No. 20-60229

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ONCOR ELECTRIC DELIVERY, L.L.C.,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

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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STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.3, the Board submits that because this case involves the application of well-settled legal principles to established facts, argument would not be of material assistance to the Court. However, if the Court desires argument, the Board asks to participate and submits that 10 minutes per side should suffice.

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Oncor Electric Delivery, L.L.C., and the cross-application for enforcement of the National Labor Relations Board, of a final Board Decision and Order issued against Oncor on March 6, 2020, and reported at 369 NLRB No. 40. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., § 160(a). All filings with the

Court are timely. This Court has jurisdiction under Section 10(e) and (f) of the Act, *id.* § 160(e) and (f), and venue is proper because the unfair labor practice occurred in Texas.

ISSUE STATEMENT

Whether substantial evidence supports the Board's finding that Oncor violated Section 8(a)(5) and (1) of the Act by failing to furnish relevant information needed by the Union to process its grievances and ensure the workplace safety of unit employees.

STATEMENT OF THE CASE

Under the Act, an employer's duty to bargain with the union that represents its employees includes the duty provide, on request, information that is relevant and necessary to the union's performance of its representational duties. Those representational duties include administering and policing the terms of a collective-bargaining agreement, filing and processing grievances when there is an apparent contract violation, and ensuring the workplace safety of unit employees. This case arises from grievances filed by the Union alleging that Oncor used nonunit employees to perform bargaining-unit work, thereby violating the parties' collective-bargaining agreement and jeopardizing the safety of unit employees. In order to process those grievances and ensure the safety of unit employees, the Union requested that Oncor provide 13 items of information.

After Oncor failed to comply fully with the Union's request for information, the Union filed an unfair-labor-practice charge with the Board alleging a violation of the duty to bargain. Following an investigation, the Board's General Counsel issued a complaint alleging that Oncor violated the Act by failing to provide the information. (ROA 180-88.)[1] A hearing was held before an administrative law judge, who found that Oncor violated the Act as alleged. (ROA 1438-43.) Oncor then filed exceptions with the Board to some of the judge's findings. (ROA 1434; ROA 1355-85.) On review, the Board found that Oncor unlawfully failed to provide information responsive to the Union's requests, except for item 6 and one of the materials listed in item 7. (ROA 1435-37.) The Board's findings of fact and its conclusions and Order are summarized below.

I. THE BOARD'S FINDINGS OF FACT

A. Background

Oncor is an electric utility company with a facility in Dallas, Texas, where the International Brotherhood of Electrical Workers, Local Union No. 69 represents a bargaining unit of approximately 600 employees. (ROA 1434, 1438; ROA 36-37, 39, 174, 180, 1289 § 2, 1328.) Oncor and the Union are parties to a collective-bargaining agreement that expressly forbids Oncor from using nonunit

[1] "ROA" refers to the administrative record, filed on May 4, 2020. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Oncor's opening brief.

employees to perform bargaining-unit work if doing so would cause a reduction in work for unit employees. (ROA 1438, 1440; ROA 36, 129, 1321 § 8.)

The bargaining unit includes Troublemen, who are the "first responders" charged with assessing damage to power lines in the aftermath of a storm. (ROA 1438; ROA 37.) Their job is to secure the scene and perform a "storm evaluation" to determine the cause of the outage, repair what they can, and create work orders for additional repairs if necessary. (ROA 37, 53-55, 306.)

B. The Union Files a Grievance Alleging That Oncor Violated the Contract by Maintaining the Dangerous Practice of Using Nonunit Employees To Perform Bargaining-Unit Work

On March 29, 2017, Troubleman James Chapman received a work order to restore power on a line after a storm. Unbeknownst to him, a downed wire had been left unrepaired in the vicinity; when he turned the power back on, the wire became live, causing an electric arc and a ball of fire that could have seriously injured him, or worse. (ROA 1440; ROA 37-38, 53-54, 59-61.) Upon investigation, Chapman discovered that a nonunit employee had performed the storm evaluation of the incident, in violation of the parties' contract. That same individual had created the work order to which Chapman responded, and then left without securing the scene of the incident, creating a hazard that could have cost Chapman his life. (ROA 1440; ROA 38, 39-40.)

Chapman reported his findings to Union Business Manager Bobby Reed. (ROA 1440; ROA 40.) As the official charged with administering the Union's contract with Oncor, Reed was alarmed because Chapman's discovery indicated that Oncor was using nonunit employees to perform storm evaluation work. (ROA 40, 61-62.) In addition, he was concerned about the safety risks of sending inexperienced, nonunit employees to respond first to power outages, as the incident involving Chapman demonstrated. (ROA 40, 50, 53-55.)

This was not the first time the Union had expressed concerns about Oncor's reliance on nonunit employees. Previously, in a July 2016 meeting, Oncor informed the Union that it was using nonunit employees to perform storm evaluation work. Reed later sent Oncor a follow-up letter describing the meeting and summarizing the Union's position as follows:

> [A]t our . . . meeting, the Union was made aware the Company has been utilizing unqualified Oncor office personnel to evaluate and create work orders to repair the Oncor Distribution System after a weather event.
>
> The Union stated the work of evaluating and restoring power to the Distribution System after a storm is bargaining unit work. The Union Committee also voiced our concerns for the safety of the public and employees regarding sending unqualified Oncor employees to begin the restoration process of the Distribution System.
>
> I realize Oncor has a depleting bargaining unit work force of 674 employees . . . . Utilizing unqualified Oncor office personnel to perform hazardous bargaining unit work in the restoration of power is not the solution to a depleting workforce.

> Please cease and desist from this illegal and unsafe work practice the Company has created.

(ROA 260.)

The Chapman incident convinced Reed to file a May 4, 2017 grievance on the Union's behalf, alleging that Oncor violated the parties' contract by using nonunit employees to troubleshoot the electrical grid after the March 29 storm. The grievance asked Oncor to make unit employees whole, cease assigning unit work to nonunit employees, and recognize in writing that this practice was "dangerous and irresponsible." (ROA 1434, 1438; ROA 39-40, 1275.) On the same day, Reed met with a member of Oncor's management and reiterated the Union's view that Oncor was diverting unit work to nonunit employees and endangering the safety of unit employees in doing so. (ROA 1279.)

On May 27, Oncor denied the grievance to the extent that it related to the Chapman incident, and also to the extent that the Union sought to challenge the practice of assigning storm evaluation work to nonunit employees, stating that this "well-known practice . . . is in no way correlated to the number of linemen employed by the Company." (ROA 1434 n.3, 1438; ROA 1279.)

C. To Pursue Its Grievance, the Union Requests Information About Oncor's Assignment of Storm Evaluation Work to Nonunit Employees and Their Safety Training

After Oncor denied the grievance at the first step, the Union decided to pursue it to the next level.[2] (ROA 1434 n.3, 1438.) Accordingly, on June 5, the Union asked Oncor to provide certain information necessary for that purpose. (ROA 1434; ROA 40-41, 198-201.) The request included the following items:

1. Names of non-bargaining unit employees who performed storm evaluation work;
2. Their regular position when they performed storm evaluation work;
3. Dates and amount of time that each nonunit employee performed storm evaluation work;
4. Regular pay rate for each employee;
5. Additional pay or compensation given to nonunit employees for storm evaluation work;[3]
6. Oncor's reason for not using unit members to perform such work;
7. Spot bonuses, work orders, memos, emails, and other records describing the work done for each instance of storm evaluation; and
8. Seniority date, present job position, and any training received "that Oncor contends is sufficient to permit [nonunit employees] to properly and safely perform storm evaluation work."

