

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

DISH NETWORK CORPORATION

and

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

Cases 16-CA-173719
16-CA-173720
16-CA-173770
16-CA-177314
16-CA-177321
16-CA-178881
16-CA-178884

**BRIEF IN SUPPORT OF RESPONDENT DISH NETWORK L.L.C.'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION**

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I. INTRODUCTION

DISH Network L.L.C. ("DISH")¹ declared a bargaining impasse in April 2016 because there was no hope of the parties reaching an agreement on wages. After five years of bargaining, including dozens of bargaining sessions and proposal exchanges, the parties were about \$30,000 apart on annual compensation per technician and, as bargaining continued, the chasm between the parties' positions was growing.²

For the final 33 months of bargaining, the Communications Workers of America ("Union") stubbornly and persistently demanded that bargaining-unit members continue to be paid under an economically unsustainable compensation program called Quality Performance Compensation ("QPC"), which had been stuck in place since the Union was certified in 2010. QPC resulted in unionized employees receiving much higher wages than their non-unionized peers, who performed the same job in the same region. With each passing year—as the performance metrics supporting QPC became ever more outdated—the wage gap between union and non-union technicians grew larger. By the time DISH declared impasse, bargaining-unit members were compensated about 50% more than their non-unionized peers.

DISH increased its wage proposals throughout bargaining, trying to close the gap between the parties' demands. But, the Union understood that as long as the parties were bargaining, DISH was required to maintain QPC, which greatly inflated employees' wages and the Union's standing with them. Indeed, the Union's lead negotiator admitted in response to a question from the ALJ that "from the Union's perspective, this status quo, *i.e.*, keeping the QPC and not bargaining for a while, was preferable." Tr. 593:5-11. The Union, therefore, engaged in

¹ Incorrectly named "DISH Network Corporation" in the Complaint.

² In May 2013, the parties' proposals were less than \$7,000 apart in annual compensation per technician; by late 2014, they were \$25,000 apart; and by early 2016, they were about \$30,000 apart.

an ever more aggressive stall campaign aimed at complicating DISH's ability to declare impasse, including repeatedly making regressive bargaining proposals followed by minor concessions to create the illusion of progress; filing meritless unfair labor practice charges; repeatedly making massive information requests; and always insisting on more bargaining sessions regardless of the futility of meeting.

The parties' bargaining positions were clear: DISH would not accept a contract in which bargaining-unit technicians earned significantly more than market wages (*i.e.*, the wages paid to non-unionized peers in the region), as the Union was insisting. Meanwhile, the Union demonstrated no hope that it was going to accept market wages, which would have meant pay cuts of tens of thousands of dollars for most of its members. Given these bargaining positions, the prospect of reaching an agreement was nil. That is the textbook Board law definition of impasse, and no fair reading of the record allows for any other conclusion. Accordingly, DISH lawfully declared impasse in April 2016 and implemented its reasonable final contract offer.

The ALJ did not reject, or even dispute, any of the foregoing facts. He ignored them. Instead, the ALJ's analysis resorted to contending that minor points—such as DISH's change in bargaining representative or offhanded comments by DISH's negotiators suggesting that the Union seek input from its members—foreclosed impasse. On each point, the ALJ is wrong as a matter of law because Board law is far more nuanced and mixed than the ALJ's cursory analysis suggests. But, just as importantly, the ALJ confused peripheral matters with the actual impasse standard.

The ALJ offered only one finding that goes to the heart of whether the parties were at impasse: he assessed that a counteroffer the Union made to DISH's final offer, wherein the Union demanded retaining QPC for current employees while eliminating it for new hires, was a

"substantial ... compromise" that forestalled impasse. The ALJ assessed that DISH's "very high attrition rate" meant that, had DISH accepted the Union's final proposal, it was "probable that new hires receiving non-QPC rates would soon become the majority." (Decision at 4). As a result, the ALJ contended, "Dish would have attained most of what it wanted on wages." (*Id.*). As discussed more fully below, the ALJ is wrong for two primary reasons. First, his assessment of the Union's proposal is premised on a fundamental misreading of the attrition statistics on which his analysis relied; he conflated very low attrition at unionized offices with high attrition at non-unionized offices. The ALJ's entire analysis was thus premised on a flawed reading of an undisputed portion of the record. Second, even under the ALJ's mistaken interpretation of the record, the ALJ implicitly imposes on DISH the obligation to accept a contract to pay at least some employees tens of thousands of dollars more than it was willing. DISH had no reason or legal requirement to do so.

The ALJ also erred by applying the wrong constructive discharge standard. The ALJ found that employees who quit following DISH's impasse declaration were constructively discharged because the employees were "presented with the 'Hobson's choice' of continuing to work versus forgoing their Section 7 rights." (Decision at 16). In fact, there is no evidence that DISH required any employee to forego exercise of Section 7 rights. Rather, the employees needed to accept only the effects of DISH's impasse declaration, namely reduced wages and a change to benefits. The ALJ's analysis ignores the fundamental distinction between relinquishing rights, on the one hand, and incurring the effects of rights (allegedly) having been violated, on the other. Only the former is a "Hobson's Choice" scenario. The latter must be analyzed under the more demanding traditional constructive discharge standards. And, neither the ALJ nor the General Counsel has demonstrated that those standards have been met.

The foregoing are among the myriad ways in which the ALJ's Decision drew conclusions that were not supported (and sometimes contradicted) by the record, and he failed to even address DISH's countervailing evidence and the case law it cited. For these reasons, discussed more fully below and in the accompanying motion, DISH excepts to the ALJ's Decision.

II. STATEMENT OF THE CASE

A. Background: QPC and Pi

QPC began as a pilot program introduced at a few DISH offices in 2009, including the two at issue in this litigation: Farmers Branch and North Richland Hills. Tr. 873:10-13. The goal of QPC was to pay employees based on their performance. Total compensation was calculated based on an employee's base hourly rate, hours worked, plus an additional amount based on employee performance relative to a set of metrics. Ex. CP-62.

Monty Beckham, the DISH Regional Director of Operations for DISH's South Central Region, explained how QPC works. Every installation or repair ("job") a technician performs is assigned a point value:

[D]epending on how well [a] Technician has done on their previous period, we would assign a weight to that point, and it could have been anywhere between 75 cents and \$4.00. So, for every single job, they were getting paid something in addition to their small hourly wage. Just to give you an idea, on a normal day, a Technician is going to run somewhere between 60 and 80 points.

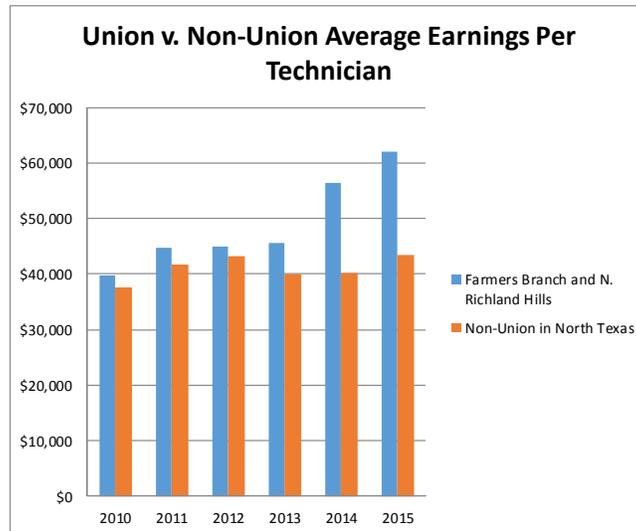
Tr. 873:19-874:10. When QPC was first implemented in 2009, technicians did not like it. In fact, animosity towards QPC led employees at North Richland Hills and Farmers Branch to unionize in 2010. Tr. 1067:1-1068:6. Ironically, by doing so, they got stuck with QPC while the parties were bargaining for a contract, because it was the status quo at the time that the Union was certified.

QPC remained in effect at the unionized offices for seven years (from 2009 to 2016). During this time, DISH had developed and implemented a new pay program for non-unionized technicians throughout the rest of the country. Tr. 875:24-876:6. The new pay system at non-unionized offices includes higher guaranteed hourly wages than those paid under QPC, and a smaller incentive program, called Pi, which serves as an "add-on that you may or may not get," paid only for performance that exceeds expectations. Ex. GC-124; Tr. 876:9-24, 878:3-13.

The maximum Pi an employee can earn is \$350 per pay period, but most earn far less. About half of technicians do not hit the metrics to earn any Pi at all. Most of those who do earn Pi, earn about \$150 in Pi per pay period rather than the \$350 maximum. Ex. GC-124; Tr. 876:9-878:2. In short, the vast majority of pay for the vast majority of non-unionized technicians is based on their hourly wages. Tr. 877:3-5.

In DISH's non-union offices in the Dallas-Fort Worth ("DFW") region, based on hourly wages plus Pi, the average technician makes about \$40,000 to \$43,000 per year. Ex. R-49. Meanwhile, despite bargaining-unit members' initial animosity toward QPC, their earnings began skyrocketing around late-2013. *Id.* This occurred because QPC primarily pays employees based on performance metrics. Those metrics, however, had not been adjusted in seven years, including the six years it was frozen in place. Tr. 880:8-881:8. During that time, DISH improved its processes and technologies. *Id.* So, tasks that were time-consuming for technicians in 2009 were completed much more quickly by 2013. Mr. Beckham explained that, due to DISH's improvements, in non-unionized offices, "[e]very year, we up our goals." Tr. 880:16. But, because DISH maintained the status quo QPC program for the unionized offices, unionized technicians still were compensated under the outdated metrics. Tr. 880:8-881:8. As a result, unionized technicians' annual earnings ballooned. Tr. 881:10-18. As the following graph

(Ex. R-49) shows, they already were higher than non-unionized technicians' wages in 2010. Between 2013 and 2015, they shot up from about \$45,500 to \$62,100.



Ex. R-49; Tr. 878:17-880:7; 881:25-882:20. Just before the impasse, unionized technicians' annual compensation was on average about \$19,000 more than their non-unionized peers. *Id.* Many of the technicians were paid more than their managers, and they knew it. Technician Robert MacDonald (one of the General Counsel's witnesses) testified, "I wanted to go into management. I mean even though I know if I go into management I'm going to take a pay cut, but it's what I enjoy." Tr. 274:14-17. *See also* Tr. 285:4-24 (same point).

Mr. Beckham explained the operational significance of the pay disparity:

[W]hile our basic pay was staying flat and manageable at the non-union offices, the pay was continuing to go up and up in the union offices. And from an operations perspective, it is not manageable. It is not. It is pricing those offices out of what I can run and manage in an efficient manner ... [I]t is not sustainable to me to be able to run that profitably.

Tr. 889:8-24; 890:5-11.

