**Facts**

|  |  |  |  |
| --- | --- | --- | --- |
| **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.** | |
| **When did the Board issue its order in this case?** | | **The Board issued its order on June 28, 2018. This case is before the Court on the petition of DISH Network Corporation to review, and the cross-application of the National Labor Relations Board to enforce, the Board’s order. NLRB 1.** | |
| **Is venue proper in this Court?** | | **Yes. Venue is proper under Section 10(e) and (f) because the unfair labor practices occurred in Texas. NLRB 2.** | |
| **What is the status of the Communications Workers of America, AFL- CIO (the Union) in this appeal?** | | **Communications Workers of America, AFL- CIO (the Union) has intervened on behalf of the Board. NLRB 2.** | |
|  | |  | |
| **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.** | |
| **When was the Union certified?** | **The Board certified the Union in 2011 as the collective-bargaining representative for employees at Farmers Branch and North Richland Hills. NLRB 4.** | |
| **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.** | |
| **What else had the parties reached agreements on in 2013?** | **By March 2013, the parties had reached tentative agreements on job classifications, union recognition, travel, leave, a retirement plan, and benefits. NLRB 4.** | |
| **As of June 2013, what issues remained unresolved in terms of collective bargaining?** | **As of June 2013, the only issues that remained unresolved were employee compensation, dues deductions, the grievance procedure, seniority, and subcontracting. NLRB 4.** | |
| **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.** | |
| **Did DISH offer Pi or any other incentive pay for Union employees in its contract proposals?** | **No. DISH did not offer Pi or any other incentive pay for unit employees in its contract proposals. NLRB 5.** | |
| **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.** | |
| **How did DISH’s final proposal compare to compensation at other DISH locations?** | **The wage rates in the proposal were higher than DISH’s previous offers, but the overall compensation package would have resulted in Union employees receiving less pay than nonunion employees at other area DISH locations. NLRB 5.** | |
| **What was DISH’s response to the Union’s outstanding proposals in November 2014?** | **DISH rejected the Union’s outstanding proposals on dues deductions, the grievance procedure, successorship, subcontracting, severance, and seniority. DISH agreed to the Union’s proposals regarding smart-home sales and clothing stipends. NLRB 5.** | |
| **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.** | |
| **After making its counterproposal in December 2014, did the Union ask to meet with DISH again?** | **Yes. On December 12, 2014, the Union asked to meet in January, reaffirming its readiness to bargain. DISH did not respond. NLRB 7.** | |
| **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.** | |
| **Did DISH propose any dates for additional bargaining sessions after rejecting the Union’s counterproposal on December 18, 2014?** | **No, DISH did not propose any other dates. DISH instead stated that the parties could discuss whether to meet again only after the Union had submitted DISH’s final proposal to the unit employees. NLRB 7.** | |
| **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 were the attrition rates at Farmers Branch and North Richland Hills?** | **Attrition rates were high at the two unionized locations at that time—40.2% in 2013 and 31.4% in 2014 at Farmers Branch, and 51.5% in 2013 and 30.5% in 2014 at North Richland Hills. NLRB 6.** | |
| **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.** | |
| **How did the Union respond to DISH’s rejection of its counterproposal in December 2014?** | **On December 30, the Union insisted on meeting and bargaining over its counterproposal, and listed several possible meeting dates in January. The Union stated that DISH’s written response to its counterproposal did “not take the place of meeting and bargaining.” ROA.1400. The Union also objected to DISH’s insistence that it take the final proposal to its members because it is the Union’s decision whether to hold a ratification vote, not DISH’s. NLRB 7-8.** | |
| **Did DISH inform the Union that Brian Balonick, who was replacing George Basara as DISH’s lead negotiator, would contact the Union sometime after January 2015?** | **Yes. On December 31, 2014, DISH sent a letter acknowledging that the Union was unwilling to take DISH’s final proposal to its membership at that time. The letter also informed the Union that DISH’s lead negotiator, George Basara, would not represent DISH in the future and that his partner, Brian Balonick, would be taking over for him. It further explained that Balonick had an upcoming trial and would contact the Union “sometime after the new year.” ROA.2173, 1401. NLRB 8.** | |
| **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 specifically did the Union state in its January 13, 2016 letter to DISH?** | **On January 13, 2016, the Union replied that:**   * **Balonick’s January 8 letter had misrepresented the parties’ 2014 negotiations;** * **the parties had yet to bargain over its December 9 counterproposal and the Union still wished to do so;** * **the Union had offered dates to meet over a year ago, had asked DISH to suggest bargaining dates, and had been informed that Balonick, as DISH’s new bargaining representative, would initiate contact in 2015.**   **ROA.2173-74, 1407-09. NLRB 9.** | |
| **What did DISH state in its February 2, 2016 letter to the Union?** | **On February 2, 2016, DISH reasserted that the parties were at a standstill and had been for over a year. Then, for the first time, DISH notified the Union of its intent to implement its final proposal, unless the Union explained why there was no standstill. The Union responded immediately, objecting to DISH’s characterization and again requesting bargaining. NLRB 9.** | |
| **Did DISH fire a Union employee in February 2016 without notifying the Union?** | **Yes, DISH fired Dakota Novak without notifying the Union or affording it an opportunity to bargain. NLRB 9.** | |
| **Had DISH agreed to notify the Union before suspending or firing any Union employees?** | **Yes. In 2014, the Union requested that DISH notify it, and provide it with an opportunity to bargain, before suspending or discharging any unit employees. DISH agreed and, in November 2014, the parties had bargained over the discipline of several unit employees. NLRB 9.** | |
| **What did DISH say in its April 4, 2016 letter to the Union?** | **On April 4, 2016, DISH sent the Union a letter asserting that “[a]t this point, [DISH] believes that further bargaining would be futile,” and warning that it intended to implement its final offer no later than April 23. ROA.1429. The letter stated that DISH would thereafter eliminate QPC, implement the wage rates from its final proposal, and provide the same fringe benefits that nonunion employees received. NLRB 9-10.** | |
| **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.** | |
| **When did DISH begin to hold meetings with Union employees to notify them that it was implementing its final proposal?** | **April 5, 2016. NLRB 9-10.** | |
| **Please describe what happened regarding a text message sent from a DISH manager to a Union employee on April 6, 2016.** | **On April 6, 2016, a DISH manager accidentally sent a text message intended for his boss to a unit employee, who forwarded it to several other employees. In the message, the manager stated that “[t]he [U]nion [was] gone,” DISH would encourage transfers to other offices, the two unionized offices “[were] gradually closing,” and DISH “would rather have the techs quit en masse.” ROA.2174, 106, 163, 275-76, 1472, 1635-45. On April 12, DISH disavowed the text message and told employees that they were still represented by the Union. NLRB 10.** | |
| **When did DISH implement its final proposal?** | **DISH implemented its final proposal on April 23, 2016, except for the health-insurance changes, which it announced but did not implement until July 2016. NLRB 10.** | |
| **What was the effect of DISH implementing its final proposal on Union employees’ pay and health insurance costs?** | **In accordance with its final proposal, DISH eliminated QPC and began paying Union employees flat wages without any incentive payments. That change cut unit employees’ earnings to levels well below what DISH paid employees at other locations, which was 30% lower than what unit employees had earned under QPC. The later health-insurance change also nearly doubled employees’ health-insurance deductibles. NLRB 10.** | |
| **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.** | |
| **Did one of DISH’s managers tell Union employees that they could not say anything about the Union to the new guys who replaced the employees who had quit?** | **Yes. One of DISH’s managers told Union employees that they could not “say anything about the Union to the new guys” who replaced the employees who had quit. ROA.2175, 2175 n.14, 663, 693-95. The manager added that new employees were “happy getting paid $13.00” per hour, and explicitly threatened to terminate any employees who violated his order not to discuss the Union with new employees. ROA.2175, 2175 n.14, 663, 693- 95. NLRB 11.** | |
| **What did the Union do after DISH implemented its final offer?** | **The Union filed charges of unfair labor practices with the NLRB.** | |
| **Did the Board’s General Counsel issue a complaint against DISH?** | **Yes. After the Union filed a charge, the Board’s General Counsel issued a complaint alleging that DISH violated Section 8(a)(5), (3), & (1) of the Act, 29 U.S.C. §158(a)(5), (3), & (1), by bargaining in bad faith with the Union, implementing a final offer in the absence of an impasse, unilaterally changing employees’ wages, health insurance, and leave, threatening employees, and constructively discharging employees. ROA.2171, 1292-1300. NLRB 11.** | |
| **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.** | |
| **What specific violations by DISH did the Board find?** | 1. **The parties were not at impasse, so DISH’s unilateral implementation of new contract terms violated Section 8(a)(5) & (1).** 2. **DISH violated Section 8(a)(5) & (1) by conditioning bargaining on the Union holding a ratification vote, and by refusing to meet and bargain with the Union after January 13, 2016.** 3. **DISH violated Section 8(a)(3) & (1) by constructively discharging the 17 employees.** 4. **The Board declined to decide whether DISH’s unilateral implementation of its final offer was unlawfully motivated or intended to cause employees to quit.**   **NLRB 13.** | |
