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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. **Parties and Amici.** All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.

B. **Ruling Under Review.** References to the rulings at issue appear in the Brief for the National Labor Relations Board.

C. **Related Cases.** This case has not previously been before this Court or any other court. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

Respectfully submitted,

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Date: March 27, 2017

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National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

GLOSSARY

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

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

INTRODUCTION

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

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

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

STATEMENT OF THE CASE

I. Facts

Volkswagen operates an automobile manufacturing facility in Chattanooga, Tennessee. DDE 1. The plant, which is Volkswagen's only manufacturing facility in the United States, began operation in 2011. Tr. 33.

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

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

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

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

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

each maintenance supervisor are several maintenance team leaders. DDE 4-5; VW Ex. 3; Union Ex. 1 & 5. Maintenance employees sign in at the beginning of each shift on a separate sign-in sheet from production employees. DDE 10; Tr. 284, 331.

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

There is a human resources manager dedicated solely to maintenance employees throughout the facility. DDE 10. Tr. 162-63, 191-92, 229-30, 272-73. This human resources manager met with maintenance employees at their separate pre-shift meetings to introduce himself and sent every maintenance employee an e-mail stating that he is their human resources "direct representative" and providing his contact information. Tr. 229-30.

The responsibility of maintenance employees throughout the facility is to keep the production line running. DDE 12. Maintenance employees accomplish this both by performing preventative maintenance and by making adjustments and repairs when a machine is not functioning properly. *Ibid.* Much of this work

requires a high degree of technical skill. For example, a maintenance employee from the paint shop testified about his duties maintaining and repairing equipment in a "highly explosive" environment where equipment must "not cause a spark, which could cause an explosion." Tr. 263. While the precise work undertaken by maintenance employees varies somewhat between shops, Volkswagen's Assembly General Manager testified that these are "just slight differences. All areas have conveyors. All have electrical. All have mechanical." Tr. 171.

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

The responsibility of production employees is to "assemble the cars." Tr. 250. This involves highly repetitive work such as loading parts onto a robot or conveyer in the body shop, Tr. 317-318, or checking that sealer is sprayed correctly onto the bottom of the car in the paint shop, Tr. 340. Production employees do not do maintenance work. DDE 10. There is also no interchange between maintenance and production employees. *Ibid.* Production employees do

not have access to locked toolboxes or locked areas used by maintenance employees and do not work in the maintenance workshops. DDE 13; Tr. 297-99.

Maintenance employees throughout the facility share the same or similar work schedules, which differ substantially from the work schedules of all production employees. Maintenance employees in the body weld and paint shops work 12.5-hour shifts and staff these two shops 24 hours per day, 7 days per week. DDE 11. Maintenance employees in the assembly shop work three 8-hour shifts and staff that shop 24 hours per day, Monday through Friday. *Ibid.* In contrast, production employees in all three shops work one of two ten-hour shifts – either 6 a.m. to 4:45 p.m. or 6 p.m. to 4:45 a.m. – and only work Monday through Thursday. DDE 10. Maintenance employees are expected to work when production employees are on breaks and lunches. DDE 11-12. As a result, maintenance employees never take breaks or lunch at the same time as production employees. DDE 12.

Maintenance employees are required to work on days and at times when production employees are not. Volkswagen shuts down production during certain days and weeks of the year for maintenance, construction, or the installation of new equipment. Tr. 214. For example, in 2015, the facility went on "summer shutdown" for the week leading up to July Fourth. Union Ex. 2. Maintenance employees from throughout the facility, but not production employees, work on

these "shutdown days," and maintenance employees are restricted from taking vacation or other leave on these days. DDE 11. If there is a breakdown or if a line runs out of parts, production employees are sometimes released before the end of their scheduled shift. *Ibid.* In contrast, maintenance employees are never released early. *Ibid.*

Maintenance employees who were hired when the plant first opened were required to have experience in industrial electricity, industrial mechanical, electronics, or facilities maintenance (HVAC, chillers, boilers, water treatment). DDE 6; Union Ex. 4A (job advertisement for "skilled maintenance team members"). For example, the maintenance employees who testified at the hearing had significant prior skilled maintenance experience, including one employee who worked as an electrician in the maintenance department at General Motors for 24 years and another who worked as a pipefitter at a tire manufacturing facility for ten years and, before that, as a mechanic at an aluminum manufacturing plant. Tr. 203-04, 261-62. In contrast, applicants for production positions were not required to have any specific experience. DDE 6; Union Ex. 4B (job advertisement for "production team members").