The massive pay disparity is why DISH needed to eliminate QPC, and it is why the Union was intent to preserve it. This dynamic was no mystery to the Union, whose

representatives testified that they knew unionized employees were receiving much higher compensation than DISH was willing to pay, and they knew that DISH's obligation to maintain the status quo while bargaining with the Union was the only reason QPC remained in effect. For example, the Union's chief spokesperson for the last three years of negotiations, Sylvia Ramos, admitted that maintaining QPC was crucial to her members. *See, e.g.*, Tr. 537:10-16 ("Q But you'll agree with me ... Employees were seeking to protect or keep the pay scale that they were currently – A Oh, absolutely."); Tr. 547:1-3 ("Obviously they were very serious about wanting to keep QPC; that was important."); Tr. 552:17-21 ("And I knew that based on the discussions that I had with the employees, that, you know, their lives – their lives and their economics of their households, were based on the wages that they were making, so I knew that it was very important to them, to all of them.").

Union staff representative Tony Shaffer conceded the same point, testifying that the members demanded QPC or another pay system that would result in wages "comparable" to it.

Q Okay. In regard to wages, what were they in favor of that would get them a contract?

A They didn't have a set, anything set in stone. It was just something that was going to be comparable if they had to not remain under QPC, it was going to be something comparable to what they already were getting.

Tr. 716:18-717:16. Some of the Union members testified that they supported the Union only because they knew DISH's obligation to maintain the status quo during bargaining kept their wages inflated. Technician Robert MacDonald, for example, testified, "It literally came to that point where a [fellow technician] was trying to talk us out of the Union, and I had to talk him back into, 'Look, ***you're making an awesome amount of money*** by doing a good job so you should stick with it.'" Tr. 283:22-284:18 (emphasis added).

Other technicians echoed this insistence on maintaining QPC, and they had no interest in wages comparable to their non-unionized peers. *See, e.g.*, Tr. 413:2-3 (Jason Morris) ("Most people just wanted to stick with QPC. I don't remember anybody offering any wage scale difference, no."); Tr. 429:13-430:1 (Preston Dutton) ("Q. [W]ould you have been interested in a Field Service Specialist position if it was under the PI incentive pay system, if you know? ... A. No, I wouldn't be able to make it under that, no."); Tr. 686:5-7 (Kenneth Daniel) (testifying that he was not interested in any pay system other than QPC).

B. The Union Lacked Bargaining Leverage

Although the Union demanded QPC, it lacked bargaining leverage to pressure DISH to agree to it. Tr. 1071:10-13. Only two of the eight DISH offices in the DFW region were unionized, and between the offices, there were about 50 to 60 unionized technicians during the final years of bargaining. *See Ex. R-44.* George Basara, DISH's chief bargaining spokesperson from the start of bargaining in July 2010 until December 2014 explained:

Q How did you view their leverage?

A They don't have any.

Q Why not?

A First off, you know, I mean, my last count just from a service center standpoint, there were 130 [DISH offices], and thousands -- I don't know how many thousands of technicians, and this is like one little tiny, tiny group, and the reality is, the only leverage the Union really has is economics, and that is taking it out on strike if they don't like your offer. I think they realize, because they never actually -- they never took a strike vote, never actually threatened to go on strike that I could recall, they realized that going on strike is kind of -- you have subcontractors in the area, you have other workers in the area. You could easily -- it is easily diffused to other places, so they really didn't have the traditional leverage that "we will walk out on you, withhold our services." They knew that.

Tr. 1070:16-1071:9.

Monty Beckham explained further that, in DISH's operational model, the entire DFW region of Texas is a single area of operations (a "CAR"). *Ex. R-44; Tr. 869:8-18.* Any

technician based out of any of the eight DISH offices in the CAR can conduct any job within it. Tr. 870:25-871:5. Further, DISH routinely uses contractors to supplement its internal technicians to complete its work within the CAR. Tr. 950:18-25. Because only two of DISH's eight offices in the CAR are unionized, had the Union taken its members on strike, DISH could have "made it work" to complete its operations. Tr. 920:11-22.

Mr. Basara summarized the implications of the Union's lack of leverage: "Q And so based on that, what sort of provisions were you willing to agree to in collective bargaining? A Ones that benefitted us, that felt -- that fit within our framework." Tr. 1071:10-13.

C. The Parties Bargained for Five Years Until They Exhausted the Prospects of Reaching an Agreement, as QPC was Driving Them Further Apart

With the Union's lack of leverage as background, the parties began bargaining in July 2010. Tr. 1072:16-18. By August 2012, the parties had already met for bargaining about 10 to 15 times for a total of 20 to 25 days. Tr. 1077:1-7. By this point, the Union was already insisting on QPC in its proposals because it had become clear that technicians earned more under QPC than their non-unionized peers. Tr. 1072:19-1073:20. Mr. Basara told Donna Bentley, the Union's then-chief spokesperson, that DISH could not continue QPC. "We can't have QPC ... It is just costing us too much." Tr. 1075:1-11. As both parties appeared unyielding in their dispute regarding wages, on August 17, 2012, Mr. Basara told the Union DISH's bottom line; *i.e.*, it could pay bargaining-unit members market-rate wages, but no more:

I said, "What about -- what about Pi," but we want some flexibility because, again, rates get adjusted, mostly upward in these incentive plans, so I didn't want to lock everybody into the lowest rate. I kind of wanted to make sure that if the rest of the country was getting a raise, they would get a raise.

Tr. 1075:11-17; Ex. 20.

The Union initially responded with information requests regarding how much technicians were compensated under Pi, which DISH provided. Tr. 1076:19-25. Then, on March 21, 2013, the Union presented a new demand, requesting market wages for one year, but also 10% raises within two years. Ex. R-27; Tr. 1078:4-1079:16. While the proposal was an improvement over the QPC demands, it still did not meet the requirements that Mr. Basara had laid out for the Union in August 2012. Tr. 1079:17-22; 1080:10-12. DISH quickly responded with a counteroffer that improved on its previous formal proposal, but was less than what the Union was demanding. Tr. 1079:23-1080:2. The Union promptly countered with another demand on March 22, similar to its previous offer, but now seeking 8% raises within two years. Ex. GC-12; Tr. 1081:3-22. DISH countered on May, 30, 2013, again improving its previous offer. Ex. GC-30; Tr. 1083:21-1084:2. Of note, while the parties butted heads on wages, they progressed on other terms, agreeing to 18 articles by May 31, 2013, and 20 by November 19, 2014. Exs. R-3; R-4. The next day, on May 31, 2013, the Union countered with another demand, seeking 6% raises within two years. Ex. GC-13; Tr. 1084:14-1085:2.

The Union's May 31, 2013, demand turned out to be its best wage proposal it would ever make. The Union then regressed. Just five weeks later, on July 9, 2013, the Union demanded QPC at higher hourly wages than technicians had been earning, plus increases to hourly wages in subsequent years. Ex. R-1; Tr. 1085:22-1086:8. The Union's chief spokesperson at the time, Donna Bentley, admitted that she knew that the Union's July 2013 QPC proposal was regressive. *See* Tr. 365:8-13 ("Q And I think you testified earlier that your understanding was that generally, even though it depended upon incentive work, that the QPC program would result in higher wages to the technicians than the PI program. Is that a fair statement? A That's a fair statement."); Tr. 366:3-7 ("and then when we went back to the QPC incentive program on July

the 9th, we of course reverted back to the wages closer to what the folks were making. Q So you retreated back to your earlier position on QPC? A I did.").

Mr. Basara rejected the QPC proposal, making it unequivocally clear that DISH would not agree to continue QPC. Tr. 1088:9-12. From his perspective, bargaining was now "going backwards." Tr. 1088:9-20. After Mr. Basara had previously made clear that DISH would not accept the continuation of QPC, and the Union had apparently understood (given that it had started to make concessions), the Union now was demanding "richer positions than they had even had before," now seeking "QPC plus." Tr. 1088:18-24. Because of this move, Mr. Basara began expressing that the parties might be at impasse. Tr. 449:15-22.

By November 2013, it was clear to the parties that their disagreement over wages (and specifically QPC) was *the* fundamental outstanding issue.³ The Union's insistence on QPC was so important to the Union that, on November 21, 2013, it offered to accept DISH's position on all four other outstanding issues just to maintain QPC. Ex. R-2; Tr. 376:1-377:7. The Union indicated this was their "final proposal" and said they would not be making another. Ex. R-24; Tr. 1094:25-1095:3; 1098:17-1099:1.

This move by the Union highlighted how essential maintenance of QPC was to the Union. Ms. Bentley testified that the Union was so "passionate" about trying to maintain QPC that it was willing to sacrifice all of its positions on dues collection, arbitration, seniority, and contractors. Tr. 379:3-25. Sylvia Ramos, who replaced Ms. Bentley at the bargaining table, likewise admitted that the four provisions that the Union suddenly was willing to concede were

³ There were four other outstanding disagreements at the time, regarding dues collection, arbitration, seniority, and contractors. Ex. R-2.

"critical" to the Union, and she had never agreed to a contract without them. Tr. 447:2-448:2; 537:25-538:5; 539:2-24. Yet, the Union was willing to sacrifice them just to maintain QPC.

Ms. Bentley also admitted she kept proposing QPC knowing DISH could not agree to it:

Q But you maintained, you maintained QPC anyhow, even though you knew DISH wasn't going to agree to it?

A I proposed the PI in the process too.

Q I'm asking about at this time though on November 21st. You maintained it knowing DISH was never going to agree to it, fair?

A Fair.

Tr. 381:4-10. Because the Union continued to demand QPC and identified their November 21, 2013, offer as a "final proposal," and it was one that DISH could not accept, Mr. Basara asked the Union representatives whether the parties were at impasse. Ex. R-24; Tr. 1095:4-16; Tr. 378:8; 382:3-24. The Union responded that they were not, and then made information requests. Ex. R-24; Tr. 1095:9-20. Mr. Basara, though frustrated that the new requests largely just repeated requests for information that Mr. Basara previously provided, responded to the requests with the requested information. Tr. 1095:17-1096:12. Among other things, the Union asked how much money DISH's wage proposals would save it compared to the Union's proposals. Mr. Basara provided the requested information by e-mail, indicating that the savings would be \$2.1 million.⁴ GC-90; GC-91; Tr. 1098:5-13. Mr. Basara did not declare impasse. Tr. 1099:9-11.

⁴ The Union and General Counsel stated repeatedly at the hearing that the Company had failed to respond to information requests, but each time, their allegations fell apart upon questioning. For example, Ms. Ramos testified that the Company failed to respond information requests regarding cost savings if the Company implemented its proposed wage rates as opposed to the Union's. Tr. 450:12-452:9. As discussed above, the Company answered the Union's question: \$2.1 million. Ms. Ramos then claimed that she asked for supporting documentation: "JUDGE RINGLER: ... [D]id you ask for a breakdown? THE WITNESS: Yes, sir. I did." Tr. 452:10-12. Upon further questioning, Ms. Ramos was forced to admit that she had never made the allegedly-unanswered information request: "JUDGE RINGLER: ... I asked, well, did you ever ask for the supporting documentation? ... And what is your answer for that? THE WITNESS: I would say not that I recall. Not that I recall, no." Tr. 455:9-22.