(ROA 1434, 1438-39; ROA 198-200.)[4]

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[2] The parties' contract sets forth a mandatory, four-step grievance procedure, culminating in final binding arbitration. (ROA 36, 1300-04.)

[3] The Union requested items 1–5 for the period since January 1, 2016.

[4] The Union first requested 14 items, and later 5 more (*see* below pp. 10-11). By the time of the hearing, items 9–14 were no longer at issue, so the Board renumbered the disputed items consecutively as 1–13. (ROA 1434 n.4.)

D. Oncor Dismisses Most of the Union's Request as Unduly Burdensome and Irrelevant, Providing Only Limited and Generalized Information

In a June 23 letter, Oncor took the position that the Union's request was unduly burdensome and that none of the requested information was relevant to its grievance. (ROA 1439; ROA 202.) In particular, Oncor faulted the Union for not explaining why it needed the names of nonunit employees (item 1) but added that it would reassess its response if the Union provided a reason. (ROA 204 ¶ 1.) Oncor also acknowledged that although unit employees count storm evaluation among their duties, it routinely uses nonunit employees to do the job. (ROA 52-53, 205 ¶ 6, 206 ¶ 12.)

Oncor provided a modicum of responsive information. First, in partial response to items 2, 4, and 5, Oncor provided a table listing 11 classifications of nonunit employees performing storm evaluation work, whom the Company called Damage Evaluators. (ROA 204 ¶ 1, ROA 209.) However, the table failed to break down the data by employee, as the Union had requested; instead, it only provided the total amounts for each classification in base salary and storm/exceptional pay. Oncor also provided a copy of its storm/exceptional pay policy. (ROA 211-12.)

Second, in response to item 3, Oncor claimed not to have any "methodology or documents that would track or reflect the amount of time" employees spent performing storm evaluation work. (ROA 204 ¶ 3.) Although Oncor offered to let the Union review all of its work orders since January 2016, it failed to mention that

they were searchable by date and employee name, which would have significantly narrowed the search to dates that corresponded with storms and occasions when nonunit employees received storm/exceptional pay, thereby facilitating the quest for storm-related information. (ROA 143, 149, 204.)

Finally, in partial response to item 8, Oncor indicated that Damage Evaluators receive certain types of training (Damage Evaluation, I-Dispatch Storm Support, and/or Mobile TC Storm Support) and must initially "ride along with more experienced employees who have served as Damage Evaluators." (ROA 205-06 ¶ 8.) However, Oncor argued that identifying each employee's seniority date, job position, and the safety trainings they received was "unduly burdensome" and "practically impossible to ascertain." (ROA 205 ¶ 8.)

E. Faced with Oncor's Failure To Cooperate, the Union Repeats Its Information Request, Adds New Items, and Files a Supplemental Grievance

On August 28, the Union renewed its request for items 1–8, together with an explanation of the specific relevance of each item. (ROA 1439; ROA 234-39.) In particular, the Union explained that Oncor's June 23 letter—which acknowledged that storm evaluation was unit work, and that nonunit employees were doing it—established that "a violation of the [contract] has taken place, and it shows the Union has a reasonable basis for believing that non-bargaining unit employees or persons are performing bargaining unit work." (ROA 234-36 ¶ 1.) The Union

further conveyed that it needed the names of nonunit employees who performed storm evaluation work "(a) to confirm that Oncor is having non-bargaining unit employees perform bargaining unit work and (b) to allow the union to quantify damages (i.e. relevant to remedy the union will seek if the grievance goes to arbitration)." (ROA 234 ¶ 1.)

The Union also agreed to review work orders issued since January 2016, noting that they could provide relevant information if Oncor also gave the names, timesheets, and pay stubs of nonunit employees who performed storm evaluation work. Based on Reed's past experience reviewing large quantities of documents provided by Oncor, which he found "a total waste of time," he asked for the work orders to be provided in text-searchable electronic form. (ROA 71-72, 236 ¶ 3, 238-39 ¶ 7.) Although it is unclear whether work orders could be furnished in that format, as noted above, they could be searched by date and employee name, a fact that Oncor did not disclose. (ROA 143, 149.)

Lastly, based on Oncor's response to item 8, the Union added 5 new items to its information request:

9. Names of individuals who received Damage Evaluation Training;
10. Names of individuals who received I-Dispatch Storm Support Training;
11. Names of individuals who received Mobile TC Storm Training;
12. Names of all new employees assigned as Damage Evaluators; and

13. Names of "more experienced employees who have served as Damage Evaluators during previous storms."

(ROA 1434; ROA 239.)[5]

On September 1, Oncor responded in a one-page letter claiming that it was "unclear regarding subject of" the Union's grievance and requesting clarification about the definition of storm evaluation work. (ROA 240.) Oncor also asked the Union to confirm that "the qualification of employees doing . . . storm evaluation work is not the subject of the grievance." (ROA 240.)

The Union replied on September 26. As to Oncor's first claim, the Union noted that Oncor had never previously expressed confusion over the meaning of storm evaluation work, and accused Oncor of trying to avoid or delay responding to its requests. As to the second inquiry, the Union responded: "Qualifications of non-bargaining unit employees or others doing this bargaining unit work is not, per se, the contract violation issue. The Union stands by its concern about safety, since bargaining unit employees are highly trained and Oncor is engaged in a dangerous practice with this ongoing contract violation." (ROA 242.)

Oncor did not respond. On October 6, the Union filed a supplemental grievance stating its position that "[s]torm evaluation work is bargaining unit work" and alleging that Oncor violated the contract "by utilizing non-bargaining

[5] The union requested items 9–11 for the period since July 1, 2015, and items 12–13 after January 1, 2016.

unit personnel for damage evaluation and/or storm evaluation work." The Union requested that Oncor "cease and desist from this very dangerous practice" and make the Union and unit employees whole, with interest. (ROA 1439; ROA 1277.) Oncor denied that grievance on October 30. (ROA 1434 n.3, 1439; ROA 1282.)

F. The Union Files a Board Charge; Oncor Supplies 1,000 Pages of Mostly Nonresponsive Documents Previously Given to Texas Authorities

On December 26, the Union filed the unfair-labor-practice charge that gave rise to this proceeding, alleging that Oncor violated the Act by refusing to furnish the requested information. (ROA 196.) Within a few days, on January 5, 2018, the Union received over 1,000 pages of documents that Oncor had submitted to the Public Utility Commission of Texas ("PUC") between July and December 2017.[6] (ROA 1439; ROA 245-1222.)

Out of all those materials, only two items were even partially responsive to the Union's request. One was a list of several nonunit job classifications used as Damage Evaluators that Oncor had omitted from its June 23 response to the Union's June 5 request. (ROA 327.) As with Oncor's June 23 response (ROA 209), however, this list failed to break down base salary and storm/

[6] Oncor submitted the documents to the PUC in response to an inquiry about whether it had "sent out office personnel instead of Linemen and/or Troublemen to perform storm restoration efforts" in the prior three years. (ROA 258.)

exceptional pay data by employee. The other item was a compilation of materials used for Mobile TC, I-Dispatch, and Damage Evaluations trainings.[7] (ROA 335-848.)

The PUC documents also included a letter that contained a significant admission by Oncor—namely, that it had the capacity to determine how many employees perform storm evaluation work in "major storms."[8] (ROA 331.) Oncor had never previously acknowledged its ability to obtain such targeted information, claiming instead that it had no methodology to track storm evaluation work.[9] (ROA 204 ¶ 3.) The fact that Oncor could identify nonunit employees who performed storm evaluation work—as opposed to other types of work for which they received storm/exceptional pay—meant that it could also tell when and how much work they did (by searching work orders by employee name and/or date), and how much they were paid (by checking their payroll records). The Union had specifically requested that information in items 3 and 5, respectively.

