ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 16-1309

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

VOLKSWAGEN GROUP OF AMERICA
CHATTANOOGA OPERATIONS, LLC,
Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Volkswagen Group of America, Inc., a New Jersey Corporation engaged in the sales and marketing of new vehicles, hereby states that it is a wholly owned subsidiary of Volkswagen, AG, a stock exchange listed German corporation. Volkswagen Group of America, Inc. is the sole member of its wholly owned subsidiary Volkswagen Group of America Chattanooga Operations, LLC, a Tennessee limited liability company engaged in automobile manufacturing in Chattanooga, Tennessee.

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

1. Volkswagen Group of America, Inc., is the Petitioner.[1]

2. The National Labor Relations Board ("Board" or "NLRB") is the Respondent and Cross-Applicant for Enforcement.

3. The United Auto Workers, Local 42 was the charging party and Petitioner in the proceedings before the NLRB and NLRB Region 10 and has filed a Motion to Intervene in these proceedings.

4. The American Council of Employees filed an *Amicus Curiae* brief in *Volkswagen Group of America, Inc. v United Auto Workers, Local 42*, Case 10-RC-162530.

5. The Coalition for a Democratic Workplace, National Association of Manufacturers, and National Federation of Independent Business filed an *Amicus Curiae* brief in *Volkswagen Group of America, Inc. v United Auto Workers, Local 42*, Case 10-RC-162530.

B. Rulings Under Review

[1] The employer of the employees at issue in this case is Volkswagen Group of America Chattanooga Operations, LLC, a Tennessee Limited Liability Company which is a wholly owned subsidiary of Volkswagen Group of America, Inc. Volkswagen Group of America Chattanooga Operations, LLC is the appropriate entity for purposes of this dispute as explained in the prior proceedings. Regardless, the undersigned counsel represents both Volkswagen Group of America, Inc. and Volkswagen Group of America Chattanooga Operations, LLC, in this matter and brings this appeal on behalf of both entities as appropriate.

Petitioner Volkswagen Group of America, Inc. seeks review of the NLRB's Decision and Order captioned as *Volkswagen Group of America, Inc. and United Auto Workers, Local 42*, Cases No. 10-CA-166500 and 10-CA-169340, published at 364 NLRB No. 110, and of the NLRB's Regional Director's and NLRB's Decisions and Orders in 10-RC-162530.

C. Related Cases

The instant case has not previously been before this Court or any other court involving the same parties. As of the date of this filing, Petitioner Volkswagen is not aware of any other case pending before this Court involving substantially the same or similar issues as the instant case.

Respectfully submitted,

/s/ Arthur T. Carter
Arthur T. Carter
Attorney for Petitioner

STATEMENT REGARDING ORAL ARGUMENT

The Board's Region 10 Regional Director ("RD") improperly approved a

petitioned-for bargaining unit consisting solely of Petitioner Volkswagen Group of America's maintenance employees. Over the dissent of another member, two members of the Board determined that the RD's decision did not warrant review. Volkswagen thereafter refused to bargain with United Auto Workers Union Local 42 in order to test the bargaining unit certification. The RD's and Board's orders failed to apply the traditional community of interests test properly, were not adequately explained, failed to follow applicable precedent and failed to comply with the National Labor Relations Act's statutory commands. Oral argument will assist the Court in addressing these important issues.

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GLOSSARY

Act or NLRA:	National Labor Relations Act
COE Policy:	Community Organizations Engagement Policy
DA:	Deferred Appendix
DDE:	Regional Director's Decision and Direction of Election
NLRB or Board:	National Labor Relations Board
PTO:	Paid Time Off
RD:	Regional Director
RFR:	Request for Review

JURISDICTION

This is a petition for review from a decision of the Board, and a cross-application for enforcement by the Board. This Court has jurisdiction pursuant to Section 10 of the National Labor Relations Act (the "NLRA" or "Act"), 29 U.S.C. § 160. The Board's Order is final with respect to all parties.

PRELIMINARY STATEMENT

The Board and RD improperly approved the United Auto Workers Union Local 42's (the "Union's") petitioned-for bargaining unit consisting solely of maintenance employees at Volkswagen's Chattanooga, Tennessee plant, and subsequently ordered Volkswagen to bargain with the Union in that unit. The RD and the Board approved the maintenance-only unit even though there is no centralized maintenance department. The maintenance employees work in three separate manufacturing shops, do not share common supervision and do not interact with one another across shops on a daily basis. The maintenance employees do, however, work side-by-side with production employees in each shop, interact with production employees on a daily basis and share common, upper-level supervision with production employees.

The Board and RD failed to properly apply the traditional community of interests test for determining an appropriate bargaining unit, failed to adequately explain their decision, failed to follow and apply applicable precedent, and failed to comply with their statutory mandates to establish bargaining units conducive to stable labor relations and not to give controlling weight to the extent of a union's organizational efforts. Among other things, the RD and NLRB failed to give proper weight to Volkswagen's organizational shop structure at the plant. Accordingly, the Board's order should be denied enforcement.

ISSUES PRESENTED

1. Whether the RD and Board erred in finding a bargaining unit consisting solely of Volkswagen's maintenance employees appropriate where they (a) failed to apply the traditional community of interest test properly; (b) failed to adequately explain why the factors on which they relied outweighed Volkswagen's shop structure; and (c) departed from precedent and failed to adequately explain their departure by giving insufficient weight to Volkswagen's organizational structure in making their unit determination.

2. Whether the RD and Board erred in finding that the petitioned-for unit was appropriate because, their this decision failed to adhere to the statutory command that the Board approve units conducive to collective bargaining and improperly gave controlling weight to the extent of organization in violation section 9(c)(5).

3. Whether the RD and Board erred in finding that the excluded production employees do not share an overwhelming community of interests with the maintenance employees.

RELEVANT STATUTES AND REGULATIONS

Section 7 of the NLRA, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158:

(a) Unfair labor practices by the employer

It shall be an unfair labor practice for an employer – …

(1) to restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title…;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession….

Section 9 of the NLRB, 29 U.S.C. § 159:

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment….

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure 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….

(c) Hearings on questions affective commerce; rules and regulations

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Section 10 of the NLRA, 29 U.S.C. § 160:

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE AND FACTS

A. Background.

Volkswagen has an assembly plant in Chattanooga, Tennessee, which began production in 2011. Initially, the Passat was produced at the plant, and preparations were also underway to produce the Atlas, a new sport utility vehicle.[3] (*See* Tr.31-33.) At relevant times, the Chattanooga 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"). (Co.Ex.2; DDE 3.)

B. The Plant is Organized Around a Shop Structure Corresponding to the Steps in the Assembly Process.

The assembly process at the plant is divided into three shops corresponding to the three main production processes in building a car. (Tr.40, 42-43.) These shops are Body, Paint, and Assembly.[4] (*Id.; see also* Co.Exs.1(b), 3.) Each shop has a separate role in producing the finished product and is separated by walls and the "spine," which is an office area in the middle of the facility that houses support departments like logistics and quality assurance. (Tr.40, 42-43; Co.Ex.1(b).)

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[3] The Atlas, was revealed to the public in October 2016. *See* http://www.usatoday.com/story/money/cars/2016/10/27/volkswagen-atlas-large-suv/92844214/ (last accessed November 9, 2016).

[4] There are also two ancillary departments, Logistics and Quality. (Co.Ex.2).

1. Production and Maintenance Employees are Assigned to Specific Shops.

Consistent with the plant's three-shop structure, there is not a separate or central maintenance department in the facility. (Tr.40-41, 197.) Instead, production and maintenance employees work in one of the three shops.[5] Each shop is in a different location, with different functions and machinery corresponding to the production process carried out in the particular shop. (Tr.40, 42, 43, 56-57, 171-72; Co.Ex.2.)

The Body Shop employs 320 employees, with 270 in production and 50 in maintenance. (Co.Ex.2.) The Paint Shop has 308 employees, with 242 in production and 66 in maintenance. (*Id.*) The Assembly Shop has 675 employees, with 629 in production and 46 in maintenance. (*Id.*)

Just as there is no centralized maintenance department in the overall plant, there are not centralized maintenance areas within the shops, either. Rather, there are work zones within the shops in which specific aspects of the manufacturing process occur. (Tr.55, 57-58, 171-72; Co.Ex.4.)

Maintenance employees are assigned to one of these zones, or to work with particular pieces of equipment or technology within their shop. (Tr.57-58.) The maintenance employees support the production process taking place in their shop.

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[5] A small number of production employees work in Logistics (27) and Quality (78). (Co.Ex.2.)

(Tr.71-72.) They do so by making repairs requested by production employees and performing preventative maintenance. (Tr.40, 51, 56-57, 171-72.)

2. The Supervisory Structure Follows the Shop Structure.

Volkswagen's supervisory structure follows the shop structure. (Tr.48-49, 51; s*ee* Co.Ex.3.) The Director of Manufacturing, Carsten Heimlich, oversees all three shops. (Tr.47.) Each shop has a General Manager, who reports to Heimlich. The General Managers oversee all functions and all production and maintenance employees in their respective shops. (Tr.43-44, 47-48; Co.Ex.3.) Each shop has Assistant Managers who report to the General Managers, and in turn maintenance and production supervisors in each shop report to the Assistant Managers. (Tr.43-44; Co.Ex.3.) As this hierarchy indicates, although production and maintenance employees report to their respective supervisors, all production and maintenance employees ultimately report to their shop General Manager. (Tr.51.)

