

Nos. 11-1273, 11-1274 & 11-1294

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DIRECTV, INC.

and

**MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC.**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**FINAL BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

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)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. *Parties and Amici*: MasTec Advanced Technologies, A Division of MasTec, Inc. (“MasTec”) and DirecTV, Inc. (“DirecTV”) are the petitioners before the Court; MasTec and DirecTV were the respondents before the Board. Joseph Guest, a former employee of MasTec, was the charging party before the Board. In this review proceeding, the American Federation of Labor and Congress of Industrial Organizations is participating as Amicus Curiae in support of the Board.

B. ***Ruling Under Review***: This case involves the petition by MasTec and DirecTV to review, and the Board's application to enforce, a Decision and Order the Board issued on July 21, 2011 (357 NLRB No. 17).

C. ***Related Cases***: The ruling under review was not previously before this Court or any other court.

/s/ Linda Dreeben
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1099 14th Street, N.W.
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Dated at Washington, D.C.
this 7th day of February 2013

GLOSSARY

1. ActThe National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
2. BoardThe National Labor Relations Board
3. Companies.....DirecTV and MasTec
4. DirecTV Br.The opening brief of DirecTV, Inc.
5. MasTec Br.The opening brief of MasTec Advanced Technologies, A Division of MasTec, Inc.

TABLE OF CONTENTS

Headings	Page(s)
Statement of Jurisdiction.....	1
Statement of the Issues Presented.....	2
Relevant Statutory and Constitutional Provisions.....	3
Statement of the Case.....	3
Statement of the Facts.....	5
I. The Board’s Findings of Fact.....	5
A. The Relationship Between the Technicians’ Employer, MasTec, and DirecTV.....	5
B. “Responding” vs. “Non-responding” Satellite Receivers.....	6
C. DirecTV Criticizes MasTec’s Performance Under the Contract; MasTec Institutes a New Charge-back Policy To Incentivize Telephone Connections; MasTec Technicians Object to the New Pay Policy and Air Their Grievance to Management.....	8
D. The Technicians Protest the Charge-back Policy in the Orlando Parking Lot; MasTec Refuses To Change Its Policy.....	11
E. The Technicians Take Their Objections to Channel 6.....	12
F. The Channel 6 News Report Airs.....	13
G. After DirecTV Refuses To Allow Technicians Shown on Channel 6 Report To Perform DirecTV Work in Customers’ Homes, MasTec Discharges Them.....	17
H. Supervisor Muniz Threatens Employee Perlaza.....	19
I. MasTec’s Confidentiality, Solicitation, and Distribution Policies.....	19

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
II. The Board’s Conclusions and Order	21
Summary of Argument.....	23
Standard of Review	25
Argument.....	27
I. The Board is Entitled to Summary Enforcement of the Portion of Its Order Remedying MasTec’s Three Uncontested Unfair Labor Practices	27
II. Substantial Evidence Supports the Board’s Finding that MasTec and DirecTV Violated Section 8(a)(1) of the Act by Terminating and Causing To Terminate, Respectively, 26 MasTec Technicians for Participating in a Television Newscast Expressly Related to an Ongoing Labor Dispute	29
A. An Employer Violates Section 8(a)(1) of the Act by Terminating Employees for Engaging in Protected, Concerted Activities	29
B. By Respectively Terminating or Causing the Termination of the 26 Technicians on the Basis of Their Protected Activity, MasTec and DirecTV Violated Section 8(a)(1) of the Act	36
C. The Board Found that the Technicians’ Statements to Channel 6 Retained the Protection of the Act, and the Companies Have Failed To Show that Substantial Evidence Does Not Support this Conclusion..	37
1. The technicians’ statements to Channel 6 grew directly out of the labor dispute with their employer.....	38
2. The technicians’ statements to Channel 6 were neither “maliciously untrue” nor “so disloyal” as to lose the protection of the Act.....	41

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
a. The technicians’ statements to Channel 6 were truthful and, in any event, not uttered with knowledge or reckless disregard of their falsity.....	41
b. The technicians’ statements directly related to their labor dispute with their employer and thus were not “so disloyal” as to strip them of the protection of the Act.....	51
D. The Court Lacks Jurisdiction To Consider DirecTV’s Argument that the Board Is “Expanding the Scope of Labor Disputes Beyond the Immediate Employer-Employee Relationship”	56
Conclusion	58

TABLE OF AUTHORITIES

Cases	Pages(s)
<i>Allentown Mack Sales & Svc., Inc. v. NLRB</i> , 522 U.S. 359 (1998).....	27
<i>Allied Aviation Serv. Co. of N.J.</i> , 248 NLRB 229 (1980), <i>enforced</i> 636 F.2d 1210 (3d Cir. 1980).....	34, 48, 51, 53
<i>Allied Mech. Servs., Inc. v. NLRB</i> , 668 F.3d 758 (D.C. Cir. 2012)	28
<i>Blue Circle Cement Co. v. NLRB</i> , 41 F.3d 203 (5th Cir. 1994)	53
<i>Cheney Cal. Lumber Co. v. NLRB</i> , 319 F.2d 375 (9th Cir. 1973)	26, 49
<i>Citizens Inv. Servs. Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005).....	26, 29, 30, 36
<i>Cnty. Hosp. of Roanoke Valley v. NLRB</i> , 538 F.2d 607 (4th Cir. 1976)	35
<i>Dews Constr. Co.</i> , 231 NLRB 182 n.4 (1977), <i>enforced</i> 578 F.2d 1374 (3d Cir. 1978).....	30
<i>Dist. 65, Distributive Workers of Am. v. NLRB</i> , 593 F.2d 1155 (D.C. Cir. 1978).....	30
<i>Emarco, Inc.</i> , 284 NLRB 832 (1987)	46
<i>Endicott Interconnect Techs., Inc. v. NLRB</i> , 453 F.3d 532 (D.C. Cir. 2006)	25, 34, 54

Cases-Cont'd	Page(s)
<i>Epilepsy Found. of Ne. Ohio v. NLRB</i> , 268 F.3d 1095 (D.C. Cir. 2001)	30
<i>Fabric Services, Inc.</i> , 190 NLRB 540 (1971)	30
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987)	25
* <i>Five Star Transp., Inc. v. NLRB</i> , 522 F.3d 46 (1st Cir. 2008)	26, 32, 35, 38, 40, 43, 52, 57
<i>George A. Hormel & Co. v. NLRB</i> , 962 F.2d 1061 (D.C. Cir. 1992)	54, 58
<i>Georgia-Pacific Corp.</i> , 221 NLRB 982 (1975)	30
<i>Gold Coast Rest. Corp v. NLRB</i> , 995 F.2d 257 (D.C.Cir.1994)	29
<i>Grouse Mtn. Lodge</i> , 333 NLRB 1322 (2001)	27
<i>Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.</i> , 456 U.S. 212 (1982)	57
<i>Int'l Shipping Ass'n</i> , 297 NLRB 1059 (1990)	30
<i>Jefferson Standard Broadcasting Company</i> , 94 NLRB 1507 (1951), <i>aff'd sub. nom. NLRB v. Local Union No. 1229</i> , <i>Int'l Bhd. of Elec. Workers</i> , 346 U.S. 464 (1953).	34
<i>Jensen v. NLRB</i> , 86 Fed. App'x 305 (9th Cir. 2004)	24, 34

* Authorities upon which the Board chiefly relies are marked with asterisks.

Cases-Cont'd	Page(s)
<i>Jolliff v. NLRB</i> , 513 F.3d 600 (6th Cir. 2008)	42
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998)	28
<i>Linn v. United Plant Guard Workers of Am.</i> , 383 U.S. 53 (1966).....	36
<i>Local 65-B, Graphic Commc'ns Conference v. NLRB</i> , 572 F.3d 342 (7th Cir. 2009)	26, 50
* <i>Misericordia Hosp. Med. Ctr. v. NLRB</i> , 623 F.2d 808 (2d Cir. 1980).....	31, 32, 35, 52
<i>Mohave Elec. Coop. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000).....	32, 48
* <i>Mountain Shadows Golf Resort</i> , 330 NLRB 1238 (2000), <i>supplemented by</i> 338 NLRB 531 (2002), <i>affirmed sub. nom.</i> , <i>Jensen v. NLRB</i> , 86 Fed. App'x 305 (9th Cir. 2004).....	24, 34, 38, 41
<i>Nevada SEIU Local 1107 v. NLRB</i> , 358 Fed. App'x 783 (9th Cir. 2009)	41, 42
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	41
<i>NLRB v. Circle Bindery, Inc.</i> , 536 F.2d 447 (1st Cir. 1979).....	32
<i>NLRB v. City Disposal Sys., Inc.</i> , 465 U.S. 822 (1984).....	26

* Authorities upon which the Board chiefly relies are marked with asterisks.

Cases-Cont'd	Page(s)
<i>NLRB v. Knuth Bros., Inc.</i> , 537 F.2d 950 (7th Cir. 1976)	32
* <i>NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers</i> (“ <i>Jefferson Standard</i> ”), 346 U.S. 464 (1953)	25, 33, 34, 51, 53, 55
<i>NLRB v. Lummus Indus., Inc.</i> , 679 F.2d 229 (11th Cir. 1982)	26
* <i>NLRB v. Mt. Desert Island Hosp.</i> , 695 F.2d 634 (1st Cir. 1982)	31, 34, 35, 42
<i>NLRB v. Parr Lance Ambulance Serv.</i> , 723 F.2d 575 (7th Cir. 1983)	26
<i>NLRB v. Peter Cailler Kohler Swiss Chocolates Co.</i> , 130 F.2d 503 (2d Cir. 1942).....	32
<i>NLRB v. Pneu Elec., Inc.</i> , 309 F.3d 843 (5th Cir. 2002)	30
<i>NLRB v. So-White Freight Lines</i> , 969 F.2d 401 (7th Cir. 1992)	26, 49
<i>NLRB v. Wash. Aluminum Co.</i> , 370 U.S. 9 (1962).....	30, 36
<i>Parsippany Hotel Mgmt. Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996)	49
<i>Philander Smith College</i> , 246 NLRB 499 (1979)	34
<i>S. Power Co. v. NLRB</i> , 664 F.3d 946 (D.C. Cir. 2012)	28, 56

* Authorities upon which the Board chiefly relies are marked with asterisks.

