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| **Jurisdiction** | | **Color:** | |
| **Where does this Court’s jurisdiction lie?** | | **This Court has jurisdiction pursuant to 29 U.S.C. § 160(e) and (f) because this is an appeal from a final decision and order of the National Labor Relations Board, and because the allegedly unfair labor practices were committed within this Court’s territorial jurisdiction. The Petition for Review and Cross-Application for Enforcement were timely filed as there is no time limit for such filings.** | |
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| **Issues  Presented** | | **Color:** | |
| **Was the Board’s determination that DISH improperly implemented its last, best, and final offer in the absence of a valid impasse supported by substantial evidence?** | **No. The Board’s decision was based entirely on the ALJ’s incorrect conclusion that there was a high attrition rate among DISH technicians at the two unionized Dallas locations.** | |
| **Did the Board err in concluding that the 17 employees who quit were constructively discharged because they faced a Hobson’s Choice?** | **Yes. The evidence is undisputed, and all parties and the ALJ agreed, that these employees quit because their wages were reduced. This Court and the Board have held that a unilateral wage reduction, standing alone, does not create a Hobson’s Choice such that employees who quit because of the reduction were necessarily constructively discharged.** | |
| **Statement  of the Case** | **Color: Yellow** | |
| **What does DISH do?** | **DISH is one of the largest providers of TV programming in the country. It sells programming packages to its customers, which it beams via satellite to small dishes mounted on their homes.** | |
| **How does DISH provide it service?** | **To provide its TV programming service, DISH employs technicians who travel to customers’ homes to install the satellite systems and troubleshoot any problems.** | |
| **How does DISH compensate its technicians?** | **DISH generally compensates its technicians using a nationwide pay system, which often included an hourly component.** | |
| **What is QPC?** | **QPC stands for Quality Performance Compensation, which was an incentive-based pay scale that DISH piloted in 2009 at several locations, including two of its eight offices in the North Texas region: Farmers Branch and North Richland Hills.** | |
| **What was the idea behind QPC?** | **Under QPC, the technicians’ hourly wages were lowered, but the hourly wages were supplemented by performance incentives — additional pay for high-quality work.** | |
| **How did QPC specifically work?** | **Each task a technician might perform was assigned a point value. These points were then weighted (based on how well the technician performed the task) and assigned dollar values. Technicians would accrue both hourly wages and incentive pay throughout the day, and their pay increased with the quantity and quality of tasks performed.** | |
| **What was the goal of QPC?** | **The goal of QPC was to develop a merit-based compensation system that would “drive performance” while “not increas[ing] pay to a drastic point.” ROA.881.** | |
| **Why did the technicians initially oppose QPC?** | **The technicians in Farmers Branch and North Richland Hills opposed QPC because it decreased their hourly base wage. They wanted to eliminate QPC and return to a system of flat hourly wages.** | |
| **What did the technicians in Farmers Branch and North Richland Hills do in response to QPC?** | **They were so opposed to QPC that they began a union drive that led to the election of the Communications Workers of America to represent them in collective bargaining.** | |
| **What was required after the Union was in place in the Dallas-area locations?** | **With the Union in place, collective bargaining was required for wages and other mandatory subjects of bargaining. 29 U.S.C. § 158(d).** | |
| **What did the Union initially seek during collective bargaining?** | **The Union initially sought a contract that would eliminate QPC at the Dallas-area locations and move back to the system of higher, flat hourly wages that had existed before.** | |
| **What did DISH initially want to do regarding QPC?** | **DISH originally wanted to preserve QPC. But DISH quickly abandoned that position when it replaced the QPC pilot program elsewhere in the country with a different performance-based incentive program, named Pi.** | |
| **How does Pi work?** | **Pi pays a higher hourly wage and is less incentive-based than QPC.** | |
| **How was Pi different from QPC?** | **1. Under QPC, everyone earned some incentive-based pay. Under Pi, a technician had to meet certain thresholds before earning incentive-based pay.**  **2. QPC had no limit on the additional wages an employee could receive. Incentives under Pi were capped for each pay period.**  **3. In short, under Pi, all technicians earn a greater hourly wage compared to QPC, and technicians who “perform above and beyond” are “rewarded with a little extra.” ROA.883** | |
| **When did DISH and the Union begin collective bargaining?** | **Collective bargaining between DISH and the Union began in July 2010. During the first years of bargaining, the parties met approximately a dozen times, for a total of 20 to 25 days.** | |