The maintenance employees are not commonly supervised across shops. Rather, each shop has its own maintenance supervisor who reports to an Assistant Manager and ultimately to the General Manager of their particular shop. (*See* Co.Ex.3.)

3. Employees' Duties are Based on Their Shop, and Maintenance Employees' Working Relationships are Shop-Specific.

While maintenance employees share some similarities—job titles, pay range and initial hiring requirements when the plant first started—Volkswagen's shop structure and the corresponding way that work is organized outweighs any of these similarities. Rather, maintenance employees' organizational and functional locus, and therefore any significant commonality they share with other maintenance employees, is within their particular shop.

First, training for maintenance employees is shop-specific. These employees are trained on the specific processes, equipment and technology used in their assigned shop, and for their assigned area. (Tr.145, 280, 290-92.) Maintenance employees generally are not cross-trained, or interchanged with the employees in the other shops. (Tr.145, 148, 263-65, 280, 291.) Because of the shop-specific training, maintenance employees cannot transfer between shops without specific training for that shop. (*See id.*) Indeed, maintenance employees rarely, if ever, transfer from one shop to another. (*See* Tr.56-57, 296, 303.)

Second, maintenance employees' job functions are shop-specific. (Tr.40, 42-44, 48-49, 51-52, 145, 168, 171-75, 263-65, 280, 290-92, 296, 302-03, 309.) Each shop has its own processes and equipment, and its own production employees who solely work in that shop. (*Id.*) Necessarily, the work of the maintenance

employees is tied to the particular shop and equipment, and the need to work with production employees in that shop. (*Id.*)

Third, on a shop basis, maintenance employees have significant interaction with production employees in performing repairs and preventative maintenance in their shops, but not with maintenance employees in other shops. (Tr.172-75, 236, 239, 300-01, 318, 353.) Maintenance employees spend 80% of their time supporting their production lines, which includes numerous walks per shift during which they engage with shop production employees. (Tr.172, 301.) Maintenance employees receive calls directly from production employees to perform repairs. (Tr.207, 300-01, 318.)

Further, repair work is a team effort between maintenance and production employees in the assigned shop. (Tr.176-77, 300-01, 318, 353.) Production and maintenance employees work alongside each other when equipment must be fixed on the line. (Tr.240-41.) Although maintenance employees troubleshoot problems, they ask production employees for help, such as operating parts of the equipment. (Tr.175, 300-01.) Production employees also perform some repairs on certain equipment, such as replacing tips and cleaning robots. (Tr.138, 326-27.) In fact, Volkswagen is training production employees to perform some maintenance functions. (Tr.175-76, 326-27.) This same approach is replicated shop-by-shop with maintenance employees working side-by-side with production employees in

their shop and not maintenance employees in other shops. (Tr.40, 42-44, 48-49, 51-52, 263-65, 280, 290-92, 296, 302-03.)

Fourth, communication with and scheduling of maintenance employees are shop-specific. Prior to the beginning of each shift, supervisors conduct brief meetings with their direct reports on a supervisor-by-supervisor basis. (Tr.195-96, 279-80, 296-97, 329, 346-47, 358.) Maintenance employees, like production employees, attend these meetings only with other employees reporting to the same supervisor within the same shop.[6] (Tr.279-80, 296-97, 329, 346-47, 358.) Also, at the time of the hearing, Assembly Shop maintenance employees had different schedules from maintenance employees in the Body and Paint Shops. (Tr.58, 122-25, 296, 342; U.Ex.2.)

Finally, there are other shop-based differences between the maintenance employees. This includes different protective equipment, the location of tools in each shop which are not shared amongst maintenance employees, separate daily sign-in sheets by supervisor, and separate approval of paid time off ("PTO") and vacation by supervisor, and thus shop-by-shop. (Tr.223-24, 228, 273, 276, 283-84, 301-02, 322-24, 331, 340-41, 344-45, 349-51.)

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[6] The RD noted that maintenance employees attend training with employees in other shops. (DDE 20.) The evidence also shows that all production and maintenance employees receive common training and attend facility-wide meetings. (Tr.83-84, 97, 156.)

C. In Contrast to the Shop-Based Distinctions Between Maintenance Employees, Production and Maintenance Employees Share Significant Terms and Conditions of Employment on a Plant-Wide Basis.

In a variety of ways, the maintenance employees have more in common with the other employees in their shop – production or maintenance—than they do with maintenance employees in other shops. However, to the extent there are similarities between maintenance employees that cross shop lines, these same similarities exist for both production and maintenance employees.

1. Common Plant Facilities.

All employees use the same parking lot. (Tr.38-39.) Adjacent to the parking lot is the Academy, where Volkswagen conducts all employee training and orientation. (Tr.85; Co.Ex.1(b).) The Academy also contains the plant entrance. (Tr.39-40; Co.Ex.1(b).) All employees use the same entrance, cross a foot bridge and proceed to their individual work areas. (Tr.39.) All employees scan their identification badges using the same security system. (*Id.*)

All employees share a common cafeteria and gymnasium. (Tr.177-78.) Every shop has break areas open to all employees.[7] (*Id.*) There are no specific

[7] The RD erroneously stated that maintenance work and break areas are not accessible to production employees. (DDE 21-22.) Assembly General Manager Butts testified that break areas are not assigned specifically to production or maintenance employees. (Tr.177-78, 185.) Maintenance employee Cochran also testified that production employees are not excluded from break areas used by maintenance employees. (Tr.244.) Production employees may also access

maintenance-only break areas. (*Id.*) For example, in the Assembly Shop, each zone, or production area, has its own break area open to all employees. (Tr.185.) The break areas have small cubicles for jackets, purses, and bags and a common area. (Tr.198.) A common locker room borders the Assembly shop.[8] (Tr.200.)

2. Common Terms and Conditions of Employment.

Maintenance and production employees also share many identical terms and conditions of employment, including benefits, wage progressions, bonuses, work rules, policies and procedures. (Tr.64-66, 69, 84; Co.Exs.6, 8.)

a. A Common Team Member Guidebook.

All employees have the same Team Member Guidebook. (Co.Ex.6; Tr.64-65.) Among other things, the Guidebook addresses Volkswagen's Diversity Initiative; equal employment and disability compliance; the attendance policy applicable to all production and maintenance employees; paid time off; leaves of absence; work environment matters such as use of social media, harassment, peer review, tobacco-free work place, substance abuse, safety, health and wellness, fall protection, lockout/tag-out, respiratory protection, security and fire measurers;

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equipment cages to get tools. (Tr.326.)

[8] The RD stated that maintenance employees have e-mail addresses and radios, and use different meeting rooms for pre-shift meetings. (DDE 11, 22). But all employees have access to electronic resources through kiosks, at least some production employees have access to e-mail and radios, and all employees, whether production or maintenance, meet with their supervisors at the beginning of their shifts. (Tr.125-28, 279-80, 296-97, 301-02, 318, 329, 340-41, 346-47, 351, 353, 358.)

compensation and pay administration; benefits; training and development, and information technology. (Co.Ex.6.) All of these policies, procedures and benefits apply to all production and maintenance employees, and, taken together, define the production and maintenance employees' shared terms and conditions of employment. (Tr.64-65.)

b. Identical Benefits.

Production and maintenance employees share significant benefits and compensation terms, which are described in the Guidebook. (Tr.65-66, 78; Co.Exs.6, 8.) Benefits for both the maintenance and production employees average 37% of their base wage. (Tr.81.) Production and maintenance employees have the same health insurance, retirement savings plans, PTO and other paid leave, life and disability insurance, tuition reimbursement, Volkswagen-provided uniforms and allowance,[9] adoption assistance, and car leasing terms. (Tr.77-78, 80-82, 84, 141; Co.Ex.6 at 80-92; Co.Ex.8.)

c. Common Wage System and Bonuses.

Volkswagen also provides a compensation and bonus program only for the production and maintenance employees. (Tr.65-66, 68-69; Co.Ex.6 at 76-79;

[9] Although maintenance employees must wear clothing that is 100% cotton and safety shoes, Volkswagen's uniform policy applies to production and maintenance employees alike. (Tr.84, 299, 303, 324, 325.) Further, employees' protective equipment varies by shop. Thus, some Paint employees wear coveralls and some Body employees wear protective sleeves or jackets. (Tr.276, 324, 345.)

Co.Ex.7.) The program includes an 84-month "grow-in" period, with adjustments in pay every six months. (Tr.66, 295-96.) The grow-in period tracks the time it takes for employees to learn their jobs. (Tr.66; Co.Ex.6 at 76.) Although maintenance employees receive higher wages, all production and maintenance employees are paid hourly, all of their wage rates vary depending on how long they have been in the progression system, and requirements to increase from level to level within the progression are identical for both groups. (Tr.67-68, 295-96; Co.Ex.6 at 76.)

Bonuses are based on the combined efforts of production and maintenance employees, and are paid as a percentage of compensation subject to the same metrics of safety, quality, productivity, and individual employee attendance. (Tr.69, 180.) These bonuses are interdependent. For example, the productivity component of the bonus program requires the efforts of both groups of employees. (Tr.76.) If maintenance takes too long to fix a machine, production will suffer, which impacts *all* production and maintenance employees' bonus opportunities. (Tr.74-75.) If production employees are inefficient in building cars, their inefficiency impacts the bonus for all production and maintenance employees. (*Id.*) When bonuses are awarded, all production and maintenance employees receive the same percentage. (Tr.76.) This common bonus arrangement aligns the interests of and encourages all production and maintenance employees to work

together to accomplish the common task of safely and efficiently producing quality cars. (Tr.74-75, 180-81.)

d. Production and Maintenance Employees are Subject to the Same Peer Review Policy and Team Leader Training and Duties.