Cases-Cont'd	Page(s)
<i>Scepter, Inc. v. NLRB</i> , 280 F.3d 1053 (D.C. Cir. 2002)	28, 56
* <i>Sierra Publ'g Co. v. NLRB</i> , 889 F.2d 210 (9th Cir. 1989)	31, 34, 46, 53
<i>St. Luke's Episcopal Presbyterian v. NLRB</i> , 268 F.3d 575 (8th Cir. 2001)	54
<i>Tele Tech Holdings, Inc.</i> , 333 NLRB 402 (2001)	28
<i>Tualatin Elec., Inc. v. NLRB</i> , 253 F.3d 714 (D.C. Cir. 2001)	25
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	26, 27
* <i>Valley Hosp. Med. Ctr.</i> , 351 NLRB 1250 (2007), <i>enf. sub. nom. Nevada SEIU Local 1107 v. NLRB</i> , 358 Fed. App'x 783 (9th Cir. 2009)	31, 35, 41, 48
<i>Veeder-Root Co.</i> , 237 NLRB 1175 (1978)	34
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	28, 56

* Authorities upon which the Board chiefly relies are marked with asterisks.

Statutes

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 2(9) (29 U.S.C. § 152(9)).....57
Section 7 (29 U.S.C. § 157) 29, 30
Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... 29, 36
Section 10(a) (29 U.S.C. § 160(a))2
Section 10(e) (29 U.S.C. § 160(e)) 2, 26, 28, 56
Section 10(f) (29 U.S.C. § 160(f))2

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STATEMENT OF JURISDICTION

This case is before the Court on the petitions of DirecTV, Inc. (“DirecTV”) and MasTec Advanced Technologies, a division of MasTec, Inc. (“MasTec”)

(collectively, “the Companies”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order against the Companies. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 160(a)). The Decision and Order, issued on July 21, 2011, and reported at 357 NLRB No. 17,¹ is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

DirecTV and MasTec petitioned for review of the Board’s Order on August 1 and August 3, 2011, respectively, and the Board cross-applied for enforcement of the Order on August 18. The Court has jurisdiction over the Companies’ petitions and the Board’s cross-application pursuant to Section 10(e) and (f) of the Act. Both were timely filed, as the Act imposes no time limit for such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portion of its Order finding that MasTec violated Section 8(a)(1) of the Act by:

¹ Where applicable, references preceding a semicolon are to the Board’s findings; those following to the supporting evidence.

- a. threatening that MasTec would close because employees had complained about their wages;
 - b. maintaining a confidentiality policy that interferes with, restrains, and coerces employees' protected concerted activities; and
 - c. maintaining an overly broad solicitation and distribution rule that requires employees to obtain permission to engage in protected concerted activities.
2. Whether substantial evidence supports the Board's finding that MasTec and DirecTV violated Section 8(a)(1) of the Act by terminating and causing the termination of, respectively, 26 MasTec technicians for participating in a television newscast expressly related to an ongoing labor dispute.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

This unfair-labor-practice case came before the Board on a consolidated complaint issued by the Board's General Counsel, pursuant to charges filed by former MasTec employee Joseph Guest. (APPX077.) Following a hearing, an

administrative law judge issued a decision on January 4, 2008, finding that MasTec had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by: threatening employees with facility closure and other unspecified reprisals for engaging in protected concerted activity; maintaining a confidentiality policy that interfered with, restrained, and coerced employees' discussion of their terms and conditions of employment; and maintaining an overly broad solicitation and distribution rule that also required employees to obtain permission to engage in protected concerted activity. (APPX088.) The judge further recommended dismissing allegations that MasTec had issued other unlawful threats, and that the Companies had unlawfully terminated 26 employees. (APPX085-86, 88.) With respect to the terminations, the judge found that the Companies had acted together, based on the employees' concerted protest regarding wages. (APPX086-87.) But the judge also recommended that the charges against the Companies be dismissed because the employees had forfeited their protection under the Act by making disloyal, reckless, or maliciously untrue statements. (APPX088.)

The General Counsel excepted to the judge's decision and, on July 21, 2011, the Board (Chairman Liebman, Members Becker and Hayes) issued a Decision and Order rejecting the judge's recommended finding that the employees' concerted protest was unprotected. (APPX070-71.) The Board held that MasTec violated Section 8(a)(1) of the Act by discharging the employees based on that protest, and

that DirecTV violated the same provision by causing MasTec to terminate the employees. (APPX071-72.) The Board further affirmed, in the absence of exceptions, the judge's findings that MasTec violated Section 8(a)(1) by threatening employees with reprisals for protected activity and maintaining its confidentiality and solicitation and distribution rules, and modified the judge's remedy to order MasTec to post a notice regarding the unlawful rules at all MasTec locations nationwide. (APPX066 nn.1 & 2, 072.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Relationship Between the Technicians' Employer, MasTec, and DirecTV

DirecTV, Inc. provides satellite television programming throughout the United States. It has a contractual arrangement with MasTec Advanced Technologies ("MasTec"), an infrastructure company that installs and maintains satellite-television systems. (APPX066, 078-79; APPX120, 159-60, 384-428.)

Pursuant to that contract, MasTec installs, upgrades, and maintains the hardware necessary to deliver DirecTV's programming, receiving fees from DirecTV on a per service basis. (APPX066; APPX092-93, 119-22, 191, 384-428.) MasTec provides these services in several different geographical regions, completing about 30 percent of all such work for DirecTV nationally. (APPX079; APPX095, 119.) In 2006, MasTec employed about 100 technicians at its facility in

Orlando, Florida. (APPX079; APPX134.) At that office, MasTec's only client was DirecTV. (APPX066, 078-79; APPX093, 097, 134-35.)

The contract between DirecTV and MasTec stipulates many of the aspects of service that MasTec is to perform. Among others, MasTec technicians must wear uniforms and drive vans emblazoned with DirecTV's logo. (APPX067 n.8, 079; APPX093, 406-07.) Should MasTec fail to meet DirecTV's performance standards, the contract permits DirecTV to remove its work from MasTec, either in a particular territory or entirely. (APPX066, 079; APPX130, 145-46, 384-428.)

B. "Responding" vs. "Non-responding" Satellite Receivers

DirecTV also contractually requires MasTec technicians to connect each DirecTV satellite system – or "receiver" – to an active telephone line. (APPX066, 079; APPX135, 384-428.) DirecTV designates receivers connected to telephone lines "responders," because they can send information to DirecTV via the phone lines; receivers *sans* telephone line hook-ups are termed "non-responders." (APPX080; APPX135-36.)

Regardless whether a receiver is a "responder" or "non-responder," it can display DirecTV satellite television programming. (APPX066 & n.4, 080; APPX099.) Nevertheless, DirecTV prefers for the receiver to be connected to a telephone line because it permits DirecTV to monitor the viewing choices of its customers. (APPX066, 080; APPX099, 132, 339.) Responding receivers also

exhibit additional functionality that non-responders do not, such as the ability to download software upgrades, to display caller-ID information on the television screen, and to order pay-per-view programming using a remote control.

(APPX066, 080; APPX098-99, 124, 340-42.) DirecTV customers with non-responding receivers must make a phone call before they can purchase and watch pay-per-view programming. (APPX066, 080; APPX099, 340-42.)

Despite the purported benefits of connecting a telephone line to the DirecTV receiver, some DirecTV customers refuse connecting the receiver to their telephone line or manually disconnect the telephone line after it has been installed. Customers refuse to allow the connection of a telephone line for a number of reasons, including the desire to prevent children from ordering pay-per-view programs and to avoid the sight of exposed telephone lines trailing from the telephone jack to the receiver. (APPX067, 080-81; APPX189, 193-94, 321, 373.) With regard to this last reason, telephone lines can be concealed, and MasTec offers customers the option of installing a wireless phone jack or “fishing” a telephone line behind a wall. These two options cost the customer additional money, however: respectively, fees of \$50 or \$52.50 per telephone line, as laid out in a MasTec worksheet for custom work. (APPX066, 079-80; APPX509.) Other customers simply do not have functioning telephone lines. (APPX067; APPX189, 260, 271.)

C. DirecTV Criticizes MasTec's Performance Under the Contract; MasTec Institutes a New Charge-back Policy To Incentivize Telephone Connections; MasTec Technicians Object to the New Pay Policy and Air Their Grievance to Management

In early 2006, DirecTV informed MasTec that the responder rate (the percentage of receivers installed that responded to telephone-connectivity tests) in the Orlando area was unacceptably low. (APPX067, 080; APPX167-69, 350-51, 438-39.) Specifically, DirecTV informed MasTec that it would charge \$5 for each non-responder if MasTec did not achieve a 53-percent responder rate. (APPX067, 080; APPX138, 169.)

In direct response, MasTec announced that it would impose a new "charge-back" policy on its technicians, incentivizing the installation of more responders and fewer non-responders. (APPX067, 080; APPX140-41, 169-71, 192-93, 438-39.) Technicians' pay was already calculated on a piecework basis. Effective February 1, 2006, MasTec would continue to pay technicians on a per-installation basis, but it would pay \$2 less per receiver installed and \$3.35 more for responder installed. Moreover, should a technician's responder rate fall below 50 percent during a 30-day period, MasTec would back-charge the technician \$5 for every non-responder installed during that period. Any technician who failed to achieve a 50-percent responder rate for 60 consecutive days would be subject to termination. (APPX067, 080; APPX139, 169-70, 438-39.)

MasTec presented the new charge-back policy at a series of meetings in which its supervisors and managers discussed the new policy with the technicians. (APPX067, 081; APPX193, 208, 218-21, 233, 240, 323, 352-53). From the outset, the technicians strongly objected to the policy. The technicians asserted that they could not control their responder rates and would have difficulty meeting the 50-percent threshold because of issues beyond their control. In explaining the sources of difficulty to management, the technicians highlighted the absence of active telephone lines in some homes as well as customers' reasons for refusing a telephone connections, including the parental, aesthetic, and cost concerns mentioned above.² (APPX067, 080-81; APPX131-32, 189, 193-94, 221-22, 260, 270-71, 298-99, 321, 373.)

MasTec's supervisors and management responded to the technicians' concerns by suggesting various solutions. Some of these solutions included emphasizing to the customer the benefits of regular software updates or the display of caller-ID on their television screen. (APPX081; APPX318-19, 429-31.) Other suggestions included disregarding the customer's preference: supervisors told the technicians to connect the telephone line without consulting with the customer or to hardwire the connection, so that customers would have difficulty disconnecting the telephone line on their own. (APPX067, 081; APPX169, 194, 220, 318-19,

² See p. 7, *supra*.

