

**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

**RESPONDENT DISH NETWORK L.L.C.'S ANSWERING BRIEF
IN RESPONSE TO GENERAL COUNSEL'S CROSS-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 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 33 months of bargaining, every Union proposal demanded wage raises. Adding to the intractability of the dispute, the General Counsel's Answering Brief to Respondent's Exceptions ("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.

In contrast to this rather pedestrian conclusion, the General Counsel presented a grand conspiracy theory, devoting the majority of its seven-day hearing to trying to convince the ALJ that DISH had been bargaining in bad faith for years to influence employees to "get rid of the Union or to quit." (*See e.g.*, Tr. 16:19-21; 777:19-22.) Anti-union animus was the central theme in the General Counsel's opening statement, presentation of witnesses, and post-hearing brief.

Upon close examination, though, it is clear that the General Counsel's Section 8(a)(3) case boiled down to: (1) a few isolated comments made years apart by DISH's former lead negotiator, most of which the Regional Director for Region 16 previously dismissed as nothing more than "hard bargaining"; and (2) a text message from a low-level supervisor that the General Counsel characterized as its "smoking gun," but turned out to just be ramblings of someone who

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

had no inside information. The ALJ did not miss the General Counsel's Section 8(a)(3) arguments—he just did not buy them. Likewise, the General Counsel has not proven a Section 8(a)(3) violation in this forum.

The General Counsel's other Cross-Exceptions likewise lack merit. First, the ALJ rejected the General Counsel's proffered campaign documents as exhibits (Cross-Exception 3), because they were lawful campaign materials (protected by the First Amendment and the Act), created years before the impasse declaration, and reflected the same positions that virtually every employer takes in a union election campaign: a preference to be union free. Therefore, they are not probative of whether the parties had reached a valid impasse. Second, the ALJ rejected the General Counsel's request for consequential damages (Cross-Exception 4), because Board law is clear that those damages are not available and are not merited.

As for Cross-Exception 2, DISH agrees with the General Counsel that the ALJ erred in failing to analyze the constructive discharge allegations under the Board's traditional constructive discharge standards. The General Counsel failed, however, to present evidence that could meet the traditional standards. DISH managers did not intend or want employees to resign. Indeed, they worked diligently to replace every employee who resigned, and they had almost completed doing so by the time of the hearing. Further, DISH's new wages are neither intolerable nor unreasonable. Indeed, they are competitive for the market, demonstrated by the fact that DISH had no trouble hiring 17 qualified employees in a short time period, all of whom accepted employment knowing that their wages would be those that DISH implemented post-impasse. Many workers, clearly, 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. The General Counsel also did not and cannot

demonstrate that DISH was motivated to retaliate against the employees who quit for their Section 7 activity given that almost none of them even engaged in Section 7 activity.

For these reasons, set forth more fully below, the General Counsel's Cross-Exceptions lack merit.

II. STATEMENT OF FACTS

DISH thoroughly set forth the relevant facts of this case in its Brief in Support of its Exceptions to the Administrative Law Judge Decision ("Opening Brief"). Here, DISH discusses the facts most relevant to the General Counsel's Brief in Support of Cross Exceptions ("Cross-Exceptions Brief"). This includes a condensed version of the facts presented in DISH's Opening Brief and additional facts as necessary to respond to the Cross-Exceptions Brief. DISH incorporates by reference the facts presented in the Statement of the Case in its Opening Brief.

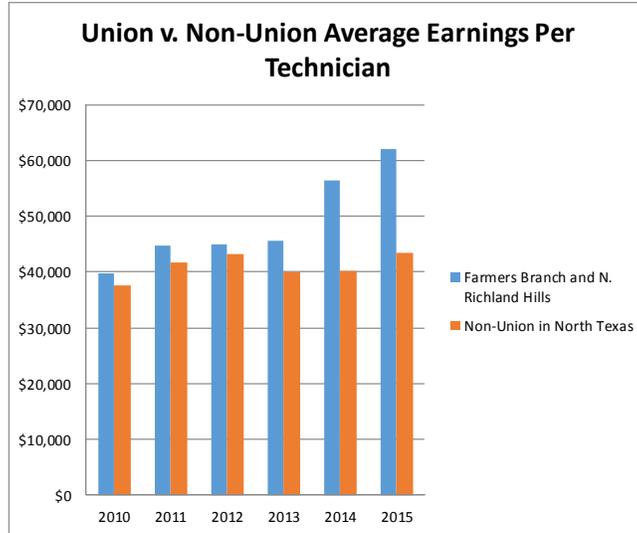
A. Background: QPC and Pi

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.)

QPC remained in effect at the unionized offices for seven years (from 2009 to 2016) because it was the status quo at the time that the Union was certified. 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 total compensation for the vast majority of non-unionized technicians is predominantly 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, QPC wages 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. Monty Beckham, the Regional Director of Operations for DISH's South Central Region, 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, earnings already were higher than non-unionized technicians' wages in 2010. Between 2013 and 2015, annual earnings 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, 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.").)

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 Until They Exhausted the Prospects of Reaching an Agreement

The skyrocketing value of QPC and the Union's lack of leverage set the backdrop to the parties' bargaining. Because the Union had no bargaining leverage over DISH, it could not convince DISH to accept a contract that would pay the unionized employees more than non-unionized employees. Meanwhile, the Union evidently thought it, too, was in a strong bargaining position. As the General Counsel stated in its Answering Brief to DISH's Exceptions, Sylvia Ramos, the Union's chief spokesperson since late-2013 "believed that the Union was in a position of relative strength as the employees were satisfied with the status quo." (Answering Brief at 14.)