Both production and maintenance employees are able to take advantage of Volkswagen's peer review policy. Under this policy, maintenance and production employees may appeal an involuntary termination to a peer review panel, which includes both maintenance and production employees. (Tr.95-98.) Moreover, all employees who are being promoted to team leader positions, regardless of whether they are maintenance or production employees, receive the same team leader training. (Co.Ex.5.) They also have the same team leader duties of providing additional training and support to their teams and filling in for absent team members. (Tr. 59-61, 63.)

e. Volkswagen Staffs Maintenance Positions with Production Employees and Apprentice Program Graduates.

Production and maintenance employees had different hiring requirements when the plant first started, but Volkswagen has not hired outside maintenance employees since October 2014. (DDE 7; Tr.92.) Instead, Volkswagen fills maintenance openings with production employees or through Volkswagen's Automotive Mechatronics Program ("Apprentice Program"). (Tr.92, 142, 305;

Co.Ex.11.) Moreover, Apprentice Program candidates spend approximately half of their time in on-the-job training, which includes time working in both production and maintenance positions. (Tr.90.) Graduates from the Apprentice Program may be assigned to maintenance or production positions. (Tr.90-91; Co.Ex.10.)

D. The Union Acknowledges the Community of Interests Between Production and Maintenance Employees.

From the very beginning of its operations in Chattanooga, Volkswagen endeavored to foster a positive relationship with the Union. In February 2014, the Union sought an election in a combined production and maintenance unit. (Co.Ex.14.) Volkswagen agreed to this unit and a plant-wide vote on union representation, and also agreed to be neutral in that election. The employees voted against union representation.

Following the 2014 election, the Union, the leadership and membership of which has both production and maintenance employees, participated in Volkswagen's Community Organization Engagement ("COE") Policy. (Tr.99-101; Co.Ex.12.) This policy provides a format for an organized exchange of information and ideas about working conditions between the Company and its employees. (Tr.102; Co.Ex.12 at 2-3.) It is open to groups whose membership is composed of employees that might seek to have non-binding discussions with management on various topics. (Tr.99-101.) A third party confirms employees' support of an organization's participation under the policy through a confidential

audit. (Tr.99; Co.Ex.12 at 3.) The Union gathered evidence of support from both production and maintenance employees. (*See* Tr.247-48.) Indeed, the Union acknowledged that it represents about 800 members. (*Id.*) In its filings with the U.S. Department of Labor, the Union states it represents over 800 members. (Co.Ex.13.)

Up to the time of the initial hearing in this matter, the Union consistently asserted that it was acting on behalf of production and maintenance employees. (Tr.247.) The Union's leadership team met with management on a bi-weekly basis to discuss various questions relevant to all employees. (Tr.100-02.) Union President Cantrell is a production employee in the Paint Shop, and he attends these bi-weekly meetings. (Tr.101, 246, 337, 356.)

The matters raised by the Union on behalf of its constituency are not maintenance employee-specific, but instead evince a course of dealings showing regular and significant commonality between the production and maintenance employees. Examples of topics raised by the Union during COE meetings include overtime assignments, break time, safety steps, policy interpretations, team wear, the grievance process, openings for team leaders and supervisors and how they are to be filled, safety, and extension of co-employee representation rights. (Tr.102, 246-47.) Thus, through its course of conduct, the Union has acknowledged the community of interests among production and maintenance employees, in contrast

to its petitioned-for maintenance-only unit.

E. Proceedings Below.

The Union filed its petition seeking an election among the maintenance employees on October 23, 2015. (GC.Ex.1(a).) NLRB Region 10 held a hearing to take evidence regarding the appropriateness of the Union's petitioned-for unit on November 3 and 4, 2015. Thereafter, Region 10's RD issued a Decision and Direction of Election ("DDE") on November 18, 2015. The RD held:

> In concluding that the employees in the petitioned-for unit are "readily identifiable as a group" I note that they share a unique function….Moreover, the petitioned-for employees share a community of interest under the Board's traditional criteria. 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 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 no interchange among maintenance employees in the three shops, that fact alone would not render the unit "fractured" as defined by the Board in *Odwalla*, supra….Accordingly, I conclude that the employees in the petitioned-for unit share a community of interest and the petitioned-for unit is appropriate for the purposes of collective bargaining.

(DDE 20-21). The RD went on to conclude that the maintenance and production employees do not share an overwhelming community of interests with one another.

(DDE 22-23).

The election was held on November 18, 2015, and the Union prevailed. (*See* Tally of Ballots.). Thereafter, Volkswagen timely requested the Board to review the RD's DDE. (*See* Volkswagen's Request for Review.) A divided three-member panel of the Board denied Volkswagen's Request for Review ("RFR") on April 13, 2016. (RFR Order at 1-2). In doing so, the Board majority stated that it agreed that the petitioned-for unit satisfied the standard set forth in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom*., *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). The Board majority stated:

> 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….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.

(RFR Order at 1, n.1). The Board majority also concluded that "for many of the same reasons," the production and maintenance employees did not share an overwhelming community of interests with one another. (*Id*. at 1-2, n.1).

Member Miscimarra dissented from the denial of review, however. He stated:

> Unlike my colleagues, I would grant review because…the [RD's DDE] gives rise to substantial issues regarding…the petitioned-for bargaining unit, which consists exclusively of maintenance employees and excludes production and other employees. Among other things,…substantial issues exist based on the following…which…warrant review by the Board: (1) there is no centralized maintenance department; (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…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).

(RFR Order at 2-3). After the NLRB issued its split decision, the Union requested

that Volkswagen bargain with it. Volkswagen's position was that the maintenance-only unit was not appropriate, and therefore Volkswagen had no obligation to bargain with the Union. Thus, Volkswagen refused the request to bargain so that it could test the NLRB's unit determination. 364 NLRB No. 110, slip op. at 1 (Aug. 26, 2016). The NLRB found that Volkswagen violated the Act by so refusing, and this appeal followed.

SUMMARY OF THE ARGUMENT

The RD and Board failed to properly apply the Board's traditional community of interests test in determining that a separate maintenance-only unit was appropriate, failed to adequately explain their decision, failed to follow applicable precedent and failed to comply with the Act's statutory mandates to establish bargaining units conducive to collective bargaining and not controlled by the extent of organization. Accordingly, the Board's order requiring Volkswagen to bargain with the Union in an improper bargaining unit should be denied enforcement.

A. The RD and Board Failed to Properly Apply the Traditional Community of Interests Test.

The Board is required by this Court's decision in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), and *Specialty Healthcare*, 357 NLRB 934 (2011), to apply its "traditional" community of interests 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. In applying this test, the Board should (a) identify shared interests among the members of the petitioned-for unit, and (b) explain why excluded employees have distinct interests that outweigh the similarities with unit members. *Constellation Brands, U.S. Operations, Inc., v. NLRB*, 842 F.3d 784 (2d Cir. 2016). A less rigorous standard here, or at the very least the RD and Board failed to explain their decision adequately. Rather, they simply tallied a list of similarities and differences between employees, but they hardly discussed, much less gave adequate weight to a critical factor driving such similarities and differences—Volkswagen's shop structure.

B. The RD and Board Failed to Follow Applicable Precedent.

The RD's and Board's failure to follow Volkswagen's shop structure in making its unit determination is contrary to its decision in *Bergdorf Goodman*, 361 NLRB No. 11 (July 28, 2014). In *Bergdorf*, the Board found a petitioned-for unit inappropriate because the boundaries of that unit did not resemble administrative or operational lines drawn by the employer. But the Union's petitioned-for unit in this case does not resemble the administrative or operational lines drawn by Volkswagen, either. The facts of this case are almost identical to *Bergdorf* because in both cases the unions broke apart an employer's chosen organizational structure and created a fictional department where none existed. The RD failed to

meaningfully distinguish *Bergdorf* and the Board did not discuss its applicability at all.

C. The Board Failed to Comply with its Statutory Mandates.

The Board also failed to comply with its statutory mandates to choose a bargaining unit conducive to stable relations and not to give controlling weight to the extent of union organizing. *See* 29 U.S.C. §§ 159(b), 159(c)(5). The statutory requirement of stable labor relations and effective collective bargaining is a prominent reason why the Board and courts have emphasized that the way an employer chooses to organize its operations is an important factor in the community of interests analysis, but this statutory requirement was ignored here.

Further, not only did the RD and Board majority ignore the statutory command to establish bargaining units conducive to collective bargaining, but also the clear inference is that their decision was controlled by the extent of union organization in violation of section 9(c)(5) of the Act. 29 U.S.C. § 159(c)(5). Of course, the Board and RD are not going to state expressly that they gave controlling weight to the extent of union organization, but their failures to apply the traditional community of interest test properly, to adequately explain why Volkswagen's shop structure had been "overcome," to follow *Bergdorf Goodman*, and to approve a bargaining unit conducive to stable labor relations all give rise to such an inference.

D. The Included Maintenance Employees and Excluded Production Employees Share an Overwhelming Community of Interests.

Finally, given the foregoing problems with the RD's and Board's unit determination, the Court need not reach the issue of whether the included maintenance employees share an "overwhelming community of interests" with the excluded production employees. But should the Court reach this issue, the record evidence establishes that maintenance and production employees' major terms and conditions of employment "overlap almost completely" due to Volkswagen's shop structure. Thus, both groups have the same benefits, the same wage progression and bonus program, and the same upper-level supervision among other things. When compared to these weighty terms, the relatively minor differences relied on by the RD and Board are simply insufficient to justify establishment of a separate bargaining unit consisting solely of Volkswagen's maintenance employees.

