

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

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*
ENTERGY MISSISSIPPI, INC. *
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and *
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INTERNATIONAL BROTHERHOOD OF *
ELECTRICAL WORKERS, LOCAL 605, *
AFL-CIO-CLC *
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and *
*
INTERNATIONAL BROTHERHOOD OF *
ELECTRICAL WORKERS, LOCAL 985, *
AFL-CIO-CLC *
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* * * * *

**CASE Nos. 15-CA-17213
15-CA-18131
15-CA-18136**

**RESPONSE TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND
MOTION FOR DISMISSAL OF CONSOLIDATED COMPLAINT**

In response to a Motion for Summary Judgment filed on May 2, 2012, Respondent filed an Opposition and a Motion for Dismissal (Motion). Counsel for the Acting General Counsel hereby files this Response.

Respondent set forth three arguments to support its Motion: 1) the Board’s decision in *Entergy Mississippi*, 357 NLRB No. 178 (2011), is a nullity; 2) Respondent’s actions were compelled by the Fifth Circuit’s decision in *Entergy Gulf States v. NLRB*, 253 F3d 203 (5th Cir. 2001); and 3) the Doctrine of Laches. However, for the following reasons, the arguments must fail.

A. Nullity of *Entergy Mississippi*, 357 NLRB No. 178 (2011)

Respondent argues that the Board’s decision in *Entergy Mississippi* is a nullity because the Board lacked a quorum when the decision was issued. Specifically, Respondent claims the

appointment of Member Becker expired on December 17, 2011, leaving the Board without a quorum when it issued the decision.¹ Respondent is mistaken. Under the terms of the Recess Appointment Clause, Becker's "Commission[] * * * expire[d] at the end of [the Senate's] next Session," U.S. Const. art II, § 2, cl. 3, that is, at the end of the 1st Session of the 112th Congress. By operation of the Twentieth Amendment, a session of Congress begins at noon on January 3 unless Congress passes a law specifying a different date. And the prior session ends at the same time unless Congress passes a concurrent resolution of adjournment specifying a different adjournment date.² Because Congress did neither here, the 1st Session of the 112th Congress, and thus Becker's term, ended by operation of law at noon on January 3, 2012, after the Board issued the decision here.³

Significantly, the Senate itself has indicated that it regards the 1st Session of the 112th Congress as having ended on January 3, 2012. *See* Senate of the United States, Executive

¹ Member Becker received a recess appointment in March 2010, during the 2nd Session of the 111th Congress. *See* National Labor Relations Board, *Members of the NLRB since 1935*, at <http://www.nlr.gov/nlr-1935>. At the time the Board issued the decision here on December 30, 2011, it comprised only three members: Mark Pearce, Brian Hayes and Craig Becker. *Ibid.* Under the Supreme Court's decision in *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2640 (2010), the Board cannot exercise its full authority when its membership falls below three.

² General Accounting Office, *Matter of Commodities Futures Trading Commission*, B-288581, at 2-3 (Nov. 19, 2001) ("It is well established that a session of Congress is brought to a close through either (1) a concurrent resolution of both houses adjourning the session *sine die* or (2) operation of law, immediately prior to the beginning of the next session of Congress.") *available at* <http://www.gao.gov/decisions/appro/288581.pdf>.

³ By contrast, in December 2007 when Congress was similarly conducting pro forma sessions at the end of the session, it adjourned the *pro forma* session *sine die*, pursuant to a concurrent resolution. *See* 153 Cong. Rec. 36,508 (Dec. 31, 2007) ("Under the provisions of S. Con. Res. 61, as amended, the Senate stands adjourned *sine die* until Thursday, January 3, 2008."). Because in December 2011 Congress did not similarly pass a concurrent resolution of adjournment specifying an adjournment *sine die* before January 3, the session ended by operation of law on January 3

Calendar (Jan 3, 2012), *available at* http://www..//LIS/_calendar/2012/01_03_2012.pdf (indicating that the First Session “adjourned January 3, 2012”). The House too regarded the 1st Session as ending on January 3. 157 Cong. Rec. H10035-36 (daily ed. Jan. 3, 2012) (declaring “the first session of the 112th Congress adjourned *sine die*”); 158 Cong. Rec. H1 (daily ed. Jan. 3, 2012). And finally, the Executive regarded the Senate’s 1st Session as ending on January 3; as demonstrated here, Becker continued to exercise his authority as a Member of the Board until noon on January 3, 2012.

