

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DISH NETWORK CORPORATION	)	
	)	
and	)	Cases 16-CA-027316, 16-CA-
	)	027331, 16-CA-027514,
COMMUNICATIONS WORKERS	)	16-CA-027700, 16-CA-
OF AMERICA LOCAL 6171	)	027701, and 16-RC-010919
	)	

**BRIEF IN SUPPORT OF CHARGING PARTY’S  
MOTION FOR RECONSIDERATION AND  
SUGGESTION FOR CONSIDERATION BY THE FULL BOARD**

Charging Party Communications Workers of America Local 6171 (the Union) files this brief in support of its motion for reconsideration and suggestion for consideration by the full Board of the panel’s Decision and Order in this case. *Dish Network Corp.*, 358 NLRB No. 29 (2012). The Union respectfully submits that the panel majority erred in determining that the Union waived its argument that the Board should overrule its decision in *Tri-Cast Inc.*, 274 NLRB 377 (1985). Because that argument was not waived, the Union requests that the Board withdraw its decision in this case and call for supplemental briefing on this issue.

1. This case squarely presents the issue of whether an employer’s statement to employees that if they choose to be represented by a union they will lose the right to bring complaints to management individually constitutes a threat in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

During an organizing drive, the Union distributed a flyer stating, consistent with the proviso to Section 9(a) of the Act, that if employees formed a union, “we will have the right to have a coworker come with us in meetings we have with management that might result in discipline” and “will not have to be all on our own anymore in those situations with management, unless that is what we choose.” *Dish Network*, 358 NLRB No. 29, slip op. 2 (Block, M., concurring). Dish Network reprinted the union’s flyer with its own answer to the Union’s statement, which stated:

“If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company’s attention, not you. He controls your fate, not you.” *Ibid.*

The Supreme Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), that although an employer “may [] make a prediction as to the precise effects he believes unionization will have on his company,” “the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.” “If there is any implication that an employer may or may not take action solely on his own initiative for reasons . . . known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion.” *Ibid.* That is, “an employer is free only to tell

‘what he reasonably believes will be the likely [] consequences of unionization that are outside his control,’ and not ‘threats of [] reprisal to be taken solely on his own volition.’ *Id.* at 619 (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967)).

The proviso to Section 9(a) of the Act states “[t]hat any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect.” 29 U.S.C. § 159(a). Prior to *Tri-Cast*, the NLRB thus held that an employer’s statement to employees that if they choose to be represented by a union they will lose the right to bring complaints to management individually constitutes “a threat to deprive employees of their right to deal directly with the Employer.” *Greensboro News Co.*, 257 NLRB 701, 701 (1981). *See also National Steel Products*, 252 NLRB 833 (1980); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); *LOF Glass, Inc.*, 249 NLRB 428 (1980); *Omark-CCI, Inc.*, 208 NLRB 469 (1974); *Jacob Wiesel d/b/a Saticoy Meat Packing Co.*, 182 NLRB 713 (1970).<sup>1</sup> In the language of *Gissel*, an

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<sup>1</sup> In its pre-*Tri-Cast* cases, the Board found both that such threats constitute objectionable pre-election conduct, *Greensboro News*, 257 NLRB at 701; *Armstrong Cork*, 250 NLRB at 1282; *LOF Glass*, 249 NLRB at 428-29, and that such threats violate Section 8(a)(1) of the Act, *National Steel*, 252 NLRB at 833, 842, 845; *Omark-CCI*, 208 NLRB at 470, 473; *Saticoy Meat Packing*, 182 NLRB

employer's statement that it will refuse to continue a practice of dealing with grievances on an individual basis if employees choose to be represented by a union is not "a reasonable prediction" based on forces "outside his control," but, in light of the proviso to Section 9(a), "a threat of retaliation based on misrepresentation and coercion" based "solely on [the employer's] own volition." 395 U.S. at 618-19.