The parties met again in July 2014, but exchanged no proposals. Ex. R-22; Tr. 1101:5-1103:11. During this session and after, the Union again asked for more information, which DISH provided. *Id.*; CP-93. At this point, from Mr. Basara's perspective, the Union was stalling to protect the status quo (*i.e.*, QPC) as long as possible before DISH could declare impasse:

They had gone into ... a four-corner stall, a basketball offense. ... Basically, you just hold the ball and -- the whole game. And so -- now, it appeared to me that they had gone into the mode of every day that if I don't have an agreement is another day that people get to work under QPC, so I think this was turning into clearly a stall tactic because they fully knew I wasn't accepting it at that point, and they were going to hang onto it as long as they can.

Tr. 1103:18-1104:3. The parties met at the bargaining table for the last times from November 18 to 20, 2014. Ms. Ramos missed the first two days of bargaining because she was in Florida.

Tr. 1108:17-20. The Union was represented at the meeting by attorney Matt Holder and Staff Representative Tony Shaffer, among others. Tr. 1177:2-5. The Union presented a proposal demanding *the richest wages yet*, including QPC plus provisions that were not in any previous proposal: an allowance for clothing and work boots; premium pay of 1.5 times regular rates for hours worked over 11 in a day; and 2 times their regular rates for hours worked over 14 in a day. Ex. CP-60; Tr. 1109:12-1111:4. The proposal made additional new demands, including requirements to evenly distribute work assignments throughout the DFW region (which was not something DISH could do based on its automated work assignment system); and that bargaining-unit technicians be permitted to participate in a program called "Smart Home Services," in which technicians could earn certain incentives for providing additional services in customers' homes. Ex. CP-60; Tr. 1110:13-1111:21. DISH rejected the proposal.

On November 19, 2014, after more than four years of bargaining, Mr. Basara presented DISH's final offer. Ex. GC-2; Tr. 1111:24-1112:25. The proposal included the terms that the parties had tentatively agreed upon throughout bargaining, and it significantly improved its wage

offer for technicians, to \$13 to \$17 per hour, depending on the technician's grade. Ex. GC-2.

Mr. Basara explained that he considered the wage offer fair even if it was a little lower than the wages DISH paid to its non-unionized workers.⁵ Tr. 1146:6-9.

The parties then bargained over the proposal. Exs. R-4; R-5; Tr. 1115:16-21. At the Union's request, Mr. Basara agreed to increase the wage proposal for warehouse specialists ("ISP") to \$12.65 per hour. Ex. R-4; Tr. 1113:20-1115:6. Mr. Basara explained that he initially inadvertently offered lower wages for ISPs; he agreed to the higher wage rate because ISP wages simply were not a point of concern for DISH. Tr. 1114:20-1115:6. Also, after initially rejecting the Union's demand that technicians participate in Smart Home Services, Mr. Basara agreed to it after further bargaining. Ex. R-4; Tr. 705:13-17; 1115:7-15. The parties wrote out the new agreements that they reached on the final offer that Mr. Basara had previously handed the Union, and then both parties left the table with a copy of the revised final offer. R-4; 1026:14-24; 1057:6-1058:12. The parties then met for another day of bargaining on November 20, 2014. Ex. GC-55; Tr. 1117:8-13.

When Mr. Basara presented DISH's final offer on November 19, 2014 and stated that it was DISH's "final offer," the Union understood he meant it. Ms. Ramos testified that she returned early from her trip to Florida because DISH had presented its final offer.

Q Okay. And did you attend the session on November 20th, 2014?

A Yes, I did.

Q And why did you attend that session?

⁵ 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 DFW region. *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—meaning roughly \$12.50 per hour in a 40-hour 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).

A Because the staff rep, Tony Shaffer, called me the day before and told me that we had gotten a final offer from George Basara at the table.

Tr. 471:20-472:1. *See also* Tr. 557:22-25.

After the November 20, 2014 session, the parties intended to meet again on December 8, 2014, but the Union cancelled the meeting due to a death in Ms. Ramos's family. Ex. GC-32. Because of scheduling difficulties, the parties next bargained by correspondence. On December 9, 2014, the Union rejected DISH's offer and presented a counterproposal via e-mail. Ex. GC-5; Tr. 1121:10-13. Specifically, the Union proposed: (1) retaining QPC plus clothing and boots allowances for current technicians; (2) that new technicians hired after the effective date of the prospective contract be paid hourly wages, starting at market rates but quickly increasing by 5.3% to 7.5% per year, plus the Pi incentive program; and (3) raises of roughly 25% for warehouse workers for the first year of the contract, and further raises of 5.9% to 6.5% per year thereafter. *Id.*

The Union evidently now regrets having sent the December 9, 2014 e-mail, but it effectively admits that this correspondence constituted bargaining over DISH's final offer. Ms. Ramos testified, "it's a policy in our, in District 6, that we don't bargain by email, and I went against that policy by even sending those proposals to Basara." Tr. 509:2-5.

For its part, DISH did not consider the Union's concessions in the final proposal to be a significant movement. Tr. 1120:19:24; Tr. 112:21-113:6. Mr. Basara testified that it did nothing to address the parties' disagreements over the current technicians. Tr. 1120:19:24. Further, in his experience, splitting compensation systems for junior and senior members of bargaining units consistently failed. Tr. 1120:25-1121:9. Brian Balonick, who ultimately took over the file from Mr. Basara, further explained that he did not see the concession as significant because annual attrition in the unionized offices was so low (16% in 2015, in contrast to about 50% in non-union

offices, due to the much-higher wages in the unionized offices), that most technicians would retain QPC for years, which both parties knew was plainly unacceptable to DISH. Tr. 112:21-113:21; R-53. Mr. Balonick thus testified:

DISH had made it clear that it could not agree to QPC. People were not leaving those offices because they were making so much more money under QPC, 50%, 60%, 70% more. So having new hires not on QPC was not a significant change to DISH, nor did I view it as a significant change when I reviewed the file and saw what the status of the parties was. So, the problem was that the union continued to take the same position that it had taken for more than a year that the only thing it could agree to was QPC. In this proposal where it rejected Dish's last, best, and final offer, it was maintaining it wanted QPC for three more years. So I did not see that as a significant change in reviewing it.

Tr. 112:21-113:21. Indeed, because the rising value of QPC outpaced attrition, calendar year 2015 under the Union's final proposal still would have been more expensive than 2014 under QPC, which DISH already had rejected.⁶

In a December 18, 2014 letter to the Union, Mr. Basara, reiterated that DISH had made its last, best and final offer (Ex. R-4), documented the terms of that offer in typed form (recognizing that in November, DISH had provided the final offer in a handwritten document, and the parties then wrote on the document as they bargained over it), and indicated that the Union's December 9 response to Dish's final offer showed no significant movement. GC-3; Tr. 1122:17-1124:9. He continued, "We believe that bargaining has been exhausted." *Id.* Emphasizing this point, Mr. Basara added, "We ask that you take our final offer to your members and let us know if the proposal is accepted." Ex. GC-3.

⁶ In 2014, unionized technicians earned, on average, \$56,437. Ex. R-49. In 2015, under the Union's final proposal, technicians hired before the effective date of a prospective contract would have earned, on average, \$62,632. *See* Ex. R-49; GC-5. Even if 16% of technicians attrited and their replacements earned market wages for FSS Level 1 (about \$32,000, *see* Ex. CP-120), unionized technicians collectively would have earned, on average, over \$57,700. *See* Exs. R-49; GC-5, CP-120.

Mr. Basara testified that he "saw the parties at loggerheads." Tr. 1128:6-13. Since July 9, 2013, he had not seen any evidence that the Union was willing to accept anything less than QPC for its technicians. Tr. 1128:20-24. He elaborated:

I didn't think [bargaining] was going to go anywhere. I think they were still going to stick to QPC. I mean, I didn't see them coming off of that, if that is what you want to know. I mean, it had been four years; Lord knows -- like I said, every day this thing got delayed, guys made money under QPC, and so I think their goal was to continue this as long as they could continue it until such time as it got changed, but, you know, I don't blame them for that. It is not a bad strategy, and they were doing something for the membership, so, you know. They were just going to continue on. Why wouldn't you? The change was going to cut everybody's pay.

Tr. 1129:9-20. Ms. Ramos, responded to Mr. Basara's letter by e-mail on December 30, which stated only two things: (1) a purported desire to continue bargaining, and (2) a suggestion of bargaining dates in January 2015. Ex. GC-8. The e-mail did not indicate any willingness to move from the Union's position regarding wages, nor did it suggest any hope that the Union would significantly change its position upon further bargaining. DISH reasonably concluded, therefore, that Ms. Ramos's December 30 e-mail was simply another stall tactic, providing no reason to believe that continued bargaining would be productive. *Id.* Mr. Basara responded by e-mail the next day, December 31, 2014, writing that he would be starting a new job, and Attorney Brian Balonick would be taking over the DISH file from him. Ex. GC-9.

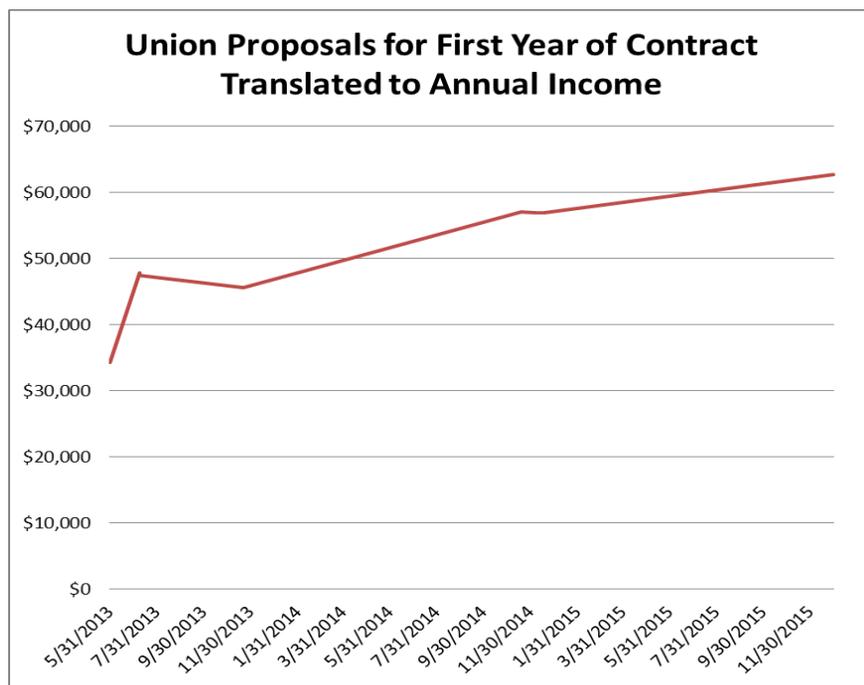
D. Summary of Wage Proposals

DISH's final offer remained with the Union for over a year, until the parties communicated again in January 2016. Early in 2015, Mr. Balonick reviewed the bargaining file and DISH assessed the status of bargaining. Tr. 1010:15-20.

The following table ("Table 1") summarizes the parties' wage proposals starting May 31, 2013, that Mr. Balonick reviewed.