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[7] The remaining documents were either unresponsive or duplicates of materials the Union already had.

[8] "Major storms," which are defined as those that cause over $500,000 in damage, trigger Oncor's insurance coverage and are assigned individual tracking numbers for recordkeeping. (ROA 109, 143-44.)

[9] Oncor used this research technique to create a table for the PUC showing how many Damage Evaluators worked in the 31 major storms that occurred between January 2016 and May 2017, broken down by job title. (ROA 331-33.)

On February 9, the Union told Oncor that the PUC documents were generally not responsive and that it was still missing a number of items, including the names of nonunit employees who performed storm evaluation work. The Union requested that Oncor promptly supply all outstanding materials. (ROA 1439; ROA 1223.)

On February 26, Oncor renewed its offer to let the Union review all work orders since January 2016, and disclosed for the first time that there were approximately 120,000 of them (most of which did not involve storm evaluation work). Alternatively, Oncor proposed to prepare redacted copies of the documents at the Union's expense, which it estimated would cost about $16,000. (ROA 1439; ROA 1225.) At no point, however, did Oncor tell the Union that its work-order database could be searched by date and employee name, which would have facilitated the search for data responsive to the Union's requests for storm-related information only. (ROA 143, 149.) Nor did Oncor mention that it had not tried to search the database specifically for work orders created around storm dates, or work orders containing the names of nonunit employees who received storm/ exceptional pay. (ROA 140, 143-45, 148-49.) Those more targeted searches would have simplified the quest for relevant information. (ROA 148.)

G. The Board's General Counsel Issues a Complaint, Prompting Oncor To Offer Additional Information, Which Is Also Incomplete

On April 27, having investigated the Union's charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging that Oncor violated the Act by failing to provide relevant information requested by the Union. (ROA 180-88.) On May 11, Oncor sent a letter to the Union that provided some of the additional information it had previously withheld. However, Oncor still did not fully respond to the Union's inquiries.

Specifically, although the May 11 submission included a list of every instance where nonunit employees received storm/exceptional pay (ROA 1231-61), in partial response to items 2, 4–5, and 8, that list was overbroad because it included every occasion where nonunit employees got storm/exceptional pay for work other than storm evaluation.[10] (ROA 152, 154, 204 ¶ 5, 1229 ¶ 5.) Moreover, instead of providing the nonunit employees' names per the Union's request, Oncor replaced their names with numbers, which prevented the Union from identifying instances where nonunit employees performed storm evaluation work, as opposed to other work. (ROA 1439-40; ROA 141, 1231-61, 1271.)

[10] Previously, Oncor had refused to provide information in this list based on its claim that the request was "unduly burdensome" and/or "practically impossible to ascertain." (ROA 204 ¶ 2 (job positions), ¶ 4 (pay rates), ¶ 5 (compensation for storm evaluation work), 205 ¶ 8 (seniority).)

Similarly, although Oncor's May 11 submission included a list of information about trainings responsive to items 9–11, it identified the nonunit employees by number only. (ROA 1440; ROA 1229 ¶¶ 15-17, 1262-67.) In response to item 12, Oncor referred the Union to the list nonunit employees who received storm/exceptional pay. (ROA 1229 ¶ 18.) As for item 13, although Oncor claimed that it did not have a list of more experienced employees who served as Damage Evaluators in previous storms, it did not deny that data responsive to the Union's request existed. (ROA 1440; ROA 1229 ¶ 19.)

On June 21, the Union reminded Oncor that it still needed the names of nonunit employees who performed storm evaluation work, explaining that the information was necessary to "identify which non-bargaining unit Oncor employees received how much compensation and when and where such work has been performed." (ROA 1440; ROA 1268.) To resolve the issue, the Union offered to sign an agreement to keep the names of nonunit employees confidential. (ROA 1435, 1440; ROA 1268.) The Union also repeated its request for a list of more experienced employees who served as Damage Evaluators in previous storms (item 13). (ROA 1270.)

On July 9, Oncor objected anew to the Union's request for information about when and where nonunit employees performed storm evaluation work, asserting that it was "unduly burdensome, harassing," and that obtaining the information

would require evaluating "hundreds of thousands" of work orders, which could "take potentially hundreds of hours." (ROA 1440; ROA 1273.) Although Oncor offered to make those work orders available if the parties signed a confidentiality agreement, it again withheld the fact that it had the ability to search its work-order database by date and employee name, which would have simplified the quest for responsive information. (ROA 1435, 1440; ROA 143, 149, 1273.)

In the same response, Oncor also addressed the Union's request for a list of more experienced employees who served as Damage Evaluators. Oncor clarified that the information did, in fact, exist, but added that the only way to retrieve it was to sift through every work order since January 2016. Oncor repeated its offer to provide redacted copies at the Union's expense, but again without mentioning that it could filter work orders by dates and employee names, which would have facilitated the search for relevant information. (ROA 1274.)

The Union did not respond to Oncor's letter or propose a confidentiality agreement. (ROA 1435; ROA 81-82.) Instead, the unfair-labor-practice case proceeded to a hearing on August 22, 2018. At the time of the hearing, Oncor still had not provided all of the requested information, and the Union's grievances were scheduled for arbitration in October 2018. (ROA 96-97.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Ring, Members Kaplan and Emanuel) found, in agreement with the administrative law judge, that Oncor violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing to comply fully with the Union's requests for items 1–5, 8–13, and part of item 7. (ROA 1434-37.) To begin, the Board found that, with the exception of item 6, the requested information was relevant to and necessary to the Union's performance of its duties as the bargaining-unit representative.[11] Specifically, the Board found that the names of nonunit employees (item 1) were relevant to the Union's grievance allegation that Oncor assigned unit work to those individuals, and were also needed to evaluate the impact of that practice on the safety of unit employees. (ROA 1434 & n.5, 1441.) The Board also found that items 2–5 and 7–8 were relevant to the Union's grievances, as they dealt squarely with whether and how much unit work had been assigned to nonunit employees, and those employees' qualifications to perform the work. (ROA 1434, 1441.) Finally, the Board found that the Union needed items 9–13 to investigate the impact of Oncor's practice on the safety of unit employees. (ROA 1434, 1441.)

[11] Because item 6 requested Oncor's reasons for assigning bargaining-unit work to nonunit employees, which was not relevant to evaluating the impact of that practice on the unit, the Board found, contrary to the judge, that Oncor did not violate the Act by refusing to respond. (ROA 1435.)

Reviewing Oncor's submissions, the Board found, in agreement with the judge, that Oncor violated the Act because it failed to provide the names of nonunit employees in response to items 1–2, 4–5, and 8–13, and any information responsive to item 3. The Board also found that Oncor failed to provide any of the information requested in item 7, but contrary to the judge it concluded that Oncor had offered a legitimate confidentiality interest in not disclosing customer data contained in work orders, as well as an accommodation to balance those concerns with the Union's need for the information. Accordingly, the Board found that Oncor did not violate the Act by failing to provide the work orders, but that it was obligated to furnish the other information listed under item 7. (ROA 1435-37.)

The Board's Order requires Oncor to cease and desist from the unfair labor practices found and, 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, 29 U.S.C. § 157. (ROA 1437.) Affirmatively, the Order requires Oncor to furnish the information requested by the Union in a timely manner, to the extent Oncor has not already done so and consistent with the Board's determination. (ROA 1437.) The Board's Order also requires Oncor to post paper copies of a remedial notice and to distribute that notice electronically to its employees, if Oncor customarily communicates with them by such means. (ROA 1437.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Oncor violated the Act by failing to provide relevant information that the Union needed to process grievances over Oncor's assignment of bargaining-unit storm evaluation work to nonunit employees, and to ensure the workplace safety of unit employees. At the outset, given Oncor's failure to file exceptions before the Board to all but one of the administrative law judge's relevance findings, the Court lacks jurisdiction to consider Oncor's belated challenge regarding items 2–5 and 8–13 on relevance grounds. In any event, even if the issue were properly before the Court, which it is not, ample record evidence supports the finding that the Union established the relevance of that information.