In *Tri-Cast*, the Board explicitly overruled *Greensboro News, Armstrong Cork*, and *LOF Glass*, characterizing employer statements that if employees choose to be represented by a union they will lose the right to bring complaints to management individually as "simply explicat[ing] one of the changes which occur between employers and employees when a statutory representative is selected," 274 NLRB at 377 & n.5. The Board thus concluded that "[t]here is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Id.* at 377.

As Member Block explained in her concurrence in this case, "it is dubious to characterize such a statement as merely 'explaining a change in the manner in

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at 714-15. Member Block notes in her concurrence other more recent examples of employer threats based on misrepresentations of statutory rights that the Board has found to violate Section 8(a)(1). See *Dish Network*, 358 NLRB No. 29, slip op. 3 n. 9 (Block, M., concurring) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407 (2008), adopted by 356 NLRB No. 70 (2011), and *Wild Oats Markets, Inc.*, 344 NLRB 717, 718 (2005)).

which employees and employers deal with each other when a union is elected.’ Rather, the statement relies on a misrepresentation of the law to suggest that employees will inevitably lose an existing benefit as a consequence of unionization,” and, “as such, could be considered a threat.” *Dish Network*, 358 NLRB No. 29, slip op. 4 (Block, M., concurring). Moreover, as Member Block noted, *Tri-Cast* makes no mention of the numerous other Board decisions that hold that “when the Board reviews the lawfulness of an employer’s predictions about the adverse consequences of unionization . . . , it requires that employers’ statements be objectively based, i.e. accurately represent the facts.” *Id.* at 3 & n. 5-9 (discussing *Gissel* and related Board cases). Because *Tri-Cast* is inconsistent with *Gissel* and with the many Board precedents discussed in Member Block’s concurrence, the Board has good reason to revisit *Tri-Cast* in this case.

2. There is no procedural barrier to the Board revisiting *Tri-Cast* here. Contrary to the panel majority’s conclusion that it was only “in its *reply* brief[] [that] the Union urged us to revisit *Tri-Cast*,” *Dish Network Corp.*, 358 NLRB No. 29, slip op. 1 n. 1 (emphasis in original), a careful review of the Union’s opening exceptions brief demonstrates that the Union preserved its request to overrule *Tri-Cast*.

The Union presented two arguments concerning the threatening effect of Dish Network’s statement to employees in its opening exceptions brief: (1) that the

Board should overrule *Tri-Cast* and apply its pre-*Tri-Cast* case law to hold that Dish Network’s statement violated Section 8(a)(1); or (2) in the alternative, that the Board should distinguish the facts of this case from *Tri-Cast* and find a violation.

As to the first point, the Union argued that:

“[O]n its face, Respondent’s statements to employees . . . would reasonably interfere with employee free choice of a representative for the purpose of collective bargaining. Dish was telling its employees that selecting Local 617[1] as their representative would diminish their working conditions, and such speech constitutes a threat to withdraw rights guaranteed by Section 9(a) in violation of Section 8(a)(1) of the Act. *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); *LOF Glass, Inc.*, 249 NLRB 428 (1980).” Union Exceptions, 8.

As already noted, the three cases cited by the Union in its opening exceptions brief – *Greensboro News*, *Armstrong Cork*, and *LOF Glass* – were each explicitly overruled by the Board in *Tri-Cast*, a fact the Union forthrightly admitted in its brief. *See ibid.* The Union nevertheless argued – echoing the Board’s pre-*Tri-Cast* decisions – that “*Tri-Cast*’s holding should not be applied to Respondent’s speech because respondent’s speech . . . expressly conflicts with employee rights under Section 9(a).” *Id.* at 9. Thus, although the Union did not request in so many words that the Board overrule *Tri-Cast*, taken together, the

Union's reliance on pre-*Tri-Cast* decisions and the Union's acknowledgment that these decisions had been overruled by *Tri-Cast* can only be understood as a request for the Board to overrule *Tri-Cast* and return to its pre-*Tri-Cast* rule.

