

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16

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CENTERPOINT ENERGY HOUSTON  
ELECTRIC,

Employer,

Case No. 16-RC-229214

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS LOCAL UNION 66,

Petitioner.

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**MOTION TO STAY CERTIFICATION OF BARGAINING REPRESENTATIVE**

Pursuant to the Board’s Rules and Regulations (“R&R”), CenterPoint Energy Houston Electric, LLC (“CEHE”) respectfully requests that the National Labor Relations Board (“NLRB” or “Board”) stay the issuance of a certification of bargaining representative in this case for the following reasons.

**A. Background**

On October 15, 2018, International Brotherhood of Electrical Workers Local 66 (“Petitioner”) filed a self-determination election petition (“Petition”) seeking to include 37 office and clerical Service Administration Assistants (“SAAs”) in a long-standing unit of construction, maintenance and operations employees. On October 22, 2018, CEHE filed a statement of position arguing that a self-determination election was inappropriate for two reasons: (1) the parties’ collective bargaining agreement (“CBA”) expressly excluded office and clerical employees like the SAAs from the bargaining unit; and (2) the SAAs did not share a sufficient community of interests with the existing bargaining unit to be included in that unit.

On November 1, 2018, the Regional Director for Region 16 (“RD”) issued a Decision and Direction of Election (“DDE”). The RD found that the SAAs performed clerical duties (DDE at 9) and cited the contract language excluding office and clerical employees from the bargaining unit (DDE at 3), but concluded that extant Board law required him to reject CEHE’s argument that the self-determination petition was inappropriate on contract grounds. (DDE at 7-8). He also found that the clerical SAAs were plant clerical employees who shared a sufficient community of interests with the construction, maintenance and operations bargaining unit to be included in that unit. (DDE at 8-11).<sup>1</sup>

**B. Argument**

Section 9(a) of the National Labor Relations Act (“Act”) requires the Board to make appropriate unit determinations *in each case*. Section 3(b) of the Act allows the Board to delegate some of its unit decision-making authority to regional directors. However, before a bargaining obligation can be created, the Board must satisfy its obligation provided in Section 3(b) to “review any action of a regional director delegated to him” upon request by an interested party. In fact, allowing a union certification to issue based solely upon a regional director’s decree means that a legal bargaining obligation has been created before the Board has satisfied this obligation and determined one of the important issues underpinning the Act – *i.e.*, whether the unit under consideration is appropriate for the purposes of collective bargaining. Such conduct essentially makes the request for review a hollow formality.<sup>2</sup>

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<sup>1</sup> The RD determined that the seven SAAs who work in CEHE’s Power Delivery Services business unit did not share a sufficient community of interest to be included in the petitioned-for unit. (DDE at n. 3).

<sup>2</sup> Section 102.67(h) of the Board’s Rules and Regulations states that the grant of a request for review will not stay a regional director’s decision unless otherwise ordered by the Board, but section 102.67(g) states that regional director’s decisions are not final in the event a request for review is granted. Furthermore, section 102.67(j) states that a party may request a stay “of some or all of the proceedings, including the election”, but the issuance of a certification is not a “proceeding”; rather, it is a ministerial act following an un-objected to election, and/or where there are an insufficient number of challenged ballots to affect the results. *See* R&R § 102.69(b). Finally, the Board’s statement in the Federal Register accompanying publication of the new rules makes clear that the reason the

**1. The Certification of Bargaining Representative Should Be Stayed Because the Board Should Review Whether the Self-Determination Petition Was Barred By Contract.**

Here, CEHE contends that the petitioned-for self-determination election was inappropriate and sought its dismissal on two grounds, as will be more fully argued in CEHE's request for review. First, because the parties' current CBA expressly excludes office and clerical employees from the bargaining unit, and because the RD found that SAAs perform clerical work, a self-determination election seeking the very thing the contract prohibits is improper. CEHE recognizes that the Board has decided cases contrary to its position. *See UMass Memorial Medical Center*, 349 NLRB 369 (2007); *Women and Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001). But these cases read too much into the decision on which they are based, *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959), and each of them contained persuasive dissents contending among other things that contract language should preclude this sort of election petition. Accordingly, the Board should stay the issuance of a bargaining representative certification here so it can revisit this important issue, especially given that if the Board finds in CEHE's favor, the Petition was inappropriate in the first instance and an election never should have been held.

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new rules allow elections to proceed despite a pending or contemplated request for review is because the results of the election may moot the need for the request. 79 Fed. Reg. at 74309-310. Putting all of this together, the clear intent of the relevant rule changes is to allow an election to proceed and ballots to be counted in the face of a request for review so that the parties can understand whether the request for review is necessary. The intent is not and should not be to impose a bargaining obligation on an employer during the time when a request for review can be filed or while one is pending, especially where that request for review could result in a finding that the petitioned-for unit is inappropriate.

**2. The Certification of Bargaining Representative Should Be Stayed Because the Board Should Review Whether the SAAs Share a Sufficient Community of Interests with the Bargaining Unit.**

Second, CEHE contends that the SAAs, who perform their clerical tasks with computers and other office equipment in an office setting, do not share a sufficient community of interests with bargaining unit employees who work in the field and with equipment used to operate CEHE's electrical distribution system. As will be more fully explained in CEHE's request for review, the SAAs do not have sufficiently similar skills, training, equipment, working conditions, bargaining history or other terms and conditions of employment to bargaining unit employees such that they could properly be included in the same unit. CEHE contends that the self-determination petition is inappropriate and should be dismissed for this reason as well.

**3. As Former Chairman Miscimarra Recognized, It Is Inappropriate to Certify a Bargaining Representative While the Board is Deciding Whether to Review Important Unit Determination Issues.**

Delaying certification of the unit until the Board has resolved these important issues is consistent in all respects with Chairman Miscimarra's previous calls for the Board to delay an election, or at the very least, stay bargaining representative certifications until after the Board has issued a final determination on election-related issues. In his persuasive dissent in *Republic Services of Southern Nevada*, 28-RC-192859 (2017) (unpublished) (Miscimarra, dissenting), Chairman Miscimarra stated "it is inappropriate and ill-advised" for regional directors to issue a certification while election-related issues are pending final resolution before the Board because the Board's "primary function of fostering labor-management stability is necessarily frustrated if union certification precedes the Board's final resolution of election related issues." *See also*, e.g., *PCC Structural, Inc.* 2017 NLRB LEXIS 487, 19-RC-202188 (September 22, 2017) (unpublished) (Miscimarra, dissenting) (stating that "all parties--especially employees voting in the election--should have the benefit of the Board's resolution of election-related issues before

the election takes place” or in the alternative before the election results are certified); *Pacific Lutheran University* (2013), 2013 NLRB LEXIS 635, 19-RC-102521 (September 23, 2013) (unpublished) (Miscimarra, dissenting) (stating that stay of election is appropriate when there are significant issues pending regarding the appropriateness of the unit). This reasoning also applies here given the significant contract bar and community of interest issues at stake.

In fact, staying certification accomplishes the Board’s policy of economically resolving labor disputes. If a bargaining representative certification issues, CEHE may face additional litigation under Section 8(a)(5) of the Act while simply exercising its Board-granted right to seek review of the DDE following the election. Such additional litigation is a waste of resources, especially given that CEHE’s defense to any such charges will be based at least in part on the same arguments it is asking the Board to address in its request for review, *i.e.*, whether the SAAs are properly included in the existing unit of construction, maintenance and operations employees. CEHE asserts this makes no sense at all, and that the NLRB, the parties, and the purposes of the Act will be better served by delaying certification until the Board decides CEHE’s request for review.

**C. Conclusion**

For all of these reasons, CEHE respectfully requests that the NLRB grant this motion to stay certification of bargaining representative, and grant CenterPoint Energy Houston Electric, LLC any other relief to which it is justly entitled.

Date: November 14, 2018

Respectfully Submitted,

*/s/ A. John Harper III*

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*/s/ Adam-Paul Tuzzo*

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