As for the one relevance finding that Oncor did preserve for court review—the Union's request for the names of nonunit employees who performed storm-evaluation work (item 1)—the Board reasonably found that the Union established it needed their names to pursue its claim that they were doing bargaining-unit work. The Union repeatedly conveyed this message to Oncor, explaining that it needed their names to confirm that a contractual violation occurred and quantify the damages owed to unit employees by determining which individuals performed unit work, when and how much work they performed, and how much compensation they received. The Union even cited on-point Board case law.

As the Board further found, the Union also established the relevance of the requested information to its duty to ensure that Oncor provided unit employees with safe working conditions. The Union relayed its safety concerns in advising Oncor about the Chapman incident, in its grievances, and in related discussions and correspondence. Indeed, Oncor acknowledged that the Union was pursuing the grievances in part because of its safety concerns.

Substantial evidence also supports the Board's finding that Oncor provided only portions of the requested information and, in doing so, violated its duty to bargain. Indeed, Oncor does not dispute its refusal to provide the key piece of information at issue now—the names of nonunit employees. Plainly, Oncor had their names on hand, since it went to the trouble of substituting them with numbers on the lists it provided to the Union. Oncor therefore has no excuse for refusing to supply the names.

Oncor also does not dispute that it failed to provide other information entirely, and that some of the data it provided was not fully responsive. And contrary to its suggestion, partial compliance does not fulfill an employer's duty to furnish other requested information. Oncor suggests that the only way to obtain the additional information was by combing through approximately 120,000 work orders, most of which were unrelated to the Union's requests. But Oncor neglected to tell the Union that it had the ability to conduct a more targeted and efficient

search of work orders corresponding to the dates of major storms and nonunit employees who received storm/exceptional pay. To the extent Oncor might claim it has no duty to provide any information contained in the work orders, that would be a mistake. Although the Board found that Oncor did not have to provide the work orders themselves because they contain confidential customer information not sought by the Union, that finding did not relieve Oncor of its duty to provide other relevant information, even if it could be gleaned from the work-order database through a more targeted search of storm dates and storm/exceptional pay. Clearly, Oncor's effort to retrieve relevant data fell short of reasonable.

Finally, the Court should reject Oncor's bizarre allegation that the Board's Decision and Order, which recites the unit description set forth in the parties' collective-bargaining agreement, somehow alters the composition of the bargaining unit. The Order, which directs Oncor to provide requested information, has no bearing on unit composition.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340

U.S. at 477; *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014). Under that test, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; *see also El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656-57 (5th Cir. 2012) ("We may not reweigh the evidence, try the case de novo, or substitute our judgment for that of the Board, 'even if the evidence preponderates against the [Board's] decision.'" (quoting *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999))).

The Court's "deference extends to [its] review of both the Board's findings of fact and its application of the law." *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). In particular, the Court gives "'great weight' to the Board's determination that information is relevant, because it is 'a finding on a mixed question of law and fact which is within the particular expertise of the Board.'" *NLRB v. PDK Invs., L.L.C.*, 433 F. App'x 297, 300 (5th Cir. 2011) (quoting *Sara Lee Bakery Grp., Inc. v. NLRB*, 514 F.3d 422, 428 (5th Cir. 2008)).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ONCOR VIOLATED THE ACT BY FAILING TO PROVIDE RELEVANT INFORMATION NEEDED BY THE UNION

A. An Employer Must Provide Information Relevant and Necessary to a Union's Fulfillment of Its Representational Duties

Section 8(a)(5) of the Act makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). For its part, Section 8(d) of the Act requires employers to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment" with unions representing their employees. *Id.* § 158(d). Together, these provisions require an employer to provide, on request, "relevant information needed by a labor union for the proper performance of its duties as the employee's bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *accord Sara Lee*, 514 F.3d at 430. Failure to do so is tantamount to bad-faith bargaining and violates Section 8(a)(5) and (1) of the Act.[12] *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *NLRB v. CJC Holdings, Inc.*, 97 F.3d 114, 117 (5th Cir. 1996).

[12] Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7 [of the Act]," 29 U.S.C. § 158(a)(1), which includes "the right . . . to bargain collectively through representatives of their own choosing," *id.* § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *accord El Paso Elec.*, 681 F.3d at 657.

A union's representational duties extend to the administration and policing of collective-bargaining agreements, including the processing of grievances. *Acme*, 385 U.S. at 436; *accord Sara Lee*, 514 F.3d at 430. The Supreme Court long ago recognized the importance of requiring the disclosure of grievance-related information among parties, as it allows them to evaluate grievances intelligently and sift out meritorious claims, while also aiding in the arbitral process and preventing the system from becoming "woefully overburdened." *Acme*, 385 U.S. at 435, 437-438.

Of equal importance here, a union's representational duties include ensuring the workplace safety of unit employees. As this Court has explained, "the phrase 'other terms and conditions of employment' contained in Section 8(d) of the Act is sufficiently broad to include safety rules and practices which are undoubtedly conditions of employment." *NLRB v. Gulf Power Co.*, 384 F.2d 822, 824-25 (5th Cir. 1967) (quoting 29 U.S.C. § 158(d)); *see also, e.g.*, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

In order to facilitate information exchanges, the Board has identified certain types of information as "presumptively relevant" to a union's fulfillment of its duties. Presumptively relevant information is "intrinsic to the employer-union relationship," such as bargaining-unit wage-and-benefit information, and must be

produced upon request. *Sara Lee*, 514 F.3d at 430; *NLRB v. Leonard B. Hebert, Jr. & Co.*, 696 F.2d 1120, 1124 (5th Cir. 1983)).

Conversely, information not ordinarily pertinent to a union's performance as bargaining representative, such as information regarding nonunit employees, is not presumed relevant, and the requesting union bears the burden of demonstrating its relevance. *Id.* That bar is a low one, however, because relevance is assessed using a "liberal, discovery-type standard." *Id.*; *see also Acme*, 385 U.S. at 437 & n.6. To carry its burden, the union need only demonstrate "a reasonable belief supported by objective evidence" that the requested information is relevant. *PDK Invs.*, 433 F. App'x at 301 & n.4; *accord DirectSat USA L.L.C. v. NLRB*, 925 F.3d 1272, 1278 (D.C. Cir. 2019). "[T]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it." *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 730 (D.C. Cir. 2011).

B. The Board Is Entitled to Summary Enforcement of the Portion of Its Order Directing Oncor To Provide Documents Responsive to Item 7, With the Exception of Work Orders

Under item 7, the Union requested that Oncor provide "any and all records of spot bonuses, work orders, memos, emails and other records describing" storm evaluation work performed by nonunit employees. (ROA 200.) Although the Board found, contrary to the judge, that Oncor did not violate the Act by refusing to turn over the work orders because they contained confidential customer

information, the Board adopted his finding that Oncor was required to provide the remaining materials requested under item 7. (ROA 1434-37.) Because Oncor does not challenge that finding in its opening brief, any objection is waived and cannot be raised in reply. *See* Fed. R. App. P. 28(a)(8)(A) (opening brief must include "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies."); *Denton Cty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 167 n.4 (5th Cir. 2020). Accordingly, the Board is entitled to summary enforcement of that portion of its Order. *See Alcoa, Inc. v. NLRB*, 849 F.3d 250, 261 (5th Cir. 2017) ("'[W]hen an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement.'" (quoting *Sara Lee*, 514 F.3d at 429)).

