Nos. 16-1309, 16-1353

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VOLKSWAGEN GROUP OF AMERICA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED AUTO WORKERS, LOCAL 42

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JILL A. GRIFFIN
Supervisory Attorney

JOEL A. HELLER
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16-1309, 16-1353

VOLKSWAGEN GROUP OF AMERICA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED AUTO WORKERS, LOCAL 42

Intervenor

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Volkswagen Group of America, Inc. ("Volkswagen") is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. United Auto Workers, Local 42 is an intervenor before the Court, and was the charging party before the Board. Amici in support of petitioner are the Chamber of Commerce, et al., and Patrick L. Pendergraft.

B. Rulings Under Review

This case is before the Court on Volkswagen's petition to review a Board Order issued on August 26, 2016, and reported at 364 NLRB No. 110. The Board seeks enforcement of that Order. The Decision and Direction of Election in the underlying representation case issued on November 18, 2015, and the Board's Order denying review issued on April 13, 2016.

C. Related Cases

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of March, 2017

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

---

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16-1309, 16-1353

VOLKSWAGEN GROUP OF AMERICA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED AUTO WORKERS, LOCAL 42

Intervenor

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

Finding that Volkswagen Group of America, Inc. ("Volkswagen") unlawfully refused to bargain with the certified representative of its maintenance employees, the National Labor Relations Board ("the Board") issued a Decision and Order against Volkswagen on August 26, 2016 (364 NLRB No. 110). This case is before the Court on Volkswagen's petition to review, and the Board's cross-application to enforce, the Board's Order. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations

Act ("the Act"). 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of final Board orders may be filed in this Court and allows the Board, in that circumstance, to cross-apply for enforcement. The petition and cross-application were timely, as the Act provides no time limits for such filings. United Auto Workers, Local 42 ("Local 42") intervened on behalf of the Board.

Because the Board's unfair-labor-practice order is based partly on findings made in the underlying representation proceeding, the record in that case (No. 10-RC-162530) is also before the Court pursuant to Section 9(d) of the Act. 29 U.S.C. § 159(d). Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding solely for the purpose of "enforcing, modifying, or setting aside in whole or in part the [unfair-labor-practice] order of the Board." *Id.* The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the Court's ruling in the unfair-labor-practice case. *Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999).

STATEMENT OF THE ISSUE

Did the Board act within its discretion in finding that the petitioned-for unit of maintenance employees is appropriate for purposes of collective bargaining? If

so, the Board properly found that Volkswagen violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 42.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to this brief.

STATEMENT OF THE CASE

In this test-of-certification case, Volkswagen refused to bargain in order to challenge the Board's finding in the underlying representation case that a unit of maintenance employees at Volkswagen's Chattanooga plant is appropriate for purposes of collective bargaining. In the representation proceeding, the Board applied its court-approved standard for unit determinations, and rejected Volkswagen's contention that the only appropriate unit would have to include both production and maintenance employees. Accordingly, the Board found in the unfair-labor-practice case that Volkswagen's refusal to bargain with the union selected by its maintenance employees violated the Act.

I. THE BOARD'S FINDINGS OF FACT

A. Volkswagen Employs Production and Maintenance Workers at Its Chattanooga Facility

Volkswagen operates a vehicle-assembly plant in Chattanooga, Tennessee, where it manufactures the Passat, a mid-size sedan. The Chattanooga facility began operations in 2011 and is Volkswagen's only manufacturing plant in the United States. In the run-up to opening, Volkswagen recruited job applicants from

the area, advertising for both production and maintenance positions. (DDE 2; Tr. 31-33, UX 4(a), 4(b).)[1] As of 2015, Volkswagen employed 1,246 production employees and 162 maintenance employees at the plant. (DDE 3; EX 2.)[2]

B. Production Employees Assemble Cars; Maintenance Employees Repair Machinery

Production employees at the Chattanooga plant operate tools and machinery and install or assemble automotive parts. Each production employee is assigned to one of the plant's three manufacturing departments (also called shops)—body weld, paint, and assembly—or to the logistics and quality-control departments. The manufacturing process begins when production employees weld body panels onto an automobile shell in the body-weld department; the shell is then sent to the paint department for painting and to assembly for installation of the remaining

[1] Record references in this proof brief are to the Regional Director's Decision and Direction of Election ("DDE") and the Board's Order denying Volkswagen's request for review ("O") of the DDE, as well as the transcript ("Tr."), Volkswagen's exhibits ("EX"), Local 42's exhibits ("UX"), and the Board's exhibits ("BX") from the hearing in the representation case. "D&O" cites are to the Board's Decision and Order and "MSJ" cites to the General Counsel's Motion for Summary Judgment in the unfair-labor-practice case. References preceding a semicolon are to the Board's or Regional Director's findings; cites following a semicolon are to supporting evidence. "Br." cites are to Volkswagen's opening brief to the Court, "Chamber Br." cites to the amicus brief of the Chamber of Commerce, et al., and "Pendergraft Br." cites to the amicus brief of Patrick Pendergraft.

[2] Production employees are also referred to as team members or team leads. Maintenance employees are sometimes called skilled team members or skilled team leads. Team leads and skilled team leads have additional responsibilities, but do not carry supervisory authority. (DDE 2; Tr. 50-51.)

components. Production work often consists of repetitive tasks, such as loading parts onto a conveyor belt. If a machine breaks down, production employees do not attempt to fix it, but instead alert maintenance employees to the issue. The logistics department ensures that the manufacturing shops have all necessary parts, and the quality-control department reviews the completed automobiles at the end of the process. (DDE 2-3, 10, 12; Tr. 40-43, 56, 317-19, 340, UX 4(b), EX 2.)

Maintenance employees repair machinery and perform scheduled preventive maintenance, with the goal of keeping the production lines running. Each maintenance employee is assigned to one of the three manufacturing departments; no maintenance employees work in logistics or quality control. In each shop, repair work is done as the need arises; in response to a request, maintenance employees diagnose and fix the particular problem. Scheduled maintenance is assigned by maintenance supervisors on a weekly basis. (DDE 3, 10, 12; Tr. 56, 119, 138, 206-07, 240-41, EX 2, UX 4(a).) Depending on the nature of the repair, some work is done on the production line, and some in dedicated maintenance workspaces—offices or fenced-in areas in each department where maintenance employees store tools or work on equipment. Some of those areas are locked, and accessible only to maintenance employees. Production employees are not prohibited from the unlocked areas, but typically do not spend any time there. (DDE 12-13; Tr. 197, 220-21, 240-41, 276-78, 327-28.) Maintenance employees

have access to locked toolboxes placed throughout their shop, and can check out tools or parts that are not available in their department from the plant's general store. Production employees can retrieve items like work gloves from the store, but not parts or tools. (DDE 13; Tr. 221-22, 277-79, 327-29.)

Maintenance employees do not perform production work as part of their job, and production employees do not perform maintenance work. Nor do maintenance employees ever fill in for production employees, or production employees for maintenance employees. (DDE 10; Tr. 195, 226-27, 283, 306, 331, 348-49.) Production employees who wish to transfer permanently to maintenance must apply for an open position and are assessed for proficiency in electrical and mechanical work. If selected for transfer, they undergo additional training. From the start of operations in 2011 through 2015, eleven employees transferred from production to maintenance; six of those transfers occurred on a single day in July 2014. No maintenance employees have transferred to production. (DDE 6; Tr. 94, 143-45, 306, EX 11.)

C. Production Employees and Maintenance Employees Have Distinct Skills, Qualifications, and Training

Applicants for production positions are not required to have any specific experience; hiring criteria include the ability to follow instructions and interact with machines, and to complete a physical agility test. Upon hire, new production employees undergo some classroom training at the on-site Volkswagen Academy

to learn Volkswagen employment policies and engage in team-building activities. They also attend a standard safety training for all new hires. The remainder of their training occurs on the job. (DDE 5-6; Tr. 84, 150, 314-16, 339, UX 4(b).)

