UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DISH NETWORK CORP.,

Petitioner,

v.

NATIONAL LABOR
RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW

Pursuant to 29 U.S.C. § 160(f) and Fed. R. App. P. 15, DISH Network Corporation hereby petitions the court for review of the attached Decision and Order by Respondent National Labor Relations Board entered on June 28, 2018, in Case Nos. 16-CA-173719, 16-CA-173720, 16-CA-173770, 16-CA-177314, 16-CA-177321, 16-CA-178881, and 16-CA-178884, in which the Board adopted the recommended Decision and Order of the Administrative Law Judge of January 23, 2017.

Date: July 17, 2018

Respectfully submitted,

/s/ Eric A. Shumsky

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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, and 16–CA–178884

June 28, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On January 23, 2017, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the judge's recommended Order.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its "last, best, and final offer" and unilaterally changing unit employees' terms and conditions of employment in the absence of a valid impasse. In making this finding, however, the judge failed to explicitly apply the analysis set forth in *Taft Broadcasting Co.*, 163 NLRB 475 (1967),[3] for determining whether the parties have reached a valid impasse. Under *Taft Broadcasting*, the Board will consider the totality of the circumstances, including "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." Id. at 478. Applying that analysis here, we affirm the judge's conclusion.

I. FACTS

The Respondent and the Union began bargaining for a first collective-bargaining agreement at a July 8, 2010 bargaining meeting, and they held about 25 bargaining sessions until their last face-to-face meeting on November 18, 2014. By November 2014, the parties had reached agreement on many issues, but the thorniest issue remaining (and throughout bargaining) was whether the Respondent would keep the incentive-based Quality Performance Compensation (QPC) system. Initially, the Union fought against QPC in favor of a straight hourly wage schedule, but the parties ultimately switched positions in 2012 or 2013 because the QPC formulas increasingly resulted in higher compensation than the Respondent had intended and the Respondent had abandoned QPC at its unrepresented locations.

At the November 18, 2014 bargaining session, the Respondent made a "final proposal" that included wholly eliminating QPC. Although the Union had to reschedule the early December 2014 bargaining dates because its negotiator experienced a death in her family, the Respondent rejected all of the Union's alternative dates and conditioned any further meetings on written responses to its final offer. Additionally, the Respondent informed the Union that failure to provide such responses would result in a declaration of impasse. The Union reluctantly replied with counterproposals via email on December 9, 2014, and again requested that the parties meet. Representing the Union's most significant movement on QPC in at least a year, the Union offered to eliminate QPC for all new hires. The Union advised that it "stand[s] firmly on the need to bargain" in person over the counterproposals and requested dates to meet.

In subsequent email exchanges, the Respondent first offered to meet within the next week, but retreated from meeting after it became clear the Union was unavailable

[1] The Respondent and the General Counsel have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by telling employees "the Union is gone," by implicitly and explicitly threatening employees with adverse consequences if they engaged in protected and/or union activities, and by creating the impression of surveillance; and violated Sec. 8(a)(5) and (1) by unilaterally changing its disciplinary policy and discharging unit employee Dakota Novak without affording the Union preimplementation notice and an opportunity to bargain.

[2] The General Counsel seeks a make-whole remedy that includes consequential damages incurred as a result of the Respondent's unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America Local 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

[3] Review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

until the first week of January 2015 because of prior commitments. On December 18, 2014, the Respondent sent an email that rejected the Union's December 9 counterproposals, stood by the terms of its November 18 proposal, and stressed the proposal was the "last, best and final offer." Concluding the email, the Respondent wrote, "We ask that you take our final offer to your members and let us know if the proposal is accepted. Once we know whether DISH's final offer is accepted or rejected, we can discuss if further bargaining is warranted."

In a December 30, 2014 email, the Union spurned the Respondent's requirement that the Union take the Respondent's offer to its membership, again requested that the parties meet and confer face-to-face over the parties' proposals, and set forth six specific dates in January when the Union was available to meet. The Respondent's counsel replied on December 31, "Based upon your email below, it does not appear that you are willing to take our final offer to your bargaining unit . . . . My partner, Brian Balonick will be taking over for me. I have apprised him of the status of negotiations and he will be getting back to you sometime after the new year."

The Respondent never did get back to the Union, as promised, in 2015. Over a year later, on January 8, 2016, the Respondent sent a letter asking the Union if it was going to accept its November 18, 2014 final offer. In a January 13 letter, the Union emphasized that it had, as a courtesy to the Respondent, departed from its normal practice by emailing its counterproposals in December 2014 rather than submit them at a bargaining session, and renewed its insistence that the parties meet and bargain. The Union also rejected the Respondent's claim that it had permitted negotiations to languish for over a year, explaining that it had offered dates for future bargaining which the Respondent promised its new representative would respond to, but he did not. The Respondent declared impasse for the first time in a February 2, 2016 email. On February 3, the Union yet again insisted on the face-to-face bargaining session it had been trying to schedule since November 2014. The Respondent again ignored the Union's request for bargaining, and on April 4, 2016, the Respondent announced that it would be implementing its final offer on April 23, 2016.

II. ANALYSIS

The Board has long defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." *Taft Broadcasting*, supra, 163 NLRB at 478; see also *Newcor Bay City Division*, 345 NLRB 1229, 1237–1238 (2005). In *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973), enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974), the Board explained:

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed the subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [Footnote omitted].

The party claiming impasse bears the burden of demonstrating its existence. *Serramonte Oldsmobile* , 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). Under the *Taft Broadcasting* analysis, as noted below, we find that the Respondent has failed to carry this burden.

By December 2014, the parties had bargained in numerous sessions for more than 4 years over a first collective-bargaining agreement,[4] and QPC remained the most important issue of disagreement. Even if the parties may have been near a valid impasse then, and the Respondent never asserted impasse at that point, the Respondent "was not warranted in assuming that further bargaining would be futile"[5] from the events that followed. When the Union proposed, on December 9, 2014, to eliminate QPC for new hires, it was an appreciable change in its position on the most important subject and would result in cost savings for the Respondent. As the judge found, "[t]his 'white flag' offered a possible resolution on bargaining's thorniest issue, and created the real possibility of fruitful discourse." Accord: *Hayward Dodge, Inc.*, 292 NLRB 434, 468 (1989) ("movement sufficient to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions" would preclude impasse (internal quotation marks omitted)).

Rather than explore this real possibility of fruitful discussion, however, the Respondent rejected the Union's repeated requests for a face-to-face bargaining session. Under Section 8(d) of the Act, collective bargaining means "performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith." Our precedent is clear that only in-person, face-to-face meetings satisfy the Act's obligation to meet and confer. See *Twin City Concrete, Inc.*, 317 NLRB 1313, 1313–1314 (1995); *Fountain Lodge, Inc.*, 269 NLRB 674, 674 (1984). The Respondent, never claiming before February 2016 that

[4] Regarding bargaining history, we are mindful that parties' attempting to reach an initial collective-bargaining agreement is "a factor militating against jumping to any conclusions that difficulties in bargaining signal the existence of a true impasse." See *Stein Industries,* 365 NLRB No. 31, slip op. at 3 fn. 9 (2017).

[5] *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016).

the parties were at impasse, denied all of the Union's requests for in-person bargaining since the Union's significant counterproposal on December 9, 2014. The Respondent's refusals to meet and confer contravened Section 8(a)(5) and (1) and amounted to bad faith.[6] Further, concerning the contemporaneous understanding of the parties, the Union reasonably disagreed that the parties were at an impasse. The Respondent summarily rejected the Union's counterproposal on QPC, the most important bargaining issue, without ever holding a bargaining session, as required by the Act, to explore potential avenues for agreement opened by the Union's change in position.

Our colleague would rely on the year-long delay in bargaining between December 2014 and January 2016 as supporting a finding that the parties were at impasse. However, we disagree that the Union is to blame for this delay. The Respondent's last communication on December 31, 2014, informed the Union that Balonick would be the Respondent's new negotiator and that it "apprised [Balonick] of the status of negotiations and he will be getting back to you sometime after the new year." Balonick, however, inexplicably waited over 12 months before contacting the Union. The Union may have benefited from the status quo during the delay, but the Union had already made abundantly clear its desire to meet and confer, and the Respondent would not bargain.

Accordingly, under the rubric set forth in *Taft Broadcasting*, we find that the parties were not at a valid impasse when the Respondent implemented its "last, best, and final offer." Specifically, the parties' history shows that they were engaged in difficult bargaining for an initial contract; the Respondent failed to bargain in good faith over the most important outstanding issue, the QPC; and the Union consistently sought additional bargaining sessions, reflecting its understanding that the parties had not yet reached impasse. Taken together, these facts demonstrate that the parties were not at impasse even considering the year-long hiatus in bargaining. Particularly significant to our determination that impasse had not been reached was the Union's substantial movement on the QPC issue and the Respondent's refusal to meet and confer even once over this meaningful counterproposal by the Union on the most important issue separating the parties.[7]

We therefore affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing unit employees' terms and conditions of employment.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dish Network Corporation, Farmers Branch and North Richland Hills, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 28, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting.

I disagree with the majority's findings in several respects. First, I believe, contrary to the judge and the majority, that at least as of April 23, 2016, when the Respondent implemented its final offer, the parties were at a valid impasse. In its December 30, 2014 email, the Union insisted on bargaining over its recent proposals (which the Respondent had already rejected), and it offered meeting dates in January 2015. In its response, the Respondent stated that it rejected the Union's proposals and again acknowledged that the Union was rejecting its final offer. Thus, after approximately 25 bargaining sessions over more than 3 years, it appeared that further bargaining would not be productive. The Respondent also announced that it was replacing its chief negotiator, George Basara, with Brian Balonick.

After December 2014, the Union made no attempt to contact the Respondent for more than 12 months when, on January 8, 2016, Balonick contacted the Union. This

[6] To the extent that the Respondent also conditioned further bargaining on the Union's submitting the Respondent's offer to unit employees for a ratification vote, which is not a mandatory subject of bargaining, the Respondent also evinced a lack of good faith. See, e.g., *Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) (employer's continued insistence on a ratification vote tainted any subsequent impasse).

[7] We respectfully disagree with our dissenting colleague that the Respondent could effectively reject the Union's counterproposal here without meeting and conferring, as requested by the Union.

[8] The General Counsel cross-excepts to the judge's finding that it was unnecessary to decide the complaint allegation that the Respondent's unilateral implementation of its "last, best, and final offer" violated Sec. 8(a)(3) and (1) because it was unlawfully motivated. We agree with the judge that it is unnecessary to decide this allegation because such a finding would not materially affect the remedy.

We adopt, for the reasons stated by the judge, his finding that the Respondent violated Sec. 8(a)(3) and (1) by constructively discharging 17 employees who resigned their positions because of the Respondent's unlawful unilateral reductions in their wages and health benefits.

delay severely undermines the Union's alleged urgency and interest in further bargaining. Rather, it appears that the Union was content with the status quo, which included the generous Quality Performance Compensation System (QPS), the primary sticking point in negotiations that the Respondent insisted on eliminating. Following an additional 2-month gap in communications from February 3 to April 4, 2016, the Respondent repeated its final offer, which had not changed since December 2014, reiterated its belief that further bargaining would be futile, and stated its intention to implement the final offer on April 23, 2016. The Union did not respond, and the Respondent implemented the final offer.

Based on the above, I would find that the parties were at impasse at least by April 23, 2016. Thus, I would dismiss the charge that the Respondent's actions violated Section 8(a)(5). In light of that finding, I would remand to the judge the allegation that, by implementing its final offer, the Respondent violated Section 8(a)(3). The judge did not decide that allegation or evaluate the underlying evidence regarding the Respondent's alleged unlawful motive for its actions.

Further, because I would find that the Respondent lawfully implemented the terms of its final offer, I would also remand the allegation that the 17 employees who resigned were constructively discharged. Because I would dismiss the 8(a)(5) allegation, there is no support for a constructive discharge under the theory applied by the majority. I would therefore instruct the judge to determine whether the evidence showed that the Respondent *intended* to cause a change in working conditions so intolerable that no reasonable employee could be expected to remain in employment, and that the Respondent did so because of the employee's union activities. See *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). Absent such a finding, the General Counsel failed to make its case that the 17 employees were constructively discharged.

Dated, Washington, D.C. June 28, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

David A. Foley, Charles Guzak, and *Karla R. Mata, Esqs.,* for the General Counsel.

Brian D. Balonick, Brian A. Casal, and *David J. Strauss, Esqs. (Buchanan, Ingersoll & Rooney P.C.),* for the Respondent.

Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Fort Worth, Texas, over 7 days in August and September 2016. The complaint alleged that the Dish Network Corporation (the Dish or Respondent) violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) by, inter alia: threatening employees; bargaining in bad faith with the Communication Workers of America, AFL–CIO (the Union); implementing a final offer in the absence of an impasse; making unilateral changes in the wages, health insurance coverage, and leave provided to its union employees; and constructively discharging 17 union employees. The controlling facts in this case are mainly undisputed.

On the entire record,[1] including my observation of the witnesses' demeanors, and after considering posthearing briefs, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

At all material times, Dish, a Colorado corporation, with a corporate office in Englewood, Colorado, and numerous branch offices, including its Farmers Branch and North Richland Hills, Texas offices (the FB and NRH hubs), has provided satellite television services. Annually, it purchases and receives at the FB and NRH hubs goods worth more than $50,000 directly from points outside of Texas. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The FB and NRH hubs warehouse supplies, and dispatch technicians for installations and repairs in the Dallas-Fort Worth area. This litigation involves the unionization of these workers.

A. Introduction of QPC and Unionization

The FB and NRH employees unionized after Dish introduced the Quality Performance Compensation System (QPC) at their hubs. See (GC Exh. 132). This novel, incentive-based pay system significantly changed their existing pay system. See (CP Exh. 62). Moreover, although QPC offered enhanced employees' productivity bonuses, it cut base wage rates, which created overall dissatisfaction and led to the Union's organizing effort.

B. FB and NRH Bargaining Units

In 2011, the Union became the designated exclusive collec-

[1] The Charging Party's November 17, 2016 motion, which seeks to correct the mislabeling of two exhibits, has been granted. CP Exh. 122, as a result, which is a letter dated May 29, 2014, shall remain as originally marked, and CP Exh. 122, a 9-line spreadsheet, shall be revised and newly marked as CP Exh. 122A.

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

tive-bargaining representative of the following group of workers employed at the FB hub (the FB unit):[3]

> INCLUDED: All regular full-time and part-time technicians and warehouse employees. . . .
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

It also, almost simultaneously, became the designated representative of the same set of workers employed at the NRH hub (the NRH unit):[4]

C. Bargaining History

1. Background

Following the Union's certification, the parties commenced joint bargaining for an initial contract for the FB and NRH units. The Union was initially represented in bargaining by Donna Bentley and, thereafter, was represented by Sylvia Ramos. Dish was initially represented by attorney George Basara and, thereafter, was represented by his law partner, Brian Balonick. It would be an understatement to say that bargaining over QPC and other matters proved keenly difficult.[5] Although roughly 25 bargaining sessions were held, a contract never resulted.

Given that employees' organizing efforts were connected to QPC, it is not surprising that QPC played a major bargaining role. It is startling, however, that, even though the parties swapped positions on QPC during negotiations, common ground on this issue was never reached. Ironically, the Union, which initially wanted to abolish QPC, later sought to retain it, once employees became comfortable and discovered that it increased their wages. Dish, which initially wanted to keep QPC, later desperately fought to eliminate it, after it concluded that employees were making too much money under this pay system.

Additionally, because bargaining demands often change with employee turnover, it is noteworthy that the FB and NRH units had extremely high attrition rates.[6] In 2014, the FB unit had an attrition rate of 31.4 percent, whereas the NRH unit's rate was 30.5 percent. (R. Exh. 53.) In 2015, the FB unit had an attrition rate of 19.6 percent, while the NRH unit's rate was 13.1 percent. (R. Exh. 53; CP Exh. 120.)

2. Allegedly closed matters[7]

Before Dish declared impasse and bargaining ceased, the parties reached oral agreement on many issues. By March 2013, they reached unsigned resolutions on, inter alia, these subjects: job classifications; union recognition; travel; leave; 401K plan; and benefits. (GC Exh. 42.) On June 19, 2013, Bentley summarized the status of negotiations and emailed Basara that 5 issues remained: dues deductions; grievance/arbitration; seniority; wages; and contracting. (R. Exh.)

3. Events leading to Dish's impasse declaration

a. Dish's November 18, 2014 final proposal

On this date, the parties held what eventually turned out to be their last in-person bargaining session. At this time, Dish tendered its first in a series of "final proposal[s]" to the Union, which proposed, inter alia, discontinuing QPC, and set forth this hourly wage schedule:[8]

FSS I	FSS II	FSS III	FSS IV	ISP	Sr. ISP
$13.00	$14.00	$16.00	$17.00	$11.50	$12.00

(GC Exh. 2.) While Dish rejected the Union's proposals on dues deductions, grievance/arbitration, successorship, subcontracting, severance and seniority, it agreed to provide smart home sales and clothing stipends. (R. Exh. 4.)

Although the parties had meetings scheduled for December 8 and 9, Ramos canceled due to the passing of a family member. (GC Exh. 21.) She offered, however, alternative dates in January and February 2015, which Dish rejected. Basara, instead, conditioned reconvening on the Union replying in writing to his November 18 proposal and warned that, if it refused, impasse would be declared. (Id.)

b. Union's December 9, 2014 proposal

The Union complied with Basara's threat, submitted a counteroffer, and again requested a meeting. The Union's new proposal represented a substantial compromise, inasmuch as it partially capitulated on QPC, a major roadblock. To this end, the Union creatively proposed a 2-tierred wage system, where incumbents retained QPC, and new hires received the traditional wage schedule Dish was seeking. (GC Exhs. 4, 5.) Although this proposal did not represent the complete abolishment of QPC that Dish desired, it still provided cause for optimism. As noted, Dish's technicians had a very high attrition rate, which meant that the Union's proposal made it probable that new hires receiving non-QPC rates would soon become the majority in the FB and NRH units, as the attrition rate continued. (R. Exh. 53 (annual attrition ranging from 116% to 13%)). This, in turn, meant that Dish would have attained most of what it wanted on wages in the short term, and would have set the stage for a fuller resolution on QPC in later bargaining (i.e.,

[3] There are approximately 24 employees in the FB unit.

[4] There are approximately 21 employees in the NRH unit.

[5] Beyond substantive difficulties, Union Negotiators Ramos and Bentley complained about Basara's hard bargaining tactics. They averred that this stymied negotiations, which were already tenuous given their nascent relationship. Their testimony was corroborated by bargaining notes and correspondence.

[6] Priorities often change as incumbents leave, and are replaced by new hires with different goals.

[7] These issues are identified as "allegedly" closed because, although the parties ceased bargaining about these matters, Basara reserved the right to later revisit the validity of any allegedly closed issue, "[if] there's something significant in bargaining that would make . . . [him] alter that particular agreement." (Tr. 1105.)

[8] "FSS" means field service specialist, i.e., technician, while "ISP" means inventory specialist, i.e., warehousemen.

eventually abolishing QPC would have become an easier selling point in later bargaining, when only a narrow minority paid under QPC remained). The Union also offered counterproposals on: dues deduction; grievance procedure; seniority; subcontracting; successorship; smart home sales; and severance pay. (GC Exhs. 4, 5.)

c. Email exchanges about scheduling another bargaining session

On December 9, 2014, Basara proposed to meet the following week. (GC Exh. 98.) His email conspicuously failed to declare an impasse, or state that scheduling another session would be futile. On December 11, Ramos replied that January 2015, was her earliest available slot. (GC Exh. 23.) Basara expressed shock about her short-term unavailability and refused to meet. (GC Exh. 23.) On December 12, Ramos repeated her offer to meet in January. (GC Exh. 25.)

d. Dish's December 18, 2014 final offer

On this date, Basara reneged on his earlier meeting offer and terminated bargaining:

> I . . . have met . . . on many occasions in an effort to reach an agreement. . . . [We] were able to reach agreement on Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 23 and 26. . . .
>
> On November 19, 2014, your bargaining team provided me with their proposals on the remaining issues. . . .

On that same day, DISH responded . . . with a final offer **. . .**

> On . . ., December 4, . . . you . . . suffered a death in your family and . . . the bargaining sessions were cancelled. . . .
>
> On December 9, . . . you emailed . . . [your] response to my final offer . . . I offered to meet with you . . . in December. . . . [but] you . . . could not meet until January. . . .
> I have now reviewed your proposals and offer the following responses:
> Article 4 Dues Deduction. DISH will not agree to your proposal. . . .
> Article 5 Grievance Procedure . . . DISH rejects your pro . . .
> Article 13 Seniority. DISH rejects the Union's proposal. . . .
>
> Article 15 Wages and Compensation. DISH rejects the . . . wage proposal. . . .
>
> Article 22 Subcontracting. . . . The Union's proposal is rejected.
>
> Article 24 Sale of Operation. . . . DISH will not accept [the] proposal. . . .
>
> Article 25 Smart Home Sales. DISH . . . agreed . . . to . . . Smart Home Sales. . . .
>
> Article 27 Participatory Management. . . . This proposal is rejected.
>
> Article 28 Severance. DISH rejects this proposal. . . .
>
> I have attached . . . DISH's *last best and final offer* for your consideration. We believe that bargaining has been exhausted and that your recent proposals do not reflect . . . significant movement from . . . [your] November 18, 2014 [proposal]. *We ask that you take our final offer to your members and let us know if the proposal is accepted. Once we know whether DISH's final offer is accepted or rejected, we can discuss if further bargaining is warranted.*

(GC Exh. 3) (italicized emphasis added). No bargaining sessions were thereafter scheduled.

e. Union's December 30, 2014 email

On December 30, 2014, Ramos replied as follows:

> [T]he Union insists on meeting and bargaining over its counterproposals. . . . Your written response . . . does not take the place of meeting and bargaining. *CWA is the exclusive representative of the employees and CWA will be the sole judge of when to present proposals to the Union membership for a vote. . . .*
>
> The Union is available to meet on January 6, 7, 8, 9, 22 and 23. If none of these dates is available . . . please inform me of any other [available] dates. . . .

(GC Exh. 8) (emphasis added).

f. Dish's December 31, 2014 reply

On this date, Basara sent the following reply:

> [I]t does not appear that you are willing to take our final offer to your . . . unit. . . .
>
> I will not be representing DISH in the future. My partner, Brian Balonick will be taking over for me.
>
> I have apprised him of the status of negotiations and he will be getting back to you sometime after the new year. . . . [H]e has a trial . . . in . . . [early] January.

(GC Exh. 9.)

g. Dish's belated January 8, 2016 letter

Balonick, however, failed to contact the Union in early 2015, as promised. He, instead, inexplicably waited 13 months, before contacting Ramos in early 2016, when he sent this letter:

> Basara left . . . at the beginning . . . [of 2015], [and] I took over for him. . . .[H]is November 19, 2014, letter . . . presented DISH's . . . final offer. *Your letters . . . in December indicated that you rejected our final offer and were unwilling to take it to your bargaining unit.* It has been one year since your last correspondence. . . . Please let us know by January 15, 2016, whether you accept our final offer. Because . . . November 19, 2014 [offer is], . . . our final offer, it does not appear . . . that further bargaining would be productive. If we do not hear from you by January 15, we will assume that you . . . reject our final offer. . . .

(GC Exh. 10) (emphasis added).

h. Union's January 13, 2016 letter

On this date, Ramos replied as follows:

> Your letter . . . completely misrepresents . . . negotiations. . . .
>
> I departed from CWA's normal practice . . . on December 9, 2014 [by providing] written counterproposals in advance of

> the next meeting. I made it clear that [this was] . . . a convenience to facilitate . . . discussions at the next meeting that remained to be scheduled. . . . I [did not] suggest that sending you the proposals would substitute for meeting and conferring. . . . I [did not] waive the Union's right to meet and confer over our counterproposals. To the contrary, my December 9 communication emphasized the need to meet and bargain.
>
> Your implication that CWA has let this matter languish for a year. . . . is preposterous. In my December 30, 2014 communication to . . . [Basara,] I offered 6 dates to meet in January 2015. . . .
> In . . . response . . . he informed me that you would be taking over . . . [and] would be getting back in touch with me sometime after the new year. . . .
>
> It has been over a year since I suggested dates for the next session. . . . Please send me suggested dates. . . .

(GC Exh. 11.)

4. Declaration of impasse

On February 2, 2016, Balonick sent this reply:

> It appears . . . that the Union's position remains the same. . . .
>
> [T]he parties have been bargaining since 2011. In December 2014, … Basara communicated . . . that bargaining had been exhausted. For over 12 months, the parties have remained rigid. . . . We view your January 13 letter as further evidence . . . [of] a standstill. If you disagree, please explain your position . . . . Otherwise, DISH will implement its last, best and final proposal. . . .

(GC Exh. 18.) On February 3, Ramos dissented and re-requested bargaining. (GC Exh. 26).

