

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 10**

VOLKSWAGEN GROUP OF AMERICA, INC.
(Employer),

and

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)
(Union),

Case No. 10-RM-121704

and

MICHAEL BURTON, *et alia*,
(Employee-Intervenors).

**EMPLOYEE-INTERVENORS' OPPOSITION TO UAW'S
REQUEST FOR SPECIAL PERMISSION TO APPEAL
ORDER GRANTING THEIR MOTION TO INTERVENE**

Volkswagen employees Michael Burton, Michael Jarvis, David Reed, Thomas Haney and Daniele Lenarduzzi ("Employee-Intervenors") oppose the UAW's Request for Special Permission to Appeal Region 10's Order Granting Their Motion to Intervene ("Request"). However, the Employee-Intervenors do not oppose the UAW's call for a stay of the Region's proceedings while the Board considers the UAW's Request.

The UAW's Request must be denied because, if it were granted, there would be no party left in the case who would cross-examine the UAW's witnesses, rebut its evidence and arguments, and otherwise defend the election results. The only parties to the case would be the UAW and its colluding partner Volkswagen, rendering these proceedings a

one-sided farce. The Region’s decision to allow the Employee-Intervenors to intervene to defend the election results was just and proper.¹

ARGUMENT IN OPPOSITION TO REQUEST

I. The UAW’s Request is Procedurally Flawed.

The UAW’s Request must be summarily denied as a procedural matter because the UAW makes its Request under Section 102.26 of the Board’s Rules and Regulations. (Request at 1). Section 102.26, however, covers special appeals only in *unfair labor practice* cases. This case is not an unfair labor practice proceeding.

Subpart C of the Board’s rules cover representation cases, and they do not allow the UAW to file its instant Request. Section 102.65(c) provides that “rulings by the regional director . . . shall not be appealed directly to the Board but shall be considered by the Board on appropriate appeal pursuant to § 102.67 (b), (c), and (d) or whenever the case is transferred to it for decision.” *Id.* Section 102.65(c) makes only a very limited exception in representation cases “for special permission to appeal from a ruling of the *hearing officer.*” (Emphasis added). But there exists no ruling of a hearing officer here, as no hearing has yet been ordered or scheduled. In short, the UAW’s Request has no

¹ In opposing the UAW’s Request, Employee-Intervenors incorporate by reference their Motion to Intervene, including supporting Exhibit 1 (the UAW-Volkswagen Neutrality Agreement) and their sworn declarations filed in support. Those documents are reproduced as Exhibit B to the UAW’s Request, and can be found at pages 70-118 of the UAW’s pdf document. Employee-Intervenors also incorporate by reference their Reply Memorandum in Support of Motion to Intervene. That document is reproduced as Exhibit E to the UAW’s Request, and can be found at pages 211-216 of the UAW’s pdf document.

basis in the Board's rules, and should be rejected as procedurally invalid.

II. The UAW's Request is Substantively Flawed.

In the interest of brevity, Employee-Intervenors will not repeat all grounds for their Motion to Intervene. To summarize, they are intervening to defend the election results by: (1) offering testimony and evidence to rebut that presented by the UAW; (2) cross-examining witnesses to create a complete record for the Board; and (3) presenting legal arguments to counter those made by the UAW.² Their intervention is necessary because, otherwise, no party will rebut the UAW's case or defend the election results.

Without the Intervenors, the only parties to this proceeding will be the UAW and Volkswagen. Volkswagen, however, will not attempt to rebut the UAW's case or defend the election results. The UAW and Volkswagen are actively colluding to unionize the Chattanooga facility, as evidenced by their Agreement for a Representation Election ("Neutrality Agreement").³ Among other things, the Neutrality Agreement binds the signatories to "align messages and communications through the time of the election and the certification of the results by the NLRB." *Id.* at § 3(f).

² The UAW's Request misrepresents the purpose of the intervention. The Employee-Intervenors do not seek to participate in this case so that Mr. Burton and others can rebut allegations made specifically about them or their alleged re-publication of politicians' statements. (Request at 6-8). Rather, it is to rebut the UAW's objections in general and defend the sanctity of the election, which *no one else* will do if Volkswagen and the UAW remain the only parties to this proceeding.

³ The Neutrality Agreement is reproduced as part of Exhibit B of the UAW's Request, pages 85-107 of the pdf document.

