

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**DISH NETWORK CORPORATION**

**RESPONDENT**

**and**

**COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO**

**CHARGING PARTY**

**Cases 16-CA-173719**

**16-CA-173720**

**16-CA-173770**

**16-CA-177314**

**16-CA-177321**

**16-CA-178881**

**16-CA-178884**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

David Foley  
Becky Mata  
Counsel for the General Counsel  
National Labor Relations Board  
Region 16, Fort Worth Regional Office  
819 Taylor St, Suite A24  
Fort Worth, Texas 76102

Dated: March 7, 2017

## **Contents**

<b>I. STATEMENT OF THE CASE.</b>	<b>.1</b>
<b>II. GENERAL COUNSEL’S CROSS-EXCEPTIONS.</b>	<b>.3</b>
<b>III. STATEMENT OF FACTS</b>	<b>.5</b>
<b>A. The Employer’s Pay System and the Union’s Representation of Employees .</b>	<b>.5</b>
<b>B. Bargaining from July 2010 – November 2014</b>	<b>.6</b>
<b>C. November 2014 Bargaining Sessions .</b>	<b>.9</b>
<b>D. December 2014 Cancelation of Bargaining Sessions and Emails, 2015.</b>	<b>.10</b>
<b>Silence.</b>	<b>.10</b>
<b>E. Respondent’s Imposition of the Changes in 2016 .</b>	<b>.10</b>
<b>F. North Richland Hills employees quit en masse, remaining employees told not to mention Union or QPC to replacements.</b>	<b>.12</b>
<b>IV. ARGUMENT AND ANALYSIS.</b>	<b>.13</b>
<b>A. Respondent’s wage cut violated Section 8(a)(3) because it was unlawfully motivated (exception 1).</b>	<b>.14</b>
<b>B. Respondent constructively discharged seventeen employees (exception 2)</b>	<b>.20</b>
<b>C. Discriminatees should be compensated for consequential damages (exception 4) .</b>	<b>.21</b>
<b>V. CONCLUSION AND REQUESTED RELIEF</b>	<b>.27</b>

## TABLE OF AUTHORITY

### Cases

<i>Ball Corp.</i> , 322 NLRB 948 (1997).	18
<i>BRC Injected Rubber Products</i> , 311 NLRB 66 (1993).	25
<i>Carpenters Local 60 v. NLRB</i> , 365 U.S. 651 (1961).	23
<i>Consec Sec.</i> , 325 NLRB 453 (1998).	21
<i>Deena Artware, Inc.</i> , 112 NLRB 371 (1955).	25
<i>Dish Network</i> , 358 NLRB 174 (2012).	5, 6, 7, 9
<i>F.W. Woolworth Co.</i> , 90 NLRB 289 (1950).	23
<i>Graves Trucking</i> , 246 NLRB 344 (1979).	22
<i>Greater Oklahoma Packing Co. v. NLRB</i> , 790 F.3d 816 (8th Cir. 2015).	25
<i>Gulf Caribe Maritime, Inc.</i> , 330 NLRB 766(2000).	16
<i>Holiday Inn of Santa Maria</i> , 259 NLRB 649 (1981).	20
<i>Isis Plumbing &amp; Heating Co.</i> , 138 NLRB 716 (1962).	23
<i>Kamtech, Inc. v. NLRB</i> , 314 F.3d 800 (6th Cir. 2002).	14
<i>Kelly's Private Car Service</i> , 289 NLRB 30.	18
<i>Kentucky River Medical Center</i> , 356 NLRB 6 (2010).	23
<i>Kurdzeil Iron of Wauseon</i> , 327 NLRB 155 (1998).	15
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244 (1994).	26

<i>Lee Brass Co.</i> , 316 NLRB 1122 (1995).	26
<i>Loudon Steel, Inc.</i> , 340 NLRB 306 (2003).	20
<i>Manno Electric</i> , 321 NLRB 278 fn. 12 (1996).	14
<i>NLRB v. J.H. Rutter-Rex Mfg. Co.</i> , 396 U.S. 258 (1969).	22, 24
<i>NLRB v. Mackay Radio &amp; Tel. Co.</i> , 304 U.S. 333 (1938).	23
<i>NLRB v. Seven-Up Bottling of Miami, Inc.</i> , 344 U.S. 344 (1953).	23
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).	14
<i>Nortech Waste</i> , 336 NLRB 554 (2001).	25, 26
<i>Operating Engineers Local 513 (Long Const. Co.)</i> , 145 NLRB 554 (1963).	22, 26
<i>Pacific Beach Hotel</i> , 361 NLRB No. 65, slip op. at 11 (2014).	23, 25
<i>Palace Sports &amp; Entertainment, Inc. v. NLRB</i> , 411 F.3d 212 (D.C. Cir. 2005)	15
<i>Pappas v. Watson Wyatt &amp; Co.</i> , 2007 WL 4178507 (D. Conn. Nov. 20, 2007)	26
<i>Peabody Coal Co.</i> , 265 NLRB 93 (1982).	15
<i>Pennsylvania State Police v. Suders</i> , 542 U.S. 129 (2004).	20
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).	22, 23, 26
<i>Phelps Dodge Mining Co.</i> , 308 NLRB 985 (1992).	15
<i>Pilliod of Mississippi, Inc.</i> , 275 NLRB 799 (1985).	26
<i>Pittsburg &amp; Midway Coal Mining Co.</i> , 355 NLRB 1210 (2010).	14
<i>Proulx v. Citibank</i> , 681 F. Supp. 199 (S.D.N.Y. 1988).	26
<i>Radio Officers' Union of Commercial Telegraphers Union v. NLRB</i> , 347 U.S. 17 (1954).	22

