UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VOLKSWAGEN GROUP OF AMERICA, INC. Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent	Case No. 16-1309

UNDERLYING DECISIONS FROM WHICH THE PETITION ARISES

Petitioner Volkswagen Group of America, Inc. [1] ("Petitioner") has attached hereto as Exhibits A – C copies of the underlying Decisions and Orders of Respondent National Labor Relations Board and its Regional Director for Region 10 from which Petitioner's Petition for Review arises.

[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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25(b), I hereby certify that a true and correct copy of the foregoing Agency Docketing Statement was served via both (1) U.S. Mail and (2) Court's ECF system on this 6th day of October, 2016, upon:

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EXHIBIT A

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

VOLKSWAGEN GROUP OF AMERICA, INC.

Employer

and **Case 10-RC-162530**

UNITED AUTO WORKERS, LOCAL 42

Petitioner

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of maintenance employees, including skilled team members and skilled team leaders, employed by the Employer at its Chattanooga, Tennessee, facility, where the Employer manufactures automobiles. The Employer maintains that the unit sought by Petitioner is not appropriate and that the only appropriate unit must also include production employees, including team members and team leaders employed by the Employer at its Chattanooga, Tennessee, facility.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As described below, based on the record and relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), I find that the petitioned-for unit limited to the Employer's full-time and regular part-time maintenance employees, including skilled team members and skilled team leaders is appropriate. Accordingly, I will direct an election in that unit.

Overview of Operations

The Employer's Chattanooga facility is Volkswagen's only manufacturing plant in the United States. It produces the Volkswagen Passat for the U.S. market and for export. Preparations are being made to produce a mid-sized SUV for the U.S. market as well. Production of vehicles at the plant started in 2011. Most of the Employer's facility is comprised of three production areas: the body weld shop, the assembly shop and the paint shop. These shops are also referred to as "departments."

All employees park in the same parking lot and they "badge in" through a single entrance. Adjacent to the parking lot is a building known as the academy. The academy houses the Employer's training facilities and its apprenticeship program, which will be discussed in greater detail below. After employees enter the premises, they cross what is referred to as "the bridge" to enter the main facility. The assembly and paint shops are located closest to the entrance and the body weld shop is at the back of the facility. Finance, IT, human resources and various support departments are located in a long, narrow area between assembly and body weld, commonly known as "the spine."

Four classifications of employees are at issue in this proceeding: team members (referred to herein as production employees), team leads (production leads), skilled team members (maintenance employees) and skilled team leads (maintenance leads). The primary responsibility of the production employees[1] is to install and assemble the parts necessary to

[1] Unless otherwise specified hereafter the term "maintenance employees" includes both maintenance employees and maintenance leads and "production employees" includes both production employees and production leads.

complete automobiles whereas the primary responsibility of maintenance employees is to keep the machinery and the line bringing parts to the production employees running.

There are 270 production employees and 50 maintenance employees in the body weld shop, 242 production employees and 66 maintenance employees in the paint shop, and 629 production employees and 46 maintenance employees in the assembly shop. There are 27 production employees in logistics and 78 in quality control, but no maintenance employees in either of these two departments. Production employees and production leads work in all five production departments, while maintenance employees and maintenance leads work only in body weld, paint, and assembly.

The manufacturing process begins in the body weld shop, where production employees assemble welded body panels into a body shell. The shell is then sent to the paint shop for painting. Next, the painted shell goes to the assembly shop where all of the remaining components of the vehicle are installed by production employees. Work performed by employees in two additional departments is considered part of the production process: the logistics department employees ensure that the production shops have the necessary parts, while the quality department employees audit the work of the production shops.

Director of Manufacturing Karsten Heimlich is responsible for the three production shops. The record is silent regarding the identity of those vested with responsibility for the logistics and quality control departments. Each of the three production shops is headed by a general manager who is responsible for everything in that shop.

In the **body weld shop**, production is divided into three zones: under-body, framer and completed body. Production workers in each zone report to a supervisor within the zone. They may rotate through different assignments within the zone, but they always report to the same supervisor. Maintenance workers on each shift team may be assigned to a particular zone or to a particular type of technology within the shop. The assistant manager for maintenance is Jeff Schuessler. Reporting to him are four supervisors, one for each shift.