Volkswagen cannot be entrusted to oppose the UAW's objections to the election, cross-examine its witnesses, offer rebuttal evidence, or otherwise defend the election results because it is contractually obligated to "align messages" with the UAW – all to help secure unionization of the Chattanooga facility. An objection proceeding in which the only parties are the UAW and its partner Volkswagen would be a complete sham. It would be akin to allowing two foxes to litigate over ownership of a henhouse, while excluding all hens from proceedings.⁴

The UAW unwittingly proves this point by rhetorically asking: "will the 'intervenor' be able to block any agreement by [Volkswagen] and the UAW that the election was tainted by the third-party threats of state and federal politicians, and be able to block an election set-aside and rerun?" (Request at 8). The answer to this question is "yes," and is the very reason why intervention is proper here. Without the Employee-Intervenors' participation, there is nothing to stop the UAW and Volkswagen from stipulating to re-run elections over and over, *ad infinitum*, until UAW representation is achieved. For this reason it would be a mockery of justice for the Board to exclude the Employee-Intervenors and allow only two colluding parties to participate in the

⁴ The UAW's recitation of the facts and procedural history of this case in its Request is not quite accurate. Not only does the UAW fail to mention its Neutrality Agreement with Volkswagen and the collusion inherent therein, but it fails to include as an Exhibit to its Request Volkswagen's separate opposition to the Employee-Intervenors' Motion to Intervene (copy attached as Exhibit 1). Like the UAW, its "aligned" partner, Volkswagen did not see "any basis for the Motions to Intervene to be granted." Volkswagen's parroting of the UAW's position against intervention provides further evidence that it will neither oppose the UAW's objections nor offer any defense of the February 12-14 election result.

objections proceeding.

Entrusting employee representational rights to the UAW and Volkswagen in this circumstance would also run contrary to a core purpose of the Act – to protect employee Section 7 rights *from* employers and unions. *See* 29 U.S.C. §§ 158(a) and (b). As the Supreme Court warned decades ago, it is improper to defer to even “good faith” employer and union beliefs about employee representational preferences because so doing “place[s] in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.” *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961). Given their ongoing collusion, the rights of over 700 employees who voted against the UAW cannot be placed into the UAW and Volkswagen’s careless hands.

III. The Employee-Intervenors Must be Permitted to Intervene to Defend Their Section 7 Rights and Those of the Majority of Their Co-Workers.

The Employee-Intervenors have a fundamental statutory interest in this election – namely, their Section 7 right to “refrain” from union representation. 29 U.S.C. § 157. The Board must presume that a majority of Volkswagen employees also want to exercise their Section 7 rights in the same manner, and not be represented by the UAW, because “[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the *true desires* of the employees.” *Delta Brands, Inc.*, 344 NLRB 252, 252-53 (2005) (emphasis added). Moreover, while “the burden of proof on parties

seeking to have a Board-supervised election set aside is a heavy one,” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989), who, other than the Employee-Intervenors, will hold the UAW to this “heavy burden?” Surely not Volkswagen.

In fact, any interests the UAW or Volkswagen possess in the election are secondary to those of the Employee-Intervenors and their fellow employees who voted against unionization. *See Levitz Furniture Co.*, 333 NLRB 717, 728 (2001) (employer’s only interest in representational matters is to not violate employee rights); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (“By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers”). As the UAW recognizes, “Section 7 rights run to employees, not to employer-funded corporations.” (Request at 6).

Given that the Employee-Intervenors not only have a statutory interest in this case, but one that exceeds the interests of the UAW and Volkswagen, they must be permitted to intervene to protect their rights and to defend the sanctity of the election they just won. “It is well to bear in mind, after all, that it is employees’ Section 7 rights to choose their bargaining representatives that is at issue here.” *Levitz Furniture*, 333 NLRB at 728; *see Rollins Transp. Sys.*, 296 NLRB 793, 794 (1989) (overriding interest under Act is “employees Section 7 rights to decide whether and by whom to be represented”).⁵

⁵ The UAW twice asserts that it has no opposition to the Employee-Intervenors appearing as *amici*. But contrary to the UAW’s Request at 3 n.1, Employee-Intervenors did *not* seek permission to participate as *amici*. They oppose being allowed to participate only as *amici*, as that would not allow them to offer evidence, cross-examine witnesses, or appeal an adverse Regional decision, which are the primary purposes for their participation herein.

CONCLUSION

The UAW's Request for Special Permission to Appeal should be denied.

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Employee-Intervenors' Opposition to UAW's Request for Special Permission to Appeal Order Granting Their Motion to Intervene were served on the NLRB Executive Secretary via NLRB e-filing, and via e-mail to:

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this 14th day of March, 2014.

/s/ Glenn M. Taubman

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Exhibit 1

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March 6, 2014

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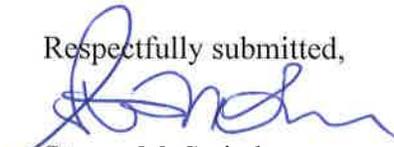
Re: Volkswagen Group of America, Inc.
Case No. 10-RM-121704

Dear Ms. Wilson:

This firm is counsel to Petitioner Volkswagen Group of America, Inc. (“VWGoA”) in the above-referenced representation case. This letter is in response to your request for VWGoA’s position with respect to the respective Motions to Intervene filed on February 26, 2014, by the National Right to Work Foundation and on February 28, 2014, by Southern Momentum.

VWGoA does not believe there is any basis for the Motions to Intervene to be granted. VWGoA defers to the NLRB to make the appropriate decision after considering the Motions.

Respectfully submitted,



Steven M. Swirsky

SMS:sgw

cc: Volkswagen Group of America, Inc.
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