5. Implementation of the final offer

On April 4, 2016, Balonick sent the following letter to the Union:

> DISH . . . delivered its . . . final offer . . . in December 2014. . . .
>
> [T]he Union rejected DISH's … final offer . . . in December 2014…. [T]he parties have exhausted bargaining. . . . In our February 2, 2016 letter . . ., DISH requested . . . . explanation as to why the Union believes that bargaining has not been exhausted. In response, the Union, once again, asked to meet to bargain.
>
> At this point, DISH believes that further bargaining would be futile. . . . Therefore, DISH is implementing its . . . final offer as proposed . . . in December 2014. This last, best, and final offer includes the following provisions:
>
> - DISH will eliminate QPC and move [to the] . . . [final offer] rate[s]. . . .
> - Full-time[rs] . . . will . . . be scheduled to work forty . . . hours per week. . . .
> - Time spent in local travel . . . shall be treated as work time.
> - An employee . . . will receive reimbursement for all reasonable, necessary and ordinary business expenses . . ., as outlined in the . . . Travel Policy. . . .
> - Paid time off benefits are the same for Union and non-union employees. . . .
> - The Company will offer its bargaining unit employees the same or similar benefits as those offered to non-union technicians . . . [as follows]:
> - Dental Plan
> - Vision Plan
> - Life Insurance Plan (and Supplemental Life Insurance)
> - Short Term Disability Plan
> - Long Term Disability Plan
> - Health Care
> - Employee Stock Purchase Plan
> - 401K Plan. . . .
>
> DISH plans to implement this . . . final offer no later than April 23, 2016. . . .

(GC Exh. 19); see also (GC Exhs. 27–29).

6. April 5 and 6, 2016 presentations

On these dates, Dish held meetings with the FB and NRH units, and announced implementation of the final offer. (Tr. 97–100; GC Exh. 114). Employee Chris Moss said that Director of Human Resources Lisa Wodell stated that "whatever wage level we are at is where we would be." (Tr. 761.) Employee Santiago Martinez corroborated his account. (Tr. 772–773.) Regional Director Monty Beckham did not recall this statement, and averred that employees consistently remained eligible for promotions. (Tr. 917–918.)

Because Moss and Santiago testified that Wodell effectively threatened that employees would no longer receive promotions, and Beckham stated otherwise, a credibility determination must be made. For several reasons, Beckham has been credited. First, he was straightforward, and had a strong recall of the meeting. Moss and Santiago had somewhat weaker recollections. Second, given that there is no evidence that Dish subsequently limited promotions or "leveling up," it is less probable that this comment was actually made.

7. April 6, 2016 text

On this date, Field Service Manager Hanns Obere errantly sent this text message to NRH unit employee Blake Daniels:

> The union is gone. Techs will be affixed hourly rates, no pi. Level 4 will earn 17 dollars an hour. They will earn like the rest of the company if they transfer to other offices which they encourage. They have QPC till 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 masse. . . .

(GC Exh. 31) (spelling and grammar as in original). Obere stated that he was solely forecasting what he thought could happen when QPC ended; he denied, however, that he was told this by management. See (CP Exh. 87). Daniels disseminated the text to his coworkers. Beckham subsequently emailed affected employees, and disavowed the text. (R. Exh. 8.)

8. April 23, 2016 final offer implementation

On this date, Dish implemented its final offer, with the exception of its health insurance changes, which were enacted in July. (Tr. 824.) This resulted in the creation of a combined vacation and sick leave pool.[9] It also meant that QPC had effectively ended, and wages were deeply cut. The health insurance changes included: annual individual deductibles rising from $1300 to $2500; annual family deductibles rising from $2600 to $5000; annual out-of-pocket expense limits for individuals rising from $5,500 to $6,000; and annual out-of-pocket expense limits for families rising from $11,000 to $12,000. (GC Exhs. 123–124.)

D. Mass Resignations[10]

Following implementation, the following 17 employees resigned because of the wage and health insurance reductions: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater[11] (the resigning employees).[12] The financial consequences associated with implementation, as noted, were significant, with unit employees receiving, on average, a 30 percent wage loss,[13] and deep health insurance cuts. (GC Exhs. 123–24; CP Exh. 100.)

E. Bargaining over Prior Terminations and the Firing of Dakota Novak

On May 29, 2014, the Union asked Dish to afford it notice and an opportunity to bargain regarding any suspensions or discharges of FB and NRH unit employees. (CP Exh. 122.) On June 13, 2014, Basara assented, and informed the Union that "we will provide you with advance notice of any suspensions, demotions or discharge." (GC Exh. 15.) On October 24, 2014, Basara implemented this policy and notified the Union about the contemplated discharge of Seth Hawkins, and on October 31, 2014, the Union requested bargaining. (GC Exh. 14; CP Exh. 125). On October 31, 2014, Basara similarly informed the Union about the contemplated discharge of Kevin Goforth, and on November 6, 2014, the Union requested bargaining. (GC Exhs. 16–17.) On November 18, 2014, the parties negotiated over these disciplinary actions; thereafter, Dish implemented final discipline. (CP Exh. 132.) Dish later fired Dakota Novak on February 19, 2016, without notification or bargaining with the Union.

F. July 6, 2016—Waeland Thomas Statements

Supervisor Thomas testified that he made these comments to unit employees:

> [W]hen you're at work . . . do not discuss the union . . . including QPC with the new guys. When you're off work, you can do what you want. . . .

(Tr. 237.)

Employee Carl Miles testified, however, that Thomas placed a much greater restriction on employees than admitted. He recalled that Thomas issued this more stringent directive:

> Just don't say anything about the Union to the new guys. [D]on't mention QPC. They're happy getting paid $13.00 an hour, and they will get phone calls from Dish . . . asking them if we said anything, and it could lead to termination.

(Tr. 657.)

I credit Miles over Thomas. Miles was corroborated by the parties' stipulation.[14] It is also implausible that Dish would have stipulated, and lost a chance to cross-examine this key witness, if his testimony were incredible. Finally, Miles was credible, and straightforward.

III. ANALYSIS

A. The 8(a)(5) Allegations[15]

1. Unilateral implementation of the final offer

a. Legal precedent

In collective bargaining, there must be a "willingness among the parties to discuss freely and fully their respective . . . demands, and, when these are opposed, to justify them on reason." *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941). The determination as to whether a party's bargaining conduct evinces a true desire to reach an agreement is made by "drawing inferences from the conduct of the parties as a whole." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 498 (1960). "Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith." *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974).

A premature declaration of impasse generally constitutes bad-faith bargaining. *CJC Holdings, Inc.*, 320 NLRB 1041, 1044–1046 (1996), enfd. mem. 110 F.3d 794 (5th Cir. 1997). Impasse can only be reached, "'after good-faith negotiations have exhausted the prospects of concluding an agreement,' and there is no realistic possibility that continuation of discussion at that time would be fruitful." Id. at 1044 (quoting *Television*

[9] In the past, such leave was stored in separate banks.

[10] Complaint par. 12(e) was amended at the hearing to add the constructive discharges of Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns and Christopher Little. (Tr. 35.)

[11] On October 21, 2016, the parties moved to reopen the record and enter a joint stipulation about Michael Cater. Their joint stipulation provided that Cater, an NRH unit technician, learned about Obere's text and resigned because of the unilateral wage cut. The motion is GRANTED; complaint par. 12(e) has been amended accordingly.

[12] See (Tr. 272–274 (McDonald); Tr. 422 (Dutton); Tr. 436 (Kubesch); Tr. 525 (Mason); Tr. 649 (Little); Tr. 675–676 (Daniel); Tr. 694–695 (Dingle); Tr. 729–730 (Benge); Tr. 737–738 (Bernardino); Tr. 748 (stipulation regarding Tillman, Thompson, Burns, Ripley, and Carson); CP Exhs. 86, 100 (Dingle, Kubesch, Cater, Dutton, Dehart, McDonald, Mason, Benge, Carson, Hernandez, and Cater)).

[13] This calculation was based upon 2015 figures (i.e., $62,132 to $43,364 is a 30% decrease). (CP Exh. 120.)

[14] They stipulated that another employee witness, if called, would have corroborated Miles. (Tr. 687–689.) The transcript, which inaccurately states "weight loss statement," instead of the "Waeland Thomas statement" to describe this issue, is hereby corrected.

[15] These allegations are listed under complaint pars. 10, 12, 13, and 16.

Artists AFTRA v. NLRB, 395 F.2d 622, 624 (D.C. Cir. 1968), enfg. *Taft Broadcasting Co.*, 163 NLRB 475 (1967)). Moreover, a genuine impasse exists, when neither party will move from their position, in spite of their best efforts to reach agreement. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000). The party asserting impasse has the burden of proof on this issue. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993). Although an employer can implement its final offer at impasse, it violates the Act when it does so prematurely. *Jano Graphics, Inc.*, 339 NLRB 251 (2003).

b. Analysis

For several reasons, Dish did not satisfy its burden of proving that an impasse existed in April 2016. It, as a result, violated the Act by implementing its final offer on April 23, 2016.

First, the Union estopped bargaining from reaching an impasse, when it offered a significant QPC compromise in its December 9, 2014 proposal. (GC Exhs. 4–5.) Although the Union's proposal created the "realistic possibility that continued discussions would be fruitful," Dish summarily rejected this concession, without bargaining. The Union, as noted, offered a substantial giveback, when it proposed a 2-tierred wage system, where incumbents kept QPC, and new hires lost it.[16] This "white flag" offered a possible resolution on bargaining's thorniest issue, and created the real possibility of fruitful discourse, which was inexplicably left by Dish to wither on the vine for over a year before it declared impasse. *CJC Holdings, Inc.*, supra. If Dish had been willing to meet about this substantial giveback, the give and take of bargaining might have led everyone closer to an agreement; Dish's failure to explore the Union's capitulation on this key issue, by definition, precluded impasse. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 772 (1999); *Grinnell Fire Protection Systems Co.*, supra, 328 NLRB at 585, 585–586.

Second, Dish similarly prevented legitimate impasse, when it repeatedly conditioned ongoing negotiations on a nonmandatory subject of bargaining, i.e., the Union submitting Dish's final offer to the FB and NRH units for a ratification vote.[17] The Union steadfastly rejected this condition,[18] which has effectively stymied bargaining since December 2014. The Board has held that conditioning ongoing bargaining on a nonmandatory subject of bargaining (e.g., a ratification vote) taints any subsequent impasse, and precludes implementation of a final offer.[19]

Third, the lengthy hiatus between the November 2014 bargaining session and the April 2016 implementation of the final offer weighs heavily against an impasse finding. *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996)("[a]nything that creates a new possibility of fruitful discussion . . . breaks an impasse: . . . [including] the mere passage of time."); *Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992)(14-month bargaining hiatus). Given Dish's high turnover, a lengthy hiatus suggests that, even assuming arguendo that an impasse existed in 2014, which it did not, Dish's high attrition rate could have broken the gridlock by 2016, as the FB and NRH units turned over and new employees might have called for a revised Union bargaining strategy, which could have brought bargaining to closure.[20]

Fourth, the change in Dish's bargaining agent amplified the possibility of agreement, which also cuts against an impasse finding. Simply put, Basara, a hard-bargainer, was substituted for Balonick, a more diplomatic representative. This trade increased the chance for positive discourse, and prevented impasse. See, e.g., *Airflow Research & Mfg. Corp.*, supra, 320 NLRB at 862 ("possibility for a break of the deadlock was fur-

[16] The potential savings associated with the Union's proposed 2-tierred wage system was significant, given Dish's high attrition rates. (R. Exh. 53 (annual attrition rates from 2013 to 2015 ranging from 116% to 13%)). Given this attrition, the Union's willingness to abandon QPC for new hires, meant that in a short time, the majority of the FB and NRH units would have likely have turned over and no longer earn QPC wages. This counter offered Dish much of what it sought on QPC, and would have likely set in motion the wholesale elimination of QPC in future bargaining for a successor contract. At a minimum, however, this concession was worthy of discourse, which, by definition, precluded impasse.

[17] See, e.g., (GC Exh. 3 (on December 18, 2014, Dish stated that "[w]e ask that you take our final offer to your members and . . . [o]nce we know whether . . . [it] is accepted or rejected, we can discuss if further bargaining is warranted."); GC Exh. 9 (on December 31, 2014, Dish stated that "[i]t does not appear that you are willing to take our final offer to your bargaining unit," and thereafter, refused to schedule an in-person bargaining session); GC Exh. 10 (on January 8, 2016, Dish stated that, "[y]our letters . . . in December [2014] indicated that you rejected our final offer and were unwilling to take it to your bargaining unit."); (GC Exh. 28) (Dish's April 19, 2016 letter)).

[18] See, e.g., (GC Exh. 8 (On December 30, 2014, the Union stated that, "CWA is the exclusive representative of the employees and … will be the sole judge of when to present proposals to the Union membership for a vote.")).

