

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

MARTHA KINARD, Regional Director of the)	
Sixteenth Region of the National Labor)	
Relations Board,)	
for and on behalf of the)	
NATIONAL LABOR RELATIONS BOARD,)	Civil Action No. 4:16-cv-952-O
)	
Petitioner,)	
v.)	
)	
DISH NETWORK COMPANY,)	
)	
Respondent.)	

DISH'S SUR-REPLY IN OPPOSITION TO SECTION 10(J) RELIEF

I. INTRODUCTION

The NLRB's position has become more untenable with each filing. After ignoring the analytical framework set forth in *McKinney v. Creative Vision Resources, LLC*, 783 F.3d (5th Cir. 2015)¹, the NLRB now admits *Creative Vision* provides the correct standard. The NLRB's short Reply (Doc. No. 21) also makes it clearer than ever that it cannot meet its burden.

Despite a mountain of evidence that this case presents a pedestrian legal question of whether the parties were at an impasse—after five years of negotiations, by the end of which the parties' positions were \$32,000 apart in annual compensation per technician—the NLRB presents a flimsy conspiracy theory, claiming that DISH worked for years to manufacture a bargaining impasse. The facts of the case raise difficult questions for the NLRB's theory. If DISH intended to create an impasse, why did it consistently increase its wage proposals (in contrast to the Union, which repeatedly offered regressive proposals)? If DISH intended to create an impasse,

¹ The NLRB tries to excuse its failure to follow the correct legal analysis by stating that *Creative Vision* "is not similar to the case at hand in any meaningful way." (Reply at 2). The NLRB here conflates the standard of review and its application to a particular set of facts in a case. It is indisputable that *Creative Vision* is the correct standard of review for this case.

why did it not do so years earlier, given that there was strong evidence that the parties were at loggerheads as early as July 2013, when the Union started to move away from a deal? If DISH intended to create an impasse, why did it reach out to the Union *five* times in 2016, practically begging the Union to provide any indication that the parties were not at impasse?

Instead of answering these questions, the NLRB lobs unsubstantiated accusations. Its Reply brief consists primarily of: (1) allegations that were never previously raised as unfair labor practices; (2) allegations that have no evidentiary foundation; and (3) attempts to connect isolated and disparate comments by low-level managers made years apart.²

The NLRB provided only three record cites for the claims in its Reply brief. The omission is for good reason. The record does not support its conspiracy theory. Instead, as DISH has maintained from the outset, the facts support a clear case of impasse.

II. THE NLRB HAS NOT PROVEN THAT THE UNDERLYING ALLEGED UNFAIR LABOR PRACTICES ARE EXTRAORDINARY OR EGREGIOUS

Faced with the legal standard it initially ignored, the NLRB now attempts to prove that the underlying unfair labor practice charges are "egregious" and "extraordinary." In trying to meet its burden, the NLRB relies on allegations not part of its administrative case and on an isolated, stray remark that it places at the center of its baseless conspiracy theory.

A. The NLRB cannot use allegations that are not part of the underlying unfair labor practice charges.

The NLRB first resorts to comments made at the bargaining table by George Basara in December 2014, which were never alleged to be unlawful. Given that the Union never even saw

² In addition to misstating facts, the NLRB also misstates the law. The NLRB asserts that it is "well established law that impasse is broken by any change." (Reply at 2 n.1). The NLRB provides no case law citation to this claim because it is wrong. Board law is clear that only changes that create a likelihood of fruitful discussions break an impasse. See, e.g., *Hayward Dodge*, 292 NLRB 434, 468 (1989); *GATX Logistics, Inc.*, 325 NLRB 413, 419 (1998).

fit to file an unfair labor practice charge regarding the comments, there is no justification for the NLRB now to retroactively characterize them as egregious.

Next, the NLRB points to purportedly "cavalier" letters to the Union in 2016, which DISH sent to try to jump-start bargaining. Far from cavalier, DISH sent five letters, reflecting the gravity of the situation. Exs. GC-10, GC-18, GC-19, GC-28, GC-29; Tr. 116:24-117:2. In the second letter, DISH reiterated its position on the status of bargaining, and then, clearly and unequivocally told the Union, "[w]e view your January 13 letter as further evidence that the parties are at a standstill. If you disagree, please explain your position to me." Ex. GC-18. Here, DISH expressly invited the Union to show the Company any indication that the parties were not at impasse, but the Union failed to do so. DISH then wrote three more letters, giving the Union even more opportunities to avoid an impasse. Not only were DISH's letters not egregious, they have never been alleged to be unlawful by the Union and are not even a part of the complaint in the underlying case.

Creative Vision made clear that the NLRB must show that the unfair labor practices in the underlying administrative proceeding are particularly egregious. 783 F.3d at 299. The comments made by Mr. Basara and the letters sent by DISH are not alleged to be unfair labor practices. A review of the NLRB's complaint and its petition here shows that those allegations are absent. Under *Creative Vision*, the NLRB cannot meet its burden by raising fresh (and time-barred) allegations that are not alleged to be unfair labor practices in the administrative proceeding.

B. The NLRB's attempt to concoct a conspiracy theory out of a low-level supervisor's comment does not show extraordinary and egregious conduct.

