Nos. 16-1278, 16-1341

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ONCOR ELECTRIC DELIVERY COMPANY, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 69

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (the Board) certifies the following:

A. Parties and Amici

Oncor Electric Delivery Company, LLC (Oncor), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The International Brotherhood of Electrical Workers, Local 69 (the Union) was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Oncor Electric Delivery Company, LLC*, 364 NLRB No. 58 (July 29, 2016).

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
Board	National Labor Relations Board
Br.	Oncor's opening brief
Committee	Texas Senate Committee on Business and Commerce
FVRA	Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq.
JA	Joint Appendix
Local 66	International Brotherhood of Electrical Workers, Local 66
Oncor	Oncor Electric Delivery Company, LLC
Union	International Brotherhood of Electrical Workers, Local 69

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Oncor Electric Delivery, LLC (Oncor) for review, and the cross-application of the National Labor Relations

Board (the Board) for enforcement, of a Board Order issued against Oncor on July 29, 2016, and reported at 364 NLRB No. 58. (JA 1-26.)[1] The International Brotherhood of Electrical Workers, Local 69 (the Union) has intervened on the Board's behalf.

The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f), which provides that petitions for review may be filed in this Court. Oncor's petition and the Board's cross-application were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

ISSUES PRESENTED

1. Does substantial evidence support the Board's finding that Oncor violated Section 8(a)(1) and (3) of the Act by discharging employee Bobby Reed for his union and protected activities?

2. Does substantial evidence support the Board's finding that Oncor violated Section 8(a)(5) and (1) on three occasions by failing and refusing to

[1] References preceding a semicolon are to the Board's findings; those following are to supporting evidence. "JA" refers to the parties' deferred joint appendix.

furnish the Union with information relevant to its duties as collective-bargaining agent?

3. Did the Board properly reject Oncor's challenges to the complaint's validity under the Federal Vacancies Reform Act?

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Company's brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On August 23, 2013, after investigating a charge filed by the Union, Acting General Counsel Lafe Solomon issued a complaint alleging several violations of the Act. (JA 246-257.) Acting on an additional charge filed by the Union, General Counsel Richard Griffin issued a consolidated complaint on January 31, 2014, alleging that Oncor violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by discharging employee Bobby Reed, and violated Section 8(a)(5) and (1) (29 U.S.C. §8(a)(5) and (1)) by failing to provide the Union with information requested on December 18, 2012, March 25, 2013, and July 24, 2013. After a hearing, an administrative law judge found that Oncor violated the Act as alleged, except as to the July 24 information request. (JA 8-26.)

On January 16, 2015, Oncor filed with the Board exceptions to the judge's decision, and the Union filed cross-exceptions. (JA 27-44, 143-48.) On May 23,

2016, General Counsel Griffin issued a notice of ratification, ratifying the initial complaint's issuance and continued prosecution. (JA 168-69.) On June 27, Oncor filed a motion to strike the ratification. (JA 1, n.1.)

On July 29, the Board adopted the administrative law judge's decision except as to the July 24, 2013 information request, and found that Oncor violated the Act as alleged in the complaint. (JA 1-8.) The Board also denied Oncor's motion to strike, finding that Oncor had waived any challenge to the complaint's validity by failing to preserve the argument in its exceptions and because Oncor had provided "no basis for [its] claim that the General Counsel's Notice of Ratification was legally insufficient." (JA 1 n.1.)

II. THE BOARD'S FINDINGS OF FACT

A. Oncor's Operations

Oncor is an electric-utility company based in the Dallas, Texas area. (JA 11; 2209.) Oncor and the Union had a collective-bargaining agreement covering certain Oncor employees through October 25, 2012. In addition to that agreement, Oncor had a progressive disciplinary policy with four steps: oral warning, written warning, suspension, and termination. (JA 11-12; 1439-42.)

In 2008, Oncor began deploying smart meters that allow for remote-control readings of its customers' electrical usage. Smart meters have three components: the meter itself, a meter base that includes "jaws" to which the meter attaches, and

an electrical panel attached to the customer's home. (JA 12; 448-49.) Oncor is responsible for maintaining and repairing the meter itself. Customers own, and must pay for any repairs to, the meter base and electrical system. By December 2012, Oncor had installed 3.25 million smart meters. (JA 12; 2206.) Increasing installation of smart meters led Oncor to lay off meter readers and some field-service employees. (JA 12; 2107.)

The smart-meter rollout was not without problems. When the "jaws" in a meter base are too wide or loose, they can overheat. (JA 18; 2100.) Such overheating can cause the plastic block of the meter to melt or burn, which can cause a flash or electrical arc when a meter technician pulls the meter out of the meter base. (JA 18; 2104.) Customers, who own the meter bases, were often displeased when they were required to pay for repairs to them. (JA 2105.) Throughout the smart-meter rollout, meter technicians informed Oncor management of jaws overheating and damaging both meters and meter bases, and Oncor had to dispatch workers to fix meter bases burned by overheating caused by smart-meter installation. (JA 18-20; 2268.) Oncor Chief Operations Officer James Greer was aware of at least two August 2010 incidents where a problem with a meter base caused a fire, and knew that claims had been made that smart meters were causing damage to customers' property. (JA 19-20; 2222, 2223.)

B. The Union's, and Union Representative Reed's, Smart-Meter Concerns

The erosion of unit work occasioned by Oncor's smart-meter rollout greatly concerned the Union. (JA 12; 374-84, 2074, 2107.) The Union lobbied the Texas state government in favor of a rule—which Oncor opposed—allowing customers to opt out of receiving smart meters. (JA 13 n. 13; 2116-17.) The Union was also concerned with the safety issues caused by meters overheating, and had discussed these concerns with the industry association of which Oncor was a member. (JA 3 n.10; 2074, 2076-77.)

In April 2011, Bobby Reed became the Union's full-time business manager and financial secretary. (JA 1; 2078.) Reed was a longtime Oncor employee, who most recently served as a "trouble man" responsible for responding to power outages. Reed's son, who worked for an Oncor contractor, was burned by a flash when servicing a smart meter. (JA 2106.) Reed himself once suffered burns from an electrical arc while working with an analog meter. (JA 3 n.12; 2104.) Reed had also personally serviced smart meters where the bad connection between the meter and the base caused overheating or burning. (JA 18; 388, 398, 399.)

As part of his duties, Reed kept up to date with the Union's smart-meter concerns. (JA 13; 374-84.) For instance, Reed spoke with Rick Childers, his counterpart at the International Brotherhood of Electrical Workers, Local 66, in Houston, and learned the Local 66 members were having issues with the smart

meters that they installed for Centerpoint. Specifically, Childers mentioned that smart meters had been melting or burning up meter bases, damaging customers' equipment, and sparking. (JA 13; 2133-35.) After surveying Local 66 meter technicians, Childers recontacted Reed and relayed that the technicians had seen an increase in the number of meter bases that had been burned or melted after smart meters were installed. The meter technicians believed loose connections between the smart meters and the meter bases were causing those problems. (JA 13; 2136-41.) In April 2011, Reed emailed a state representative's staff member from his union email address to relay that employees of Centerpoint in Houston had reported a "significant increase in the amount of smart meters being turned in due to the meter burning up in the customers' meter bases." (JA 13; 386.)

C. The Parties' Contract Negotiations Are Contentious

In advance of the October 2012 expiration of the parties' collective-bargaining agreement, Oncor and the Union met on August 23 to narrow the issues to be negotiated and schedule bargaining sessions. Oncor offered a 1-year extension, with raises for most, but not all, employees. (JA 1, 13; 2279.) When Reed, who served as the Union's chief negotiator, asked what Oncor intended by such a short extension, Oncor Director of Employee and Labor Relations Kyle Davis mentioned an upcoming state legislative session concerning smart meters, which he stated might result in some changes that Oncor would want to address in

a new agreement. (JA 1, 12-13; 2116.) Reed vowed that he would not agree to a contract that did not include wage raises for all employees. (JA 13; 2279.) During the meeting, Davis accused Reed of "looking for a fight," and opined that Reed "stuck his head in the sand, and that he did not tell the truth." (JA 13; 2117.)