When operations began in Chattanooga in 2011, applicants for maintenance positions were required to have experience and aptitude in electrical, mechanical, facilities maintenance, or programmable-logic-controller work. They also were required to take a written test and a series of skills tests, including wiring, motor mount, and programmable-logic-controller exercises. New hires underwent six months of training at the Volkswagen Academy in areas such as hydraulics, pneumatics, tools, computer boards, and forklift. (DDE 6; Tr. 149-50, 153, 204-06, 262-63, 308, UX 4(a).) Since 2013, external maintenance hiring is done through a three-year automotive mechatronics apprenticeship program in conjunction with Chattanooga State Community College, in which participants receive both classroom and on-the-job training. (DDE 6-7; Tr. 88-92.) Maintenance employees continue to undergo specialized training during their careers. Training related to equipment that is common to all three manufacturing departments—such as conveyor belts—is sometimes conducted across departments. Other training is department-specific. Production employees do not participate in such trainings. (DDE 14; Tr. 141-42, 224-25, 280-81, 293.)

D. Production Employees and Maintenance Employees Have Different Supervisors, Hours, and Wages; Some Terms and Conditions of Employment Are Shared

Each manufacturing department has a general manager and separate mid-level managers for production and maintenance, as well as front-line production supervisors and maintenance supervisors. Supervisors record time and attendance, issue discipline, review time-off requests, and conduct annual evaluations for the employees they oversee. The three departments are overseen by a Director of Manufacturing. Maintenance employees have a dedicated human-resources representative. (DDE 3-5, 10; Tr. 43-49, 116-17, 190-91, 196, 216, 229-30, 273-74, EX 3.)

Production employees work one of two ten-hour shifts, Monday through Thursday. They rotate weekly between the day shift (6:00 a.m. to 4:45 p.m.) and the night shift (6:00 p.m. to 4:45 a.m.). Each shift includes a forty-five minute break for lunch and two other ten-minute breaks. At the start of every shift are six-minute meetings led by each production supervisor for his or her direct reports. (DDE 10-12; Tr. 119-20, 133, 196, 346-47, EX 6 at 75, UX 2.) Production employees are released early for the day if something prevents production from running until the end of their shift, such as a breakdown or insufficient parts. (DDE 11; Tr. 214, 272, 322.) At least twice a year—often around the Fourth of July and Christmas—the plant goes into shutdown mode, during which operation

temporarily ceases and production employees do not work. Production employees may take time off during other periods only if no more than ten percent of the other production employees on their shift are already out. (DDE 11; Tr. 214, 271, 320-23, 342-43.)

Maintenance operates twenty-four hours a day. Employees in the body-weld and paint shops work twelve-hours shifts, rotating between the day shift (7:00 a.m. to 7:30 p.m.) and night shift (7:00 p.m. to 7:30 a.m.); the two shops run seven days a week. Maintenance shifts in the assembly shop are eight hours, with employees rotating between first (8:00 a.m. to 4:40 p.m.), second (4:00 p.m. to 12:00 a.m.), and third shifts (12:00 a.m. to 8:30 a.m.); the shop operates Monday through Friday. In each department, shifts begin with meetings led by maintenance supervisors. (DDE 11-12; Tr. 120-21, 134-35, 223-24, 242-43, 279-80, EX 6 at 75, UX 2.) All maintenance employees have a thirty-minute lunch break and two other ten-minute breaks. They do not take their lunch or breaks at the same time as production employees, so that they can work on the machines while the latter are away. They also must postpone and work through their scheduled breaks if repairs are needed during that time; if they already have gone on break, they are required to return to work. Maintenance employees in all departments also work during shutdown periods. They do not leave early from their shift when production has to halt. Supervisors will deny vacation requests if more than ten percent of

maintenance employees on the shift are already out; the number of absent production employees is not a factor. (DDE 11-12; Tr. 183-84, 214-15, 225-26, 229, 272, 282-84, 321-22, 330, EX 6 at 75.)

Volkswagen maintains a wage-progression schedule with eleven levels, with employees receiving a level increase after completing a set amount of hours. At each level, maintenance employees are paid approximately seven dollars per hour more than production employees. Depending on length of service, maintenance employees receive between $23 and $30 per hour (or $24.25 and $31 for maintenance leads), and production employees receive between $15.50 and $23 (or $16.75 and $24.25 for leads). The highest rate for a production employee thus is the same as the starting rate for a maintenance employee. Employees reach the top level in their progression after approximately seven years of service. (DDE 8; Tr. 66, EX 6 at 76.)

Maintenance employees are all required to carry radios, wear one-hundred percent cotton clothing, and have company email addresses. Only production leads have radios, and production employees need not wear cotton and are not automatically assigned an email address. Maintenance employees communicate with their supervisors via email, and can access any computer in the plant; production employees have access only to stand-alone, limited-use kiosks. (DDE 13-14; Tr. 217, 222-23, 230-33, 275-76, 285, 333, 345, 351.)

All employees—hourly as well as salaried—receive the same benefits. Production and maintenance employees also are all eligible for quarterly bonuses, which are based on achievement of company targets. All employees are given the same employee guidebook and are subject to the same personnel policies. Volkswagen holds company-wide meetings roughly every 3-4 months. (DDE 7-9, 14; Tr. 64-65, 69, 77-81, 97.)

E. The Chattanooga Plant Has No Collective-Bargaining History

Volkswagen's Chattanooga employees have never before been represented by a union. Volkswagen maintains a Community Organization Engagement policy under which it grants certain privileges to organizations that represent its employees' interests. Depending on the level of support it enjoys among employees, an organization can achieve Level 1, Level 2, or Level 3 status, with additional benefits accruing as support increases. With a showing of forty-five percent support, a Level 3 organization can post information at the plant, meet there "as reasonably needed," and send employee and non-employee representatives to meet with management. Participation in the policy does not constitute collective bargaining or bestow exclusive-representative status. (DDE 14-16; Tr. 29, 97-99, EX 12.)

In February 2014, the United Auto Workers lost an election to represent a unit of all production and maintenance employees at the Chattanooga plant. Early

in 2015, Local 42 was recognized by Volkswagen as a Level 3 organization under the Community Organization Engagement policy. (DDE 16; Tr. 100, EX 14.)

II. PROCEDURAL HISTORY

A. The Representation Proceeding: Volkswagen's Maintenance Employees Vote for Representation

In October 2015, Local 42 petitioned to represent a unit consisting of all maintenance employees at Volkswagen's Chattanooga facility. After a hearing, the Board's Regional Director for Region 10 issued a Decision and Direction of Election finding the unit appropriate and scheduling the election for December 3-4. Employees voted for representation by a margin of 108-44. On December 14, the Regional Director certified Local 42 as the exclusive collective-bargaining representative of the petitioned-for unit of employees. (D&O 2; BX 1(a), MSJ Ex. 3, 4.) Volkswagen filed a request for review of the Regional Director's decision, arguing that the unit was inappropriate, and that only a unit of both production and maintenance employees would be appropriate. The Board (Members Hirozawa and McFerran; Member Miscimarra, dissenting) denied Volkswagen's request on April 13, 2016.

B. The Unfair-Labor-Practice Proceeding: Volkswagen Refuses to Bargain

Local 42 wrote to Volkswagen on December 15, 2015, to request bargaining. Volkswagen refused, contending that the unit was not appropriate for

collective bargaining. Local 42 repeated its request on January 8 and April 15, 2016, but Volkswagen again refused. (D&O 3; MSJ Ex. 7, 8.)

On April 26, the Board's General Counsel issued an unfair-labor-practice complaint alleging that Volkswagen violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by refusing to bargain with Local 42 as the certified collective-bargaining representative of its employees. In response, Volkswagen admitted that it had refused to bargain with Local 42, and reasserted its contention that the unit was inappropriate.