This conclusion is confirmed by the fact that in the following section of its brief, the Union argued that “[a]lternately” the Board could distinguish *Tri-Cast* on the basis that “Respondent[’s] statement . . . directly contradicts Section 9(a)’s proviso in a way that the statement[] in *Tri-Cast* . . . did not because Respondent was specifically telling employees [that] complaints could not be brought to it if they selected the Union,” whereas *Tri-Cast* “involved general statements along the lines of ‘things will change with a union.’” Union Exceptions, 10. The fact that the Union argued in the *alternative* that the Board could distinguish *Tri-Cast* from this case demonstrates that the Union’s *primary* argument was that *Tri-Cast* should be overruled.

3. The panel majority also erred in holding that because the Acting General Counsel did not explicitly seek to overrule *Tri-Cast*, “the Union’s suggestion that *Tri-Cast* be revisited is not properly before us.” *Dish Network*, 358 NLRB No. 29, slip op. 1 n. 1.

As a matter of law, once a complaint alleging an unfair labor practice is presented to the Board by the General Counsel, the decision whether to overrule one or more of the Board’s earlier decisions belongs solely to the Board itself and

does not require a request or concurrence from the General Counsel. *See* NLRA § 10(c), 29 U.S.C. § 160(c). As the Supreme Court has explained, the decision to “announc[e] new principles in an adjudicative proceeding . . . lies in the first instance within the Board’s discretion.” *NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267, 294 (1974).

The cases cited by the panel majority in support of its claim that the General Counsel must seek to overrule Board precedent before the Board may do so are inapposite. Both *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999), and *Kimtruss Corp.*, 305 NLRB 710 (1991), stand only for the proposition that “the General Counsel’s theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel’s theory.” *Zurn/N.E.P.C.O.*, 329 NLRB at 484. What is at issue here is not any difference between the Charging Party’s and the Acting General Counsel’s theories of the case, but rather whether it was necessary and desirable for the Board to overrule *Tri-Cast* in order to find a violation under the Acting General Counsel’s stated theory.

It is clear that the Acting General Counsel squarely presented the issue of whether Dish Network’s statement to employees constituted a threat in violation of Section 8(a)(1) to the Board. The complaint “allege[d] that the Respondent violated the Act by informing its employees in writing . . . that ‘they would be limited in bringing concerns to management if they selected the Union as their

exclusive bargaining representative.” *Dish Network*, 358 NLRB No. 29, slip op. 5 (ALJ decision) (quoting subparagraphs 7(d) and (i) of the complaint). In its brief to the ALJ, the Acting General Counsel cited the Board’s pre-*Tri-Cast* decision in *National Steel Products*, 252 NLRB 833 (1980), which held that a similar employer statement violated Section 8(a)(1), and argued that Dish Network’s statement to employees constituted “a clear threat and as such it violates the Act.” Acting G.C.’s Brief to the ALJ, 15. The issue of whether to overrule *Tri-Cast* in order to find an unfair labor practice in this case was, therefore, properly before the Board.

4. That said, as Member Block noted in her concurrence, the Board has not had the benefit of full briefing from either the Acting General Counsel or the Respondent on the issue of whether *Tri-Cast* should be overruled. *Dish Network*, 358 NLRB No. 29, slip op. 1, n. 1 (Block, M., concurring). The Union agrees that the Board would benefit from briefing of this issue and therefore respectfully suggests that if the Board grants this motion for reconsideration or grants consideration of this case by the full Board it should call for supplemental briefs on whether *Tri-Cast* should be overruled.

## CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board grant this motion for reconsideration or grant consideration by the full Board of the panel's Decision and Order in this case.

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Respectfully Submitted,

/s/ Matt Holder

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## CERTIFICATE OF SERVICE

I, Matthew J. Ginsburg, hereby certify that on May 9, 2012, I caused to be served a copy of the foregoing Brief in Support of Charging Party's Motion for Reconsideration and Suggestion for Consideration by the Full Board by U.S. mail and electronic mail on the following:

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