C. The Court Lacks Jurisdiction To Consider Oncor's Meritless Challenge to the Board's Finding That the Information Requested in Items 2–5 and 8–13 Was Relevant to the Union's Work-Diversion Grievances and Safety Concerns

In items 2–5 and 8, the Union requested that Oncor provide, for each nonunit employee identified in item 1, their job position, the dates and amount of time they performed storm evaluation work, their regular pay rate, additional compensation they received for storm evaluation work, and their seniority date. (ROA 198-200.) The Board, in agreement with the administrative law judge, found that the Union

established the relevance of that requested information for the purpose of pursuing its work-diversion grievances. (ROA 1434, 1441.)

In items 9–13, the Union asked to know which nonunit employees received storm-evaluation trainings and were assigned as Damage Evaluators, as well as the names of the more experienced employees who trained them. (ROA 239.) The Board, further adopting the judge's recommended findings, found that the Union established the relevance of that information to its duty to ensure unit employees' workplace safety. (ROA 1434, 1441.)

The Court lacks jurisdiction to consider Oncor's challenges to the Board's relevance findings regarding those items because Oncor failed to file exceptions to the judge's findings before the Board. Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Although Oncor filed some exceptions to the judge's recommended decision, it argued only that he erred in finding that it failed to provide information responsive to those items; nowhere did Oncor dispute the *relevance* of the information requested in items 2–5 and 8–13.[13] Moreover, Oncor's opening brief does not identify any extraordinary circumstance

[13] (*See* ROA 1361, 1367 (item 2), 1368, 1377-78 (item 3), 1361, 1368 (item 4), 1368-69 (item 5), 1361, 1369 (item 8), 1376 (items 9–11), 1376-77 (items 12–13).)

that would excuse its failure to except to those relevance findings, and thus Oncor has waived that potential defense.[14] Accordingly, the Court lacks jurisdiction to consider Oncor's relevance arguments regarding those items. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (courts are jurisdictionally barred from hearing objections not raised to Board during initial proceeding or on motion for reconsideration); *In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 720 (5th Cir. 2018) (courts cannot consider arguments not made before the Board); *Hallmark Phoenix 3, L.L.C. v. NLRB*, 820 F.3d 696, 709 (5th Cir. 2016) (same).

Even if those relevance findings were properly before the Court, which they are not, they would pass muster on substantial-evidence grounds. In short, for the same reason that the Board provided for the relevance of item 1 (discussed below pp. 31-35), the Union established the relevance of items 2–5 and 8—that is, by demonstrating a reasonable belief, based on Oncor's June 23 letter, that nonunit employees had performed unit work. (ROA 205 ¶ 6, 206 ¶ 12, 234-36.) This showed that the Union had a legitimate purpose for its requests, *i.e.*, to investigate and pursue its grievance allegation that Oncor violated the contract by assigning unit work to nonunit employees, which included calculating damages owed to unit employees. *See, e.g.*, *N.Y. & Presbyterian Hosp.*, 649 F.3d at 727, 730-31 (nonunit

[14] *See* cases cited above p. 27.

employees' names, dates of hire and/or termination, job duties, departments or areas of work, shifts, and full- or part-time status were relevant to union's duty to ensure employer did not violate contract by diverting unit work); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 956-57 (6th Cir. 1969) (nonunit employees' names, job classifications, and job descriptions were necessary for union alleging improper work diversion to determine whether to process grievances, file unfair labor practice charges, or seek amendments to contract).

The record evidence likewise supports the finding that the Union established the relevance of items 9–13 to its duty to ensure the workplace safety of unit employees. (ROA 1434, 1441.) As explained below in full (pp. 34-35), the Union had a reasonable belief, substantiated by the Chapman incident and conveyed in communications about the ensuing grievances, that Oncor's practice of assigning storm evaluation work to nonunit employees posed a safety risk to unit employees. Accordingly, even if Oncor had excepted to that finding before the Board, it is plain on this record that the Union met its burden of demonstrating relevance.

D. The Board Reasonably Found That the Union Established That Information Sought in Item 1 Was Relevant and Necessary To Fulfill Its Duties as Bargaining-Unit Representative

In item 1, the Union requested the names of nonunit employees who performed storm evaluation work since January 2016. The Board found that the Union had a reasonable belief that this information was relevant to its representational duties of pursuing its work-diversion grievances and ensuring the workplace safety of unit employees. (ROA 1434, 1441.) As shown below, substantial evidence supports this finding.

1. The requested information was relevant to pursuing the Union's work-diversion grievances

Ample evidence supports the Board's finding that the Union established a reasonable belief, based on objective evidence, that the requested information was relevant and necessary to pursuing its work-diversion grievances. (ROA 1434, 1441.) In its August 28, 2017 response to Oncor's inquiries, the Union specifically explained that nonunit employees' names were relevant to its grievance allegation that Oncor was diverting bargaining-unit work. (ROA 234.) That response alone, the Board found (ROA 1441), sufficed to meet the Union's burden of showing relevance and need. Indeed, it is uncontested that storm evaluation was bargaining-unit work (ROA 206 ¶ 12, 309), that the parties' contract prohibited outside assignment of unit work if doing so reduced available work for unit employees (ROA 37, 1321 § 8), and that nonunit employees regularly performed

the work (ROA 205 ¶ 6, 309). On these uncontested facts, there can be no doubt that the Union "act[ed] upon the probability" that the names of nonunit employees were relevant and would be of use in carrying out its duty to investigate whether a contractual violation occurred, including by pursuing the issue through the grievance/arbitration process. *Acme*, 385 U.S. at 437; *Sara Lee*, 514 F.3d at 430-31.

But the Union did not stop there. In the same communication, the Union also explained that it needed the names in order to quantify the value of work lost to nonunit employees. (ROA 234.) In addition, citing Oncor's June 23 letter acknowledging that nonunit employees performed storm evaluation work (ROA 205 ¶ 6, 206 ¶ 12), the Union explained that it amounted to "an initial showing" of a contract violation, which established the Union's "reasonable basis for believing" that nonunit employees performed unit work (ROA 236). The Union even provided a helpful citation to *Duquesne Light Company*, 306 NLRB 1042, 1043-44 (1992), an on-point Board decision holding that a union professing a reasonable belief that an employer assigned unit work to nonunit employees is entitled to obtain their names.[15] (ROA 236.) Further, when Oncor

[15] The Board and the courts agree than when an employer is alleged to have assigned bargaining-unit work to nonunit employees, the names of those employees are relevant to the duties of the unit representative. *See, e.g.*, *Teachers Coll., Columbia Univ.*, 365 NLRB No. 86, 2017 WL 2402771 (2017), *enforced*,

continued to dodge its requests, the Union reiterated in a June 21, 2018 letter that the names of nonunit employees were necessary to know who among them performed unit work, when and where, and how much they received in compensation.[16] (ROA 1268.) Together, these explanations more than met the Union's burden to establish that the requested information was relevant to its work-diversion grievances.[17]

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902 F.3d 296, 304 (D.C. Cir. 2018) (nonunit employees' names were relevant for processing union's grievance over improper diversion of unit work and to prepare for arbitration); *AGA Gas, Inc.*, 307 NLRB 1327, 1327 n.2, 1329-30 (1992) (nonunit employees' names were relevant to grievance alleging they performed unit work in violation of collective-bargaining agreement); *Depository Trust Co.*, 300 NLRB 700, 704-05 (1990) (employer required to provide names of nonunit employees allegedly performing unit work); *Leland Stanford Junior Univ.*, 262 NLRB 136, 136 n.1, 139, 151 (1982) (names of temporary employees hired to perform unit work found relevant to grievance that employer violated contract), *enforced*, 715 F.2d 473 (9th Cir. 1983).