346-49.) Some MasTec supervisors even advised technicians to inform customers, falsely, that the receivers would not work without a telephone connection.

(APPX067; APPX319-20, 324.) MasTec Operations Manager Christopher Brown instructed technicians to tell customers “whatever you have to tell them” and “whatever it takes” to hook up the telephone lines. (APPX067, 081; APPX223, 260-61, 269, 279, 303-04, 324, 335.) He also told the technicians that they should warn customers that the receivers would “blow up” if not connected to a telephone line. (APPX067; APPX194-95.) Chris Brown uttered this comment “in jest,” and at least several of the technicians understood it as such, though not all. (APPX067, 081; APPX194-95, 204-05, 261, 327.)

MasTec also showed technicians a video filmed by DirecTV, in which two DirecTV vice presidents – Scott Brown and Stephen Crawford – appeared. Crawford began his remarks by informing the technicians that their new work rules stemmed from DirecTV, not MasTec: “don’t blame your manager, don’t blame your owner of your company, don’t blame your supervisor. I am the guy putting pressure on the enterprise to get phone lines installed.” (APPX081; APPX429-31.) Scott Brown and Crawford then suggested similar techniques for increasing the number of responders installed, including hooking up the telephone line without informing the customer, and telling customers, falsely, that a telephone connection

was “mandatory” and necessary “for the equipment to function correctly.”

(APPX067, 081; APPX100-09, 192, 429-31.)

D. The Technicians Protest the Charge-Back Policy in the Orlando Parking Lot; MasTec Refuses To Change Its Policy

On a Friday in late March 2006, the MasTec technicians received their first paychecks containing deductions under the new charge-back policy. (APPX067, 081; APPX171, 195, 224.) Technician Delroy Harrison lost \$405 in one pay period, owing to the new charge-back policy. (APPX081; APPX293-94.)

The following Monday, March 27, a large group of technicians gathered in the Orlando-facility parking lot to express their dissatisfaction. They spoke at length with Supervisor Villa, and then with MasTec Manager Chris Brown, who arrived later, reiterating many of the concerns they had raised in previous meetings. (APPX067, 081; APPX195-96, 209-10, 214, 224-25, 234, 273, 357-59.) Brown eventually ordered them back to work, promising to meet with them again the following day with some answers to their questions and with a method for tracking their responder rates as they worked. (APPX081; APPX196, 202, 223, 262-63.)

The next day, a number of technicians gathered once more in the parking lot. Brown met with them, distributed a tracking sheet, and then ordered them back to work. (APPX082; APPX210, 226, 263, 274.) Although MasTec corrected clerical

errors it had made in calculating a few of the technicians' back charges, it made clear that it would not rescind the new policy. (APPX067; APPX362-63.)

E. The Technicians Take Their Objections to Channel 6

Frustrated by MasTec's response, a group of technicians discussed taking their complaints to the media, in hopes of persuading MasTec to reconsider. (APPX067, 082; APPX227-28, 235, 265, 276, 295, 301.) Technician Frank Martinez set up a meeting with Nancy Alvarez, an investigative reporter for WKMG-TV Channel 6 ("Channel 6"), on the morning of March 30. (APPX067, 082; APPX230-31, 248, 265.) That morning, rather than starting their routes, he and 27 other technicians drove their company vans from MasTec's facility to the Channel 6 studio. (APPX067, 082; APPX249-51, 286, 310-12.)

They met Alvarez in the parking lot. (APPX067, 082; APPX249-51, 313-14.) Alvarez invited the technicians into the studio, where she interviewed them on camera as a group. (APPX067-68, 082; APPX249-51, 278-79, 313-14.) After hearing a rumor that the technicians were talking to Channel 6, MasTec manager Brown and supervisor Villa drove by the Channel 6 parking lot, where they saw the technicians and their company vans. (APPX082; APPX197-98.)

After interviewing the technicians, Alvarez reached out to DirecTV and MasTec, seeking a response to the statements made by the technicians, but both DirecTV and MasTec refused to provide any interviews to Alvarez. (APPX082-

83; APPX432, 512.) Instead, the two companies chose to provide Alvarez with written statements. MasTec's written statement explained the charge-back policy in detail. (APPX083; APPX512.) DirecTV's statement announced, among other things, that "[w]e fully endorse MasTec's plan to provide incentives for technicians to install the required phone line connection so our customers can enjoy the full complement of DirecTV services." (APPX083; APPX110, 432.)

Apart from the group interview they gave Alvarez on March 30, the technicians provided no additional input to Alvarez or Channel 6. Likewise, Alvarez did not review the content of the newscast with the technicians nor give them the opportunity to see the newscast before it aired. (APPX071 n.12; APPX257, 291, 334.)

F. The Channel 6 News Report Aired

On April 28, Channel 6 first aired a "teaser" advertisement of Alvarez's report. (APPX068, 083; APPX180-82, 514-21.) The advertisement alternated between a voice-over and video footage of an interview with one of the MasTec technicians:

Voice-over: Why did over 20 employees of a major company show up at Local 6?

Interviewer: So you've basically been told to lie to customers?

Technician: Yeah.

Voice-over: . . . to tell the Problem Solvers about a dirty little secret

Technician: Tell the customer whatever you have to tell them.

Voice-over: . . . that may be costing you money.

MasTec manager Christopher Brown saw the teaser advertisement and alerted his supervisors, who instructed him to record the upcoming newscast. (APPX068-69, 084; APPX176-77, 368.) Brown recorded and distributed the full newscast, which aired on May 1 and is as follows:

News Anchor 1: Only on 6 . . . a problem solver investigation with a bit of a twist . . . this time they came to us.

News Anchor 2: Yeah . . . technicians who have installed hundreds of DirecTV satellite systems across Central Florida . . . they're talking about a company policy that charges you for something you may not ever use. And as problem solver Nancy Alvarez found, if you don't pay for it, the workers do.

Reporter Alvarez: They arrived at our Local 6 studios in droves. DirecTV trucks packed the parking lot and inside the technicians spoke their minds. (accompanying video showed more than 16 DirecTV vans in the parking lot followed by a shot panning a group of technicians wearing shirts bearing the DirecTV logo).

<The scene shifts to a room where more than 20 technicians were seated, facing Alvarez.>

Technician Lee Selby: We're just asking to be treated fairly.

Alvarez: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

Technician Hugh Fowler: If we don't lie to the customers, we get back charged for it. And you can't make money.

Alvarez: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

Alvarez: So it's a convenience

Technician Frank Martinez: It's more of a convenience than anything else

Alvarez: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been putting pressure on them. Deducting five bucks from their paychecks for every DirecTV receiver that's not connected to a phone line.

Martinez: We go to a home that . . . needs three . . . three receivers that's . . . fifteen dollars.

Alvarez: Throw in dozens of homes every week and the losses are adding up fast.

Alvarez (questioning a room full of technicians): How many of you here by a show of hands have had \$200 taken out of your paycheck?
(Accompanying video shows virtually every technician in the room raising his hand.)

Martinez: More.

Alvarez (reporting): Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.

Martinez: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.

Alvarez (interviewing): You've been told to tell customers that

Martinez: We've been told to say that. Whatever it takes to get the phone line into that receiver.

Alvarez (reporting): That lie could cost customers big money . . . the fee to have a phone line installed could be as high as \$52.00 per room

<text flashes on the screen stating: “Wall Fish – 52.50 (per floor or wall)”>

Alvarez (reporting): Want a wireless phone jack? That will cost you another 50 bucks.

<text flashes on the screen stating: “Wireless Phone Jack – \$ 49.99 (transmit and receive set)”>

Alvarez (shown outside Respondent’s Orlando office attempting to speak to Villa): We’re hoping to talk to you guys about some concerns raised by your employees

Villa: Sorry . . . guys, I need you to walk out of the office; this is a private office.

Alvarez (reporting): The bosses at MasTec’s Orlando office did not want to comment.

Alvarez (seen attempting to interview Villa): We have employees saying that you asked them to lie

Villa: Please . . . thank you

Alvarez: . . . to customers. Is that true? <Alvarez and camera crew are ushered out of the office.>

Alvarez (reporting): But statements from their corporate office and from DirecTV make it clear the policy of deducting money from employees’ paychecks will continue. A DirecTV spokesman said techs who don’t hook up phone lines are quote ‘denying customers the full benefit and function of their DirecTV system.’ These men disagree and say the policy has done nothing but create an environment where lying to customers is part of the job.

Alvarez (interviewing): It’s either lie or lose money.

Technician Sebastian Eriste: We don't have a choice.

Alvarez (reporting): Now . . . during our investigation, MasTec decided to reimburse money to some techs who had met a certain quota but the policy continues and one reason could be that DirecTV does keep track of their customers' viewing habits through those phone lines. Now just last year, DirecTV paid out a \$5 million settlement with Florida and 21 other states for deceptive practices and now, because of our story, the attorney general's office is looking into this newest issue so we'll, of course, keep you posted.

News Anchor 2: You think they would have learned the first time.

Alvarez: You think so. We'll see what happens.

News Anchor 2: Thank you, Nancy.

(APPX068, 083-84; APPX111-16, 433.) Over the next two days, slightly different versions of the report aired on Channel 6. (APPX068, 083-84; APPX176, 434-36.)

G. After DirecTV Refuses To Allow Technicians Shown on Channel 6 Report To Perform DirecTV Work in Customers' Homes, MasTec Discharges Them

MasTec Vice-President Mark Retherford forwarded the recorded video of the broadcast to Crawford and others at DirecTV. (APPX069, 084; APPX143, 183.) Crawford and Retherford discussed the broadcast, which they believed misrepresented the facts of the technicians' situation. During their conversation, Crawford informed Retherford that he did not want any technician who had appeared on the broadcast to represent DirecTV in customers' homes. (APPX069, 084; APPX117-18, 126-28, 129, 144-46, 148-49, 151, 183-85, 187-88.)

Retherford directed MasTec manager Christopher Brown to identify all of the technicians visible on the video; and then, on May 2, ordered Brown to fire each of them. (APPX069, 084; APPX143-44, 186, 198, 370-71, 372.) He made the termination decision solely on the basis of the technicians' appearance on the show. (APPX084; APPX146-49, 156-58.)