Dean Parker is the general manager of the **paint shop.** Maintenance employees report to the maintenance "profi-room" at the beginning of each shift. Posted there is a document titled Paint Maintenance Organization v42 that contains photos of all maintenance personnel in the paint shop. At the top of the chart is Maintenance and Engineering Assistant Manager Earl Nichols. Below him are four supervisors, one for each shift. Under each supervisor are three team leaders. On each shift, one team leader is assigned to Zone 1, one to Zone 3 and one to Zones 2 and 4. Employees working under each supervisor are assigned to a single designated zone. There are also two "CCR" employees who report directly to the shift supervisor. Five salaried engineers and specialists report directly to Nichols.

Chad Butts is the general manager of the **assembly shop**. Manager Noland Mickens, who reports directly to Butts, is responsible for the production line. Three assistant managers, one for each production zone, report to Mickens. Each of the assistant managers has three or four supervisors per shift reporting to him or her. There is also a separate finish department with its own manager, assistant managers and supervisors. Front line production supervisors are responsible for 15 to 30 production employees. There is generally one supervisor for each process in the assembly department and one for each line in the finishing department.

Ultimate responsibility for maintenance in the assembly shop is vested in Assistant Manager Tim Lovvorn. All assembly shop maintenance supervisors have desks in a partitioned area of the shop. An assembly maintenance organizational chart is posted there. It displays photographs of all maintenance personnel in the assembly shop. At the top of the chart is Maintenance Assistant Manager Lovvorn. Below him are three supervisors, one for each shift. White shift supervisor William Hays recently resigned and the employees who worked under him now report directly to Lovvorn. Under each supervisor are three team leaders, one for each of three zones. Lovvorn is also responsible for several salaried specialists.

The steps in the assembly process take place in a certain order and vehicles proceed through three numbered zones. Maintenance employees are assigned to a specific zone but occasionally assist in other zones if needed. The technology in each of the three zones is slightly different. For example Zone 1 contains most of the robots in the shop. However, all areas have mechanical, electrical and conveyor technology, so that some of the maintenance needs in each zone are the same.

Hiring and Orientation

All new hires, including production and maintenance employees, complete a standard orientation about the Employer's work and safety rules, production system, policies and procedures. This program is referred to as "common core training" and takes place in the academy. They all receive a similar new hire packet and are required to sign certain forms and agreements.

Before the Employer began hiring maintenance employees exclusively through its apprenticeship program, discussed below, applicants were required to have experience in at least one of the following areas: industrial electricity, industrial mechanical, electronics or facilities maintenance (HVAC, chillers, boilers, water treatment). Applicants for maintenance positions took a written test as well as a skills test. Once selected, new maintenance employees underwent six months of training at the academy before beginning work. Applicants for hourly production jobs are not required to have any specific experience. They take a physical agility test to ensure that they can perform the work required. After some hands-on training, they can begin working almost immediately.

Since the plant began production, eleven production employees have applied for and transferred to a maintenance position. In order for a production employee to be considered for a maintenance position, they must to undergo an assessment to determine if they have basic proficiency in electrical, mechanical and/or PLC (project logistics controller) work. These are skills that would not have been part of their job duties as a production employee. Once an employee passes the assessment, they still need additional training before they can work as a maintenance employee.

The Employer currently offers training and apprenticeship programs in conjunction with Chattanooga State Community College and Tennessee Technology Center. The automotive mechatronics program (AMP) is a three-year program that includes both classroom training at the academy and skills training in the plant. Students typically spend one semester in production and two in maintenance. Upon completion of the program, graduates who wish to be hired are generally placed in a maintenance position. If no maintenance position is open, graduates may

be placed in a production position. Graduates have also accepted positions in other areas, such as quality assurance. Since the inception of the AMP, 50 graduates have accepted jobs with the Employer. Five accepted salaried positions, nine accepted production positions and 36 were placed in maintenance. The Employer has not accepted outside applicants for maintenance positions in over a year. Presently, the only source for new maintenance employees, other than internal transfers, is the AMP.