| **What did the Board order DISH to do to remedy its violations?** | **The Board ordered DISH to cease and desist from:**   * **telling employees that the Union is gone** * **threatening to close its offices or discharge employees due to their union or protected activity** * **threatening to discipline employees who talk about the Union to new hires** * **creating the impression that employees’ union or protected activity is being monitored** * **constructively discharging employees for their union or protected activity.**   **NLRB 13.** | |
| **What else did the Board order DISH to do to remedy its violations?** | **The Board also ordered DISH to cease and desist from:**   * **refusing to bargain with the Union** * **conditioning bargaining on the Union holding a ratification vote** * **implementing its final offer without reaching agreement or impasse** * **unilaterally changing employees’ terms and conditions of employment** * **unilaterally changing its discipline policy** * **interfering with, restraining, or coercing employees in the exercise of their rights under the Act.**   **NLRB 13.** | |
| **What did the Board order DISH to do regarding the 17 constructively discharged employees?** | **The Board ordered DISH to:**   * **offer backpay and reinstatement to Novak and the 17 constructively discharged employees** * **remove any references in its files to the employees’ discharges** * **bargain with the Union** * **rescind the April 2016 unilateral changes if the Union requests it** * **make employees whole for any losses suffered as a result of those changes** * **post a remedial notice at its two unionized facilities.**   **NLRB 13.** | |
| **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 did the district court decide in *Kinard v. DISH Network Co.* (N.D. Tex. 2017)?** | **On January 14, 2017, the District Court for the Northern District of Texas granted the injunction in part, finding reasonable cause to believe that the parties were *not* at impasse and that the unilateral wage cut likely caused *irreparable harm* to the Union. Accordingly, the District Court ordered DISH to restore QPC for unit employees pending the Board’s decision. NLRB 12.** | |
| **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).** | |
|  |  | |

**Arguments**

|  |  |
| --- | --- |
| **Standard of Review** | **Color:** |
| **What standard of review do we apply?** | **This Court reviews the Board’s factual findings for substantial evidence. 29 U.S.C. § 160. “Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion.” *Carey Salt Co.* (5th Cir. 2013). Although the standard is deferential, this “deference … has limits.” *Id.*** |
| **When does a factual finding fail substantial-evidence review?** | **A factual finding cannot survive substantial-evidence review when it is “based on a flawed reading of the record,” “ignores a portion of the record,” or fails to “take into account whatever in the record fairly detracts from its weight.” *Carey Salt Co.* (5th Cir. 2013).** |
| **Is the Board is entitled to summary enforcement of the portions of its order relating to uncontested findings?** | **Yes. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008) (finding that “when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement”). NLRB 17.** |
| **Does this Court have jurisdiction to consider any uncontested findings of the Board?** | **No. The Court does not have jurisdiction to consider any challenge to the Board’s findings, except as to the violation for conditioning bargaining on a ratification vote, because DISH did not challenge them before the Board. ROA.2169 n.1.; *see* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Mooney Aircraft, Inc.*, 310 F.2d 565, 565-66 (5th Cir. 1962). NLRB 17.** |
| **Argument I:**  **Last, Best, & Final Offer** | **Color:** |
| **What is an employer required to do under the National Labor Relations Act?** | **The NLRA requires an employer “to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5), (d).** |
| **What is an unfair labor practice under Section 8(a)(5) of the NLRA?** | **Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). NLRB 18.** |
| **What does the duty to bargain include?** | **The duty to bargain includes an obligation to “meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment,” but “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). NLRB 18.** |
| **What does the obligation to bargain in good faith require of the parties?** | **The obligation to bargain in good faith imposed by Section 8(d) and (a)(5) requires both parties “to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement . . . .” *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). NLRB 18.** |
| **What did the Supreme Court say about collective bargaining in *NLRB v. Insurance Agents’ International Union* (U.S. 1960).** | **In *NLRB v. Insurance Agents’ International Union*, the Supreme Court explained that “[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of ‘take it or leave it’; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” 361 U.S. 477, 485 (1960). NLRB 19.** |
| **When does an employer violate its duty to collectively bargain?** | **An employer violates its duty to collectively bargain if it “unilaterally institutes changes in existing terms and conditions of employment” while “negotiations are sought or are in progress.” *Taft* (NLRB 1967); *TruServ Corp.* (D.C. Cir. 2001).** |
| **What did the Supreme Court say in *Litton Financial Printing Division v. NLRB* (U.S. 1991) about when an employer violates the bargaining obligation?** | **In *Litton Financial Printing Division v. NLRB*, the Supreme Court said that an employer violates the bargaining obligation “if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.” 501 U.S. 190, 198 (1991); *accord NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1013 (5th Cir. 1990) (recognizing that “[a]s a general rule, where no impasse in negotiations has occurred, a company’s unilateral implementation of terms and conditions of employment is an unfair labor practice”). NRLB 19.** |
| **What did the Supreme Court say in *NLRB v. Katz* (U.S. 1962)regarding an employer’s unilateral change of employment terms absent an impasse?** | **Such a unilateral change is “a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal” to bargain. *NLRB v. Katz*, 369 U.S. 736, 742 n.9, 743 (1962). NLRB 19.** |
| **When are parties considered to have bargained to an impasse?** | **Parties have “bargain[ed] to an impasse” when “good-faith negotiations have exhausted the prospects of concluding an agreement.” *Taft* (NLRB 1967).** |
| **What is considered an impasse?** | **An impasse is a complete deadlock in negotiations. NLRB 21.** |
| **Who bears the burden of proving an impasse?** | **Where, as here, an employer asserts as an affirmative defense that a bona fide impasse in negotiations rendered its unilateral changes permissible, it bears the burden of proving the asserted impasse before the Board. *See CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996), *enforced mem.*, 110 F.3d 794 (5th Cir. 1997). NLRB 20.** |
| **What has this Court said about the Board’s ability to decide whether negotiations have reached an impasse?** | **This Court has recognized that “[a] decision about whether negotiations have reached an impasse is particularly suited to the Board’s expertise as fact finder.” *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1011 (5th Cir. 1990). NLRB 20.** |
| **What does the Board consider in determining whether parties are at a valid impasse?** | **The Board considers all of the surrounding circumstances. *See Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff’d sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *accord Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1398 (5th Cir. 1983). NLRB 21.** |
| **What has the Board identified as being particularly relevant to determining whether parties are at a valid impasse?** | **The Board has identified as particularly relevant:**   * **the parties’ bargaining history;** * **their good faith in negotiations;** * **the length of negotiations;** * **the importance of the issue or issues as to which there was disagreement; and** * **the contemporaneous understanding of the parties as to the status of negotiations.**   ***Taft Broadcasting*, 163 NLRB at 478. NLRB 21.** |
| **What factor does the Board consider significant in determining whether parties are at a valid impasse?** | **The Board’s determination of the parties’ good faith, which this Court reviews “with heightened deference in light of the complex subjective inquiry required,” can be dispositive on its own. *Carey Salt Co. v. NLRB*, 736 F.3d 405, 411-12 (5th Cir. 2013). Thus, bad faith “preclude[s] an impasse finding.” *Id.* at 412. NLRB 21.** |
| **Does a long bargaining history weigh heavily toward finding impasse?** | **No. The Board has cautioned against “jumping to any conclusions that difficulties in bargaining signal the existence of a true impasse.” *Stein Ind.*, 365 NLRB No. 31, slip op. at 12 (2016). NLRB 21.** |
| **What must an employer show to establish an impasse defense?** | **To establish an impasse defense, an employer must show that, under the circumstances, the parties were, “despite the best of faith, . . . simply deadlocked,” making “further discussion . . . futile as of that time [when the employer implemented the unilateral changes].” *Powell Elec. Mfg. Co.*, 906 F.2d at 1011-12. Moreover, “for such a deadlock to occur, *neither party* must be willing to compromise.” *Id.* NLRB 22.** |
| **Does a wide gap between the parties mean there is an impasse?** | **Not necessarily. Even when “a wide gap between the parties remains,” there is no impasse if “there is reason to believe that further bargaining might produce additional movement.” *Hayward Dodge*, 292 NLRB 434, 468 (1989). NLRB 22.** |
| **If the parties have bargained to an impasse, can the employer make unilateral changes?** | **Yes. When the** **parties have “bargain[ed] to an impasse . . . an employer does not violate the Act by making unilateral changes that are reasonably comprehended within [its] pre-impasse proposals.” *Taft* (NLRB 1967).** |
| **How common is it for an impasse to arise?** | **Impasses arise with some frequency. *E.I. Du Pont* (NLRB 1984) (“[T]here need be no undue reluctance to find that an impasse existed. Its occurrence cannot be said to be an unexpected, unforeseen, or unusual event in the process** **of negotiations ….”); *Charles D. Bonanno Linen Serv.* (U.S. 1982) (impasse is “a recurring feature in the bargaining process”).** |
| **Does the NLRA require either party to agree to a proposal or to make a concession?** | **No. While there is a duty to bargain, that “obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(d). Section 158(d) makes clear “that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.” *Am. Nat’l Ins. Co.* (U.S. 1952).** |
| **Does Section 8(d) of the NLRA require parties to agree or concede on any particular substantive issue?** | **No. Although Section 8(d) does not require parties to agree or concede on any particular substantive issue, the statutory bargaining obligation is not satisfied when a party comes to the table “with a ‘predetermined resolve not to budge from an initial position.’” *NLRB v. Gen. Elec. Co.* (2d Cir. 1969). NLRB 19.** |
