

18-60522

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

DISH NETWORK CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD
TO THE UNION'S PETITION FOR REHEARING EN BANC**

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A panel of this Court denied enforcement of the portion of a National Labor Relations Board Order remedying DISH Network Corporation's unlawful refusal to bargain with its employees' representative, the Communications Workers of America (the Union). The Union petitioned for en banc review of the panel's decision, and the Court directed the Board to respond.

The panel's decision rests on its view that the Board relied on a factual error in finding that DISH and the Union never reached an impasse in their contract negotiations that would have justified DISH's conduct. The issue presented here is whether, in that circumstance, the panel departed from circuit precedent by denying full enforcement of the Board's Order. As discussed below, en banc review is not warranted because it is not necessary either to ensure uniformity of this Court's decisions or to resolve a question of exceptional importance.

BACKGROUND

1. DISH operates several local hubs where it employs service and installation technicians for its satellite television service. In 2009, DISH piloted a new compensation scheme called Quality Performance Compensation (QPC) at some of those hubs, including at its Farmers Branch and North Richland Hills locations in Texas. QPC sharply decreased base wages and increased incentive payments. Shortly after DISH piloted QPC, employees at those two locations

elected the Union as their bargaining representative. *DISH Network, LLC v. NLRB*, 953 F.3d 370, 373 (5th Cir. 2020).

The parties started first-contract negotiations in the summer of 2010. They made slow progress, and still had several items outstanding years later. Initially, the Union had sought to eliminate QPC. Sometime in 2013, it became apparent to both sides that QPC led to unit employees earning far more than expected due to technological changes that increased employee productivity. The Union thereafter sought to preserve QPC; DISH proposed to eliminate it. Meanwhile, DISH ended the QPC pilot program at all non-union locations. DISH implemented a new incentive-pay system at those locations, but did not formally offer it to unionized employees in bargaining. *Id.* at 373-74. (ROA.1085.)

By November 2014, the parties had reached agreement on many issues, but wages remained outstanding. At the November 18, 2014 bargaining session, DISH made a “final proposal” that included wholly eliminating QPC and contained wage rates lower than those offered at non-union locations. *Id.* at 374. After the Union cancelled the next planned bargaining session due to a death in its negotiator’s family, DISH refused to schedule more sessions and informed the Union that it would declare impasse if the Union did not make a counterproposal. The Union emailed a counterproposal on December 9, and again requested that the parties meet. *Id.*

The Union's counterproposal included, for the first time, a proposal to end QPC for new hires. DISH rejected the counterproposal by email and requested that the Union take its final offer to the Union's membership. DISH did not agree to meet again. At the end of December, DISH notified the Union that its bargaining representative would change and stated that the new representative would be in touch. *Id.*

DISH did not get back to the Union until over a year later, in January 2016. At that time, DISH wrote to ask the Union once again whether it would accept DISH's final offer from November 2014. The Union replied that it wished to meet to discuss its counterproposal. DISH continued to refuse to meet and declared impasse. *Id.* DISH eventually notified the Union that it would implement its final proposal in April and did so. Seventeen unit employees subsequently quit due to the significant reduction in their wages that resulted. *Id.*

2. On June 28, 2018, the Board issued a decision finding that DISH committed several unfair labor practices. As relevant here, the Board found that DISH violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. § 158(a)(5) and (1), by unilaterally changing unionized employees' terms and conditions of employment after prematurely declaring an impasse in negotiations. (ROA.2168-70.) In doing so, the Board reasoned that the Union's December counterproposal included the most significant concession on wages to

date and that, due to DISH's high attrition rates, the proposed two-tier wage system could shortly lead to the elimination of QPC for all employees. (ROA.2169, 2176 & n.16.) Therefore, DISH could not lawfully declare impasse without ever meeting to discuss the Union's proposal. (ROA.2169-70.) The Board further found that DISH violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) & (1), by constructively discharging 17 employees who quit when faced with DISH's unilateral pay cuts. (ROA.2170 n.8.) To remedy those violations, the Board ordered DISH to cease and desist from the unlawful conduct, rescind the unilateral changes, make employees whole, and bargain with the Union. (ROA.2170, 2180-81.)

3. DISH petitioned the Court for review of the portions of the Board's Order remedying the unilateral-change and constructive-discharge violations, and the Board cross-applied for enforcement of its Order in full. The Union intervened. On review, the panel (Judges Southwick, Willett, and Oldham) granted the petition for review and denied the cross-application for enforcement, except as to the uncontested violations. *Id.* at 373, 381. In denying review, the panel held that the Board cited the wrong attrition rates to support its finding that the Union's counterproposal was a significant concession, which it found was an error that led the Board to erroneously conclude that the parties were not at impasse in

December 2014. *Id.* at 376. The Union petitioned the Court for rehearing en banc, and the Court ordered DISH and the Board to file responses.

ARGUMENT

En banc review is appropriate either “to secure or maintain uniformity of the court’s decisions” or to resolve “a question of exceptional importance.” Fed. R. App. Pro. 35(a). Here, the Union contends that the panel’s decision conflicts with in-circuit precedent; it does not argue that the case presents a question of exceptional importance. Although the Board disagrees with the panel decision—and particularly with the panel’s assertion that the Board’s analysis rested on a factual error—no aspect of the panel’s decision conflicts with in-circuit precedent or otherwise warrants en banc review.

