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

August 26, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ruling on Motion for Summary Judgment

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

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

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

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

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

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

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

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

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

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

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

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

B. Refusal to Bargain

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

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

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

CONCLUSION OF LAW

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

REMEDY

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

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

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

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

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

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

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

VOLKSWAGEN GROUP OF AMERICA, INC.

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