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,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

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

FINAL REPLY BRIEF OF PETITIONER

Arthur T. Carter
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201
T: (214) 880-8105
F: (214) 594-8601
atcarter@littler.com

A. John Harper III
1301 McKinney Street, Suite 1900
Houston, Texas 77010
T: (713) 652-4750
F: (713) 513-5978
ajharper@littler.com

Elizabeth D. Parry
1255 Treat Boulevard, Suite 600
Walnut Creek, CA 94597
T: (925) 927-4542
F: (925) 407-8240
mparry@littler.com

Maurice Baskin
815 Connecticut Ave., N.W.
Washington, D.C. 20006
T: (202) 772-2526
F: (202) 318-4048
mbaskin@littler.com

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GLOSSARY

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

SUMMARY OF THE ARGUMENT

The NLRB's and Union's briefs fail to overcome the deficiencies in the Regional Director's ("RD's") Decision and Direction of Election ("DDE") and the National Labor Relations Board's ("NLRB's" or "Board's") Order Denying Volkswagen's Request for Review ("RFR").[1] Their briefs could not overcome those deficiencies because "the integrity of the administration process requires that the court may not accept appellate counsel's *post hoc* rationalizations for agency action." *NLRB v. Metropolitan Life Ins. Co*., 380 U.S. 438, 443-44 (1965)); *Spectrum Health v. NLRB*, 647 F.3d 341, 348, n.6 (D.C. Cir. 2011); *Jochims v. NLRB*, 480 F.3d 1161, 1169 (D.C. Cir. 2007).

Notwithstanding NLRB counsel's rationalizations, it remains the case that the Board's decision departs from and cannot be reconciled with the agency's clear precedent holding that the way an employer has organized its operations is a "particularly significant" community of interest factor. *See Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3 (July 28, 2014); *Specialty Healthcare*, 357 NLRB 934, 942, n.19 (2011). The departure from such precedent is based on distinguishable cases and the Board's arbitrary assignment of greater weight to

[1] This Reply refers to the NLRB's responsive brief as the "NLRB's Brief", which it cites at (Bd. Br.___). References to the RD, the Board and their decisions are to the RD's DDE and to the Board's Order Denying Volkswagen's Request for Review. References to Volkswagen's Opening Brief are cited as (Pet. Br.___). Both the RD's DDE and the Board's denial of the RFR are addressed herein for the reasons set forth in Petitioner's Opening Brief 25-26, n.10.

isolated factors while ignoring compelling evidence of a lack of traditional community of interest in the petitioned-for unit. The RD and Board also failed to explain the weight accorded to these isolated factors, and why they outweighed the contrary factors concerning Volkswagen's workplace structure.

Further, neither the RD nor Board analyzed the statutory requirement that they approve bargaining units conducive to efficient collective bargaining. The totality of the circumstances here show that if the maintenance unit is approved, Volkswagen and the Union will be bargaining with an eye towards the impact on the much larger group of production employees, whom the Union also purports to represent through Volkswagen's Community Organizations Engagement ("COE") policy. The consequence is that effective collective bargaining will be undermined rather than promoted.

Finally, if *Specialty Healthcare* is properly applied on its own terms, then the Board's decision in the present case cannot be enforced because it departs from the traditional community of interest test set forth therein. If, on the other hand, the Board's decision here is somehow found to be consistent with the holding in *Specialty*, then that decision itself must be found to be arbitrary and capricious and should be overruled.

ARGUMENT

I.
THE RD AND BOARD DEPARTED FROM PRECEDENT WITHOUT EXPLANATION IN MAKING THEIR UNIT DETERMINATION.

As stated in Volkswagen's opening brief, the RD and Board failed to follow precedent by not giving sufficient weight to Volkswagen's shop structure. (Pet. Br. 41-46). The RD and Board lumped maintenance employees from three separate shops with different supervisors and little daily interaction across shops into one bargaining unit. They did so despite clear precedent holding that the way an employer has organized its operations is a "particularly significant" community of interest factor. *See Bergdorf Goodman*, 361 NLRB No. 11, slip op. at 3; *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.") (emphasis in original); *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); quoting *International Paper Co.*, 96 NLRB 295, 296, n.7 (1951)); *Birdsall, Inc.*, 268 NLRB 186, 190 (1983).