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 26, 2016, the Board (Members Miscimarra, Hirozawa, and McFerran) issued a Decision and Order finding that Volkswagen violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 42. The Order directs Volkswagen to cease and desist from that unfair labor practice. Affirmatively, the Order requires Volkswagen to bargain with Local 42 on request, embody any understanding that the parties reach in a written agreement, and post a remedial notice.

STANDARD OF REVIEW

The Board "has broad discretion in making unit determinations, and its unit determinations are accorded particular deference by a reviewing court." *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8-9 (D.C. Cir. 2008) (internal quotations

omitted); *see also RC Aluminum Indus., Inc. v. NLRB*, 326 F.3d 235, 240 (D.C. Cir. 2003) ("[T]he Board has wide latitude in determining an appropriate bargaining unit."). Because "the selection of an appropriate bargaining unit lies largely within the discretion of the Board," the Board's determination "'is rarely to be disturbed.'" *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805 (1976) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Accordingly, the Court "will uphold an NLRB bargaining unit determination unless it is arbitrary or not supported by substantial evidence in the record." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000). The wide discretion afforded the Board in this area "reflect[s] Congress' recognition of the need for flexibility in shaping the bargaining unit to the particular case." *NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985) (internal quotations omitted).

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Court also "applies the familiar substantial evidence test to the Board's … application of law to the facts." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). The Court likewise will "defer to the Board's interpretation of the Act if it is reasonable." *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002).

Where the plain terms of the Act do not specifically address a precise issue, courts will defer to the Board's reasonable interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

SUMMARY OF ARGUMENT

Exercising its wide discretion in such matters, the Board determined that the petitioned-for unit of maintenance employees at Volkswagen's Chattanooga plant is appropriate for purposes of collective bargaining. In so doing, the Board applied its court-approved standard for unit determinations and found that maintenance employees at the Chattanooga plant are readily identifiable as a group and share a community of interest. Maintenance employees share a distinct job classification and function that requires a higher degree of skill, training, and qualifications, and pays more, than production. They also share the bargaining interests that go along with those unique characteristics. Such traits have been found to create a community of interest within maintenance units in prior cases cited by the Board and Regional Director. Volkswagen's attempt to substitute its view of an appropriate unit for the Board's relies on a restrictive approach to the flexible community-of-interest test that is contrary to court and Board precedent.

Volkswagen's preference for a unit of both production and maintenance employees likewise falls short, as Volkswagen failed to meet its burden of showing that the excluded production employees share an overwhelming community of

interest with the maintenance employees such that their absence renders the unit truly inappropriate. The two groups have different functions, skills, training, qualifications, supervision, hours, and wages, and do not interchange. Those differences make clear that the community-of-interest factors do not overlap almost completely, which the Court has recognized as the standard for an overwhelming community of interest.

Finally, Volkswagen's and amici's challenges to the Board's unit-determination standard run up against the universal acceptance of that standard by the courts of appeals that have reviewed it, as well as the standard's grounding in this Court's precedent. Those arguments are also premised largely on mischaracterization or speculation, and provide no grounds for the Court to depart from the analysis of sister circuits or its own caselaw. Nor do they overcome the significant deference afforded the Board in performing its statutorily prescribed role of making unit determinations.

ARGUMENT

The Board Acted Within Its Discretion in Finding the Petitioned-For Unit of Maintenance Employees Appropriate for Collective Bargaining

Maintenance employees at Volkswagen's Chattanooga plant perform a unique function requiring greater skills and training for higher pay than production employees. Pursuant to statutory authority and consistent with prior cases, the Board found a unit of those distinctly highly skilled and compensated employees appropriate for purposes of collective bargaining. Volkswagen's attempt to substitute its own view of what constitutes an appropriate unit rests on an overly restrictive vision of community of interest, by contrast, and its effort to impose its preferred unit of both production and maintenance employees lacks evidentiary support. Because the unit was appropriate, Volkswagen had a statutory obligation to bargain with Local 42 after a majority of maintenance employees voted for union representation. Volkswagen admits that it refused to do so, and it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees." 29 U.S.C. § 158(a)(5).[3]

A. The Board's Unit-Determination Standard

A labor union will serve as the exclusive collective-bargaining representative if selected by "the majority of the employees in a unit appropriate

[3] A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1). *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

for such purposes." 29 U.S.C. § 159(a). Section 9(b) of the Act tasks the Board with "decid[ing] 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 purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Because "the Board receives little guidance from the statute as to how it should make unit determinations," *Local 1325, Retail Clerks Int'l Ass'n v. NLRB*, 414 F.2d 1194, 1199 (D.C. Cir. 1969), such determinations "involve[] of necessity a large measure of informed discretion," *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947). The Board does not conduct that analysis in the abstract, but reviews the appropriateness of the unit identified in the representation petition filed by employees or a union. *See Country Ford Trucks*, 229 F.3d at 1191 (explaining that the Board will "look at the Union's proposed unit"); *Overnite Transp. Co.*, 325 NLRB 612, 614 (1998) (noting that petition "must … be for a particular unit").

To determine if a petitioned-for unit of employees is appropriate for collective bargaining, the Board assesses whether the employees both "are readily identifiable as a group" and "share a community of interest." *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB 934, 945 (2011), *affirmed sub nom. Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013); *Am. Cyanamid Co.*, 131 NLRB 909, 910 (1961); *accord Action Auto.*, 469 U.S. at 494 ("[I]n

defining bargaining units, [the Board's] focus is on whether the employees share a 'community of interest.'"); *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008) (same). "Readily identifiable as a group" means that "the description of the unit is sufficient to specify the group of employees the petitioner seeks to include." *DPI Secuprint, Inc.*, 362 NLRB No. 172, 2015 WL 5001021, at *5 n.10 (2015). To meet that standard, the petition can describe the included employees based on "job classifications, departments, functions, work locations, skills, or similar factors." *Specialty Healthcare*, 357 NLRB at 945.

Whether employees share a community of interest is a fact-specific, case-by-case analysis in which "[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider." *Blue Man Vegas*, 529 F.3d at 421 (internal quotations omitted); *see also RC Aluminum*, 326 F.3d at 240 (emphasizing that "no particular factor controls"). Among the relevant considerations are "similarity of wages, benefits, skills, duties, working conditions, and supervision," *Agri Processor*, 514 F.3d at 9 (internal quotations omitted), and the degree to which those factors are "'separate'" and "'distinct'" to the employees in the unit, *Specialty Healthcare*, 357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). The Board also looks to the extent of interaction and interchange with other employees, as well as whether the unit tracks an internal division that the employer has established, such as "lines

between job classifications …, departments, functions, facilities, and the like." *Specialty Healthcare*, 357 NLRB at 942 & n.19. Employees need not be identical to share a community of interest; some differences can exist within the proposed unit. *Blue Man Vegas*, 529 F.3d at 424-25.

Generally, more than one unit may be appropriate within a particular group of employees. *Blue Man Vegas*, 529 F.3d at 421. And Section 9(a) speaks only in terms of "a unit" that is appropriate for collective bargaining. 29 U.S.C. § 159(a). Courts and the Board therefore have long held that the Board's task is to determine simply whether the proposed grouping constitutes "*an* appropriate unit," *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 38 (D.C. Cir. 2015) (internal quotations omitted); it need not be "necessarily *the* single most appropriate unit," *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991); *see also RC Aluminum*, 326 F.3d at 240 ("[T]he Board need not choose the most appropriate unit, but simply an appropriate unit.").