Acting under orders from Brown, Villa fired 26 MasTec technicians on or about May 3.³ (APPX069, 084-85; APPX155-58, 199-200, 211-12, 229, 244, 296, 381-83, 440-65.) Retherford specified that each technician be told that his termination was "at will," and that no other rationale be provided for the discharges. (APPX069, 084; APPX149, 178, 199, 229, 382.)

DirecTV's Crawford sent Retherford emails inquiring of the status of the technicians, including one email in which Crawford asked "of the 30 or so techs on the show are they all still employed?" (APPX084 n.16; APPX437.) MasTec kept DirecTV informed of his progress in dealing with the technicians who had appeared on Channel 6. (APPX086; APPX118, 503-04.)

³ Those 26 employees include: Jouvani Alicea, Marlon Binet, Christopher Creary, Leroy Davis, Donovan Edwards, Sebastian Eriste, Hugh Fowler, Joseph Guest, Delroy Harrison, James Hehmann, Mark Hemann, Michael Hermit, Federico Hoy, Fernando Hoy, Ariel Kelly, Shervoy Lopez, Ricardo Perlaza, Sergio Pitta, Noel Rodriguez, Rudy Rodriguez, Fernando Sando, Olmy Talent, Diego Velez, Nerio Vera, Ralph Wilson, and Carlos Zambrano. Due to vacations or other absences, a few technicians who appeared in the video were fired at a later date. Brown ultimately decided, without consulting Retherford, not to fire one of the technicians who was away on May 3 because MasTec was so short-handed after firing the others. (APPX085; APPX152-53, 200-01, 206.)

H. Supervisor Muniz Threatens Employee Perlaza

Meanwhile, on May 2, before any employees were fired, Supervisor Noel Muniz called one of his supervisees, technician Ricardo Perlaza and asked if Perlaza had anything to do with the Channel 6 story. (APPX085; APPX325-26, 332.) Perlaza responded that he had participated in the broadcast, and Muniz asked him why. Perlaza explained that he did not agree with the new charge-back policy. (APPX085; APPX326.) Muniz then told Perlaza that he “was not supposed to do that” and related the story of a MasTec facility in New Jersey, where the employees had attempted to do the same thing and, in response, MasTec had shut down the facility. (APPX085; APPX326.) Muniz advised Perlaza to call manager Chris Brown, apologize, and tell Brown that Perlaza did not know the consequences of going to Channel 6. (APPX085; APPX326.) If Perlaza did not do this, Muniz warned, “there’s going to be a lot of trouble for everybody, whoever’s involved in this.” (APPX085; APPX326.)

I. MasTec’s Confidentiality, Solicitation, and Distribution Policies

The MasTec Employee Handbook – effective in MasTec facilities nationwide in March 2006 – provided extensive prohibitions on the dissemination of confidential information, regardless of an employee’s purpose:

In the handling of all Confidential Information, [employees] must not communicate such information to anyone, inside or outside the Company . . . , except on a strict “need-to-know” basis and under circumstances that make it reasonable to believe that the information

will not be used or misused or improperly disclosed by the recipient. [Employees] must be careful to avoid discussing Confidential Information in any place . . . where such information may be heard or seen by others

(APPX078; APPX466-502.) In addition, the Handbook broadly prohibited employees from “us[ing] Confidential Information . . . to personally benefit himself, herself, or others.” (APPX078; APPX153, 466-502.) As used in the Handbook, “Confidential Information” included “any documents, knowledge, data or other information relating to . . . (6) the identity of and compensation paid to” MasTec employees. (APPX078; APPX153, 466-502.)

The MasTec Handbook additionally contained a “solicitation” provision, barring solicitation of contributions “on company property without the permission of the supervisor or Division manager.” As “EXAMPLES OF VIOLATIONS CAUSING IMMEDIATE TERMINATION,” the Handbook listed both “[u]nauthorized distribution of written or printed matter,” and “[u]nauthorized solicitations or collections.” (APPX078; APPX466-502.)

Some time after terminating the 26 technicians, MasTec revised these provisions in its Handbook. (APPX079; APPX154, 522, 523.) MasTec did not present specific evidence at the hearing, however, that it communicated those revisions to its employees, that its employees understood that these provisions had been rescinded, or that it told its employees that they were free to engage in protected activity at the appropriate times and places. (APPX079.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board found, in agreement with the administrative law judge, that MasTec had violated Section 8(a)(1) by: threatening employees, through Supervisor Muniz, with facility closure and other unspecified reprisals for engaging in protected concerted activity; maintaining a confidentiality policy that interferes with, restrains, and coerces its employees in their exercise of their rights under the Act; and maintaining an overly broad solicitation and distribution rule that required its employees to obtain permission before engaging in protected concerted activity. (APPX072, 078-79, 086.)

Contrary to the judge, the Board found that MasTec violated Section 8(a)(1) of the Act by discharging 26 technicians for engaging in protected concerted activity that was directly related to and in furtherance of their ongoing labor dispute. In so finding, the Board concluded that the technicians' participation in the newscast and/or their statements were not so disloyal or maliciously untrue as to warrant removal of the Act's protection. (APPX070-72.) The Board further agreed with the judge that DirecTV attempted to cause and did cause MasTec to terminate these 26 MasTec employees on the basis of their participation in this concerted activity.

To remedy the unfair labor practices of MasTec, the Board's Order requires MasTec to cease and desist from the unfair labor practices found and from, in any

like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the Order requires MasTec to offer reinstatement to the 26 terminated employees; to make them whole for any loss of earnings or benefits suffered as a result of their wrongful termination, jointly and severally with DirecTV; to remove from its files any reference to the wrongful discharge of these employees and to notify them that this has been done and that the discharges will not be used against them in any case; to rescind its confidentiality policy and solicitation and distribution rules, such as they existed in March 2006; to notify its employees that the employee handbook that existed in March 2006 has been rescinded and will no longer be enforced; and to post remedial notices, both at its Orlando facility and at all its other facilities. (APPX073.)

To remedy the unfair labor practices of DirecTV, the Board's Order requires DirecTV to cease and desist from causing the termination or otherwise discriminating against any employee for engaging in protected concerted activity and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. Affirmatively, the Order requires DirecTV to make the 26 MasTec employees whole for any loss of earnings or benefits suffered as a result of their wrongful

termination, jointly and severally with MasTec; and to sign remedial notices that are to be posted at MasTec's Orlando facility. (APPX073-74.)

SUMMARY OF ARGUMENT

The Board found MasTec to have violated Section 8(a)(1) of the Act by threatening its employees with retaliation for their protected concerted activities as well as for maintaining certain restrictive workplace policies. MasTec did not challenge these findings before the Board; consequently, MasTec could not and does not challenge them before this Court, and those findings should be summarily enforced.

In this proceeding, the Companies solely contest the Board's additional finding that MasTec and DirecTV violated Section 8(a)(1) by terminating – or, in the case of DirecTV, causing the termination of – 26 MasTec employees who exercised their rights under the Act by participating in a television newscast.

Substantial evidence supports this finding by the Board. In 2006, MasTec implemented a new pay policy that penalized its technicians when they did not connect customers' telephone land lines to newly installed DirecTV satellite television receivers. Its technicians made clear that they found the new policy unfair, since it penalized them for occurrences out of their control, but MasTec refused to alter its new policy. Instead, it instructed the technicians that they could connect more telephone lines by telling customers various untruths. After two

months of fruitlessly discussing the policy with MasTec, which refused to yield, the technicians gave an interview to a local TV news station, explaining their grievance. When the newscast aired, DirecTV exerted its influence over MasTec to discharge the technicians. MasTec promptly complied.

The Companies attempt to justify these terminations by characterizing the technicians' statements to the local news station as "maliciously untrue" and "so disloyal" as to lose the protection of the Act. In so arguing, the Companies improperly denigrate a legitimate public appeal made by employees seeking to explain their grievance to a larger audience.

Applying the well-settled *Mountain Shadows Golf*⁴ test, the Board reasonably found that the Companies failed to meet their burden of proving that the technicians' statements lost the Act's protection. Those statements, which concerned a pay policy that the technicians considered unfair, were clearly "related to an ongoing labor dispute," a finding that the Companies do not contest. Substantial evidence also supports the Board's finding that the technicians' statements to the news station were not "maliciously untrue." In fact, those statements were truthful, as can be seen once the Companies' spin is cleared away; and in any event, there is no evidence showing that the technicians deliberately or

⁴ *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000) (and cases cited), *supplemented by* 338 NLRB 531 (2002), *aff'd sub nom. Jensen v. NLRB*, 86 Fed. App'x 305 (9th Cir. 2004).

recklessly uttered falsehoods to Channel 6. And finally, the technicians' statements were not "so disloyal" as to lose the protection of the Act. The technicians' statements focused tightly upon their legitimate grievance without straying into disparagement of their employer. Contrary to the Companies, the decisions in *Jefferson Standard*⁵ and *Endicott*⁶ are distinguishable, and do not undermine the Board's finding in this case.

For these reasons, the Court should enforce the Board's finding that MasTec & DirecTV violated Section 8(a)(1) by, respectively, terminating or causing the termination of the 26 technicians who participated in the newscast.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law."⁷ The legal conclusion that Section 7 of the Act

⁵ *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953) ("*Jefferson Standard*").

⁶ *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006).

⁷ *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001); *see also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts.") (citation omitted).

protects employee activities “implicates [the Board’s] expertise in labor relations.”⁸ Reviewing courts accordingly grant additional deference to such determinations.⁹ When the Board and the administrative law judge disagree as to a legal issue, this standard of review “is not modified in any way.”¹⁰ The Board is “free to draw its own conclusions” whether conduct is protected by Section 7 of the Act when it reviews the evidence presented to the administrative law judge.¹¹

The Board’s findings of fact are conclusive if supported by substantial evidence in the record considered as a whole.¹² Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.”¹³

⁸ *Citizens Inv. Svcs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)).

⁹ *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982) (“[P]rimary responsibility for drawing the line between protected and unprotected activity falls on the Board.”). *Accord Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 54 (1st Cir. 2008); *NLRB v. Parr Lance Ambulance Serv.*, 723 F.2d 575, 577 (7th Cir. 1983) (“We will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is ‘illogical or arbitrary.’”)

¹⁰ *NLRB v. So-White Freight Lines*, 969 F.2d 401, 405 (7th Cir. 1992).