For a brief period in early 2013, before QPC wages had dramatically increased and before Ms. Ramos had taken over as the Union's chief spokesperson, the parties came close to reaching a deal. On March 21, 2013, the Union presented a demand for 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 Union's prior demands, it still did not meet the requirements that Mr. Basara had laid out for the Union a few months prior, when he made clear to the Union that DISH could pay bargaining-unit members market-rate wages, but no more. (Tr. 1075:11-17; 1079:17-22; 1080:10-12; Ex. 20.) 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.) 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.) At this point, the parties' proposals were only a few thousand dollars apart.

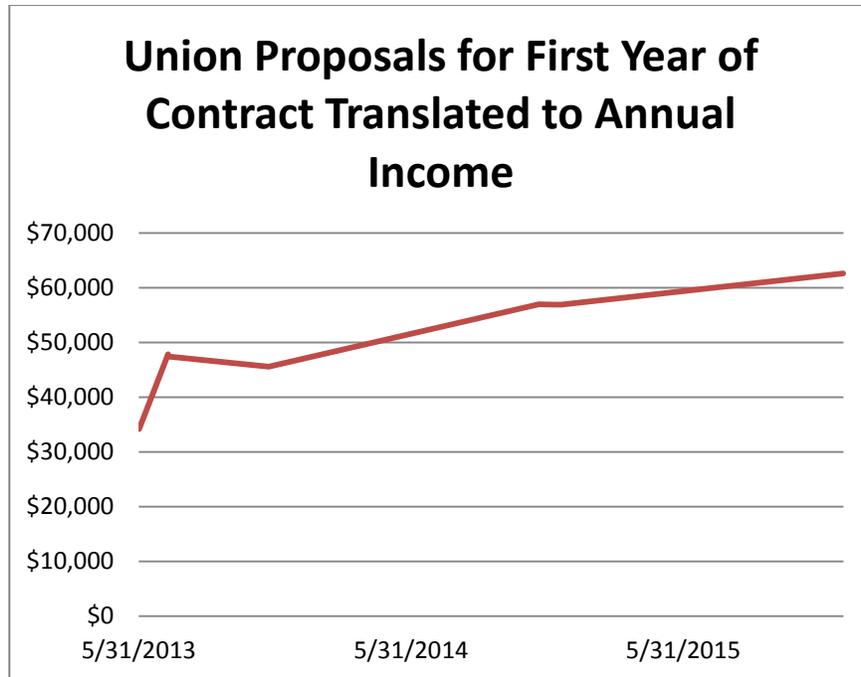
But, the Union's May 31, 2013, demand turned out to be its best wage proposal it would ever make, as the Union evidently began to believe that it was in the position of strength in the negotiations. The Union quickly regressed. On July 9, 2013 (just five weeks after its May 31 offer), the Union demanded 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.").)

For the final 33 months of bargaining, the Union stubbornly and persistently demanded that bargaining-unit members continue to be paid QPC or "QPC plus," even when QPC was worth 50% more than the wages paid to non-unionized technicians.

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

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.² 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.

Meanwhile, DISH had been doing its part to bargain towards an agreement, continuously increasing the value of its proposals throughout bargaining. (See *supra*, Table 1.) With the Union stuck on QPC, however, DISH was then stuck bargaining against itself. It did so for a

² 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 boot 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).

while, improving its wage proposals repeatedly in late 2013 and 2014. (*See* Table 1.) But eventually DISH came to see the Union's bargaining tactics—including its multiple uses of regressive proposals followed by minor concessions to create the illusion of progress—as stall tactics to fend off an impasse declaration and preserve QPC as long as possible. (Tr. 1103:18-1104:3.)

Eventually, DISH reached the end of its rope. 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 20 articles that the parties had tentatively agreed upon throughout bargaining, and it significantly improved its prior wage offer for technicians, to \$13 to \$17 per hour. (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. (Tr. 1146:6-9.) The parties bargained in person over DISH's proposal for the next two days. (Exs. R-4; R-5; Tr. 1115:16-21; 1117:8-13.)

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 boot 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.*)

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 took over the file from Mr. Basara 16 months before DISH declared impasse, 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.³

After some email exchanges between Mr. Basara and Ms. Ramos in the final weeks of 2014, the parties did not communicate again with one another for a year until DISH reached out to the Union. On January 8, 2016, Mr. Balonick, who had by then taken over the file from Mr. Basara, sent Ms. Ramos a letter reiterating DISH's position that it had made its last, best and

³ 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.

final offer to the Union in November 2014, and requested that the Union indicate whether it intended to accept. (Ex. GC-10.) Over the next four months, Mr. Balonick sent the Union a total of five letters, seeking any indication from the Union that further bargaining would not be futile. (Exs. GC-10; GC-18; GC-19; GC-28; GC-29.) Mr. Balonick explained why he sent so many letters.

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.) But, throughout all of the letter writing, the Union just stood pat, offering nothing more than empty demands for more bargaining sessions and a recitation of the Union's perspective on the bargaining history. (Ex. GC-26.) 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.)

Finally, DISH determined that there was no longer any hope of reaching an agreement and it declared impasse.

D. DISH Implemented Its Last, Best and Final Offer

In early 2016, DISH's managers who were involved in collective bargaining and making the decision to declare impasse began disseminating information to the operational managers who would be most directly affected. In January or February 2016, then Human Resources Director Lisa Wodell informed Monty Beckham that DISH might implement the wage rates in DISH's final offer. (Tr. 897:20-898:9.) Mr. Beckham had not been involved in bargaining or in bargaining strategy sessions, and he was not aware how DISH got to the point of offering the wages that were implemented. (Tr. 898:23-25.) About one week before DISH announced the impasse, Mr. Beckham called his two direct reports responsible for Farmers Branch (Keith

Barton) and North Richland Hills (Thomas Nicholas), telling them that DISH would be declaring impasse, but providing no details about what the new wages would be. (Tr. 912:5-24; 973:1-21.) Then, on April 5, 2016, Mr. Beckham met in person with Mr. Barton and Mr. Nicholas, along with Lisa Wodell and the local human resources representative, to show them PowerPoint slides that would be presented to employees later that day and throughout the week, providing them an explanation of the impasse declaration. (Tr. 912:5-24.)

