

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

DENTON COUNTY ELECTRIC COOPERATIVE,)	
INC. d/b/a COSERV ELECTRIC)	
Petitioners/Cross-Respondents)	
)	
v.)	No. 18-60474
)	
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	

**NATIONAL LABOR RELATIONS BOARD’S MOTION
TO RECALL MANDATE AND AMEND THE JUDGMENT
TO CONFORM TO THE COURT’S OPINION**

The National Labor Relations Board moves this Court to recall the mandate issued on June 16, 2020, and to amend the judgment issued that day. The Board seeks to correct an omission in the judgment and to conform the judgment with the Court’s opinion. In support, the Board states:

1. “The clearest reason for recall or revision of appellate mandate is to exercise the court’s power to recall its mandate—at any time—to correct clerical mistakes, or to make the judgment consistent with the opinion.” *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971); *see also Kinnear-Weed Corp. v. Humble Oil*, 296 F.2d 215, 216 (5th Cir. 1961) (recall of mandate to fix clerical error and properly reflect court’s opinion). A court’s authority to recall and modify its mandate is “exercised for good cause and to prevent injustice, and one of the classic examples of such circumstances is where the mandate does not

fully express the intentions of the court.” *Graham v. Balcor Co.*, 241 F.3d 1246, 1248 (9th Cir. 2001) (citations and quotation marks omitted).

2. The Board submits that the Court’s mandate does not accurately reflect its judgment. First, the Court omitted an appendix containing the remedial notice to employees, which appears to have been a clerical error. Second, the Board imposed an order to cease and desist from violations of the National Labor Relations Act (the Act) “in any like or related manner,” as is standard in the Board’s unfair-labor-practice cases. The Court did not disturb that remedy in its opinion but omitted it in the judgment. Third, Court omitted the provision requiring the rescission of the unilateral changes Denton County Electric Cooperative, Inc. made after unlawfully withdrawing recognition from the International Brotherhood of Electrical Workers, Local 220 (the Union), even though the opinion enforced the portion of the Order regarding the unilateral changes and expressed no concern with the rescission remedy. Each of those omissions is explained further below.

3. First, the Court’s judgment omits an essential element: the appendix containing the remedial notice to employees. Board orders, including those enforced by the circuit courts, require the posting of a remedial notice to employees to advise them of their statutory rights and the actions the respondent will take to remedy its unfair labor practices; that notice is contained in an

“appendix” to the Board’s order. Here, the Court’s judgment orders Denton to post such a notice, attached as the “Appendix” to the judgment. Judgment at 2 ¶ 2(b). However, the Court’s judgment failed to attach the appendix. The Board presumes the omission was an inadvertent clerical error given the judgment’s reference to the appendix.

4. Next, the judgment does not accurately reflect the substance of the Court’s opinion. The Court enforced the Board’s Order except in two respects: it denied enforcement of the portions of the Board’s Order affirmatively requiring Denton to recognize and bargain with the Union and requiring public reading of the notice to employees attached to the Order. Slip op. at 21. The Court’s judgment, however, deletes two additional provisions of the Board’s Order that were not specifically challenged before or mentioned by the Court in its opinion. Those provisions require Denton to cease and desist from violating the Act “in any like or related manner” and to rescind the unilateral changes it made to employees’ terms and conditions of employment after it unlawfully withdrew recognition from the Union.

5. Accordingly, the Board requests that the Court recall the mandate to substitute the attached judgment, which reinstates the two omitted order provisions and includes the appendix. The appendix conforms to the corrected version of the judgment.

WHEREFORE, the Board respectfully requests that the Court recall
mandate to substitute the attached judgment including the appendix.

Respectfully submitted,

/s/ David Habenstreit
David Habenstreit
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Dated at Washington, D.C.
this 25th day of June 2020

UNITED STATES COURT OF APPEALS
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DENTON COUNTY ELECTRIC COOPERATIVE,)	
INC. d/b/a COSERV ELECTRIC)	
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)	
v.)	No. 18-60474
)	
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 711 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

/s/ David Habenstreit
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v.)	No. 18-60474
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	16-CA-149330
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I certify that on June 25, 2020, the foregoing motion 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.

/s/ David Habenstreit
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**UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD)	16-CA-149330
)	
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JUDGMENT

Before: DAVIS, STEWART, and ELROD, Circuit Judges

THIS CAUSE came to be heard upon a petition filed by the Denton County Electric Cooperative, Inc. to review an Order of the National Labor Relations Board dated June 12, 2018, in Case No. 16-CA-149330, reported at 366 NLRB No. 103, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and agency record filed in this cause. On March 18, 2020, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of Denton County Electric Cooperative and granting in part the Board’s cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the Petitioner/Cross-Respondent Denton County Electric Cooperative, Inc. d/b/a CoServ Electric, Corinth, Texas, its officers, agents, successors, and assigns (the Company), shall

1. Cease and desist from
 - (a) Withdrawing recognition from the International Brotherhood of Electrical Workers Local 220, affiliated with International Brotherhood of Electrical Workers (the Union), and failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees.
 - (b) Refusing to bargain collectively with the Union by failing and refusing to furnish it (the Union) with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Company’s unit employees.

- (c) Changing wages, benefits, or other terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.
 - (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request by the Union, rescind the changes in its unit employees' terms and conditions of employment that were unilaterally implemented since November 26, 2014.
 - (b) Furnish to the Union in a timely manner the information requested by the Union on November 27, 2014.
 - (c) Within 14 days after service by the Region, post at its Corinth, Texas facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. If the Company has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at any time since November 26, 2014.
 - (d) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Mandate shall issue forthwith

ENTERED:

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from, and fail and refuse to recognize and bargain with, the International Brotherhood of Electrical Workers Local 220, affiliated with International Brotherhood of Electrical Workers (the Union), as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT change your wages, benefits, or other terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon the Union's request, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented since November 26, 2014.

WE WILL furnish to the Union in a timely manner the information requested by the Union on November 27, 2014.

DENTON COUNTY ELECTRIC COOPERATIVE, INC. D/B/A COSERV ELECTRIC