<i>Roman Iron Works,</i> 292 NLRB 1292 (1989).	24
<i>Roure Bertrand Dupont, Inc.,</i> 271 NLRB 443 (1984).	15
<i>Serrano Painting,</i> 332 NLRB 1363 (2000).	15
<i>Service Employees Local 87 (Pacific Telephone),</i> 279 NLRB 168 (1986).	26
<i>Tortillas Don Chavas,</i> 361 NLRB No. 10 (Aug. 8, 2014).	22, 23
<i>Virginia Elec. &amp; Power Co. v. NLRB,</i> 319 U.S. 533 (1943).	22
<i>Willamette Industries,</i> 341 NLRB 560 (2004).	15
<i>Wright Line,</i> 251 NLRB 1083 (1980).	14
Statutes	
42 U.S.C. § 1981a(b)(3).	26
Other Authorities	
<i>The Practicality of Increasing the Use of Section 10(j) Injunctions,</i> 7 INDUS. REL. L.J. 599 (1985)	21

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**DISH NETWORK CORPORATION**

**RESPONDENT**

<b>And</b>	<b>Cases 16-CA-173719</b>
<b>COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO</b>	<b>16-CA-173720</b>
<b>CHARGING PARTY</b>	<b>16-CA-173770</b>
	<b>16-CA-177314</b>
	<b>16-CA-177321</b>
	<b>16-CA-178881</b>
	<b>16-CA-178884</b>

**GENERAL COUNSEL’S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. STATEMENT OF THE CASE**

On January 23, 2017, Administrative Law Judge Robert A. Ringler issued a decision in this matter, finding that Dish Network (Respondent) violated Section 8(a)(5) of the Act when in January and February 2016, it refused to meet with its bargaining partner, Communication Workers of America (Union) and when on April 23, 2016, it implemented, without reaching an impasse, changes to employees’ wages and healthcare and other benefits at its North Richland Hills and Farmers Branch locations. Judge Ringler also found that Respondent violated Section 8(a)(1) when prior to the changes, on April 6, 2016, its manager Hanns Obere sent a text message to an employee in which he stated among other things, that “the union was gone,” the offices were closing, employees would be paid less than their peers unless they transferred out, and it was preferred that they quit. Judge Ringler found that seventeen

employees who quit after these changes had been constructively discharged because in light of Respondent's actions, to continue working for Respondent would be to forgo Section 7 rights. Finally, Judge Ringler found that when Respondent hired new employees to replace those who had quit, its manager Waeland Thomas told incumbent employees not to talk to the new employees about the Union, that Respondent would find out if they did, and they would be fired.

As argued in its contemporaneously filed Answering Brief to Respondent's Exceptions, the General Counsel agrees with the above conclusions. The current brief, however, addresses Judge Ringler's failure to rule on the Complaint allegation which alleges that the wage rate Respondent imposed was retaliatory and discriminatory and on Judge Ringler's failure to address an alternative theory of the constructive discharges. In brief, the case presented herein can be summarized as follows:

When Respondent unilaterally implemented the changes described above, the effect of that change was to reduce by half the wages of sixty technicians at its Farmers Branch and North Richland Hills, Texas offices. The wage reduction made those employees its lowest paid technicians in North Texas and possibly in the nation. The wage rate that Respondent imposed was not based on market surveys or done with any reasonable calculations as to how to retain and recruit a workforce. According to Respondent's negotiator, he and an unknown person in the "Comp and Benefits Department" came up with the wage rate sometime in 2014. No one bothered to ask the Comp and Benefits Department or local managers in 2016 if the wage rates were viable. Respondent presented no legitimate justification for paying these employees less than their peers.

Evidence of an unlawful motivation was presented, however. Since the Union's campaign, Respondent had threatened to pay employees less than their peers if they sought union representation. Respondent's long-time bargaining agent stated during bargaining sessions that he intended to pay employees of these facilities less because their union had filed charges against Respondent. It was known among managers that Respondent was bargaining to get rid of the Union. The purpose for paying Unit employees less than non-Union technicians was to force them to transfer out of the Unit or quit, as one manager, Hanns Obere of the North Richland Hills, facility described in a text message on April 6, 2016:

*The union is gone  
Techs will be on affixed hourly rates [sic], no Pi  
Level 4 will earn 17 dollars an hour  
They will earn like the rest of the company if they transfer to other offices which they encourage  
They have QPC till [sic] the 23<sup>rd</sup>  
The two offices are gradually closing  
We will be dispatched to other offices or a new one will be started  
**They would rather have the techs quit en mass [sic]**  
Seatbelt for a bumpy ride  
Call me when you have a minute*

[Emphasis supplied]

Respondent's plan was simple and brutal: reduce the wages of the Union supporting employees to the point where they quit, pay them less than other offices to send a warning, and cut off from the Union the employees who replace those who quit.

Unsurprisingly, seventeen of Respondent's employees quit soon after the wage reduction. Sixteen of those who quit had worked at the North Richland Hills facility where Manager Obere had sent the above text message. These sixteen comprised roughly half of the North Richland Hills workforce.