In early October, before the parties' first formal contract-negotiation session, the Union's attorney suggested that Reed might want to attend a Texas Senate Committee on Business and Commerce (the Committee) hearing concerning whether smart meters "have harmful effects on health" and whether the legislature should commission an independent analysis of smart meters. (JA 13-14; 2070-71, 446-47.) The attorney suggested that Reed present the Union's safety concerns regarding smart meters overheating. (JA 3 n.10; 2070-73.) On October 8, before the negotiating session started, Reed and Union President Charles Jackson met with Davis and another Oncor manager. Reed told them that he was "trying to play nice," but that if they did not "make a deal today," he would "testif[y] before the senate commerce committee [the next day] about smart meters." (JA 1; 2281.) Reed clarified that he was not threatening Oncor, and Davis told Reed to testify if he thought he must. Although "the atmosphere was somewhat strained" at the meeting's conclusion, Reed agreed to take a contract proposal to the Union's members for a ratification vote, and the parties scheduled another bargaining meeting for October 22 or 23. (JA 1, 13; 2119.)

D. Reed Testifies about Smart Meters

Due to the strained atmosphere at the October 8 meeting, Reed decided to testify at the smart-meter hearing. (JA 14; 2120.) Before doing so, he called Dallas County Assistant Fire Marshall Mike Simmons, who said that his office had been involved in two fires caused by smart-meter installations. During that conversation, Reed mentioned that he had experienced difficulty with a smart-meter installation in a woman's home in southern Dallas County. (JA 14, 20; 2143-45.)

On October 9, Reed appeared at an open hearing of the Committee concerning smart-meter safety. He indicated on the Committee's witness list that he was representing both himself and the Union, and would testify "on" the topic, rather than "for" or "against." (JA 14; 451.) Reed testified for about 2 or 3 minutes. (JA 2; 2114.)

At the start of his testimony, Reed introduced himself as an Oncor employee and as a representative of the Union. He then testified that after smart meter deployment started, he increasingly saw two issues: "meters burning up and burning up the meter bases." (JA 14; 1519-21.) As an example, he recounted a story about going to an elderly woman's house, discovering that she had a burned meter base, and having to explain that the woman would be responsible for repairs to the meter base, because the base is the customer's equipment. (JA 14; 1519-21.)

When Senator Carona asked Reed whether the age of the line or the meter caused the problems, Reed responded "it's the meter," and explained that the smart meters are a bit too big to fit the meter bases, particularly in older houses. He further mentioned that he had spoken with a union colleague in Houston, who told him that "they are experiencing a significant increase in the meters being turned in that are burnt up [when changing] from the old analog meters to [smart meters]." (JA 14; 1520-21.) Finally, Reed stated that he did not know how frequently such problems happened, but that "fire and heat" were "causing damage to people's homes." (JA 14; 1521.)

E. Oncor Investigates Reed's Testimony; the Union Requests Information Regarding Investigation

Manager Mark Moore was at the Committee hearing to testify in favor of smart meters on Oncor's behalf. Moore reported the contents of Reed's testimony to Davis, Oncor's labor relations director. (JA 14; 2236.) The next day, Davis, Greer, and another Oncor manager met to watch video of the senate hearing. Due to "the totality of the comments [Reed] made, not any specific line," Greer ordered an investigation into smart-meter safety. (JA 15; 2226.) He asked his subordinates to review several kinds of documents to determine whether smart meters cause fires or damage to customers' homes, including trouble tickets, compliance-hotline calls, service orders, and claims from the claims department. (JA 15; 2213-17.)

Around November 6, 2012, Greer met with his subordinates, who reported that they had found no evidence supporting Reed's testimony that smart meters had caused fires or damages to customers' homes. (JA 15; 2251-52.) On November 7, Oncor sent Reed a letter stating that it had found no evidence showing that fires from smart meters damaged customers' homes, and requesting that Reed provide any information on which he had based his testimony. (JA 16; 1545.) At no time did any Oncor manager meet with Reed or speak with him orally about his testimony. (JA 17; 2123.)

On November 29, Reed responded by letter, stating that his testimony was based on his own experiences with trouble incidents. (JA 16; 1546.) Greer responded to Reed's letter on December 14. In his response, Greer stated that Reed had provided no evidence to support his testimony, and that Oncor's code of conduct prohibited employees from providing misleading or fraudulent information to public officials or government agencies. (JA 16; 1547.) Greer gave Reed until December 19 to submit any additional evidence he wanted the Company to consider before the Company made its disciplinary decision with respect to Reed's testimony. (JA 16; 1547.)

On December 18, Reed responded to Greer's December 12 letter and, on behalf of the Union, requested that Oncor provide the specific portions of the code of conduct that the letter referenced, all documents that Oncor had created or

considered in connection with its investigation into Reed's testimony, and all completed trouble tickets Reed had handled since smart-meter deployment began. (JA 16; 1548-51.) In addition to electronic tickets, trouble men, including Reed, used handwritten tickets, which Oncor kept in a file cabinet. (JA 18; 2259-60.) Oncor did not provide any of the requested information before Reed's discharge. (JA 16; 2122-23.)

F. Oncor Fires Reed for His Testimony

Oncor discharged Reed on January 14, 2013. That day, Greer sent Reed a discharge letter stating that Reed had violated Oncor's code of conduct by falsely testifying that smart meters were causing damage to people's homes. The letter also notified Reed that he could contact manager Donna Smith to review his electronic trouble tickets. (JA 17; 1554-58.)

Reed replied by email on January 17, notifying Oncor that the Union would grieve his discharge under the parties' collective-bargaining agreement. (JA 17; 2058.) The parties met to discuss the grievance, which Oncor denied on February 21. (JA 17; 2059.) The Union filed a request for arbitration with the Federal Mediation and Conciliation Service on February 26. (JA 17; 2060-63.)

G. Oncor Ignores the Union's March 25, 2013 Information Request

On March 25, in advance of arbitration, the Union requested the following information from Oncor: (1) documents reflecting claims for damages to customers' meter bases or metering equipment; (2) identification of any electrical contractors Oncor used to fix damage to meter bases or metering equipment; (3) any service tickets that include the words or phrases "breaker heading, burn, burned, defective load lugs, defective smart meter, fire, fire dept, heating up, load lugs, load side lug, MB, meter, meter base, meter block, meter lugs, mtr, [or] smart meter"; (4) all documents Oncor reviewed, created, or considered in connection with its investigation of Reed's testimony at the hearing; (5) provisions of Oncor's code of conduct that it contended Reed had violated; (6) answers to several questions relating to Oncor's investigation of Reed's testimony and its lack of response to the December information request; (7) documents relating to Reed's work record; and (8) prior instances in which Oncor was aware of, or disciplined employees for, their testimony before a government body. (JA 17-18; 1559-84.) Oncor did not respond to the request. (JA 18; 2129.)

That same day, Reed met with Smith to review his trouble tickets. When Smith produced the tickets from Oncor's electronic records, Reed asked what they were, and commented that they were not in his handwriting. (JA 18; 2257-58.) Oncor did not provide Reed with his handwritten trouble tickets until April 2014,

the month that the hearing before the administrative law judge started. (JA 18-19; 2125, 1587-91.)

H. The Union Requests Information on July 24, 2013; Oncor Withholds Some Requested Information

On July 16, 2013, Oncor discharged employee Sam Goodson for lying about a May 13 incident involving him and another employee, Eddie Lopez. (JA 5, 18; 2080.) The Union filed a grievance about the termination and, on July 24, 2013, requested that Oncor provide it with information about the investigation, including Lopez's personnel records. (JA 18; 1594-96.) The Union wanted to determine whether Goodson and Lopez were treated disparately and whether to pursue Goodson's grievance. (JA 5; 2082-83.) Oncor provided all of the requested information except for Lopez's records after May 26, 2013, which Oncor refused to provide because it had promoted Lopez out of the unit on that date. (JA 18; 2085-97, 1597-1600, 1993-95.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce; Members Hirozawa and McFerran) found that Reed's testimony before the Committee was protected by Section 7 of the Act and did not lose the Act's protection. (JA 2-5.) The Board therefore found that Oncor's discharge of Reed violated Section 8(a)(1) and (3) of the Act. The Board further found that Oncor violated Section 8(a)(5) and (1) of the Act by failing to provide information the Union requested on

December 18, 2012, March 25, 2013, and July 24, 2013. (JA 1-6.) Chairman Pearce dissented as to the July 24 information request. (JA 6 n.15.)