| **How did collective bargaining progress from 2010 to 2013?** | **By early 2013, substantial progress had been made. Both sides agreed that QPC should be replaced with a system of hourly wages, plus the opportunity to earn additional pay under Pi. The only remaining wage-based issues concerned the hourly wage schedule, and how much wages should increase each year.** | |
| **Before the Union changed its position in July 2013, what had the parties agreed to during collective bargaining?** | **By May 2013, the parties were approximately one dollar apart on hourly wages. They also had agreed on other items, such as the 401(k) plan and the right to advance notice of schedules. A final agreement seemed to be within sight.** | |
| **When did the Union change its position regarding QPC?** | **In July 2013, the Union abandoned the position it had promoted for the previous three years. Instead of fighting to eliminate QPC, it now demanded that QPC be retained and that hourly wages be increased as well.** | |
| **Why did the Union change its position regarding QPC?** | **The Union’s reversal was driven by a design flaw in QPC that caused wages to skyrocket for technicians in Farmers Branch and North Richland Hills.** **QPC compensated technicians based on a** **set of point values assigned to different tasks. But the performance metrics from 2009 were frozen in place when the Union was certified, and those metrics didn’t account for changes in technology. So, when technology improved, technicians could complete their work faster and more efficiently, and their pay would increase—regardless of whether the technician was doing anything differently or better than before.** | |
| **What were the technological improvements that benefited DISH technicians?** | **1. Improvements at DISH’s call center. DISH implemented a system that enabled it to resolve many problems over the phone that previously would have required it to send a technician to the customer’s house.**  **2. DISH’s shift to electronic forms, which saved technicians time on paperwork.**  **3. Improvements in DISH’s GPS system, which saved technicians time by routing them more efficiently to customers’ homes.** | |
| **What happened to the wages at Farmers Branch and North Richland Hills under QPC?** | **Wages at Farmers Branch and North Richland Hills quickly exceeded wages at non-unionized offices in the same region. In 2013, average earnings at Farmers Branch and North Richland Hills were 14% higher than average earnings for non-unionized technicians. The disparity increased to 41% in 2014, and 43% in 2015. ROA.1778** | |
| **How much more did the technicians paid under QPC earn over technicians elsewhere in the region?** | **Technicians paid under QPC earned on average nearly $20,000 more per year than technicians elsewhere in the region—notwithstanding the fact that they worked (on average) 200 fewerhours per year. ROA.895-96. The wage increase was so dramatic that technicians could earn more than their managers.** | |
| **What was the bargaining dynamic that the technicians’ windfall under QPC produced?** | **Although a union normally enters bargaining seeking to obtain something *better*, here, the Union recognized that the “status quo, i.e., keeping the QPC and not bargaining for a while, was preferable.” ROA.599. The employees’ goal was “to protect or keep the [QPC] pay scale.” ROA.543.** | |
| **What concessions did the Union offer to preserve QPC?** | **The Union offered concessions on issues it normally regards as critical, such as automatic deduction of union dues from payroll, arbitration for workplace disputes, and seniority protections.** | |
| **What did DISH offer in response to the Union’s concessions?** | **DISH said it would significantly increase the technicians’ hourly wages, but that it “would not agree to** **QPC.” ROA.1097.** | |
| **At what point did DISH determine that the parties were at an impasse?** | **Once the Union refused to consider any proposal that didn’t preserve QPC, DISH responded by asking, “Are we at impasse then?” ROA.1104. The Union then made a regressive proposal—to preserve QPC and get additional concessions, such as a “clothing allowance.” ROA.1097, 1820. The bargaining was “going backwards.” ROA.1097.** | |
| **Did the Union have any economic leverage during collective bargaining?** | **No. The Union couldn’t threaten to go on strike because it represented only a small subset of technicians in the North Texas region, and technicians at the other, non-unionized locations could work anywhere in the region.** | |
| **Did the Union ever threaten to go on strike to preserve QPC?** | **No. The Union never threatened to go on strike, and instead focused on dragging out the negotiations for as long as possible.** | |
| **When did DISH’s offer its “final proposal” during collective bargaining?** | **After more than four years of bargaining, and recognizing that the parties were deadlocked on QPC, DISH offered its “final proposal” in November 2014. ROA.1725.** | |
| **What was DISH’s final proposal to the Union during collective bargaining?** | **DISH’s final proposal would replace QPC with an hourly wage schedule.** | |