¹¹ *Cheney Cal. Lumber Co. v. NLRB*, 319 F.2d 375, 377 (9th Cir. 1973). *See also Local 65-B, Graphic Communications Conference v. NLRB*, 572 F.3d 342, 349 (7th Cir. 2009) (affirming Board’s decision to overrule administrative law judge because “[t]he ALJ and the Board simply disagree about what conclusion to draw from the same piece of testimony”).

¹² 29 U.S.C. § 160(e). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Citizens Inv. Svcs.*, 430 F.3d at 1198.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTION OF ITS ORDER REMEDYING MASTEC'S THREE UNCONTESTED UNFAIR LABOR PRACTICES

The Board found that MasTec threatened its employees and maintained workplace policies in a manner that violated Section 8(a)(1) of the Act (APPX066 & n.2). On May 2, 2006, Supervisor Muniz told Technician Ricardo Perlaza that MasTec had closed a New Jersey facility after employees there had similarly protested MasTec's charge-back policy. Muniz further told Perlaza that he should apologize to MasTec Manager Chris Brown for having spoken to Channel 6; otherwise, "there's going to be a lot of trouble for everybody, whoever's involved in this." (APPX066 n.2, 086; APPX326.) The Board found these statements would reasonably tend to interfere, restrain, and coerce employees in the exercise of their rights under the Act, in violation of Section 8(a)(1) (APPX066 n.2).¹⁴ The Board additionally found that MasTec violated Section 8(a)(1) by maintaining a confidentiality policy that interfered with, restrained, and coerced its employees in

¹³ *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion.").

¹⁴ *Citing Grouse Mtn. Lodge*, 333 NLRB 1322, 1324-25 (2001).

the exercise of their rights under the Act (APPX066, 079; APPX466-502),¹⁵ and by maintaining an overly broad work rule concerning solicitation and distribution that required employees to secure permission before engaging in protected concerted activity. (APPX066, 079; APPX466-502.)¹⁶

On review, MasTec neither challenges these violations nor could challenge them. MasTec did not object to these violations in any exceptions filed with the Board; the Court is therefore jurisdictionally barred from considering any challenge to those violations.¹⁷ Accordingly, the Board is entitled to summary enforcement of the portions of its Order remedying these violations.¹⁸

¹⁵ *Citing Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

¹⁶ *Citing Tele Tech Holdings, Inc.*, 333 NLRB 402, 403 (2001).

¹⁷ *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982). *Accord S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012); *see also Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (requiring that a party specifically urge its claim to the Board to preserve it for judicial review).

¹⁸ *See, e.g., Allied Mechanical Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT MASTEC AND DIRECTV VIOLATED SECTION 8(a)(1) OF THE ACT BY TERMINATING AND CAUSING THE TERMINATION OF, RESPECTIVELY, 26 MASTEC TECHNICIANS FOR PARTICIPATING IN A TELEVISION NEWSCAST EXPRESSLY RELATED TO AN ONGOING LABOR DISPUTE

A. An Employer Violates Section 8(a)(1) of the Act by Terminating or Causing the Termination of Employees for Engaging in Protected, Concerted Activities

Section 7 of the Act guarantees employees the right to engage in protected, concerted activities, not only for the purposes of “self-organization” and “collective bargaining,” but also “for the purpose of . . . other mutual aid or protection.”¹⁹ To give teeth to Section 7’s guarantees, Congress enacted Section 8(a)(1),²⁰ which generally prohibits “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of” Section 7 rights.²¹ “Accordingly, an employer violates Section 8(a)(1) by discharging an employee for engaging in concerted activities protected by the Act.”²² An employer also violates Section 8(a)(1) by directing another employer with whom it has business dealings to discharge the

¹⁹ 29 U.S.C. § 157.

²⁰ 29 U.S.C. § 158(a)(1).

²¹ *Id.*

²² *Citizens Inv. Servs.*, 430 F.3d at 1197. *See also Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir.1994).

latter's employees because of their protected concerted activity.²³

Section 7 of the Act “extend[s] beyond formal union activities and include[s] concerted activities of the type engaged in here, where the employees found it necessary to present their demands as a group in order to secure relief from intolerable working conditions.”²⁴ In fact, “the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’”²⁵

Employees’ rights under Section 7 also include the right to appeal to third-

²³ See *Int’l Shipping Ass’n*, 297 NLRB 1059, 1059 (1990) (“The Board consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.”). See also *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 857 (5th Cir. 2002); *Dews Constr. Co.*, 231 NLRB 182, 182 n.4 (1977), enforced 578 F.2d 1374 (3d Cir. 1978); *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975); *Fabric Servs., Inc.*, 190 NLRB 540, 541-42 (1971).

²⁴ *Dist. 65, Distributive Workers of Am. v. NLRB*, 593 F.2d 1155, 1166 (D.C. Cir. 1978) (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962)). See also *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1099 (D.C. Cir. 2001) (“Both union and nonunion employees fall under the protections of § 7 of the Act.”).

²⁵ *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

parties for support in a labor dispute.²⁶ “[L]abor’s cause often is advanced on fronts other than [those] within the immediate employment context,” as the Supreme Court recognized in *Eastex, Inc. v. NLRB*.²⁷ “To hold that activity of this nature is entirely unprotected – irrespective of location or the means employed – would leave employees open to retaliation for much legitimate activity that could improve their lot as employees.”²⁸ Inherent in employees’ right to publicly air their grievances is the right to tailor their message to the concerns of the intended audience. As the Ninth Circuit noted, “[i]f unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers’ undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.”²⁹

²⁶ See, e.g., *NLRB v. Mt. Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982); *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 813-14 (2d Cir. 1980) (employees’ submission of critical report to accreditation committee was “for mutual aid and protection” because it raised “issues directly related to employee working conditions” (citation omitted)); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007) (employee’s appeals for public support in a newspaper article were protected), *enforced sub. nom. Nevada SEIU Local 1107 v. NLRB*, 358 Fed. App’x 783 (9th Cir. 2009).

²⁷ 437 U.S. 556, 565 (1978).

²⁸ *Id.* at 566-67.

²⁹ *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989).

Employers may very well consider such public appeals by their employees to be harmful or disloyal; this is not dispositive of the question whether the Act protects such activities, however. “[T]he fact that an employee’s actions may cause some harm to the employer does not alone render them disloyal.”³⁰ “To hold otherwise would be to render meaningless the rights guaranteed to employees by § 7.”³¹ “Indeed, were harm or potential harm to the employer to be the determining factor in the Court’s § 7 protection analysis, it is doubtful that the legislative purposes of the Act would ever be realized.”³²

³⁰ *Mohave Elec. Coop. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (citing *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 953 (7th Cir. 1976)). *See also Sierra Publ’g Co.*, 889 F.2d at 219 n.14 (“Concerted activity that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer.”) (quoting *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1979)); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942) (L. Hand, J.) (“[A] union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side. Such activities may be highly prejudicial to its employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him.”).

³¹ *Miscericordia Hosp. Med. Ctr.*, 623 F.2d at 815 (quoting *Circle Bindery, Inc.*, 536 F.2d at 452). *See also Sierra Publ’g Co.*, 889 F.2d at 219 n.14 (same).

³² *Five Star Transp. Inc. v. NLRB*, 522 F.3d 46, 53-54 (1st Cir. 2008).

At the same time, the Supreme Court set limits to the kinds of public appeals protected by the Act in its *Jefferson Standard* decision.³³ In that case, although the employees were engaged in a collective-bargaining dispute with their employer, they distributed handbills criticizing “the quality of the company’s product and its business policies” – handbills that failed to make any mention of the labor dispute.³⁴ The Supreme Court ruled that the handbills constituted “a sharp, public, and disparaging attack” that “had no discernible relationship to [the labor] controversy,” and therefore were not protected by the Act.³⁵

Assimilating the Supreme Court’s holding, the Board subsequently formulated a two-pronged test to identify the circumstances under which employee public appeals lose the protection of the Act. In *Mountain Shadows Golf*, the Board recently re-articulated this standard: “employee communications to third parties in an effort to obtain their support are protected where [1] the communication indicated it is related to an ongoing dispute between the employees and the employers and [2] the communication is not so disloyal, reckless or maliciously

³³ *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464 (1953) (“*Jefferson Standard*”).

³⁴ *Jefferson Standard*, 346 U.S. at 471.

³⁵ *Id.* at 471, 476.

untrue as to lose the Act's protection."³⁶ According to this Court, "the Board's formulation accurately reflects the holding in *Jefferson Standard*."³⁷

Applying this test, the Board has held that "the Act protects employees against employer reprisals when they . . . in one way or another denounce their employer for his conduct of . . . affairs germane to the employment relationship."³⁸ Put another way, employee criticism is protected if it "concern[s] primarily working conditions and . . . avoid[s] needlessly tarnishing the [employer's] image."³⁹ Under this approach, criticism that is "flagrantly disloyal" and "wholly incommensurate with any grievances which [employees] may have" remains unprotected.⁴⁰ But "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues."⁴¹

³⁶ *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000) (and cases cited), *supplemented by* 338 NLRB 531 (2002), *aff'd sub nom. Jensen v. NLRB*, 86 Fed. App'x 305 (9th Cir. 2004).

³⁷ *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (citing *Mountain Shadows*, 330 NLRB 1238 (2000)).

³⁸ *Philander Smith College*, 246 NLRB 499, 507 (1979) (quoting *Jefferson Standard Broad. Co.*, 94 NLRB 1507, 1511-12 (1951), *aff'd sub. nom. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 471 (1953)).

³⁹ *NLRB v. Mt. Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982).

⁴⁰ *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978).

⁴¹ *Allied Aviation Serv. Co. of N.J.*, 248 NLRB 229, 231 (1980), *enforced* 636 F.2d 1210 (3d Cir. 1980). *See also Sierra Publ'g Co.*, 889 F.2d at 217 ("[T]he

This approach taken by the Board – in which some measure of employee disloyalty is tolerated so long as it is reasonably related to the employees’ legitimate concerted aims – has been approved by the Courts of Appeal⁴² and accords with Supreme Court precedent in this area.⁴³

effect of *Jefferson Standard* was not to equate every critical comment with unprotected disloyalty.”).

