United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 17, 2014

TO: Claude T. Harrell, Jr., Regional Director
Region 10

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Volkswagen Group of America
10-CA-114589
10-CA-114636
10-CA-114669
177-1617
177-1642
512-5006-8333
518-0120-5000
712-5014-0140

These cases were submitted for advice as to whether the Employer violated the Act by providing unlawful assistance to the Union, or by threatening to condition future work on whether employees select the Union as their bargaining representative. We agree with the Region that the Employer did not violate the Act.

FACTS

These cases arise in the context of an organizing campaign by the United Auto Workers (the Union) at the Chattanooga, Tennessee, manufacturing facility of Volkswagen Group of America (VWGA or the Employer). The facility currently manufactures only the Volkswagen Passat, but it has the potential to expand to manufacture other vehicles.

VWAG[1]

The Employer is a wholly-owned subsidiary of Volkswagen Aktiengesellschaft Group ("VWAG"), a German automobile manufacturer. VWAG, which has no formal corporate presence or employees in the United States, operates pursuant to the corporate laws of Germany. German law mandates that VWAG promote employee co-determination of the business of the enterprise through employee works councils and representation on corporate boards. Thus, VWAG has a works council in its German operation. Local works councils, comprised of employee-elected members, negotiate with the employer on issues such as plant rules, discharge, work hours, and vacation

[1] VWAG is not a Charged Party in the instant cases.

scheduling, and have authority to request information and address employee grievances.[2] In addition to these local works councils, VWAG has a global works council comprised of representatives from each of its production facilities' local works councils. Members of the global works council serve on VWAG's supervisory board.

VWAG maintains a two-tiered corporate structure encompassing a "supervisory board" and a "management board." The 20-member supervisory board, with 10 members elected by shareholders and 10 elected by employees, appoints the members of the management board, and advises, regulates, and supervises the management board. Three of the ten employee-elected supervisory board members represent unions. Currently, the three union representatives are: Berthold Huber, deputy chairman of the supervisory board, who also serves as president of IG Metall (the German union representing a majority of the VWAG workforce); Bernd Osterloh, chairman of the general and group works council of VWAG; and Stephen Wolf, deputy chairman of the general and group works council of VWAG.

The eight-member management board is responsible "for independently managing the enterprise in the interest of the enterprise, thus taking into account the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value."[3] The management board runs the company, performs all transactions, and represents the company in dealings with third parties. In particular, the management board decides where product manufacturing takes place.

VWAG maintains general policies and goals, such as its Global Charter on Labour Relations (which confirms employees' right to labor representation free from discrimination). It appears that the Employer's Chattanooga facility is the only manufacturing facility operated by a subsidiary of VWAG that does not have a works council system in place.

The Employer (VWGA)

The Employer, which is headquartered in Virginia, operates a number of wholly-owned subsidiaries in the U.S., including the Chattanooga facility. The Employer and

[2] German Unions, in contrast to the works councils, negotiate collective-bargaining agreements with multi-employer associations, or industry wide, which generally establish only minimum wages and other terms and conditions. Union representatives are also entitled to attend all works council and department meetings in an advisory capacity.

[3] Corporate Governance Code §4.1.1.

its subsidiaries produce, market, and sell parts and vehicles, pursuant to arm's-length agreements executed between VWAG and the Employer. The Employer is a separate corporation from VWAG, with separate management and its own board of directors. The Employer's president throughout 2013 had previously worked for General Motors for more than 30 years.

The Employer and its subsidiaries independently set their own employment policies. For instance, the policies applicable to Chattanooga employees are contained in the Employer's Chattanooga Operations Team Member Guidebook, created solely for the Chattanooga facility. The Employer's human resource department is responsible for hiring, disciplining, and discharging employees at the Employer's subsidiaries, as well as decisions on compensation and benefits for these employees.

Statements by individuals related to VWAG and its works councils and unions

Beginning in at least 2011, Union representatives began to meet with officials of the VWAG Works Council. In March 2013,[4] Automotive News reported that Horst Neumann (identified as a VWAG management board member) stated during a meeting that VWAG executives are confident that a works council plan would work in the U.S., that VWAG executives might release a works council plan as early as May or June, and that, if the works council proposal won the support of the VWAG managing board, formal negotiations with a labor organization could begin as soon as 2013. Neumann was quoted saying that VW wants a works council and that the "UAW would be a natural partner."