## **II. GENERAL COUNSEL'S CROSS-EXCEPTIONS**

As noted above, Judge Ringler found that Respondent violated Section 8(a)(1) when

Manager Obere sent the text message above to employees; violated Section 8(a)(5) when it unilaterally imposed the wage rate at issue; violated Section 8(a)(3) by constructively discharging employees under a Hobson's Choice rationale; and violated Section 8(a)(1) again when another manager told incumbent employees that Respondent would find out if they spoke to replacement employees about the Union and fire them if they did. Because of redundancy in the remedy, Judge Ringler declined to rule on whether the wage reduction was, in addition to being unilaterally implemented, also discriminatory in violation of Section 8(a)(3) and (1) of the Act. Following that reasoning, he declined to analyze the constructive discharges under the traditional theory.

In exception 1, Counsel for the General Counsel excepts to the Judge's failure to address the 8(a)(3) violation. (JD slip op. at 17, LL. 6-9) The finding of a violation under a Section 8(a)(3) theory would broaden the scope of the cease and desist order such that Respondent would be prohibited from similarly discriminating against its employees in the future.

In exception 2, Counsel for the General Counsel excepts to the Judge's failure to analyze the constructive discharge allegations under the Board's traditional theory.

In exception 3, which is only briefly mentioned in this brief, Counsel for the General Counsel excepts to the Judge's rejection of certain campaign materials as exhibits. (Tr. 831-835)

In exception 4, Counsel for the General Counsel addresses herein the inadequacy of the recommended remedy granted in so much as it does not provide for compensatory damages. (JD slip op. at 18, LL. 44-46; 19, LL. 1-42; 20, LL. 1-35)

### **III. STATEMENT OF FACTS**

Respondent is engaged in the business of installing, repairing and providing satellite television. Of its 18,000 employees throughout the United States, only approximately 50, at its places of business in Farmers Branch and North Richland Hills, Texas, (the Units) are currently represented by a labor organization. After the Units were certified in 2010 and 2011 respectively, the parties bargained until 2016 when Respondent refused to meet with the Union and as Judge Ringler found, unilaterally implemented changes including most significantly, changes to wages. Prior to the changes there were 31 technicians at the North Richland Hills facility and 27 at the Farmers Branch location.

#### **A. The Employer's Pay System and the Union's Representation of Employees**

The Union first came to represent the employees at issue here, technicians (Field Service Specialists) and warehouse employees (Inventory Specialists), at Respondent's Farmers Branch and North Richland Hills, Texas facilities (the "Facilities") after an organizing drive in 2009. *Dish Network*, 358 NLRB 174, 177 (2012). The impetus for the organizing drive was Respondent's implementation of a new, performance based, pay system for technicians called the Quality Performance Compensation system ("QPC"). (JD slip op. at 2, LL. 21-26) The QPC provided a low base hourly wage rate with incentives to earn more by completing jobs quickly and effectively and by maintaining high levels of customer satisfaction. When it was first rolled out, employees were opposed to the QPC and voted for Union representation. *Id.*

At that time, Respondent campaigned against the Union. Chief in its campaign message was the fact that no union had ever achieved a contract with Respondent and that employees

could end up with lower wages if they brought in a union. (GC Exh. 125 at 5, 12)(rejected)<sup>1</sup> Respondent violated Section 8(a)(1) when, during the campaign, it told employees that Respondent *would* bargain to impasse and that the employees would be stuck with the pay system they did not want because of the Union. *Dish Network*, 358 NLRB 174, 179 (2012).

Following the election, Respondent ended its use of QPC at all other locations, but kept it in effect at North Richland Hills and Farmers Branch. *Id.* In its place, Respondent instituted, nationwide, except for the two locations, a more balanced incentive program, which it calls the Performance Incentive Plan (PI or  $\pi$ ). Under the PI plan, technicians receive a higher wage floor than those on the QPC and can earn up to \$9,100 more in income annually. (CP Exh. 95) Respondent managers told Unit employees that they would be stuck with the QPC and that because of the Union they would be paid differently than other locations. *Dish Network*, 358 NLRB 174, 177 (2012).

#### **B. Bargaining from July 2010 – November 2014**

The parties bargained in a series of face-to-face bargaining sessions from July 8, 2010 until November 20, 2014. Attorney George Basara, who had been Respondent's bargaining agent in Farmingdale, New York and roughly five other facilities where no contract was reached, acted as Respondent's lead negotiator at all bargaining sessions. (JD slip op. at 3, LL. 11-12; Tr. 1135, L. 10 – Tr. 1136 L. 20) A series of three negotiators bargained for the Union. Sylvia Ramos took over for the Union after November 21, 2013 (JD slip op. at 3, LL 9-10; Tr. 343, LL. 21-24) and, to date, remains the Union's bargaining agent.

---

<sup>1</sup> The Judge erred by rejecting Exhibits 125-133 which consisted of campaign materials in the original organizing drive at this locations. (Tr. 831-835) When those materials were being distributed, Respondent was essentially laying out its intentions not to reach a contract and to impose a punitive wage system. As those intentions have come to fruition, the campaign materials remain relevant. (exception 3)

In early bargaining sessions, the Union proposed replacing the QPC with an hourly rate or alternatively increasing the rate floor for the QPC. In March and May 2013, the Union proposed a base wage rate that was similar to the other Employer DFW locations and included the PI incentive. (GC Exhs. 12 and 13) Both of these offers were rejected by Respondent which countered only with straight hourly rates. (GC Exh. 40) Later, employees began to improve their performances under the QPC and accordingly earned increased pay. In an unusual switch of positions, the Union proposed continuing, without adjustment, the QPC plan that had initially contributed to employees seeking union representation. (R Exh. 2). The Employer rejected this proposal, offering instead hourly wages that were below the wages of its other DFW area facilities. (GC Exh. 49 at 3)

