

**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

**REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO
GENERAL COUNSEL'S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

The General Counsel cross-expected to Judge Ringler's failure to address two alternative theories of violation: first that in addition to violating its duty to bargain in good faith when it imposed a drastically lower wage rate on Unit employees (herein the "\$13-17/hour wage rate") Respondent additionally violated Section 8(a)(3) by that same action because the \$13-17/hour wage rate was retaliatory (cross-exception 1); and second that the seventeen employees who quit as a result of the change were not only constructively discharged because of the *Hobson's Choice* presented by Respondent's actions but were also discharged under the Board's traditional theory of constructive discharge (cross-exception 2). In its Answering Brief, Respondent raises issues with respect to the unaddressed theories of violation that the General Counsel shall address herein. Below, first General Counsel addresses the shortcomings of Respondent's defense to the Section 8(a)(3) aspect of its wage cut and second, addresses the flaws in Respondent's defense to the traditional theory of constructive discharge.

II. RESPONDENT'S WAGE REDUCTION WAS UNLAWFULLY MOTIVATED

Respondent misses the central issue of this cross-exception: Respondent's motivation for implementing the \$13-17/hour wage rate. As discussed below: (A) Respondent cannot shield its motivation under the curtain of negotiations; (B) its insistence that other reviewing bodies have agreed with it is as incorrect as it is irrelevant; (C) its discussion of its intentions with respect to impasse misses the point; (D) its discussion of its attempts to secure a good deal in bargaining does not explain how the \$13-17/hour wage rate was a good deal; (E) its attacks on the prima facie case fail because that case is built on the words of its own agents; and (F) its after-the-fact evidence does nothing to cast a positive light on its motivations.

A. Respondent Attempts to Shield its Motivations under the Curtain of Negotiations

On April 23, 2017, Respondent lowered the wages of technicians at its two Union-represented offices by over half and in so doing made them its lowest paid technicians in the area, if not the nation. At issue in cross-exception 1, which addresses the Section 8(a)(3) allegation, is whether Respondent's motivation for imposing the \$13-17/hour wage rate was discriminatory. Respondent attempts to defend this *Wright Line* motivation case with case law pertaining to Section 8(a)(5) bad faith bargaining allegations but offers almost no evidence to support a "legitimate, nondiscriminatory motivation" for the \$13-17 wage rate.

Respondent points to *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), which dealt with the issue of whether an employer bargained in bad faith by refusing to agree to dues checkoff. *H.K. Porter* was an 8(a)(5) case which did not deal with an employer punishing employees for union activity, as such, it has no relevance to the exceptions at issue here. Nonetheless, Respondent seeks to extend from *H.K. Porter* a curtain of protection, that any adverse actions implemented against a workforce cannot violate Section 8(a)(3) so long as the action was first proposed at the bargaining table.

However, it has long been established under Board law that where an employer, through bargaining or otherwise, implements lower wages or benefits to represented employees than unrepresented employees, such an implementation is unlawful if it is discriminatorily motivated. See *Shell Oil Co.*, 77 NLRB 1306, 1310 (1948), *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2 (2015), *Sun Transport Inc.*, 340 NLRB 70, 72 & fn. 12 (2003), *B.F. Goodrich Co.*, 195 NLRB 914, 915 (1972). Under those cases, Respondent could have defended the \$13-17/hour wage rate by establishing that the it was part of a bargaining strategy, but the closest it came to doing so

were the words of its bargaining agent, “we’re going to spend all of this money [defending NLRB charges], right, and now in the end, ‘Why didn’t you just offer PI?’ Well, that wasn’t my strategy.” Thus, Respondent’s “strategy” of punishing employees for their Union’s actions is not a legitimate defense for the discriminatory wage rate.

B. Respondent Declares that the Section 8(a)(3) Violation has been Rejected when it has never been Considered

First, Respondent argues that Judge Ringler rejected an 8(a)(3) violation, when in, actuality, he simply determined that finding a “Section 8(a)(3) violation would be cumulative” and thus “unnecessary to decide” because of redundancy. (JD slip op. at 17). Counsel for the General Counsel submits this was error, but Respondent’s leap to a conclusion that the Judge’s limited words were tantamount to a ratification of Respondent’s conduct should be rejected.

