

**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

**DISH'S REPLY IN SUPPORT OF ITS  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION**

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## I. Introduction<sup>1</sup>

As DISH set forth in its Exceptions to the Administrative Law Judge Decision and its Brief in Support thereof ("Opening Brief"), the ALJ made several errors of law and he misread a key part of the record in reaching his conclusions in this case. The General Counsel's Answering Brief did not even attempt to defend some of the ALJ's most crucial errors, and it attempted to defend others by adding findings to the Decision that the ALJ never made.

This case raises a fundamental question: If a union insists on more bargaining sessions, may an employer nonetheless declare impasse when it becomes perfectly clear that there is no hope of the parties reaching an agreement? DISH declared a bargaining impasse in April 2016 when, after five years of bargaining, the parties were about \$30,000 apart on annual compensation per technician and, as bargaining continued, the gap between the parties' positions was growing. DISH had been demanding large wage concessions because unionized employees were earning tens of thousands of dollars more than their non-unionized peers, leaving the unionized offices economically unsustainable. Yet, for the final years of bargaining, every Union proposal demanded wage raises. Adding to the intractability of the dispute, the General Counsel's Answering Brief reveals that both parties believed they were in a strong bargaining position (Answering Brief at 14), effectively admitting that neither party felt compelled to make a concession of the scale necessary to close the gap. In short, the prospect of reaching an agreement was nil.

As DISH argued in its Opening Brief, the ALJ erred by, among other things, failing to analyze any of the evidence from DISH's perspective; misreading the key evidence he used to

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<sup>1</sup> The arguments in the Communications Workers of America's ("Union") Answering Brief substantively mirror those in the General Counsel's Answering Brief. Rather than address the same arguments in separate briefs, this Brief replies to both Answering Briefs. For simplicity, this Brief primarily references the arguments in the General Counsel's Answering Brief.

support his most crucial finding; misinterpreting and misapplying Board law regarding the technical aspects of impasse; and applying the wrong standard to determine whether employees were constructively discharged. For the reasons set forth below, the General Counsel's attempts to resuscitate the ALJ's Decision are unavailing.

**II. The ALJ's Most Crucial Finding—Regarding the Significance of the Union's Counterproposal to DISH's Final Offer—is Premised on a Clearly Erroneous Reading of the Record**

Central to the ALJ's flawed Decision was a misreading of DISH's attrition statistics; the ALJ conflated *very low attrition at the two unionized offices* at issue in this case (which were as low as 13% in one office) with *high attrition at DISH's non-unionized offices* (which were as high as 116% in one office). (Decision at 4; Ex. R-53.) Based on this misreading, the ALJ misinterpreted the Union's December 2014 counteroffer to DISH's final bargaining offer, wherein the Union demanded retaining QPC for current employees while eliminating it for new hires.<sup>2</sup> (Decision at 4, 12.) Because the ALJ believed that DISH's attrition at its unionized offices was much higher than it actually was (as high as 116%), the ALJ grossly overstated the alleged "concession" that the Union made in relinquishing QPC for new hires. (*Id.*) The ALJ incorrectly concluded that, in a short period of time, "Dish would have attained most of what it wanted on wages." (*Id.* at 4.)

Contrary to the Decision, attrition at the unionized offices was very low—only about 16% in the first year in which the Union's counteroffer would have been in effect. (Ex. R-53.) As a result, 84% of the technicians who would have initially retained QPC under the Union's final counterproposal in December 2014 still would have retained QPC one year later when, in

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<sup>2</sup> The Union's proposal demanded 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 that warehouse workers receive raises of roughly 25% for the first year of the contract, and further raises of 5.9% to 6.5% per year thereafter. (Ex. GC-5; Tr. 1121:10-13.)

January 2016, DISH restarted talks with the Union after a one-year bargaining hiatus.<sup>3</sup> In short, despite DISH having made clear over and over again in bargaining that technicians' wages needed to come down, the Union countered DISH's final offer with a proposal that—given low attrition rates and the skyrocketing value of QPC for those who retained it—would have sent wages up. Definitively, the Union's proposal would not have given DISH "most of what it wanted on wages." (Decision at 4.) Rather, by increasing wages, the Union's proposal merely was a continuation of its long and unbroken string of proposals demanding the opposite of what DISH was seeking. The Union's December 2014 counteroffer thus was far from the concession that the ALJ claimed it was.