⁴² See *Five Star Transp.*, 522 F.3d at 54 (enforcing Board decision that “found the discriminatees to be protected because their letters primarily addressed employment-related concerns and did not disparage Five Star” and that found “[a]nother group of drivers . . . unprotected . . . because . . . their letters [] primarily address . . . non-employment related concerns”); *NLRB v. Mt. Desert Island Hosp.*, 695 F.2d 634, 641 (1st Cir. 1982) (holding that employee’s third-party appeal was protected because his “criticism of the Hospital’s administration was intertwined inextricably with complaints of working conditions” and because the employee “published his letter in a spirit of loyal opposition – not out of malice or anger”); *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (employees’ submission of critical report to accreditation committee was “for mutual aid and protection” because it raised “issues directly related to employee working conditions”) (citation omitted); *Cnty. Hosp. of Roanoke Valley v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (“We conclude that Weinman’s statements were not unprotected. As Hanley admitted, they were true, and unlike the statements found unprotected in [*Jefferson Standard*], they were directly related to protected concerted activities then in progress.”); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1253 (2007) (finding various statements made by employee protected because employee’s “intent was not to disparage or harm [her employer] but to pressure [her employer] to increase staffing and thereby improve nurses’ working conditions”), *enforced sub. nom. Nevada SEIU Local 1107 v. NLRB*, 358 Fed. App’x 783 (9th Cir. 2009).

⁴³ See *Misericordia Hosp. Med. Ctr.*, 623 F.2d at 814 (“[*Jefferson Standard*] is not authority for the proposition that a statement critical of an employer automatically provides grounds for discharging the speaker. As the Court later made clear, the rationale of [*Jefferson Standard*] was that the leaflets distributed there demonstrated a disloyalty to the employer ‘unnecessary to carry on the

B. By Respectively Terminating or Causing the Termination of the 26 Technicians on the Basis of Their Protected Activity, MasTec and DirecTV Violated Section 8(a)(1) of the Act

MasTec admittedly terminated 26 technicians on the basis of the statements they made to Channel 6 – statements that clearly formed part of the technicians’ concerted efforts to modify a new pay policy they believed to be unfair.

(APPX071, 072, 086.) There is no dispute that, if those statements constituted protected activity under the Act, MasTec violated Section 8(a)(1) of the Act by terminating the technicians⁴⁴ and the Board is entitled to enforcement of its Order against MasTec. Accordingly, as to MasTec, the issue before the Court is whether substantial evidence supports the Board’s finding that the technicians retained the protection of the Act when they made their statements to Channel 6.

The same goes for DirecTV. Provided that the technicians’ statements to Channel 6 retained the Act’s protection, the record amply supports the Board’s finding that DirecTV violated Section 8(a)(1) by causing MasTec to terminate the

workers’ legitimate concerted activities.’”) (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962)). See also *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 62 (1966) (explaining that statements made in the course of a labor dispute “are to be considered against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks”) (internal citations and quotation marks omitted).

⁴⁴ See 29 U.S.C. § 158(a)(1); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005).

technicians on the basis of those statements. (APPX072, 086.)⁴⁵ DirecTV Vice-President Crawford squarely instructed MasTec that none of the technicians who participated in the Channel 6 broadcast could install DirecTV receivers in customers' homes (APPX066, 078-79, 084; APPX117-18, 128) and then kept tabs on MasTec to ensure that it carried out his directive (APPX084 n.16; APPX437). MasTec promptly complied by discharging the 26 technicians shortly after speaking with Crawford, without interviewing them or investigating the grounds for their dismissal in any other way. (APPX084; APPX146-49, 156-58, 186.) Accordingly, if, as shown below, substantial evidence supports the Board's finding that the technicians' statements did not lose the Act's protection, the Board is entitled to enforcement of its Order against DirecTV as well.

C. The Board Found that the Technicians' Statements to Channel 6 Retained the Protection of the Act, and the Companies Have Failed To Show that Substantial Evidence Does Not Support this Conclusion

Substantial evidence supports the Board's finding that the technicians' statements to Channel 6 satisfied each of the prongs of the *Mountain Shadows Golf* test and thereby retained the protection of the Act: the statements clearly related to the technicians' pay dispute; were truthful concerning that dispute and, in any event, were not uttered with knowledge or reckless disregard of their falsity; and

⁴⁵ See pp. 29-30 & n.23, *supra*.

without exception remained germane to that pay dispute without needlessly tarnishing the Companies' reputations. MasTec and DirecTV do not dispute that the technicians' statements related to an ongoing labor dispute; instead, they defend themselves by arguing that the statements were "maliciously untrue" and "so disloyal" as to strip the technicians of the protection of the Act. In so arguing, the Companies reprise the same errors made by the administrative law judge, whom the Board correctly overturned. The Board did not err in finding that the decision to discharge the technicians on the basis of their concerted activity – a decision made by MasTec, at the instigation of DirecTV – violated Section 8(a)(1) of the Act. (APPX071.)

1. The technicians' statements to Channel 6 grew directly out of the labor dispute with their employer

In addressing the first prong of the *Mountain Shadows Golf* test, the Board agreed with the administrative law judge that "the employee communications here were clearly related to their pay dispute" (APPX070).⁴⁶ The Companies do not contest this finding; in any case, it is amply supported by the record.⁴⁷

The technicians' decision to speak to Channel 6 grew directly out of their labor dispute with MasTec. When MasTec announced its new pay policy in

⁴⁶ See *Mountain Shadows Golf Resort*, 330 NLRB at 1240.

⁴⁷ See *Five Star Transp.*, 522 F.3d at 53 (reviewing for substantial evidence Board's determination that there existed an ongoing labor dispute).

January 2006, its employees immediately joined together in raising their mutual concern that the policy penalized them for customer behavior outside their control. (APPX067, 080-81; APPX193-94, 208, 221-22, 260, 270-71, 298-99.)

When MasTec and DirecTV's management proposed solutions to address the problems created by the new policy, the scope of the technicians' grievance only widened. MasTec and DirecTV responded to the technicians' concerns by telling them that the best strategy for increasing their responder rates was to misrepresent to customers how the satellite systems functioned: the technicians should tell customers "whatever you have to tell them" and "whatever it takes" to hook-up the receiver to a land line (APPX067; APPX223, 260-61, 269, 303-04, 324). MasTec even went so far as to suggest that the technicians simply disregard the customers' desires by connecting the land line without permission or by hard-wiring the land line, so that the customer could not easily remove it (APPX081; APPX220). Rather than assuage the technicians' grievance, these proposals and suggestions added to their grievance: the technicians did not want to be penalized for low responder rates, but they also did not want to engage in what they believed to be dishonest practices with DirecTV customers. (APPX068-70; APPX280, 302-03, 324.)

For more than two months, the technicians continued to jointly express their criticism of MasTec's policy and twice gathered in MasTec's parking lot to protest

the charge-back policy. (APPX067, 082; APPX195-96, 209-10, 226.) But in the end, MasTec Manager Chris Brown merely handed the technicians a spreadsheet, so that they could track the number of “responders” they had installed, and told them they would be fired and replaced if they refused to do their work.

(APPX067, 082; APPX226, 274, 364.) Only at this point – after months of discussing the pay policy with management had produced no concession at all – did the technicians finally decide as a group to visit the Channel 6 studios (APPX067; APPX235, 295, 301), wearing the DirecTV uniforms and driving the DirecTV vans that their contract required them to (APPX067 n.8; APPX093, 384-428).

It is therefore manifestly incorrect to characterize the technicians’ statements as “a separable attack” on the Companies’ “product and institutional integrity.” (DirecTV Br. at 18, 19.) To the contrary, the evidence as found by the Board indicates that the technicians made every effort to confine their criticisms of the charge-back policy to the workplace and only resorted to Channel 6 after their grievance had been repeatedly ignored. (APPX071.)⁴⁸ The technicians also did not pretend to be disinterested parties. Throughout the broadcast, they made clear

⁴⁸ See, e.g., *Five Star Transp.*, 522 F.3d at 54 (finding union’s appeal to third-party “reasonably necessary to carry out their lawful aim” “because the Union had already contacted [the employer] in an effort to be recognized as the drivers’ bargaining representative, and [the employer] had ignored its advances”).

that their criticism of MasTec’s business practices grew out of their dispute over the new pay policy: “[i]f we don’t lie to the customers, we get back charged for it.” (APPX433-36.) In every respect, therefore, the technicians’ statements to Channel 6 “were clearly related to their pay dispute,”⁴⁹ (APPX070) as the Board correctly found.

2. The technicians’ statements to Channel 6 were neither “maliciously untrue” nor “so disloyal” as to lose the protection of the Act

a. The technicians’ statements to Channel 6 were truthful and, in any event, not uttered with knowledge or reckless disregard of their falsity

Reversing the administrative law judge, the Board found that the technicians did not make any “maliciously untrue” statements to Channel 6 and therefore retained the protection of Section 7 of the Act (APPX070). In defining the phrase “maliciously untrue,” the Board has used the same formulation as the Supreme Court in defining “actual malice”: namely, the protected nature of employees’ statements turns upon whether the statements were false and the employees made them “with knowledge that [they were] false or with reckless disregard of whether [they were] false or not.”⁵⁰ (APPX070.) The Board’s finding that statements were

⁴⁹ See *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).

⁵⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Compare with *Valley Hosp. Med Ctr.*, 351 NLRB 1250, 1252 (2007) (“Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of

not “maliciously untrue” is to be reviewed for substantial evidence.⁵¹

Both Companies object to this finding by the Board. (DirecTV Br. at 20-23; MasTec Br. at 28-32.) The Companies’ arguments do not provide grounds for rejecting the Board’s finding, however, because of two fundamental errors: first, the Companies fail to recognize the truth of many of the technicians’ statements; and second, they disregard the relevant standard, which requires not only that a speaker make a false statement but also that he know of or recklessly disregard its falsity. The Companies’ arguments thus reprise the erroneous reasoning of the administrative law judge, whose findings the Board correctly overturned. In fact, substantial evidence supports the Board’s conclusion that the technicians did not make “maliciously untrue” statements, and this conclusion should be upheld by the Court.

The Companies understandably dislike the tone and approach of the Channel 6 broadcast, which is critical of their business practices; but in the final analysis, they do not demonstrate that any statement made by the technicians was false. For example, the Companies strenuously object (MasTec Br. at 26) to the Board’s

their falsity or with reckless disregard for their truth or falsity.”), *enforced sub nom. Nevada SEIU Local 1107 v. NLRB*, 358 Fed. App’x 783, 785 (9th Cir. 2009).