STANDING

Volkswagen has standing to seek review in this Court as an aggrieved party to a final order of the Board pursuant to 29 U.S.C. § 160(f). *See Retail Clerks Union v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

ARGUMENT

The RD and Board majority failed to apply *Specialty Healthcare*, 358 NLRB 934, properly in this case.[10] As explained below, they did not apply the required

[10] The Board's denial of Volkswagen's RFR effectively left the RD's decision

traditional community of interests test, failed to explain their decision, and failed to comply with applicable precedent. Further, they approved a bargaining unit that fails to comply with the statutory mandate to establish units conducive to collective bargaining, and appear to have giving controlling weight to the extent of organization. Volkswagen respects the rights of its employees to organize and otherwise exercise their rights under the NLRA, but the RD and Board majority erred in this case, and the Board's bargaining order should not be enforced.

A. The RD and Board Majority Failed to Properly Apply the Traditional Community of Interests Test.

Although the Board has a wide degree of discretion in unit determination matters, that discretion is not unbounded. *See, e.g., Constellation Brands*, 842 F.3d at 790; *National Federation of Fed. Employees, Local 1669 v. FLRA*, 745 F.2d 705 (D.C. Cir. 1984) (stating an agency is entitled to considerable but not unbounded deference when exercising discretion). The Board's bargaining unit determinations must not be arbitrary, must be supported by substantial evidence on the record as a whole and must be rational and in accord with past precedent. *See Blue Man Vegas,* 529 F.3d at 420; *Desert Hosp. v. NLRB*, 91 F.3d 187, 191 (D.C. Cir. 1996); *see also NLRB v. Jones & Laughlin Steel Corp*., 331 U.S. 416, 422-23

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as the basis for this Court's review. *See NLRB v. NStar Elec. Co*., 798 F.3d 1, 6 n.1 (1st Cir. 2015); *Point Park Univ. v. NLRB*, 457 F.3d 42, 46 (D.C. Cir. 2006). The points on which the Board majority relied in denying the RFR varied from the RD's reasoning, however. Accordingly, both decisions are addressed herein.

(1947) (overruled on other grounds by statute)(stating that the Board's unit determinations "are binding on reviewing courts if grounded in reasonableness," which "necessarily implies that the Board has given due consideration to all relevant factors and that it has correlated the policies of the Act with whatever . . . interests may allegedly or actually be in conflict.").

This Court has stated that "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 v. NLRB*, 229 F.3d 1184, 1190-91 (D.C. Cir. 2000))(internal quotation marks omitted). Both the Board and this Court have held that the traditional community of interest factors to be weighed in making unit determinations "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 work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit." *Id*. (emphasis added) (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n. 11 (D.C. Cir. 1996))(internal quotation marks omitted); *see also Constellation Brands*, 842 F.3d at 793-94; *Wheeling Island Gaming, Inc.*, 355 NLRB 637, 638 (2010); *Seaboard Marine, Ltd*., 327 NLRB 556, 556 (1999); *Newton Wellesley Hosp*., 250 NLRB 409, 411-12 (1980).

In *Specialty Healthcare*, 357 NLRB at 944-45, the Board purported to follow this Court's decision in *Blue Man Vegas*, 529 F.3d at 421, and to adhere to its traditional community of interests test. As the Second Circuit explained in *Constellation Brands*, 842 F.3d at 794:

> To properly apply the *Specialty Healthcare* framework, the Board must *analyze* at step one the facts presented to: (a) identify shared interests among members of the petitioned for unit, *and* (b) explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.

(emphasis added); *see also LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004)(applying a multi-factor test through case-by-case adjudication "can lead to predictability only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why."); *Sundor Brands, Inc. v. NLRB*, 168 F.3d 515, 519-520 (D.C. Cir. 1999)(requiring Board to adequately explain its unit determination).

The facts of this case make clear that although the RD and Board majority purported to apply the "traditional" community of interests test under *Specialty Healthcare* (DDE 17-18), they actually applied a less rigorous standard, or at the very least failed to adequately explain their decision. *See, e.g.*, Joan Flynn, *The Costs and Benefits of Hiding the Ball: NLRB Policy Making and the Failure of Judicial Review*, 75 B.U.L. Rev. 387, 393 (1995)("[T]here is often a significant disparity between the Board's articulated adjudicative standard and its application

of that standard."). Indeed, the RD effectively limited his analysis at the first *Specialty* 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. (DDE 20-23). Further, although the RD and Board tallied a list of similarities and differences among the included and excluded employees, they failed to give adequate weight to Volkswagen's shop structure, which divides maintenance employees into three distinct groups, and failed to explain *why* the factors they identified outweighed Volkswagen's shop structure. (DDE 20-23; RFR Order at 1-2, n.1.) *See Constellation Brands*, 842 F.3d at 794-95. Additionally, when the impact of the stop structure is considered, the RD's and Board's decision upholding the proposed maintenance unit is not supported by substantial evidence. Either way, the unit determination in this case is error and the Board's order that Volkswagen bargain with the Union should be denied enforcement.

1. The RD and Board Majority did not Explain *Why* Volkswagen's Shop Structure Was Outweighed by Other Factors.

The Board repeatedly has emphasized that the employer's chosen organizational structure is a "particularly important factor" in the community of interest analysis. *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3; *see Macy's Inc.*, 361 NLRB No. 4, slip op. at 8 (July 22, 2014), *enf'd*, 824 F.3d 557 (5th Cir.

2016); *Specialty Healthcare*, 357 NLRB at 942, n.19 ("It is highly significant that…the community-of-interest test focuses almost exclusively on how *the employer* has chosen to structure its workplace."); *see also Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1270, n.9 (D.C. Cir. 1991) ("The Board has long held that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interests among various groups of employees . . . and is thus an important consideration in any unit determination.")(citing *Gustave Fischer, Inc.*, 256 NLRB 1069, n.5 (1981) and *International Paper Co.*, 96 NLRB 295, 296, n.7 (1951)); *Birdsall, Inc.*, 268 NLRB 186, 190 (1982).

Here, however, the RD and Board majority ignored Volkswagen's shop structure, effectively created a separate maintenance department where one did not exist organizationally or functionally, and presumed the existence of a distinct community of interest amongst maintenance employees from the excluded production employees with whom they work in the same shops, side-by-side, on a daily basis. This decision also is contrary to the numerous, shop-specific differences between the maintenance employees. In reaching his conclusions, the RD merely tallied a list of similarities among the maintenance employees based on their job functions, training and hours of work, and concluded that these similarities meant maintenance employees were readily identifiable as a group and

thus shared a sufficient community of interests sufficient to support a separate bargaining unit. (DDE 19-21.) He did not discuss Volkswagen's shop structure or explain why these similarities outweighed Volkswagen's shop structure (other than an ill-fated effort to distinguish *Bergdorf* discussed below).

For its part, the Board majority concluded without explanation that other factors "outweighed" the important shop structure factor. Merely finding that employees are readily identifiable as a group or tallying 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 is reason enough to deny enforcement to the Board's order. *See Constellation Brands*, 842 F.3d at 794-95; *LeMoyne-Owen College*, 357 F.3d at 61; *Purnell's Pride, Inc. v. NLRB*, 609 F.2d 1153, 1161-62 (5th Cir. 1980).

2. The RD's and Board Majority's Unit Determination is Improper Under the Board's Traditional Criteria.

Further, when Volkswagen's shop structure is properly considered, it becomes clear that the Union's gerrymandered maintenance unit is not an appropriate one under the Board's traditional criteria. This is so because the shop structure: (a) drives critical differences in maintenance employees' terms and conditions of employment, but these differences were not adequately considered; and (b) means 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. In addition to the shop structure, the evidence shows that the Union itself has consistently treated production and maintenance employees as a single bargaining unit.[11]

a. Volkswagen's Shop Structure Drives Critical Differences in Maintenance Employees' Terms and Conditions of Employment Across Shops.

As Member Miscimarra recognized but the RD and Board majority ignored, Volkswagen's shop structure drives critical differences among the employees in the proposed maintenance unit, and many of these differences are also shared by the excluded production employees based on the shop in which they work. (RFR Order at 2). In fact, when Volkswagen's shop structure is properly analyzed, many of the factors relied on by the RD and Board majority in approving the proposed unit are significantly minimized in importance.

Job Functions: The RD and Board majority relied heavily on the fact that maintenance employees all have the general job function of repairing and maintaining equipment. They ignored the fact that the shops (and thus the employees in them) are physically separated by walls, and much of the equipment maintenance employees repair and maintain is shop-specific because each shop has a different role in the assembly process. (DDE 3; Tr.40, 42-43, 51-52, 145, 148, 291, 309.) As a result, their precise duties in each shop vary, the training needed to

[11] Under the traditional community of interests standard, a plant-wide unit is presumptively appropriate. *Airco, Inc.*, 273 NLRB 348, 349 (1984).

work in each shop is different, and maintenance employees cannot transfer from shop to shop without additional training. (Tr.40, 42-43, 51-52, 57, 263-65, 280, 290-92, 296, 302-03.) In fact, the record establishes that maintenance employees report to their shops each morning rather than to a common location, have shop-specific morning meetings, and are assigned either to a specific zone in each shop or to a specific piece of equipment in each shop, thereby emphasizing the shop-specific nature of their work. (Tr.172, 301). Finally, production employees are increasingly performing routine maintenance tasks. (Tr.138, 326-27.)