A. The NLRB's Brief Impermissibly Relies on Post-Hoc Rationalizations.

The NLRB's brief attempts to overcome this clear precedent by asserting that a shared department is not a requirement for finding a community of interests. (Bd. Br. 29-30). But having a common job function and some unique skills is not determinative, either. *See Jewish Hosp. Assoc. of Cincinnati*, 223 NLRB 614, 617 (1976). The NLRB's brief further asserts that the "shared qualifications and foundational training"[2] of the maintenance employees "counter any differences in the precise contours of their day-to-day work."[3] (Bd. Br. 30). Neither the RD nor the Board articulated this rationale for their decisions, however, and as such, this is a prohibited post-hoc rationalization. *See Metropolitan*, 380 U.S. at 443-44; *Jochims*, 480 F.3d at 1169.

B. The Board's Decision Ignores the Daily Realities of Maintenance Employees' Work.

Moreover, the community of interest analysis turns on day-to-day job duties and terms and conditions of employment. *See, e.g., Bentson*, 941 F.2d at 1269-70

[2] It is illogical to rely on events that happened years prior to the Union's petition (namely, initial hiring and training of maintenance employees) as somehow outweighing employees' present terms and conditions of employment.

[3] The NLRB cites *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016), for the proposition that all it is required to do is assess the petitioned-for employees "essential function" of repairing machines. Among other things, this fails to account for the fact that maintenance employees cannot transfer from one shop to another without additional training–thus establishing that maintenance employees' "essential functions" are shop-specific. Moreover, as discussed in the main text, *infra* at 9, the maintenance employees in *Nestle* were organized into their own department, unlike in this case.

(requiring the Board to take account of the realities of the situation); *Avon Products, Inc.*, 250 NLRB 1479, 1483 (1980) (relying on "actual job functions" in community of interest analysis). To hold otherwise would allow bargaining units based on theoretical rather than actual similarities and distinctions. And this is why the RD's and Board's giving short shrift to Volkswagen's shop structure amounted to error.

Day-to-day, day-in and day-out, the petitioned-for maintenance employees:

- work in separate shops;
- do not regularly see or interact with maintenance employees in other shops;
- have separate shop-based supervision;
- do not share any supervision across departments until the Director of Manufacturing level (in common with excluded production employees);
- have separate meetings by shop (in common with excluded production employees);
- have separate training by shop; and
- have separate vacation and leave sign-up sheets based on shop and shift (in common with excluded production employees), among other things.

(Pet. Br. 32-39, 56-62). Importantly, maintenance employees in one shop cannot transfer to another shop without additional training because each of the shops uses different equipment and plays a different role in the assembly process. (JA61-62, 273-275, 290, 300-302).

These factors, which were not mentioned in the Board majority's Order at all, demonstrate that maintenance employees' terms and conditions of employment are largely based on the shop in which they work, not on the Board's generalized factors of same job title, same "essential function" and same high-level skills and training. *See NLRB v Tito Contractors, Inc*., 847 F. 3d 724, 732-34 (D.C. Cir. 2017).

Furthermore, these factors indicating the lack of a community of interests among the petitioned-for employees are no more "granular" than those relied on by the RD and Board to find that a community of interests exists. Indeed, unlike the Board's relied-on factors of initial hiring criteria (that are no longer applicable at the plant), generalized job function of "repairing machines", and that maintenance employees sometimes work when production employees do not, the factors pointed out by Volkswagen and dissenting Member Miscimarra directly relate to the things maintenance employees do every day, including their shop-based training and work; daily interaction with excluded employees in their own shop but not other shops; their shop-based supervision; the shared benefits among all employees, both

included and excluded; and the common wage structure, bonus structure and benefits applicable to all included and excluded employees.

C. The RD's and Board Counsel's Efforts to Distinguish *Bergdorf* Fail.

The factors relied on by Volkswagen and dissenting Member Miscimarra are why the RD's and the Board's counsel's efforts to distinguish *Bergdorf Goodman* fail. In *Bergdorf*, 361 NLRB No. 11, slip op. at 3, the Board ruled that sales associates in two different departments (Salon and Contemporary), despite sharing some community of interest factors, were not properly placed in the same unit because "[t]he boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the Employer." Both the RD and Board attempt to sidestep *Bergdorf*, asserting that it is distinguishable because the employees there had no special training or skills, but the maintenance employees here do. This distinction is not tenable. As with *Bergdorf*, the maintenance employees share some community of interest factors. Further, like in *Bergdorf*, where the employer chose to place employees with the same essential function of selling women's shoes into separate departments, so too did Volkswagen place employees with the same "essential function" (as defined by the NLRB's counsel) of "repairing machines" (Bd. Br. 25) into the three separate shops. There are no transfers between the shops, there is no interchange of maintenance employees between the shops, and the maintenance employees' day-to-day job functions and

training vary based on the shop to which they are assigned. (Pet. Br. 43-44).