[16] The Court should reject any argument that the Union did not provide this justification "at the time" of its request. When the Union sent its June 21 letter, the parties were still sparring over relevance.

[17] Oncor errs (Br. 33) in relying on *NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 937-38 (5th Cir. 1978), a distinguishable case where the union, which was only contesting a single instance of work diversion, made an overbroad request for information about all nonunit employees. By contrast, the Union here tailored its request to address a broader claim that nonunit employees were performing unit work. Moreover, in the excerpt quoted by Oncor (Br. 33), the Court found that the requested information was of no use to the union without other information it did not ask for. *Id.* at 938. In this case, it is Oncor who is withholding critical data—the names of nonunit employees—without which the Union cannot make full use of the information it received.

2. The requested information was also relevant to ensuring the workplace safety of unit employees

Substantial evidence also supports the Board's further finding (ROA 1434, 1441) that the Union had a reasonable belief, based on objective evidence, that the information requested in item 1 was relevant and necessary to ensure that Oncor provided safe working conditions for unit employees. *See, e.g.*, *Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559, 568 (5th Cir. 1987) (safety practices "indisputably and necessarily involve 'conditions of employment'"). Indeed, to confirm the reasonableness of the Union's safety concerns, one need look no further than the Chapman incident. By itself, this event showed that the Union's misgivings over the assignment of storm evaluation work to nonunit employees were justified.

Nor can there be any doubt that Oncor understood the Union's grievances and information request were partly motivated by safety concerns. To begin, in July 2016, the Union expressed its "concerns for the safety of the public and employees" due to Oncor's "unsafe work practice." (ROA 260.) After the Chapman incident proved those concerns were legitimate, the Union filed its first grievance, specifically requesting that Oncor recognize in writing that having nonunit employees do storm evaluation work was "dangerous and irresponsible." (ROA 1275.) Union Business Representative Reed also conveyed those concerns in person to Oncor's managers at a grievance meeting. (ROA 1279.) Evidently,

Oncor got the message: the first sentence of its letter denying the grievance described the Chapman incident as "the focus of the grievance." (ROA 1279.) Moreover, when Oncor subsequently asked whether "the qualification of employees doing . . . storm evaluation work" was the subject of the grievance (ROA 240), the Union responded unequivocally that it "stands by its concern about safety, since bargaining unit employees are highly trained and Oncor is engaged in a dangerous practice with this ongoing contract violation." (ROA 242.) Finally, the Union's second grievance repeated its demand that Oncor "cease and desist from this very dangerous practice." (ROA 1277.) This record shows the Union clearly conveyed to Oncor that it needed the information not only to pursue its work-diversion grievances but also to address concerns about the safety of unit employees.

3. Oncor's challenges to the Board's relevance determination are without merit

As shown above (pp. 28-29), Section 10(e) of the Act bars consideration of Oncor's challenges to the Board's finding that the information requested under items 2–5 and 9–13 was relevant to the Union's grievance-processing duties and safety concerns. As for the remaining item 1 (the names of nonunit employees who performed storm evaluation work), there is no merit to Oncor's claim (Br. 21-22) that the Board's finding of relevance does not pass muster under Fifth Circuit law. As this Court has explained, a union seeking information about nonunit

employees must, at the time of its request, articulate a legitimate purpose for seeking the information. *Sara Lee*, 514 F.3d at 431. This is done by showing a reasonable belief supported by objective evidence that the information is relevant to the union's representational duties. *Id.*; *accord PDK Invs.*, 433 F. App'x at 301. The union must also show at some point that the information bears a logical relationship to its stated purpose. *Id.* To be sure, this formulation varies slightly from the Board's test for extra-unit information, which requires the union to show a reasonable belief supported by objective evidence that such information is relevant to its representational duties. *See, e.g.*, *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). But as shown above (pp. 31-35), substantial evidence supports the Board's finding that the Union established relevance under either articulation.

Oncor distorts *Sara Lee* by arguing the Union should be held to an artificially high standard to show that requested information is "'specially relevant'" to its grievances. (Br. 33 (quoting *Sara Lee*, 514 F.3d at 432).) *Sara Lee* merely borrowed that term from a passage in a First Circuit case that was distinguishing between presumptively relevant information and extra-unit information. *See W. Mass. Elec. Co. v. NLRB*, 573 F.2d 101, 105 (1st Cir. 1978). Read in context, that term is just a different articulation of the "discovery-type standard" set forth in lead cases like *Acme*, 385 U.S. at 437.

Oncor gains no more ground by claiming that the legitimate purposes articulated by the Union—pursuing its work-diversion grievances and ensuring the workplace safety of unit employees—were just "bare assertions" insufficient to satisfy its burden. (Br. 22-25.) The Union's repeated explanations of its reasons for needing the information were hardly a bare assertion. In that regard, Oncor errs in its heavy reliance on distinguishable cases like *Detroit Edison*, where the union merely stated that it "need[ed] information to process a grievance." 440 U.S. at 314. As shown above (pp. 31-35), the Union's justifications far exceeded a bare assertion, both in substance and in detail.

Oncor's "bare assertion" argument also misstates applicable law. In *Detroit Edison*, the Supreme Court made it clear that the duty to provide information "turns upon 'the circumstances of the particular case.'" 440 U.S. at 314 (quoting *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956)). Indeed, this Court and others have since agreed that the circumstances surrounding a request can create an obligation to supply information if they are "reasonably calculated to put the employer on notice of a relevant purpose which the union has not specifically spelled out." *Brazos Elec. Power Coop.*, 241 NLRB 1016, 1018 (1979), *enforced*, 615 F.2d 1100, 1101 (5th Cir. 1980); *accord Hertz Corp. v. NLRB*, 105 F.3d 868, 874 (3d Cir. 1997) ("When it is clear that the employer should have known the

reason for the union's request for [nonunit] information, a specific communication of the facts underlying the request may be unnecessary.").

Even if the Union's repeated explanations were "bare assertions," which they were not, the record shows that the surrounding circumstances also provided clear notice at the time that the requested information was relevant to the Union's duties of policing the contract and ensuring the safety of unit employees.[18] As shown, the Union first objected to the practice of assigning storm evaluation work to nonunit employees in July 2016, making clear its position that this was unit work, and accusing Oncor of using nonunit employees to compensate for the steady decline in unit size. (ROA 260.) After the Chapman incident, the Union filed a grievance alleging that Oncor violated the contract by using nonunit personnel to perform unit work after a storm, and Union Business Representative Reed met with Oncor's management to discuss it. (ROA 1275, 1279.) Indeed, Oncor's response (ROA 1279) demonstrates that it understood the Union was

[18] Misreading *Sara Lee*, Oncor claims this Court has rejected the notion that the context of an information request can give an employer sufficient notice of a union's purpose for the request. (Br. 23 n.6.) But the Court endorsed that principle in *Brazos*, 615 F.2d at 1101, and thus the *Sara Lee* panel could not reject it. *Tex. Refrigeration Supply, Inc. v. F.D.I.C.*, 953 F.2d 975, 983 n.15 (5th Cir. 1992). Indeed, *Sara Lee* simply held that even if the purpose of the union's request was apparent from the surrounding circumstances, the union never established a logical connection between that purpose and the information it requested. 514 F.3d at 431. By contrast, the Union here established both its purpose for the request and the logical connection.

challenging the assignment of storm evaluation work to nonunit employees as violating the parties' contract. That was the context in which Oncor received the Union's information request, less than two weeks later. Oncor's claim that it needed unspecified additional explanations to understand the purpose of the request is simply not credible.