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. Lisa Wodell, the primary speaker at the sessions, presented PowerPoint slides to employees. (Tr. 901:17-902:6; 917:6-8.)

During the presentation, DISH told the employees what it told the Union: that the parties had bargained to impasse, and DISH was implementing its final offer. (Ex. GC-114.) DISH also summarized the major terms of employment that were going to change. (*Id.*)

E. Inadvertent Text Message

Despite DISH's best efforts to provide its employees a complete and accurate account of the history and current status of bargaining, low-level supervisors and bargaining-unit technicians began spreading gossip and conspiracy theories. In one incident that received considerable attention in the General Counsel's Complaint and during the hearing, on April 6, 2016, a first-level supervisor inadvertently communicated his personal and mistaken beliefs about the impasse to a technician. On April 6, Field Service Manager ("FSM") Hanns Obere was having a text message conversation with then-fellow-FSM Waeland Thomas,⁴ while he also was having a separate text message conversation with bargaining-unit technician Kenneth Daniel.

⁴ Mr. Thomas is now an Operations Manager.

(Tr. 210:18-211:5.) At 9:54 a.m., Mr. Obere inadvertently sent the following text message to Mr. Daniel, which he intended to send to Mr. Thomas:

The union is gone
Techs will be on affixed hourly rates, no Pi
Level 4 will earn 17 dollars an hour
They will earn like the rest of DISH if they transfer to other offices
which they encourage
They have QPC till the 23rd
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
Seatbelt for a bumpy ride
Call me when you have a minute.

(Ex. R-40.) Both Mr. Obere and Mr. Daniel quickly realized that the message was accidentally sent to the wrong person. (Tr. 671:5-6; Tr. 210:18-211:5.) Mr. Daniel acknowledged the message was not intended for him, replying, "you didn't mean to msg me that." (*Id.*)

At 10:06 a.m., upon realizing he had sent the text message to the wrong person, Mr. Obere sent the message to Mr. Thomas, the intended recipient.

1. The Origins of the Text Message

Mr. Obere contends that the source of all of the content of the text message was his boss, Region Manager Thomas Nicholas, who had a short meeting with Mr. Obere regarding the bargaining impasse about one to two hours before Mr. Obere sent the text message. (Ex. CP-87; Tr. 196:4-6 ("Q And [the text message is] based on your paraphrasing of a discussion you had with Mr. Nicholas? A Yes, sir.").)

For his part, Nicholas agrees that he had a short meeting with Mr. Obere that morning, in which Mr. Nicholas informed Mr. Obere about the impasse. (Tr. 979:6-17.) As for what was discussed during the meeting, Mr. Nicholas testified:

Q And what did you tell Mr. Obere?
A He asked, you know, what was going on this afternoon, and I let him know what I had learned the previous day when we told the

employees at Farmers Branch, which was simply that we had declared an impasse and that we're going to be letting the employees know what was going to happen, that they were going to go to a fixed rate schedule of \$13 to \$17 for Levels 1 through 4, and that all of that would go into effect on the 23rd of April.

Q Did you tell him anything else?

A I also did mention to him that QPC was going to be eliminated as part of the plan, but other than that that's all I told him.

(Tr. 979:18- 980:5.)

2. The Remainder of the Text Message

Aside from the facts that QPC would be eliminated on April 23 and technicians would be paid straight hourly wages of \$13 to \$17 per hour, the *only* evidence that any of the remaining content of the text message came from anywhere other than Mr. Obere's imagination was his contention that he heard it from Mr. Nicholas earlier that morning. All of the remaining evidence discredits or otherwise refutes this contention.

First, Mr. Nicholas testified that he never told Mr. Obere any of the points in the text message other than that QPC was being eliminated and the new wage rates. (Tr. 979:18- 980:5.) He did not tell Mr. Obere that the Union is gone, (Tr. 975:20-21); that the unionized offices were closing, (Tr. 976:9-14); that employees or technicians would be dispatched to other offices or a new one would be started, (Tr. 977:14-16); or that DISH wanted employees to quit. (Tr. 978:12-15.)

Second, Mr. Obere demonstrably gave false testimony on the stand when describing the circumstances of the text message and its aftermath. Mr. Obere testified on August 8, 2016, regarding his communications with technician Daniel:

Q And so did Daniels respond to your text message?

A He did.

...

Q Did he call you?

A No, he didn't.

Q He didn't call you?

A No.
Q Did you call him?
A No, I did not.
Q *There was no phone conversation?*
A *Not at all.*

(Tr. 185:12-24 (emphasis added).) Mr. Obere's phone records demonstrate this is false; they show that, within 15 minutes of him sending the text message to Mr. Daniel at 9:54 a.m., the two men had two phone conversations. (R-46; Tr. 992:12-15; 993:4-21.) Mr. Daniel called Mr. Obere at 10:04 a.m., and Mr. Obere called Mr. Daniel at 10:07 a.m. (*Id.*) Mr. Daniel confirmed in his testimony that these phone calls were made, and that both calls consisted of Mr. Obere trying to deny or make light of having sent the text message. (Tr. 671:12-672:7.) Upon DISH recalling Mr. Obere to the stand, he again gave false testimony, inexplicably claiming, despite the phone records being shown to him, that his earlier testimony was truthful. (Tr. 995:18-20.)