Indeed, the *Bergdorf* Board recognized that the petitioned-for employees had "a common purpose" of selling women's shoes, a unique wage structure of being the only employees in the store to be paid on a "draw against commission basis," received "the highest commission rates of any sales associates," had the same hiring criteria, had the same employee handbook and had the same appraisal process. 361 NLRB No. 11, slip op. at 2-3. These factors were not sufficient to warrant including the petitioned-for *Bergdorf* employees in one unit, but they are nearly identical to the Board's reliance on maintenance employees' job functions, initial hiring criteria, higher pay, and different schedules in this case.

Why do initial shared skills and training, which are directly related to job function (or in the parlance of *Bergdorf*, "common purpose") outweigh Volkswagen's deliberate business choice to divide these employees into three separate shops with different functions and supervision, and no daily interaction? [4] Neither the RD nor the Board explained why, and the short answer is that they

[4] In dicta in a footnote, the *Bergdorf* Board stated that "other factors might serve to justify dividing the Contemporary Sportswear department" in order to group women's shoe sales people into one unit, and noted that there was no evidence in the record indicating that the sales associates share any distinct skills or have received any specialized training. *Bergdorf*, 361 NLRB No. 11, slip op. at 4, n.5 (emphasis added). Whether selling women's shoes is a distinct skill requiring specialized training or not, the Board's speculation in *Bergdorf* cannot substitute for meaningful factual and legal analysis of the facts of this case.

cannot under the facts of this case.

D. The Board's Reliance on *Nestle*, *Ore-Ida* and *Capri Sun* is Misplaced.

The Board's reliance on several cases finding maintenance units appropriate is misplaced. In fact, these cases support Volkswagen's position because each of them involved maintenance employees who were organized into a separate department and/or had their own supervision. (*See* Pet. Br. 35 n.12). In *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016), the maintenance and production employees were "organized into separate departments with different immediate supervisors." Accordingly, the Fourth Circuit concluded that the approved unit tracked the company's departmental lines. *Nestle*, 821 F.3d at 498; *see also Skyline Distribs. v. NLRB*, 99 F.3d 403, 405 (D.C. Cir. 1996) (stating that the employees in the "maintenance and sanitation area" were the only unrepresented group at the facility, and that there was a separate maintenance supervisor). No such structures exist at Volkswagen; rather, the maintenance employees are assigned to one of three shops and ultimately report to their shop's General Manager, who also has responsibility for the excluded production employees.

Similarly, in *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1016 (1994), unlike here, the maintenance employees were in the "technology support department" and not in the same department as the production employees. The technology support

department, also unlike here, had its own manager. *Id*. at 1017. The Board stated, "It is Board policy, as set forth in *American Cyanamid Co.*, 131 NLRB 909 (1961), to find separate maintenance department units appropriate" when the facts of the case demonstrate the requisite community of interests. *Id*. at 1019 (emphasis added); *accord Capri Sun*, *Inc.*, 330 NLRB 1124, 1124 (2000) (utilizing the same "separate maintenance department unit" language). The Board then began its community of interest analysis by emphasizing that "the Employer's maintenance employees are in a separate departmental section with their own supervisors." *Ore-Ida*, 313 NRLB at 1017. Similarly, in *Capri Sun*, *Inc*., 330 NLRB at 1126, the Board majority emphasized that most maintenance employees were organized into a separate department with a separate maintenance supervisor.[5] Of course, this is consistent with the Board's repeated statements that departmental structure is a "particularly significant" community of interest factor.

The Board has repeatedly distinguished *Ore-Ida* and *Capri Sun* because the maintenance employees in those cases had separate departments, separate supervision and limited contact and interchange with the excluded production employees. *See Buckhorn*, *Inc.*, 343 NLRB 201, 203, n.6 (2004); *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004); *Harrah's Ill. Corp.*, 319 NLRB 749, 750,

[5] *See also Yuengling Brewing Co*., 333 NLRB 892, 893-94 (2001) (maintenance employees were separately supervised and some of them had limited contact with production employees).

n.3 (1995). Regardless of what other factors were involved in these cases, the point is clear: departmental organization, common supervision and regular contact with excluded employees are important community of interest factors, and the RD and Board failed to adequately consider them in this case.[6]

II.
THE RD AND BOARD FAILED TO ARTICULATE WHY THE FACTORS ON WHICH THEY RELIED WERE ENTITLED TO GREATER WEIGHT THAN THE CONTRARY FACTORS IN THE RECORD.