So flawed was the ALJ's reading of DISH's attrition data that the General Counsel did not even attempt to defend it.<sup>4</sup> The General Counsel declined to support the ALJ's claim that DISH's "annual attrition rang[ed] from 116% to 13%." In fact, in the context of trying to defend the ALJ's conclusion that the Union's counterproposal was a significant move, the General Counsel did not address attrition at all. (*See* Answering Brief at 27-29.)

Instead, the General Counsel argues that *any* concession by the Union in response to DISH's final offer forestalled impasse and necessitated further bargaining. (*Id.*) This position is plainly contrary to Board law, which establishes that union concessions break or forestall impasse only where they create a new possibility for fruitful discussion. *See, e.g., In re Matanuska Elec. Ass'n, Inc.*, 337 NLRB 680, 681 (2002) (finding impasse despite the union

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<sup>3</sup> Further, no unionized technicians quit during the first three months of 2016, during which the parties were exchanging letters. Only one technician attrited during that time period, and he was fired for cause. The negligible attrition during the first quarter of 2016 only reinforces DISH's point that attrition among QPC-paid employees had been plummeting as QPC increased in value.

<sup>4</sup> Nor, for that matter, did the Union attempt to defend the ALJ's reading of the data in its Answering Brief. Instead, the Union argued on page 22 of its Answering Brief that attrition rates the unionized offices still were high, referencing *past* attrition rates at the offices. The Union ignores, of course, that attrition rates were plummeting each year as the value of QPC continued to rise, so it was clear that the attrition rates were only going down as time went on. Indeed, the attrition rate was 16% in 2015 (the first year that the Union's proposal could have been in effect, given that the Union made its proposal on December 9, 2014).

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); *Hayward Dodge*, 292 NLRB 434 (1989) (union's compromise of dropping a week from its prior vacation demand, when the employer needed far more substantial relief from its benefits package, was not a significant enough concession to forestall impasse).

The General Counsel further contended that the Union "was willing to move further." (Answering Brief at 28.) Conspicuously, the General Counsel did not provide a record citation for this proposition. This failure is for good reason. As DISH set forth in detail in its Opening Brief, the Union had been following up many of its bargaining "concessions" (which always were minimal) with regressive proposals. (Opening Brief at 18, 26.) There is no evidence beyond mere say-so that anything would have been different this time. Moreover, the General Counsel admits that the Union's chief negotiator "believed that the Union was in a position of relative strength as the employees were satisfied with the status quo. Although the employees were happy with the status quo pay system, Ramos was open to negotiating a different pay system." (Answering Brief at 14.) This is precisely why there was no hope of reaching an agreement. DISH made clear that it would not accept a contract in which bargaining-unit technicians earned significantly more than market wages. Yet, market wages represented a pay cut of tens of thousands of dollars for most members. Meanwhile, the Union's chief negotiator "believed that the Union was in a position of relative strength" (*id.*), and its actions conveyed that belief insofar as it did not make a single proposal over the course of the final 33 months of bargaining that would have resulted in lowering wages. Under these circumstances, the General Counsel cannot credibly argue that there was any realistic hope of reaching an agreement. What

was needed was a massive concession, not merely an alleged "open[ness] to negotiating a different pay system." (*Id.*)

Finally, the General Counsel argues that "[t]he employer also showed significant movement in its last proposals." (Answering Brief at 28.) The ALJ, however, made no finding that any of DISH's alleged "movements" had any bearing on whether the parties were at impasse.<sup>5</sup>

### **III. The ALJ Should Have Analyzed the Role of the Union's Tactics**

DISH excepted to the ALJ's failure to analyze any of the facts from its perspective. The ALJ should have done so, including analyzing the Union's tactics, given that DISH's assessment about the futility of further bargaining was based on DISH's perception that the Union employed tactics to prolong bargaining and delay impasse rather than reach an agreement. *See Southwestern Portland Cement Co.*, 289 NLRB 1264, 1276 (1988) (citing *M & M Contractors*, 262 NLRB 1472, 1476 (1982) and *R. A. Hatch Co.*, 263 NLRB 1221, 1223 (1982)); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 101 (1995).

