

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
AUG - 8 2016
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ONCOR ELECTRIC DELIVERY
COMPANY LLC

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

PETITION FOR
REVIEW

16-1278

ORIGINAL

PETITION FOR REVIEW

Petitioner Oncor Electric Delivery Company LLC (“Oncor”), petitions the Court to review and set aside, and to the extent the Board seeks enforcement, refuse to enforce, the Decision and Order of the National Labor Relations Board (“Board”) issued as to the alleged unfair labor practices charged against Oncor in Case Nos. 16-CA-103387 and 16-CA-112404 dated July 29, 2016. A copy of the Decision and Order is attached. The Board’s Decision and Order is a final order within the meaning of Section 10(f) of National Labor Relations Act (“NLRA”), 29 U.S.C. § 160(f), and Oncor is a party aggrieved by the Decision and Order. The Board’s Decision and Order against Oncor is not supported by substantial evidence and is contrary to the law and should be set aside.

Oncor respectfully prays that this Court review and set aside the Board’s Decision and Order, and that Oncor receive any further relief to which it may be entitled.

Respectfully submitted,

HUNTON & WILLIAMS LLP


David C. Lonergan
Texas State Bar No. 12513500

Amber M. Rogers
Texas State Bar No. 24056224
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202
Phone: (214) 979-3000
Fax: (214) 880-0011

*Counsel for Petitioner
Oncor Electric Delivery Company LLC*

CERTIFICATE OF SERVICE

I certify that on this 8th day of August 2016, I caused the foregoing document to be served by US first class mail to the following:

Richard F. Griffin, Jr., General Counsel
Jennifer Abruzzo, Deputy General Counsel
General Counsel's Office of Appellate Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Timothy Watson
National Labor Relations Board
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6178

Hal Gillespie
Gillespie Sanford LLP
4925 Greenville Ave., Suite 200
Dallas, Texas 75206


Amber M. Rogers 

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The General Counsel's motion to amend at trial

On June 19, 2014, at the conclusion of the second day of the resumed trial, the General Counsel stated that he wished to move to amend paragraph 15 of the complaint to include the allegation that the Respondent unreasonably delayed furnishing information in response to all three information requests. The following morning, the seventh and last day of trial, he submitted General Counsel's Exhibit 1(x). The Respondent's counsel objected, and I offered the Respondent an opportunity to offer testimony why its delays in furnishing information were not unreasonable. However, the Respondent's counsel stated that he was not prepared to go forward and instead wanted a continuance to prepare. I granted the General Counsel's motion to amend. The Respondent's counsel continued with the presentation of the Respondent's case in chief, before resting.

Upon further reflection and with the benefit of additional research, I reverse my decision granting the motion to amend. Amendments to a complaint are allowed "upon such terms as may be deemed just." Board's Rules, Section 102.17. Whether it is just to grant a motion to amend a complaint during a hearing is based on three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service*, 347 NLRB 1167, 1171 (2006), *enfd. after remand* 315 Fed.App.318 (4th Cir. 2009); *Cab Associates*, 340 NLRB 1397, 1307 (2003). A review of the cases indicates that the motion should not be granted if any of the three factors are decided against the General Counsel.

In a case with similar facts, *New York Post Corp.*, 283 NLRB 430 (1987), a judge allowed, over the respondent's objection, a motion to amend made on the last day of hearing, to add the allegation of unlawful delay in furnishing information. The Board reversing, stating (at 431):

There is no explanation why counsel for the General Counsel waited until the last minute to add this allegation to the complaints . . . Although the record reveals some discussion from which the Respondent earlier surmised that amendments to the complaints might be proposed, we do not share the judge's confidence in finding that the Respondent was not prejudiced by the 11th hour amendments.

Here, the General Counsel was aware prior to the beginning of the trial that the Respondent had provided some of the information that the Union had requested in its three information requests after much time had elapsed. The General Counsel offered no reason for why the motion to amend was not made earlier, indeed not made prior to or at the beginning of the trial, or at the very least prior to the trial's resumption on June 18. In this respect, on April 30, the General Counsel raised—somewhat causally—the issue of unlawful delay but took no action to amend the complaint until the end of the second day

of the resumed trial and after the Respondent had presented most of its case in chief. The burden is on the General Counsel to aver violations, and the Respondent's burden is to refute them once they are made—not to rebut them in advance.