Also in March, the Union distributed a booklet at the Chattanooga facility titled "Co-determining the Future." The booklet contained a letter from Berthold Huber, IG Metall president and VWAG supervisory board member. Huber wrote about the ongoing efforts of IG Metall to communicate with the Chattanooga employees and explain the works council system. Huber noted that such direct communication between workers' representatives globally is "essential to guarantee good working conditions," and that it was important for Chattanooga to have employee representation on the global works council. Huber opined further that, in the United States, "only a labor union can negotiate" with the Employer. Finally, Huber endorsed the UAW. Huber signed the letter as "IG Metall, President."

In June, Stephan Wolf, the deputy chairman of the general and group works council and a member of the VWAG supervisory board, was reported by the German news outlet *Handelsblatt* to have made a statement (in German) regarding unionization at the Chattanooga facility. This statement was widely reported in the American news media. The Chattanooga daily paper *Times Free Press* reported that

[4] All dates hereafter are in 2013, unless otherwise noted.

"VW Group deputy council chief Stephan Wolf" stated, "[w]e will only agree to an extension of the site or any other model contract when it is clear how to proceed with the employees' representatives in the United States."

In October, a Berlin-based Reuters report quoted Osterloh, identified as head of VW's global works council, saying that forming a works council in Chattanooga was important, that he would continue talks with the UAW about it, and that "[w]e know how important that (second) vehicle is for Chattanooga . . . In the interests of our U.S. colleagues, we're open to such an allocation (of an order)."

In November, Osterloh, Neumann, a VWAG management board member for human resources, and Michael Macht, a VWAG management board member for production, came to the Chattanooga facility at the invitation of the Employer to speak to employees about the works council system. All three German representatives urged the Chattanooga employees to participate in the global works council, noted that U.S. law required a labor organization before employees could do so, and said that it was "up to employees" to exercise their choice as to whether to have a labor representative.

Also during this November visit, Osterloh was interviewed by an AP reporter (in German). Osterloh reportedly said that the pending decision about union representation for the Chattanooga employees "will have no bearing on whether the company will decide to add the production of a new SUV in Tennessee or in Mexico," and that "[t]hose two things have nothing to do with each other . . . The decision about a vehicle will always be made along economic and employment policy lines. It has absolutely nothing to do with the whole topic about whether there is a union there or not."

Statements by the Employer

On at least dozens of occasions throughout this entire period, the Employer has consistently emphasized in person, in writing, and through media outlets that the decision on unionization and forming a works council was up to its employees.[5] Thus, for example, as early as July 2011, the Employer was quoted in the media saying that "[a]ny decision on representation belongs to our employees alone." In March, an Employer spokesman was quoted saying that "[w]e have always said that any choice of formal representation by a union in the U.S. will be based on a vote of the workers at the facility," and that the Employer's president and other executives had repeated "the company's long-held stance said the choice for UAW representation was up to the

[5] The Charging Parties' witnesses have confirmed that the Employer's supervisors and managers have been neutral with regard to employees' union efforts.

workers" and that "the bottom line of this discussion is that the employees will decide on unionization." And, as recently as January 14, 2014, the Employer's president was quoted in a news report saying that he "will accept whatever workers at the factory decide on the issue," and that "it's up to the plant's workers to decide what they want to do."

Further, at the November meeting with Osterloh, Neumann, and Macht about works councils, the CEO of the Employer's Chattanooga facility responded to an employee's question about a new product line by stating that the existence of a works council was not a consideration, and that the decision on where the new product would be produced would be based solely on quality and cost. After that meeting, the Employer distributed two newsletters to employees discussing the meeting and unionization in general. One of the newsletters quoted Osterloh saying that the employees' decision on union representation and product decisions "have nothing to do with each other." The other quoted Osterloh saying, "[u]ltimately, it is up to the employees of Chattanooga to decide," Neumann saying, "[w]hat union - the UAW or another union - or no such representation of this type at all, must be decided by the employees," and Macht saying "it is [the employees'] right to decide without threats or coercion of any type." This newsletter also highlighted the "key messages from the visit," including:

- There is absolutely no connection between the decision by the workforce for or against a union and/or a works council and a decision to build a second model at the plant. Any such decision will be based solely on business considerations including the economics.

- The decision on representation by a union lies with the employees and should be made by them without threats, promises or coercion.

and

- In the end, it is the employees' decision whether they want representation or not.

This newsletter also stated the Employer's "commitment" that it "respects the right of employees to decide whether they wish to join or be represented by a union and will not interfere with this right," and that "[n]either the Company nor its management will . . .make promises or grant benefits to convince employees to support or oppose a union" or "take negative actions (e.g. factory closing, job loss) if employees do or do not choose a union. The newsletter also quoted the Employer's vice president for human resources as reiterating that the Employer "respect[s] our employees' right to decide whether they wish to be represented by a union."