The Union asked if instead of Respondent's low hourly proposal, employees could simply be paid under the same rates as Respondent's other DFW area employees. Basara responded that Respondent had spent half a million dollars defending frivolous charges filed by the Union and asked rhetorically, "So you can ask is it going to be less? Yes, it's going to be less." (GC Exh. 43) Basara also asked rhetorically, "You think you can just come in and say, "Well I cost you half a million dollars and give [us] the same thing you're giving everybody else? Would you?" Basara noted, "That stuff doesn't get let go by the company." *Id.* He also said, in response to the Union's accusation that Respondent was proposing to pay bargaining Unit employees less because they are represented by a union, "When you say they're being paid less because they're being represented, they're being paid less because the costs of being represented are greater than the cost of non-representation." *Id.* Respondent provided no evidence during negotiations or at trial as to how its proposals would recover costs associated with representation.

Respondent's operations manager for the North Richland Hills office, Waeland Thomas, was informed by another operations manager, Robert Phillips, in 2012 that the Employer was "bargaining to get rid of [the Union]." (Tr. 999, LL. 12-17) Respondent did not call Phillips, who is still employed by Respondent, to either explain or deny this statement.

Employees in Farmers Branch filed a decertification petition on July 29, 2011. This resulted in an election on May 29, 2014. (GC Exh. 108)

Prior to the election, Respondent met with employees and discussed the status of negotiations. (GC Exh. 107) Its managers told employees the parties were very close to impasse and that if impasse (Tr. 786, LL. 17-22) were reached, Respondent would implement its last best and final offer. (Tr. 791, LL. 7-12) Managers showed employees the low wages Respondent was currently offering and encouraged them to study the proposals. (Tr. 803, LL. 10-15) Although Respondent's managers did not explicitly promise to pay employees at area wages if employees voted out the Union, they did offer to meet with employees to show them how much employees at other facilities made. (Tr. 806, LL. 4-25). Employees voted 13-8 to retain the Union as their bargaining representative. (GC Exh. 108). These results were certified on June 6, 2014.<sup>2</sup>

The parties resumed negotiations on July 23, 2014, ending an eight-month hiatus from bargaining. (Tr. 541, LL. 22-24) By that point, the Union had made significant concessions. Several issues remained unresolved, with wages being the primary issue.

---

<sup>2</sup> The processing of the election was delayed by the investigation and resolution of an unfair labor practice filed by the Union against Respondent which alleged that Respondent had engaged in bad faith bargaining. That charge was dismissed. Respondent seeks to imply unwarranted significance to that dismissal, asserting essentially that issues of Respondent's bargaining up until that dismissal were in good faith as a matter of *res judicata*. However, this insinuation would be a misrepresentation of Board procedure. Moreover, at the time, Respondent had *proposed* certain wage rates in the course of bargaining, but had not implemented them.

### C. November 2014 Bargaining Sessions

The last bargaining sessions between Respondent and the Union took place on November 18, 19, and 20, 2014. (GC Exh. 8) On November 19, 2014, Respondent provided a handwritten document titled "Final Proposal" dated November 18, 2014. (GC Exh. 2) That proposal included significant wage cuts for technicians and provided for no incentive pay. The proposed wages for technicians were lower than the wages of the other six facilities in DFW and unlike those facilities, contained no incentive pay. (CP Exh. 91)

Ramos asked during bargaining what Respondent's rationale was for providing the low wages with no incentive plans to the bargaining unit employees. (Tr. 551, LL. 12-25; GC Exh. 55) Ramos asked why Respondent wanted to pay the Union represented employees less than the other employees. *Id.* To this day, Respondent has provided no information about how it arrived at the wages that it offered.

Basara testified that he came up with rate with someone in Respondent's "Comp and Benefits Department" but could not provide a name. (Tr. 1147, LL. 1-12). When asked why Respondent would not offer Unit employees the same incentive plan as unrepresented employees, Basara linked Respondent's reluctance to pay Unit employees the PI incentive to their collective actions. (Tr. 1150, LL. 2-9). Basara testified:

We also had other issues on the table, but at this point, we had also spent countless -- I mean, I can't even imagine, a hundred thousand was spent given all of the charges and everything else that was in this case, and so we're going to spend all of this money, right, and now in the end, 'Why didn't you just offer PI?' Well, that wasn't my strategy.

*Ibid.*

Thus, although pressed throughout the hearing to explain the lower-than-nonunion wage rate, the record contains no rationale other than the fact that employees were represented and that their representative had filed charges against Respondent.

**D. December 2014 Cancellation of Bargaining Sessions and Emails, 2015  
Silence**

As discussed in greater detail in the General Counsel's Answering Brief, a death in the family of the Union's chief negotiator caused the Union to cancel one session in December, 2014 and Respondent switched bargaining representatives at the year's end. Basara explained that his replacement, Brian Balonick, would be contacting the Union "in the new year." In fact, an entire year passed before Balonick contacted the Union.