In finding the maintenance-only unit appropriate, the RD and Board failed to explain the weight given to the factors they have relied on and rejected, and why certain factors are more significant than others. Nothing in the NLRB's or Union's responsive briefs provides any basis to change this conclusion.

The NLRB's brief did not and could not take issue with Judge Roberts's admonition in *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004), that where the Board employs a case-by-case, multi-factor test, it must explain

[6] In *Macy's, Inc*., 361 NLRB No. 4, slip op. at 8-9 (2014), a case upon which the NLRB counsel relies, the Board emphasized that the petitioned-for employees were in the same department in finding the unit appropriate. And in *Macy's*, unlike here, there was no effort to create a unit across departmental lines. *Accord Northrup Grumman, Shipbuilding, Inc*., 357 NLRB No. 163, slip op. at 4 (2011). The NLRB's brief also relies on *Country Ford Trucks v. NLRB*, 229 F.3d 1184 (D.C. Cir. 2000), especially in its argument regarding the overwhelming community of interest issue. *Country Ford Trucks* involved auto dealership service technicians and lube workers, and applied Board precedent with respect to such employees. Unlike this case, *Country Ford* did not involve pulling employees from separate departments into one unit, but instead involved the issue of which employees in the same department should be included in the unit.

"which factors are significant and which less so, and why. In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim–or worse." (internal citation omitted). Where such explanation is inadequate or missing altogether, this Court should not enforce the Board's order. *See Tito Contractors*, 847 F. 3d at 732-34 (enforcement denied where the Board failed to consider and discuss "ample evidence" showing lack of community of interest); *see also NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (noting that the Board's unit determination opinion lacked adequate factual analysis); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 793-94 (2d Cir. 2016) (denying NLRB's petition for enforcement where the RD made factual findings that outside cellar employees had interests distinct from other employees, but never explained the weight or relevance of those findings); *Purnell's Pride, Inc. v. NLRB*, 609 F.2d 1153, 1156 (5th Cir. 1980) (stating, "the crucial consideration is the weight or significance, not the number of factors relevant to a particular case").

A. The RD and Board Merely Listed a Limited Number of Factors as Justification for Their Decisions Rather than Providing an Explanation of the Weight Accorded to Such Factors, and Without Taking into Account Contradictory Factors and Evidence.

As Volkswagen demonstrated in its opening brief, the RD and Board merely listed factors supporting their decisions, failed to explain the weight accorded such factors and why, and failed to adequately consider evidence contrary to their

conclusions. (Pet. Br. 26-31, 41). The decisions are therefore not supported by substantial evidence. *Tito Contractors*, 847 F.3d at 733 ("[T]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.")(quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

1. The RD's DDE Does Not Contain the Required Analysis.

At the first *Specialty* step, the RD stated that the maintenance employees (i) were readily identifiable as a group because they shared a unique function; and (ii) had a community of interests because they had the same job title, performed a unique function, had different initial hiring criteria, undergo separate training and provide around-the-clock coverage. (JA623-624). Missing from the RD's first-step analysis is any explanation as to <u>why</u> these factors outweigh countervailing facts demonstrating "actual divisions" among Volkswagen's maintenance employees, including that they:

- are divided into three separate shops;
- work on different machines, have different day-to-day duties, and receive different training depending on their shop;
- work different schedules depending on their shop;
- do not have any significant interchange with employees in other shops;
- do not share any common supervision across shops that is not also

shared by production employees;

- share a common wage and bonus structure with production employees;
- share the vast majority of their terms and conditions of employment with production employees, including facilities, the Employee Guidebook and health and welfare benefits that account for 37% of both production and maintenance employees' compensation.

(Pet. Br. 32-39, 56-62; JA91). *See Bentson*, 941 F.2d at 1269-70 ("[U]nit determinations must conform to the reality of the situation. Otherwise, they are simply arbitrary . . . [w]hen a bargaining unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.")(internal quotations and citations omitted). This is the same type of error the RD committed in *Constellation Brands*, thus leading the court to deny enforcement of the Board's order. 842 F.3d at 794 (RD erred despite his factual findings because "he never explained the weight or relevance of those findings," or to the extent that he did, he did so at step two of the *Specialty Healthcare* analysis).

2. The Board's Denial of Volkswagen's RFR Does Not Contain the Required Analysis.

The Board's order denying Volkswagen's RFR stated that the petitioned-for unit was readily identifiable as a group because it consisted of all employees at the

plant in the maintenance classification.[7] Then, like the RD, the Board listed a series of factors indicating the maintenance employees share a community of interests. The factors listed by the Board included job function, skills, qualifications, training; and different wages, hours, and schedules than production employees. In a statement bereft of analysis, the Board concluded that the factors on which it relied "outweighed" Volkswagen's shop structure.