Third, contrary to Mr. Obere's initial insistence that all of the content of the text message came from Mr. Nicholas, Mr. Obere went on to testify that portions of the text message—particularly, those indicating that the unionized offices were closing down—were merely his "impressions" and "opinions" from his conversation with Mr. Nicholas, rather than statements made by Mr. Nicholas. He testified:

Q Based on your conversation, you thought they were going to shut --
A That is correct, based on the reaction that might happen, *I was under the impression* that the person who's managing the techs that they might quit en masse and the offices might close down.
...
A When I was sending my message to Waeland, I was paraphrasing what Mr. Tom Nicholas told me. ... What is reflecting on that is *my opinion* that the office might close.

(Tr. 180:13-181:18 (emphasis added).) (*See also* Tr. 198:7-15 ("Q All right, so going down, the next states, "The two offices are gradually closing." What did Mr. Nicholas say that led you to

put that statement in the text message? A No, this is on my own. I was talking to a fellow manager. If we are going to have this pay period implemented and it might lead to the techs quitting, so the offices might gradually close. That was my opinion."). *See also* Tr. 215:8-16.)

Fourth, multiple witnesses testified that neither Mr. Obere nor Mr. Nicholas had any knowledge of DISH's strategy or intentions in bargaining, which the text message purportedly reveals. Mr. Obere did not participate in bargaining with the Union or any of DISH's internal strategy sessions. (Tr. 216:9-15.) Mr. Nicholas likewise testified that he had no inside information regarding the status of bargaining or DISH's bargaining strategy that would have made him privy to the type of information in Mr. Obere's text message. (Tr. 972:7-24.) He did not, for example, have any role in collective bargaining, provided no input to those who did, did not know who was bargaining with the Union on behalf of DISH, and had not been provided updates about the status of bargaining other than the two previously-referenced discussions with his boss, Monty Beckham. (*Id.*) Indeed, even Monty Beckham, who was the source of Mr. Nicholas's information about the impasse, and who was in regular contact with senior managers at DISH who had been involved in bargaining, had not been receiving bargaining updates or been made aware of bargaining strategy. (Tr. 895:1-10; 897:20-898:25.)

Fifth, Mr. Beckham and Mr. Nicholas each testified that they have never said nor heard any Company manager ever say that the Union was gone; that DISH would encourage unionized technicians to transfer to other offices; that the unionized offices were gradually closing; that either technicians or FSMs would be dispatched to other offices or a new office would be started; or that DISH would rather have technicians quit en masse. (Tr. 912:25-914:7; 975:22-978:23.) Nor had the above managers said or heard from any DISH manager that any of the above were objectives of the impasse declaration. (Tr. 914:8-24; 975:22-978:2.)

Sixth, Mr. Obere claimed in a written statement that he submitted to Human Resources that Mr. Nicholas told him on April 6 that DISH planned to close the unionized offices and transfer employees to non-unionized offices (as Obere had written in his text message), and that was the reason DISH had been leaving open an Operations Manager position in DISH's nearby Sunnyvale office. (Ex. CP-87.) This was false. Mr. Beckham interviewed a candidate, Chad Turner, for that Operations Manager position the week Mr. Beckham came to the region for the impasse implementation, and Mr. Beckham hired Mr. Turner. (Tr. 947:23-948:9.) The Sunnyvale position had been open for 90-120 days, which is average for such positions. (Tr. 948:13-21.)

Finally, it is undisputed that much of the text message is plainly false:

- "The union is gone"
 - The record is unquestionably clear that the Union is not gone.
- "They will earn like the rest of DISH if they transfer to other offices which they encourage"
 - Mr. Obere and each of DISH's witnesses testified that no one has been encouraging bargaining-unit employees to transfer to other offices. (*See* Tr. 213:21-24; 936:24-937:5.)
- "The two offices are gradually closing"
 - Mr. Obere and each of DISH's witnesses testified that, not only are Farmers Branch and North Richland Hills remaining open, DISH has hired 17 new technicians since April 6, 2016, in an effort to bring the North Richland Hills office back to quota, and the Farmers Branch office already is above quota.⁵ (*See* Tr. 908:17-909:17; 214:1-215:4.)
 - DISH has multi-year leases on its offices, and there are no plans or discussions of closing them. (R-51; R-52; Tr. 904:8-905:19, 907:17-908:9.)

⁵ Of the 17 hired, 3 have quit, leaving 14 new hires remaining at North Richland Hills. The three resignations are not unusual for DISH during this time span. Mr. Beckham estimates that 25% of technicians quit within their first 90 days. (Tr. 909:12-910:3.)

- "We will be dispatched to other offices or a new one will be started":
 - There have been no plans to transfer employees to other offices. Mr. Beckham testified, "I would not transfer an employee out of the office if that office needed employees. So you're taking, say, North Richland Hills with lots of techs, if a tech at North Richland Hills wanted to transfer I won't do a transfer because I still needed techs in that office. The same process as it's always been would be in effect." (Tr. 936:24-937:5.)
- "They would rather have the techs quit en mass":
 - DISH's managers testified that neither they nor anyone they knew wanted employees to quit. (*See* Tr. 241:25-242:9 (Mr. Thomas) ("Q Was Monty concerned about all the employees quitting? A He was ... He just told me that he did not want the employees to quit and we were not going to close down that shop and we were going to keep the doors open."); 899:7-13 (Mr. Beckham) ("Q Did you want the employees to quit? A No. ... Losing those employees, there's a reason I have them. I need them. I needed them where they were."); 920:9; 978:24-979:2.)

3. DISH Does Not Know the Source of the Information in the Text Message

Aside from the facts that QPC was being eliminated and new wage rates were being implemented, DISH does not know the source of the content of the text message. Lisa Wodell conducted an investigation, which confirmed that Mr. Obere and Mr. Nicholas have very different accounts of their April 6 discussion. Mr. Beckham believes Mr. Nicholas's account, for the reasons discussed above. (Tr. 902:15-903:4; 903:10-14.)

