UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant	)	
	)	
v.	)	Docket No. 08-1104
	)	
IMPERIAL SUGAR COMPANY; IMPERIAL-SAVANNAH, L.P.	)	
	)	
Respondents.	)	
	)	

RESPONDENTS' OPPOSITION TO PETITIONS FOR LEAVE TO INTERVENE

Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively "Imperial") oppose the two Petitions for Leave to Intervene filed in this case on April 16, 2009 (the "Petitions") by twenty Imperial employees and employee representatives who have filed civil actions against Imperial and others regarding the February 7, 2008 accident at Imperial's sugar refinery in Port Wentworth, Georgia (the "Petitioners"). The Petitioners, who are represented by two primary law firms and secondary counsel from other firms, have not shown – or even attempted to show – that their participation in this administrative litigation will assist the Commission in determining the issues in question or that they have a legitimate interest in intervention. In fact, their intervention would unnecessarily delay the proceedings here, unduly hinder the efficient resolution of this case, and open the door for hundreds of other Imperial employees to seek to intervene. Accordingly, Imperial respectfully submits that the Petitions should be denied.

I. LEGAL STANDARD FOR INTERVENTION

A petition for leave to intervene in an administrative proceeding before the Commission pursuant to 29 C.F.R. § 2200.21 "must set forth the petitioner's interest in the proceeding, show

that participation of the petitioner will assist in the determination of the issues in question, and show that the intervention will not unnecessarily delay the proceedings." Sec'y of Labor v. Brown & Root, Inc., 7 O.S.H. Cas. (BNA) 1526 (O.S.H.R.C. 1979). The Commission looks for specific factual support for whether a petitioner's participation will assist in the adjudication of the issues. See Brown & Root, Inc., 7 O.S.H. Cas. (BNA) 1526; Sec'y of Labor v. Pa. Truck Lines, Inc., 7 O.S.H. Cas. (BNA) 1722 (1979); Sec'y of Labor v. Harry Pepper & Assocs., Inc., 7 O.S.H. Cas. (BNA) 1815 (1979).

A petitioner's interest in the proceedings should be legitimate and aligned with the purpose of the proceedings. Indeed, the Commission has "caution[ed] that proceedings before the Commission are not to be used as a forum for litigating matters totally unrelated to the citation alleging violations of the [OSH] Act on which our proceedings are predicated." Harry Pepper & Assocs., 7 O.S.H. Cas. (BNA) 1815. Finally, if a petitioner has made the requisite showing for intervention, intervention rights may not be unlimited; the Commission may impose conditions on the intervention to protect the integrity of its proceedings. See Brown & Root, 7 O.S.H. Cas. (BNA) 1526.

II. ARGUMENT AND CITATION OF AUTHORITY

Petitioners have not shown that their interest in intervening in this case is legitimate. In fact, correspondence from Petitioners' counsel to Imperial's civil defense counsel on the day the Petitions were filed demonstrates that Petitioners want to intervene merely to obtain additional discovery outside of the civil suits they have filed against Imperial. (See Ex. A. (announcing intent to intervene so that Petitioners could "get the discovery in all of these [civil] matters done more quickly").)[1] This is improper and not a legitimate interest in intervening in these proceedings. See Harry Pepper & Assocs., 7 O.S.H. Cas. (BNA) 1815. Contrary to Petitioners

[1] This April 16, 2009 letter is attached to this brief as Exhibit A.

apparent motives, they have no private right of action in this administrative litigation. They do, however, have a full and fair opportunity to litigate their claims against Imperial and obtain discovery in the pending civil suits they have filed, and they should not be allowed to piggy-back their civil claims onto this administrative litigation. There is no legitimate interest to be served by Petitioners' intervention in this case, and they have not shown otherwise.

Petitioners also have not shown that their intervention in this case will assist in the determination of the issues. Petitioners have offered no details or support for their conclusory assertion that they "can provide insight into topics necessary for a factual determination of the issues involved" in this case. (Petitions at 2.) Such an assertion is insufficient to carry Petitioners' burden, as Commission precedent indicates that proposed intervenors must specifically show how they can assist in the adjudication of particular issues. See Brown & Root, Inc., 7 O.S.H. Cas. (BNA) 1526 (considering petitioner union's "expertise in the steel erection industry" and "knowledge of structural steel construction techniques and procedures" as important to intervention decision); Pa. Truck Lines, Inc., 7 O.S.H. Cas. (BNA) 1722 (1979) (same as to petitioner railway company's expertise and compliance with the Federal Railroad Administration's regulations, which was important to preemption issue); Sec'y of Labor v. Harry Pepper & Assocs., Inc., 7 O.S.H. Cas. (BNA) 1815 (1979) (same for petitioner electric company's expertise regarding the electrical power lines that it owned and controlled, which was important to abatement issues). Petitioners, none of whom purport to have any relevant expertise, will only hinder the determination of the issues in this case, particularly given their stated interest in intervening for their own benefit – to pursue discovery for their civil suits in another forum.