The problem is that neither the RD nor the Board explained **WHY** controlling weight was accorded the listed factors over the numerous other factors indicating that employees in the petitioned-for unit do not share a community of interests. The RD and Board had to do more at the first *Specialty Healthcare* step than provide a generic, "hyper-generalized" description of the maintenance employees' community of interests and a conclusory statement that such

[7] As applied by the RD, the Board and the NLRB's brief, the "readily identifiable as a group" factor is not a substantive one, but rather is based on whether the petition adequately described the employees included in the unit based on their job title or function. Member Johnson vigorously criticized the Board majority in *DPI Secuprint*, 362 NLRB No. 172, slip op. at 11, n.6, 13-15 (Aug. 20, 2015), for the Board's reliance on job classifications as a "lowest common denominator" proxy for the readily identifiable as a group factor, especially where the employer never recognized such classifications as separate departments. *FedEx Freight, Inc. v. NLRB*, 832 F.3d 432, 446 (3d Cir. 2016), is not to the contrary because all of the drivers in that case were assigned to the same department and had the same skills and functions, but here the maintenance employees are assigned to three separate shops and have different skills and functions based on shop. Further, the majority of similarities between the maintenance employees in each shop are also similarities between all maintenance employees and the excluded production employees.

description "outweighed" the contradictory factors presented here. *Tito Contractors*, 847 F.3d at 733; *Constellation Brands*, 842 F.3d at 794.

Compounding this analytical failure, neither the RD nor the Board specifically addressed the realities of Volkswagen's workplace that (a) that distinguish maintenance employees in one shop from those in another, and (b) are common between maintenance and production employees within each shop and across shops. Again, merely listing factors and pronouncing the unit appropriate—as the RD and Board both did here—is a fundamental abdication of their administrative responsibilities and insufficient to support their unit determination. *See Yeshiva Univ.*, 444 U.S. at 691; *Constellation Brands*, 842 F.3d at 793-94; *LeMoyne Owen College*, 357 F.3d at 61; *Purnell's Pride*, 609 F.2d at 1161-62.

B. The After-the-Fact Explanations in the NLRB's Brief Cannot Cure the Deficiencies in the RD's and Board's Decisions.

The NLRB's brief attempts to fill the gaps in the RD's and Board's decisions by offering after-the-fact explanations, but such explanations are legally invalid and cannot be considered by this Court. *Jochims*, 480 F.3d at 1169. Specifically, the NLRB's brief, like the decisions of the RD and the Board itself, lists various distinctions between production and maintenance employees, which it summarizes as "maintenance employees repair machines and production employees assemble cars." (Bd. Br. 25). This ignores Board authority that distinct job functions and skills, standing alone, are insufficient to constitute a separate

community of interests. *Jewish Hosp. Assoc. of Cincinnati*, 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).[8]

The NLRB's brief then attempts to explain how the list of factors on which it relies "outweigh" Volkswagen's departmental structure by asserting a litany of legal conclusions divorced from the realities of Volkswagen's actual operations, and how its employees function on a day-to-day basis within those operations.[9] (Bd. Br. 30-31). The NLRB's brief also contends that the variations on which Volkswagen relies were present in other cases where the petitioned-for unit was

[8] Volkswagen relied heavily in its opening brief (at 28, 31, 45, 46) on this Court's decision in *LeMoyne-Owen College*, the Second Circuit's decision in *Constellation Brands* and the Fifth Circuit's decision in *Purnell's Pride*, each of which required the Board to explain the "why" and "how" of its decisions. Yet the NLRB's brief does not address *LeMoyne-Owen* or *Purnell's Pride*, and it relegates *Constellation Brands* to a footnote and a string cite discussing section 9(c)(5) standards. In effect, like the RD and the Board itself, the NLRB's brief effectively ignores the requirement that the RD and Board adequately explain their decisions.