The Board and courts have recognized that similar job functions are not an adequate basis on which to base a unit determination. *See Rayonier, Inc. v. NLRB*, 380 F.2d 187, 189 (5th Cir. 1967) (existence of common maintenance classification, without more, insufficient to justify separate bargaining unit); *TDK Ferrites Corp*., 342 NLRB 1006, 1009 (2004) (petitioned-for maintenance unit inappropriate even though maintenance employees were higher paid and had greater skills than production employees); *Harrah's Ill. Corp*., 319 NLRB 749, 750 (1995) (rejecting maintenance unit even though the RD found it appropriate based on unique functions and skills among other factors); *Jewish Hosp. Assoc. of Cincinnati*, 223 NLRB 614, 617 (1976) (holding that employees having some different skills and functions does not necessarily warrant a finding that they are entitled to a separate unit). This is especially true in this case where it is the

function being performed by the shop, rather than a job classification, that drives what maintenance employees do on a daily basis. (Tr.40-43, 51-52, 263, 254-65.)

Skills, Qualifications and Training: Differences in skills, qualifications and training is another factor relied on by the RD and Board that does not bear the weight they try to give it. When maintenance employees were first hired at the time the plant opened, they had similar basic skills and training. But as stated above, the fact that each shop uses different equipment means that they need additional training before they can transfer from one shop to another. (Tr.51-52, 263, 264-65, 280, 290-92.) It also means that maintenance employees receive shop-specific training and there is little or no interchange among them across shops. (Tr.56-57, 290-92.) Further, although maintenance employees occasionally attend training with employees in other shops, all production and maintenance employees also attend training and occasional meetings together. (Tr.83-84, 97.) Additionally, production employees are being trained to perform some maintenance work, and the only way maintenance employees are currently hired is through the Apprentice Program (which is also a source of production employees) or through production employees being transferred to maintenance positions. In other words, whatever differences in skills and training that existed at the outset of employment have been narrowed over time and will continue to narrow in the future. Thus, as with job functions, this factor should have been weighed on a

shop basis and not on a job title basis.

Separate Supervision: Although maintenance employees have separate supervisors from production employees, the Board majority's and RD's analysis ignored the fact that such supervision is shop-specific, and that this is also true of the excluded production employees. (Tr.43-44, 47-49, 51.) In fact, there is no separate maintenance department, and maintenance employees have no common supervision that is not also shared by production employees (*i.e.* the shop General Manager and the Director of Manufacturing).[12] (Tr.40-41, 43-44, 48-49, 51-52; Co.Ex.4.) In other words, Volkswagen's supervisory structure is based on shop, not on job function. (Tr.48-49.) *See, e.g., Buckhorn, Inc*., 343 NLRB 201, 203 (2004) (the fact that maintenance employees had different supervisors weighed against finding a maintenance unit appropriate).

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[12] The cases approving separate maintenance units are distinguishable. Significant factors in those cases were the existence of a separate maintenance department; separate, unified supervision; and limited contact with the excluded employees—factors that are absent here. *See, e.g., Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016) (stating that maintenance employees were organized in a separate department from production employees); *Yuengling Brewing Co*., 333 NLRB 892, 893-94 (2001) (maintenance employees were separately supervised and some of them had limited contact with production employees); *Capri Sun*, *Inc*., 330 NLRB 1124, 1126 (2000) (most maintenance employees in a separate department with a maintenance supervisor); *Ore-Ida Foods, Inc*., 313 NLRB 1016, 1019-20 (1994) (maintenance employees in a separate department with their own supervisors and had limited contact with production employees). Indeed, the Board distinguished these cases on this very same basis in *Buckhorn*, *Inc.*, 343 NLRB at 203, n.6. *Accord TDK Ferrites*, 342 NLRB at 1009; *Harrah's*, 319 NLRB at 750, n.3.

Schedules and Hours: Although maintenance employees had different schedules and hours from production employees, they also had different schedules and hours among themselves based on the shop in which they work. Specifically, maintenance employees in the Assembly Shop have a different schedule than maintenance employees in the Body and Paint Shops. (Tr.58.) Further, the RD and Board majority rely heavily on the fact that maintenance employees sometimes work when production employees do not, but there is also evidence in the record that production employees sometimes work during weekends and plant shutdowns. (Tr.113-14, 115-16, 129, 130, 321, 341-42.) Additionally, there is evidence that, like production employees, maintenance employees do receive time-off for holidays. (Tr.123-24, 289.) This is yet another example of the RD and Board majority cherry-picking facts to justify their desired result while ignoring contrary evidence in the record.

Wages: The RD did not rely on differences in wages in finding that the maintenance employees shared a sufficient community of interests at the first *Specialty* step, but the Board majority did. (DDE 19-21; RFR Order at 1, n.1). While it is true that maintenance employees receive higher hourly wages than production employees, this factor is minimized by the fact that both maintenance and production employees' wages have the same method of calculation—hourly wages based on an 84-week grow-in period specified in the Team Member

Guidebook. *See Blue Man Vegas*, 529 F.3d at 421 (identifying the relevant factor as "different methods of compensation"). Moreover, a significant part of both production and maintenance employees' compensation is the quarterly bonus, which is calculated in the same way and based on the same metrics for both maintenance and production employees.

Functional Integration and Interchange: Finally, the RD acknowledged that the employees in the proposed unit had no interchange with one another (DDE 20), but he cavalierly dismissed this otherwise significant factor because the petitioned-for maintenance unit did not satisfy the definition of a fractured unit. (DDE 20-21). The undisputed facts are that maintenance employees work side-by-side with the excluded production employees in their own shops, spend 80% of their time on the floor of their own shops interacting with the excluded production employees, and do not transfer to or otherwise work in an integrated fashion with maintenance employees in other shops. Further, both production and maintenance employees have graduated from the Academy, and production employees have moved into maintenance positions.

The Board always has relied heavily on the integration of operations and the degree of contact and interaction between employees in determining whether a production and maintenance unit is appropriate. *See Buckhorn*, 343 NLRB at 203; *TDK Ferrites*, 342 NLRB at 1008; *Vincent M. Ippolito*, 313 NLRB 715, 715

(1994); *Peterson/Puritan, Inc*., 240 NLRB 1051, 1051 (1979). But neither the RD nor the Board majority explained the weight assigned to these factors in this case or why these factors were outweighed by a common job title and different work hours. *See, e.g., Sundor Brands*, 168 F.3d at 519-20 (criticizing the Board's failure to explain why proposed unit was appropriate where it included employees with limited common supervision and limited interaction with one another but daily interaction with excluded employees).[13]

In short, Volkswagen's operational shop structure means that employees in the proposed unit do not have common job duties, hours of work, supervision, training or skills; their work is not integrated with one another; they do not have temporary or permanent interchange among themselves; and, as discussed below, they historically have not been included in a separate bargaining unit. *See Blue*

[13] Many of the differences relied on by the Board majority and RD in approving the maintenance unit are driven by shop structure rather than job function. Thus, all production and maintenance employees sign sign-in sheets by supervisor in their shop. All production and maintenance employees have PTO and vacation approved by their supervisor within their shop pursuant to common policies. Although the RD relied on maintenance organization charts for the Assembly and Paint Shops, these charts are shop-based and were unknown to Volkswagen's General Manager of Human Resources Operations. (DDE 21, Tr.54, 107-08.) The RD erroneously concluded that production and maintenance employees have separate break areas, but there is no restriction on production employees accessing all work and break areas. (Tr.177-78, 185, 244.) The RD noted that all maintenance employees carry radios but only production team leaders carry radios; he ignored that production team leaders are included in Volkswagen's proposed unit, but excluded from the maintenance-only unit. (Tr.50-51, 59; DDE 14, 22.)

Man Vegas, 529 F.3d at 421 (listing relevant community of interest factors). In their rush to approve a gerrymandered unit requested by the Union, the RD and the Board majority either ignored these differences altogether or failed to explain *why* they were outweighed by the commonalities on which they relied in approving the unit. *Sundor Brands*, 168 F.3d at 519-20 (remanding case to Board for further explanation of unit determination). Accordingly, the Board's order requiring Volkswagen to bargain with the Union should be denied enforcement.

b. The Maintenance Employees Share More in Common with the Production Employees in Their Own Shop than They do with Each Other.

Member Miscimarra highlighted something else that was ignored by the RD and Board majority: The facts demonstrate that the maintenance employees share more in common with the production employees in their own shop than they do with maintenance employees in other shops. Stated differently, the maintenance employees do not have "meaningfully distinct interests" that outweigh their similarities with the excluded employees. *See Constellations Brands*, 842 F.3d at 794. As stated above, production and maintenance employees work side-by-side on a daily basis and have common upper-level supervision within each shop. They are also subject to the same wage progression schedule and bonus program.

Furthermore, as discussed *infra* at 58-62, the maintenance employees and excluded production employees share significant terms and conditions of

employment with one another when considered on a plant-wide basis. Finally, the Union, through its course of conduct, has not treated the maintenance employees as being sufficiently distinct to be grouped into a bargaining unit by themselves.