ACTION

We agree with the Region that the Employer did not violate the Act by providing unlawful assistance to the Union or by threatening to condition future work on whether employees select the Union as their bargaining representative.[6]

The Employer did not unlawfully interfere with employees' right to refrain from supporting the Union, or provide unlawful assistance to the Union

Section 8(c) of the Act expressly protects "[t]he expressing of any views, argument, or opinion . . . if such expression contains no threat of reprisal or force or promise of benefit." Consistent with Section 8(c), an employer is free to state its preference for a union, so long as the statements are not accompanied by threats of reprisal or force or promises of benefit.[7]

In the instant cases, we agree with the Region that all of the statements or other conduct alleged as violative by the Charging Parties were lawful, reserving discussion of two statements made by German union representatives. Thus, regardless of what employer entity, if any, could be held responsible for any of the statements, there is nothing unlawful about such statements of preference for unionization in general, or the Union in particular. All of these statements –urging union representation and/or a works council system, and those saying that the Union would be a "natural partner," that direct communication between workers' representatives globally is "essential to guarantee good working conditions," or that the law requires a labor organization before employees could form a works council -- were lawful, regardless of who said them, or on whose behalf they were said. Thus, none of these statements were accompanied by any threats of reprisal or force or promises of benefit, and therefore all of them were protected by Section 8(c) of the Act.

Similarly, none of the other alleged Employer misconduct amounted to unlawful assistance of the Union. It is well settled that a certain amount of employer

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[6] The charges in the instant cases also allege that the Employer unlawfully recognized the Union without a bona fide showing of majority support. While the Union claims to have obtained majority status in an appropriate bargaining unit in July 2012, and has not denied that it demanded recognition from the Employer thereafter, the Employer has not agreed to recognize the Union, or otherwise to enter into any contractual arrangement. Therefore, this allegation should also be dismissed.

[7] See, e.g., *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 7 (2001).

"cooperation" with the efforts of a union to organize is lawful.[8] Thus, the Board and courts evaluate the totality of the employer's conduct to determine whether it tends to inhibit employees in their free choice regarding a bargaining representative and/or to interfere with the representative's maintenance of an arms-length relationship with it.[9] In this regard, the Board has long held that the use of company time and property by an otherwise independent union does not in itself amount to unlawful assistance within the meaning of Section 8(a)(2).[10]

Here, the Employer hosted a November meeting with Osterloh, Neumann, and Macht, who urged employees to participate in the global works council. The Employer is also alleged to have cooperated with the Union's "Co-determining the Future" booklet (through VWAG supervisory board member and IG Metall president Huber). These actions were well within the range of lawful cooperation with the Union and its organizing efforts. This is particularly clear in light of the Employer's consistently repeated statements that the decision on unionization, and on forming a works council, was entirely up to its employees, a message that was emphatically reiterated at the November meeting itself and in two newsletters distributed to employees after that meeting. In addition, the Charging Parties' witnesses have also generally stated that the Employer's supervisors and managers have been neutral with regard to employees' union efforts. Thus, there is no evidence that the Employer did anything that would inhibit employees' free choice regarding a bargaining representative or interfere with an arm's length relationship with the Union. Therefore, we agree with the Region that none of these statements or other conduct violated the Act.

The two possible exceptions to this conclusion are: (1) the statement reportedly made in June by Wolf that, "[w]e will only agree to an extension of the site or any

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[8] See, e.g., *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973) (no unlawful assistance where employer permitted union to address employees on company property during work time and directed some employees to enter room where a union representative would speak to them; employer did not urge employees to support the union, no management representatives were present when employees signed cards, and local governmental procedures were used to verify union's majority); *Jolog Sportswear, Inc.*, 128 NLRB 886, 888-889 (1960), affd. sub nom. *Kimbrell v. NLRB*, 290 F.2d 799 (4th Cir. 1961) (no unlawful assistance where employer permitted union to address employees on company time; management officials were not present when cards were signed, card check was conducted by independent authority, and employer issued statements assuring employees of their free choice and its neutrality).

[9] See, e.g., *Kaiser Foundation Hospitals*, 223 NLRB 322, 322 (1976).