The Board ordered Oncor to cease and desist from the violations found and from any like or related violations of the Act. The Board further ordered Oncor to provide the requested information, reinstate Reed, and make Reed whole. (JA 6-7.) Finally, the Board's Order requires Oncor to post a remedial notice. (JA 7-8.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Reed's legislative testimony was both concerted and protected within the meaning of Section 7 of the Act, and Oncor therefore violated Section 8(a)(1) and (3) by discharging him for his testimony. Reed explicitly testified on behalf of the Union, which renders his testimony concerted. He testified in order to gain leverage in collective-bargaining negotiations, and the Board reasonably interpreted the text of Section 7 to protect such a motive. Reed's testimony also related to employee safety and job duties. His choice to tailor his message to his audience by highlighting the effects of smart-meter deployment on customers' property does not obscure that relationship or undermine Section 7's protection.

Substantial evidence further supports the Board's finding that Oncor did not show that Reed's testimony was either maliciously untrue or so disloyal as to lose the Act's protection. Reed not only relied on his personal experience but also

consulted another union and a fire marshall before testifying. Any imprecision in his testimony was appropriate in context, and did not rise close to the level of malicious falsehood. Nor was Reed's testimony disloyally disparaging: it directly addressed the crux of the Union's concern with smart meters—overheating—and did not disparage Oncor or any Oncor product. Reed's testimony thus remained proportionate to his grievance. This Court is without jurisdiction to consider Oncor's present contention that Reed's testimony lost the Act's protection because he did not indicate that it was linked to an ongoing labor dispute. In any event, it would have been clear to the Committee that Reed spoke on behalf of the Union in furtherance of the Union's longstanding opposition to across-the-board smart-meter deployment.

Substantial evidence further supports the Board's finding that Oncor violated Section 8(a)(5) and (1) of the Act on three occasions by failing to provide complete information in response to union requests. First, Oncor's failure to provide all documents reviewed—rather than those it relied on—during its investigation into Reed's testimony was unlawful because the Union's request clearly included such documents. Second, Oncor unlawfully ignored the Union's request for information related to Reed's discharge. The Union's request sought only relevant information, and did not cross the line into probing Oncor's arbitral strategy. Third, Oncor unlawfully refused to provide Lopez's full personnel records, which were relevant

as comparator data to allow the Union to decide whether to grieve Goodson's termination. Lopez's promotion out of the bargaining unit did not change his status as a comparator for Goodson.

Finally, the Court lacks jurisdiction to consider Oncor's FVRA-based challenge to the initial complaint, which was issued by an acting general counsel not properly appointed under that statute. Oncor failed to timely challenge the complaint's validity before the Board and offers no extraordinary circumstances to excuse its failure to do so. In any event, the issue of the initial complaint's validity is moot because General Counsel Griffin ratified the complaint's issuance and continued prosecution, correcting any alleged defect.

STANDARD OF REVIEW

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). As the Supreme Court has observed, "Congress made a conscious decision" to delegate to the Board "the primary responsibility of marking out the scope of the statutory language." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979); *see also Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 357 (D.C. Cir. 2016) (court "will uphold Board's legal determinations so long as they are neither arbitrary nor inconsistent with established law") (internal quotation omitted).

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2012). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). "Determining whether activity is concerted and protected within the meaning of Section 7 is a task that 'implicates [the Board's] expertise in labor relations.'" *Citizens Inv. Serv. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ONCOR VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DISCHARGING REED FOR HIS UNION AND PROTECTED ACTIVITIES

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). Thus, an employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activity protected by Section 7 of the Act. *See Citizens Inv. Servs.*, 430 F.3d at1197; *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993). Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Accordingly, an employer also violates Section 8(a)(3) of the Act by discharging employees because of their union activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

Here, it is undisputed that Oncor discharged Bobby Reed because of his testimony at the Texas legislative hearing on smart-meter safety. As shown below, substantial evidence supports the Board finding that Reed's testimony was concerted within the meaning of Section 7 because he spoke on behalf of the Union. (JA 2.) The record also supports the Board's finding that Reed's testimony had a protected subject matter within the meaning of Section 7 because it was intended to serve as leverage in collective bargaining, and related to terms and conditions of employment that were the subject of ongoing union concern. (JA 2-4.) The Board further reasonably found that Oncor failed to demonstrate that Reed's truthful testimony did not lose the Act's protection. (JA 4-5.) Accordingly, the Board is entitled to enforcement of its finding that Oncor violated Section 8(a)(1) and (3) of the Act by discharging Reed for his testimony on behalf of the Union.

A. The Board Reasonably Found That Reed's Testimony Was Concerted and Protected within the Meaning of Section 7

1. Explicitly representing the Union renders Reed's testimony concerted

Section 7 "explicitly recognizes" that "assisting a labor organization" is concerted activity. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 832-33 (1984). Section 7's protection extends "throughout the entire process of labor organizing, collective bargaining and enforcement of collective-bargaining agreements." *Id.* at

835. Thus, when an employee testifies as a union official, the "concerted nature of [the employee's] testimony is established by the capacity in which [the employee] was testifying." *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), *enforced mem.*, 924 F.2d 1055 (5th Cir. 1991); *see also Tradesmen International, Inc.*, 332 NLRB 1158, 1159 (2000) ("assisting the [u]nion" by testifying before municipal board constitutes concerted activity), *enforcement denied on other grounds*, 275 F.3d 1137 (D.C. Cir. 2002).

Ample evidence supports the Board's finding that Reed "openly testified in his capacity as a union official" and his testimony was therefore concerted. (JA 2.) Most notably, Reed identified himself as a union officer both on his sign-in sheet and in his actual testimony. Moreover, the Union's attorney notified Reed about the hearing and suggested that he attend. Before the hearing, Reed spoke with Childers, an official for the Union's counterpart in Houston, about the subject of his testimony. And at the hearing, he discussed what he had learned from Childers. In those circumstances, Reed clearly testified not solely on his own behalf, but on behalf of the Union and the employees it represents.

Oncor's claim that there is no evidence that the Union "sought or needed assistance" (Br. 20) from its own full-time business manager and financial secretary is counterintuitive; Reed's position afforded him the authority to determine how to assist the Union. In any event, the record evidence just

discussed belies Oncor's contention, as does the Union's long history of involvement with the Texas legislature's regulation of smart meters, *see* p. 21.

In arguing that Reed's testimony was not concerted (Br. 17-19), Oncor conflates the two elements defining the scope of Section 7: concerted activity and protected subject matter. "[S]ection 7 . . . requires that both the 'mutual aid or protection' *and* the 'concerted activity' prongs be satisfied." *Prill v. NLRB*, 835 F.2d 1481, 1485 (D.C. Cir. 1987). The Board held that "the concerted nature of Reed's senate testimony derives from the fact that he was assisting a labor organization" (JA 2 n.6), not that his testimony had a protected subject matter solely for that reason.