| **Is a party’s insistence on a bargaining position a refusal to bargain in good faith?** | **No, “[a]damant insistence on a bargaining position ... is not in itself a refusal to bargain in good faith.” *Chevron Oil Co.* (5th Cir. 1971). So long as “the insistence is genuinely and sincerely held,” and “it is not mere window** **dressing, it may be maintained forever though it produce a stalemate.” *Herman Sausage Co.* (5th Cir. 1960).** |
| **Is a party permitted to intentionally cause an impasse?** | **Yes. A party may intentionally bring about impasse “as a device to further, rather than destroy, the bargaining process.” *Charles D. Bonanno Linen Serv.* (U.S. 1982).** |
| **When do impasses tend to arise?** | **Impasses often arise when there is a “single critical issue” on which the parties cannot agree. *Erie Brush & Mfg. Corp.* (D.C. Cir. 2012); *E.I. Du Pont* (NLRB 1984) (issue of “overriding importance”).** |
| **What happened in *Erie Brush & Mfg. Corp.* (D.C. Cir. 2012)?** | **In *Erie Brush*, the D.C. Circuit overturned the Board’s no-impasse determination for lack of substantial evidence where the parties could not agree on a key issue: “The Union insisted on including union security and arbitration clauses in the contract” whereas the employer “was equally committed to an open shop and opposed to arbitration.” *Erie Brush & Mfg. Corp.* (D.C. Cir. 2012).** |
| **What happened in *Laurel Bay Health & Rehabilitation Center v. NLRB* (D.C. 2012)?** | **In *Laurel Bay Health & Rehabilitation Center*, the D.C. Circuit reversed a no-impasse finding for lack of substantial evidence where the parties couldn’t agree on the amount the employer should contribute to the union’s benefit fund. Notwithstanding the theoretical possibility of movement within that range, the D.C. Circuit held that “the parties were at loggerheads.” *Laurel Bay Health & Rehab. Ctr.* (D.C. 2012).** |
| **Who controls the negotiations during collective bargaining?** | **“[T]he parties remain in control of their negotiations, and each party, not the Board, determines at what point it ceases to be willing to compromise.” *TruServ* (D.C. 2001).** |
| **How does the Board assess whether there is an impasse on an issue of overriding importance?** | **The Board uses a three-part test to assess whether there is an impasse on an issue of overriding importance. A party must demonstrate:**  **1. The actual existence of a good-faith bargaining impasse;**  **2. That the issue as to which the parties are at impasse is a critical issue;**  **3. That the impasse on this critical issue led to a breakdown in the overall negotiations.**  ***CalMat* (NLRB 2000).** |
| **Was the three-part test to assess an impasse met here?** | **Yes. The Board’s order recognized that the second and third elements were met.**  **Second element: QPC plainly was the “critical issue” in the negotiations. ROA.2170.**  **Third element:** **It is clear that, if there was an impasse on the QPC issue, it led to a breakdown in the overallnegotiations.**  **\*The only issue is whether the first element (existence of an impasse) was met.** |
| **Was the first element of the three-part impasse test met here—were the parties at loggerheads over QPC?** | **Yes. After the Union reversed its position in 2013, it consistently fought to preserve QPC. And DISH made clear that it would not agree to any proposal that retained QPC in any form. Finally, in November 2014, DISH presented its “last, best, and final offer,” ROA.1375, which, like every other offer that DISH made, “included wholly eliminating QPC.” ROA.2168.** |
| **Does anything in the record contradict DISH’s classification of its November 2014 proposal as its “last, best, and final offer”?** | **No. DISH had made clear that it could not accept QPC, and that was its bottom line. In offering its final proposal, DISH unequivocally stated: “Company rejects continuation of QPC.” ROA.1725.** |
| **On what basis did the Board conclude that an impasse was averted?** | **The Board concluded that an impasse was averted by the Union’s December 2014 counterproposal. In it, the Union proposed to retain QPC, but limit it to existing technicians. The Board and ALJ considered this offer a “white flag”** t**hat “offered a possible resolution on bargaining’s thorniest issue.” ROA.2169.** |
| **Why did the Board and ALJ consider the Union’s December 2014 proposal a “white flag?** | **The Board’s “white flag” characterization was taken verbatim from the ALJ, who based his reasoning on a chart of attrition rates at DISH’s North Texas locations from 2013 to 2015.** |
| **How did the ALJ view the Union’s December 2014 proposal as a “substantial compromise”?** | **The ALJ thought that, under the Union’s proposal, DISH would get most of what it wanted on wages in the short term, and the stage would be set for resolving QPC later. The ALJ thought abolishing QPC would become easier “when only a narrow minority paid under QPC remained.” ROA.2172-73, 2176 & n.16.** |
| **What did the ALJ conclude based on the chart of attrition rates at DISH’s North Texas locations from 2013 to 2015?** | **Based on the chart, the ALJ concluded that DISH’s technicians had a very high attrition rate, which meant that new hires receiving non-QPC rates would soon** **become the majority in the Farmers Branch and North Richland Hills units.** |
| **How did the ALJ read the chart incorrectly?** | **The chart shows the *opposite* of what the ALJ found. Attrition was high at *other* locations, but low—and getting even lower—in Farmers Branch and North Richland Hills.** |
| **What were the attrition rates at Farmers Branch and North Richland Hills in 2015?** | **In 2015, the attrition rates at Farmers Branch and North Richland Hills were the lowest of any location in the region. They were in the teens, while most of the other locations were over 50%.** |
| **On what basis did the ALJ conclude that DISH’s technicians had a “very high attrition rate”? ROA.2172.** | **The ALJ said the chart of attrition rates showed “annual attrition ranging from 116% to 13%.” ROA.2172. But this conclusion conflated the unionized locations with the non-unionized ones. The low end (13%) came from North Richland Hills, but the high end (116%) came from Arlington/Fort Worth, *a non-unionized location*.** |
| **What was the trend line of attrition at Farmers Branch and North Richland Hills from 2013 to 2015?** | **Attrition at Farmers Branch and North Richland Hills was steadily declining. It decreased more than 10% in both 2013 and 2014. This happened because QPC was tethered to outdated performance metrics. When DISH’s technology improved, technicians could complete the same tasks in far less time, and earnings in Farmers Branch and North Richland Hills ballooned. As compensation went up, attrition went down.** |
| **Did the ALJ err in finding that new hires receiving non-QPC rates would soon become the majority in the Farmers Branch and North Richland Hills units?** | **Yes.**  **With attrition rates in the teens and falling, it’s simply not true that “new hires receiving non-QPC rates would soon become the majority in” the Farmers Branch and North Richland Hills locations. Rather, the low and declining attrition rates meant that legacy technicians receiving QPC wages would remain the substantial majority at both locations for the foreseeable future.** |
| **Based on what the parties likely knew in December 2014, weren’t attrition rates in the North Texas locations high?** | **At the time the Union made its proposal, the parties likely knew the attrition rates of 40.2% and 51.5% in 2013 and possibly knew the rates of 30.5% and 31.4% in 2014. If those rates remained constant for employees receiving QPC, those employees would become the minority of unit employees in just 2 years. NLRB 24.** |
| **The Board argues that the Union wouldn’t have had the 2015 attrition rates when it offered its counterproposal in December 2014. Did the ALJ rely on the 2015 attrition rates?** | **Yes, the ALJ relied on the 2015 attrition rates. ROA.2172. And the Board, in adopting the ALJ’s characterization of the Union’s December 2014 counterproposal as a “white flag,” said nothing to the contrary.** |
| **Does DISH cite any authority for the proposition that a 13% attrition rate is low?** | **The issue isn’t whether rates were “high” or “low” in the abstract. The ALJ’s reasoning was that the attrition rate, combined with limiting QPC to existing employees, would have “meant that in a short time, the majority of the [bargaining] units would have likely turned over and no longer earn QPC wages” (and would someday have led the Union to abandon QPC). ROA.2176 n.16. But that’s simply not true. At a constant 13% attrition rate, it would have taken *five years* for the proportion of employees receiving wages under QPC to drop even to 50%. Far from a “short time,” that’s longer than QPC had been existence when the Union made the counterproposal. Reply 9.** |
| **The Union made its counterproposal in late 2014 — what were the attrition rates available to the parties at that time?** | **The attrition rates available to the parties when the Union made its counterproposal in late 2014 were the rates for 2013 and, possibly, 2014. DISH’s records show attrition rates of 40.2% (2013) and 31.4% (2014) at Farmers Branch, and 51.5% (2013) and 30.5% (2014) at North Richland Hills. NLRB 30.** |
| **Does the fact that the 2015 attrition rates were lower than the two prior years for the North Texas locations mean that they were inevitably trending downward?** | **No. The judge was not required to infer that attrition rates would continue to decrease, much less that the parties could have known in December 2014 that they would. There is no record evidence explaining why attrition was lower in 2015 than in 2014; the ratio of unionized employee earnings to nonunion employee earnings was similar in 2014 and 2015. ROA.1932. NLRB 30.** |
| **Is there any record evidence explaining why attrition was decreasing at the unionized locations?** | **Yes. DISH offered ample evidence why attrition was decreasing at the unionized locations. *See* OB10-17, OB38-41. Salaries for unionized technicians were ballooning—in 2013, the average unionized technician earned about 14% more than the average nonunionized technician; by 2015, the disparity was 43%. ROA.1778. “QPC was lucrative for Technicians, so they were not leaving.” ROA.1062. Reply 10.** |
| **Wasn’t it reasonable for the Board to infer that, at the attrition rates prevailing when the Union made its offer, the majority of unit employees would not have QPC after a relatively short time?** | **At an attrition rate of 30.5%, which was the *lowest* annual rate at either location in years when the Union made its offer, only 33.6% of unit employees would still be under QPC at the expiration of the 3-year contract. (This calculation is based on the assumption that attrition rates for employees hired under QPC remained at 30.5% throughout the contract, which would have been a reasonable assumption given that QPC wages remained steady thereafter.) NLRB 30.** |