Once the Board approves of a unit under the community-of-interest analysis, an employer challenging the unit bears the burden of showing that it is nonetheless "truly inappropriate." *Country Ford Trucks*, 229 F.3d at 1189. For example, an employer contending that the unit should include additional employees must show that the excluded employees share an "overwhelming community of interest" with the employees in the unit. *Blue Man Vegas*, 529 F.3d at 421; *Specialty Healthcare*,

357 NLRB at 934. Such circumstances exist when "there 'is no legitimate basis upon which to exclude certain employees'" from the unit, such as when the traditional community-of-interest factors "'overlap almost completely'" between the excluded and included employees. *Specialty Healthcare*, 357 NLRB at 944 (quoting *Blue Man Vegas*, 529 F.3d at 421-22). The employer must do more than show that the excluded employees share a community of interest with included employees, such that the larger unit also would be appropriate, *Blue Man Vegas*, 529 F.3d at 421; *Country Ford Trucks*, 229 F.3d at 1189—a principle that "follows apodictically from the proposition that there may be more than one appropriate bargaining unit," *Blue Man Vegas*, 529 F.3d at 421.[4]

B. The Petitioned-For Unit of Maintenance Employees at Volkswagen's Chattanooga Plant Is Appropriate

The Board reasonably determined that the petitioned-for unit of maintenance

[4] Although the Board previously had used a variety of language to describe the heightened standard for such challenges, it clarified in *Specialty Healthcare* that "overwhelming community of interest" is the test. 357 NLRB at 944-46. In so doing, the Board expressly relied upon and adopted the Court's language and reasoning in *Blue Man Vegas*. 357 NLRB at 943-44. The Board's *Specialty Healthcare* framework has been approved by every court of appeals to review it. *Constellation Brands, Inc. v. NLRB*, 842 F.3d 784, 791-93 (2d Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636, 638-39 (7th Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 439-45 (3d Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557, 564-70 (5th Cir. 2016), *reh'g en banc denied* (Nov. 18, 2016), *petition for cert. filed* (Feb. 22, 2017); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 495-502 (4th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 522-27 (8th Cir. 2016), *reh'g & reh'g en banc denied* (May 26, 2016); *Kindred Nursing Ctrs. East, LLC v. NLRB*, 727 F.3d 552, 559-65 (6th Cir. 2013).

employees is appropriate for purposes of collective bargaining. Applying its judicially approved unit-determination standard, the Board found that the employees in the unit are readily identifiable as a group and share a community of interest, and that Volkswagen failed to meet its burden of showing that they share an overwhelming community of interest with the excluded production employees. Volkswagen's arguments are inconsistent with unit-determination principles, and its and amici's shopworn attacks on the standard itself are premised largely on mischaracterization and speculation.

1. Maintenance Employees Are Readily Identifiable as a Group and Share a Community of Interest

a. Readily Identifiable as a Group

The employees in the petitioned-for unit are readily identifiable as a group because the petition's description of the unit as "[a]ll full-time and regular part-time maintenance employees" employed by Volkswagen at the Chattanooga plant (BX 1(a)) is "sufficient to specify the group of employees the petitioner seeks to include." *DPI Secuprint*, 2015 WL 5001021, at *5 n.10. As described in more detail below, maintenance is a distinct classification used by Volkswagen to describe certain of its employees, and those employees serve the unique function of repairing machinery and performing preventive maintenance. *See, e.g.*, *FedEx Freight*, 832 F.3d at 446 (employees readily identifiable as a group based on classification and function); *Bergdorf Goodman*, 361 NLRB No. 11, 2014 WL

3724884, at *3 (2014) (function); *Macy's, Inc.*, 361 NLRB No. 4, 2014 WL 3613065, at *10 (2014) (classification, function, department), *affirmed*, 824 F.3d 557 (5th Cir. 2016). It is thus clear from the express terms of the petition which employees would be included in the unit and which employees would not. Volkswagen does not seriously contend otherwise.[5]

b. Community of Interest

As explained above, pp. 19-20, the Board considers a variety of factors when determining whether a community of interest exists among employees in a petitioned-for unit, with no one factor or combination of factors determinative. *See, e.g.*, *Blue Man Vegas*, 529 F.3d at 421; *RC Aluminum*, 326 F.3d at 240. Applying that analysis, courts and the Board have found units of maintenance employees at manufacturing plants appropriate where, for example, those employees performed distinct functions requiring unique skills for higher pay, and had little or no interchange with excluded production employees. *See, e.g.*, *Nestle*,

[5] Contrary to Volkswagen's (Br. 29) and amicus Chamber of Commerce's (Chamber Br. 8-9, 13) mischaracterization of the Board's appropriateness analysis as "limited to whether the proposed unit is 'readily identifiable,'" the Board has made clear that whether employees are readily identifiable as a group is a distinct inquiry preliminary to—not a substitute for—whether they share a community of interest. *DPI Secuprint*, 2015 WL 5001021, at *5 n.10; *accord FedEx Freight*, 832 F.3d at 443 (rejecting similar argument); *see also Bergdorf Goodman*, 2014 WL 3724884, at *3 (finding inappropriate a unit of employees that were readily identifiable as a group but lacked community of interest). Here, the Regional Director (DDE 20) and the Board (O 1 n.1) found the maintenance employees readily identifiable as a group and then proceeded to assess community of interest.

821 F.3d at 493-94, 496-97, *Capri-Sun, Inc.*, 330 NLRB 1124, 1124, 1126 (2000), *Ore-Ida Foods, Inc.*, 313 NLRB 1016, 1019-20 (1994), *affirmed*, 66 F.3d 328 (7th Cir. 1995); *Phillips Prods. Co.*, 234 NLRB 323, 323-24 (1978); *see also Am. Cyanamid Co.*, 131 NLRB at 910 (rejecting argument that maintenance-only units are inappropriate). This Court likewise has found appropriate a maintenance-only unit where those employees had a distinct wage scale and "performed job functions requiring special skills not required of other workers." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 407 (D.C. Cir. 1996).

Substantial evidence supports the Board's finding that maintenance employees at Volkswagen's Chattanooga plant share a community of interest. As the Board (O 1 n.1) and Regional Director (DDE 19-21) detailed, many of the factors considered in that analysis both unite the employees in the petitioned-for unit and distinguish them from excluded production employees. Volkswagen's contrary arguments employ a rigid approach that ignores "the need for flexibility in shaping the bargaining unit." *Action Auto.*, 469 U.S. at 494.

All maintenance employees at the Chattanooga plant perform the same function of repairing machinery and performing preventive maintenance, with the shared goal of keeping the production lines operating. They all serve in that role by both responding to requests for assistance and completing scheduled tasks assigned by their supervisors. No other Volkswagen employees perform those

"distinct functions" (DDE 20), either as part of their own duties or as temporary relief. In short, maintenance employees repair machines and production employees assemble cars. *Cf. Nestle*, 821 F.3d at 497 (noting that employees' "essential functions … differ: The maintenance employees are primarily in charge of maintaining the Employer's machinery, and the production employees are primarily in charge of producing the ice cream").[6] And while all maintenance work occurs in the three manufacturing departments, production employees also work in logistics and quality-control. Further, the nature as well as the type of work is unique to maintenance. Unlike maintenance duties, which can change from day to day pursuant to the repair needs presented, production consists largely of performing the same repetitive tasks each day. Concomitantly, all maintenance employees maintain and utilize the "highly specialized skills" (DDE 19) required to perform their function, including knowledge of mechanical, electrical, and programmable-logic-controller technology.

[6] Volkswagen asserts that production employees "perform some maintenance work" (Br. 10, 34), but the work it refers to consists only of a few minor, discrete tasks such as replacing glue tips and cleaning machines. (Tr. 176, 326-27.) Such occasional unskilled tasks are at most "peripheral" to maintenance employees' duties, and, just as "some overlap of lesser skilled duties"—including cleaning and adjusting machines—did "not negate the separate identity of the petitioned-for maintenance unit" in *Capri Sun*, they do not undermine the distinctiveness of Volkswagen maintenance employees' skilled work. 330 NLRB at 1126 & n.9; *see also Nestle*, 821 F.3d at 493, 496 (production employees made "minor adjustments" to resolve "routine technical problems").

