to exclude certain employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Specialty Healthcare*, supra at 944. As described above, many of the traditional community-of-interest

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., April 13, 2016.

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factors differentiate the production employees from the maintenance employees; it is impossible to say that the factors “overlap almost completely.” The Board’s decisions in *Capri Sun, Inc.*, 330 NLRB 1124 (2000), and *Ore-Ida Foods*, 313 NLRB 1016 (1994) further support our conclusion. In *Capri Sun*, the employer maintained a facility where, similar to the Employer here, it divided its operations into several different departments to which both production and maintenance employees were assigned. The Board found that the maintenance employees constituted an appropriate bargaining unit. Similarly, in *Ore-Ida*, the employer divided its production operations among several different departments, each with its own maintenance employees with the skills necessary to maintain the equipment of that department. Again, the Board found a maintenance-only unit appropriate. The same factors the Board relied on in those cases, including the limited interchange between maintenance and production workers, compel the conclusion that the petitioned-for unit in this case is an appropriate unit. See *Overnite Transportation Co.*, 322 NLRB 723 (1996) (the Act does not require a petitioner to seek to represent employees in the most appropriate unit possible, only in an appropriate unit).

The Employer’s requests for a stay of certification and oral argument are also denied.

Member Miscimarra, dissenting:

Unlike my colleagues, I would grant review because I believe the Regional Director's Decision and Direction of Election gives rise to substantial issues regarding the potential inappropriateness of the petitioned-for bargaining unit, which consists exclusively of maintenance employees and excludes production and other employees. Among other things, I believe substantial issues exist based on the following considerations, which in my opinion warrant review by the Board: (1) there is no centralized maintenance department;<sup>2</sup> (2) the Employer's facility includes three distinct departments (body weld, paint, and assembly), each of which includes both production and maintenance employees; (3) the maintenance employees in one department have little or no interaction or interchange with maintenance employees in other departments; (4) there is no common maintenance supervisor having responsibility over maintenance employees across the three combined production-and-maintenance departments; (5) the maintenance employees in any one of the combined production-and-maintenance departments work in a different physical location within the facility than the maintenance employees in the other combined production-and-maintenance departments; (6) there are substantial differences in the equipment used in each combined production-and-maintenance department, which means the job duties and work functions of maintenance employees in a particular department relate to the specific equipment used by production employees in that department; (7) to the extent that similarities exist among maintenance employees across departments, many of the same similarities exist among production employees across departments (e.g., hiring procedures and orientation, applicable policies and handbook provisions, payroll procedures, bonus programs, benefit plans, peer review, and potential bargaining history); and (8) to the extent that dissimilarities exist between production employees and maintenance employees, many of the same dissimilarities exist between the maintenance employees who work in one department and the maintenance employees who work in the other departments (e.g., different supervisors, different operations, different equipment, and different job duties and work functions).

As I have stated elsewhere, I disagree with the Board's standard in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), which in my view "affords too much deference to the petitioned-for unit in derogation of the mandatory role that Congress requires the Board to play" when evaluating bargaining-unit issues, contrary to Section 9(a), 9(b) and 9(c)(5) of the Act.<sup>3</sup> However, even if one applies *Specialty Healthcare*, I believe substantial

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<sup>2</sup> According to the Decision and Direction of Election, the Employer uses the terms "shop" and "department" interchangeably when referring to its distinct organizational groups or functions.

<sup>3</sup> See *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 25-32 (2014) (Member Miscimarra, dissenting); Sec. 9(b) ("The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the

questions warrant Board review regarding whether the petitioned-for maintenance-only bargaining unit constitutes an impermissible fractured unit that departs from the Employer's organizational structure, see *Odwalla, Inc.*, 357 NLRB 1608, 1611-1613 (2011), and whether an overwhelming community of interest warrants including production and/or other employees in any bargaining unit, *Specialty Healthcare*, 357 NLRB at 945-946.

Accordingly, I respectfully dissent from my colleagues' denial of review.

PHILIP A. MISCIMARRA, MEMBER

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purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."); *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611 (1991) ("Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision 'in each case' in which a dispute arises is to be made by the Board."); *id.* at 614 (Section 9(b) requires "that the Board decide the appropriate unit in every case in which there is a dispute.").

# **EXHIBIT I**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 16-1309**

**September Term, 2017**

**NLRB-10CA166500  
NLRB-10CA169340  
NLRB-10RC162530**

**Filed On: December 26, 2017**

Volkswagen Group of America, Inc.,

Petitioner

v.

National Labor Relations Board,

Respondent

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United Auto Workers, Local 42,  
Intervenor  
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Consolidated with 16-1353

**BEFORE:** Rogers, Millett, and Wilkins, Circuit Judges

**ORDER**

Upon consideration of the motion of the National Labor Relations Board for remand of the case to the Board for reconsideration in light of new Board precedent, the response and the opposition thereto, it is

**ORDERED** that the motion be granted and the cases be remanded to the Board for further consideration in light of the Board’s recent decision in PCC Structural Inc., 365 NLRB No. 160 (Dec. 15, 2017)

The Clerk is directed to issue the mandate forthwith to the agency.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Scott H. Atchue  
Deputy Clerk