[10] See, e.g., *Tecumseh Corrugated Box Co.*, 333 NLRB at 1 fn. 2, 9, citing *Jolog Sportswear*, 128 NLRB at 888-89; *Longchamps*, 205 NLRB at 1031.

other model contract when it is clear how to proceed with the employees' representatives in the United States;" and (2) the statement reportedly made in October by Osterloh that, "[w]e know how important that (second) vehicle is for Chattanooga . . . In the interests of our U.S. colleagues, we're open to such an allocation of an order." These statements, as reported, could perhaps be understood to condition future expansion of the Chattanooga facility on the employees' representational status. Therefore, for the purposes of these cases, we will assume that they arguably make out a violation if they were made by an employer subject to the coverage of the Act.[11]

The Employer cannot be held responsible for the statements of German union representatives who are members of VWAG's supervisory board

We agree with the Region that the Employer cannot be held responsible for Wolf's and Osterloh's statements.[12] First, VWAG and the Employer are not a single employer. In determining whether ostensibly separate entities in fact comprise a single employer, the Board and courts consider whether the entities share the following factors: (1) common ownership; (2) common management; (3) centralized

[11] It is well established that the Act does not apply beyond the geographic boundaries of the United States, and is limited to locations in which the United States has sovereignty or some measure of legislative control. See, e.g., *Computer Sciences Raytheon*, 318 NLRB 966, 968 (1995), citing *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244 (1991). Thus, if the Employer is not responsible for Wolf and Osterloh's statements, they would appear to be beyond the Act's jurisdiction. The Charging Parties argue that we could nonetheless attempt to exert jurisdiction over VWAG, citing *California Gas Transport, Inc.*, 347 NLRB 1314, 1316 (2006), and *Asplundh Tree Expert Co.,* 336 NLRB 1106, 1107 (2001). These cases, however, involve domestic companies or their agents acting against their own American employees. As VWAG does itself not have any formal presence or employees in the United States, it is clear that VWAG itself is not an employer for purposes of the Act.

[12] Given this conclusion, we need not address other issues that might preclude finding a violation based on these statements, including that the statements: (1) were made by individuals who are only affiliated with VWAG in their capacity as union representatives; (2) were made in German, with their meaning unclear in translation; (3) are hearsay that might only be admissible as an admission if the reporter were to testify; and, (4) at least as to Osterloh's statement, have subsequently been contradicted by the speaker.

control of labor relations and; (4) interrelation of operations.[13] While no single factor is controlling,[14] the Board stresses the latter three factors, and places particular emphasis upon centralized control of labor relations.[15] Thus, ownership by the parent corporation alone is insufficient to establish a single-employer relationship;[16] in a parent/subsidiary relationship, the ultimate question in determining single employer status is whether "one of the companies exercises *actual or active* control over the day-to-day operations or labor relations of the other."[17] In general, single employer status will be based upon a determination that, in all the circumstances, the relationship among the nominally separate entities lacks "the arm's length relationship found among unintegrated companies."[18]

Here, while the Employer is wholly owned by VWAG, and there has been some level of consultation and cooperation between the two entities, the evidence does not establish the other indicia of single employer status. The Employer and VWAG each maintain separate corporate boards and local management structures. The Employer directly employs the executives and managers assigned to the Chattanooga facility; there is no evidence that these individuals are simultaneously employed by VWAG in any capacity. Most importantly, the Employer makes its own day-to-day employment decisions, including hiring and retention of employees, and develops its own employee rules and procedures, independent of VWAG. Chattanooga employees' compensation and benefits are established by the Employer, and there is no evidence that VWAG exerts any influence with regard to these local labor relations decisions.

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[13] See, e.g., *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Emsing's Supermarket*, 284 NLRB 302, 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

[14] See, e.g., *Central Mack Sales*, 273 NLRB 1268, 1271-1272 (1984); *Air-Vac Industries, Inc.*, 259 NLRB 336, 340 (1981); *Blumenfeld Theatres*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

[15] See, e.g., *Hydrolines, Inc.*, 305 NLRB 416, 417 (1991); *Geo. V. Hamilton Inc.*, 289 NLRB 1335, 1337 (1988); *Fedco Freight Lines, Inc.*, 273 NLRB 399, n. 1 (1984).

[16] See, e.g., *Dow Chemical Co*, 326 NLRB 288, 289 (1998).

[17] *Id*. at 289 (emphasis in original); *Mercy General Health Partners*, 331 NLRB 783, 784 (2000).

[18] *Allegheny Graphics*, 320 NLRB 1141, 1142 (1996), enfd. 113 F.3d 845 (8th Cir. 1997); *Blumenfeld Theatres*, 240 NLRB at 215; *Emsing's Supermarket*, 284 NLRB at 302.

We recognize that VWAG has established general policies applicable to all of its subsidiaries, such as its Global Charter on Labour Relations (which confirms employees' right to labor representation free from discrimination), and that the Employer says that it is cognizant of, and seeks to set policy in accordance with, such general guidance. Regardless of these general policies, though, the Employer and its subsidiaries independently set their own employment policies. There is no evidence that VWAG directly exerts any actual control over the Employer's labor relations decisions. Therefore, we agree with the Region that VWAG and the Employer are not a single employer.