Next, Respondent moves further into the realm of the irrelevant when it discusses the dismissal of a charge against Respondent in March 2014. Respondent again seeks to draw some deep meaning behind plain words. This time, Respondent references the Regional Director’s Comment on Appeal which is an irrelevant document that is not in the record, and cherry-picks a phrase in an attempt to twist the document’s meaning.¹ At that time of the dismissal in Case 16-CA-117693, the parties were still bargaining, exchanging proposals and moving in their positions and thus the Section 8(a)(5) allegations was dismissed. Respondent had not actually implemented any changes and so no adverse actions had been taken. Thus, the allegation was dismissed because Section 8(a)(3) violations require an adverse employment action. Similarly, Respondent’s negotiator’s statements did not violate Section 8(a)(1) because there was no evidence that Respondent’s comments had been disseminated to the employees. Nothing about the dismissal of that those allegations diminishes the fact that Respondent’s negotiator stated that

¹ Inasmuch as the referenced comment on appeal is an extra-record document, Counsel for the General Counsel moves that Respondent’s reference to the Comment on Appeal be stricken.

he intended to pay Union-represented employees less because of the actions of their Union. *Tim Foley Plumbing Service*, 337 NLRB 328, 329 & n.5 (2001) Although Respondent would like to believe that the dismissal letter in that charge was a “get out of jail free card,” the dismissal of the charge did not mean that Basara’s words could not be used against Respondent in the future. All the dismissal meant was that the evidence did not yet show that Respondent had violated the Act. Thus, Respondent’s claim that “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” rests on an over-reading of the Judge’s efforts at efficiency and a misunderstanding of the dismissal of unripe allegations.

C. Respondent Argues the General Counsel Overstates Evidence

Next, Respondent argues, by posing a series of supposed “difficult questions,” that the General Counsel has overstated evidence. In so arguing, Respondent continues to defend a Section 8(a)(5) allegation not at issue in this cross-exception. The questions posed by Respondent concern whether Respondent intended to create an impasse. That Respondent *did* create an impasse is at issue in Respondent’s exceptions and not addressed here. What is at issue here is Respondent’s motivation for paying its technicians at the rates imposed. Thus, Respondent’s question, “Why did [Respondent] consistently increase its wage proposals?” is off the mark.² The relevant question here is why Respondent wanted to pay these employees less than the rest of its workforce. Likewise, Respondent’s question “why did it not [declare impasse] years earlier” is an irrelevant question.³ Similarly, Respondent’s question as to why it

² The answer could easily be that Respondent was attempting to uphold the appearance of bargaining in good faith by making small concessions in order to stave off an 8(a)(5) allegation.

³ Venturing down this rabbit hole, the answer could be that might be that Respondent was comfortable with the status quo and hopeful as to its prospects with the pending decertification vote in earlier years.

“reach[ed] out to the Union five times in 2016” has nothing to do with its motivation for the rate it paid its employees. Thus, these questions have no bearing on Respondent’s motivation.

D. Respondent’s Argues that it is Entitled to Bargain for the Best Deal but Fails to Discuss how the \$13-17/hour wage is a good Deal.

Next, Respondent begins a discussion of the wage rate. Respondent argues, to the agreement of all, that the Union-represented employees eventually came to earn significantly higher wages than their peers and that Respondent had a legitimate interest in reducing their wages. The question here is not whether Respondent had a legitimate motivation to end the QPC, the question is why Respondent decided to impose the \$13-17 wage rate.

The Union was attempting to get the best deal that it could for its employees. The best deal for employees is the highest wage that does not result in loss of work. The best deal for an employer is the lowest wage that it can pay while recruiting, retaining, and motivating its workforce. As long as Respondent created a wage rate that was motivated by these or any legitimate goal, Respondent is correct that it is not for the Board to weigh whether the wage rate effectively meets its goal. But in this case, there is evidence of unlawful motivation; this evidence shows that Respondent was not actually trying to achieve the “best deal” that it could, but rather that it was seeking to punish its employees for Union activity and to get them to quit.

The only evidence Respondent presented regarding how it came up with these numbers in 2014 is the vague testimony of Basara. Respondent writes:

“Mr. Basara testified that he worked with [a contact whose name he could not recall] 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.’”

Respondent provides no further explanation as to how the \$13-17/wage rate was a good deal for Respondent. There is no explanation as to what factors went into this calculation or why it was a good deal for Respondent to pay these employees less than others and without incentive pay to

motivate them. Its explanation would be akin to an employer defending a *Wright Line* discharge case on the grounds that “the terminating manager worked with someone in the Human Resources Department and determined that it was appropriate to discharge the employee.” Such opaque and conclusory explanations do not satisfy an employer’s burden under *Wright Line*.

E. Respondent offers Implausible Explanations for the Words of its Managers while Casting their Plain Language as “Conspiracy Theories”

Having failed to establish its legitimate, non-discriminatory reason for the \$13-17/hour wage rate, Respondent moves on to attacking the prima facie case. Although the case is largely built on direct statements by its own agents, Respondent seeks to spin the allegation as the stuff of conspiracy theories.

1. Respondent Fails to Deny or Explain Basara’s Comments

As discussed above, Respondent cannot escape the words of its negotiator for the purposes of its motivation. The General Counsel relies on the plain meaning of Basara’s words at the bargaining table when he told his counterparts that because the charges the Union filed, the employees would be paid less. (“So you can ask is it going to be less? Yes, it’s going to be less.”) (GC Exh. 43) In its defense, Respondent does not call into question that Basara actually said these words or explain that his statements have somehow been misinterpreted. Instead, it points out that on another occasion Basara denied that the employees are being punished by the wage rate. Respondent does not attempt to explain the discrepancy (although it seems clear that Basara saw the question as a set-up and wisely answered it in a way that was not direct evidence of animus) but just asks the Board to believe Basara’s third statement on the subject which is different than his first⁴, second⁵ and fourth⁶ Leaving unsolved the mystery of why Basara told

⁴ “So you can ask is it going to be less? Yes, it’s going to be less.” (GC Exh. 43)

⁵ “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.” (GC Exh. 43)

union representatives he would pay Unit employees less than non-represented employees because of the charges they had filed, Respondent accuses the General Counsel of dealing in “conspiracy theories.”

2. Respondent claims Obere Imagined Nicholas telling him that the Employer Preferred the Unit-employee quit.

Just as Respondent is stuck with Basara’s words, it is stuck also with the words of its manager Obere. Here, Respondent puts forward an exotic explanation for Obere’s words while accusing the General Counsel of more “conspiracy theories.” The important questions here are as follows. Why would a current manager attempt to send a message to another manager telling him that Respondent preferred that Unit employees quit or transfer to unrepresented facilities? Why would that manager, on his own, draft a formal statement setting out the conversation he had with his manager wherein he heard that Respondent preferred that the employees quit? Why would that manager testify against the interests of his employer during this proceeding? The General Counsel’s so called “conspiracy theory” is that Manager Obere was telling the truth. Respondent, on the other hand, admits it has no actual explanation for Obere’s words but speculates that he imagined the story.

Respondent attempts to impugn the testimony of its own agent by jumping on a minor and irrelevant error in his testimony and stacking his testimony against the self-serving denials of other managers. Respondent cannot come up with a reason for Obere to lie and so it reasons that Obere simply imagined the events that he texted about, wrote about in a self-directed sworn statement, and testified about under oath.

⁶ “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.” (Tr. 1150, LL. 2-9)

So, while the General Counsel's theory centers on the plain meaning of two of Respondent's managers, Respondent's theory involves the unsolved mystery of why Basara would say that he was going to pay employees less because of the actions of the Union if it was not true and the idea that its manager imagined adverse details of a conversation with his boss.

F. Respondent Looks to After-the-Fact Evidence of Hiring to Establish Before-the-Fact Motivation

Next, Respondent argues that its post-implementation hiring of replacements establishes that its wage reduction was benignly motivated. The hiring of replacements after the implementation of \$13-17/wage rate – which occurred after the text message about plans to shut down the facilities had already landed Respondent in hot water – cannot be interpreted as evidence that its motivation for the \$13-17/wage rate was legitimate. Moreover, Respondent arrives at this conclusion by glossing over the fact that its manager Thomas threatened employees with discharge if they spoke to the new employees about the Union or the old wage rate. Thus, Respondent cannot plausibly rebut its *Wright Line* burden by pointing to replacements, especially when it made efforts to quarantine those replacements from the Union.

III. RESPONDENT CONSTRUCTIVELY DISCHARGED EMPLOYEES

Respondent defends against the traditional discharge theory on the grounds that (A) the \$13-17/hour wage rate was not intended to cause employees to resign; (B) that not all of its technicians quit; (C) that some of the technicians quit to work for employers with similar hourly wage rates; (D) that Respondent has secured replacements, and has high attrition at its facilities overall.

A. \$13-17/hour Wage rate was Intended to Cause Employees to Resign

As addressed above, Respondent deliberately set the \$13-17/hour wage rate below the rate of its non-Union employees to punish unit employees for their protected activity.

Respondent knew that this punitive wage would cause employees to quit. Moreover, Respondent actually preferred that they quit.

B. The Fact that Not all of its Employees Immediately Quit Does Not Save Respondent

Soon after the new wage was announced, the employees heard from their Union who told them that it was going to fight the changes. The Union and certain key leaders encouraged employees to hang together despite the upended circumstances of work. The Union told the employees that it was going to file Board charges and hopefully an injunction. The employees who were still employed by the end of the administrative hearing had held on because they were hopeful that an injunction would restore their wages. Respondent's argument that since some employees were able to suffer through its dramatic pay decrease this proved that the new terms were not intolerable for those who could not remain, should be rejected as a feeble attempt to justify its unlawful actions.

C. That some of the Employees found Work at Comparable Hourly Wages does Not Save Respondent

All employees who quit did so because of the dramatic drop in their wages. This drop in wages completely changed the nature of the employment relationship. Employees were still being asked to crawl through hot attics, to risk their lives on roofs and to hustle from job to job, only now they were being paid \$13 or \$17 dollars an hour for that same work. They left to find other work, more hours⁷ and better opportunity from employers who would not trample on their rights. Whether they actually found the opportunities they left to seek is irrelevant to the point of why they left.

⁷ Respondent stretches hard to extrapolate that employee issues with working exceedingly long work *days* at times in 2014 means that they had plenty of overtime in 2016. To begin with the complaint about work days over twelve hours only implies that on some days in 2014 employees worked very long periods, it does not mean that they earned 40 hours in those weeks. Additionally the record shows that employees were getting very modest overtime at Dish in 2016 (Tr. 439, LL 7-9) or none at all (Tr. 739 LL. 14-15) and had more opportunities for overtime elsewhere (Tr. 739 LL 8-9)

D. Respondent's Replacements and Attrition Rates are Not Germane to the Question of why These Employees Left

Respondent's arguments about its hiring of replacements and attrition rates at other facilities miss the point of the constructive discharge allegation, which is that *these* employees left because of Respondent's unlawful actions. That Respondent was able to find applicants willing to join its force at \$13/hour does not disprove that the wage rate was intolerable for an employee who had been earning \$30/hour. Similarly, the fact that other facilities experienced high attrition⁸ does not bear on the question of whether these employees quit because of Respondent's actions and whether it intended for them to do so.

IV. CONCLUSION

As discussed above, the General Counsel presents an un rebutted prima facie case that the \$13-17/hour wage rate was intended to punish employees, Respondent knew and hoped it would cause employees to quit, and employees did indeed quit because of it. Justice demands that the affected employees be made whole.

DATED at Fort Worth, Texas, this 4th day of April, 2017.

Respectfully Submitted,



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⁸ Additionally, attrition is too blunt of a statistic for any meaningful comparison. An apples to apples comparison would involve voluntary quits against voluntary quits. Attrition includes discharges and there is no evidence in the record as to the breakdown of voluntary quits versus involuntary quits in Respondent's statistics.

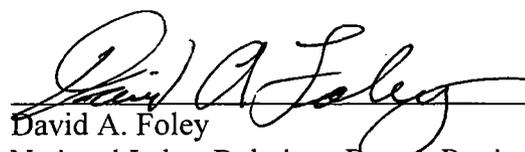
CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of April, 2017, a copy of General Counsel's Reply Brief to Respondent's Answering Brief was electronically served upon the following parties:

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