1. The Union fails to identify any conflict with controlling caselaw. It principally contends that the panel failed to apply the governing standard of review. The panel correctly stated, however, that this Court “review[s] the Board’s findings of fact for substantial evidence,” citing *Carey Salt Co. v. NLRB*, 736 F.3d 405, 410 (5th Cir. 2013). *DISH Network*, 953 F.3d at 376. Under that standard of review, the panel found that the Board’s no-impasse decision “rested on an unsound factual foundation[.]” *Id.*

Specifically, the panel stated that the attrition rates the judge cited from non-unionized DISH locations were not relevant because “unionized QPC technicians

generally had lower attrition rates than their non-union, non-QPC peers.” *Id.*

Given those comparative rates, the Union’s counterproposal would not, in the panel’s view, shortly lead to the elimination of QPC for the majority of the unit, as the Board found. The panel therefore found that “the Union wasn’t giving up all that much by agreeing to phase out QPC for new employees.” *Id.* Because the Board “built its no-impasse decision” on a contrary view of the attrition rates and counterproposal, the panel determined that the Board’s finding lacked substantial-evidence support. *Id.* at 377.

At its essence, the panel’s disagreement with the Board turns on the fact-bound issue of whether the Union’s counterproposal constituted significant movement, sufficient to prevent a bargaining impasse. The Union does not dispute the principle that the Board cannot base its analysis on a factual error. It frames its argument as identifying legal errors. But the panel’s decision explicitly describes and applies the correct legal standards in light of its interpretation of the record evidence regarding attrition rates.

The Union cites cases (pp.6-7) requiring the Court to defer to the Board’s reasonable inferences even if it disagrees with them. *See In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018); *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998). The Union also relies on cases (pp.8-9) holding that the Court cannot substitute its judgment for the Board’s or reject

findings that a reasonable mind would accept as adequately supported. *See Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014); *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 292 (5th Cir. 2015). But the panel based its reasoning on its view that the Board made a factual error, and inferences or judgments based on a factual error are not entitled to deference.

The one conflict of substantive law that the Union posits turns on the same factual disagreement. The Union cites cases (pp.10-11) for the proposition that a concessionary proposal may break a stalemate in negotiations. *See Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983); *CJC Holdings*, 320 NLRB 1041, 1045 (1996), *enforced*, 110 F.3d 794 (5th Cir. 1997). But the panel's discounting of the Union's counterproposal followed from its view that the Board misinterpreted the evidence detailing DISH's attrition rates, not from a failure to recognize the legal significance of a concession when assessing impasse.

The Union also purports to identify another conflict with applicable precedent but cites only Board cases to support its view, and again rests its argument on its disagreement with the panel's assessment of the counterproposal. Thus, the Union argues (p.12) that, under Board law, the panel erred by failing to recognize that conditioning bargaining on a ratification vote constitutes bad faith, which precludes impasse. But the panel acknowledged that bad faith may preclude impasse. *DISH Network*, 953 F.3d at 378 (citing *Carey Salt*, 736 F.3d at 413). It

found that the parties were at impasse as of the Union's counterproposal, which predated DISH's request that the Union hold a ratification vote. *DISH Network*, 953 F.3d at 379 n.4. As the Union's petition appears to acknowledge, its argument requires a contrary finding, that "no impasse existed because of [DISH's] refusal to bargain over the Union's wage proposal" (p.12).

In sum, the panel's decision does not, contrary to the Union's position, directly conflict with this Court's cases defining the substantial-evidence standard of review or defining the factors relevant to assessing impasse. The Union's claims of legal error essentially amount to challenges to the panel's factual findings regarding the Union's counterproposal. And correcting mistaken factual findings, as opposed to legal errors, is not necessary to maintain uniformity of the Court's decisions. *See* "Petition for Rehearing En Banc," Fifth Cir. I.O.P. 35 ("Alleged errors in the facts of the case (including sufficiency of the evidence) or in the application of correct precedent to the facts of the case are generally matters for panel rehearing but not for rehearing en banc."). Accordingly, even if the panel erred in applying the substantial-evidence or impasse standards to the Board's decision here, the panel decision does not warrant en banc review.¹

¹ The Union further contends (p.11-12) that the panel should have remanded to the Board, as in *Entergy*, 810 F.3d at 297-98. But in *Entergy*, the Court determined that the Board had disregarded particular, relevant record evidence; here, the panel

2. Like its claim that the panel misapplied the standard of review, the Union's claim that the panel read the Board's decision too narrowly does not present an issue for en banc review. Specifically, the Union claims (p.13) that the panel incorrectly disregarded its arguments, accepted by the administrative law judge, that factors other than the Union's counterproposal legally precluded impasse, citing the long hiatus in bargaining, DISH's change in negotiator, and DISH's refusal to reschedule December 14 bargaining sessions. But the panel did not base its reasoning on rejecting any of the caselaw the Union cites for the proposition that such factors bar impasse; instead, the panel found that each of those arguments was outside the scope of the Board's reasoning and therefore not a valid basis for upholding the Board's decision. *DISH Network*, 953 F.3d at 379-80. The panel's interpretation of the Board's rationale under review is specific to this case and cannot create a conflict with decisions reviewing different Board orders.

In any event, the panel here applied the same legal standard to assess impasse that the Court applied in the cases the Union cites (p.13-17). *Id.* at 376; *see Raven Serv. Corp. v. NLRB*, 315 F.3d 499, 505-06 (5th Cir. 2002) (applying *Gulf States* test); *Gulf States*, 704 F.2d at 1398. The Board therefore disagrees

determined that the Board made a mistake in evaluating evidence. Thus, the panel's decision not to remand does not conflict with *Entergy*.

with the Union's assertion that the panel's possible misinterpretation of the grounds on which the Board relied warrants en banc review.

CONCLUSION

The Board agrees with the Union that its Order should have been enforced, for the reasons stated in the Board's brief and argument to the panel. But because nothing in the panel's opinion creates a conflict with governing precedent, en banc review is not necessary to secure uniformity of this Court's decisions.

Respectfully submitted,

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June 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Nos. 32(g)(1), the National Labor Relations Board certifies that the attached document contains 2237 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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