Summary of Wage Proposals			
	DISH Proposals	Union Proposals	
		First Year of Contract	Later Years
5/31/2013	Straight Hourly Wages: FSS1 \$11.00; FSS2 \$12.00; FSS3 \$13.50; FSS4 \$15.00	Hourly Wages: FSS1 \$12.25; FSS2 \$13.48; FSS3 \$14.82; FSS4 \$16.30. Plus Pi	3% annual increases
7/9/2013		QPC + Hourly Wages above current rates: FSS1 \$7.35; FSS2 \$8.08; FSS3 \$8.89; FSS4 \$9.79.	5% annual increases
7/9/2013		QPC + Hourly Wages above current rates: FSS1 \$7.21; FSS2 \$7.93; FSS3 \$8.72; FSS4 \$9.60.	3% annual increases
11/21/2013		QPC at current rates	
11/19/2014	Straight Hourly Wages: FSS1 \$13.00; FSS2 \$14.00; FSS3 \$16.00; FSS4 \$17.00	QPC at current rates plus \$550 annual clothing and boots allowance plus daily premiums of 1.5X for hours worked over 11/day and 2x for over 14/day	
12/9/2014		For current technicians, QPC at current rates plus \$500 annual clothing and boots allowance; For new technicians, market rates	5.3% to 7.5% annual increases for new techs
12/18/2014	Same as 11/19/2014		

See Exs.GC-40; R-4; GC-7; GC-13; R-1; R-2; CP-60; GC-5. The following graph ("Figure 1") translates the Union's proposals into estimated annual earnings.



As Figure 1 shows, the Union's QPC proposal on July 9, 2013 was worth over \$10,000 more per technicians' annual compensation than its prior proposal.⁷ Due to increases in the value of QPC, discussed earlier, and the Union's demands for "QPC Plus," the value of the Union's proposals continuously rose. While DISH was clearly demanding a reduction in payroll, the Union's demands increased by tens of thousands of dollars per employee. *See* Figure 1. The Union's demands thereby drove the parties' proposals further and further apart as bargaining continued.

E. DISH Declares Impasse in 2016

After hearing nothing from the Union for more than a year, Mr. Balonick sent Ms. Ramos a letter on January 8, 2016. Mr. Balonick reiterated DISH's position that it had made its last, best and final offer to the Union in November 2014, and requested that the Union indicate whether it intended to accept.

George was clear that after four years of bargaining, his November 19, 2014, letter to you presented DISH's last, best and final offer. Your letters back to him in December indicated that you rejected our final offer and were unwilling to take it to your bargaining unit. It has been one year since your last correspondence with George, and we have not heard anything further from you. Please let us know by January 15, 2016, whether you accept our final offer. Because the proposal we gave you on November 19, 2014, was and remains our final offer, it does not appear at this point that further bargaining would be productive. If we do not hear from you by January 15, we will assume that you again reject our final offer.

⁷ For the Union's proposals of QPC and "QPC Plus", the values are based on the actual earnings of technicians under QPC (Ex. R-49), plus, as applicable, the value of additional demands, including clothing and boots allowances and the higher hourly rates multiplied by the number of hours worked (R-54). For the Union's proposal of Pi in May 2013, the values include an average of \$150 for half of technicians per pay period, in accordance with Monty Beckham's testimony, discussed above (Tr. 876:9-878:2).

Ex. GC-10. Mr. Balonick explained why DISH did not contact the Union earlier:

Based upon what I saw, and what I had been told, we had the impression that the Union was stalling and delaying this to protect QPC. ... [T]hey were going to see how long they could hold on to it.

Q So what did you decide to do?

A ... I thought it would be a good time to kind of sit back and put the Union to the test a little bit. . . [I]n the other first contracts I've been involved in, the Union has been sort of banging on our door, "Hey, let's meet," and putting proposals forth. And so, I wanted to sort of test them out and see if they were serious about getting a deal or whether they truly were just stalling to protect QPC.

Tr. 1011:20-1012:24. Mr. Balonick further explained the purpose of his January 8 letter:

I wrote that letter in January of '16 inviting them to show us something that -- anything that they were interested in a contract where it wasn't QPC.

Tr. 116:24-117:2. Indeed, Ms. Ramos confirmed in her testimony the suspicion that the Union found stalling to be a useful tactic to protect QPC.

JUDGE RINGLER: First, is it also fair to say that from the Union's perspective, this status quo, i.e., keeping the QPC and not bargaining for a while, was preferable? Is that fair to say, as well, or is that not fair to say?

THE WITNESS: I would say, of course, that's fair to say.

Tr. 593:5-11. Employing this tactic, on January 13, 2016, Ms. Ramos responded by letter to Mr. Balonick, focusing entirely, as she did in December 2014, on her desire to meet again and expressing her version of the bargaining history. She again refused to address whether the Union would be willing to substantively change its position, let alone accept DISH's final offer.

Ex. GC-11.

Mr. Balonick viewed the response as more stalling. Tr. 1015:9-10. So, he replied on February 2, 2016:

I write in response to your January 13, 2016 letter. It appears from your letter that the Union's position remains the same as it did in December of 2014. That is, it rejects DISH's last, best and final

offer and continues to offer counter-proposals that do not differ greatly from its previous proposals.

As you know, the parties have been bargaining since 2011. In December 2014, Mr. Basara communicated to you that bargaining had been exhausted. For over 12 months, the parties have remained rigid in their respective positions. **We view your January 13 letter as further evidence that the parties are at a standstill. If you disagree, please explain your position to me. Otherwise, DISH will implement its last, best and final proposal.**

Please do not hesitate to call me if you would like to discuss further.

Ex. GC-18 (emphasis added). Mr. Balonick discussed the purpose of his letter: "I was practically begging them, if you read the letter, to give me something to show that bargaining would be -- could be productive on this QPC issue." Tr. 1015:17-20.

Even after being directly and repeatedly asked to provide any explanation as to why the Union believed that the parties were not at impasse, Ms. Ramos replied on February 3, 2016, as she had each time before, with a "demand that Dish meet to discuss and confer" and a recitation of the Union's perspective on the bargaining history. Ex. GC-26. The Union offered no suggestion that it would accept DISH's final offer or change its wage demands. *Id.*

At this point, DISH started planning what it would do if it needed to implement the impasse. Tr. 1017:4-10. Finally, on April 4, 2016, after more than five years of bargaining, three final months of DISH reiterating its final offer, and the Union offering nothing other than demands to further string out bargaining, Mr. Balonick notified Ms. Ramos that DISH would implement its final offer effective April 23, 2016. Ex. GC-19. Mr. Balonick explained that he sent the letter with the "hope[] that I was going to get something back from the Union, saying, 'Stop. We can talk about QPC.' ... I was looking to push them to do something different on QPC and I wanted them to know, you know, how serious we were about -- about it." Tr. 1018:2-10.

Despite Mr. Balonick's hopes and clear and unambiguous letters, the Union showed no willingness to make any concessions that would suggest any chance that further bargaining would be fruitful. Indeed, it did not even contact its membership to let them know what was happening. *See, e.g.*, Tr. 168:9-169:10; 281:19-283:4; 289:1-20; 430:2-10; 440:13-15; 442:1-16; 430:2-10; 531:2-9. Employees first learned that the Company was even discussing the prospect of impasse when, between April 5 and April 14, 2016, DISH held information sessions for employees and their first-level supervisors at Farmers Branch and North Richland Hills, and told the employees what it had told the Union: that parties had bargained to impasse, and DISH was implementing its final offer. Tr. 901:17-902:6; 917:6-8; Ex. GC-114. DISH also summarized the major terms of employment that were going to change.⁸ *Id.*

Despite all that was happening, on April 12, 2016, the Union simply reiterated its insistence on meeting again and presented its self-serving account of the parties' bargaining history. Ex. GC-27; Tr. 1019:9-15. On April 19, 2016, Mr. Balonick sent yet another letter, this time after DISH already had informed technicians of the impasse and implementation of the final offer, "begging them to show me in writing that they were willing to do something different on what had clearly been a roadblock for the parties so I was trying again." Tr. 1020:16-19; Ex. GC-28. The Union did not respond. Tr. 1020:20-1021:1. Finally, on April 21, 2016, Mr. Balonick sent Ms. Ramos an e-mail, confirming DISH would implement its final offer on April 23. Ex. GC-29.

Mr. Balonick explained why he sent so many letters.

⁸ Despite DISH's best efforts to provide its employees a complete and accurate account of the bargaining history and current status of bargaining, on April 6, 2016, a first level supervisor, Hanns Obere, inadvertently communicated his personal and mistaken beliefs about the impasse to a technician, in which Obere said, among other things, "The Union is gone." Ex. R-40. The ALJ found the text to be a Section 8(a)(1) violation (Decision at 15). Because the ALJ did not find that the text had any bearing on whether the impasse was lawful, DISH does not discuss it further here.

I understood what the employees -- their wages were going to change, and -- you know, in a pretty significant way. I was trying again to reach out to them ... [I]t was kind of a Hail Mary, to see if maybe they -- if they would reach out and try to do something to get us back to the table.

Tr. 1021:23-1022:7. Mr. Balonick also confirmed that he would have met with the Union at the bargaining table had it shown any indication that doing so would not have been futile, but the Union never gave any such indication. Tr. 1023:6-13. Instead, it continued to stall.

III. QUESTIONS PRESENTED

1. Did the ALJ err in concluding that DISH unlawfully implemented its final offer and failed to bargain with the Union? (Exceptions 1-14; 18-20)
2. Did the ALJ err in concluding that DISH constructively discharged employees who quit after DISH implemented its final offer? (Exceptions 15-20)

IV. ARGUMENT

A. The Parties Were at Impasse

By April 2016, the parties were about \$30,000 apart on wages per technician, with no reasonable prospects of closing that gap. Board law defines impasse as the "situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement.'" *Royal Motor Sales*, 329 NLRB 760, 761 (1999) (citing *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968)). Put another way, a genuine impasse exists where there "is no realistic possibility that continuation of discussion at that time would [be] fruitful." *Rochester Tel. Corp.*, 333 NLRB 30, n.3 (2001) (citing *Hayward Dodge*, 292 NLRB 434, 468 (1989), and authorities cited therein).

Thus, in *In re Matanuska Elec. Ass'n, Inc.*, a case with many factual similarities to the present one, the Board affirmed an ALJ finding of impasse where:

- The parties had been unable to reach agreement on two contract provisions after reaching agreement on many others;

- The employer made clear that it sought to eliminate a contract provision that it deemed unfavorable (regarding subcontracting), but the union repeatedly refused to eliminate the provision, and sometimes demanded a revision that was even less favorable to the employer;
- The union used stall tactics, evidently preferring to retain the status quo;
- The union changed bargaining representatives between the last face-to-face bargaining session and the employer's impasse declaration; and
- The employer declared impasse prior to a planned bargaining session upon realizing that "further bargaining would be futile and not likely to produce an agreement."

337 NLRB 680, 681 (2002). The Board determined that the parties were at impasse because it agreed with the employer that "there [was] no reasonable likelihood of the parties reaching an agreement." *Id.* at 683. The Board noted that, between the last face-to-face bargaining session and the employer's impasse declaration, the union had made "substantial" concessions on the two contract provisions in dispute. *Id.* at 681. Nevertheless, the Board found, the employer lawfully declared impasse because the proposals were "still far apart from the Respondent's offer," and there was no reasonable likelihood that continued negotiations would result in a contract. *Id.* at 684.