Likewise, the circumstances surrounding the Union's request, as well as the Union's letters, put Oncor on notice that the Union was proceeding in part to verify that unit employees operated in safe conditions. Thus, in July 2016, the Union directly expressed its "concerns for the safety of the public and employees" due to Oncor's "unsafe work practice" of assigning storm evaluation work to nonunit employees. (ROA 260.) Nine months later, the Chapman incident demonstrated the legitimacy of those concerns. The Union filed its grievance a few weeks later, and on the same day Reed conveyed the Union's safety concerns to Oncor's management in person. (ROA 1279.) The information request came soon after, and was followed by correspondence directly noting the Union's safety concerns. (ROA 242.) Thus, Oncor would reasonably have known from the surrounding context that the Union was requesting the information in part to fulfill its duty to ensure the workplace safety of unit employees.

There is no more merit to Oncor's claim that the Union failed to show a logical connection between the requested information and those legitimate

purposes. (Br. 32-36.) The relationship between grievances alleging that Oncor assigned unit work to nonunit employees and the names of the employees to whom Oncor assigned that work is self-evident. Likewise, the connection between the Union's safety concerns and the names of nonunit employees who performed storm evaluation work is straightforward and logical, especially in the context of Chapman's near-fatal experience.

Ignoring this plain evidence, Oncor erroneously suggests that the Union waited until the unfair-labor-practice hearing to put forward a legitimate purpose for the information and the logical connection between that purpose and the requested data. (Br. 29-32.) But Reed's testimony at the hearing merely confirms what the Union had already made clear—namely, that the requested names were necessary to pursue its work-diversion grievances, including by interviewing nonunit employees, verifying that the work they did was actually bargaining-unit work, and subpoenaing them as arbitration witnesses if necessary. (ROA 1440; ROA 40-41, 47, 50-51, 66, 97.) Reed's further testimony—that nonunit storm evaluators are a "huge safety concern" because they are expected to neutralize hazards at the site of an incident so that unit employees who respond to their work orders can proceed without risk—likewise confirmed what the Union had already told Oncor. (ROA 40, 53-55.) The same is true of Reed's testimony that to ensure the safety of unit employees, the Union needed to know how nonunit employees

were trained, what kind of work they performed, and whether they were comfortable doing it.[19] (ROA 50.) In short, Reed's testimony simply confirmed the logical connections between the requested information and the Union's representational duties—connections that were already made clear during the lengthy period in which the parties haggled over the information request.

Finally, Oncor tries in vain to fault the Board for noting that having the names of nonunit employees would allow the Union to interview or subpoena them. (Br. 28 (citing ROA 1440).) As shown, the Union established the relevance of those names to pursuing its work-diversion grievances, quantifying any resulting damages, and evaluating the implications of that practice on workplace safety. (ROA 1434 n.5, 1441.) Moreover, even if the Board had relied in part on Reed's testimony about how the Union might use the names to show a logical relationship between the information and the Union's purpose for requesting it, that would be consistent with *Sara Lee*, 514 F.3d at 431, which does not require such a showing to be made at the time of the request. *Accord PDK Invs.*, 433 F. App'x at 301.

[19] Reed also noted (ROA 50) that two children had been killed by a power line brought down in the same storm that caused the Chapman incident. *See* Samantha Schmidt, *Family of 2 Young Brothers Killed by Downed Power Line Sues Texas Electric Company*, Wash. Post, July 28, 2017.

E. Substantial Evidence Supports the Board's Finding That Oncor Violated the Act by Failing To Provide All Relevant Information Responsive to Items 1–5 and 8–13

1. Oncor failed to provide the names of nonunit employees in response to items 1, 2, 4, and 8–11

Oncor does not dispute that it failed to provide the names of all nonunit employees who performed storm evaluation work since January 1, 2016, as requested by item 1. Likewise, Oncor admits its failure to produce those names in response to items 2, 4, and 8–11. (Br. 43.) Accordingly, the Court should uphold the Board's finding (ROA 1434 & n.5, 1439-40 (chart), 1441) that Oncor violated the Act by failing to provide all responsive information to items 1, 2, 4, and 8–11.

Never short on irony, Oncor argues that the Court should reject the Board's findings as to items 2, 4, and 8–11 because, "other than the names of non-bargaining unit employees, Oncor provided the Union with the information it requested." (Br. 43.) However, Board law is clear that absent a legitimate countervailing interest, all responsive information must be provided in full. *See, e.g.*, *Monmouth Care Ctr*., 354 NLRB 11, 56-57 (2009) (partial compliance with information request violates the Act), *affirmed*, 356 NLRB 152 (2010), *enforced*, 672 F.3d 1085, 1094 (D.C. Cir. 2012). Indeed, if parties were free to pick and choose what they care to divulge, the requirement to share relevant information would soon become an empty mandate. That is especially true in this case, where nonunit employees' names were the common denominator of the Union's request.

Without them, any information Oncor provided—job positions, salaries, seniority dates, and training—was incomplete and thus insufficient to enable the Union to perform its representational functions. Oncor's Senior Labor Relations Manager Barbara Gibson even admitted that the information Oncor provided was not sufficient to allow the Union to speak with nonunit employees who performed storm evaluation work. (ROA 147.)

Oncor goes so far as to claim it had "every reason to believe" the Union was satisfied with the information received because its last communication "gave no indication" to the contrary. (Br. 43 (quoting *Day Auto. Res., Inc.*, 348 NLRB 1257, 1263 (2006)), 44, 45, 46, 47.) The record proves otherwise. The Union spent *over a year* trying to get Oncor to turn over the requested information. Along the way, the Union expressed its dissatisfaction on multiple occasions, every one of which raised Oncor's failure to provide the requested names. (ROA 234-39, 242-44, 1223, 1268-70.) In fact, the Union's last message to Oncor stated: "Without the names of the individuals who have performed storm evaluation work, the Union lacks the information we need." (ROA 1268.) The fact that Oncor's responses to every item were incomplete without those names was plain and obvious. *See Monmouth Care Ctr.*, 672 F.3d at 1094 (record belied employer's claim that union failed to object to its submissions).

2. Oncor failed to provide any information responsive to item 3

Item 3 requested the dates and amount of time that individual nonunit employees performed storm evaluation work. (ROA 1434; ROA 198.) Oncor responded that it had no methodology to obtain such information, and that the only solution was for the Union review every work order for the relevant period. (ROA 204 ¶ 3, ROA 1225.) Oncor repeats that claim here, arguing that it offered the information in good faith to the Union, "although not in the precise form requested." (Br. 38-39.) The Board reasonably rejected those claims. (ROA 1434, 1441.)

It is well established that, although employers cannot be required to produce information they do not have, "[they] do have an obligation to make reasonable efforts to secure any unavailable information." *Sara Lee*, 514 F.3d at 429 (citation omitted). In this case, the fact that the requested information could not be produced by simply printing a list at the push of a button did not spell the end of Oncor's statutory duty.

The record shows beyond dispute that Oncor had the ability to filter its data, which would have made it significantly easier to obtain the information needed by the Union. As Gibson admitted, work orders are maintained in a database that is searchable by date and employee name. (ROA 142-43, 149.) She also acknowledged that Oncor keeps a record of major storms each year, and that it can

search its payroll system for nonunit employees who receive storm/exceptional pay.[20] (ROA 136, 143-44.) Under further questioning, she eventually admitted that Oncor could extract work orders related to major storm dates, or performed by nonunit employees who received storm/exceptional pay, either of which would have greatly simplified the quest for responsive information. (ROA 148-49, 152-53.) Gibson, however, confessed that Oncor did not run any of those searches and generally made no effort to narrow the data. (ROA 140, 144-45, 148-49.) Instead, Oncor made it appear that the only way to obtain the information was for the Union to review 120,000 work orders, most of which were irrelevant.