[19] See, e.g., *Jano Graphics, Inc.*, supra (company's continued insistence of a permissive subject of bargaining, a ratification vote by union employees, and its later refusal to bargain tainted subsequent impasse); *Movers & Warehousemen's Assn.*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir.), cert. denied 98 S.Ct. 75 (1977) (a ratification procedure was a nonmandatory subject of bargaining, which would not permit a company to lawfully lock out employees in support of demands on that subject); *Houchens Market*, 155 NLRB 729 (1965), enfd. 375 F.2d 208 (6th Cir. 1967) (employee ratification is not a mandatory bargaining subject on which an employer may insist to impasse); *Grosvenor Resort*, 336 NLRB 613 (2001) (employer engaged in bad-faith bargaining by, inter alia, insisting to impasse on a non-mandatory subject of bargaining, e.g., the scope of the bargaining unit). Although the Board has held that, *under exceptional circumstances*, insistence upon a nonmandatory bargaining topic does not preclude lawful impasse (see *ACF Industries, LLC*, 347 NLRB 1040 (2006)), this narrow condition is limited to those cases where the non-mandatory insistence did *not* cause the impasse. Cf. *National Gypsum Co.*, 359 NLRB 1058, 1074–1075 (2013) (insistence on ratification vote, which occurred *after* impasse, logically could not cause impasse). In the current case, however, the Union protested this nonmandatory bargaining condition over a year *before* Dish's 2016 declaration of impasse and implementation of the final offer, which is unlike the *National Gypsum* scenario, where insistence on the nonmandatory subject occurred *after* impasse.

[20] In a year, the composition of FB and NRH units changed significantly; this might have resulted in these modified units concluding that the retention of QPC was no longer sustainable, or newer employees creating a different mandate. This, minimally, met the "new possibility of fruitful discussion" criteria, which precluded impasse.

ther heightened by the change in the person representing the Union for negotiations . . . [which] created the possibility of a new approach toward the subjects of the earlier impasse); *KIMA-TV*, 324 NLRB 1148, 1152 (1997).

Fifth, Dish's unwillingness to reschedule the December 2014 bargaining session further undercuts an impasse finding. It logically follows that, if the parties were continuously at impasse since November 2014 as Dish avers, veteran labor attorney Basara would never have agreed to meet in December 2014, or offered alternative dates after Ramos cancelled. Moreover, it is eminently fair to assume that he would not have wasted his time or client's resources by meeting during an extant impasse, following multiple years of bargaining. His declaration of impasse seemed to follow Ramos' unwillingness to meet in December 2014, in accordance with his own schedule and expected departure from his law firm. Basara's actions, as a result, appeared more retaliatory than substantive, and are inconsistent with those of a labor law professional handling an impasse. *Bottom Line Enterprises*, 302 NLRB 373 (1991) (employer cannot react to reasonable cancellation of session by declaring impasse and threatening implementation).

In sum, several circumstances demonstrate that Dish failed to meet its burden of proof on impasse. These circumstances were: Dish's unwillingness to meet and bargain after the Union offered a substantial QPC compromise; the unlawful conditioning of bargaining on ratification; the passage of time; the change in negotiators; and Dish's unwillingness to reschedule a previously scheduled session.[21] Dish was, as a result, not privileged to unilaterally implement its final offer. See generally *Jano Graphics, Inc.*, supra.

2. Ongoing failure to negotiate since January 13, 2016

Dish violated Section 8(a)(5) by ignoring the Union's ongoing request to bargain since January 13, 2016. (GC Exh. 11.) Given that the parties were not at impasse, Dish was under an ongoing obligation to bargain over wages, hours, and other terms and conditions of employment regarding the FB and NRH units. *Storer Communications, Inc.*, 294 NLRB 1056 (1989) (statutory duty to bargain encompasses affirmative duty to make prompt arrangements, within reason, for meeting and conferring); *Rutter-Rex Mfg. Co.*, 86 NLRB 470 (1949).

3. Novak's firing[22]

Dish unlawfully failed to bargain with the Union over Novak's firing. The Board has described an employer's obligation to bargain with a newly established union as follows:

> Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." . . . . Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. . . . When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences . . . [on] the date of the election.

San Miguel Hospital Corp., 357 NLRB 326, 326–327 (2011) (citations omitted). In order to trigger a bargaining obligation, unilateral changes must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004).

Dish created a new workplace disciplinary rule in June 2014, when in response to the Union's request, it agreed to "provide . . . advance notice of any suspensions, demotions or discharge." (GC Exh. 15.) Thereafter, it notified, and bargained with, the Union before enacting terminations on 2 occasions in late-2014 (e.g., Hawkins and GoForth). (GC Exhs. 14, 16, 17; CP Exhs. 125, 132.) Dish then abandoned this policy, when it later fired Novak, without notice or pre-implementation bargaining. Given that a disciplinary rule is a mandatory subject of bargaining, and that the elimination of notice is a material change, Dish violated Section 8(a)(5) by changing this rule without notice or bargaining. *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2005) (disciplinary procedures are mandatory bargaining topics).

B. The 8(a)(1) Allegations[23]

1. Wodell statement

Wodell did not make the statement alleged in the complaint. Her commentary at the April meetings, therefore, did not violate the Act.

2. Obere statement

Dish violated Section 8(a)(1), when Obere sent a text to Daniels, which stated, inter alia, that, "the union is gone," the FB and NRH offices are closing, and Dish would prefer its technicians to quit. See, e.g., *Concrete Co.*, 336 NLRB 1311, 1316 (2001) ("union is gone"); *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (unsubstantiated predictions of closure due to union activities); *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (2015) (inviting resignations because of union activities is an implied discharge threat); *Mesker Door, Inc.*, 357 NLRB 591 (2011) (same).[24]

[21] Many of these factors, even if considered in isolation, precluded impasse.

[22] The General Counsel, in a motion dated November 17, 2016, moved to withdraw the portion of this complaint allegation, which relied upon a theory of violation under *Alan Ritchey*, 359 NLRB 396 (2012). See also *Total Security*, 364 NLRB No. 106 (2016). The motion is granted.

[23] These allegations are listed under complaint pars. 11 and 14. At the hearing, the General Counsel amended the complaint to add par. 11(c), which alleged that Waeland Thomas threatened employees with discipline, if they discussed union issues with trainees, and created the impression the their union activities were under surveillance, when he told employees that someone would be calling the trainees to determine if they had been approached about the Union. (Tr. 36–37.)

[24] Although Dish contends that Beckham's disavowal erased the unlawfulness of the text, this contention is invalid. Effective repudiation must be timely, unambiguous, specific, adequately publicized, *free from other illegal acts*, and accompanied by some assurance against repeat offenses. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Because Dish's disavowal was accompanied by the other violations at issue herein, it was ineffective.

3. Thomas statement

Thomas' violated Section 8(a)(1), when he: told employees not to discuss the Union with trainees under the threat of discipline, without restricting this ban to working areas and time; and threatened employees that trainees would be called to gauge compliance. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987)("employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas"); *Food Services of America, Inc.*, 360 NLRB 1012, 1018 (2014)(same); *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009)(unlawful impression of surveillance, where reasonable employees would assume that their union activities are being monitored.).

C. The 8(a)(3) *Allegations*[25]

1. Constructive discharges

a. Legal precedent

Regarding constructive discharges, the Board has held as follows:

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

Remodeling by Oltmanns, 263 NLRB 1152, 1162 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983) (emphasis added and citations omitted).

b. Analysis

Dish violated Section 8(a)(3), when it constructively discharged the 17 resigning employees. These employees were presented with the "Hobson's choice" of continuing to work versus forgoing their Section 7 rights.[26] This is a Category 2 constructive discharge scenario, where Dish's violation of their Section 7 rights resulted in their wages being cut by 30% and their health insurance costs being greatly increased. It is undisputed the resigning employees left because of these changes, after effectively being left with the "Hobson's choice" of continuing to work under greatly diminished conditions that flowed from the violation of their Section 7 rights.[27] *Control Services*, 303 NLRB 481, 485 (1991) (unlawful cuts in wages, hours and health insurance benefits resulted in a category 2 constructive discharge); *White-Evans Service Co.*, 285 NLRB 81, 82–83 (1987) (same).

2. Unilateral Implementation of final offer

Given that Dish violated Section 8(a)(5), when it unilaterally implemented its final offer absent a good-faith impasse, a finding that this action also violated Section 8(a)(3) violation would be cumulative and not impact the remedy. It is, thus, unnecessary to decide this redundant allegation. *Tri-Tech Services*, 340 NLRB 894, 895–896 (2003); *Sygma Network Corp.*, 317 NLRB 411 (1995).

CONCLUSIONS OF LAW

1. Dish is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization, within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees at the FB hub:

> INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in Farmers Branch, Texas.
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

4. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees at the NRH hub:

> INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in North Richland Hills, Texas.
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

5. Dish violated Section 8(a)(1), when:

(a) Obere told employees that "the union is gone," that their offices would close because of their Union activities, and that Dish would prefer technicians employed at its unionized facilities to quit.

(b). Thomas threatened employees that they would be disciplined, if they discussed the Union with new hires.

(c) Thomas created the impression of surveillance, when he

[25] These allegations are listed under complaint pars. 12 and 15.

[26] Dish violated their Sec. 7 rights by, inter alia, implementing its final offer without an impasse, making unilateral changes, refusing to bargain with the Union, and conditioning bargaining on a ratification vote.

[27] Dish's contentions in its brief that the employees were not constructively discharged because the General Counsel did not show that its unilateral changes "were imposed because of the employee's union activities" is without merit, inasmuch as Dish errantly characterizes this matter as a Category 1 constructive discharge, when it still remains, a Category 2 constructive discharge case, which has no such intent requirement.

told employees that someone would call trainees to confirm that they did not discuss the Union with them.

6. Dish violated Section 8(a)(3), when it constructively discharged the following 17 employees: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

7. Dish violated Section 8(a)(5), when it:

(a) Failed to meet and bargain with the Union at reasonable times for the purposes of collective bargaining since January 13, 2016, after prematurely declaring an impasse, regarding the units described above.

(b) Refused to bargain with the Union by conditioning bargaining upon a ratification vote.

(c) Implemented its final offer on April 23, 2016, and, thereafter, unilaterally changed terms and conditions of employees in the above-described units without having reached agreement with the Union and in the absence of a valid bargaining impasse.

(d) Unilaterally changed the wages, health insurance coverage, leave benefits, and other terms and conditions of employment since April 23, 2016, in the above-described units.

(f) Unilaterally changed its disciplinary policy and discharged unit employee Dakota Novak, by failing to afford the Union preimplementation notice of his contemplated discipline, and an opportunity to bargain.

(g The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Dish committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. Having found that Dish violated Section 8(a)(3) by constructively discharging the 17 employees described above, it is ordered to offer them full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It is further ordered to make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), it shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate them for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is also ordered to remove from its files any references to their unlawful discharges, and within 3 days thereafter to notify them in writing that this has been done and that their unlawful constructive discharges will not be used against them in any way.

Having found that Dish violated Section 8(a)(5) by prematurely declaring an impasse, refusing to meet with the Union for collective-bargaining purposes, and conditioning meeting with the Union on a nonmandatory subject of bargaining, it is ordered to, upon request by the Union, bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, to embody it in a signed agreement. Upon resumption of bargaining, it is further ordered to reinstate all tentative agreements reached during contract negotiations. See *Health Care Services Group*, 331 NLRB 333 (2000).

Furthermore, having found that Dish violated Section 8(a)(5) by unilaterally changing terms and conditions of employment for unit employees, which included eliminating QPC, cutting wages, combining sick and vacation leave banks, and cutting health insurance deductibles and caps, it shall, on request of the Union, retroactively restore any unilaterally modified terms and conditions of employment, and rescind the unilateral changes it has made, until such time as Dish and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations.[28] It shall also be required to make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd.444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. With respect to its unilateral termination of the unit employees' preexisting health care benefits, it shall restore, upon request of the Union, the preexisting health care benefits and reimburse the unit employees for any expenses ensuing from its failure to continue the preexisting healthcare coverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

Additionally, having found that Dish violated Section 8(a)(5) by unilaterally changing its disciplinary rule and consequently firing Novak, it shall offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in his place. Novak shall also be made whole for any loss of earnings he may have suffered due to his unlawful discharges. Backpay shall be computed in accordance with

[28] *Pressroom Cleaners*, 361 NLRB 643 (2014), motion for reconsideration denied 361 NLRB No. 133 (2014). Nothing in this recommended order, however, shall be construed as requiring or authorizing Dish to rescind any improvements in the unit employees' terms and conditions of employment unless requested to do so by the Union. *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016).