Here, similarly, DISH bargained in good faith for more than five years. It met with the Union for dozens of bargaining sessions, and the parties exchanged dozens of proposals and counterproposals. These numbers strongly support a finding of good-faith leading up to and including the impasse declaration. *See Prentice-Hall, Inc.*, 306 NLRB 31, 40-41 (1992) (good-faith impasse found after eight bargaining sessions over five months).

Further, DISH made numerous material concessions throughout negotiations, on wages and other issues. By the time negotiations reached a standstill in November 2014, DISH had significantly improved its previous proposals for wages, ending at \$13.00 to \$17.00 per hour. Ex. GC-7. It also agreed to 20 other provisions. *Id.*

The only real issue, then, is whether, at the time DISH declared the impasse, there remained any viable prospect of reaching an agreement. *Royal Motor Sales*, 329 NLRB at 761. There was not. The parties held polar opposite positions for the final 33 months of bargaining. The Union sought to maintain or raise wages for its bargaining-unit members, and it demonstrated that it would not and could not agree to significantly reduce them. Meanwhile, DISH sought to substantially reduce wages, and the need for doing so increased throughout negotiations as the pay disparity between the technicians at the unionized offices and those at DISH's other offices grew. Ex. R-49.

DISH did its part to bargain towards an agreement. Once it became clear, however, that the Union would not let go of QPC, which the Union signaled by offering at one point to withdraw every other point of contention just to maintain QPC, the parties got stuck. Ex. R-2; Tr. 376:1-377:7. The Union, unwilling to relinquish QPC, was at the end of its rope. So, it engaged in gamesmanship, regressing in its proposals so that it could appear to make concessions later. *See supra*, Table 1; Figure 1. DISH was then stuck bargaining against itself. It did so for a while, improving its wage proposals repeatedly in late 2013 and 2014, but it eventually reached the end of its rope, having made a fair, final offer with wages that were competitive with those paid by other employers in the market.

After DISH made its final offer on November 19, 2014, the parties bargained over it in person for the rest of the day, and the following day, and continued to bargain by correspondence. Exs. R-4; R-5; GC-9. But, the Union made clear in its December 9, 2014, response and counterproposal that it would not accept reductions in current bargaining-unit members' wages, and it even insisted that new technicians hired after the signing of the contract would receive raises to be paid well above market wages within one to two years. Ex. GC-5.

Board law permits DISH to stand pat as it did. In *CalMat Co.*, 331 NLRB 1084, 1098 (2000), for example, the employer took a firm position from the beginning of negotiations regarding the issue of pension benefits. In determining that an impasse existed, the Board noted that, "The Respondent never wavered from its position [regarding the pension]. The Union, too, was equally adamant in its position that the fixed contribution rate could not be eliminated. All other bargaining occurred in the shadow of this fundamental disagreement." *Id.* See also *Atl. Hilton & Towers*, 271 NLRB 1600, 1603 (1984) (both parties "have a duty to negotiate with a 'sincere purpose to find a basis of agreement,'" but "an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith.") (internal citations omitted). Similarly, here, the parties took firm positions with respect to what they could and could not accept with respect to wages. DISH never would accept QPC. The Union insisted on keeping it. All other bargaining occurred in the shadow of this fundamental disagreement.

DISH could have declared impasse in late 2014. But, it did not want to rush to judgment, so it provided the Union with every opportunity to reach a deal. Indeed, after receiving the Union's regressive proposal in July 2013, Ex. R-1, Mr. Basara had repeatedly been questioning whether the parties were at impasse. See *supra*, pp. 11-12, 16. But DISH understood the severity of declaring impasse, and it had been taking pains to avoid doing so. To that end, rather than immediately declare impasse, DISH decided to put the Union to the test to determine whether it would change its position and accept reductions to wages. First, DISH clearly and unequivocally stated in its December 18, 2014 letter to the Union that its November 19, 2014 proposal was its last, best and final offer, and that it appeared to DISH that continued bargaining would be futile. Ex. GC-3. It also gave the Union significant time (over one year) to make a decision. This was a costly proposition for DISH because it knew that bargaining-unit members'

wages were costing DISH a lot of money. But still, DISH did not rush to judgment. It waited. Sure enough, the Union went radio silent, content to stall if that meant its members could continue to enjoy their QPC windfall. Second, after a one-year bargaining hiatus, it was DISH—not the Union—that reached out to resume discussions. Ex. GC-10. Still, DISH did not rush to judgment. It put the Union to the test again and again, reiterating five times over the course of the final four months that it had made its last, best and final offer, and repeatedly asking the Union for any indication that continued bargaining would be fruitful. *See supra*, pp. 19-23. Each time, the Union failed to offer one, thereby providing further indication that an impasse had been reached. *Id.* In *Rochester Telephone Corp.*, 333 NLRB at 64, the Board upheld the ALJ finding of impasse where, after the company presented its final offer, "neither at the table nor in [its] letter response to [the Company], did [the Union] indicate what subject areas the Union was prepared to move on and to what extent it was prepared to move... . The Union thus failed at a crucial ... time when impasse was imminent, to provide the Company with any signal that it was amenable to further movement." *See also The Union Leader Corporation*, NLRB General Counsel Memorandum, Case No. 01-CA-123340, 2014 WL 7721825, at *5 (Nov. 24, 2014) ("we initially conclude that the parties had reached impasse as of March 3 because the parties were far apart on economic issues, particularly wages, and neither side demonstrated a willingness to compromise further."). The exact same situation occurred here.

Ultimately, the Union did nothing but make empty demands to continue bargaining. *See supra*, pp. 17, 19-23. Such demands do not preclude a finding of impasse. In *National Gypsum Co.*, 359 NLRB No. 116 (2013), the Board reviewed the issue of whether a union's requests to continue bargaining indicates the lack of an impasse. In that case, despite evidence that the two sides could not come to an agreement on a 401(k) issue, the union communicated it wanted to

continue to meet. The Board adopted the ALJ's statement that: "there was no reasonable basis for the Union to believe that continued bargaining ... would have been fruitful. Nor do I believe the Union really believed this, notwithstanding [the Union]'s statements on the record that it was prepared to continue bargaining. And there was every reason for the company to believe ... that [the Union]'s statements were an 'empty offer.'" Likewise, here, given the parties' positions and their long bargaining history, there was no reason to believe additional bargaining sessions would be fruitful, and it was clear that the Union's empty demands to continue bargaining were a self-serving ploy to delay an impasse declaration. Therefore, after a final 33 months of futile bargaining, and five written warnings to the Union that it believed impasse existed with no meaningful response, DISH finally—and lawfully—declared a bargaining impasse in April 2016.

Despite the foregoing evidence and Board law, the ALJ concluded the parties were not at impasse because:

- DISH did not meet and bargain with the Union even after the Union offered what the ALJ characterized as a "substantial QPC compromise" in December 2014: *i.e.*, eliminating QPC for new hires while retaining it for current technicians;
- Mr. Basara allegedly conditioned bargaining on the Union taking DISH's final offer to a vote;
- The passage of time between the final offer and implementation created a new possibility for fruitful discussion;
- The change in DISH's bargaining representative created a new possibility for fruitful discussion; and
- DISH refused to reschedule a previously scheduled session.

(Decision at 12-14). The myriad errors in the ALJ's conclusions can be summarized in three categories. First, the ALJ failed to analyze any of the evidence from DISH's perspective, including ignoring how the Union's stalling and regressive bargaining affected the analysis of whether the parties were at impasse. Second, the ALJ's most important finding—regarding the

significance of the Union's December 2014 counterproposal—was based on a fundamental misreading of the evidence. Third, the ALJ's remaining findings are premised on mischaracterizations of the impasse standard and one-sided superficial accounts of Board law that, in each case, is more nuanced and mixed than the ALJ acknowledged.

1. The ALJ Failed to Analyze Any of the Evidence from DISH's Perspective, Including Ignoring the Union's Stall Tactics.

Board law is clear that it is appropriate to view the facts from the employer's perspective when the employer's assessment that further bargaining would be fruitless stems from its perception that the Union employed dilatory tactics. *See Southwestern Portland Cement Co.*, 289 NLRB 1264, 1276 (1988) (citing *M & M Contractors*, 262 NLRB 1472, 1476 (1982); *R. A. Hatch Co.*, 263 NLRB 1221, 1223 (1982)); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 101 (1995).

In *Southwestern Portland Cement Co.*, for example, the Board affirmed an ALJ's finding that an employer lawfully declared impasse where the ALJ examined the evidence from the employer's perspective and found the following:

[T]he Respondent was anxious to achieve "give backs" or "take backs" in its collective-bargaining relations with the Union, which "take backs" would substantially modify the terms and conditions of employment of the expired 1981-1984 agreement. The Union was just as anxious to avoid those takebacks and, indeed, was anxious to gain concessions in terms of wages, hours, and terms and conditions of employment. Basic to an understanding of union conduct herein, I also find that failing to achieve its end, the Union was content to sail along with unit employees operating under the terms and conditions of employment of the expired contract.

289 NLRB at 1273. In reviewing the Union's conduct, the Board affirmed the ALJ's finding that the Union had no bargaining leverage, such as taking its employees out on strike, and it resorted to various stall tactics, including filing unfair labor practice charges, to delay impasse. *Id.*

Under these circumstances, the Board found that the Union's bargaining position and conduct

were crucial to the analysis, and ultimately concluded the parties had reached impasse. *Id.* at 1264. *See also In re Matanuska Elec. Ass'n*, 337 NLRB at 685 (considering union's bargaining tactics as evidence supporting that the parties were unlikely to reach an agreement, and thus were at impasse).

Similarly, here, the parties' respective tactics, particularly when viewed from DISH's perspective, demonstrate that they reached impasse. After five years of hard bargaining by both sides, DISH's position was perfectly clear to the Union. DISH was committed to eliminating QPC and lowering wages, and in no event would it agree to a contract paying union employees significantly more than their non-union peers because it had no reason to do so. Union employees were not in a position to economically leverage DISH because they were too few in number to effectively strike, and if they tried, DISH could have met its operational requirements by relying on contractors and employees in nearby offices. *See supra*, pp. 8-9. In short, in the absence of bargaining leverage, the Union could not pressure DISH to accept its demands. *See Southwestern Portland Cement Co.*, 289 NLRB at 1273 (citing *Roman Ironworks*, 275 NLRB 449, 452 (1985)) (an employer may rely on its bargaining leverage and demand "givebacks" in bargaining "consistent with its strength. Quite obviously, the respective strength of a union verses a company in bargaining is largely dependent on the support of the employees it represents, their willingness to strike and the vulnerability of the company to a strike.").

The Union, in contrast, wanted to retain QPC or comparable wages for its members, which far exceeded the wages of non-union peers. The Union did not back off of its insistence on QPC since July 9, 2013, and it indicated no willingness to compromise in five rounds of correspondence in 2016, including rounds before and after DISH declared impasse. The Union

also admitted that its members were demanding to remain on QPC or a wage system that would pay comparably to it. *See supra*, pp. 6-8.