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In sum, the only significant community of interest factors relied on by the RD and the Board majority that are not undercut by Volkswagen's shop structure or also common to production employees, are a common title, that maintenance employees sometimes work when production employees do not, and higher wage rates.[14] But these factors are simply not substantial enough to justify a separate maintenance unit under the totality of the circumstances in this case. *See NLRB v. Lundy Packing Co.,* 68 F.3d 1577, 1580-81 (4th Cir. 1995) (Board's reliance on meager differences in approving a bargaining unit is an insufficient community of interests analysis); *Rayonier, Inc.*, 380 F.2d at 189 (existence of common maintenance classification, without more, insufficient to justify separate bargaining

[14] The RD and Board majority rely on the fact that maintenance employees have a separate human resources contact. (DDE 21; RFR Order at 1, n.1). But all employees can contact any member of the human resources department or management with questions. (Tr.97, 161-62.) Moreover, this human resources contact is not a manager, and is also the primary contact for temporary production employees employed by a Volkswagen contractor. (Tr.161-62.) Further, given the common Guidebook, common benefits, common peer review, and other common terms and conditions of employment, and Rose's testimony that he is responsible for such things, having a separate point of contact cannot imply that maintenance employees' terms of employment are separately determined from those of production employees. (Tr.32.)

unit); *TDK Ferrites Corp.*, 342 NLRB at 1009 (petitioned-for maintenance unit inappropriate even though maintenance employees were higher paid and had greater skills than production employees); *Harrah's Ill.*, 319 NLRB at 750 (rejecting maintenance unit even though the RD found it appropriate based on unique functions and skills among other factors); *Jewish Hosp.*, 223 NLRB at 617 (holding that employees having some different skills and functions does not necessarily warrant a finding that they are entitled to a separate unit); *Monsanto Co.*, 183 NLRB 415, 416-17 (1970) (rejecting petitioned-for maintenance unit).

The RD's and Board majority's failure to give appropriate weight to Volkswagen's shop structure and the similarities and differences created by it, or to explain why the shop structure and the numerous shop-specific aspects of employment were outweighed by the comparatively minor distinctions between production and maintenance employees, means that the approved unit is arbitrary, unreasonable, and not supported by substantial evidence. Accordingly, the Board's order that Volkswagen bargain in this unit should be denied enforcement.

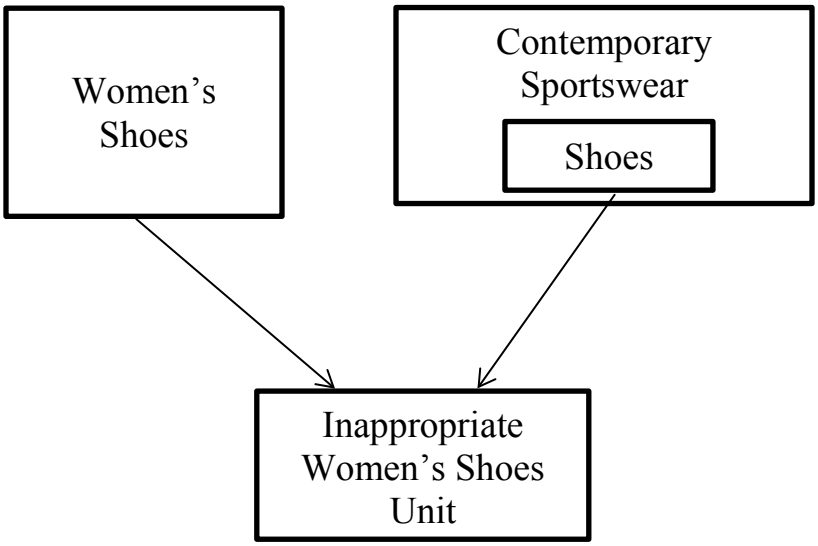
B. The Board's Disregard of Volkswagen's Shop Structure is Contrary to Its Decision in *Bergdorf Goodman.*

The Board's failure to follow Volkswagen's shop structure in making its unit determination is contrary to its decision in *Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3. In *Bergdorf*, the Board held that the petitioned-for unit was inappropriate because the employees the union grouped together did not conform

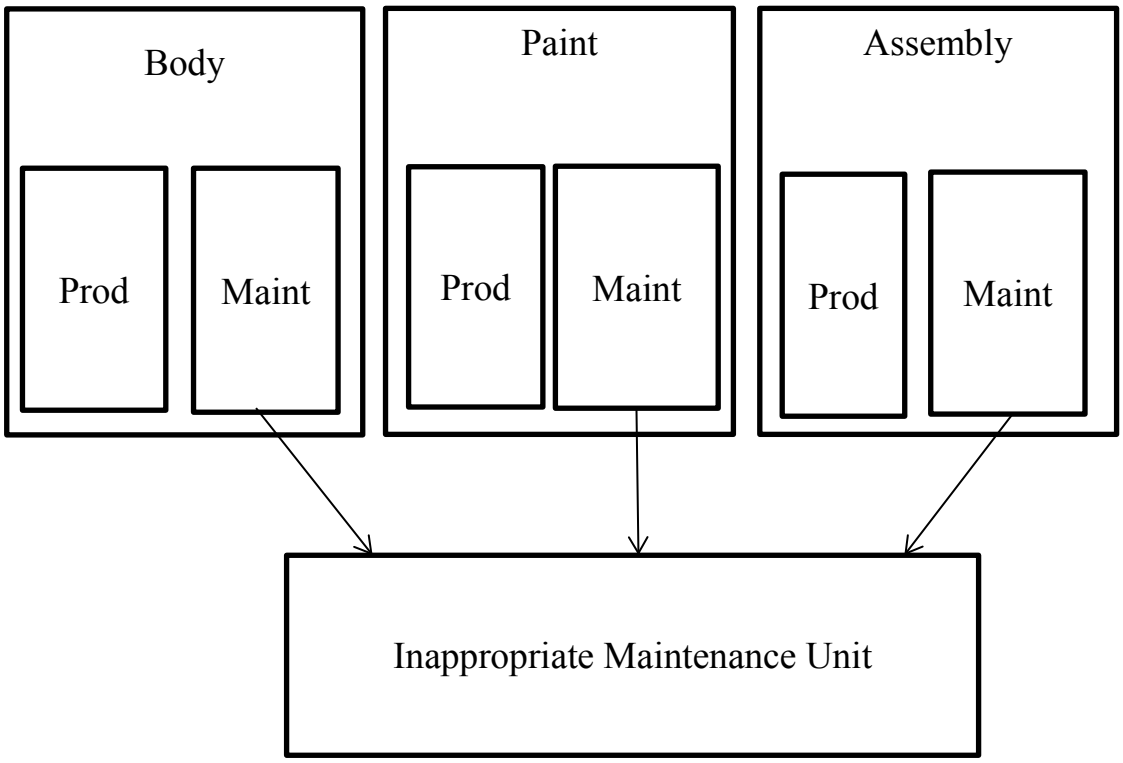
to the departmental lines drawn by the employer. *Id*. at 3-4. Rather, the petitioned-for unit cobbled together by the union consisted of all of the employees in one department—Women's Shoes, and a sub-group of employees from a second department—shoe sales employees in Contemporary Sportswear. As a result, although the Board acknowledged that the employees shared some community of interest factors, the balance weighed against an appropriate unit because "the boundaries of the petitioned-for unit [did] not resemble any administrative or operational lines drawn by the Employer (such as departments, job classifications or supervision)." *Id*. at 4.

The facts in this case are almost identical to *Bergdorf*. Here, just like in *Bergdorf*, the Union broke apart 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. The following diagrams illustrate the similarity between the *Bergdorf* case and this case.

The inappropriate *Bergdorf* unit:



The inappropriate Volkswagen unit (*see* Co.Ex.3):



Despite its applicability, the RD failed to distinguish *Bergdorf* meaningfully from this case. He first stated that *Bergdorf* is distinguishable because the

maintenance employees here possess highly specialized skills and training. (DDE 19.) This is not a tenable basis upon which to distinguish *Bergdorf* from this case. At the outset, the evidence shows that maintenance employees' job functions and training vary depending on the shop to which they are assigned, thus making this a more egregious form of gerrymandering than in *Bergdorf* where all employees sold women's shoes. (Tr.51, 145, 291.) Moreover, the RD's analysis actually reflects a similarity between the two cases because in both cases the Union sought to include the petitioned-for employees in one unit based on their function, but this effort was rejected in *Bergdorf* based on the employer's organizational structure. In other words, in *Bergdorf*, as in this case, the employer chose to place employees with similar, basic functions and skills into different departments with different supervisors, a choice the Board has described as a particularly important one in the community of interests analysis. *Id.* at 3; *Macy's*, 361 NLRB No. 4, slip op. at 8; *Specialty Healthcare*, 357 NLRB at 942, n.19.

The RD also attempted to distinguish *Bergdorf* because there the proposed unit consisted of all of one department and part of another. But the Union's gerrymandered unit here is even more inappropriate because it consists of parts of three shops – it does not even have one complete department. (DDE 19.) *See also Northrup Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2018 (2011), *enf. denied sub nom., NLRB v. Enterprise Leasing Co.*, 722 F.3d 609 (4th Cir. 2013)

(emphasizing that petitioned-for employees were placed in a separate department under separate supervision). This is once again a meaningless distinction that actually highlights a similarity between *Bergdorf* and this case.