F. W. Woolworth, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. Dish shall also be required to expunge from its files any reference to Novak's unlawful discharge and to notify him in writing that this has been done. It is further ordered to compensate him for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar year. Dish is, however, entitled to show, at a compliance proceeding, that it would have discharged Novak under the preexisting terms and conditions, avoiding as to him any reinstatement, expunction, and backpay obligation. See *Adams & Associates, Inc*., 363 NLRB No. 193, slip op. at 11, fn. 17 (2016).

Finally, in addition to the traditional remedies discussed above, Beckham will read the notice marked "Appendix" to FB and NRH unit employees, during work time, at the FB and NRH hubs in the presence of a Board agent. A notice reading will counteract the coercive impact of the instant violations, which were substantial. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004). Dish shall also distribute remedial notices electronically via text message, email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[29]

ORDER

Dish Network Corporation, Farmers Branch and North Richland Hills, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that "the union is gone."

(b) Threatening employees that the Farmers Branch and North Richland Hills offices would close because they engaged in union or any other protected concerted activities.

(c) Implicitly threatening employees with discharge by inviting their resignations because they engaged in union or any other protected concerted activities.

(d) Threatening employees that they will be disciplined, if they discuss the Union with newly-hired employees.

(e) Creating the impression that employees' union or other protected concerted activities were being monitored.

(f) Constructively discharging or otherwise discriminating against its employees for engaging in union or any other protected concerted activities.

(g) Failing and refusing to meet and bargain at reasonable times with the Union for collective bargaining as the exclusive collective bargaining representative in the following appropriate units:

Farmers Branch bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in Farmers Branch, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

North Richland Hills bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in North Richland Hills, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

(h) Refusing to bargain with the Union by conditioning future bargaining upon the holding a ratification vote.

(i) Implementing its final offer and unilaterally changing terms and conditions of employees in the above-described units without reaching agreement with the Union and in the absence of a valid bargaining impasse.

(j) Unilaterally changing the wages, health insurance coverage, leave benefits, and other terms and conditions of employment for the above described units.

(k) Unilaterally changing its disciplinary policy and discharging unit employee Dakota Novak, by failing to afford the Union preimplementation notice of his contemplated discipline and an opportunity to bargain.

(l) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following 17 constructively discharged employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

(b) Make the 17 constructively discharged employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision, compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(c) Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges of the 17

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

constructively discharged employees, and within 3 days thereafter, notify them in writing that this has been done and that their constructive discharges will not be used against them in any way.

(d) On request by the Union, bargain with it as the exclusive bargaining representative of our unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) On request by the Union, rescind the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after April 23, 2016, and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(f) Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of this decision.

(g) Offer Novak full reinstatement to his former job or, if his job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

(h) Make Novak whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of this decision, compensate him for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

(i) Remove from its files any reference to the discharge of Novak, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against him in any way, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by Region 16, post at its Farmers Branch and North Richland Hills, Texas facilities copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by text message, email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If Dish has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since January 13, 2016.

Within 14 days after service by the Region, hold a meeting or meetings during working hours at the FB and NRH hubs, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be read to its employees by Beckham in the presence of a Board agent.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. January 23, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that "the union is gone," threaten that the Farmers Branch and North Richland Hills offices will close because you engaged in union or any other protected concerted activities, or implicitly threaten your discharge by inviting you to resign because you engaged in union or any other protected concerted activities.

WE WILL NOT threaten that you will be disciplined, if you discuss the Union with newly-hired employees, or create the impression that your union activities or any other protected concerted activities are being monitored.

WE WILL NOT constructively discharge or otherwise discriminate against you for engaging in union or any other protected concerted activities.

WE WILL NOT fail and refuse to meet and bargain at reasona-

[30] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ble times with the Union as the exclusive collective bargaining representative of its employees in these appropriate units:

Farmers Branch bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at its facility located in Farmers Branch, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

North Richland Hills bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at its facility located in North Richland Hills, Texas.

EXCLUDED**:** All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union by conditioning future bargaining upon it holding a ratification vote.

WE WILL NOT implement our final offer and unilaterally change the terms and conditions of employment of our employees in the above-described units without reaching agreement with the Union and in the absence of a valid bargaining impasse.

WE WILL NOT unilaterally change wages, eliminate QPC, cut health insurance coverage, reduce leave benefits, or otherwise change terms and conditions of employment in the above described units.

WE WILL NOT unilaterally change our disciplinary policy and discharge unit employee Dakota Novak, by failing to afford the Union pre-implementation notice of his contemplated discipline and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL within 14 days from the date of the Board's Order, offer the following 17 constructively discharged employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

WE WILL make the 17 constructively discharged employees described above whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful constructive discharges of the 17 employees described above, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that their constructive discharges will not be used against them in any way.

WE WILL on request by the Union, bargain with it as the exclusive bargaining representative of our unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented on and after April 23, 2016, and retroactively restore the wages and other terms and conditions of employment that existed before our unlawful unilateral changes were implemented, until we have reached an agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make unit employees whole for any losses sustained as a result of the unilateral changes in terms and conditions of employment, plus interest compounded daily.

WE WILL offer Dakota Novak, who was discharged pursuant to our unilaterally implemented disciplinary policies and procedures, full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in his place, subject to our demonstrating in a compliance hearing that we would have discharged Novak even under the terms and conditions of employment that existed immediately prior to our unilateral change.

WE WILL, subject to the condition set forth above, make Novak whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, subject to the condition set forth above, remove from our files any reference to the unlawful discharge of Novak, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

DISH NETWORK CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16–CA–173719 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

JD–02–17
North Richland Hills, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DISH NETWORK CORPORATION

and

COMMUNICATION 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

David A. Foley, Charles Guzak* and *Karla R. Mata, Esqs.,
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Brian D. Balonick, Brian A. Casal* and *David J. Strauss, Esqs.
(Buchanan, Ingersoll & Rooney P.C.), for the Respondent.
Matthew Holder, Esq. (David Van Os & Associates, P.C.),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Fort Worth, Texas over 7 days in August and September 2016. The complaint alleged that the Dish Network Corporation (the Dish or Respondent) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by, inter alia: threatening employees; bargaining in bad faith with the Communication Workers of America, AFL–CIO (the Union); implementing a final offer in the absence of an impasse; making unilateral changes in the wages, health insurance coverage, and leave provided to its Union employees; and constructively discharging 17 Union employees. The controlling facts in this case are mainly undisputed.

On the entire record,[1] including my observation of the witnesses' demeanors, and after considering post-hearing briefs, I make the following

[1] The Charging Party's November 17, 2016 motion, which seeks to correct the mislabeling of 2 exhibits, has been GRANTED. CP Exh. 122, as a result, which is a letter dated May 29, 2014, shall remain as originally marked, and CP Exh. 122, a 9-line spreadsheet, shall be revised and newly marked as CP Exh. 122A.

FINDINGS OF FACT[2]

I. JURISDICTION

At all material times, Dish, a Colorado corporation, with a corporate office in Englewood, Colorado, and numerous branch offices, including its Farmers Branch and North Richland Hills, Texas offices (the FB and NRH hubs), has provided satellite television services. Annually, it purchases and receives at the FB and NRH hubs goods worth more than $50,000 directly from points outside of Texas. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The FB and NRH hubs warehouse supplies, and dispatch technicians for installations and repairs in the Dallas-Fort Worth area. This litigation involves the unionization of these workers.

A. Introduction of QPC and Unionization

The FB and NRH employees unionized after Dish introduced the Quality Performance Compensation System (QPC) at their hubs. See (GC Exh. 132). This novel, incentive-based pay system significantly changed their existing pay system. See (CP Exh. 62). Moreover, although QPC offered enhanced employees' productivity bonuses, it cut base wage rates, which created overall dissatisfaction and led to the Union's organizing effort.

B. FB and NRH Bargaining Units

In 2011, the Union became the designated exclusive collective-bargaining representative of the following group of workers employed at the FB hub (the FB unit):[3]

> INCLUDED: All regular full-time and part-time technicians and warehouse employees ….
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

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[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

[3] There are approximately 24 employees in the FB unit.

It also, almost simultaneously, became the designated representative of the same set of workers employed at the NRH hub (the NRH unit):[4]

C. Bargaining History

1. Background

Following the Union's certification, the parties commenced joint bargaining for an initial contract for the FB and NRH units. The Union was initially represented in bargaining by Donna Bentley and, thereafter, was represented by Sylvia Ramos. Dish was initially represented by attorney George Basara and, thereafter, was represented by his law partner, Brian Balonick. It would be an understatement to say that bargaining over QPC and other matters proved keenly difficult.[5] Although roughly 25 bargaining sessions were held, a contract never resulted.

Given that employees' organizing efforts were connected to QPC, it is not surprising that QPC played a major bargaining role. It is startling, however, that, even though the parties swapped positions on QPC during negotiations, common ground on this issue was never reached. Ironically, the Union, which initially wanted to abolish QPC, later sought to retain it, once employees became comfortable and discovered that it increased their wages. Dish, which initially wanted to keep QPC, later desperately fought to eliminate it, after it concluded that employees were making too much money under this pay system.

Additionally, because bargaining demands often change with employee turnover, it is noteworthy that the FB and NRH units had extremely high attrition rates.[6] In 2014, the FB unit had an attrition rate of 31.4%, whereas the NRH unit's rate was 30.5%. (R. Exh. 53). In 2015, the FB unit had an attrition rate of 19.6%, while the NRH unit's rate was 13.1%. (R. Exh. 53; CP Exh. 120).

2. Allegedly Closed Matters[7]

Before Dish declared impasse and bargaining ceased, the parties reached oral agreement on many issues. By March 2013, they reached unsigned resolutions on, inter alia, these subjects: job classifications; Union recognition; travel; leave; 401K plan; and benefits. (GC Exh. 42). On June 19, 2013, Bentley summarized the status of negotiations and emailed Basara that 5 issues remained: dues deductions; grievance/arbitration; seniority; wages; and contracting. (R. Exh. 6).

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4 There are approximately 21 employees in the NRH unit.

5 Beyond substantive difficulties, Union negotiators Ramos and Bentley complained about Basara's hard bargaining tactics. They averred that this stymied negotiations, which were already tenuous given their nascent relationship. Their testimony was corroborated by bargaining notes and correspondence.

6 Priorities often change as incumbents leave, and are replaced by new hires with different goals.

7 These issues are identified as "allegedly" closed because, although the parties ceased bargaining about these matters, Basara reserved the right to later revisit the validity of any allegedly closed issue, "[if] there's something significant in bargaining that would make … [him] alter that particular agreement." (Tr. 1105).

3. Events Leading to Dish's Impasse Declaration

a. Dish's November 18, 2014 Final Proposal

On this date, the parties held what eventually turned out to be their last in-person bargaining session. At this time, Dish tendered its first in a series of "final proposal[s]" to the Union, which proposed, inter alia, discontinuing QPC, and set forth this hourly wage schedule:[8]

FSS I	FSS II	FSS III	FSS IV	ISP	Sr. ISP
$13.00	$14.00	$16.00	$17.00	$11.50	$12.00

(GC Exh. 2). While Dish rejected the Union's proposals on dues deductions, grievance/arbitration, successorship, subcontracting, severance and seniority, it agreed to provide smart home sales and clothing stipends. (R. Exh. 4).

Although the parties had meetings scheduled for December 8 and 9, Ramos canceled due to the passing of a family member. (GC Exh. 21). She offered, however, alternative dates in January and February 2015, which Dish rejected. Basara, instead, conditioned reconvening on the Union replying in writing to his November 18 proposal and warned that, if it refused, impasse would be declared. (Id.).

b. Union's December 9, 2014 Proposal

The Union complied with Basara's threat, submitted a counteroffer, and again requested a meeting. The Union's new proposal represented a substantial compromise, inasmuch as it partially capitulated on QPC, a major roadblock. To this end, the Union creatively proposed a 2-tierred wage system, where incumbents retained QPC, and new hires received the traditional wage schedule Dish was seeking. (GC Exhs. 4, 5). Although this proposal did not represent the complete abolishment of QPC that Dish desired, it still provided cause for optimism. As noted, Dish's technicians had a very high attrition rate, which meant that the Union's proposal made it probable that new hires receiving non-QPC rates would soon become the majority in the FB and NRH units, as the attrition rate continued. (R. Exh. 53 (annual attrition ranging from 116% to 13%)). This, in turn, meant that Dish would have attained most of what it wanted on wages in the short term, and would have set the stage for a fuller resolution on QPC in later bargaining (i.e., eventually abolishing QPC would have become an easier selling point in later bargaining, when only a narrow minority paid under QPC remained). The Union also offered counterproposals on: dues deduction; grievance procedure; seniority; subcontracting; successorship; smart home sales; and severance pay. (GC Exhs. 4, 5).