| **Did the Union consider the hourly wage schedule to be DISH’s final offer?** | **Yes. The Union’s main negotiator returned early from a trip to attend the November 2014 bargaining session because she had been told by one of her associates that they “had gotten a final offer” from DISH. ROA.477-78, 1373.** | |
| **What was the Union’s response to DISH’s final offer of the hourly wage schedule?** | **The Union declined DISH’s offer, and instead proposed that all currently employed technicians continue to be paid under QPC, while new hires would be paid an hourly wage plus the opportunity to earn Pi.** | |
| **What was DISH’s response to the Union’s counterproposal of keeping QPC for employed technicians and having new hires paid an hourly wage plus the opportunity to earn Pi?** | **DISH rejected the counterproposal on December 18, 2014, and made clear that DISH was “not giving [the Union] QPC, in any way, shape, or form.” ROA. 1133. The Union demanded a “meet and confer,” but did not indicate it had changed its position about maintaining QPC.** | |
| **Would the Union’s counterproposal of keeping QPC for employed technicians have eventually eliminated QPC?** | **No. The Union’s proposal would ensure there would be a “boatload of Technicians making QPC” for years into the future. Attrition was unusually low at Farmers Branch and North Richland Hills because of the windfall technicians there were receiving under QPC. ROA.1129.** | |
| **What would have been the effect of the Union’s counterproposal, e.g., keeping QPC for some technicians and using an hourly wage plus Pi for others?** | **It would have created an awkward situation in which two otherwise identical technicians would make dramatically different salaries for doing the same work, based solely on whether they were grandfathered into QPC.** | |
| **Did DISH contact the Union after rejecting its counterproposal and sending its letter of December 31, 2014?** | **No. DISH decided not to contact the Union, and a full year passed. This confirmed DISH’s suspicion that the Union’s goal was to delay for as long as possible (rather than getting a deal).** | |
| **What was the purpose of DISH’s letter to the Union dated January 8, 2016?** | **DISH’s January 8, 2016 letter to the Union reiterated that its November 2014 offer constituted its “last, best and final offer.” ROA.1405. Because the Union had rejected that offer, the letter stated that it did “not appear at this point that further bargaining would be productive.” *Id.* By sending the letter and threatening to declare an impasse, DISH hoped to pressure the Union to “come off of QPC.” ROA.1022.** | |
| **What did the Union do in response to DISH’s January 8, 2016 letter threating to declare an impasse?** | **The Union asked DISH to propose meeting dates, but did not indicate that is position on QPC or anything else had changed.** | |
| **What happened in April 2016?** | **In early April 2016, DISH met with employees in Farmers Branch and North Richland Hills to announce that it was implementing its final offer.** | |
| **What did the employees in Farmers Branch and North Richland Hills do after DISH announced it was implementing its final offer?** | **Dissatisfied with the changes, 17 employees resigned over the next four months. As the NLRB’s lawyer later argued, “[t]he employees all quit because of the cut in wages.” ROA.2034.** | |
| **What did the Union do after DISH implemented its final offer?** | **The Union filed charges of unfair labor practices with the NLRB.** | |
| **What did an Administrative Law Judge conclude regarding DISH’s implementation of its final offer?** | **Following a hearing, an ALJ concluded that DISH committed an unfair labor practice in violation of § 8(a)(5) of the NLRA, 29 U.S.C** **§ 158(a)(5, because there was not truly an impasse at the time DISH unilaterally implemented its final offer.** | |
| **What was the basis of the ALJ’s decision?** | **The ALJ focused on the Union’s December 2014 counterproposal, which he characterized as a “white flag” on QPC. ROA.2176. The ALJ believed that DISH’s unionized locations had extremely high attrition rates. The ALJ therefore concluded that the Union’s counterproposal “offered Dish much of what it sought on QPC, and would have likely set in motion the wholesale elimination of QPC in future bargaining for a successor contract.” ROA.2176 & n.16. The ALJ found that DISH “summarily rejected this concession, without bargaining.” *Id.*** | |
| **What did the ALJ conclude regarding the 17 employees who quit when QPC was eliminated?** | **The ALJ concluded that DISH constructively discharged the 17 employees who quit when QPC was eliminated, in violation of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3).** | |
| **What were the two categories of constructive discharge discussed by the ALJ?** | **The ALJ distinguished between two categories of constructive discharge:**  **Category 1, where an “employer harasses [an employee] to the point that his job conditions become intolerable and, as a result, the employee quits”; and**  **Category 2, where “an employer confronts an employee with the Hobson’s choice of either continuing to work or foregoing the rights guaranteed to him under Section 7 of the Act.” ROA.2178.** | |