[9] The Board asserts, "A shared department is not a requirement for a community of interest," (citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 419-20 (D.C. Cir. 2008)), and that Volkswagen "demands a granular level of sameness that ignores overall similarities and bargaining interests, and is inconsistent with precedent." (Bd. Brief 30-31). None of this supplies a factual explanation of why or how the factors relied on by the RD and Board outweigh the countervailing factors identified by Volkswagen at each step of these proceedings in the specific context of Volkswagen's operations. What is apparent is that neither job function—on which the Board relies—or department assignment—on which Volkswagen relies—is legally sufficient to justify a bargaining unit determination standing alone. There must be something more, some further explanation. It is incumbent on the RD and Board to provide it, and they failed to do so.

also found appropriate. The NLRB's brief cites *DPI Secuprint* for this contention, but Member Johnson dissented in that case because the Board's decision did not "meaningfully assess community-of-interest standards and provide[d] no explanation of the elevation of insignificant distinctions, to the extent they exist, over critical factors."[10] *DPI Secuprint*, 362 NLRB No. 172, slip op. at 10.[11] And that is exactly the case here—the RD and Board ignored factors indicating that no community of interest exists among the petitioned-for employees and elevated relatively insignificant factors all without proper explanation. *See Tito Contractors*, 847 F.3d at 733-34; *Sundor Brands v. NLRB*, 168 F.3d 515, 519 (D.C. Cir. 1999).

In sum, neither the RD nor the Board offer any meaningful analysis of Volkswagen's shop structure or explanation of how and why a job title, job functions and specialized training in the abstract (without recognition that functions and training are shop-specific and vary accordingly) outweighed that

[10] The NLRB's brief relies on *Blue Man Vegas*, 529 F.3d at 426, to argue that the absence of interchange between departments does not render a unit inappropriate. Of course it doesn't—it is one non-dispositive community of interest factor among several, but it is a significant factor and one that is missing from the approved unit here. Moreover, *Blue Man* was decided on the grounds that there was no overwhelming community of interests between the included and excluded employees; here Volkswagen argues that the RD and Board erred at the first *Specialty Healthcare* step.

[11] The Board's decision in *DPI Secuprint* was insulated from review by this or any other court because the petitioning union lost the election. *See* https://www.nlrb.gov/case/03-RC-012019 (last accessed April 26, 2017).

structure at the first step of the *Specialty Healthcare* analysis. Similarly, neither the RD nor the Board explained how or why the conclusory list of factors on which they rely outweighed (a) the differences among the petitioned-for employees terms and conditions of employment driven by Volkswagen's shop structure, and (b) the similarities in terms and conditions of employment between production and maintenance employees. *See Tito Contractors*, 847 F.3d at 732-33. Contrary to the Board's accusation, Volkswagen is not demanding a "granular level of sameness that ignores overall similarities" (Bd. Br. 30). Instead, Volkswagen demands that the RD and the Board comply with their administrative responsibilities to explain their decision, taking all facts **both** favoring and disfavoring their conclusion into account. *See id.* at 733. As Judge Roberts stated in *LeMoyne-Owen College*, 357 F.3d at 61, "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse."

III.
THE RD AND THE BOARD FAILED TO COMPLY WITH THEIR STATUTORY OBLIGATIONS.

The RD and the Board also failed to comply with their statutory obligations under section 9(b) of the National Labor Relations Act ("Act"). 29 U.S.C. § 159(b). Volkswagen's opening brief demonstrated that the Board failed to consider whether its ordered unit would foster industrial peace and stability

through collective bargaining. The Board compounded this failure by finding the unit to be appropriate even though it would not be conducive to efficient and effective collective bargaining.[12] (Pet. Br. 47-51). The NLRB's brief does not address the Board's failures in this regard, and does not answer the merits of Volkswagen's argument. Instead, it incorrectly portrays Volkswagen's position as based on policy arguments (Bd. Br. 44), and does not cite any language, explanation, articulation or analysis by the RD or Board addressing the "industrial stability and conducive to collective bargaining" points made by Volkswagen. In place of such analysis, the NLRB's brief, post-hoc, rationalizes the unit determination by circularly referencing the "host of community of interest factors" on which the RD and Board relied. (Bd. Br. 41, 44).

A. The RD and Board Have a Statutory Obligation to Consider Stable Labor Relations and Effective Collective Bargaining in Making Unit Determinations.

While the policy arguments in favor of the Board considering the impact of unit determinations on collective bargaining are sound, Volkswagen's position is based on the statutory language, which expressly requires the Board to approve bargaining units that are "appropriate for the purpose of collective bargaining . . . ." 29 U.S.C. § 159(b). The Board acknowledged this requirement in

[12] Volkswagen has consistently identified the need for the Board to consider the impact of the proposed unit on the stability of labor relations and collective bargaining. (*E.g.*, VW RFR Br. 32-34).

Kalamazoo Paper Box Corp., 136 NLRB 134, 137-38 (1962). Referring to the "basic and far-reaching responsibility placed upon the Board by Congress," the Board stated that it had a statutory duty to "maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining."