The only tools at the Union's disposal were stall tactics to maintain the status quo as long as possible to deliver to its members what it could not obtain through an agreement. The Union used those tools. It repeatedly regressed in its bargaining positions (including repeatedly demanding "QPC Plus") only to next offer minor concessions to create the illusion that bargaining was fruitful. *See supra*, Table 1; Figure 1. It made massive information requests, including 38 in a single May 2014 letter, after the parties had already been bargaining for almost four years, and much of the requested information already had been provided. Exs. CP-122; CP-93. When it was finally clear that all other stall tactics had been exhausted, the Union resorted to empty demands to continue bargaining, maintaining the QPC windfall as long as it could, while doing everything it could to build its record for a Board charge for when DISH eventually would need to declare impasse. *See supra*, pp. 17, 19-23.

Parties should not be permitted to obtain through Board procedures what they cannot obtain through bargaining. *See The Union Leader Corporation*, 2014 WL 7721825 at *5. Yet, that is exactly what the Union seeks in this case, attempting to coerce DISH to continue QPC, which was not attainable through bargaining. The ALJ's analysis tacitly permits this abuse of the NLRA by failing to analyze the facts from DISH's perspective or address the role of the Union's bargaining tactics on the impasse.

2. The ALJ's Most Crucial Finding is Flawed Because it is Premised on a Plainly Erroneous Reading of the Record; Incorrectly Imposes on DISH an Obligation to Make a Concession that the Law Does Not Require; and Ignores the Parties' Bargaining History.

The ALJ's only finding that goes to the heart of the question of whether the parties were at impasse (*i.e.*, the Union's "substantial QPC compromise") is based on a gross misinterpretation

of DISH's attrition data.⁹ The ALJ contended:

[T]he Union creatively proposed a 2-tiered wage system [in December 2014, in response to DISH's final offer], where incumbents retained QPC, and new hires received the traditional wage schedule Dish was seeking. (GC Exhs. 4, 5). Although this proposal did not represent the complete abolishment of QPC that Dish desired, it still provided cause for optimism. As noted, **Dish's technicians had a very high attrition rate, which meant that the Union's proposal made it probable that new hires receiving non-QPC rates would soon become the majority in the FB and NRH units, as the attrition rate continued. (R. Exh. 53 (annual attrition ranging from 116% to 13%))**. This, in turn, meant that Dish would have attained most of what it wanted on wages in the short term, and would have set the stage for a fuller resolution on QPC in later bargaining (i.e., eventually abolishing QPC would have become an easier selling point in later bargaining, when only a narrow minority paid under QPC remained).

(Decision at 4) (emphasis added).

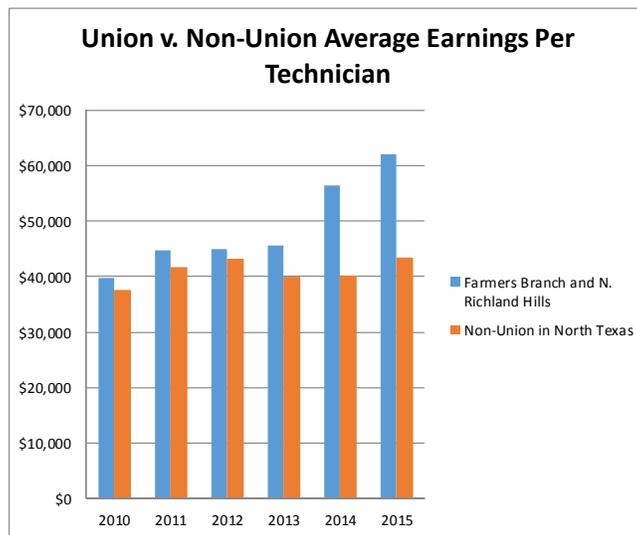
The ALJ's analysis of the significance of the Union's December 2014 proposal is founded on three fundamental errors. *First*, his assessment of the attrition rates is clearly erroneous. DISH's Exhibit 53 shows that attrition rates in the unionized offices (Farmers Branch and North Richland Hills) were markedly lower than the attrition rates in non-unionized offices. In 2013, the unionized offices had the third and fourth lowest attrition rates in the region. In 2014, they had the second and third lowest rates in the region. And, in 2015, they had the two lowest rates in the region.

⁹ As discussed below, the ALJ's finding regarding the significance of passage of time also relies on his erroneous interpretation of the attrition data.

Attrition Rates in N. Texas			
Office	2013	2014	2015
Farmers Branch	40.20%	31.40%	19.60%
North Richland Hills	51.50%	30.50%	13.10%
Denton	37.00%	39.30%	76.20%
Arlinton/Ft Worth	116.00%	69.50%	86.00%
Waxahachie	58.80%	28.40%	27.20%
Weatherford	61.80%	46.70%	22.40%
McKinney	58.50%	32.70%	60.20%
Sunnyvale	63.80%	47.80%	56.70%
Burleson	39.90%	N/A	N/A

R-53. This is no coincidence. As DISH's witnesses testified, supported by the data, attrition rates were falling just as wages under QPC were ballooning. Tr. 890:22-893:18. From 2013 to 2016, attrition in the unionized offices fell from about 46% to about 16%. During those same years, annual wages in the unionized offices rose from about \$45,500 to about \$62,100.

See R-49.



In contrast, non-union wages and attrition rates remained relatively flat during this three-year period.

The ALJ's assessment that "Dish's technicians had a very high attrition rate ... ranging from 116% to 13%" thus conflates the attrition rates in the unionized offices with the non-union

offices, and it ignores that the unionized attrition rates were falling quickly as wages rose, whereas non-union attrition rates remained much higher. Indeed, the data show that attrition rates in the unionized offices had fallen to about 16%, and likely would have fallen further in 2016 if technicians remained on QPC (which all then-employed unionized technicians would have under the Union's December 2014 proposal) and QPC wages continued to rise (as they had every single year since 2010). Exs. R-49; R-53.

Because DISH understood the relevance of the low attrition rates in the unionized offices and that QPC wages were rising quickly, DISH's bargaining agents testified, they did not view the Union's December 2014 proposal as a significant compromise. The data demonstrate they were right. In 2014, unionized technicians earned, on average, \$56,437. Ex. R-49. In 2015, under the Union's final proposal, unionized technicians collectively would have earned, on average, over \$57,700. *See* Exs. R-49; GC-5, CP-120.¹⁰

The ALJ expressly tied his clearly-erroneous reading of DISH's attrition statistics to his determination that the Union's December 2014 proposal was "significant" and "created the 'realistic possibility that continued discussions would be fruitful.'" (Decision at 12). Therefore, his finding that the December 2014 proposal "estopped bargaining from reaching impasse" was plain error and should be reversed.

Second, even if the Union's alleged concession in its December 2014 proposal were a real concession, the ALJ implicitly ascribed to DISH an obligation to make a concession that the law does not require. The ALJ wrote, "This, in turn, meant that Dish would have attained most of what it wanted on wages in the short term, and would have set the stage for a fuller resolution on

¹⁰ Pursuant to the Union's December 9 proposal, technicians hired before the effective date of a prospective contract would have earned QPC, which, in 2015, meant an average of \$62,632. *See* Ex. R-49; GC-5. Even if the 16% of technicians who attrited in 2015 were replaced with new technicians who earned market wages for FSS Level 1 (about \$32,000) (*see* Ex. CP-120), unionized technicians collectively would have earned, on average, over \$57,700.

QPC in later bargaining (i.e., eventually abolishing QPC would have become an easier selling point in later bargaining, when only a narrow minority paid under QPC remained)." (Decision at 4). He continued, "This counter ... would have likely set in motion the wholesale elimination of QPC in future bargaining for a successor contract." (Decision at 12 n.16) (emphasis added). The ALJ's analysis suggests that DISH should have conceded to allowing some employees to remain on QPC throughout the parties' first contract. DISH had absolutely no obligation to make this concession. The Act requires employers to bargain in good faith. It does not require either party to agree to any proposals or make any concessions. *CalMat Co.*, 331 NLRB at 1098. Further, the ALJ simply ignored that the Union's proposal guaranteed market rates plus 5.3% to 7.5% annual raises for new technicians hired after the parties reached a contract, Ex. GC-5, which DISH had clearly and repeatedly indicated was unacceptable.

The bottom line is that the Union responded to DISH's final offer with a counteroffer that included terms that, based on the previous four years of bargaining, it knew DISH would never accept. As discussed, DISH would not accept continuing to pay QPC for then-employed technicians. Board law is clear that union concessions break or forestall impasse only where they create a new possibility for fruitful discussion. In *Hayward Dodge*, for example, the employer claimed it needed substantial relief from its benefits package because it was losing money, while the union claimed that the employer was profitable and demanded increased benefits. 292 NLRB 434 (1989). The Board found that the parties were at impasse even though the union dropped a week from its prior vacation demand at the last bargaining session. *Id.* at 469. Due to the fundamental difference in the parties' perspectives, the Board held that, even despite the union's concession, there was no reasonable basis to conclude that continued talks would be fruitful. *Id.* Similarly, in *GATX Logistics, Inc.*, the Board held that parties were at

impasse even though the union continued to reduce the proposed employer contributions to the union health and pension funds throughout bargaining, the key point of contention between the parties. 325 NLRB 413, 419 (1998). The Board found that the union's concessions were insufficient to provide a reasonable likelihood of reaching an agreement. *Id.* at 413, 419. *See also In re Matanuska Elec. Ass'n*, 337 NLRB at 681 (finding impasse despite the union making "substantial" concession to its position immediately before employer declared impasse because, even with the concession, there was little hope of the parties reaching an agreement). Likewise, here, due to the fundamental difference in the parties' positions on wages, a major concession would have been necessary. No minor concession—affecting only a small number of prospective employees, while doing nothing to address existing employees' wages, all the while guaranteeing large annual raises to newly-hired technicians not enjoyed by non-unionized technicians—would have been sufficient to lead to fruitful bargaining.

Third, the ALJ's analysis ignores the context in which the Union made its proposal. The Union bargained regressively multiple times in the final years of bargaining. After demanding a little above market wages in May 2013, it demanded "QPC Plus" in July 2013, then QPC at current rates, then "QPC Plus" again in November 2014. *See supra*, Table 1; Figure 1. Meanwhile, the Union knew DISH would not accept QPC, which was only increasing in value, making it less likely by the day that DISH would accept any proposal including QPC. When viewed as a whole, the Union's proposals in the final years of bargaining, including its December 2014 proposal, reflect nothing but gamesmanship, taking two steps backwards and then one step forward. To contend that one of the Union's one-step-forward movements was a concession that forestalled impasse wrongly accepts at face value textbook bargaining stall tactics and misapplies Board law.

3. The ALJ's Remaining Findings are Incorrect as a Matter of Law

The ALJ's remaining findings are incorrect as a matter of law for two key reasons. First, the ALJ got lost in the weeds, losing sight of the fundamental question in this case: whether there was any hope of the parties reaching an agreement. Second, each of the ALJ's findings is based on incorrect one-sided readings of Board law, which, in each case, is far more nuanced than the ALJ's cursory analysis suggests.

a. *DISH Did Not Declare Impasse Based on the Union's Failing to Take DISH's Final Offer to a Vote.*

The ALJ asserts that DISH's suggestion that the Union take DISH's final offer to a ratification vote taints the impasse because ratification votes are internal union matters and non-mandatory subjects of bargaining. (Decision at 12-13).