| **Why did the ALJ conclude that the 17 employees were constructively discharged?** | **The ALJ concluded that this was a Category 2 constructive discharge scenario because DISH’s violation of [the technicians’ Section 7 rights (implementing unilateral changes in the absence of an impasse) resulted in their wages being cut, which caused the employees to leave. ROA.2178.** | |
| **What other unfair labor practices did the ALJ find DISH committed?** | **The ALJ found that DISH committed additional unfair labor practices when:**  **1. A manager accidentally texted an employee “the union is gone” after DISH implemented the new wage scale;**  **2. When DISH did not bargain before firing an employee for violating company rules; and**  **3. When a DISH manager told employees not to discuss the union with trainees.**  **\*DISH did not appeal these determinations to the Board, and they are not at issue here.** | |
| **Were any exceptions to the ALJ’s decision filed?** | **Yes. DISH and the General Counsel both filed exceptions to the ALJ’s decision.** | |
| **What did the Board decide regarding the ALJ’s decision?** | **The Board affirmed. Applying the framework set forth in *Taft Broadcasting Co.* (N.L.R.B. 1967), the Board acknowledged that “the parties may have been near a valid impasse” by December 2014. But the Board concluded there was no impasse because of the Union’s December 2014 proposal “to eliminate QPC for new hires.” ROA.2169. The Board did not adopt the ALJ’s various other reasons for finding no impasse.** | |
| **Did the Board address DISH’s position that it would not accept QPC in any form?** | **No.** | |
| **What did the Board conclude regarding DISH’s conduct in terms of the NLRA?** | **Because it concluded that the Union’s offer canceled any impasse, the Board determined that DISH acted in bad faith by failing to conduct further meetings with the Union, and violated the NLRA by unilaterally implementing its last, best, and final offer.** | |
| **What did the Board conclude regarding constructive discharge?** | **The Board adopted the ALJ’s finding that DISH constructively discharged the 17 employees who resigned. ROA.2170 n.8.** | |
| **Was there a dissent from the Board’s decision?** | **Yes. Board Member Emanuel dissented because there was “a valid impasse.” ROA.2170. He explained that when the Union rejected DISH’s last, best, and final offer in December 2014, “it appeared that further bargaining would not be productive.” *Id.* The Union’s conduct showed that it “was content with the status quo.” ROA.2171. Thus, after DISH repeated its final offer and the Union did not respond, “the parties were at impasse by at least April 23, 2016.” *Id.* Because DISH lawfully implemented the terms of its final offer, Board Member Emanuel also found there was no support for the Board’s constructive-discharge theory.** | |
| **Did the Board also file suit against DISH?** | **Yes. The Board (acting through a Regional Director) separately filed suit in district court under § 10(j) of the NLRA, 29 U.S.C. § 160(j), seeking interim injunctive relief pending resolution of the agency process that is the subject of this appeal. *Kinard v. DISH Network Co.* (N.D. Tex. 2017).** | |
| **What specifically did the district court decide in *Kinard v. DISH Network Co.* (N.D. Tex. 2017)?** | 1. **The district court declined to reinstate the 17 employees because the Regional Director had failed to show any “anti-union sentiment [that] arose out of the alleged constructive discharge of these employees.” *Kinard* at 780-81, 784.** 2. **The court also declined to enter an injunction requiring DISH to bargain in good faith because “[t]here is no evidence that DISH has refused to bargain with the Union after declaring impasse and imposing the new wage reduction” or “evidence of any other ongoing unfair labor practices that threaten to weaken the Union or harm unit employees.” *Id.* at 780-81, 784-85.** | |
| **What did the district court decide regarding restoring wages to the 17 employees?** | **The district court required DISH to restore wages, on an interim basis, to the levels that existed before it implemented its final offer. *Kinard* at 785. It concluded that the Board had “reasonable cause to believe that the parties were not at an impasse,” and that restoring wages was necessary “to prevent[] further injury and restor[e] the status quo … [and] preserve the remedial powers of the NLRB.” *Id.* at 780, 783.** | |
| **What did “reasonable cause” mean according to the district court?** | **“Reasonable cause” means that “that the Board’s theories of law and fact are not insubstantial or frivolous.” *Kinard* at 778.** | |
| **What did this Court decide in *Kinard v. DISH Network Co.* (5th Cir. 2018)?** | **This Court affirmed the district court on appeal. It found that the district court’s decision to restore the wage scale was not an abuse of discretion, and rejected the Regional Director’s cross-appeal seeking to order DISH to bargain in good faith. *Kinard v. DISH Network Corp*. at 616-17 (5th Cir. 2018).** | |

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