[8] "FSS" means field service specialist, i.e., technician, while "ISP" means inventory specialist, i.e., warehousemen.

c. Email Exchanges About Scheduling Another Bargaining Session

On December 9, 2014, Basara proposed to meet the following week. (GC Exh. 98). His email conspicuously failed to declare an impasse, or state that scheduling another session would be futile. On December 11, Ramos replied that January 2015 was her earliest available slot. (GC Exh. 23). Basara expressed shock about her short-term unavailability and refused to meet. (GC Exh. 23). On December 12, Ramos repeated her offer to meet in January. (GC Exh. 25).

d. Dish's December 18, 2014 Final Offer

On this date, Basara reneged on his earlier meeting offer and terminated bargaining:

> I … have met … on many occasions in an effort to reach an agreement…. [We] were able to reach agreement on Articles 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 23 and 26….
>
> On November 19, 2014, your bargaining team provided me with their proposals on the remaining issues….
>
> On that same day, DISH responded … with a **final offer** ….
>
> On …, December 4, … you … suffered a death in your family and …the bargaining sessions were cancelled….
>
> On December 9, … you emailed … [your] response to my final offer …. I offered to meet with you … in December …. [but] you … could not meet until January….
>
> I have now reviewed your proposals and offer the following responses:
>
> **Article 4 Dues Deduction**. DISH will not agree to your proposal ….
>
> **Article 5 Grievance Procedure ….** DISH rejects your proposal ….
>
> **Article 13 Seniority**. DISH rejects the Union's proposal ….
>
> **Article 15 Wages and Compensation**. DISH rejects the … wage proposal ….
>
> **Article 22 Subcontracting**…. The Union's proposal is rejected.
>
> **Article 24 Sale of Operation**…. DISH will not accept [the] proposal ….
>
> **Article 25 Smart Home Sales**. DISH … agreed … to … Smart Home Sales ….

> **Article 27 Participatory Management** …. This proposal is rejected.
>
> **Article 28 Severance**. DISH rejects this proposal….
>
> I have attached … DISH's last best and final offer for your consideration. We believe that bargaining has been exhausted and that your recent proposals do not reflect … significant movement from … [your] November 18, 2014 [proposal]. ***We ask that you take our final offer to your members and let us know if the proposal is accepted. Once we know whether DISH's final offer is accepted or rejected, we can discuss if further bargaining is warranted***.

(GC Exh. 3) (italicized emphasis added). No bargaining sessions were thereafter scheduled.

e. Union's December 30, 2014 Email

On December 30, 2014, Ramos replied as follows:

> [T]he Union insists on meeting and bargaining over its counterproposals …. Your written response … does not take the place of meeting and bargaining. ***CWA is the exclusive representative of the employees and CWA will be the sole judge of when to present proposals to the Union membership for a vote….***
>
> The Union is available to meet on January 6, 7, 8, 9, 22 and 23. If none of these dates is available … please inform me of any other [available] dates ….

(GC Exh. 8) (emphasis added).

f. Dish's December 31, 2014 Reply

On this date, Basara sent the following reply:

> [I]t does not appear that you are willing to take our final offer to your … unit ….
>
> I will not be representing DISH in the future. My partner, Brian Balonick will be taking over for me.
>
> I have apprised him of the status of negotiations and he will be getting back to you sometime after the new year…. [H]e has a trial … in … [early] January.

(GC Exh. 9).

g. Dish's Belated January 8, 2016 Letter

Balonick, however, failed to contact the Union in early 2015, as promised. He,

instead, inexplicably waited 13 months, before contacting Ramos in early 2016, when he sent this letter:

> Basara left … at the beginning … [of 2015], [and] I took over for him ….
>
> [H]is November 19, 2014, letter … presented DISH's … final offer. ***Your letters … in December indicated that you rejected our final offer and were unwilling to take it to your bargaining unit.*** It has been one year since your last correspondence …. Please let us know by January 15, 2016, whether you accept our final offer. Because the … November 19, 2014 [offer is], … our final offer, it does not appear … that further bargaining would be productive. If we do not hear from you by January 15, we will assume that you … reject our final offer….

(GC Exh. 10) (emphasis added).

h. Union's January 13, 2016 Letter

On this date, Ramos replied as follows:

> Your letter … completely misrepresents … negotiations….
>
> I departed from CWA's normal practice … on December 9, 2014 [by providing] written counterproposals in advance of the next meeting. I made it clear that [this was] ... a convenience to facilitate … discussions at the next meeting that remained to be scheduled…. I [did not] suggest that sending you the proposals would substitute for meeting and conferring…. I [did not] waive the Union's right to meet and confer over our counterproposals. To the contrary, my December 9 communication emphasized the need to meet and bargain.
>
> Your implication that CWA has let this matter languish for a year …. is preposterous. In my December 30, 2014 communication to … [Basara,] I offered 6 dates to meet in January 2015 ….
>
> In … response … he informed me that you would be taking over … [and] would be getting back in touch with me sometime after the new year….
>
> It has been over a year since I suggested dates for the next session …. Please send me suggested dates ….

(GC Exh. 11).

4. Declaration of Impasse

On February 2, 2016, Balonick sent this reply:

> It appears … that the Union's position remains the same ….
>
> [T]he parties have been bargaining since 2011. In December 2014, … Basara communicated … that bargaining had been exhausted. For over 12 months, the parties have remained rigid …. We view your January 13 letter as further evidence … [of] a standstill. If you disagree, please explain your position …. Otherwise, DISH will implement its last, best and final proposal….

(GC Exh. 18). On February 3, Ramos dissented and re-requested bargaining. (GC Exh. 26).

5. Implementation of the Final Offer

On April 4, 2016, Balonick sent the following letter to the Union:

> DISH … delivered its … final offer … in December 2014….
>
> [T]he Union rejected DISH's … final offer … in December 2014…. [T]he parties have exhausted bargaining…. In our February 2, 2016 letter …, DISH requested … explanation as to why the Union believes that bargaining has not been exhausted. In response, the Union, once again, asked to meet to bargain.
>
> At this point, DISH believes that further bargaining would be futile …. Therefore, DISH is implementing its … final offer as proposed … in December 2014. This last, best, and final offer includes the following provisions:
>
> - DISH will eliminate QPC and move [to the] … [final offer] rate[s] ….
> - Full-time[rs] … will … be scheduled to work forty … hours per week….
> - Time spent in local travel … shall be treated as work time.
> - An employee … will receive reimbursement for all reasonable, necessary and ordinary business expenses …, as outlined in the … Travel Policy….
> - Paid time off benefits are the same for Union and non-union employees….
> - The Company will offer its bargaining unit employees the same or similar benefits as those offered to non-union technicians … [as follows]:
> - Dental Plan
> - Vision Plan
> - Life Insurance Plan (and Supplemental Life Insurance)
> - Short Term Disability Plan
> - Long Term Disability Plan
> - Health Care
> - Employee Stock Purchase Plan

- 401K Plan….

DISH plans to implement this … final offer no later than April 23, 2016….

(GC Exh. 19); see also (GC Exhs. 27–29).

6. April 5 and 6, 2016 Presentations

On these dates, Dish held meetings with the FB and NRH units, and announced implementation of the final offer. (Tr. 97–100; GC Exh. 114). Employee Chris Moss said that Director of Human Resources Lisa Wodell stated that, "whatever wage level we are at is where we would be." (Tr. 761). Employee Santiago Martinez corroborated his account. (Tr. 772–73). Regional Director Monty Beckham did not recall this statement, and averred that employees consistently remained eligible for promotions. (Tr. 917–18).

Because Moss and Santiago testified that Wodell effectively threatened that employees would no longer receive promotions, and Beckham stated otherwise, a credibility determination must be made. For several reasons, Beckham has been credited. First, he was straightforward, and had a strong recall of the meeting. Moss and Santiago had somewhat weaker recollections. Second, given that there is no evidence that Dish subsequently limited promotions or "leveling up," it is less probable that this comment was actually made.

7. April 6, 2016 Text

On this date, Field Service Manager Hanns Obere errantly sent this text message to NRH unit employee Blake Daniels:

> The union is gone. Techs will be affixed hourly rates, no pi. Level 4 will earn 17 dollars an hour. They will earn like the rest of the company if they transfer to other offices which they encourage. They have QPC till 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 masse….

(GC Exh. 31) (spelling and grammar as in original). Obere stated that he was solely forecasting what he thought could happen when QPC ended; he denied, however, that he was told this by management. See (CP Exh. 87). Daniels disseminated the text to his coworkers. Beckham subsequently emailed affected employees, and disavowed the text. (R. Exh. 8).

8. April 23, 2016 Final Offer Implementation

On this date, Dish implemented its final offer, with the exception of its health insurance changes, which were enacted in July. (Tr. 824). This resulted in the creation of a combined vacation and sick leave pool.[9] It also meant that QPC had effectively ended, and wages were deeply cut. The health insurance changes included: annual individual deductibles

[9] In the past, such leave was stored in separate banks.

rising from $1,300 to $2,500; annual family deductibles rising from $2,600 to $5,000; annual out-of-pocket expense limits for individuals rising from $5,500 to $6,000; and annual out-of-pocket expense limits for families rising from $11,000 to $12,000. (GC Exhs. 123–124).

D. Mass Resignations[10]

Following implementation, the following 17 employees resigned because of the wage and health insurance reductions: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater[11] (the resigning employees).[12] The financial consequences associated with implementation, as noted, were significant, with unit employees receiving, on average, a 30% wage loss,[13] and deep health insurance cuts. (GC Exhs. 123–24; CP Exh. 100).

E. Bargaining over Prior Terminations and the Firing of Dakota Novak

On May 29, 2014, the Union asked Dish to afford it notice and an opportunity to bargain regarding any suspensions or discharges of FB and NRH unit employees. (CP Exh. 122). On June 13, 2014, Basara assented, and informed the Union that "we will provide you with advance notice of any suspensions, demotions or discharge." (GC Exh. 15). On October 24, 2014, Basara implemented this policy and notified the Union about the contemplated discharge of Seth Hawkins, and on October 31, 2014, the Union requested bargaining. (GC Exh. 14; CP Exh. 125). On October 31, 2014, Basara similarly informed the Union about the contemplated discharge of Kevin Goforth, and on November 6, 2014, the Union requested bargaining. (GC Exhs. 16–17). On November 18, 2014, the parties negotiated over these disciplinary actions; thereafter, Dish implemented final discipline. (CP Exh. 132). Dish later fired Dakota Novak on February 19, 2016, without notification or bargaining with the Union.

F. July 6, 2016—Waeland Thomas Statements

Supervisor Thomas testified that he made these comments to unit employees:

> [W]hen you're at work … do not discuss the union … including QPC with the new guys. When you're off work, you can do what you want ….

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10 Complaint par. 12(e) was amended at the hearing to add the constructive discharges of Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns and Christopher Little. (Tr. 35).

11 On October 21, 2016, the parties moved to reopen the record and enter a joint stipulation about Michael Cater. Their joint stipulation provided that Cater, an NRH unit technician, learned about Obere's text and resigned because of the unilateral wage cut. The motion is GRANTED; complaint par. 12(e) has been amended accordingly.

12 See (Tr. 272-74 (McDonald); tr. 422 (Dutton); tr. 436 (Kubesch); tr. 525 (Mason); tr. 649 (Little); tr. 675-76 (Daniel); tr. 694-95 (Dingle); tr. 729-30 (Benge); tr. 737-38 (Bernardino); tr. 748 (stipulation regarding Tillman, Thompson, Burns, Ripley, and Carson); CP Exhs. 86, 100 (Dingle, Kubesch, Cater, Dutton, Dehart, McDonald, Mason, Benge, Carson, Hernandez, and Cater)).

13 This calculation was based upon 2015 figures (i.e., $62,132 to $43,364 is a 30% decrease). (CP Exh. 120).

(Tr. 237).

Employee Carl Miles testified, however, that Thomas placed a much greater restriction on employees than admitted. He recalled that Thomas issued this more stringent directive:

> Just don't say anything about the Union to the new guys. [D]on't mention QPC. They're happy getting paid $13.00 an hour, and they will get phone calls from Dish ... asking them if we said anything, and it could lead to termination.

(Tr. 657).

I credit Miles over Thomas. Miles was corroborated by the parties' stipulation.[14] It is also implausible that Dish would have stipulated, and lost a chance to cross-examine this key witness, if his testimony were incredible. Finally, Miles was credible, and straightforward.