Wages and Benefits

The employee handbook, entitled Team Member Guidebook applies to all employees, including production and maintenance employees. All employees at the Chattanooga plant, including production and maintenance, share a common health plan and can choose from a number of options. The Employer offers both a 401(k) and a defined contribution retirement plan. The 401 (k) provides a 100 percent match on contributions of up to 3 percent of employees' eligible earnings and a 50 percent match on additional contributions of up to 5 percent. All employees, including production and maintenance, are eligible and fully vested from the date they are hired. The Employer also contributes 5 percent of employees' base pay to a defined contribution plan with no employee-mandated contributions. This plan fully vests after three years of service. The Employer provides all employees with basic life and disability insurance at no cost to the employee. Employees can purchase additional coverage if they choose. The Employer also offers all employees tuition reimbursement, adoption assistance and a car leasing program. It is estimated that the benefits and bonuses the Employer pays to hourly employees amounts to 37 percent of their base pay.

The Employer compensates hourly employees according to a "Wage Progression" chart contained in the employee handbook. There are eleven steps from the starting rate to the top rate. Employees must complete six months of service and work 1040 eligible hours to move to the next level. If an employee works full time and is not absent on extended leave, he or she would progress to the top level in 84 months or seven years. There are four separate progressions for production employees, production leads, maintenance employees and maintenance leads. At each level, the hourly rate for maintenance employees is around $7 higher than the rate for production employees. The highest Level 11 production wage rate is $23 per hour, which is the same as the Level 1 rate for maintenance employees. There are similar differences within the wage rates at each level for production leads and maintenance leads and the Level 11 hourly rate for production leads is $24.25, the same as the Level 1 rate for maintenance leads.

All hourly employees are eligible for quarterly performance bonuses. Bonuses are based on achievement of company targets in safety, quality and productivity and individual attendance. The Employer issues a quarterly Hourly Performance Bonus Update that sets forth the bonus amounts for the previous quarter and how they were calculated. In the categories of safety, quality and productivity, there are levels of performance that yield a predetermined bonus percentage, if achieved. For example, the safety portion of the bonus is determined by the Total Incident Rate. That rate is determined by dividing the number of safety incidents (as defined by OSHA) by the number of hours worked and then multiplying that number by 200,000 to determine the number of incidents per 100 employees. There are five different levels that can merit a bonus of zero up to a maximum of 4 percent. Anything equal to or greater than 3.31

incidents per 100 would result in no bonus in the safety category, while a rate equal to or less than 1.64 incidents would result in the maximum bonus of 4 percent. The quality portion of the bonus is determined by the total quality index which is defined as the percentage of achievement in three key quality targets. As with the safety category, there are five levels that can merit a bonus of up to 4 percent. The productivity portion is determined by hours per vehicle and can yield a maximum of 2 percent. The final portion of the bonus is determined by each individual's attendance for the quarter. An employee with no unexcused absences will receive a 4 percent bonus, while an employee with one unexcused absence of less than 30 minutes will receive a 2 percent bonus. Employees with one unexcused absence of more than 30 minutes or 2 unexcused absences of any duration receive no attendance bonus.

The percentages for all four performance categories are totaled for each employee. The percentage is then applied to each employee's gross earnings for the period, including overtime. The performance of both maintenance and production employees can potentially affect the amount of bonus all employees receive under the first three metrics. For example, hours per vehicle can be affected by a lag in production speed or by an equipment shutdown.

The Employer's peer review policy allows both salaried and hourly employees who have been terminated to appeal their termination to a panel of their peers. A five-member panel is drawn from a pool of trained volunteers. If the peer review is for an hourly employee, three of the five panel members must be hourly. For a salaried employee, three of the panel members must be salaried. The panel makes a recommendation to either uphold the termination or return the employee to work. Both production and maintenance employees have had peer reviews and both production and maintenance employees have served on such panels.

Maintenance employees have a dedicated human resource manager who is not responsible for any other Volkswagen employees. Employee Relations Manager Mark Cordell is the human resources contact for maintenance employees in all three shops. He is also the human resources contact for contract workers employed by Aerotech, an outside company that provides production workers to the Employer on a temp-to-hire basis. At some unspecified time, maintenance employees received an e-mail from Cordell stating that he was the direct human resources representative for maintenance employees. There was no evidence presented about how other human resource personnel are assigned.

Job Functions, Duties and Requirements

Both production and maintenance employees are permanently assigned to one of the production shops. Production employees report to production supervisors and maintenance employees report to maintenance supervisors. Immediate supervisors are responsible for approving PTO (paid time off), issuing discipline and performing an annual evaluation of their employees. Employees do not clock in and out, but they sign in every morning when they arrive for work. Production and maintenance employees sign in on separate sheets. There is no interchange between maintenance and production: only production employees do production work and only maintenance employees perform maintenance work. However, the Employer plans to implement a program that would train production workers in the assembly shop to perform minor tasks on certain machines, such as cleaning below the car lifters or changing out glue tips in the area where windshields are installed.