Rather than even address the ALJ's failure, the General Counsel resorted to the same tactic it employed in much of the rest of its Answering Brief; it adds findings that it wishes the ALJ would have made. As for the phantom findings that the Union had not engaged in dilatory tactics, the General Counsel focused almost entirely on the Union's requests to meet with DISH

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<sup>5</sup> The alleged "movement" that the General Counsel appears most captivated by (given that it discussed the issue on no fewer than nine pages of its Answering Brief), was an alleged slight difference with regard to wages for warehouse technicians ("ISPs") between DISH's handwritten November 19, 2014 final offer and its December 18, 2014 typed version of the final offer. The General Counsel's fixation on this point is inexplicable. First, even the General Counsel admits on page 1 of its Answering Brief that the documents differed no more than "slightly." Second, DISH's author of those documents testified that there are no differences between the two documents regarding ISP wages. DISH's offer for all ISPs was \$12.65. The Union's witnesses may suggest otherwise, but no witness contended that ISP wages were a significant source of contention in bargaining, and, in any event, DISH did not even implement wage changes for ISPs (because it had no operational need to lower ISP wages and, contrary to the General Counsel's baseless allegations otherwise, DISH had no interest in unnecessarily lowering unionized employees' wages). In short, the General Counsel has tried to make a mountain out of what may or may not have been a typo. Thus, despite the General Counsel devoting much of the seven-day hearing (and its Answering Brief) to the issue, the ALJ did not find it worth even mentioning in his Decision.

for a seemingly infinite number of bargaining sessions. DISH of course does not deny that the Union was often willing to meet. Rather, as set forth extensively in DISH's Opening Brief, the Union's primary delay tactic was to repeatedly regress in its bargaining positions (including repeatedly demanding "QPC Plus") only to next offer minor concessions to create the illusion that bargaining was fruitful. (*See* Opening Brief at 18, 26.) The Union employed this tactic for years, allowing bargaining to drag on even when there was no hope of reaching an agreement. Tellingly, the General Counsel did not even once deny that the Union had been engaging in the regressive bargaining DISH described.

#### **IV. The ALJ Applied the Wrong Constructive Discharge Standard**

The ALJ incorrectly applied "Hobson's Choice" standards in finding that employees who quit following DISH's impasse declaration were constructively discharged. (Decision at 16.) As set forth in DISH's Opening Brief, Board law is clear that Hobson's Choice standards are applicable only where employees quit after being confronted with a choice between resignation and continued employment conditioned on relinquishment of Section 7 rights. Where employees are faced with incurring the effects of rights (allegedly) having been violated, traditional constructive discharge standards apply. Here, the ALJ erred in applying Hobson's Choice standards because 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.

Both of the General Counsel's attempts to defend the ALJ's reliance on the Hobson's Choice theory fail. Initially, the General Counsel argues that *Control Services*, 303 NLRB 481 (1991), which conflated Category 1 and Category 2 standards, is the controlling precedent in this case. (Answering Brief at 41.) This proposition ignores that *Control Services* is a 26-year-old decision. Since then, the Board has decided hundreds of constructive discharge cases in which it

consistently reiterated the distinction between circumstances giving rise to the Hobson's Choice theory versus the traditional constructive discharge theory, including in impasse cases. Neither the General Counsel nor the ALJ cited any post-*Control Services* decision in which the Board found that Hobson's Choice theory applies under the circumstances present here. The reason for their omission is clear. When similar cases have arisen, the Board has found that traditional constructive discharge theory applies. *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).