The record also suggests the content of the text message was based on rumors that had been circulating for years. One of the General Counsel's witnesses, bargaining-unit member Aaron Mason, for example, testified that, when he heard about the impasse, he jumped to the conclusion that the Union was disbanded. (Tr. 529:12-23.)

4. DISH Promptly Disavowed the Text Message

Upon learning of the text message, DISH quickly disavowed it and corrected the misinformation being spread. On April 12, 2016, Monty Beckham sent Mr. Daniel an e-mail stating:

We understand that you were accidentally copied on a text message concerning collective bargaining at Farmer's Branch and North Richland Hills. The information in the text was incorrect and the FSM who sent it had not attended any DISH meetings concerning the implementation of new terms of employment at the time the text was sent. You should disregard that message and refer to the presentation that was delivered to all employees.

(Ex. R-8.) Mr. Beckham followed up that email with one to the entire bargaining unit:

We understand that a few rumors have arisen that we want to dispel:

1. You are still represented by the union. We respect your right to continued union representation.
2. Despite what you might have heard, we have no plans to close either North Richland Hills and Farmer's Branch. We have multi-year leases at both offices.
3. While we understand this is a difficult time, we hope to have long term success at both offices.

(Ex. R-8.) Mr. Beckham explained the purpose of his e-mails.

[T]he rumors were rampant, and I wanted to set it straight and put it back to what was true and accurate. I didn't think that it was fair that they were trying to wonder what was going on, and hearing things, and I wanted them to hear it from me. "This is truly what is going on." And to be clear and transparent with them.

(Tr. 915:19-25.)

III. ARGUMENT⁶

For the reasons set forth below, the General Counsel's Cross-Exceptions to the ALJ's Decision are unavailing and should be denied.

⁶ The General Counsel failed to set forth Questions Presented, violating NLRB Rules and Regulations 102.46(a)(2) and (c) ("Any brief in support of exceptions must contain ... [a] specification of the questions involved and to be argued"). As a result, DISH cannot directly comply with 102.46(b) and (d) ("The answering brief ... must present clearly the points of fact and law relied on in support of the position taken on each question.") In the absence of Questions Presented by the General Counsel, DISH herein responds directly to the General Counsel's allegations and arguments.

A. DISH's Implementation of Lower Wages Was Not Unlawfully Motivated (Cross-Exception 1)

The ALJ could not have missed the General Counsel's theory that DISH reduced technicians' wages "to force them to transfer out of the Unit or quit." (Cross-Exceptions Brief at 3.) The General Counsel devoted the majority of the seven days of hearing to trying to convince the ALJ that DISH had engaged in a multi-year conspiracy to influence employees to "get rid of the Union or to quit." (*See e.g.*, Tr. 16:19-21; 777:19-21.) Anti-union animus was the central theme in the General Counsel's opening statement, presentation of witnesses, and post-hearing brief.

The evidence was not compelling, and the ALJ did not buy it. His finding that DISH's impasse declaration was invalid was based solely on technical issues, such as DISH's insisting on a non-mandatory subject of bargaining and DISH's changing its lead negotiator. The ALJ did not find that DISH's overall conduct constituted bad faith.

This result should not have been surprising. Two years earlier, in response to an Unfair Labor Practice charge submitted by the Union (Case No. 16-CA-117693), Region 16 looked at nearly all of the same Section 8(a)(3) evidence and heard from the same witnesses that the General Counsel presented to the ALJ in this case and in its Cross Exceptions Brief. At that time, while in the neutral role of investigator (in contrast to its attorneys' present roles as advocates), the Region did not buy the Union's theory that DISH's overall conduct indicated bad faith. To the contrary, it dismissed the charge, "conclud[ing] that the evidence established the Employer engaged in ***hard bargaining*** rather than conduct designed to frustrate the possibility of arriving at any agreement." Comment on Appeal by NLRB Director of Office of Appeals Deborah Yaffee to Martha Kinard, Case No. 16-CA-117693 (March 19, 2014). The General Counsel's Office in Washington, D.C. then reviewed the evidence on the Union's appeal, and it,

too, found no merit to the charges. *Id.*; *DISH Network*, Case No. 16-CA-117693, NLRB Office of General Counsel (March 31, 2014).

In sum, everyone who has looked at the General Counsel's Section 8(a)(3) evidence in a neutral capacity and has heard from live witnesses has rejected the conspiracy theory that the General Counsel now presents to the Board. Now, months after ALJ hearing, and years after Region previously looked at most of the same evidence while it was still fresh, the General Counsel asks the Board, based on nothing but briefs and a transcript, to come to a different conclusion than everyone before it.

1. The General Counsel Grossly Overstates Its Evidence and Fails to Address Any Contrary Facts

The facts of the case raise some difficult questions for the General Counsel. If DISH intended to create an impasse, why did it consistently increase its wage proposals (in contrast to the Union, which repeatedly offered regressive proposals)? If DISH intended to create an impasse, why did it not do so years earlier, given that there was strong evidence that the parties were at loggerheads as early as July 2013, when the Union started to move away from a deal? If DISH intended to create an impasse, why did it reach out to the Union *five* times in 2016, practically begging the Union to provide any indication that the parties were not at impasse? If Mr. Basara's comments at the bargaining table and DISH managers' comments made prior to January 2014 were as egregious as the General Counsel portrays them to be in its Cross-Exceptions Brief, why did Region 16 dismiss them and characterize them as nothing more than "hard bargaining"? These are questions for which the General Counsel has no answer, and it does not even try to address.

a. *DISH's Final Wage Offer Was Justified*

The General Counsel falsely but repeatedly claims that DISH had no justification for the wage reduction it implemented. (Cross-Exceptions Brief at 2, 20.) As a preliminary matter, the vast majority of the wage reduction has been extensively explained. DISH needed to lower wages at the unionized offices—which had artificially ballooned to tens of thousands of dollars above those at non-unionized offices—in order to return the offices to economic viability. The drop in wages was not based on animus, but rather is a reflection of how disproportionately high wages had been before the impasse declaration.