In light of that distinction, Oncor's reliance on this Court's decision in *NLRB v. Tradesmen Int'l, Inc.* to argue that the testimony was not concerted is misplaced. In *Tradesmen*, the Court explicitly "assume[d] without deciding that [the employee's] activity as a union representative constituted concerted activity." 275 F.3d 1137, 1142 (2002) (citing *City Disposal*, 465 U.S. at 829). Thus, that decision clearly does not address whether union activity is concerted. Oncor's reliance on *GHR Energy* to challenge concertedness is similarly unavailing. There, the Board adopted the judge's finding that the union official's testimony was intrinsically concerted; it examined the details of the testimony only in analyzing

whether it satisfied the mutual-aid-or-protection prong of Section 7. 294 NLRB at 1014.[2]

2. Reed's testimony was for the purpose of collective bargaining and mutual aid or protection

a. Reed testified in part to pressure Oncor in collective-bargaining negotiations

Section 7 explicitly protects "activities for the purpose of collective bargaining." 29 U.S.C. § 7. Substantial evidence supports the Board's finding that "Reed's testimony before the Texas Senate was at least partially motivated by his attempt to gain leverage for the Union in bargaining negotiations." (JA 2-3.) Reed stated during negotiations that if the Union and Oncor could not reach a reasonable contract, he would testify about smart meters. (JA 1.) He then did so the very next day. Oncor does not seriously challenge the Board's finding that those circumstances show that Reed was motivated to create leverage for the Union's bargaining position.

Oncor's contention (Br. 21) that smart meters were not an issue in collective bargaining is factually incorrect and legally irrelevant. It is undisputed that Oncor offered just a one-year contract at the start of negotiations because it thought

[2] Because Section 7 protects union activity even when "divorced in time, and in location as well, from the actions of fellow employees," it is irrelevant that no other employees were present for Reed's testimony. *City Disposal*, 465 U.S. at 833-34.

legislative action on smart meters would affect negotiations. Moreover, the Board's finding relied on the *purpose*—not the subject—of Reed's testimony. The Board's determination that Section 7 protects collective-bargaining activities taken to aid a union's bargaining position is rational and consistent with the text and purposes of the Act. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "statutory text forecloses" agency's interpretation). One of Section 7's core functions is to protect economic weapons used to bring pressure in negotiations, including strikes and lockouts. *See NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 489 (economic weapons are "part and parcel of the system that the [Act] ha[s] recognized"); *see also Cintas Corp. v. NLRB*, 589 F. 3d 905, 913-14 (8th Cir. 2009) (employee did not lose Act's protection by participating in national publicity campaign criticizing employer to gain leverage in organizing activities). Here, Reed's testimony pressured Oncor to offer a better contract to avoid legislative interference with its smart-meter-deployment plan, just as strikes pressure employers to increase offers to get employees back to work.

b. Reed's testimony related to employee safety and increased customer-service work

Section 7 explicitly protects concerted activities taken for "mutual aid or protection." 29 U.S.C. §157. That language is liberally construed to protect concerted activities addressing a broad range of employee concerns or improve

employees' situation. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-66 (1978). Section 7's protection extends, moreover, to appeals directed at third parties "outside the immediate employee-employer relationship." *Eastex*, 437 U.S. at 565. *Accord DirecTV, Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016). Indeed, the Supreme Court has held that "employees' appeals to legislators to protect their interests as employees are within the scope of [the mutual aid or protection] clause." *Eastex*, 437 U.S. at 565-66; *see also GHR Energy*, 294 NLRB at 1014 (Section 7 protected employee's testimony in support of environmental-safety laws). And when making third-party appeals, employees may tailor their message to their audience. *Allied Aviation Serv. Co.*, 248 NLRB 229, 231 n.10 (1980), *enforced mem.*, 636 F.2d 1210 (3d Cir. 1980) (recognizing that employees can "emphasize the . . . aspects of [labor] disputes" with which "customers would . . . be concerned"); *accord Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) ("If unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision."). As discussed below, substantial evidence supports the Board's finding that Reed's testimony was precisely that type of appeal.

Ample evidence supports the Board's finding that Reed's testimony about meters and meter bases overheating "related to (and was spurred by) an ongoing and legitimate concern of the Union about the safety of represented bargaining unit employees working with the meters, particularly given the hazard of electrical arcs." (JA 3.) The primary focus of Reed's testimony was smart-meter installations overheating. Such overheating may lead to electrical arcs or flashes that can endanger employees, *see* pp. 34-36. *See GHR Energy*, 294 NLRB at 1014 (finding Section 7 protected union official's testimony in support of environmental safety laws because of those laws' "direct impact on the working conditions of employees"). *See also Caterpillar, Inc. v. NLRB*, 803 F.3d 360, 364 (7th Cir. 2015) (union has right "to look out for the safety of the employees whom it represents").

The Union and employees were concerned about that effect on employee safety. The Union raised its concerns during an ongoing lobbying campaign addressing smart-meter deployment. Reed himself had previously discussed those safety concerns with his counterpart, Childers, who relayed Local 69's problems with smart meter installations. Reed then emailed a legislative staff member to report problems with smart-meter bases burning up in Houston, using an email signature and email address clearly indicating that he did so on behalf of the Union. (JA 384.) As noted, the Union's attorney suggested that Reed testify at the

Committee hearing, which was focused on smart-meter safety. And the Board explicitly credited the Union's attorney's testimony that his primary concern with smart meters was safety. (JA 2074.) Moreover, employees also complained to their supervisors that "the smart meters were heating up and the lugs melting or burning." (JA 19.) In other words, Reed's testimony was part of an ongoing union effort to address the effects of the smart-meter rollout, including the impact of increased meter overheating on employee safety, a condition of employment. Accordingly, the Board reasonably found that the subject of Reed's testimony fell within the mutual-aid-or-protection language of Section 7.

Reed's decision when testifying to highlight the effects of overheating on customers' property, rather than the impact on employee safety, does not undermine the Board's finding that Section 7 protected his testimony. As discussed above, p. 25, the Board and courts focus on whether the subject of the testimony relates to and impacts employees' working conditions, not whether the testifying employee explicitly refers to that impact. For instance, in *Misericordia Hospital Medical Center v. NLRB*, a group of employees submitted a report to a hospital accreditation committee criticizing the hospital's emergency room and admissions policies, unsanitary patient-care units, and staff shortages. 623 F.2d 808, 811-12 (2d Cir. 1980). The Second Circuit held that, although the primary thrust of the report was hospital accreditation and patient care, not working

conditions, the report had a sufficient connection to working conditions to warrant Section 7 protection. *Id.* at 813. Likewise, in *GHR Energy*, the Board found that an employee's testimony to a United States Senate committee focusing on the illegality of the employer's waste disposal system was protected because the environmental safety laws under consideration "have [a] direct impact on the working conditions of employees[.]" 294 NLRB at 1014. Because the relevant inquiry is whether the employee discussed an issue that affects employee interests, *GHR* is not inapposite, as Oncor claims (Br. 17-18), simply because the employee in that case expressly testified as to effects on employee safety. Here, although Reed focused his presentation on customer safety to capture the Committee's attention, the overheating problem he discussed bore a close relationship to the safety of employees who service smart meters.

There is no merit to Oncor's contention (Br. 18-19) that the nexus between Reed's testimony and employee working conditions is analogous to the one this Court found insufficient in *Tradesmen*. In that case, a prospective employee lobbied a municipal government in order to force his prospective employer to post a surety bond for certain construction work. 275 F.3d at 1139. The Court, noting that the employer's employees would suffer if it had to post the surety bond, held that Section 7 did not protect the employee's lobbying because the surety bond did not relate to employee working conditions. *Id.* at 1144. By contrast, here, the

Board detailed the practical impacts of the smart-meter rollout on employees, and found that Oncor's employees would greatly benefit from any reduction in smart-meter deployment. In addition to safety concerns, the Board found (JA 12) that increased smart-meter use had caused significant layoffs, and cited (JA 4) effects on employees' customer-service duties, discussed below.[3]

Finally, it makes no difference that, as Oncor emphasizes (Br. 24-25), the Board supported its finding of safety concerns in part by referencing the experiences of Houston employees who installed a different type of meter than the one Oncor uses. As an initial matter, although Reed cited the Houston employees' experiences, he also made clear that he personally had dealt with smart meters overheating.[4] More fundamentally, Reed's generalized discussion of smart meters, including references to other employees' experiences, fits within Section 7 because

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[3] Oncor's reliance (Br. 22) on *Ampersand Publishing, LLC v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012), is misplaced. In *Ampersand*, the Court found unprotected employees' "demands for editorial control," because the First Amendment bars government interference with the content of what newspapers publish, not because the employees demands did not fall within the mutual aid or protection clause. 702 F.3d at 57. This case does not implicate the First Amendment.