For that reason alone, the motion to amend was deficient. Requiring the Respondent to alter or expand its evidence at the end of the trial, and/or necessitating a continuance to ensure that the Respondent has full due process, would be untenable and fly in the face of the goal of timely and efficient administrative adjudication.

Accordingly, the General Counsel's motion to amend is now denied.

Witnesses

The General Counsel's witnesses were Reed; Waugh; Edward (Rick) Childers and Greg Lucero, officials of IBEW Local 66, which represents employees of CenterPoint, Oncor's counterpart in the Houston area; Richard Levi, a union-side labor attorney who represents IBEW; and Michael Simmons, assistant fire marshal for Dallas County, who was stipulated to be a qualified expert in arson and fire investigations.

The Respondent called the following company representatives, with their positions at times relevant:

- (1) James Greer, senior vice president and chief operations officer, the highest-level management official herein.
- (2) Distribution operations department:
 1. Vice-President Keith Hull.
 2. Reginald Bonner, director of distribution operations, who reported to Hull.
 3. Donna Smith (aka Donna Smith Jackson), trouble department manager, who reported to Bonner.
 4. Troublemakers Supervisors Michael Anderson and Randle Efflandt, both of whom reported to Smith and who supervised Reed.
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The Respondent also called Kenneth Longeway as an expert witness; the parties stipulated to his expertise in the area of fires in general.

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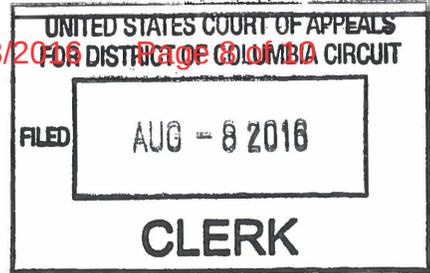
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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, and to enable the Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Petitioner Oncor Electric Delivery Company LLC (“Oncor”), states the following: Oncor is a private limited liability company organized under the laws of the State of Delaware. Oncor’s outstanding equity is held as follows:

- 80.03% by Oncor Electric Delivery Holdings Company LLC, a Delaware limited liability company. Oncor Electric Delivery Holdings Company LLC is wholly owned by Energy Future Intermediate Holding Company LLC, a wholly-owned subsidiary of Energy Future Holdings Cor. 98.9 % of the equity of Energy Future Holdings Corp. is owned by Texas Energy Future Holdings Limited Partnership, a limited partnership controlled by certain investment funds affiliated with Kohlberg Kravis Roberts & Co. L.P., TPG Global, LLC and GS Capital Partners, an affiliate of Goldman, Sachs &Co. For a list of the subsidiaries of Energy Future Holdings Corp., please see the Energy Future Holdings Corp. Annual Report on Form 10-K filed with the Securities and Exchange Commission on February 29, 2016.

- 19.75 by Texas Transmission Investment LLC, a Delaware limited liability company indirectly owned by a private investment group led by OMERS Administration Corporation, acting through its infrastructure investment entity, Borealis Infrastructure Management Inc., and the Government of Singapore Investment Corporation, acting through its private equity and infrastructure arm, GIC Special Investments Pte Ltd.
- 0.22% by Oncor Management Investment LLC, an entity whose Class A membership interests are owned by Oncor Electric Delivery Company LLC and whose non-voting Class B membership interests are held by certain members of management and independent directors of Oncor Electric Delivery Company LLC.

Oncor owns 100% of the equity in each of Oncor Electric Delivery Transition Bond Company LLC, a Delaware limited company, and Oncor Electric Delivery Administration Corp., a Texas corporation. In addition, Oncor hold a 19.5% equity interest in EFH CG Holdings Company LP and a 32% equity interest in 926 Pulliam Street, LLC. Oncor is a regulated electricity business that operates the largest distribution and transmission system in Texas.

Respectfully submitted,

HUNTON & WILLIAMS LLP



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Texas State Bar No. 24056224

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