As for the wages being a little lower than those at non-unionized offices, the General Counsel conveniently overlooks that the Union approached the issue of wages at the unionized offices without any regard to wages at non-unionized offices. It was trying to get the highest wages for its members that it could, repeatedly demanding that its members be paid tens of thousands of dollars more than non-unionized technicians. The General Counsel never criticized the Union for doing so. Evidently, this is because the General Counsel accepts that, in bargaining, the Union had the right to seek the best deal it could for the technicians in the offices it represented, regardless of pay in other offices.

Likewise, DISH had every right under Board law to pursue the best deal it could, and like the Union, it could approach the two unionized offices in isolation. That is what DISH did. Mr. Basara testified that he worked with one of his contacts in DISH's Compensation and Benefits Department, and developed the final proposal that he gave the Union, paying technicians \$13 to \$17 per hour, which DISH considered "reasonable" and "workable."

(Tr. 1146:6-9; 1171:17-21.)⁷ DISH believed it could successfully run its operations in the two unionized offices at the wages it proposed, and it had the right to try.⁸

The General Counsel's argument, endorsing the Union for demanding *much* higher wages for unionized offices while criticizing DISH for offering *modestly* lower wages, tries to create a double standard that the Supreme Court has rejected, which clearly establishes that the Board should not sit in judgment of parties' wage proposals. *See, e.g., H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970) ("agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement."); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 497 (1960) (It is not a proper function of the Board to act "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.").

Despite the Supreme Court's warnings, the General Counsel tries to insert itself into the role of DISH's compensation director, judging for itself whether the wages DISH paid its employees worked for its business model. The General Counsel contends, "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." (Cross-Exceptions Brief at 18.) This is a gross overreach by the General Counsel, and the numerous errors in its analysis perfectly illustrates why the General Counsel has no business inserting itself into the

⁷ The General Counsel implicitly questions whether Mr. Basara had the conversation with his contact in DISH's Compensation and Benefits Department about which he testified. (*See* Cross-Exceptions Brief at 18.) There is no evidence that Mr. Basara's testimony was anything other than truthful, and the ALJ made no findings otherwise.

⁸ The General Counsel contends that even if the wage rates DISH proposed in November 2014 were viable, they likely were no longer viable by 2016 because DISH considered raising wages at one office in the Dallas-Fort Worth region in the interim. (Cross-Exceptions Brief at 10.) The General Counsel ignores that DISH did not actually raise the wages at that office, ultimately deeming it unnecessary to do so, nor did DISH raise the wages at any other office in the region during that time period. Indeed, a review of the average wages that DISH paid non-unionized technicians in the region shows that they were essentially flat from 2011 to 2015. (*See* Ex. R-49, a copy of which appears on page 5, above.)

question of what wages an employer should propose or accept at the bargaining table. As DISH showed in Exhibit R-53, attrition rates of about 50% are common in DISH offices, and some offices experience considerably higher attrition. While DISH does not desire high attrition, it recognizes that it is part of the cost of doing business for a low-cost satellite television service provider whose technicians perform a difficult job. As for the General Counsel's claim that the wage DISH implemented "failed in legitimate business goals such as profitability retaining, recruiting and motivating employees," the General Counsel provides no record citation or any other basis for its claims.

b. *Mr. Basara's Comments Reflect Hard Bargaining*

The General Counsel's Section 8(a)(3) argument largely centers on a couple of comments that George Basara made in 2012 and 2013, before DISH repeatedly raised its wage proposals and years before DISH ultimately declared impasse. As noted above, both Region 16 and the General Counsel's Office in Washington, D.C. already found there is no merit to these claims. The Union first raised them in late 2013 by filing unfair labor practice charges against DISH, making *the same* allegations as those in the General Counsel's Cross-Exception Brief regarding Mr. Basara's comments. The Region investigated those charges—including reviewing the Union's position statement, speaking to live witnesses, and reviewing all of the parties' bargaining notes—after which Regional Director Martha Kinard dismissed them on January 30, 2014. Ms. Kinard concluded, "[u]pon the examination of the conduct of both parties, including actions at and away from the bargaining table, the Employer's actions do not rise to a level of bad faith bargaining." *DISH Network*, Case No. 16-CA-117693, NLRB Regional Director Letter (January 30, 2014). The Region further concluded that Mr. Basara's comments reflected "**hard bargaining**" rather than unlawful conduct. Comment on Appeal by NLRB Director of Office of

Appeals Deborah Yaffee to Martha Kinard, Case No. 16-CA-117693 (March 19, 2014)
(emphasis added).

The Region's investigation included gathering evidence from both parties, going beyond isolated quotes from *the Union's own, self-serving bargaining notes*. In doing so, the Region concluded that, in context, Mr. Basara's comments were not retaliatory or otherwise unlawful. Indeed, elsewhere in the Union's own notes, Mr. Basara made clear that he was not seeking to penalize bargaining-unit members. (*See, e.g., Ex GC-49* ("Ken: Can I ask a question real quick. To take two bargain for units and pay them less than non-bargain units? Is it a penalty because these people chose to be in a Union?; George: No; Sylvia: because it is less that is your answer.; George: Because it is good economics for my client.").)

The General Counsel argues that the Regional Director's investigative findings have no "res judicata effect." (Cross-Exceptions Brief at 18 n.7.) DISH does not suggest otherwise. But, the investigative findings are probative. The Regional Director's decision was based on thoroughly gathering and reviewing the relevant evidence, and she reached an affirmative conclusion and explained her reasoning. She specifically found that the relevant evidence did not support a finding of bad faith bargaining. *DISH Network*, Case No. 16-CA-117693, NLRB Regional Director Letter (January 30, 2014). The General Counsel concurred. *DISH Network*, Case No. 16-CA-117693, NLRB Office of General Counsel Letter (March 31, 2014).