This finding fails for several reasons. First, an employer's demand regarding a permissive subject of bargaining taints an impasse only where the demand causes the impasse. *See ACF Ind.*, 347 NLRB 1042 (2006) (impasse was not invalidated by the employer's insistence on a non-mandatory subject of bargaining because it did not cause the impasse). The ALJ simply discarded *ACF Ind.* and similar cases, describing them as involving "exceptional circumstances." (Decision at 13, n.19). But, there is nothing in these cases suggesting that they are exceptional or that exceptional circumstances are necessary. Rather, the standard is straightforward: a permissive bargaining subject may not cause an impasse, but an employer certainly may make requests on permissive subjects of bargaining without tainting future impasse. *Id.*

There is no record evidence or finding by the ALJ showing that DISH's requests for a ratification vote caused the impasse. Rather, the impasse occurred because of the Union's insistence on maintaining wages that far exceeded the wages that DISH was willing to pay.

Mr. Basara's suggestion of having employees vote was a tactic to signal the seriousness of the situation and try to get employees involved in the process. There is no evidence that the Union's subsequent conduct was affected in any way by the suggestion of a vote. Nor is there any evidence suggesting that DISH ultimately would have required an employee vote to reach an agreement. The primary case cited by the ALJ, *In Re Jano Graphics, Inc.*, like the other cases he cited, is therefore readily distinguishable. In *Jano Graphics*, the union asked the employer to continue to bargain *and stated that it had additional proposals to offer*, yet the employer refused to meet with the union again until after employees voted on the employer's offer. 339 NLRB 251, 258 (2003). Here, in contrast, DISH made clear repeatedly that what was necessary to return to the bargaining table was the Union showing a willingness to change its position on wages, not a vote. *See supra*, pp. 16-17, 19-23. DISH hoped a vote could generate member participation and potential movement on the Union's position on QPC, but it was never a prerequisite to bargaining. Of note, none of DISH's final four letters to the Union even mentioned a ratification vote. Exs. GC-18; GC-19; GC-28; GC-29. Instead, what they discussed was the parties' evidently stagnant positions, and they requested the Union to provide any indication that they were not at impasse. *See, e.g.*, GC-18 ("For over 12 months, the parties have remained rigid in their respective positions. We view your January 13 letter as further evidence that the parties are at a standstill. If you disagree, please explain your position to me."). Nothing in the record suggests that DISH would not have met with the Union had it shown a willingness to compromise to a degree that there was any hope of reaching an agreement.

Contrary to the ALJ's opinion, the Board recently found that a suggestion of an employee ratification vote in the face of an impasse does not make the impasse unlawful. *National Gypsum Co.*, 359 NLRB at *27-28 (holding that impasse was not invalidated because the

employer refused to bargain until a ratification vote was held). Suggesting that the union take a final offer to a vote is a textbook bargaining tactic. There is no Board law to support the ALJ's implication that merely suggesting a ratification vote invalidates any future impasse declaration.

Of note, not even the Union or the General Counsel interpreted DISH as having insisted upon a non-mandatory subject of bargaining until the ALJ raised the issue *sua sponte* on the third day of the General Counsel's case-in-chief, in August 2016. Tr. 627:15-628:7. Whatever the propriety of DISH having suggested that the Union take a membership vote, there simply is no evidence that it caused the impasse declaration. In the absence of such evidence, the suggestion did not taint the impasse.

b. *The Bargaining Hiatus Confirmed the Parties Were at Impasse*

The ALJ incorrectly assessed that the passage of time between the final offer and implementation "weighs heavily against an impasse finding." (Decision at 13). In support, he cited a few Board cases in which the Board found no impasse following a hiatus, and cited no case finding otherwise. The ALJ's cursory and one-sided analysis is flawed because it ignores Board law showing that a hiatus can weigh either in favor or against impasse depending on the surrounding circumstances. A hiatus weighs in favor of impasse where it highlights that bargaining has broken down because the parties are entrenched in their positions. In *Civic Motors (Holiday Inn Downtown-New Haven)*, 300 NLRB 774 (1990), for example, after a long bargaining hiatus, the union sought to bargain again and claimed it would be more flexible on the points of contention, but the employer refused to resume bargaining if the union could not provide anything more assuring to indicate there was hope of reaching an agreement. The Board found the parties were at impasse, concluding that the bargaining history confirmed that there was no reasonable likelihood that a resumption of bargaining would be fruitful. *See also Pepsi Cola-Dr. Pepper Bottling*, 219 NLRB 1200 (1975) (same scenario and conclusion); *McAllister*

Bros., Inc., 312 NLRB 1121, 1122 (1993) (finding impasse where the union rejected the company's final offer and then the parties did not meet again for four months).

Here, the evidence in support of impasse is even stronger because the Union did not indicate, as the unions did in the cited cases, that it would be more flexible on the points of contention. Indeed, since July 2013, QPC was always part of the Union's proposals, and the Union demonstrated no willingness to let QPC go. Given that the parties' positions were stagnant before and after impasse, the Union's radio silence during 2015 while it was stalling to maintain QPC, and the Union's failure to offer any indication that it would change its position despite DISH's letters asking whether it would do so, the bargaining hiatus confirms how entrenched the parties had become in their positions.

The ALJ's analysis of the hiatus further fails because it flows from his earlier error in reading DISH's attrition data, offering that "Dish's high attrition rate could have broken the gridlock by 2016, as the FB and NRH units turned over and new employees might have called for a revised Union bargaining strategy." (Decision at 13). As discussed above, the ALJ fundamentally misinterpreted the attrition data; attrition in the Union offices was low, not high. Because that error is the factual underpinning of his assessment that the hiatus created a new possibility of reaching an agreement, his analysis of the hiatus likewise fails.

c. *The Change in DISH's Bargaining Representative Had No Bearing on Whether the Parties were at Impasse.*

The ALJ again misread Board law and the facts in finding that DISH's change in bargaining representative from Mr. Basara to Mr. Balonick somehow provided hope for reaching agreement. (Decision at 13). As a preliminary matter, there is no general rule that a change in bargaining representative forestalls impasse. *See, e.g., In re Matanuska Elec. Ass'n*, 337 NLRB at 681 (union changing its bargaining representative between the last bargaining session and the

employer's impasse declaration had no bearing on whether the parties were at impasse). As for Board decisions that have found changes to bargaining agents relevant to breaking or forestalling impasse, it is telling that, in every case that either the ALJ or the General Counsel cited, it was the union that changed bargaining agent, not the employer. See *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996); *KIMA-TV*, 324 NLRB 1148, 1152 (1997); *Raven Services Corp. v. NLRB*, 315 F.3d 499 (5th Cir. 2002). This makes sense. When an employer declares impasse, it knows its own bargaining position, including whether that position has changed as a result of its change in negotiators. In contrast, an employer must make an inference about the union's bargaining position, which may be more difficult when the union changes negotiators because the employer cannot be certain of what the change in negotiators means for the union's bargaining strategy.

Here, the record demonstrates that Mr. Basara's and Mr. Balonick's dealings with the Union were entirely consistent with one another; each steadfastly pursued DISH's strong negotiating position. There is no evidence that Mr. Balonick was or would have been more "diplomatic" with the Union (as the ALJ curiously described Mr. Balonick)¹¹ or that he would have taken any different approach. They were partners in the same law firm, working for the same client, and the record shows that Mr. Basara briefed Mr. Balonick on the status of bargaining and DISH's position prior to Mr. Basara handing over the file to Mr. Balonick. Tr. 1010: 15-20. Both DISH and Mr. Balonick knew that DISH's bargaining position had not changed upon Mr. Balonick taking over the file. The only question was whether the Union's position had changed, which it evidently had not. Therefore, the suggestion that the change in

¹¹ The ALJ provides no support for his assessment of Mr. Balonick's personality. Presumably, it is based entirely on the ALJ's observations of him at the hearing, which is, of course, an entirely different context than a bargaining table.

DISH's bargaining representative created a realistic possibility of the parties reaching agreement is nothing but unsupported speculation.

- d. *DISH Did Not Reschedule a Previously Scheduled Bargaining Session Because DISH Determined the Session Would be Fruitless.*

The ALJ's assessment of the significance of DISH's unwillingness to reschedule the December 2014 session is based on unreasonable inferences that are not supported by the record or Board law. (Decision at 13-14). The record is clear that, after the November 18-20, 2014 bargaining session in which DISH presented its final offer, the parties planned to meet again in early December. The Union needed to cancel the meeting due to a personal matter, and it sent a counterproposal via e-mail at 5:54 PM on December 9. Ex. GC-98. In its e-mail, the Union requested dates to bargain again "as soon as possible." *Id.* Mr. Basara received and initially responded to the Union's counterproposal on his mobile phone at 8:50 PM that same evening, asking when the Union was available to meet the following week. *Id.* Despite the Union initially indicating urgency to return to the bargaining table, the Union responded that it suddenly could not meet for the remainder of the month. Ex. GC-23.

The ALJ incorrectly interprets Mr. Basara's initial willingness to meet as a sign that the parties could not have been at impasse as of December 2014 because, he inferred, "It logically follows that, if the parties were continuously at impasse since November 2014 as Dish avers, veteran labor attorney Basara would never have agreed to meet in December 2014, or offered alternative dates after Ramos cancelled." (Decision at 13). The ALJ continued, claiming that, given Mr. Basara's initial willingness to meet, his later actions must have been "retaliatory" and "inconsistent with those of a labor law professional handling an impasse." (Decision at 14). The ALJ's inferences are contrary to the record. As a preliminary matter, DISH has not averred that the parties were at impasse since November 2014. DISH believes the parties were at impasse

since the Union rejected DISH's final offer on December 9, 2014 (*see* DISH's Answer to Consolidated Complaint ¶ 10(a)), and the impasse was confirmed and solidified by the parties' subsequent correspondence and the absence of any apparent change in the parties' positions over the next year. Further, Mr. Basara's initial expression on December 9, 2014, of his willingness to meet with the Union was moments after receiving the Union's counteroffer on his mobile phone. A much more "logical" inference than the ALJ's is that, Mr. Basara, replying to the Union with a one-line response shortly after reading the Union's e-mail on his phone at night, had not yet thoroughly analyzed the Union's counteroffer and reached a legal conclusion as to whether it meant the parties were at impasse. The record shows that the parties had already been planning to meet in December; Mr. Basara's short December 9 e-mail shows nothing more than that he did not immediately, upon receiving the Union's e-mail, decide to cancel his pre-existing plan to meet with the Union.