[4] Oncor's contention (Br. 40) that Reed never actually saw a meter overheat is meritless. Reed identified 26 instances where his service tickets showed broken meter lugs, and the Board credited his testimony that the lugs had broken in each case due to overheating. (JA 4; 385-442.) Oncor has not shown that the Board's credibility resolutions were "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012).

that provision protects not only his attempts to ensure the safety of Oncor's employees, but also his attempts to improve working conditions for other unionized employees in Texas. *Eastex*, 437 U.S. at 564 (Section 7 protects employee action "in support of employees of employers other than their own"). The Board thus properly considered the evidence of Houston employees' experiences in determining that Reed's testimony related to employee safety. (JA 3-4.)

Even aside from employee safety, Reed's testimony related to another term or condition of employment. As the Board found, Reed explicitly mentioned an "increase both in the number of service calls and the frequency with which [employees] had to deal with disgruntled customers when explaining to them that they must pay to repair or replace their burned up meter bases." (JA 4.) In this regard, he related a story of an irate elderly customer who complained about having to "pay for the repairs before you can get your lights back on." (JA 1520.) Reed also stated that such situations happened "a lot," and that he had noticed an increase in work orders for "meters burning up and burning up the meter bases." (JA 1519-20.) Those qualitative and quantitative effects of the smart-meter rollout on employees' customer-service duties bring Reed's testimony within the "mutual aid or protection" language of Section 7. As the Board found, those effects, referenced in Reed's testimony, "directly related to (and arose from) the daily work

that unit employees performed" and "had a meaningful impact on working conditions." (JA 4 n.13.)

Before the Board, Oncor did not except to "the judge's finding . . . that the increasing number of difficult interactions with customers regarding the smart meters had a meaningful impact on working conditions." (JA 4 n.13.) The Court is thus without jurisdiction to consider Oncor's challenge (Br. 25-26) to that independent basis for finding that Reed's testimony had a protected subject matter within the meaning of Section 7. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). Oncor neither disputes the Board's finding that Oncor did not challenge the judge's findings respecting the customer-service impacts of the smart-meter rollout, nor contends that extraordinary circumstances excuse its failure to do so. That nexus between Reed's testimony and employee working conditions is sufficient to satisfy the mutual-aid-or-protection element of Section 7, whether or not the Court also finds a link between the testimony and employee safety.

B. Oncor Has Not Shown that Reed's Testimony Lost the Protection of the Act

Section 7 protects employee statements critical of or prejudicial to employers so long as the statements are not "so disloyal or maliciously untrue as to relinquish the Act's protection." *DirecTV*, 837 F.3d at 36. Before the Board, Oncor argued that Reed's testimony lost the Act's protection because it was maliciously false and disloyally disparaged Oncor's product. The Board rejected both of those arguments, finding that Reed had a factual basis for his testimony, that any imprecision was understandable in context, and that he did not attack Oncor or its product, but instead raised legitimate concerns about smart-meter installations generally. (JA 4-5, 5 n. 15.) Substantial evidence supports those findings.

1. Reed's testimony was not maliciously false

Employee statements may forfeit the protection of the Act if they are maliciously untrue. *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007), *enforced mem.*, 358 Fed.Appx. 783 (9th Cir. 2009). To lose the Act's protection under that standard, "it is not enough for employee statements to be false, inaccurate, or misleading." *DirecTV*, 837 F.3d at 41. They must also be "made with knowledge of their falsity or reckless disregard for their truth." *Valley Hosp.*, 351 NLRB at 1252. Statements based on employees' own experiences or on the accounts of coworkers thus do not qualify as maliciously false even if inaccurate or incomplete. *See NLRB v. Greyhound Lines, Inc.*, 660 F.2d 354, 357 (8th Cir.

1981) (press release containing inaccurate statement not malicious when employees had attempted to verify statement's truth); *Valley Hosp.*, 351 NLRB at 1261 (nurse's public statements about patient care did not lose Act's protection when based on "conversations with [another employee] and her own observations" despite "mistaken . . . inferences she drew from her conversations and/or her observations").

Substantial evidence supports the Board's finding (JA 4) that Oncor failed to demonstrate that Reed's testimony was maliciously untrue. The Board properly rejected as "highly technical" Oncor's claim that "Reed testified falsely . . . by suggesting that the heating and burning of smart meters and meter bases were intrinsically caused by smart meters themselves, rather than the connection between the new meters and the existing bases." (JA 4; *see also* Br. 38-39.) Reed's brief testimony did not address the mechanical details as to how smart meters connect to their bases. Nor would such details have been relevant to his message that smart-meter deployment had led to increasing incidents of overheating. If an employee is burned or a customer's property is damaged due to such overheating, it makes no difference whether the meter itself or the connection to the base caused the electrical arc. As the Board noted, "smart meters and meter bases are interconnected components that must remain connected to operate." (JA 5.) That Reed did not fully distinguish between meters and meter bases "in the 2

minutes he was allotted to testify," when doing so bore no relation to the hearing's purpose, does not come close to a malicious falsehood. (JA 5.)

In fact, Reed's testimony alluded to the connection being the problem. After stating that the meter rather than the age of the line caused the issues with burning, he identified the crux of the issue as the fit between the meters and bases, noting that employees "have to manipulate the meter in order to get the cover to lock." (JA 1520-21.) Moreover, Reed did not testify that only smart meters could cause overheating due to poor connections with a meter base. Instead, he merely testified that such issues *increased* with the deployment of smart meters. The judge and the Board credited that testimony (JA 4, 19), which even Oncor's supervisors corroborated. (JA 2268.)

The Board further found (JA 5) that to the extent Reed's testimony contained any inaccuracies, they were not made knowingly or recklessly. To the contrary, as the Board detailed, the record amply shows that Reed's testimony was well-founded; he had good reasons to believe that smart-meter installation caused burning and damage to meter bases. In testifying to that effect, Reed not only relied on his personal experience, but also on information he had received after taking affirmative steps to determine if smart-meter safety issues were a global concern. He had reached out to the Union's counterpart in Houston. He had also called a fire marshall to learn if the marshall had seen any issues with smart

meters. The Houston union reported many incidents of new smart-meter installations overheating, and the fire marshall corroborated Reed's view that smart-meter deployment had caused fires.[5] The record therefore fully supports the Board's finding that Reed had ample basis for his testimony. *See Valley Hosp.*, 351 NLRB at 1261 (employee's personal observations and information from coworker adequate basis for public critique of employer).

Contrary to Oncor's suggestion (Br. 43-45), the information Reed received from the Houston employees did contribute to the factual basis for his testimony. Reed did not purport to discuss any particular brand of smart meter. He never stated in his testimony that Oncor used the same meter as Centerpoint in Houston, and never even mentioned Oncor's meter manufacturer, Landis & Gyr. That broad-brush testimony was consistent with the hearing's focus on smart-meter safety in general, not the safety of any particular brand of smart meter.

Reed's testimony that smart-meter installation caused meter bases to burn up and damaged employee's homes is therefore fully consistent with the evidence he had assembled. The factual basis for Reed's testimony, and the steps he took to investigate the issue beyond his personal experience, distinguish this case from

[5] Oncor's suggestion (Br. 37-38) that Reed should have reviewed its records before testifying would place an unreasonable burden on employee Section 7 activity, particularly considering that there is no reason to believe Oncor would have allowed Reed to access the same records it later unlawfully refused to provide him.

those cited by Oncor (Br. 37-38), wherein the Board found that employees had made false statements without making any effort to ascertain their truth. *See Kvaerner Phila. Shipyard, Inc.*, 347 NLRB 390, 390 (2006) (arbitrator's decision that employee lost Act's protection was not "palpably wrong" where employee did not check with union or otherwise seek to verify baseless accusation that employer took improper deductions from employees' paychecks); *Stanley Furniture Co.*, 271 NLRB 702, 703 (1984) (baseless employee statement that fire department was called to employer premises daily lost Act's protection where fire department had only actually been called five times in the previous 6 months). That factual basis also belies Oncor's suggestion (Br. 45-46) that Reed spoke with reckless disregard for the truth because his motivation to gain leverage in collective-bargaining negotiations caused him to testify impulsively and without adequate preparation. In any event, Reed's motivation for speaking is distinct from the issue of whether he had reason to believe his statements were true.