Applicants for maintenance positions were required to take both a written and a skills test and, once selected, were required to undertake six months of training before beginning work. *Ibid.* Applicants for production positions were

not required to take any tests other than a basic physical agility test and, after some brief hands-on training, were permitted to start work almost immediately. *Ibid.*

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

Once hired, all maintenance employees from throughout the facility receive ongoing training at Volkswagen's on-site training facility that is not available to production employees. DDE 14; Tr. 141-42. Maintenance employees from throughout the facility also receive occasional training about equipment that is common to all shops, such as conveyors. *Ibid.*; Tr. 224-25. Production employees do not participate in any of this training. *Ibid.*; Tr. 225.

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

II. PROCEDURAL HISTORY

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

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

Volkswagen filed a request for review of the Regional Director's decision with the NLRB. The Board denied the company's request for review, explaining that the petitioned-for unit was appropriate because "[t]he employees in the petitioned-for unit are readily identifiable as a group, as it consists of all maintenance employees employed by the Employer at its Chattanooga, Tennessee facility" and also that the maintenance employees "share a community of interest

under the traditional criteria[.]" Or. 1-2 n.1. The Board also rejected Volkswagen's claim that the smallest appropriate unit had to include all production employees, explaining that "many of the traditional community-of-interest factors differentiate the production employees from the maintenance employees; it is impossible to say that the factors 'overlap almost completely.'" *Ibid.* (quoting *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 944 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013)).

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

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

SUMMARY OF ARGUMENT

The NLRB properly applied its traditional community of interests test to determine that a unit consisting of all maintenance employees at Volkswagen's automobile manufacturing facility is appropriate for collective bargaining. That

conclusion is fully supported by the evidence, which shows that maintenance employees are much more highly skilled, trained, and paid than the company's production employees, are separately supervised, have their own dedicated human resources manager, work different schedules including working during plant shutdowns, never interchange with production workers, and perform a fundamentally different function in the workplace, *viz.*, production employees assemble the cars; maintenance employees maintain and repair the specialized machinery used to build those cars. Because the skills, working conditions, and job function of maintenance employees differ so significantly from those of production employees, it is entirely sensible for Volkswagen to negotiate with maintenance employees separately from production workers. The NLRB's conclusion in that regard fully accords with its longstanding practice of approving separate maintenance units in cases presenting similar facts.

Against all this, Volkswagen's principal argument is that because maintenance employees work in three separate shops and are not organized in a single plant-wide maintenance department, maintenance employees from across the facility do not share a sufficiently strong community of interest with each other to constitute an appropriate unit. The NLRB correctly rejected this argument based on the evidence, concluding that the similarities shared by maintenance employees throughout the facility – a common job title, a common job function of maintaining

and repairing equipment, common skills, common initial training as well as ongoing training, common or substantially similar work schedules, a common requirement of working during plant shutdowns – substantially outweigh any slight differences between maintenance employees who work in different shops.

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

Finally, Volkswagen argues briefly that the NLRB's decision is flawed because the Board allegedly relied on the extent of union organization in reaching its unit determination in violation of Section 9(c)(5) of the NLRA. Because Volkswagen acknowledges that the Board did not expressly rely on the extent of organization in reaching its decision, the nub of the company's argument seems to

be an unsupported allegation that the Board acted in bad faith by approving the unit after Local 42 had previously sought to organize a broader unit at the plant. There is no merit to Volkswagen's entirely unsupported allegation that the NLRB acted in bad faith in reaching its decision. Nor was it improper for the Board to approve the petitioned-for unit despite Local 42's previous effort to organize a larger group. As long as a unit is appropriate on its own terms, neither the fact that a larger appropriate unit also exists nor the fact that the union previously sought to organize the larger unit renders the smaller unit inappropriate.