Finally, Petitioners have failed to show that their intervention will not unnecessarily

delay the proceedings in this case. In fact, Petitioners' intervention will delay the proceedings in what is already a large, complex case set on a tight schedule. Fact discovery ends in just seven months, with many depositions to be taken in several states in the coming weeks. The hearing in this case is set for May 2010 and is expected to last three to four weeks. The involvement of the numerous individual Petitioners, represented by several lawyers in several law firms, in discovery proceedings and the hearing would undoubtedly multiply the issues and delay this case unnecessarily.[2] See Brown & Root, 7 O.S.H. Cas. (BNA) 1526 ("[I]f unconditional intervention is granted, an intervenor enjoys the same rights as a party."). Moreover, Petitioners' intervention in this case likely would spur the numerous other individuals who have filed suit against Imperial regarding the February 7, 2008 accident to seek to intervene (forty such suits on behalf of more than fifty claimants have been filed, and Petitioners represent only a fraction of these claimants). Indeed, under Petitioners' apparent position on intervention, all of the employees at Imperial's Port Wentworth plant – over 300 of them – are entitled to intervene. The proceedings in this case would become unmanageable and unduly prolonged if intervention is allowed.

III. CONCLUSION

For the foregoing reasons, Imperial respectfully requests that the Commission deny the Petitioners leave to intervene in this case.

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[2] In fact, if Petitioners are permitted to intervene, it is likely that their counsel will intentionally interfere with the proceedings. Counsel for one Petitioner has already demonstrated a willingness to disrupt the discovery proceedings. On April 28, 2009, attorney Mark Tate threatened to unilaterally cause the cancellation of a deposition in this matter, even though he does not represent the witness. The deposition had been properly subpoenaed by Imperial and was scheduled for April 30. On April 28, Mr. Tate attempted to notice the witness's deposition for the same day in the civil litigation. When Imperial's counsel in the civil litigation explained that the deposition notice was untimely, and thus they would move for a protective order regarding any questioning by Mr. Tate, Mr. Tate threatened to "advise" the witness's counsel not to produce the witness for the deposition in this case. See Exhibit B to this brief (Mr. Tate's email to Imperial counsel in the civil litigation matters, threatening "Just know if you file the Motion, there will be no witness there for you on the thirtieth."). Based on this type of conduct, Imperial believes that Petitioners plan to disrupt and manipulate discovery in this matter in order to attempt to gain an advantage in the civil litigation matters.

Respectfully submitted this 1st day of May 2009.

/s/ Jeremy D. Tucker
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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of RESPONDENTS' OPPOSITION TO PETITIONS FOR LEAVE TO INTERVENE was electronically served on May 1, 2009 on the following counsel for Complainant:

Karen E. Mock
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Office of the Solicitor
U.S. Department of Labor
61 Forsyth Street S.W.
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Atlanta, Georgia 30303

I further certify that a copy of RESPONDENTS' OPPOSITION TO PETITIONS FOR LEAVE TO INTERVENE was served on May 1, 2009 by U.S. mail, postage prepaid, on the following counsel for Petitioners:

Mark Tate
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2 East Bryan Street
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Savannah, Georgia 31401

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Savage, Turner, Pinson & Karsman
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/s/ Jeremy D. Tucker
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Secretary of Labor v. Imperial Sugar Company and Imperial-Savannah, L.P.
OSHRC Docket No. 08-1104
Respondents' Opposition to Petitions to Intervene

Administrative Law Judge Covette Rooney
Exhibit A
April 16, 2009 Letter from Brent J. Savage to David Dial
Filed Electronically on May 1, 2009

SAVAGE, TURNER, PINSON & KARSMAN

ATTORNEYS AT LAW

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April 16, 2009

David Dial, Esquire
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
950 East Paces Ferry, Suite 3000
Atlanta, GA 30326

Re: Imperial Sugar Claims

Dear Dave:

We are planning to intervene in the Imperial Sugar OSHA Review Commission actions. Why don't you intervene as well and we can get the discovery in all of these matters done more quickly.

Very truly yours,

Brent J. Savage
SAVAGE, TURNER, PINSON & KARSMAN

BJS/gtm

Encl.

cc: Mark Tate, Esquire
Mike Mixson, Esquire

Secretary of Labor v. Imperial Sugar Company and Imperial-Savannah, L.P.
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Administrative Law Judge Covette Rooney
Exhibit B
April 28, 2009 E-mail from Mark Tate to Scott Kerew and Phillip Hilder
Filed Electronically on May 1, 2009

From: Mark Tate [marktate@tatelawgroup.com]

Sent: Tuesday, April 28, 2009 5:52 PM

To: Kerew, Scott; phillip@hilderlaw.com

Cc: Brent Savage; Jeremy McKenzie; Steve Lowry; Jeffrey Y. Lewis; David Hobson; ken.david@davidandrosetti.com; attys@bhrlegal.com; rbrown@brbcsw.com; Philip Hilder

Subject: Re: Imperial - Graham deposition

Dear Scott:

I do not generally respond by email but I will now.
File what you like.
I will be there.
I will be at the deposition.
File your motion and I will simply advise Mr. Hilder that his client cannot be deposed because of the Motion.
Or perhaps you might want to think about whether Imperial wants that deposition to go forward as it has been subpoenaed by its lawyers.
Just know if you file the Motion there will be no witness there for you on the thirtieth.
Your choice but better figure out how imperial can file a motion to quash its own deposition and how cute that will be to explain at the hearing.
Mark
On Apr 28, 2009, at 5:24 PM, Kerew, Scott wrote:

> <Tate letter April 28, 2009.pdf>