Because their jobs "requir[e] special skills not required of other workers," *Skyline Distribs.*, 99 F.3d at 407, maintenance employees also share unique qualifications and "training … that is unavailable to production employees" (DDE 14). All applicants for maintenance positions in the initial rounds of hiring were required to meet certain criteria of experience and technical aptitude, and were assessed via the same written and skills tests; once hired, all new maintenance employees went through six months of training in the same array of technical fields. *See, e.g.*, *Nestle*, 821 F.3d at 496 (maintenance positions require distinct technical qualifications); *Capri Sun*, 330 NLRB at 1124-25 (same). By contrast, applicants for production jobs are not required to have any specific experience or technical knowledge and do not have to take skills tests as part of the hiring process.[7] Nor did they participate in the six-month training at Volkswagen Academy. Because of that gap, production employees who transfer into maintenance positions are required to undergo additional training.

Since 2013, all new external maintenance hires must have completed the three-year mechatronics apprenticeship program at Chattanooga State. *See Ore-Ida*, 313 NLRB at 1018 (all new maintenance hires required to complete

[7] For example, before he came to Volkswagen, maintenance employee Frank Stewart had worked for twenty-four years as an electrician in the maintenance department at a General Motors plant; production employee Vicky Holloway had no previous production or manufacturing experience, but instead had sold insurance and worked in customer service. (Tr. 261-62, 314-15.)

apprenticeship program). Although some graduates of the mechatronics program take production jobs if no maintenance positions are available, the apprenticeship is not a prerequisite for such jobs as it is for maintenance. All maintenance employees also have "separate ongoing training" (DDE 20) throughout their careers. Although some of those trainings are department-specific, others are common across shops. None involve production employees, who do not have the same training requirements.

Maintenance employees also share "unique terms and conditions of employment" (O 1 n.1), including foundational collective-bargaining issues like wages. They have their own pay scale, and all proceed from $23 to $30 per hour (or $24.25 to $31 for leads) over the same length of time. Production employees occupy a separate range on the wage-progression schedule, and are paid seven dollars per hour less at every step. As the Regional Director emphasized (DDE 8), the top rate for production employees, which takes seven years to achieve, is the same as the starting salary for maintenance employees. *See, e.g.*, *Nestle*, 821 F.3d at 493-94 (maintenance workers better paid); *Ore-Ida*, 313 NLRB at 1017 (same); *cf. FedEx Freight*, 832 F.3d at 436 (50-cents per hour difference considered significant). In addition, Volkswagen provides a dedicated human-resources representative for maintenance employees.

In each shop, maintenance work is performed twenty-four hours a day. All

maintenance shifts contain a half-hour lunch break and two other ten-minute breaks. Even during scheduled break times, all maintenance employees essentially remain on-call in case repairs are needed. *See Capri Sun*, 330 NLRB at 1125 (maintenance employees on-call during lunch and breaks). Production never operates round-the-clock, and production employees have no on-call requirement during their breaks. In addition, all maintenance employees work during periods when production employees are off—no maintenance employee can take her breaks at the same time as production employees or go home early if production has to halt for the day, and all maintenance employees work during shutdown periods. *See Nestle*, 821 F.3d at 494 (maintenance employees work shutdowns); *Capri Sun*, 330 NLRB at 1129 (same).

Moreover, Volkswagen itself consistently has treated maintenance as a specific, distinct classification of employees at the Chattanooga plant. From the outset, maintenance jobs were advertised separately. Maintenance employees also are described and tracked separately in Volkswagen's internal material, including its employee guidebooks (EX 6 at 75-76), human-resources organizational charts (EX 2, 3), and team-leader documents (EX 5 at 1-4). *See Specialty Healthcare*, 357 NLRB at 942 n.19 (identifying employer's "lines between job classifications" as relevant to community of interest); *Gustave Fischer, Inc.*, 256 NLRB 1069, 1069 n.5 (1981) (considering how employer "utilizes the skills of [its] labor force"

(internal quotations omitted)).[8]

Given the foregoing community-of-interest factors, and consistent with cited precedent, the Board reasonably found (O 1 n.1) that those factors outweigh the fact that not all maintenance employees work in the same department within the plant. As the Board has explained, "departure from any aspect of the Employer's organizational structure might be mitigated or outweighed by other community-of-interest factors," including "distinct skills" or "specialized training" within the unit, *Bergdorf Goodman*, 2014 WL 3724884, at *4, 5 n.5—both of which are

[8] The cases Volkswagen cites (Br. 40-41) finding maintenance-only units inappropriate all contained factors not present here, such as overlapping job functions, frequent interchange, or shared supervision between maintenance and production employees. *See, e.g.*, *Rayonier, Inc. v. NLRB*, 380 F.2d 187, 192-93 (5th Cir. 1967) (no distinct training, skills, function, or qualifications; equivalent pay); *Buckhorn, Inc.*, 343 NLRB 201, 203-04 (2004) (permanent and temporary interchange, shared supervisors, overlap in wages; production and maintenance employees "routinely perform the same duties"); *TDK Ferrites Corp.*, 342 NLRB 1006, 1007-09 (2004) (same supervisors, schedule; "maintenance [employees] also perform production work, and vice versa"); *Harrah's Ill. Corp.*, 319 NLRB 749, 750-51 (1995) (shared supervision, job duties; "maintenance employees do not use their skills on the job all or most of the time"); *Monsanto Co.*, 183 NLRB 415, 416 (1970) (common supervision, similar functions, permanent and temporary interchange). In any event, given the fact-intensive nature of the unit-determination analysis, the Court has recognized that "there is no need to harmonize all NLRB decisions into a uniform pattern." *Country Ford Trucks*, 229 F.3d at 1190 (internal quotations omitted).

present here.[9]

Volkswagen's central argument nonetheless relies on maintenance employees' assignments to separate departments (Br. 29-41), but neither the different shops themselves nor the differences among some maintenance employees that follow from them undermine the Board's finding. A shared department is not a requirement for community of interest. *See Blue Man Vegas*, 529 F.3d at 419-20 (approving unit consisting of employees from six different departments). And by focusing on differences in the "precise duties" of each shop assignment (Br. 32), Volkswagen demands a granular level of sameness that ignores overall similarities and bargaining interests, and is inconsistent with precedent. The probative weight of maintenance employees' shared (and distinct) function of repairing machinery is not lessened by the fact that they do not all work on the exact same type of machine, and their shared qualifications and foundational training counter any differences in the precise contours of their day-to-day work. *See Nestle*, 821 F.3d at 497 (looking to employees' "essential functions"). Indeed,

[9] Because no such distinct skills or training existed within the unit of shoe salespeople found inappropriate in *Bergdorf Goodman*, 2014 WL 3724884, at *5 n.5, Volkswagen's reliance on that case (Br. 41-45) is misplaced. Further, unlike the unit of maintenance employees here, which tracks one of Volkswagen's own job classifications, that unit lacked "any relationship [with] … any of the administrative or operational lines drawn by the Employer." 2014 WL 3724884, at *5. In distinguishing *Bergdorf Goodman* on those grounds, the Regional Director referred to the case as *The Neiman Marcus Group, Inc.* (DDE 19.)

each of the six departments in the *Blue Man Vegas* unit performed its own specific role as part of a stage show. 529 F.3d at 419, 426. Similarly, most of the maintenance employees in *Capri Sun* were split among three different production departments, and were classified into different designations within maintenance based on their qualifications and skill levels. 330 NLRB at 1124-25. And in *Ore-Ida*, the maintenance employees in the unit specialized in different skill areas ranging from electrician to boiler operator, and were divided into different groups that corresponded to production areas. 313 NLRB at 1016-17.[10]