2. Reed did not disloyally disparage Oncor or its products

The Board will only find that truthful employee statements prejudicial to an employer lose the Act's protection if they are "flagrantly disloyal, wholly incommensurate with any grievances which they might have." *DirecTV*, 837 F.3d at 41 (internal quotation omitted). *See also Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 53-54 (1st Cir. 2008) ("It is widely recognized that not all employee

activity that prejudices the employer, and which could thus be characterized as disloyal, is denied protection by the Act."); *Allied Aviation*, 248 NLRB at 231 (sensitive information or topics do not render a communication unprotected). The Board reasonably rejected Oncor's argument that Reed's testimony met that disloyalty standard "because it 'disparaged Oncor's business reputation' and was 'calculated to cause Oncor harm.'"[6] (JA 5 n.15.) Substantial evidence supports the Board's finding that Reed instead "raised legitimate, employment-related concerns about smart meter installations." (JA 5 n.15.)

As an initial matter, Reed's testimony simply was not directed at Oncor in particular. Reed did not insult Oncor or even mention Oncor by name other than to identify himself as an Oncor employee. Indeed, any criticism was leveled not on a product or service that Oncor provides to consumers but on a type of product—smart meters—that Oncor uses in the course of its business. Moreover, Reed did not identify or criticize the brand of smart meter Oncor has deployed. Indeed, by mentioning the Houston employees' similar issues, Reed expressly conveyed that his criticism was general to the industry and not specific to Oncor or its products.

Reed's testimony therefore does not resemble the statements at issue in cases where the Board has found a loss of protection due to disloyal criticism directed at

[6] That express finding belies Oncor's claim (Br. 32-33) that the Board did not examine whether Reed's statements were disloyal.

a particular employer and its products or services. *See, e.g.*, *Five Star Transp.*, 349 NLRB 42, 45-46 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008) (employee letters characterized school-bus company as "substandard company" that employed "alcohol abusers, drug offenders, [and] child molesters"); *Kitty Clover*, *Inc.*, 103 NLRB 1665, 1687 (1953) (accusation that potato chip manufacturer employed "diseased girls from North 16th Street"), *enforced*, 208 F.2d 212 (8th Cir. 1953). Oncor's reliance on *Endicott Interconnect Technologies, Inc. v. NLRB*, is similarly misplaced, because the Court found that the statements in that case, unlike Reed's testimony, directly attacked the quality of the service provided by the employer. 453 F.3d 532, 534-35 (D.C. Cir. 2006) (citing employee statements that characterized employer decisions as creating "gaping holes" and "voids" in critical knowledge base for highly technical business, which was consequently "being tanked").

Moreover, Reed's testimony was fully commensurate with his and the Union's concerns regarding employee-safety issues and increased customer-service duties stemming from overheating smart-meter installations. Reed had personally seen broken jaws, which can cause electrical arcs, and had spoken with other employees about their similar issues. He testified about exactly those issues, identifying the fit of the new meters on the existing bases as the source of the problem. He did not directly insult or disparage Oncor's product, electrical

service, or imply that it was inferior in any way. That Reed's testimony may have been inconvenient or sensitive from Oncor's perspective does not strip it of Section 7 protection. *See, e.g.*, *Greyhound Lines*, 660 F.2d at 354-56 (bus drivers who could not meet assigned time schedules did not lose Act's protection when they issued press release stating that passengers might face delays); *Prof'l Porter & Window Cleaning Co.*, 263 NLRB 136, 136 (1982) (janitorial employees' statement to customer that customer's facility was not cleaned because employer used inferior cleaning products did not lose Act's protection), *enforced mem.*, 742 F.2d 1438 (2d Cir. 1983). Reed did not ask customers to avoid Oncor's products or even Oncor's service generally; at most, he supported giving customers a choice to continue to use one of Oncor's services—electricity measured through analog meters—that would otherwise be discontinued.

Finally, although Reed's comment that fire and heat are damaging people's "homes" might seem hyperbolic, it was well within the bounds of protected communication. First, as noted above, pp. 34-36, the statement is not technically incorrect. Second, the Board, with court approval, has often found solicitations for public support on issues affecting employees to be protected even when presented in an explicit and attention-grabbing manner far more provocative than Reed's testimony. *See Valley Hosp.*, 351 NLRB at 1250 (statement that patients "could be lying in their own excrement for who knows how long" before receiving

medications), *enforced mem.*, 358 Fed.Appx. 783; *Five Star Transp.*, 349 NLRB at 57 (letter stating that employer would provide "poorly maintained busses" and "[s]chool bus drivers that don't know your children or care if they get home safely") *enforced*, 522 F.3d 46; *Allied Aviation*, 248 NLRB at 229 (describing employer policy as "haz[]ard to airline person[n]el, equipment, facilities, and customers" and warning customers to call management "before a tragedy does occur!") *enforced mem.*, 636 F.2d 1210.

C. This Court Is Without Jurisdiction To Consider Oncor's Contention That the Board Did Not Properly Apply *Jefferson Standard*

As stated above, Section 10(e) of the Act bars consideration of any claim that has not been presented to the Board absent extraordinary circumstances. Oncor contends (Br. 27-32) that in *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000), the Board developed a two-part test for determining whether a communication to third party prejudicial to an employer loses the protection of the Act under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). To retain protection, the prejudicial third-party communication must first indicate "it is related to an ongoing labor dispute" and, second, must not be "so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Mountain Shadows*, 330 NLRB at 1240. *Accord DirecTV*, 837 F.3d at 36. Because no party mentioned the "ongoing labor dispute" prong of *Mountain*

Shadows to the Board, and Oncor has not asserted that extraordinary circumstances excuse its failure to do so, this Court is without jurisdiction to consider it. *Woelke & Romero Framing*, 456 U.S. at 665 (stating Section 10(e) precludes court of appeals from reviewing claim not raised to the Board). *See also* p. 31.

Oncor's exceptions to the Board gave no notice that it believed Reed lost the Act's protection because his testimony did not indicate that it was related to a labor dispute. (JA 27-44.) Although Oncor excepted generally to the judge's finding that Reed's discharge violated the Act, it did not specifically except to the judge's failure to find that Reed's actions lost the protection of the Act. (JA 44.) In order for such a vague exception to preserve an issue, Oncor's brief to the Board would have had to set forth the issue in detail. *See Parsippany Hotel Management Co. v. NLRB*, 99 F. 3d 413, 418 (D.C. Cir. 1995) (bare exception to violation insufficient to put Board on notice of statute-of-limitations defense). Although Oncor's brief to the Board argues that Reed lost the protection of the Act because his testimony was false and because he disparaged Oncor's product, the brief does not contend that Reed also lost the protection of the Act because his testimony did not state it was part of a labor dispute. (JA 71-78.) Neither the exceptions nor the brief cites *Jefferson Standard* or *Mountain Shadows*, much less states the two-part standard Oncor now urges the Court to apply. Oncor raised (JA 66-71), and the Board

discussed (JA 2-3), a "labor dispute" only in determining whether Reed's testimony was concerted within the meaning of Section 7.

Having found Reed's testimony to be protected, the Board, in light of Oncor's arguments, only considered whether Reed forfeited the Act's protection either because his testimony was reckless or maliciously false (JA 3-5) or because his testimony was disloyally disparaging of Oncor or Oncor's products (JA 5 n.15). The Board had no occasion to address whether Reed's testimony was clearly linked to a labor dispute, an element of an affirmative defense Oncor had not asserted. Furthermore, to the extent that Oncor believed that the Board had erred in failing to apply the full *Mountain Shadows/Jefferson Standard* framework, it should have filed a motion for reconsideration raising that point. Its failure to do so bars this Court from addressing the question. *Woelke & Romero Framing*, 456 U.S. at 665 (Section 10(e) precludes court of appeals from reviewing claim not raised to the Board in motion for reconsideration).