ARGUMENT

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

Volkswagen argues that this case is different from other maintenance unit cases because the company has organized the facility on a shop-by-shop basis such that maintenance employees do not have enough in common with each other across

shops to constitute a single appropriate unit and, consequently, the only appropriate unit consists of all production and maintenance employees throughout the entire facility. In addition, Volkswagen argues that the NLRB failed to properly apply the analytical framework, set forth in the Board's *Specialty Healthcare* decision, that applies when an employer contends that additional employees should be added to the petitioned-for bargaining unit and that the Board violated Section 9(c)(5) of the NLRA by allowing the extent of union organization to control its unit determination.[2] As we explain in detail below, none of the company's arguments have merit.

1. The NLRB's determination that all of the maintenance employees at the Chattanooga facility share a sufficient community of interest to constitute an appropriate unit is clearly correct. Although Volkswagen directs its maintenance

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

In any event, as the NLRB correctly explains in its brief, the attacks on *Specialty Healthcare* leveled by Volkswagen's *amici* "have met with repeated failure in other courts and are inconsistent with this Court's own precedent." NLRB Br. 40-46. *See id.* at 21 n.4 (listing circuit cases uniformly approving of the *Specialty Healthcare* framework).

employees through shop-based maintenance managers and maintenance shift supervisors rather than through a single facility-wide maintenance director, maintenance employees throughout the facility easily share a sufficient community of interest with each other based on numerous other traditional factors to constitute an appropriate unit.

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

a. Section 9(b) of the NLRA delegates to the Board the authority to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). "The Board . . . has 'broad discretion in making unit determinations, and its unit determinations are accorded particular deference by a reviewing court.'" *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8-9

(D.C. Cir. 2008) (quoting *Speedrack Prods. Group, Ltd. v. NLRB*, 114 F.3d 1276, 1278 (D.C. Cir. 1997)). For this reason, this Court will uphold the Board's unit determination unless it is "'arbitrary and without substantial evidence.'" *Salem Hospital Corp. v. NLRB*, 808 F.3d 59, 67 (D.C. Cir. 2015) (quoting *Cleveland Construction, Inc. v. NLRB*, 44 F.3d 1010, 1014 (D.C. Cir. 1995)).

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

In accordance with this statutory framework, "[u]nder NLRB law, the Board first looks to the unit sought by the union. If the unit is appropriate, the Board's inquiry ends." *Cleveland Construction*, 44 F.3d at 1013. In evaluating whether a unit is appropriate, "the Board's focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985)

(quoting *South Prairie Constr. Co. v. International Union of Operating Engineers*, 425 U.S. 800, 805 (1976)). "A cohesive unit – one relatively free of conflicts of interest – serves the Act's purpose of effective collective bargaining and prevents a minority interest group from being submerged in an overly large unit." *Ibid.* (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941), and *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-73 (1971)). This Court has emphasized that "'[t]here is no hard and fast definition or an inclusive or exclusive listing of the factors to consider under the community-of-interest standard. Rather, unit determinations must be made only after weighing all relevant factors on a case-by-case basis.'" *Blue Man Vegas*, 529 F.3d at 421 (quoting *Country Ford Trucks*, 229 F.3d at 1190-91). Such relevant factors include "whether, in distinction from other employees, the employees in the proposed unit have 'different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit.'" *Ibid.* (quoting *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 n.11 (D.C. Cir. 1996)).