Other department-based variations that Volkswagen mentions (Br. 35-38) likewise were present in other cases without foreclosing community of interest. As here, the employees in the unit found appropriate in *DPI Secuprint* did not all share the same schedule as each other, but none of them worked the same hours as the excluded employees. 2015 WL 5001021, at *2. The unit employees in that case also had different direct supervisors based on their specific task and shift. *Id.* at *2; *see also Phillips Prods.*, 234 NLRB at 323 (same). And there was no functional interchange between the various departments in the *Blue Man Vegas*

[10] Volkswagen also notes that the shops are "separated by walls" (Br. 6, 32), but the distinct physical location of each shop's maintenance work does not prevent community of interest—connecting bonds do not dissipate along the length of a hallway. *See Macy's*, 2014 WL 3613065, at *11 ("[A] petitioned-for unit is not rendered inappropriate simply because the petitioned-for employees work on different floors of the same facility."); *Yuengling Brewing Co.*, 333 NLRB 892, 892 (2001) (unit employees worked in different buildings).

unit, which "each … remain[ed] solely responsible for the technical tasks ordinarily within its domain." 529 F.3d at 426; *see also Macy's*, 2014 WL 3613065, at *2 (unit employees did not regularly interchange between each other's sales counters). Likewise, the unit found appropriate in *Yuengling Brewing* included employees who did not interchange with other employees in the unit because they lacked the necessary qualifications to perform their work. 333 NLRB at 894, 896.[11]

Contrary to Volkswagen's accusation, the Board thus did not "ignore[]" (Br. 30) Volkswagen's shop structure—the Board just did not find that factor dispositive. Volkswagen's suggestion that it should carry such decisive weight runs counter to the Court's consistent admonitions that no one factor is determinative and that employees need not be identical in order to share a community of interest. *Blue Man Vegas*, 529 F.3d at 421, 424-25; *RC Aluminum*, 326 F.3d at 240. Ultimately, Volkswagen's argument consists of emphasizing different facts than did the Board and downplaying others—an approach that is insufficient to overcome the significant deference afforded the Board's

[11] Moreover, as detailed below, pp. 35-37, each of those factors distinguish maintenance employees from production employees as a whole. No maintenance employee shares a supervisor or a schedule with any production employee, and there is no interchange between the two groups.

determination. *Action Auto.*, 469 U.S. at 494; *Agri Processor*, 514 F.3d at 8-9.[12]

In sum, the Board's determination that maintenance employees—with their unique function, skills, training, wages, and hours—share a community of interest is reasonable, consistent with precedent, and supported by substantial evidence. Because the petitioned-for unit of maintenance employees thus would constitute "*an* appropriate unit," *Dodge of Naperville*, 796 F.3d at 38, the burden shifts to Volkswagen to show that the absence of production employees renders it "truly inappropriate," *Country Ford Trucks*, 229 F.3d at 1189. As explained below, it has failed to do so.

2. Production Employees Do Not Share an Overwhelming Community of Interest with Maintenance Employees

As discussed above, pp. 20-21, an employer contending that a petitioned-for unit is inappropriate because it should include additional employees must show that those employees share an "overwhelming community of interest" with the employees in the unit, such that the community-of-interest factors "'overlap almost completely.'" *Specialty Healthcare*, 357 NLRB at 934, 944 (quoting *Blue Man*

[12] Volkswagen's insistence that differences between shops preclude a community of interest is also inconsistent with its ultimate argument (Br. 56-59, MSJ Ex. 8) that any unit at the Chattanooga plant must include both production and maintenance employees. Like the petitioned-for unit, the production-and-maintenance unit that Volkswagen contends is appropriate—indeed, the "only appropriate unit" (Br. 59)—includes employees from all three manufacturing shops. Indeed, Volkswagen's preferred unit would cover *more* different shops than the petitioned-for unit, as production employees also work in the logistics and quality-control departments.

Vegas, 529 F.3d at 422). For example, the court in *Nestle* found no overwhelming community of interest where maintenance employees were paid more, had greater training and technical knowledge, met higher eligibility requirements, worked a different schedule, performed different work, and had different immediate supervisors than production employees. 821 F.3d at 493-94, 496-98. Similarly, this Court has described "disparities in job functions, skills, working conditions, qualifications, training, and wages" as "key distinctions" when determining whether employees must be included in the same bargaining unit. *Marjam Supply Co. v. NLRB*, 213 F. App'x 4, 6 (D.C. Cir. 2007); *see also Country Ford Trucks*, 229 F.3d at 1190 (included and excluded employees "perform different functions … and are required to have different skills" and "do not share work hours … or compensation").

Although Volkswagen would prefer a production-and-maintenance unit, substantial evidence supports the Board's determination that Volkswagen failed to meet its burden of showing that production employees share an overwhelming community of interest with maintenance employees. Given the number of community-of-interest factors that distinguish maintenance and production employees, it simply cannot be said that those factors "overlap almost completely" across the two groups. *Blue Man Vegas*, 529 F.3d at 422. As detailed above, pp. 24-28, maintenance employees have distinct functions (both in the type and nature

of work), skills, training, qualifications, and wages than production employees. Thus, this case presents all of the "key distinctions" identified by the Court in *Marjam Supply Co.*, 213 F. App'x at 6, as well as many of the circumstances in *Nestle*, 821 F.3d at 493-94, 496-97.[13]

Other factors further distinguish the included and excluded employees. Maintenance and production employees have separate direct supervisors and mid-level managers. Thus, the management representatives with control over discipline, time and attendance, and performance evaluations differ for the two groups.[14] Maintenance employees also work different schedules than production employees. In addition to the need for maintenance work to continue on a twenty-four basis and during times when production is not operating, maintenance employees work eight or twelve-hour shifts with a half-hour lunch break, while

[13] Volkswagen emphasizes (Br. 56) that some production and maintenance employees work in the same departments, but a shared departmental assignment does not create an overwhelming community of interest. *See FedEx Freight*, 832 F.3d at 446 (unit employees "were not in separate departments" from excluded employees); *Country Ford Trucks*, 229 F.3d at 1187 (included and excluded employees part of same department); *Skyline Distribs.*, 319 NLRB 270, 274 (1995) (same), *enforced*, 99 F.3d 403 (D.C. Cir. 1996).

[14] Given the power to impact terms and conditions of employment vested in the separate supervisors, Volkswagen does not identify an overwhelming community of interest by pointing (Br. 25) to shared upper-level management such as the department heads or the Director of Manufacturing. *See Macy's*, 2014 WL 3613065, at *12 (explaining that "common upper-level supervision can be … outweighed by other factors favoring a separate unit").

production employees work ten-hour shifts with forty-five minutes for lunch.[15] Further, production and maintenance employees attend separate start-of-shift meetings, track time and attendance separately, and have some separate work areas. Production employees also do not have the same access to tools, equipment, and computers.

Further undermining Volkswagen's position is, as the Board found (O 2 n.1), the lack of any temporary interchange between production and maintenance—no employees from one group perform the work of the other. And evidence of permanent transfer is both limited and one-way—only 11 transfers from production to maintenance over the course of 4 years, and no such transfers from maintenance to production. *Cf. Macy's*, 2014 WL 3613065, at *13 (finding 9 permanent transfers over 2 years did not establish overwhelming community of interest); *FedEx Freight*, 832 F.3d at 446 (same where transfers went only one-way). Moreover, because an employee's permanent transfer constitutes a wholesale shift from one group to another, the Board long has held that it is less

[15] Such differences are probative even though, as Volkswagen emphasizes (Br. 58), not all maintenance employees have the same supervisor or schedule as each other; because "overwhelming community of interest" is a higher standard than "community of interest," factors that distinguish excluded employees from included employees are relevant to the former inquiry even if they also distinguish some included employees from each other. *See Blue Man Vegas*, 529 F.3d at 424-25, 427 (considering "differences that can be found among all [employees]" in finding no overwhelming community of interest).

significant than temporary interchange in showing a connection between the two groups. *Macy's*, 2014 WL 3613065, at *13; *Ore-Ida*, 313 NLRB at 1020 n.4. Here, especially, the fact that production employees who transfer must undergo additional training shows a lack of overlap with maintenance.