Even if the Court were to consider it, Reed's interactions with the legislature adequately put the Committee on notice that Oncor and the Union had a labor dispute involving smart meters. The Union lobbied the legislature in support of a bill that would allow customers to opt out of receiving smart meters, and Oncor opposed the same bill. (JA 12, 13 n.13.) Both Oncor and the Union had followed smart-meter legislation for years; it is undisputed that smart meters were important

to Oncor's business and that the Union had suffered layoffs as a result of their deployment. (JA 12.) Reed identified himself as representing the Union both in his sign-in sheet and in his testimony. (JA 14.) And an Oncor manager testified in favor of smart meters in the same legislative hearing. (JA 14.) In those circumstances, the legislators would recognize that the Union and Oncor were engaged in a labor dispute regarding smart-meter deployment, and that Reed was at the hearing to represent the Union's side of that dispute. *See Sierra Publ'g*, 889 F.2d at 217 (communications that are part of labor dispute put public on notice to evaluate message critically).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ONCOR VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT ON THREE OCCASIONS BY FAILING AND REFUSING TO FURNISH THE UNION WITH INFORMATION RELEVANT TO ITS DUTIES AS COLLECTIVE-BARGAINING AGENT

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[7] An employer's duty to bargain includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37

[7] A violation of Section 8(a)(5) results in a derivative violation of 8(a)(1) by interfering with employees' collective bargaining rights. *See, e.g., NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 778 (1990); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

(1967); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 45 (D.C. Cir. 2005). An employer therefore violates Section 8(a)(5) and (1) of the Act by failing to timely provide its employees' representative with relevant information upon request. *Acme*, 385 U.S. at 435-36; *Brewers & Maltsters*, 414 F.3d at 45-46.

Information pertaining to bargaining-unit employees, including names, addresses, wage rates, and job classifications, is presumptively relevant. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Information about non-unit employees, while not presumptively relevant, must be provided if it meets a liberal "discovery-type standard" of relevance. *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983). That standard is not demanding: "a union need not demonstrate that the information is certainly relevant or clearly dispositive of the basic issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation to provide it." *Id.* (quotations and ellipses omitted). Information related to the investigation of potential grievances falls comfortably within that definition. *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002) (citing *Acme Indus.*, 385 U.S. at 437-38). Whether information is relevant "is, in the first instance, a matter for the NLRB, and the Board's conclusions are given great weight by the courts." *Id.* at 360.

Here, the Union made three requests for information: (1) the December 18, 2012 request relating to Oncor's investigation into Reed's testimony; (2) the March 25, 2013 request seeking information about Reed's discharge; and (3) the July 24, 2013 request about Goodson's discharge. As explained below, substantial evidence supports the Board's finding that Oncor's refusal to provide all relevant information responsive to each request violated Section 8(a)(5) and (1). (JA 5-6, 21-22.)

A. Oncor Unlawfully Failed To Provide Information from Its Investigation into Reed's Testimony

On December 18, 2012, the Union requested, inter alia, "[a]ll documents reviewed and/or created or considered in connection with [Oncor's] investigation" into Reed's testimony. (JA 1548-51.) As the Board found, the relevance of such documents is "patently obvious." (JA 21.) Indeed, Oncor does not dispute that the information sought was relevant or that it had a duty to provide it. Instead, it contends (Br. 48) that it complied fully with the request by providing the Union with every document it *relied on* in its investigation. In making that argument, however, Oncor misreads the Union's information request.

In the course of investigating Reed's testimony, Oncor managers checked Reed's tickets from two computer systems, as well as help-line records, service orders, and lawsuits and claims alleging that smart meters caused fires. (JA 21.) Oncor admits as much in its opening brief. (Br. 47.) Although Oncor eventually

provided, or allowed the Union to access, Reed's handwritten and computerized tickets, it did not provide any help-line records, service orders, lawsuits, or claims. Nor, as the Board observed, did Oncor ever "raise[] any objections to providing any of these documents." (JA 21.)

Oncor now asserts that its investigation revealed no relevant help-line records, service orders, lawsuits, or claims. But the Union's information request did not seek only those documents Oncor actually used to justify discharging Reed; it sought all documents Oncor reviewed or considered, as well. Oncor discharged Reed, in part, because its investigation concluded that there were no help-line records, service orders, lawsuits, or claims that supported Reed's testimony. In processing Reed's grievance, the Union was entitled to examine those records itself to determine whether it agreed with Oncor's assessment. *See Providence Hosp. v. NLRB*, 93 F.3d 1012, 1021 (1st Cir. 1996) (union entitled to relevant information despite "naked assertion that the union had to take management at its word"). In those circumstances, the Board reasonably found that Oncor's failure to provide all documents considered in its investigation of Reed's testimony violated Section 8(a)(5) and (1).

B. Oncor Unlawfully Ignored the Union's Request for Information about Reed's Discharge

On March 25, the Union requested information "pertaining directly to [Reed's] discharge, possible disparate treatment, and/or records that might

substantiate the testimony that he gave." (JA 21.) Once again, Oncor does not dispute that the information requested was relevant to the Union's representational duties. *See DaimlerChrysler*, 288 F.3d at 443. Instead, it contends that the Union's request constituted impermissible pre-arbitration discovery. (Br. 48-49.) But, as the Board observed, "the duty to supply information extends to a request for material to prepare for arbitration." (JA 21, citing cases.) *See also Brewers & Maltsters*, 414 F.3d at 46 (pendency of arbitration hearing does not change Board's relevance standard for assessing information requests). Therefore, substantial evidence supports the Board's finding that Oncor violated Section 8(a)(5) and (1) when it ignored the Union's request.

Although the Board recognizes a limited exception for information that goes to an employer's arbitral strategy, such as witness lists, that exception does not apply to facts and documents relevant to the subject of the arbitration. *See California Nurses Assn.*, 326 NLRB 1362, 1362 (1998). Here, the Board reasonably found that the Union's request did not cross the line from exploring the circumstances of the discharge to probing Oncor's arbitral strategy. The information request does not so much as mention arbitration details, witness lists, or anything else that might reveal legal strategy. (JA 1562-8.) Although Oncor states (Br. 49) that the Union requested "[t]he names of potential witnesses in the arbitration," the Union's request contains no such language. Of course, some

individuals, such as the managers who examined Reed's service tickets, have both relevant information and could potentially serve as witnesses in the arbitration. But the Union's request did not ask Oncor to identify which of those individuals it intended to call as witnesses.

Moreover, Oncor provides no support for its contention that it is excused from providing any information at all because the "entire RFI" constituted pre-arbitral discovery. (Br. 49.) Even in *California Nurses Association*, the case Oncor cites for that proposition, the Board evaluated a large information request and ordered production of the "facts and documents relevant to each incident," but not "the names of witnesses [the respondent] intends to call [or] the evidence on which it intends to rely." 326 NLRB at 1362. The information requested here is analogous to the information the Board ordered produced in *California Nurses*; none of it is similar to the witness lists that the Board in that case found exempt from production as pre-arbitration discovery. The Union requested only facts and documents relevant to Reed's discharge, the incident to be arbitrated. The Board is therefore entitled to enforcement of its finding that Oncor violated Section 8(a)(5) and (1) by failing to respond to the Union's March 25 information request.