In all three shops, production employees work the same schedule. They all work Monday through Thursday on one of two ten-hour shifts: 6 a.m. to 4:45 p.m. or 6 p.m. to 4:45 a.m. In

each shop, production employees are divided into two teams: the red team and the white team. The teams rotate every week so that each team works the early shift one week and the late shift the next.

Maintenance employees in the body weld and paint shops work 12.5 hour shifts beginning either at 7 a.m. or 7 p.m. They are divided into four different shift teams: red, white, blue and silver. These teams rotate in order to staff the departments around the clock, seven days a week. Only two of the four teams work on any given day. The teams are on a bi-weekly rotation, working four days in a row one week and three days the next. Maintenance employees in the assembly shop work one of three 8-hour shifts with start times of 12:00 a.m. (midnight), 8 a.m. and 4 p.m., Monday through Friday. In all of the shops, maintenance teams rotate through the various shift start times so that no team works the same shift all the time.

Production workers can sometimes be released early if there is a breakdown or if the line runs out of parts. They are offered the opportunity to stay at work, go home with PTO or go on leave without pay without accruing an occurrence on their attendance. Maintenance employees are never released early. Maintenance employees work during shutdown days and shutdown weeks and there are restrictions as to when they can schedule vacation during those weeks. PTO is approved separately for maintenance and production workers in each shop. Neither classification of employee will be approved for PTO if ten percent of the team is already scheduled to be out.

Production workers in each department have common scheduled break and lunch periods that they all adhere to, whereas maintenance employees' breaks are scheduled so that they are

working while production employees are on break. Maintenance employees never take breaks and lunch at the same time as production employees. Maintenance employees may not get to take scheduled breaks and lunch if there is work that must be done. Maintenance employees in at least one department have been instructed to stagger their breaks so that at least a few maintenance employees are on the floor at all times. In each of the shops, production and maintenance employees have separate lunch and break areas and they generally do not share their respective lunch and break rooms.

All employees have a meeting with their supervisor at the start of their shift. For production employees, this meeting is referred to as a "6 minute meeting" and is conducted while employees are stretching and preparing to work. These production meetings are usually conducted on the shop floor. Maintenance meetings can sometimes last 15 to 20 minutes. Maintenance meetings in the paint shop take place in the maintenance "profi-room," which also serves as a maintenance training area. In the assembly shop, maintenance employees start their shift with a meeting in a maintenance meeting room and shop located in the "spine" which is an area adjacent to but not inside the assembly shop. This area also contains repair machinery such as presses, cleaners, worktables and rebuilt robots.

As noted earlier, the primary responsibility of maintenance employees in all three shops is to keep the line running. They perform scheduled preventative maintenance as well as repairs. Machines in some departments have a button that alerts maintenance if there is a problem with the machine. Although rank-and-file production employees can contact maintenance personnel directly if there is a problem, usually leads or supervisors do this. Depending on the type of maintenance or repair they are performing, maintenance employees perform work both out on

the production line and in maintenance shops. There are several fenced-in or partitioned maintenance areas in all three shops where maintenance employees store tools and work on equipment. Production employees do not have keys or access to any locked toolboxes or areas. While there is no rule prohibiting production employees from entering the maintenance areas, they generally do not go into those areas.

If a maintenance employee needs a part or tool that is not available in the maintenance area of the shop, the employee can procure it from the general store, located between the body weld and assembly shops. To check out a tool, the employee must fill out a form with his name, supervisor's name, badge number and a maintenance cost number. The general store employee then scans the maintenance employee's ID barcode. In order to get a part, the employee must fill out and submit a work order. Production employees have access to items like gloves and towels, which are available from the general store, but only maintenance employees with a work order have access to repair parts.

Production and maintenance employees wear "team wear" purchased from the company store. Production employees have several options, depending on where they work. All maintenance employees are required to wear 100 percent cotton pants and shirts to prevent their clothing from catching fire in the event of an arc flash. They must also wear special safety rated boots. These boots are specifically designated for maintenance employees in the company store. Maintenance employees in body weld and assembly wear black hats, while production employees wear gray hats. Hats are not required in the paint shop, but some employees wear "bump caps." Maintenance employees wear black caps and production employees wear gray.