The General Counsel's other defense of the ALJ's application of the Hobson's Choice standards is that Hanns Obere, a low-level supervisor,<sup>6</sup> inadvertently sent a text message to one employee wherein he stated, among other things, that "The union is gone." Recognizing that the Hobson's Choice theory would otherwise be inapplicable to this case, the General Counsel admits that DISH's "argument [regarding the inapplicability of Hobson's Choice] would be much stronger if [Mr. Obere] had not sent [the] text message." (Answering Brief at 3.) The General Counsel's reliance on the text message here makes clear that it not only views the text message as its "smoking gun" (General Counsel's Brief in Support of Cross-Exceptions at 20), but that it also is a silver bullet to use whenever it has no other argument.

The General Counsel's argument fails for several reasons. First, the ALJ did not find that Mr. Obere's text had any connection to the alleged constructive discharges. Thus, the General Counsel adds findings that the ALJ simply did not make. Second, by the time the employees quit—in most cases weeks or months after seeing a copy of Mr. Obere's text message—they could not reasonably have interpreted the text message as DISH presenting a choice between resignation and continued employment conditioned on relinquishment of Section 7 rights. As

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<sup>6</sup> Mr. Obere is a Field Service Manager, the lowest level-supervisor in DISH's organization chart.

even the General Counsel admits, the text message was sent inadvertently to one technician, who distributed it to the rest of the technicians. The General Counsel also admits that, upon learning of the text message, DISH Regional Director of Operations quickly disavowed it and corrected the misinformation being spread. (Answering Brief at 17; Ex R-8.) Further, regardless of whether technicians immediately believed Mr. Beckham's disavowal, technicians quickly learned that all of the alleged "threats" contained in the text message were false. The Union obviously was not "gone" because it was holding strategy meetings with the employees. Multiple witnesses testified that no DISH technician transferred to other offices, and no DISH manager encouraged technicians to do so. (*See, e.g.*, Tr. 213:21-24; 936:24-937:5.) The two offices did not close; DISH has multi-year leases on the offices, and DISH made no plans to close them. (Exs. R-51; R-52; Tr. 904:8-905:19, 907:17-908:9.) And, no one encouraged employees to quit. To the contrary, DISH actively replaced employees who quit. (*See, e.g.*, Tr. 920:9; 978:24-979:2.) Third, even if the text message had been taken at face value by employees and even if it represented the views of the Company (it does not), it still would not have presented a Hobson's Choice. The General Counsel admits that, where the text states "'They would rather have the techs quit en mass' [sic] ... the text message does not explicitly states [sic] what the other side of 'rather' is." (Answering Brief at 41.) In the absence of an explicit choice, the General Counsel says, the text "would reasonably be read by employees in this situation ..." (*Id.*) The rest of the General Counsel's sentence is irrelevant because it already fails to meet the Hobson's Choice standard. 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. Fourth, all of the 17 former employees at issue

stated in their resignation letters or at the hearing that they resigned because they did not want to continue to work for DISH with reduced wages (that is, because of the effects of the alleged ULP). Tellingly, not a single one of them claimed that their resignations were because of any concerns about their ability to engage in any Section 7 activities while working at DISH. If the Hobson's Choice were as "clear and unequivocal" as it would have needed to be to meet the General Counsel's burden, and if the choice would have caused the employees to resign, one would expect some employees to have said something about it when they provided the reasons why they quit.

#### **V. Conclusion**

The General Counsel's remaining arguments primarily amount to repeating the ALJ's incorrect interpretations of Board law and adding findings that the General Counsel wishes the ALJ had made. Issues related to interpreting Board law have been thoroughly briefed at this point. Regarding the General Counsel's wishes that the ALJ had made other findings, most are rehashed in its Cross-Exceptions to the ALJ's Decision, and DISH anticipated and addressed many of them in its Opening Brief. DISH responds to others in its Answering Brief, concurrently filed.

As for the ALJ's most fundamental errors in this case—his misreading of data that he made central to his analysis; his failure to analyze the Union's tactics or their role in the events leading to impasse; and his application of the wrong constructive discharge standard—for the foregoing reasons and those in DISH's Opening Brief, the ALJ's errors are clear and should be reversed, and the General Counsel has failed to salvage them.



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing DISH's Reply in Support of Its 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 March, 2017.

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