The ALJ's analysis also is wrong as a matter of law because he ignores that, whatever the parties' initial plans were regarding face-to-face bargaining in December 2014, an employer is permitted to reassess whether meeting would be fruitful based on intervening correspondence providing the employer with new information or a re-evaluation of the status of bargaining. In *The Union Leader Corporation*, for example, an employer similarly cancelled a previously-scheduled bargaining session based on intervening correspondence. 2014 WL 7721825, at *2. There, the employer presented a "last, best, and final" offer by letter, clarifying the details of its offer of an 18 % wage cut. *Id.* The employer then rejected a counterproposal provided by the union via letter, and the employer subsequently cancelled a previously-scheduled bargaining session, indicating that it no longer saw any purpose of the meeting. *Id.* at *3. The NLRB General Counsel agreed with the employer's determination that the parties had reached impasse,

finding that the correspondence confirmed that there was no realistic hope that further face-to-face meetings would lead to an agreement. *Id.* at *5. *See also In re Matanuska Elec. Ass'n*, 337 NLRB at 681 (employer lawfully declared impasse where, after what turned out to be the last pre-impasse face-to-face bargaining session, the employer initially agreed to additional bargaining sessions, but then declared impasse prior to the next bargaining session upon determining that further bargaining would not likely to lead to an agreement). Here, similarly, DISH's decision that further bargaining would be fruitless was based on the parties' correspondence, showing that the Union: (1) rejected DISH's final offer; (2) was still—after four years of bargaining—offering proposals that were miles apart from anything DISH would possibly accept; and (3) was further stalling, since it would not make time to meet again for another month.

Finally, the ALJ's inference ignores the extensive evidence that DISH took pains throughout negotiations to avoid declaring impasse despite believing the parties had been on the brink of impasse for years. Similarly, in *Southwest Portland Cement Co.*, the Board found:

This Respondent's conduct does not demonstrate stage setting for unilateral implementation. On the contrary, its repeated delay in implementation demonstrates a fear of unilateral implementation and a desire to get union agreement or good-faith impasse. Having given the Union its detailed offer 8 weeks before implementation and the Union having intentionally and systematically delayed and avoided bargaining thereon, and there being prior evidence of union stalling, Respondent did not unlawfully implement its offer on 1 September 1985.

289 NLRB at 1277. Likewise, here, DISH repeatedly delayed declaring and implementing impasse for years. Mr. Basara testified that he thought the parties may have reached impasse in July 2013, which is reflected in the Union's own bargaining notes. Tr. 449:15-22. Yet, DISH waited. The parties had reached impasse after the Union rejected DISH's final offer on December 9, 2014, yet DISH waited another year, testing, throughout 2015 whether the Union

was just stalling to protect QPC or would reach out to DISH and evidence a desire to resume productive bargaining. The Union sat silent. Even after DISH resumed communications by correspondence, indicating it thought the parties were at impasse, DISH sent five letters over the course of four months, rather than rush to unilateral implementation. *See supra*, pp. 19-23. On these facts, it is plain that "[DISH's] repeated delay in implementation demonstrates a fear of unilateral implementation and a desire to get union agreement or good-faith impasse." 289 NLRB at 1277. For the ALJ to ignore these facts and criticize DISH for offering to meet with the Union up until the time that it became convinced that further meetings would be fruitless, misrepresents the record and the law.

B. Employees Who Resigned Were Not Constructively Discharged

Following his conclusion regarding impasse, the ALJ erroneously applied the Board's "Hobson's Choice" theory of constructive discharge in finding that DISH constructively discharged 17 employees.

As the ALJ observed, the NLRB uses two categories of constructive discharge.

In the first [*i.e.*, Category 1], with knowledge of its employees' participation in union or other protected concerted activities, an employer harasses the individual to the point that his job conditions become intolerable and, as a result, the employee quits. In such circumstances, a nexus between the working conditions and the individual's protected activities must be shown and the imposed burdens must be intended to cause an altering of the worker's working conditions. If both factors are present, a constructive discharge will be found In the second factual situation [*i.e.*, Category 2], an employer confronts an employee with the Hobson's choice of either continuing to work or foregoing the rights guaranteed to him under Section 7 of the Act. In such a circumstance, his choice must be clear and unequivocal and not left to inference.

Remodeling by Oltmanns, 263 NLRB 1152, 1162 (1982), *enfd.* 719 F.2d 1420 (8th Cir. 1983).

The ALJ then concluded, without substantive analysis, that the technicians who quit were constructively discharged based on the Category 2 standards:

Dish violated Section 8(a)(3), when it constructively discharged the 17 resigning employees. These employees were presented with the "Hobson's choice" of continuing to work versus forgoing their Section 7 rights. This is a Category 2 constructive discharge scenario, where Dish's violation of their Section 7 rights resulted in their wages being cut by 30% and their health insurance costs being greatly increased. It is undisputed the resigning employees left because of these changes, after effectively being left with the "Hobson's choice" of continuing to work under greatly diminished conditions that flowed from the violation of their Section 7 rights. *Control Services*, 303 NLRB 481, 485 (1991) (unlawful cuts in wages, hours and health insurance benefits resulted in a category 2 constructive discharge); *White-Evans Service Co.*, 285 NLRB 81, 82–83 (1987) (same).

(Decision at 16-17). This interpretation of the "Hobson's Choice" theory of constructive discharge, and its application here, is an error of law.

The "Hobson's Choice" theory applies when employees quit after being confronted with a choice between resignation and continued employment conditioned on relinquishment of Section 7 rights. If, for example, an employee quits because he is told he will be disciplined or fired unless he foreswears his Section 7 rights—including, for example, soliciting employees to support a union, serving as a union steward, wearing pro-union buttons, or voting for a union—that employee has been constructively discharged based on the Hobson's Choice presented. *See, e.g., Atlas Mills*, 3 NLRB 10 (1937) (early case establishing Hobson's Choice theory); *Intercon I (Zercom)*, 333 NLRB 223 (2001) (employee who quit after being threatened with retaliation if she encouraged employees to unionize was constructively discharged). In such cases, even if employees' working conditions and pay are not otherwise affected (thus failing to meet the standards of a Category 1 case), the fact that the employees are forced to forego exercise of Section 7 rights is sufficient under Category 2 to find that they have been constructively

discharged. See *Chartwells, Compass Grp., Usa, Inc.*, 342 NLRB 1155, 1158 (2004). Here, in contrast, no employee was required to forego exercise of Section 7 rights. Rather, the ALJ wrote, the technicians needed to "continu[e] to work under greatly diminished conditions that flowed from the violation of their Section 7 rights." In other words, the employees needed to accept ***the effects of an alleged ULP***, namely reduced wages and changes to benefits. The ALJ's analysis errs in ignoring the fundamental distinction between relinquishing Section 7 rights, on the one hand, and suffering the effects of rights having been violated (*i.e.*, a ULP), on the other. Only the former is a Hobson's Choice scenario. The latter must be analyzed as a Category 1 case.

In fairness to the ALJ, the Board itself has on one or two occasions conflated Category 1 and Category 2 cases, as it apparently did in one of the cases that the ALJ cited, *Control Services*, 303 NLRB 481 (1991).

But, a thorough analysis of Board law demonstrates that there is a sharp line between relinquishing rights and suffering the effects of rights having been violated. Hobson's Choice standards apply only to the former scenario. See, e.g., *Intercon I (Zercom)*, 333 NLRB 223 (2001) (Hobson's Choice analysis appropriate where employee quit after being threatened with retaliation if she encouraged employees to unionize and employer threatened plant closure if employees unionized); *Chartwells, Compass Grp., Usa, Inc.*, 342 NLRB at 1158 (Hobson's Choice discharge could be found only if "the evidence also established that Bramsen's reason for quitting was her fear that the Respondent would discharge her if she continued her union activities") (emphasis added); *Titus Elec. Contracting, Inc.*, 355 NLRB 1357, 1358 (2010) (Hobson's Choice analysis appropriate where employee quit after employer told employee he would not be allowed to work if he continued wearing his union shirt). In contrast, the Board has

rejected the applicability of Hobson's Choice standards where employees suffer the effects of an unfair labor practice, but are not required to forego Section 7 activity. *See, e.g., Lively Elec., Inc.*, 316 NLRB 471, 472 (1995) (finding unilateral change in pay rate must be analyzed under Category 1 standards, and expressly rejecting applicability of Hobson's Choice standards).

A clear distinction between relinquishing rights and suffering the effects of rights having been violated is necessary because, without it, every case could be analyzed under Hobson's Choice standards, which are lower than traditional Category 1 standards. The Board has never indicated that it is prepared to eliminate the traditional Category 1 theory any time a unionized employee suffers diminished working conditions as a result of an employer's unfair labor practice. But, that would be the net effect of adopting the ALJ's analysis in this case, wherein the lower Hobson's Choice standards apply whenever employees are "left with the [c]hoice of continuing to work under greatly diminished conditions that flowed from the violation of their Section 7 rights." (Decision at 16).

Finally, even if Hobson's Choice analysis applied (it does not), the ALJ also erred in ignoring that, to establish a Hobson's Choice constructive discharge, the choice "must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork on his part." *ComGeneral Corp.*, 251 NLRB 653, 657-658 (1980), *enfd.* 684 F.2d 367 (6th Cir. 1982); *Intercon I (Zercom)*, 333 NLRB at n.9.

Ultimately, the General Counsel must demonstrate that the employees who quit after DISH implemented its final offer were constructively discharged under traditional Category 1 standards, and the ALJ evidently recognized it cannot do so. In *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976), the Board set forth the two elements that must be proven for establishing a constructive discharge: First, the burdens imposed upon the employee must cause,

and be intended to cause, a change in his working conditions so intolerable that no reasonable person could be expected to remain in employment. *Id.* Second, it must be shown that those burdens were imposed because of the employee's union activities. *Id.* This is a high standard. The Board has held that a discriminatory transfer of an employee followed by his quitting or abandonment of employment, *even when accompanied by a wage cut*, interrogation, or harassment, does not constitute a constructive discharge unless both conditions are met. *See Hit 'n Run Food Stores*, 231 NLRB 660, 666–67 (1977) (collecting cases); *Midwest Television, Inc.*, 343 NLRB 748, 751 (2004).

The record does not establish either element. As discussed above, the first element—intentionally intolerable working conditions to cause termination—cannot be established because the evidence unequivocally demonstrates that DISH's managers did not intend or want employees to resign. Indeed, they have worked diligently to replace every employee who resigned, and they have almost completed doing so. Further, the new wages are neither intolerable nor unreasonable. Indeed, they are competitive for the market. Most technicians have not quit, and DISH had already (as of the close of the record) hired 17 employees since April 2016, all of whom accepted employment knowing that their wages would be those that DISH implemented, demonstrating that many workers are willing to do the job for those wages. The notion that the wages are so low as to be intolerable is particularly nonsensical for the many employees who quit only to take new jobs with comparable wages. (*See supra*, p.14 n.5.) The second element—retaliation for union activity—also cannot be established because the vast majority of bargaining-unit technicians testified that they had little or no contact with the Union. Given that most of the technicians were not engaging in Section 7 activity, it is implausible that DISH was motivated to retaliate against them for their Section 7 activity.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief In Support Of Respondent DISH Network L.L.C.'s Exceptions to Administrative Law Judge Decision** was filed via NLRB E-File and served to the following via overnight mail and electronic mail on this 21st day of February, 2017.

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