| **Is the General Counsel correct that, using the *2014* attrition rate, “only 33.6% of unit employees would still be under QPC at the expiration of the 3-year contract.” NLRB 30.** | **That’s not what the ALJ held, and it’s no answer. Fully one-third of employees would have remained under the plan that, DISH had made clear, was a non-starter. *See also* OB16-17 (testimony that having two different plans creates workplace strife). Reply 9 n.2.** |
| **Why do you argue that the Board’s factual finding regarding new hires soon becoming the majority is not substantial evidence?** | **A factual finding does not constitute substantial evidence when it is “based on a flawed reading of the record.” *Carey Salt Co.* (5th Cir. 2013).** |
| **What did the Supreme Court say in *Universal Camera Corp. v. NLRB* (U.S. 1951) about factual findings by the Board?** | **The Supreme Court explained that the Board’s findings may be “entitled to respect,” but “they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within** **its special competence or both.” *Universal Camera Corp. v. NLRB* (U.S. 1951).** |
| **What did the Supreme Court say in *SEC v. Chenery Corp.* (U.S. 1947) regarding administrative law?** | **Under the seminal decision in *SEC v. Chenery Corp.* (U.S. 1947), “an agency’s discretionary order [can] be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines, Inc. v. United States* (U.S. 1962).** |
| **What does this Court review on appeal?** | **This Court reviews the “final order of the Board,” 29 U.S.C. § 160(f), and can affirm only on the theory adopted by the Board. *SEC v. Chenery Corp.* (U.S. 1947); *cf. In-N-Out Burger v. NLRB* (5th Cir. 2018).** |
| **Why does this Court review only the final order of the Board?** | **This “simple but fundamental rule of administrative law,” *Chenery*, 332 U.S. at 196, ensures that agency discretion doesn’t become a blank check. *Burlington Truck Lines* (U.S. 1962) (“Expert discretion is the lifeblood of the administrative process, but ‘unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.’”).** |
| **In exchange for deference, what do agencies need to do in their decision making?** | **In exchange for deference, agencies have to explain why they did what they did. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto.* (U.S. 1983). And courts evaluate agency action based on those stated** **reasons. *Burlington Truck Lines* (U.S. 1962) (“The courts may not accept counsel’s post hoc rationalizations for agency action .…”).** |
| **What evidence did the ALJ cite in finding that it would be easier to abolish QPC in later bargaining “when only a narrow minority paid under QPC remained”? ROA.2172-73.** | **The ALJ cited no evidence whatsoever to support this assertion about potential future bargaining. This unsupported speculation cannot support the ALJ’s decision. *Chrysler Credit Corp.* (5th Cir. 1982).** |
| **Has any party offered any evidence to support the ALJ’s suggestion that QPC might be eliminated in subsequent bargaining?** | **No. Neither the ALJ, the Board, nor the General Counsel has offered anything to support that suggestion. It was pure speculation.** |
| **Is there any evidence in the record that having only some employees earning QPC would have created discord?** | **Yes. There was testimony about problems caused by having multiple pay systems in a workplace. ROA.1130; *see also* ROA.899-900 (testimony from Monty Beckham attributing much of the attrition at other locations to new hires who “didn’t make it,” and attributing the low attrition rates at the North Richland Hills and Farmers Branch locations to the fact that technicians there “were making really good money and they were staying because of that”).** |
| **Did DISH ever bring its concern about possible discord under a two-tier wage system to the Union’s attention at the bargaining table?** | **NLRB 31.** |
| **Why do you argue that the Board’s decision must be vacated?** | **At a bare minimum, the decision must be vacated because the Board failed to consider or address the ALJ’s basic mistake concerning the attrition statistics. DISH pointed out the error, but he Board did not respond to this argument. ROA.2004 (DISH’s exceptions to the ALJ’s decision).** |
| **What is required of an agency in making decisions?** | **An agency is required to engage in an “analysis of all relevant issues.” *Long Island Head Start Child Dev. Servs. v. NLRB* (2d Cir. 2006). This requirement springs from the basic principle of administrative law that agencies must engage in reasoned decision making, which requires that “the process by which [an agency] reaches [a] result must be logical and rational.” *Allentown Mack Sales & Serv., Inc. v. NLRB* (U.S. 1998).** |
| **What did the Supreme Court say about agency decision making in *Motor Vehicle Mfrs. Ass’n v. State Farm* (U.S. 1983)?** | **The Supreme Court explained that an agency “must examine the relevant data and articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n v. State Farm* (U.S. 1983).** |
| **Why do you argue that the Board failed to engage in reasoned decision making?** | **Here, the ALJ’s determination that “new hires receiving non-QPC rates would soon become the majority” in DISH’s unionized locations relied on a basic misreading of the attrition statistics. ROA.2172. By parroting the ALJ’s characterization of the Union’s counterproposal as a “white flag,” but not addressing the basic flaw that DISH raised with this determination, the Board failed in its fundamental obligation to engage in reasoned decision making. *See Carey Salt Co.* (5th Cir. 2013) (a decision by the Board that “‘ignores a portion of the record’ cannot survive review under the ‘substantial evidence’ standard”).** |
| **Did the Union’s December 2014 proposal mean that an impasse was foreclosed?** | **No. Impasse is not foreclosed by the mere fact that the Union made an offer. Movement by one party doesn’t foreclose impasse when the parties’ positions remain irreconcilable. *See E.I. Du Pont* (NLRB 1984).** |
| **Didn’t the substantive change in the Union’s bargaining position support the Board’s finding that no impasse existed in December 2014?** | **NLRB 23.** |
| **Before changing its position in December 2014, hadn’t the Union been insisting for over a year on maintaining QPC for all unit employees for the full contract term?** | **Yes. The Union therefore “offered a substantial giveback, when it proposed a 2-tiered wage system, where incumbents kept QPC, and new hires lost it.” ROA.2176. That offer “was an appreciable change in its position on the most important subject and would result in cost savings for [DISH].” ROA.2169. NLRB 23.** |
| **Didn’t the Union’s December 2014 proposal bring it closer to DISH’s position that QPC should be eliminated entirely (since *for the first time* it proposed eliminating QPC for some unit employees)?** | **NLRB 23.** |
| **Didn’t the Union’s proposal, at the very least, indicate that the Union had room for compromise on the issue of QPC?** | **NLRB 24.** |
| **Didn’t the Union’s proposal indicate that it might have agreed to further concessions in bargaining?** | **NLRB 28.** |
| **Why did DISH flat out refuse to meet with the Union or discuss the Union’s proposal?** | **NLRB 28-29 (“[I]t makes little sense that DISH—which met and bargained for over a year while the Union steadfastly insisted that all unit employees receive QPC—would suddenly reverse course when the Union offered the first concrete indication that it would move from its position.”).** |
| **If the Union was still willing to compromise (as its December 2014 proposal indicates), how could the parties have been deadlocked?** | **Even if DISH’s position that no employee could receive QPC were firm, “[a]n impasse requires a deadlock, and for such a deadlock to occur, *neither* party must be willing to compromise.” *Powell Elec. Mfg. Co.*, 906 F.2d at 1011-12. NLRB 29.** |
| **Didn’t the parties’ contemporaneous communications support the Board’s finding that neither party thought negotiations were at an impasse in November 2014?** | **When the parties met in late November, they planned to continue to bargain on December 8 and 9. DISH did not declare impasse, nor did it indicate that it thought the scheduled bargaining sessions would be fruitless. Even after the Union cancelled the sessions due to an emergency, DISH agreed to continue to meet on the condition that the Union first submit a counterproposal, which the Union promptly did. In short, there was no indication from either party that they would do anything but continue to bargain. NLRB 24.** |
| **How do you respond to the ALJ’s finding that, “if the parties were continuously at impasse since November 2014 as DISH avers . . . [DISH] would never have agreed to meet in December 2014, or offered alternative dates after [the Union] cancelled”? ROA.2177.** | **NLRB 24-25.** |
| **Is the General Counsel correct that, if either party is willing to move at all, there can be no impasse? NLRB 22.** | **No. The General Counsel’s own authority disproves this claim. It can’t just be “movement” or a “ray of hope.” It must be “[m]ovement sufficient to open up a ray of hope *with a real potentiality for agreement*.” *Hayward Dodge* (NLRB 1989)*.*** |
| **How would the “ray of hope” standard (under which any movement by one party forecloses impasse) have absurd consequences?** | **It would permit a party to perpetually prolong negotiations and unilaterally lock in untenable financial arrangements, simply by offering minor concessions—even if (as here) it hewed to a position the other side never would accept. But the obligation to bargain “does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement of support of [its] position.” *NLRB v. Am. Nat’l Ins.* (U.S. 1952).** |
| **Here, did the Union’s movement create a real possibility for agreement?** | **No. DISH had made clear it would not accept QPC in any form, and the Union still was insisting on keeping QPC in effect for years.** |
| **What did the Board say about impasse in *E.I. Du Pont* (NLRB 1984)?** | **In *E.I. Du Pont*, “a finding of impasse [was] warranted *irrespective of whether there was some movement in the parties’ positions* prior to the Respondent’s implementation of its proposal.” *E.I. Du Pont* (NLRB 1984) (emphasis added). What mattered was that the issue was of “overriding importance” and that “after long, hard negotiations the parties were still not close to reaching agreement.” *Id.*; *Saunders House v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983) (impasse on wages even though in prior negotiations, “the union progressively lowered its on-the-record demands”).** |
| **The General Counsel says *Du Pont* is distinguishable because “the union unequivocally told the employer that … it would never agree to the substance of the employer’s critical job-movement proposal.” NLRB 32. Is that correct?** | **No. On the contrary, the parties in *Du Pont* disputed whether the union had made that statement, and the ALJ never resolved that dispute. *E.I. Du Pont* (NLRB 1984).** |