The Supreme Court recognized this requirement in *Allied Chem. Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971), where it cited *Kalamazoo Paper Box Corp*. among other cases, and described the "standard the Board must comply with" in making unit determinations. *Id.* at 172-73. The Court said, "[T]he unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." *Id*. As these cases indicate, more than policy is involved. Instead, based on its own telling, the Board has a **duty** under the Act to determine whether the proposed unit is conducive to labor stability and collective bargaining in addition to assuring employee freedom of choice, and it must decline to approve a unit that does not meet both requirements.

B. NLRB Counsel's Post-Hoc Explanations Cannot Correct the RD's and Board's Failure to Analyze Whether the Unit is Conducive to Stable Labor Relations and Collective Bargaining.

Neither the RD's DDE nor the Board's Order denying Volkswagen's RFR contain any analysis or explanation of how, in light of the facts in this case, the

approved unit is conducive to the stability of labor relations and effective collective bargaining.[13] The absence of such an explanation is error and demonstrates that the unit determination is not supported by substantial evidence. *See, e.g.*, 29 U.S.C. § 159(b); *Constellation Brands*, 842 F.3d at 794-95 & n.41; *LeMoyne-Owen College*, 357 F.3d at 61.

C. NLRB Counsel's Post-Hoc Explanations Are Unavailing.

In an effort to rectify the deficiencies, the NLRB counsel has proffered various after-the-fact explanations as to why the unit in this case is nonetheless proper. Again, such after-the-fact explanations cannot cure the failure of the RD and Board to have considered and explained the impact, if any, of the proposed

[13] The unit approved here will require bargaining with the Union over a small segment of the work force (162 maintenance employees out of a total of 1,417 employees), even though the two groups share substantially the same terms and conditions of employment, and where virtually all topics that will arise at the braining table will impact both groups of employees. For example, the Union has combined and serves as spokesman for both the maintenance and production employees under Volkswagen's Community Organizations Engagement Policy. Its leadership is made up of both maintenance and production employees. Both maintenance and production employees have the same benefits, same health insurance, same 401(k), same measure of and entitlement to bonuses, same wage progression structure, and are all subject to the Team Member Guidebook, which is a comprehensive listing of the terms and conditions of employment covering both groups. All of this, to borrow a phrase from the NLRB counsel is "foundational" to collective bargaining. (Bd. Br. 27). This combination of a small number of represented employees and the substantial commonality of foundational bargaining topics could lead to conflict between the included and excluded employees. The negotiations in the smaller group will necessarily impact the larger, excluded group of employees. The Board's failure to take these facts into account cannot be said to effectuate "efficient collective bargaining," *Pittsburgh Plate Glass Co.*, 404 U.S. at 173.

unit on industrial stability and collective bargaining in the first instance. *See Metro Life Ins. Co.*, 380 U.S. at 443-44; *Jochims*, 480 F.3d at 1169. Even if they were properly before the Court, each of the NLRB counsel's three post-hoc explanations is unavailing. NLRB counsel initially asserts that it is neither unusual nor inconsistent with the Act to provide for a unit consisting of a subdivision or smaller group of an employer's workforce. While this may be true in the abstract, it does not address anything particular about the facts of Volkswagen's situation. As such, this argument suffers from the same type of NLRB "hyper-generality" strongly condemned by this Court in *Tito Contractors*, 847 F.3d at 733, and a group of Fifth Circuit judges commenting on the denial of a petition for *en banc* review in *Macy's Inc. v. NLRB*, 844 F.3d 188, 194-95 (5th Cir. 2016) (Jolly, J., dissenting).

Next, in a subtle mischaracterization of Volkswagen's position, the NLRB counsel stated that the possibility of employer intransigence at the bargaining table does not make the unit determination here inappropriate. Again, this is a conclusion without analysis of the underlying facts that could give rise to a bargaining breakdown. Further, this conclusion is premised on the faulty notion that it would only be employer intransigence that could undermine collective bargaining efficiency. While the Union seeks to represent only 162 maintenance employees, it previously agreed to a combined production and maintenance unit

for the October 2014 NLRB election, and through the COE Policy it purports to act for both groups of employees. Given the broader interests involved, it ignores reality to assume, as the NLRB counsel seems to do, that employer intransigence versus the competing interests of both parties would undermine bargaining efficacy. Stated differently, bargaining over a small percentage of a large, integrated workforce could also be a source of frustration of the bargaining process. *NLRB v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969, 978-79 (4th Cir. 1969) (in reversing a bargaining unit determination, noting that neither the company nor the union could overlook the fact that waiting in the wings were other employees who could not be meaningfully separated from a labor relations standpoint from those in the selected unit).