Where an employer challenges a unit that the NLRB has found appropriate on the ground that it improperly excludes additional employees, "the employer must do more than show there is another appropriate unit because 'more than one

appropriate bargaining unit logically can be defined in any particular factual setting.'" *Ibid.* (quoting *Country Ford Trucks*, 229 F.3d at 1189). "'Rather, . . . the employer's burden is to show the *prima facie* appropriate unit is 'truly inappropriate.'" *Ibid.* (quoting *Country Ford Trucks*, 229 F.3d at 1189).

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

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

The NLRB's conclusion in this case is entirely consistent with its over half-century old policy of finding separate maintenance units appropriate where "maintenance employees are readily identifiable as a group whose similarity of function and skills create a community of interest such as would warrant separate representation." *American Cyanamid Co.*, 131 NLRB 909, 910 (1961). Cases applying that policy to find separate maintenance employee units appropriate in manufacturing facilities similar to this one are legion. *See, e.g.*, *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 494 (4th Cir. 2016); *Skyline Distributors v.*

NLRB, 99 F.3d 403, 406-07 (D.C. Cir. 1996); *Yuengling Brewing Co.*, 333 NLRB 892 (2001); *Capri Sun, Inc.*, 330 NLRB 1124 (2000); *Ore-Ida Foods, Inc.*, 313 NLRB 1016 (1994), enfd. 66 F.3d 328 (7th Cir. 1995); *Franklin Mint Corp.*, 254 NLRB 714 (1981); *Phillips Products Co.*, 234 NLRB 323 (1978); *Mobay Chemical Corp.*, 225 NLRB 1159 (1976); *Crown Simpson Pulp Co.*, 163 NLRB 796 (1967). *Cf. Lewis Mardon U.S.A., Inc.*, 332 NLRB 1282 (2000) (excluding maintenance employees from a petitioned-for unit of production employees).

In contesting the NLRB's conclusion that maintenance employees throughout the Chattanooga facility share a sufficiently strong community of interest to constitute an appropriate plant-wide unit, Volkswagen's principal claim is that its "shop structure drives critical differences in maintenance employees' terms and conditions of employment across shops," Pet. Br. 32 (bold and capitalization omitted), *i.e.*, that maintenance employees in the body weld shop, the paint shop, and the assembly shop have so little in common with each other that together they do not constitute an appropriate unit. Volkswagen emphasizes that "the shops (and thus the employees in them) are physically separated by walls," that "much of the equipment maintenance employees repair and maintain is shop-specific because each shop has a different role in the assembly process," and that "[a]s a result, [maintenance employees'] precise duties in each shop vary, the

training needed to work in each shop is different, and maintenance employees cannot transfer from shop to shop without additional training." Pet. Br. 32-33.

Even if all that were so – and the evidence makes clear that the differences in maintenance employee duties between shops are "slight" because "[a]ll areas have conveyors[,] . . . electrical[, and] . . . mechanical" components, Tr. 171, and that maintenance employees may transfer to "other Skilled Team Member positions in any production shop," VW Ex. 6, p. 97 – it would do little to detract from the Board's overall conclusion that many *other* community of interest factors strongly point in the direction of a shared community of interest between all maintenance employees in Volkswagen's facility.[3] As the Regional Director cogently explained in rejecting Volkswagen's arguments on this point,

> "Maintenance employees share a job title and perform distinct functions – they all perform preventative maintenance and repairs. While they may work on different machines once they are assigned to a department, they all shared common initial hiring criteria and training. They undergo separate

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

> ongoing training and sometimes train with employees assigned to other shops. Maintenance employees in the body weld and paint shops work an identical schedule to provide maintenance coverage around the clock, seven days a week. While maintenance employees in the assembly shop work a different schedule, they still provide coverage around the clock five days per week. All maintenance employees work at times when production employees are not working and they are all required to work on days and weeks when the plant is shut down. While there is not interchange among maintenance employees in the three shops, that fact alone would not render the unit 'fractured.'" DDE 20-21 (citations omitted).

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

maintenance employees' schedules in all the shops are all calibrated to "provide coverage around the clock" in contrast to the schedules of production employees. DDE 20-21. As the NLRB further elaborated in denying Volkswagen's request for review, factors such as "similar job functions; shared skills, qualifications, and training" and "supervision separate from the production employees'; wages different from the production employees'; hours and scheduling different from production employees'" "*substantially outweigh* the fact that [Volkswagen] assigns the maintenance employees to three separate departments." Or. 1-2 n.1 (emphasis added).[4]

Relatedly, Volkswagen contends that the NLRB's decision in this case conflicts with the Board's decision in *Bergdorf-Goodman*, 361 NLRB No. 11 (July 28, 2014), alleging that "[h]ere, just like in *Bergdorf*, the Union broke apart Volkswagen's organizational structure by cherry-picking three separate sub-groups

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

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

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

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

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

In this case, in contrast, the NLRB found, as recounted above, that although Volkswagen does not maintain a facility-wide maintenance department, maintenance employees from across the plant nevertheless "share a community of interest under the traditional criteria." Or. 1-2 n.1. The most basic point is that all maintenance employees throughout Volkswagen's facility "share a job title" of

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

[5] Insofar as Volkswagen suggests that the Board's approval of a unit that does not strictly track the company's departmental lines is legal error, *see* Pet. Br. 45 & n.15, that argument is without merit. Whether "a unit of employees" is "readily identifiable as a group" may turn on "job classifications, departments, functions, work locations, skills, or similar factors." *Specialty Healthcare*, 357 NLRB at 945. Here, maintenance employees from across the facility share the same job classification, function, and skills without regard to which shop they work in.

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

In the case below, the Regional Director described a long list of community-of-interest factors that distinguish maintenance employees from production employees, including that "production and maintenance employees are separately

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

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

Volkswagen contends that the factors relied on by the Board are outweighed by the fact that "maintenance employees work side-by-side with the excluded production employees in their own shops" and "spend 80% of their time on the floor of their own shops interacting with the excluded production employees." Pet. Br. 37. As the Regional Director correctly concluded, however, where maintenance employees otherwise have a sufficiently separate community of interest from production employees, "'interaction between the production and

maintenance employees when working together on their functions or discussing problems about the machines' does not mandate a combined unit." DDE 23 (quoting *Capri Sun*, 330 NLRB at 1126). *Accord Ore-Ida Foods*, 66 F.3d at 328 (maintenance unit appropriate although maintenance employees "spend half or more of their time in production areas inspecting equipment or solving immediate problems with malfunctioning equipment on the line"); *Yuengling Brewing*, 333 NLRB at 893 (fact that some maintenance employees "spend most of their time on the production floor and have a significant degree of interaction with production employees . . . by itself is not sufficient to negate the appropriateness of a separate maintenance unit"). This conclusion holds true even where maintenance employees are assigned to particular shops or departments. *See Capri Sun*, 330 NLRB at 1124 (maintenance unit appropriate in case where "[t]he vast majority of the maintenance employees are assigned to one of three production departments"). In sum, the Board has long held that, although it is typical for maintenance work to be undertaken "in conjunction with production workers in the area involved," where, as here, maintenance employees maintain their "identity as a function separate from production" they may constitute their own unit. *American Cyanamid Co.*, 131 NLRB at 910.

The few cases cited by Volkswagen in which the Board has found maintenance units inappropriate are, as the Regional Director found, "readily

distinguishable" from this case. DDE 22.[7] As the Regional Director explained, in *Buckhorn, Inc.*, 343 NLRB 201 (2004), "maintenance employees regularly performed production work so that production and maintenance employees had essentially the same job functions," DDE 22, and, in addition, 14 of 19 maintenance employees reported to a production supervisor, *Buckhorn*, 343 NLRB at 202. Similarly, in *TDK Ferrites Corp.*, 342 NLRB 1006 (2004), "the petitioned-for maintenance technicians performed a significant amount of production work and were supervised by production personnel." DDE 22. The same was true in *Monsanto Co.*, 183 NLRB 415, 416-17 & n.5 (1970), where maintenance employees worked "under the immediate direction and control of production supervisors" and interchanged regularly with production employees. In this case, in contrast, Volkswagen's maintenance employees *never* perform production work and *all* maintenance employees throughout the facility report to maintenance supervisors and, above the supervisory level, to assistant managers for maintenance.