Respondent’s suggestion to the contrary is rooted in a misunderstanding of the government’s position with respect to the recess appointments made by the President on January 4, 2012—appointments whose validity is not at issue in this case. The opinion of the Office of Legal Counsel that Respondent cites (Br. 4, fn. 2) did not address the question of when the 1st Session of the 112th Congress ended. It, instead, addressed the separate question of whether the Senate’s use of *pro forma* sessions “with no business to be conducted” interrupted the Senate’s recess within the meaning of the Recess Appointment Clause. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at 1 (Jan. 6, 2012). The fact that the Senate was engaged in *pro forma* sessions between December 17, 2011 and January 23, 2012 is irrelevant to the question of when the 1st Session ended and the 2nd Session began. Consequently, based on the aforementioned facts and law, this defense must fail.

B. The Decision in *Entergy Gulf States v. NLRB*, 253 F3d 203 (5th Cir. 2001)

Respondent claims it should not be found to be in violation of the Act because it was merely complying with the Fifth Circuit’s decision in *Entergy Gulf States v. NLRB*, 253 F3d 203 (5th Cir. 2001). In *Entergy Gulf States*, the Fifth Circuit found certain employees (Operations

Coordinators) to be supervisors as defined by the Act. Respondent claims the employees at issue in the current matter perform the same duties as the employees in *Entergy Gulf States*.

Consequently, according to Respondent, the employees in the current matter are also supervisors and treating them as non-supervisors would be in defiance of the Fifth Circuit. However, Respondent cannot rely on *Entergy Gulf States* case to defend its actions.

While the issues presented in *Entergy Gulf States* are the same as those presented in the current matter, the employees involved are not. Further, while both employers involved are “sister” companies, they are not the same employer. Respondent claims both groups of employees perform the same work. However, Respondent presented the same argument in *Entergy Mississippi*, supra, and the Board found it to be without merit. Respondent chose to rely on its erroneous belief to its detriment in the current matter. Respondent’s reliance on the Fifth Circuit’s findings in *Entergy Gulf States* is not a defense in the current matter.

C. Doctrine of Laches

Finally, Respondent puts forth the Doctrine of Laches as a means to relieve itself from legal responsibility. However, the Doctrine of Laches does not apply. As somewhat noted by Respondent, the Doctrine of Laches cannot act to defeat a government agency in enforcing a public right. See, e.g., *Unitog Rental Services*, 318 NLRB 880, 885 (1995), affd. 105 F.3d 651 (5th Cir. 1996). Further, even if it were available to Respondent, the Doctrine of Laches applies only if a delay prejudices a party or renders an advantage to the delaying party. See, e.g., *Pleasant View Nursing Home*, 351 F3d 747, 765 (6th Cir. 2003). Board proceedings have long been bifurcated – violations being determined in one phase and remedies determined in a second. Even assuming the Board unduly delayed in issuing its decision, Respondent failed to explain how it was prejudiced in the violation phase of the litigation or the Board given an advantage.

To the extent Respondent seeks relief from any remedies (enhanced or otherwise), such issues are not currently before the Board and should be raised during the remedy phase of these proceedings.

Conclusion

As Respondent stated in its Motion, its “defenses are based entirely on the administrative record before the Region and the Board,” which is the same record on which the Board made its decision in *Entergy Mississippi*, supra, that the Dispatchers are not supervisors, and from which this “test of cert” in the instant case stems. Therefore, for the reasons explained above, Counsel for the Acting General Counsel requests that Respondent’s Motion be denied and the Motion for Summary Judgment be granted in its favor.

Dated at New Orleans, Louisiana, this 8th day of June, 2012.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Response to Motion to Dismiss Consolidated Complaint has been served upon the individuals noted below by Email on June 8, 2012.

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