Production employees in the paint shop wear silver coveralls and maintenance employees wear green.

All maintenance employees carry radios. In production, only team leads carry radios. The lockout/tagout procedure is a safety measure that prevents and insures that energy will not flow through a piece of equipment while it is being worked on. All maintenance employees are assigned a lock and carry it with them while they work. Maintenance employees are assigned a company e-mail address when they are hired. They also have a user name and password to log into the Employer's computer system on terminals throughout the plant. Production employees are not assigned an e-mail address and they only have access to the Employer's computer system through limited-use kiosks.

Maintenance employees receive specialized training at the academy that is unavailable to production employees. Occasionally, maintenance employees in one shop might train with employees from another shop if the training is about equipment common to all shops, such as conveyors. There is no evidence that production and maintenance employees have participated in common training. The Employer does conduct quarterly shop-wide meetings and periodic plant-wide meetings.

No Prior Bargaining History

The Employer maintains a community organization engagement (COE) policy that governs its interaction with outside groups seeking to represent employees' interests. The policy states, inter alia, "Engagement opportunities will be available to eligible organizations that represent a significant percentage of employees in the relevant employee groups and whose

members support the organization's interaction with Volkswagen pursuant to this policy." To qualify, an organization must "exist for the primary purpose of representing employees and their interests to employers consistent with the NLRA." An organization that is interested in representing either salaried employees or hourly employees (but apparently not both) can submit their membership rolls to an independent third-party auditor who will verify that the organization's membership comprises a certain percentage of the total employees in the relevant group. To date, two groups have been certified under this policy: the Petitioner and the American Council of Employees.

There are three "levels" for different percentages of employee support and the policy sets forth various "engagement opportunities" for each level of support. Level 1 organizations, defined as having greater than 15 percent support, are able to reserve and use space in the Employer's conference center for internal employee meetings once monthly during non-working time, and can post announcements and information in designated locations. Employee representatives of the organization, as opposed to representatives who are not employees, may meet monthly with human resources to present topics of general interest. Level 2 organizations, with greater than 30 percent support, may use the Employer facilities to conduct weekly meetings, invite outside representatives from their organization for monthly meetings, post materials on a dedicated and branded posting board and meet quarterly with a member of the Employer's executive committee. Level 3 organizations with membership support greater than 45 percent may also conduct meetings on-site "as reasonably needed" and meet bi-weekly with human resources and monthly with the executive committee.

Organizations are required to resubmit their membership list every six months to verify that they still have the required level of support. The policy specifically states that it is not to be used to claim or request recognition as the exclusive collective bargaining representative of any group of employees. Rather, any organization seeking to represent employees must fully comply with provisions set forth in the National Labor Relations Act.

In 2014, the Employer and the Petitioner's parent organization, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), entered into a stipulated election agreement in Case 10-RM-121704 for a unit to include all full-time and regular part-time production and maintenance employees. An election was conducted in February 2014 and an insufficient number of ballots were cast in favor of representation by the UAW. At some unspecified time after the election, the Petitioner was certified as a Level 3 organization for all production and maintenance employees at the Chattanooga facility.

Pursuant to the COE policy, the Employer regularly meets with representatives of the Petitioner. The Petitioner is represented in those meetings by Local President Mike Cantrell, Vice-President Steve Cochran and Recording Secretary Myra Montgomery. Cantrell is a production employee in the paint shop; Cochran is a maintenance employee in the assembly shop; and Montgomery is a quality assurance employee. During these meetings, the parties discuss areas of concern among employees such as safety, vacant team leader positions and the production and disciplinary processes. Petitioner representatives sometimes make suggestions for improvements in the areas discussed. The Employer acknowledges that meetings with organizations under its COE policy are not for purposes of collective bargaining or considered collective bargaining.