**E. Respondent's Imposition of the Changes in 2016**

As the Judge found, Respondent refused to bargain with the Union in 2016 and ultimately unilaterally imposed the low wage rates on April 23, 2016. (JD slip op. at 12, LL. 8-10)

Respondent failed to present any evidence that it took any steps to check whether the proposed wage rates were still economically viable. An internal report shows that Respondent measured area wage information for the other facilities in DFW, but lists only "NA" for union-represented facilities. (GC Exh. 123) This report shows that area wages for the McKinney, Texas office, which is approximately 30 miles from the Farmers Branch office, had risen in 2015, making it harder for Respondent to recruit and retain employees. (GC Exh. 123) For that reason, Respondent internally proposed to raise wages by 4% for the McKinney office. *Id.*

Respondent presented five managers for testimony. None was consulted about the wage rate Respondent planned to impose<sup>3</sup> Indeed, Respondent's bargaining representative, Balonick, testified that he had not checked with anyone as to whether the 2014 wage rate, if it ever had

---

<sup>3</sup> Sagirah Ferrell, Human Resources Advisor with responsibilities over eleven facilities including the two at issue, testified that wage rates were created by a Compensation Team in Denver and offered no insight into the creation of the wage rate that was ultimately implemented here. (Tr. 138, LL. 1-5) Nowhere in Field Service Manager Hanns Obere's testimony did he indicate that he had been consulted as to whether the wage rate would fit the needs of the workers he supervised. Operations Manager Waeland Thomas testified that he was not consulted about whether the wage rate would be good for his office. (Tr. 242, LL. 4-6) District Manger Monty Beckham testified that he was not aware of any wage evaluations being run on the Union offices. (Tr. 946, LL. 6-17) Beckham was not consulted about the wage rate. (Tr. 949, LL. 19-25). Region Manager Thomas Nichols was not consulted either. (Tr. 982, LL. 14-16)

been economically viable, continued to be so in April 2016. (Tr. 70, LL. 4-25). Nor was Balonick privy to what considerations usually go into determining employee salaries. (Tr. 68, LL. 6-4) Apparently it was no one's job to ensure that Respondent paid its union-represented employees a competitive wage rate.

It makes sense that Respondent would not seek to ensure the viability of its wage rate if its goal was actually to punish its employees. Evidence of Respondent's motivation for setting the low wage rate can be seen in a text message, inadvertently sent to a Unit technician (Kenneth Daniel) by Field Service Manager Hanns Obere, April 6, 2016, at 9:54 a.m. That text message said:

*The union is gone  
Techs will be on affixed hourly rates [sic], no Pi  
Level 4 will earn 17 dollars an hour  
They will earn like the rest of the company if they transfer to other offices which  
they encourage  
They have QPC till [sic] the 23<sup>rd</sup>  
The two offices are gradually closing  
We will be dispatched to other offices or a new one will be started  
They would rather have the techs quit en mass [sic]  
Seatbelt for a bumpy ride  
Call me when you have a minute*

(JD slip op at 9, LL. 25-34; GC Exh. 31; R Exh. 40)

This message was widely disseminated by employees.<sup>4</sup> (Tr. 157, 270, 401, 421, 648, 672, 693)

Following the text exchange, Obere also traded brief phone calls with the technician. Obere's testimony was inaccurate as to this minor point.

Obere's testimony about the source of the information, however, was accurate. Obere testified that he had heard the information that he was relating from Region Manager Thomas Nicholas in a meeting between the two that morning. (Tr. 180-181). Obere attempted to assign

---

<sup>4</sup> Respondent manager Monty Beckham later sent emails to the employees in an attempt to rescind the message. (Tr. 1377-1379)

some of the statements to confusion on his part but he testified consistently that Nicholas told him it would be preferable for employees to quit. *Id.* When news of the text message got to Respondent, Nicholas called Obere on April 12, 2016 and attempted to “walk back” the facts of the conversation he had with Obere on April 6. (Tr. 208, LL. 12-15; Tr. 218, LL. 11-13) In response, Obere drafted a statement to memorialize the conversation. (CP Exh. 87) In this statement he quoted Nicholas as follows:

all I know is that should the technicians resign on their own which I think should be preferable, then we will either transfer the FSMs to [] different locations or merge the two offices. This has been long coming that is why I’m yet to fill the vacant OM position [i]n Sunnyvale since I might just transfer the [FSM] in Farmers to that location.

No evidence was presented as to any motivation for Obere to invent facts about Nicholas’ preference that employees quit or that there were plans to shut down the facilities. In fact, internal documents show that as of March 18, 2016, Respondent had been working on a plan to close at least two DFW office locations. (GC Exh. 121).

Nicholas acknowledged a brief conversation with Obere on the morning of April 6, 2016, but denied mentioning a preference for employees to quit, or the topics of transfers or facility closures. (Tr. 878, 984) Nicholas did not testify regarding the April 12, 2016 conversation where Obere alleged that Nicholas attempted to “walk back” his statement.

On April 23, 2016, Respondent implemented the changes.

**F. North Richland Hills employees quit en masse, remaining employees told not to mention Union or QPC to replacements**

Prior to April 23, 2016, technicians’ pay averaged as follows: Level 1, \$23 per hour; Level 2 \$28.60 per hour; Level 3, \$32.20 per hour; Level 4, \$30.60 per hour. (CP Exh. 120, R Exh. 54<sup>5</sup>) Many technicians earned well beyond those averages. (Tr. 285, 694) Under the wage

---

<sup>5</sup> These figures are derived by dividing the average annual earnings by the average hours worked

scale imposed by Respondent on April 23, 2016, employees now made between \$13.00 and \$17.00 an hour, an approximately 50% reduction in wages.