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

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

In addition to being wholly consistent with the Board's longstanding maintenance unit jurisprudence, the facts of this case are also broadly similar to – although much clearer than – those this Court considered in *Blue Man Vegas*. That case involved the Blue Man Group theatrical show, which was assisted "by a stage crew comprising seven different departments: audio, carpentry; electrics; properties (props); video; wardrobe; and musical instrument technicians (MITs)." 529 F.3d at 419. The NLRB approved a unit consisting of employees from six of the seven departments but excluding MITs. *Ibid.*

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

> "A unit comprising all the non-MIT stage crews is *prima facie* appropriate because, notwithstanding the differences among them, those employees

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

"It may well be that a unit comprising" Volkswagen's production and maintenance employees "would also be *prima facie* appropriate" because the production employees would "also share a community of interest with" maintenance employees. *Blue Man Vegas*, 529 F.3d at 424. That does "not necessarily render the unit comprising only" the maintenance employees "'truly inappropriate.'" *Ibid.* Rather, "the differences that are unique to the [production employees] . . . stand in [Volkswagen]'s way: The [production employees] lack an overwhelming community of interest with the [maintenance employees]." *Id.* at 424-25. As the NLRB aptly put it, because many significant "traditional community-of-interest factors differentiate the production employees from the

maintenance employees[,] it is impossible to say that the factors 'overlap almost completely.'" Or. 1-2 n.1.

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

a. Volkswagen argues that "although the R[egional] D[irector] and Board majority purported to apply the 'traditional' community of interests test under *Specialty Healthcare*, they actually applied a less rigorous standard, or at the very least failed to adequately explain their decision." Pet. Br. 28. Specifically, the company claims that "the R[egional] D[irector] effectively limited his analysis at the first *Specialty* [*Healthcare*] step to whether the maintenance employees were readily identifiable as a group (which they are not) and pushed the traditional community of interests analysis to the 'overwhelming community of interests' portion of his decision." *Id.* at 28-29. Even a cursory review of the Regional Director's decision, and of the NLRB's decision denying Volkswagen's request for review, makes clear that this is not the case.

In the section of his decision addressing "Board Law," the Regional Director correctly stated that "the first inquiry is whether the job classifications sought by

Petitioner are readily identifiable as a group *and share a community of interest*." DDE 17 (citing *Specialty Healthcare*, 357 NLRB at 945-46) (emphasis added). In describing the community of interest aspect of this initial inquiry, the Regional Director stated clearly that the appropriate analysis includes,

> "whether the employees . . . have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." DDE 18 (citing *United Operations, Inc.*, 338 NLRB 123 (2002), and *Specialty Healthcare*, 357 NLRB at 942).

The Regional Director made clear that it was only after completing this "first inquiry," DDE 17 – an inquiry that includes full consideration of the community of interest factors – that he would turn to "the second inquiry" of the *Specialty Healthcare* framework, namely, whether "additional employees share an overwhelming community of interest with the petitioned-for employees" "because the traditional community-of-interest factors 'overlap almost completely.'" DDE 18 (quoting *Specialty Healthcare*, 357 NLRB at 943-45 & n.28, quoting, in turn, *Blue Man Vegas*, 529 F.3d at 421-22).