Second, neither Wolf nor Osterloh were agents of the Employer when they made the statements at issue.[19] The Board has held that agency based on actual authority is created when an agent is given power to act on his principal's behalf by the principal's express or implied manifestation to him.[20] In the instant cases, there is no evidence that the Employer in any way gave Wolf or Osterloh the authority to speak on its behalf.

Nor did either Wolf or Osterloh have apparent authority to speak on behalf of the Employer. The Board has recognized that "an agent can have 'apparent authority' to act when a principal's manifestation . . . to a third party . . . supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question."[21] The Board's test for determining whether in individual is acting as the apparent agent of an employer is whether, under all of the circumstances, employees would reasonably believe that the individual was reflecting company policy and speaking and acting for management.[22] In particular, the Board

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[19] The burden of proving agency rests with the party alleging it. See, e.g., *Pan-Oston Co.*, 336 NLRB 305, 306 (2001).

[20] See, e.g., *CWA Local 9431 (Pacific Bell)*, 304 NLRB 446, n. 4 (1991); *Fisher Stove Works*, 235 NLRB 1032, 1041-1042 (1978).

[21] *Service Employees Union Local 87 (West Bay)*, 291 NLRB 82, 82-83 (1988). Under the theory of apparent authority, the principal must either intend that the other party believe the agent is authorized to act for him, or should realize that a third party is likely to believe that the agent is authorized based on the principal's conduct. *Id*. at 83; *Alleghany Aggregate, Inc.*, 311 NLRB 1165, 1165 (1993); *Dentech Corp.*, 294 NLRB 924, 925-926 (1989).

[22] See, e.g., *Pan-Osten Co.*, 336 NLRB at 306; *California Gas Transport, Inc.*, 347 NLRB at 1317.

considers whether the statements or actions of an alleged agent are consistent with statements or actions of the employer,[23] and whether the employer disavows the alleged agents' statements or conduct.[24]

Here, if Wolf's June statement or Osterloh's October statement indicated that future expansion of the Chattanooga facility might be conditioned on the employees' representational status, such a message would be contrary to the Employer's consistently repeated statements that the decision on unionization, and on forming a works council, was entirely up to its employees. Thus, employees would not reasonably believe that Wolf or Osterloh was reflecting the Employer's policy or speaking and acting on behalf of the Employer.

More importantly, after these statements were made, the Employer clearly and effectively disavowed any message indicating that future expansion of the Chattanooga facility might be conditioned on the employees' representational status. At the November meeting, the CEO of the Employer's Chattanooga facility explicitly responded to an employee's question about a new product line by stating that the existence of a works council was not a consideration, and that the decision on where the new product would be produced would be based solely on quality and cost. And, after that meeting, the Employer distributed two newsletters to all employees discussing the meeting and unionization in general. In addition to these two newsletters emphasizing the Employer's consistent message that the decision on unionization, and on forming a works council, was entirely up to its employees, one of the newsletters highlighted the "key message[ ] from the visit" that "[t]here is absolutely no connection between the decision by the workforce for or against a union and/or a works council and a decision to build a second model at the plant. Any such decision will be based solely on business considerations including the economics." Under all of the circumstances, then, employees would not reasonably believe that either Wolf or Osterloh was reflecting the Employer's policy or speaking for the Employer if they said that future expansion of the Chattanooga facility might be conditioned on the employees' representational status. Therefore, for the foregoing reasons, we agree with the Region that the Employer cannot be held responsible for Wolf's and Osterloh's statements, and that the Employer did not violate the Act.[25]

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[23] See, e.g., *Viking of Minneapolis*, 171 NLRB 1155, 1156, 1175-76 (1968); *Pan-Oston*, 336 NLRB at 306; *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998).

[24] See, e.g., *Henry I. Siegel Co., Inc.*, 172 NLRB 825, 839 (1968) (employer's association with, and failure to disavow the comments of, the city mayor rendered the employer liable for the mayor's unlawful threats);*Viking of Minneapolis*, 171 NLRB at 1156.

[25] The Charging Parties have also alleged that these statements violate Section 8(a)(3) of the Act, as they were direct threats of discrimination if the employees refrained

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

/s/
B.J.K.

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from selecting the Union, and are inherently destructive of employee interests. As we have concluded that there have been no threats of reprisal or discriminatory action attributable to the Employer, as discussed above, the 8(a)(3) allegations should also be dismissed as well.