III. Analysis

A. 8(a)(5) Allegations[15]

1. Unilateral Implementation of the Final Offer

a. Legal Precedent

In collective bargaining, there must be a "willingness among the parties to discuss freely and fully their respective . . . demands, and, when these are opposed, to justify them on reason." *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (3d Cir. 1941). The determination as to whether a party's bargaining conduct evinces a true desire to reach an agreement is made by "drawing inferences from the conduct of the parties as a whole." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 498 (1960). "Specific conduct, while it may not, standing alone, amount to a per se failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith." *Continental Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974).

A premature declaration of impasse generally constitutes bad-faith bargaining. *CJC Holdings, Inc.*, 320 NLRB 1041, 1044–1046 (1996), enfd. mem. 110 F.3d 794 (5th Cir. 1997). Impasse can only be reached, "'after good-faith negotiations have exhausted the prospects of concluding an agreement,' and there is no realistic possibility that continuation of discussion at that time would be fruitful." Id. at 1044 (quoting *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968), enfg. *Taft Broadcasting Co.*, 163 NLRB 475 (1967)). Moreover, a genuine impasse exists, when neither party will move from their position, in spite of their best efforts to reach agreement. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000). The party asserting impasse

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[14] They stipulated that another employee witness, if called, would have corroborated Miles. (Tr. 687-89). The transcript, which inaccurately states "weight loss statement," instead of the "Waeland Thomas statement" to describe this issue, is hereby corrected.

[15] These allegations are listed under complaint pars. 10, 12, 13 and 16.

has the burden of proof on this issue. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993). Although an employer can implement its final offer at impasse, it violates the Act when it does so prematurely. *Jano Graphics, Inc.*, 339 NLRB 251 (2003).

b. Analysis

For several reasons, Dish did not satisfy its burden of proving that an impasse existed in April 2016. It, as a result, violated the Act by implementing its final offer on April 23, 2016.

First, the Union estopped bargaining from reaching an impasse, when it offered a significant QPC compromise in its December 9, 2014 proposal. (GC Exhs. 4–5). Although the Union's proposal created the "realistic possibility that continued discussions would be fruitful," Dish summarily rejected this concession, without bargaining. The Union, as noted, offered a substantial giveback, when it proposed a 2-tierred wage system, where incumbents kept QPC, and new hires lost it.[16] This "white flag" offered a possible resolution on bargaining's thorniest issue, and created the real possibility of fruitful discourse, which was inexplicably left by Dish to wither on the vine for over a year before it declared impasse. *CJC Holdings, Inc.*, supra. If Dish had been willing to meet about this substantial giveback, the give and take of bargaining might have led everyone closer to an agreement; Dish's failure to explore the Union's capitulation on this key issue, by definition, precluded impasse. See, e.g., *Royal Motor Sales*, 329 NLRB 760, 772 (1999); *Grinnell Fire Protection Systems Co.*, supra, 328 NLRB at 585, 585–86.

Second, Dish similarly prevented legitimate impasse, when it repeatedly conditioned ongoing negotiations on a non-mandatory subject of bargaining, i.e., the Union submitting Dish's final offer to the FB and NRH units for a ratification vote.[17] The Union steadfastly rejected this condition,[18] which has effectively stymied bargaining since December 2014. The Board has held that conditioning ongoing bargaining on a non-mandatory subject of bargaining (e.g., a ratification vote) taints any subsequent impasse, and precludes

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[16] The potential savings associated with the Union' proposed 2-tierred wage system was significant, given Dish's high attrition rates. (R. Exh. 53 (annual attrition rates from 2013 to 2015 ranging from 116% to 13%)). Given this attrition, the Union's willingness to abandon QPC for new hires, meant that in a short time, the majority of the FB and NRH units would have likely have turned over and no longer earn QPC wages. This counter offered Dish much of what it sought on QPC, and would have likely set in motion the wholesale elimination of QPC in future bargaining for a successor contract. At a minimum, however, this concession was worthy of discourse, which, by definition, precluded impasse.

[17] See, e.g., (GC Exh. 3 (on December 18, 2014, Dish stated that, "[w]e ask that you take our final offer to your members and …. [o]nce we know whether … [it] is accepted or rejected, we can discuss if further bargaining is warranted."); GC Exh. 9 (on December 31, 2014, Dish stated that, "[i]t does not appear that you are willing to take our final offer to your bargaining unit," and thereafter, refused to schedule an in-person bargaining session); GC Exh. 10 (on January 8, 2016, Dish stated that, "[y]our letters … in December [2014] indicated that you rejected our final offer and were unwilling to take it to your bargaining unit."); (GC Exh. 28) (Dish's April 19, 2016 letter)).

[18] See, e.g., (GC Exh. 8 (On December 30, 2014, the Union stated that, "CWA is the exclusive representative of the employees and … will be the sole judge of when to present proposals to the Union membership for a vote.")).

implementation of a final offer.[19]

Third, the lengthy hiatus between the November 2014 bargaining session and the April 2016 implementation of the final offer weighs heavily against an impasse finding. *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996)("[a]nything that creates a new possibility of fruitful discussion ... breaks an impasse: ... [including] the mere passage of time."); *Circuit-Wise, Inc.*, 309 NLRB 905, 921 (1992)(14-month bargaining hiatus). Given Dish's high turnover, a lengthy hiatus suggests that, even assuming arguendo that an impasse existed in 2014, which it did not, Dish's high attrition rate could have broken the gridlock by 2016, as the FB and NRH units turned over and new employees might have called for a revised Union bargaining strategy, which could have brought bargaining to closure.[20]

Fourth, the change in Dish's bargaining agent amplified the possibility of agreement, which also cuts against an impasse finding. Simply put, Basara, a hard-bargainer, was substituted for Balonick, a more diplomatic representative. This trade increased the chance for positive discourse, and prevented impasse. See, e.g., *Airflow Research & Mfg. Corp.*, supra, 320 NLRB at 862 ("possibility for a break of the deadlock was further heightened by the change in the person representing the Union for negotiations…. [which] created the possibility of a new approach toward the subjects of the earlier impasse); *KIMA-TV*, 324 NLRB 1148, 1152 (1997).

Fifth, Dish's unwillingness to reschedule the December 2014 bargaining session further undercuts an impasse finding. It logically follows that, if the parties were continuously at impasse since November 2014 as Dish avers, veteran labor attorney Basara would never have agreed to meet in December 2014, or offered alternative dates after Ramos cancelled. Moreover, it is eminently fair to assume that he would not have wasted his time or client's resources by meeting during an extant impasse, following multiple years of

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[19] See, e.g., *Jano Graphics, Inc.*, supra (company's continued insistence of a permissive subject of bargaining, a ratification vote by union employees, and its later refusal to bargain tainted subsequent impasse); *Movers & Warehousemen's Assn.*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir.), cert. denied 98 S.Ct. 75 (1977) (a ratification procedure was a non-mandatory subject of bargaining, which would not permit a company to lawfully lock out employees in support of demands on that subject); *Houchens Market*, 155 NLRB 729 (1965), enfd. 375 F.2d 208 (6th Cir. 1967) (employee ratification is not a mandatory bargaining subject on which an employer may insist to impasse); *Grosvenor Resort*, 336 NLRB 613 (2001) (employer engaged in bad-faith bargaining by, inter alia, insisting to impasse on a non-mandatory subject of bargaining, e.g., the scope of the bargaining unit). Although the Board has held that, under exceptional circumstances, insistence upon a non-mandatory bargaining topic does not preclude lawful impasse (see *ACF Industries, LLC*, 347 NLRB 1040 (2006)), this narrow condition is limited to those cases where the non-mandatory insistence did not cause the impasse. *Cf. National Gypsum Co.*, 359 NLRB No. 116, slip op. 27-28 (2013) (insistence on ratification vote, which occurred after impasse, logically could not cause impasse). In the current case, however, the Union protested this non-mandatory bargaining condition over a year before Dish's 2016 declaration of impasse and implementation of the final offer, which is unlike the *National Gypsum* scenario, where insistence on the non-mandatory subject occurred after impasse.

[20] In a year, the composition of FB and NRH units changed significantly; this might have resulted in these modified units concluding that the retention of QPC was no longer sustainable, or newer employees creating a different mandate. This, minimally, met the "new possibility of fruitful discussion" criteria, which precluded impasse.

bargaining. His declaration of impasse seemed to follow Ramos' unwillingness to meet in December 2014, in accordance with his own schedule and expected departure from his law firm. Basara's actions, as a result, appeared more retaliatory than substantive, and are inconsistent with those of a labor law professional handling an impasse. *Bottom Line Enterprises*, 302 NLRB 373 (1991) (employer cannot react to reasonable cancellation of session by declaring impasse and threatening implementation).

In sum, several circumstances demonstrate that Dish failed to meet its burden of proof on impasse. These circumstances were: Dish's unwillingness to meet and bargain after the Union offered a substantial QPC compromise; the unlawful conditioning of bargaining on ratification; the passage of time; the change in negotiators; and Dish's unwillingness to reschedule a previously scheduled session.[21] Dish was, as a result, not privileged to unilaterally implement its final offer. See generally *Jano Graphics, Inc.*, supra.

2. Ongoing Failure to Negotiate Since January 13, 2016

Dish violated Section 8(a)(5) by ignoring the Union's ongoing request to bargain since January 13, 2016. (GC Exh. 11). Given that the parties were not at impasse, Dish was under an ongoing obligation to bargain over wages, hours, and other terms and conditions of employment regarding the FB and NRH units. *Storer Communications, Inc.*, 294 NLRB 1056 (1989) (statutory duty to bargain encompasses affirmative duty to make prompt arrangements, within reason, for meeting and conferring); *Rutter-Rex Mfg. Co.*, 86 NLRB 470 (1949).

3. Novak's Firing[22]

Dish unlawfully failed to bargain with the Union over Novak's firing. The Board has described an employer's obligation to bargain with a newly established union as follows:

> Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." . . . . Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. . . . When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences . . . [on] the date of the election.

San Miguel Hospital Corp., 357 NLRB 326, 326–27 (2011) (citations omitted). In order to trigger a bargaining obligation, unilateral changes must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004).

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[21] Many of these factors, even if considered in isolation, precluded impasse.

[22] The General Counsel, in a motion dated November 17, 2016, moved to withdraw the portion of this complaint allegation, which relied upon a theory of violation under *Alan Ritchey*, 359 NLRB No. 40 (2012). See also *Total Security*, 364 NLRB No. 106 (2016). The motion is GRANTED.

Dish created a new workplace disciplinary rule in June 2014, when in response to the Union's request, it agreed to "provide . . . advance notice of any suspensions, demotions or discharge." (GC Exh. 15). Thereafter, it notified, and bargained with, the Union before enacting terminations on 2 occasions in late-2014 (e.g., Hawkins and GoForth). (GC Exhs. 14, 16, 17; CP Exhs. 125, 132). Dish then abandoned this policy, when it later fired Novak, without notice or pre-implementation bargaining. Given that a disciplinary rule is a mandatory subject of bargaining, and that the elimination of notice is a material change, Dish violated Section 8(a)(5) by changing this rule without notice or bargaining. *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2005) (disciplinary procedures are mandatory bargaining topics).

B. 8(a)(1) Allegations[23]

1. Wodell Statement

Wodell did not make the statement alleged in the complaint. Her commentary at the April meetings, therefore, did not violate the Act.

2. Obere Statement

Dish violated Section 8(a)(1), when Obere sent a text to Daniels, which stated, inter alia, that, "the union is gone," the FB and NRH offices are closing, and Dish would prefer its technicians to quit. See, e.g., *Concrete Co.*, 336 NLRB 1311, 1316 (2001) ("union is gone"); *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003) (unsubstantiated predictions of closure due to union activities); *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (2015) (inviting resignations because of union activities is an implied discharge threat); *Mesker Door, Inc.*, 357 NLRB 591 (2011) (same).[24]

3. Thomas Statement

Thomas' violated Section 8(a)(1), when he: told employees not to discuss the Union with trainees under the threat of discipline, without restricting this ban to working areas and time; and threatened employees that trainees would be called to gauge compliance. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987)("employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas"); *Food Services of America, Inc.*, 360 NLRB No. 123, slip op. at 7 (2014)(same); *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–96 (2009)(unlawful impression of

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[23] These allegations are listed under complaint pars. 11 and 14. At the hearing, the General Counsel amended the complaint to add paragraph 11(c), which alleged that Waeland Thomas threatened employees with discipline, if they discussed Union issues with trainees, and created the impression the their Union activities were under surveillance, when he told employees that someone would be calling the trainees to determine if they had been approached about the Union. (Tr. 36-37).