C. Oncor Unlawfully Failed To Provide Information Relating to Goodson's Discharge

Oncor discharged employee Samuel Goodson following an investigation into a May 13 incident involving Goodson and employee Eddie Lopez. (JA 5.) On

July 24, just 8 days after Goodson's discharge, the Union requested that Oncor provide it with information about Oncor's investigation, including Lopez's personnel records. (JA 5.) Substantial evidence supports the Board's finding that the requested information was relevant, and that the relevance should have been apparent to Oncor. Accordingly, Oncor's refusal to provide Lopez's records after his promotion from the unit on May 26 violated Section 8(a)(5) and (1) of the Act.[8]

The Board has repeatedly found, with court approval, that information about non-unit employees can be relevant when a union is pursuing a grievance involving such employees, including when the union seeks information about non-unit comparators to unit employees. *See, e.g., New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 731 (D.C. Cir. 2011) (union's information request to determine if non-unit employees were performing unit work was relevant); *Public Serv. Co. of N.M. v. NLRB*, 692 F.3d 1068, 1077 (10th Cir. 2012) (non-unit comparator data "bore directly on the theory [the union] sought to prove" in grievance proceedings). In this case, Lopez was involved in the same incident as Goodson, and is an obvious comparator. The Board thus reasonably found that the requested information was relevant—even after Lopez left the unit—because it would "be likely to show how [Oncor] handled and referred to Lopez's role in the

[8] Because the Board found a violation only with respect to that post-promotion information regarding *Lopez*, Oncor's undisputed contention (Br. 51-52) that it provided all documents pertaining to the May 13 *incident* is immaterial.

incident as compared to its treatment of Goodson" and "would be relevant to the Union in assessing whether to proceed to arbitration on Goodson's grievance." (JA 6.)[9]

Oncor suggests (Br. 52) that it was not required to provide the Lopez comparator data because the Union did not explain why it was entitled to that information. Substantial evidence, however, supports the Board's finding (JA 6) that the relevance of the requested information would have been clear to Oncor. *See Disneyland Park*, 350 NLRB 1256, 1258 (2007) (employer must provide non-unit information if "relevance of the information should have been apparent to [the employer] under the circumstances"). The incident involving Goodson and Lopez occurred on May 13. Lopez was promoted out of the unit on May 26, Oncor disciplined Goodson on July 16, and the Union requested information about Lopez on July 25. As the Board explained, the timeline makes clear that the Union requested the information about Lopez in order to determine whether Oncor treated Lopez and Goodson disparately, and to assess whether to grieve Goodson's termination.

[9] Oncor thus misreads the Board's decision when it states (Br. 52) that the Board concluded that information about Lopez after May 26 is presumptively relevant.

III. THE BOARD PROPERLY REJECTED ONCOR'S CHALLENGES TO THE COMPLAINT'S VALIDITY

In *NLRB v. SW General, Inc*., 580 U.S. ___, 2017 WL 1050977 (March 21, 2017), the Supreme Court held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 et seq. (the FVRA) after January 5, 2011, when President Obama nominated him to be General Counsel. 580 U.S. , 2017 WL 1050977 (March 21, 2017), affirming *SW General, Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015). The initial complaint here issued during the period Acting General Counsel Solomon served in violation of the FVRA. Nevertheless, the Supreme Court's decision in *SW General* does not support Oncor's argument that this Court should dismiss the case.

First, the Court does not have jurisdiction to consider Oncor's challenge (Br. 53-54) to Solomon's service under FVRA. As explained above, pp. 31, 40-41, Section 10(e) of the Act precludes courts of appeal from reviewing claims not raised to the Board. *Woelke & Romero Framing, Inc*., 456 U.S. at 665; *see also United States v. L.A. Tucker Truck Lines, Inc*., 344 U.S. 33, 37 (1952) ("[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"). As the Board found (JA 1 n. 1), Oncor waived its challenge to Solomon's complaint by failing to

timely raise it to the Board in its exceptions.[10] *See SW General*, 796 F.3d at 83 ("[w]e address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision," and "[w]e doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success", citing 29 U.S.C. § 160(e)); *Marquez Bros. Enter., Inc. v. NLRB*, __F.3d__, 2016 WL 3040501, *2 (D.C. Cir. May 19, 2016) (holding that "typical NLRA exhaustion doctrine applies" to FVRA-based challenges to Solomon's service as Acting General Counsel).

Second, unlike in *SW General*, a Senate-confirmed General Counsel ratified the unfair-labor-practice complaint in this case. Accordingly, as explained below, even if the Court does not find Oncor's challenge to Solomon waived, General Counsel Griffin's ratification of the complaint moots the challenge.

Section 3348(d) of the FVRA provides that "[a]n action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1)-(2). Significantly, however, Section 3348(e) exempts "the General Counsel of the National Labor Relations Board" from the provisions of "this section." 5 U.S.C. § 3348(e). Thus, as this Court

[10] Oncor first raised a challenge to Solomon in its motion to strike, filed 18 months after Oncor filed its exceptions.

recognized in *SW General*, the Board's General Counsel is one of only several officers expressly exempted from the FVRA's "void-ab-initio" and "no-ratification" provisions. 796 F.3d at 79 (discussing 5 U.S.C. § 3348(e) and assuming that Sec. 3348(e) "renders the actions of an improperly serving Acting General Counsel *voidable*, not void") (emphasis in original)).[11] The Board's General Counsel therefore retains the authority to ratify a previous officer's actions. Exercising that prerogative, General Counsel Griffin—who was sworn into office on November 4, 2013, and whose appointment is undisputedly valid—issued a notice of ratification stating that, "[a]fter appropriate review and consultation with [] staff," he had "decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." (JA 168-69.)

This Court's precedent confirms that a properly appointed official can subsequently validate decisions made by those whose appointments were improper. In *Doolin Sec. Sav. Bank, FSB v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998), for example, the Court upheld a cease-and-desist order issued by a validly appointed official, which implicitly ratified the prior

[11] The Supreme Court acknowledged but did not address this Court's statement that the FVRA renders actions of an improperly serving Acting General Counsel voidable, because the issue was not presented in the petition for certiorari. 2017 WL 1050977, at *7 n.2.

action of a possibly improperly appointed "acting" official. 139 F.3d at 213.[12] *Accord FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707 (D.C. Cir. 1996) (holding that reconstituted FEC could properly ratify prior decisions made when unconstitutionally constituted). *See also Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016) (upholding ratification of prior decisions made by director who served in violation of the FVRA but was subsequently properly appointed).

Because General Counsel Griffin ratified the prior actions of Acting General Counsel Solomon in this case, Oncor cannot show that the case is based on an unauthorized complaint. Indeed, by ratifying the issuance and continued prosecution of the complaint against Oncor, General Counsel Griffin eliminated any uncertainty as to whether a lawfully serving General Counsel would issue the complaint. *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118-19 (D.C. Cir. 2015) ("de novo review" by properly appointed members sufficiently cured taint caused by invalid members' prior actions).

There is no merit to Oncor's contention (Br. 54) that the ratification was invalid because it did not expressly discuss specific facts from this case. That contention fails to recognize that courts apply a "presumption of regularity" under

[12] In *SW General*, this Court contrasted *Doolin* with the case before it, noting that "no properly appointed General Counsel ratified the ULP complaint against Southwest." 796 F.3d at 79.

which they presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). Oncor's arguments disregard the Supreme Court's instruction that federal courts should not probe the mental processes of agency decisionmakers; "[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (error to permit Secretary of Agriculture to be deposed regarding process by which he reached decision, including extent to which he studied record and consulted with subordinates). Oncor has offered no facts, much less the sort of "clear evidence to the contrary," *Chem. Found.*, 272 U.S. at 14-15, that would warrant disregarding General Counsel Griffin's ratification or delving into the process underlying it. Nor has Oncor attempted to distinguish *Intercollegiate Broadcasting* or *Doolin*, wherein this Court has validated ratifications that are far less detailed, including implicit ratifications.

Equally unavailing is Oncor's contention (Br. 54-55) that the Board's acceptance of the ratification is flawed because the Board was not presented with any basis for finding the ratification valid. As discussed above, the Board is entitled to presume that General Counsel Griffin acted properly in issuing the notice of ratification absent evidence to the contrary. Here, there is no such

evidence. Thus, the Board properly found that there is "no basis" to believe that the notice "was legally insufficient." (JA 1 n.1.)

In sum, General Counsel Griffin's ratification is sufficient to cure the unauthorized complaint issued under Acting General Counsel's Solomon.

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
May 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ONCOR ELECTRIC DELIVERY COMPANY, LLC	)	
Petitioner/Cross-Respondent	)	Nos. 16-1278, 16-1341
v.	)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	)	16-CA-103387
	)	16-CA-112404
Respondent/Cross-Petitioner	)	
and	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 69	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,782 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 12th day of May, 2017

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	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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