In *Manufacturing Woodworkers Ass'n*, 194 NLRB 178 (1972), the Board held that a history of collective bargaining on a "members only" basis did not provide an adequate basis for determining the appropriateness of a bargaining unit. "The Board has traditionally refused to give weight to such a bargaining history..." *Id.* at 1123. Likewise, Petitioner's proceeding to an election in a larger unit is not evidence that a smaller unit is inappropriate. *Macy's*, 361 NLRB No. 4 at fn. 30 (2014). Bargaining history determined by the parties and not by the Board is not binding. *Laboratory Corporation of America Holdings*, 341 NLRB 1079, 1083 (2004). In light of the above, I find that neither the prior election in a plant-wide unit nor the parties' meetings pursuant to the COE policy would constitute prior bargaining history.

Board Law

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare*, supra, slip op. at 7.

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In this regard, the Board has made

clear that it will not approve fractured units; that is combinations of employees that have no rational basis. *Odwalla, Inc.*, 357 NLRB No. 132 (2011), *Seaboard Marine*, 327 NLRB 556 (1999). Thus an important consideration is whether the employees sought are organized into a separate department or administrative grouping. Also important are whether the employees sought by a union have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002); see also *Specialty Healthcare*, supra, at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip. op. at 3, fn. 8 (2011).

Application of Board Law to the Facts of this Case

The Classifications Sought By Petitioner Share a Community of Interest

The Employer first contends that employees in the petitioned-for unit do not share a sufficient community of interest and are a "fractured" unit as defined by the Board. The Employer further contends that the smallest appropriate unit must include the petitioned-for employees plus production employees and leads (team members and team leaders).

In support of its position, the Employer cites *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11 (2014). In that case, the Board determined that the petitioned-for unit of women's shoe sales associates in the store's separate departments of Salon Shoes and Contemporary Shoes was a readily identifiable group, but did not share a community of interest. Employees in the two departments did not track any administrative or operational boundaries, especially where Contemporary Shoes was a part of the larger Contemporary Sportswear department. In addition, the two groups did not share common supervision; there was no interchange; there was insufficient contact between the two groups; and they did not share any specialized skills and training. The facts in *Neiman Marcus* differ from the instant case in two very significant and distinct ways. First, the Employer's maintenance employees possess highly specialized skills and training. Second, unlike the two groups of shoe sales employees, one of which contained all of the employees in a single department, while the other was only part of a larger department, all three of the Employer's shops have both production and maintenance employees. While there is no separate maintenance department that covers the entire plant, there is, in effect a maintenance department within each shop, where they are separately supervised up to the level of each shop's general manager.

The Board has determined that certain petitioned-for units of maintenance employees constituted fractured units. For example, in *Peterson/Puritan, Inc.*, 240 NLRB 1051 (1979), the union sought to represent only a portion of the employer's maintenance employees, specifically, the unskilled line mechanics. Similarly, in *Chromalloy Photographic*, 243 NLRB 1046 (1978), the union sought to represent only a small unskilled portion of the employer's maintenance employees, whose functions were substantially the same as other maintenance and production employees.

In concluding that the employees in the petitioned-for unit are "readily identifiable as a group" I note that they share a unique function. *Macy's Inc.*, 361 NLRB No. 4 (2014). 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. *DTG Operations, Inc.*, 357 NLRB No. 175 (2011); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011).

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.

The Employees the Employer Contends Must Be Included in the Unit Do Not Share an Overwhelming Community of Interest with the Employees in the Classifications Sought by Petitioner

I further conclude that the production employees the Employer seeks to include in the unit do not share an overwhelming community of interest warranting their inclusion with the employees sought by Petitioner. In reaching this conclusion, I find that production and maintenance employees are separately supervised and there is no interchange between the two classifications. At least two of the three departments, paint and assembly, have separate maintenance organizational charts. Maintenance employees have their own human resources manager. As new employees, maintenance workers are required to possess more experience and training. Once employed, they are required to undergo more extensive training. Although both production and maintenance employees have an eleven-step wage progression, all maintenance employees are compensated at a wage rate that exceeds the rates paid to production employees. The maintenance employees work a different schedule than production employees. They are specifically required to be available when production employees are not working, which includes shutdowns. While production employees can be released early from their shifts, maintenance employees are never released early.

Production and maintenance employees have separate meetings at the beginning of their shifts and their attendance is maintained separately. Although maintenance employees perform

some of their work on the production floor, they have separate work and break areas which are not accessible to production employees. Production employees do not have access to the same tools, parts and equipment as maintenance employees. While all hourly employees are required to wear "team wear" from the company store, the attire requirements for maintenance employees are significantly different. Maintenance employees are also distinguishable from production employees by the black hats they wear in the plant. All maintenance employees carry radios, while in production, only leads carry them. All maintenance employees are assigned a company e-mail address and can access the Employer's computer system through an assigned login and password. Except in very limited circumstances, production employees do not share access to the computer system.