The similarities that Volkswagen identifies (Br. 56-57) cannot overcome those differences, so as to show there is "no legitimate basis upon which to exclude" production employees. *Blue Man Vegas*, 529 F.3d at 421. Volkswagen points to shared benefits, personnel policies, and facilities, but such items regularly have been found insufficient to create an overwhelming community of interest, especially, as here, in light of distinctions in function, skill, and foundational terms and conditions of employment like wages, hours, and supervision. *See, e.g.*, *Nestle*, 821 F.3d at 493; *Macy's*, 824 F.3d at 562; *FedEx Freight*, 832 F.3d at 437; *Ore-Ida*, 313 NLRB at 1017. And where such distinctions are present, working in "an integrated fashion" (Br. 56) with production does not preclude a separate maintenance unit. *See, e.g.*, *NLRB v. Metal Container Corp.*, 660 F.2d 1309, 1314-16 (8th Cir. 1981) (maintenance-only unit appropriate "despite the highly integrated nature of the plant's operation" and "the fact that skilled employees

must coordinate their operations with other employees in achieving maintenance goals" (internal quotations omitted)).[16]

Further, although some of Volkswagen's production and maintenance employees sometimes "work side-by-side" (Br. 37, 56) in the same physical area, the Board has held in similar situations that, absent interchange, such routine contact does not mandate inclusion in the same unit. *DPI Secuprint*, 2015 WL 5001021, at *7; *see also Ore-Ida*, 313 NLRB at 1017, 1020 (describing maintenance employees' practice of "line-walking" in the production area). As Volkswagen notes is the case here (Br. 10, 37), the maintenance-unit employees in *Metal Container* spent 80 percent of their time supporting the production line. 660

[16] Volkswagen does not define the term "integrated fashion," but to the extent it means, like amicus Chamber of Commerce suggests, that maintenance and production employees work "toward a common end" (Chamber Br. 17), included and excluded employees regularly do so, such as in mounting a theatrical production, *Blue Man Vegas*, 529 F.3d at 419, servicing trucks, *Country Ford Trucks*, 229 F.3d at 1187, manufacturing beer cans, *Metal Container*, 660 F.2d at 1310-12, or preparing frozen-food products, *Nestle*, 821 F.3d at 493; *Ore-Ida*, 313 NLRB at 1016-17. No more than in those cases does the fact that production and maintenance employees at Volkswagen share the ultimate overall goal of manufacturing cars mean that any bargaining unit without both of them is inappropriate.

Moreover, because maintenance employees in a manufacturing facility almost always "support" (Br. 7-8, 10) production by repairing the machines they use and responding to their requests for such repairs, Volkswagen's argument essentially is that no maintenance-only units can be appropriate—a position that the Board long ago rejected. *See Am. Cyanamid*, 131 NLRB at 910.

F.2d at 1311. Moreover, not all production employees work in proximity to maintenance employees—over 100 of them work in the logistics or quality-control departments, which have no maintenance employees.

Finally, the fact that, as Volkswagen notes (Br. 58-59), the United Auto Workers previously sought to represent a unit of both production and maintenance employees has no bearing on the appropriateness of a maintenance-only unit. The appropriateness of a larger unit does not render the smaller unit inappropriate. *Specialty Healthcare*, 357 NLRB at 943; *see also Macy's*, 2014 WL 3613065, at *7 & n.30 (union's earlier "willingness to proceed to an election" in a larger unit "does not suggest that it did not believe that a separate unit … would also be an appropriate unit"); *Macy's San Francisco*, 120 NLRB 69, 71-72 (1958) (same). Volkswagen cites no case to the contrary. For the same reason, it is not relevant whether the larger unit is "presumptively appropriate" (Br. 32 n.11, 54). *See Macy's*, 824 F.3d at 570 ("[R]ecognition that a unit is presumptively appropriate does not lead to a requirement that *only* that unit can be appropriate."). Similarly unavailing is Volkswagen's invocation (Br. 58-59) of Local 42's participation in the Community Organization Engagement policy. Bargaining history with an exclusive representative is a relevant community-of-interest factor, but, as Volkswagen acknowledges (Br. 17, EX 12 at 4), participation in the policy is not collective bargaining. *Cf. Mfg. Woodworkers Ass'n*, 194 NLRB 1122, 1123 (1972)

(history of members-only representation carries no weight as to unit's appropriateness).

Ultimately, Volkswagen has at most shown that some similarities exist between maintenance and production employees—similarities that the Regional Director also recognized (DDE 22-23). But that is not the standard. Even if the two groups share a community of interest, such that a unit including both also would be appropriate, Volkswagen's challenge still fails because it has not met its burden of showing an *overwhelming* community of interest between them that would make the petitioned-for maintenance unit inappropriate. *Blue Man Vegas*, 529 F.3d at 421, 424; *Country Ford Trucks*, 229 F.3d at 1189; *Specialty Healthcare*, 357 NLRB at 934, 943.

3. Volkswagen's and Amici's Remaining Challenges Rest on Error and Speculation, and Have Been Roundly Rejected

Volkswagen and its amici launch a variety of other challenges to the Board's unit determination in this case and to the *Specialty Healthcare* standard itself. None have merit, and the attacks on the standard consist largely of recycled arguments that have met with repeated failure in other courts and are inconsistent with this Court's own precedent. Premised on mischaracterization or speculation, they cannot overcome the "particular deference" afforded the Board in evaluating unit appropriateness. *Agri Processor*, 514 F.3d at 8-9.

Volkswagen and amicus Chamber of Commerce contend (Br. 51-55;

Chamber Br. 6-14) that the *Specialty Healthcare* standard (or its application in this case) conflicts with the proscription in Section 9(c)(5) of the Act that "the extent to which the employees have organized shall not be controlling," 29 U.S.C. § 159(c)(5). But every court to hear a Section 9(c)(5) challenge to *Specialty Healthcare* has rejected it. *Constellation Brands*, 842 F.3d at 791-92; *FedEx Freight*, 839 F.3d at 638; *FedEx Freight*, 832 F.3d at 443-45; *Macy's*, 824 F.3d at 568; *Nestle*, 821 F.3d at 498-99; *FedEx Freight*, 816 F.3d at 525-56; *Kindred Nursing Ctrs. East*, 727 F.3d at 563-65; *cf. Blue Man Vegas*, 529 F.3d at 423 ("As long as the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate, the Board does not run afoul of the statutory injunction that the extent of the union's organization not be given controlling weight.") Volkswagen and its amicus offer nothing to warrant a different result here.

As the Supreme Court has explained, in enacting Section 9(c)(5), "Congress intended to overrule Board decisions where the unit determined could only be supported on the basis of the extent of organization." *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 441 (1965). The Board's express reliance on the host of community-of-interest factors discussed above makes clear that the Board's

analysis is not so cabined.[17] And Volkswagen's (Br. 30) and amicus's contention that *Specialty Healthcare* affords the petitioned-for unit a "presumption of appropriateness" (Chamber Br. 14) is simply incorrect. Instead, as it did here, "the Board applies the overwhelming community-of-interest standard only after the proposed unit has been shown to be *prima facie* appropriate"—because the employees within it are readily identifiable as a group and share a community of interest. *Blue Man Vegas*, 529 F.3d at 423. As *Blue Man Vegas* makes clear, such an approach complies with Section 9(c)(5). *Id.*[18]

Similarly mistaken is amicus's assertion that *Specialty Healthcare*'s community-of-interest test examines the petitioned-for unit "in isolation" (Chamber Br. 8-14, 17) and does not consider distinctions between included and

---

[17] Board precedent finding maintenance units appropriate under similar circumstances, *supra* pp. 23-24, further makes clear that the decision in this case did not simply track Local 42's organization. *See Nestle*, 821 F.3d 497-98 (holding that "consisten[cy] with prior Board unit determinations" undercuts Section 9(c)(5) challenge). And contrary to Volkswagen's suggestion (Br. 53-54), whether Local 42 thought it had a better chance of winning in a maintenance unit is not, by itself, legally relevant. A petitioner's desire to win an election is only a problem if the unit it proposes is otherwise inappropriate. *See FedEx Freight*, 839 F.3d at 637 (whether party has "a better chance of winning the election" is "tangential to whether or not different worker groups have a community of interest").