| **What did the Board say about impasse in *Taft Broadcasting* (NLRB 1967)?** | **In *Taft Broadcasting*, the Board explained that “an impasse is no less an impasse because the parties were closer to agreement than previously.” *Taft Broadcasting* (NLRB 1967).** |
| **How do courts determine whether parties are at an impasse?** | **The question is whether “there is no realistic possibility that continuation of discussions … would have been fruitful.” *Laurel Bay* (D.C. Cir. 2012). “The parties … need not pursue negotiations simply to go through the motions when there is no objectively reasonable hope** **of reaching an agreement,” and “bad faith is not evidenced by a failure to reach agreement or by a failure to yield to a position fairly maintained.” *AMF Bowling Co. v. NLRB* (4th Cir. 1995).** |
| **Why do you argue that the parties were at an impasse, even after the Union made a counterproposal in December 2014?** | **The parties had “exhausted the prospects of concluding an agreement” because the Union had again proposed a term (QPC) that DISH had made clear it never could accept. *Taft Broad. Co*. (NLRB 1967).** |
| **Would further discussions between DISH and the Union have been fruitful after the Union’s December 2014 proposal?** | **No, further discussions would not have been fruitful because DISH would not accept QPC in any form, and after years of negotiation, the Union still was insisting on it.** |
| **Did the Union’s repeated requests for a face-to-face bargaining session defeat the impasse?** | **No. Because the Union’s December 2014 proposal changed nothing, neither did the Union’s meeting requests. “‘[A] vague request by one party for additional meetings, if unaccompanied by an indication of the areas in which that party foresees future concessions,** **is … insufficient to defeat an impasse where the other party has clearly announced that its position is final.’” *Erie Brush* (D.C. Cir. 2012) (quoting *TruServ* (D.C. Cir. 2001)).** |
| **On what basis did the Board find a bad-faith refusal to bargain?** | **The Board found a bad-faith refusal to bargain based on its finding of no impasse. If there was an impasse, however, there was no bad-faith refusal to bargain. *Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) (“[A] good- faith impasse in negotiations temporarily suspends the duty to bargain.…”).** |
| **What specific conduct by DISH did the Board consider to be bad faith?** | **After DISH made its “final” proposal in November 2014, both parties appeared to believe that future in-person bargaining would be required. But then DISH:**  **(1) abruptly changed course, refusing to meet until the Union brought forth a counterproposal;**  **(2) momentarily agreed to discuss the Union’s counterproposal (which was a major concession on QPC);**  **(3) moved the goalposts, summarily rejecting the counterproposal and refusing to bargain further unless the Union put DISH’s proposal to a ratification vote; and**  **4) reversed course again and told the Union that its new negotiator would be in touch, then waited over a year to contact the Union and declare impasse. NLRB 25.** |
| **Viewed as a whole, didn’t DISH’s course of conduct evidence an attempt “to engineer a premature impasse” rather than reach genuine agreement? *Carey Salt*, 736 F.3d at 416.** | **NLRB 25.** |
| **Which two aspects of DISH’s conduct did the Board find to be particularly indicative of bad faith?** | **1. DISH’s refusal to meet with the Union to discuss the Union’s written counterproposal—which DISH had summarily rejected in writing.**  **2. Conditioning bargaining on a ratification vote. (DISH does not contest this.)**  **NLRB 26.** |
| **How did DISH’s summary written rejection of the Union’s counterproposal fulfill its bargaining obligation?** | **S*ee NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924, 928 (5th Cir. 1953) (“statutory obligation [to bargain collectively] is not satisfied by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference”); *Twin City Concrete*, 317 NLRB 1313, 1313-14 (1995) (employer’s requirement that union provide written notice of open issues to bargain before in-person bargaining violated duty to bargain). NLRB 27.** |
| **Did DISH’s insistence that it would not bargain because the Union was not willing to take its final offer to the bargaining unit demonstrate bad faith?** | **That is what the Board found (ROA.2170 n.6), and DISH did not address this in its opening brief. *See Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) (employer’s insistence on a ratification vote tainted any subsequent impasse); *see also NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (insisting to impasse on a nonmandatory subject of bargaining violates the Act). NLRB 27.** |
| **What flexibility had DISH shown during bargaining?** | **NLRB 27 n. 4 (“[C]ontrary to DISH’s implication, the Union showed substantial flexibility while DISH seemed uninterested in any agreement at all.”).** |
| **You argue that we should apply the test from *CalMat Co.*, 331 NLRB 1084, 1097 (2000) because the impasse over QPC precluded the parties’ willingness to compromise on other issues. But didn’t the Board find that the Union was willing to compromise on that very issue (of QPC)?** | **NLRB 21 n.3.** |
| **What is the result if this Court determines that DISH lawfully declared an impasse?** | **If the Court determines that DISH lawfully declared an impasse, that fully resolves the appeal. If there was an impasse, then DISH’s implementation of its last, best, and final offer (including the shift in pay structure) was not unlawful.** |
| **You argue that DISH’s refusal to meet with the Union was not bad faith bargaining because the parties were at an impasse. But the Board also found that DISH independently violated Section 8(a)(5) and evidenced bad faith by conditioning bargaining on the Union** **submitting to a ratification vote. Doesn’t that violation stand whether or not the parties ultimately reached impasse?** | **NLRB 31-32.** |
| **Can you point to any case where good-faith impasse existed when a party offered a concession on a central issue in negotiations and the other party refused to even meet and confer over that proposal?** | **NLRB 32.** |
| **What was the basis for the impasse in *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir. 1983)?** | **In *Saunders House v. NLRB*, 719 F.2d 683 (3d Cir. 1983), the union made no concession at all, but instead merely shifted from an off-the-record position to an on-the-record position. *Id*. at 688-89. NLRB 32.** |
| **What was the basis for the impasse in*****E. I. Du Pont & Co.*, 268 NLRB 1075 (1984)?** | **In *E. I. Du Pont & Co.*, 268 NLRB 1075 (1984), the union unequivocally told the employer that despite its counterproposals over 17 bargaining sessions dedicated to the issue of employee job movement, it would never agree to the substance of the employer’s critical job-movement proposal. *Id*. at 1075. NLRB 32.** |
| **Did the Union say that it would *never* agree to eliminating QPC?** | **No. And DISH’s mere belief that it would not is irrelevant. *See Ford Store San Leandro*, 349 NLRB 116, 121 (2007) (fact that employer “believed the [u]nion would never agree to [the employer’s] . . . proposals does not establish an impasse”). NLRB 32.** |
| **The General Counsel points to “the part[ies’] contemporaneous communications[] and DISH’s bad-faith refusal to** **meet with the Union.” NLRB 23. Did the Board rely on those factors in finding no impasse?** | **No. The Board never relied on these factors in finding no impasse, and they do not support the determination in any event:**  **1. The “contemporaneous communications” about scheduling evinced no plans to break the QPC deadlock.**  **2. The Board only mentioned DISH’s supposed bad faith in the period *after* the Union’s December 2014 counterproposal—the point at which an impasse was evident. ROA.2170. That’s significant because an “impasse temporarily suspends … the duty to bargain.” *Raven Servs. Corp. v. NLRB* (5th Cir. 2002).** |
| **Why didn’t the communications about scheduling future meetings show that there were plans to break the deadlock on QPC?** | **First, the December bargaining session had been scheduled *before* the Union rejected DISH’s last, best, and final offer. ROA.480, 1388. George Basara—DISH’s lead negotiator—sought to reschedule the meeting not because negotiations would be fruitful, but because he “prefer[red]” to communicate to the Union “face to face” that, if it wouldn’t agree to end QPC, DISH would be forced to declare an impasse. ROA.1133. The communications reinforced that the parties had exhausted meaningful bargaining—that they were at an impasse.** |
| **What is the meaning of “impasse”?** | **“Impasse” is “a term-of-art … that describes situations in which good faith bargaining has not resolved a key issue and ... there are no definite plans for further efforts to break the deadlock.” *Inland Tugs v. NLRB* (7th Cir. 1990).** |
| **Why do you argue that any finding of bad faith rises or falls with whether there was an impasse?** | **Because an “impasse temporarily suspends … the duty to bargain.” *Raven Servs. Corp. v. NLRB* (5th Cir. 2002); *see Charles D. Bonanno Linen Serv. v. NLRB* (U.S. 1982); *NLRB v. U.S. Cold Storage*, 203 F.2d 924, 928 (5th Cir. 1953) (“[T]he duty to meet does not mean that parties must engage in futile bargaining in the face of a genuine impasse.”).** |
| **Did DISH act in bad faith when it suggested the Union take DISH’s final proposal to the Union’s membership? NLRB 27.** | **That argument fails for numerous reasons:**  **1. The Board didn’t rely on this in its impasse determination, so the General Counsel can’t do so now.**  **2. The Board never found** **(as the General Counsel asserts, NLRB 27) that DISH conditioned bargaining on ratification. In fact, DISH did not condition further bargaining on a ratification vote. Basara simply “ask[ed] that [the Union] take [DISH’s] final offer to [its] members.” ROA.1375.** |
| **Why do you argue that, even if DISH had conditioned bargaining on ratification, it would not have tainted the impasse?** | **DISH asked the Union to take its final offer to the Union’s members in late December 2014, *after* the Union had rejected DISH’s last, best, and final offer. To have tainted the impasse, the conduct would have to have *preceded* it, as the General Counsel acknowledges.** |
| **What did the Board say about the effect of the passage of time on an impasse?** | **The Board believed the passage of time *supported* an impasse. The Board wrote that “the parties were not at impasse *even considering* the year-long hiatus in bargaining.” ROA.2170 (emphasis added). The dissent similarly recognized that the delay “severely undermines the Union’s alleged urgency and interest in further bargaining,” and confirms that “the Union was content with the status quo.” ROA.2171.** |