In support of its contention that production and maintenance employees share an overwhelming community of interest, the Employer cites several cases that are readily distinguishable. For example, in *Buckhorn, Inc.*, 343 NLRB 201 (2004), maintenance employees regularly performed production work so that production and maintenance employees had essentially the same job functions. Similarly, in *TCK Ferrites Corp.*, 342 NLRB 1006 (2004), the petitioned-for maintenance technicians performed a significant amount of production work and were supervised by production personnel.

I acknowledge that the employees the Employer contends must be included in the unit share some community of interest factors with the petitioned-for unit including some of the same benefits available to salaried employees, common supervision at the department level, and a performance bonus program for all hourly employees. While maintenance employees perform some but not all of their work on the production floor and frequently communicate with

production employees regarding problems with their machines, regular contact in the absence of interchange does not establish an overwhelming community of interest. *DPI Secuprint, Inc.*, 362 NLRB No. 172, slip op. at 6 (2015)(No overwhelming community of interest despite common supervision, functional integration and similar wages and benefits). *See also, Capri Sun, Inc.*, 330 NLRB 1124, 1126 (2000) (Although maintenance employees had regular contact with production employees, the "interaction between the production and the maintenance employees when working together on their functions or discussing problems about the machines" does not mandate a combined unit). Although the Employer's contentions may establish that the broader unit sought by the Employer is an appropriate unit, they are insufficient to establish that production employees share such an overwhelming community of interest as to require their inclusion in the unit.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Auto Workers, Local 42 or American Counsel of Employees.

A. Election Details

The election will be held at the Academy Conference Center on the following dates and times:

Thursday, December 3, 2015 6:00 a.m. to 9:30 a.m. and 3:00 p.m. to 8:30 p.m.

Friday, December 4, 2015 6:00 a.m. to 9:30 a.m. and 3:00 p.m. to 6:30 p.m.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending November 8, 2015, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Friday, November 20, 2015**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not

precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 18, 2015

Claude T Harrell Jr

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

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLKSWAGEN GROUP OF AMERICA, INC.
Employer

and

Case 10-RC-162530

UNITED AUTO WORKERS, LOCAL 42
Petitioner

ORDER

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

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

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

KENT Y. HIROZAWA, MEMBER

LAUREN McFERRAN, MEMBER

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

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

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

Member Miscimarra, dissenting:

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

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

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

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

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

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

PHILIP A. MISCIMARRA, MEMBER

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

EXHIBIT C

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

August 26, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

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

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

[1] On May 10, 2016, counsel for the Respondent filed a document styled "Respondent Volkswagen Group of America Chattanooga Operations, LLC's Answer and Affirmative Defenses to Complaint." The opening paragraph of that document states:

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

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

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

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

We do this in order to give the Respondent the benefit of the doubt. We presume that they have retained experienced labor counsel and caused them to enter an appearance in this matter on their behalf because they wish to be represented and defend their position. To take the documents as styled at face value would lead to the conclusion that the Respondent has filed no responsive pleadings. If this were the case, all of the allegations of the complaint would be "deemed to be admitted to be true" under Sec. 102.20 of the Board's Rules and Regulations, and the Respondent would have waived its right to assert a defense.

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

[3] In its response to the Notice to Show Cause (Response), the Respondent repeats its assertion that it has been incorrectly named in the consolidated complaint.

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

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

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

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

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

Ruling on Motion for Summary Judgment

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

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

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

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

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

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

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

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

[5] Member Miscimarra would have granted review in the underlying representation proceeding regarding whether the petitioned-for maintenance-only bargaining unit constituted an impermissibly fractured unit that departed from the Employer's organizational structure, see *Odwalla, Inc.*, 357 NLRB 1608, 1611–1613 (2011), and whether an overwhelming community of interest warranted including production and/or other employees in any bargaining unit, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 945–946 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). While he remains of that view, he agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

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

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

B. Refusal to Bargain

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

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

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

CONCLUSION OF LAW

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

REMEDY

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

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

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

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

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

VOLKSWAGEN GROUP OF AMERICA, INC.

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