In sum, Mr. Basara's comments at the bargaining table repeatedly reflect DISH's business position that the unionized offices were too costly and DISH needed to realign those costs. This business motive is plainly distinct from a "brutal [plan to] reduce the wages of the Union supporting employees to the point where they quit." (Cross-Exceptions Brief at 3.) Nowhere in

the record is there any support for the proposition that DISH had such a plan, and the Region's prior findings concluded just the opposite.

c. *Mr. Obere's Text Message Shed No Light on DISH's Strategy*

The General Counsel hinges much of its argument on Mr. Obere's text message, even calling it a "smoking gun," revealing DISH's bargaining strategy. (Cross-Exceptions Brief at 20.) The evidence, however, makes it abundantly clear that the text message shed no light on DISH's motives or strategy. The vast majority of Mr. Obere's text message is demonstrably false; Mr. Obere had no role in the bargaining process or strategy; and the content of the offensive portions of the text did not come from the source Mr. Obere identified, Mr. Nicholas. The only evidence that the offensive comments in the text message came from anywhere other than Mr. Obere's imagination or rumors that he had heard (which is the most likely explanation) was Mr. Obere's own testimony, and even he admitted that much of what he wrote in the text message were his "impressions" and "opinions", rather than what he was told. The rest of his testimony was conclusively refuted, given that neither Mr. Nicholas, nor his boss from whom he obtained all of his information, Mr. Beckham, had been told what was in Mr. Obere's message. Further, Mr. Obere gave false testimony on the witness stand when he testified about the events surrounding his text message, casting further doubt on his credibility.

d. *The General Counsel's Theory that DISH's Plan Was and/or Is to Rid Itself of the Union Through Attrition is Contradicted by All of the Evidence*

The General Counsel inexplicably continues to maintain that DISH's goal in reducing wages was to "rid itself of the Union by attrition." (Cross-Exceptions Brief at 17.) All of the evidence shows otherwise. Most importantly, DISH has been replacing the employees who quit. Lest DISH's actions be mistaken as a few perfunctory hires to muddy the record, DISH hired 17 new Union-represented technicians in the few months between its implementation of the new

wage rates and the hearing, and that hiring effort started even before Region 16 filed its original Complaint in this matter. (Tr. 908:17-911:21.)

The General Counsel also curiously contends that an off-handed comment by Operations Manager Waeland Thomas, telling a few senior technicians not to discuss the Union during technical training sessions, was somehow part of DISH's alleged effort to eliminate the Union by attrition. (Cross-Exceptions Brief at 17.) None of the General Counsel's witnesses testified that Thomas made the alleged comment more than once or that he said it to more than a few technicians in a small meeting. The ALJ did not find that this comment reflected any overall animus or had any connection to any of the General Counsel's other allegations. The General Counsel's effort to now ascribe the comment as part of DISH's alleged grand plan to eliminate the Union is wholly unsupported by the record.

2. The General Counsel Failed to Prove that DISH was Motivated by Animus in Implementing its Post-Impasse Wage Rates

The General Counsel has not proven that anyone who was involved in the decision to declare impasse or implement the post-impasse wage rates bore any animus towards the Union. Mr. Basara had stopped representing DISH 16 months before DISH declared impasse. While DISH disagrees strongly with the General Counsel's characterization of Mr. Basara's comments, it also notes that, whatever the propriety of Mr. Basara's hard-bargaining comments, he had long been out of DISH's decision-making process by the time DISH decided to declare impasse and implemented the new wage rates. And, there is no evidence that his comments were directed by anyone involved in the decision. Furthermore, it is clear that neither Mr. Thomas nor Mr. Obere had any involvement or insight into DISH's strategy or decision making regarding bargaining or declaring impasse.

In fact, DISH made the decision after recognizing that DISH had made a fair final offer that the Union had rejected while offering a counter-proposal that showed no movement substantial enough to give any hope that an agreement could be reached. Despite the Union's failure to show any sign of flexibility after the bargaining hiatus in 2015, DISH attempted repeatedly to contact the Union for a signal that further bargaining could be fruitful. The Union failed to give any such sign and instead made empty demands for further bargaining. In the end, DISH saw no hope of the parties ever reaching agreement.

B. Employees Who Resigned Were Not Constructively Discharged (Cross-Exception 2)

DISH demonstrated in its Opening Brief that the ALJ erroneously applied the Board's "Hobson's Choice" theory of constructive discharge in finding that DISH constructively discharged 17 employees. The General Counsel all but concedes that this was an error. It offered only a tepid defense of the ALJ's conclusion in its Answering Brief to DISH's Exceptions, and its Cross-Exception 2 admits that the ALJ erred in failing to analyze the resignations under the Board's traditional constructive discharge theory.

But, as the ALJ evidently recognized, the General Counsel cannot demonstrate that the employees who quit after DISH implemented its final offer were constructively discharged under the Board's traditional standards. 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).

DISH demonstrated in its Opening Brief that the record does not establish either element. 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. Contrary to the General Counsel's contention that "Respondent has hired a few replacement employees," the record is clear that, even by the date of the hearing, DISH had almost completed the process of replacing every employee who quit. 908:17-911:21.

Further, the new wages are neither intolerable nor unreasonable. Rather, 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 qualified 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 wages comparable to or worse than the wages DISH implemented (particularly when combined with DISH's benefits package). (*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).)