| **Why do you argue that the passage of time shows DISH’s good faith rather than (as the General Counsel posits) “an attempt to ‘engineer a premature impasse’”?** | **The passage of time shows DISH’s good faith because DISH allowed technicians to continue working for a year at lucrative QPC rates to test whether the union was serious about reaching an agreement. ROA.1020-22. Only when the union’s conduct confirmed it was stalling did DISH implement its final offer.** |
| **Why do you argue that the change in DISH’s lead negotiator did not preclude impasse?** | **The ALJ speculated that “the change in Dish’s bargaining agent amplified the possibility of agreement” because Basara was a “hard-bargainer” while Balonick was a “more diplomatic representative.” ROA.2176. DISH challenged that speculation before the Board, ROA.2005, and the Board did not adopt it. The impasse did not result from a single person’s personality, but from the parties’ irreconcilable positions.** |

|  |  |
| --- | --- |
| **Argument II:**  **No Constructive Discharge** | **Color:** |
| **What does Section 7 of the NLRA provide?** | **Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. NLRB 33.** |
| **On which section of the NLRA did the ALJ base his constructive discharge conclusion?** | **The ALJ rested his constructive discharge conclusion solely on Section 8(a)(3), but the Board purported to adopt the ALJ’s finding that DISH violated section 8(a)(3) *and (1)*. ROA.2170 n.8, 2178-79.** |
| **What does Section 8(a)(3) of the Act prohibit?** | **Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). NLRB 33.** |
| **The Board argues that an employer who violates Section 8(a)(5) of the NLRA derivatively violates Section 8(a)(1). Is that correct?** | **Yes. An employer who violates Section 8(a)(5) derivatively violates Section 8(a)(1), which bans employer interference with, coercion, or restraint of employees’ rights under Section 7 of the Act, 29 U.S.C. § 157, including the right to bargain collectively. *Tri-State Health Serv., Inc. v. NLRB* (5th Cir. 2004). NLRB 18.** |
| **Explain how a violation of Section 8(a)(5) derivatively violates Section 8(a)(1) of the NLRA?** | **Although the protections of Section 8(a)(3) and Section 8(a)(1) “are not coterminous, a violation of [the former] constitutes a derivative violation of [the latter].” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). NLRB 33-34.** |
| **What constitutes an employer’s violation of Section 8(a)(3)?** | **An employer violates Section 8(a)(3) by “discharging employees because of their union activity.”  *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186 (5th Cir. 1988). NLRB 34.** |
| **What was the predicate for the Board’s constructive-discharge determination on?** | **The Board’s constructive-discharge determination was predicated on its conclusion that the 17 employees “resigned their positions because of” DISH’s “*unlawful* unilateral reductions in their wages and health benefits.” ROA.2170 n.8 (emphasis added).** |
| **If this Court determines that DISH lawfully declared an impasse, what happens to the constructive discharge issue?** | **Because the Board’s constructive-discharge determination was predicated DISH’s *unlawful* unilateral reductions in wages and health benefits, if the Court determines that there was no unlawful activity, the premise of the Board’s ruling is gone, and it must be vacated.** |
| **How did DISH’s final proposal compare to compensation at other DISH locations?** | **The wage rates in the proposal were higher than DISH’s previous offers, but the overall compensation package would have resulted in Union employees receiving less pay than nonunion employees at other area DISH locations.** |
| **Why did the 17 employees resign after DISH declared an impasse?** | **Everyone agrees that the 17 employees who resigned after DISH declared impasse did so because they were unhappy with the pay cut.** |
| **Is there any evidence in the record that shows the 17 employees resigned because of the pay cut?** | **Yes. The employees testified to that in unambiguous terms; the General Counsel relied on only that theory before the ALJ and Board; and the ALJ and the Board both ruled on that basis. ROA.2178 (ALJ); ROA.2170 (Board).** |
| **Does a cut in wages or benefits create a constructive discharge under the “Hobson’s Choice” theory?** | **No. Both this Court and the Board itself have held that a cut in wages or benefits—even if otherwise unlawful—does not by itself create a constructive discharge under the “Hobson’s Choice” theory the Board adopted here. “Because the cited standard was inapplicable, there is not substantial evidence” to support the constructive discharge determination, and it must be vacated. *Sanderson Farms, Inc. v. Perez* (5th Cir. 2016).** |
| **What does the NLRA require of employers regarding union membership?** | **Under the NLRA, an employer may not “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). In short, an employer can’t use terms and conditions of employment to disfavor union membership; it cannot, for instance, fire someone based on their union membership. *Wright Line,* 251 N.L.R.B. 1083 (1980)** |
| **What is a constructive discharge?** | **A constructive discharge “is not a discharge at all but a quit which the Board treats as a discharge.” *Remodeling by Oltmanns, Inc.* (NLRB 1982).** |
| **What must the charging party show to establish a constructive discharge?** | **To establish a constructive discharge, the charging party must show that “the employer’s conduct … created working conditions so intolerable that an employee is forced to resign,” and that the employer “acted ‘to encourage or discourage membership” in the union. *NLRB v. Haberman Constr. Co.* (5th Cir. 1981) (en banc).** |
| **What is the first type of constructive discharge?** | **Under a “traditional” theory of constructive discharge, “the employee quits because the employer deliberately made working conditions intolerable.” *The Developing Labor Law* (Higgins 2017). In short, the charging party proves the two elements directly. The Board did not find that here.** |
| **What is the second type of constructive discharge?** | **Under a Hobson’s Choice theory, an employer typically “informs [its] employees that they must choose between union activity and continued employment.” *NLRB v. CER Inc.* (5th Cir. 1985). The “choice” confronting the employee must involve giving up union rights so fundamental that doing so is “inherently destructive” of the union. *Lively Elec., Inc.* (NLRB 1995).** |
| **What supplies the discriminatory motive element of a constructive discharge in a Hobson’s Choice case?** | **The unequivocal demand that the employee surrender union rights to keep his job. *Lively Elec., Inc.* (NLRB 1995).** |
| **What is an example of a Hobson’s Choice?** | **“A ‘Hobson’s Choice’ constructive discharge may occur when the employer unlawfully withdraws recognition of the union and imposes unlawful terms and conditions of employment on its employees or conditions continued employment on an employee abandoning the right to solicit support for the union.” *The Developing Labor Law* (Higgins 2017).** |
| **How did the General Counsel conflate the two types of constructive discharge?** | **Here, there was no Hobson’s Choice (Category 2) because a unilateral change to an employee’s wage schedule and benefits following an unlawfully declared impasse is not an “action which would permanently jeopardize future union status.” *Elec. Mach. Co.* (5th Cir. 1981). Accordingly, any constructive discharge here would have to be a “traditional” one (Category 1), and the Board did not find the requisite intent, *i.e.*, that DISH “acted to encourage or discourage membership” in the Union. *Haberman Constr.* (5th Cir. 1981) (en banc).** |
| **How did the NLRB describe the Hobson’s Choice theory of constructive discharge in *Intercon I (Zercom)*, 333 NLRB 223, 223 n.4 (2001)?** | **Under the “Hobson’s Choice” theory of constructive discharge, “an employee’s voluntary quit will be considered a constructive discharge when an employer conditions an employee’s continued employment on the employee’s abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition.” *Intercon I (Zercom)*, 333 NLRB 223, 223 n.4 (2001). NLRB 34.** |
| **What framework was established in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) to determine whether an employer’s actions constitute a constructive discharge?** | **An employer’s imposition of intolerable working conditions constitutes constructive discharge if the employer’s conduct is “inherently destructive of important employee rights.” *NLRB v. Haberman Const. Co.*, 641 F.2d 351, 359 (5th Cir. 1981) (en banc) (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967)). NLRB 34-35.** |
| **What two types of conduct does this Court recognize as inherently destructive of employee rights?** | **This Court recognizes two types of conduct that are inherently destructive of employee rights:**  **1. “that which directly and unambiguously penalizes or deters protected activity,” and**  **2. “that which jeopardizes the position of the union as bargaining agent or diminishes the union’s capacity effectively to represent the employees in the bargaining unit.”**  ***NLRB v. Haberman Const. Co.*, 641 F.2d 351, 359 (5th Cir. 1981) (en banc). NLRB 35.** |
| **Given DISH’s actions beginning in early 2016, didn’t the employees have a distinct choice: quit, or continue working for DISH, an employer that unlawfully reduced their wages and benefits and repeatedly disregarded and undermined their Section 7 rights?** | **NLRB 35-36.** |
| **What evidence supports the Board’s argument that DISH’s actions jeopardized the Union’s position as bargaining agent so as to destroy employees’ representational rights?** | **The dramatic decrease in pay—particularly when juxtaposed with the more advantageous terms of their nonunion counterparts—undermined the Union by creating the impression that it was useless in securing wage increases or even preventing unlawful unilateral wage cuts. *Cf. Great Dane*, 388 U.S. at 32 (granting a benefit to some employees but denying it to others “who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity”). NLRB 36.** |
| **In *Kinard v. DISH Network*, 890 F.3d 890 F.3d 608, 613 (5th Cir. 2018), didn’t this Court note the possibility of union dissolution in concluding that DISH’s wage cuts warranted injunctive relief?** | ***See Kinard v. DISH Network*, 890 F.3d 890 F.3d 608, 613 (5th Cir. 2018) (relying on district court’s findings that wage reduction was exceptional, wages were $5 per hour lower than for workers at neighboring non-union branches, union membership continued to erode, and loss of membership and morale presented possibility of union dissolution). NLRB 36-37.** |
| **Hasn’t the Board held, with court approval, that unilateral changes to represented employees’ wages erode their support for the union?** | ***See Goya Foods of Florida*, 347 NLRB 1118, 1122 (2006) (unilateral changes that “vitally impacted employee earnings . . . would reasonably tend to coerce employees into abandoning support for the [u]nion”), *enforced*, 525 F.3d 1117 (11th Cir. 2008); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (finding possibility of long-lasting effect on union support when employer conduct suggests that the union “is irrelevant in preserving or increasing their wages”). NLRB 37.** |
| **Didn’t DISH’s unilateral wage cut “present[] a concrete possibility of union dissolution”? *Kinard v. DISH Network*, 890 F.3d 608, 613 (5th Cir. 2018).** | **NLRB 37.** |
| **Hasn’t the Board held in other cases that reductions in employee wages and benefits that are so drastic as to jeopardize the union constitute constructive discharge?** | ***See Control Serv.*, 303 NLRB 481, 485 (1991) (unlawful cuts in wages, hours and health insurance benefits resulted in a constructive discharge); *White-Evans Serv. Co.*, 285 NLRB 81, 82-83 (1987) (same).** |
| **From the employees’ perspective, didn’t DISH’s other contemporaneous unfair labor practices telegraph that they faced a Hobson’s choice?** | **The very day that employees found out their wages and benefits were being cut, one of DISH’s managers texted an employee that the Union was gone and tied its departure explicitly to the elimination of QPC. At the time, DISH was unlawfully refusing to meet with the Union and insisting that the Union hold a ratification vote. NLRB 38.** |
| **Why do you argue that the Union’s reliance on *Superior Sprinkler* (NLRB 1976) is misplaced?** | **The employer in *Superior Sprinkler* “had unlawfully terminated its relationship with the union and announced an intent to operate nonunion henceforth.” *Lively Electric* (NLRB 1995). This Court therefore has explained that *Superior Sprinkler* is “distinguishable” from a case based solely on a unilateral wage cut, and that extending it to such a case “would approach eliminating the requirement of proving anti-union animus entirely.” *Electric Machinery* (5th Cir. 1981).** |
| **How did the General Counsel impermissibly expand the Hobson’s Choice theory?** | **Reply 22.** |
| **What did the Supreme Court say in *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) about the effect of unilateral changes on unions?** | **A unilateral change such as the cuts here “minimizes the influence of organized bargaining” and “interferes with the right of self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.” *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). NLRB 38.** |
| **What did the ALJ find regarding constructive discharge?** | **The ALJ found that the 17 employees who resigned didn’t truly resign, but in fact were constructively discharged. ROA.2178 (ALJ ruling); ROA.2170 n.8 (affirming “for the reasons stated by the” ALJ). Specifically, the ALJ concluded that “[t]hese employees were presented with the ‘Hobson’s choice’ of continuing to work versus forgoing their Section 7 rights.” ROA.2178.** |
| **What decision is this Court reviewing, the ALJ’s or the Board’s?** | **The ALJ’s decision. *See In-N-Out Burger, Inc. v. NLRB* (5th Cir. 2018) (“To the extent the Board affirms and adopts an ALJ’s findings and conclusions,” this Court reviews “the ALJ’s decision itself.”).** |
| **What is the question on appeal regarding constructive discharge?** | **The only question is whether the 17 employees who resigned in the months after DISH implemented its final offer were forced to “choose between union activity and continued employment.” *CER* (5th Cir. 1985).** |
| **Were the 17 employees forced to choose between union activity and continued employment?** | **No. The nature of this violation is that the employer is forcing the employee to *choose*—prospectively—between continued employment on the one hand and union rights on the other. But here, the only conduct at issue is a purportedly unfair practice that took place wholly in the past—the unilateral pay cut.** |
| **What has this Court (and the Board) said about unilateral pay cuts?** | **This Court and the Board have been clear that such conduct is not inherently destructive to the union and so, absent a specific finding of an *anti-union motive*—which neither the ALJ nor the Board made here—does not constitute a Hobson’s Choice.** |
| **What did this Court decide in *Haberman Construction* (5th Cir. 1981) (en banc)?** | **In *Haberman Construction*, (5th Cir. 1981) (en banc), this Court affirmed the Board’s finding of constructive discharge based on two key facts:**  **1. The company’s decision to go “open shop” and to refuse to bargain with the union moving forward; and**  **2. Its decision “to unilaterally cease payment of all union benefits” without first collectively bargaining.** |
| **In *Haberman Construction* (5th Cir. 1981) (en banc), did this Court decide whether a cut in benefits alone would be enough to find constructive discharge?** | **No. The Court expressly reserved the question (we “need not decide”) whether the cut in benefits “alone” would be “sufficient for a finding of a constructive discharge.” *Haberman Construction* (5th Cir. 1981) (en banc).**  **That was because the employer’s “announcement that it intended to go ‘open shop’ … forced the Company’s employees to choose between quitting its employ or continuing in the face of the Company’s unlawful repudiation of its bargaining obligations under the Act.” *Id.*** |
| **What did this Court decide in *Electric Machinery Co. v. NLRB* (5th Cir. 1981)?** | **In *Electric Machinery Co. v. NLRB* (5th Cir. 1981), this Court concluded that the employer violated the NLRA by declaring an impasse and “unilaterally” changing its employees’ “wage schedule” and other benefits. But the Court rejected the constructive-discharge claim of 18 employees who quit soon after the changes because the employer had “t[aken] no action which would permanently jeopardize future union status.” *Id.* In other words, the employees had not been forced to choose between their union rights or their jobs.** |
| **How did this Court distinguish the *Haberman* casein *Electric Machinery Co. v. NLRB* (5th Cir. 1981)?** | **In *Electric Machinery Co. v. NLRB* (5th Cir. 1981), this Court distinguished *Haberman* by explaining that (in *Electric Machinery*) there was no threat to immediately create a non-union company, nor any behavior from the employer that would hinder future bargaining, such as a “permanent discharge for participation in union activities.” In short, there was no conduct that was inherently destructive of the union.** |
| **Did this Court in *Electric Machinery Co. v. NLRB* (5th Cir. 1981) rely solely on the unilaterally imposed wage change to establish the discriminatory-intent prong of the analysis?** | **No. Unlike what the Board did here, the Court in *Electric Machinery* (5th Cir. 1981) rejected the argument “that this court should infer anti-union animus simply by virtue of the fact that the employer unilaterally changed mandatory terms and conditions of employment.”** |
| **But didn’t the Court in *Electric Machinery* base its no-constructive-discharge decision on factors not present here?** | **In finding no constructive discharge, the Court highlighted that the employer “urged [employees] to stay on,” “evidenced a desire to bargain in good faith,” and “brought forth a convincing business justification” for its actions. *Electric Machinery Co. v. NLRB*,** **653 F.2d 958, 966(5th Cir. 1981). None of those factors is present here: The Board found that DISH bargained in bad faith, it did not urge employees to stay on, and it did not proffer a business justification for cutting its unionized employees’ wages to far below what its other area employees earned. NLRB 39.** |
| **Did the Court in *Electric Machinery* state that employee resignations as a result of unilateral changes to their wages can *never* be treated as constructive discharges? NLRB 39.** | **That is not DISH’s point. The point is simply—as the Board and this Court have made clear— that such changes don’t give rise to a Hobson’s Choice. Changes to wages and benefits do not present employees with a choice “between losing [their] job and giving up statutory rights.” *Lively Electric* (NLRB 1995). And at no point has the Board or the General Counsel** **identified any “statutory right” that the 17 DISH employees were forced to “relinquish[]” as a “condition[]” of “continued employment.” *Id.*** |
| **What was the basis of the Board’s constructive discharge finding in *White-Evans Serv. Co.*, 285 NLRB 81, 82-83 (1987)?** | **In *White-Evans Serv. Co.*, the employer committed several contemporaneous unfair labor practices that tended to undermine the union, including direct dealing, and instituted draconian unilateral changes. 285 NLRB 81, 82-83 (1987); *see also Control Serv.*, 303 NLRB 481, 485 (1991) (employer’s unilateral reduction in employee hours, causing reduced wages and loss of health insurance, constituted constructive discharge). Thus, in that case, as here, the employer’s entire course of unlawful conduct, not its direct communications, led employees to understand that they faced a Hobson’s choice. NLRB 39-40.** |
| **Did DISH act in bad faith because there was “no apparent reason to cut employee wages and benefits so deeply”? NLRB 40.** | **First, the Board made no finding of bad faith, which isn’t an element of a Hobson’s Choice claim in any event. And there were business justifications for the pay cut: Employees at the two unionized branches were making an average of $20,000 per year more than technicians at other regional branches despite working 200 fewer hours per year. ROA.895-96.** |
| **Has the NLRB treated a unilateral wage reduction alone as giving rise to a Hobson’s Choice?** | **No.**  **In *Lively Electric* (NLRB 1995), the Board addressed a complaint from an employee who quit after his employer unilaterally modified his contract to decrease his pay. It concluded that there had been no constructive discharge because “[t]he failure to follow the contract” did not “signal[] essential hostility to the bargaining relationship” between the employer and union. It emphasized that employees are not “privileged to quit their employment whenever there is alleged a mere breach of the collective-bargaining agreement.” *Id.*** |
| **In *Lively Electric* (NLRB 1995), what did the NLRB decide regarding constructive discharge?** | **In *Lively Electric* (NLRB 1995), the Board concluded that a claim based solely on “a unilateral modification of … pay rate” was not a constructive discharge.** |
| **Wasn’t the situation in *Lively Electric*, where only one employee’s working conditions changed, different from this situation, where the whole unit’s compensation changed?** | **Changes to a single employee’s compensation do not undermine the union’s representational status to the same degree as changed to the whole unit’s compensation. *See Lively Electric*, 316 NLRB 471, 472 (1995) (citing and distinguishing, not overruling, *Control Services*). NLRB 40. The General Counsel cites no authority for this claim, and we are aware of none. In *Electric Machinery* (5th Cir. 1981), the employer unilaterally changed compensation for the whole bargaining unit, yet there was no Hobson’s Choice. Reply 26.** |
| **Why do you argue that the distinction the General Counsel makes between changes to a single employee’s compensation versus the whole unit’s makes no sense?** | **A constructive-discharge claim is specific to the individual: The issue in every case is whether “*the employee* [who was allegedly constructively discharged] was unlawfully forced to a choice between losing his job and giving up statutory rights.” *Lively Electric* (NLRB 1995) (emphasis added). That’s true whether a case involves one employee or one hundred.** |
| **How does *Electric Machinery* (5th Cir. 1981) mirror this case?** | **In *Electric Machinery* (5th Cir. 1981), the employer unilaterally changed employee wages based on a claimed impasse that the Board later concluded was unlawful. This Court affirmed the Board’s no impasse finding, but nevertheless held that the employer’s erroneous impasse claim did not create a Hobson’s Choice. *Id.*** |
| **In finding constructive discharge, didn’t the Board rely on all of DISH’s unlawful actions, not just the unilateral changes?** | **Yes. *See* ROA.2178 n.26. DISH’s contention (Br. 52) that the Board solely relied on the pay cut misreads the Board’s decision. NLRB 41.** |
| **Does DISH dispute that the unilateral pay cut was severe enough to constitute an intolerable condition?** | **NLRB 41.** |
| **By cutting wages without bargaining to impasse or agreement, didn’t DISH leave unit employees worse off than if they had never selected the Union to represent them?** | **DISH’s actions and statements conveyed to employees that it had no intention of faithfully fulfilling its duty to bargain. NLRB 41-42.** |
| **What would be the result if courts held that a unilateral pay cut was a constructive discharge?** | **Such a rule would “approach eliminating the requirement of proving anti-union animus entirely.” *Electric Machinery* (5th Cir. 1981). It would mean that any unlawful practice followed by employee resignations would be treated as a discriminatory practice, regardless of whether there was any showing of discrimination.** |
| **What should an employee who suffers an unfair labor practice do?** | **The employee should file a grievance and, if the respondent refuses to accede to the grievance, pursue it while he continues to work. *Lively Electric* (NLRB 1995). It would be “ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer *any* unlawful condition, at least if they have avenues for remedying that condition.” *Id.*** |
| **What decisions did the ALJ rely on to support the idea that resigning after a unilateral pay cut may constitute a Hobson’s Choice?** | **The ALJ relied on two Board decisions to support the idea that resigning after a unilateral pay cut may constitute a Hobson’s Choice:**   * ***White-Evans Serv. Co.* (NLRB 1987)** * ***Control Services* (NLRB 1991).** |
| **What did the Board decide in *White-Evans Serv. Co.* (NLRB 1987)?** | ***White-Evans Serv. Co.* (NLRB 1987) is wholly irrelevant. It involved the classic situation in which the employer was engaged in a “plan to convert to a nonunion operation,” which left the employees with the choice of quitting or relinquishing their collective-bargaining rights.** |
| **What did the Board decide** **in *Control Services* (NLRB 1991)?** | ***Control Services* (NLRB 1991) did treat an employer’s unilateral changes to employee compensation as a Hobson’s Choice. But it offered no reasoning, and the Board later made clear in *Lively Electric* (NLRB 1995) that a “unilateral modification” of an employee’s “pay rate” falls “clearly” outside of the Hobson’s Choice theory. More importantly, *Control Services* is inconsistent with this Court’s decision in *Electric Machinery Co.* (5th Cir. 1981). To resuscitate *Control Services* would be inconsistent with this “judicial construction” of the “unambiguous terms of the statute.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* (U.S. 2005).** |
| **Why did the 17 employees quit?** | **They quit because they were unhappy with the new pay scale.** |
| **What evidence in the record shows that the 17 employees quit because of the new pay scale?** | **1. The General Counsel opened its argument before the ALJ by stating that DISH “constructively discharged 17 employees by implementing its drastic reduction in employee wages.” ROA.16.**  **2. The Union stated in its brief to the Board that the “employees were constructively discharged as a result of the pay cut.” ROA.2078.**  **3. Eight of the 17 employees testified that they resigned because of the reduction in pay. ROA.655, 736.**  **4. The Union stipulated that the remaining employees resigned for the same reason. ROA.753-55.** |
| **Did any employees identify any other reason for resigning besides the pay cut?** | **No. Not a single employee identified any other reason for resigning.** |
| **What other conduct did the ALJ point to, besides the pay cut, that caused the employees to quit?** | **The ALJ at times pointed to other conduct indicating that DISH implemented its final offer without an impasse, made unilateral changes, refused to bargain with the Union, and conditioned bargaining on a ratification vote. ROA.2178 n.26. To the extent that the ALJ found that anything besides the pay cut caused the employees to quit, that conclusion is not supported by substantial evidence—everyone agreed that the pay cut was the reason they quit. But even if this were true, that conduct occurred in the past; the ALJ did not find that DISH had done anything to punish or dissuade *future* union activity.** |
| **Isn’t it irrelevant that DISH’s unilateral conduct occurred in the past?** | **That the unilateral change happened in the past (Br. 56 n.12) is of no moment; the benefits change for strikers at issue in *Great Dane* also happened in the past. Undermining the Union has a lasting effect on the bargaining unit even if the employer takes no further unlawful actions, and there was no reason for employees to believe that DISH would refrain from doing so. NLRB 42.** |
| **Did any employees even suggest that they quit because they thought they’d otherwise have to relinquish their union rights?** | **No. None of the hallmarks of a Hobson’s Choice are present. DISH did not, for instance, insist that it would run a non-union shop moving forward—the classic evidence of a Hobson’s Choice. To the contrary, the Union appears alive and well, remains in place at the two North Texas locations, and continues to be actively engaged with those members who did not resign.** |
| **Isn’t the Union’s continued existence a testament to the effectiveness of the Section 10(j) injunction restoring previous pay levels, not a sign that DISH’s unlawful actions have had no effect?** | **NLRB 42.** |
| **Why did the district court in the earlier proceedings refuse the General Counsel’s request to order DISH to continue to bargain in good faith?** | **The district court in the earlier proceedings refused the General Counsel’s request to order DISH to continue to bargain in good faith specifically because “there is no evidence of any other ongoing unfair labor practices that threaten to weaken the Union or harm unit employees.” *Kinard* (5th Cir. 2018).** |
| **Is there any evidence that DISH ever forced employees to give up their union rights to keep their jobs?** | **No.** |
| **Was there any finding that the Union was damaged or diminished going forward?** | **No. Two-thirds of the unionized employees continued to work at DISH, and the Union continued to represent them. ROA.254. Indeed, the district court that considered the Board’s request for an injunction found no “evidence that DISH has refused to bargain with the Union after declaring impasse” or “evidence of any other ongoing unfair labor practices that threaten to weaken the Union or harm unit employees.” *Kinard v. DISH Network Co.* (N.D. Tex. 2017). Reply 29.** |
| **The General Counsel argues that the pay cut created intolerable conditions. NLRB 36. What is the problem with this argument?** | **Again, this confuses the types of constructive discharge. In a Hobson’s Choice—the only thing the Board found—it’s the choice between the employee’s job and union rights that is intolerable. The Board didn’t find that conditions otherwise were intolerable, so this is no basis to affirm.** |
| **Why do you argue that the General Counsel is mistaken that the pay cut created intolerable conditions?** | **The General Counsel asserts that “DISH does not seriously dispute that the unilateral pay cut was severe enough to constitute an intolerable condition.” NLRB 36. However, DISH did dispute this, explaining that “the new wages are neither intolerable nor** **unreasonable” because “they are competitive for the market.” ROA.2149-50. Far from conditions being intolerable, two-thirds of the unionized technicians chose not to quit. ROA.358-59.** |
| **What should this Court do if we conclude that the 17 employees who resigned were not faced with a Hobson’s Choice?** | **Because the 17 employees who resigned were not faced with a Hobson’s Choice, the Court should vacate and decline to enforce that aspect of the Board’s Order. *See Electric Machinery Co.* (5th Cir. 1981)(reversing on substantial evidence review the Board’s constructive discharge finding because the employer’s conduct was not “so egregious as to eliminate the General Counsel’s burden of proving anti-union animus”).** |
| **Why was the General Counsel incorrect to point to evidence reflecting an impermissible intent to harm the Union? NLRB 38, 41.** | **Intent is relevant to a *traditional* constructive discharge, not a Hobson’s Choice. ROA.2178 n.27 (ALJ recognizing as much). The General Counsel and the Union pressed a traditional theory before the Board, which didn’t adopt it. ROA.2011, ROA.2095-2101. And the ALJ relied on no such conduct in finding a constructive discharge.** |
| **Why do you argue that the text message from a DISH manager to a DISH employee is irrelevant?** | **A single “errant[]” text from one DISH manager to one DISH employee—which immediately prompted a “disavow[al]” from a DISH regional supervisor to all “affected employees”—is hardly evidence that DISH intended to discourage union membership for the 17 employees who quit. ROA.2174.** |
| **Did the Board consider DISH’s other unfair labor practices in determining whether its actions were inherently destructive of important employee rights? NLRB 41.** | **No, that isn’t what the Board held. The Board relied on the “unilateral reductions in [the employees’] wages and health benefits.” ROA.2170 n.8. And a wage cut does not give rise to the requisite “clear and unequivocal” choice between union activity** **and continued employment. *Remodeling by Oltmanns* (NLRB 1982).** |
| **What evidence did the General Counsel rely on that the Board did not consider?** | **Reply 22.** |