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

It was only after fully considering whether employees in the petitioned-for unit shared a community of interest that the Regional Director turned to consider Volkswagen's argument that "production employees share such an overwhelming community of interest as to require their inclusion in the unit." DDE 23. The Regional Director once again described the many factors that differentiate maintenance employees from production employees – such as that they are "separately supervised," "there is no interchange between the two classifications," "maintenance workers are required to possess more experience and training" than

[8] The Regional Director also described the similarities shared by maintenance employees with regard to each community of interest factor in the decision's detailed statement of facts. *See* DDE 2-17.

production employees, "all maintenance employees are compensated at a wage rate that exceeds the rates paid to production employees," "maintenance employees work a different schedule than production employees," and maintenance employees "are specifically required to be available when production employees are not working, which includes shutdowns." DDE 21. On the basis of these and other differences, the Regional Director concluded that "the production employees [Volkswagen] seeks to include in the unit do not share an overwhelming community of interest warranting their inclusion with the [maintenance] employees." *Ibid.*

Contrary to Volkswagen's claim, then, the Regional Director properly considered whether the petitioned-for unit of maintenance employees shared a community of interest at the first step of the *Specialty Healthcare* analysis before turning to Volkswagen's argument that production employees share such an overwhelming community of interest with maintenance employees as to require their inclusion in the unit.[9]

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

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

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

In fact, Volkswagen acknowledges that the Board did not *actually* rely on the extent of organization at all in rendering its decision. *See id.* at 51 ("Of course, the Board is not going to expressly state that it gave controlling weight to the extent of organization."). Nevertheless, the company seeks to persuade the Court that it should draw an inference that "the Board's decision was a cloak for reliance on the extent of organization as the dispositive factor" because Local 42 petitioned for a unit that purportedly is "the apex of its organizational strength" and did so "after losing an election in a plant-wide unit," even while acknowledging that "the Union's conduct in this regard may not be enough to establish a section 9(c)(5) violation." *Id.* at 53-54.

The short answer is that, as Volkswagen signals by its various hedges, there is no basis for the company's claim that the Board's determination was "controll[ed]" by "the extent to which the employees have organized." 29 U.S.C. § 159(c)(5). As the Regional Director correctly determined, the fact that Local 42 previously "proceeded to an election in a larger unit is not evidence that a smaller unit is inappropriate." DDE 17 (citing *Macy's, Inc.*, 361 NLRB No. 4, slip op. 6 n.30). That is true for the simple reason that "'more than one appropriate bargaining unit logically can be defined in any particular factual setting.'" *Blue Man Vegas*, 529 F.3d at 421 (quoting *Country Ford Trucks*, 229 F.3d at 1189). Not surprisingly, then, the principle that a union may petition for a smaller appropriate unit after previously having lost an election in a larger appropriate unit is longstanding and well-established. *See*, *e.g.*, *Macy's, Inc.*, 361 NLRB No. 4, slip op. 6 n.30; *Fraser Engineering Co.*, 359 NLRB 681, 681 (2013), *Amoco Production Co.*, 235 NLRB 1096, 1096 (1977), *Stern's*, *Paramus*, 150 NLRB 799, 807 (1965); *Macy's San Francisco*, 120 NLRB 69, 71 (1958).

Volkswagen's thinly-veiled claims that the NLRB acted in bad faith in reaching its decision in this case – evidenced by such arguments that "the Board's decision was a cloak for reliance on the extent of organization as the dispositive factor," Pet. Br. 53, and that the Board used its "multi-factor [community of interest] test[] to 'hide the ball' regarding its true intentions," *id.* at 55 n.18 –

should not be countenanced. This Court has repeatedly made clear that, "[w]ithout evidence to the contrary, '[w]e must presume an agency acts in good faith.'" *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (quoting *Comcast Corp. v. FCC*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008)). In this case, there is more than ample evidence to support the NLRB's conclusion that the unit at issue here – the sort of maintenance unit that the Board has historically approved in similar settings – is appropriate. Conversely, there is "no substance" to support Volkswagen's "assertions bordering on accusations of . . . bad faith." *Comcast*, 526 F.3d at 769 n.2.

CONCLUSION

The Decision and Order of the Board should be enforced.

Respectfully submitted,

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Date: March 27, 2017

CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, certify that on March 27, 2017, the foregoing Proof Brief of Intervenor United Auto Workers, Local 42 In Support of Respondent was served on all parties or their counsel of record through the CM/EFC system.

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