Since the implementation of Respondent's "last, best and final offer," one Famers Branch technician (Marcus Tillman) and sixteen North Richland Hills technicians<sup>6</sup> resigned. The employees all quit because of the cut in wages. (Tr. 272-273, 422, 436, 525, 649, 675, 694, 730, 738, 748) Some took other jobs with wages comparable to what they had been earning prior to reduction but with no benefits (Tr. 294, 29). Others went to lower paying or similarly paying jobs which offered more hours or the possibility of advancement. (Tr. 739)

Respondent has hired a few replacement employees. (Tr. 224, LL. 23-25) Operations Manager Thomas told incumbent employees:

Just don't say anything about the Union to the new guys. [D]on't mention QPC. They're happy getting paid \$13.00 an hour, and they will get phone calls from higher up at Dish, and [if higher-ups learned of such discussions that] could lead to termination.

(Tr. 657, LL. 13-19) Judge Ringler concluded that this statement violated Section 8(a)(1) and Respondent has not filed exceptions to that ruling. (JD slip op at 15, LL. 31-33)

#### **IV. ARGUMENT AND ANALYSIS**

As discussed below, Respondent's wage reduction was not only unilaterally implemented but also discriminatory and retaliatory. Its employees were discharged under the Hobson's Choice analysis, as the Judge found, and additionally under the traditional theory. Finally, the recommended order fails to remedy the violation.

---

<sup>6</sup> They are David Dingle, Justin Ripley, Kenneth Daniel, Bryce Benge, Salvador Bernardino, Preston Dutton, Robert Thompson, John Carson, Scott Dehart, Robert MacDonald, Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns, Christopher Little, and Michael Cater.

**A. Respondent's wage cut violated Section 8(a)(3) because it was unlawfully motivated (exception 1)**

Respondent violated Section 8(a)(3) of the Act when it cut employees' pay in response to its employees' union activity. Respondent not only stopped paying employees at the QPC rate, but also replaced QPC with an hourly rate, devoid of an incentive plan, which resulted in Unit employees being paid significantly less than other employees in the DFW area. This reduction was unlawful because it was motivated by Respondent's hostility to its employees' exercise of their Section 7 right to seek union representation.

The Board analyzes an employer's motive in a Section 8(a)(3) case under *Wright Line*, 251 NLRB 1083 (1980), *enfd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982); see also *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983) (noting with approval the Board's approach adopted in *Wright Line*). This framework applies not only to cases of employee discipline, but other instances of employer retaliation for protected, concerted activity. See, e.g., *Pittsburg & Midway Coal Mining Co.*, 355 NLRB 1210, 1212 (2010).

Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that employee protected conduct motivated an adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

If the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the second part of the *Wright Line* analysis comes into play: the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *Kamtech*,

*Inc. v. NLRB*, 314 F.3d 800, 811 (6<sup>th</sup> Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* 127 F.3d 34 (5<sup>th</sup> Cir. 1997) (per curiam). To meet this burden, “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer’s proffered defenses are found to be a pretext, i.e., the reasons given for the employer’s actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The *Wright Line* analysis of motivation is not limited to actions taken against individual employees nor can an unlawful motivation be hidden by the pretext of “hard bargaining.” See, e.g., *Willamette Industries*, 341 NLRB 560, 562-63 (2004) (employer changed employee shift schedules and reduced overtime in retaliation for employees electing union); *Kurdzeil Iron of Wauseon*, 327 NLRB 155, 155 (1998) (employer told unit employees they would receive routine wage increase granted to non-union employees if they voted to decertify the union in pending election); *Phelps Dodge Mining Co.*, 308 NLRB 985, 995-96 (1992) (employer granted special bonuses to its “union-free” employees shortly before unit employees were eligible to petition for decertification), *enforcement denied*, 22 F.3d 1493 (10th Cir. 1994); *Peabody Coal Co.*, 265 NLRB 93, 99-100 (1982) (employer with history of 8(a)(1) conduct told unit employees that new

benefits were withheld because they were “trying to get into the [u]nion”), *enforced in relevant part*, 725 F.2d 357, 366 (6th Cir. 1984), *Gulf Caribe Maritime, Inc.*, 330 NLRB 766, 773(2000)(unilateral rollback of wages to status quo violated Section 8(a)(3) and (4)).

The first elements of the *Wright Line* framework are not in dispute here: employees engaged in protected activity by seeking union representation and by protesting Respondent’s actions, resulting in charges with the Board. Respondent was aware of the same. Moreover, employees suffered an adverse employment action when their wages were reduced to a wage rate below other offices in the area. Although Respondent argues that the prima facie case fails for lack of a connection between the protected activity and the wage reduction, the record is replete with evidence of Respondent’s animus toward the Union which connects the wage reduction to employee protected activity.

The earliest evidence of animus may be seen in the statements that the Respondent’s managers made to employees during the organizing campaign, i.e., employees would be under a less desirable pay system than other employees if they chose the Union.

Respondent made good on those threats when Respondent made wage proposals well below those in the area. That these low wage proposals were connected to its Union animus is evidenced by Operation Manager Phillips’ 2012 admission that Respondent was “bargaining to get rid of the Union.” (Tr. 999, LL. 12-17) Respondent campaigned on the low proposals in 2014 to show the employees that they risked being paid worse than other offices if they retained the Union.