⁵¹ *Nevada SEIU Local 1107*, 358 Fed. App’x at 785; *Jolliff v. NLRB*, 513 F.3d 600, 615, 617 (6th Cir. 2008); *NLRB v. Mt. Desert Island Hosp.*, 695 F.2d 634, 641 (1st Cir. 1982).

finding that “the technicians *were* essentially told to lie” (APPX070), but substantial evidence supports the Board’s finding that the technicians were told just that. When the technicians complained that customers were resistant to connecting phone lines to their DirecTV receivers, one MasTec supervisor instructed the technicians to tell customers that the receiver is “not going to work” without a phone line hook-up; similarly, DirecTV Vice-President Scott Brown lectured the technicians that they should tell customers that the phone line hook-up was “a mandatory part of the installation.” (APPX070; APPX324, 430-31.)

Plainly put, this was false counsel. It is not true that non-responders are “not going to work”: non-responding receivers still permitted customers to receive DirecTV programming and order pay-per-view programs over the phone or internet. Customers with non-responders only lacked certain ancillary features, such as the ability to order pay-per-view programs with the remote control, view caller-ID information on their television screens, and receive software upgrades of a yet-to-be-determined nature. (APPX066, 080; APPX098-99, 124, 340-42.)

Indeed, technician Francisco Martinez did not lie but rather summed up the situation most accurately when he stated on the Channel 6 broadcast: “it’s more of a convenience than anything else” (APPX068; APPX433-36.) Nor was the connection of a phone line to a DirecTV receiver “mandatory,” as DirecTV Vice-President Scott Brown stated: the technicians would install the DirecTV receiver

even if a phone line hook-up was not possible – indeed, this was the origin of the technicians’ dispute over charge-backs. If more were needed, MasTec Manager Chris Brown instructed the technicians to tell customers “whatever you have to tell them” to connect the phone line (APPX070; APPX303-04, 324) – an open-ended invitation to further bend the truth in pursuit of a higher responder rate. Substantial evidence thus shows that MasTec and DirecTV supervisors essentially told the technicians to lie (APPX070), even if those supervisors carefully stepped around an express command to “lie.”

It is also true that MasTec Manager Chris Brown said that the technicians should tell customers that “if these phone lines are not connected the receiver will blow up,” as later repeated by Francisco Martinez during the Channel 6 broadcast. (APPX068; APPX434-36.) Chris Brown himself admits to having made this statement (APPX194-95); other technicians remember him having made it, too (APPX237, 261). The Companies’ only objection, ultimately, is that Martinez did not accurately convey the hyperbole in Brown’s words when Martinez repeated them during the Channel 6 broadcast. (MasTec Br. at 30; DirecTV Br. at 21-22.) But whether the statement was meant to be understood literally or as hyperbole, the Board correctly observed that it was intended to “underscore[]” (APPX070) the Companies’ message that the technicians should say whatever is necessary to

customers in order to achieve a high responder rate. This was in fact how technician Joseph Guest understood the comment:

[Counsel for MasTec]: Did any of [the technicians] explain that the statement [by Christopher Brown] was made in an offhand manner as opposed to a direction?

[Joseph Guest]: No, but it was my understanding that what was being understood was what was the length to which the company was going to, to make us plug these phone lines in.

(APPX237.) Moreover, whatever hyperbole Brown meant to convey by his comment, that hyperbole was inherent in the comment itself: the absurdist notion of a satellite receiver “blow[ing] up” ensured that the comment was understood as a rhetorical flourish by the technicians as well as by the Channel 6 viewers listening to Martinez. (APPX336.)⁵²

The Companies’ claim that the technicians falsely stated that installing a phone line costs customers money (DirecTV Br. at 22-23) similarly runs aground on the defense of truth. During the broadcast, Alvarez, not the technicians, stated: “the fee to have a phone line installed could be as high as fifty-two dollars per room.” (APPX068; APPX434-36.) Contrary to the Companies’ argument, this statement is true, albeit somewhat conditional. It is accurate that “hav[ing] a phone line installed could be as high as \$52.00 per room,” provided that the customer

⁵² See APPX336 (“It was an asinine comment. I thought that was a dumb comment. Telling the customer the box was going to blow up, basically saying that the customer was stupid.”) (testimony of Rudy Rodriguez).

wished to conceal exposed wiring by threading the wire through a wall (APPX334), and testimony at the hearing indicated that such “wall fishes” were not uncommon (APPX306-07). Moreover, this was not the only information displayed on the screen when Alvarez spoke these words.⁵³ When producing the report, Alvarez and Channel 6 had in their possession a worksheet from MasTec that listed the prices for custom installation work (APPX509), and when Alvarez uttered the above statement during the broadcast, several words on that checklist were magnified and displayed prominently on the screen: “Wall Fish – 52.50 (per floor or wall).” (APPX433.) In any case, the Companies have put forth absolutely no evidence to show that the technicians intentionally made any misrepresentations to Alvarez concerning the costs of phone installations. (APPX071 n.12.)

MasTec does identify one statement made during the Channel 6 broadcast that, while not untruthful, was not wholly precise. Specifically, MasTec claims that the technicians misrepresented that they were charged-back \$5 for every non-responding receiver, when actually they were charged-back \$5 per non-responder installed during the past 30 days only when their overall responder rate fell below 50% for that period. (MasTec Br. at 26, 31-32) In fact, the only footage of a technician speaking to this issue is never so specific and never indicates that

⁵³ See *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (observing that public appeal must “be evaluated in its entirety and in context”); *Emarco, Inc.*, 284 NLRB 832, 834 (1987) (examining employee’s remarks “in the context of an emotional labor dispute”).

“every” non-responding receiver resulted in a \$5 charge-back. Rather, during the broadcast, edited footage shows Francisco Martinez stating that “[w]e go to a home that . . . needs three . . . three receivers that’s . . . fifteen dollars.” Although imprecise, this statement is actually true to the technicians’ experience, as the Board found: a technician encountering three non-responders in a single home could be charged-back \$15. (APPX070.) And once more, the Companies point to no evidence showing that Martinez intended by his statement, which was clearly edited, to mislead Alvarez or the viewing public regarding the charge-back policy.

Seen from the proper perspective, the Companies’ gravamen is against third-parties – namely, Alvarez and Channel 6. It was Alvarez – *not* a technician – who stated during the report that “the techs say their supervisors have been putting pressure on them. Deducting five bucks from their paychecks for *every DirecTV receiver* that’s not connected to a phone line.” (APPX434-36) (emphasis added.) Furthermore, it was Alvarez and Channel 6 who controlled how the report was edited and presented. As the Board correctly found, the technicians’ “only input was in responding to Alvarez’ questions on the day of the interview”; “Alvarez did not review the content of the report with them”; and “they did not see the telecast before May 1, when it initially aired.” (APPX071 n.12; APPX257, 291, 334.) It was thus Alvarez and Channel 6 who chose how to portray the finer points of

MasTec's charge-back policy, a written explanation of which had been delivered to them by MasTec. (APPX083; APPX175, 512.)

Obviously, Alvarez and Channel 6 are not parties before this Court. But this does not mean that MasTec can attribute statements to the technicians (MasTec Br. at 28) when those statements are owing to Alvarez or Channel 6, not to the technicians themselves. To show that the technicians lost the protection of the Act, MasTec must show that the technicians themselves uttered statements "with knowledge of their falsity or with reckless disregard for their truth or falsity."⁵⁴ At most MasTec has expressed its disagreement with the way in which Alvarez and Channel 6 portrayed its employees' grievance to the public. This is not enough to show that the technicians made "maliciously untrue" statements, let alone demonstrate that the Board's finding lacks substantial evidence, for "'absent a malicious motive,' [an employee's] right to appeal to the public is not dependent on the sensitivity of [his employer] to his choice of forum."⁵⁵

The Companies repeatedly and incorrectly assail the Board for overturning the administrative law judge's conclusion that the technicians made "maliciously untrue" statements (DirecTV Br. at 22-23; MasTec Br. at 22, 28-32). In fact, the

⁵⁴ *Valley Hosp. Med Ctr.*, 351 NLRB at 1252.

⁵⁵ *Allied Aviation Serv. Co. of N.J., Inc.*, 248 NLRB 229, 231 (1980) (internal quotation marks omitted). *Accord Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000).

standard of review “is not modified in any way when the Board and the ALJ disagree as to legal issues or derivative inferences made from the testimony.”⁵⁶

“[T]he examiner’s conclusions, although they differ from the Board’s, are not entitled to special weight. The Board was free to draw its own conclusions, turning as they did on matters other than credibility.”⁵⁷

Contrary to MasTec’s claims (MasTec Br. at 28-32), the Board did not reverse any of the judge’s credibility findings in concluding that the technicians did not utter “maliciously untrue” statements. The Board merely drew a different conclusion from the facts found by the administrative law judge. It is important to note that the administrative law judge did not hear testimony from any of the technicians who the Companies claim to have made misrepresentations on the Channel 6 broadcast.⁵⁸ The Board therefore did not need to discredit any testimony in order to conclude that the technicians who spoke during the broadcast

⁵⁶ *NLRB v. So-White Freight Lines*, 969 F.2d 401, 405 (7th Cir. 1992) (citations omitted).

⁵⁷ *Cheney Cal. Lumber Co. v. NLRB*, 319 F.2d 375, 377 (9th Cir. 1973).

⁵⁸ The one exception to this is Technician Joseph Guest, who testified at the unfair labor practice hearing. But in their briefs, the Companies do not challenge the Board’s finding that Guest did not make a “maliciously untrue” gesture by raising his hand in response to Alvarez’ question “[h]ow many of you here by a show of hands have had \$200 taken out of your paycheck?” (APPX070-71 n.12; APPX433-36.) This argument has therefore been waived. *See, e.g., Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996).

did so without knowledge or reckless disregard for the falsity of their statements. In a recent decision, the Seventh Circuit aptly summarized the situation here: “a credibility determination is a decision about whether or not to believe testimony in the first place or which witness to believe when testimony conflicts. But the difference between the ALJ’s opinion and the Board’s opinion was not a decision to credit different pieces of testimony. The ALJ and the Board simply disagree about what conclusion to draw from the same piece of testimony. . . . The ALJ and the Board both took that testimony at face value, they simply reached different conclusions about what it meant.”⁵⁹

Applying the appropriate standard of review, this Court should affirm the Board’s conclusion in this case. Regardless whether the Companies believe the technicians’ statements were false and malicious, there exists substantial evidence in the record that those statements were truthful and, in any event, uttered without knowledge or reckless disregard of their falsity. Under *Mountain Shadows Golf*, this is the relevant test, and the Companies have not carried their burden of showing that the Board’s finding was in error.