[18] The lack of a presumption also distinguishes *Specialty Healthcare* from the approach amicus invokes (Chamber Br. 7) that was rejected on Section 9(c)(5) grounds in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1581 (4th Cir. 1995)—a distinction made by the Fourth Circuit itself in *Nestle*, 821 F.3d at 498-99. *See also Blue Man Vegas*, 529 F.3d at 422-23 (distinguishing *Lundy*).

excluded employees. That argument, too, has been roundly rejected. *See, e.g.*, *Macy's*, 824 F.3d at 568 ("The community of interest test articulated in *Specialty Healthcare* … does not look only at the commonalities within the petitioned-for unit."); *FedEx Freight*, 832 F.3d at 442-43 (same); *FedEx Freight*, 816 F.3d at 523 (same). Both *Specialty Healthcare* itself, 357 NLRB at 942, and the Board's decision in this case—with its articulation of the ways maintenance employees are "different," "separate," and "unique" (O 1 n.1)—belie amicus's proposition. And amicus's speculation (Chamber Br. 9, 13) that Regional Directors in some future case might not follow stated Board law on that point cannot be grounds for rejecting the law.

Further, amicus's challenge to the "overwhelming community of interest" standard (Chamber Br. 12-13) is largely an exercise in futility, as that standard was used by this Court in *Blue Man Vegas*. Amicus's contention (Chamber Br. 15-16) that *Blue Man Vegas* concerned only the preservation of historical units finds no support in the decision itself; the fact that the unit under review had previously existed was not part of the Court's analysis, and the Court gave no indication that its holding was limited to such situations. Nor, contrary to amicus's complaint (Chamber Br. 9, 12), is the standard impossible to meet. *See Odwalla, Inc.*, 357 NLRB 1608, 1611-13 (2011) (finding overwhelming community of interest); *Lodigan, Inc.*, 332 NLRB 1246, 1255 (2000) (same); *see also FedEx Freight*, 832

F.3d at 444-45 (rejecting "impossible standard" argument); *FedEx Freight*, 816 F.3d at 526 (same).[19]

No more availing are Volkswagen's and amicus's policy arguments (Br. 47-51; Chamber Br. 21-23) regarding the potential impact on collective bargaining of less than plant-wide units. Such a scenario is neither unusual nor inconsistent with the Act, which explicitly provides that an appropriate unit can consist of a "subdivision" of an employer or plant. 29 U.S.C. § 159(b); *see also Am. Hosp. Ass'n*, 499 U.S. at 610 (explaining that "one union might seek to represent all of the employees in a particular plant … or perhaps just a portion thereof"). Further, the presence of an "unrepresented group of employees" whom bargaining potentially "could impact" (Br. 49-50) is not fatal, but a product of the fact recognized by this Court that some similar interests (even enough to show community of interest) can exist between included and excluded employees without rendering any unit without both of them inappropriate. *Blue Man Vegas*, 529 F.3d at 421, 424. Similarly wanting is Volkswagen's claim (Br. 50) that it would lack incentive to bargain over certain issues under those circumstances, as the possibility of employer intransigence at the bargaining table does not render a

[19] Although amicus also asserts that *Blue Man Vegas* "never condoned the 'overlapping almost completely' burden" (Chamber Br. 15), the Court expressly stated that when two groups of employees have interests that "overlap almost completely[,] this indicates they have an overwhelming community of interest," 529 F.3d at 422.

unit inappropriate. In addition, the focus on the concerns of employers ignores the countervailing statutory right of employees to select their bargaining representative.

Amicus's concerns (Chamber Br. 17-23) with multiple bargaining units in the same workplace—an issue not presented here—is likewise off base. *See, e.g.*, *Banknote Corp. of Am., Inc. v. NLRB*, 84 F.3d 637, 639-40 (2d Cir. 1996) (approving three units in same workplace). In response to similar conjecture, the Fifth Circuit explained in *Macy's* that "the Board's history of approving multiple units … suggests that neither workers nor businesses will suffer grave consequences" from such an outcome. 824 F.3d at 566. Moreover, amicus's parade of horribles also fails on its own terms. It depicts (Chamber Br. 21-22) a scenario in which the existence of different bargaining units in a workplace prevents an employer from cross-training or swapping shifts across units and results in disparate employment terms. But the Board's unit-determination analysis under *Specialty Healthcare* would separate into different units employees for whom that situation already existed—as in this case, included and excluded employees may have different skills and training, lack of interchange, and different terms and conditions of employment. The Board's evaluation of such factors on a case-by-case basis, as well as its generally fact-intensive determination of appropriateness, also demonstrates that, contrary to amicus's suggestion, the Board

"consider[s] the realities of the particular business setting" (Chamber Br. 18) when applying *Specialty Healthcare*.

Finally, amicus Patrick Pendergraft's argument (Pendergraft Br. 6-11) that the *Specialty Healthcare* standard interferes with employees' right to refrain from concerted activity is not properly before the Court, as that argument was never made to the Board. Under Section 10(e) of the Act, "[n]o objection that has not been urged before the Board … shall be considered by the court" absent "extraordinary circumstances." 29 U.S.C. § 160(e); *see also New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) ("[S]ection 10(e) prevents us from considering the argument raised for the first time on appeal."); *cf. Am. Dental Ass'n v. Shalala*, 3 F.3d 445, 448 (D.C. Cir. 1993) (explaining that the Court "do[es] not address … contentions raised by *amicus curiae* … [that] are beyond the scope of the issues raised below by the appellants"). Amicus makes no effort to show such circumstances.

In sum, neither Volkswagen nor its amici offer the Court a reason to part ways with its sister circuits that uniformly have approved *Specialty Healthcare* or to depart from its own analysis in *Blue Man Vegas*. And although Volkswagen goes to great lengths to substitute its own preferred unit, the Board's finding that the petitioned-for, maintenance-only unit is appropriate is reasonable, supported by record evidence, and consistent with Board and court precedent. Volkswagen's

refusal to bargain with the representative chosen by its distinctly skilled, trained, and compensated maintenance employees was thus unlawful, and the Board's Order should be enforced.

CONCLUSION

The Board respectfully requests that the Court deny Volkswagen's petition for review and enforce the Board's Order in full.

s/ Jill A. Griffin
JILL A. GRIFFIN
Supervisory Attorney

s/ Joel A. Heller
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2949
(202) 273-1042

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
March 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VOLKSWAGEN GROUP OF AMERICA, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1309, 16-1353
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	10-CA-166500
	)	10-CA-169340
Respondent/Cross-Petitioner	)	10-RC-162530
	)	
and	)	
	)	
UNITED AUTO WORKERS, LOCAL 42	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 10,955 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of March, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VOLKSWAGEN GROUP OF AMERICA, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-1309, 16-1353
v.	)	
	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	10-CA-166500
	)	10-CA-169340
Respondent/Cross-Petitioner	)	10-RC-162530
	)	
and	)	
	)	
UNITED AUTO WORKERS, LOCAL 42	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Dated at Washington, DC
this 20th day of March, 2017

STATUTORY ADDENDUM

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities ….

Section 8(a) of the Act (29 U.S.C. § 158(a)):

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

…

(5) to refuse to bargain collectively with the representatives of his employees ….

Section 9 of the Act (29 U.S.C. § 159):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) 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 purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

…

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

Section 10(e) of the Act (29 U.S.C. § 160(e)):

…. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances ….