

Oral argument April 2, 2019

**No. 18-60474**

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**DENTON COUNTY ELECTRICAL COOPERATIVE, INCORPORATED  
D/B/A COSERV ELECTRIC**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**SUPPLEMENTAL BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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As ordered by the Court, the National Labor Relations Board submits this supplemental brief to address the extent to which this Court's cases concerning bargaining orders "bear on analyzing the propriety of the bargaining order" that the Board issued in this case.

This Court, like the Board and other courts, distinguishes between two types of bargaining orders. One type of bargaining order is issued when an employer, like CoServ here, unlawfully withdraws recognition from an incumbent union as its employees' bargaining representative. *Air Exp. Intern. Corp. v. NLRB*, 659 F.2d 610, 614 (5th Cir. 1981), *modified*, 670 F.2d 512 (5th Cir. 1982). The other type is issued when an employer refuses to recognize a union that has shown that it once enjoyed the support of a majority of employees but has neither won an election nor previously represented the employees in the bargaining unit. In that situation; "the order issues because a formal election either fails or is likely to fail because of the company's commission of unfair labor practices." *Air Exp.*, 659 F.2d at 613-14; *see generally* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969). Such a bargaining order, therefore, bypasses a union election, the preferred "means to determine employee sentiment." *NLRB v. Gibson Products Co. of Wash. Parish*, 494 F.2d 762, 763 (5th Cir. 1974). This Court has characterized the first circumstance as "a withdrawal of recognition (non-Gissel) case" and the second as "a refusal of recognition (Gissel) case." *Air Exp.*, 659 F.2d at 614.

Different standards apply to bargaining orders issued in those two types of cases. In a *Gissel* case, the “issue is whether an extraordinary remedy is warranted” where employees have not formally elected union representation. *Id.* at 617 n. 10; *Gissel*, 395 U.S. at 613-14. (bargaining orders are appropriate to remedy outrageous and pervasive unfair labor practices that render fair election impossible or to remedy less extreme violations that nonetheless render fair election unlikely if union has shown through employees’ signed representation cards that majority of employees previously supported it). This Court has a long line of precedent discussing *Gissel* cases, including both cases cited in the Court’s supplemental briefing order. *See, e.g., Cal. Gas Transp., Inc. v. NLRB*, 507 F.3d 847 (5th Cir. 2007); *NLRB v. Am. Cable Sys., Inc.*, 414 F.2d 661 (5th Cir. 1969). Those cases have no bearing here.

This is a non-*Gissel* withdrawal-of-recognition case, where CoServ unlawfully withdrew recognition from an incumbent union. Thus, there is no concern about bypassing an election as in *Gissel* bargaining order. Rather, “the issue is simply whether the [Union’s election] certification is to be given continued effect.” *Air Exp.*, 659 F.2d at 617 n. 10. It is well established that a bargaining order is the standard remedy for that violation. *Id.* at 614 (“If an employer fails to honor properly a union’s certification, then a non-*Gissel* bargaining order may issue to enforce the certification.”). As this Court has explained, where an employer “had no valid basis for doubting the [u]nion’s majority status,” a bargaining order “is the only remedy which can restore the status quo ante, and dissipate the effects of the [employer’s]

unlawful withdrawal of recognition.” *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 986-87 (5th Cir. 1970).

This Court has routinely enforced such orders without requiring the Board to inquire into “the actual state of the [u]nion’s majority status” or otherwise separately justify the order. *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 554 (5th Cir. 1989); *see also Air Exp.*, 659 F.2d at 617 (enforcing bargaining order remedying withdrawal-of-recognition violation and declining to “address whether a Gissel order would be appropriate”). Indeed, aside from Gissel cases, the only in-circuit cases refusing to enforce bargaining orders are, to counsel’s knowledge, where the Court disagrees that there was an unlawful withdrawal of recognition, or where the Court finds that the Board has inordinately delayed without taking subsequent events into account, which is not at issue here. *NLRB v. Anvil Prods., Inc.*, 496 F.2d 94, 96-98 (5th Cir. 1974) (remanding withdrawal-of-unlawful finding on the merits); *Tex. Petrochemicals Corp. v. NLRB*, 923 F.2d 398, 404-06 (5th Cir. 1991) (refusing to enforce bargaining order due to 6-year delay and Board’s refusal to consider post-charge evidence). The Court’s precedent therefore warrants enforcement of the bargaining order.

Respectfully submitted,

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Dated March 28, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

DENTON COUNTY ELECTRIC COOPERATIVE, )  
INCORPORATED, doing business as COSERV )  
ELECTRIC )  
Petitioners/Cross-Respondents )  
v. ) No. 18-60474  
NATIONAL LABOR RELATIONS BOARD )  
Respondent/Cross-Petitioner )

**CERTIFICATE OF COMPLIANCE**

Pursuant to this Court’s March 26, 2019 Order, the Board certifies that its supplemental brief is 3 pages long using proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

s/ David Habenstreit  
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Dated at Washington, D.C.  
this 28th day of March, 2019

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

DENTON COUNTY ELECTRIC COOPERATIVE,	)	
INCORPORATED, doing business as COSERV	)	
ELECTRIC	)	
Petitioners/Cross-Respondents	)	No. 18-60474
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No.
Respondent/Cross-Petitioner	)	16-CA-149330

**CERTIFICATE OF SERVICE**

I certify that on March 28, 2019, the foregoing supplemental brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

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