The General Counsel tries to escape this basic fact by contending that the former employees went to "jobs which offered more hours or the possibility for advancement." (Cross-Exceptions Brief at 13.) Conspicuously, the General Counsel offered only one record citation relating to one former employee who claimed to work more overtime hours in his new job. (*Id.*) The General Counsel also offers no record citations for the proposition that technicians do not work overtime at DISH (because it is not true). Even more striking, the General Counsel's implication that overtime hours were not available to DISH's unionized employees is directly contradicted by the General Counsel's own Answering Brief, which it filed contemporaneously with its Cross-Exceptions. The General Counsel's Answering Brief complained of unionized technicians working "extraordinarily long hours ...[due to DISH's] roll[ing] out its automated scheduling system known as the ETA Direct." (Answering Brief at 9.) To summarize, on the same day, the General Counsel filed two briefs, with one complaining that DISH required unionized technicians to work too many overtime hours and the other complaining they worked too few.

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.

Finally, despite the General Counsel's constant refrain that there was a "mass exodus" of unionized employees after DISH implemented its wage reduction and that employees "quit en

masse" (*see* Cross-Exceptions Brief at 12; Answering Brief at 6, 22, 39), it simply is not true. Even with the 17 resignations that the General Counsel highlights (16 of which were at one office with one employee quitting at the other office), the attrition rate at the unionized offices in 2016 was about 50%. In the context of DISH's operational experience and business model, this rate of attrition cannot legitimately be characterized as a "mass exodus" for at least two reasons. First, attrition of 50% is about average for DISH's non-unionized offices in the region. (*See* Ex. R-53.) Second, even the General Counsel admits that 50% is not a particularly high rate for DISH's unionized offices. In trying to defend one of the ALJ's other findings from DISH's Exceptions, the General Counsel wrote that DISH "suffers from high attrition rates both at its union and non-union facilities. Attrition in the first years following the election and certification of the bargaining units was very high and remained so in 2013, 2014, and 2015. In 2013, the locations experienced nearly 50% attrition." (Answering Brief at 9 n.3; *see also id.* at 34.) To recap, the General Counsel maintains that DISH has long-suffered high attrition in its unionized offices, including a rate of 50% in 2013, but the General Counsel calls that rate of attrition a "mass exodus" when it occurs in 2016.

Notwithstanding the General Counsel's mischaracterizations, attrition at DISH's unionized offices had been very low from late-2014 through early-2016 because QPC had turned into a windfall for the technicians who received it. Not surprisingly, some technicians quit when the windfall ended, and attrition rates went up from their artificially low numbers. But, the rates never went above DISH's norm, and in this context, they cannot reasonably be described as a "mass exodus."

C. The ALJ Correctly Rejected the General Counsel's Proffer of Campaign Materials (Cross-Exception 3)

The ALJ rejected the General Counsel's proffer of campaign materials into evidence because they were nothing more than lawful speech (protected by the First Amendment and the Act), created years before the impasse declaration, and reflected the same positions that virtually every employer takes in a union election campaign: a preference to remain union free. (*See* Tr. 831:19-835:2). They were not relevant to whether the parties had reached a valid impasse or whether DISH was motivated by animus when it changed employees' wages. Moreover, the ALJ's ruling on these exhibits was consistent with his ruling earlier in the hearing, to which the General Counsel does not have exceptions, rejecting evidence of the parties' conduct before 2013, other than a couple limited exceptions that he identified at the time of his ruling. (Tr. 308:22-310:12.) DISH was compelled to comply with the ALJ's evidentiary rulings during the hearing, so it did not introduce evidence of its own from the time period in question. Further, because the ALJ already had rejected the proffered campaign materials, DISH did not have the opportunity to rebut their contents. DISH would therefore be unduly prejudiced by suddenly admitting these previously-rejected exhibits.

The General Counsel has not even attempted to offer an argument in support of this Cross-Exception, save for a short footnote. Given the ALJ's well-founded reasons for rejecting the proffered exhibits and the absence of any substantive argument by the General Counsel for reversing the ALJ's decision, this Cross-Exception should be denied.

D. The ALJ Correctly Rejected the General Counsel's Request for Consequential Damages (Cross-Exception 4)⁹

The Board should deny the General Counsel's Cross-Exception contending that the ALJ should have awarded consequential damages because such an award is unavailable under decades of well-established Board law. The Board consistently refuses to award consequential damages as part of its "make whole" remedies, reaffirming that position as recently as a few weeks ago. *See, e.g., Tschiggfrie Properties, Ltd.*, 365 NLRB No. 34 (Feb. 13, 2017) (declining to change Board law by awarding consequential damages). *See also Frank S. Mantell*, 365 NLRB No. 28, n.2 (Feb. 7, 2017) (rejecting the General Counsel's request for consequential damages because such relief would require a change in Board law, which the Board was "not prepared to deviate from"); *Mcgrath Downtown Auto Inc.*, 2016 WL 4205624, n.15 (Aug. 9 2016) ("This consequential damage request does not reflect extant law and must be denied."); *Goodman Logistics*, 363 NLRB No. 177 (Apr. 29, 2016) (declining to change Board law regarding consequential damages); *Guy Brewer 43 Inc.*, 363 NLRB No. 173, n.2 (Apr. 28, 2016) (rejecting request for consequential damages on basis of longstanding Board precedent). The General Counsel has provided no unique justification to merit suddenly departing from firmly established Board law by awarding consequential damages. Therefore this Cross-Exception should be denied.

⁹ The General Counsel's Cross-Exception 4 states that the General Counsel takes exception to "The Judge's failure to grant *compensatory* damages." (emphasis added). Given that the General Counsel's entire argument in its Cross-Exceptions Brief focused on *consequential* damages, DISH believes that the General Counsel intended to type "consequential" in its Cross-Exceptions, and DISH responds herein based on that belief. If the General Counsel intended "compensatory," as it wrote, it has failed to offer any argument in support of its position to which DISH can respond.