If there was any doubt about Respondent’s motivations for providing low wage proposals, Basara made clear Respondent’s intentions when he explained that Respondent would not provide the PI incentive or otherwise bring pay of the Unit employees in line with area pay

because the Union had filed charges against Respondent, noting that “[t]hat stuff doesn’t get let go by the company.” (GC Exh. 43) Basara reiterated the connection during the hearing when explaining why Respondent would not offer the PI incentive. (“ but at this point, we had also spent countless -- I mean, I can’t even imagine, a hundred thousand was spent given all of the charges and everything else that was in this case, and so we’re going to spend all of this money, right, and now in the end, ‘Why didn’t you just offer PI?’”) (Tr. 1150, LL. 2-9)

Throughout four years of bargaining, Respondent’s proposals were intended to drive employees to get rid of the Union or quit. As recently as April 6, 2016, Regional Manager Nicholas admitted to Field Service Manager Obere that management preferred the employees quit in response to the wage cut. Thus, Respondent could rid itself of the Union by attrition. For this reason, Operations Manager Thomas warned the employees, at the threat of termination, not to talk to new employees about the Union.

Respondent would write off the above as “conspiracy theories.” To do so, it must claim that Phillips (whom it did not call to testify) was simply wrong when he stated the Employer was bargaining to get rid of the Union; Basara was wrong or misquoted when, during bargaining *and at trial*, he linked employees’ collective action with his wage proposals; and that Obere was wrong or had some reason to testify falsely that management wanted the wage cut to result in Unit employees quitting.

Thus, the General Counsel establishes a prima facie case and the burden shifts to Respondent to establish that cutting employees’ wages was not intended to discourage Union activity, i.e., its cut in employees’ wages was not intended to cause employees to quit. One would generally have expected Respondent to provide some evidence that the wage rate was

calculated to achieve legitimate business goals such as profitably retaining, recruiting and motivating employees.

However, here, Respondent provided no evidence of such calculations. The numbers themselves came from Respondent's negotiator Basara and a phantom "Comp and Benefits" staffer. The main rationale put forward by Basara was his anger that the Union had filed NLRB charges against Respondent.<sup>7</sup>

Because it cannot point to any pre-implementation evidence of a legitimate calculation, Respondent points to weak post-implementation evidence to establish that its motivation was grounded in legitimate business concerns.

First, Respondent argues that because *half* of the North Richland Hills technicians and most of the Farmers Branch employees did not quit within a few months, the wage rate was economically viable at that location and therefore because the results were only somewhat disastrous, the actions could not have been unlawfully motivated. There are several problems with this argument. First, if the employees did not believe that the change was going to be enjoined as a result of the NLRB's filing of a Petition seeking 10(j) injunctive relief seeking, inter alia, interim restoration of the QPC wage rate, many more would have quit. Second, this argument fails to consider that when half of a workforce quits within months of a change in pay, the change has failed in legitimate business goals such as profitably retaining, recruiting and motivating employees. Third, even if no employees had quit, the result of the wage reduction would not negate the possibility that Respondent intended for employees to quit. Thus, the fact

---

<sup>7</sup> Respondent argues that the dismissal by the Petitioner of a charge filed by the Union alleging bad faith bargaining at the time of these statements somehow renders the statements innocuous. That argument relies on a misunderstanding of Board law and procedure. See *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988) ("It is well settled that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given to th[o]se actions."), enforced sub nom., 919 F.2d 839 (2d Cir. 1990); *Ball Corp.*, 322 NLRB 948, 951 (1997).

that not all of Respondent's employees immediately quit can hardly be counted as evidence of a legitimate motivation.

Neither can Respondent's broad assertions that it has been able to recruit at the reduced wage rate establish that the wage rate was properly motivated. At the hearing, Respondent offered testimony that it had no problem replacing the seventeen employees who quit with recruits willing to work at the lower wage rate. However, Respondent District Manager Beckham acknowledged that as of the time of his testimony most of the newly hired employees were still in their probationary period. (Tr. 938) Beckham expected that 75% would stay on through the probationary period, but it was too early to tell. Thus, despite Respondent's arguments that it is fully staffed at the reduced rate, there is not actually any evidence that the lower wage rate attracted recruits with the ability to perform the job or that the wage rate was high enough to retain those newly hired employees.

Thus, Respondent offers no evidence that prior to implementing its wage rate, it considered at all whether the wage rate would be good for business and the evidence that it offers about its ability to retain some of its employees and to recruit some applicants does nothing to establish that its motivation was legitimate.

Although unlawful, it is not particularly unusual for employers to tell employees that if they bring in a union they will end up with worse wages than nonunion peers. Nor is it unusual for an employer to offer union-represented employees lower wages than wages paid to non-union employees. Those two factors alone would not establish that Respondent's wage cuts were unlawfully motivated.

However, three aspects of the evidence in this case are highly unusual and particularly telling. First, it is highly unusual for an employer's bargaining agent to present as his rationale

for offering lower-than-nonunion wages, the fact a union has filed NLRB charges. Second, it is highly usual for employees to receive smoking gun evidence from a manager that their employer is taking an action because it prefers that they quit en masse. These two factors alone establish a prima facie case.

Third and finally, it is rare that an employer would be able to offer no legitimate justification whatsoever as to why it paid its union-represented employees less than their peers.

Thus, in this extraordinary case, the evidence establishes that Respondent's reduction of the employees' wages was unlawfully motivated.

**B. Respondent constructively discharged seventeen employees (exception 2)**

Respondent's April 23, 2016 reduction of wages violated both Section 8(a)(3) and Section 8(a)(5) of the Act. The evidence also establishes that seventeen of Respondent's employees quit as a direct result of those wage reductions. General Counsel alleges that these employees were constructively discharged by Respondent. The Judge was correct in his finding that the employees were discharged under the Hobson's Choice rationale, but he erred in failing to find they were also unlawfully discharged under the Board's traditional theory of constructive discharge.