For its part, in denying Volkswagen's RFR, the Board majority did not even discuss why its holding in *Bergdorf* did not apply here. Again, the Board's failure to explain adequately why *Bergdorf* did not control the outcome of this case is error, its conclusory assertion that Volkswagen's shop structure had been "overcome" is inadequate, and its bargaining order should be denied enforcement as a result.[15] *See Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984) (The general principle of administrative law that if the Board reverses course it must explain its reasons is fully applicable to unit determinations); *see also Blue Man Vegas,* 529 F.3d at 420 (stating that unit determinations must be in

[15] The "particularly important" weight the Board gives to organizational structure in some cases, but not in others means that the Board fails to "apply with reasonable consistency" its standards. *Continental Web Press*, 742 F.2d at 1089; *see also LeMoyne-Owen College*, 357 F.3d at 61. The result is inconsistency among RD decisions attempting to apply *Specialty Healthcare*. *Compare, e.g., Koch Foods of Fairfield, Inc.*, 09-RC-078984 (May 10, 2012) (finding the petitioned-for unit appropriate where the employees are in the same department, share a unique function, and are under common supervision) *with Boeing Company*, 19-RC-015419 (November 1, 2011) (finding the petitioned-for unit inappropriate giving particular weight to the lack of common skills and functions, common working conditions, and lack of common supervision with less focus on organizational structure). The Board has failed its constituencies—employers, employees and unions—because there is no predictability in determining whether a proposed unit will or will not be appropriate until the matter is fully litigated through the courts. *See LeMoyne-Owen College*, 357 F.3d at 61.

accord with past precedent).

C. The RD and Board Failed to Comply with Their Statutory Mandates.

The foregoing analysis demonstrates that the Board applied a much less rigorous analysis than the traditional community of interest analysis it said it would apply and that is required by the courts of appeals. *See Constellation Brands*, 842 F.3d at 794 ("[M]erely recording similarities or differences between employees does not substitute for an explanation of how and why these collective bargaining interests are relevant and support the conclusion"); *LeMoyne-Owen College*, 357 F.3d at 61 (requiring "thorough, careful and consistent applications" of multi-factor tests); *Purnell's Pride*, 609 F.2d at 1156-57 (stating, "the crucial consideration is the weight or significance, not the number of factors relevant to a particular case"); Flynn, *The Costs and Benefits of Hiding the Ball*, 75 B.U.L. Rev. at 393. The RD's and Board's failure to analyze adequately and fully the maintenance employees' terms and conditions of employment in light of the shop structure in which they work and compared to production employees, and its failure to explain why other factors outweighed Volkswagen's shop structure, not only merit denial of enforcement of its bargaining order, but also highlight the Board's failure to comply with its statutory mandates in this case.

1. The Board Failed to Approve a Bargaining Unit Conducive to Collective Bargaining.

The RD and Board lost sight of the Act's twin purposes (i) to assure employees the fullest freedom to exercise their statutory rights (ii) "in *the* unit *appropriate for the purpose* of collective bargaining…." 29 U.S.C. § 159(b) (emphasis added); s*ee also* 29 U.S.C. §159(a) ("in such unit for the purposes of collective bargaining…."); *Constellation Brands*, 842 F.3d at 794.[16] Courts and prior Board decisions have long recognized that in exercising its discretion to determine a unit appropriate for the purposes of collective bargaining, the Board must assure that the approved unit creates a situation where stable and efficient bargaining relationships can occur. *See Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the [NLRA]."); *NLRB v. Catherine McAuley Health Center*, 885 F.2d 341, 344 (6th Cir. 1989) ("In addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act's policy of efficient collective bargaining.").

The goal of employee free choice, frequently lauded by the Board, must be balanced with the need to assure a stable, efficient collective bargaining

[16] In section 9(b) of the Act, Congress sought to preclude the situation where "by breaking off into small groups," employees could "make it impossible for the employer to run his plant." *Hearings on S. 1958) Before the S. Comm. on Educ. & Labor*, 74th Cong. 82 (1935) (testimony of Francis Biddle, Chairman, NLRB) (cited by *Constellation*, 842 F.3d at 790, n.18).

relationship. *See Allied Chem. Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 172-73 (1971) (citing *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941)); *Kalamazoo Paper Box Co.*, 136 NLRB 134, 137 (1962)). "As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." *Pittsburg Plate Glass Co. v. NLRB*, 313 U.S. at 165. To do otherwise undermines, rather than promotes, efficient and stable collective bargaining. *See, e.g., Bentson Contracting Co.*, 941 F.2d at 1265, 1269-70; *see also Fraser Eng'g Co.*, 359 NLRB 681, 681 & n.2 (2013).

The statutory requirement of stable labor relations and effective collective bargaining is a prominent reason why the Board and courts have emphasized that "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various group of employees in the plant and is thus an important consideration in any unit determination." *Bentson*, 941 F.2d at 1270, n.9 (citing *Gustave Fisher*, 256 NLRB at 1069, n.5 and quoting *International Paper Co.*, 96 NLRB 295, 296 n.7 (1951)); *Catherine McCauley*, 885 F.2d at 345; *Fraser Eng'g*, 359 NLRB at 681 & n.2. As similarly observed in *NLRB v. Harry T. Campbell Sons' Corporation*:

> But winning an election is, in itself, insignificant unless followed by stable and successful negotiations which may be expected to

> culminate in satisfactory labor relations….If the Board's selection of the appropriate bargaining unit…[here, a separate department of an integrated quarry operation] were to stand and bargaining is undertaken, neither party on the stage at the bargaining table could overlook the fact standing in the wings are more…[unrepresented] employees, employees who cannot be separated in terms of labor relations from the small group of employees directly involved…. The Board here has created a fictional mold within which the parties…[must] force their bargaining relationships. In the language of *Kalamazoo Paper Box Corp*…such a determination "could only create a state of chaos rather than foster stable collective bargaining," because in the "fictional mold" the prospects of fruitful bargaining are overshadowed by the prospects of a breakdown in bargaining.

407 F.2d 969, 978 (4th Cir. 1969). Fruitful bargaining breaks down because both parties would be necessarily focused on the impact of their bargaining decisions on the larger, unrepresented group of employees with whom the unit employees clearly share a significant community of interests. *See also Szabo Food Servs., Inc. v. NLRB*, 550 F.2d 705, 709 (2d Cir. 1976)("In view of the high degree of integration of the employer's…business operation, the practical necessities of collective bargaining militate against the creation of a fractured bargaining unit, with its attendant distortion of the employer's business activities and labor relations…."). The Board's ability under *Specialty Healthcare* to approve gerrymandered units that fail to comply with the statutory requirements in section 9(b) of the Act is a significant reason why *Specialty* was wrongly decided and should be overruled.

The RD's and Board majority's failure to approve a unit conducive to stable labor relations and effective collective bargaining is easily illustrated. For example, the RD and Board majority relied on different wage rates as justification for a separate maintenance unit, but Volkswagen has little incentive to modify maintenance employees' wage rates because doing so could have a detrimental impact on the common, 84-month wage progression applicable to both production and maintenance employees. This is especially true given the record evidence that Volkswagen has always changed the wage progression for production and maintenance employees at the same time. (Tr.67-68.) Similarly, Volkswagen has no incentive to change maintenance employees' health or retirement benefits because those benefits are also shared by excluded production employees. The same holds true for the quarterly bonus scheme shared by both groups.[17] Wages and benefits are the quintessential bargaining subjects. But if the Union's gerrymandered maintenance unit is allowed to stand, neither party will be able to overlook the fact that any deal they strike could impact the excluded production employees who constitute the vast majority of Volkswagen's workforce, especially where the Union's leadership consists of excluded employees. *See Harry T.*

[17] In NLRB case number 10-CA-169340, the Union alleged that Volkswagen failed to bargain over a change in food and vending prices. Although the allegation was ultimately dismissed, it illustrates the same point—the Union was seeking to force Volkswagen to bargain over food prices for all employees, even though it only represents 162 of them in a Board-certified unit.

Campbell Sons' Corp., 407 F.2d at 979. The upshot is that given all of the common terms and conditions of employment shared by production and maintenance employees (see *infra* at 58-60), bargaining will turn into a proxy war with both parties positioning themselves to address the employment terms of the excluded production employees who constitute about 90% of the plant's hourly workforce. This stymies rather than promotes collective bargaining.

As this Court has observed, "[c]ommon sense sometimes matters in resolving legal disputes." *S. New Eng. Tel. Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015). Common sense here shows that the RD and Board majority created an artificial construct without considering whether its construct would create a stable and effective collective bargaining relationship. Accordingly, the Board erred in approving the Union-proposed maintenance unit, and its order should be denied enforcement.

2. The Facts of this Case Demonstrate that the Board Gave Controlling Weight to the Extent of Organization in Violation of Section 9(c)(5).

Not only did the RD's and Board majority's lack of analysis give short shrift to the statutory command to approve bargaining units conducive to bargaining, it also created the reasonable inference of a section 9(c)(5) violation. Of course, the Board is not going to expressly state that it gave controlling weight to the extent of organization. But its failure to apply the proper analysis in light of the facts of this

case allows a reasonable inference that this is exactly what it did. *See Constellation Brands*, 842 F.3d at 795; *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1580-83 (1995); *Szabo Food Servs*., 550 F.2d at 708-09 (where only geographic differences relied upon by Board to carve out three cafeterias from a larger, centralized multi cafeteria operation, all in reasonable proximity to the segregated three, the Board's reliance was unwarranted and the extent of organization had been given controlling weight, in contravention of the Act).

Section 9(c)(5) states that, "[i]n determining whether a unit is appropriate… the extent in which the employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). Although the extent of organization may be "considered as one factor in determining whether a proposed unit is appropriate," *Blue Man Vegas*, 529 F.3d at 421, "the enforcing Court should not overlook or ignore an evasion of the § 9(c)(5) command." *Metro. Life Ins. Co.*, 380 U.S. at 442. In determining whether a Board order violates section 9(c)(5), courts analyze the community of interest facts at issue, whether the Board followed its own precedent, and whether the Board adequately explained its decision. *See Lundy Packing Co*., 68 F.3d at 1580-83; *May Dept. Stores Co. v. NLRB*, 454 F.2d 148, 150-51 (9th Cir. 1972).