[24] Although Dish contends that Beckham's disavowal erased the unlawfulness of the text, this contention is invalid. Effective repudiation must be timely, unambiguous, specific, adequately publicized, ***free from other illegal acts***, and accompanied by some assurance against repeat offenses. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Because Dish's disavowal was accompanied by the other violations at issue herein, it was ineffective.

surveillance, where reasonable employees would assume that their union activities are being monitored.).

C. 8(a)(3) Allegations[25]

1. Constructive Discharges

a. Legal Precedent

Regarding constructive discharges, the Board has held as follows:

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

Remodeling by Oltmanns, 263 NLRB 1152, 1162 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983) (emphasis added and citations omitted).

b. Analysis

Dish violated Section 8(a)(3), when it constructively discharged the 17 resigning employees. These employees were presented with the "Hobson's choice" of continuing to work versus forgoing their Section 7 rights.[26] This is a Category 2 constructive discharge scenario, where Dish's violation of their Section 7 rights resulted in their wages being cut by 30% and their health insurance costs being greatly increased. It is undisputed the resigning employees left because of these changes, after effectively being left with the "Hobson's choice" of continuing to work under greatly diminished conditions that flowed from the violation of their Section 7 rights.[27] *Control Services*, 303 NLRB 481, 485 (1991) (unlawful

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[25] These allegations are listed under complaint pars. 12 and 15.

[26] Dish violated their Section 7 rights by, inter alia, implementing its final offer without an impasse, making unilateral changes, refusing to bargain with the Union, and conditioning bargaining on a ratification vote.

[27] Dish's contentions in its brief that the employees were not constructively discharged because the General Counsel did not show that its unilateral changes "were imposed because of the employee's

cuts in wages, hours and health insurance benefits resulted in a category 2 constructive discharge); *White-Evans Service Co.*, 285 NLRB 81, 82–83 (1987) (same).

2. Unilateral Implementation of Final Offer

Given that Dish violated Section 8(a)(5), when it unilaterally implemented its final offer absent a good-faith impasse, a finding that this action also violated Section 8(a)(3) violation would be cumulative and not impact the remedy. It is, thus, unnecessary to decide this redundant allegation. *Tri-Tech Services*, 340 NLRB 894, 895–96 (2003); *Sygma Network Corp.*, 317 NLRB 411 (1995).

Conclusions of Law

1. Dish is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization, within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees at the FB hub:

> INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in Farmers Branch, Texas.
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

4. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees at the NRH hub:

> INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in North Richland Hills, Texas.
>
> EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

5. Dish violated Section 8(a)(1), when:

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union activities" is without merit, inasmuch as Dish errantly characterizes this matter as a Category 1 constructive discharge, when it still remains, a Category 2 constructive discharge case, which has no such intent requirement.

a. Obere told employees that "the union is gone," that their offices would close because of their Union activities, and that Dish would prefer technicians employed at its unionized facilities to quit.

b. Thomas threatened employees that they would be disciplined, if they discussed the Union with new hires.

c. Thomas created the impression of surveillance, when he told employees that someone would call trainees to confirm that they did not discuss the Union with them.

6. Dish violated Section 8(a)(3), when it constructively discharged the following 17 employees: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

7. Dish violated Section 8(a)(5), when it:

a. Failed to meet and bargain with the Union at reasonable times for the purposes of collective bargaining since January 13, 2016, after prematurely declaring an impasse, regarding the units described above.

b. Refused to bargain with the Union by conditioning bargaining upon a ratification vote.

c. Implemented its final offer on April 23, 2016 and, thereafter, unilaterally changed terms and conditions of employees in the above-described units without having reached agreement with the Union and in the absence of a valid bargaining impasse.

d. Unilaterally changed the wages, health insurance coverage, leave benefits, and other terms and conditions of employment since April 23, 2016 in the above-described units.

e. Unilaterally changed its disciplinary policy and discharged unit employee Dakota Novak, by failing to afford the Union pre-implementation notice of his contemplated discipline, and an opportunity to bargain.

8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Dish committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. Having found that Dish violated Section 8(a)(3) by constructively discharging the 17 employees described

above, it is ordered to offer them full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. It is further ordered to make them whole for any loss of earnings and other benefits suffered as a result of their discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Moreover, in accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), it shall compensate them for their search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. It is further ordered to compensate them for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar year. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It is also ordered to remove from its files any references to their unlawful discharges, and within 3 days thereafter to notify them in writing that this has been done and that their unlawful constructive discharges will not be used against them in any way.

Having found that Dish violated Section 8(a)(5) by prematurely declaring an impasse, refusing to meet with the Union for collective-bargaining purposes, and conditioning meeting with the Union on a non-mandatory subject of bargaining, it is ordered to, upon request by the Union, bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, to embody it in a signed agreement. Upon resumption of bargaining, it is further ordered to reinstate all tentative agreements reached during contract negotiations. See *Health Care Services Group*, 331 NLRB 333 (2000).

Furthermore, having found that Dish violated Section 8(a)(5) by unilaterally changing terms and conditions of employment for unit employees, which included eliminating QPC, cutting wages, combining sick and vacation leave banks, and cutting health insurance deductibles and caps, it shall, on request of the Union, retroactively restore any unilaterally modified terms and conditions of employment, and rescind the unilateral changes it has made, until such time as Dish and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations.[28] It shall also be required to make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. With respect to its unilateral termination of the unit employees' preexisting health care benefits, it shall restore, upon request of the Union, the preexisting health care benefits and reimburse the unit employees for

[28] *Pressroom Cleaners*, 361 NLRB No. 57 (2014), motion for reconsideration denied 361 NLRB No. 133 (2014). Nothing in this recommended order, however, shall be construed as requiring or authorizing Dish to rescind any improvements in the unit employees' terms and conditions of employment unless requested to do so by the Union. *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016).

any expenses ensuing from its failure to continue the preexisting healthcare coverage, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

Additionally, having found that Dish violated Section 8(a)(5) by unilaterally changing its disciplinary rule and consequently firing Novak, it shall offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in his place. Novak shall also be made whole for any loss of earnings he may have suffered due to his unlawful discharges. Backpay shall be computed in accordance with *F. W. Woolworth*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra. Dish shall also be required to expunge from its files any reference to Novak's unlawful discharge and to notify him in writing that this has been done. It is further ordered to compensate him for any adverse tax consequences associated with receiving a lump-sum backpay award and to file with the Regional Director for Region 16 a report allocating the backpay award to the appropriate calendar year. Dish is, however, entitled to show, at a compliance proceeding, that it would have discharged Novak under the preexisting terms and conditions, avoiding as to him any reinstatement, expunction, and backpay obligation. See *Adams & Associates, Inc*., 363 NLRB No. 193, slip op. at 11, fn. 17 (2016).

Finally, in addition to the traditional remedies discussed above, Beckham will read the notice marked "Appendix" to FB and NRH unit employees, during work time, at the FB and NRH hubs in the presence of a Board agent. A notice reading will counteract the coercive impact of the instant violations, which were substantial. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004). Dish shall also distribute remedial notices electronically via text message, email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[29]

ORDER

Dish Network Corporation, Farmers Branch and North Richland Hills, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Telling employees that "the union is gone."

b. Threatening employees that the Farmers Branch and North Richland Hills offices would close because they engaged in union or any other protected concerted activities.

c. Implicitly threatening employees with discharge by inviting their resignations because they engaged in union or any other protected concerted activities.

d. Threatening employees that they will be disciplined, if they discuss the Union with newly-hired employees.

e. Creating the impression that employees' union or other protected concerted activities were being monitored.

f. Constructively discharging or otherwise discriminating against its employees for engaging in union or any other protected concerted activities.

g. Failing and refusing to meet and bargain at reasonable times with the Union for collective bargaining as the exclusive collective bargaining representative in the following appropriate units:

Farmers Branch bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in Farmers Branch, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

North Richland Hills bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at Dish's facility in North Richland Hills, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

h. Refusing to bargain with the Union by conditioning future bargaining upon the holding a ratification vote.

i. Implementing its final offer and unilaterally changing terms and conditions of employees in the above-described units without reaching agreement with the Union and in the absence of a valid bargaining impasse.

j. Unilaterally changing the wages, health insurance coverage, leave benefits, and other terms and conditions of employment for the above described units.

k. Unilaterally changing its disciplinary policy and discharging unit employee Dakota Novak, by failing to afford the Union pre-implementation notice of his contemplated discipline and an opportunity to bargain.

l. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Within 14 days from the date of this Order, offer the following 17 constructively discharged employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

b. Make the 17 constructively discharged employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision, compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

c. Within 14 days from the date of this Order, remove from its files any reference to these unlawful discharges of the 17 constructively discharged employees, and within 3 days thereafter, notify them in writing that this has been done and that their constructive discharges will not be used against them in any way.

d. On request by the Union, bargain with it as the exclusive bargaining representative of our unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

e. On request by the Union, rescind the changes in the terms and conditions of employment for the unit employees that were unilaterally implemented on and after April 23, 2016, and restore the status quo ante until such time as the Respondent and the Union reach an agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

f. Make the unit employees whole, with interest, for any losses sustained as a result of the unilateral changes in terms and conditions of employment in the manner set forth in the remedy section of this decision.

g. Offer Novak full reinstatement to his former job or, if his job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

h. Make Novak whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of this decision, compensate him for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

i. Remove from its files any reference to the discharge of Novak, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against him in any way, unless it is shown that the Respondent would have discharged him under the preexisting terms and conditions of employment.

j. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

k. Within 14 days after service by Region 16, post at its Farmers Branch and North Richland Hills, Texas facilities copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by text message, email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If Dish has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since January 13, 2016.

l. Within 14 days after service by the Region, hold a meeting or meetings during working hours at the FB and NRH hubs, which will be scheduled to ensure the widest

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[30] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be read to its employees by Beckham in the presence of a Board agent.

m. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. January 23, 2017

Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT tell you that "the union is gone," threaten that the Farmers Branch and North Richland Hills offices will close because you engaged in union or any other protected concerted activities, or implicitly threaten your discharge by inviting you to resign because you engaged in union or any other protected concerted activities.

WE WILL NOT threaten that you will be disciplined, if you discuss the Union with newly-hired employees, or create the impression that your union activities or any other protected concerted activities are being monitored.

WE WILL NOT constructively discharge or otherwise discriminate against you for engaging in union or any other protected concerted activities.

WE WILL NOT fail and refuse to meet and bargain at reasonable times with the Union as the exclusive collective bargaining representative of its employees in these appropriate units:

Farmers Branch bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at its facility located in Farmers Branch, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

North Richland Hills bargaining unit

INCLUDED: All regular full-time and part-time technicians and warehouse employees employed at its facility located in North Richland Hills, Texas.

EXCLUDED: All other employees including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with the Union by conditioning future bargaining upon it holding a ratification vote.

WE WILL NOT implement our final offer and unilaterally change the terms and conditions of employment of our employees in the above-described units without reaching agreement with the Union and in the absence of a valid bargaining impasse.

WE WILL NOT unilaterally change wages, eliminate QPC, cut health insurance coverage, reduce leave benefits, or otherwise change terms and conditions of employment in the above described units.

WE WILL NOT unilaterally change our disciplinary policy and discharge unit employee Dakota Novak, by failing to afford the Union pre-implementation notice of his contemplated discipline and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL within 14 days from the date of the Board's Order, offer the following 17 constructively discharged employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed: Marcus Tillman; David Dingle; Justin Ripley; Kenneth Daniel; Bryce Benge; Salvador Bernardino; Preston Dutton; Robert Thompson; John Carson; Scott Dehart; Robert MacDonald; Aaron Mason; Aaron Kubesch; Severo Hernandez; John Burns; Christopher Little; and Michael Cater.

WE WILL make the 17 constructively discharged employees described above whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful constructive discharges of the 17 employees described above, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their constructive discharges will not be used against them in any way.

WE WILL on request by the Union, bargain with it as the exclusive bargaining representative of our unit employees on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented on and after April 23, 2016, and retroactively restore the wages and other terms and conditions of employment that existed before our unlawful unilateral changes were implemented, until we have reached an agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL make unit employees whole for any losses sustained as a result of the unilateral changes in terms and conditions of employment, plus interest compounded daily.

WE WILL offer Dakota Novak, who was discharged pursuant to our unilaterally implemented disciplinary policies and procedures, full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in his place, subject to our demonstrating in a compliance hearing that we would have discharged Novak even under the terms and conditions of employment that existed immediately prior to our unilateral change.

WE WILL, subject to the condition set forth above, make Novak whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, subject to the condition set forth above, remove from our files any reference to the unlawful discharge of Novak, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

DISH NETWORK CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the

Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-173719 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978-2941.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on July 17, 2018, and I sent a true and correct copy of the foregoing to the following via first-class certified mail:

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