The Board's traditional approach to constructive discharge allegations was articulated in *Crystal Princeton Refining*, and involves a two-part test referencing the burden imposed (in this case the wage reduction) as well as causality and the state of mind of the employer:

First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

222 NLRB 1068, 1069 (1976), cited with approval in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004); see also *Loudon Steel, Inc.*, 340 NLRB 306 (2003).

The Board has consistently held that where employers reduce employee wages, the action is of the type so difficult or unpleasant as to make employees quit. See, e.g., *Holiday Inn of Santa Maria*, 259 NLRB 649, 662 (1981) (17% reduction). Under Board precedent if the reduction of wages is significant and extends for an indefinite period, the reduction is so onerous as to force an employee to leave. *Consec Sec.*, 325 NLRB 453, 454 (1998) (25% reduction). In such circumstances, the burden of a “work then grieve” approach is too onerous; the employee is forced to seek a higher paying job elsewhere. *Id.*

In this case, Respondent does not dispute that employees quit because of the reduction in wages. Employees suffered reduction of wages by as much as 60%. This drastic reduction left many facing financial obligations that they could not meet. They went to higher paying jobs with more hours or at least the potential of greater income.

Respondent argues that because some of the employees were only able to find work that paid at a similar rate to what they were making under the reduced wage rate, that conditions had not become sufficiently onerous as to cause a constructive discharge. However, Respondent misses the point that employees who left to take jobs at similar wage rates went to other employers where they were given more hours at those jobs and or the chance to advance. Moreover, the point of the constructive discharge is that an employee is driven to leave by the imposition of onerous conditions. Board law is clear that the type of reduction experienced by Respondent’s employees was sufficiently onerous to cause them to quit.

**C. Discriminatees should be compensated for consequential damages  
(exception 4)**

Under the Board’s present remedial approach, some economic harms flowing from a respondent’s unfair labor practices are not adequately remedied. See Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603

(1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. See, e.g., *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case to require Respondent to compensate employees for all consequential economic harms they sustain, prior to full compliance, as a result of Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (Aug. 8, 2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. See, e.g., *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for" the unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539

(1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must “draw on enlightenment gained from experience.” *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act’s make whole remedial objective); *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interest on backpay awards), *enforcement denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-93 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that “the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress”). Compensation for employees’ consequential economic harm would further the Board’s charge to “adapt [its] remedies to the needs of particular situations so that ‘the victims of discrimination’ may be treated fairly,” provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent’s unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for an unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car.<sup>8</sup> Similarly, employees who lose employer-furnished medical coverage as the result of an unfair labor practice should be compensated for penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the policy or purchasing a new policy providing comparable coverage, in addition to medical costs incurred due to loss of medical coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, (1989) (discriminatee entitled to out-of-pocket medical expenses incurred during backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).<sup>9</sup>

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. The Board

---

<sup>8</sup> However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

<sup>9</sup> Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. See *Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board’s “broad discretion”); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (discriminatees entitled to expenses incurred in searching for new work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee entitled to consequential medical expenses attributable to respondent’s unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (Oct. 24, 2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent’s original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole. The Board’s existing remedial orders do not ensure reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.<sup>10</sup> In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), *enforced mem.*, 105 F.3d 671 (11th Cir. 1996)).<sup>11</sup>

---

<sup>10</sup> This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

<sup>11</sup> The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. See *Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at \*3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

**V. CONCLUSION AND REQUESTED RELIEF**

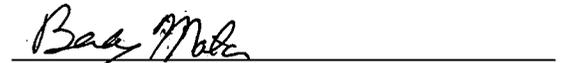
In addition to the Board's traditional remedies, Counsel for the General Counsel seeks an order requiring that any notice be read and sent via text message to represented employees, that Respondent be required to grant access to the Union, and that the employees be compensated for consequential damages associated with the wage reduction. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

**DATED** at Fort Worth, Texas, this 7<sup>th</sup> day of March 2017.

Respectfully Submitted,



David A. Foley  
National Labor Relations Board, Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, TX 76102-6178  
Telephone: (682) 703-7221  
Facsimile: (817) 978-2928  
Email: david.foley@nlrb.gov



Becky Mata  
National Labor Relations Board, Region 16  
819 Taylor St., Room 8A24  
Fort Worth, Texas 76102  
Telephone: (682) 703-7232  
Facsimile: (817)978-2928  
Email: karla.mata@nlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 7<sup>th</sup> day of March 2017, a copy of General Counsel's Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge was electronically served upon the following parties:

Brian D. Balonick, Esq.  
Buchanan, Ingersoll & Rooney, PC  
One Oxford Centre  
301 Grant Street, 20th Floor  
Pittsburgh, PA 15219-1410  
[brian.balonick@bipc.com](mailto:brian.balonick@bipc.com)

Sylvia Ramos  
Communications Workers of America,  
AFL-CIO  
Parkway at Oakhill, Bldg One 4801  
4801 SW Parkway, Suite 115  
Austin, TX 78735  
[sramos@cwa-union.org](mailto:sramos@cwa-union.org)

Matt Holder, Esq.  
David Van Os & Associates, PC  
8626 Tesoro Dr  
Suite 510  
San Antonio, TX 78217  
[matt@vanoslaw.com](mailto:matt@vanoslaw.com)

  
David A. Foley  
National Labor Relations Board, Region 16  
819 Taylor Street, Room 8A24  
Fort Worth, TX 76102-6178  
Telephone: (82) 703-7221  
Facsimile: (817) 978-2928  
Email: [david.foley@nrlb.gov](mailto:david.foley@nrlb.gov)