The NLRB mischaracterizes the record to advance its union-busting theory. There are several such examples in the NLRB's brief, but perhaps the most glaring instance is its

contention that a manager's mundane instruction to a few senior technicians meant that they "could not talk to new employees about the Union; that Respondent would find out if they did talk to them; and that they would be fired if they did talk to the new employees about the Union." (Reply at 3). The NLRB also characterized the comment as one that "specifically ordered what amounted to a quarantine for new employees with respect to discussion about the Union and the QPC system. By its actions, Respondent is replacing Union-supporting employees with new employees, who are cut off from their certified bargaining representative." (Reply at 5).

These are strong words by the NLRB, but they find no support in the record. If the NLRB had directed the Court to the record, it would have revealed an essential variance from the NLRB's conclusion. The manager at issue instructed a few senior technicians who were training new technicians that, "**when you're at work** that we do not discuss the union or anything going on with—anything that is going on with the union at all, including QPC with the new guys." Tr. 237:18-22 (emphasis added). He went on to say "**When you're off work, you can do what you want to do.**" Tr. 237:22-23. (emphasis added). Mr. Thomas continued, "Make sure that you're not having any discussions with them about anything you're not supposed to because if they get on the phone and you have **discussed these things with them during business hours**, then that could get you in trouble." (emphasis added).

The only technician who testified about the instruction, Carl Miles, embellished on the manager's words, but did not substantively refute his account. Mr. Miles testified:

Q Okay. What did Mr. Thomas say about training these guys?

A Just don't say anything about the Union to the new guys. He said don't mention QPC. They're happy getting paid \$13.00 an hour, and they will get phone calls from higher up at Dish, and -- basically asking them if we said anything, and it could lead to termination.

Tr. 657:13-19. Given how central to its case the NLRB now is making the manager's instruction, it is conspicuous that the NLRB failed to ask Mr. Miles if the direction was confined to while the employees were on working time. Indeed, the notion that new technicians were "quarantined" is preposterous given that no restrictions were imposed on Union discussions during non-working time, and the record is replete with instances of the Union holding meetings with its members after DISH declared impasse. *See, e.g.*, Tr. 289:1-17; 400:25-401:18.

In the end, it is clear that the manager was mistaken in telling employees not to discuss the Union during work time, which DISH has cured by instructing him to avoid making such comments in the future. But, as the NLRB well knows, the belief that union discussions and activities can only be conducted outside of working hours is one of the most common mistakes that managers across all industries make, and the NLRB likely receives hundreds of complaints about managers making such mistakes every year. It does not qualify as egregious.

III. THE NLRB HAS NOT PROVEN THAT INJUNCTIVE RELIEF IS AFFIRMATIVELY MORE APPROPRIATE THAN ITS OWN ADMINISTRATIVE REMEDIES

The NLRB shifts its attempt to meet its burden and now focuses on employees who were allegedly constructively discharged. But, the NLRB possesses the authority to provide an adequate remedy for this claim. "Reinstatement of unlawfully discharged employees is 'generally left to the administrative expertise of the Board.'" *Overstreet v. El Paso Elec. Co.*, 176 Fed. Appx. 607, 610 (5th Cir. 2006) (*citing Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192 (5th Cir. 1975) (affirming the district court's refusal to order the reinstatement of discharged employees).

Further, the NLRB's focus on employees who have quit is a red herring. Attrition is about 50 percent per year across non-union DISH offices, and in two of the eight offices in the region, attrition was above 76 percent in 2015. Ex. R-53; Tr. 890:22-893:18. Put simply, DISH

is in a high-employee-turnover business. In the six months from the announcement of the wage change to the close of the record, the NLRB alleges 17 of 50 (34 percent) unionized technicians quit because of their wages. Even if true, and even if attrition continued at the same rate for another six months, attrition at DISH's unionized offices would remain in the normal range for DISH's offices in the region. *See id.* Moreover, the turnover at the two unionized offices involved in this case was artificially low over the past several years (including 13.1 percent to 19.6 percent in 2015) because QPC was frozen in place from 2010 to April 2016. Even with the recent increased attrition at the unionized offices, over the past two years combined, attrition at those offices remains below average for DISH offices in the region. *See id.* The recent attrition is not, as the NLRB contends, characteristic of an "exodus," but rather reflects typical attrition in the industry. Finally, of note, many former technicians confirmed that DISH's final wage offer (particularly when combined with DISH's benefits package) is comparable to or better than the wages they have been able to find in the Dallas-Fort Worth region.³

The NLRB makes no mention in its reply brief of returning employees to QPC. But, that is what it wants—to force DISH back into an economically unsustainable wage program so it can short-circuit its own administrative case and force the result that the NLRB and the Union desire. This Court should decline to do so.

³ *See* Tr. 698:24-699:7, 698:24-699:4 (David Dingle now works at Foster's Electric making \$17 per hour, and he has reapplied to work at DISH; he testified he wants to return to his former position, even at the current wage rates and irrespective of the prospects of the Union prevailing in this case); 738:14-739:2 (Salvador Bernardino currently works for Lee Engineering and earns \$15 per hour); 731:11-16 (Bryce Bengé now works for FedEx Home Delivery and makes \$500 per week); 438:17-24 (Aaron Kubesch now works for a contractor for AT&T making \$19.00 per hour flat rate); 532:2-18 (Aaron Mason works at Red Lobster making \$100-150 per shift).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a copy of the foregoing and that the Court's Electronic Filing System will provide notice of this filing to counsel of record for all parties.

/s/ Brian D. Balonick _____

Brian D. Balonick