Under this standard the RD's and Board majority's decision is wanting. Indeed this point was vividly made by dissenting Member Miscimarra when he

stated that the Board's *Specialty Healthcare* standard affords too much deference to a union's petitioned-for unit. (RFR Order at 2). The majority tacitly acknowledged this point by asserting that Volkswagen's operational structure had "been overcome", but it offered no explanation of *why* or *how* that was so. *Id.* at n.1. This lack of explanation is legally inadequate, is arbitrary and unreasonable and cannot stand. *See Encino Motorcars v. Navarro*, --U.S.--, 195 L. Ed. 2d 382, 393 (2016); *NLRB v. Yeshiva Univ.,* 444 U.S. 672, 691 (1980) ("[T]he Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that [the issue] may be decided on the basis of conclusory rationales rather than examination of the facts of each case….[W]e accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act."); *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 442-44 (1965); *Point Park Univ.,* 457 F.3d 42, 46, 49-50 (D.C. Cir. 2006); *LeMoyne-Owen College*, 357 F.3d at 61; *Sundor Brands*, 168 F.3d at 519-20; *Lundy Packing Co.,* 68 F.3d at 1583; *Continental Web Press,* 742 F.2d at 1093; *Szabo Food Servs*., 550 F.2d at 709.

Here, the facts suggest that the Board's decision was a cloak for reliance on the extent of organization as the dispositive factor. The Union's gerrymandered maintenance unit was the apex of its organizational strength. *See Macy's, Inc.*, *v. NLRB*, 844 F.3d 188, 188 (5th Cir. 2016)(Jolly, J. dissenting). The Union lost the

2014 election in a plant-wide unit - a unit deemed presumptively appropriate by the Board and to which the Union previously agreed. *See Constellation*, 842 F.3d at 790, n.18; *Macy's, Inc.*, 844 F.3d at 188 (Jolly, J., dissenting)(noting that the union had twice failed to organize larger units). Further, the Union relies on its membership of both production and maintenance employees in seeking approval under the COE Policy. (Tr.247-48; Co.Ex.12.) Elevating form over substance, the RD discounted this evidence on the grounds that "collective bargaining on a members-only basis [does] not provide any adequate basis for determining the appropriateness of a bargaining unit." (DDE 17.) That is beside the point. Rather, the logical conclusion from this evidence is that the Union, after losing an election in a plant-wide unit and consistently purporting to represent all production and maintenance employees, chose the unit in which it could win an election.

While the Union's conduct in this regard may not be enough to establish a section 9(c)(5) violation by itself, when that conduct is combined with the RD's and Board majority's failure to properly analyze the first step of the *Specialty Healthcare* analysis, and their failure to comply with *Bergdorf* and other precedent according considerable weight to organizational structure, such a violation is reasonably demonstrated. As the *Constellation* Court, 2016 WL 6832936, at *8, held:

> without this critical first step of the *Specialty Healthcare* framework, the burden would be exclusively on the employer to prove the absence

> of distinctions. Such a burden is inconsistent with the NLRA and the Board's past precedent.

Indeed, the Board's failure to weigh properly the traditional community of interest factors *before* moving to an overwhelming community of interests analysis is why the Fourth Circuit found a section 9(c)(5) violation in *Lundy Packing Co.*, 68 F.3d at 1581; a*ccord Nestle Dreyer's*, 821 F.3d at 499 (stating, "Lundy prohibits the overwhelming-community-of-interest test where the Board first conducts a deficient community-of-interest analysis.").[18] The ability of the Board to use *Specialty Healthcare* to masquerade a section 9(c)(5) violation is another reason why it is not good law and should be overruled.

D. The Board Erred in Finding that the Excluded Production Employees do not Share an Overwhelming Community of Interests with the Maintenance Employees.

Finally, given the infirmities of the RD's and Board majority's decisions at the first *Specialty Healthcare* step, the Court need not reach the issue of whether

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[18] The Board's use of multi-factor tests to "hide the ball" regarding its true intentions is a reason why its *Specialty Healthcare* test is inappropriate under section 9 of the Act. *See LeMoyne-Owen College*, 168 F.3d at 519-20; Flynn, *The Costs and Benefits of Hiding the Ball*, 75 B.U.L. Rev. at 393. The *Specialty Healthcare* test allows the Board to hide a section 9(c)(5) violation by doing exactly what it did here, stringing together a list of similarities and differences common in almost any workplace, pronouncing the unit appropriate, and requiring the employer to meet *Specialty's* "overwhelming community of interests" test. When its decision is challenged on appeal, the Board will state that it is the expert, its findings are entitled to wide deference, and its decision should be affirmed. The Board's effort to hide a section 9(c)(5) violation like this, and this Court's skepticism of the Board's multi-factor tests as expressed in *LeMoyne-Owen College*, 168 F.3d at 519-20, require more than overly deferential review.

Volkswagen's production employees share an overwhelming community of interests with the maintenance employees. For many of the reasons discussed above, however, the RD's and Board majority's short-shrift rejection of Volkswagen's contention in this regard was also arbitrary, unreasonable and not supported by substantial evidence.

1. The Petitioned-For Maintenance Employees Share More in Common with the Excluded Production Employees than They do with Each Other.

Production and maintenance employees work side-by-side on a daily basis and in an integrated fashion within each shop. They share shop-specific supervision, and most of the significant bargaining terms, like benefits, method of wage payment, peer review program, and work rules. Among other things, the maintenance and production employees share the following terms:

- 401(k) plan
- Defined contribution plan
- Life and disability insurance
- Guidebook
- Attendance, paid time off and leave of absence policies
- Common peer review system
- Car leasing program
- Uniform program
- Parking lot and entrance

- Locker room
- Cafeteria
- Gymnasium
- Break areas
- Team leader training

(Tr.38-40, 59-61, 63-66, 76-79, 80-82, 84-85, 92, 95-98, 141-42, 177-78, 185, 198, 200, 244, 326; Co.Ex.6.)

The included maintenance and excluded production employees share the majority of major terms and conditions of employment. The RD and the Board gave too much weight to minor differences that might be found in any workplace—differences in the color or material of uniforms, whether one group of employees uses different tools, whether a group of employees carries a radio or has access to e-mail. (DDE 22). *See, e.g., Wheeling Island Gaming*, 355 NLRB at 638 (fact that craps, roulette and blackjack dealers played hands and handled cash while poker dealers did not were too minor to justify their exclusion from the proposed unit). Some of these differences are not even differences at all because both included maintenance and excluded production team leaders carry radios, and production employees can also obtain e-mail addresses. These overwhelming commonalities arise out of the way Volkswagen has deliberately structured its operations—the very thing the Board said would drive its *Specialty Healthcare* analysis. Again, this is not analysis; this is merely tallying similarities and

differences to justify a desired result.

Moreover, as Member Miscimarra explained, many of the terms and conditions of employment that distinguish production employees from maintenance employees, for example different supervision, different skills, different training and different hours, also distinguish the maintenance employees from each other based on the shop where they work. Again, this demonstrates that it is Volkswagen's shop structure, rather than an employee's job duties, that drives the similarities and differences between employees.

2. The Union has Consistently Treated Maintenance and Production Employees as One Unit.

Until it requested to split the maintenance employees from their production co-workers, the Union consistently treated these employees as one unit. First, the Union sought to represent all production and maintenance employees in a single unit in a 2014 election. It lost, and then sought a much smaller unit—a unit in which it won. Although the Board asserts that this is not "bargaining history" worthy of consideration, it is a factor in the totality of circumstances in this case. *See Macy's, Inc. v. NLRB*, 844 F.3d at 195 (Jolly, J., dissenting)(noting that after the union was defeated in a storewide unit, it cherry-picked a smaller unit apparently most favorable to the union's organizing efforts).

Second, even after it lost the 2014 election, the Union continued to treat the production and maintenance employees as one unit under Volkswagen's COE

Policy. In seeking certification under the policy, the Union counted both production and maintenance employees among its members. The Union's President is an excluded production employee, and its Recording Secretary at the time of the hearing was an excluded quality employee. (Tr.101, 246.) Accordingly, if the separate maintenance unit is allowed to stand, excluded employees would represent maintenance employees in their dealings with Volkswagen management. Finally, the Union has not treated maintenance employees separately from production employees during meetings under the COE policy.

Of course, it is up to the employees (or in this case the Union) to define the bargaining unit they seek initially. Here, the Union gerrymandered a maintenance department out of Volkswagen's three separate shops after consistently representing both groups of employees. But because it is the shop structure, and not job duties, that defines employees' terms and conditions of employment, the production employees in each of those shops share an overwhelming community of interests with the petitioned-for maintenance employees. As a result, the only appropriate unit (which is also a presumptively appropriate unit), is one consisting of all production and maintenance employees. *See Constellation Brands*, 842 F.3d at 794; *Harry T. Campbell Sons'*, 407 F.2d at 976, 979; *see also Airco*, 273 NLRB at 349.

CONCLUSION

For each of the reasons set forth above, Volkswagen Group of America, Inc.'s Petition should be granted, and the Board's Order requiring Volkswagen to bargain in a unit consisting solely of maintenance employees should be denied enforcement. Volkswagen further requests that it be awarded its costs and any other relief, legal or equitable, to which it is entitled.

Dated: January 26, 2017

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,962 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

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 this brief has been prepared in a proportionally spaced typeface using Word 210 in Times New Roman Font 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

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