Oncor would gain no ground by arguing that a more targeted search would not have yielded the exact information the Union requested.[21] Oncor's duty was to make a reasonable effort to secure information relevant to the Union's request, and Gibson admitted (ROA 148) that searching work orders by date or employee name

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[20] Indeed, Oncor gave the Union a list of all nonunit employees who received storm/exceptional pay between January 2016 and May 2018, although the list was deficient because it substituted their names with numbers. (ROA 1227, 1231-61.) Oncor also gave the PUC a table showing the number of nonunit employees who did storm evaluation work during each major storm between January 2016 and May 2017. (ROA 332-33.)

[21] Because Oncor only tracks "major storms," a search by date would not include smaller storms unless their dates were known as well. Moreover, as Gibson explained, a search by date would inevitably return some work orders unrelated to any storm. (ROA 148.) Likewise, because employees can receive storm/ exceptional pay for other reasons besides storm evaluation work, a search by employee name would include some inapposite results. (ROA 152-53.)

would have made it easier to obtain the requested information. *See Sara Lee*, 514 F.3d at 430 (employer who did not keep records of requested information violated the Act because it "failed to conduct a good faith inquiry" into whether information was available from other sources).

Oncor may also claim that, even if it failed to make a reasonable effort to provide the requested information, it should no longer be required to do so, given the Board's finding that it was not obligated to furnish the work orders themselves because they contained confidential customer information. But that would be a misreading of the Board's Order, which requires Oncor to provide the information requested in items 1–5, 7 (except for the actual work orders), and 8–13 to the extent it has not already done so. (ROA 1434, 1437.) Thus, there is no contradiction between the Board's Order and its finding that Oncor is not required to furnish the work orders themselves. In short, to the extent that information is responsive to the Union's request, it must be provided, even if it must be gleaned from work orders.[22]

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[22] It should also be noted that if the Court enforces the Board's Order, Oncor will have the opportunity in a future compliance proceeding to address specific compliance-related issues regarding the availability of requested information, and thereafter to seek review of the Board's final decision and order in the compliance case. *See Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1330 (D.C. Cir. 2012) ("[I]t is well-established that 'compliance proceedings provide the appropriate forum' to consider objections to the relief ordered." (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984))); *Great Lakes Chem. Corp. v. NLRB*, 967

3. Oncor's response to item 5 was unnecessarily overbroad

In item 5, the Union requested the amount of additional pay or compensation received by every nonunit employee who performed storm evaluation work. (ROA 198.) Almost a full year after the Union's request, and after the complaint was issued, Oncor supplied a list of instances where nonunit employees had received storm/exceptional pay. (ROA 1231-61.) The Board reasonably found that Oncor's response fell short for two reasons. (ROA 1434, 1441.)

First, as Oncor acknowledged, employees can receive storm/exceptional pay for other activities besides storm evaluation work, which means the list was overbroad. (ROA 152, 154, 1229 ¶ 5.) Second, Oncor replaced the employees' names with numbers, making it impossible for the Union to determine for itself whether any given employee actually performed storm evaluation work. In other words, Oncor provided a list that, by its own admission, was not accurate, and then made sure the Union could not discover its flaws by removing the names.

Oncor's claim that it "unequivocally provided the Union the information that it had" is blatantly false. (Br. 41.) Clearly, Oncor had the employees' names since it went to the trouble of replacing them with numbers. In addition, while testifying on this very item, Gibson admitted that Oncor tracks major storms, and that it can

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F.2d 624, 630 (D.C. Cir. 1992) ("Any recognized defense to the order's implementation can be raised by a petition to review the compliance order.").

search work orders for the dates corresponding to those storms. (ROA 143-44.) Indeed, Oncor demonstrated that capacity by giving the PUC a table showing exactly how many nonunit employees received storm/exceptional pay for assignments during major storms. (ROA 331-33.) The inescapable conclusion is that Oncor could have identified those instances where individual nonunit employees received storm/exceptional pay specifically for work during major storms, which would have been a significant improvement over the inaccurate and misleading list it provided. Thus, Oncor failed in its obligation to make a reasonable effort to procure the information requested by the Union. *See Sara Lee*, 514 F.3d at 429-30.

4. Oncor failed to provide any information responsive to items 12 and 13

In item 12, the Union requested that Oncor provide the names of all new employees assigned as Damage Evaluators since January 1, 2016, and in item 13, it asked for the names of all "more experienced employees who served as Damage Evaluators" since the same date. (ROA 239.) Oncor does not dispute that it failed to provide any information responsive to these items. Therefore, the Board's finding that Oncor violated the Act by failing to provide the requested information is based on substantial evidence. (ROA 1434, 1441.)

Oncor has waived any challenge to the Board's finding regarding item 12, which requested the names of new employees who served as Damage Evaluators.

Although Oncor's opening brief generally claims that information responsive to items 3, 5, 12, and 13 did not exist or was not available in the exact form requested by the Union, it then proceeds to address items 3, 5, and 13, but neglects 12 altogether. (Br. 37-43.) Accordingly, Oncor has waived that argument as to item 12 and cannot raise it in reply. *See Denton*, 962 F.3d at 167 n.4. In any event, although Oncor's May 11, 2018 letter asserted that the list of unnamed employees who received storm/exceptional pay was responsive to item 12 (ROA 1229 ¶ 18), that list failed to identify the individual employees by name. Oncor's response to item 12 was therefore incomplete.

Oncor's arguments regarding item 13 are equally unavailing. Oncor admits that responsive information exists somewhere in the 120,000 work orders covering the relevant period; once again, however, Oncor claims it fulfilled its statutory duty by offering to charge the Union $16,000 for redacted copies. (Br. 42.) But as shown above (pp. 44-45), Oncor had the capacity to extract relevant information from those work orders, by searching for the names of employees who received storm/exceptional pay and the dates of major storms. Yet Oncor never mentioned that possibility to the Union, and Gibson testified that Oncor never attempted to run those searches. (ROA 140, 144-45, 148-49.) Thus, Oncor failed in its obligation to make a reasonable effort to procure the information requested by the Union. *See Sara Lee*, 514 F.3d at 429-30.

E. The Order Does Not Alter the Composition of the Bargaining Unit

Oncor saves its most bizarre claim for last, arguing that the Board's Order should not be enforced because the Board's Decision contains an erroneous description of the bargaining unit (Br. 49), even though that description mirrors the one set forth in the parties' collective-bargaining agreement.[23] This claim misses the mark entirely. The Board's Order requires Oncor to cease and desist from its unfair labor practices, furnish outstanding information, and post and distribute a remedial notice. (ROA 1437.) The Order says nothing about, and does not affect, the composition of the bargaining unit. Moreover, the remedial notice that the Board's Order requires Oncor to post does not contain a unit description. Thus, the issue is a red herring and provides no basis for denying enforcement of the Board's Order.

[23] By its own terms, the agreement applies to employees "covered under certifications 16-RC-951, 16-RC-l078, 16-RC-1079 and 16-RC-l0746, *as shown in the Appendix*." (ROA 1289 § 2 (emphasis added).) The Board's description simply reproduces all of the job classifications included in the agreement's Appendix. (ROA 1328.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Oncor's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ONCOR ELECTRIC DELIVERY, L.L.C.,	)	
	)	
Petitioner Cross-Respondent	)	No. 20-60229
	)	
v.	)	Board Case No.
	)	16-CA-212174
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 29th day of July 2020

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	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(5)-(6), 32(a)(7)(B), and 32(g)(1), the Board certifies that its final brief contains 11,834 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

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Dated at Washington, DC
this 29th day of July 2020