⁵⁹ *Local 65-B, Graphic Commc’ns Conference v. NLRB*, 572 F.3d 342, 349 (7th Cir. 2009) (internal citations omitted).

b. The technicians' statements directly related to their labor dispute with their employer and thus were not "so disloyal" as to strip them of the protection of the Act

Substantial evidence also supports the Board's conclusion that "none of the technicians' statements constituted unprotected disloyalty or reckless disparagement of the Respondents' services." (APPX071.)⁶⁰ In its analysis, the Board acknowledged that the news report "cast unwelcome light on certain business practices" but emphasized that this unwelcome publicity was "directly related to the technicians' grievance about what they considered to be an unfair pay policy that they believed forced them to mislead customers." (APPX071.)⁶¹ Similarly, the Board accepted that the technicians possibly knew that their public statements might cause DirecTV customers to cancel their subscriptions. But it tempered this with the observation that no evidence indicated that the technicians participated in the newscast in order to cause these financial consequences or in reckless disregard of them. (APPX071.)⁶² Finally, the Board underlined the fact

⁶⁰ See, e.g., *George A. Hormel v. NLRB*, 962 F.2d 1061, 1066 (D.C. Cir. 1992) (reviewing for substantial evidence Board's finding that employee was not so disloyal as to lose protection of the Act).

⁶¹ See *Allied Aviation Serv. Co. of N.J.*, 248 NLRB at 231 ("[G]reat care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues.").

⁶² Compare with *Jefferson Standard*, 346 U.S. 464, 476-77 (1953) ("The only connection between the handbill and the labor controversy was an ultimate and

that the technicians had only resorted to Channel 6 “after repeated unsuccessful attempts to resolve their pay dispute in direct communications with the Respondents.” (APPX071.)⁶³

Contrary to the Companies’ claims (DirecTV Br. at 9, 18; MasTec Br. at 24-25, 27), the public statements by the MasTec technicians to Channel 6 stand in stark contrast to those made by the employees in *Jefferson Standard*, as the Board correctly concluded (APPX071). In their statements, the MasTec technicians rigorously maintained a focus upon their labor dispute with their employer. Even when the MasTec technicians stated that their employer had encouraged them to make misrepresentations about how DirecTV receivers function – statements which, as discussed above, were truthful⁶⁴ – they framed this as an unfortunate consequence of the employer’s new charge-back policy. (APPX068-69;

undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession. A disclosure of that motive might have lost more public support for the employees than it would have gained, for it would have given the handbill more the character of coercion than of collective bargaining.”).

⁶³ See *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 54 (1st Cir. 2008) (finding union’s appeal to third party “reasonably necessary to carry out their lawful aim” “because the Union had already contacted [the employer] in an effort to be recognized as the drivers’ bargaining representative, and [the employer] had ignored its advances”).

⁶⁴ See pp. 42-47, *supra*.

APPX434-36.)⁶⁵ Whereas the *Jefferson Standard* employees sharply criticized their employer without mentioning their labor dispute with their employer, the MasTec technicians' statements outlined the scope of their pay grievance and did not unnecessarily address tangential issues or disparage their employer. The Board therefore properly understood the technicians' public criticism of their employer's business practices as an attempt to inform the public of the technicians' grievance – *not* as an attack “reasonably calculated to harm the company's reputation and reduce its income.”⁶⁶ And although the Channel 6 broadcast somewhat shifted the emphasis of the technicians' grievance, focusing more upon the misrepresentations that they were encouraged to make rather than the new pay policy they were forced to swallow, this does not render the technicians' statements comparable to those of the *Jefferson Standard* employees.⁶⁷

⁶⁵ See, e.g., *Blue Circle Cement Co., Inc. v. NLRB*, 41 F.3d 203, 211 (5th Cir. 1994) (finding employee's conduct protected where “[a]t all times, during rallies and picketing, opposition to the plan was voiced in conjunction with the ongoing labor dispute”).

⁶⁶ *Jefferson Standard*, 346 U.S. at 471.

⁶⁷ See *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (“If unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.”). See also *Allied Aviation Serv. Co. of N.J.*, 248 NLRB at 232 (“[A]bsent a malicious motive an employee's right to appeal to the public is not dependent on the sensitivity of [his employer] to his choice of forum.”).

The Companies err (MasTec Br. at 23-25, 27; DirecTV Br. at 20) in relying on *Endicott* and *St. Luke's Episcopal Presbyterian*, two factually distinguishable cases. In *Endicott*, this Court held that substantial evidence did not support the Board's finding that an employee had not been disloyal because, among other things, he had strongly criticized the fundamental competence of his supervisors by writing a web-post claiming that the business was being "tanked" by people with "no good ability to manage," causing the business to be "put in the dirt."⁶⁸ There is nothing in the instant case comparable to these caustic statements that the *Endicott* Court held to be unprotected attacks on management. With respect to *St. Luke's*, the Eighth Circuit found in that case that the employee made multiple statements that were "materially false and misleading."⁶⁹ *St. Luke's* therefore critically differs from the instant case, where the Companies have not shown that the technicians' statements were false, much less that they uttered those statements with knowledge or reckless disregard for their falsity.⁷⁰

⁶⁸ *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 534-35 (D.C. Cir. 2006).

⁶⁹ *St. Luke's Episcopal Presbyterian v. NLRB*, 268 F.3d 575, 580-81 (8th Cir. 2001).

⁷⁰ See pp. 41-50, *supra*.

DirecTV also misconstrues the Board's reference to the technicians' intentions (DirecTV Br. at 18-19), arguing that it violates this Court's holding in *George A. Hormel & Co. v. NLRB*.⁷¹ In *Hormel*, this Court stated that the disloyalty of an employee's acts should be judged from the perspective of a "reasonable observer," regardless of "whatever [the employee] believed in his heart of hearts."⁷² Contrary to DirecTV's claim of error, the Board's decision evinces no sign that it attempted to peer into the technicians' "heart of hearts." In determining that the MasTec technicians had no intent to harm MasTec or DirecTV, the Board relied on objective criteria, such as the nexus between the technicians' statements to Channel 6 and their labor dispute, the accuracy of the technicians' statements, and the timing of their decision to air their decision to the public. (APPX070-71.) The Board's reasoning thereby paralleled that of the Supreme Court in *Jefferson Standard*, which considered similar objective criteria before conversely finding that the handbilling employees in that case had acted "in a manner reasonably calculated to harm the [employer's] reputation and reduce its income."⁷³

⁷¹ 962 F.2d 1061 (D.C. Cir. 1992).

⁷² *Id.* at 1066.

⁷³ *Jefferson Standard*, 346 U.S. 464, 471 (1953).

The Board's Decision therefore suffers from none of the legal infirmities attributed to it by the Companies and, via the *Mountain Shadows Golf* test, properly addresses the Supreme Court's holding in *Jefferson Standard*. The Board's finding that the technicians' statements were not "so disloyal" as to strip them of the protection of the Act (APPX071) should be affirmed.

D. The Court Lacks Jurisdiction To Consider DirecTV's Argument that the Board Is "Expanding the Scope of Labor Disputes Beyond the Immediate Employer-Employee Relationship"

In a coda to its brief (DirecTV Br. at 25-28), DirecTV argues that the Board's holding disrupts the federal labor-management relations scheme by construing the Act to protect employees who criticize the practices of a client existing "beyond the immediate employer-employee relationship." This Court has no jurisdiction to consider this argument, since DirecTV did not present it to the Board (APPX025-65).⁷⁴

In any event, the premise for DirecTV's argument – that it did not interfere in the employer-employee relationship between MasTec and its technicians – is simply incorrect. DirecTV deliberately inserted itself into MasTec's labor

⁷⁴ See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982). *Accord S. Power Co.*, 664 F.3d 946, 949 (D.C. Cir. 2012).

dispute⁷⁵: among other things, DirecTV distributed a video in which it claimed responsibility for MasTec’s charge-back policy (APPX081; APPX430-31)⁷⁶; and later, it stated in a press release that it “fully endorse[d]” that policy (APPX083; APPX432). Thus, DirecTV is by no means a “neutral employer[]” being dragged into “the labor disputes of others,”⁷⁷ and its analogy to secondary boycotts – which, as it admits, is merely an analogy (DirecTV Br. at 26) – is inapposite.

* * * * *

In sum, the Board correctly concluded that the technicians retained the protection of the Act when giving their interview to Channel 6, and the Companies’ arguments reveal no flaw in the Board’s reasoning. Consequently, MasTec and DirecTV violated Section 8(a)(1) by respectively discharging and causing the discharge of the 26 technicians on the basis of that protected activity. The portions of the Board’s Order so finding should be enforced.

⁷⁵ See *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 53 (1st Cir. 2008) (“[T]he Act defines ‘labor dispute’ broadly to include ‘any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee.’”) (emphasis in original) (quoting 29 U.S.C. § 152(9)).

⁷⁶ See p.10, *supra*.

⁷⁷ *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 223 n.20 (1982). See, e.g., *id.* (describing dual objectives of prohibition against secondary boycotts).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Companies' petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

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National Labor Relations Board
February 2013
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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DIRECTV, INC.)	
)	
and)	
)	
MASTEC ADVANCED TECHNOLOGIES, A DIVISION OF MASTEC, INC.)	
)	
Petitioners/Cross-Respondents)	
)	
v.)	Nos. 11-1273,
)	11-1274, &
NATIONAL LABOR RELATIONS BOARD)	11-1294
)	
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,221 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben
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Dated at Washington, DC
this 7th day of February 2013

RELEVANT STATUTORY PROVISIONS

Section 2(9) of the Act, 29 U.S.C. § 152(9):

The term “labor dispute” includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Section 7 of the Act, 29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1):

It shall be an unfair labor practice for an employer--

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 10(a), (e), and (f) of the Act, 29 U.S.C. § 160(a), (e), and (f):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the

determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of

the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner)	
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CERTIFICATE OF SERVICE

I certify that on February 7, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

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Dated at Washington, D.C.
this 7th day of February 2013