Finally, the NLRB counsel argues that Volkswagen's concerns about industrial peace and stability and the efficacy of bargaining ignore the countervailing right of the employees to select their bargaining representative. To the contrary, Volkswagen supports the right of its employees to freely choose to organize into appropriate bargaining units consistent with the facts of its operations and the law. But again, the Board itself has said that it must maintain the two-fold objective of insuring employee choice and "fostering industrial peace and security through collective bargaining" in making bargaining unit determinations. *Kalamazoo*, 136 NLRB at 137-38. It is not an answer to Volkswagen's criticism

of the unit decision to assert that "countervailing rights of employees" to select their bargaining representative must be the focus. (Bd. Br. 41). Rather, the Board has a statutory responsibility in rendering unit determinations to account for both employee free choice and effective collective bargaining. The RD and Board's failure to take both statutory interests into account here led them to render a unit determination with a strong likelihood of being inimical to industrial stability, peace and collective bargaining.

IV.
IF THE BOARD'S DECISION IS SOMEHOW DEEMED CONSISTENT WITH *SPECIALTY HEALTHCARE*, THEN *SPECIALTY* SHOULD BE OVERRULED.

For the reasons set forth above and in Petitioner's opening brief, it should be unnecessary to reach the question posed in a number of other courts as to whether *Specialty Healthcare* was improperly decided and should therefore be overruled. This is so because, even on its own terms, the *Specialty Healthcare* holding required the Board to engage in a traditional community of interests analysis that the Board here failed to do in a manner consistent with the precedents discussed above. However, if the Board's approach in the present case is deemed to be consistent with the holding of *Specialty Healthcare*, then *Specialty Healthcare* is cannot be good law and should be overruled.

As the Second Circuit noted in *Constellation Brands*, 842 F.3d at 795, without a proper community of interest analysis at the first *Specialty* step, the

employer would bear the entire burden of proof, which is inconsistent with the NLRA and the Board's 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 *NLRB v. Lundy Packing Co*., 68 F.3d 1577, 1581 (4th Cir. 1995).

As noted above, this Court's holding in *Blue Man Vegas* does not support the Board's new application of *Specialty Healthcare* to the facts of this case, because *Blue Man Vegas* was decided on the limited ground that there was no overwhelming community of interests between the included and excluded employees (*i.e.* the second *Specialty* step). Here, the Board's order either violated *Specialty Healthcare* by not applying the traditional community of interest test at the first *Specialty* step, or, if the Board's decision is consistent with *Specialty Healthcare,* then *Specialty* itself has discarded the traditional community of interest test at its first step, is thus arbitrary and capricious and should be overruled. Either way, the Board's order should be denied enforcement.[14]

[14] Contrary to the Board's Brief at 21, none of the previous cases seeking to overrule *Specialty Healthcare* addressed the application of the Board's holding therein to the first step traditional community of interests tests under facts at all similar to the present case.

V.
CONCLUSION

For all of the reasons set forth in this Reply and in Volkswagen's Opening Brief, Volkswagen respectfully requests that its petition for review be granted, that the Board's cross-petition for enforcement be denied, that the Board's order be denied enforcement in its entirety, and that Volkswagen be granted any other relief, legal or equitable, to which it is entitled.

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Respectfully submitted,

LITTLER MENDELSON, P.C.
Attorneys for Petitioner

By: */s/ Arthur T. Carter*

Arthur T. Carter
2001 Ross Ave., Suite 1500
Dallas, Texas 75201
T: (214)880-8105
F: (214)594-8601
atcarter@littler.com

A. John Harper III
1301 McKinney St., Suite 1900
Houston, Texas 77010
T: (713)652-4750
F: (713)513-5978
ajharper@littler.com

Maurice Baskin
815 Connecticut Ave., N.W.
Washington, D.C. 20006
T: (202) 772-2526
F: (202) 318-4048
mbaskin@littler.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,495 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 2010 in Times New Roman Font 14.

/s/ Arthur T. Carter
Arthur T. Carter

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 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:

Richard F. Griffin, Jr.
Office of the General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Claude T. Harrell, Jr.
NLRB, Region 10
233 Peachtree Street N.E.
Suite 1000
Atlanta, GA 30303-1531

Katherine Chahrouri
NLRB, Region 10
Birmingham Resident Office
1130 22nd St. S, Suite 3400
Birmingham, AL 35205

Michael Nicholson
Nicholson Feldman LLP
232 Nickels Arcade
Ann Arbor, MI 48104

Mike Cantrell
United Auto Workers, Local 42
3922 Volunteer Dr., Suite 7
Chattanooga, TN 37416-3882

/s/ Arthur T. Carter
Arthur T. Carter